

# COMMUNITY FOCUS

*The Northwest's Full Service HOA Law Firm and Resource Center*

VOLUME 2, ISSUE 1

## IN THE NEWS . . .

Recently Vial Fotheringham's own senior attorney, Richard Vial, had the opportunity to provide expert insight in connection with a news story which ran on a local ABC affiliate, KATU, in its evening news broadcast. The controversy which led to the news story was actually a very interesting one.

On one side of Portland, a client of Vial Fotheringham was faced with increasing complaints from families about the fact that all of the open areas within their community were being used by pet owners and was thus unsafe and in some cases unsanitary for their children to play. The board of directors' response to this concern was to designate certain of the parks/open areas in the community as set aside for pets and others limited to use by owners and residents without pets. This led to an aggrieved pet owner contacting the press.

Meanwhile, on the other side of town a disgruntled owner complained that the

association was not taking steps to ensure that pets were prevented from running loose in the community and soiling the yards of neighbors and community members. In this case, the disgruntled owner contacted the press because he felt that the association was not doing enough and perhaps did not have enough authority or "teeth" to be meaningful.

As Mr. Vial pointed out to reporter Ed Teachout, homeowner associations do in fact have the power to positively affect their living environment. However, the board of directors must sometimes undertake positions which are not popular with all residents in order to properly exercise that power. In the interview, Rich gave a very helpful explanation about how boards of directors deliberate and the difficult job that they have.

Interestingly, Vial Fotheringham and the Northwest HOA Law Center's official HOA Handbook was prominently photographed. Rich was honored to have the chance to share his experience and knowledge in the hope that it will help those in homeowner associations understand the importance of a healthy community.

For the full news report go to:

<http://www.katu.com/printstory.asp?ID=83776>



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### SPECIAL POINTS OF INTEREST:

- *Voting Procedure*
- *Solving The Unsolvable*
- *Statute Handbook*
- *Pets And HOAs*

### INSIDE THIS ISSUE:

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“A GOOD SCHEDULE OF FINES AND AN ENFORCEMENT PROCEDURE RESOLUTION ARE GREAT TOOLS TO HELP AN ASSOCIATION ADDRESS VIOLATIONS OF THE DOCS AND RULES AND REGS AS SOON AS THEY HAPPEN.”



“THIS MONTHS CONTRIBUTOR OF THE MYSTERY PROBLEM WINS A \$50 GIFT CERTIFICATE TO THE OLIVE GARDEN.”

## Dank Whetley



**TROUBLESHOOTER XTRAORDINAIRE**

Problems shot so you don't have to.

Questions posed & answered with 1 bullet.

Unmuzzling life's little puzzles, one by one.

Vial Fotheringham LLP and the Northwest HOA law center are excited to build our relationships with you through our newsletter. We hope that it will provide you with valuable, as well as entertaining, information.

As part of our upcoming newsletters we would like to help you solve your unsolvable problems. We have hired Dank Whetley to join our team to be our unsolvable problem solver and troubleshooter.

Please feel free to e-mail your unsolvable mystery problems to:

newsletter@nwhoalaw.com.

The subject should read, “Problem for Dank”.

We will put Dank on the trail right away to decide which problem is most worthy of solving. The association providing the problem Dank chooses will win a special prize. We will publish the problem along with Dank's solution in the following newsletter. Naturally names of people and associations will be changed to protect the privacy of all involved. So go ahead!! Make Dank's Day!!!

This quarter's mystery . . .

*We are an HOA-Planned Community of 13 homes. A house was put up for sale which had an improperly terminated French drain, which was channeling waste water onto an adjoining home's lot, caus-*

*ing erosion of the adjoining driveway. The home inspector for the house pointed out the problem to both the buyer and seller's real estate agents. All parties were notified well in advance of the sale of the home. Nobody rectified the situation, and the new owner is now faced with the need to comply with bylaws regarding maintenance of their lot.*

*The relevant section of the Declaration reads . . .*

*“Every owner must perform promptly all maintenance and repair work required which if omitted would affect the common property or any portion of a lot or property belonging to other owners, and shall be responsible for the damages and liabilities that his failure to do so may cause.”*

### Dank Says . . .

Before we get to the answer to this dilemma, there are some things to consider. Any time a lot sells, it is a great opportunity for the Board to ensure that the lot is in full compliance. Homeowners who are selling are motivated to make the lot compliant. The Board can trigger this motivation by informing the potential buyer and seller—and their real estate agents, of the current violations.

Keep in mind that it is never a good idea for an Association to wait until a sale to try to bring a lot into compliance. A good schedule of fines and an en-

forcement procedure resolution are great tools to help an Association address violations of the docs and rules and regs as soon as they happen. In this situation, these tools might have solved the problem for the new owner before the sale.

Another tool the Association can use in this kind of situation is a document that can be filed with county recording office referencing the property and the fact that the property is not in compliance. Once the document is filed, the seller will not likely be able to sell the property until the lot is in compliance. Doing this is a little tricky, check with your legal counsel before attempting this process.

A seller must disclose what the seller knows about the house. However, current Oregon law requires the Association to disclose only when asked by the seller or seller's agent. The Association has no affirmative duty to disclose anything unless it is asked.

In short, the one bullet answer is that the new homeowner likely has the responsibility to fix the drain and resulting damage. However, the new homeowner can possibly claim the prior owner has some liability depending upon what disclosures were made. It's too late for these folks, but the best way to solve this kind of problem is to address it with the original owner, before the sale of the home.

*Best Regards, Dank Whetley*

## COMMON INTEREST DEVELOPMENTS

Homeowners associations are quickly becoming ubiquitous with home ownership. According to the 1990 United States census, nearly one out of every eight Americans lived in a CID; since that time, an estimated (60%) of the new housing developed in the United States is CID-type housing. The bulk of new residential projects in Oregon (and nationwide) are governed by homeowners associations, which in turn are run by a board of directors made up of individual homeowners. For many new homeowners, figuring out which type of development they live in, the statutory provisions that govern their association, and the rights and obligations of owners within an association is a challenge.

Generally, homeowners associations have the following characteristics: 1) membership is mandatory and automatic, 2) certain documents (CC&Rs, Bylaws, Rules and Regulations) impose mutual obligations on the association and the owners, and 3) owners must pay mandatory assessments. Communities with these characteristics are called "Common Interest Developments" or CIDs. In Oregon, there are two major types of CIDs: planned communities and condominiums.

In a planned community each

member of the association owns his or her lot and the dwelling that sits on the lot. Typically, the planned community contains common areas owned by the association. The common areas are maintained by the association using assessments collected from the owners. Although there are different classes and types, planned communities are governed by ORS chapter 94, also known as the "Planned Community Act." The Oregon Planned Community Act was enacted by the 1981 Legislature and became effective July 1, 1982. The Planned Community Act requires that there be a declaration, which must include certain provisions, and that the declaration be recorded. It further requires that a HOA be formed and bylaws, which must also include certain provisions, be adopted and recorded to govern the affairs of the planned community pursuant to the Act and the association's governing documents. It also imposes specific responsibilities and obligations, and confers certain authority on the board of directors.

In contrast, owners in a condominium do not own the earth beneath their condominium unit. The unit owner usually owns the air space within the boundaries of the unit, and also

owns a fractional interest in the "common elements" of the condominium. Condominiums are governed by ORS chapter 100, also known as the "Condominium Act." The Condominium Act was first adopted as the Unit Ownership Law in 1963. The OCA requires that an association be formed to govern the affairs of the condominium pursuant to the Act and the association's governing documents. It also imposes specific responsibilities and obligations, and confers certain authority on the homeowner's (HOA's) board of directors.

Sometimes it is easy to determine which type of development you live in. However, with the increase of town-home-style developments, the line is often blurred. Owners must carefully examine their governing documents to determine the type of development, and, subsequently, the appropriate statutory provisions that are applicable to the development.

*By Kevin H. Harker*

*~Attorney at Law~*



## Finding Harmony with a few Barks and Meows (Good Rules Can Make a Difference)



“Before drafting a pet policy, the board should understand that pet rules are about people with pets, and not just pets.”



Recently, CNN did a special report on pets. Currently, in the United States, there are 360 million pets, according to the pet industry. This means that pets actually outnumber people in the United States by about 60 million. Because pets are such an integral part of most people's lives, pet issues are some of the most common issues with which condominiums and homeowners associations have to deal. How many pets you are allowed to have? What types of pet are permitted? Where pets are allowed to roam? These are just some of the examples of pet issues facing associations.

Before the board can even consider adopting a pet policy, the first source that associations must look at to determine how much authority the board has to impose restrictions is the governing documents (i.e. the declaration and bylaws). After careful review of the governing documents, the board can then evaluate whether the pet restrictions in the documents, if any, are clear or need further clarification, and whether it should adopt other rules to protect the association.

Before drafting a pet policy, the board should understand that pet rules are about people with pets, and not just pets. For example, a rule

stating that pets are not allowed to “do their business” on the common area is probably not as effective as a rule stating that owners must clean up after their pets. Focusing on regulating the behavior of the owner will make enforcement of the rule easier for the association.

Associations need rules that are clear, well-defined, and above all, reasonable. If a rule is unreasonable, courts will not enforce it. There are four things associations should consider after drafting a pet rule.

### 1. Does it serve a purpose?

Board members should ask whether the rule was adopted in good faith to benefit the community as a whole, or whether the rule was adopted to address a particular owner with who a member of the board has a problem and is furthering a vendetta. The board may want to consider adding language such as “providing for the health, comfort, safety, and well-being of the residents,” to underscore that the rule was adopted for a legitimate purpose.

### 2. Is it reasonable?

Board members should ask whether the rule is logical, whether it addresses a specific problem with a specific solution that is rational and fair, and whether it is too broad or too restrictive.

### 3. Is the rule consistent with the declaration, by-laws, local and state statutes, and federal regulations?

As was mentioned above, before a pet rule is adopted, the board should determine whether the rule would violate the declaration, bylaws, or other local, state, or federal laws. The association's attorney should be consulted in making this determination.

### 4. Is the rule consistent with public policy?

Board members should ask whether there is anything in the rule that is discriminatory or that would be contrary to public policy.

Affirmative answers to the four questions above will make it more likely that a court would uphold a pet restriction if it were to be challenged.

Pets are a part of life in a community association. If the association recognizes this and adopts reasonable pet policies, then the likelihood increases that both people and their pets will be able to live together in harmony.

*By Greg Coxey*

*~Attorney at Law~*



**PROCEDURE**  
for  
**VOTING BY WRITTEN BALLOT**  
**(In Lieu of a Formal Meeting)**  
**Under ORS 94.647 and 100.425**

For many reasons, it is often more convenient, efficient and effective for associations to conduct a vote by written ballot in lieu of a formal meeting. For example, a vote on proposed amendments to governing documents is commonly conducted by this method. Proxies may be utilized to the same extent that they could be for a formal meeting. The information set forth below describes the procedure provided for under ORS 94.647 of the Oregon Planned Community Act (ORS 94.550 to 94.783) and ORS 100.425 of the Oregon Condominium Act (ORS Chapter 100) for voting by written ballot.

**Note:** See Chapter 10 of the *Official HOA Handbook Oregon 2003* for a more information regarding meetings of owners.

**STATUTORY PROCEDURE**

ORS 94.647 and 100.425 each provide that unless prohibited or limited by an association's declaration, bylaws or articles of incorporation, any action that may be taken at any annual, regular or special meeting of owners may be taken by written ballot in lieu of a formal gathering of owners if the procedures set forth below are followed, except action by written ballot may not substitute for:

- The turnover meeting required under ORS 94.616 or 100.210.
- The annual meeting of an association if more than a majority of the units or lots are the principal residences of the occupants.

**NOTICE OF INTENT**

**TO CONDUCT VOTE BY WRITTEN BALLOT**

At least 10 days before written ballots are mailed or otherwise distributed, the board of directors must provide notice to owners that a vote by written ballot is to be conducted. The notice is for the purpose of informing owners that the vote must be conducted by the secrecy procedure described below if at least 10 percent of the owners request the procedure. The notice must state:

- The general subject matter of the vote by written ballot;
- The right of owners to request secrecy procedures specified in ORS 94.674 or 100.425;
- The date after which ballots may be distributed;
- The date and time by which any petition must be received by the board requesting secrecy procedures; and
- The address where any petition must be delivered.

**Note:** If the governing documents require a secrecy procedure or the board of directors decides to conduct the vote by secrecy procedure, the notice described above is not required.

**WRITTEN BALLOTS**

**Delivery of Ballots** A written ballot must be delivered to every association member entitled to vote on the matter.

**Note:** See governing documents regarding method of delivery.

**Ballot Content** A written ballot must set forth each proposed action and provide an opportunity to vote for or against each proposed action.

**Required Information** All solicitations for votes by written must state the following:

- If approval of a proposal by written ballot requires that the total number of votes cast equal or exceed a certain quorum requirement, the number of responses needed to meet such quorum requirement.
- If approval of a proposal by written ballot requires that a certain percentage of total votes cast approve the proposal, the required percentage of total votes needed for approval.

Tear along this edge in order to place this resource in a more convenient location

- The period during which the association shall accept written ballots for counting, which period shall end on the earliest of the following dates:
  - (a) If approval of a proposed action by written ballot requires that a certain percentage of the owners approve the proposal, the date on which the association has received a sufficient number of approving ballots;
  - (b) If approval of a proposed action by written ballot requires that a certain percentage of the owners approve the proposal, the date on which the association has received a sufficient number of disapproving ballots to render approval impossible; and
  - (c) In all cases, a date certain on which all ballots must be returned to be counted.

**Secrecy Provisions** If at least 10 percent of the owners have requested the secrecy procedure as provided in ORS 94.647 or 100.425 or the governing documents require or the board elects to conduct the vote by secrecy procedure, then written ballots must be accompanied by:

- A secrecy envelope;
- A return identification envelope to be signed by the owner; and
- Instructions for marking and returning the ballot.

#### **EXAMINATION OF BALLOTS & DETERMINATION OF VOTE**

**Revocation of Ballot** Except as otherwise provided in the declaration, articles of incorporation, or bylaws, a written ballot may not be revoked.

**Examination & Counting of Ballots** Unless otherwise prohibited by the declaration, articles of incorporation or bylaws, the votes may be counted from time to time before the final return date to determine whether the proposal has passed or failed by the votes already cast on the date they are counted, except written ballots that are returned in secrecy envelopes may not be examined or counted before the deadline for returning ballots has passed.

**Determination of Vote** Matters that may be voted on by written ballot shall be deemed approved or rejected as follows:

- If approval of a proposed action otherwise would require a meeting at which a certain quorum must be present and at which a certain percentage of total votes cast is required to authorize the action, the proposal shall be deemed to be approved when the date for return of ballots has passed, a quorum of owners has voted and the required percentage of approving votes has been received. Otherwise, the proposal shall be deemed to be rejected; or
- If approval of a proposed action otherwise would require a meeting at which a specified percentage of owners must authorize the action, the proposal shall be deemed to be approved when the percentage of total votes cast in favor of the proposal equals or exceeds such required percentage. The proposal shall be deemed to be rejected when the number of votes cast in opposition renders approval impossible or when both the date for return of ballots has passed and such required percentage has not been met.

#### **RETENTION OF BALLOTS**

Under ORS 94.670(1) and 100.480(1), proxies and ballots must be retained by the association for one year from the date of determination of the vote.

**Note:** For amendments to the declaration or bylaws, it is recommended that ballots and proxies be retained for at least one year from the recording of the amendment or longer depending on the nature of the amendment.

#### **NOTICE**

**THE GOVERNING DOCUMENTS AND THE OREGON PLANNED COMMUNITY ACT OR OREGON CONDOMINIUM ACT SHOULD BE CAREFULLY REVIEWED. IN ADDITION TO ORS 94.647 and 100.425, THE ACTS INCLUDE SPECIFIC REQUIREMENTS FOR CERTAIN ACTIONS. THE DECLARATION, BYLAWS AND ARTICLES OF INCORPORATION MAY ALSO INCLUDE SPECIFIC REQUIREMENTS (INCLUDING THE CONSENT OF LENDERS FOR CERTAIN MATTERS).**

**THE BOARD SHOULD CONSULT LEGAL COUNSEL IF IT IS CONSIDERING CONDUCTING A VOTE BY WRITTEN BALLOT.**

## Lorman Seminar A Success!

Vial Fotheringham was honored to be asked to provide instruction at two Lorman Education Services sponsored seminars entitled, "Legal Aspects of Condominium Development and Homeowners Associations in Oregon." One seminar was in Portland on February 21, and the other in Salem on February 23. Both were

well attended by Managers, Attorneys, Surveyors, Developers and other Business Professionals. In addition to Vial Fotheringham Staff, Steve Brodehl of Northwest Community Management, David Schwindt of Schwindt & Co. and Eugene Grant of Davis Wright and Tremaine also presented information from their respective fields.

Attendees commented the day long seminar was very informative.

The development and operation of Homeowner Associations was discussed from the perspective of Homeowners and Associations, a rare vantage point for many of the professionals who were present.

## STATUTE AND HOA HANDBOOKS

The NW HOA Law Center is provided by Vial Fotheringham LLP as a resource and education center. Among other important functions, it produces HOA Handbooks and Statute Reference books. The publications with Oregon HOA Statutes are now available. Below is a listing of the publications.

### **The Official HOA Handbook Oregon 2003 edition** (\$35.00).

This will be the most current edition until there are legislative changes which will require a new edition. We expect that to take place in 2007.



### **The Oregon Statutes with NW HOA Law Center Index 2005 edition** (\$20.00).

Includes: Oregon Condominium Act, Oregon Planned Community Act and Oregon Nonprofit Corporation Act.

*Especially for Managers and Other HOA Professionals:*

**The Oregon HOA Statutes Side by Side with the NW HOA Law Center Index** (25.00). Includes everything that is found in the Oregon Statutes 2005 edition organized by topic (i.e. Meetings of Board of Directors) for quick and easy reference and comparison.

*For ordering and questions contact Barbara Kanz at 503-684-4111  
or email to, bzk@yf-law.com.*





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**Kori Henrie**  
Attorney At Law



**TOM JOHNSON**  
Attorney At Law

## VIAL FOTHERINGHAM ADDS TWO MEMBERS TO OUR TEAM

As we take on more clients in all aspects of our work we are doing our best to continue giving valuable and timely service. In order to better serve our clients we have added two new attorneys as well as two paralegals to our team. Our new attorneys are Kori Henrie and Tom Johnson who both joined us this March.

**Kori Henrie's** practice will focus on estate planning and business transactions. Kori graduated from Lewis and Clark Law School in May of 2005. She was admitted to the Oregon State Bar in September of 2005.

**Tom Johnson** returns to Vial Fotheringham's litigation and business practice after spending 10 years in the consumer goods manufacturing and packaging industries as a Director, CEO, General Counsel and other administrative capacities. He is experienced in advising businesses that face additional pressures of family ownership, financial distress or status as a start-up. He brings a practical financial background and hands-on experience in developing operational plans, procedures and processes.

Tom's practice area include: Litigation; corporate and homeowner's association governance; business start-up; corporate policy and strategy development; contracting; family business transactions; mergers and acquisitions; creditor's rights.

Community Focus is a publication of Vial Fotheringham LLP and the Northwest HOA Law Center. The articles and information contained in Community Focus are for general informational purposes only and are not and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. We recommend that you consult your own attorney if you have specific legal questions and want assurance that our information, and your interpretation of it, is appropriate for your particular situation. Vial Fotheringham LLP and the Northwest HOA Law Center make no assurances, claims, guarantees or promises about the absolute accuracy, completeness, or adequacy of the contents of Community Focus and expressly disclaim liability for errors and omissions in the contents.