

COMMUNITY FOCUS

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

ANOTHER SUCCESSFUL OREGON HOA LAW FORUM

VOLUME 1, ISSUE 2

This year's Vial Fotheringham 5th Annual HOA Law Forum was held Saturday, November 8th, 2005, at the Holiday Inn in Wilsonville, Oregon. The Annual Forum is an educational seminar covering "hot topics" that face homeowner associations, recent legislative changes affecting homeowners associations, and ways to better operate and manage associations.



bandanas, western music, cowboy hats, a bull's head, and lassoing. Vial Fotheringham also gave away free beef (from cattle raised on Rich Vial's farm) to a couple of lucky attendees.

This year's topics included:

- **Bankruptcy and HOA collections**
- **Electronic communications and record keeping**
- **Manager-board relations**
- **Dealing with unsolvable HOA issues**
- **Document interpretation and amendment**
- **Adoption and enforcement of board resolutions**
- **Understanding construction defect litigation**

Go to the Vial Fotheringham LLP website www.nwhoalaw.com, to add your email address to the firm's mailing list, to be notified of the date and details of next year's forum, and to look at photographs from the most recent Forum. Thanks to everyone who came and helped to make it a success. If you were not able to attend this year, we would love to have you for the next Oregon HOA Law Forum, which is always the first or second Saturday of October. If you have any questions or comments about the Annual Oregon HOA Law Forum, please contact Barbara Kanz at (503) 684-4111.

The Forum gives attendees the opportunity to interact with board members, managers, accountants, and attorneys. In addition, there is always an "open mic" session, which gives attendees the opportunity to ask Vial Fotheringham LLP attorneys their most pressing legal questions.

This year, nearly 200 managers, board members, and other homeowner association professionals were in attendance.

This year's Forum theme was the "Wild West," complete with

7000 SW Varns Street
Portland, OR 97223

Phone: 503-684-4111
Fax: 503-597-7758
E-mail: lawfirm@vf-law.com

SPECIAL POINTS OF INTEREST:

- *Vial Fotheringham LLP Collections Program*
- *Senate Bill 955*
- *Lorman Educational-Seminar*
- *Statute Handbook*

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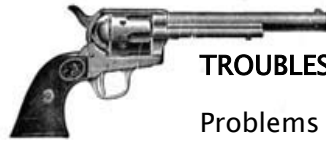
COLLECTIONS 7



Lorman Education Services

The Attorney Team of Vial Fotheringham LLP will be presenting an educational seminar for Lorman Education Services. There will be one in Portland on February 21 2006 and one in Salem on February 23 2006. The seminar is entitled, "Legal aspects of Condominium Development and Homeowner Associations." This would be a great way of getting education credit toward Real Estate Licensee and Manager Certification. You should be receiving more information in the mail within the next couple of months for registration if you are interested, or you can go to their website at <http://www.lorman.com/> Please feel free to call us with

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. If you were unable to make it to our forum, allow us to introduce to you Mr. Dank Whetley.

Dank N. Whetley, for reasons only a few know, dresses in all black.

In his past life Dank was a New York architect, turned Minnesota lawyer, turned Peruvian Banana Republic consultant, turned Arizona sheep herder, turned Wisconsin dairy-

farmer, turned Colorado miner, turned Hawaiian Fire & Rescue technician, turned Alaskan Iditerod Adventure Pilot, turned Oregonian HOA problem solver. During all these careers, Dank has come across his share of friends and foes, and a goodly portion of life's usual and unusual troubles. Now he dedicates his time and energies to helping homeowner associations solve seemingly insurmountable problems.

Citizen Whetley can often be seen walking the streets of a troubled homeowners association, around the twilight hours - often whistling a lonely tune, filled with all the longing of his restless and uneasy soul. His black hat, tipped forward, reveals very little of the handsome features underneath its broad brim, but there is no mistaking his 6 foot 4 inch frame - a frame

he uses often to inspect the nooks and crannies, as well as crooks and grannies, of associations who have gone off center. Often, though, as a disguise, Dank will appear as goofy as your next-door-neighbor, or as exotic as a winebibber from central California.

Please feel free 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!!!

"VIAL FOTHERINGHAM LLP AND THE NORTHWEST HOA LAW CENTER ARE EXCITED TO BUILD OUR RELATIONSHIP WITH YOU THROUGH OUR NEWSLETTER."

Board Meeting Minutes

Both the Oregon Planned Community Act and the Oregon Condominium Act require associations to maintain books and records. ORS 94.670; ORS 100.480. Board meeting minutes are a public/legal record of board action. Meeting minutes should accurately and succinctly reflect the *actions* taken by the board.

In general, meeting minutes should include: 1) the date, time, and place of the current meeting and the date, time, and place of the next scheduled meeting; 2) which board members were present; 3) whether a quorum was present; 4) any motions made and seconded; 5) votes taken; and 6) general meeting procedures. It is not necessary to list the members of the board who voted for or against a particular item or the discussion leading up to the vote.

In some instances it may be appropriate to include a specific comment in the meeting minutes at the request of a board member. For example, it may be appropriate to include a comment where a board member believes the board is acting contrary to the advice

of counsel or another professional and requests that his or her comment be included in the minutes.

Limiting the meeting minutes is important not only for brevity's sake, but also to protect the association and the board. Both the Oregon Planned Community Act and the Oregon Condominium Act require that all records of an association be available for examination at the request of a unit owner. ORS 94.670; ORS 100.480. If there is information included in the meeting minutes regarding a particular owner, it may injure the association and the board in the event of a lawsuit.

Since meeting minutes are discoverable in litigation, including information about litigation strategies, fee arrangements, and other pertinent information regarding a case may have a negative impact. For example, detailing legal advice or litigation strategies in meeting minutes could constitute a waiver of the attorney-client privilege. Waiving this privilege by voluntary disclosure of privileged information may also constitute a waiver of the privilege with respect to all commu-

nications on that specific subject matter or area of law.

In addition because meeting minutes are discoverable in litigation, board meetings should not be recorded in any fashion. However, if a board member insists on recording the meeting to accurately create the minutes, all recordings should either be erased or discarded once the minutes are drafted.

In conclusion, the board meeting minutes are a record of the actions that were taken at a board meeting. Therefore, it is the responsibility of an owner to attend the board meeting if they wish to have a comprehensive account of the meeting. If the board feels that more owners should be informed of the business that the board is conducting on behalf of the association, then a more appropriate forum may be a community newsletter or information posted on a community website.

~Gregory B Coxey~

Vial Fotheringham LLP



TRUST DEED FORECLOSURE



“IF AN ASSOCIATION OBTAINS A JUDGMENT AFTER A FORECLOSURE, “PATIENCE” IS THE KEY WORD.”



So, you have just received a Trustee’s Notice of Sale for one of your member’s units. What does that mean? Will it affect the association’s assessment lien? Will the association get paid? What should the association do?

When a financial institution loans money to someone to purchase a house or condominium, the lender usually will record a trust deed in the real property records of the county where the property is located. That trust deed secures the financial institution’s loan to the homeowner. There are typically three parties to a trust deed: (1) the grantor (homeowner); (2) the beneficiary (the lender); and the trustee (usually a title company or attorney).

If the homeowner fails to make the loan payments as required by the loan, the lender will direct the trustee to start foreclosure proceedings. Most trust deed foreclosures in Oregon are non judicial, meaning no court action is required. Once the lender directs the trustee to foreclose, the trustee will record in the real property records a “Notice of Default and Intent to Sell.” That puts anyone else on notice that a foreclosure is proceeding so the property cannot be sold to a third party without that third party being able to determine that a foreclosure is pending.

Thereafter, the trustee will mail to the lien holders, including the homeowner or

condominium association a “Trustee’s Notice of Sale” and will advertise the pending sale in a newspaper of general circulation located within the same county as the property. The notice will provide important information to the association. It will include the name of the trustee, the date and time the sale will be held, and information about the amount due and amount in default. The approximate amount due is important because it will allow the association to determine the approximate equity in the property. For instance, assuming the lender who is foreclosing is in a first priority position, if the balance owed is \$80,000 and the association determines the property is worth \$120,000, then the association may want to consider bidding at the sale. Even if it does not bid, if someone bids more than the amount owed to the lender, the excess proceeds from the sale will be used to pay the junior lien holders, including the association.

When a trustee starts foreclosure of a trust deed, it will obtain a Trustee’s Sale Guaranty from a title company. This title report will identify the liens and encumbrances on the property. Some trustees will make these reports available to third parties for a fee, typically in the range of \$25 or so. Obtaining such reports is helpful because it will help the association to determine what liens encumber the property and the relative priority of the

association with respect to other liens. Of course, since the title company did not issue the report to the association or other third parties, the association should not rely on the report. If it wants to bid on the property, the association may want to obtain its own report from a title company.

Absent contrary provisions in the declaration or bylaws, boards do have the authority to make such a bid if they have the money. Of course, most associations do not bid at foreclosure sales because they do not have the funds. Even if the board does not bid, it may get paid. With the increase in investors purchasing properties at foreclosure sales, fewer lenders are the buyers at the sales. Instead, it is quite common for a trustee to hold a sale on the county courthouse steps where the property is located, start the bidding with the amount owed to the lender, and then receive several bids from investors there hoping to pick up a piece of property for thousands less than fair market value.

Increasingly, the amount bid is more than the amount owed to the lender. In such cases, the trustee is responsible for applying such “excess proceeds” to the junior lien holders in order of priority. Most often, the association is the next in line to be paid.

Once a sale has taken place, the association or its attorney, if the matter has been referred for collection,

should contact the trustee to find out if any excess proceeds are available. Typically, if there are such funds, the trustee will request a notarized statement of the amount due at the time of the sale and an indemnity agreement. Once those are signed and delivered to the trustee, the trustee will mail the funds to the association.

So, what is the effect of the foreclosure sale? Typically, the association's lien is gone or is no longer enforceable with respect to assessments due prior to the date of the sale. The new owner is responsible for assessments which come due after the sale.

Let's assume the sale took place and the association did not get paid in full, either because the lender bought the

property or because the excess proceeds were not sufficient to payoff the association. Can the association still collect from the old owner? Yes. Although the lien is gone, the prior owner continues to be personally liable for the assessments due prior to the foreclosure sale. The association can make demand on the old owner for those assessments and, if they are not paid, may file a lawsuit.

From a practical standpoint, the association may want to make a determination, if it can, whether the old owner is employed or has other assets from which it can collect the balance. If it chooses to sue, it should do so before the old owner moves from the premises. In fact, we recommend the association commence its lawsuit prior to

the foreclosure sale so that the owner can be served with the summons and complaint at the premises. Once the foreclosure sale takes place, it is not uncommon for the old owner to move and leave no forwarding address. It can take months to locate an old owner after he moves and even longer to collect a judgment. If an association obtains a judgment after a foreclosure, "patience" is the key word. Often the debtor has no other significant assets to pay the judgment; otherwise he would have paid the lender to prevent the foreclosure. In Oregon, the judgment is good for ten years and may be renewed. Once the debtor is back on his feet, the association can enforce its judgment.

~Tim Zimmerman~

Vial Fotheringham LLP

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 will be available in early 2006, when the 2005 Oregon HOA Statutes ("ORS") are published. 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.

Contact Barbara Kanz at 503-684-4111 for ordering and questions



SENATE BILL 955

Oregon's continuing evolution of reserve & maintenance management

The 2005 legislative session marked a low point for Oregon homeowner associations. Budget woes generally being experienced by the state captured virtually all of the legislators' time while homeowner association bills received short shrift. Added to the lack of attention that the homeowner association-related bills received was the new phenomenon of a variety of bills being presented from diverse and sometimes opposing constituencies. Some attempts were made to resolve the concerns, but for the most part bills simply languished and ultimately died on *sine die*.

The one bill which survived the session and actually adopted new law was Senate Bill 955. Now codified at Chapter 534, Oregon Laws 2005, Senate Bill 955 made a seemingly small change to the requirements relating to reserves and reserve studies.

A brief history of the bill is appropriate. Senate Bill 955 was proposed by a group of developers in the Portland area who appear to have been motivated by the concerns surrounding construction defect suits in cases where there is some question about whether or not the project has properly been maintained. On its face, this certainly is an altruistic desire for the developer to address, but the bill had some fundamental flaws. From a homeowner association standpoint, the

largest of these flaws was that it would have essentially limited claims to strictly warranty claims, and it dropped from 10 years to 3 years the statutory time frame within which a homeowner's association could bring a claim.

Naturally, we opposed Senate Bill 955, and in the compromise meetings held in Salem, it was agreed that a new requirement be imposed upon associations to adopt a maintenance plan.

It is important first to understand how this new law applies. The reader should remember that the law ties the requirement for a maintenance plan to the sections for reserves and reserve studies. Let's review when reserves (and thus now a maintenance plan) are required. The answer is relatively simple.

Condominiums created on and after January 1, 1982 must establish reserve accounts. All other condominiums must establish reserve accounts if required by the declaration or bylaws. The same holds true for planned communities. All planned communities created under the planned community act (remember that many planned communities opted out) on and after July 1, 1982 are required to have a reserve account. All other planned communities (pre-1982 and post-1982 projects not under the act) are only required to have reserves if required by the declaration and bylaws.

The question of a **reserve study** is entirely different. All condominiums created on and after October 23, 1999 must have a reserve study. All other condominiums must have a reserve study only if the declaration and bylaws require it and a board of directors resolution has been passed to apply the provisions of the act to that association or the board has received a petition signed by a majority of the owners. If these requirements are satisfied, then the association must conduct a reserve study within one year of the date of adoption of the resolution or submission of the petition. Once again, for planned communities, the law is essentially the same. For all planned communities created on or after October 23, 1999, a reserve study is required and for all other planned communities (those created prior to October 23, 1999 and those projects not subjected to the provisions of the act) must go through the same steps as outlined above for condominiums.

Finally, we must ask ourselves, "What is a maintenance plan?" While a reserve study requires analysis of all components which will require replacement between three and thirty years, the reserve study does not appear to be so limited. Essentially, the law requires that the maintenance plan deals with all repair and replacement of common elements and address issues including, **but**

not limited to, the useful life of the common elements and association properties. It is important to note that for planned communities, the act appears to be limited to items of common property and may not cover items requiring common maintenance.

In any event, we are recommending to associations that they assess all of their maintenance obligations, including landscaping, painting, roofing, etc. and provide for a clear and objective process to make sure that the maintenance is properly done. Obviously, there is a great deal of overlap with the preparation of a maintenance study and the preparation of a reserves budget. We note that the legislature including the language that the plan shall "be appropriate for the size and complexity of the common property. . . ." Associations are cautioned not to use this language as an excuse to say that they don't have enough money to properly perform a maintenance plan.

We are hopeful that qualified professionals will emerge who are in a position to provide opinions supported by their professional integrity and firm resources should those opinions not be found reasonable. We urge associations to be careful in considering choice of these service providers.

~A. Richard Vial~

Vial Fotheringham LLP

COLLECTIONS



DO YOUR DELINQUENT OWNERS TELL YOU TO “POUND SAND”?



CHEER UP, YOUR ASSOCIATION DOESN'T HAVE TO TIE UP ITS CASH TO COLLECT PAST DUE ASSESSMENTS.

VIAL FOTHERINGHAM LLP COLLECTS AT *NO COST* TO THE ASSOCIATION.

Vial Fotheringham LLP understands the difficult dynamics involved in collecting past due assessments. We have created an innovative solution called the **Cash Flow Enhancement Program (CFE)**.

Benefits of the CFE Program

- Aggressive-Professional-Prompt action with a High Rate of Success
- Monthly Status reports providing up to date information on the status of each account
- All collections fees and court costs are charged to the debtor, not the association
- To avoid bounced checks, funds are distributed to the association upon collection after verification
- Vial Fotheringham LLP manages all communication with the debtor, so you don't have to
- Strict enforcement of payment plans allows homeowners to bring delinquent accounts current

How the CFE Program Works

We review your association's governing documents and draft a Collection Resolution for adoption by the Association's Board of Directors (a one-time set up fee of only \$250)

When an account is past due, the HOA or Property Management Company sends the debtor a final 30-day notice that the account will be turned over to an attorney if it remains unpaid

The homeowner association or property Management Company follows the Vial Fotheringham LLP procedure for turnover of delinquent accounts

Vial Fotheringham LLP mails notices to the debtor, records a lien if necessary, and works with the debtor to set up a payment plan.

If a debt to the HOA remains unpaid after repeated attempts, a lawsuit will be filed. When the funds are collected, the disbursement is promptly made to the association after verification of funds

Rarely, as in the case of bankruptcy and foreclosure, the debt may become uncollectible. In these rare cases the Association is billed only for the costs incurred and a limited amount of attorney fees.



HELPING CLIENTS NAVIGATE TODAY'S
COMPLEX LEGAL ENVIRONMENT

7000 SW Varns Street
Portland, OR 97223

Phone: 503-684-4111
Fax: 503-597-7758
E-mail: lawfirm@vf-law.com

VISIT US ON THE WEB!
WWW.NWHOALAW.COM

ALLOW US TO INTRODUCE OURSELVES

Vial Fotheringham LLP and its predecessor firm, A. R. Vial and Associates, traces their roots to founder Rich Vial's work with the Oregon Department of Real Estate beginning in 1979, where Rich reviewed condominium applications for the state. After working with a firm in downtown Portland for several years, Rich started his own law firm in 1992 and was soon joined by Rob Fotheringham, who also had a solid background in real estate, title and specializes in all aspects of estate planning matters.

Those of us who comprise Vial Fotheringham LLP are first and foremost people. Moms, dads, husbands, wives, sons, daughters, neighbors, and friends. The relationships we share with people are our most cherished assets. We recognize the need to carry out our responsibilities in a professional and effective manner, but we hope never to lose sight of the fact that we are dealing with people and not things.

We believe that by actively participating in our neighborhoods and commu-

nities we not only carry out our responsibilities as citizens, but are better prepared to understand and serve our clients. Our lawyers and staff are involved in many organizations, all with the support of our law firm. At each of the firm's offices, our clients are welcomed in a warm and congenial atmosphere.

So, ask us about our families, our office space, the art on the walls, or anything else you want, but expect to get some of the same questions back! Bottom line - we want to build a relationship, not just an account.



Robert C. Fotheringham
Attorney At Law



A. RICHARD VIAL
Attorney At Law

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