

Western Winds Homeowners Association, Inc.
405 East Wetmore Road, #117-170, Tucson, Arizona 85705
hoa@85705ww.com 85705ww.com

June 3, 2021

Dear Homeowner,

As part of its regular due diligence, the Board of Directors of Western Winds Homeowners Association, Inc. retained the law firm of McEvoy, Daniels & Darcy, P.C. (the "firm") to perform an independent review of the Association's governing documents.

The results of this review act as an addendum to the Articles of Incorporation, Bylaws, and Declaration of Covenants, Conditions, and Restrictions, and should be filed as such with those documents.

In their review, the firm noted that the Association is in violation of its Articles of Incorporation because it does not have nine (9) directors. The Bylaws state that there can be no less than three (3) and no more than nine (9) directors. (There are currently four (4) directors; three (3) directors have three (3) year terms, and one (1) has a two (2) year term.)

In response to the firm's comment, the Board's position is:

1. Conduct the election for the Board of Directors in December as usual.
2. Based upon the outcome of this election, the Board will determine if it is necessary to amend the Articles of Incorporation to provide for a lesser number of directors as recommended by the firm.

The Board will begin the process of seeking candidates for the Board of Directors in September.

If you have any questions regarding this letter, please do not hesitate to contact us at hoa@85705ww.com.

Board of Directors
Western Winds Homeowners Association, Inc.

**McEVOY, DANIELS & DARCY, P.C.
LAWYERS**

Earl F. "Sam" Daniels, III
David A. McEvoy

David A. McEvoy
520-326-0585
DAMcEvoy@AOL.COM

May 11, 2021

Email: hoa@85705ww.com
Western Winds Homeowners Association
Attention: Mr. Nigel Brooks, President

Re: Legal Review of Governing Documents for Western Winds Homeowners Association ("Association")

Dear Mr. Brooks:

This letter reflects my review of the following governing documents for the Association:

1. Articles of Incorporation (1978):

1.1 Section 9 requires that there be nine (9) directors. Does the Association have nine (9) directors? If not, the Association is in violation of the Articles of Incorporation. A solution would be to amend the Articles of Incorporation pursuant to Section 14 thereof to provide for a lesser number of directors or a variable range for the number of directors (such as, between three (3) and five (5) directors). Article IV, Section 1, of the By-Laws states (first sentence thereof) that there shall be a range in the number of directors of not less than three (3) nor more than nine (9), but also states (last sentence) that there shall be nine (9) directors after the Class B Membership ceases, like the Articles of Incorporation. In any event, that internal inconsistency in the by-Laws is resolved in favor of what is provided in the Articles of Incorporation pursuant to Article XIII, Section 2, of the By-Laws.

1.2 Although the heading of Section 12 is "Duration," Section 12 only addresses when the corporate existence of the Association commenced, and does not address its duration. No change is required, since the default situation is that the corporate existence of the Association continues until it is dissolved, such as by a combination of director action and member approval pursuant to A.R.S. Section 10-11402.

2. Amendment to Articles of Incorporation (1982): no comments.

3. By-Laws: Article III, Section 5, would allow members to vote by proxy. However, A.R.S. Section 33-1812(A) added in 2005 (quoted below after the end of this letter) prohibits the use of proxies. The By-Laws do not need to be amended to reflect that overriding legal requirement. Rather, the Association simply has to be aware that the legal requirement prevails on this issue.

4. Restated and Amended Declaration of Covenants, Conditions and Restrictions for Western Winds Townhouses ("CC&Rs") (2008):

- 4.1 Section 5.6 would allow the Board of Directors to impose fines and penalties against an Owner, and once imposed, the fines and penalties would become a lien against the Owner's Lot. However, such fines and penalties do not have the same status as assessments in terms of being a lien against a Lot pursuant to A.R.S. Section 33-1807(A) (quoted below after the end of this letter). The CC&Rs do not need to be amended to reflect that overriding legal requirement. Rather, the Association simply has to be aware that the legal requirement prevails on this issue.
- 4.2 Section 5.9, subpart (2), refers to the date of the recording of the original declaration, December 11, 1978, in regard to determining the priority of the Association's assessment liens vis-à-vis mortgages. That conflicts with pursuant to A.R.S. Section 33-1807(B)(2) (quoted below after the end of this letter). The CC&Rs do not need to be amended to reflect that overriding legal requirement. Rather, the Association simply has to be aware that the legal requirement prevails on this issue.
- 4.3 Section 6.4.5 would require an Owner to provide information about the Owner's Lessees and leases. The extent of such information is limited by A.R.S. Section 33-1806.01(C) (quoted below after the end of this letter). The CC&Rs do not need to be amended to reflect that overriding legal requirement. Rather, the Association simply has to be aware that the legal requirement prevails on this issue.
- 4.4 Section 6.4.6 states that, leases not containing the information required by Section 6.4 would be "null and void" and the Board of Directors may require the Owner to evict the Lessee. There is no basis in the law for such a right in favor of the Association, and it would be unenforceable.
- 4.5 Section 6.4.7 would allow the Association to impose on an Owner to evict the cost of providing documents to the Owner's Lessee. There is no basis in the law for such a right in favor of the Association, and it would be unenforceable.
- 4.6 Section 6.5.2 would limit the number of animals on a Lot. To the extent reasonably required by an Owner or Lessee for disability reasons (such as, service animals), the Association may have to make an exception as a reasonable accommodation to an Owner under applicable laws.
- 4.7 Section 6.19 would limit for sale/for rent/open house signs. To the extent that A.R.S. Section 33-1808(F) (quoted below after the end of this letter) addresses the issue, that statute would govern the issue.
- 4.8 Section 13.1(c) would allow the Association to decide not to enforce the rules. Such discretion is limited by the *Johnson* case (a copy of which accompanies this letter).
5. Certificate of Amendment to Declaration (2010): no comments.
6. Collection Policy (2012/2020): no comments.
7. Board Resolution (2020): no comments.
8. Association Member Complaint Declaration: no comments.
9. Rules and Regulations (2020): no comments.

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Please contact me if you have any questions or comments about this letter. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read 'DA McEvoy', with a stylized flourish at the end.

David A. McEvoy

33-1812. PROXIES; ABSENTEE BALLOTS; DEFINITION

A. Notwithstanding any provision in the community documents, after termination of the period of declarant control, votes allocated to a unit may not be cast pursuant to a proxy. The association shall provide for votes to be cast in person and by absentee ballot and, in addition, the association may provide for voting by some other form of delivery, including the use of e-mail and fax delivery. Notwithstanding section 10-3708 or the provisions of the community documents, any action taken at an annual, regular or special meeting of the members shall comply with all of the following if absentee ballots or ballots provided by some other form of delivery are used:

1. The ballot shall set forth each proposed action.
2. The ballot shall provide an opportunity to vote for or against each proposed action.
3. The ballot is valid for only one specified election or meeting of the members and expires automatically after the completion of the election or meeting.
4. The ballot specifies the time and date by which the ballot must be delivered to the board of directors in order to be counted, which shall be at least seven days after the date that the board delivers the unvoted ballot to the member.
5. The ballot does not authorize another person to cast votes on behalf of the member.
6. The completed ballot shall contain the name, address and signature of the person voting, except that if the community documents permit secret ballots, only the envelope shall contain the name, address and signature of the voter.
7. Ballots, envelopes and related materials, including sign-in sheets if used, shall be retained in electronic or paper format and made available for member inspection for at least one year after completion of the election.

B. Votes cast by absentee ballot or other form of delivery, including the use of e-mail and fax delivery, are valid for the purpose of establishing a quorum.

C. Notwithstanding subsection A of this section, an association for a timeshare plan as defined in section 32-2197 may permit votes by a proxy that is duly executed by a unit owner.

D. For the purposes of this section, "period of declarant control" means the time during which the declarant or persons designated by the declarant may elect or appoint the members of the board of directors pursuant to the community documents or by virtue of superior voting power.

33-1803. ASSESSMENT LIMITATION; PENALTIES; NOTICE TO MEMBER OF VIOLATION

A. Unless limitations in the community documents would result in a lower limit for the assessment, the association shall not impose a regular assessment that is more than twenty percent greater than the immediately preceding fiscal year's assessment without the approval of the majority of the members of the association. Unless reserved to the members of the association, the board of directors may impose reasonable charges for the late payment of assessments. A payment by a member is deemed late if it is unpaid fifteen or more days after its due date, unless the community documents provide for a longer period. Charges for the late payment of assessments are limited to the greater of fifteen dollars or ten percent of the amount of the unpaid assessment and may be imposed only after the association has provided notice that the assessment is overdue or provided notice that the assessment is considered overdue after a certain date. Any monies paid by the member for an unpaid assessment shall be applied first to the principal amount unpaid and then to the interest accrued.

B. After notice and an opportunity to be heard, the board of directors may impose reasonable monetary penalties on members for violations of the declaration, bylaws and rules of the association. Notwithstanding any provision in the community documents, the board of directors shall not impose a charge for a late payment of a penalty that exceeds the greater of fifteen dollars or ten percent of the amount of the unpaid penalty. A payment is deemed late if it is unpaid fifteen or more days after its due date, unless the declaration, bylaws or rules of the association provide for a longer period. Any monies paid by a member for an unpaid penalty shall be applied first to the principal

amount unpaid and then to the interest accrued. Notice pursuant to this subsection shall include information pertaining to the manner in which the penalty shall be enforced.

C. A member who receives a written notice that the condition of the property owned by the member is in violation of the community documents without regard to whether a monetary penalty is imposed by the notice may provide the association with a written response by sending the response by certified mail within twenty-one calendar days after the date of the notice. The response shall be sent to the address identified in the notice.

D. Within ten business days after receipt of the certified mail containing the response from the member, the association shall respond to the member with a written explanation regarding the notice that shall provide at least the following information unless previously provided in the notice of violation:

1. The provision of the community documents that has allegedly been violated.
2. The date of the violation or the date the violation was observed.
3. The first and last name of the person or persons who observed the violation.
4. The process the member must follow to contest the notice.

E. Unless the information required in subsection D, paragraph 4 of this section is provided in the notice of violation, the association shall not proceed with any action to enforce the community documents, including the collection of attorney fees, before or during the time prescribed by subsection D of this section regarding the exchange of information between the association and the member and shall give the member written notice of the member's option to petition for an administrative hearing on the matter in the state real estate department pursuant to section 32-2199.01. At any time before or after completion of the exchange of information pursuant to this section, the member may petition for a hearing pursuant to section 32-2199.01 if the dispute is within the jurisdiction of the state real estate department as prescribed in section 32-2199.01.

33-1807. LIEN FOR ASSESSMENTS; PRIORITY; MECHANICS' AND MATERIALMEN'S LIENS; NOTICE

A. The association has a lien on a unit for any assessment levied against that unit from the time the assessment becomes due. The association's lien for assessments, for charges for late payment of those assessments, for reasonable collection fees and for reasonable attorney fees and costs incurred with respect to those assessments may be foreclosed in the same manner as a mortgage on real estate but may be foreclosed only if the owner has been delinquent in the payment of monies secured by the lien, excluding reasonable collection fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to those assessments, for a period of one year or in the amount of \$1,200 or more, whichever occurs first, as determined on the date the action is filed. Fees, charges, late charges, monetary penalties and interest charged pursuant to section 33-1803, other than charges for late payment of assessments are not enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment of the assessment becomes due. The association has a lien for fees, charges, late charges, other than charges for late payment of assessments, monetary penalties or interest charged pursuant to section 33-1803 after the entry of a judgment in a civil suit for those fees, charges, late charges, monetary penalties or interest from a court of competent jurisdiction and the recording of that judgment in the office of the county recorder as otherwise provided by law. The association's lien for monies other than for assessments, for charges for late payment of those assessments, for reasonable collection fees and for reasonable attorney fees and costs incurred with respect to those assessments may not be foreclosed and is effective only on conveyance of any interest in the real property.

B. A lien for assessments, for charges for late payment of those assessments, for reasonable collection fees and for reasonable attorney fees and costs incurred with respect to those assessments under this section is prior to all other liens, interests and encumbrances on a unit except:

1. Liens and encumbrances recorded before the recordation of the declaration.

2. A recorded first mortgage on the unit, a seller's interest in a first contract for sale pursuant to chapter 6, article 3 of this title on the unit recorded prior to the lien arising pursuant to subsection A of this section or a recorded first deed of trust on the unit.

3. Liens for real estate taxes and other governmental assessments or charges against the unit.

33-1806.01. RENTAL PROPERTY; MEMBER AND AGENT INFORMATION; FEE; DISCLOSURE

A. A member may use the member's property as a rental property unless prohibited in the declaration and shall use it in accordance with the declaration's rental time period restrictions.

B. A member may designate in writing a third party to act as the member's agent with respect to all association matters relating to the rental property, except for voting in association elections and serving on the board of directors. The member shall sign the written designation and shall provide a copy of the written designation to the association. On delivery of the written designation, the association is authorized to conduct all association business relating to the member's rental property through the designated agent. Any notice given by the association to a member's designated agent on any matter relating to the member's rental property constitutes notice to the member.

C. Notwithstanding any provision in the community documents, on rental of a member's property an association shall not require a member or a member's agent to disclose any information regarding a tenant other than the name and contact information for any adults occupying the property, the time period of the lease, including the beginning and ending dates of the tenancy, and a description and the license plate numbers of the tenants' vehicles. If the planned community is an age restricted community, the member, the member's agent or the tenant shall show a government issued identification that bears a photograph and that confirms that the tenant meets the community's age restrictions or requirements.

D. On request of an association or its managing agent for the disclosures prescribed in subsection C of this section, the managing agent or, if there is no managing agent, the association may charge a fee of not more than twenty-five dollars, which shall be paid within fifteen days after the postmarked request. The fee may be charged for each new tenancy for that property but may not be charged for a renewal of a lease. Except for the fee permitted by this subsection and fees related to the use of recreational facilities, the association or its managing agent shall not assess, levy or charge a fee or fine or otherwise impose a requirement on a member's rental property any differently than on an owner-occupied property in the association.

E. Notwithstanding any provision in the community documents, the association is prohibited from doing any of the following:

1. Requiring a member to provide the association with a copy of the tenant's rental application, credit report, lease agreement or rental contract or other personal information except as prescribed by this section. This paragraph does not prohibit the association from acquiring a credit report on a person in an attempt to collect a debt.

2. Requiring the tenant to sign a waiver or other document limiting the tenant's due process rights as a condition of the tenant's occupancy of the rental property.

3. Prohibiting or otherwise restricting a member from serving on the board of directors based on the member's not being an occupant of the property.

4. Imposing on a member or managing agent any fee, assessment, penalty or other charge in an amount greater than fifteen dollars for incomplete or late information regarding the information requested pursuant to subsection C of this section.

F. Any attempt by an association to exceed the fee, assessment, penalty or other charge authorized by subsection D or E of this section voids the fee, assessment, penalty or other charge authorized by subsection D or E of this section. This section does not prevent an association from complying with the housing for older persons act of 1995 (P.L. 104 76; 109 Stat. 787).

G. An owner may use a crime free addendum as part of a lease agreement. This section does not prohibit the owner's use of a crime free addendum.

H. This section does not prohibit and an association may lawfully enforce a provision in the community documents that restricts the residency of persons who are required to be registered pursuant to section 13-3821 and who are classified as level two or level three offenders.

I. An owner of rental property shall abate criminal activity as authorized in section 12-991.

33-1808. FLAG DISPLAY; POLITICAL SIGNS; CAUTION SIGNS; FOR SALE, RENT OR LEASE SIGNS; POLITICAL ACTIVITIES

A. Notwithstanding any provision in the community documents, an association shall not prohibit the outdoor front yard or backyard display of any of the following:

1. The American flag or an official or replica of a flag of the United States army, navy, air force, marine corps or coast guard by an association member on that member's property if the American flag or military flag is displayed in a manner consistent with the federal flag code (P.L. 94-344; 90 Stat. 810; 4 United States Code sections 4 through 10).

2. The POW/MIA flag.

3. The Arizona state flag.

4. An Arizona Indian nations flag.

5. The Gadsden flag.

B. The association shall adopt reasonable rules and regulations regarding the placement and manner of display of the American flag, the military flag, the POW/MIA flag, the Arizona state flag or an Arizona Indian nations flag. The association rules may regulate the location and size of flagpoles, may limit the member to displaying no more than two flags at once and may limit the height of the flagpole to no more than the height of the rooftop of the member's home but shall not prohibit the installation of a flagpole in the front yard or backyard of the member's property.

C. Notwithstanding any provision in the community documents, an association shall not prohibit the indoor or outdoor display of a political sign by an association member on that member's property, except that an association may prohibit the display of political signs earlier than seventy-one days before the day of an election and later than three days after an election day. An association may regulate the size and number of political signs that may be placed on a member's property if the association's regulation is no more restrictive than any applicable city, town or county ordinance that regulates the size and number of political signs on residential property. If the city, town or county in which the property is located does not regulate the size and number of political signs on residential property, the association shall not limit the number of political signs, except that the maximum aggregate total dimensions of all political signs on a member's property shall not exceed nine square feet. For the purposes of this subsection, "political sign" means a sign that attempts to influence the outcome of an election, including supporting or opposing the recall of a public officer or supporting or opposing the circulation of a petition for a ballot measure, question or proposition or the recall of a public officer.

D. Notwithstanding any provision in the community documents, an association shall not prohibit the use of cautionary signs regarding children if the signs are used and displayed as follows:

1. The signs are displayed in residential areas only.

2. The signs are removed within one hour of children ceasing to play.

3. The signs are displayed only when children are actually present within fifty feet of the sign.

4. The temporary signs are no taller than three feet in height.

5. The signs are professionally manufactured or produced.

E. Notwithstanding any provision in the community documents, an association shall not prohibit children who reside in the planned community from engaging in recreational activity on residential roadways that are under the jurisdiction of the association and on which the posted speed limit is twenty-five miles per hour or less.

F. Notwithstanding any provision in the community documents, an association shall not prohibit or charge a fee for the use of, placement of or the indoor or outdoor display of a for

sale, for rent or for lease sign and a sign rider by an association member on that member's property in any combination, including a sign that indicates the member is offering the property for sale by owner. The size of a sign offering a property for sale, for rent or for lease shall be in conformance with the industry standard size sign, which shall not exceed eighteen by twenty-four inches, and the industry standard size sign rider, which shall not exceed six by twenty-four inches. This subsection applies only to a commercially produced sign, and an association may prohibit the use of signs that are not commercially produced. With respect to real estate for sale, for rent or for lease in the planned community, an association shall not prohibit in any way other than as is specifically authorized by this section or otherwise regulate any of the following:

1. Temporary open house signs or a member's for sale sign. The association shall not require the use of particular signs indicating an open house or real property for sale and may not further regulate the use of temporary open house or for sale signs that are industry standard size and that are owned or used by the seller or the seller's agent.

2. Open house hours. The association may not limit the hours for an open house for real estate that is for sale in the planned community, except that the association may prohibit an open house being held before 8:00 a.m. or after 6:00 p.m. and may prohibit open house signs on the common areas of the planned community.

3. An owner's or an owner's agent's for rent or for lease sign unless an association's documents prohibit or restrict leasing of a member's property. An association shall not further regulate a for rent or for lease sign or require the use of a particular for rent or for lease sign other than the for rent or for lease sign shall not be any larger than the industry standard size sign of eighteen by twenty-four inches on or in the member's property. If rental or leasing of a member's property is not prohibited or restricted, the association may prohibit an open house for rental or leasing being held before 8:00 a.m. or after 6:00 p.m.

G. Notwithstanding any provision in the community documents, an association shall not prohibit door to door political activity, including solicitations of support or opposition regarding candidates or ballot issues, and shall not prohibit the circulation of political petitions, including candidate nomination petitions or petitions in support of or opposition to an initiative, referendum or recall or other political issue on property normally open to visitors within the association, except that an association may do the following:

1. Restrict or prohibit the door to door political activity from sunset to sunrise.

2. Require the prominent display of an identification tag for each person engaged in the activity, along with the prominent identification of the candidate or ballot issue that is the subject of the support or opposition.

H. A planned community shall not make any regulations regarding the number of candidates supported, the number of public officers supported or opposed in a recall or the number of propositions supported or opposed on a political sign.

I. A planned community shall not require political signs to be commercially produced or professionally manufactured or prohibit the utilization of both sides of a political sign.

J. A planned community is not required to comply with subsection G if the planned community restricts vehicular or pedestrian access to the planned community. Nothing in this section requires a planned community to make its common elements other than roadways and sidewalks that are normally open to visitors available for the circulation of political petitions to anyone who is not an owner or resident of the community.

K. An association or managing agent that violates subsection F of this section forfeits and extinguishes the lien rights authorized under section 33-1807 against that member's property for a period of six consecutive months from the date of the violation.