

*President's Rpt.*

**Carol Opatrny**

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**From:** Michael Simon <michael.simon@landerholm.com>  
**Sent:** Saturday, March 28, 2015 1:26 PM  
**To:** 'Carol Opatrny'  
**Cc:** Jacqueline S. Delgado  
**Subject:** FW:  
**Attachments:** doc08918820150328121535.pdf

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Carol;

Thanks for talking this morning about the myriad issues dealing with the Cedars HOA and Phases 1, 3 and 4 of it. Your questions were very helpful in giving clarity to the issues and your insight into the history and progress of the different phases was very helpful.

I want to explain how a phased development usually works and then apply those principles to what we know occurred at the Cedars, and then look at how the phases have been organized, how they should be organized and how the past operations affect the current situation.

A phased development begins with the developers plan of how the development can be built over time to result in a complete build out, subject to a number of factors including the economy, market factors and changes in development standards. There is usually a time period that once it expires, ends the opportunity for further development. The developer builds the first phase, organizes an association (HOA) and then builds another phase. When the second phase is built, it is folded into the HOA, and so on as different phases are completed. Eventually the developer hopes that all phases are added into the HOA. There are developments that encompass thousands of acres with multiple different kinds of development, (e.g. retail, stand-alone houses, condos, offices, golf courses townhomes, restaurants, etc.. Think Sun River in Bend). All of these phases will be subject to the same set of master CC&Rs and may also have CC&Rs that govern an individual area because of its unique uses, standards or area.

The Cedars was intended to be one development when completed consisting of 4 different phases. The HOA was established and the first phase officially organized in February, 1973 by recording the CC&Rs. The cover page for the CC&Rs is attached and shows the auditor's recording number G 627415. Phase 4 was established by recording the "Declaration of Additional Property Subject to Covenants, Conditions and Restrictions, see attached second page, dated Sept. 7, 1978. Note at the bottom of the page is a reference to Auditor's number G 627415. This document added Phase 4 to the already established HOA for the Cedars. It did not create a new, separate HOA but rather folded Phase 4 into the HOA that was created in 1973. The legal description, Exhibit A describes lots 1-21 inclusive of the plat of Cedars 4.

Phase 3 was added in December, 1978 by recording "The Cedars Phase III Towne House Area Supplemental Declaration of Covenants, Conditions and Restrictions, see the third page attached. This recording does not reference the G 627415 document but rather states it supplements the CC&Rs of the CC&Rs recorded for Phase 1. It also states that this Supplemental CC&R affect only the towne home areas and common areas of Phase 3.

As a result of the above, you have one Cedars HOA which consists of Phases 1, 3 and 4, all subject to the CC&Rs recorded at auditor's numbers 860732-860746, with Phase 3 having a separate set of CC&Rs that govern the towne house lots, but these lots are still subject to the CC&Rs for the HOA, auditor's recording numbers 860732-869746. Because of this, there is one set of CC&Rs that governs the 3 phases with the additional set that governs Phase 3 towne houses. There should be one governing set of Bylaws and one board of directors for the one HOA.

Each phase has common areas within it. There is a question whether when phases 3 and 4 were added, if the common areas in Phase 1 were made available to the residents of phases 3 and 4, and if they are, are the owners in phases 3 and 4 liable for assessment for them? The common areas for phase 1 are included in the CC&Rs and when the other phases were added, it is likely the common areas for phase 1 were included in the addition. It would then follow that the

*EXH. A*

owners in Phases 3 and 4 are liable for the expense of maintaining them. And because there is only one HOA for all 3 phases, it is likely that all owners are liable for the assessments to maintain all of the common areas within the phases, except for the common areas of the townhouse in Phase 3, which are made separately the responsibility of the townhouse owners.

I recognize that this governance structure has not been followed by the Cedars HOA for the past 30 years. There is a question whether you can continue to govern as 3 separate HOAs or if one HOA governing body is required. There is a legal doctrine called waiver that is a recognition that if people know a legal right and choose to not enforce it, they are not bound by it. Once a party relinquishes a known legal right, he cannot reclaim it without the consent of the other party. Another legal doctrine, estoppel, is established if 3 criteria are met; 1) an act inconsistent with a claim afterwards asserted; 2) action by the other party on the faith of those acts; 3) injury to the second party if the acts are allowed to be repudiated. Because the CC&Rs of the 3 phases were recorded, people buying into the Cedars were aware of them and therefore had constructive knowledge of their legal right to belong to one HOA. This may be a legal fiction, people did not know of this legal right but the doctrine of constructive knowledge is still there and may bind people to a knowledge of the one HOA.

You can see how both of these doctrines could be asserted here. The 3 phases have acted as separate entities for 30 years, each has relied on the acts of the others to continue acting independently; and if they are now required to act as one HOA, they will have to redo their assessments, be responsible for assessments they haven't been responsible for, etc.. So it is possible that by the actions of the owners for the past 30 years they have established 3 HOAs.

The best legal way to separate the 3, if that is what is wanted, is to amend the CC&Rs to break the Cedars HOA into 3 separate HOAs going forward. Article VII, Section 3 requires a vote of 75% of the owners to amend them. Amending the CC&Rs to establish 3 separate, independent HOAs is the legally supportable method of establishing 3 separate HOAs. I trust this explanation will help you at the HOA meeting tomorrow. If you have any further questions, please contact me.

Sincerely;  
Michael Simon