

## INTERPRETING YOUR DOCUMENTS: A COMMON MISCONCEPTION EXPLAINED

By: *David G. Hellmuth, Esq.*

The Nebraska Supreme Court recently considered a community association case, Regency Homes Association v. Schrier, 759 N.W.2d 484 (Neb. 2009). In Regency Homes, a homeowner replaced his roof with asphalt shingles, in direct violation of a covenant prohibiting asphalt shingles. The homeowners association brought an action for injunctive relief restraining the homeowner from maintaining the roof and mandating an order for removal of the improvements. The association prevailed and the court granted summary judgment. Interestingly, the case was appealed to the Nebraska Court of Appeals and subsequently petitioned to the Nebraska Supreme Court.

The Nebraska courts addressed some interesting amendments to the Bylaws and Declaration, including amendments regarding acceptable shingle materials. The homeowner in the case challenged some of the amendments to the Bylaws and

Declaration and alleged that said amendments were not properly adopted by the association and, therefore, not valid or enforceable. The homeowner specifically challenged the association's extension of covenants under an amendment provision.

The actual text of the amendment provision quoted in the case is as follows:

"[The Declaration] . . . shall be extended, modified, or terminated only when no one person holds more than one-fourth of the entire number of memberships of Regular Members and upon recommendation of the Board of Directors accepted by a three-quarters vote of the entire number of memberships of Regular Members present in person or by proxy at any annual or special meeting or responsive to a vote thereon by mail."

The meaning of this provision was one of the primary issues in the Regency Homes case. The homeowner contended that, at a minimum, consent of a majority of all members was required to adopt an amendment. However, the court held that the "entire number of memberships" was subject to the

additional language "present in person or by proxy at any annual or special meeting." In interpreting these documents, the court emphasized that all words used must be given their regular and ordinary meaning. The Nebraska Supreme Court held that consent of three-fourths (3/4) of the owners present at the meeting, not all owners, was sufficient to adopt the amendment.

The language in this Nebraska case is quite common within community association governing documents. We often face arguments which disregard certain words and lead to improper interpretations and conclusions. Specifically, in the case at bar in Nebraska, the words ignored by the homeowner included the language subjecting the vote to those present in person or by proxy at a meeting - critically different from a stated number of all members.

In order to provide an example of the correct interpretation of a similar covenant provision, I propose the following hypothetical:

Assume there is a one hundred fifty (150) unit homeowners association in which each unit owner has equal voting rights of one (1) vote per unit. The association desires to amend one of its governing documents. The amendment provision in the governing documents states as follows:

"This document may be amended by a majority of a quorum of members present in person or by proxy at a special meeting of the association."


For purposes of the foregoing example, assume that the quorum is twenty percent (20%) of the members. Since there are one hundred fifty (150) members and the quorum is twenty percent (20%), at least thirty (30) members must participate in order to establish a quorum. Assuming that a vote on an amendment came before the association at a special meeting, the

number of votes required would depend on the actual number of persons attending the meeting in person or by proxy. At a minimum, quorum must be achieved. Accordingly, at least thirty (30) members must show up, in person or by proxy. However, what number constitutes the "majority" required depends on the actual number of persons who participate in person or by proxy at the meeting.

Assuming that only thirty (30) members attend, in person or by proxy, a majority (more than one-half) of those thirty (30) must vote in favor of the measure for it to pass. In this example, at least sixteen (16) of the thirty (30) members participating must vote to approve the measure. However, if one hundred (100) of the one hundred fifty (150) members participate in person or by proxy, then at least fifty-one (51) of the one hundred (100) members present must vote in favor of the measure for it to pass.

Over the years, I have often seen misinterpretations of the foregoing principles. Specifically, the words "voting in person or by proxy" are often ignored. However, as noted above, all words must be

given their ordinary meaning to ascertain the drafter's full intent with respect to the document in question.

Prior to completing any document amendments, you should consult your association's attorney to assist with the preparation of the amendments and a careful review of the approval procedures necessary in connection therewith. It is my hope that this article is informative and helpful to you in the operation of your association. 

## ELECTRONIC NEWSLETTERS

If you would like to receive our newsletters electronically, please send us your e-mail address at [marketing@hjlawfirm.com](mailto:marketing@hjlawfirm.com)

## NEW FANNIE MAE AND HUD LENDING RULES - LEARN HOW YOUR ASSOCIATION IS AFFECTED

By Joel A. Hilgendorf, Esq.

As condominium owners can attest, the recent economy has not helped the value and marketability of condominiums. Fannie Mae has now implemented new guidelines that can make it yet more difficult to sell condominiums. The Department of Housing and Urban Development ("HUD") has adopted similar new temporary regulations that went into effect on December 7, 2009 and remain effective until December 31, 2010. More restrictive permanent regulations are scheduled to become effective after that time.

The new regulations stand to have an enormous impact on community associations. Historically, Fannie Mae and Freddie Mac own or guaranty over 50% of the America's first mortgages, and HUD insures another substantial portion of FHA loans. If a condominium community fails to adopt the guidelines, then units within that association will not qualify for Fannie Mae underwritten or FHA insured loans. Removing Fannie Mae and FHA financing from the purchasing pool could significantly depress sales within an association.

For a discussion of significant provisions of the new HUD temporary regulations, please visit our community association article archive at [www.MNcommunityassociation.com](http://www.MNcommunityassociation.com).



HELLMUTH & JOHNSON PLLC  
ATTORNEYS AT LAW

10400 Viking Drive, Suite 500  
Eden Prairie, Minnesota 55344

PRSR STD  
US Postage  
PAID  
Minneapolis, MN  
PERMIT 4656

## THE AUTHORITY

COMMUNITY ASSOCIATIONS

WINTER 2009 - 2010

THE NEWSLETTER FOR CLIENTS AND FRIENDS OF  
HELLMUTH & JOHNSON PLLC

10400 Viking Drive, Suite 500  
Eden Prairie, MN 55344  
T 952-941-4005 F 952-941-2337  
[www.hjlawfirm.com](http://www.hjlawfirm.com)

FOR PAST NEWSLETTERS,  
ARTICLES AND ADDITIONAL  
INFORMATION:  
[HJLAWFIRM.COM](http://HJLAWFIRM.COM)



### H&J ATTORNEYS NAMED TO 2010 MINNESOTA RISING STAR® LIST

Recognized Among top 2.5% Attorneys in State

Hellmuth & Johnson, PLLC announced that Minnesota Law & Politics magazine has named four firm attorneys to the 2010 Minnesota Rising Star® list. The attorneys were recognized in the December 2009 issues of Minnesota Law & Politics, Twin Cities Business and Mpls/St.Paul Magazine.

The attorneys named to the 2010 list are: Matthew J. Franken, Joel A. Hilgendorf, Christopher R. Jones, and Anthony T. Smith.

Representing the top 2.5 percent of attorneys in the state as selected by their peers, the "Rising Star" list recognizes the accomplishments of attorneys who have practiced for 10 or less years and are 40 years of age or younger.

To learn more about the "Rising Stars", we invite you to visit their biographies on our website at [www.hjlawfirm.com](http://www.hjlawfirm.com).

### H&J ADDS NEW ATTORNEYS

Please help us welcome the following attorneys:

**Gary Fuchs** joins us as a Partner practicing in real estate law, construction and civil litigation, eminent domain and mediation/arbitration.

**Raymond Bonnabeau** joins us as a Partner practicing in information technology and eCommerce.

**Elizabeth Rein** joins us as an Associate practicing in real estate law, construction and litigation.

**Susan Anderson** joins us as an Associate practicing in estate planning and trust law.

You can learn more about them at [www.hjlawfirm.com](http://www.hjlawfirm.com) 