



SOCIAL ENGINEERING

Presented by A. Richard Vial

SOCIAL ENGINEERING: Bridge, Blanket or Green?

Government Involvement with the Operation and Administration of Homeowner Associations

By A. Richard Vial

INTRODUCTION

At first blush, the term “social engineering” conjures up visions of things that George Orwell caused all of us to fear 30 years ago. Yet, that is precisely what government does whenever it chooses to put up fences along the edge of the road that homeowner associations must travel. Virtually all law is social engineering to one degree or another, and in our society the adoption of a constitution set the entire process in motion. Homeowner associations, however, seem to be particularly likely to incur the attention of those in our society who would “design” the utopia that is constantly discussed. These social architects, whether they are community activists, legislators or judges are doing nothing other than what has always been done. They are we, and we are they. Nevertheless, it behooves us in dealing with homeowner associations to understand the dynamics and potential pitfalls in dealing with matters as they evolve. The purpose of this short essay is to help associations accept and manage matters of social engineering.

Bridge or Blanket or Green?

Social engineering tries to achieve one of several objectives. The first is to encourage participation and interaction so as to maximize the ability of people to democratically participate in their community. Past examples of this “bridge” concept include the now familiar open meetings requirement and the opportunity for secret ballots in voting. While there is nothing absolutely new, emerging issues include an association’s reconciliation of governing documents and the law when considering the evolution of communication devices such as satellite dishes and other antennas, the requirements for access to be provided to the mentally and physically disabled, and interestingly, issues dealing with pets as they become more and more ubiquitous in our society.

Another most common objective of social engineering seeks to protect those who are weak. By covering the weary, the cold, and the needy we achieve the goal of making everyone feel welcome in our communities. Obviously, the Americans with Disabilities Act falls into this category as well, but interesting issues continue to emerge with respect to smoking, the allowance of group homes, and even accommodating strollers.

A third category which is difficult to pin down, includes issues like solar access, the ability to put laundry outdoors for drying, and the right to plant a garden versus the strict requirement of specific aesthetic presentation. While each of these can be argued as both a bridge and a blanket, they seem more to reflect a broad, general category of "green." It is this latter category that seems to be generating the most heat in discussions by homeowner associations.

With respect to all of these issues, the initial reaction is to take the position that we will decide for ourselves and no one will tell us what to do. But is that reality?

Where is the quicksand?

The big problem with these issues, whether they be bridge, blanket or green, is that the issues inherently become problematic even before legislation is often adopted. Here is where (and I hate to admit this) lawyers are not as good as we think we are in giving you advice. The reason for that is because those issues are often political, and the shifting political winds often create problems for homeowner associations even before the law has caught up to it. For example, we do not have in the Pacific Northwest specific laws that deal with smoking in units at this time, but we all recognize that the "trend" is to put a blanket over all of us to protect us from the effects of second-hand smoke. What that means for associations is that even though they may not want to, it may be important for them to prohibit smoking, even in an owner's private space, if that activity causes others to be affected.

Many associations got in trouble early in the satellite dish debate by assuming that their recorded declaration and bylaws trumped federal law when it came to allowing a satellite dish. Ultimately they came to realize, sometimes through expensive and lengthy litigation, that the law specifically was designed to ensure that anyone could get an "over the air" signal without unreasonable cost. Even today we frequently get questions about whether or not an individual is entitled to put up a dish in other than the specified association location if it is required to get a particular religious, language or other narrow market channel.

The problems seem to be particularly perplexing in the area of "green." Recent legislation has overridden the ability of homeowner associations to prohibit laundry on clotheslines which can essentially be seen from all common areas. Though this legislation did not pass in Oregon, it likely will, and has passed in other jurisdictions. Many cities and counties have specific ordinances that require solar access. Associations have already begun to grapple with the need to cut trees or otherwise modify their physical environment so as to give residents access to solar panels. In a few jurisdictions the legislature has even gone so far as to require the association to allow owners to plant gardens (herb, vegetable, etc.) in areas that previously were required to be grass for aesthetic purposes.

Equally confounding are the flurry of proposals (one of which came to the Oregon legislature this session) to allow developers to put in facilities such as solar or wind or hydro power with long-term contracts associated that the homeowners association of course had no opportunity to negotiate. Under most laws, the association is not going to be bound by those contracts after

turnover, but the “social engineering” that many are arguing for overrides these provisions in order to incentivize developers to put in these often expensive facilities which require lengthy time periods in order to recover their economic investment.

THE REALITY OF THE TRIBAL COUNCIL

We often hear that if we saw either law or sausage being made, we would want nothing to do with either. As one who spends a fair amount of time in front of the various legislative bodies relevant to our areas of practice, I can testify to this fact. Law is often made as a result of the pressure of special interest groups by legislators who are overburdened with more issues than one could possibly imagine, and who rarely have time to read the very laws that they adopt. The unfortunate fact is that while we may not like the way the tribal council conducts its business, we are nevertheless bound by its conclusions.

Homeowner associations often think that in the face of potential legislation with which they may be unhappy, a shrill voice will turn the tide. While it is true that legislators often respond to those with the loudest refrain, the length of the refrain is often just as important. In other words, it may not simply be a scream, but a sustained scream that is important.

Like it or not, this is what we've got.

In conclusion, it is important to reinforce the fact that social engineering is something with which homeowner associations will inevitably continue to deal. Direct and sustained involvement with the legislative process is the only way for homeowner associations to educate and influence those who make our laws. While all of the social engineering issues faced by homeowner associations come down to a matter of balance, unfortunately it is not the association that gets to decide where that balance should be.

The caution that one would hope all homeowner associations heed is to avoid presuming that because their group feels a certain way that is the end of the debate. The truth is that the larger institutions (read: government) to which we must all give deference make the rules here. Violate them at your peril.

We understand many are conflicted about lawyers and their art. We are certainly no smarter than anyone else, but common ownership issues are ones upon which we ponder, debate, educate and argue, and about which we are able to explain and use positively for bridging, blanketing or greening the gaps of community life. If you live, work or breathe in a homeowner association you are surrounded by these issues.

Got a problem with social engineering? Turmoil at a Tribal Council?

Call us. It's what we do.