



**WSSFC 2023**

**Substantive Law Track – Session 3**

**Transparency, Fairness &  
Resolution: Finding Common  
Ground in Owner and  
Condo/HOA Board Disputes**

***Presented By:***

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## About the Presenter...

**Michael J. O'Brien** is the founding attorney of O'Brien Law Office, LLC, located in Chippewa Falls, Wisconsin. After beginning his legal career in the corporate sector, Mike transitioned to private practice when he opened O'Brien Law Office, LLC in 2020. Mike is admitted to practice law in Wisconsin, Minnesota and Indiana. O'Brien Law Office, LLC represents clients in civil matters related to business, litigation, employment, administrative and regulatory compliance, estate planning and real estate. Mike earned undergraduate degrees in Finance and Business Law from the Kelley School of Business at Indiana University – Bloomington. Mike earned his law degree from the Louis D. Brandeis School of Law at the University of Louisville – located a few blocks from Churchill Downs where he learned just as many truths about life and the practice of law at the track as he did in the classroom.



## Transparency, Fairness & Resolution: Finding Common Ground in Owner and Condo/HOA Board Disputes

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## The HOA: Statistics

Source: 2021 National Data Foundation for Community Association Research

<https://foundation.caionline.org/wp-content/uploads/2022/09/2021-2CAIStatsReviewWeb.pdf>

- 29% of the US population live in community associations
- \$11 trillion- value of homes in community associations
- \$106.4 billion- assessments collected from homeowners. Assessments fund many essential association obligations, including professional management services, utilities, security, insurance, common area maintenance, landscaping, capital improvement projects, and amenities like pools and club houses
- \$26.6 billion- assessment dollars contributed to association reserve funds for the repair, replacement, and enhancement of common property

Note: The term "community association" refers to condominiums, cooperatives, and planned communities with the latter sometimes referred to as HOAs.

# The HOA: Statistics

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- 40% of community associations that are self-managed, meaning they may use professional assistance for specific projects, activities, and services but do not employ a property management company
- 2.5 million HOA elected members of board of directors and appointed committee members

Wisconsin Law Takeaway: There are not a lot of HOA statutes or case law that provide guidance. As a general rule, if there is a dispute the HOA governing documents are controlling (articles of incorporation; declaration of covenants, conditions and restrictions, bylaws and rules and regulations).

### \*\*\*Legislative Update\*\*\* New Wisconsin Homeowner's Association Law

Section 710.18 Wis. Stat. Homeowners' associations; regulation (effective 01-01-2023)

# The HOA: Statistics

Sources: Foundation for Community Association Research, U.S. Census Bureau

<https://foundation.caionline.org/wp-content/uploads/2023/03/FCARSnapSurveyRisingCostsFinancialPlanning2023final.pdf>  
<https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html>

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- 91% of HOA board members and community association managers reported unexpected expense increases in 2023 because of rising maintenance costs and inflation. (Foundation for Community Association Research March 2023)
- To deal with rising costs, 73% of surveyed HOA board members and community association managers say they plan to increase assessments. (Foundation for Community Association Research March 2023)
- 87% of surveyed property management companies that manage HOAs will raise fees in 2023, with 71% of these property management companies raising fees by as much as 10% in 2023. (Foundation for Community Association Research March 2023)
- In 2021 the average monthly HOA fee was \$191. (U.S. Census Bureau September 2022)

# The HOA: An Overview

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- A homeowner association (HOA) is an organization that makes and enforces rules and guidelines for a planned community. HOA rules are geared to maintain the appearance and amenities of the community.
- The HOA members are the residents of the community and use of their property is subject to the HOA rules.
- The HOA Board is comprised of HOA members elected by the members to manage the community, enforce community rules, collect assessments for common expenses of the community and may impose fines against HOA members for non-compliance with community rules.

# The HOA: The Benefits

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- The rules governing the HOA aim to maintain and enhance property values. A home that is part of an HOA normally sells on average by at least 4% greater than a comparable home outside of an HOA. (Journal of Urban Economics, 2019 vol. 112, issue C, 1-15)
- Increased community engagement and amenities. Common area amenities available to residents may include recreational features such as pools, courts, walking/bike trails, fitness center, clubhouse, playgrounds, party space. Exterior maintenance provided by HOA may include landscaping and snow removal.
- Rules deter nuisance activity. Residents are held to the same standards for maintaining their property, noise policies, parking restrictions, rental guidelines.

# The HOA: The Disadvantages

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- Poor management and lack of communication from the HOA board may lead to operational inefficiencies and conflict between the HOA board and residents.
- Residents may view the community rules as too restrictive and overzealously enforced. Rules may prohibit a homeowner from owning pets, adding or changing exterior features to the property to maintain a *cookie cutter* appearance. *For example, parking, fencing, garden and landscape restrictions.* Rules may be viewed as arbitrary? *For example, why can't I park my company vehicle in my own driveway; or why can't I build a deck?*
- Residents may view the assessments as excessive and if they fall behind on payments it may lead to liens and foreclosure.

# The HOA: Governing Documents

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- Articles of Incorporation (Wis. Ch. 181 – Wisconsin Nonstock Corporation)
- Declaration of Covenants, Conditions & Restrictions (CC&Rs)
- Bylaws
- Rules, Regulations and Enforcement Procedures

# The HOA Board: Proactive Steps to Avoid Problems and Resolve Conflict

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## Familiarity and Understanding of the HOA Governing Documents

1. The HOA board is comprised of HOA residents who volunteer their time to serve on the board. Most board members may not have any prior experience to draw from that will prepare them for managing an association.
2. All HOA residents should educate themselves and understand the rights and obligations under the HOA's governing documents.
3. **Focus on the Big Picture.** The HOA board needs to understand the objectives the governing documents seek to accomplish and how these rights and obligations benefit the community.

# The HOA Board: Proactive Steps to Avoid Problems and Resolve Conflict

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## Communication and Transparency

1. Effective communication is a prerequisite to good governance.
2. The HOA board should promote an environment that facilitates open and direct communication by focusing on member engagement. Allow a forum for HOA residents to provide input and voice any concerns by encouraging open dialogue.
3. **HOA Board Action and a Call to Promote Transparency.** Maintain accurate records (organizational records, meeting minutes, resolutions, financial records, budget and HOA funds); provide updates on HOA initiatives and projects. Make this information readily available to HOA residents.

# The HOA Board: Proactive Steps to Avoid Problems and Resolve Conflict

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## Maintaining Community Standards

1. HOA rules are geared to maintain the appearance and amenities of the community through the assessments collected from the HOA residents.
2. The HOA board should use its rule making authority to establish policies that help ensure collection of assessments by creating a uniform standard for collecting assessments.
3. **A Written Policy for the Collection of Delinquent Assessments will Reduce Delinquencies.** An HOA collections policy provides a procedure with progressive steps to ensure more timely and consistent collection of assessments.

# The HOA Board: Proactive Steps to Avoid Problems and Resolve Conflict

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## Uniform Enforcement of Community Rules Avoid Selective Enforcement!

1. Inconsistent enforcement of rules provides an HOA member with the legal defense of "Selective Enforcement". Selective enforcement occurs when an HOA board elects to apply certain rules and regulations inconsistently.
2. Selective enforcement may occur when rules established by the HOA board do not serve the community or do not reasonably relate to the objectives of the HOA governing documents. Arbitrary rules that lack specificity will be scrutinized and are fatal to enforcement and the HOA board's credibility.
3. **Consistent Enforcement of Specific Community Rules.** All rules should be specific and reasonably related to the objectives of the community. Rules that lack specificity and do not serve the welfare of the community cannot be enforced and are ripe for conflict.



# The HOA: Dispute Resolution

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## **You can choose your friends, but you can't choose your neighbors...**

1. Conflict is unavoidable but liability is based on how you handle the conflict.
2. An HOA board that takes proactive steps to promote transparency through open communication, consistent enforcement and reasonable rule making can minimize the likelihood of conflict.
3. **The Case for an Internal Dispute Resolution Policy.** Sometimes conflict is simply unavoidable.

# The HOA: Internal Dispute Resolution

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1. An internal dispute resolution (or grievance) procedure to resolve conflict. This is a cost-effective approach, which allows the dispute to be resolved by the residents internally. .
2. A conflict resolution committee can be established to address the conflict and allow all parties the opportunity to present the matter to the committee. Some factors to consider include the following:

The HOA should first determine whether it is appropriate to intervene. Does the conflict involve the HOA or affect the welfare of the community?

The resolution committee serves as a neutral third-party and its role should be focused on identifying the facts to mediate the dispute without bias.

# The HOA: Alternative Dispute Resolution

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1. **Mediation.** Mediation is a dispute resolution process where the parties meet with a neutral third-party who assists them in the negotiation of their differences to resolve the dispute. Mediation can be a valuable method of expediting a resolution to conflict.
2. **Arbitration.** Arbitration is a dispute resolution process where the parties agree to have their conflict heard by a neutral third-party, the Arbitrator. Parties typically agree to arbitrate to avoid the time, expense, and complexity of litigation. The Arbitrator's decision is binding on the parties and generally not appealable.
3. **Litigation aka The Nuclear Option.** Litigation is time consuming, emotionally exhausting for the client and expensive. In matters involving the HOA, who wins?

# The HOA: New Wisconsin Homeowner's Association Law

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## Section 710.18 Wis. Stat. Homeowners' associations; regulation (effective 01-01-2023)

1. All HOAs are required to comply with the Statute (even if formed before 01-01-2023).
2. Recording Required. Recording the CCRs with the Register of Deeds is mandatory for enforcement. Wis. Ch. 710.18(2)
3. All HOA must annually file public notice with the Wisconsin Department of Financial Institutions. Wis. Ch. 710.18(3)
4. 48-hour notice of ALL meetings is required Wis. Ch. 710.18(4)
5. Limitation on fees charged for the production of documents not to exceed \$50 Wis. Ch. 710.18(5)
6. HOA required to provide written notice of suspension of rights for failure to pay assessments
7. Payoff Statement must be provided within 10 days of the request. Wis. Ch. 710.18(7)

# The HOA: Questions/Comments

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**Thank you**

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