

The HOA Mini Report is a quarterly newsletter providing news of legal developments of interest to homeowners associations throughout Eastern Washington. If you have any comments or suggestions, would prefer to receive this report by email, or would prefer not to receive this newsletter in the future, please contact me at nick@gnbergh.com.

I hope you had a great 4th of July, and are looking forward as much as I am to the beginning of summer.

1. New Case.

The first HOA decision of the year has been handed down. In *Greenbank Beach v. Bunney* the Court of Appeals upheld a HOA by requiring modification of a house to bring it in compliance with height restrictions set out in the covenants. The case is noteworthy for a couple of reasons. First, the judges had absolutely no trouble requiring the height restrictions covenants to be enforced. A technical argument by the homeowner on the meaning of a "suit to enjoin" was quickly disposed of and the court then proceeded to order correction of the violation without much discussion of earlier cases. I believe there were two reasons the Court so easily reached its decision. First, the HOA had clear rules on how height was to be measured, leaving no doubt that the house was in violation. Second, the HOA had acted promptly and followed the procedures in the covenants. The Board promptly reviewed and rejected the plans, and held a hearing on the matter. When discussions broke down, the homeowner was notified, before construction started, that the violation would not be tolerated. Finally, when it became apparent that the homeowner would not comply, the HOA sued to enforce the covenants. In the face of these efforts by the Board, the Court has no trouble finding that the homeowner had acted in bad faith.

2. Ok, So What Does That Mean to Us?

In the January 2012 issue of the HOA Mini Report, I discussed the power of an HOA to issue fines. The new case discussed above dovetails nicely with that discussion. To recap, a Washington statute provides:

Unless otherwise provided in the governing documents, an association may . . . after notice and an opportunity to be heard by the board of directors or by the representative designated by the board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association.

Remember, under the statute, before levying any fines, the Board must do several things.

First, the Board must review the Covenants to make sure that the power to fine is not prohibited—however, this is an uncommon provision.

Second, the Board must review the Covenants and Bylaws to locate procedures for enforcement of fines, especially provisions for a hearing to contest the fine. Covenants often describe methods for collection of assessments, but less often address collection of fines for other violations. If there are such provisions, the Board must follow them, and if there are no such provisions, the Board must enact them. If the Board fails to establish or follow enforcement procedures, it is inviting an expensive challenge to the validity of its fines. The following is a very simple example of a Bylaw provision addressing hearing rights that may serve as a starting point for review of your enforcement policy:

The Board of Directors shall have the power to impose monetary fines, temporary suspensions of an Owner's rights as a Member of the Association or other appropriate discipline for failure to comply with the Declaration, these Bylaws or duly enacted rules and regulations; provided that the accused shall be given notice of the violation and the opportunity to be heard by the Board of Directors not less than ten days after notice of the alleged violations, before a decision to impose discipline is reached.

Third, the Board must make sure that a schedule of fines is in place for violations, either in the Covenants, the Bylaws or in rules adopted by the Board. In any event, the schedule of fines must be provided to the members of the association before enforcement.

Finally, The enforcement procedure and schedule of fines need to be backed up by rules clear enough that homeowners can understand what is required or prohibited. Covenants often provide good guidance only in some areas, and leave it to the Board to adopt more specific rules in other areas. If the Covenants do not provide clear guidance, the Board must enact the rules as well as the penalties for violation. As an example of this problem, Denver media recently reported on an HOA attempt to ban children's sidewalk chalk art. The HOA had acted after receiving complaints from neighbors, and based its decision on Covenant language prohibiting activity that "potentially offends, disturbs or interferes with the peaceful enjoyment" of the community. In my opinion, the Board's decision was not well founded on a clear rule since a typical "reasonable person" would not be likely to understand that children's sidewalk art would be considered offensive activity. I would be interested in hearing the opinions of others on whether the Board's attempt to ban sidewalk chalk art were appropriate.

All amendments to Bylaws and any enactment of rules must be in compliance with the requirements of the Covenants, Bylaws and state law. Members of the HOA must be advised of the amendments and rules before enforcement can proceed. The exact language to be used will differ for each HOA, depending on what language is already in the Covenants and Bylaws and what rules have been already adopted.

If you would like help in developing or reviewing your enforcement policy, please let me know. If you would like additional sample language to serve as a beginning point for developing your enforcement policy, I would be happy to provide that as well.

This newsletter is not a substitute for legal advice. Please consult with your legal counsel for specific advice and information.

Nick Bergh has practiced law in Washington for over 25 years, primarily handling real estate and business matters. Nick is available to provide a full range of legal services to association boards, including enforcement of covenants, collection of delinquent assessments, interpretation and amendment of governing documents, governance, and guidance regarding applicable laws. Nick works collaboratively with clients to formulate and achieve goals appropriate to each situation, and strives to be responsive and efficient in providing legal services. Nick can be reached at:

Garth Nicholas Bergh
Law Office of G N Bergh
2006 South Post Street
Spokane, WA 99203
Phone: 509-624-4295
e-mail: nick@gnbergh.com
web: www.gnbergh.com