HOA MINI REPORT

APRIL 2014
VOLUME 3, ISSUE 3

A quarterly newsletter providing legal news and analysis of interest to homeowners associations in Eastern Washington. Please contact me at nick@gnbergh.com with any comments or suggestions. If you would prefer not to receive this newsletter, please let me know. Back issues of the HOA Mini Report are available at my website.

Happy Spring! Longer days, warm weather and sunshine are always welcome. As always, I have a favor to ask. Postage and handling for this newsletter are expensive and time consuming. If you would provide me with your email address, I will send future issues to you in PDF format by email, rather than by US mail. I will not share your email address with others.

New Law on Meeting Minutes.

A new law governing minutes of association meetings takes effect June 12, 2014. The new law amends RCW 64.38.035 to require associations to make minutes available to each owner for examination and copying no later than sixty days after each association meeting. In addition, the new law requires approval of the minutes of an association meeting at the next association meeting, in accordance with the association's governing documents. For associations having meetings less frequently than every two months, this means that draft minutes must be made available to members prior to formal approval.

Limitations on Covenant Amendments and Rules.

Covenants often specifically allow amendments, and specify the percentage of membership votes required to approve an amendment. If your covenants do not address amendments or do not specify an approval requirement, amendments will require 100% member approval. Subject to constitutional, public policy, and statutory restraints, any amendment may be made to covenants if everyone agrees. However, the right to make amendments with less than unanimous approval is not unlimited. Covenant provisions allowing less than all members to amend covenants or adopt new restrictions are valid if that power is exercised in a reasonable manner consistent with the general plan of the development. Amendments may not subject a minority of members to unlimited and unexpected restrictions on the use of their land merely because the covenants permitted changes with less than unanimous agreement. There are only a couple of Washington cases analyzing this limitation:

Meresse v. Stelma, the 2000 Washington Court of Appeals case that first stated the limitation, involved a small development platted in 1985, encumbered by covenants that provided for the owners of the lots to share equally the expense for ordinary maintenance, and repairs of an existing road. The covenants permitted amendment by a majority of owners in the development. The existing road was not in the same location as shown on the plat of the development. In 1997, the owners of a majority of the lots in the development voted to move the road to the location shown on the plat and establish 40-foot wide scenic easement areas adjacent to each side of the relocated road, characterizing their action as an amendment to the road covenant. One of the owners objected to the amendment. The court agreed the amendment was invalid, holding that the original road maintenance covenant contemplated only ordinary types of maintenance to the existing road, and the relocation of the long-established road and creation of adjacent scenic easement areas were beyond the scope of the original covenants. In particular, the court held the creation of the scenic easement areas alongside the road deprived the owner of the right to make reasonable use of his property.

Ebel v. Fairwood Park II Homeowners' Association, a 2007 Washington Court of Appeals case, involved covenant amendments that established a homeowners association, even though the covenants did not originally provide for one. The court held the amendment valid, noting that the original covenants provided for architectural controls and

specified permitted uses of the property, including the types of animals an owner could have and the types of signs that could be placed and gave all property owners the right to enforce the covenants. The court found the amendments were reasonable and consistent with this overall scheme, because it did not significantly change the nature of restrictions on the property; rather, it simply created a homeowners' association to be in charge of enforcing the covenants and established procedures for dealing with problems arising under the covenants.

Wilkinson v. Chiwawa Communities Association, an unpublished 2000 Washington Court of Appeals case, involved amendments to covenants prohibiting short-term rentals of homes within a large development, but allowed long-term rentals. The court found the amendments invalid because the original covenants contemplated rentals, and the amendment was an unexpected restriction on that use.

A similar parallel limitation exists on the power of an association or Board to enact rules. The Mini Report has noted before that the law requires rules, in order to be valid, to be reasonable and consistent with the covenants. If this were not the case, rules could be enacted that effectively (and improperly) amend the covenants to create unexpected burdens or obligations. *Kawawaki v. Academy Square Condominium Association,* an unpublished 2013 Washington Court of Appeals case, recently considered and expanded on this consistency requirement. The case involved covenants on a condominium development that provided that no more that 25% of all units in the condominium could be rented at any time, with eligibility for rental status determined by a waiting list established on a first-come, first-served basis. The Board first unsuccessfully attempted to amend the covenants to allow transfer of rental eligibility to a purchaser on any a sale of a unit. The Board subsequently enacted a rule to the same effect. The court found the rule invalid because it conflicted with the first-come, first-served waiting list established in the covenants, since a purchaser of a rental unit could bypass the waiting list and rent the just purchased unit immediately, while a prior owner of a non-rental unit would be required to wait on the waiting list. The court determined the rule was not valid because it created a new use restriction not contained in the covenants, one that purchasers would not have notice of when they purchased their unit. The court went on to find the rule unreasonable because (i) it was not enacted to promote the welfare and interests of the majority of unit owners (the rule was created to benefit the economic interests of the original owners of the rental units, including a board member) and (ii) it was not uniformly applied.

These cases show that covenant amendments and rules should not be undertaken lightly. The reasons for and effects of amendments and new rules must be carefully considered, and the language carefully drafted. You should seek the assistance of experienced counsel in preparing amendments and rules for your association.

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:

Law Office of G N Bergh
2006 South Post Street
Spokane WA 99203-2049
Phone: 509-624-4295
e-mail: nick@gnbergh.com
website: www.gnbergh.com