HOA MINI REPORT

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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.

The newsletter is a bit late—too much fun in the summer! 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.

Flags.

In honor of the Fourth of July holiday, I thought it appropriate to consider the subject of flags, a seemingly endless source of dispute for HOAs.

- This year's winner with over 18,000 Google hits, is Larry Murphree, a Florida veteran who was fined for having an American flag in a flowerpot outside his door. This violated an HOA rule that flowerpots could contain only plants, as well as separate rules controlling how flags could be displayed. A Good Samaritan recently paid over $10,000 to clear Murphree's fines, but no word on whether Murphree intends to comply with rules in the future.

- Littleton, Colorado's David Renner was fined by his HOA for serially flying the Gadsen flag, the Betsy Ross flag, and the Colorado flag. The HOA maintained that the only flag allowed is the current 50 star US flag. Mr. Renner has reportedly hired an attorney.

- Closer to home, Curtis Benham, a Post Falls veteran, recently received a verbal apology from his HOA for its attempts to force removal of an American flag from his front window, claiming it was an inappropriate curtain. According to KXLY news, "Although Benham wasn't complying according to [HOA] rules, which he agreed to when he bought the house, the board let it go. Benham is happy that they did, but would also like a written apology so he can show all veterans."

- Dale Carlson, a Seahawks fan in Snohomish, drew the ire of his HOA for flying a 12th Man flag last year on game days. Even though he went from a single flag to a "slew of banners, flags, and jerseys" as the season progressed, he apparently was not fined as originally threatened.

- Tenzin Digkhang, a Santa Fe Buddhist, was told by his HOA to remove his traditional Tibetan prayer flags from his front porch. The HOA rules allow only U.S. and New Mexico flags, military unit flags, New Mexico Indian nation flags or POW/MIA flags. After a three-month letter-writing battle, culminating in a media blitz on behalf of Digkhang, the HOA granted a variance that allowed him to keep his prayer flags as long as he owns the home.

Under RCW 64.38.033, HOAs may not prohibit displays of US flags that are consistent with federal flag display law, nor may an HOA prohibit installation of a flagpole, although the size and location of the flagpole may be regulated. Federal law similarly protects the right to display US flags in HOA controlled areas, although HOAs may enact reasonable restrictions on the time, place, and manner of the display to protect a "substantial" interest of the association.

Recent Cases.

Two recent cases are significant to HOAs. The first is a Washington Supreme Court decision affirming a case reported in my last newsletter. The second is a Court of Appeals case interpreting the budgeting provisions of the Homeowners Association statutes.

Wilkinson v. Chiwawa Communities Association. In April, I reported on *Wilkinson v. Chiwawa Communities Association*, a case invalidating covenant amendments that prohibited short-term rentals of homes, but allowed long-term rentals. The Washington State Supreme Court has affirmed that decision (over vigorous dissents), reasoning that the amendments were invalid because the original covenants established a general plan allowing unrestricted rentals, by virtue of a provision that restricted the size and number of rental signs residents could display.

The court reasoned that the amendment prohibiting short-term rentals was a restriction on the general plan of development, which could not be changed by a simple majority vote. The court also

articulated a rule that if a set of covenants permit a majority vote to create amendments, any amendments must both relate to an existing provision and be consistent with "the general plan of development" of the original covenants. On the other hand, if covenants permit a majority vote to create new covenants, an amendment creating a new unrelated covenant can be created, but still must be consistent with the general plan of development. The dissent points out that determining whether an amendment is "related" to an existing covenant can be difficult. The majority opinion acknowledged that it did not provide any guidance on "the precise contours of when an amendment would be consistent with the general plan of development." The Mini Report predicts that it will take many cases before the precise contours of these issues are established.

Casey v. Sudden Valley Community Association. *Casey v. Sudden Valley* involved an association of over 3400 lots with common area golf course, community center, marina, swimming pools, and fitness facility. The Sudden Valley bylaws do not address adoption of a budget, but require 60 percent member approval for assessment increases. The result—repeated instances of approval of a budget by majority vote, but disapproval of increases in assessments on which the budget was based, because the 60% approval threshold could not be reached. Over the history of the development only one assessment increase had been approved.

RCW 64.38.025 requires every association board to develop budgets and submit a summary of the proposed budget to the members of the association for ratification. The budget summary is required to describe any proposed assessment increases. Under the statute, the budget is ratified unless a majority (or greater percentage specified in the governing documents) vote to reject the budget. The Sudden Valley Board took the position that the statute trumped the bylaws requirement of 60% approval for assessment increases, and that ratification of a budget with increased assessments would also ratify the increased assessments contained in the budget.

The court said no. Owners may ratify a budget including increased assessments pursuant to the statute. However, if the governing documents require a different threshold for approval of increased assessments, a separate vote will be required in order to authorize the increase. The Court decision was based on several concepts; (i) the statutory scheme treats budgets and assessments as distinct subjects, (ii) that the purpose of the budget summary is to explain capital reserve projections, and has nothing to do with increased assessments, and (iii) almost identical language in the condominium homeowners association statutes was not relevant to determining the meaning of RCW 64.38.025. The court also approved the Board's practice of unilaterally reducing the budget when separate approval of increased assessment failed.

Both the Chiwawa and Sudden Valley decisions could complicate the lives of board members. Chiwawa make it difficult to predict whether or not covenant amendments will be declared invalid, and increase the likelihood of litigation over amendments. The Sudden Valley decision could complicate the process of approval of budgets and assessment increases; however, this decision is unpublished, meaning it cannot be cited as precedent in other cases. Until the Supreme Court weighs in, or a published decision is issued, the ramifications of the Sudden Valley decision remain unclear. Please let me know if you would like me to email you copies of either case.

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