

*A quarterly newsletter providing legal news and analysis of interest to homeowners associations in Eastern Washington. Please contact me at [nick@gnbergh.com](mailto: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.*



I hope your holidays were full of friends, family and joy, and that you are looking forward to a bright new year. As always, I have a favor to ask. Postage for this newsletter is expensive and handling is time consuming. If you would provide me with your email address, I will send future issues to you in by email, rather than by US mail. I will not share your email address with others.

**Duty of Directors to Members and Others.** In the April 2013 issue of this newsletter, I discussed the "business judgment rule" which requires officers and directors of HOAs to perform their duties in good faith and in a manner they believe to be in the best interests of the HOA, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. A recent case (*Waltz v. Tanager Estates HOA*) by the Washington Court of Appeals reaffirmed that standard of care as applicable to a board of an HOA. The case involved a lengthy dispute between a board and an HOA member over approval of plans for a storage, shop, and garage building that neither side was happy with.

After the building was completed, the member sued the HOA and board members for breach of fiduciary duty. The trial court found the HOA and Board members did not breach their fiduciary duties because they were not "grossly negligent." The Court of Appeals ruled that the trial court was wrong, and that the "gross negligence" standard applied only when parties outside the HOA nonprofit corporation sued board members. In actions brought against board members by HOA members, the less forgiving "ordinary negligence" standard of the business judgment rule applies.

This case is interesting because it discusses the different standards of conduct that apply when board members' official actions affect HOA members, on the one hand, and outsiders, on the other. When dealing with outsiders, board members can be personally liable only for gross negligence, which is defined as a conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable grave injury or harm to persons or property. Gross negligence is conduct far worse than ordinary negligence, which is defined as a simple failure to exercise reasonable care. This distinction is applicable only to Board members acting in their official capacities – board members not performing official duties for the HOA would most likely be liable for ordinary negligence.

**Defenses to Covenant Enforcement.** Before you take action against a member for violation of covenants, carefully consider what response the member may have. The most obvious defense is that the conduct is not a violation. Before you send that first letter, read the governing documents to make sure that they clearly designate the objectionable behavior as prohibited. Sometimes covenants can be confusing or misleading. For example, I have seen boards that want to take action to prevent unrelated persons, or multiple families from sharing a home, based on covenant language that allows only "single family homes" to be constructed. Unfortunately, this type of language is most likely to be interpreted as specifying a style of building rather than an occupancy restriction. Pursuing such an attempt could easily lead to a Fair Housing Act complaint, an experience to be avoided if at all possible.

Other defenses can also stop or limit enforcement actions. A few examples:

- **Selective Enforcement.** In this common defense, a member tries to show that the HOA is enforcing restrictions in an arbitrary manner, usually against some owners and not others. This defense works best when a single restriction is unevenly

enforced – for example, when some owners are allowed to have pink mailboxes, but others are not. It is less effective when the person wanting a pink mailbox tries to establish selective enforcement by showing non-enforcement of a flag restriction.

- Abandonment. Abandonment is uncommon, but can be found when enforcement of covenants has ceased altogether. This is most often found when an HOA is allowed to lapse or when the neighborhood has changed from the use originally contemplated by the covenants, e.g., a residential area turning commercial, and the original covenants are no longer enforced.
- Prior Settlement. This defense prevents new enforcement actions in a dispute that has already been resolved. Suppose that an architectural committee mistakenly approved an improvement that is prohibited, but then reached an agreement that the affected owner could maintain the improvement until it needed to be replaced. The board could not later attempt to enforce the original restriction but would be required to honor the earlier settlement of the dispute.
- Statute of Limitations. Probably the most common defense, especially in collection efforts. This defense prevents bringing enforcement actions after a specific period of time set forth in a statute. While there are many different statutes of limitation, the six-year limitation period applicable to written contracts is the one most often encountered in HOA settings.
- Laches. A cousin of the Statute of Limitations defense, this defense can block claims where the HOA has delayed enforcement for an unreasonable period and it would be unfair to allow enforcement. If a board waits several years to take action to prevent construction of a non-conforming building it was aware of, laches may be used to defend against a belated effort to force removal.
- Equitable Estoppel. This defense is available when a party seeking enforcement has changed a position after another party has relied on it. For example, enforcement will not be allowed if a board approves plans but later attempts to withdraw the approval, after construction has begun in reliance on the initial approval.
- Waiver. This defense applies where an HOA has voluntarily surrendered a known right. If HOA documents require building plan approval within 30 days and the board waits 45 days before disapproving, waiver will likely be found.

Enforcement decisions should not be made in haste or without careful consideration. In all but the clearest cases, boards should consider consulting counsel to determine if they have authority to enforce and if there are circumstances that would limit or prevent effective enforcement. Remember, not everything is black and white.

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This newsletter is not a substitute for legal advice. Legal counsel should be consulted for advice applicable to your particular situation.

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. If you would like to retain Nick as counsel, he can be reached at:

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