

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.



It's too darn hot! 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.

Making Change. How should your board cope with changes that were unanticipated when your HOA was formed? Consider the following changed circumstances, large and small:

- Record heat this spring caused residents in an eastern Washington HOA to install window air conditioning units for relief, even though the covenants prohibited them. The board sent letters threatening \$30 a day fines if the air conditioning units remained. Residents claim they needed the air conditioners for their well-being during the heat wave, but the board insisted there could be no exceptions to the rule and that violators risked suspension of voting rights, legal action, and possibly a lien against the offenders' property. Was the Board's action prudent? Required?

- Following the 1991 Firestorm near Spokane that destroyed 114 homes, an area HOA wanted to amend the covenants that required all homes to have wooden shake roofs. Because the covenants had no provisions authorizing changes, a unanimous vote of all owners was required and accomplished, through a well-organized effort.

- An HOA in central Washington has covenants requiring garbage cans to remain inside, except during pickup. The garbage company recently issued gargantuan trash containers that do not fit in many residents' garages. Can, or should the HOA allow the containers to remain outside?

- California's drought and water rationing have been big news recently. Recent California laws prohibit homeowners associations from enforcing rules that prevent use of drought-tolerant plants instead of lawns. However, some homeowners who wanted to replace lawns with drought-resistant landscaping have been told no by their HOAs. One association told residents to paint dead lawns green instead. Another association threatened fines if an owner did not replant grass. Even though Washington does not have legislation like California's, may, or should, Washington HOAs respond to recent drought conditions here by allowing or encouraging drought-resistant landscaping in neighborhoods where lawns are the norm?

Sometimes, like the case in California, courts or legislatures determine when outdated covenant provisions will no longer be allowed. In 1948, the U.S. Supreme Court prohibited courts from enforcing racially discriminatory covenants. The Washington legislature has passed laws making covenants restricting solar panels, political yard signs, and adult group homes unenforceable.

Assuming the board decides a change is in order, and the legislature has not already acted, the means to accomplish this may vary. Sometimes a board has authority to change rules (as distinguished from covenants) on its own, without consulting the members. This can be the case where the covenants do not require the members to approve rule changes, and the proposed rules aren't inconsistent with provisions of the covenants.

This approach would not work in the first three situations described, since in each case the covenants expressly prohibited the desired change. In the last example, this approach would be more likely to work, since covenants (at least in Eastern Washington) do not commonly specify landscaping requirements in this level of detail. Decisions on landscaping, if they are made by the board or the architectural committee, are usually based on esthetic preferences rather than covenant requirements. Because dramatic changes from past practices, even if within the board's discretion, may be controversial, I suggest that the reasons for the change be well documented, and explained to all members. It may be wise to establish and disseminate new rules and guidelines in advance of a specific request, if possible.

Another possible way to address changed circumstances may be to abandon a covenant, by simply refusing to enforce it. A related approach is to reduce the consequences of a violation to insignificance, such as a fine of a penny a year. However, unless the covenant is truly obsolete, these approaches may be an incomplete solution, since most covenants can be enforced by any member against another. However, if the advertised policy of the board is not to enforce an obsolete covenant, and the reasons for non-enforcement are published to and accepted by the members, private actions may be uncommon.

Ultimately, the best way to change a covenant that has outlived its usefulness is to formally amend it. Often the best way to accomplish this is a periodic review of your covenants to identify provisions that have outlived their usefulness, or need to be revised to conform with current needs and norms. Once identified, changes can be proposed and voted on in accordance with the provisions of the covenants governing amendments. Smaller changes are usually easier to shepherd through the process than wholesale rewrites. Legal counsel should be consulted to ensure that proposed changes are clearly written and consistent with applicable law.

Outsize Assessments. Are your members up in arms about outrageous assessments? Next time you get a complaint, point out that in San Francisco, monthly assessments for a luxury condo can reach into four figures. The highest reported in a recent article was \$4,017 per month for a three bedroom unit, covering expenses for water, garbage, exterior building and grounds maintenance, door person, security, management and use of the pool. Additional fees applied for parking and gym facilities.

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

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