HOA MINI REPORT

APRIL 2016
VOLUME 5, 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.

Spring has definitely sprung! As always, I have a favor to ask. Postage for this newsletter is expensive and handling is time consuming. If you provide me with your email address, I will send future issues to you by email, rather than by US mail. I will not share your email address with others. This issue takes up two recent Washington HOA cases and an amusing news story from Tennessee.

Halme v. Walsh A recent Court of Appeals case considers the question of what is a homeowners association. Covenants established for a development in 1983 imposed restrictions on the use of the property. In 1990, all lot owners signed a road maintenance agreement providing for road costs to be shared among the lot owners. In 2014, owners of six lots in the development organized a homeowners association, elected a board of directors, adopted bylaws and a fine schedule, and amendments to the road maintenance agreement, all by virtue of their ownership of two-thirds of the lots in the development. Another owner filed suit, contending the homeowners association did not legally exist and the amendments to the agreement were void. The trial court agreed and Court of Appeals affirmed the decision.

RCW 64.38.010(11) defines a homeowners association as "a corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member."

The court ruled that because the road maintenance agreement did not establish or provide for creation of an organization to implement the agreement, no homeowners association existed. The agreement created a bare covenant to share in the costs of the road, but was not sufficient to establish a homeowners association. Since there was no homeowners association, there could not be a board, officers, bylaws, or fine schedule.

As to the attempted amendments to the agreement, the court ruled that while amendments could be made, they had to be adopted under procedures stated the covenants, must be consistent with the general plan of the development, and could not create new covenants that were not related to existing covenants. The agreement contained provisions allowing alteration of contributions to the road fund by an 80% vote, but did not otherwise allow (or address) amendments. Accordingly, the court ruled that any other amendments required a unanimous vote. Since not all owners agreed, the attempted amendments were void.

Why is this important? The court fails to specify how much language is enough to establish a homeowners association. Many older developments (and even some newer ones) have bare-bones covenants that establish use restrictions but have only rudimentary (or no) language addressing governance. This case would make amendments to these types of covenants difficult, if not impossible, and could allow challenges to HOAs established under these covenants based on as yet undefined shortcomings in the covenant language. Another issue is that the absence of a homeowners association precludes reliance on the provisions of the homeowners association statutes; for example the statutes allowing approval of budgets without a quorum present, enforcement by fines, and limitations on covenants prohibiting flags, political signs, and solar panels.

Bilanko v. Barclay Court Owners Association This recent Washington Supreme Court case addressed amendments to a declaration for a condominium to restrict leasing. The original declaration allowed unrestricted rentals of condo units in the project; an amendment limited rental units to seven. A prior Court of Appeals decision (*Filmore LLLP v. Unit Owners Association of Centre Pointe Condominium*) had established that any amendment changing the permitted use of condo units, such as imposing new leasing restrictions, required approval of 90% of affected owners, and an amendment approved by just 67% of the owners was invalid.

In *Bilanko*, a condo association passed a similar limitation on rental units by less than a 90% vote. The amendment was challenged four years later. The association defended, relying on a statute of limitations that required any claims challenging the validity of an amendment to be brought within one year. The court rejected the challenge as untimely. To reach this conclusion, the court had to deal with another recent Court of Appeals decision (*Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n*) that upheld a challenge to an amendment changing a permitted use, even though the challenge was more than a year later.

The Court did not overrule the *Club Envy* case, but instead said that it was different, because the Club Envy amendment was never actually voted on. Since no vote had been taken, the Club Envy amendment was fraudulent and void. The statute of limitations did not apply since it limits only challenges to the validity of amendments, the amendment was void, and its validity was not at issue. In contrast, the Barclay Court amendment was not void, merely voidable, because it was actually voted on, even though the vote was not sufficient under the *Filmore* case. Since this amendment was voidable, not void, the statute of limitations applied. This case appears to be a deviation from usual interpretation of void/voidable acts, and is important because the scope of the decision is unclear – will other cases follow Bilanko, or will exceptions to the application of the statute of limitations be limited to the unusual facts of *Club Envy*? Will the reasoning be limited to the statute of limitations and the type of amendment involved in *Bilanko*, or extended to other statutes of limitations and other types of amendments? As with several other recent HOA decisions, this decision perhaps raises more questions than it answers, and the Mini Report expects it may take many new cases to explain.

Tyrannical HOA Orders Man to Remove Zombie From Yard A Nashville HOA is ordering a resident to remove "Clawed," a statue depicting a zombie digging out from a grave in his front yard. The statue has been there for five years, and other yards in the neighborhood also have yard art. The owner was surprised that the HOA chose to focus on the statute rather than the new landscaping recently installed at a cost of $12,000. Even though the owner has not previously had any complaints about the statue and felt the HOA needed to lighten up, he intends to comply with the HOA demand. Reporters asked the HOA for comment but did not respond. (Headline from original story)

Nick Bergh has practiced law in Washington for 30 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:

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