

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 Mini Report had quite enough of winter, thank you, and is enjoying green grass and warmer weather. 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.

Disputed Pickleball Election A pitched battle over proposed pickleball courts has led to a disputed HOA election and demands for a recount. (Pickleball? the Mini Report had to look it up - it is played on a badminton court with a lowered net, using a plastic whiffle ball and a solid paddle.) Some enthusiastic pickleball fans in a California HOA proposed building four tournament-quality courts in the development with an estimated cost in excess of \$300,000. Other residents objected to the distinctive noise caused by the game. Following intensive social media and permitting battles, opponents sought to derail the project by running for office in the HOA elections. The anti-pickleball candidate won by six of nearly 2000 votes and the new board immediately overturned the decision to build the pickleball courts.

In a counterstrike, the pickleball proponents called into question the procedures used while counting votes and demanded a recount. The anti-pickleball contingent countered that an accountant supervised the vote counting and that the vote counters included equal numbers of proponents and opponents. HOA staff has tried to ward off charges of partisanship by looking for non-residents to recount the vote.

The recount failed to overturn the election results and the new board voted to terminate the construction contract at a well-attended and contentious meeting, claiming it was their fiduciary duty to do so. It is sad to see this type of partisan battle in an HOA, but as Winston Churchill observed, democracy is the worst form of government, except for all those other forms that have been tried from time to time."

HOA Record-Keeping Every HOA accumulates records. Lots of records. Financial records, governance records, records of legal and enforcement matters, insurance records. Over time, the volume of paper can become overwhelming. Moreover, by law, all association records may be examined by HOA members. One way to reduce the volume and improve member access to records is to digitize them, by scanning them and saving them as searchable PDFs. Your efforts will be rewarded by elimination of boxes of ancient paper and reduction in time spent searching for records. If you digitize your records, make sure to make arrangements for regular backup and redundant storage of digitized records to avoid loss of records due to computer failure or unanticipated disaster. Also, spend time up front to organize your records in a way that makes sense to you and future board members.

You may want to consider posting commonly requested documents to an association website. Your members will appreciate the transparency, and you will spend less time responding to records requests. Some records can be posted without confidentiality concerns, such as the Plat, Covenants, Articles of Incorporation, Bylaws, rules, and amendments to any of these. Most of these are public records and all would be of interest to both current members and potential future members. You may want to take steps to maintain the confidentiality other records posted to your website, such as establishing password protected areas. Records to keep in this area include member rosters, meeting minutes, board resolutions, reserve studies, budgets, and other financial records. Some records should not be posted to a website, including correspondence with HOA counsel, records related to enforcement or collection matters, architectural approvals, third party contracts, and records relating to unresolved claims, such as accident reports, demand letters, and fair housing claims.

How long should records be maintained? Different times apply:

- *Permanent.* Corporate records, including governing documents and amendments, minutes from member and board meetings, board resolutions, architectural approvals, including records and correspondence related to enforcement or waiver of architectural controls; main financial records, including reserve studies, budgets, balance sheets, financial statements, and tax returns; legal documents, including opinion letters, records of judgments affecting association property. These documents collectively are the history of the HOA and having a full set of records will provide substance, context, and institutional memory for the organization.
- *Temporary.* Other records need be maintained only as long as the possibility of legal action remains. These include general correspondence; copies of expired or terminated third party contracts and insurance policies; records of collection actions, records relating to claims for injury, property damage or violations of law; banking records such as records of accounts, bank statements, invoices, purchase orders and expense reports. While some of these records may be disposed of sooner, retaining them for seven years should be sufficient in most cases. You should have a written document retention/destruction policy in place before you destroy HOA records, to avoid claims that you are attempting to avoid members statutory right of access to HOA records.
- *Continuously Updated.* Owner rosters, current third party contracts.

Special considerations apply to records protected by attorney-client privilege. As the name suggests, this privilege protects confidential communications between attorney and client. The privilege, by preventing forced disclosure of confidential information, allows clients to provide complete information to their attorneys, and the attorney, in turn, to provide informed and thorough advice. In the case of an HOA, the privilege belongs to the association, acting through its board. If the privilege is waived, the information can be used without restriction by opposing counsel or any other party that obtains it. To protect against such use, the HOA must prove that an attorney-client relationship existed, that the communication was privileged, and that the privilege was not waived. While the privilege can be intentionally waived, this happens infrequently. More commonly, waiver of the privilege occurs unintentionally, by inadvertently providing it to uninvolved third parties in response to a document request, or by forwarding an email. If you have correspondence (written or emailed) with an attorney representing the association, don't agree to waive the privilege without your lawyer's advice. Be especially careful to avoid inadvertent waiver of the privilege by keeping attorney-client communications segregated in a file marked "Confidential" and do not provide information in the file to anyone except board members or your attorney without your attorney's advice. Make sure each of your board members are aware of the privilege associated with the information and the proper methods of handling such information.

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 since 1986, 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, contact him at:

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