

HOA MINI REPORT

OCTOBER 2018
VOLUME 8, ISSUE 1

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.



This issue marks the seventh anniversary of my HOA Mini Report, and I thank you for your continuing readership and support. There is an index of the past year's articles at the end of this issue. 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.

WUCIOA Revisited. It appears that many of my readers are confused about the applicability of the WUCIOA, the new HOA law that became effective July 1, 2018, and the subject of my last newsletter. Except for the section describing procedures for authorizing budgets (which applies to all HOAs) the new law does not apply to any HOA formed prior to July 1, 2018. HOAs can choose to amend their governing documents to have the new law apply, but unless they do so, the law in effect prior to July 1, 2018 continues to apply.

Minimize Risks of Board Service. We all know that serving as an HOA director is the way to fame and fortune and the gratitude of your members. Even so, you should be careful to minimize personal liability that could arise from your service on the Board. Here are some things you should and shouldn't do:

- Follow the business judgment rule, which prevents board members from having personal liability when their decisions go wrong, so long as the Directors perform their duties in good faith, in a manner they believe to be in the best interests of the Association, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.
- Make sure the association has proper insurance, including coverage for property, liability (including motor vehicle liability), and directors and officers (D&O) liability. The first two coverages protect the Association's assets, but failure to maintain adequate property and liability insurance may be a violation of the business judgment rule if a substantial loss occurs that could have been covered. D&O coverage protects against claims against directors and officers made because of wrongful (or allegedly wrongful) acts or omissions made while acting in that capacity on behalf of the association. An important exception is that D&O insurance does not cover bad faith acts, so fraud, theft and self-dealing are not covered.
- Refuse compensation. Under RCW 4.24.670, a volunteer in a nonprofit organization is not personally liable for harm caused when acting within the scope of responsibilities for the organization, without criminal misconduct or gross negligence, provided the harm was not caused by a operation of a motor vehicle, and the organization carries specified levels of liability insurance. Receiving compensation eliminates the protection of this statute. Reimbursement for out-of-pocket expenses is not compensation.
- Keep your temper. Willful, malicious or retaliatory actions do not evidence good will. Be evenhanded in enforcing the rules. The old rule about not saying or writing anything you wouldn't want to see on the news tomorrow, is good advice.
- Act cooperatively. Even if you think you know the proper course of action, wait for the board to consider and act on your suggestions. This includes making agreements. Wait for the board to vote to approve the agreement and document that approval in the minutes. If you sign contracts in your own name rather than the Association's, or sign without board approval, you could be personally responsible.

- Act on proper advice. Sometimes specialized expertise is needed, and if so, rely on outside experts rather than a fellow board member. Acting as a director is enough responsibility, without added liability of being asked to be an unpaid expert.
- Don't put your head in the sand on potentially dangerous conditions. Failure to deal with known dangers can expose directors to personal liability for failure to exercise good faith or act on behalf of the association.
- Avoid conflicts of interest. Don't enter into agreements with the association, or seek or accept special favors or treatment, which could be considered a failure to act on behalf of the association. Refrain from acting or voting on matters that affect you, your family or business.
- Know your governing documents and applicable law. Reading, rereading and seeking advice of counsel where you do not have a clear understanding of the legal or contractual obligations could help avoid disputes within the board or the association. Failure to follow the requirements of the governing documents or applicable law could be evidence of bad faith or not being properly informed, leading to personal liability.
- Be transparent and consistent. Keep records of board decisions and actions so there is a record of the reason for decisions, allowing for consistent actions to be taken in the future under similar circumstances. Future boards will thank you for this. Keep the association members advised of board actions by regular meetings and distributing minutes, policies and information. Allow members access to board records – this is required by law and all these steps will increase member confidence in board actions. Acting in secret can undermine member confidence and will often result in unfortunate outcomes for all concerned.

This newsletter is not a substitute for legal advice. Consult your legal counsel 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:

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

Index to Volume Seven

Volume 7, Issue 1 October 2017	Updating Governing Documents Man Parks Tank in Upscale Neighborhood, HOA Declares War
Volume 7, Issue 2 January 2018	Officers and Directors Reserve Study Booklet Fake Covenant Scam RICO Claim for Unauthorized Assessments Street Fighting
Volume 7, Issue 3 April 2018	Case Law – The Year (so far) in Review <ul style="list-style-type: none"> • <i>Pritchett v. Picnic Point HOA</i> • <i>Brewer v. Lake Easton HOA</i> • <i>Shangri-La Community Club, Inc. v. Struck</i> • <i>Estate of Wheat v. Fairwood Park HOA</i>
Volume 7, Issue 4 July 2018	WUCIOA