LEGAL OPINIONS

provided by attorney Kevin L. Britt, www.SeattleCondoAttorney.com, who was retained in 2010 by the One Club House Lane Sector 12 Homeowners' Association (HOA)

Note that these opinions were rendered based on the CC&Rs and other HOA polices then in place on the dates the opinions were given. New policies (e.g., a Fine Schedule) and other changes to our CC&Rs, have been implemented in response to the opinions received. Also, this listing does not contain all the legal advice that Attorney Britt has provided the HOA as opinions requested in connection with specific homeowner situations are sometimes excluded.

1/23/13

COMMITTEE VOLUNTEER APPRECIATION DINNER

Hosting annual volunteer appreciation dinners in the manner that you describe does not violate the Association's governing documents or state law. This practice is common in the homeowners association context. I do not perceive there to be any ethical breach associated with this practice.

10/12/2012

PLAYGOUND STRUCTURE COLORS

The owner was required to seek ACC approval before painting the playground structure. The ACC has the authority to require that structure to be repainted, and exercising this authority in that manner would probably be found reasonable by a judge given the lack of harmony between the new colors of that structure and the colors of the surrounding area and structures.

If the ACC concludes that the repainted playground structure does not meet applicable aesthetic standards but is not inclined to require the owner to repaint the structure, then it must consider whether it is appropriate to grant a variation as described in Section 13 of Article XVII. However, such a variation can only be granted if the ACC decides that the color of the existing structure does not have a detrimental impact on the overall appearance of the community or adversely affect the character of nearby lots. Given the complaint submitted by the owner's neighbor and the brightness of the colors chosen, a decision to grant a variation would be vulnerable to legal challenge.

I recommend notifying the owner in writing that the playground structure needs to be repainted after consultation with the ACC.

The color of the Association's playground structure does not affect the above analysis. Each structure must be evaluated individually based on color and location. The Association's structure can be reasonably distinguished from the owner's structure in both respects.

8/10/2012

PRIVATE ROADS IN OCHL-12

After reviewing the Association's governing documents and conducting legal research, I have determined that it is proper for the Association to continue to follow the road maintenance system established by the Plat Maps (designated groups of owners pay for the maintenance of private roads on Tracts 992, 993, 994, 995, 996, 998, 999).

Washington courts consider plat maps and covenants to be "correlated documents" that should be interpreted collectively (see attached Roats decision). While there does not appear to be a Washington case directly on point, a Missouri court has ruled that a specific expression of an intention to dedicate certain streets to public use in a plat map prevailed over a general description of streets as private in a set of covenants (see attached Ginter decision). In my view, a Washington court would likely use the same reasoning to decide that the specific dedications regarding tract maintenance in the Plat Maps control in this situation.

In order to eliminate the potential for further confusion regarding the maintenance of the private roads at issue, I recommend amending the Covenants to reflect the road maintenance system established by the Plat Maps.

Date: July 13, 2012

Pertaining to the 2010 Tree Arbitration with the Harbour Pointe Golf Club

☐ The arbitrators' decision was not unanimous. Mr. Goodwin disagreed with the decision to permit skirting of the trees on the 11th Fairway. He signed the arbitration award in deference to the majority view in order to make it binding on the parties.

☐ The arbitration award does not constitute legal precedent or bind future arbitrators.

☐ The Association should be confident that future arbitrators would similarly consider the competing interests of views, safety, and aesthetics and attempt to strike a reasonable balance between them.

☐ Ms. Hammel and Mr. Beresford agreed that the Association's right to have views at least partially restored overrode the safety and aesthetic considerations in the specific 11th Fairway situation. My impression is that these arbitrators reached that conclusion because they decided that the ordered skirting would not have a significant impact on homeowners' safety or aesthetic appeal.

☐ The Association should give Mr. Goodwin's expressed concerns about the impact of safety substantial weight. My impression is that the arbitrators were not willing to order any tree trimming that had a significant impact on safety.

☐ The arbitrator's ruling implicitly acknowledges the Association's right to demand, after safety and aesthetics have been taken into account, the trimming of view-impairing golf course trees.

☐ The arbitrator's ruling does not support the assertion that the Association has a right to demand that views be restored to what they were in 1989. The competing interests of views,

safety, and aesthetics must be balanced each time the parties discuss how much trimming to perform.

☐ It is not reasonable for the Association to insist that the starting point for reference in regards to views, safety, and aesthetics must be 1989. Those interests must be balanced based on the situation at the time the discussion takes place.

☐ The arbitrator's ruling implicitly acknowledges that the homeowners' protected views include views of Puget Sound, the Olympic Mountains, and Whidbey Island as well as views of the golf course.

☐ Only the parties to the Covenant (the Association and the Golf Club) have rights under it, and only those parties may assert those rights.

☐ I do not see any problem with the Association meeting with the Golf Club to create a procedural policy for handling view impairment issues.

☐ I do not see any problem with the Association meeting with the Golf Club to create a new mechanism for handling future situations where they do not agree on what is required by the Covenant. This could include selecting a neutral third party to mediate or arbitrate these types of issues in the future.

☐ The Association and the Golf Club could agree to use a new mechanism to handle future disputes about what is required by the Covenant without amending that Covenant. However, both parties will continue to have the right to insist that the dispute resolution process described in the Covenant be used until that document is amended.

7/5/2012

LOT MAINTENANCE ISSUE

I advise the Association to mail the letter to the property as well. If the July 18 deadline passes without action, then I advise the Association to engage a contractor to perform the required maintenance, to notify the owner and the residents of the property of the date that the work will be performed in advance, and to specially assess the cost of the work to this lot's account.

10/24/2011

DISPUTE WITH WINDWARD BLUFF

Your assumption regarding the "previous agreement" dispute is correct. The obligations at issue were created by covenants recorded against the property, and the only legal way to alter such obligations is by approving and recording amendments to those covenants.

10/21/2011

DISPUTE WITH WINDWARD BLUFF

I will answer what I perceive to be the three questions posed by the Board in the order presented. I can certainly elaborate on any of these conclusions, but I wanted to convey my impressions after reviewing the documents and performing legal research.

1. Do the covenants require WB to pay 20% of properly authorized maintenance costs that relate to view maintenance and restoration?
Yes. The term "maintenance expenses" is broad enough to include view preservation and restoration. There is no "benefit" component to WB's obligation to pay those costs.

2. Do the covenants require WB to pay 20% of the liability insurance costs related to the Common Areas?
Probably not. Maintenance and insurance are typically viewed as distinct obligations (See Article XII, Section 3 of OCHL's Covenants). An argument can certainly be made that insurance is part of the cost of maintaining the property, but in my view WB has the stronger position.

3. Do the covenants require OCHL to pay to maintain Tracts B, J, and K?
No. The second and third amendments of WB's covenants state that Tracts A through M must be maintained by WB.

9/28/2011

ARBITRATION STATEMENT OF ONE CLUB HOUSE LANE SECTOR 12 HOMEOWNERS' ASSOCIATION

My office represents the One Club House Lane Sector 12 Homeowners' Association ("One Club House"). Thank you for agreeing to arbitrate this tree trimming dispute.

One Club House and Harbour Pointe Golf, LLC ("Harbour Pointe") are bound by a Covenant Agreement that was recorded in 1989. This Agreement (attached as Exhibit A) provides for periodic trimming and removal of Habour Pointe's trees to preserve and enhance One Club House's views. For example, Section 4.1.1 of the Agreement requires Harbour Pointe to maintain the sides of the golf course fairways adjoining residential lots to One Club House's reasonable satisfaction. Section 4.1.2 requires Harbour Pointe to cooperate reasonably with One Club House to remove trees in order to decrease view obstructions. Most importantly, Section 4.1.3 requires Harbour Pointe to remove and thin trees from the sides of the fairways to create and preserve neighboring properties' views.

Over the past twenty years, various trees on Harbour Pointe's property have grown to impede One Club House's beautiful and valuable views of the Olympic Mountains, Puget Sound, Whidbey Island, and the Golf Club at Harbour Pointe (see attached Exhibits B through F). This prompted One Club House to ask Harbour Pointe to trim certain trees on its property to restore impeded views. One Club House did not request that any trees be removed. After lengthy negotiations, Harbour Pointe refused to perform any trimming. The tree trimming proposal that One Club House submitted to Harbour Pointe last year is attached as Exhibit G.

Harbour Pointe based its refusal to trim primarily on the vocal opposition of a small number of owners at One Club House to any trimming being performed. However, Sections 1 and 6 of the Agreement indicate that its rights and benefits inure to One Club House, not individual owners.

Harbour Pointe is legally obligated to fulfill its duties to One Club House under the Agreement notwithstanding the objections that have been raised by a few of its owners. One Club House has done everything in its power (including paying for a formal mediation) to reach a reasonable

compromise with the anti-trimming owners, but it has been forced to conclude that such a compromise is not possible and that the necessary trimming must occur over their objections.

Harbour Pointe also based its refusal to trim on concern about the safety of the owners at One Club House. This concern is misplaced in this context. Section 8(j) of the Agreement warns potential owners that golf balls may hit residential lots at One Club House and that property damage and bodily injury may result. The risk associated with flying golf balls was assumed by every owner at One Club House upon the purchase of his or her lot. The panel should not allow Harbour Pointe to use that risk as an excuse to avoid performing its trimming duties under the Agreement, particularly when it has shown no previous interest in enhancing the safety of the lots at issue.

Many owners at One Club House purchased their lots with the expectation that the existing views would be protected through regular tree trimming. Those owners' expectations were consistent with the letter and the spirit of the Agreement, and they are entitled to protection at this time. Failure to enforce the Agreement in this manner would unjustly deprive some owners of views that they purchased in order to provide other owners with protection from golf balls that they did not purchase.

One Club House asks the arbitration panel to provide it and Harbour Pointe with detailed guidance regarding how present and future tree trimming should be conducted. It hopes that this will eliminate the need for future arbitrations regarding this issue.

Fri 7/1/2011 5:21 PM

HOA RECORDS

The owners have a broad right to review Association records, but that right has limits. The Washington Homeowners' Associations Act allows the Board to meet in closed executive session to consider alleged violations of the governing documents. If the Board can shield its deliberations of such matters from the owners, it follows that it can also limit owners' access to the circumstances surrounding such matters in its production of records. The question in each case is whether the proposed restrictions go too far in that direction

While a legal argument could be made in defense of preventing access to the entire complaint, I do not recommend that course of action. In my view, the stronger legal position is that owners' broad right to review Association records entitles them to review submitted complaints. However, it is also my view that redacting names from complaints before providing them to owners is a legal and proper exercise of the Board's authority. If a complaint does not contain a signature or other identifying information, I recommend providing it to the requesting owner as is.

Tue 5/24/2011 12:44 PM

HOMEOWNER CONTACT INFORMATION

With regard to the availability of records, the Washington Homeowners' Associations Act states as follows:

"**All records of the association, including the names and addresses of owners and other occupants of the lots, shall be available for examination by all owners**, holders of

mortgages on the lots, and their respective authorized agents on reasonable advance notice during normal working hours at the offices of the association or its managing agent. **The association shall not release the unlisted telephone number of any owner.** The association may impose and collect a reasonable charge for copies and any reasonable costs incurred by the association in providing access to records." (emphasis mine).

In light of this law, I advise the Association to provide requesting parties with owners' and other occupants' names, mailing addresses, and listed telephone numbers only. Unlisted telephone numbers (including cell phone numbers) and email addresses should be withheld from everyone except current Board members.

IDENTIFYING DELINQUENT HOMEOWNERS

With regard to the identity of delinquent owners, the Washington Homeowners' Associations Act states as follows:

"**The board of directors may convene in closed executive session** to consider personnel matters; consult with legal counsel or consider communications from legal counsel; and **discuss likely or pending litigation**, matters involving possible violations of the governing documents of the association, and **matters involving the possible liability of an owner to the association**." (emphasis mine).

This law gives the Association the ability to conceal delinquent owners' identities (at least until collection actions are commenced) through the use of executive sessions if it is so inclined, but neither this law or any other law requires such concealment. In my view, discussing delinquencies in executive session is a good policy for three reasons. First, it eliminates the potential for the Association to get involved in disputes about confidentiality. Second, it reduces the amount of information and documents available to delinquent owners seeking to challenge collection actions against them. Third, publishing the names of delinquent owners does not result in payment or serve any other useful purpose in my experience. That being said, the Association is free to make a different choice in this area.

Fri 10/8/2010 6:20 PM

PROXY FORMS AT ANNUAL MEETINGS

The answer to all of these questions is a qualified "yes". The proposed proxy form is satisfactory. The only binding proxy requirements in Article X Section 5 of the Bylaws are that they be "in writing" and "filed with the secretary" before meetings. There are no proxy requirements in the Washington Homeowners' Associations Act. The Washington Condominium Act, which can be looked to for guidance if the Board chooses, merely requires proxies to be "duly executed" and dated. The Board can accept faxed or emailed proxies (with or without digital signatures) if it wants to do so and considers the information transmitted to accurately represent the wish of the owner. The Board can also strictly interpret the Bylaws "writing" requirement to bar faxed and emailed proxies. The Board should in any event consider amending the Bylaws to permit fax and email proxies if it is inclined to permit this.

HOA BUDGET APPROVALS

The answer to both questions is "yes". A Board approved budget does not require a positive membership vote to take effect and can only be rejected by 51% of the membership. A Board approved budget is automatically approved unless 51% of the membership reject it.

HOA ANNUAL MEETING VOTING RULES

As mentioned above, the Board can interpret ambiguous terms like "writing" and "mail" strictly and require paper voting and proxies. It can also interpret them loosely and permit electronic voting and proxies. For example, the Washington Nonprofit Corporation Act defines the term "writing" to exclude electronic transmissions, and the Board could adopt this approach. However, the Act goes on to expressly permit corporations to utilize electronic voting and proxies. The best approach is to amend your Bylaws to eliminate the ambiguity.

HOA ANNUAL MEETING QUORUM

The applicable quorum for annual meetings is 34% of the membership vote. The 51% quorum requirement relates only to meetings at which increased annual assessments or new special assessments for capital improvements are proposed.

A meeting does not officially begin until there is a quorum, so all essential business should be conducted after a quorum has been established. Any vote requires a quorum to be present. The meeting time may have to be moved later. The proposed absentee ballot is consistent with the ability to hold a mail-in vote that is specified in the Bylaws.

Tue 7/13/2010 11:36 PM

OCHL-12 AND OCHL-SOUTH JOINT MAINTENANCE AGREEMENT

The joint maintenance agreement is enforceable at law. The statements and demands in the Association's June 15 letter are reasonable and enforceable.

The joint maintenance agreement implies that interest may be charged on past due amounts, but it does not specify a rate. This creates room for debate about the proper interest rate (maximum rate vs. market rate?), and it is not clear which side would prevail. In my view, taking the position that the maximum rate is applicable is both legally defensible and appropriate at this time.

If the other association does not respond by July 15, I recommend authorizing my office to mail it a combined arbitration demand and collection letter. This could persuade the other association to act quickly to resolve this matter without further expense. The Association could alternatively use its usual collection practices to seek payment of the outstanding debt (small claims court, attorney demand letter, etc.). I do not recommend cutting off water and electricity to the other association's side of the entrance because the joint maintenance agreement does not convey the authority to utilize that remedy.

Tue 7/13/2010 11:36 PM

APPLICATION FOR APPROVAL OF IMPROVEMENTS

On the deck issue, the consequence of failing to follow the application procedures is that the improvement violates the Association's governing documents and is subject to removal if the Association presses the issue in court. The Association currently appears to lack the authority to fine an owner for failing to submit the pertinent documentation along with an Application for

Approval of Improvements, but the Board could add such a penalty to the existing fine schedule at any time and begin enforcing this new rule once it is distributed to all owners. The other alternative is to record a notice of this violation with the county and wait for the owner to react to this encumbrance on their property.

Wednesday, April 21, 2010

LATE FEES

The Association's Covenants do not permit the Board to impose a flat late fee of $25 on accounts that are more than 30 days past due. The Covenants must be amended before such a system of late fees can be imposed.

Article IX, Section 9 of the Covenants states that the effects of non-payment of assessments are interest charges, collection remedies such as foreclosure, and liability for the Association's attorney fees. Late fees are not mentioned.

The Washington Homeowners Associations' Act gives homeowners associations the power to charge late fees, stating that "unless otherwise provided in the governing documents, an association may … impose and collect charges for late payment of assessments." RCW 64.38.020(11). A recent appellate court decision indicated that this part of the statute does not make powers available to associations that are not contained in their governing documents. This means that the Association lacks the power to charge late fees at the present time.

ELECTRONIC MAIL

Owners can legally receive many Association-related documents by electronic mail, but only if those owners have consented to be notified through that medium. The Association may not penalize owners that do not consent to receive documents by electronic mail.

The Washington Homeowners' Associations Act is unfortunately silent regarding the use of electronic mail, but the Washington Nonprofit Corporations Act is a source of guidance on the subject. The latter law states that members can be notified of corporate matters by electronic mail, but only if they have consented in writing or by electronic mail to that form of communication. RCW 24.03.009, .080, and .120. This law also states that members may vote by electronic mail if this is authorized by the corporation's governing documents. RCW 24.03.085.

There are two important limits to the Association's ability to use electronic mail to communicate with owners. First, the Washington Homeowners Associations' Act requires notices of association meetings to be hand-delivered or sent via first-class U.S. mail, so electronic mail may not be used in those types of notices. RCW 64.38.035(1). Second, Article 9, Section 6 of the Covenants requires "written notice of any meeting called for the purpose of taking any action authorized under Sections 3 and 4 of this Article" (which govern the imposition of regular and special assessments). The Washington Nonprofit Corporations Act defines the term "written" in a manner that excludes electronic mail, and I recommend that the Association interpret that term in Article 9, Section 6 of the Covenants in the same manner.

TREE GROWTH

The preamble of the Covenant Agreement notes that maximizing the value of surrounding properties and opening views are important goals. Section 4 of that document repeatedly recognizes that the Association's views are valuable assets that are entitled to protection.

Section 4.1.1 of the Covenant Agreement requires Golf Associates to "maintain those sides of the golf course fairways which adjoin the Sector 12 Owner's and the Sector 17 Owner's fairway lots" to the "reasonable satisfaction" of those owners. Section 4.1.3 of the Covenant Agreement requires Golf Associates to thin and remove trees from the sides of the fairways to create and preserve the neighboring properties' views. If the trees at issue are within the covered areas, then Golf Associates is legally obligated to trim them to restore lost views. This work must be done at its expense pursuant to Section 4.1.8 of the Covenant Agreement.

Even if the trees at issue do not fall within the applicable areas, the Association can bring the matter to arbitration in accordance with Sections 4.1.2 and 4.6 of the Covenant Agreement. Arbitration is a way to allow a third party to resolve this matter faster and cheaper than litigation. In my view, the Association would have a strong case in arbitration or litigation as long as the request to trim is reasonable in scope. A Washington appellate court recently reaffirmed that "view covenants" are routinely enforced to achieve their intended purposes.

There is no basis in the Covenant Agreement for Golf Associates to ask the Association to accept more risk from errant golf balls. The Association is entitled to enjoy the benefits specified in the Covenant Agreement without taking on increased legal liability. Furthermore, the Association is not authorized to bargain away the right of individual owners to assert claims. There is the potential for golfers to assert claims against the Association for injuries related to the removal of branches, but in my estimation that risk is very small.

Tue 4/13/2010 12:47 PM

LATE FEES

The CC&Rs do not currently permit the Board to impose a flat late fee of $25 on accounts that are more than 30 days past due. Amending the CC&Rs is the only way to validate such a system of late fees.

MEETING NOTICES

Owners can legally receive some notices (see exceptions below) and association-related documents by e-mail, but only if those persons have consented to receive such items by e-mail. In short, the system must be opt-in, and the Board can not penalize owners for failing to consent to notice by e-mail.

State law requires notices of association meetings to be hand-delivered or sent via first-class U.S. mail, so those documents may not be sent via e-mail. Article 9, Section 6 of the CC&Rs requires "written notice" of certain types of assessment-related meetings to be sent, and state law indicates that such language means that those documents may not be sent via e-mail either.

GOLF CLUB COVENANT

The Covenant Agreement obligates Golf Associates to maintain the "sides of the golf course fairways which adjoin" the Association to its reasonable satisfaction, and thinning existing trees is specifically mentioned (4.1.1 and 4.1.3). If the trees at issue are within those areas, then Golf Associates is obligated to trim them to restore lost views at its expense. Even if the trees at issue arguably do not fall within those areas, the Association can bring the matter to arbitration, and it would have a strong case because the protection of views is deemed important in the Covenant Agreement.

I do not see any basis for Golf Associates to compel the Association to accept any increased risk relating to tree thinning.
