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Hot Legal Issues

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This presentation is for general informational purposes only and should not be construed as legal advice or a legal opinion on specific facts or circumstances, nor a solicitation of legal business.

We urge you to consult your own attorney concerning your particular factual situation and any specific legal questions you may have.

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Is that a Party or Just Your Medical Marijuana I Smell?



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Overview of Washington State Marijuana Laws

- **Medical Marijuana (RCW 69.51A):** Production, possession or administration of marijuana for the exclusive benefit of a qualifying patient in the treatment of his or her terminal or debilitating illness.
- **Legalized Marijuana (I-502):** Legalizes the possession of marijuana for adults age 21 and older and allows for WA farmers and businesses to grow and sell marijuana through special licenses. The WA Liquor Control Board is presently finalizing the legal framework for legal possession or sale.



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How Should Boards Regulate Legal Marijuana in Their Communities?

- CC&Rs: Nuisance provisions regarding second hand smoke in common areas and smoking in units
- Nuisance provisions regarding noise
- Medical marijuana grow operations and how to limit production in units
- Enforcement by amending the CC&Rs
- Enforcement by legislation clarifying nuisance/annoyance/disturbance CC&R provisions



Limiting Association Liability

- Have the association's CC&Rs reviewed for compliance with State law and nuisance provisions.
- Follow your governing documents
- Risk management



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When Associations Get Sued... and Lose



Common Triggers for Lawsuits

- Failure to adhere to governing documents
- Challenges to elections
- Challenges to board authority
- Challenges to assessments
- Breach of third-party contracts
- Challenges to ARC decisions
- Board's failure to preserve common elements
- Defamation
- Selective enforcement
- Violation of privacy laws



Case Examples

Process and Procedures Matter: Florida homeowner association was ordered to pay an owner \$85,000 in damages from a dispute that stemmed from a \$2,212 landscaping bill for the replacement of the owner's lawn.



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Sample Washington Case:

Hartstene Pointe Mntc. Assn. v. Diehl 95 Wn. App. 339, 979 P.2d 854 (1999).

Basic Facts: HOA ACC committee found to be not properly constituted under statute requiring “two or more directors” of nonprofit corporation to be on a committee appointed by board of directors, and under CC&Rs referring to ACC “composed of three members,” where committee had five members and only one was a director.

Held: the ACC’s denial of owner’s application to cut down tree was invalid.

Lesson: even if the Association has the authority to take a certain action, if the Association exercises the power incorrectly, impermissibly grants the power to a committee, or if committee is not properly constituted, the decision may be voidable if challenged.



How Associations Avoid Lawsuits

- Know and understand your governing documents
- Have your governing documents reviewed by an attorney
- Follow procedures as outlined by the association's documents
- Communicate and listen to community members
- Professionalism (Would you want a judge to read that email?)
- Collaboration with community members
- Consistent, unbiased, even handed enforcement.



Insurance and Risk Management

- Association's Insurance policies
- Director's and Officer's insurance (D&O)
- Vendors licensed, bonded and insured



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Working With (Not Against) the Rentals in Your Association



Rental Restrictions

- The “What”
 - Rental Cap
 - Rental Type
 - Tenant Screening
 - Lease Approval
 - Occupant registration
 - Compliance/Enforcement



Rental Restrictions

- The “Why”
 - Rationale
 - \$\$\$
 - Community
 - Administrative procedures and control
 - Federal lending policies
 - Fannie Mae (Federal National Mortgage Association); VA, FHA, etc.



Rental Restrictions

- The “How”
 - Via Declaration Amendment
 - Condominium: RCW 64.34.264
 - HOA: Look to Declaration itself



Rental Restrictions

- The “Beware”
 - Applicable Statutes
 - Residential Landlord and Tenant Act: RCW 59.18, *et seq.*
 - Fair Housing Act: 42 U.S.C. 3601, *et seq.*
 - Privacy Act: RCW 9.73, *et seq.*
 - Fair Debt Collection Practice Act: 15 U.S.C. 1601, *et seq.*



Rental Cap

- Rental Cap or Ceiling
 - Limits the number of non-owner occupied units
 - Ordinarily a percentage of total units
- Hardship exceptions
- Grandfather clauses



Rental Type

- Period of lease (min / max)
- Use of property
- Number of tenants
- Subletting or assignment
- Lease requirements (need to incorporate governing documents)
- CC&R compliance



Tenant Screening

- Tenant screening company / report
 - Consumer credit report
 - Rental history
 - Criminal background check
- Association DO NOT obtain access to info; only require landlord owner to do so
- Jeopardizes HUD/FHA project approval



Lease Approval

- Compliance with procedural steps
- If renewal, track record
- Lease meets all requirements
- Lease would exceed the rental ceiling
- Waiting list
- Mortgagee or institutional lender exception
- Hardship consideration



Tenant Registration

- Contact info
- Identification of all occupants
- Automobile info
- Updating for new occupants
- Move-in and move-out dates
- Non-occupant owner contact information



Compliance / Enforcement

- Owner ultimately responsible for any and all damages and misconduct of tenant
 - Indemnification and hold harmless
- Hearing board
 - If violation of governing documents constitutes a violation of the lease
- Require owner to commence unlawful detainer action
- Rental intercept



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Reserve Study: We Have One... ...But What Exactly Is It and How Do We Use It?



What is a Reserve Study?

- A Reserve Study is a budget/cash flow model to reduce the risk of special assessments
 - NOT a maintenance or repair plan
 - NOT a building envelope inspection
- Reserve Studies provide information for owners and buyers
 - Provide buyers with notice of anticipated repair expenses
 - Sales and market value
 - Borrowing capacity of purchasers, which may *effect* prices
 - Lender willingness to fund loans



Benefits of a Reserve Study

- Fulfill legal obligation
- Effective communication tool
- Reveals unbudgeted items
- Reduces liability
- Assists proper life cycle and replacement budgeting



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WA Law Requires Reserve Studies

- Condos: RCW 64.34.380; HOAs: RCW 64.38.065
- Specifies how often
- Specifies content and some format
- Specifies who can/must perform
- Requires inclusion in Resale Certificates and Public Offering Statements and Budgets (Condos)
- DOES NOT require funding
- DOES NOT have penalties for failure to comply with law

WA Law Requires Reserve Studies

- Requires a “Reserve Study Professional”
 - RCW 64.34.020 (35); 64.34.380(2) and (3); 64.38.010 (17); 34.38.062 (2) (3)
- “Independent person suitably qualified by knowledge, skill, experience, training, or education to prepare a reserve study.”
- Required for initial study and every three years to do visual inspection
- Not required for annual updates between site visits.



Content and Format

- RCW 64.34.382

- A reserve component list including roofing, painting, paving, decks, siding, plumbing, windows and any other component that will cost more than 1% of annual budget

RCW 64.38.070

- Any reserve component that would cost more than 1% of the annual budget

Contribution Rates

- Changes to law fix some confusion over study contents
- Must show Baseline Funding level, just enough to keep reserves above ZERO
- Must show Full Funding Level, enough so that you are 100% funded in 30 years
- Must show Recommended Funding by Reserve Study Professional



Disclosures

- Required in budget and public offering statement or resale certificate
- Required to disclose if there is no current reserve study



Reserve Fund

- **The reserve fund consists of funds put aside—in reserve—for the *replacement* of major components of a community's common property.**
- Typically used to replace asphalt paving, concrete sidewalks, roofs, central heating and cooling plants, swimming pool, tennis courts, elevators, and other varied property components.
- Revenue raised for *adding* a major item will be a major improvement expense.
- Revenue raised for *replacing* that item when it deteriorates will come from the replacement reserve account.
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Funding is Not Required

- Funding a reserve account in accordance with the reserve study is “encouraged”
- There are no legal penalties or liability for failing to follow the law, however, the owners can vote to demand compliance. At that point, failure to comply can be the basis for legal action.



Benefits of an Adequate Reserve Account

- Meets legal, fiduciary, and professional requirements
- Provides for planned replacement of major items
- Equalizes contribution of new and old owners
- Minimizes need for special assessment
- Enhances resale value

Exceptions for Small Associations or “Unreasonable Hardship”

- Condos with 10 units or fewer can exempt themselves by 2/3 vote of owners
- HOA's with 10 homes or fewer can exempt selves if the cost of reserve study exceeds 5% of annual budget (no vote requirement)
- “Significant assets” is the new threshold—whether total maintenance/repair/replacement of reserve components is 50% or more of gross budget of Association, excluding reserve account; 75% for HOA's
- Unreasonable hardship



Major Changes for Budget Process

- Requires disclosure of information from the Reserve Study, and how the CURRENT and PROPOSED BUDGET compare to the RECOMMENDED CONTRIBUTION rate
- Still no REQUIREMENT to save money