

Report: Summary of 12/14/20 Meeting with HOA Attorney

This report is submitted to the Board from directors Stacey Johnson, Kirk Johnson, and Brett Coffman who attended the meeting

December 17, 2020

Recap of attorney meeting with Andy Chase, from Miller & Chase HOA Attorney firm. Meeting was via teleconference on December 14, 2020. Meeting was regarding the HOA/Board moving forward on fulfilling a Special Membership Meeting request via Zoom. General subjects discussed were:

- procedural and legal parameters and potential costs,
- proxy voting and related,
- how the mechanics of Zoom would work for controlling/facilitating the meeting and voting,
- addressing potential issues that members are expected to bring to the meeting, and how we can best be prepared and find ways to satisfy requests from members if possible while protecting ALL members and their wishes,
- and of course, all of the above working within our governing documents and applicable laws.

Board members Brett Coffman, Stacey Johnson and Kirk Johnson were present with Mr. Chase at the meeting.

- Clarification as to whether the HOA 'owes' a Special Membership Meeting per the petitions received and recent attorney demands from Mr. Mathis & Mr. Naysnerski (HOA members). Mr. Chase responded that because the Board responded to the attorneys stating we would have a Zoom meeting he recommended that the Board follow through with that. He also stated that because of COVID he didn't think any court anywhere would hold it against the HOA for not having the meeting at this time. (Courts are backed up, people are sitting in jail with no hearings scheduled; the thought was that 9MR would not be a priority in law to force a meeting at this time of a global pandemic).
- No Board members can be at the Miller & Chase office during Zoom meeting; COVID restrictions will not allow this at this time.
- Mr. Chase felt that Zoom was simple enough for someone in our HOA to run as an alternative to having his firm facilitate it. Andy did not think that the Chair of the meeting needed to be physically present with the facilitator of Zoom during the meeting, but this needs to be thought through to verify.
- Mr. Chase stated that he can represent the HOA at the meeting, but that if we choose to have him there there are two different ways this can be done and with two different related consequences:
 - (1) he can counsel openly for all attendees to hear. In this circumstance the HOA would lose 'attorney/client privilege' and he would thereafter be able to be called as a witness by an opposing party against the HOA, and he would also not be able to represent the HOA as an attorney in the related matter.
 - (2) we can counsel with him privately during the meeting on the Zoom format in what he called a 'private room'. Mr. Chase recommended that, even though we are entitled to this, to not do it because of the perception of lack of transparency.

Mr. Chase recommended that the most beneficial scenario for the HOA would be to not have him attend or advise at the meeting and to rather have an "HOA specialist" there if we felt we still needed some help.

- Mr. Chase confirmed that to remove directors from the Board it requires the assent of a majority of ALL members, not just the majority of members at a meeting where a quorum is present.
- Regarding the petition's demand that a list of agenda items be **voted** upon at the first meeting: Mr. Chase described that for the first meeting there is no formal agenda of items of membership business to vote upon but rather there can be 'subjects of interest' prior submitted to the Board that the president would bring up during the meeting. With the first meeting notice the Board would tell the membership that the petition items are requested to be addressed, and in that same notice the Board would also ask the entire

membership to submit any other subjects of interest for the president to bring up in the meeting. Then at the meeting the president would bring up each item and allow the member to bring a motion about that subject (like for example, "I move that a vote to remove XXX director be brought to the entire membership."). Mr. Chase suggested that if any motion were carried forward from this meeting that the subsequent vote for the full membership be sent out in ballot form instead of another Zoom meeting. With the ballot mail-out the membership would be sent a copy of the motion(s) and minutes from the prior meeting; that's all. The opportunity for discussion and sharing of information regarding any subject would be in the *first meeting*; motion, second, discussion and vote. The discussion portion will give all those at the meeting the opportunity to have their say and would be recorded in the meeting minutes.

- Regarding Mathis' claim that the Board has not held the meeting soon enough according to law, Mr. Chase said that above all, real world circumstances (COVID) override specific deadlines, and there are many other variables.
- Voting using Zoom format; the votes could be done by either a member selecting the Zoom 'digital hand' indicator or by a verbal vote of each member. Either way the secretary will record the votes. Zoom does not record votes.
- The President is the Chair of the meeting, per Bylaws. The members cannot legally appoint a Chair, and the Board is not in conflict by being at or speaking at the meeting. If a member made a motion to remove the Chair; the Board elected the Chair so the Board can make a motion to remove the Chair but not the membership, per Bylaws.
- Mr. Chase suggested the Chair state the following as part of the Rules of the meeting, at the beginning of the meeting: "The official record of this meeting, as required by our Bylaws, are the minutes of the secretary. No other recording of any kind will supplant or replace the record of the secretary." He informed us also that, according to law, anyone recording in a phone call or Zoom meeting without the knowledge and consent of all people present would be committing a felony.
- Regarding proxy verification, etc re: proxies:
 - RCW64.34.340 addresses requirements (as a referral from 64.38)
 - Only another HOA member can be given the right to proxy vote for an HOA member. Suggested meeting notice language: "Proxy voting will be allowed, and only through another member."
 - Suggested meeting notice language: "If you are authorizing someone to cast your vote by proxy please sign here and identify the person who is authorized to cast your vote".
 - Suggested meeting notice language: "Please submit proxies at least (14) [- or whatever -] days prior to the meeting so we can verify proxies prior to the meeting in an attempt to be able to make final vote tallies at the meeting." Mr. Chase said that whatever time period the BOD prescribes must simply be reasonable; 14 or 30 days is reasonable, 180 is not.
 - Hypothetical situation: A member does not submit proxies prior to the meeting but shows up at the Zoom meeting and states they possess proxies. Mr. Chase said that while the BOD may have the literal legal right to declare the proxies invalid because of submission past the deadline, he recommended that the BOD deal with it this way: receive the proxies on the spot at the meeting as being in 'pending verification' status, and record the votes of those 'pending proxies' as voting occurs. If the vote tally about any given subject during the meeting appears to be close enough that the 'pending proxies' could flip a tally, then verify the proxies after the meeting and make actual final official vote tallies based on proxy verifications.
 - Proxies cannot be legitimately presented via Zoom anyway; the paper cannot be presented via video, and proxy has to be given to the BOD *from the proxy giver*.
- Mr. Chase said that any owner can speak at a meeting, including each of the owners of a lot that is owned by multiple people; they cannot be limited to one speaker per lot. There is only one vote per lot though, and only one equal period of time to speak per lot can be required.
- Regarding verifying who attends the meeting and what their voter eligibility status is: have a verbal roll call at the beginning of the meeting, addressing each actual attendee, and compare that to a verified eligibility list the secretary creates ahead of time.

- Per Mr. Chase, if a member does not formally register with the BOD to be an attendee of the meeting in advance of the meeting but still signs up for the Zoom and attends the meeting, this does not disallow the member from being a legitimate attendee of the meeting. In other words, registering for attendance with the BOD by an advance deadline notice cannot be required of members. They are allowed to simply show up on the screen via Zoom during the meeting.
- Regarding a member making a motion for a compliance audit, as has been requested in the petition, Mr. Chase's advice included:
 - Suggested language for a response to the member: 'Based on our Bylaws that is not allowable, so according to legal counsel we understand that there are two different possible ways that a compliance audit could be accomplished by the membership:
 - (1) you can move to have the Board solicit the membership to vote to amend the Bylaws to add a provision to allow compliance audits. That motion needs to carry, and then the Board will form a committee to consider the motion to amend being thereafter brought to the membership for a vote. Committee considerations would include things like how much it would impact immediately available HOA funds to bring that membership-wide vote, including possible legal counsel costs, and from there a timeline decision would be made. The goal of the Board is to try to find a feasible way to make the request happen if possible.'
 - (2) According to the Common Law doctrine, you can move to have the board conduct a vote of the entire membership for a compliance audit. Such a membership-wide vote would pass with a majority of all votes in the HOA voting affirmatively. **The attorney advice just stated is in addition to what Miller Chase earlier advised the BOD in their 10/5/20 letter to the BOD:**
 - page 2, para 2, “Neither the Bylaws nor the CCRs provide for a compliance audit. The term “compliance audit” is not found within Chapter 64.38, RCW, and the term “audit” appears therein only three times, all in RCW 64.38.045(3) (referring to the independent CPA financial audit). Not only this, we could find no reports of Court Decisions in Washington State using the term “compliance audit” in reference to an HOA. And similarly to the financial issue, there does not seem to be any authority in the CCRs or the Bylaws for the HOA to spend members funds on such a compliance audit.”
 - The “common law” option discussed above require first a successful motion passed at a meeting where a quorum is present to bring that vote to the entire membership, and then a duly noticed vote of the entire membership would happen after that.
 - Mr. Chase also suggested that as an alternative to a 'compliance audit' being conducted by the HOA/BOD that a member(s) could conduct there own. This is much like a member requesting copies or access to review HOA documents as is allowed in the bylaws and state laws, except this level of records request is far more extensive and therefore requires a motion brought and carried by the membership, essentially a form of approval/permission from the membership. The suggested procedure is that a member would bring a motion at a membership meeting, where a quorum is present, to access, review and/or copy records in quantity and variety sufficient to facilitate that member's private compliance audit. If the motion is assented to by a majority of members present then the motion passes, and the documents that are copied by the member(s) can be thereafter copied by other members.
- The following is the process by which Mr. Chase advised is the lawful way that amendments to the CCRs and Bylaws can be made (NOTE that further down in this report Mr. Chase discusses what HE suggests we do for helpful structural amendments to the CCRs):
 - The membership would pass a motion at a meeting, by majority where a quorum is present, to ask the Board to bring a vote to the entire membership *asking if the membership wants to amend the CCRs or Bylaws – not proposing any specific language*. This 'asking' by the Board could also include a cost estimate to involve legal opinion, projected ballot costs and mailings costs, and any brief descriptions of subjects that are currently known in any significant way for desired change. If that vote of the membership passes with the required minimum votes of the entire membership (60% for CCRs, 51% for Bylaws) then the Board would form a committee to contemplate, research and

- develop the potential amendment(s), which would include asking for general membership input and opinion and of course utilizing legal counsel. After that is accomplished then the final language would be sent out by the Board to the entire membership for a final vote again seeking minimum required approval votes of the membership (60% for CCRs, 51% for Bylaws). So please note it would take (2) votes of the membership to accomplish final approved amendment language.
- Regarding the language in the Bylaws suggesting that the Bylaws can also be amended without going through the BOD by 51% of the membership simply submitting in writing an approval of a bylaw amendment, per Bylaws Article XI/1: Mr. Chase advised that this interpretation is incorrect, and that any amendment must come through duly carried motions at duly-held membership meetings with the Board-conducted action and voting processes as discussed in the bullet point immediately above. This is the same regarding the correct interpretation of amending the CCRs at Article XIII.
 - Regarding Mr. Chase's objective general observations and recommendations about our current CCRs and Bylaws:
 - He felt the docs were originally drafted with benefiting the developer in mind as a priority and that we should make some changes to better benefit the HOA now instead.
 - There are structural incongruencies between the two documents and within each document, like how the Bylaws VIII/8.c makes the “duty” of the treasurer to cause a financial audit whenever 10% or more of the membership requests it but the neither the Bylaws or the CCRs give the BOD/treasurer the “power” to spend funds in that way. These kinds of things could be cleaned up and allow several governing aspects to be more successful.
 - He suggested that we give his firm the task of going through the CCRs and Bylaws and discovering and offering language to clean up the structural aspects of the documents, including offering amendments that they have experienced from other non-profit/municipal clients work that are helpful changes we would also benefit from. Their firm is well-experienced in doing this proposed work. He estimated it would cost “\$6000 - \$8000” to do this; this does not include dealing with significant 'other' discretionary amendments we might come to him wanting but rather is an estimate to do the go-through 'clean-up' amending.
 - He suggested that, if we want to bring amendments to either docs, we DO NOT write up our own language and submit that to him but rather it would be more efficient/cost-effective for us to just tell him the nature/essence of any amendment we'd want to see and allow his firm to draft the language. It takes far more effort/time to parse, investigate and correct non-professional language – and verify if the language is both lawful and not in conflict with other doc language – than to just let them handle it from the beginning.

In closing, we all stressed that it is important that in the meeting the Board takes the approach to try to find ways, though our governing documents and applicable laws, to assist members in getting their needs met, if possible. Through this approach the Board can help limit conflict as much as possible in the meeting and cultivate progress and responsibility.

Additional counsel from this meeting which was verified in the 1/8/21 meeting with Andy:

- Regarding 'who' approves HOA *membership* meeting minutes pursuant to RCW64.38.035(1): it is the Board, not the membership.
- Question: Can the membership optionally amend Bylaws and CCRs just by presenting the BOD with a written instrument, versus requiring that a membership vote be held by the Board?
 - Bylaws, Article XI, 1: “...may be amended only with the written approval of Owners who represent at least 51%...”
 - CCRs: Article XIII: “...amended at any time by an instrument signed by Lot Owners 60%...”

Andy's answer: No. Just like every other action that comes from the membership, an amendment has to first come by way of a duly-passed motion at a membership meeting, where

a quorum is present, that asks the Board to ask the membership if they want to amend the bylaws or CCRs. If that motion passes then the BOD would send out a vote to the entire membership asking them if they want to spend the money and go through the process of amending, without any specific language changes yet being offered. If the membership votes by either 51% (for Bylaws) or 60% (for CCRs) to that question then the BOD would form a committee to address possible subjects for amendments and counsel with attorney for the attorney to form proposed language. The resulting language would then be sent out for a second vote of the entire membership, again needing assenting numbers of 51% and 60% for bylaws and CCRs respectively.

- Question: In Andy's 12/14/20 counsel meeting with us he stated that the 'common law doctrine' would allow that if a majority of members voted to cause the Board to conduct a 'compliance audit' then the BOD would have to conduct that audit. But Miller's 10/5/20 legal counsel letter to the BOD says, page 2: "Neither the Bylaws nor the CCRs provide for a compliance audit. The term "compliance audit" is not found within Chapter 64.38, RCW, and the term "audit" appears therein only 3 times, all in RCW64.38.045(3) (referring to the independent CPA financial audit). Not only this, we could find no reports of Court Decisions in Washington state using the term "compliance audit" in reference to an HOA. And similarly to the financial issue, there does not seem to be any authority in the CCRs or the Bylaws for the HOA to spend member funds on such a compliance audit."

SO which is it; common law applies, or does the lack of citing in the RCWs and our governing docs mean that the action cannot be taken?

ANSWER: common law applies in circumstances when a desired or proposed action is not expressly addressed in law or contract.