Testimony of Chuck Sheketoff

Supporting –A3 Amendments to HB 2823-A

Before the Senate

Committee on General Government, Consumer and Small Business Protection

May 22, 2013

My name is Chuck Sheketoff and I live in Silverton in a home on property within the bounds of a planned community and homeowners association (HOA), the Abiqua Heights Homeowners Association (Abiqua Heights). My wife and I purchased the home in 2008. I am a member of the HOA and a past board member and president.

I am here today to urge you to adopt the –A3 amendments to HB 2823-A. I'd like to thank Senator George for his support in getting them drafted and Senator Shields for his interest in having the committee consider them, as well.

The amendments clarify the law to address two problems that have arisen in Abiqua Heights that I am confident are problems in other HOAs: people being denied the right to post election-related signs and access to HOA business records.

Protecting Right to Post Election-Related Signs

First, the –A3 amendments make clear that HOAs may not outright ban the posting of election-related signs, whether they be signs that merely say "Vote" or say "Vote or Against for a Particular Candidate or Measure." While the role of election-related signs has undoubtedly changed with the advent of the internet and as we've moved to a 24-hour news cycle, their continued widespread use by candidates and campaigns suggests they undoubtedly still play an important role in our democracy's election process, not the least of which are reminding Oregonians to vote in the vote-by-mail election and providing an opening for discussion of issues and candidates among neighbors.

At Abiqua Heights our CC&Rs provide that we can have signs of any type if approved by the Board. In late February, I asked our board permission to post an election-related sign on my front lawn concerning the May school bond issue. Just as they rejected three requests for election-related signs last fall, the board rejected my request at the March meeting. Last fall they told the rejected members that the members had other ways to express their political views, including placing signs in home windows. The HOA's board secretary told the three households "One additional major concern is that the Association has no control of content on political signs once approved." That of course gave me cause for concern about their interest in regulating content.

When I made my request the first response from the board was an email from the board president requesting me to submit my sign for the board's review. If I had any doubt in my mind about whether board members' dislike of election-related signs was subject matter censorship, the board president's request to see what my sign would actually say made it perfectly clear that the board was trying to regulate content.

I hired an attorney and engaged in an unsuccessful settlement discussion. For some unexplained reason, the board ultimately relented at the following meeting. When about a half-dozen neighbors subsequently put up the exact same sign, however, the board threatened them with penalties.

The proposed amendments make clear that the HOA "may impose reasonable restrictions on the number and size of signs or the time period during which signs may be displayed" but may not prohibit display on the lot. Telling people that they have other ways to express political views, such as putting signs in windows, would not be allowed.

Clarifying Right to Business Records of the Association

The second part of **the –A3 amendments clarify HOA members' right to access to business records**. The amendments define the terms in current law "records of an association" and "records kept by or on behalf of an association." The definition is consistent with the definition of public records in Oregon's Public Records Law (ORS Chapter 192) and **ensures that communications to and from board members and board-sanctioned committees working on association business as they exercise their responsibilities to the planned community are business records that HOA members may inspect.**

The amendments **also clarify that a board may withhold only those records ORS 670(9)(b) allows to be withheld.**[1] Under the amendment, an HOA board may not make documents confidential that are not set forth in that statute as permissibly confidential. Last, **the amendments make clear that requests in writing include electronic mail – email – requests.**

Each of these amendments stem from problems at Abiqua Heights. Moreover, according to both the board president and treasurer, Abiqua Heights' attorney at Vial Fotheringham, a law firm specializing in representing HOAs, advised the board that the board can refuse to release comments submitted to the board if the person

[1] ORS 94.670(9)(b) provides "(b) Records kept by or on behalf of the association may be withheld from examination and duplication to the extent the records concern:
(A) Personnel matters relating to a specific identified person or a person's medical records.
(B) Contracts, leases and other business transactions that are currently under negotiation to purchase or provide goods or services.
(C) Communications with legal counsel that relate to matters specified in subparagraphs (A) and (B) of this paragraph and the rights and duties of the association regarding existing or potential litigation or criminal matters.
(D) Disclosure of information in violation of law.
(E) Documents, correspondence or management or board reports compiled for or on behalf of the association or the board of directors by its agents or committees for consideration by the board of directors in executive session held in accordance with ORS 94.640 (7).
(F) Documents, correspondence or other matters considered by the board of directors in executive session held in accordance with ORS 94.640 (7).
(G) Files of individual owners, other than those of a requesting owner or requesting mortgagee of an individual owner, including any individual owner's file kept by or on behalf of the association."

submitting the comment did not "release" the document when s/he submitted it to the board. In other words, the attorney, according to the board president and treasurer, advises that documents are presumed confidential unless the author states otherwise, the list at ORS 94.670 be damned. These amendments will hopefully provide the clarity that firm needs to understand that that business records are generally available to members.

The Vial Fotheringham firm not only allegedly told our board that certain materials are confidential unless waived by the author, but in one of the firm's blog posts that the firm emailed to their mailing list the firm advised board members to shield HOA business conducted with their personal email accounts by adopting "a resolution specifying that any emails, text messages, voicemails, or other electronic communications that are the private property of any board member are NOT association documents or records." This –A3 amendment would clarify that such a resolution creating an end run around access to HOA business records would not be authorized under law.

In January, when I asked the board treasurer to tell me the extent to which accounts receivable as of the previous September 1 were cleared by the end of the year, the board secretary showed his true colors when he wrote back saying "At this point it is NOYB." This bill may be clarifying financial records, but in the real world of HOAs we have board members like mine who think it is none of your business. These amendments clarify that it is the members' business to understand the financial situation of the HOA.

When I sent an email asking for copies of a maintenance committee report submitted to the board and two contracts that already had been signed, I was told I had to put my request in writing and into the mail. The Abiqua Heights treasurer claimed, "I can not verify the validity of the sender of an email." Never mind that he could have called me to verify. This –A3 amendment makes clear that "written requests" includes email.

Summary

The –A3 amendments clarify that HOA members have the right to place election-related signs on their property subject to reasonable regulation by the HOA and clarify HOA members' rights to access to HOA business records and that those rights may not be abridged by board resolutions, attorney interpretations, or procedural hurdles. I urge you to adopt them.

Thank you for your consideration of the –A3 amendments.

From: Dave & Diane Paul <ddsilverton@frontier.com>
To: "Ferrell, Todd" <graphsonthego@yahoo.com>; "Meganck, Rich & Jan" <jomeganck@gmail.com>; Mayou Chris <chrismayou@gmail.com>
Cc: "Helbling, Tony" <helbling@wilsonconst.com>; "Danskey, David" <daviddanskey@wavecable.com>; Barrett Steve & Joeine <stevejoeine.barrett@frontier.com>
Sent: Saturday, October 13, 2012 2:12 PM
Subject: Sign Request

At the October 11th AHHA Board meeting, the Board considered three requests for political signs. The following is the result of the Board's deliberations as recorded in the draft minutes:

Dave Paul made a motion to approve the requests of three members (Lots 23, 29 and 125) to post one political sign each in their yards. The motion was seconded by Tony and, following discussion, the motion failed by a vote of 0 yes and 4 no. Board members indicated that members have ample opportunity to express their political views (e.g., signs may be placed inside windows of home). One additional major concern is that the Association has no control of content on political signs once approved.

Dave Paul
Secretary

What is an Association Document?

Vial Fotheringham LLP Lawyers

Date: March 20, 2013

Written by: Kyle Grant

Association Documents: Putting a resolution in place to define, and a policy for retention

Many owners believe that as members of a community association, they are entitled to inspect association records at will and at any time. An owner's request to see the association records may happen for any number of reasons, such as when an owner feels that assessments are too high and sets out on a quest to rid the budget of all the "useless" expenditures.

Of course, association boards should strive to be as transparent as possible. It is never a good idea for a board to appear secretive. In fact, Oregon law requires the association to make certain records available for owners. At the same time, Oregon law also restricts the availability of certain documents and communications. Because of these requirements, the board must have a clear understanding of what is an "association document." Often, a well-drafted records resolution can clear up this issue and avoid costly litigation while keeping certain sensitive records safe.

Oregon law requires homeowners associations to retain "documents, information and records" of the association and that those records be made available to owners who make a request in good faith for a proper purpose. The Planned Community Act (PCA) and Oregon Condominium Act (OCA) both require the association to retain certain documents, such as documents it receives at turnover from the developer, financial records, and owner lists. Unfortunately, however, the Oregon law does not provide any further guidance on how the terms *documents*, *information*, or *records* are defined. Also, the association's declaration and bylaws may not have specific definitions on these terms.

Without a resolution, owners can make—and have made—the argument that emails contained in board members' personal email accounts constitutes "records of the association" if the subject matter of the email deals with association business. This is especially true in the case where the association does not have its own dedicated email address. The same argument could be made with board members' voicemail accounts or text messages. This becomes a serious problem when someone other than the board member has to sift through the board member's personal communications to determine which communications are related to association business.

In order to avoid this situation altogether, boards can do two things. First, open an email account using the association's name, such as "edgewaterhoa@gmail.com". The board can copy this email address on certain board communications that may be available to owners. Communications with third parties should go through the association's email. Second, adopt a resolution specifying that any emails, text messages, voicemails, or other electronic communications that are the private property of any board member are NOT association documents or records. The resolution also establishes a policy establishing the frequency, time, location, notice and manner of examination and duplication of association records.

Boards should also be aware that even with a dedicated email address and records resolution in place, certain communications and records are exempted from examination by owners. These records include confidential information such as owners' social security numbers, communications with attorneys, contracts currently in negotiations to purchase goods or services, or documents the disclosure of which would be a violation of law. *See* ORS 94.670(9); ORS 100.480(9).

As a practical matter, most owners will likely not request inspections if they feel that they are being kept in the

know through mailings, newsletters, or an association website containing the governing documents, resolutions, house rules, board minutes, and financial records of the association.