

# The CC&R's (Comparisons, Contrasts, & Relationships) Oregon and Washington Home Owners' Acts

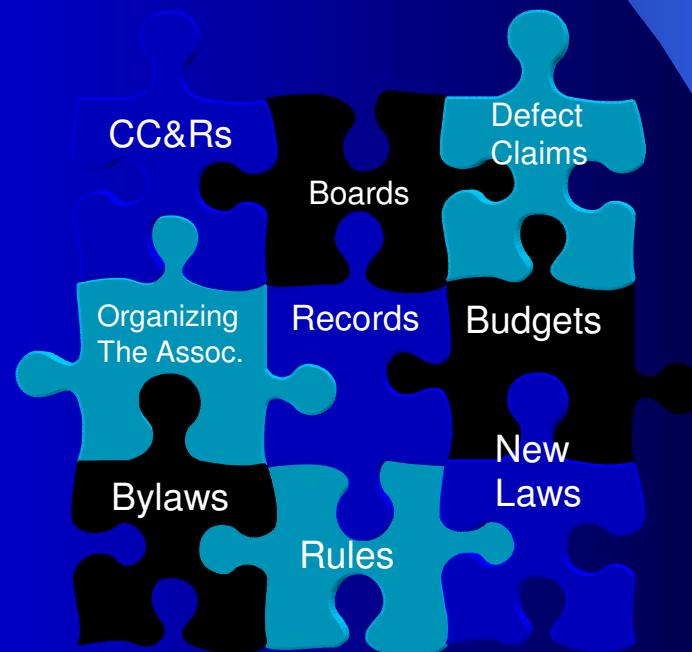
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# Overview

- Oregon and Washington “Homeowners Acts”
- Broad Brush Comparison



# Oregon “Planned Communities”

- Generally more than 12 lots
- Owners are collectively responsible for:
  - maintenance, operation, insurance and property taxes related to common property; and/or
  - exterior maintenance of any individually owned property

# Washington Homeowners' Assoc.

- Owners' associations not otherwise subject to the Condominium Act or the Horizontal Regimes Act (i.e., "Old" condominium act)
- Each member is obligated to pay for:
  - Real property taxes
  - Insurance premiums
  - Maintenance costs; OR
  - Improvement of:
    - Real property *other* than that which is owned by the member (i.e., common area property)

# CC&Rs - The Declaration

- Declaration is key governing document
  - Trumps inconsistent provisions in bylaws (see, e.g., ORS 94.630(1))
  - In Oregon, *condominium* declaration expressly does not trump if inconsistent with condominium statutes (ORS 100.122) - no parallel provision in PCA
  - In Washington, declaration would appear to trump but not as clear from statutes.

# Declaration Amendments

- Oregon Planned Community Act (PCA):
  - Amendment requires at least 75% or greater approval (if in declaration) of owners required.
  - Amendments are effective on recording
- Washington Home Owners' Act:
  - Adoption and amendment of *bylaws, rules and regulations* is allowed
  - No statutory mandate allowing amendments to declarations. Must look to the declaration to determine powers of the Association and voting requirements

# Organizing the Association

- Oregon Planned Community Act (PCA):
  - May be for-profit or non-profit corporation, or an unincorporated association (ORS 94.625)
  - Unincorporated associations may be incorporated by vote of majority of unit owners unless declaration or bylaws provide otherwise (see ORS 100.405(1)(b))
- Washington Home Owners' Act (HOA):
  - Can be a corporation, unincorporated association, *or other legal entity*
  - Unlike Oregon, there are no specific statutory provisions to make changes in legal entity form. Check the Declaration and the Bylaws!

# The Bylaws - Oregon

- Bylaws cannot require greater than an affirmative majority of votes
- If bylaw duplicates a declaration element, an amendment must meet declaration amendment requirements (i.e., minimum 75%)

# Bylaws Oregon: Required elements

- Initial meeting
- Transitional advisory committee
- Turnover meeting
- Annual meetings
- Board elections and terms
- Board meetings
- Officer selections
- Budget
- Maintenance and repair program
- Initial employment contracts for maintenance and repair
- Collection of common expenses
- Insurance coverage
- Annual financial statements
- Methods for adopting administrative rules and regulations governing common property
- Method to amend the bylaws

# Bylaws - Washington

- Required elements (*Unless otherwise provided in the other governing documents!*)
  - Number, qualifications, powers, duties, terms of office, and manner of electing and removing the Board and officers
  - Procedure for election by the Board of the officers of the association
  - Identify powers the Board or officers may delegate
  - Which officers can prepare, execute, certify, and record amendments to the governing documents on behalf of the association
  - Method to amend the bylaws
  - Anything else the association deems necessary and appropriate, and not inconsistent with the governing documents
- Washington does not have voting restrictions similar to Oregon

# Board Meetings - Oregon

- Most meetings must be open to owners [ORS 94.640]
- Executive session [closed] meetings may be for purpose of:
  - consultation with counsel
  - personnel matters
  - negotiation of third party contracts
  - discussion of collection of unpaid assessments

# Meetings and Voting - Oregon

- Annual and Special and Written Ballot in Lieu of Meeting
  - Special Meetings can be called in several ways
    - By Board President
    - By majority vote of Board
    - By vote of % of owners specified in Bylaws (but not less than 10% and not more than 50%)
      - If the Bylaws don't say, 30% vote may call a Special meeting
  - Written Ballot In Lieu of Meeting – read ORS 94.647 *carefully!*

# Oregon- Meeting Notice

- Notice must be *hand delivered or mailed* to the address of each lot or the owner-designated address and to all mortgagees that request notices.
  - Not less than 10 days and not more than 50 days before a meeting
  - Notice must state time and place and items on the agenda

# Oregon- Quorum

- Quorum=# of people entitled to cast 20% of votes *and* who are present in person or by proxy *at the beginning of the meeting* unless the Bylaws provide a different standard. ORS 94.655

# Oregon- Procedure

- Unless other rules required by Declaration or Bylaws, Roberts Rules of Order governs conduct of meeting.
- One lot – one vote . . . unless Declaration says something else
- Proxies and Absentee Ballots
  - Allowed unless the Bylaws prohibit
  - Owner cannot revoke except by actual notice to the presiding officer or Board
  - Undated proxies are not valid

# Board Meeting - Washington

- Most meetings must be open to owners [RCW 64.38.035(2)]
- Executive session meetings may be for purpose of
  - consultation with counsel
  - considering communication with legal counsel
  - personnel matters
  - discussion of possible violation of governing documents
  - discussion of possible owner liability to an association
  - discuss likely or pending litigation

# Duty of Care of Board Member

## Duty of Care of Board Member

- tied duty of care to the Nonprofit Corporation Act in both states

# Association Meeting - Washington

- Annual and Special Meeting
  - No particular provision for absentee ballots (Look at Governing Documents)
  - Special Meetings can be called in several ways
    - By Board President
    - By majority vote of Board
    - By vote of 10% of owner voting interests
    - Notice must be *hand delivered or mailed* to the address of each owner and any other owner-designated address.

# Washington - Notice

- Not less than 14 days and not more than 60 days before a meeting
- Notice must state time and place and items on the agenda

# Washington- Procedure

- Quorum=# of people entitled to cast 34% of votes *and* who are present in person or by proxy *at the beginning of the meeting* unless the Bylaws or Declaration provide a different standard. RCW 64.38.040
- Proxies and Absentee Ballots – check the governing documents

# Record Retention - Oregon

- Permanently retain all documents received from the developer at the turnover meeting [ORS 94.670(1)] – you can find a list at ORS 94.616
- Proxies and ballots must be kept for one year following the vote
- Must also retain records consistent with the Nonprofit Corporation Act [see ORS 65.771] even if not a nonprofit corporation!

# Access to Records - Oregon

- Owners may make a written request to examine and duplicate documents of the Association if in ‘good faith’ and for a ‘proper purpose’. Association has 10 days from receipt of a request to produce the documents
- Exempt records include:
  - Communication with legal counsel
  - Contracts in current negotiation
  - Personnel matters
  - Executive session documents
  - Individual owner files

# Record Retention - Washington

- Associations are required to maintain financial and other records ‘sufficiently detailed to enable the association to fully declare to each owner the true statement of its *financial* status.’ RCW 64.38.045(1) (emphasis added).
- Query whether this relieves a nonprofit corporation from complying with nonprofit Act record requirements.

# Access to Records - Washington

- ALL records of the association are available to owners and mortgagees and their agents. RCW 64.38.045(2). Only exception: unlisted telephone numbers.

# Rules and Enforcement - Oregon

- Association may adopt rules for the operation and use of the common property [ORS 94.635(15)]
  - Bylaws set process
  - Must provide for notice and opportunity to be heard if the rules will terminate access/use of common property or impose fines for violations [ORS 94.630(1)(m)-(n)]
  - Must adopt and mail any fine schedule to each owner prior to imposing fines

# Rules and Enforcement – cont'd

- Failures to comply may be enforced by:
  - Fines
  - Termination of Access/Use of Common Property
- Generally fines will be treated as unpaid assessments
  - Allows for lien claim against owner property [ORS 94.709]
  - Can pursue as ordinary action for money judgment w/o waiving lien rights
- Alternative Resolution
  - Association must offer mediation before suing [ORS 94.630(4)]
  - Association may use a 'Permit' as a means to selectively allow a technical violation [ORS 94.630(3)].

# Construction Defect - Oregon

- Association has standing to initiate or intervene in any litigation regarding matters :
  - ‘Relating to or affecting’ common property including actions for damage, destruction, impairment, or loss of use
  - ‘Relating to or affecting’ lots or interests of individual owners resulting from nuisance or defect in or damage to common property
  - Any matter which the association has standing by law *or under the declaration or bylaws* [self-appointed standing]

# Construction Defect – cont'd

- Before any litigation is commenced against a developer/contractor:
  - Association must initiate a Notice of Defect and follow the strict timelines contained in ORS 701.560-701.595
  - Contractor may, within 14 days of receipt of notice, request an inspection; Association must make properties available for inspection not later than 20 days after receiving a request
  - Contractor has 90 days from Notice of Defect to make a response
  - No obligation to accept offer, but litigation cannot commence prior to process playing out

# Construction Defect - Washington

- Association has standing to initiate or intervene in any litigation regarding:
  - On matters “affecting the homeowners’ association”
  - On behalf of itself, or on behalf of two or more members
  - Not on behalf of owners involved in disputes not a responsibility of the HOA

# Construction Defect – cont'd

- Boards of HOA's *must* deliver notice of commencement or anticipated commencement of a construction defect action to the members
  - Notice must describe action and relief sought
  - Notice must provide estimate of anticipated expenses and fees to be incurred. RCW 64.50.040
- Before any litigation is commenced against a developer/contractor:
  - Association must initiate a Notice of Claim and follow the strict timelines contained in RCW 64.50.020
  - Very similar in nature to Oregon process, but different timelines

# Budgets & Financials - Oregon

- Bylaws must specify the process to adopt the budget. ORS 94.635(9)
- Unless Bylaws provide otherwise, Board must adopt a budget annually and provide a summary 30 days after adoption to each homeowner.
- If the Board fails to adopt a budget, the last annual budget remains in effect for the new year. ORS 94.645.

# Budgets & Financials - Oregon

- Within 90 days after close of fiscal year prepare annual financial statements and distribute
- If assessments exceed \$75K annually, association's financials must be reviewed by CPA within 180 days of close of fiscal year.  
ORS 94.670\*
- An association can dispense with reviews upon vote of 60% of non-declarant controlled voting interests

# Budgets & Financials – Wash.

- Board must [?] adopt a budget annually and within 30 days call a ratification meeting.
- The meeting date must be 14-60 days after mailing of a summary of the budget.
- 50% of voting interests required to *reject* budget.
- No quorum required to ratify the budget.

# Budgets & Financials – Wash.

- If assessments exceed \$50K annually, association's financials must be audited by CPA within 180 days of close of fiscal year.
- An association can dispense with audits upon vote of 67% of votes cast by owners

# Reserve Studies - Oregon

- Declarant must conduct initial reserve study
- Reserve Account is for all items of common property
  - that will require partial or full replacement in 3-30 years;
  - For exterior painting of common property
  - Other items for which association has maintenance burden
- Reserve Account does not include reserves for items that can “reasonably be funded by annual operating assessments”

# Reserve Studies - Oregon

- Boards must annually conduct a study to update
- Owners can reduce or increase future assessments by 75% vote
- Owners can annually choose not to fund by unanimous vote
- Assessments paid to Reserve Account are not refundable to owners

# New Legislative Changes

# Questions?



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CONSTRUCTION DEFECT  
AND  
HOMEOWNER ASSOCIATION ATTORNEYS