

# Board Member Liability

Community Associations Institute  
Managers Only Meeting  
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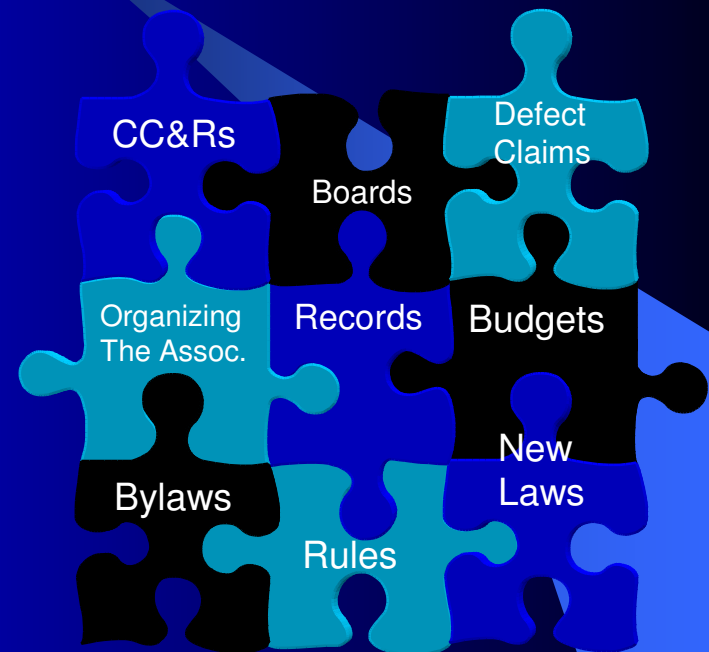
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# Overview

- General Legal Landscape
- Board Member Liability
- Prudent Acts by Boards
- Hot Topics



# General Legal Landscape

- Homeowner Associations
- Condominium Owners Associations

# Organizing the Association

- Washington Home Owners' Act (HOA):
  - Can be a corporation, unincorporated association, *or other legal entity*
- Washington Condo Act (WCA):
  - Shall be incorporated

# Board Member Liability

- Legal Duty of Care of Board Member
- Responsibilities and Obligations to HOA
- Responsibilities and Obligations to Board
- Attorney-Client Privilege
- Insurance Issues

# Duty of Care of Board Member

- Tied duty of care to the Nonprofit Corporation Act
- Better Judgment Rule
  - “...act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board of directors are required to exercise ... ordinary and reasonable care”
- Fiduciary duty for Declarant as member of board

# Board Member Liability (cont.)

## Attorney-Client Privilege

- Board Members must take care to protect the Association's confidences
- Walking the line of disclosure to the owners versus waiver of attorney client privilege

# Prudent Acts by Boards

- Meetings
- Financials
- Record Retention
- Response to Homeowner Issues
- Investigations
- Reserve Studies

# Board Meeting

- 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

# Record Retention

- 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

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

# Response to Homeowner Issues

- Based upon:
  - Declaration
  - Bylaws
  - CCRs
  - Statute
- Uniform application
  - NOT arbitrary or capricious

# Insurance

- Coverage for Directors and Officers
- Limit Liability through governing docs
- Limit Liability through professional management
- Limit Liability by hiring experts – and listening to them
- Organized Meeting Structure
- Reserve Studies

# Resale Certificates

- Resale Certificate (RCW 64.34.425)

Does the Board see the resale certificate?

During the period of Declarant control, is the Declarant signing off on the resale certificate?

Who is responsible for the contents?

# WHY DO MANAGERS GET SUED?

- Perceived/Actual Conflict of Interest
- Mishandling of Funds
- Records Mismanagement
- Contract Duties not Fulfilled
- Unlawful Practice of Law
- Disclosure Failures
- Negligence
- Libel/Slander
- Vicarious liability for acts of the Board
- Other?

# OVERVIEW

- Agency Law and the Manager
- Contract Obligations
- Tort Claims
  - Negligence
  - Intentional Torts
- Regulatory Obligations and Claims
- Avoiding Problems
- Q & A

# AGENCY LAW AND THE MANAGER

- Manager is an Agent
  - Duty of Loyalty
  - Duty of Care
- Third-party Issues
  - Express and Implied Authority
  - Making representations to 3<sup>rd</sup> parties
- Breach of Duties and the Association

# CONTRACTUAL OBLIGATIONS

- Express and Implied Obligations
- Limitations on Liability
- Indemnity and Third-Parties
- Remedies

# TORT CLAIMS AGAINST THE MANAGER

- Negligence
  - Ordinary Negligence
  - Negligent Breach of Agent's Duties
- Intentional Torts
  - Libel/Slander
  - Fraud
  - Conflicts
  - Other

# REGULATORY ISSUES

- Licensing
  - On the Horizon?
  - Implications
- Violation of Community Association Acts
- Unlawful Practice of Law
  - Lien Claims

# AVOIDING PROBLEMS

- Use vendors for ‘cover’
  - Tax advice
  - Accounting Advice
  - Legal
  - Construction/Maintenance/etc.
- Conflicts - disclose, disclose, disclose!
- Proper insurance

# Case Studies

# Q&A

*For more information please contact:*

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