

Key Issues with Governing Documents

Governing Documents and Reserve Study Seminar
March 28, 2006 - Bellingham, WA

Presented by:

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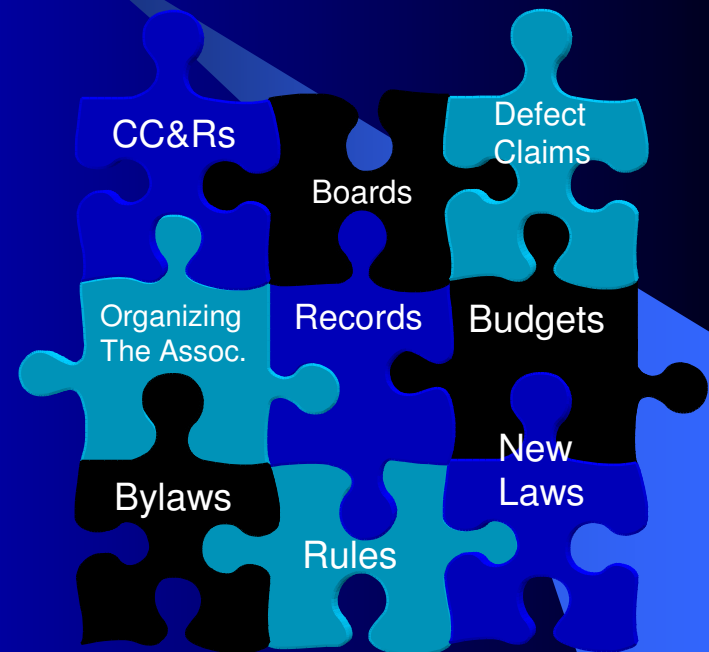
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Association Reserves WA

Overview

- The Mechanics
- Liability Issues
- Hot Topics



The Mechanics

- Governing Documents
- Voting
- Quorums
- Procedural Issues

Governing Document Summary

- Declarations
 - Creates the Condominium
 - Statutory Requirements
 - Amendment Process

Declaration

- Creates the Association
- Acts kind of like a State Constitution
- Must include: name, # of units, description of limited common elements other than those in 64.34.204(4)
- Etc., etc. *See RCW 64 .34.220*

Declaration Amendments

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

Declaration Amendments

- Washington Condo Act:

- Statutory minimum voting percentage of 67% required, unless:
 - Alters size, interest or use of unit, then 90% approval required
- Every amendment must be recorded
- Except to the extent expressly permitted or required by other provisions of this chapter, no amendment may create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or the uses to which any unit is restricted, in the absence of the vote or agreement of the owner of each unit particularly affected and the owners of units to which at least ninety percent of the votes in the association are allocated other than the declarant or such larger percentage as the declaration provides.

Board Meeting - Washington

- Most meetings must be open to owners [RCW 64.38.035(2)] (Not addressed in Condo Act)
- 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

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% (20% for Condo Assoc.) of owner voting interests
 - Notice must be *hand delivered or mailed* to the address of each owner and any other owner-designated address

Bylaws Wash: Required elements

- 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 - 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 equals # of people entitled to cast 25% 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 64.34.336
- Board Meeting: Quorum equals 50% of voting members
- Proxies and Absentee Ballots – check the governing documents

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

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

Liability Issues

- Insurance liability and requirements
- Board Members
- Property Managers
- Limited & Common Elements

Board Member Liability

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

Prudent Acts by Boards

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

Board Member Liability (cont.)

- Case Studies
 - Responsibilities and Obligations to HOA
 - Responsibilities and Obligations to Board
- Attorney-Client Privilege

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

Response to Homeowner Issues

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

Investigations

- New Association
- Nearing statute of limitations
- Upon evidence of problems
 - Reserve Study Expert
 - Homeowner
 - Property Mgr
- Ostrich Syndrome

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

Hot Topics!

- Parking
- Pets
- Rental Caps
- Rule Enforcement
- Smoking
- Others?

And....

Maintenance Plans

Q&A

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