

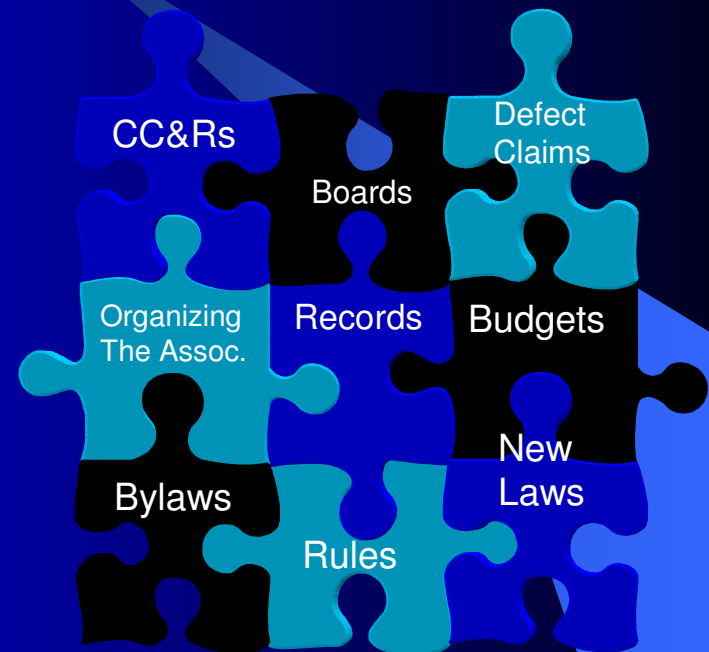


# Association Board Membership: How to Avoid Making a D&O Insurance Claim

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# Overview

- General Legal Landscape
- Board Member Liability
- Prudent Acts by Boards
- Hot Topics
- Legislative Action
- Maintenance Plans
- Governing Document Summary



# General Legal Landscape

- Homeowner Associations
- Condominium Owners Associations
- “New” or “Old” Act

# 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))

# 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

# Bylaws

- 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: 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

# Board Member Liability

- Legal Duty of Care of Board Member
- 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

# Prudent Acts by Boards

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

# Board Meetings

- Most meetings must be open to owners
- 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

- 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

# 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
  - Additional reqt's found in ORS 100.407

# 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

# Quorum

- Quorum equals # 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 100.407

# Budgets & Financials

- Bylaws must specify the process to adopt the budget
- 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 100.412

# Budgets & Financials

- 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

# Record Retention

- Permanently retain all documents received from the developer at the turnover meeting – 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

- 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

# Response to Homeowner Issues

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

# Investigations

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

# Construction Defect

- 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

# Reserve Studies

- 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

- 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

# Hot Topics

- Insurance
- Smoking
- Rental Caps
- Rule Enforcement
- Others?

# Rules and Enforcement

- 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)]

# Maintenance Plans

- Oregon only
- New law effective 1/1/06
- Requires 30-year plan
  - “The reserve study shall include a 30-year plan for the maintenance, repair and replacement of common elements and association property...”
- Amendment to current reserve study statutes

# Governing Document Summary

- Statutory Requirements
- Amendment Process
- Disclosure Requirements for Sale of Units

# 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

# Declaration Amendments

- Oregon Condo Act:
  - Amendment requires at least 75% or greater approval (if in declaration) of owners required.
  - Amendments are effective on recording

# Bylaw Amendments

- Oregon Condo Act:
  - Amendment requires approval by majority of unit owners, unless age, pet, # of persons, or rental of units (75% approval)
  - Requires Real Estate Commissioner if in first 5 yrs
  - Effective upon approval

# Disclosure Requirements

- Oregon
  - Multiple disclosure statutes (ORS 100.720-.750)

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