

Governing Documents and Related Liability

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Liability

- Litigation vs. Liability
 - Easy to sue, harder to establish liability.
 - You want to avoid both.
- Trouble Typically Stems From:
 - Ignorance of the law;
 - Failure to follow Declaration, Bylaws, and Rules and Regulations;
 - Exceeding authority;
 - Acting beyond your expertise;
 - Lack of communication; or
 - The appearance of impropriety.

Liability Hot Spots

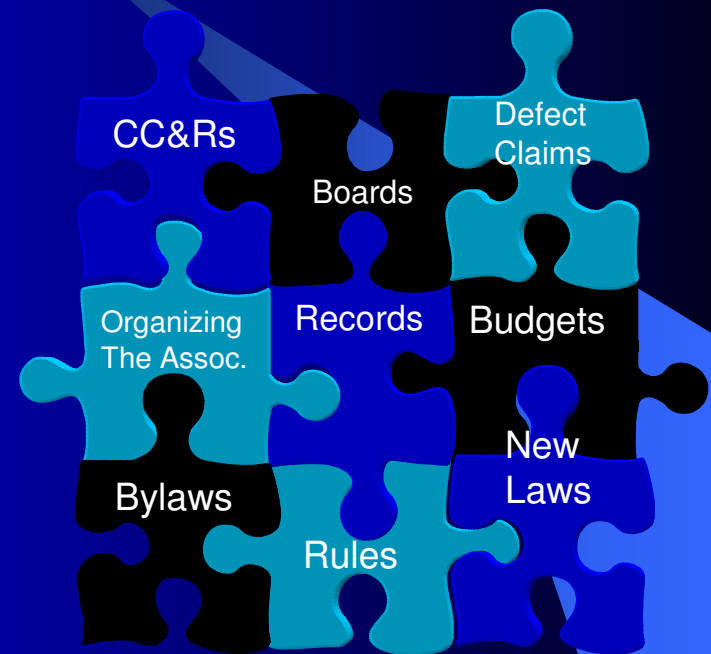
- Transition of Control from Declarant
 - New board & unfamiliar documents;
 - Audit is required;
 - See RCW 64.34.308 for transition details; and
 - Obtain documents
- Big Ticket Items:
 - Special Assessments;
 - Legal Deadlines;
 - Money Mismanagement.
- Trouble or Troubled Homeowners
 - The 10% rule.

Avoiding Liability

- Follow your documents!
 - As a board member or manager you DO NOT have the authority to deviate from your Declaration and Bylaws.
- As board members, know the extent of your authority.
- Shift Liability – also known as hiring professionals.
 - Professional management;
 - Accountant;
 - Legal representation.
- Do not assume you know enough.
- Be very careful if you are going to ignore professional advice.

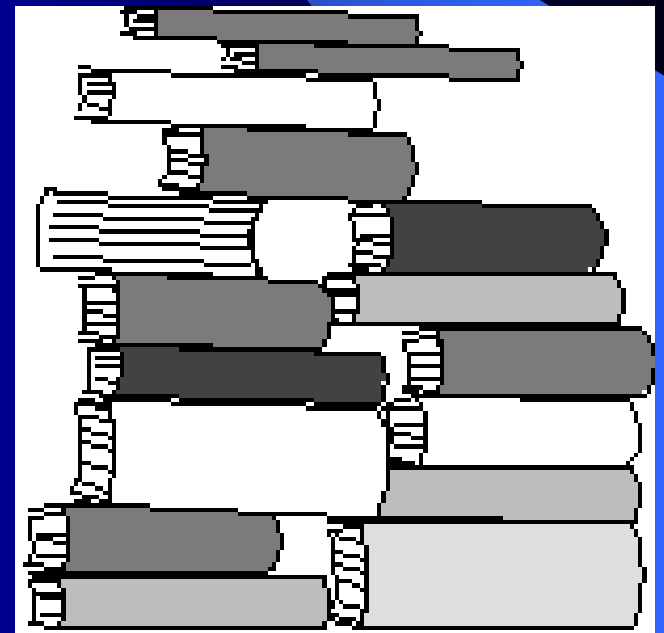
Overview

- Sources of Authority & Governing Documents
- Powers of Association and Board
- Common Procedural Issues
- Board Member and Property Manager Liability



Sources of Authority & Governing Documents

- Primary Statutes
- Other Statutes and Common Law
- Governing Documents
- Human Resources



Primary Statutes (COA & HOA)

- Condominium
 - “Old” Horizontal Property Regimes Act (RCW 64.32) (1963)
 - “New” Washington Condo Act (RCW 64.34) (July 1, 1990).
- HOA
 - Homeowners’ Association Act (RCW 64.38)
- When in conflict, these statutes control over corporation acts

Other Statutes & Common Law

- Condos
 - RCW 64.34.070 – Condo Act trumps when conflict, but other laws supplement
 - Nonprofit Corporations Act (RCW 24.03) (trumped by Condo Act)
- HOAs
 - Little other guidance if not a separate entity – no provision re what trumps
 - Nonprofit Corporations Act (RCW 24.03)
- Law of Servitudes
- These laws may fundamentally impact your governing documents. Consult an attorney.

Statute vs. Declaration

- Example of how the statute may modify your declaration.

“The declaration may not impose limitations on the power of the association to deal with the declarant which are more restrictive than the limitations imposed on the power of the association to deal with other persons.”

RCW 64.34.304(2)

Governing Documents

- Articles of Incorporation
- Declaration (“CC&Rs”)
- Bylaws
- Rules & Regulations



Articles of Incorporation

- Establishes the Association as a profit or nonprofit corporation. Required by Condo Act RCW 64.34.300
- Very little information for governance – intended to be extremely broad
- RCW 24.03.025 states list of things it must contain:
 - Name, duration, purpose, definition and limitations of power, liability, number of directors, address, incorporator
- Task force considering change to allow other forms of ownership such as LLC

Declaration or CC&Rs

- Creates the Condominium (COA only)
- Must meet statutory requirements.
See RCW 64.34.216
- Defines the Common Areas and Organization of the Association
- Allows for Amendments
- When in conflict, trumps bylaws, but is trumped by HOA or Condo Act (unless Condo Act specifies it is only a default rule)

Bylaws: (HOA & COA)

- Trumped by Declaration, but trumps statutes if declaration so provides
- Board Members and Officers: Number, qualifications, powers, duties, terms of office, and manner of electing and removing
- Delegation
- Authority of officers to prepare, execute and record amendments to governing docs
- Amending Bylaws
- Catch-all: Anything else the association deems necessary and appropriate

Rules & Enforcement

- Trumped by Statutes, Declarations and Bylaws
- Overall Considerations for Rules
 - Reasonable, expected rules
- Recommendations:
 - Bylaws set enforcement process
 - Due Process
 - Notice to Owners - adopt and mail fine schedule to each owner prior to imposing fines
- Failures to comply may be enforced by:
 - Fines
 - Termination of Access/Use of Common Property



Rules and Enforcement (cont'd)

- Fines should be treated as unpaid assessments
 - Have an established process in your governing documents.
 - Allows for lien claim against owner property.
 - Can pursue as ordinary action for money judgment w/o waiving lien rights.
- Alternative Resolution – Consider:
 - Requiring mediation before suing;
 - Allowing for a 'Permit' / 'Variance' as a means to selectively allow a technical violation; and
 - Attorneys' Fees.

Human Resources

- Property Manager
- Consultants (reserves, defects)
- Construction Defect Counsel
- General Counsel
- Accountants



Powers of the Association Generally

WCA & HOA Act are similar (compare: RCW 64.34.304 & RCW 64.38.020).

The following are some of those powers conferred by the WCA:

- Bylaws & Rules: adopt and amend
- Budgets & Expenditures, Reserves & Assessments: adopt and amend
- Agents: hire, discharge, contract with managing agents, other employees, agents and independent contractors.

Power of the Association cont'd.

- Litigation: institute, defend, intervene in litigation on behalf of 2 or more unit owners on matters affecting the condominium
- Contracts: make contracts and incur liabilities
- Maintenance & Repair: regulate the use, maintenance repair, replacement and modification of common elements
- Property Rights: grant easements, leases, licenses through or over the common elements
- Rents: impose and collect any payments, fees or charges for the use, rental or operation of any common element – other than ltd. common elements

Powers of the Association cont'd.

- Assessments and Fines - can levy fines only upon notice and opportunity to be heard and after all other procedures set forth in governing docs have been followed
- Charges for amendments, resale certificates and statements of unpaid assessments (WCA)
- Indemnification of officers and board of directors and maintain D&O liability insurance (WCA)
- Exercise any other powers conferred by the Declaration and Bylaws.
- *Exercise any other powers necessary and proper for the governance and operation of the association.*

Obligations of the Board

- Govern the Association consistent with duty of care to “...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 appointed board members**
- Authority to establish policies and supervise their implementation
- Often have a right to enter individual units in emergencies.
- RCW 64.34.308 – Duties and powers of WCA Board
- RCW 64.38.025 – Duties and powers of HOA Board

Common Procedural Issues

- Meetings
- Amendments
- Budgets & Special Assessments
- Initiating Litigation

Board Meetings (HOA)

- For HOAs, most meetings must be open to owners under RCW 64.38.035(2) (Not addressed in Condo Act).
- Executive session meetings may be for purpose of privilege and privacy including such things as consultation or communication with counsel, personnel matters, governing docs violations, owner liability, discuss likely or pending litigation



Association Meetings

- 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% (HOA) or 20% (COA) of owners' voting interests
 - Notice must be *hand delivered or mailed* to the address of each owner and any other owner-designated address
- Notice (HOA) (see Decl/Bylaws for COA)
 - between 14 and 60 days
 - Time and place, items on the agenda and votes

Meeting Procedures

- Association Meeting Quorum:
 - # 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) (WCA)
 - 34% of the votes of the association are present or by proxy (RCW 64.38.040) (HOA)
- Board Meeting Quorum: 50% of voting members present at beginning of meeting (WCA)
- Proxies, Absentee Ballots, voting by mail - check the governing documents

Declaration Amendments

- HOA
 - 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
- COA
 - 67% Homeowner Approval unless alters size, interest or use of unit, then 90%.

Bylaws Amendments

- Declaration to say how to amend bylaws
- Consult Bylaws

Rules Amendments

- Consistent with above principles
- Advise consulting Association
- Done by Board Resolution
- Notice to all Owners prior to implementation of penalties

Budgets (WCA & HOA)

- Within 30 days after adopting proposed budget, the Board must:
 - provide a summary of the budget to all unit owners; and
 - set a date for a meeting to ratify the budget.
- The ratification meeting must occur between 14 and 60 days after mailing the summary
- No quorum required to ratify the budget.
- If rejected or required notice not given, then the budget last ratified shall be continued.
- Special Assessments levied by board and treated like budgets



Initiating Litigation

- 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 Defects are Not Capital Improvements
- Declaration or Bylaws may contain other requirements – *read these carefully*

Q&A

THANK YOU

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