

Association Duties, Powers & Liability

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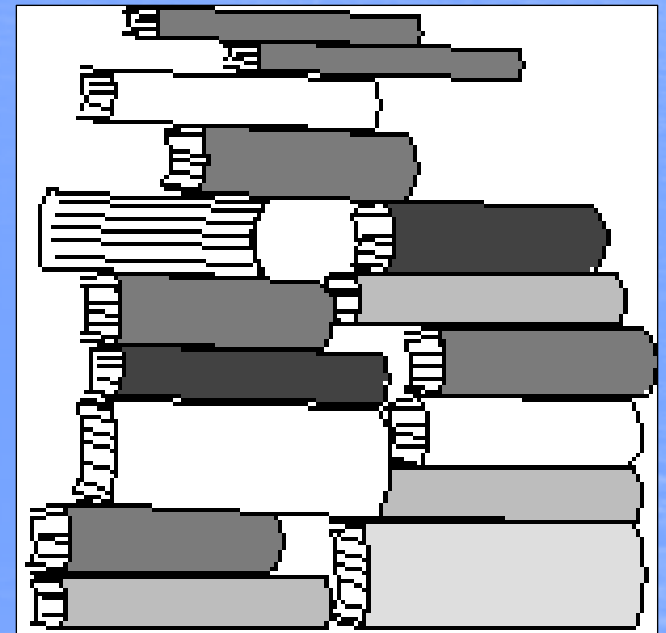
Overview

- Sources of Association Authority
- Powers & Duties of the Association
- Powers & Duties of the Board
- Board and Manager Liability



Sources of Authority

- Statutes
- 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)

Conflicts of Laws

- **Condominiums**
 - RCW 64.34.070
 - Nonprofit Corporations Act (RCW 24.03)
- **HOAs**
 - Nonprofit Corporations Act (RCW 24.03)
 - Little other guidance if not a separate entity

Governing Documents

- Declaration / Conditions, Covenants & Restrictions
- Articles of Incorporation
- Bylaws
- Rules & Regulations



Declaration or CC&Rs

- **Creates the Condominium (COA only)**
- **Defines the Common Areas and Organization of the Association**
- **Must meet statutory requirements**
- **Amendments**

Bylaws: Required Elements (HOA & COA)

- Unless otherwise provided in the other governing documents!
- 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

- 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**
 - Allows for lien claim against owner property
 - Can pursue as ordinary action for money judgment w/o waiving lien rights
- **Alternative Resolution**
 - Association must offer mediation before suing
 - Association may use a 'Permit' / 'Variance' as a means to selectively allow a technical violation
 - 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.

Powers of the Board

- 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

Liability

- Board Members
- Property Managers



Duty of Care of Board Members

- WCA
 - If appointed by Declarant, the care required of fiduciaries of the unit owners
 - If elected by unit owners, then ordinary and reasonable care.
- HOA
 - Board members shall exercise the degree of care and loyalty required of an officer or director of a corporation.
- Business judgment rule / Fiduciary duty

Common Duties of the Association & Board Giving Rise to Liability

- Meetings
- Budgets
- Records & Financials
- Amendments
- Suspected Defects & Investigations
- Disclosures
- Reserve Studies

Board Meeting (HOA)

- 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 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% (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
- Notice (HOA)
 - 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 and Absentee Ballots – check the governing documents

Budgets (WCA & HOA)

- Within 30 days after adopting proposed budget, the Board must:
 - 1) provide a summary of the budget to all unit owners; and
 - 2) set a date for a meeting to ratify the budget.
- The meeting to consider ratification must be had 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.



Records & Financials

- Manager or Association duty to keep financial and other records sufficiently detailed to enable the association to fully declare to each owner the true statement of its *financial* status
- Manager must return all original documents/records to Association upon termination or request of Board. Manager entitled to keep a copy of the records
- All owners or their mortgagees entitled to inspection of records upon advance notice
- No unlisted phone number of any owner can

Records & Financials Cont'd.

- Association shall prepare annual financial statements.
 - HOA: Assessments of \$50,000 or more must be annually audited by a CPA.
 - COA: If 50 or more units, then CPA must annually audit.
 - An association can dispense with audits upon vote of 67% of votes cast by owners
- No commingling of Association's funds – funds must be kept in Association-named account.

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

Declaration Amendments (COA)

- Statutory minimum voting percentage of 67% required, *unless* amendment alters size, interest or use of unit, then 90% approval required
- Every amendment must be recorded:
 - 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 Member Liability

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

Common Contexts for Board Member Liability

- Powers and Duties
 - Rule Enforcement
 - Meetings
 - Record Retention & Financials
 - Amendments
- Response to Homeowner Issues
- Suspected Defects & Investigations
- Disclosures
- Reserve Studies

Response to Homeowner Issues

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

Defect Investigations

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

Disclosure Requirements

- Resale Certificate (RCW 64.34.425)



Property Manager Liability

- 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

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