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# Governing Documents & Liability

Presented By:

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# Overview

- Sources of Authority & Governing Documents
- Powers of Association and Board
- Areas to use Caution



# Sources of Authority & Governing Documents

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

# Primary Condo Statutes

- Condominium
  - “Old” Horizontal Property Regimes Act (RCW 64.32) (1963)
  - “New” Washington Condo Act (RCW 64.34) (July 1, 1990).
- When in conflict, these statutes control over corporation acts (RCW 64.34.300)

# Other Statutes & Common Law

- RCW 64.34.070 – Condo Act trumps when conflict, but other laws supplement
  - Nonprofit Corporations Act (RCW 24.03) (trumped by Condo Act)



# Governing Documents

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

# Articles of Incorporation

- Establishes the Association as a profit or nonprofit corporation as 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 Condo Act (unless Condo Act specifies it is only a default rule)

# Bylaws

- 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



# Bylaws Amendments

- Consult Declaration
- Consult Bylaws



# Rules Amendments

- Consistent with above principles
- Advise consulting Association members
- Normally done by Board Resolution
- Notice to all Owners prior to implementation of penalties
- Prior to imposing penalties or fines for violations, all Association members must be provided a copy of the rules, and a schedule of the fines.

# 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 – must adopt and mail fine schedule to each owner prior to imposing fines (RCW 34.34.304(k)).
- Failures to comply may be enforced by:
  - Fines
  - Check Declaration (liens, advance deposits, foreclosure)

# 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

# Powers of the Association Generally

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.*

# 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.

# 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 as member of 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

# Human Resources

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



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# Association Liability



# Common Duties of the Association & Board Giving Rise to Liability

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

# 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
    - 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
- Decl/Bylaws for COA
  - between 14 and 60 days for budget meeting
  - Between 10 and 60 for regular or special meeting
  - 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)
- Board Meeting Quorum: 50% of voting members present at beginning of meeting (WCA)
- Proxies, Absentee Ballots, voting by mail - check the governing documents

# Budgets

- 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 held between 14 and 60 days after mailing the summary (notice of meeting)
- 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 (or authorized agents) entitled to inspection of records upon advance notice.
- No unlisted phone number of any owner can be released.
- Use caution releasing other personal information of members.

# Records & Financials Cont'd.

- Association shall prepare annual financial statements.
  - 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 (COA)

- Statutory minimum voting percentage of 67% required, *unless* amendment alters size, interest or use of unit, then 90% approval required
  - 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. RCW 64.34.264(4)
- Every amendment must be recorded



# 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

# Defect Investigations

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

# 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*



# Disclosure Requirements

- Resale Certificate (RCW 64.34.425)

# Q&A

THANK YOU

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