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Governing Documents 101, Discussion of Board Liability, & Committee Roles and Limitations

Presented By:

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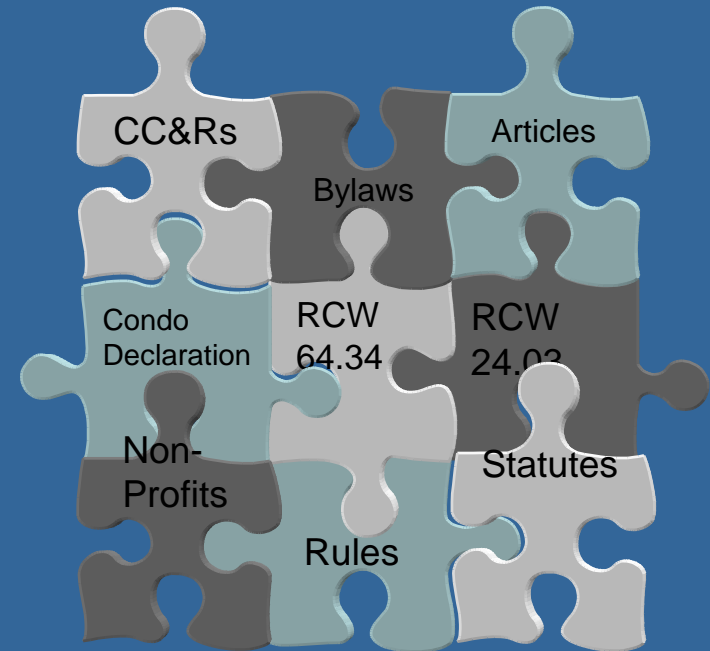
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Overview

- **Governing Documents:**
 - What are they, what are the differences between them, what is the “pecking order” of the governing documents, and why do we have to follow them
- **Board Liability**
 - Standard of Care
 - Common Problem Areas
- **Committees**
 - The Law
 - Best Practices



Governing Documents

- What are they?
 - Condominiums:
 - Condominium Declaration
 - Condominium Association Articles of Incorporation
 - Condominium Association Bylaws
 - Rules and Regulations
 - HOAs:
 - Covenants, Conditions & Restrictions
 - Homeowner Association Articles of Incorporation
 - Homeowner Association Bylaws
 - Rules and Regulations

Condominiums – Creatures of Statute

- “Old” Horizontal Property Regimes Act (RCW 64.32) (1963)
- “New” Washington Condo Act (RCW 64.34) (July 1, 1990).
- Washington Nonprofit Corporation Act (RCW 24.03)
- When in conflict, condo statutes control over corporation acts (RCW 64.34.300)

Homeowners' Associations & CC&Rs

- Homeowners' Associations Act (RCW 64.38)
- Washington Nonprofit Corporation Act (RCW 24.03)
- HOA Act addresses very few association issues when compared to the Condo Act
- Real Property Covenants (CC&Rs)
 - A covenant is a written promise restricting an owner's use of his or her property for the benefit of other property.
 - HOA CC&Rs similarly burden and benefit each property in the HOA.
 - CC&Rs normally require an Association be created to administer certain functions, such as collection of assessments, budgeting, caring for common areas, etc.

Condominium Declarations

- Condo formed upon *RECORDING* of Declaration and Survey Map and Plans. (RCW 64.34.200)
- Why is *RECORDING* important?
 - Because it places purchasers on notice of Dec's contents
 - Generally, it takes away the "Well, I didn't read that boring document so I didn't know that I had to _____" excuse
- Must meet minimum statutory requirements (RCW 64.34.216)
 - Minimum requirements allow a fair amount of drafting freedom, which results in a variety of different condominium declarations in Washington
 - Defines Common Areas and Organization of Association, among other things
 - Allows for Amendments
 - When in conflict, Declaration trumps Bylaws, but is trumped by Condo Act.

Condo & HOA 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

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 (subject to Declaration)
- Amending Bylaws
- Catch-all: Anything else the association deems necessary and appropriate

Rules and Regulations

- Condos - Authorized by Condo Act as an Association power (RCW 64.34.304(a)) *UNLESS* declaration provides otherwise
- HOAs – Authorized by HOA Act as an Association power (RCW 64.38.020) *UNLESS* CC&Rs provide otherwise
- Rules and Regulations should supplement Declaration, CC&Rs and Bylaws
- Normally contain the day-to-day, detailed guidelines that promote good behavior, safety, and Association harmony
- Oftentimes, Declaration or CC&R provisions will state “...this section may be supplemented by rules adopted by the Board.”



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

- Board members are not required to know *EVERYTHING* ... but, Board members should consider consulting with professionals who do, such as:
 - 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.



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

COMMITTEES

One statute says it all...RCW 24.03.115:

If the articles of incorporation or the bylaws so provide, the board of directors, by resolution adopted by a majority of the directors in office, may designate and appoint one or more committees each of which shall consist of two or more directors, which committees, to the extent provided in such resolution, in the articles of incorporation or in the bylaws of the corporation, shall have and exercise the authority of the board of directors in the management of the corporation: PROVIDED,

That no such committee shall have the authority of the board of directors in reference to amending, altering or repealing the bylaws; electing, appointing or removing any member of any such committee or any director or officer of the corporation; amending the articles of incorporation; adopting a plan of merger or adopting a plan of consolidation with another corporation; authorizing the sale, lease, or exchange of all or substantially all of the property and assets of the corporation not in the ordinary course of business; authorizing the voluntary dissolution of the corporation or revoking proceedings therefor; adopting a plan for the distribution of the assets of the corporation; or amending, altering or repealing any resolution of the board of directors which by its terms provides that it shall not be amended, altered or repealed by such committee.

The designation and appointment of any such committee and the delegation thereto of authority shall not operate to relieve the board of directors, or any individual director of any responsibility imposed upon it or him by law.

Sample Washington Case:

Hartstene Pointe Mntc. Assn. v. Diehl 95 Wn. App. 339, 979 P.2d 854 (1999).

HOA ACC committee found to be not properly constituted under statute requiring “two or more directors” of nonprofit corporation to be on a committee appointed by board of directors, and under CC&Rs referring to ACC “composed of three members,” where committee had five members and only one was a director.

Held: the ACC’s denial of owner’s application to cut down tree was invalid.

Lesson: even if the Association has the authority to prevent the cutting of the tree, if the Association exercises the power incorrectly, or impermissibly grants the power to a committee, the decision is voidable.

Q&A

THANK YOU!

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