



BARKER · MARTIN

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Oak Harbor, WA

# **Board Boot Camp:**

**Governing Documents 101**

**Assorted Topics on Association Challenges in Today's Economy**

Presented by Attorneys

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# Overview

- 5:30 – 5:40:** Welcome and Introductions
- 5:40 – 6:20:** Governing Documents 101 & Discussion of Board Liability & Common Problem Areas
- 6:20 – 6:30** Q&A
- 6:30 – 6:40:** Break
- 6:40 – 6:55:** Construction Defect & Warranty Topics
- 6:55 – 7:20:** Association Challenges in Today's Economy: Effective Covenant Enforcement and Assessment Collection Basics
- 7:20 – 7:30:** Q&A and Wrap-up

# DISCLAIMER

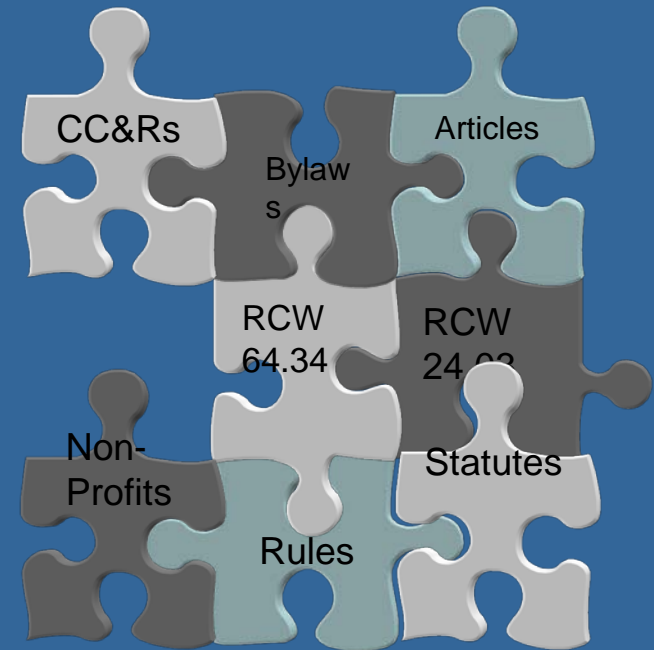
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We urge you to consult your own attorney concerning your particular factual situation and any specific legal questions you may have.

No attorney-client relationship attaches as a result of any exchange of information.

# CENTRAL TOPIC: Governing Documents 101

- Governing Documents:
  - What are they?
  - What are the differences between them?
  - What is their order of importance?
  - Why do we have to follow them?



# Governing Documents

- **Condominiums:**
  - Condominium Declaration (*Recorded*)
  - Association Articles of Incorporation (*Filed w/ Sec'y of State*)
  - Association Bylaws
  - Rules and Regulations
- **HOAs:**
  - Covenants, Conditions & Restrictions (*Recorded*)
  - Association Articles of Incorporation (*Filed w/ Sec'y of State*)
  - Association Bylaws
  - Rules and Regulations

# Condominiums – *Creatures of Statute*

- “Old Act Condos” governed by **Horizontal Property Regimes Act** (RCW 64.32) (1963)
- “New Act Condos” governed by **WA 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)

# Homeowner Associations & CC&Rs

- Homeowner Associations Act (RCW 64.38)
  - Very limited in the topics it addresses
- Washington Nonprofit Corporation Act (RCW 24.03)
- 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
  - **Similarly burden and benefit each property**
  - 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 and Limited Common Areas, Units, Powers of Association, Collection tools, among other things
  - Allows for Amendments
  - When in conflict, Declaration trumps Bylaws, but is trumped by Condo Act.



# Condo & HOA Articles of Incorporation

- They establish the Association as a profit or nonprofit corporate entity (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 Articles must contain:
  - Name, duration, purpose, definition and **limitations of power**, liability, number of directors, address, incorporator
- Association can be for-profit, a non-profit, or even a mutual and miscellaneous corporation (RCW 24.06).  
**Read your Articles!**

# Bylaws

- Trumped by Declaration, but in certain situations may trump statutes if Declaration so provides
- Directors and Officers: Number, qualifications, powers, duties, terms of office, meetings, quorum, and manner of electing and removing
- Delegation to Committees
- 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 (but not contradict) 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 something like: “...this section may be supplemented by rules adopted by the Board.”

## CENTRAL TOPIC:

# Association & Board Member Liability

- Legal Duty of Care of Board Members (COA & HOA)
- Common Duties Giving Rise to Liability

# Board Duties - Condos

- 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**” RCW 64.34.308(1)
- *Fiduciary duty* for Declarant as member of the board, and for Declarant-appointed board members. Id.
- Authority to establish policies and supervise their implementation. Often have a right to enter individual units in emergencies, and to maintain and repair common elements

# Board Duties - HOAs

- “Except as provided in the association’s governing documents or this chapter [RCW 64.38], the board of directors shall act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board of directors **shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 24.03 RCW.** RCW 64.38.025 (emphasis added)
- Business Judgment Rule

# Business Judgment

- Directors should exercise good business judgment and perform their duties (1) in good faith; (2) adhering to the applicable standard of care; (3) in a manner reasonably believed to be in the best interests of the Association.
- Act in good faith. Act in the best interests of the Association. Be informed. Be not wasteful. Watch for personal conflicts of interest!

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

- Meetings
- Budgets
- Records
- Committees
- Warranties & Defects



# Association Meetings

- Condo Annual and Special Meeting
  - How may a meeting be called?
  - **Notice** must be *hand delivered or mailed* to the address of each owner and any other owner-designated address
- HOA Meetings
  - Notice to owners must be hand delivered or sent via first class U.S. mail 14-60 days in advance of meeting. Notice must contain certain info. See RCW 64.38.035. Check Gov. Docs
- Quorum
  - Condo: 25% present in person or by proxy *at start of meeting* unless the Bylaws or Declaration provide a different standard. RCW 64.34.336 (WCA)
  - HOA: 34% present in person or by proxy at start of meeting unless the governing documents specify a different percentage RCW 64.38.040 (HOA Act)

# Budgets

- COA: The Board, within 30 days after adopting a proposed budget, must:
  - 1) provide a summary of the budget to all unit owners; and
  - 2) set a date for a meeting to ratify the budget between 14 and 60 days after mailing notice of summary
- No quorum required to ratify
- If rejected or required notice not given, then the budget last ratified shall be continued
- HOA: Read your CC&Rs Do they comply with RCW 64.38.025? If not, consult legal counsel

# Records

- COA: Duty to keep financial and other records sufficiently detailed to enable the association to comply with RCW 64.34.425, the resale certificate statute. RCW 64.34.372
- HOA: Association or manager must keep financial and other records sufficiently detailed to enable the Association to fully declare the true statement of its financial status. RCW 64.38.045(1)
- 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 (HOA) Use caution releasing other personal information of members, or other privileged information
- **No commingling of Association's funds – funds must be kept in Association-named account**

# Committee Roles & Limitations

For nonprofit corporations: **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...
- Committee does not and may not operate to relieve the board of directors, or any individual director, of any responsibility imposed upon him or her by law
- Use caution if a committee exercises Board authority!

## Sample Washington Case:

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

Basic Facts: 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 take a certain action, if the Association exercises the power incorrectly, impermissibly grants the power to a committee, or if committee is not properly constituted, the decision may be voidable if challenged.



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Q&A

BREAK

# CENTRAL TOPIC:

## Warranties & Defects

- Condo versus HOA warranties
- Statutory implied warranty for condos under Condo Act, RCW 64.34.445
- Generally runs 4 years from first sale
  - Most common exception is one year from transition
- No implied warranties for HOAs, but may be express or implied warranty of habitability
- Duty to maintain, repair & replace
- Implied duty to investigate

## CENTRAL TOPIC:

# Association Challenges in Today's Economy:

## Eight Steps to Effective Covenant Enforcement & Collection Basics

### 1. Know what laws apply

- Condos: Old Act (RCW 64.32) or New Act (RCW 64.34)
- HOA: HOA Act (RCW 64.38)
- Corporate Statutes
- Fair Credit Reporting Act, ADA, FDCPA, FHA/HUD
- Tip: check your Articles, Bylaws, and CC&Rs or Declaration—an association could be a miscellaneous & mutual corporation, or a for-profit, or some other form of entity



## 2. Know Your Governing Documents

- What are they? Why are they important? What is their order of importance? What collection and enforcement “tools” are available???
- Declaration (and Survey Map) , CC&Rs
- Association Articles, Bylaws, Rules & Regs
- Collection and Enforcement Tools:
  - Applicable Statutes
  - Interest? Late fees? Fines?
  - Lawsuit for Injunctive relief?
  - Judicial and/or non-judicial Foreclosure?
  - Lawsuit for a Money Judgment?

## 3. Assess Trends, Identify Issues, Create Action Plan

- What's the Problem?
  - Increased rules violations?
  - Assessment collection problems?
  - Low meeting participation? Budget shortfalls? Parking? Pets?
- Brainstorm & Consider Options
  - Get your ducks in a row (get the easy stuff right!!!)
  - Develop an action plan
- Read your Governing Documents
  - Oftentimes, the tools you need are right under your nose. Does the Declaration already address the issue? Can you accomplish what you need with rules and regulations? Or, will you need to amend your declaration, bylaws or articles?

## 4. Develop Clear Rules and Regulations

- Condos - Authorized by Condo Act *UNLESS* declaration provides otherwise. RCW 64.34.304(a)
- HOAs – Authorized by HOA Act *UNLESS* CC&Rs provide otherwise. RCW 64.38.020
- Rules and Regulations may supplement , but not contradict,
- Normally contain the day-to-day, detailed guidelines that promote good behavior, safety, and Association harmony
- Look for an invitation! Declaration or CC&R provisions often state “...**this section may be supplemented by rules adopted by the Board**”
- Are your rules too complicated? Is it easy for owners to figure out how to comply? Do they contradict the Declaration?

## 5. Adopt a Fine and Fee Schedule

- Reasonable fines and fees
- Look to local municipal fines and fees
- Look to past association actions
- Talk to your manager and attorney
- Look at your Declaration or CC&Rs (if there are specific amounts, or rates of interest, you must observe them)
- Disseminate to owners in advance – proper notice is very important!



**“No person shall be . . . deprived of life, liberty or property, without due process of law . . .”**

U.S. Const. Amendment V.

**Group Discussion Topic:**

How does the concept of *Due Process* apply to association enforcement?

## 6. Develop Notice & Hearing Procedures

- Both the Condo Act and the HOA Act require an owner be given notice and opportunity to be heard before a fine may be levied against them.
  - See, RCW 64.34.304(1)(k); 64.38.020(11)
- Timelines
  - Request hearing within \_\_\_\_\_ days, hearing will be scheduled within \_\_\_\_\_ days, written decision within \_\_\_\_\_ days, time allotted for hearing, verbal testimony and/or written statement
- Administrative Guidelines
  - Complaints must be in writing and delivered to secretary/manager
  - Provisions for board member recusal
  - Listen, do not debate!!

## 7. Be Proactive

- Review governing documents and rules regularly
- Make sure new owners/occupants are provided governing documents
- Set policy ahead of problems
- Provide updates on Board involvement
- Send reminders on common issues
- Act swiftly, consistently and with certainty

### **Group Discussion**

Ideas? What works?

## 8. Use Professionals and Other Experts

- Directors are not required to know *EVERYTHING* ... but, directors should consider consulting with professionals, such as:
  - Professional Association Manager
  - General Counsel & Construction Defect Counsel
  - Reserve Study Specialists
  - Accountants
- CC&Rs and the law often expressly provide that the Board may consult with agents and attorneys as needed
- Consider the best interests of the Association



# CENTRAL TOPIC:

## Assessment Collection Basics

- For most Associations, Assessments are the personal obligation of the owner of a unit, *and* they constitute a lien against the property.
  - RCW 64.34.364. HOAs check your CC&Rs & RCW 64.38.020;
- Are fines, fees, legal fees, and interest *assessments* that may be collected as such?
- Does your Association keep accurate ledgers?
- In consultation with your manager and attorney, develop policies regarding:
  - Late fees and interest—when and how much \$
  - Lien recording—when and how much \$
  - Demand letters—when and how much \$
  - Referral to legal counsel—when and how much \$

# Assessment Collection Basics Cont.

- Foreclosure
  - Can the Association foreclose its lien? Has the lien been recorded?
  - Types of Foreclosure: Judicial / Non-judicial (trustee's sale)
- Lawsuit for Money Judgment
  - When? How much?
- One-Action Rule. An Association cannot simultaneously sue and foreclose to collect the same debt at the same time.
  - How to choose – talk to your lawyer!
- Bankruptcy – Automatic “Stay” – All collection efforts must stop immediately – talk to your lawyer!



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# Q&A

THANK YOU!

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