

Community Associations Journal

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Changing of the Guard: A Survival Guide for New Board Members

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Legally Speaking

Transition from Declarant/Developer to HOA

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Condominium declarations and other residential community declarations typically provide for a period of declarant control that permits the declarant/developer to appoint or remove the association's board of directors and officers and authorizes the declarant to approve or veto the board or association's actions. At a certain point, the declarant must turn over control of the board and the association to the unit owners. The timing of this transition may vary, but the Washington Condominium Act requires the declarant to transfer control of the association no later than sixty days after 75% of the units have been conveyed to someone other than the declarant. See RCW 64.34.308(4)(b). The Washington Homeowners' Associations Act (RCW 64.38) does not contain a similar requirement, which means homeowners' associations should look to their governing documents to determine when and how turnover should occur.

The termination of declarant control raises a variety of legal issues for the association. First and foremost, the unit owners must elect a board of directors of at least three members. This election must occur within 30 days after declarant control has been terminated. See RCW 64.34.308(6). The board of directors then appoints the officers of the association.

The newly elected board should take time to familiarize itself with the association's rights upon turnover. One of these rights is the right to have the declarant deliver to the association all of the association's property that is held or controlled by the declarant. This includes a copy of the recorded declaration and any amendments thereto, the certificate of incorporation, the articles of incorporation, the association's bylaws, any rules and regulations that have been adopted, the minute books, the association's financial records, all association funds, all tangible property of the association, a copy of the declarant's plans and specifications used in the construction of the condominium, the association's insurance policies, certificates of occupancy, permits issued for the condominium, any written warranties that are still in effect, any qualified warranty issued to the association, a roster of the unit owners and eligible mortgagees, and any leases or contracts that the association is a party to. The declarant must deliver these items to the association within sixty days after the termination of declarant control. Further details on these turnover requirements can be found in RCW 64.34.312(1).

The newly elected board also takes over a variety of responsibilities and obligations. These responsibilities include preparing and approving budgets, levying and collecting assessments, maintaining proper insurance coverage, enforcing the governing documents, enforcing use and occupancy restrictions, maintaining and repairing

areas of common responsibility, entering into agreements on behalf of the association, assuring compliance with the law, initiating and managing litigation, and contracting for services and facilities. Condominium associations also must conduct a reserve study and update it annually in accordance with the association's governing documents and RCW 64.34.382.

In addition, RCW 64.34.312(2) requires that the records of a condominium association be audited as of the date of termination of declarant control. This audit can be waived by a two-thirds vote of the unit owners, but this is not recommended. The audit must be performed by an independent certified public accountant, and must examine the association's records and documents to ascertain whether the declarant's expenditures were for association purposes and whether the declarant paid the proper assessments owed to the association.

After transition, the board should examine the association's governing documents to determine whether they need to be amended. This can be particularly necessary if the governing documents contain language favorable to the declarant that does not serve the best interests of the association or is contrary to applicable laws.

The board should also examine the condition of the condominium to determine whether the association needs to assert its warranty rights. This usually includes hiring a professional to conduct an inspection of the condominium. Condominiums have implied warranties of quality pursuant to RCW 64.34.445, but these warranties may expire a year after the termination of declarant control. If defects exist at the condominium, the board should act diligently to ensure that the association's warranty rights are protected. If warranty rights are not timely asserted, the cost of necessary repairs falls to the owners rather than the declarant.

Although the transition process can be complicated, with careful planning and careful attention paid to the requirements of both the relevant statutes and the association's governing documents, the newly elected board can ensure that the transition goes smoothly and the association's rights are fully protected. ■



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