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HOA Disputes

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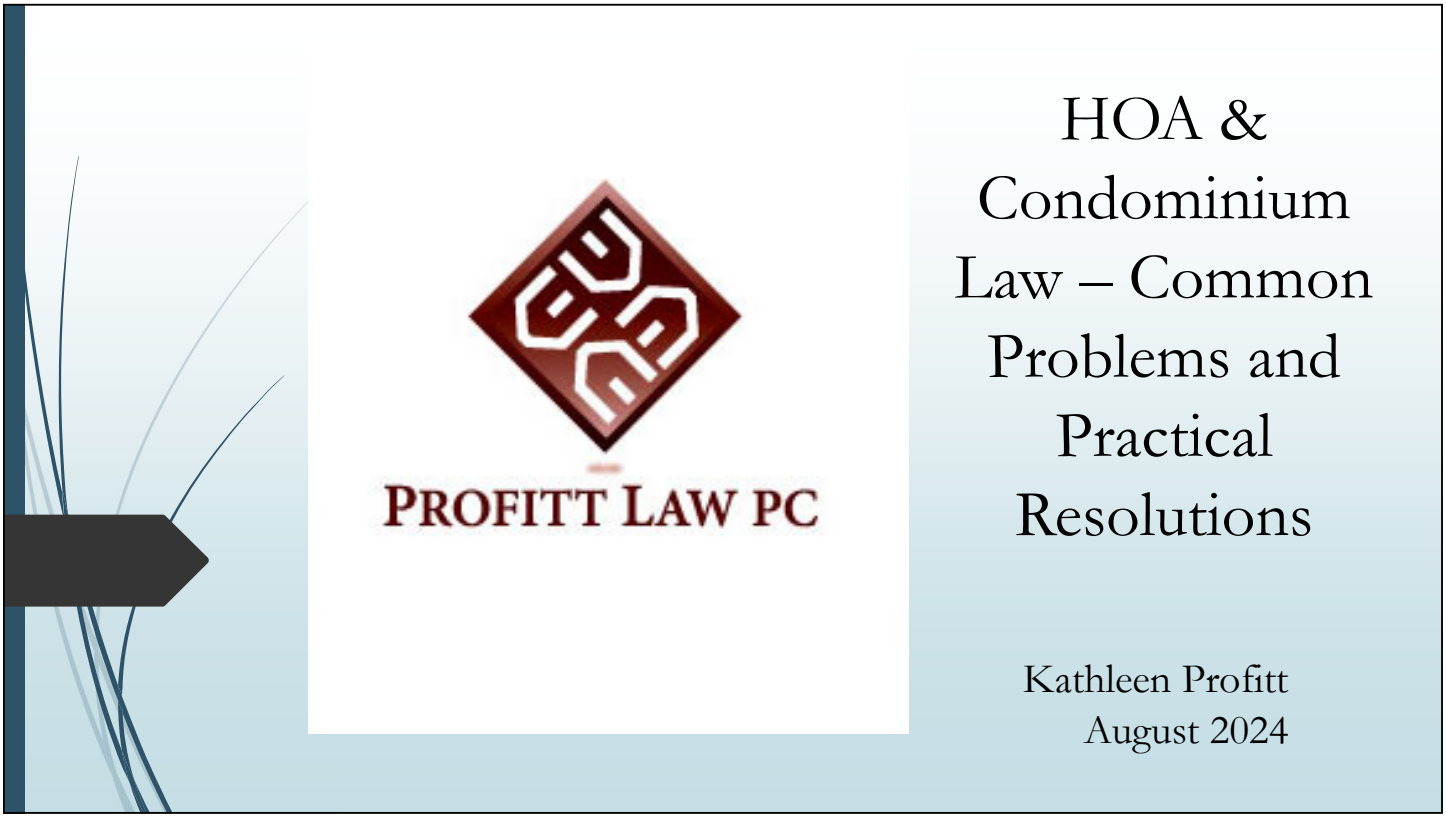
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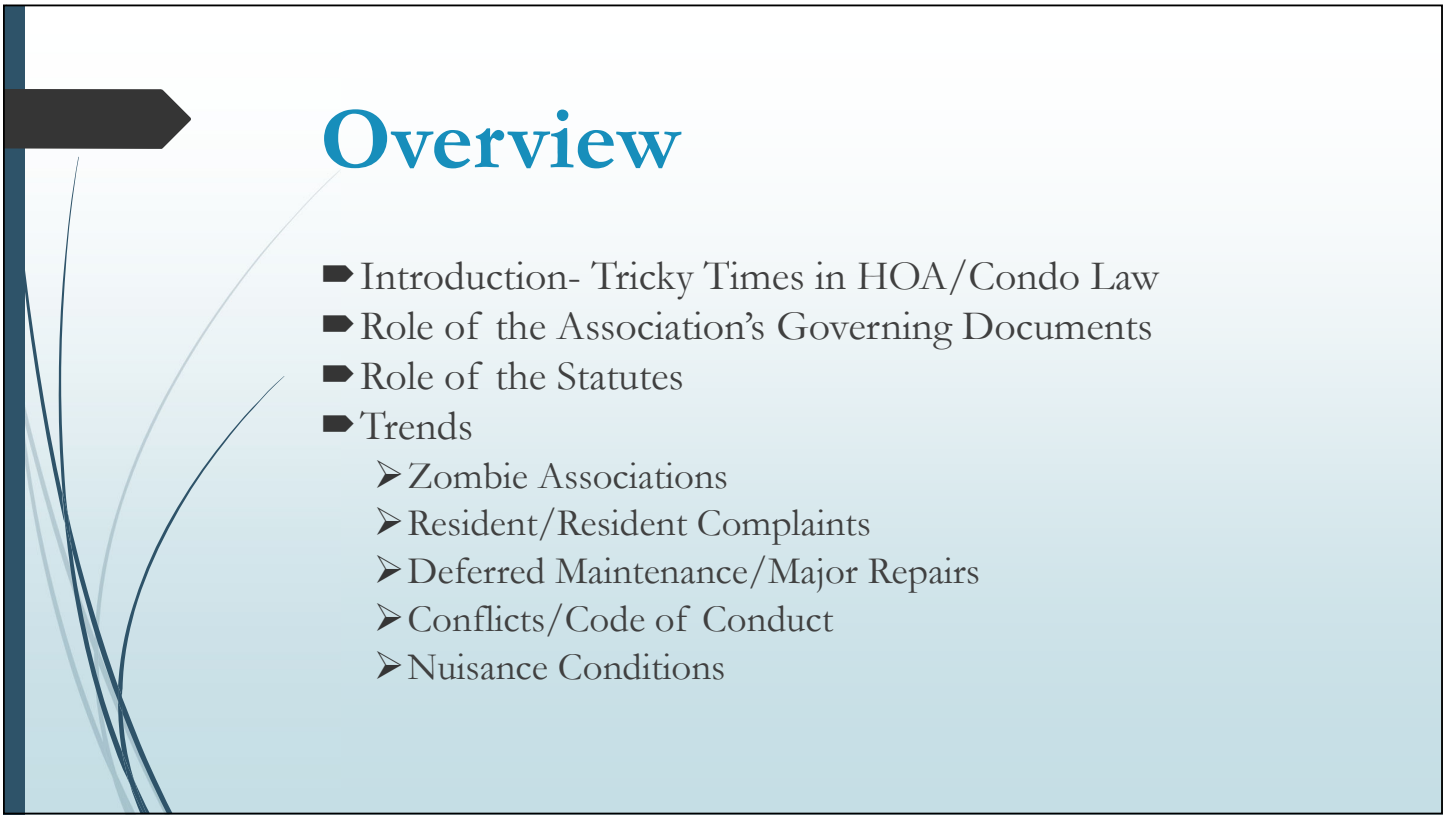
Chapter 16

Presentation Slides: HOA and Condominium Law—Common Problems and Practical Resolutions

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NOTES


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HOA & Condominium Law – Common Problems and Practical Resolutions
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Overview
Introduction- Tricky Times in HOA/Condo Law
Role of the Association's Governing Documents
Role of the Statutes
Trends
Zombie Associations
Resident/Resident Complaints
Deferred Maintenance/Major Repairs
Conflicts/Code of Conduct
Nuisance Conditions

HOAs and Condominium Law Special Considerations

- Family Law of Real Estate?
  - Higher Level of Conflict
  - Intense Feelings
  - Not Arms Length
  - History/Relationships
  - Neighbors Continue Living Next Door
  - Continued Joint Obligations

HOAs and Condos– Creatures of Statute

- Condominium Act (ORS 100.005-100.990)
- Planned Community Act (ORS 94.550-94.783)
- Nonprofit Corporations Act (ORS 65.001-65.992)

Governing Documents

- Articles of Incorporation
- Declaration
- Bylaws
- Plat
- Rules and Regulations
- Board Resolutions and Policies

Governing Documents

- Association Rules and Regulations
  - Subject to provision of Declaration and Bylaws, an association may adopt reasonable rules and regulations
  - May exercise any powers deemed necessary and proper for governance
  - ORS 100.405(4)(a), (r), ORS 94.630(1)(a), (r)
  - Defining the boundaries of rulemaking authority – conservative approach advised

Existential Question- Does the HOA Exist?

- Zombie Associations!
- Old CC&RS- Do they still govern?
- Is there an Association?
  - Not all covenants create an Association
  - Not all Associations have mandatory membership
  - Not all Associations have a right to levy and collect assessments
    - Depending on date created and other details, some of the Oregon Planned Community Act may apply **to the extent consistent**. Answers will hinge on the specific recorded covenant terms. See ORS 94.572.

Existential Question- Does the HOA Exist?

- Generally, HOA's do not die a natural death!
  - Covenants continue until terminated, unless unenforceable as matter of law (discriminatory*) or judge says.
    - *See Temporary Provisions of ORS 94.625 and 100.415
  - Can be directly enforced!
  - Can be resurrected! Risky!
    - Board can be elected and reconstituted.
    - Receiver can be appointed. ORS 100.418: 94.642
  - Unincorporated Association continues. ORS 94.626; 100.405(1)(f)
  - Termination Required Per the Covenant Terms – super majority or unanimous vote? Approval of county or city? Lienholders? Disposition of the shared property?
  - Condominium Termination – ORS 100.600
    - Unanimous owner and lienholder consent.

Defunct HOAs - Risks

- Commonly Maintained or Commonly Owned Property?
  - Common Tracts, trails, streets, parks, buildings, storm water retention ponds, etc.
    - Landscaping
    - Insurance
    - Gravel, bark chips, surface
- Most HOAs have some common property or obligation – PURPOSE
  - Often required as part of conditional approval to develop lots. Require installation of certain improvements and amenities with HOA required to administer.
- Many prefer to ignore, but do so at their peril.
  - Injury upon shared property. Damage caused to other property. No insurance. All owners at risk.
- Receiver can be appointed to reconstitute. Everyone Pays (MORE).

Functioning HOAs - Benefits

- Membership can work collectively to effect common purposes and goals.
  - Administer common property
  - Insurance
  - Maintenance, repair, replacement of commonly maintained property or components
- Share costs and share workload
  - Volunteers required! Professional community management encouraged.
  - Elected representatives make the difficult decisions not reserved specifically for membership.
- Business Judgement Rule and Indemnity. ORS 65.357

Functioning HOAs – An Oxymoron?

- Increased neighborhood conflicts
  - Pandemic and increased work-from-home
  - More simultaneous use
  - Greater emphasis on Individual Rights
- Lawful governance and best practices can improve results.

Typical Conflicts

- Noise
- Parking
- Pets
- Signs
- Garbage
- Business Use
- Rentals (Tenants Violating Rules)
- Trees/Views
- Fences
- Alterations: Decks and Patios
- Property Maintenance and Repair
- Reasonable Requests for Accommodation/Modification

Resident/Resident Conflicts

- Resident Complaints
  - Often include multiple allegations and alleged consequential health impacts, etc.
  - Policy Implementation. First Notice may be courtesy reminder, but not always.
- Notice of Violation – 94.630(1)(n); 100.405(4)(k)
  - Description of violation, opportunity to be heard, levy of fines upon published fine schedule.
  - Boards may seek legal counsel depending on policy and allegations made

Resident/Resident Conflicts

- Previously we asked residents to work together to solve issue.
  - Not since HUD's rulemaking in 2016, *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under Fair Housing Act*, 81 FR 63054, Sept. 14, 2016.
- HOA/Condo Ass'n is Housing Provider under Fair Housing Act.
  - Responsible for 3rd party conduct if knew or should have known of the discriminatory conduct, had the power to correct, and failed to do so.

Resident/Resident Conflicts

- Board must seek to reasonably enforce the Governing Documents. Should adopt reasonable policies.
- Equal Treatment is critical to avoid and defend against unlawful discrimination claims.
- Resident/Resident Complaints put the Board in the hot seat. Dueling Complaints of Harassment.
  - May have to determine credibility. Policy helps.
- Have key policies in place PRIOR to conflict. Follow policies. Everyone feels picked on.

Critical Resolutions and Policies

- Rules Enforcement and Fine Schedule
- Assessment Collection Resolution
- Insurance Resolution (Condos and Townhomes)
- Fair Housing Reasonable Accommodation/Modification Resolution
- **Code of Conduct***
- Electronic Notice Resolution
- Maintenance Resolution (Condos and Townhomes)

Case of the Rapping Rapscallion

- Resident/Resident Harassment
- Condominium, shared/walls. An adult with multiple diagnosis/disabilities living alone in parents' condo. A black family lives next door. Each feel are being harassed.

Case of Rapping Rapscallion

- Protected Class v. Protected Class
  - Risk is in all directions for Board. Can't ignore. Many claim fear for safety. Communicate next steps to all.
- Enforcement Hearing
  - Executive Session as merited by facts.
- Pre-litigation ADR required by 94.630(4); 100.405(11))

Case of Rapping Rapscallion

- Resolution Strategy
  - Provided redacted complaints.
  - Held all of the accrued fines in "abeyance" pending results of hearing and negotiation.
  - Prepared to take it to owner vote. Put it back in owner hands.
    - Owners will authorize further legal action, or not.

Lessons Learned

- Not everyone is unreasonable, but it can take work to get a shared perspective!
- Owners need lawyers to help them with their HOAs!
  - What does the foundational document SAY? Is it a Declaration, Bylaw, or Policy or Rule?
    - If rule or policy, is it one within their clear authority? Could be beyond their authority depending on CC&RS.
  - Did they get notice and an opportunity for a hearing?
    - Did the Board or ARC follow their policies?
  - Are the fines according to published fine schedule?
  - Attorney fees to prevailing party! ORS 100.470: 94.780

Difficult Decision-Making

- Deferred Maintenance and Required Repairs (Condominium and Townhomes)
  - Ugliest of the Difficult Decision-Making
- Owners Question:
  - Is someone at fault and can we sue them?
    - Why didn't the prior Board/owners do the work?
  - Why do we have to pay now?
  - What is wrong? What is the proper repair? Do we get to vote?
  - What happens when some owners can't pay?

Wrangling the Repair

- Often the subject of litigation, but rife with conflict anyway.
- Aggressive Transparency is the best practices (litigation caveat).
- Board is typically charged with responsibility to maintain, repair, and replace certain components and levy and collect assessments necessary to fund.
  - Declaration and Bylaws texts are critical to the analysis.
    - Who is responsible for what? Is there ambiguity? Has it been interpreted in a certain way historically? Is there a written policy?
      - Board deference? *Velenti v. Hopkins*, 926 P.2d 813 (Or. 1997) ; *Yogman v. Parrott,* 937 P.2d 1019 (Or. 1997)
    - Board may rely on its experts and exercise its business judgement in making difficult decisions. ORS 65.357
      - Made in good faith; ordinary prudent person in like situation; reasonably believes in best interest = INDEMNITY
    - But a reviewing court may have the last word!

Wrangling the Repair

- Advice for Interested Owner:
  - Get on the Board!
  - Attend the meetings and read the meeting minutes. Ask questions during open forum.
- Owners may or may not have a right to vote to authorize the repair and assessments
  - Special Assessment.
  - Repair or improvement over certain amount. (capital improvement language is common, but that usually has a carve out for the maintenance and repair work required by the Declaration)
  - To obtain an Association loan secured by the assessment stream.
  - Most conservative approach is to get an owner vote if it is ambiguous.
    - If the owners reject the vote, more education or a different scope is required.
    - Often when the repair is voted down, some or all of the Board will resign. Many directors worry about their liability and sometimes are just tired of the fight

Wrangling the Repair

- Unpleasant stories abound.
  - Failed repairs, multiple rounds of litigation and diminished property values.
  - Board faces pressure from all sides. Owners have their individual property concerns.
- Most aren't litigated. Many communities come out stronger once repaired.
- Experience changed how I approach these problems.

Wrangling the Repair

- Major, multi-million-dollar exterior repair.
- Multiple open Board meetings held with building experts in open forum and scope developed.
- Insufficient funds. Association worked with its professionals to secure a loan that would be repaid over time by the owners' assessments.
- The Bylaws required an owner vote for an increase of assessments. The Board held a vote by mail by **secret ballot.**
  - **Minority Board faction** sending community wide emails and disparaging the repair scope and process.
- The vote failed. It got uglier.

Wrangling the Repair

- Problem: Board member acting unilaterally against the majority decision.
- Solution: Code of Conduct setting objective standards for behavior in Board meetings for Board and members. Attending meetings prepared. No cursing. No name calling. No pounding the table and intimidating people, etc. Identified remedies for violations. Censure, fines, calling a meeting for the purpose of a recall, etc.
- Board member repeated conduct at meeting.
- With the clear violations of the Code of Conduct, action could be taken.
  - Letter with violations, and meeting date for special owners meeting for recall.
  - Resigned in lieu.

Wrangling the Repair

- Starting over!
- Hired consultant to conduct community town halls.
- A slightly revised scope was developed. It was expanded a bit!
- Owners voted to approve the repair project and assessment **unanimously**.

Lessons from Wrangling the Repair

- More meetings and more transparency.
- Establish and use a Code of Conduct.
- Use experts/consultants to educate and persuade.
- Some people may try to sell and not disclose. The Association record should speak for itself.
- Seek to gain critical consensus.
- Board composition- one person can change tone and results.

Conflicts and Code of Conduct

- Code of Conduct is an important tool for Associations
- Sets respective, reasonable, standard of conduct for Board, Committee and Residents in meetings
- Sets an anti-harassment standard for the community as a tool to prevent and address resident/resident conflicts and potential hostile living environments.
- Adds substance to subjective nuisance prohibitions in CC&RS
- Identifies remedies for addressing harassing conduct: censure, fines, participation in mediation, or other lawful remedies.
  - Association is protected by having a policy and implementing the policy fairly and equally across the community.

Recalcitrant Rentals and Other Nuisances

- Repeat violations from rental units are frequent problems requiring practical solutions.
- The long list of complaints (parking, pets, people) *but by renters*!
  - Less compliance with community rules
  - Owners vs. Renters mindset can take hold.
    - Seek to avoid creating nuisance condition preventing others' peaceful enjoyment
- Owners who rent have property rights! Tenants who rent have property rights!
  - Oregon Residential Landlord Tenant Act applied to the owner, not the Association.

Recalcitrant Rentals and Other Nuisances

- Association must follow lawful policies. Can enforce recorded, reasonable rental restrictions: Max rentals; initial rental term; written rental agreements; right to terminate lease for violations of rules.
  - Must be in recorded Declaration or Bylaws. Can establish administrative rules if empowered under the Declaration or Bylaws.
  - **75% vote of membership required to adopt rental restrictions and must be recorded.**

Recalcitrant Rentals and Other Nuisances

- Communication problems. Notice goes to owner, but tenant does not receive. Vice versa. CC&RS bind owner, so notices go to owner. Fines accrue on owner's lots/unit account.
- Property Managers that hang up or don't respond.
- Provide notices in writing in accordance with policies. Invite all to a hearing. Try to get resolution by getting participation in process.
- Pattern and practice of use may reach nuisance level. Requires a determination and should provide hearing..
- When faced with the prospect of being the subject of an Association vote, most will do utmost to resolve problem.

Closing Thoughts

- Associations are only increasing, and the laws are changing and getting more complicated.
- **Lots of room** in this practice for owner-side representation.
- Evaluating the issue from all sides is critical to crafting a functional resolution.
- Encourage serving on the Board or the Architectural Review Committee to have greater influence on community decisions!

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