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Common Interest Properties and Non-Profit Corporations

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(I) Introduction:

The Oregon Condominium Act (OCA)¹ was enacted in 1963 as the Oregon Unit Ownership Law.² For the first few decades, the OCA functioned as a basic horizontal regimes act. However, between 1979 and 1981, the OCA underwent comprehensive legislative changes and amendments.³ At that time, Oregon chose not to adopt the Uniform Condominium Act.⁴ Instead, the drafters relied on a previous version of the Oregon Nonprofit Corporation Act⁵ (NCA) for guidance on the operation of condominium associations. Nevertheless, the drafters understood that differences between nonprofit corporations and condominiums existed, both in purpose and daily operations and a result, additional safeguards and provisions were necessary. However, gradually it became clear that nonprofit corporations and condominium associations were far more similar than originally anticipated. Consequently, the NCA was relied upon frequently, which is apparent from the many similarities between the OCA and NCA.

1 Or. Rev. Stat. §100.010 (2015).

2 Oregon State Bar, *Representing Homeowner Associations*, 9-6 (1995 ed & 1999 supp), (the Oregon Condominium Act was “first enacted in 1963 as the Oregon Unit Ownership Law, and has been amended several times since its passage”); *Towerhill Condo. Assoc. v. American Condo.*, 66 Or App 342 (1984).

3 1981 Or. Laws, ch. 647, § 2; See generally A Richard Vial, *The Oregon Condominium Act: A Question of Vested Interest*, 18 Willamette L. Rev. 95 (1982) (discussing the various changes and amendments made the the Oregon Condominium Act).

4 See 1 Gary A. Poliakoff, *Law of Condominium Operations* § 1:2 (ed. 2015) (“A number of states have adopted the Uniform Condominium Act, a model statute developed by the National Conference of Commissioners on Uniform State Laws in order to encourage greater uniformity in condominium laws around the country”).

5 OR. REV. STAT. §65.951 (2015); the former Oregon nonprofit act was found in the Oregon Revised Statutes Chapter 60, while the current version was adopted in 1989 in the Oregon Revised Statutes Chapter 65. Preface, *Official Commentary to the Revised Oregon Nonprofit Corporation Act*, OR. L. REV. iii (1992).

While condominiums were being governed by the OCA, Oregon soon realized that many other homeowner associations were experiencing problems from the lack of statutory provisions.⁶ Consequently, in 1981, Oregon enacted the Oregon Planned Community Act (PCA).⁷ Planned communities typically contain less commonly maintained areas than condominiums, and often provide private lots. The drafters assumed that planned community owners did not require the same protections and safeguards afforded to condominium owners. Unfortunately, Oregon had little exposure and history with planned communities to truly understand their operations, and in hindsight, congruence among all three acts would have been ideal, but did not occur.

Currently, the vast majority of community associations are incorporated as nonprofit corporations. In fact, incorporation is required for condominiums containing more than four units (maybe add this as a footnote, for smoother flow).⁸ Incorporated associations will find themselves subject to both the NCA, and the applicable community association act. As a result, associations may find themselves dealing with conflicting rules and provisions. While community associations tend to run smoothly, avoiding confusion and conflicting provisions is paramount.

(II) A few examples of where the different laws intersect are shown below:

(a) Proxy voting

While all three acts provide for proxy voting,⁹ there are important differences. Under the NCA, a proxy will automatically be valid for 11 months, unless a different time period is provided.¹⁰ In contrast, a proxy under the OCA and PCA is automatically valid for one year, unless the proxy specifies a shorter term.¹¹ Under the community association laws, the board is prohibited from requiring proxy appointment forms to be on a form prescribed by the board.¹² On the other hand, the NCA contains no such limitation and provides that, “members may appoint a proxy by signing an appointment form.”¹³

(b) Electronic voting

Both community association acts have been amended to allow electronic voting.¹⁴ There are certain limitations and guidelines that must be followed for electronic voting, and a careful reading of the statute and governing documents is crucial for any attorney attempting to advise an association that wishes to conduct electronic voting. The NCA does not contain provisions governing electronic voting.

(c) Cumulative voting

Under the NCA, members are entitled to cumulative voting,¹⁵ while the community association acts contain no such provision. An association that wishes to conduct cumulative voting will need to look towards the NCA, which provides specific requirements to authorize cumulative voting.¹⁶

⁶ OR. REV. STAT. § 94.560 (2015).

⁷ *Id.* § 94.785 (2015).

⁸ *Id.* § 100.405(1).

⁹ *Id.* § 100.427(1); *Id.* § 94.660(1); *Id.* § 65.231(1).

¹⁰ *Id.* § 65.231(2).

¹¹ *Id.* § 100.427(2)(a)(C); *Id.* § 94.660(2)(a)(C).

¹² *Id.* § 100.427(2)(b); *Id.* § 94.660(2)(b).

¹³ *Id.* § 65.231(1).

¹⁴ *Id.* § 94.661. *Id.* § 100.428.

¹⁵ *Id.* § 65.247.

¹⁶ *Id.*

(d) Board of director qualifications:

Both the OCA and PCA limit eligibility to owners or co-owners of a unit or lot.¹⁷ In contrast, the NCA only requires directors to be individuals, and any other limitations must be prescribed in the bylaws or articles of incorporation.¹⁸ Such difference in eligibility may seem obvious since nonprofit corporations are not typically comprised of owners but rather deal with members, and a similar requirement would be inapplicable to most nonprofit corporations.

(e) Notice of board meetings

When conducting board meetings, both community association laws contain specific provisions regarding notice to owners. In particular, associations with a majority of primary residences are required to post notices of the meeting at least three days prior to the meeting, or in a manner that will otherwise reasonably inform owners of the meeting.¹⁹ Both community association laws permit electronic notification of meetings.²⁰ On the other hand, the NCA does not require providing owners with notice of board meetings, unless the articles or bylaws contain a notice requirement.²¹

(f) Open meetings

In addition to requiring notices to owners, both community association acts require that board meetings be open to owners.²² As an exception, the board is permitted to close meetings to owners for executive sessions.²³ Executive sessions are limited to specific purposes, such as consulting with legal counsel, negotiating contracts, and collection matters on unpaid assessments.²⁴ In contrast, the NCA does not require board meetings to be open to members.

(g) Quorum requirements

Quorum requirements for member meetings are also different among the three acts. The NCA contains no minimum quorum for member meetings, unless a quorum is specified in the governing documents.²⁵ Both the OCA and PCA require a quorum to consist of owners entitled to cast 20 percent of the votes.²⁶ While the associations' governing documents may provide for a different quorum, the quorum may not be lower than 20 percent.²⁷

(h) Records and record inspection by owners.

All three acts will require an association to have certain records available and provide members the opportunity to inspect certain records at a reasonable time. While all three acts contain a list of records subject to duplication,²⁸ the NCA provides a longer list with specific provisions²⁹ that are not found in either

¹⁷ *Id.* § 94.639(1); *Id.* § ORS 100.416(1).

¹⁸ *Id.* § 65.304.

¹⁹ *Id.* § 100.420(4); *Id.* § 94.640(10).

²⁰ *Id.* § 100.423; *Id.* § 94.652.

²¹ *Id.* § 65.344.

²² *Id.* § 94.640(8); *Id.* § 100.420(1).

²³ *Id.* § 94.640(8)(a)(A)-(B); *Id.* § 100.420(1)(a)(A)-(B).

²⁴ *Id.*

²⁵ *Id.* § 65.241; *supra* note 5, at xii.

²⁶ *Id.* § 100.408(1), *Id.* § 94.655(1).

²⁷ *Id.*

²⁸ *Id.* § 94.670; *Id.* § 100.480; *Id.* § 65.774.

²⁹ *Id.* § 65.774.

the PCA or OCA. In addition, while the NCA states that the organization must provide the requested records within five business days,³⁰ both the OCA and PCA allow 10 business days.³¹ It is important to note that the 10-day provision in the OCA and PCA applies only to specific documents listed under the statute. Lastly, neither the OCA or PCA provide any recourse or right of action if the organization fails to provide documentation. In contrast, the NCA explicitly provides for court remedies, including reasonable attorney fees, if the corporation fails to comply with rules relating to record production.³²

(III) Conclusion:

Any attorney encountering a community association issue in their practice should be aware of the tension between the NCA and community association laws. Because most condominiums and homeowner associations tend to be incorporated, they will be subject to the nonprofit corporation laws as well as community association laws. This in turn will expose them to any differences between NCA and community association laws. As a result, no practitioner should act without first consulting the NCA.³³

It should be noted that consulting the NCA alone is insufficient, and a thorough and complete understanding of the all three acts is crucial. While spotting a difference between the NCA and applicable governing provision is important, knowing whether this difference will result in a conflict is pivotal. Some differences occur because one act contains a provision or limitation not within the the other act, and other times the acts are in direct conflict. The OCA and PCA provide that in the event of a conflict with the NCA, the provisions in the community association act will control.³⁴ Similarly, the NCA provides that where a conflict between the OCA, PCA or their respective governing documents occurs, the OCA, PCA and governing documents control over the NCA.³⁵

Whether there is a direct conflict between the acts is often unclear. For example, in *Goodsell v. Eagle-Air Estates HOA*,³⁶ the Oregon Court of Appeals found that judicial removal of directors pursuant to the NCA³⁷ does not conflict with the PCA or the association's governing documents.³⁸ Defendants asserted that the PCA's provision of removing directors pursuant to a majority vote of the quorum and a similar provision in the association's bylaws were exclusive.³⁹ As a result, Defendants argued that the NCA's process of judicial removal was in direct conflict with the PCA and the association's governing documents.⁴⁰ While court found no conflict between provisions in the NCA and PCA,⁴¹ we are cautioned to not apply their principal broadly.

³⁰ *Id.* § 65.774(1)-(3).

³¹ *Id.* § 100.480(10)-(11); *Id.* § 94.670(10)-(11).

³² *Id.* § 65.781.

³³ Every practitioner should also be careful to consult with the bylaws and declaration, where applicable. This is important because all three laws contain provisions deferring to the governing documents.

³⁴ *Id.* § 100.100(6); *Id.* § 94.770(4).

³⁵ *Id.* § 65.959(2).

³⁶ 249 Or App 639 (2012).

³⁷ OR. REV. STAT. § 65.327(1).

³⁸ 249 Or App 639, 650 (2012).

³⁹ *Id.* at 641.

⁴⁰ *Id.*

⁴¹ *Id.*

This case illustrates the important need for those who deal with common interest communities to understand the nature of their day-to-day operation. Often listening carefully to the fellow who actually manage and operate these communities will temper the lawyer's application of the law.

Community Associations: In the Business of Transparency

Amanda Anderson, Anderson Ballard LLC, Portland, Oregon

Community associations in Oregon are commonly incorporated as nonprofit corporations. As such, ORS Chapter 65 (the "Nonprofit Corporation Act") is relevant to their operation. However, ORS Chapter 100 (the "Condominium Act") and ORS 94.550 *et seq.* (the "Planned Community Act") provide the statutory specifics. This additional statutory overlay shapes some of the differences in practices between a nonprofit governed by the Nonprofit Corporation Act and a community association governed by, for example, both the Condominium Act *and* the Nonprofit Corporation Act (the former trumping the latter as set forth in ORS 65.959). In many ways, the additional statutory structure is tasked with balancing the operation of a community association as a business with the understanding that many issues faced by those community associations are personal to the individual members that comprise the association.

Increased Transparency in Community Association Board Meetings

This article will address some "hot topics" covered by the Condominium Act and the Planned Community Act, but at the outset, it is essential to understand how board of director meetings are altered by the Condominium Act and the Planned Community Act in the interests of transparency and the rights of the individual members. ORS 94.640 and ORS 100.420 both indicate that all meetings of the board of directors shall be *open* to owners unless the board elects to close the meeting to meet in executive session to consult with legal counsel or consider the following: (i) Personnel matters, including salary negotiations and employee discipline; (ii) Negotiation of contracts with third parties; or (iii) Collection of unpaid assessments. This open meeting requirement is accompanied by notice requirements to enable owners to attend board meetings (ORS 94.640 and ORS 100.420 note an exception for emergency meetings).¹ Even for executive sessions, both the Planned Community Act and the Condominium Act indicate that the board shall vote in an open meeting whether to meet in executive session and shall explain to owners the general nature of the action to be considered, *as precisely as possible*, and when and under what circumstances the deliberations can be disclosed to owners.² This focus on transparency to owners is one way the statutory structure seems to shift from an emphasis on efficiency in business operations to accommodate the residential and personal aspect of community associations.

Another aspect of both the Condominium Act and Planned Community Act that focuses on transparency relates to the format of board meetings. For community associations where the majority of the units/lots are the principal residences of the occupants, only emergency meetings may be conducted by telephonic communication (or by the use of means of communication that allows all members of the board of directors

1 ORS 94.640 and ORS 100.420 set forth a 3-day notice requirement for communities in which the majority of the units/lots are the principal residences of the occupants.

2 ORS 100.420(1)(b); ORS 94.640(8)(b).

participating to hear each other simultaneously or otherwise to be able to communicate during the meeting).³ In short, directors on boards for community associations are generally required to provide notice to all owners of each upcoming board meeting, transact business in an open meeting, and attend board meetings in person.

Hot Topics in Community Association Law

In practice, the open meeting requirements set forth above translate to increased operation transparency often at the expense of efficiency. And this is especially true in relation to “hot topics” frequently faced by community associations. Depending on the issue at hand, the board of directors may alone have the authority to resolve the matter or alternatively, the owners may have the right to vote on it (and without sufficient participation, an issue could go unresolved or the status quo may remain). In any event, open meetings certainly bring those topics to the forefront, and depending on the issue, the Planned Community Act or the Condominium Act may provide specific procedures for addressing, changing, or promulgating any rules or requirements relating to those topics. The following are three hot topics that the Oregon legislature has addressed in specific contexts: Rental Restrictions, Pet Restrictions, and Electric Vehicle Charging Stations.

TIP: In transitioning from working with nonprofits primarily governed by ORS Chapter 65 to working with a community association, it is best to anticipate that the Planned Community Act or the Condominium Act *could* have guidance in relation to fairly specific (and sometimes surprisingly specific) topics.

Rental Restrictions and Pet Restrictions

Rental restrictions and pet restrictions are hot topics in community associations. These hot topics manifest themselves in many ways, but most recently, the popularity of short-term rentals (e.g., Airbnb) has amplified issues relating to rental restrictions and for pet restrictions, disputes regarding what counts as a pet has caused more than one heated debate over what the term “poultry” really means. The Oregon legislature recognized that these issues would be hot topics when they drafted ORS 100.410, which indicates, among other things, that pet restrictions and leasing restrictions in condominiums that are exclusively residential cannot be changed unless approved by seventy-five percent (75%) of the owners or a greater percentage specified in the bylaws (for planned communities, specific voting requirements will depend on the association’s governing documents).⁴ Although a condominium association can obtain 75% owner approval to facilitate this type of change, depending on the community, obtaining that type of participation alone (to say nothing of approval) can be an uphill endeavor. Because any change to an individual’s right to lease their home or to keep their pets is quintessentially personal, the Condominium Act favors owners’ rights here over an association’s potential goals (even goals that could be in the collective best interest of the community).

Electric Vehicle Charging Stations

Another specific hot topic that the legislature has addressed (this one more recently) is electric vehicle charging stations. With the purchasing of electric vehicles on the rise, the Oregon legislature added laws to the Condominium Act and the Planned Community Act in 2014 to permit owners to install charging stations

³ ORS 100.420(4)(b); ORS 94.640(10)(c).

⁴ See ORS 100.410(4)(a). Planned communities do not have a corollary statutory requirement.

for their electric vehicles at their own cost in a parking space, on a lot, or in any other area subject to the exclusive use of the owner, including a limited common element.⁵ To strike the business/personal balance here, the statutes indicate that the installation is subject to an association's reasonable application, architectural review, permitting, installation, and use requirements.⁶

In 2015, the Oregon Legislature updated the electric vehicle charging station laws to clarify that the new laws are intended to facilitate the installation of charging stations by owners for their own personal residential use in condominiums and planned communities. The updated statute provides associations and owners with flexibility to agree otherwise, but if they do not, the statutory default provisions apply. For example, by default, a charging station installed by a homeowner is considered the owner's personal property and an owner must remove that charging station before transferring the owner's lot or unit unless the prospective buyer of the lot or unit will accept ownership of the charging station and all of the associated rights and responsibilities.⁷

As noted above, the community association statutory structure requires community associations to abide by a fairly open process, and one which often engages owners on specific topics relating to their communities. Balancing owner interests on hot topics like the ones set forth above can be challenging for Boards of Directors. The process of doing so in an open meeting context can add to that challenge, but for the most part, both the Condominium Act and the Planned Community Act seem to value transparency over efficiency to strike a balance for owners who live in communities run by nonprofit corporations.

⁵ See ORS 100.627; ORS 94.762.

⁶ *Id.*

⁷ ORS 100.627(7); ORS 94.762(7).

Practical Tips for Advising HOA Boards

Karna Gustafson, Landye Bennett Blumstein LLP, Portland, Oregon

Peter Do Right calls you Monday morning and advises you that he has just been elected as the chairperson of his homeowners' association. He wants to know what he needs to know from a "legal perspective" about being on a HOA Board. After sympathizing with him for his misfortune, you praise him for his forethought in coming to you before he waded into the seemingly harmless pool of piranhas. The next thing you discuss with him is who your client is (i.e., the association or the individual Board member). For the purpose of this article, we assume you will represent the association. The following is a list of advice to give to Mr. Do Right if you plan to represent the association:

1. Read and become familiar with the governing documents (Declaration, Bylaws, plat, rules and Board resolutions) of the Association and applicable law, including all amendments thereto.
2. Review association's insurance coverage.
 - Make sure the coverage matches what is required by the Bylaws.
 - Check for Directors and Officers coverage and cyber crime coverage.

3. Seek competent advice and education, i.e., retain experienced consultants.
 - There is a non-profit trade organization Community Association Institute that has a local chapter for educating Board members.
4. Apply rules and enforce covenants uniformly and consistently. Have written procedures in place for hearings and grievances.
 - Before an association can fine, there must be a resolution in place per the OCA and PCA.
5. Review warranties to make sure the association is carrying out required maintenance. Failure to do so may void any warranty that may have been given.
6. Undertake a thorough review of the association's financial accounts, records and practices.
 - Was a reserve study done and has it been adequately funded?
 - When was the last financial audit/review of the books of the association?
 - Check on the association's investments. Make sure the investments are in compliance with PCA or OCA requirements.
7. Complete an inventory of the association's written resolutions and policies on fines, hearings, late fees, termination of utilities, collections, parking, architectural modifications, and maintenance of association books and records.
 - Check for inconsistencies.
8. If the project is new construction, determine whether an engineer's report is necessary. Make sure any warranty claims are properly and timely made.
9. Except in executive sessions, Boards of Directors are required to hold open Board meetings. Executive sessions are only permitted under the OCA and PCA for: (1) consultation with legal counsel; (2) discussion of personnel matters, including salary negotiations and employee discipline; (3) the negotiation of contracts with third parties; and (4) collection of unpaid assessments. The Board is required to vote in an open meeting whether to go into an executive session and the meeting and notice requirements in the statute cannot be circumvented by chance or social meetings. While discussions of the above can be made in executive session, any decisions must be made at a regular Board meeting.
10. Listen, hear and remember. Do not respond to every question or comment from the owners. People often just want to vent. When a legitimate question is asked, be deliberative with your answer. When you do not know the answer tell the owner you do not know and that you will get back to them. Then follow up.



NOLS SECTION SOCIAL

Thursday, September 29, 2016

5:30 – 7:30 pm

Stoel Rives

760 SW Ninth Ave., Suite 3000

Portland, OR 97205

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The purpose of this newsletter is to provide information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities. The opinions and recommendations expressed are the author's own and do not necessarily reflect the views of the NOL Section or the Oregon State Bar.

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Take a look at special issues for religious nonprofits and find out what's so special about 501(c)(4)s. Executive compensation will be examined and gain an introduction to public charter and basic school law.

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Friday, September 30, 2016

Morning Seminar

8:30 a.m. – 11:45 a.m.

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12:45 p.m. – 4 p.m.

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MORNING SESSION

- 8:00 Registration**
- 8:30 Lawyer as Board Member**
Amber Hollister, *Oregon State Bar, Tigard*
Scott Pratt, *Attorney at Law, Portland*
- 9:15 Tax Traps That Threaten Exempt Status**
 - Unrelated business taxable income
 - Advocacy and lobbying
 - Conflicts of interestR. Brent Berselli, *Holland & Knight LLP, Portland*
- 10:00 Break**
- 10:15 IRS Exempt Organization Update**
(via video conference)
Moderator: Michele Wasson, *Stoel Rives LLP, Portland*
Cheryl Teser, *Program Analyst, IRS Office of Exempt Organizations*
Margaret Von Lienen, *Director, EO Examinations, IRS Office of Exempt Organizations*
- 11:15 Directors and Officers Liability Insurance – Avoiding Pitfalls when Serving on a Non-Profit Board**
 - D & O insurance: what is it and why is it needed
 - Coverage
 - Common litigation risksBryana Blessinger, *Bullivant Houser Bailey PC, Portland*
Laura Caldera Taylor, *Bullivant Houser Bailey PC, Portland*
- 11:45 Adjourn**
- 11:45 Lunch and NOLS Section Annual Meeting and Lunch** *(A box lunch can be ordered during the registration process; brown bags are welcome at the OSB Center)*

AFTERNOON SESSION

- 12:00 Registration**
- 12:45 Special Issues for Religious Nonprofits**
 - Legal advantages
 - Why formal IRS recognition matters
 - Special reporting and government oversight issuesDavid Atkin, *Center for Nonprofit Law, Eugene*
- 1:30 “Did the Candidate Really Say That?” How to Advocate for Your Cause During a Hot Election Season**
 - Political activities for nonprofit organizations
 - What 501(c)(4) organizations can say or do during an election season
 - Registering as a political committee and disclosing donors
 - The “shadow” side of 501(c)(4) organizationsMargaret Olney, *Bennett Hartman Morris & Kaplan LLP, Portland*
- 2:30 Break**
- 2:45 Executive Compensation**
 - Legal guideposts
 - What’s reasonable?
 - Common and uncommon scenariosNancy Murray, *Attorney at Law, Portland*
- 3:15 The Intersection of Nonprofits and Law School: An Introduction to Public Charter and Basic School Law**
 - Applying for exempt status
 - Public charter schools vs. private schools
 - Primary governance considerations
 - Oregon’s charter school statutesShouka Rezvani, *Tonkon Torp LLP, Portland*
- 4:00 Adjourn**

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