

2009 LEGISLATIVE SUPPLEMENT
to
THE OFFICIAL HOA HANDBOOK OREGON
3rd Edition

Notice: The revisions set forth below reflect amendments to the Oregon Planned Community Act and Oregon Condominium Act by Senate Bill 963 (Chapter 641, Oregon Laws 2009). The amendments are effective January 1, 2010.

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CHAPTER 5 ASSOCIATION GOVERNANCE **5-1**

Board of Director Meetings **5-5**
Executive Sessions **5-9**

Under the PCA and OCA, at the discretion of the board, the board may close a meeting of the board to owners other than board members and meet in executive session to:

1. Consult with legal counsel; and
2. Consider the following:
 - * Personnel matters, including salary negotiations and employee discipline;
 - * Negotiation of contracts with third parties; and
 - * Collection of unpaid assessments.

See Sec. 8 and 28, SB 963.

Election and Removal of Members of the Board of Directors **5-13**
New Section **5-14**

Qualifications. Except during a period of developer control of the association, for developments created under the PCA or OCA, members of the board of directors must be elected from among the owners. However, until amendments by SB 963, there were no provisions governing qualifications when a lot or unit is owned by an entity or in a fiduciary capacity. The PCA and OCA provide:

(1) Each member of the board of directors must be an individual and, except as provided in subsections (2) and (3) of this section an owner or co-owner of a lot in the planned community or unit in the condominium.

(2) A director appointed by a declarant under ORS 94.600 or 100.200 need not be an owner or co-owner of a lot in the planned community or a unit in the condominium.

(3)(a) Except as otherwise provided in the bylaws, prior to election to the board of directors, an individual described in this subsection shall, upon request of the board, provide the board with documentation satisfactory to the board that the individual is qualified to represent the entity or is a trustee or is serving in a fiduciary capacity for the owner of a lot or a unit.

(b) If a corporation, limited liability company or partnership owns a lot in the planned community/unit in the condominium or owns an interest in an entity that owns a lot in the planned community/unit in the condominium, an officer, employee or agent of a corporation, a member, manager, employee or agent of a limited liability company, or a partner, employee or agent of a partnership may serve on the board of directors.

(c) A trustee may serve on the board of directors if the trustee holds legal title to a lot in the planned community/unit in the condominium for the benefit of the owner of the beneficial interest in the lot/unit.

(d) An executor, administrator, guardian, conservator, or other individual appointed by a court to serve in a fiduciary capacity for an owner of a lot in the planned community/unit in the condominium or an officer or employee of an entity if an entity is appointed, may serve on the board of directors.

(4) The position of an individual serving on the board of directors under subsection (3) of this section automatically becomes vacant if the individual no longer meets the requirements of subsection (3) of this section.

See Sec. 2 and 18, SB 963.

CHAPTER 7 INCORPORATION 7-1

***New Section* 7-5**

Dissolution and Duration

It is not uncommon for an association to be administratively dissolved by the Oregon Corporation Division for failing to file the annual report. Because dissolution causes serious problems for an association, especially associations under the PCA, provisions set forth below were added to the PCA and OCA by SB 963.

Also, the amendments clarify that a separate association is not created when an unincorporated association is incorporated or when an association is reinstated after administrative dissolution under ORS 65.654 or again incorporated following dissolution.

Planned Communities. Section 3 of SB 963 provides:

(1) If a homeowners association is at any time dissolved, whether inadvertently or deliberately:

(a) The association automatically continues as an unincorporated association under the same name.

(b) The unincorporated association:

(A) Has all the property, powers and obligations of the incorporated association existing immediately prior to dissolution;

(B) Shall be governed by the bylaws and, to the extent applicable, the articles of incorporation of the incorporated association; and

(C) Shall be served by the members of the board of directors and the officers who served immediately prior to dissolution.

(2) A separate association is not created when an association is reinstated after administrative dissolution under ORS 65.654 or again incorporated following dissolution. The association automatically continues without any further action by incorporators, directors or officers that may otherwise be required under ORS chapter 65.

(3)(a) The association described in subsection (2) of this section has all the property, powers and obligations of the unincorporated association that existed immediately prior to incorporation or reinstatement.

(b) The bylaws in effect immediately prior to incorporation or reinstatement constitute the bylaws of the incorporated association.

(c) The members of the board of directors and the officers continue to serve as directors and officers.

(4) The provisions of this section apply notwithstanding any provision of a governing document of a planned community that appears to be contrary.
See Sec. 3, SB 963.

Condominiums. ORS 100.405(1)(e) provides:

(e) A separate association is not created when an unincorporated association formed under this section is incorporated, reinstated after administrative dissolution under ORS 60.654 or 65.654 or again incorporated following dissolution. The association automatically continues and, without any further action by incorporators, directors or officers that may otherwise be required under Oregon corporation laws:

(A) The incorporated association has all of the property, powers and obligations of the association that existed immediately prior to incorporation in addition to the powers and obligations under Oregon corporation laws.

(B) The bylaws in effect immediately prior to incorporation or reinstatement constitute the bylaws of the incorporated association.

(C) The members of the board of directors and the officers continue to serve as directors and officers.

(f) If an incorporated association is at any time dissolved, whether inadvertently or deliberately:

(A) The association continues as an unincorporated association under the same name.

(B) The unincorporated association has all of the property, powers and obligations of the incorporated association existing immediately prior to dissolution.

(C) The unincorporated association shall be governed by the bylaws, and to the extent applicable, the articles of incorporation of the incorporated association.

(D) The board of directors and the officers serving immediately prior to the dissolution continue to serve as the directors and officers of the unincorporated association.

See Sec. 24, SB 963.

CHAPTER 8 RECORDS AND REPORTS 8-1

Where and How Long Records Must be Maintained 8-8

How Long? 8-9

Proxies and ballots must be retained for one year from the date of determination of the vote except that:

✕ Under the PCA, proxies and ballots relating to an amendment to the declaration, bylaws or other governing document must be retained for one year from the date the amendment is effective.

✕ Under the OCA, proxies and ballots relating to an amendment to the declaration, supplemental declaration, plat, supplemental plat or bylaws must be retained for one year from the date the amendment is recorded.

See Sec. 13 and 29, SB 963.

PCA and OCA Requirements 8-11
Records Not Subject to Examination 8-12

Communications with Legal Counsel: Communications with legal counsel that relate to the following are not subject to examination by owners:

- ✓ Personnel matters relating to a specific identified person or a person's medical records.
- ✓ Contracts, leases and other business transactions that are currently under negotiation to purchase or provide goods or services.
- ✓ The rights and duties of the association regarding existing or potential litigation or criminal matters.

See Sec. 13 and 29, SB 963.

CHAPTER 10 MEETINGS AND VOTING PROCEDURES 10-1

Quorum Requirements 10-5

Minimum Requirements. The bylaws of a condominium or planned community created on or after January 1, 2010, must specify a quorum requirement of owners representing at least 20 percent of the votes who are present in person, by proxy or by absentee ballot if permitted by the board.

Reduced Quorum; Limitations. The PCA and OCA provide if any meeting of the association cannot be organized because of a lack of a quorum, the owners who are present, either in person or by proxy, may adjourn the meeting from time to time until a quorum is present. The PCA and OCA further provide for the quorum requirement to be reduced as follows:

(3) Except as provided in subsection (4) of this section, the quorum for a meeting following a meeting adjourned for lack of a quorum is the greater of:

- (a) One-half of the quorum required in the declaration or bylaws; or
- (b) Twenty percent of the votes that may be cast by persons who are present in person, by proxy or by absentee ballot, if absentee ballots are permitted.

(4) A quorum is not reduced under subsection (3) of this section unless:

- (a) The meeting is adjourned to a date that is at least 48 hours from the time the original meeting was called; or
- (b) The meeting notice specifies:
 - (A) That the quorum requirement will be reduced if the meeting cannot be organized because of a lack of a quorum; and
 - (B) The reduced quorum requirement.

See Sec. 9 and 25, SB 963.

Manner of Voting or Granting Consent 10-9

Powers of Attorney 10-13

The PCA and OCA now provide for appointment of attorneys-in-fact. *See following section.*

Voting in a Representative Capacity 10-13

Attorneys-in-fact and conservators are now included in the list of persons who may vote or grant consent with respect to a lot or unit owned or held in fiduciary capacity.

See Sec. 11 and 32, SB 963.

CHAPTER 17 RESERVE FUNDING 17-1

Reserve Account Requirements 17-1

Account and Record Keeping 17-4

The PCA and OCA provide that all assessments, including declarant subsidies and all other association funds, must be deposited and maintained in the name of the association in one or more separate federally insured accounts, including certificates of deposit, at a financial institution, as defined in ORS 706.008, other than an extranational institution. Funds must be maintained in an association account until disbursed EXCEPT:

Subject to any limitations imposed by the declaration or bylaws, funds of the association maintained in the association accounts may be used to purchase obligations of the United States government.

See Sec. 13 and 29, SB 963.

***SPECIAL NOTICE:** The increase of FDIC insurance from \$100,000 to \$250,000 is valid to December 31, 2013. On January 1, 2014, the standard insurance amount will return to \$100,000 per depositor for all account categories except for IRAs and other certain retirement accounts which will remain at \$250,000 per depositor.*

Investment of Fund 17-5

The reserve account may not be invested except funds may be used to purchase obligations of the United States Government. ORS 94.595 and 100.175 provide that the reserve account is subject to the requirements and restrictions of ORS 94.670 or 100.480 and any additional restrictions or requirements imposed by the declaration, bylaws or rules of the association.

See Sec. 4 and 23, SB 963.

Determining Adequate Reserves 17-7

Annual Requirement 17-8

Restriction. Unless the board of directors determines that the reserve account will be adequately funded for the following year, the board of directors or the owners may not vote to eliminate funding a reserve account required under ORS 94.595 or 100.175 or under the declaration or bylaws. EXCEPT:

Following the turnover meeting, on an annual basis, the board of directors, with the approval of all owners, may elect not to fund the reserve account for the following year.

See Sec. 4 and 23, SB 963.

CHAPTER 18 COMMON PROPERTY ISSUES 18-1

Leases, Easements, Rights-of-Way, and License 18-6

Authority of HOA to Grant Easements and Other Interests 18-7

Condominiums.

Required Owner Approval. The “75% Rule” discussed in this section has changed. The required vote is now 75% of the unit owners present at a meeting of the association or the consent of at least 75% of all owners solicited by any means the board of directors determines is reasonable.

With respect to consent to vacation of roadways within and adjacent to the condominium, ORS 100.405 was amended to provide that the consent of at least a majority of all owners is required if owner consent is solicited by a means other than at a meeting of the association. The current requirement of a majority of owners present at a meeting of the association remains unchanged.

If a meeting is held to conduct a vote under ORS 100.405, the meeting notice must include a statement that the approval of the grant or roadway vacation will be an item of business on the agenda of the meeting.

See Sec. 24, SB 963.

Note: *Whether the above change applies to condominiums created before January 1, 2010, will depend on the provisions of the declaration.*

Planned Communities. Except for the general power of an association under ORS 94.630(j), until amendments by SB 963, there were no provisions in the PCA governing the granting of easements, leases, licenses and other similar interests in the common property. Similarly, many governing documents only provide for the general power of the association as in ORS 94.630(j). Because of the lack of specific provisions relating to the granting of easements and other similar interests and the general language of governing documents, it was often unclear whether the approval of owners required to convey, sell or encumber common property was also required to grant an easement or other similar interest in common property.

SB 963 amended ORS 94.665 to clarify existing provisions governing the sale and encumbrance of common property and to add new provisions governing the granting of easements, leases and other similar interest (mirroring the requirements of the OCA as amended). ORS 94.665 provides:

(1) Except as otherwise provided in the declaration, a homeowners association may sell, transfer, convey or subject to a security interest any portion of the common property if 80 percent or more of the votes in the homeowners association, including 80 percent of the votes of lots not owned by a declarant at the time of the vote, are cast in favor of the action.

(2) A sale, transfer, conveyance or encumbrance by a security interest of the common property or any portion of the common property made pursuant to a right reserved in the declaration under this section may provide that the common property be released from any restriction imposed on the common property by the declaration or other governing document if the request for approval of the action also includes approval of the release. However, a sale, transfer or encumbrance may not deprive any lot of its right of access to or support for the lot without the consent of the owner of the lot.

(3) Subject to subsections (4) and (5) of this section, unless expressly limited or prohibited by the declaration, the homeowners association may execute, acknowledge and deliver leases, easements, rights of way, licenses and other similar interests affecting common property and consent to vacation of roadways within and adjacent to common property.

(4)(a) Except as otherwise provided in the declaration and paragraph (b) of this subsection, the granting of a lease, easement, right of way, license or other similar interest pursuant to subsection (3) of this section shall be first approved by at least 75 percent of owners present at a meeting of the association or with the consent of at least 75 percent of all owners solicited by any means the board of directors determines is reasonable. If a meeting is held to conduct the vote, the meeting notice must include a statement that approval of the grant will be an item of business in the agenda of the meeting.

(b)(A) The granting of a lease, easement, right of way, license or other similar interest affecting common property for a term of two years or less requires the approval of a majority of the board of directors.

(B) The granting of a lease, easement, right of way, license or other similar interest affecting common property for a term of more than two years to a public body, as defined in ORS 174.109, or to a utility or a communications company for installation and maintenance of power, gas, electric, water or other utility and communication lines and services requires the approval of a majority of the board of directors.

(5) Unless the declaration otherwise provides, the consent to vacation of roadways within and adjacent to common property must be approved first by at least a majority of owners present and voting at a meeting of the association or with the consent of at least a majority of all owners solicited by any means the board of directors determines is reasonable. If a meeting is held to conduct the vote, the meeting notice must include a statement that the roadway vacation will be an item of business in the agenda of the meeting.

(6) An instrument that sells, transfers, conveys or encumbers common property pursuant to subsection (1) of this section or grants an interest or consent pursuant to subsection (3) of this section shall:

(a) State that the action of the homeowners association was approved in accordance with this section; and

(b) Be executed by the president and secretary of the association and acknowledged in the manner provided for acknowledgment of the instruments by the officers.

(7) The association shall treat proceeds of any sale, transfer or conveyance under subsection (1) of this section, any grant under subsection (4) of this section or any consent to vacation under subsection (5) of this section as an asset of the association.

See Sec. 12, SB 963.

NOTICE

THE ABOVE REVISIONS INCLUDE SUBSTANTIVE CHANGES TO THE HANDBOOK TO REFLECT AMENDMENTS BY SB 963. REVISIONS DO NOT INCLUDE MINOR CHANGES, ALL CHANGES TO STATUTORY REFERENCES OR CHANGES TO THE PCA OR OCA MADE TO CONFORM LEGISLATIVE FORM AND STYLE.

FOR A COPY OF SB 963 & OTHER INFORMATION REGARDING 2009 HOA LEGISLATION GO TO: www.vf-law.com