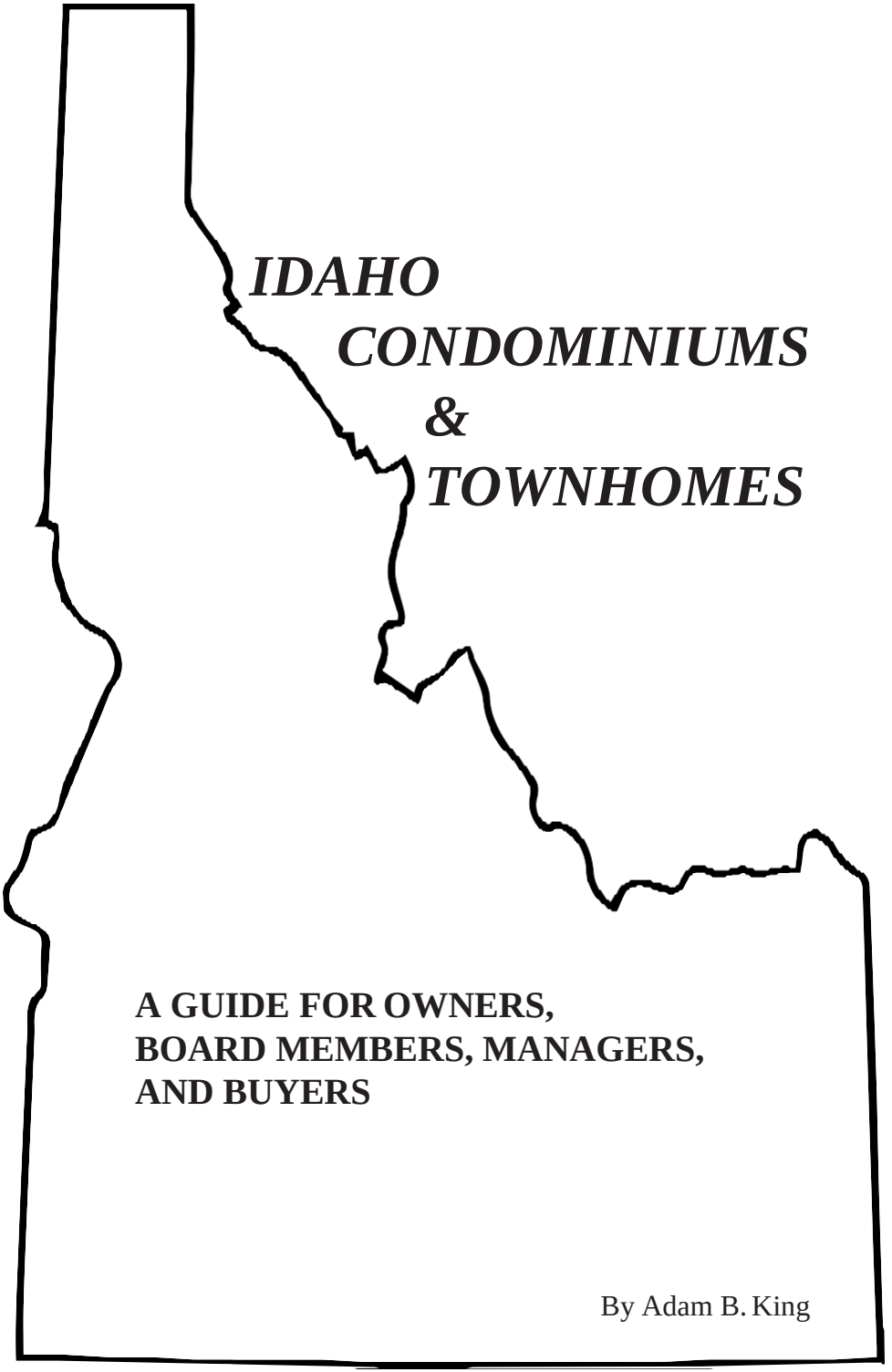

IDAHO CONDOMINIUMS & TOWNHOMES

A GUIDE FOR OWNERS, BOARD MEMBERS, MANAGERS, AND BUYERS

By Adam B. King

About the Author

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For Elana and Sara

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A Brief Disclaimer

This book does not constitute legal advice. No attorney-client relationship is created between the author and any purchaser or reader of this book. The laws relating to real property, liens, covenants, contracts, corporations, etc. are complex and subtle. You should contact a qualified attorney for legal advice.

Introduction: Condominium and Townhouse Living

Welcome! In my numerous years of practicing condominium law in Idaho, I have noticed that many of the same issues come up again and again. Are the assessments fair? How can the board make a special assessment that costs me thousands of dollars? Can the association fine me? Why don't they fine my noisy neighbors? Why weren't "my" windows replaced? Why wasn't "my" roof repaired? Why can't I put a satellite dish on "my" deck? My upstairs neighbor's dishwasher leaked and flooded my condo – who is responsible?

While it can be profitable for an attorney to answer the same questions year in and year out, I thought to myself, "there must be a better way!" Hence this book. Several tens of thousands of people live in or own Idaho condominiums. Many others live in free-standing houses that are subject to association covenants.

When we are talking about all three of the types of living – condominiums, townhomes, and free standing houses with covenants – we'll use the concept "association living." When specific differences matter, they will be highlighted.

This guide is the product of many years of practicing law, and many interactions with association managers, board members, and residents. Some of the interactions have been more pleasant than others, but all of them have been truly interesting because they shed light on the human aspect of association living.

ONE

Condominiums and Townhomes

What is a Condominium?

A condominium is a combination of individual ownership and shared ownership. When you own a condominium you own your unit outright, and you share ownership with every other unit owner in the common area. The common area will consist of the structure of the buildings that house the condos, and other elements such as parking areas, landscaping, lighting, paths, trash enclosures, and perhaps a pool or spa or clubhouse building. Your unit will be defined in the most important document – the declaration, or covenants or "CCRs," and the actual dimensions of your unit also will be described or drawn on the subdivision plat.

Importantly, what you *actually own separately* in most condominiums is the interior of the unit's walls, floors, and ceilings, or "paint to paint" as many refer to it. This means you own the interior spaces of the condominium, starting with the paint on the walls and ceilings, and floor coverings. Most condominium owners do not own their doors or windows separately, but rather as shared elements of the Common Area with other owners. This shared ownership of doors and windows is of great significance and leads to much confusion, and at times thorny and emotional disputes. In some associations exterior decks are part of the unit, in some associations they are part of the common area. Exterior decks should usually be "limited common area" (discussed extensively in this book), or part of the unit itself, but this is frequently overlooked in many declarations.

The common area, that is: **shared ownership of common elements**, is discussed in more detail below.

Because you own "paint to paint," the typical condominium owner does not separately own the roof or any land – rather, these are owned with everyone as common area. You own a proportional part of the lawns and parking lot, just like you own a fraction of the front door on your condo.

What is a Townhouse?

A Townhouse is different from a condominium in that you typically own all of the elements of your portion of building. If the townhomes are side-by-side (called "duets" by some imaginative realtors), you typically own your foundation, walls, windows, doors, and roof. You may also own the land underneath and around your townhouse. Any walls that are shared in common with another townhouse are called "party walls," and you typically own one half of a party wall. (If your neighbors are quiet, you'll take comfort in the fact that a party wall means it is owned by more than one party, not that there is always a party going on next door.) There is a separate discussion of unique townhouse issues later on. In this book, townhouse and townhome are used synonymously.

What Rules and Laws Apply?

A starting point for any understanding of association living is the question, "What laws apply?" For state laws, the Idaho Condominium Property Act and the Idaho Non-profit Corporations Act will usually have a direct application to you. The Idaho Condominium Property Act does not usually apply where there is no common area. Certain federal laws will also pertain, among them the Americans With Disabilities Act, the Federal Communications

Commission's rules (regarding cable and satellite dishes), and the fair housing laws, which apply to certain accommodations for disabilities[1].

But that is just the framework – the real meat of association living comes from the declaration or Covenants, Conditions, & Restrictions (CCRs), the by-laws, the articles of incorporation, and rules and regulations. These are discussed extensively.

Throughout this book, there will be footnotes that point anyone who is interested to some applicable sections of the Idaho Code. Feel free to ignore the footnotes. The Idaho Code is readily found online.

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[1] All of these laws are readily found on the internet. Government links change frequently, and are not furnished.

TWO

The Common Area, or Whose Door Is It, Anyway?

As noted above, in a condominium association certain things are owned in common. Some people have trouble wrapping their mind around the fact that "my" door is not "my" door, and I only own 1/100th of it. Not only that, each of my neighbors owns 1/100th of my door, and I own 1/100th of their doors. But because the doors (and windows, and lawns, and parking lot, etc.) are Common Area, this makes sense.

But what does all of that really mean? With ownership comes responsibility. For example, if "my" door, actually just the Common Area door on my unit, is facing north and never gets any sunlight, it may only need to be repainted every ten years and replaced every twenty years. But if 50% of the doors in my association face south and get full sun, they may need to be repainted every three years and replaced every seven years. Because I own a portion of those doors, it is my responsibility to pay for my share of the cost of painting and replacing them, even if "my" door rarely gets painted or replaced.

Likewise, I own a portion of all of the roofs. But maybe my condo is on the bottom floor and there are two condos above it, so I think I don't "use" the roof. But I still own a portion of it, and I have to pay my fair share. Another example is where one building in a multi-building complex has roof leaks that need to be repaired – the roof belongs to everyone, not just the owners in that building, so all must share in the cost.

The same goes for other common area elements, such as landscaping, parking lots, pools, etc. Everyone owns a portion, so everyone pays his or her share. As will often be stressed:

> **When you take title to your condo or townhouse, you accept and agree to all of the terms of the covenants, declaration, articles, by-laws, and rules.**

This means that you cannot suddenly decide that because you don't have a view of the garden area from your window you don't need to pay for landscaping. Or that "your" roof did not blow off in the storm so you don't have to pay for the new roof on the next building over. Just wait until the foundations need repairs, or "your" roof caves in. You'll appreciate not having to bear all of the costs yourself!

Of course, the CCRs, their assessment schemes, the by-laws, articles, etc. can be changed with a properly conducted vote at a meeting of the owners by using the mechanisms and voting provided for in the documents. It is vitally important to remember that except for a court's order, the only way the agreements can be changed is through the amendment procedures contained in them.

THREE

How Common Is the Common Area?

The notion of common area is pretty simple. Everyone owns it essentially equally. But there are a lot of subtleties about how common area is controlled, used, and sometimes abused.

Plain Vanilla Common Area

Good ol' common area is simple: everyone owns a portion of it, and everyone can, in theory use it. If a lawn or patio or pool area is common area, anyone can use it at any time, subject only to other reasonable rules. No one person has any greater claim to common area than another. On the other hand, **limited** common area gives the owner (or owners) to whom it is assigned greater possessory rights than others, even though everyone still owns it together.

Remember: the board typically has exclusive control of common area. This means that the board decides when to trim trees, take out trees, plant flowers, etc. It also means that owners essentially have no right to do anything to the common area, such as drill through it, run pipes or vents through it, create a vaulted ceiling from it, etc. – unless they get written permission from the board.

Limited Common Area

There are actually two typical flavors of common area – regular common area and limited common area. Every unit owner owns a portion of all common area and a portion all limited common area – but limited common area is slightly different. **You can exclude others from your limited common area** – even though they own a portion of it! They can exclude you from their limited common area – even though you own a portion of it. But be aware, because limited common area is a flavor of common area, all owners are typically responsible for paying for the upkeep and repairs. Some declarations require owners to pay to maintain their limited common area, but this can lead to problems if the owners fail to. For example, if a deck is limited common area and the owner fails to pay to maintain it, it can become unsightly, rot, and even collapse. When declarations require owners to maintain limited common area, there must be some recourse for the association to step in if the owner fails to. The owner is then assessed for the work.

Here are some examples: Some association CCRs define decks as limited common area. That means that other owners cannot come uninvited and sit on your deck. But it also may mean that if your neighbor's deck blows off in a windstorm, you may be assessed to rebuild it. Remember, you owned a portion of it, but because it was limited common area, everybody essentially agreed in the declaration that each would stick to his or her own limited common area.

Another example is an assigned parking space. Your assigned parking space may be listed as limited common area in the declaration. You can exclude others, even though everyone in the association owns a portion of the asphalt. On the contrary, if parking spaces are not assigned, anyone may park in any spot. Just because a space is in front of your condo does not make it "your"

space. Other types of limited common area are storage closets, utility enclosures, and certain equipment like a water heater that serves one unit but is physically in the common area.

Declarations are fairly flexible with their approach to limited common area. As noted above, some associations require the unit to whom the limited common area is assigned to pay to maintain it. As always, the CCRs will control. Hopefully they are well written, clear and don't leave the association with a hodge-podge of unkempt decks.

Common, Common Area Problems:
You Can't Do Anything to It Without Permission

One very important aspect of common area is that a unit owner does not have the right to change it or harm it or drill holes into it or put vents through it or trim trees or plant roses or move it without the permission of the association. For example, if a condominium owner remodels his bathroom and wants to add an exhaust fan, it is absolutely not permissible to simply have a contractor run a new fan through the ceiling and the roof. This is technically a trespass, because that owner does not have the right to cut into common area and place things there.

Bear in mind that minor invasions are usually not an issue, such as putting a picture hook into an inside wall - - technically anything past the paint is common area, but minor intrusions are usually fine. Another example of a minor or "*de minimis*" intrusion would be a nail to hang a thermometer on the outside of a building. However, a large nail that punctured a water line or an electrical wire could lead to liability for the owner.

More importantly, the Board has the exclusive right to control the common area, and an affirmative duty to preserve and maintain the common area – if such work is not done properly, leaks, mold, and ice dams can occur.

Nor can an owner, for the same reasons, simply go out and cut down or trim trees in the common area, or plant new ones. The board normally has exclusive control over the common area. No action can be done to alter the common area without the express permission of the board.

In the example of the bathroom remodel, the board should have an application procedure for the owners, and have an association-retained architect or contractor to ensure that the roof penetrations are done properly. The owner applying to penetrate the common area would have to pay an application fee that would cover all monitoring and inspection costs.

FOUR

My Townhouse Is My Castle (Sort Of): Unique Issues With Townhomes

Are Townhomes Subject to the Idaho Condominium Property Act?

Good question. The answer is a firm "maybe." Idaho law defines a "condominium" as essentially the ownership of [2]:

A separate interest in real estate [the "unit"]	AND	A shared interest in real estate [the "common area"]

With some townhomes, each unit owner directly owns a portion of the common area. These developments are *typically* subject to the Idaho Condominium Property Act[3].

However, in some townhouse developments the **association** actually owns the common area. These developments are *typically* not subject to the Idaho Condominium Property Act. There can, however, still be valid covenants, conditions, and restrictions.

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[2] 55-101B. All references are to the Idaho Code, so only section numbers are used after this.

[3] 55-1503, 55-1504

What does all this mean? The Idaho Condominium Property act contains certain mandatory provisions and other rules. It is good to know if you and your property come under its purview. Either way, it is vital to understand what you own and how it affects assessments, decision-making, etc. Once again, even if the act does not apply, there still may be valid covenants that affect the use of a unit, require assessments and dues, etc.

Private Yards

Some townhomes may include a privately owned yard, some may feature a yard that is common area, or limited common area. Again, know what you are buying and owning beforehand with a careful understanding of the deed, legal description, and declaration.

Party Walls

Party walls are walls that are shared by two townhouse owners in common. Your townhouse declaration should have fairly detailed rules detailing maintenance and the rules for repairing a party wall if one owner damages it via a leak, condensation, or other casualty. Generally, the common owners should share maintenance costs, and the owner from whose property damage originates should bear the cost of repairing any damage. Insurance companies are usually able to work this out among themselves. (See the section on Insurance.)

FIVE

Covenants, CCRs, Declarations, Etc.

What are Covenants?

Covenants, a.k.a. "covenants, conditions, and restrictions," aka "CCRs," a.k.a. the "declaration," are a set of agreements that are **recorded**, which means filed with the county, and they affect how property can be used. When you take title to your unit, you are agreeing to be bound by the covenants. The Idaho Condominium Property Act controls to a small extent what must be in covenants (the declaration), but there is a great deal of flexibility also.

Idaho Condominium Property Act Requirements

To be valid under the act, a condominium declaration must contain at least the following provisions. Idaho law does not address any minimum requirements for townhouse declarations or declarations for free-standing communities.

Under the act, a condominium declaration must contain[4]:

- ❖ Legal description of all land, buildings, and units
- ❖ Each owner's percentage of ownership of the common area

[4] 55-1505(1)

Optional Provisions

A condominium declaration may (and should, but does not have to) contain provisions for[5]:

1. Descriptions of buildings, units, and locations

2. Description of common areas and limited common areas

3. Land and unit values

4. Statement of purpose for each building

5. Voting rules in the event of destruction of the project

6. Elements usually found in by-laws

7. Management provisions

8. Amending the declaration [these are really important!]

9. Independent audits

10. Assessments [also really important]

11. Just about anything else as long as it's not in conflict with the Idaho Condominium Property Act[6].

[5] 55-1505(2)

[6] 55-1505(2)(q),(3)

As noted above, the declaration is the single most important document that affects association living. It is vital to understand the fundamentals of the declaration. Declarations may require you to pay assessments, tell you what color window shades you can and cannot have, and what you can or cannot place on the deck off of your unit.

Amending the Declaration

A declaration can be amended, usually (and hopefully) by some super-majority that is over and above the usual voting majority. Many declarations may require a super-majority of 66 per cent or higher. It is not advisable to have a super-majority that is too high, because a super-majority creates a powerful super-minority: If a huge majority is necessary to do something, a very small minority can block the action! If 85 per cent of the owners must agree to something, a mere 16 per cent can block it.

By the same token, a super-majority is useful, because it is a mistake to amend the declaration willy-nilly to serve a small interest group or lobby.

The declaration should contain the recipe for its own amendment, and usually requires that notice of the proposed amendment be specifically stated in a meeting notice. The actual amendment should be certified by the secretary of the association, signed and notarized by the president, and must be recorded to be valid.

Before amending the declaration, it is important to understand mortgagee clauses and how they work.

Mortgagee Clauses

Most declarations have "mortgagee" clauses. The mortgagee is typically a bank which carries a mortgage, or a deed of trust[7]. The typical mortgagee clause states that the declaration cannot be changed without the written consent of all mortgagees. This presents a big problem: It can be really difficult to locate, communicate with, and get a response from all mortgagees, so many associations have developed different strategies for amending their declarations.

While not tested in Idaho courts, a common practice is to send each mortgagee a certified letter notifying the mortgagee of the change to the declaration, and alerting each that it has thirty days to respond. I personally have never heard of a bank actually responding. It is advisable to then change the declaration such that mortgagee consent is only required for certain things that actually affect the mortgagee's security, such as changing the lot lines for condominiums, or conveying common area.

It is important to note that any mortgagee/bank that finances a unit after such an amendment essentially consents to the new language. Just like owners, banks are bound by the terms of the declaration in effect at the time of taking their interest.

[7] A mortgage and deed of trust are quite different from each other, but for these purposes they can be used synonymously.

SIX

Enforcement of the Declaration and Association Rules

Due and Fair Process

Fairness and the appearance of fairness are very important when dealing with enforcement. It should go without saying that all rules and procedures established in the declaration and by-laws must be followed. If your declaration does not have any hearing or review mechanism for fines, penalties, or loss of voting rights (or any other rights of owners), careful consideration should be given to an amendment. Note that "due process" is not as formal as due process under state or the federal Constitutions, as we are dealing with agreed-upon contractual rights, not civil rights.

Violations

There are times when there are violations of the declaration or rules. The best approach is a rule of reason. The violator should first be apprised of the violation in a friendly and polite manner. Violators who refuse to comply with the declaration or rules should face an escalating enforcement, which may culminate with fines and/or a lawsuit to enforce the declaration or to seek an injunction.

Fines

Fines are controversial. The Idaho Legislature enacted Idaho Code Section 55-115 in the spring of 2014, which makes it clear that fines are legal IF they are (1) provided for in the declara-

tion; (2) the board gives the offending owner a thirty day notice of a meeting/hearing on the fine; and (3) a majority of the board votes to impose the fine. The new law also has a provision that may lead to some confusion: If the member begins to resolve the violation "in good faith" before the fine hearing, no fine shall be imposed. The analysis of whether the offending member has begun to resolve the violation "in good faith" will have to be determined by the board on a factual, case by case basis. One can imagine situations, such as a loud, all-night party, or cutting down a common-area tree, where no conduct could remedy the violation. One could also imagine scenarios, such as an unpermitted installation on the common area, where good faith steps might really work towards a remedy.

Fines must have some reasonable relationship to the damage that actually occurs to the association. So a $1,000 fine for littering in the common area would likely not be reasonable, but a $25 fine might be. A fine for an improperly parked vehicle that had to be towed might take into consideration the extra management time necessary to arrange towing, plus of course towing fees. The declaration should absolutely provide that a fine becomes a special assessment against a unit, that can in turn give rise to a lien on the unit.

Lawsuits

There are unfortunately times when boards or owners turn to the courts to enforce what they believe is the correct interpretation of the CCRs or by-laws. Litigation is very expensive and is fraught with uncertainty and risk, and should generally be avoided. There are of course times when owners simply refuse to abide by the declaration, or when associations fail to follow their own rules, and then litigation may be necessary. Idaho courts have consistently honored attorneys' fees provisions in contracts, and it may

be wise to have an attorneys' fees provision in the declaration.

Injunctions

An injunction is an order from a court that requires a person to do, or to stop doing something. For example, if an owner were engaging in conduct in violation of the declaration such as running a daycare center, an association could seek an injunction from a court to have the conduct stopped. Injunctions often begin with a temporary restraining order. While very useful under certain circumstances, injunctions are confrontational and expensive, and should generally only be used only in the case of a true emergency or as a remedy of last resort.

SEVEN

Non-Profit Corporation Laws

What Laws Apply to the Association?

As mentioned above, the Idaho Non-Profit Corporation Act (INPCA), Title 30, Chapter 3 of the Idaho Code, contains over 140 code sections specific to non-profit corporations. Most homeowners' associations are set up as non-profits, so the INPCA is centrally important. The INPCA contains certain provisions that are mandatory, and others that provide "fill-ins" if the articles or by-laws of the association are silent on an issue. Still other provisions are only applicable "unless otherwise provided" in the articles or by-laws, so in many instances the articles or by-laws can establish rules that differ greatly from the Idaho Code. Yet other provisions affect only corporations with members, such as homeowners' associations, and others only pertain to religious corporations. There is not sufficient room here for a complete discussion of the INPCA, but the INPCA can resolve many questions concerning corporate duties, procedures, and relationships. There are many references to the INPCA in the portions of this book that discuss directors and officers.

If your association is not a non-profit corporation, there are many advantages to becoming one, including statutory protection from liability for the directors and officers.

What Association Documents May Owners Inspect?

A very common question from managers, board members, and condominium owners is, "What homeowners' association corporate records may an owner inspect?" Assuming your association is a non-profit corporation, the INPCA governs this question. The INPCA allows a member to inspect the following records, if the member gives written notice at least fifteen days prior to the date of the inspection – incidentally, all of these records must be maintained by the association anyway. The association can charge a reasonable fee for any copies provided to the member.

Here are the Documents That an Owner May Inspect[8]:

1. Articles of incorporation;
2. By-laws;
3. Resolutions adopted by its board of directors relating to the characteristics, qualifications, rights, limitations and obligations of members or any class or category of members;
4. The minutes of all meetings of members and records of all actions approved by the members for the past three (3) years;
5. All written communications to members generally within the past seven (7) years, including the financial statements furnished for the past seven (7) years under section 30-3-134, Idaho Code;
6. A list of the names and business or home addresses of its current directors and officers; and
7. Its most recent annual report delivered to the Secretary of State.

[8] 30-3-131

Additional specific records may be inspected, but here the Member must jump through some hoops. Again, fifteen days written notice is required. The hoops to jump through are showing that the request to inspect the records is legitimate and specific[9], that is:

- ❖ the member's demand is made in good faith and for a proper purpose reasonably related to the member's interest as a member of the corporation
- ❖ the member describes with reasonable particularity the purpose and the records the member desires to inspect
- ❖ the records are directly connected with this purpose, and
- ❖ the board of directors shall determine whether a member's request is for a proper purpose.

So if the member clears the above hurdles the member can also inspect these records[10]:

- ❖ minutes of all meetings of its members and board of directors
- ❖ a record of all actions taken by the members or directors without a meeting, and
- ❖ a record of all actions taken by committees of the board of directors
- ❖ under certain conditions, a membership list[11]

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[9] 30-3-131(3)

[10] 30-3-130(1)

[11] See 30-3-79(4); 30-3-131(2)(c), 33-3-133

Again, these are records that must be kept by all non-profit corporations. It should be noted that the board may deny inspection of certain personnel records and confidential attorney-client communications if that denial is in the best interests of the association.

Membership lists must be made available two days after noticing a corporate meeting, and at the meeting. A request to inspect a membership list should be made fifteen days in advance.

EIGHT

The Board of Directors

The Function of the Board

The board exercises all corporate powers[12], but can also delegate powers to others. In association living, the board typically controls association finances and typically has exclusive control over, and responsibility for, the common area. (See Board Powers, below.)

Who Can Be a Board Member?

The by-laws (or possibly the declaration or articles) will state who can serve as a board member. While most associations require that a board member be an owner, some do not. Note that an "owner" is someone with any interest in a unit – so theoretically a person could own 1% of a unit and still serve as a board member if properly seated. A board member must be an individual[13].

[12] 30-3-63

[13] 30-3-64

General Standards of Conduct for the Board

The Idaho Code contains detailed standards for board members[14]. If board members act in compliance with the code, they are immune from liability to the association, any member, or any other person. To paraphrase the code, a board member must act:

- ❖ in good faith;
- ❖ with the care that an ordinarily prudent person would use under similar circumstances; and
- ❖ in a manner the board member reasonably believes is in the best interests of the association[15].

In serving the association, a board member is allowed to rely on information, reports, financial statements, etc., if the information was prepared or presented by:

- ❖ officers or employees of the association whom the board member reasonably believes to be competent and reliable; or
- ❖ the association's attorney, accountant, or other professional whom the board member reasonably believes is competent; or
- ❖ a board committee consisting of other board members, where the board member has reasonable confidence in the committee.

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[14] 30-3-80

[15] 30-3-80

A board member is not acting in good faith if the board member is in possession of information which makes reliance on others unwarranted[16].

Conflicts of Interest for Board Members

Again, the conflict rules are the subject of a very detailed statute[17], and a full discussion is impossible here. If there is a question of a conflict of interest, it is important to contact an attorney. The ***basic*** rules are:

- A conflict of interest exists if the board member has a direct or indirect interest in a transaction with the corporation. For example, if the board member is a painting contractor and is hired to repaint the common area, a conflict of interest exists.
- A conflict of interest transaction can be approved by the association if all of the material facts, including the board member's interest, are known to the board and the board approves the transaction, OR if all of the material facts, including the board member's interest, are known to the members and the members approve the transaction.

This is just a summary. The code is complex, and there are subtle nuances to analyzing the conflict, and what constitutes approval. Contact a qualified lawyer if there is a serious question about a conflict! A good rule of thumb is: if the association is contracting with a company and a board member has any financial interest in that company, raise the red flags!

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[16] 30-3-80(3)

[17] 30-3-81

How Many Board Members Do You Need?

There must be at least three board members in a non-profit homeowners association[18], and the by-laws or articles may specify a greater number.

Can Board Members be Paid?

Indeed, under Idaho law board members can be paid, although most declarations and by-laws or articles require board members to serve without compensation. If the board is to be compensated, the by-laws, articles or the board sets the compensation[19]. Likewise, if the articles or by-laws provide, board members can be reimbursed for expenses.

The by-laws will specify election procedures. Typically board elections are conducted at the annual meeting[20]. The by-laws will also specify whether board members are elected by cumulative voting, or one-candidate, one-vote[21]. It is highly advisable to have staggered terms for directors so that the entire board does not turn over at once[22]. Not every board seat must be for the same length of time.

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[18] 30-3-65

[19] 30-3-73

[20] 30-3-66

[21] 30-3-59

[22] 30-3-68

Electing the Board

Under cumulative voting, each person gets as many votes as there are board seats open, so one could cast multiple votes for one person.

Resignation, Removal, Incapacity, Death

Again, the by-laws should contain procedures for the circumstances where a director resigns or dies. By-laws often allow the remaining board members to appoint a new director who will serve until the next election for that seat. If the by-laws are silent, or don't cover every eventuality, the Idaho Code contains procedures for filling an empty seat on the board[23].

Likewise, the by-laws should have procedures for removing a director with or without cause. Either way, the Idaho Code lays out the rules[24]. Importantly, a director can only be removed by the members at a meeting called for that purpose, and the meeting notice must state so[25]. One, two, several, or all directors may be removed. Essentially, the number of votes it takes to remove a director must be equal to the number of votes it would take to elect the director. If the association allows cumulative voting, this analysis is complex.

It is important to note that this is one of the areas of law that *cannot* be modified by the by-laws or articles of the corporation[26].

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[23] 30-3-72

[24] 30-3-70

[25] 30-3-70(5)

[26] 30-3-70(10) Only religious corporations' by-laws and articles may change the 30-3-70 framework.

Indemnification of Board Members

The association has the power to indemnify (pay the legal fees and damages for) board members who are acting in good faith in the best interests, or not opposed to the best interests of the corporation. The rules for when a corporation indemnifies board members, officers, employees, etc. are exceedingly complex[27]. This is another area where an association will greatly benefit from careful legal guidance.

Board Procedures

Procedurally, the board is usually governed by the by-laws. The by-laws will typically contain the recipe for how board members are elected, and how they are replaced in the event of removal, resignation, incapacity, or death, all subject to Idaho statutes as discussed above.

The by-laws will also typically contain rules for how and when board meetings occur. The by-laws will designate regular board meetings and a procedure for calling a special board meeting[28]. Board members can waive notice of a meeting in writing. Actual attendance at a meeting is generally a waiver of notice, unless the board member objects to the lack of notice and does not vote on the objectionable action[29].

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[27] 30-3-88

[28] 30-3-74

[29] 30-3-77

The Board May Act Without a Meeting: Unanimous Board Consent

Idaho law allows the board to act without a meeting by signing a unanimous written consent[30]. True to its name, a unanimous written consent must be signed by **all** current board members, and must be included with the minutes of the corporation. If proper procedures are followed, a unanimous consent constitutes a board action without convening a meeting. The board members do not all need to have their signatures on the same document, but all must sign a consent.

Electronic Attendance by the Board

Any or all board members may attend meetings electronically (i.e. via phone, videoconferencing, etc.), as long as all participants can simultaneously hear each other[31] and the by-laws do not forbid it.

No Board Proxies

Unlike a Members' meeting, a Board member cannot use a proxy or stand-in for any board meeting. The Board member must attend, but can do so electronically as long as the by-laws don't forbid it[32]. This is because a fiduciary duty such as Board membership cannot be delegated to someone else.

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[30] 30-3-75

[31] 30-3-74(3)

[32] 30-3-74(3)

Who Can Attend Board Meetings?

A frequent question is whether the non-board member owners can attend board meetings. Absent a clear statement one way or another in the articles of incorporation or by-laws, the question of who can attend board meetings is a matter for the discretion of the board as a whole rather than any individual director[33]. Consequently the board usually decides who may attend.

Board Powers

The board is charged with running the corporation, i.e. the Association, managing its financial affairs, and managing its property. Many board duties may be delegated to others by hiring managers, landscapers, snow removers, and accountants. Even though the board can delegate duties, the board is ultimately responsible and must do so in a reasonable way. While the board has a lot of discretion in what it decides, it is vital to have properly noticed meetings to make decisions, as well as accurate minutes showing a robust discussion.

Limitations on Board's Powers

The board's powers are not unlimited. The board only has the powers that are conferred on it by Idaho laws and the controlling documents, i.e. the declaration, the by-laws, the articles of incorporation, and the rules.

[33] 18B Amjur 2d., Corporations, Sec. 1276.

For example, in an interesting Pennsylvania case (which Idaho courts would likely follow) the court ruled that without specific authority in the declaration, the board could *not* require owners to subscribe to a bulk cable TV service. The court held that only a vote of the owners or an amendment of the declaration could give the board power to require residents to subscribe to a certain cable provider[34].

[34] River Park Owners Association v. Crumley 47 A.3d 870 (Pa. App. 2012)

NINE

Officers

Required Officers

The by-laws and articles of incorporation will specify the required officers. The Idaho Code provides that *unless otherwise provided in the articles or by-laws*, a corporation must have a president, secretary, and a treasurer[35]. The Idaho Code thus gives a great deal of flexibility. Most associations indeed have a president, secretary and treasurer, and some have one or more vice presidents. The by-laws usually specify the duties of each officer. The board can also amplify officers' duties by resolution, and the board can appoint an officer to direct the duties of other officers [36]. The latter two options are far less frequent than a clear statement in the by-laws.

Can One Person Hold Two Officer Positions?

Yes, with one exception: Except for being president and secretary, one person can hold two positions. So one person can be president and treasurer, or treasurer and secretary, vice president and secretary, etc. One person cannot be president and secretary at the same time.

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[35] 30-3-83

[36] 30-3-84

Optional Officers

Under the INPCA an association may have "such other officers as are appointed by the board[37]," so in theory the number and types of officers are limited only by the bounds of practicality.

Who Can Be an Officer?

Unless otherwise limited by the by-laws or the declaration, any individual can be an officer. Some associations require that officers be owners/members, but others do not.

Standards of Conduct for Officers

Much like board members (directors), the Idaho code specifies standards of conduct for officers[38]. (The guides for conduct for directors and officers are nearly identical.) If officers act in compliance with the code, they are immune from liability to the association, any member, or any other person[39]. To paraphrase the code, an officer must act:

- ❖ in good faith;
- ❖ with the care an ordinarily prudent person would use under similar circumstances; and
- ❖ in a manner the officer reasonably believes is in the best interests of the association.

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[37] 30-3-83(1)

[38] 30-3-85

[39] 30-3-85(5)

In serving the association, an officer is allowed to rely on information, reports, financial statements, etc., if the information was prepared or presented by:

- officers or employees of the association whom the board member reasonably believes to be competent and reliable; or
- the association's attorney, accountant, or other professional whom the board member reasonably believes is competent; or
- a board committee consisting of other board members, where the board member has reasonable confidence in the committee.

An officer is not acting in good faith if the officer is in possession of information which makes reliance on others unwarranted[40].

Resignation and Removal of Officers

An officer can resign at any time by delivering notice of resignation[41]. The resignation can be effective at a future date. An association board may remove an officer at any time, with or without cause[42].

[40] 30-3-85(4)

[41] 30-3-86

[42] 30-3-86

Officers' Power to Sign Documents

Generally, the association by-laws should designate who can sign contracts, agreements, and other documents that legally bind the association. The Idaho Code protects innocent parties who are not aware of the internal signing protocols[43].

Indemnification of Officers

Just as with board members, the association has the power to indemnify officers who are acting in good faith in the best interests, or not opposed to the best interests of the corporation. The rules for when a corporation indemnifies board members, officers, employees, etc. are exceedingly complex[44]. This is another area where an association will greatly benefit from careful legal guidance.

[43] 30-3-87

[44] 30-3-88

TEN

By-laws

The Idaho Code is a bit confusing when it comes to by-laws. Under the Idaho Condominium Property Act[45]:

- ❖ if no corporation is formed, there must be recorded by-laws
- ❖ if a corporation is formed, by-laws are not mandatory, because the Idaho Non-profit Corporations Act governs the association.

In simple terms, all homeowners' associations, be they incorporated or not (and incorporation is usually a good idea) ***should*** have by-laws. The by-laws ***should*** be recorded because then owners are put on the best notice of them. Remember, recording a document puts everyone on notice of its contents!

What Must Be in the By-laws

Again, the Idaho Code is a bit wacky about when by-laws are actually really required, but again, they are a great idea and should be used. If there are by-laws, they should be recorded. Here is what must be in required by-laws (and should be in all by-laws)[46]. Provisions for:

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[45] 55-1506

[46] 55-1507

- election of a board of directors
- method of calling meetings and determining quorums
- election of officers (president, secretary, treasurer)
- maintenance of the common area
- method of estimating the annual budget, the manner of assessing owners for expenses
- upon 10 days written notice the association will furnish a statement of unpaid assessments to a requesting owner
- personnel for common area maintenance
- provisions for how units are used
- method for adopting rules and regulations
- percentage of votes required to modify the by-laws.

Of course, by-laws should contain a lot of other provisions – a complete list would be exhaustive, but by-laws should also at a minimum describe:

- the number and powers of board members, and provide for election, removal, filling vacancies, meetings, quorums, and action without a meeting
- the officers and the duties of their offices
- membership qualifications, voting rights, annual meetings, special meetings, notices, quorums, proxies, etc.

- ❖ provisions for entering contracts, writing checks, record keeping, etc.
- ❖ how to amend the by-laws, and whether special notice is needed for a meeting where an amendment is considered.

This list could be endless; these are just examples.

ELEVEN

Rules and Regulations

Many declarations provide that the association, i.e. the board, can create reasonable rules and regulations. Rules and regulations are typically not recorded, and can be amended by the board at any time, making them much more flexible. Importantly, rules and regulations cannot take away rights or create rights not provided for in the declaration or by-laws. For example, if the declaration has no provisions about putting signs in windows, such as political or for-sale signs, the board could not create a rule forbidding signs: absent a restriction in the declaration, there is a presumption that there is free use of the property.

Also, it is wise to make sure that authority for fines or other sanctions, such as a suspension of voting rights or suspension of certain common area privileges is provided for in the declaration, not just the rules, **and** that there are due process/fairness provisions for applying them.

TWELVE

Membership & Meetings

Who Can Be a Member?

The articles and/or the declaration will restrict association membership to owners. An owner can be any legal "person," such as one or more individuals, a married couple, a corporation, partnership, LLC, estate of a deceased person, etc. An owner can also be a combination of any of these entities, such as a person and a partnership.

Each unit only gets that unit's vote: if there are numerous owners of one unit, they'll have to use their own procedures to decide how to cast their vote. They cannot fragment out the vote based on fragmented ownership.

Meetings of the Members

Membership meetings must be held at least annually[47]. A special meeting may be called by the board or by ten per cent of the members[48]. A court can order a meeting, but this is very rare[49].

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[47] 30-3-46

[48] 30-3-47

[49] 30-3-48

Action by Owners Without a Meeting

Unless the declaration, articles, or by-laws limit or forbid it, the members can act *without* a meeting if eighty percent (80%) of the voting power of the members sign a written consent. The written consent must be delivered to the association for inclusion in corporate records. Notice of the action must be given to all owners[50].

Meeting Minutes

Minutes of all members' meetings must be kept[51]. While the contents of minutes can be fairly flexible, certain things must be in them, such as waivers of notice[52], and actions by the members or directors without a meeting[53].

[50] 30-3-49

[51] 30-3-130

[52] 30-3-51 - 30-3-77

[53] 30-3-49 - 30-3-75

THIRTEEN

Voting

Power of Votes

There are different methods for valuing votes. Your association may also have classes of memberships where one class of membership (usually a developer, see below) gets more votes. There are two basic voting approaches, one-unit-one-vote, and proportional voting.

"House of Representatives"

Analogous to the US Congress, this type of voting is a function of the size of the unit, just like more populous states have more congressmen. Bigger units get more voting power. This makes sense, because bigger units usually have proportionally bigger assessments.

"Senate"

Under this model, each unit gets one vote, identical in power. This works best where all units are the exact same size.

Hybrid Voting

Caution should be exercised: if the documents call for a certain type of voting and another method is used, the action could be challenged. Many times I have heard, "that's the way we have always done it," but it is worthwhile to double check the voting system and how votes are weighted, and to make sure that the votes are weighted accurately at any election.

Classes of Voters

With some Associations the developer will set up two classes of voters, so that the developer's unsold units have more powerful votes, such as three-to-one. In this manner the developer retains control of the Association until a certain number of units are sold, or until a certain date in the future. This is very useful in most cases, as it is often the case that minor changes must be made to the Declaration after a few units are sold.

Ballot By Mail

Under Idaho law, unless the articles or by-laws prohibit a ballot by mail, an election may be held by mail[54]. This is really useful, because it can get an important issue in front of the owners without waiting for the annual meeting, and without calling a special meeting. Oftentimes with vacation condos and absentee owners, a special meeting can be very cumbersome.

[54] 30-3-53

Under the ballot by mail law, the association must send out a written ballot to every member. The ballot has to set out the proposed action, and provide a way to vote yes or no. A measure will pass as long as a required quorum votes on it, and the percentage/number of votes is in line with any other requirements. For example, a measure may require "66 and 2/3 percent of all units voting in favor." A ballot by mail would need to meet the same standard. But if only a simple majority of a quorum is required for a measure, then that is all it would take to pass.

A ballot by mail must also indicate the number of responses needed to reach a quorum, state the percentage of approvals necessary for the measure to pass, and provide a deadline for responding[55].

[55] 30-3-53(4)

Proxies

Most by-laws provide for proxies, and the INPCA does as well. Unless the articles or by-laws prohibit or limit proxies, they can be used freely, as long as they comply with the law[56]. Proxies can be very valuable in a contested election, because they can be sought by lobbying individuals outside of a meeting. Most bylaws require that proxies be delivered to the association or its managers within a fixed time period prior to a meeting, often at least 24 hours.

A proxy should nominate an individual person. Many proxies name "the board of directors" but that can lead to other problems as the board then has to decide how to vote the proxy. The much better practice is to name an individual on a proxy. A proxy is valid for 11 months unless a different period is specified, but it cannot be valid over 3 years.

A proxy can be revoked in writing, or by naming a new proxy, or by simply attending the meeting in person and voting. The association by-laws and articles can put reasonable conditions on proxies.

[56] 30-3-58

FOURTEEN

Relationship of CCRs, Articles, By-laws, Rules, Resolutions

The interrelationship among all of the documents that affect your association can be complex, but there are some fairly simple guidelines.

Courts and attorneys generally try to read documents together so that they harmonize. In association documents, stark contradictions are rare, i.e. where one document says you must do X and the other document says X is forbidden. More commonly, the documents don't contradict each other, but may not harmonize perfectly.

Applicable federal laws come first in the pecking order, then Idaho State laws. After that comes the recorded declaration, the recorded plat, and the articles of incorporation. That is to say that if something in the by-laws or rules is in conflict with one of them, the articles and declaration take priority. This is because the articles are filed with the Secretary of State, and the declaration and plat are recorded. Both documents usually have a higher standard of notice and voting to amend them.

As advisable as it is rare, some documents provide a hierarchy for interpretation in case of conflicts. Because the declaration is recorded as a covenant, it almost always takes precedence over other documents, because it amounts to an agreement that you accept and agree to when accepting the deed to your unit.

So the fundamental order of precedence is:

- Federal law
- Idaho State Law
- Plat
- Declaration
- Articles of Incorporation
- By-laws
- Board Resolutions
- Rules & Regulations

FIFTEEN

Assessments

Assessments are a necessary part of association living: the association must spend money for all sorts of upkeep, management fees, etc. Assessments also cause a fair deal of strife, as some people do not like having others, i.e. the board, decide how their money is spent.

The Power to Assess

The power to assess is in the Idaho Code, and is usually in the declaration. Assessments can be limited in the declaration also. Assessments are usually within the power of the board, however, some associations require that extraordinary or large assessments be approved by the members.

Assessments are not only an obligation of the "unit" (which can be enforced by a lien), but almost all declarations provide that the assessments are personal obligations of the owners as well. This means that even if the owner sells the unit or is foreclosed out, she or he is still responsible as an individual for any unpaid amounts. The foreclosed owner is still responsible as an individual for unpaid assessments, though they may be difficult to collect.

Regular Assessments

Regular assessments are vital for the day-to-day expenses of the association. The board in most cases has discretion to set the regular assessments on a yearly basis. Regular assessments should

also have elements for normal reserves for long-term capital repairs, maintenance and projects, and even emergency reserves.

Special Assessments

The board usually has the authority to make special assessments. Special assessments may be levied upon all owners for unanticipated expenses, on a class of owners if the declaration so provides, or on individual owners in the case of fines or penalties. Special assessments are often needed if an owner sues the association: the owner-plaintiff gets to (with chagrin) contribute money to defend his/her own lawsuit!

Limitations on Assessments

It is wise for the declaration to limit increases in regular assessments, and to limit special assessments. This is usually done by giving the board some discretionary formula, such as 120 per cent of the prior year's assessments. Then, if the board wants to exceed its authority it must get a majority of owners to approve. This prevents the board from undertaking expensive projects that the owners may not generally approve of, for example, expensive landscaping upgrades, common area remodels, etc.

Who Pays the Assessment?

Assessments are tied to unit ownership. If there are multiple owners, each owner is "jointly and severally" liable, meaning the association can look to any current owner for the entire amount due. Almost all associations base an assessment percentage on the unit's size relative to other units.

SIXTEEN

Fines and Penalties

The Idaho Legislature directly addressed fines in 2014 with the new Idaho Code Section 55-115, effective July 1, 2014. The new law affects all Homeowners Associations in Idaho. The Legislature confirmed that fines are permissible. There must be authority for fines in the declaration, not just in the rules. Also, a board majority must vote to impose the fine. The board must then have a "meeting," and give the offending party thirty (30) days' notice of that "meeting." While unclear, it appears that the Legislature meant a "hearing." If the offending member begins resolving the violation prior to the hearing, no fine shall be imposed as long as the member "continues to address the violation in good faith until fully resolved." The money from the fine cannot be used to increase the pay of a board member or the manager.

While unclear, the Legislature has finally spoken and said "fines are okay." What is not clear is who determines the good faith of the offending party – it ought to be the board. It also appears that no one can get a "bonus" for a fine, but it makes sense that if the manager incurs costs, such as cleanup, those costs can be reimbursed from the fine. Any fines must have a reasonable relationship to the actual cost or damage incurred by the association. Under the Idaho Code, a fine or penalty can become an assessment against the offending unit, which can be enforced with a lien[57]. The declaration should have clear provisions linking fines to assessments and liens. Indeed, the INPCA provides that a member may become liable to a corporation for dues, assessments, and fees[58].

So be sure your declaration provides for fines if you want to impose them.

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[57] 55-1518

[58] 30-3-40

SEVENTEEN

Liens

Liens by the Association

A lien is technically a claim against real estate, such as a condominium or townhouse, made to secure a debt owed to the lien claimant, i.e. the association. Almost all declarations provide a mechanism so that the association can record a lien against a unit if the owner fails to pay any assessments, be they regular, special, emergency, etc. Liens can also arise from unpaid fines (see the section on liens), or other charges established in the declaration.

Under the Idaho Code, a lien can be recorded for debts incurred in the previous twelve months[59]. The technical requirements for liens must be followed precisely. Once recorded, the lien continues in force for one year, and can be extended for one additional year. During the time the lien is valid, the association may file suit to foreclose on the lien. As always, initiating litigation against an owner should be carefully thought out and planned with an attorney. For example, if a unit is "upside down" financially, or has little to no equity, it may not make practical economic sense to foreclose. However, lien foreclosure is not the only way to collect. (For a general discussion of collections, see below.)

[59] 45-810(1)

Procedurally, a lien is usually drafted by an attorney, signed by the association or manager (as may be specified in the declaration), and recorded in the county recorder's office. Once a lien is recorded, it must be sent within five days via certified mail (or hand delivery) to the owner's last known address[60]. As a practical matter, liens should be sent certified to the address that the owner has on file with the county assessor for tax purposes, as well as to any other address on file with the association. Some declarations have formal procedures for notifying the association of an address change.

The amounts that the association can put in a lien should be described in the declaration, and should include all basic amounts due, i.e. assessments, fines, charges, interest, late charges, and all attorney's fees. The owner who has a lien recorded against his or her unit can attempt to negotiate lesser amounts with the association, but the association has no obligation to discount the lien. Once the owner pays the amount due, the association must release the lien. If the owner fails to pay, the association can foreclose if it makes economic sense, or at times simply wait for the unit to be foreclosed by a bank, or otherwise sold or transferred. These complex strategies are discussed below.

Liens Against a Condominium or the Association

There are times when a contractor's or mechanic's lien may arise against an individual condominium or an association. This sort of lien arises when a contractor or worker is unpaid. Under Idaho law, if the work was done only on one condo, the contractor can lien that condo, but no other condos unless somehow the other owners agreed in advance[61].

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[60] 45-810(2)(d)

[61] 55-1519

However, a lien against the association and the common area for improvements to the common area can get ugly – because each condo owner also owns the common area, each condo owner must have his or her interest liened. For an unpaid contractor, this can be a very effective way to get the association to stand up and pay attention! Owners are not typically happy to receive liens in the mail.

EIGHTEEN

Collections

With the recent economic downturn, collecting unpaid dues can be a daunting challenge for associations – sometimes wildly successful, and at times fraught with frustration.

Collection Agencies

There are many collection agencies that will try to collect a debt, usually taking as much as fifty cents on the dollar or more, and only upon collection. Because an association usually has a lien against a unit, collection agencies may not be the best route to recovery.

Liens, Priorities, and Strategies

A lien is a powerful instrument. In order to record a lien against a unit, the requirements of the declaration and Idaho law must be carefully followed. Under the law, an unpaid assessment can become a lien[62]. If a lien is properly recorded and maintained, the owner cannot sell the unit without the lien being paid off. Most declarations allow the association to add attorney's fees to the lien.

Note that a plain vanilla sale is very different from a foreclosure or deed-in-lieu. These are discussed below.

[62] 55-1518

A lien is a claim of ownership. A properly recorded lien can be foreclosed against, however foreclosure is complex. Before pulling the foreclosure trigger, it is vital to know what other liens and mortgages (or deeds of trust) exist against the unit. The bank's mortgage will always be first in line, so if there is a bank mortgage that exceeds the equity in the unit, foreclosure by another lien holder may well be a futile and exasperating waste of time and money.

One can informally determine what mortgages and liens are against a unit with a call to a title company. A title company will make a formal determination for a charge, known as a lot book or litigation guarantee.

If there is no mortgage or other liens above your association's lien on a unit, the association is in a **very** strong position, because the threat of foreclosure is much more realistic with than a heavily mortgaged unit.

Foreclosure by the Association

If an association does choose to foreclose, the association must have a valid lien and file a lawsuit. The ultimate result of the lawsuit would be a judicial sale of the unit[63], and the proceeds go to all of the lienholders in order of their priority. This means that it will usually not make sense to foreclose against a unit with a large mortgage and not a lot of equity: the bank-mortgagee, always in first position, will get all of the money.

[63] 55-1518

Foreclosure by the Bank

Oftentimes a bank will foreclose on a unit, or the owner will give the unit back to the bank with a deed-in-lieu of foreclosure.

If a bank gets a deed-in-lieu of foreclosure, it steps into the shoes of the owner, and depending on what the declaration says, the bank may be fully, partially, or not liable for any unpaid dues (see below).

When a bank forecloses, the bank becomes the owner, and any less-senior, i.e. junior liens are **wiped out**. Gone. That means that if your association is a junior lienor, the lien is done and worthless after the bank forecloses. But not all may be lost…

Many associations, especially older ones, have language in their declaration that can come back to bite the bank, or any other new owner, and require them to pay the unpaid dues as a matter of contract, not through a lien. Remember, when the bank or any other foreclosure purchaser becomes an owner, it too has "agreed" to all of the terms of the declaration.

Liability of the Bank-as-Owner

Where a bank forecloses, or someone else purchases a unit at a foreclosure sale or otherwise, a careful analysis of the declaration is vital. Many older associations have language that puts any **new** owner **on the hook for the last owner's unpaid dues**. Banks hate this! Purchasers of condos should be aware of this language, because it is fully enforceable. This author has recovered several tens of thousands of dollars from banks based on such language!

Some declarations wipe out any old dues with a foreclosure (but not a new purchaser). Some require the bank or new owner to pay

only the last six months' balance. Again, careful analysis of the particular language is important – both as a potential buyer and as an association.

Interestingly, out-of-state banks often claim that there is an Idaho statute that protects them from back dues. There is not. While the lien may be wiped out, the agreements in the declaration are valid and the bank may be liable for all unpaid dues as the subsequent owner.

Small Claims Actions

For any debt up to $5,000, small claims court is a viable alternative. Your association cannot foreclose on a lien in small claims court, but it can get a money judgment against an individual. Small claims court is fast, inexpensive, and efficient. No party in small claims court may have a lawyer appear, but you can consult with a lawyer to prepare your case [64]. A judgment in small claims court can be enforced just like any other judgment. If you have to hire a lawyer to collect on a small claims judgment, you *can* recover attorney's fees up to the amount of the judgment[65]. Small claims judgments can also be appealed, and the court then re-tries the entire action from scratch[66].

[64] Idaho Rules of Civil Procedure 81(d)

[65] 12-120(6)

[66] Idaho Rules of Civil Procedure 81(n)

Other Court Actions

Almost all declarations provide that a debt gives rise to a lien, and is a personal obligation of the owner(s) also. There are times where an association may wish to sue in court on the personal obligation, but not foreclose. This would make sense when, for example, the unit is upside-down, but the owner has other traceable assets, such as real estate with good equity.

Other Collection Leverage

One fairly novel approach to an owner who simply won't pay assessments is to cut off association-furnished services to that unit. This approach has NOT been tested in Idaho courts, and it is vital to proceed with careful legal advice. This should only be done with a precise amendment to the declaration that gives the owner due process, i.e. a right to a hearing before the board. Only services that are provided by the association can be cut. With that said, a deadbeat owner who suddenly loses cable and internet, or perhaps water and electricity, will usually pay attention. Oftentimes there are tenants in the unit who are paying rent to the owner, and the owner simply does not want to pay the dues or assessments. Tenants become very vocal. Again, this approach has not been tested in the Idaho courts: **proceed with caution and good counsel!** I have used it on occasion and seen quite dramatic results.

NINETEEN

Problems and Challenges

There are a host of problems and annoyances that can occur in association living. Well-crafted declarations and rules will provide a roadmap to solve many of them. Poorly crafted declarations and rules can provide an expensive trip to court.

Unruly Owners

Some people are not suited to association living, or living in close quarters with others. Some people just cannot, for some reason, follow rules, even when they have already agreed to the rules. If an owner violates the provisions of the declaration or rules and regulations, a fine can be appropriate. If unacceptable behavior continues, an association may have to go to court to seek an injunction against the owner at fault.

Unruly Renters

Association managers will quickly tell you that 95% of their troubles come from renters. It is very important to remember that the *owner* is fundamentally responsible for what happens in and around his or her unit. It makes no sense at some level to fine or discipline renters, because it is the owner's responsibility.

Owners and their tenants should have a good written lease, and the owner should formally furnish a copy of the declaration and all rules to the tenants, and have the tenants acknowledge receipt of the declaration and all rules. That means if the tenants cause violations and the owner is fined, the tenants cannot claim they were

unaware of the rules. The lease should permit the owner to enter the unit upon reasonable written notice to inspect it.

If tenants violate the declaration or rules, while a polite notice to the tenants may be appropriate (depending on the violation) it is very important to contact the owner, because it is the owner's fundamental responsibility. The association is not responsible to babysit tenants.

Crowded Units

A related problem to unruly tenants is when all of a sudden a unit has an exceedingly large number of adults sleeping there; for example, where 8 adults are living in a 2 bedroom unit. Idaho courts have indeed affirmed a declaration's limitations on how many unrelated adults can reside in one unit[67]. Reasonable health and safety rules may be established also that limit the number of residents per bedroom. This is another area that is impacted by Federal fair housing laws, and an area where different cultures can clash. Proceed carefully with advice of counsel.

Unruly Guests

Just as with renters, the unit owner is fundamentally responsible for the conduct of his or her guests, and any tenant's guests. The difference between a guest and a renter is that the guest has no right to possess the premises, and it can be easier to get guests to leave. If a guest is asked to leave by the person who invited him or her and refuses to leave, that person becomes a trespasser.

[67] D & M Country Estates v.v Romriell, 59 P. 3d 965 (Idaho 2002)

Mental Health Issues

One of the toughest issues that associations face is when an occupant may be mentally imbalanced or ill, and persists in disrupting the quiet enjoyment of others. Sometimes people who are mentally ill have a great deal of trouble understanding and complying with association rules and common decency. If the person is a renter, there can be significant leverage used against the owner in the form of fines for maintaining a nuisance, assuming your declaration gives the association the authority to levy fines.

If the mentally ill person is an owner, fines can be levied, but if the person does not pay the fines, or becomes more belligerent, the circumstances can be very complex, and the association may need to seek an injunction in court.

Under any circumstances, if someone appears to be mentally ill and is annoying others, it makes sense to call the police. Idaho has fairly straightforward laws about disturbing the peace, and if any further action needs to be taken by the association, it can be helpful to have one or more citations on record. At times if the police observe the person being a danger to his or herself or others, the police can intervene more effectively.

Pets

Every association should have clear provisions in the declaration and/or rules concerning pets. The rules should address what specific types of pets are allowed in type (dogs, cats, reptiles, rodents, fish, etc.) and number. While one or two dogs may be fine, are five or six? Not every species of animal need be specified, it may suffice to describe traditional household pets. This would allow a guinea pig or a pet lizard, but not a tiger.

There is a general rule of property law that restrictions on the free use of property must be specific and will not be implied. So if a declaration says, "no dogs, cats, or rodents," one cannot imply that fish and reptiles are banned. A declaration that said, "no pigs or swine" would not forbid goats or elephants either, for that matter. An association that allows "household pets" may find an owner with a pet miniature pig or a squawking parrot.

Pet rules should also have very specific provisions for areas where pets may or may not be, leash rules, pet clean-up rules, and fines. Noise should also be addressed. Some associations choose to only allow resident owners to have pets, and do not permit renters to have pets. (While this approach has not been tested by the Idaho courts, as long as the restriction is clearly stated in the declaration, it should be valid.) Remarkably, there are now DNA companies that will analyze dog droppings so that the appropriate owner can be fined.

Service Animals Are NOT Pets

If someone claims that an animal is a service animal, proceed with caution. Legitimate service animals, such as seeing-eye dogs, therapy dogs, etc. are *not* pets under federal law **and cannot be banned**. However, sometimes people attempt to abuse this notion, and claim that a pet is really a service animal. If faced with a claim that what appears to be a pet is a service animal, an association is allowed to make reasonable inquiries as to the person's diagnosis and the specific training of the animal. Again, caution is warranted, and if there were ever a place to contact an attorney, this is one of them.

Radon

Radon is a naturally occurring gas that can cause cancer with

long exposure. It is clear and odorless. Radon is emitted by the earth, and humans can be exposed to it if it is not captured and vented off properly. Radon is a hazard, and you or your association should test for radon to see if it is being emitted into living spaces at hazardous levels. As noted below, the responsibility for mitigation lies with the party who owns the source of the radon.

A board that learns of a radon hazard in its common area likely has an affirmative duty to take action to mitigate the hazard.

Radon and Condominiums

Because radon is emitted from the earth and the ground is usually common area, it is a problem that should be addressed at association expense. If radon is being emitted from the ground into a condominium at levels that the EPA deems hazardous, there is technically a trespass and certainly a nuisance. It is reasonable for an owner to demand that the association mitigate the problem. Of course, because it is a common area expense, all owners will share in the cost. Also, mitigating radon in only one part of a joined crawlspace would probably not be very effective.

Radon and Townhomes

With townhomes, the townhome owner usually owns the dirt under the townhome, and would be responsible for mitigating radon. However, if there is a radon problem it is probably more efficient to mitigate it all at once and share the cost among the owners rather than to have each owner mitigating independently. Because the townhomes in one association are in close proximity, the radon levels will likely be very similar across the development.

Nuisances

Most declarations have specific provisions that disallow nuisances such as offensive odors, noises, or conduct. There is no crystal-clear definition of a nuisance or what constitutes "offensive," so careful consideration should be given to the circumstances before levying a fine or filing suit to seek an injunction. With that said, the nuisance provisions can be very powerful if residents are prone to raucous parties, loud music, etc.

Smoking

Smoke and other odors are a thorny challenge in association living. One person may like to fry onions and garlic, and the person upstairs may not be as keen on the result. Moreover, societal attitudes towards smoking have changed dramatically in the years since some condominiums were constructed, and poor ventilation systems may leave one person smelling another person's cigarette or cigar smoke. The issue of smoke in apartments and condominiums has challenged associations and courts across the country.

Second-Hand Smoke Theories

If an owner is bothered by second-hand smoke, the owner may have recourse in either claiming that the smoke constitutes a nuisance, or alternatively the intrusion of smoke into his unit is a trespass. Many declarations have nuisance provisions which essentially say that one owner cannot do anything that unreasonably interferes with another owner's enjoyment of his condominium. The key word is "unreasonable," and although several states have ruled on second-hand smoke in condominiums, Idaho has not. Under a trespass theory, any instrumentality that crosses a property line and does damage is technically a trespass. Again, Idaho courts have not ruled on any condominium smoke cases.

Banning Smoking in the Common Area

Because the board has exclusive control of the common area, the board can ban smoking in common areas through rules and regulations. Alternatively, a declaration could ban smoking in common areas. Note that where outdoor decks are common area, such a ban would be enforceable on decks.

Banning Smoking in Units?

A much thornier question is whether a declaration can ban smoking in units. Other states, e.g. Utah, give associations the express right to do so[68]. The very purpose of a declaration is to restrict, in various ways, the use of property, but for some people smoking inside one's home amounts to a "right," although certainly not a constitutional right. It is exceedingly unlikely that a board could enact a *rule* to ban smoking in units. However, if at the time of purchasing a condominium or townhome there were a clearly stated prohibition against indoor smoking in a *declaration*, it is likely that an Idaho court would uphold such a ban. As a Florida Court observed in a smoking case: "**each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed**[69]." This profoundly simple sentence applies to everything in the declaration.

In *theory* an association could amend its declaration to ban smoking in already-owned units, and the smoking owners would have to stop. Such an action could be extremely divisive and would very likely lead to litigation. This author speculates that the association would prevail.

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[68] Utah Code Ann. Section 57-8-17(7)(b)

[69] Hidden Harbour Ent. v. Basso, 393 So.2d 637 (Fla. Dist. Ct. App. 1981).

As for offensive odors, careful thought must again be given to what constitutes "offensive." If a unit is emitting noxious chemical smells, the approach might be clear. Food odors can be quite culturally based and therefore biased, and care should be taken not to take action that could be viewed as discriminatory.

Leaks

Leaks happen. Pipes get old, washers fail, plumbers make mistakes, sinks and toilets clog, and bathtubs run over. When water leaks out of one unit, and into the common area, and/or into another unit, a trespass has occurred. Likewise, if water runs from a common area pipe into a unit, a trespass has occurred. The person or entity that owns the source of the water, i.e. where the leak occurred, is usually liable. Oftentimes, reference to the definition of "unit" in the declaration will resolve the issue. Note that pipes in any wall are usually common area pipes, and after the point at which they protrude into the unit, they belong to the unit owner.

Consequently, if a leak originates in a common area wall and floods a unit, the association should pay for all of the damage, usually via insurance. If the leak originates (i.e. is caused[70]) in a unit and floods common area or another unit, the unit owner in whose unit the leak originated in is responsible, and hopefully is insured. If a contractor did work in the unit and caused the leak, that contractor is responsible. Hopefully the contractor is insured!

[70] If an owner drives a nail into a wall and punctures a common area pipe, even though the leak "orginated" in the common area, it is the *cause* that is imporant.

Fire

The analysis for fire is essentially the same as the analysis for leaks: it is vital to determine where the fire started, and then to determine from the definition of "unit" in the declaration, on whose property the fire originated. As always, adequate liability and property insurance is vital. (See the section on insurance.)

Satellite Dishes

Satellite Dishes have been the subject of FCC guidelines starting in 1996, known as the OTARD (Over-The-Air-Reception-Device) rule. Under OTARD, there is no right to install a satellite dish in or onto common area. That means that an HOA can forbid (or cause the removal of) satellite dishes that are attached to common area. Alternatively, an HOA could come up with guidelines for how and where satellite dishes may be affixed to common area, but that could result in fairly unsightly buildings. Some associations permit satellite dishes to be placed on decks without screwing them into the decking. Note also that owners with balconies facing the wrong way do not have any special rights to install a dish elsewhere. In a townhome development where the roofs and walls are not common area, the association cannot forbid satellite dishes.

TWENTY

Disabilities and Reasonable Accommodations

With an aging population, the issue of disabilities and accommodations will be more important in years to come. While homeowners' associations must consent to certain accommodations and/or modifications, the rules are somewhat complex.

What Laws Apply?

The Americans With Disabilities Act cite (ADA) only has limited application at private condominium or townhome developments. The ADA only applies in places of "public accommodation," which would include pools, spas, dumpster areas, common laundry facilities, meeting halls and other such places where the public might reasonably be anticipated to gather. The ADA does not generally apply to access to residential units.

The Fair Housing Act and its amendments, Title VIII of the Civil Rights Act of 1969 (FHAA) do indeed apply to the entire development, but there is some dispute about the scope of the FHAA.

One interesting note is that under the FHAA all multi-family housing built after 1991 must be accessible[71]. This is usually, but not always, monitored by the local building inspector. In some small communities, however, compliance is not always perfect. If a post-1991 development fails to comply, the association can possibly be compelled to comply at its own expense.

[71] Technically, built for occupancy after March 13, 1991.

Inside a Unit

Again, it is important to distinguish the common area from the units. Changes made inside the unit that do not affect the structure, wiring, or plumbing are probably fine. Remember though, that once inside the walls (actually once past the paint) in a condominium, an owner must ordinarily get permission from the association for any structural, wiring, or plumbing work. For example, if an owner in a wheelchair wanted to widen doorways or lower a kitchen sink, there is potential impact on the common area because there may be wiring or plumbing moved in the affected walls, and the walls may provide structural support to the common area structure. Any plumbing or wiring that is moved inside common area walls must be verified by the association for safety and integrity. A slow leak in a common area wall can be disastrous over time.

In a townhome where the owner typically owns the inside of the walls (except for the shared party wall), structural modifications do not usually need association approval.

Exterior Modifications

Modifications outside a unit, such as a wheelchair ramp or extra railings are more sensitive and perhaps controversial, as they have a cosmetic effect. There is no question that certain modifications must be permitted at the unit owner's expense, such as a wheelchair ramp. However, the unit owner must follow any set association procedures and guidelines, and the association may require the owner to pay all expenses related to construction and removal. It is highly unlikely that an owner would be able to make common area modifications that were not directly connected to the unit and the disability, and the least intrusive modifications available.

Caution: This area of the law is exceedingly complex. If this issue arises, contact qualified counsel. The Housing and Urban Development Department and the Department of Justice have three excellent publications on this issue that can be found on the internet:

- ❖ Joint Statement from HUD/DOJ, "Reasonable Accommodations Under the Fair Housing Act"
- ❖ Joint Statement from HUD/DOJ, "Reasonable Modifications Under the Fair Housing Act"
- ❖ Joint Statement from HUD/DOJ, Accessibility (Design and Construction) Requirements for Multifamily Dwellings Under the Fair Housing Act.

TWENTY-ONE

Managers

Most associations hire a management company to assist in the many day-to-day tasks of running the association. There should be a clear written contract with the management company containing at a minimum the duties the manager will take on, and what fees will be charged. Many managers charge a monthly "door fee" based on the number of units, and are allowed to charge the association additionally for extra services. It is vital to delineate what services are covered by the door fee and what services are "extras."

While the contract will have many other provisions, it should contain a termination clause and a dispute resolution clause.

TWENTY-TWO

Attorneys

Many associations have an ongoing relationship with an attorney or law firm. It is important to have an attorney who has a working familiarity with the management company, the board, the controlling documents, and the management and collection policies for the association. Your association's attorney should be able to answer most routine questions with a quick (and hopefully inexpensive!) e-mail citing the applicable provisions of the declaration, by-laws, rules, Idaho law, etc.

When Should You Contact an Attorney?

Your association should contact an attorney when amending the declaration, by-laws, or the articles of incorporation. Other areas that will benefit from legal advice are easements, contracts, potential conflicts of interest, major accidents, leaks, fires, and threats of lawsuits.

The Attorney-Client Relationship

Whom does the attorney represent?

Normally the Association's attorney represents the Association as embodied by the Board, and has a duty to act in the Association's best interest. The attorney typically does not represent the Board President or any other officer as an individual, although the attorney's communications may often be directed towards a certain individual.

Attorney-client privilege and confidentiality

All of the private communications made to or from the attorney and your association, in the course of representing your association, are "privileged." This means that they cannot be disclosed to anyone without the Board's consent. The Board "owns" the privilege. So for example, a former Board member in a dispute with the Association could not disclose the private Board-Attorney communications from when he or she was a Board member, because only the Board can decide to divulge them. Not even the attorney can disclose privileged communications without the Board's agreement. To do so would be a serious ethical violation. Privileged communications can include letters, e-mails, memoranda, legal opinions, drafts of documents, texts, instant messages, etc. It is vitally important to preserve the confidentiality of such privileged information.

TWENTY-THREE

Insurance

The Importance of Insurance

Being properly insured against foreseeable, and some less foreseeable risks cannot be overstated. Insurance is complex, and a board should annually review the types of insurance and the limits of coverage that an association maintains. Below, several types of insurance common to associations are discussed.

Liability Insurance

Liability insurance protects your association from lawsuits and claims that it was negligent, for example injuries, slip-and-falls, or damaging someone else's property. Liability insurance limits should be generous, and the marginal cost of adding another million dollars or two, or three, is usually very reasonable.

Casualty/Fire Insurance

The association must insure association property against fire, wind damage, or other casualties. The major association asset is usually the buildings that hold the condominiums, and the association should work closely with a qualified insurance broker or agent, and consider replacement costs, code upgrades, etc.

Earthquake Insurance

Earthquake damage is not typically covered under a normal fire/casualty policy, and although rare in Idaho, earthquakes do occur. It may make sense to have this additional coverage. Earthquake policies typically cover casualties that are caused by earthquakes, such as structural damage and fire.

Directors and Officers Liability Insurance

Also known as D&O insurance, this insurance protects the board of directors and association officers where a lawsuit is filed claiming a breach of duty to the association. Typically, there is only coverage where the board or officers have acted in good faith, and not with malice.

Other Types of Association Insurance

If your association has employees, it should carry worker's compensation insurance in case an employee is injured on the job. Likewise, if your association owns any automobiles, there should be specific coverage. Some associations also carry fidelity bonding insurance to protect against dishonesty, embezzlement, or theft by insiders with access to association funds.

Owners' Insurance

While the owners benefit indirectly from the association insurance, there are significant risks for which owners should be separately insured. These include owner liability for injury to others or to the common area, fire/casualty insurance for the owners' interest in his or her condominium structure, and insurance for the contents of the condominium.

Owners' Liability Insurance

Some association declarations require owners to maintain liability insurance, and to furnish proof of liability insurance to the association. That approach makes good sense because if an owner who has no liability insurance causes a significant flood or fire, the association and other owners could suffer substantial uninsured losses. Most mortgage holders require that the borrower have liability insurance, but someone who owns a unit outright may not have such a requirement, so a requirement in the declaration is beneficial.

Owners' Casualty / Fire Insurance

Again, if an owner does not carry casualty/fire insurance on his or her condominium structure, it is possible that a fire or flood could occur in the owner's condominium, and there would not be funds to rebuild.

Owners' Personal Property Insurance

This is probably the least important category of insurance, but a prudent owner will have contents insurance for the personal property (i.e. "stuff") in his or her unit.

TWENTY-FOUR

Planning For the Future: Reserves

It is vitally important to set aside money for the long term costs of repairing and replacing major common area elements, such as roofs, siding, and pavement. In a perfect world, all major costs would be covered by adequate reserves, and owners would not be subject to large special assessments. The association board has a duty to manage the association property, and so the board's attention to reserve information gathering, budgeting, and funding is absolutely crucial.

While some associations do their own reserve studies, and some use their association manager to conduct studies, there are independent companies that conduct reserve studies for associations. Determining adequate reserves is quite complex, and involves an analysis of the association's repair and replacement obligations, as well as the future costs and timing of repair and replacement, all while juggling inflation, future construction costs, and a reasonable return on prudently invested reserve funds.

For owners, careful reserve planning is a major foundation of property value – not only are repair funds available, but with adequate reserves, associations will actually do the work, and not suffer from deferred maintenance and become shabby. A condo buyer should *always* inquire as to the state of the association's reserve plans because poor reserve planning will hit all of the owners like a financial freight train when the day comes that the roofs need to be replaced.

Townhome associations' needs for reserves may vary, as some expenses like re-roofing may indeed be borne directly by the owners, but a sensible reserve plan is no less important.

TWENTY-FIVE

Interesting Idaho Cases

While there are relatively few reported Idaho cases on association living, here are brief summaries of some interesting and key Idaho cases:

Atwood v. Smith, 138 P.3d 310 (Idaho 2006)

Smith opened a daycare business. Various neighbors sued, claiming that the daycare violated the association CCRs, which said "no lot shall be used except for residential purposes." The Idaho Supreme Court held for the neighbors, and found Smith in violation of the CCRs. A daycare operation is not a residential use.

Berezowski v. Schuman, 112 P.3d 820 (Idaho 2005)

This was a legal brawl involving one party who wanted to build a fence and a shed, and another party who parked an RV on his property. Each claimed the other was wrong and sued. The Idaho Supreme Court held: (1) although covenants are enforceable, they must be narrowly construed, and the Court will not extend or amplify unclear restrictions by implication; (2) a prior erroneous decision of a board or committee of the association **does not create a precedent if the CCRs do not provide for precedents**; (3) the fence was legal because the Architectural Control Committee had the authority to approve it; and (4) the RV could not be parked without screening (or indoors) because the CCRs were clear.

D & M Country Estates v. Romriell, 59 P.3d 965 (Idaho 2002)

Here, a homeowner tried to convert his house to an adult group home. The CCRs clearly stated that one dwelling per lot could be used for no more than two families. The Idaho Supreme Court ruled that a group home that would have up to eight unrelated adults would violate the CCRs.

Pinehaven v. Brooks, 70 P.3d 664 (Idaho 2003)

This case involved a challenge to an owner doing short-term rentals of his condominium for profit where commercial ventures and business uses were prohibited. The Supreme Court interpreted the restriction narrowly, ruling that short term residential rentals did not constitute business activity as commonly understood. More importantly, the Court held that covenants are disfavored and should be narrowly construed to allow the free use of land.

Shawver v. Huckleberry Estates, 93 P.3d 685 (Idaho 2004).

This important case underscores the mechanics of legitimately amending the declaration. The Shawvers contracted to buy a lot, and at the time of going under contract, there was a minimum house size requirement. Shortly thereafter, the association amended its declaration to increase the minimum house size. The Shawvers had relied on the smaller house size and were not thrilled about the amendment; the Shawvers sued the association. The Idaho Supreme Court ruled against the Shawvers. In a well-reasoned opinion, the Court observed that the declaration contained a clear provision where it could be amended. As long as the amendment was properly done, it bound all owners, even those who "relied" on pre-amendment terms.

Glossary of Common Terms

Articles of Incorporation: Filed with the Secretary of State, the Articles of Incorporation set forth the fundamental organizational structure of a corporation. In recent years, Articles of Incorporation have become far less wordy, and are often a simple form. All filed Articles of Incorporation may be viewed on the Secretary of State's website.

By-laws: A set of rules adopted by a corporation or association for internal governance and regulation of corporate affairs[72].

CCRs: See Declaration

Common Area: The portions of the condo or townhouse development that all owners own together. The Idaho Code defines Common Area as the entire association property except the units[73].

Condominium: The combination of a shared interest in Common Area property and a separate interest in the unit. The Idaho Code defines a condominium as "an estate consisting of (i) an undivided interest in common in real property, in an interest or interests in real property, or in any combination thereof, together with (ii) a separate interest in real property, in an interest or interests in real property, or in any combination thereof. (55-101B)

Covenant: See Declaration

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[72] 30-3-11(4)

[73] 55-1503(e)

Declaration, CCRs (Covenants, Conditions, and Restrictions): A contractual agreement that has been recorded against real estate. The declaration is in the nature of a covenant, and can restrict the use of real estate. When an owner takes title to real estate that has a declaration, that owner consents to the terms of the declaration.

Injunction: An order from a court requiring a person to do something or refrain from doing something. Similar to a restraining order. The operative verb for an injunction is to "enjoin."

Lien: A lien is a claim against real property to secure a debt, and is recorded as a public record in the County Recorder's office.

Limited Common Area: Those common areas and facilities designated in the declaration for use of a certain condominium owner or owners to the exclusion of others[74].

Record, Recordation: A formal process for registering documents with a county. By definition, all members of the public, indeed everyone is deemed to be aware of the contents of recorded documents. Recording puts the whole world on notice.

Restraining Order: see Injunction

Townhome/Townhouse: [The terms are synonymous.] While townhomes are not specifically defined in Idaho law, in a townhome the owner typically owns the entire structure with at least one commonly owned wall with a neighbor. Townhomes are fundamentally distinguished from condominiums because the structure is separately owned, i.e. foundation, walls, doors, windows, roof, etc. Sometimes the land underneath is separately owned also.

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[74] 55-1503(g)

Unit: what you actually own separately, "the separate interest in a condominium[75]." A unit is normally described with great precision in the Declaration. If the Declaration does not describe a unit, the Idaho Code steps in at 55-1509. In most condominium declarations, windows and exterior doors are *not* part of a unit.

[75] 55-1503(d)

Acknowledgements and Thanks

This book has been several years in the making, or perhaps 25 years in the making, as that is how long I have been an attorney. I wish to graciously thank the following individuals who have contributed suggestions and constructive criticism. It is no coincidence that they are among the lawyers and property managers I greatly respect: Reginald Reeves, John Parten, and Anne Jacobi. Special thanks (and great respect also) go to Jennifer Colson for her editing, organizational skills, and invaluable comments. I am particularly grateful to Reginald Reeves, Lucy King, and Laura Holt for their keen eyes and remarkable command of English grammar.

Suggestions? Questions? Comments?

You can send the author comments, questions and suggestions at abk@ketchumlegal.com Thanks!

A Brief Disclaimer

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PDF PRINTING 2015