

**2009 & 2011**

**LEGISLATIVE SUPPLEMENT**

to

**THE OFFICIAL HOA HANDBOOK OREGON**

**3<sup>rd</sup> Edition**

**Notice:** The revisions set forth below reflect amendments to the Oregon Planned Community Act and Oregon Condominium Act by Senate Bill 963 (Chapter 641, Oregon Laws 2009), effective January 1, 2010 and House Bill 3317 (Chapter 532, Oregon Laws 2011), effective January 1, 2012.

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**CHAPTER 3 AMENDING AND RESTATING GOVERNING DOCUMENTS ..... 3-1**

**Additional Consents or Approvals ..... 3-7**

**Lender Consent ..... 3-7**

The PCA and OCA (subject to certain exceptions) provide that notwithstanding a contrary provision of a declaration or bylaws, when a change to the declaration, bylaws or other governing document or another action to be taken by the board of directors, association or owners requires approval or consent of a mortgagee, if the mortgagee receives a request to approve or consent to the change or action, the mortgagee is deemed to have approved or consented to the request unless the mortgagee delivers or posts a negative response to the requesting party within 60 days after receipt

of the request. The request must:

X Be in writing.

X Name the mortgagor.

X Identify the property securing the mortgage by legal description as required for recordation in ORS 93.600 or by address.

X Identify the mortgage by loan number or reference to the county recording office and date of recording and recording index numbers of the mortgage.

X (e) Be delivered to the mortgagee by certified or registered mail, return receipt requested.

*See Sec. 6 and 15, HB 3317*

**CHAPTER 5 ASSOCIATION GOVERNANCE ..... 5-1**

**Board of Director Meetings ..... 5-5**

**Executive Sessions ..... 5-9**

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

1. Consult with legal counsel.

2. Consider the following:

\* Personnel matters, including salary negotiations and employee discipline;

\* Negotiation of contracts with third parties; or

\* Collection of unpaid assessments.

See Sec. 8(ORS 94.640) and 28(ORS 100.420), SB 963; Sec. 3 and 12, HB 3317

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**Election and Removal of Members of the Board of Directors ..... 5-13**

**New Section ..... 5-14**

**Qualifications.** Except during a period of developer control of the association, for developments created under the PCA or OCA, members of the board of directors must be elected from among the

owners. However, until amendments by SB 963, there were no provisions governing qualifications

when a lot or unit is owned by an entity or in a fiduciary capacity. The PCA and OCA provide:

- (1) Each member of the board of directors must be an individual and, except as provided in subsections (2) and (3) of this section an owner or co-owner of a lot in the planned community or unit in the condominium.
- (2) A director appointed by a declarant under ORS 94.600 or 100.200 need not be an owner or co-owner of a lot in the planned community or a unit in the condominium.
- (3)(a) Except as otherwise provided in the bylaws, prior to election to the board of directors, an individual described in this subsection shall, upon request of the board, provide the board with documentation satisfactory to the board that the individual is qualified to represent the entity or is a trustee or is serving in a fiduciary capacity for the owner of a lot or a unit.
- (b) If a corporation, limited liability company or partnership owns a lot in the planned community/unit in the condominium or owns an interest in an entity that owns a lot in the planned community/unit in the condominium, an officer, employee or agent of a corporation, a member, manager, employee or agent of a limited liability company, or a partner, employee or agent of a partnership may serve on the board of directors.
- (c) A trustee may serve on the board of directors if the trustee holds legal title to a lot in the planned community/unit in the condominium for the benefit of the owner of the beneficial interest in the lot/unit.
- (d) An executor, administrator, guardian, conservator, or other individual appointed by a court to serve in a fiduciary capacity for an owner of a lot in the planned community/unit in the condominium or an officer or employee of an entity if an entity is appointed, may serve on the board of directors.
- (4) The position of an individual serving on the board of directors under subsection (3) of this section automatically becomes vacant if the individual no longer meets the requirements of subsection (3) of this section.

See Sec. 2(ORS 94.639) and 18(ORS 100.416), SB 963.

**Removal of Directors ..... 5-17**

By Owners.

**New Provision.**

**Procedural Requirements for Removal by Owners.** The PCA and OCA provide:

Unless otherwise provided in the declaration or bylaws, at a meeting of the owners at which a quorum is present, the owners may remove a director from the board of directors, other than directors appointed by the declarant or individuals who are ex officio directors, with or without cause, by a majority vote of owners who are present and entitled to vote.

Notwithstanding contrary provisions in the declaration or bylaws:

- (A) Before a vote to remove a director, owners must give the director whose removal has been proposed an opportunity to be heard at the meeting.
- (B) The owners must vote on the removal of each director whose removal has been proposed as a separate question.

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(C) Removal of a director by owners is effective only if the matter of removal was an item on the agenda and was stated in the notice of the meeting required under ORS 94.650/100.407.

(c) A director who is removed by the owners remains a director until a successor is elected by the owners or the vacancy is filled as provided in subsection (7) of this section.

(7) Unless the declaration or bylaws specifically prescribe a different procedure for filling a vacancy created by the removal of a director by owners, the owners shall fill a vacancy created by the removal of a director by the owners at a meeting of owners. The notice of the meeting must state that filling a vacancy is an item on the agenda.

See Sec. 3(ORS 94.640) and 11(ORS 100.417), HB 3317.

**CHAPTER 7 INCORPORATION . . . . . 7-1**

**New Section . . . . . 7-5**

**Dissolution and Duration**

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

added to the PCA and OCA by SB 963.

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

ORS 65.654 or again incorporated following dissolution.

**Planned Communities.** ORS 94.626 (Section 3 of SB 963) provides:

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

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

(b) The unincorporated association:

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

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

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

(2) A separate association is not created when an association is reinstated after administrative dissolution under ORS 65.654 or again incorporated following dissolution.

The association automatically continues without any further action by incorporators, directors or officers that may otherwise be required under ORS chapter 65.

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

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

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

(4) The provisions of this section apply notwithstanding any provision of a governing document of a planned community that appears to be contrary.

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

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

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

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

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

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

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

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

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

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

*See Sec. 24, SB 963 (ORS 100.405).*

**CHAPTER 8 RECORDS AND REPORTS . . . . . 8-1**

**Where and How Long Records Must be Maintained . . . . . 8-8**

**How Long? . . . . . 8-9**

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

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

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

*See Sec. 13(ORS 94.670) and 29(ORS 100.480), SB 963.*

**PCA and OCA Requirements . . . . . 8-11**

**Records Not Subject to Examination . . . . . 8-12**

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

T Personnel matters relating to a specific identified person or a person's medical records.

T Contracts, leases and other business transactions that are currently under negotiation to

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purchase or provide goods or services.

T The rights and duties of the association regarding existing or potential litigation or criminal matters.

*See Sec. 13(ORS 94.670) and 29(ORS 100.480), SB 963.*

**CHAPTER 10 MEETINGS AND VOTING PROCEDURES . . . . . 10-1**

**Quorum Requirements . . . . . 10-5**

**Minimum Requirements.** The bylaws of a condominium or planned community created on or

after January 1, 2010, must specify a quorum requirement of owners representing at least 20 percent of the votes who are present in person, by proxy or by absentee ballot if permitted by the board. The PCA and OCA provide unless the declaration or bylaws specify a greater percentage, a quorum for any meeting of the association consists of the number of persons who are entitled to cast 20 percent of votes.

**Reduced Quorum; Limitations.** The PCA and OCA provide if any meeting of the association cannot be organized because of a lack of a quorum, the owners who are present, either in person or

by proxy, may adjourn the meeting from time to time until a quorum is present. The PCA and OCA

further provide for the quorum requirement to be reduced as follows:

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

- (a) One-half of the quorum required in the declaration or bylaws; or
- (b) The number of persons who are entitled to cast 20 percent of the votes.

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

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

*See Sec. 9 and 25, SB 963; Sec.4(ORS 94.655) and 10(ORS 100.408), HB 3317.*

**Manner of Voting or Granting Consent . . . . . 10-9**

**Powers of Attorney . . . . . 10-13**

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

**Voting in a Representative Capacity . . . . . 10-13**

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

*See Sec. 11(ORS 94.658) and 32(ORS 100.525), SB 963.*

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**CHAPTER 17 RESERVE FUNDING . . . . . 17-1**

**Reserve Account Requirements . . . . . 17-1**

**Account and Record Keeping . . . . . 17-4**

The PCA and OCA provide that all assessments, including declarant subsidies and all other association funds, must be deposited and maintained in the name of the association in one or more

separate federally insured accounts, including certificates of deposit, at a financial institution, as defined in ORS 706.008, other than an extranational institution. Funds must be maintained in an association account until disbursed EXCEPT:

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

*See Sec. 13(ORS 94.670) and 29(ORS 100.480), SB 963.*

**Investment of Fund . . . . . 17-5**

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

or requirements imposed by the declaration, bylaws or rules of the association.

*See Sec. 4(ORS 94.595) and 23(ORS 100.175), SB 963.*

**Determining Adequate Reserves . . . . . 17-7**

**Annual Requirement . . . . . 17-8**

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

or bylaws. EXCEPT:

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

*See Sec. 4(ORS 94.595) and 23(ORS 100.175), SB 963.*

**CHAPTER 18 COMMON PROPERTY ISSUES . . . . . 18-1**

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

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

Condominiums.

*Required Owner Approval.* The “75% Rule” discussed in this section has changed. The required vote is now 75% of the unit owners present at a meeting of the association or the consent

of at least 75% of all owners solicited by any means the board of directors determines is reasonable.

With respect to consent to vacation of roadways within and adjacent to the condominium, ORS 100.405 was amended to provide that the consent of at least a majority of all owners is required

if owner consent is solicited by a means other than at a meeting of the association. The current requirement of a majority of owners present at a meeting of the association remains unchanged.

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

*See Sec. 24, SB 963.*

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

**Limited Common Elements.** HB 3317 changed the requirements for granting easements with respect to limited common elements. If the use of the limited common element is reserved for five

or more units:

! When the action is for more than two years, the owners of 75 percent of the units to which the use of the limited common element is reserved must approve or consent.

! When the action is for two years or less, the owners of a majority of the units to

which the use of the limited common element is reserved must approve or consent.  
*See Sec. 9, HB 3317.*

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

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

provides:

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

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

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

(4)(a) Except as otherwise provided in the declaration and paragraph (b) of this subsection, the granting of a lease, easement, right of way, license or other similar interest

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pursuant to subsection (3) of this section shall be first approved by at least 75 percent of owners present at a meeting of the association or with the consent of at least 75 percent of all owners solicited by any means the board of directors determines is reasonable. If a meeting is held to conduct the vote, the meeting notice must include a statement that approval of the grant will be an item of business in the agenda of the meeting.

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

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

(5) Unless the declaration otherwise provides, the consent to vacation of roadways within and adjacent to common property must be approved first by at least a majority of

owners present and voting at a meeting of the association or with the consent of at least a majority of

all owners solicited by any means the board of directors determines is reasonable. If a meeting is held to conduct the vote, the meeting notice must include a statement that the roadway vacation will be an item of business in the agenda of the meeting.

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

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

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

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

*See Sec. 12, SB 963.*

### **NOTICE**

**THE ABOVE REVISIONS INCLUDE SUBSTANTIVE CHANGES TO THE HANDBOOK TO REFLECT AMENDMENTS BY SB 963 AND HB 3317.**

**REVISIONS DO NOT INCLUDE MINOR CHANGES, ALL CHANGES TO STATUTORY REFERENCES OR CHANGES TO THE PCA OR OCA MADE TO CONFORM LEGISLATIVE FORM AND STYLE.**

**FOR A COPY OF SB 963, HB 3317 & OTHER INFORMATION REGARDING 2009 AND 2011 HOA LEGISLATION, GO TO: [www.vf-law.com](http://www.vf-law.com)**