



2023 LAW DAY RESOURCE GUIDE



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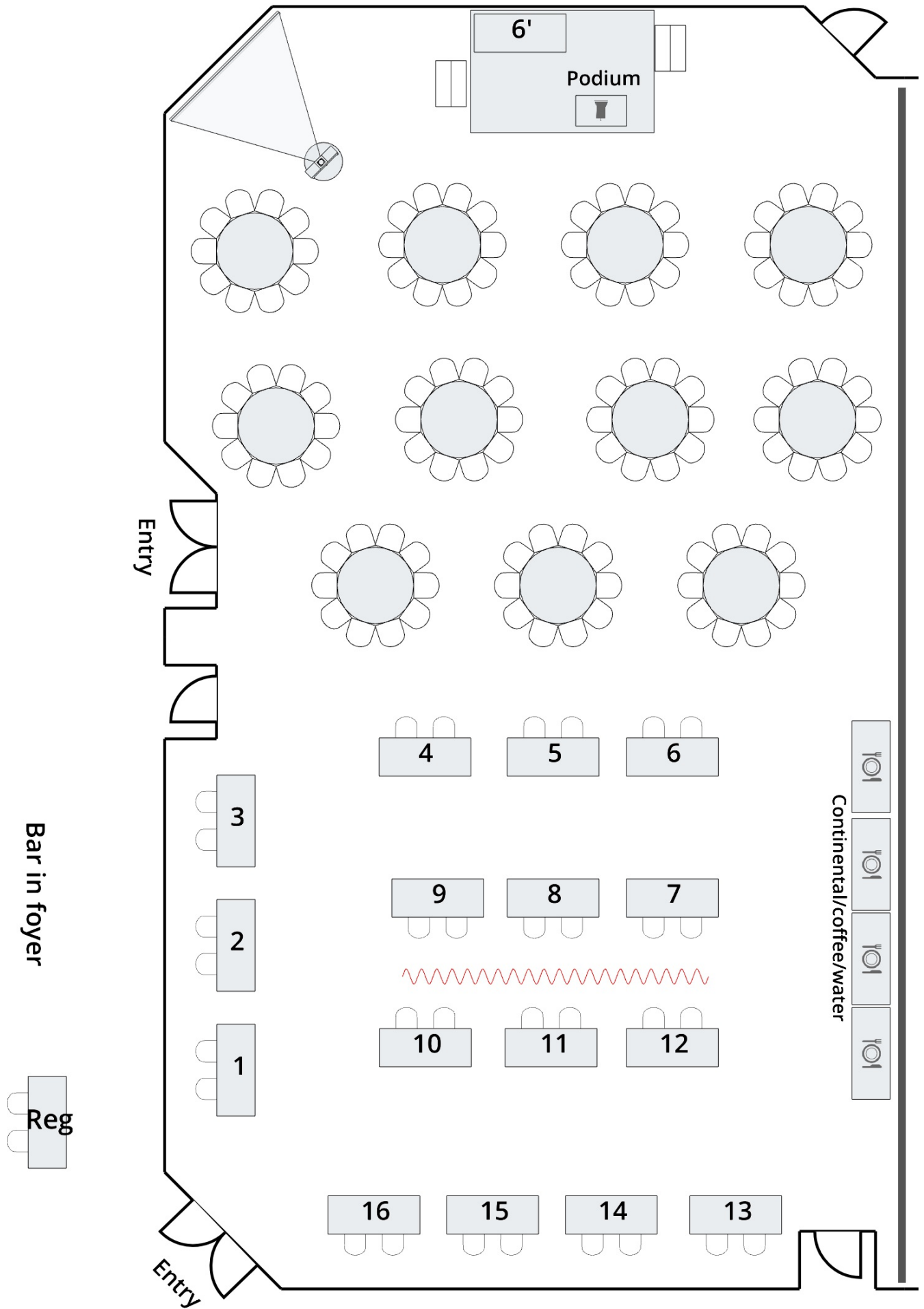
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2023 LAW DAY | CAIOREGON.ORG



2023 Law Day Booth Assignments		
Booth #	Company	
1	Kennedy	
2	Summit Bank	
3	Shamrock	
4	Aylwin Construction	
5	J2 Building Consultants	
6	WRB Construction	
7	NW Bank	
8	JR Johnson	
9	Columbia Bank	
10	Vial Fotheringham	
11	Accurate Reserves	
12	Riverview Bank	
13	AMFAM	
14	Blue Mountain CM	
15	Alliance Bank	
16	ABI	



Legal and Practical Implications of a Reserve Study

8:35-9:50am – Columbia River Ballroom

Presenters: Angie Bagby & Karen McDonald

Angie Bagby:

Angie Bagby founded Bagby Law Firm in January, 2014, to provide guidance and solutions to community and homeowner's associations and in Oregon and Southwest Washington.

Angie graduated from the University of Washington in 1994, and graduated from the University of Oregon School Of Law in 1997.

She began her legal career in 1997 with a focus on family law that provided many opportunities to develop her talents in courtroom litigation as well as her client counseling skills. In 2001, Angie transitioned to insurance defense work: defending insured parties against construction defect, products liability, transportation, contract, and personal injury claims.

In 2006, Angie moved to Portland, Oregon to represent HOAs in construction defect disputes and in general counsel matters. She is licensed to practice in Washington and Oregon. She is also a member of and frequent guest speaker at several industry organizations, including Community Associations Institute (CAI), and Oregon Washington Community Association Managers (OWCAM).

Karen McDonald:

Karen McDonald, CMCA, AMS, PCAM, RS started in the community association industry in 2001. Prior to becoming a reserve study provider, she spent 15 years in the community management industry, with a portion of this time also managing rental properties. Her experience working with community associations is vast, with a strong background in bookkeeping, budgeting and building maintenance and administration. She founded Accurate Reserve Professionals, LLC to provide community associations with affordable, high quality reserve studies.

Due to her extensive management experience, Karen bridges the gap between community associations and their reserve studies and brings a reasonable, whole minded approach to the studies she prepares. As a former board member and President of her prior HOA, she understands the challenges that properly funding the reserve account can pose for some communities and works to find a solution which will assist the client in reaching their reserve funding goals. She has worked with both community associations and other entities (private clubs, water systems, etc.) throughout Washington, Oregon, Idaho and Montana and has prepared over 1,000 studies in her career.

Legal and Practical Implications of a Reserve Study



1

Introduction



Karen McDonald, CMCA, AMS, PCAM, RS
President & Founder
Accurate Reserve Professionals, LLC



2

Audience Poll



Washington



Oregon



3

Reserve Study

What It is

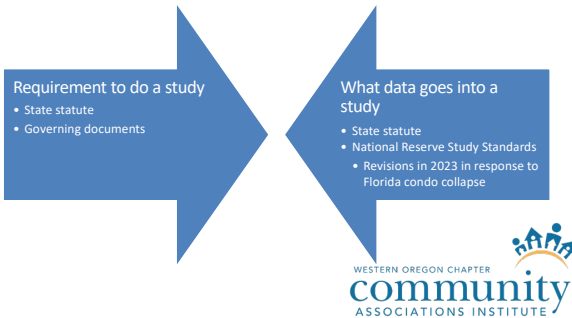
- **Budgeting tool**
- Rough project cost and timeframe
- Funds for predictable projects
- Includes existing assets only
- Site visits are a limited visual review, typically from ground level

What It Isn't

- Structural, engineering, building envelope or otherwise invasive investigation
- An exact cost or timeline estimate
- Forecaster of unpredictable or unknown projects/costs
- Capital improvement model

4

Reserve Study Governance



5

Key Reserve Study Calculations

- **Fully Funded Balance**
 - The cumulative amount the association's assets have deteriorated as of the date of the study
- **Percent Funded**
 - A comparison between the amount the association has in reserves and the fully funded balance



6

The Importance of Percent Funded

0 – 29% funded:
Weak, high risk of
special assessment

30 – 69% funded:
Fair, moderate risk
of special
assessment

70%+ funded:
Strong, lowest risk
of special
assessment



7

Funding Plans

100% Full Funding

Threshold Funding (often 70%)

Baseline Funding



8

Considerations When Selecting a Funding Plan to Follow

Community tolerance for special assessment risk



Long term community funding goals



Potential for variability in project costs and timing (can be mitigated through proactive research)

9

Use of Your Reserve Study as a Community Tool

- Review study upon receipt and notify provider of any revisions
 - Some revisions may not be negotiable
 - Study is a budget model so some variance ok
- Research projects as they near to determine exact timing and costs
 - Perform regular building envelope investigations and other professional inspections as needed
- If underfunded, identify and prioritize essential vs. discretionary projects

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- 1 Priority 1 – Risk of damage or safety concern**

Structural repairs	Sealants	Trip hazard repairs
Siding repair/replacement	Paint	Fire system equipment
Roof repair/replacement	Deck Coatings	
- 2 Priority 2 – Risk of accelerated deterioration or equipment failure**

Fence repairs/staining	Roof cleaning	Concrete repairs (non hazard)
Asphalt repairs and/or seal coat	Gutter cleaning	Mechanical equipment
- 3 Priority 3 - Cosmetic**

Carpet	Interior paint
Pressure washing	Furniture/general decor

*Sometimes lower priority items can become a high priority (i.e. carpet worn to point of trip hazard)

11

Benefits of a Building Envelope Investigation



12

Traits of a Good Reserve Study

At a Minimum

- Prepared by, or under the supervision of, a credentialed Reserve Specialist
- Meets statutory requirements
- Meets National Reserve Study Standards requirements
- Includes component quantities!!

Bonus Points

- Easy to read/understand
- Project costs include professional fees for building envelope components
- Predictable projects included, regardless of length of lifespan
- Study notates client project histories
- Contract includes meeting(s) with association

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Legal Requirements (Oregon)



Estimated Useful Life of Each Reserve Component

1 year–30 year funding
Can exclude components which are the responsibility of fewer than all owners



Estimated cost for repair/replacement at end of Useful Life



Maintenance Plan with schedule



Annual Review/Update (with or without visual inspection)



14

Legal Requirements (Washington)

Reserve Component List (anything that would cost more than 1% of the budget)

Remaining Useful Life of Each Component

Full Funding and Baseline Funding Models

Disclosure



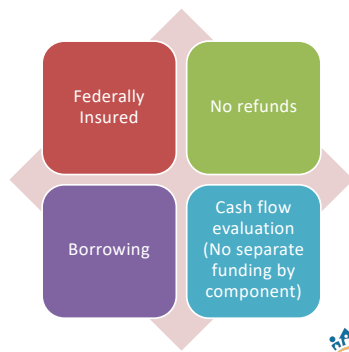
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This reserve study should be reviewed carefully. It may not include all common and limited common element components that will require major maintenance, repair, or replacement in future years, and may not include regular contributions to a reserve account for the cost of such maintenance, repair, or replacement. The failure to include a component in a reserve to provide contributions to a reserve account for component, may, under some circumstances, require you to pay on demand as a special assessment share of common expenses for the cost of major maintenance, repair, or replacement of a reserve component



16

Properly Using the Reserve Funds



17

LIABILITY

- Can we just ignore it?
- Can we do our own reserve study?
- What do we have to disclose?
- Can we sue the reserve analyst?



18

For Your Consideration

We just found out our plumbing system needs to be replaced and it's not even in our reserve study. We have enough money in our reserve fund to pay for it, but that money is being saved for other things. Our members are threatening to sue the board and the reserve analyst, what should we do?



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For Your Consideration

We thought we had been doing a good job following the reserve funding recommendations, but the siding replacement project is going to be twice the price we expected. We tried to pass a special assessment, but the membership voted it down, what do we do?



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For Your Consideration

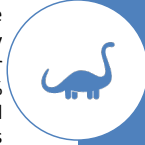
Our reserve study says that the parking lot is due for repaving this year, but our contractor says we can get another 1-3 years of use. We want to follow our reserve study, but it seems like repaving early would be a waste of money. What should we do?



21

For Your Consideration

We hired a new reserve analyst this year and the new study shows that we are very underfunded. The reserve study recommends a 100% increase in our reserve contribution. We think a 50% increase makes a lot more sense and wouldn't make our members quite as mad. The reserve analyst says they can put a "board recommended" model in the reserve study with our 50% increase. Is this ok?



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**Thank
You**



23

Buying and Selling in your Community

10:15-11:30am – Columbia River Ballroom

Presenter: Kevin Eike

Kevin Eike:

Legal: **University of Nebraska College of Law, J.D. *cum laude*, Litigation Skills Track**

Undergraduate: **Iowa State University, BS Business Management, Dean's List**

Experience

Owner/Administrator **Arbitration Service of Portland**

Owner **Eike Law PC and Kevin A. Eike Arbitration and Mediation** Portland, Oregon.

2007-2018 Owner/Partner Attorney **Aldrich Eike, PC** Portland, Oregon

Practice included complex civil litigation with emphasis on Insurance, Construction, Home Owner Association HOA, Real Estate and Construction Defect Litigation, Liens, Payment Claims, Contracts, and Negotiation. Complete case responsibility from marketing, to intake, through resolution, and appeal if necessary. Primary trial counsel for one of Oregon's only large townhome construction defect multimillion dollar cases which has gone to trial, ultimately resulting in a multi million dollar settlement from America's largest homebuilder after four weeks of trial. Litigated cases through state and federal courts throughout Oregon and SW Washington, Oregon Court of Appeals and Oregon Supreme Courts. Active in Oregon legislation involving construction and real estate law. Owner and manager of all aspects of mid-sized premier boutique firm with 10 employees.

2001-2006 Attorney **Davis Rothwell Mullin Earle & Xochihua** Portland, Oregon.

Practice included heavy insurance defense litigation and coverage disputes - construction defect, professional malpractice (real estate, legal, architectural, and psychiatry), personal injury, bailment, products liability, premises liability, trade defamation, disparagement, and contract dispute cases. Specific experience includes all aspects of case organization, investigation, and discovery, taking and defending depositions representing clients at jury and bench trials, arbitrations, mediations and judicial settlement conferences, direct negotiation with clients, claims representatives, and plaintiffs' attorneys, writing and arguing motions, requests for admissions, interrogatories, and all aspects of trial work.

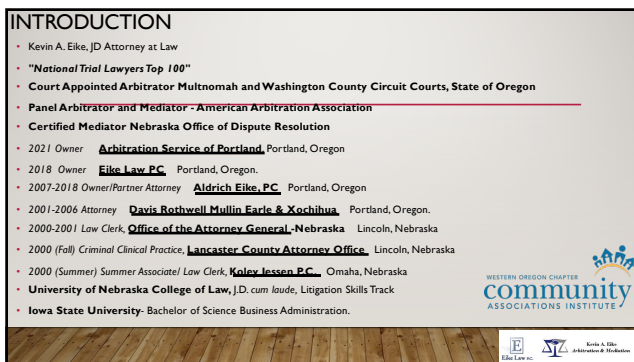
2000-2001 Law Clerk, **Office of the Attorney General -Nebraska** Lincoln, Nebraska

2000 (Fall) Criminal Clinical Practice, **Lancaster County Attorney Office** Lincoln, Nebraska

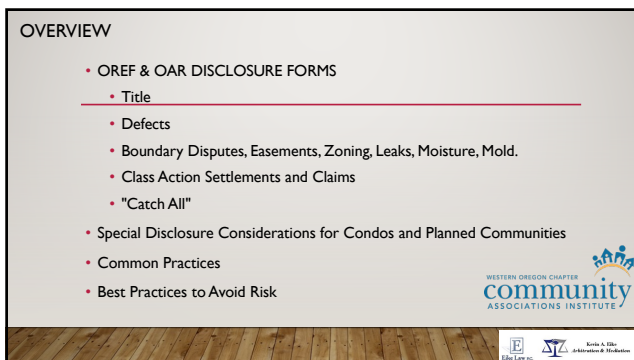
2000 (Summer) Summer Associate/ Law Clerk, **Koley Jessen P.C.** Omaha, Nebraska



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REAL ESTATE FORMS

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REAL ESTATE FORMS

REAL ESTATE FORMS

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MILLER'S PROPERTY DISCLOSURE STATEMENT ADDENDUM

DISCLOSURE

1. **Property Address:** _____

2. **Property Owner:** ☐ OF OR ☐ BY ☐ (If "OF" or "BY", include name, address, and phone number.)

3. **Agent:** _____

4. **Broker:** _____

5. **Co-Agent:** _____

6. **Co-Broker:** _____

7. **Relationship:** _____

8. **Property Description:** _____

9. **Property Features:** _____

10. **Property History:** _____

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EXERCISE RIGHTS-REDCROSS & A DISCLOSURE

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TYPICAL DISCLOSURE LAWSUIT PROCEDURE




- OREF or OAR RESA AGREEMENT- Mediation, then Arbitration
- Arbitration Services of Portland –Private Arbitration and Mediation Providers- Option
- Request for Mediation through ASP or other private provider
- Mediation as condition precedent to fee recovery in arbitration
- Discovery
 - Party- (Requests for production and admissions, depositions)
 - Third party, subpoenas, depositions.
- Arbitration
 - Selecting an arbitrator
 - Fees
 - Attorney Fees
 - Binding

7

Disclosure Lawsuits




- Title
 - Pending or Proposed Special Assessments
 - Marketable title- READ THE TITLE REPORT, due diligence, don't rely on plat
 - Appraisal
 - Liens (tax, construction, attorney)
 - Easements (private access, sewer, duration, etc)
 - Boundary Disputes
 - Leaks, moisture and mold
 - What to disclose if seller has had prior issues, repairs, non-permitted remodel
 - Inspections

8

CLASS ACTION CLAIMS AND SETTLEMENT




- Louisiana Pacific LP Siding
- Exterior Insulated Finish System (EIFS) Dryvit
- Asbestos, Roundup, Hazmat
- Roofing, Celotex, Certainteed, Genstar
- Chinese Drywall
- Plumbing

9

CATCH ALL




- Are there any other material defects impacting the fair market value that a potential buyer should know about?
- If yes, please explain.
- This is the so-called catch all.
- Well septic, termites, settlement, fill, prior repairs, non permitted work, HAZMAT, Drug manufacturing, death, crime, mineral rights, neighbors, CC&R restrictions, suspected microbial growth, fungus, mildew mold.
- Balancing Act- foil sale vs. get sued

10

SPECIAL DISCLOSURE FOR CONDOS AND PLANNED COMMUNITIES




- Condo questionnaire
- Special Assessments
- Pending Litigation
- Airbnb, adult foster homes
- Marijuana
- Age Restrictions
- Smoking bans
- Others

11

BEST PRACTICES TO MANAGE RISK

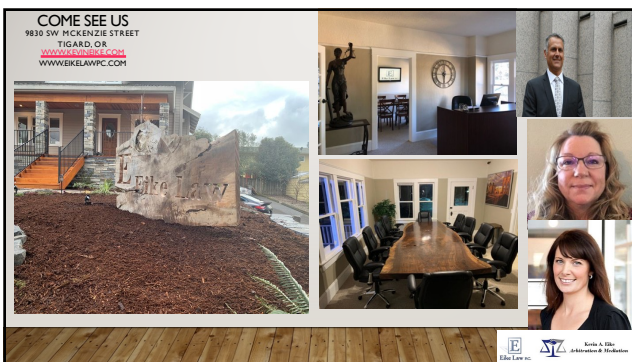
- Disclose, disclose, disclose.
- Think of it from an insurer's perspective
 - Flood plain, fire risk, distance to coast
 - Earth movement, topography, mudslides, tsunamis (exclusions)
 - Updates- electrical, plumbing
 - Asbestos, mold, etc.
 - Well, irrigation, septic
 - Historic
- Contractually place risk, investigation, and due diligence on buyer
- Advise buyer in any explanation to contact contractor who did work, HOA, manager, remediator, etc.

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14

Who Makes Decisions in your Community

12:30-1:45pm – Columbia River Ballroom

Presenters: Mike Vial

Mike Vial:

Mike is a partner in Vial Fotheringham's Lake Oswego office. He is also licensed to practice in Washington and Arizona. Mike assists and counsels his community association clients on a variety of legal issues. He specializes in representing associations in state and federal court, and strives to help his clients resolve their legal disputes without litigation whenever possible.

CAI Law Day 2023

Who Makes Decisions In Your Community

Mike Vial, Vial Fotheringham LLP



1

What's My Job?

- Director: an elected representative charged with administering the affairs of the Association in what he/she reasonably believes to be the best interests of the Association as a whole.
- You represent the owners' collective interest. Not the interest of any one owner, a group of owners, or the Board.
- Officer: an elected representative (although often appointed by fellow Board members) with a specific scope of tasks.
- Chairperson/President
- Vice Chair/Vice President
- Secretary
- Treasurer



2

What's My Job?

- Committee Member: member of either a standing or ad hoc body that serves at the pleasure of the Board of Directors
 - may or may not have a limited scope of decision-making authority delegated to it by the Board in either the governing documents or by resolution. See ORS 65.354
 - ARC Committee
 - Rules Committee
 - Parking Committee
 - Nominating Committee
 - Project-Specific Committees
- Manager: an independent contractor that works to implement the decisions of the Board of Directors and serves as an advisor to the elected representatives of the Association.



3

Who Makes Decisions?

- The Board of Directors, as a group, by majority vote, in an open meeting, EXCEPT:
 - If a particular decision is specifically reserved for an owner vote.
 - If it is a bona fide emergency and a manager or individual Board member must act to preserve Association property or safety of some person.
 - Board has specifically delegated a particular decision to a committee or officer (which would have required an earlier decision in an open meeting anyway).



4

Quiz 1

- Emergency Decisions...



5

Board is in charge. Mostly.

3.7 Powers and Duties. *The board of directors shall have all the powers and duties necessary for the administration of the affairs of the Association, except such powers and duties that by law or by the Declaration or by these Bylaws may not be delegated to the board of directors by the unit owners; provided, however, that the board of directors may not take any action that could unreasonably interfere with the sale, lease or other disposition of units owned by Declarant or that could abridge, modify, eliminate or otherwise affect any right, power, easement, privilege or benefit reserved for Declarant or that would impose any discriminatory charge or fee against Declarant, without the prior written consent of Declarant. The powers and duties to be exercised by the board of directors shall include, but shall not be limited to the following:*



6

Common Limitations on Board Powers

- Special Assessments
- Increases in Monthly Assessments
- Loans
- Litigation
- Mortgagee Approval
- Reserve Funding
- Amendments
- Capital Improvements
- Closing of Common Facilities
- Granting of Easements
- Selling Common Property / Common Elements



7

Quiz 2

- Where do we find limitations on Board power?



8

Example - Capital Improvements

(k) Making additions and improvements to, or alterations of, the common elements; provided, however, that no such project may be undertaken by the board if the total cost will exceed \$20,000 unless the unit owners have enacted a resolution authorizing the project by a majority vote of the members, except that no such vote shall be required for work that is urgently needed for reasons of life, safety or structural integrity reasons. This limitation shall not be applicable to maintenance, repairs or replacement undertaken pursuant to paragraph (a) above. The limitation set forth in this paragraph shall increase by \$1,000 on each anniversary of the recording of the Declaration.



9

Quiz 3

- What's a capital improvement?



10

Example – Borrowing

Article 8 Contracts. *The Board of Directors may authorize any officer or Director, agent or agents, to enter into any contract or execute and deliver any instrument in the name of and on behalf of the Association, and such authority may be general or confined to specific instances. No loan shall be contracted on behalf of the Association, and no evidence of indebtedness shall be issued in its name unless authorized by a resolution of the Board of Directors and approved by the affirmative vote of the owners of seventy-five percent (75%) of the percentage interests of the apartments as established in the Declaration. Such authority may be general or confined to specific instances.*



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Example - Sell Common Property

ORS 94.665 Authority of association to sell, transfer, convey or encumber common property. (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.



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Example – Assessments

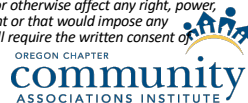
6.7 Voting and notices for special assessment and change of maximum assessment and maximum reserve fund assessment. Any special assessment or change in maximum annual assessment and/or maximum reserve fund assessment must have the assent of two-thirds of the total number of votes in the association at a meeting duly called for that purpose, written notice of which shall be sent to all such owners at least thirty days in advance of the date of such meeting, setting forth the purpose of the meeting.



13

Amending Declaration

16.2 Approval Required. Except as may otherwise be provided in this Declaration or by the Oregon Condominium Act, this Declaration may be amended if the amendment is approved by unit owners holding 75 percent of the voting rights of the Condominium, without regard to any weighted vote otherwise allocable to units owned by Declarant, and by Mortgagees to the extent required by Article 13, Declarant's prior written consent shall also be required so long as Declarant owns any of the units in the Condominium, but no such consent shall be required after 10 years from the date of conveyance of the first Living Unit to a person other than a successor declarant. Except as otherwise permitted by the Oregon Condominium Act, no amendment may change the size, location, allocation of undivided interest in the common elements, the method of determining liability for common expenses, the method of determining the right to common profits or the method of determining voting rights of any unit unless the amendment has been approved by the owners and Mortgagees of the affected unit. Any amendment that would limit or diminish any special Declarant rights established in this Declaration or the Bylaws, including, without limitation, any amendment that could unreasonably interfere with the sale, lease or other disposition of units owned by Declarant or that could abridge, modify, eliminate or otherwise affect any right, power, easement, privilege or benefit reserved for Declarant or that would impose any discriminatory charge or fee against Declarant, shall require the written consent of Declarant.



14

Amending Bylaws

9.2 Adoption. A resolution adopting a proposed amendment may be proposed by either the board of directors or by the unit owners and may be approved by the unit owners at a meeting called for this purpose or by ballot vote. Unit owners not present at the meeting considering such amendment may express their approval in writing or by proxy. Any resolution must be approved by unit owners holding a majority of the voting rights and by Mortgagees to the extent required by the Declaration, except that (a) any provision of these Bylaws that is also contained in the Declaration must be approved by the same voting requirement for amendment of such provision of the Declaration, and (b) any amendment relating to age restrictions, pet restrictions, limitations on the number of persons who may occupy units, or limitations on the rental or leasing of units must be approved by unit owners holding 75 percent of the voting rights. Declarant's consent shall also be required as long as Declarant owns any of the units in the Condominium. Such consent shall not be required after 10 years from the date of conveyance of the first Living Unit to a person other than a successor declarant. Any amendment that would limit or diminish any special Declarant rights established in these Bylaws shall require the written consent of Declarant and any amendment to Sections 3.7, 3.16, 7.8, 9.2 and 10.3 of these Bylaws shall require the written consent of Declarant for a period of 10 years after the date of the organizational and turnover meeting described in Section 2.2.



15

Age, Pets, Occupancy, Rentals

100.410(5) In condominiums that are exclusively residential:

(a) The bylaws may not require more than a majority of the unit owners to amend the bylaws.

(b) Notwithstanding paragraph (a) of this subsection, amendments relating to age restrictions, pet restrictions, limitations on the number of persons who may occupy units and limitations on the rental or leasing of units are not effective unless approved by at least 75 percent of the owners or a greater percentage specified in the bylaws.



16

Quiz 4

- What's a Mortgagee and why do we care?



17

Mortgagee Approval

(d) Any Mortgagee who receives a written request to approve any termination, additions or amendments under this Article 13 and who does not deliver or post to the requesting party a negative response within 60 days after it receives proper notice of the proposal, provided the notice was delivered by certified or registered mail, return receipt requested, shall be deemed to have approved such request.



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What Are My Protections as a Director?

- Court deference to Board and committee decision-making in Oregon– *Valenti v. Hopkins*.
 - Exception: “Fraud, bad faith, failure to exercise honest judgment.” Then the court will second-guess your decision.
- NO Court deference in Washington - *Wilkinson v. Chiuwawa Cmty. Ass'n*
 - Relation to existing covenants, reasonableness, relation to original plan of development.
- Business Judgment Rule: presumptive reasonableness of decision made based on the reliance of experts.
- Indemnification from the Association.
- Qualified Indemnity under ORS 65.357. Must be stated in governing docs in Washington.
- Directors and Officers insurance.



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How do I Make Hard Decisions in the Real World?

- Examples and War Stories.
 - Absolutely necessary repair vs. Absolutely unattainable voting threshold to authorize assessment necessary to pay for repair.
 - Lawsuit that needs to be filed vs. Absolutely unattainable voting threshold.
 - Culpable or possibly malicious director who won't resign.
 - Well-meaning director who has become so invested in his or her position that he or she cannot act with the care of an ordinarily prudent person.
 - Two rival warring factions on the Board.
 - Spontaneous resignation of entire Board.



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Parting Shots Thoughts and Questions

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