

# COMMUNITY FOCUS OREGON

*The Northwest's Full Service HOA Law Firm and Resource Center*

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*More resources, including information on the most recent HOA legislation, available at:*

**[www.nwhoalaw.com](http://www.nwhoalaw.com)**

## The Turnover Process

One of the most underestimated and least thought about occurrences in the life of a homeowners or condominium association is “turnover.” Turnover is the transition of administrative control of the association from the declarant<sup>1</sup> to the homeowners association. This transition, however, is more often a process rather than a singular event. While its importance is often minimized or misunderstood by the declarant and homeowners alike, the ramifications and repercussions of a bad turnover can last for years if it is not

done properly or in an organized manner. The purpose of this article is to look at those elements of the turnover process that are integral to a successful transition from declarant to homeowner control.

### Declarant-Control Period

A community and its administrative homeowners or condominium association are created when the documents governing the community (CC&Rs and bylaws) are recorded with the county in which the community is located. These documents usually

provide for a period of declarant-control of the association. At the conclusion of this period of declarant-control, the administrative control of the association, and thereby the community, must be turned over from the declarant to the homeowners. Most often, the governing documents provide that the declarant must turn over control of the project once 75% of all homes or units in the project have been sold. Homeowners whose community is still under declarant-control should review their governing documents to determine the declarant-control period.

### Transitional Advisory Committee

Prior to turnover, Oregon law requires, with some exceptions, that the declarant create a transitional advisory committee to facilitate the transition from declarant-control to homeowner control. Many governing documents require that the transitional advisory committee be es-



<sup>1</sup>The declarant is the person or entity that creates or “declares the existence of” the community. Most often the declarant is also the developer of the community, although that is not always the case.

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## Dank Whetley on “Too Much” Money

Dear Dank:

*If our HOA has over-funded one of our reserve accounts, is there a method to redistribute a portion of the over funding back to the homeowners? The Board was told by our management company that this could not be done. Is there truly no legal method by which this can be done?*

Sincerely,

*Flush with Green Commons*

Dear Green Commons:

The answer to your question largely depends upon what your governing documents say. Your Declaration or Bylaws may have a prohibition against refunding any overpaid funds.

However, if your governing documents are silent, then your Association may refund the money if it wishes. Beware, both the Planned Community Act and the Condominium Act contain sections which essentially state that assess-



ments paid into the reserve account are the property of the association and are not refundable to sellers of units (or lots) or owners. See ORS 100.175(9) and ORS 94.595(10). The key word in these sections is the word “seller.” These provisions prohibit an owner who sells their unit or lot from seeking to recover from the Association all funds paid to the reserve account which have not yet

been used. These sections do not prevent an association from refunding an over-funded account. So, depending upon your governing documents, it’s possible that you may be able to refund your owners the over-paid amounts.

As a practical matter, I would encourage the Board to take a good look at the Association before refunding the money. Is the Board certain there has been an

over-funding? Has an audit been recently performed on the Association financials? When was the last time a review of the reserve funds or reserve study occurred? It is quite possible that upon review of these items there will no longer be any surplus funds. For example, if your reserve study calls for replacing the roof in 20 years, but upon proper review of the roof by a qualified expert, you only have 10 years left, your surplus is gone, and you are likely short of the funds required. I’m not advocating spending money just because you have it, but be sure that the Board does its due diligence in making sure all is in order before giving the money back.

It might also be worth considering a temporary decrease in monthly assessments rather than a refund, just make sure your owners know what is going on!

Best of Luck!

**Dank**

### Questions For Dank

Do you have a problem or a question that troubles you or your association? Dank is here to help. In each newsletter you can count on Dank Whetley to answer the questions for which we all want answers. Dank is our “Go To” guy for all the trickiest questions and stickiest situations. If you want your question answered right, call on Dank. Dank will choose a question from those received and answer it in each newsletter.

Send your questions to [dank@vf-law.com](mailto:dank@vf-law.com).



*Continued from Page 1*

established once 50% of the lots or units in the community are sold.

As the name suggests, the committee is purely advisory: it has no voting power or membership on the declarant-controlled board of directors. However, it can request access to the information, documents, and records that the declarant must deliver to the owners at the turnover meeting. It also provides owners with an opportunity to become familiar with the association's governing documents, architectural and other restrictions, budgets, financial records, rules and regulations, and other aspects of the association prior to assuming total control of the operation and management of the association.

### **Turnover Meeting**

Oregon law requires that the declarant call a "Turnover Meeting" within 90 days of the expiration of the declarant-control period established by the community's governing documents. If the governing documents do not specify a declarant-control period, then Oregon law further specifies by when the turnover meeting must

occur.

Notice of the meeting must be given to all owners in the manner established by the governing documents. If the declarant does not call the turnover meeting within the time specified by Oregon law or the governing documents, then it may be called and noticed up by an owner or the transitional advisory committee.

The biggest event at the turnover meeting is the election of a board of directors by the owners. Directors are elected from the body of homeowners. Remember, however, a developer who maintains a large number of lots or units may still maintain some practical control of the association because of the voting rights attached to those lots or units. It is common for the developer to remain on the board of directors after turnover simply because he or she can marshal his or her votes together to get him or herself elected to the post-turnover board of directors.

In addition, the declarant is obligated to deliver all the property and records of the association to the owners at the turnover meeting. Oregon law specifies what documents and records must be turned over. The documents to be turned over include, but are not limited to, the association's governing documents, financial records, deeds to common property, association and board of di-

rectors meeting minutes, income tax returns, bank signature cards and account statements, reserve account and reserve study information, and insurance policies. Frequently, one of the biggest problems associations have at turnover is getting all of the records and documents the declarant is obligated to turn over, so associations should pay close attention to the documents that have been turned over and secure legal counsel if documents and records are not being turned over.

### **Post-Turnover Meetings with Declarant**

Oregon law also requires that the declarant, or an informed representative of the declarant, be available to meet with the post-turnover board of directors during the three-month period following the turnover meeting. The declarant, or declarant's representative, must meet with the board on at least three mutually accepted dates to review the documents handed over to the owners at the turnover meeting.

### **Audit of Association Affairs**

Finally, it is advisable that all post-turnover boards of directors audit the affairs of the association after turnover. With the help of legal counsel, property management professionals, accounting professionals, and insurance professionals, the association should review various

aspects of its history and operation. Certainly the board of directors should determine the breadth and scope of the audit; however, the board should, at a minimum, consider the following areas to review: (1) status of the physical property, (2) corporate status of the association, (3) association records, (4) assessment collections, and (5) special declarant rights. By looking at these areas, the board of directors will be able to determine the strengths and weaknesses of the association, the condition of the property, and the needs of the association. In doing so, the post-turnover board is acting to safeguard the assets of the association and the owners, and to protect property values.

Turnover is an important time for homeowners and condominium associations. It sets the tone for the future of the association, and if the transition is disjointed and problematic, the repercussions could last for years. Post-turnover boards of directors should seek professional guidance in leading the association through this important time, and should be vigilant in ensuring that the rights of the association are being protected throughout the turnover process.

**Chris Tingey**

*Attorney*



## Rental Restrictions: Maintaining the Balance

The real estate market in Oregon and Washington has been “hot”, and an ever-increasing number of homeowners are looking at the option of renting out their existing home and purchasing a second home. Real estate investors, big and small, have increasingly begun buying units or lots with an eye toward maintaining them as rental properties. As a result, homeowners associations are looking for ways to balance the competing interests of landlords desiring to rent their units with owner-occupiers who want to preserve the aesthetics and character of their neighborhood. Thus, many homeowners associations have looked to rental restriction amendments as a means to maintain this sensitive balance.

What are Rental Re-

strictions? Rental restrictions are a controversial but effective means of restricting the number of units that can be rented in a community association. Members who own their units as investments often view rental restrictions as an unfair restriction of their property rights. By contrast, owners who live in their units see rental restrictions as a means for preventing their community from becoming a loose affiliation of rental properties.

Why restrict the number of renters in your association? Owners who live in their association have a number of concerns about renters. Many owners think that renters, being more transient than owners, are less likely to comply with rules and regulations in an association’s governing documents. Additionally,

some owners perceive renters as taking less pride in their community and property. Others fear that renters will let the aesthetics of their units suffer, or be irresponsible with the use of association property. Finally, the prevalence of renters in a community association tends to increase insurance rates and make it more difficult to obtain resale financing.

How can my association regulate rentals? Associations can restrict renting in a variety of ways. In recent years, rental restriction amendments have become overwhelmingly popular. Whatever method an association chooses, the restriction should set up clear lines of communication between the association and any potential tenant. New renters should receive a set of the association’s governing

documents and understand that they must abide by the same rules as owners. Many times, establishing good channels of communication with tenants can alleviate the need for a rental restriction amendment.

Associations use different types of amendments to restrict renting. Many associations adopt an amendment which limits the percentage of units rented to either 20 and 30 percent. When an association has more than 30 percent of its units rented, secondary mortgage lenders may designate it “non-owner occupied,” making it more difficult to obtain financing. Owners who want to rent out their units sign up for a waiting list which is reviewed by the Board of Directors on a first come, first served basis. Limiting the number of renters to 20

percent allows the Board to exercise some discretion in granting the remaining 10 percent of rentals to those association members with special needs. Sometimes an owner who occupies his or her unit will have a job transfer or family emergency requiring him or her to rent out their unit. This type of amendment allows the Board to accommodate those with special needs.

Another option is to pass an amendment limiting the maximum number of units that one investor-owner may purchase. This prevents an investor from purchasing a large group of units in the association and then using his or her voting power to block the passage of a rental restriction amendment. Similarly, some associations have attempted to deter investors by establish-

ing a minimum period of occupancy after which a unit owner may rent out his or her unit. These choices are attractive because they preserve rental rights for owners who originally purchased their units as a residence.

Whatever method is used, Associations should take an honest look at the treatment of renters in their community before attempting to pass an amendment. Are renters invited to social gatherings and Association meetings? If not, owner-occupiers should be sensitive to renters' desire to be part of the community association. Renters who are active in their communities are likely to stay longer and take pride in their Association

**Jason L. Grosz**

*Attorney*



## New Oregon HOA Legislation

Our legislative team has been at work in Salem fighting for the rights of HOAs! The following new or amended bills will affect community associations in Oregon:

**HOUSE BILL 2665:** *Amends Oregon Condominium Act and Oregon Planned Community Act. Articles amended include meetings & voting, electronic communication, insurance, and more.*

**HOUSE BILL 2666:** *Amends Oregon Condominium Act and Oregon Planned Community Act. Articles amended include definitions, incorporation, disclosure, and more for condominiums and planned communities.*

**SENATE BILL 543:** *Amends Oregon Condominium Act and Oregon Planned Community Act. Articles amended include treatment of assessments.*

To read the complete bills and for more information go to our website:

**[www.vf-law.com](http://www.vf-law.com)**

## Introducing Sarah Lappin



Vial Fotheringham LLP is pleased to introduce Sarah Lappin as the newest attorney in the Oregon office. Sarah joins the Oregon of-

fice with seven years of legal experience. As an attorney in Chicago, her practice focused on homeowners association representation, collection law, commercial contract disputes, criminal law and family law. Sarah received her JD from DePaul University College of Law in Chicago, Illinois in 2002. She received a BS in Political Science and Philosophy from Illinois State University.

At Vial Fotheringham

Sarah will handle, along with the firm's focus on homeowners associations, issues pertaining to divorce, custody, pre-marital agreements, post-marital agreements, partnership agreements, and criminal matters misdemeanor and felony.

Family law and criminal law are practice areas of the law that are often troubling and unfamiliar to clients. Vial Fotheringham understands that attorneys assist clients with matters in

these areas are working with sensitive, personal issues. It is important clients feel comfortable with their attorneys. Sarah will offer a free, one-hour consultation to potential clients. She knows confidence in the choice of counsel is key to a successful working relationship.

Vial Fotheringham is please to have Sarah's experience to help our clients navigate today's complex legal environment.

# Late Charges

Associations typically charge both late charges and interest for the late payment of assessments. Some associations charge only a late charge and some charge only interest. Any one of those scenarios is acceptable.

CC&Rs, or Bylaws will state the date on which a late charge will accrue. If the documents are silent as to when to levy a late charge and the documents do not prohibit late charges, it will be up to the board to establish when the late

Associations should not, however, charge multiple late charges for the same past due payment. **Figure 1** gives a good example.

On January 1, the assessment was due. Since it was not paid within 14 days, a late charge for the January assessment was levied. On February 1, a new assessment was due. The balance was then \$225 (\$100 each for January and February, plus the late charge of \$25). No payment was received in February. A new late charge was assessed for the late February payment only. It is normally not appropriate to charge a late charge for the late January payment a second time, since the association is usually compensated in such circumstances by accruing interest.

that a payment was received on March 6 for \$100, but the association still charged a late charge for the March assessment. The reason a late charge was still levied was because the \$100 payment received on March 6 was applied to the earlier balance first. Thus, the March payment was still delinquent. Unless the prior balance is paid in full, it is appropriate to charge a late charge for the March assessment.

It is recommended that associations levy both late charges and interest for the delinquent assessments to encourage owners to make their assessment payments in a timely manner.

**Timothy J. Zimmerman**  
*Attorney*



For the purpose of this article, we will focus only on late charges. It is customary that when an owner does not pay his assessment on time, the association will charge a late charge. Some associations will charge a fixed late fee, such as \$10, \$25, or some other reasonable amount. Some associations will charge the late fee based upon percentage of the amount of the monthly assessment not timely paid, such as 10% or 25%. Either method is correct. In Oregon, there is no cap on the amount of a late fee, but it must be reasonable.

Typically, the late charge is assessed after some period of time in which the payment was not paid. Some declarations,

charge will be levied. Most associations typically assess a late charge for assessments anywhere from 10 to 30 days late. Any date within that period is acceptable under Oregon law.

Note in the example

### Figure 1

Assume assessments are \$100 per month due on the first day of the month. If the assessment is not paid within 14 days, a late charge of \$25 is assessed. This association has chosen to not charge interest.

January 1	\$100 assessment due
January 15	\$25 late charge for past due January assessment; total due \$125
February 1	\$100 assessment; total due \$225
February 15	\$25 late charge for past due February assessment; total due \$250
March 1	\$100 assessment due; total due \$350
March 6	\$100 payment received; remaining balance due \$250
March 15	\$25 late charge for past due March assessments; total due \$275

# Resources Available For HOAs

Vial Fotheringham is a law firm committed to the education and continual progression of community associations. Throughout the years Vial Fotheringham has found that resources for community associations in many states, including Oregon and Washington, are hard to find. When the firm finds or creates good resources it makes them available through the Northwest HOA Law Center.

The following are a few of the resources available through the HOA Law Center:

## HOA Law Forums

These forums are held in various locations throughout the year. This year the firm held forums in Wilsonville, Downtown Portland, Vancouver, Salt Lake City and is preparing for a forum in Bend. In October the firm will start a new forum season with a new theme and new material.



## Newsletter

The newsletter, written by the attorneys at Vial Fotheringham, contains articles on topics of interest to community associations, including answers to reader's questions.

## Publications

Northwest HOA Law Center publishes The Official HOA Handbook for Oregon, Washington and Utah. These books contain a wealth of useful information for community associations. Also available is a convenient compilation of statutes for each state.



## Website

[www.nwhoalaw.com](http://www.nwhoalaw.com)

The website is a one-stop shop for all of the resources listed above plus more. Forum dates and locations are posted along with online registration. Publications can be purchased on the site. Newsletter are available to read and download. The site also contains a wealth of additional, free, information in the resource section.



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## Distribution of Community Focus

The Northwest HOA Law Center produces the Community Focus newsletter as a resource for homeowners living in community associations. The articles in the newsletter are prepared by attorneys who, through everyday work with community association law, have established themselves as experts in the field. Please review the following options for receiving the newsletter.

*The following are the methods available to receive the newsletter:*

**By Email:** The greenest option. Receive your newsletter as a PDF file in your email. If you choose to receive your newsletter by email, please send your email address.

**By Mail:** The traditional option. You may choose to continue receiving the newsletter by mail, or by mail and email if you desire. Please contact NW HOA Law Center with any changes to your address or contact information.

**Online:** Our newsletters are archived with a wealth of additional, free resources at [www.nwhoalaw.com](http://www.nwhoalaw.com).

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