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ASSOCIATION TURNOVER

Making the Transition from Declarant Control
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One of the most important stages in the development and operation of a community association is the transfer of control from the declarant to the unit owners, commonly known as "turnover." This article provides an overview of many issues associated with turnover under Minnesota Statutes Chapter 515B, the Minnesota Common Interest Ownership Act ("MCIOA").

Typically, declarations provide for a period of declarant control of the association, during which the declarant may appoint and remove the officers and directors of the association. This gives the declarant control over the association, because the board of directors has broad authority to carry out and enforce the governing documents and statutes and to act on behalf of the association. However, during the period of declarant control, the declarant and any of its representatives who are acting as officers or directors of the association must cause the association to be operated and administered in accordance with its governing documents and applicable law, comply with fiduciary obligations and obligations of good faith, cause the association's funds to be maintained in separate bank accounts solely in the association's name, and maintain complete and accurate records.

The period of declarant control terminates upon the earliest of the following events: (i) five years after the date of the first conveyance of a unit to an owner other than a declarant in the case of a flexible common interest community (one that is subject to the declarant's right to add additional real estate) or three years in the case of any other common interest community, (ii) the declarant's voluntary surrender of control by giving written notice to the unit owners as provided in MCIOA, or (iii) the conveyance of 75 percent of the units to unit owners other than a declarant.

MCIOA requires the board appointed by the declarant to cause a meeting to be called and held within 60 days after termination of the period of declarant control, for the purpose of the unit owners, including the declarant, appointing or electing a board of directors. This is commonly known as a "turnover meeting." If the board fails or refuses to cause a turnover meeting to be called, then the unit owners other than a declarant and its affiliates may cause the meeting to be called pursuant to the statute under which the association was created (typically the Minnesota Nonprofit Corporations Act), and the declarant and its affiliates will be deemed to be present at such meeting for purposes of establishing a quorum even if they do not attend the meeting.

After the turnover meeting, the declarant must deliver to the board elected by the unit owners exclusive control of all funds of the association, all contracts and agreements that are binding on the association, all association records, copies of all CIC plats, personal property owned or represented to be owned by the association, assignments of third-party warranties relating to common element improvements or other improvements the association is obliged to maintain, repair, or replace, if not in the name of the association, and, to the extent they are in the control or possession of the declarant, copies of all plans and specifications relating to buildings and related improvements which are part of the common elements, and operating manuals and warranty materials for any equipment or personal property used in the operation of the common interest community. The declarant has a continuing obligation to turn over additional new or changed items in its possession or control. However, the declarant is not obligated to assign any third-party warranty if assignment is prohibited by the warranty or applicable law or if assignment would prevent the declarant from enforcing the warranty.

After termination of the period of declarant control, the declarant is obligated to make up any operating deficit resulting from an alternative common expense plan that reduced the declarant's liability for common expenses. The applicable requirements and procedures for CIC's created before August 1, 2010, are stated in Minn. Stat. § 515B.3-115, and the applicable requirements and procedures for CIC's created on or after August 1, 2010, are stated in Minn. Stat. § 515B.3-1151.

Under MCIOA, an alternative common expense plan cannot reduce the declarant's liability for replacement reserves required by Minn. Stat. § 515B.3-114 (for fiscal years commencing before January 1, 2012) or Minn. Stat. § 515B.3-1141 (for fiscal years commencing on or after January 1, 2012). An association may have a claim against a declarant if the replacement reserves are underfunded or if the declarant did not pay the replacement reserves required for units owned by the declarant.

Within two years after termination of the period of declarant control, the board elected by the unit owners may terminate various contracts, leases and licenses made during the period of declarant control, without penalty. The applicable requirements and procedures for CIC's created before August 1, 2010, are specified in Minn. Stat. § 515B.3-105, and the applicable requirements and procedures for CIC's created on or after August 1, 2010, are specified in Minn. Stat. § 515B.3-1051.

Review of the association records and inspection of the property may reveal additional issues. For example, the declarant may have failed to complete improvements that the declarant is required to complete under express or implied warranties; a physical inspection of the property may reveal construction defects; or, in a planned community, the declarant may have failed to record a deed to convey the common elements to the association.

Many of the issues addressed in this article, and other issues that may confront an association in connection with turnover, are time-sensitive and may be subject to statutes of limitation or other deadlines. The information in this article is general information based on the law in effect at the time of this writing and does not constitute legal advice regarding action to be taken in any particular case, which may vary depending on the facts, governing documents and applicable statutes. An association should obtain advice from legal, accounting and other professionals promptly after turnover as necessary to timely address these issues.

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