

DEVELOPER AND TURNOVER ISSUES

By: Charles T. VanderVennet

An association passes through many phases during its lifetime. The end of the development stage is marked by a **Turnover** to the owners. Turnover is the time of transition of the developer's authority and responsibility for administration of the property to board members elected by the membership. The **Owner** board replaces the **Developer** board and takes over the responsibility for the property and authority to act.

Turnover can be exciting, energized, combative or anti-climactic depending on how the developer and owners approach it. With a bit of awareness and planning, it can be a calm and routine moment in the association's life. It could be a difficult time if proper groundwork has not been established by the developer or if the owners are not ready to take over the administration of the property. A number of pitfalls can be avoided.

Not surprisingly, the Developer often takes very good care of itself with language in the association's governing documents. The Developer often retains a wide-ranging entitlement to use association property so long as the Developer owns even just one unit within the association. That entitlement typically includes access to the property, use of the units as model units for sales and marketing purposes and use of those units while completing or correcting construction, alterations, additions or improvements at the development. There may be some room for regulation of that activity through properly-adopted Rules and Regulations, so long as the rules do not take away a right given to the Developer by the covenants set forth in the Declaration.

The portions of the Illinois Condominium Property Act ("Act") applicable to condominium turnovers are summarized on the attached pages. Only Section 18.5(f) of the Act applies to non-condominiums. Beyond that, non-condominiums must rely only on provisions of their governing documents but some guidance may be derived from the other statutory provisions.

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**PORTIONS OF THE ILLINOIS CONDOMINIUM PROPERTY ACT
APPLICABLE TO DEVELOPERS AND TO UNIT OWNERS PRIOR TO
AND AT THE TIME OF TURNOVER FROM THE DEVELOPER**

ICPA Section 2(q) The term **Developer** means any person who submits property legally or equitably owned by him to the provisions of the Act or any person who offers units legally or equitably owned by him for sale in the ordinary course of business, including any successor or successors to such developers ~~entire~~ interest in the property other than the purchaser of a unit.

ICPA Section 2(v) The term **Developer control** means such control at a time prior to the election of the initial unit owner board of managers

ICPA Section 9(a) The developer pays all common expenses incurred or accrued prior to the first conveyance of a unit -- no common expense shall be payable to the Association. Commencing with the first conveyance, it is the duty of each unit owner -- including the developer -- to pay his proportionate share of the common expenses. The proportionate share shall be in the same ratio as his percentage of ownership in the common elements set forth in the Declaration.

ICPA Section 9(c)(1) The initial budget and common expense assessment based thereon shall be adopted prior to the conveyance of any unit. ICPA Section 9(c)(2) requires all budgets to provide for **Reasonable** reserves for capital expenditures and deferred maintenance for repair and replacement of the common elements

ICPA Section 18.2(a) Until the first unit owner board is elected, the rights, duties and obligations vested in or imposed on the board by the ICPA and the governing documents of the Association shall be held and performed by the developer.

ICPA Section 18.2(b)(i) The election of the first unit owner board shall be held not later than 60 days after conveyance by the developer of 75% of the units or 3 years after the recording of the Declaration, whichever comes first. The developer is to give at least 21 days ~~notice~~ notice of such election meeting and shall provide to any unit owner within 3 working days of the request the names, addresses and weighted vote of each unit owner entitled to vote at the meeting.

ICPA Section 18.2(b)(ii) If the developer does not call a meeting as required, unit owners holding 20% of the interest in the Association may file a petition with the developer to call such meeting after which those unit owners can send notice of such meeting to the unit owners and to hold such meeting.

ICPA Section 18.2(c) If the election of the first unit owner board does not take place at the time established, the developer shall continue in office for 30 days whereupon written notice of his resignation shall be sent to all unit owners entitled to vote at such election.

ICPA Section 18.2(d) Within 60 days following the election of the first unit owner board, the developer shall deliver to the Board of Managers:

- (1) all original documents as recorded or filed pertaining to the property, its administration and the Association (such as the Declaration, By-laws, Articles of Incorporation, annual reports, minutes and Rules and Regulations, contracts, leases or other agreements entered into by the Association) *[copies (certified by the affidavit of developer or developer's officer or agent that the copy is a complete copy of the actual document recorded) may be provided if the original document is unavailable];*

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- (2) (i) a detailed accounting by the developer, setting forth the source and nature of receipts and expenditures in connection with the management, maintenance and operation of the property, (ii) copies of all insurance policies and (iii) a list of any loans or advances to the Association which are outstanding;
- (3) Association funds, which at all times were to have been held separately from the funds of the developer;
- (4) a schedule of all real or personal property, equipment and fixtures belonging to the Association, including documents transferring the property, warranties, if any, for the real and personal property and equipment, deeds, title insurance policies and all tax bills; and
- (5) along with originals of all documents relating to everything listed in this subparagraph, a list of all litigation, administrative action and arbitrations involving the Association, any notices from governmental bodies involving actions taken or which may be taken concerning the Association, engineering and architectural drawings and specifications as approved by any governmental authority, all other documents filed with any other governmental authority, all governmental certificates, correspondence involving enforcement of any Association requirements, copies of any documents relating to disputes involving unit owners.

ICPA Section 18.2(e) Any contract, lease or other agreement made prior to the date of the election of the first unit owner board by or on behalf of the unit owners (individually or collectively), the Association, the board of managers or the developer and its affiliates which extends for a period of more than 2 years from the date of the election shall be subject to cancellation by a majority of the votes of the unit owners other than the developer cast at a special meeting of members called for that purpose held during the 180 days following the election. At least 60 days prior to the end of the 180 day cancellation period, the Board shall send notice to every unit owner notifying them of this provision and of what contracts, leases and other agreements are affected by it and the procedure for calling a meeting of the unit owners for the purpose of voting on termination of such contracts, leases or other agreements. Cancellation shall be effective 30 days after mailing notice by certified mail, return receipt requested, to the last known address of the other parties to the contract, lease or other agreement. During the 180 day period, the other party to the contract, lease or other agreement also shall have the right to cancel.

ICPA Section 18.2(f) The statute of limitations (the time limit within which a lawsuit must be filed following the rise of a cause of action after which the case is barred) in law or equity actions which the Association may bring shall not begin to run until election of the first unit owner board where unit owners have elected a majority of the members of the board.

ICPA Section 18.2(g) If the developer fails to comply fully with the requirements of ICPA Section 18.2(d) and fails to comply fully within 10 days of a written demand mailed by registered or certified mail to developer's last known address, the Board may bring an action to compel compliance. If the court finds that any of the required deliveries were not made within the time required, the Board shall be entitled to recover its reasonable attorney fees and costs incurred from and after the date of expiration of the 10-day demand.

ICPA Section 18.4 The powers and duties of the Board of Managers are listed in this section. The section includes a statement that in the performance of their duties, the Board members and officers

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Whether appointed by the developer or elected by the unit owners shall exercise the care required of a fiduciary of the unit owners.

ICPA Section 18.5(f) This section addresses the administration of a master association (including common interest communities which are not master associations) prior to election of the initial board of directors. Its terms are similar to those set forth above regarding condominium associations. Care should be taken to review this section thoroughly and compare it specifically to the listing above before addressing the developer of a master association or common interest community about turnover issues.

ICPA Section 22 This section deals with what information must be provided by the developer to a prospective buyer. The section prohibits the developer from making any changes or amendments to any of the items furnished in the disclosure (including the Declaration and By-laws of the Association) which would materially affect the rights of the buyer or the value of the unit without obtaining the approval of at least 75% of the buyers then owning an interest in the condominium.

ICPA Section 25 This section deals with Add-on condominiums in which the developer reserves the right to add additional property to that which has been submitted to the provisions of the ICPA. The addition would cause reallocation of the percentages of interest in the common elements. No approval of the unit owners is required if the developer has complied with the requirements of this section. The Add-on rights set forth in the Declaration can last for 10 years from recording the Declaration after which they expire. The developer is not required to exercise the Add-on rights.

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