The End of Declarant Control:

Clearing up the Confusion

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Transition of a community association's board of directors from declarant control to homeowner control is a process that is done inconsistently and with spotty documentation. This can sometimes lead to problems down the road if the association ever has legal issues with its declarant. The following FAQ is intended to address some of the most misunderstood aspects of the end of the declarant control process.

What is the period of declarant control?

The period of declarant control is the time when the declarant, or persons designated by the declarant, may appoint and remove the officers and members of the executive board. C.R.S. § 38-33.3-303. When the declarant no longer has the authority to appoint or remove board members, the period of declarant control is over.

When does the period of declarant control end?

Unless a shorter time is provided in the declaration (which is uncommon), the period of declarant control ends when the first of one of these things occurs:

1. 60 days after conveyance of 75% of the units
2. Two years after the last conveyance of a unit by the declarant in the ordinary course of business, or
3. Two years after any right to add new units was last exercised.

For most associations, the period of declarant control will end 60 days after 75% of the units are sold.

When can the homeowners start electing board members?

Before the end of declarant control, the homeowners are entitled to elect some members of the board. No later than 60 days after conveyance of 25% of the units that may be created, at least one member and not less than 25% of the members of the executive board must be elected by unit owners other than the declarant. No later than 60 days after conveyance of 50% percent of the units, not less than 33 1/3% of the members of the executive board must be elected by unit owners other than the declarant.

For a three-member board, this means that after 25% of the units are sold, the homeowners should elect one board member. For a five-member board, the homeowners should elect two members. Unless the board has more than five members, after 50% of the units are sold, there is no change. A three-member board would still have one elected member. A five-member board would still have two elected members.

Can the declarant appoint homeowners to the board during the period of declarant control?

Yes. The declarant can use its power to appoint or remove any person from the board the declarant chooses. However, unit owners should be wary about being a declarant appointed member of the board. C.R.S. § 38-33.3-303(2) provides that declarant appointed board members may have personal liability for their actions as board members. Board members who are elected by the homeowners are protected from personal liability except for "wanton and willful acts or omissions." This means that a homeowner who is appointed to the board by the declarant could be exposed to more personal liability than a homeowner who is elected by the other homeowners.

Can the declarant vote in these elections?

No. The declarant cannot vote to elect board members, ever. Unfortunately, however, the Colorado Common Interest Ownership Act (CCIOA) is not as clear as it should be. C.R.S. § 38-33.3-303(6) specifically says that the declarant cannot vote at the 25% and 50% mark. However, C.R.S. § 38-33.3-303(7) is silent as to whether the declarant can vote at the 75% mark when the declarant control period ends. However, C.R.S. § 38-33.3-303(9) somewhat awkwardly clarifies that unit owners "other than the declarant" may participate in the election at the end of declarant control.

At the end of declarant control, do the homeowners get to elect a majority of the board, or the entire board?

The homeowners should elect the entire board at the end of the period of declarant control. This is another area whether CCIOA is not as clear as it should be. C.R.S. § 38-33.3-303(7) says that at the 75% mark, the owners shall "elect an executive board of at least three members." This subsection means that the board must have at least three members. However, regardless of the size of the board, the entire boards must be elected at this time. There should be no declarant appointed board members on the board after the period of declarant control.

Can the declarant have candidates run for positions on the board at the end of declarant control?

Yes, but there are limitations. At the end of declarant control, the owners must elect the entire board, and the board must have at least three members. The declarant cannot vote. The declarant can have its representatives run for these positions. However, a majority of the newly elected board must be unit owners "other than the declarant." So, if the declarant runs multiple candidates who, if elected, would make up a majority of the board, then at least some of the declarant's candidates must be disqualified to make room for unit owners other than the declarant to make up a majority of the board. Because of the conflicts of interest that can occur by having declarant candidates run for board positions, a community association manager should discourage a declarant from running for board positions after the end of declarant control.

What documents should the board sign at the end of declarant control?

The simple answer is none. Documentation of the end of declarant control is important and it is helpful when the minutes of the homeowner meeting can clearly indicate that that it is the transition meeting where the homeowners are electing their first homeowner-controlled board.

However, there are no documents that the new board is required to sign at the end of declarant control showing that the homeowners are "accepting" the common areas. Many developers will attempt to get a newly elected board to sign a complete release of liability as part of the transition process, sometimes in exchange for a small payment to compensate the association for minor landscaping issues. It is almost always a bad idea for an association to sign any such document. DO NOT SIGN ANYTHING without first checking with an independent attorney hired by the new homeowner-controlled board.

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Developer Transition Checklist

Items the Developer Must Transfer to the Association

1. **A certified copy of all governing documents, minute books, and records.**
2. **An accounting of money and financial statements, audited at the declarant's expense, by an independent CPA.**
3. **Control of the association's funds.**
4. **All common element property the declarant used and an inventory of this property (for example: clubhouse furniture and pool equipment).**
5. **A copy of the plans and specifications of the buildings and other improvements.**
6. **All insurance policies in which the owners, officers and directors or association are named insureds.**
7. **Copies of certificates of occupancy.**
8. **Copies of any open permits pulled for Association property (for example: elevator and pool permits).**
9. **Any written warranties for the property (for example: roof shingles, landscape warranties).**
10. **A roster of owners and mortgagees with addresses and telephone numbers.**
11. **Management contracts and/or maintenance employee contracts.**
12. **Any vendor contracts.**
13. **Copies of all leases and recorded deeds for the common elements.**

C.R.S. § 38-33.3-303(9)(a-m)