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### **Transition – A critical period in the life of a condominium association**

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The most critical time in the life of many condominium associations is the period known as “Transition.” In its most technical sense, Transition is the gradual transfer of control of a new association’s board of trustees from the Sponsor to the unit owners. Transition, however, is much more. It is a multi-faceted process in which the unit owner board, with the guidance of a property manager and other professionals, confirms that the Sponsor properly constructed the condominium complex, accurately maintained the association’s finances, and honored its other commitments to the association - and it also is the time when the association attempts to assure that the Sponsor remedies any deficiencies in fulfilling those obligations.

Under New Jersey law, the unit owners are entitled to elect all seats on the association’s board once the Sponsor has sold 75% of all units (except for one seat that the Sponsor is permitted to appoint while it continues to construct or market units). This election, in which the Sponsor is not entitled to vote, truly commences Transition.

One of the most important steps in Transition is the association’s retention of an independent engineer to compare the actual construction with the development plans approved by the municipality; inspect the common elements and identify any code violations or other defects in their design and construction; and determine whether the capital reserve schedule prepared by the Sponsor is sufficient. Similarly, the association should hire an independent CPA to review the association’s financial records for the period of Sponsor control and determine whether the Sponsor fully paid its share of common expenses; properly funded the reserve account; maintained accurate records; improperly spent association funds for Sponsor expenses; or otherwise deviated from accepted accounting practice.

The engineering and accounting reports will be key tools in the most significant event in Transition - the association’s negotiations with the Sponsor seeking remediation of discovered construction and financial deficiencies, hopefully without resorting to litigation. Accordingly, in hiring the engineer and accountant, the association’s board should conduct a thorough selection process, including interviewing at least three qualified candidates for each position, ascertaining their experience in Transition and dealing with known, existing problems, obtaining references, and confirming they have not worked for the Sponsor.

As part of Transition, the association should secure from the municipality, pursuant to New Jersey’s Open Public Records Act (OPRA), a copy of (a) the Developer’s Agreement between the municipality and Sponsor, (b) all performance bonds that the municipality required the Sponsor to post, which may be a source of funds for the association, through the municipality, to obtain repairs of covered items (roads, drainage, sewer lines, curbing, and similar infrastructure) that the Sponsor refuses to perform; (c) any “punch list” prepared by the municipal engineer of items to be remedied by the Sponsor, and (d) the Planning Board resolutions granting the Sponsor site plan approval, and all final approved and as-built plans for construction of the complex. These documents contain important information relating to the Sponsor’s obligations and may assist the association’s engineer in preparing the Transition report.

There are numerous other documents that the association should obtain as part of Transition. Under two New Jersey statutes, the Sponsor is required to “forthwith deliver to the association all items and documents pertinent to the association,” including, e.g., minute books and all other records of the association; an accounting of and control over all association funds; a copy of the actual plans and specifications used in construction; all active written warranties; and all contracts to which the association is a party. The board should review all association contracts inherited from the Sponsor. Under the New Jersey Condominium Act, any management contract entered into by the Sponsor terminates automatically 90 days after the first board meeting at which the unit owners constitute a majority of members, unless the board ratifies it. If the association is being managed by the Sponsor, its in-house manager, or an affiliate, the board should hire an independent management company. The Act also prohibits the Sponsor from entering into any management, employment, service or maintenance contracts for a term longer than two years.

The association also should file an OPRA inquiry with the New Jersey Department of Environmental Protection requesting whether there are any outstanding environmental obligations affecting the condominium. Identifying such problems will allow the association to promptly seek recourse against the Sponsor. Otherwise, years later, the DEP might seek to compel the association to fulfill such obligations, especially if the Sponsor no longer exists.

It is critically important that the board/management not repair any construction defects for which the association intends to hold the Sponsor liable, or perform any related destructive tests/inspections, without being guided by its attorney regarding the association’s duties under the “spoliation of evidence” doctrine. Under this doctrine, the association’s failure to preserve evidence of the defect, and to provide the Sponsor with reasonable notice of and an opportunity to be present during such work, could severely prejudice the association’s claims if settlement negotiations are unsuccessful and the association sues the Sponsor.

Some other important actions that the board should consider include becoming familiar with the association’s master deed and by-laws; confirming from the association’s insurance agent that all policies required by the master deed and by-laws, and otherwise recommended, have been obtained; changing the association’s registered agent to its property manager or attorney to assure prompt receipt of service of process and the annual report form from the State; and confirming that the municipality is complying with its obligations under the Municipal Services Act (particularly regarding collection of solid waste and recyclables, and providing snow removal, from the association’s roads, or monetary reimbursement for those services).

Throughout these and other steps in Transition, a board should work closely with its property manager and other professionals.