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### Turnover: The Greatest Risk or Reward

Turnover (also known as transition from developer control) is perhaps the most important event in your Association's history. The Legislature (through the Condominium Act, Fla. Stat. 718, et. seq., and the Homeowner Act, Fla. Stat. 720, et. seq.,) and the Courts (via Florida Case Law) have set up significant protection(s) for Condominium and Homeowner Associations and their members. Unfortunately, many Associations fail to properly deal with Turnover and thereby fail to obtain and recover many items and funds to which they are entitled.

As alluded to above, Florida Statutes, and significant case law have developed specifically dealing with the issue of Turnover. However, for purposes of this Article, we shall primarily deal with Condominium Associations as opposed to Homeowners' Associations. Nevertheless, Homeowners' Associations have significant rights even if some of their remedies, etc. are not as extensive as Condominium Associations. (Note: the Homeowner Act is still in its infancy compared to the Condominium Act. As such, additional protections exist for Condominium Associations, which do not exist for Homeowners' Associations).

For Condominium Associations, Fla. Stat. §718.301 designates not only when Turnover must transpire, but also numerous items which must be provided by the developer and/or the developer-controlled board to the Association. (Note: For Homeowner Associations, please see Fla. Stat. 720.307) These items are extremely significant and important to the Association for its continued viable existence.

At the time of Turnover, the Association and its members may not even be experiencing any problems. Nevertheless, significant unknown or unrecognized problems such as latent defects and deficiencies may exist. In addition, virtually every Association will need certain information about their property at some point in the



#### ***About the Author***

Neal McCulloh, our Founding and Senior Partner, has practiced Association Law since 1982. He has participated in hundreds of turnover through the year from both the developer and the owner's side.

A popular speaker on the national, state, and local levels, he has lectured extensively on the subject of turnover as well many other areas of Association Law. He has appeared as the featured speaker at such prestigious events such as The Florida Bar, University of Miami's Institute of Condominium and Cluster Development, NCAM, CAI, Orange County Homeowners Association, BCAM, Space Coast Community Association, Orange County Neighborhood Partnership Programs to name a few.

future. Therefore, often the newly elected unit owner Board members do not realize or appreciate how important it is to *ensure* that:

1. The Association properly and timely deals with the Turnover process;
2. The Association obtains all items listed and required to be turned over by the developer, pursuant to Fla. Stat. §718.301. (Note: Homeowners Associations, please see Fla. Stat. §720.307) ;
3. The Association determines whether it received all the funds to which it is entitled;
4. The Association investigates and determines whether any construction defects or deficiencies exist (Note: Condominium Associations even have specific statutory warranties pursuant to Fla. Stat. §718.203) ; and
5. The Association enforces its rights in a timely fashion.

It is regrettable in today's world of technology and information that Associations so often manage to waive or fail to timely preserve their rights, resulting in the Association suffering a significant loss. Needless to say, this should not transpire. As Turnover is such an important event in an Association's history, the Association needs to proceed through the Turnover process properly, diligently and carefully. Quite frankly, to do this properly, an attorney should assist the Association with this process. Additionally, other professionals can also be of significant help and may actually be necessary. Such professionals include, but are not necessarily limited to, Association manager(s), accountant(s), insurance agent(s), engineer(s) and architect(s).

The Association should consider approaching Turnover as an event where the Association has a gun with one bullet and the Association consciously determines whether or not to fire that bullet. Additionally, many Associations are under the mistaken belief that they are totally protected by the Florida Statutes or by actions that will be taken on behalf of the Association, by the Florida Division of Land Sales, Condominium and Mobile Homes (i.e., the Bureau of Condominiums) or some other regulatory agency. Certainly, there are protections available, but it is a misplaced belief that such are automatic or sufficient. Nothing could be further from the truth. It is up to the Association and its professionals to investigate the issues and guarantee a proper Turnover. It is not uncommon for more than a million dollars to be at stake in a Turnover case. Additionally, many of the legal, accounting, design and construction issues are very complex. It is unrealistic for the Association to expect their Board of Directors or even their manager to know how to protect the Association and its members. Such individuals cannot be expected to know or be able to analyze many of the bases for recovery. As an example, attorneys, who do not deal with Condominium Turnover cases, probably do not understand "phantom unit" issues. Nevertheless, these issues can easily account for hundreds, thousands, or even millions of dollars in recoveries. While a phantom unit issue ostensibly is complex, understand:

1. Each and every unit designated in the Declaration arguably exists, *whether or not constructed*; and
2. Each and every unit designated in the Declaration may owe assessments from the date the Declaration was filed (i.e. whether or not the units and/or buildings were ever constructed).

Therefore, significant funds can be owed by a Developer to an Association for non-payment of assessments, for units and buildings *which were never built* but are designated in a Condominium Declaration or Amendment thereto.

Pursuant to Fla. Stat., 718.301, Condominium developers are required to provide the Condominium Association an audit of the Association's financial affairs through the date of Turnover and this audit is to be

performed by an independent accountant. What is sad is the fact that often times Associations believe that, by virtue of their obtaining such an audit, they are adequately protected. These Associations believe that if there were any funds still due and owing to the Association, such would be clearly earmarked in the audit. Unfortunately, this is not necessarily accurate or true. In fact, it is our experience that the majority of the \$718.301 audits performed in connection with Turnovers are deficient and that it is extremely common for Associations to be entitled to *significant additional funds from the developer*. While most accountants may be familiar with doing audits, this does not mean they are familiar with all of the additional requirements of Fla. Stat. §718, much less the Administrative Rules and case law governing this area of the law.

Another big problem area that needs to be evaluated at the time of Turnover involves developer guarantees of the budget and whether the developer properly paid pursuant to the budget guaranty and Florida Statutes. Other issues which often become very significant at the time of Turnover involve:

1. Whether reserves have been properly established and funded;
2. Whether reserves have been waived, and whether proper and accurate reserve evaluations have been performed by the Association during the developer-controlled time period.
3. Whether the developer low-balled the Budget.

The above discussion has only briefly touched on a few of the accounting issues. This article has not even touched on the potential severe construction defects and deficiencies which separately may exist, but which must be analyzed and addressed during the Turnover process.

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Since Hurricane Andrew struck, the public appears to have become more aware and more concerned with construction defects and deficiencies. We hope so, as we see such defects and deficiencies week in and week out in our Turnover cases. Moreover, the cost to correct these defects and deficiencies can be astronomical. The Board of Directors needs to consciously decide:

1. Whether to properly evaluate and investigate the sufficiency of the construction (i.e., whether defects and deficiencies exist);
2. Whether it wants the cost to correct defects and deficiencies to be born by the owners or the developer.

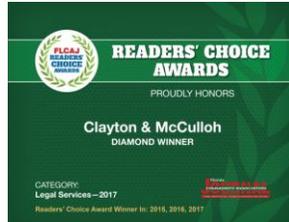
Given the fact that members of the Board of Directors owe a fiduciary duty to the Association and its members, we strongly urge the Board of Directors to always investigate and evaluate whether construction defects exist, and if they do exist, to properly evaluate with their attorney how to proceed.

While this article has barely scratched the surface of what needs to be considered for Turnover, it is hoped that this article will alert Associations to the importance of the Turnover process.

Lastly, Associations need to understand that Turnover refers to a point of time (i.e., when control of the Board of Directors transfers from developer control to non-developer control). However, Turnover also refers to a process during which the Association is to obtain all of the items and funds to which it is entitled.

Please do not forget that Board members have a fiduciary duty to the membership, and in this firm's opinion, one of the first and cornerstone tests of this duty includes properly dealing with the Turnover process. 📧

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