

*“Louie, I Think This Is the Beginning
of a Beautiful Friendship” –*

Avoiding Transition Mistakes in Community Associations

By Jonathan H. Katz, Esq.
Hill Wallack LLP



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Transition is defined as a movement or evolution from one form, stage, or style to another.¹ In the community association context, transition describes the two-part process by which control of an association, together with responsibility for the common elements and/or common property, is transferred from the developer of the community to the unit owners.

The first step in the transition process involves the unit owners assuming control of the association’s governance, which is signified by the unit owners occupying a majority of seats on the association’s board of trustees or directors (normally when seventy-five percent of the units have been conveyed). This allows the unit owners to make the decisions concerning the community that, up to that point, were made solely by the developer or its representatives on the board. This “transfer of power” is governed by the Planned Real Estate Development Full Disclosure Act (“PREDFDA”)² and the New Jersey Condominium Act,³ as well as the association’s declaration of covenants and restrictions and/or master deed and by-laws

(collectively the “governing documents”).

The second step in the transition process involves the unit-owner controlled association assuming the responsibility for the common elements and/or common property throughout the association. The objective in this phase is for the unit-owner controlled board to ensure, prior to accepting the obligation for control of the common property in perpetuity, that the developer constructed and/or improved the property to accepted standards and without defects, properly managed the association from its formation until the transfer of power, and contributed funds to the association in accordance with PREDFDA, Condominium Act and the association’s governing documents.

Transition can be both a complex and time-consuming process, but it is the most important time in the early existence of a community association. Identifying and understanding common issues and problems that may arise between an association and its developer is half the battle in completing a successful transition and reducing the potential for transition litigation. And while no

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association or transition is the same, management and board members should be aware of and guard against the following common transition mistakes.⁴

**“Toto, I’ve got a feeling we’re not
in Kansas anymore.”⁵**

For many unit owners who are elected or appointed to their association boards, this may be the first time serving in such a capacity. Often, this leads to being overwhelmed with transition questions and, like Dorothy, involves a sneaky suspicion that they might be in an unfamiliar place. As discussed below, experienced management and counsel can allay many of these fears, and it is also common practice for association boards to engage an engineer and an accountant to address transition-related issues. Specifically, these professionals will be charged with inspecting the association’s

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property and books and records, essentially probing whether the association has any potential claims – either construction-related or financial – against the developer.

“What we’ve got here is ... failure to communicate.”⁶

Failing to communicate – or at least attempting to communicate – with both the developer and the association’s unit owners is quite possibly the biggest and most costly mistake a unit-owner controlled board can make during the transition process. Communication with the developer is the key to addressing unit owner concerns and unresolved issues, as well as addressing any problems or misconceptions regarding additional work or repairs still being performed. Educating the unit owners is also vital to the transition process. Whether it is holding monthly association meetings, creating a newsletter, updating the association’s website or promptly responding to calls and requests for additional information, taking a proactive role can make the process more open and transparent to all those involved and, more importantly, save time and money over the course of the transition.

“These aren’t the droids you are looking for...”⁷

For our purposes, the old Jedi mind trick applies to the documents, plans and other information that must be provided to the association pursuant to PREDFDA and the Condominium Act. At the outset of the transition, the unit-owner controlled board should request these essential documents if they have not already been turned over by the developer. In addition, the association should also request any contracts, budget and financial documents, and insurance information that will guide the initial operation of the association. As the transition progresses, it is imperative that the association have all of the plans, specifications and “as-builts” in order to engage an engineer to conduct a transition inspection and prepare a transition report. All of these documents must be turned over to the association within sixty (60) days from the transition election when the unit owners take control of the board.

“Greed, for lack of a better word, is good.”⁸

While this mantra may be true in some circumstances (at least according to Gordon Gekko), an association must be vigilant to safeguard its financial position during the

transition. The board must take note of the developer's financial contributions to the association before the transition election, including any ongoing assessments due from the developer for unsold units or units under development in proportion to the "benefit derived" by the unit from the items included in the budget.⁹ It is also important that the association's initial budget drafted by the unit owners takes into account the likely costs of the transition and sets the common assessments high enough to fund both the association's regular maintenance as well as the capital reserves. Equally important is to conduct annual audits and, if necessary, a transition audit as the transition progresses.

"Round up the usual suspects."¹⁰

One of the most important decisions an association board can make is the engagement of a professional property management company. Prior to beginning transition, it will be highly beneficial to employ a management company that is well-versed in the transition process. This may be the management company hired by the developer; however, some boards prefer to contract with management that the unit owners feel is independent from the developer. In either case, management should be the conduit for communication between the board and the developer to facilitate and resolve repairs or other problems.

"Send lawyers, guns and money."¹¹

Although some developers may balk at the idea, it is in the best interest of the association to retain independent association counsel as soon as possible after the first transition election (when twenty-five percent of the units have been conveyed). Involving counsel knowledgeable about community association law and familiar with transition at this early stage will be beneficial to both the association and the developer by fostering communication to resolve any potentially problematic issues and increasing the comfort level of the unit owners.

"Houston, we have a problem."¹²

Aside from lack of communication, nothing can raise the ire of unit owners more than failing to address necessary repairs or even something as minor as not properly maintaining the association's landscaping. Not only do these issues annoy the unit owners, but they also affect the ever-important "curb appeal" of the new community. Punch lists are effective ways for the association to

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advise the developer of issues that need to be addressed, but association boards should not pass the buck for such issues if the developer fails to be responsive to such demands after sufficient notice. When these issues arise, boards should consult with counsel to discuss options to rectify issues that have not been addressed in a timely manner by the developer so as not to exacerbate the problem and create animosity among the unit owners.

“I’m gonna make him an offer he can’t refuse.”¹³

In certain situations, it may be optimal for both the association and the developer to consider an early turnover of control to a unit-owner controlled board prior to the statutorily mandated period, especially when a significant period of time has elapsed from the creation of the association. This can be beneficial to both parties for several reasons. First, it allows a unit-owner controlled board to engage professionals before problems may arise (such as the common argument that construction defects are really caused by maintenance issues). Second, it facilitates cooperation between the association and the developer in addressing and resolving any construction related issues at an earlier stage, rather than in a later adversarial situation, and may allow the developer to look to its subcontractors, if applicable, to remedy any defects. While this “early transition” may not be practical in all associations, it should be considered in some circumstances with the input of counsel.

“If you build it, he will come.”¹⁴

It is imperative that from the time the unit-owner controlled board takes control of the association that it maintains and enforces the exterior and architectural standards set forth in the association’s governing documents. This issue arises in many community associations at some point during transition, as the association board is left to deal with a unit owner or owners who alters a patio or a fence or (shudder to think) decides to paint his or her front door pink. The unit owner invariably fails to submit an exterior change application and/or seek approval of the board or architectural control/covenants committee. While management will often be able to resolve many of these issues before they become major problems, the association board must pay close attention to enforcing the association’s covenants and restrictions during the early stages of transition and throughout the life of the community.

“Surely you can’t be serious!”¹⁵

“I am serious... and don’t call me Shirley.”

You mean to tell me that the municipality where the association is located is required to reimburse an association for lighting as well as trash and snow removal? With some caveats, yes. One issue usually not addressed as part of the transition is the application of New Jersey’s Municipal Services Act,¹⁶ which provides that a municipality must either provide to a qualified association certain services or reimburse the association for the cost of those services, including snow removal, collection of trash and recyclables, and the lighting of roads. Generally, this responsibility will not begin until the transition has taken place, as municipalities may, as part of a properly adopted development agreement, delegate to a developer the obligations to pay for such municipal services until the time that the unit owners take control of the association. Association boards should be aware of the fact that their communities may be entitled to these services or reimbursements.

“Louie, I think this is the beginning of a beautiful friendship”¹⁷

Community association transition, by its nature, can become an extremely adversarial process if the parties allow it to be. However, with knowledge of the common transition mistakes discussed above, and by being aware of and properly addressing these pitfalls early in the process, association boards may be able to prevent their transition experience from becoming a nightmare. ■

Footnotes:

1. Merriam-Webster’s Online Dictionary – <http://www.merriam-webster.com/dictionary/transition>
2. N.J.S.A. 45:22A-21 et seq.
3. N.J.S.A. 46:8B-1 et seq.
4. With a little help from some of my favorite movie lines (and one song title for good measure).
5. *The Wizard of Oz* (1939).
6. *Cool Hand Luke* (1967).
7. *Star Wars: Episode IV - A New Hope* (1977).
8. *Wall Street* (1987).
9. N.J.A.C. 5:26-8.6.
10. *Casablanca* (1942).
11. Warren Zevon, “Lawyers, Guns and Money,” *Excitable Boy* (1978).
12. *Apollo 13* (1995).
13. *The Godfather* (1972).
14. *Field of Dreams* (1989).
15. *Airplane!* (1980).
16. N.J.S.A. 40:67-23.1 et seq.
17. See endnote IX, *supra*.



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