

Why Associations Should Incorporate
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I am frequently asked by clients whether it would be advisable to incorporate their condominium or homeowners' association. I always give the same answer. I strongly recommend incorporating as a nonprofit miscellaneous and mutual corporation. Incorporation can be accomplished by the Association's legal counsel and the cost is minimal. Generally all that is needed is to provide counsel with the legal name that the corporation wants to use, e.g., Dream House Condominium Association, a list of the names and addresses of the current directors, the name and address of the person or persons to serve as incorporator and as registered agent or an authorization for counsel to do so on behalf of the Association. In some cases, where the condominium declaration provides that the association will be an unincorporated association and does not give the board of directors the authority to incorporate the association at a later date, incorporation will need to be preceded by the approval of an amendment to the declaration.

It is not absolutely necessary for an association that was created under the Horizontal Property Regimes Act (the "Old Act"), prior to the effective date of the Washington Condominium Act (the "WCA"), to be incorporated, but it is certainly desirable. The WCA requires that the owners' association for condominiums created on or after July 1, 1990 must be incorporated, however, neither the Old Act nor the WCA requires that condominiums created before that date must be incorporated. While it is also not statutorily required that homeowners' associations in non-condominium projects subject to RCW Chapter 64.38 be incorporated, this is also highly desirable.

The incorporation of an association provides several actual and potential benefits. First, and most important, it creates a "corporate shield," whereby the personal assets of association members would not potentially be at risk in the event of a large monetary liability of the Association. The Washington Supreme Court case of *Riss v. Angel* sent shock waves through the community association community in 1997 when the members of an association were held jointly and severally personally liable for what the Court considered an unreasonable denial of an architectural control application. Since this was not an accident or occurrence covered by association insurance, it directly impacted the individual members of the association. There are other situations where insurance might not be adequate that would have a similar effect. To the extent that an association is incorporated, an action of the corporation can only result in a judgment against the corporation. Where a judgment is obtained against an incorporated homeowners' or condominium association, the members of the corporation are only subject to being assessed by the association for their pro-rata share of the corporate liability. In the *Riss* case, the homeowner who took the judgment was in a position to go after any individual owner or owners for the full amount of the judgment.

A second possible advantage concerns the holding of title to real property. Under Washington law, an unincorporated association cannot hold title to real property in its own name. Thus, unincorporated homeowners' associations which own common areas and unincorporated

condominium associations which acquire a resident manager's unit or another parcel of property, for example offsite parking, must place title to the property in trust or a separate corporation owned by the association (shares of stock are personal property rather than real property.) Trusts are becoming increasingly expensive, and the use of a wholly-owned corporation may create tax and other potential liability issues. However, an incorporated association can hold title to real property in its own name, thus eliminating the need for such complications.

A third advantage is that an incorporated association has the ability to borrow funds, whereas an unincorporated association does not. Association borrowing is becoming an option that is increasingly popular for associations as the face huge unfunded capital requirements, and more and more banks are entering the market to make these loans.

A fourth advantage is that the corporate statute would be available to provide answers and guidance to procedural issues that might not be addressed in either the condominium statute or the Association's governing documents. I recommend incorporating under the Washington Nonprofit Miscellaneous and Mutual Corporation Act, RCW Chapter 24.06, rather than the Washington Nonprofit Corporation Act, RCW Chapter 24.03, for a number of reasons. I have found that the answers provided by the corporate laws have been useful to fill gaps in an association's documents many times over the years.

The response to all of this is usually, "That sounds too good to be true. What is the downside of incorporating?" I am pleased to report that the only disadvantage for incorporated associations is that they need to remember to file an annual report with the Secretary of State and pay the Ten Dollar (\$10.00) filing fee.