

**CONDOLAW'S 2018 HANDBOOK
FOR COMMUNITY ASSOCIATIONS**

**A Resource for Washington State
Condominium and Homeowners'
Associations**

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Preface

This book is made up of a selection of topics we believe Associations will find useful and informative. We kept the chapters very short. To further flesh out each topic, we have provided more detailed information, including citations to relevant statutory and case law, in the endnotes. We recommend that you read the section entitled "Basic Legal Information" first.

This book is not a substitute for advice from a qualified attorney. While there are many similarities between Associations and their Governing Documents, without reviewing the specific documents and the facts and circumstances involved, we cannot give competent advice about any situation you might face.

Condominium Law Group, PLLC assumes no liability or responsibility to any person or entity with respect to any direct or indirect loss or damage caused or alleged to be caused by the information contained herein, or for errors, omissions, inaccuracies, or any other inconsistency with this book, or for unintentional slights against people, professions, or organizations.

Should you desire legal advice on these or other areas of law pertaining to a Condominium or Homeowners' Association in Washington State, please consider Condominium Law Group.

Ken Harer and a partner started Condominium Law Group, PLLC in 2001. Originally focused on construction defect litigation, the firm's practice evolved as the needs of communities changed.

In 2016, Valerie Oman became a partner after practicing with the firm for eight years. Today, the firm (CondoLaw for short) has seven attorneys and a comparable number of support staff.

CondoLaw represents over 500 community Associations, assisting with assessment collection, Governing Document interpretation and revision, construction disputes, insurance claims, and advising Board Members on a variety of matters, from water leaks to smoking complaints and everything in between.

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1--What Basic Legal Concepts and Information Should I Keep in Mind While Reading this Book?

Before you start reading this book, it is important for you to be familiar with some basic concepts about the types of communities that exist and the law which governs them. Often this book will address condominiums and HOAs separately and may refer to these communities collectively as common interest communities. There are four major sets of laws which cover common interest communities. WUCIOA (RCW 64.90) is the most recent of the laws. It applies to all new common interest communities and went into effect on July 1, 2018. Condominiums formed before July 1, 2018 are covered by either the New Act (RCW 64.34) or the Old Act (RCW 64.32). HOAs formed before July 1, 2018 will be governed by the HOA Act (RCW 64.38). Additionally, many Associations are organized as nonprofit corporations and therefore will be covered by either the Nonprofit Corporations Act (RCW 24.03) or the Nonprofit Miscellaneous and Mutual Corporations Act (RCW 24.06)

Condos

“Condominium” refers to real property developments in which the property can be divided by lines on the ground like traditional real estate, but can also be divided with horizontal planes, like the floors of a building. The individual Owners each own an undivided (collective) interest in the common areas (like offices, lobbies, elevators, recreational facilities, hallways, parking garages, pools, etc.). The Unit (or apartment) is a separate piece of property within a whole. A carton of eggs is an excellent analogy for the condominium structure. Each egg is a Unit with a defined boundary. The carton is all the common elements surrounding and between the eggs.

A condominium is the collection of Units, along with the entire physical entity. The Association of Owners is the legal entity that

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manages the affairs of the condominium and its Owners. Usually, the Association itself owns no property. Common elements, even a manager apartment, are owned by the Unit Owners collectively, and typically have no tax parcel number associated with them.

While every Owner is a member of the Association, the Association is a legal entity that is governed by its Board of Directors. Actions taken by the Association are decided by the Board. Attorneys who work for Associations take direction from and provide advice to the Association Board. Whether that information is shared is at the discretion of the Board, not individual Owners.

Often, outside managers are hired by the Board to assist with the administration and management of the Association and the physical property. Managers are agents of the Association and act at the direction of the Board, or where Board powers have been delegated to the manager by the Board, they may act on behalf of the Association without further consultation with the Board.

HOAs

Many residential developments that are not condominiums are governed as "Homeowners' Associations" or "HOAs." Most are platted communities of single family homes or Lots. An HOA is an Association where all members own separate real property and pay assessments for common expenses associated with property other than that owned by each member. An HOA is separate from the property and is an organization in which membership is tied to the ownership of property within a community.

Usually, in addition to an obligation to pay for some common property or services, there are covenants and conditions that restrict the property rights of the Owners within a community. In addition, the HOA often has some power to enforce or regulate the use of the property within the community. Generally, any restrictions on the use of the property must be contained within the recorded deed for the property, though it may be through

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reference to some other recorded document, like Covenants, Conditions, and Restrictions (CC&Rs) or a Declaration.

Cooperatives

These are buildings owned by a single corporation which pays all the real estate taxes and expenses. Each shareholder is entitled to lease an apartment.

Common Interest Community

The term "common interest community" is the general term used to refer to this constellation of communities including HOAs, condominiums, or cooperatives which had previously been treated separately by the law. More formally, a common interest community is real estate described in a Declaration, in which a person may own a Unit, and as a result the Owner is obligated to pay a share of the expenses and costs of the community. But, at its heart, a common interest community is nothing new. It is just another way to refer to your condominium, cooperative, or HOA. This general term is necessary because WUCIOA creates a single set of laws which will govern these different types of communities. All of these communities have common interest ownership of some part of the property.

Which Laws Apply?

Associations of Owners of property formed before July 1, 2018, and that are not condos or co-ops are governed by the Homeowners' Association Act (Chapter 64.38 of the Revised Code of Washington (RCW)). The HOA Act does not apply to non-residential developments or residential cooperatives.

Any HOA formed as a nonprofit corporation is also governed by the Nonprofit Corporations Act (Chapter 24.03 RCW) or the Nonprofit Miscellaneous and Mutual Corporations Act (Chapter 24.06 RCW). To a certain extent, these acts also implicate the Business Corporations Act (Title 23B RCW). Other state laws will apply in some situations and federal laws like the Fair Housing Act and Americans with Disabilities Act may also apply.

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Condos and their Owners' Associations created on or after July 1, 1990, (meaning the Declaration was recorded on or after that date) but before July 1, 2018, are governed by the Washington Condominium Act, RCW 64.34 (the "New Act"). It is now 27 years old but is still "new" compared to the prior statute.

Condos and their Associations created before July 1, 1990 are mostly governed by the Horizontal Property Regimes Act, RCW 64.32 (the "Old Act"). Parts of the New Act also apply to older condos, and we generally advise our clients in "Old Act" condos to comply with the more restrictive of the two Acts to be safe.

Any Condominium Association formed as a nonprofit corporation, which should include all "New Act" condominiums, is also governed by the Nonprofit Corporations Act, RCW 24.03, or the Nonprofit Miscellaneous and Mutual Corporations Act, RCW 24.06. To a certain extent, these acts also implicate the Business Corporations Act. Other state laws will apply in some situations, and federal laws like the Fair Housing Act may apply as well.

Cooperatives created prior to July 1, 2018, where each Owner is a shareholder in the corporation, are governed by corporate law. Which one will depend on the statute under which the corporation was formed. In addition, because each shareholder leases their home, the Landlord Tenant Act, RCW 59.18, may apply.

Any common interest community (whether a condominium or an HOA) created after July 1, 2018 is governed by the Washington Uniform Common Interest Ownership Act. Some provisions introduced by WUCIOA automatically extend to preexisting communities, and there are some provisions that a community may choose to adopt by amending their Declaration. There is also a process for a preexisting community to change their Governing Statute to WUCIOA. There are several benefits to adopting WUCIOA, but the decision should be made with the assistance of an attorney and after a conversation with your members.

2--What Documents Define and Control My Association?

A Common Interest Community is primarily controlled by its Declaration and CC&Rs. These documents outline the property rights and obligations of the community. These documents are supplemented by the Bylaws. The property covered by the Declaration and CC&Rs is usually defined by maps and plans. These maps and plans contain the physical boundaries of the community. They would also contain information about easements and other obligations not necessarily recorded in the Declaration. Finally, there may be equitable servitudes running with the property that are not recorded in any of these documents.

The condominium Declaration, or an HOA's Covenants, Conditions and Restrictions (CC&Rs) are the primary documents that control the property rights and obligations for Units or Lots within a common interest community. For condominiums, they create the individual pieces of real estate that can be purchased and sold, and they control the rights and obligations of the individual Owners and the Association as a whole. These documents also create the Association that manages the Owners and may contain guidance on how the Association operates and is managed through a Board of Directors.

These documents are recorded in the county and courts take the position that every buyer has read and understands every requirement contained within them. There is no excuse for Owners who have not read the documents; they are binding on the land and the Owners, even if they were not given directly to the Owner. Because recording with the County constitutes public notice, every Owner is deemed to have accepted them when they made their purchase.

The operation of the community, the conduct of the Owners, and the allocation of expenses are all controlled by the Declaration.

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The community should be operated, and Owners should conduct themselves in accordance with the Governing Documents. If you want a different outcome, you need to change the documents to reflect those changes.

Frequently, Associations do not conduct their affairs in accordance with the Governing Documents. Customs and practices that seem fair and reasonable may conflict with the written requirements. At times, the recorded documents are silent on how a community functions and these customs and practices are written within policies and rules adopted by the communities over time. This can be problematic, because these new restrictions and obligations are not recorded with the county.

The general rule, and the way that statutes are written, is that a restriction on property can only be binding if it is recorded, and a new restriction is only binding on a property if it is written and is signed (in front of a notary) by the property Owner who is to be bound. This is known as the "Statute of Frauds" and makes it easier to determine what alleged rights and obligations control a property. But there have been several cases where courts have looked at what equitable rights and obligations should be applied to property to allow homeowner Associations to enforce restrictions where the recorded documents are silent, missing, or flawed. The courts ask: "What is fair?"

Often the Declarations, which do appropriately designate the formation of the Association, will include provisions that would appropriately be in the Bylaws. Examples include stating when the annual meeting must occur, the number of Board Members, how they are elected and removed, etc. This may have occurred historically because some such provisions are provided in statutes, or because Bylaws were not prepared in advance of the Association being created. It may have been that the developer wanted to have a single document that contained all the information necessary for both the property rights and for management of the Association.

The Declaration must contain those provisions that affect a property Owner's rights to use the property. It should contain all

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provisions that deal with what happens to the property and what obligations are tied to the property. Restrictions on use such as prohibitions on rentals, businesses, pets, etc. must be contained in the Declaration. A description of Owners' rights in the event of destruction or condemnation belongs in this document along with provisions on how to amend the document. Some statutes, like the Washington Condominium Act (RCW 64.34) state specific contents that are required in a condominium Declaration.

The Declaration will typically contain a legal description of the property bound by the document. This is often a long list of compass directions and distances that is virtually impossible to understand except by surveyors. Along with every Declaration is a Survey Map and Plans for a Condominium or Plat Map for an HOA ("Maps and Plans"). Maps and Plans are recorded along with the Declaration, usually at the same time (and they will usually have recording numbers that are sequential).

Maps and Plans are essential to understanding what property is bound by the Declaration. For condominiums, the description of the property in the Declaration almost always refers to the plans to show the description and location of each Unit. Deeds for Units in condominiums often only describe the property as a particular Unit number, with no other legal description, such that the only way that the Owner can identify the Unit is by reference to the plans. Note that most condo Declarations contain a provision stating that the actual Unit boundaries are as the building is constructed, not what is shown on the plans. So, if you discover an error, and the boundaries of the Unit are not what is shown on the plans, you still only get what was actually built.

Maps and Plans often contain additional information that may be missing from the Declaration. We find easements and obligations required by the city or county for maintenance that are only on the Map and Plans and are not mentioned in the Declaration. This could be because the county only allowed a subdivision of the property if certain restrictions were placed on portions of the property (like obligations to maintain wetlands, native growth protection areas, retention ponds, etc.). These restrictions would

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apply to the property as a condition of the separation of the land into smaller parcels, required of the developer regardless of what other restrictions may be placed on the property when the community is created with a Declaration. Sometimes for condos it is not possible to know the boundaries of the Units without reference to notes contained only on the Plans.

When a boilerplate Declaration is used to form the community, these prior obligations are often just missed. Often the developer fails to mention them in any of the promotional material to sell the Units or homes. Usually such obligations come to the attention of the Association years later, often by notice of violation from the government.

Just because Declarations may be silent about these obligations, it does not make them invalid. They are in recorded documents and the courts consider every buyer to have read (and agreed to) every document recorded on the property at any time in the past. One recommendation is to insert into the Declaration any definitions or obligations contained in the Maps and Plans or any prior recorded documents, because then all obligations would be in one document. At a minimum, note those obligations and refer the reader to the other recorded document.

There can also be rights and obligations running with the property that are not written down on any recorded document. This generally requires special circumstances and fact patterns that create what are known in the courts as equitable servitudes. These might occur in HOAs where the developer made promises about the community but did not write them into the documents. It can occur when members of the community agree to how something is to be done in the community for an extended period of time, including payment of assessments, even if it was never written down. Equitable servitudes are created by a court to recognize rights or obligations that run with property. This is because of the Statute of Frauds, which is legislation that requires that any obligation running with land must be recorded. Only the court can rule with any certainty that equity (fairness) requires that

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the Statute of Frauds be disregarded, and that unrecorded obligations are binding on property.

If the way that you want the community to operate does not match the documents, then you can and should change the recorded documents to reflect the changes. Virtually all Declarations have provisions within them to allow changes if approved by some stated majority of the Owners. These changes are binding on all Owners if the changes are consistent with the general scheme of the original development. Courts have enforced changes against Owners who voted "no" to those specific changes in many cases but have also invalidated some changes because they found that the new restriction was not consistent with the original plan of development.

3--What is the Hierarchy of the Governing Documents and Statutes?

Statutes take priority over the Governing Documents, and the Declaration takes priority over Rules, policies and other decisions of the Board. When provisions in two documents conflict, then the provision with less priority will be invalid. We advise correcting any conflicts within your documents.

From most controlling to least controlling, the hierarchy is as follows:

1. *Federal laws.* Federal laws trump state laws and your Governing Documents. In conflicts, the federal law controls. Examples include regulation of satellite dishes and service or companion animals.
2. *State laws.* State laws trump your Governing Documents, so anything regulated by the State must be allowed. An example is installation of solar panels on homes.
3. *City or County ordinances and laws.* The building code adopted by the City is an example.
4. *Survey Maps and Plans or Plat Maps.* Survey Maps and Plans are usually recorded with or before the Declaration and are often equal to the Declaration in priority. They may contain obligations not in the Declaration.
5. *Condominium Declaration or CC&Rs.* The primary focus of these documents is to regulate the rights and obligations of an Owner as related to the property. Changes to these documents always require approval of the membership.
6. *The Articles of Incorporation.* These are typically filed with the Secretary of State when the Association is created by the developer but are often silent on anything except the

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name of the organization and the names of the directors. Many Associations are not incorporated until years after the community is created.

7. *Bylaws.* The Bylaws focus on how the community manages its affairs. Bylaws usually require amendment by a stated majority of the community, but sometimes can be amended by the Board of Directors alone. These are usually not recorded. They are typically created by the developer when the Association is initially formed.
8. *Rules and Regulations.* Rules and Regulations are typically prepared and distributed by the Board, without Owner approval. They may be amended at any time by the Board and should take effect upon distribution to the Owners. These are often created initially by the developer. They are distributed to all Owners so they have notice of the Rules.
9. *Policies.* Policies are typically used by the Board to be consistent in how they administer the affairs of the Association. Policies can relate to collections, fines and opportunities to be heard, reserves for major repairs, investments of reserves, etc. These are almost always adopted over time by the Board.
10. *Resolutions.* These are decisions by the Board and usually relate to one-time decisions, or issues that come up infrequently. These are documented in Board meeting minutes, or in a book of resolutions

It is important to ensure that lower priority documents are consistent with controlling laws and documents. If you want to make a change in how the community functions, look at what the change is, and which document must be amended. You cannot create Rules or Bylaws provisions that are inconsistent with the Declaration. If you do, the provision is invalid and unenforceable.¹

If you know you have invalid provisions, we suggest correcting the mistake with another recorded document. If an inadequate vote invalidates the provision, you could revote to get the correct approval, then rerecord the document. If that is not possible,

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record a document that identifies the invalid provisions and strikes them from the document. We believe this can be done with an action of the Board alone, since the original vote was not enforceable, but remember that a single invalid provision in an amendment does not invalidate the entire amendment.²

Because it is so important that the documents reflect how your community actually operates, it is worth the effort to modify them to reflect those changes. In this way you can avoid the train wreck that occurs when you have an Owner who does not comply with the expectations of the community and an Association determined to enforce the community's standards (where the wrong documents support the Association's position).³

¹ *Shorewood West Condominium Ass'n v. Sadri*, 140 Wash.2d 47, 57 (2000). ("When the Association promulgated a restriction on leasing in a bylaw without first amending the condominium declaration, it did not act in accordance with the Horizontal Property Regimes Act. The bylaw is invalid and this court may not enforce it.")

² See, *Keller v. Sixty-01 Ass'n of Apartment Owners*. (Court permitted the board acting on its own to revoke an improperly passed amendment to the declaration.)

³ See, *Sadri*, 140 Wash.2d 47 (Condominium Association was unable to prevent an owner from leasing their unit because the rental restriction was written into their bylaws rather than the declaration, as required by law.)

4--Why are Community Documents So Difficult to Read and Revise?

Governing Documents are difficult to read because they cover a broad range of topics, have different priorities over time, and must be read by a diverse group of people. As a result, there are competing interests in drafting (or revising) the documents. You want them to be easy to read, but specific enough to be clear as to their intent and how they are to be interpreted. Courts usually look at the intent of the drafter to determine what it means but are increasingly moving towards interpreting the document to best serve the community as it exists today. The written words are the best indicator of the intent, but often lack sufficient detail to know what the words actually mean. More detail means longer documents as well as a greater chance that a factual situation could be interpreted as an exception to a written provision.

Many Declarations have copied provisions from their applicable statutes into the documents. This is a low risk option for the drafter, because there can be no error if they copied the statute word for word. This makes the document long, and changes nothing from the statute regarding the rights and obligations of the Owners. One option to deal with length is to skip writing the statute in the document, but instead refer to the statute as controlling.

For example, you can write all of the powers of the Association into a condo Declaration that are provided for in the statutes, filling a couple pages of the document, or you could simply state that the Board can exercise all powers of the Association as provided for in RCW 64.34.304 (the applicable statute for a pre WUCIOA condo), accomplishing the same thing with a single sentence. The latter approach is not usually chosen because most Owners are unfamiliar with the statutes, are unaware that statutes are more controlling than the Declaration and rely exclusively on the

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Declaration to interpret their own rights and obligations. Therefore, including the detail of the statute in the Declaration has value in communicating with the Owners. This puts the information in the one place they are most likely to read.

Originally the developer (or their attorney) chooses the level of detail in the documents. Developers' attorneys often draft documents using a boilerplate set of provisions that evolved over time, usually with more and more detail, as the attorneys attempted to anticipate problems for their developer clients. Your developer's goals were likely not consistent with the goals of your current community, both as to their content and the level of specificity required. You can change that.

Most Declarations have a sweeping restriction on activity that is a nuisance or is offensive to neighbors. This provision could be applied to any situation that offends the Board or a neighbor but is very subjective. Because people do live in communities, they must expect some intrusion into their lives from their neighbors. With such a vague provision, how does the community decide when an individual's conduct goes from reasonably expected to offensive?

If a neighbor is playing their piano or radio, neighbors nearby are likely going to hear it. It is unreasonable for neighbors to expect that they would never hear anything from their neighbors. Whether the sound is offensive or not may depend on the time of day, the volume of the sound, the type of sound, and the subjective opinion of the listener. The sound of dogs barking may be more offensive than the sound of classical music playing. A piano during the day may not be offensive, but at four in the morning it is.

Often Boards will draft rules to try and guide the community on what conduct would be considered normal and what would be offensive. One example is a bright line rule establishing specific hours of the day for activities like running dishwashers, vacuums, and washing machines. Operation of these devices would generally be easy to measure as a violation. Some Boards

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establish "quiet hours" hoping that any noise would be limited to the allowed times, but this is more difficult to measure for violations, because things like televisions are operated all times of the day, and the potential for offending the neighbor remains.

Often Governing Documents will attempt to put objective criteria in place where there is no direct connection between the criteria of the rule, and the offensive behavior being prohibited. Pet rules are the best example. The goal is to prevent pets from being offensive to other residents. The behavior of a dog and how the dog is controlled by its Owner are the activities that would be offensive, not the size, breed, or number of dogs. However, it is difficult to put objective measures on a dog's conduct, so instead rules are established about the weight of the dogs (say 20 pounds), the number of dogs, or restrictions on breeds of dogs (like prohibitions on pit bulls). This creates a situation where a small dog that is offensive to the neighbors because of barking would be allowed, but a mellow larger dog that is not offensive would be prohibited.

Language is a difficult problem. Generally, shorter, less specific language regarding the dog's behavior is preferred, along with a subjective evaluation of the dog and its Owner's conduct on a case-by-case basis to determine if the animal is offensive. On the other hand, specific measurable criteria provide guidance to an Owner about what kind of dogs would more likely be a good fit in the community and make enforcement if the dog is both offensive and outside the specific criteria much easier. This is another situation where the community is trying to balance conflicting goals in how it drafts its documents.

Often a Declaration will provide that animals can only be kept in compliance with rules adopted by the Board. This allows Boards to craft rules that control pets, but many communities have never adopted rules related to pets, so enforcement is not possible, because there you cannot violate a rule that does not exist.

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Statutes can help to objectively evaluate subjective criteria. One Association prohibited parking vehicles that were not “passenger vehicles” or “light trucks.” An Owner purchased a shuttle bus, like one you might take to the airport, and converted it into a work vehicle for his business. It was too big to fit in his garage, and to everyone but him, violated the rule prohibiting trucks contained in the Declaration. His attorney argued that it was originally a passenger vehicle or is now a “light truck,” thus clearly allowed.

Definitions of the two terms were absent from the Declaration, and no rule had been implemented to clarify what those terms meant. (Who could have predicted that such specificity would ever be needed?) However, there are other statutes that define what a “truck” is, what a “light truck” is and what a “passenger vehicle” is. This bus originally seated too many people to be a passenger vehicle as defined by statute, and the question of whether it was a light truck turned on the exact designed gross vehicle weight of the vehicle, because the state legislature had chosen a gross weight of 12,000 pounds as the difference between a “light truck” and a regular truck. A 12,000-pound truck is much bigger than a pickup truck, which would probably have been a better term than “light truck” in this Declaration.

Absent a statute to provide guidance (usually there are none), courts will give terms their most logical meaning, as would be commonly understood by the public. Look up a word in the dictionary, and find the most common meanings, not obscure meanings (and not the definition chosen by the offending Owner or the unreasonable Board). To the extent that you can rely on other sources to clarify your documents, you limit their length.

Some terms are difficult because they are used frequently with different meanings in the same document. The word “notice” appears over 50 times in a typical Declaration. Sometimes it means the contents of a communication, sometimes it means the process of communicating, and sometimes it means that the communication was received.

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Definitions for terms like “dogs” or “commercial businesses” are usually absent from Governing Documents. Most people agree on what these are. You do see definitions on “domestic pets” or “home businesses,” because there are many interpretations on what those might be. We were once asked if a pig is an allowed domestic pet. If the Governing Documents say, “only cats and dogs,” a pig is clearly not allowed. If the documents say, “only domesticated animals like dogs and cats,” the Owner can argue that it is “like” a dog or cat because it is their “pet.”

You can shorten the documents and be less specific when there are other sources of information you can go to and supplement the documents if needed. If dealing with the issues of whether noise is offensive, it is possible to measure the level of the noise. You can buy inexpensive sound meters to measure how loud (in decibels) something is. That may not change how a particular listener perceives it but might allow parties to agree on what is an appropriate volume, perhaps for a particular time of day.

When dealing with sound complaints related to hardwood floor installation, engineers can test the floor and tell you exactly how much noise is transmitted through the floor. By comparing the sound levels from the original construction (usually carpet) with what was installed (usually hardwood), you can precisely measure how much of a change has occurred and help evaluate if the new sound level is “offensive.” There are published standards, some from the government, that make specific recommendations on the sound reduction of floors and walls between Units, and the actual results of your test can be compared to those standards to determine if violations of the documents have occurred.

Some Boards believe that the more detail they include in their documents, the better their community operates. They may be right for their communities; on the other hand, the longer the documents are, the less likely Owners are to read them.

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Many Boards will copy and paste provisions from the Declaration word for word into the Rules, because they think the Owners are more likely to read the Rules than the Declaration. (We are not convinced that is true.) Declarations often copy and paste statutes directly into them. Almost everyone agrees that the statutory language is difficult to understand, but they do not want to take the risk that rewording statutes to make them more readable would change the meaning of the provisions (even if they do not understand the intent of the statutes themselves.)

WUCIOA, adopted by the legislature and effective July 1, 2018, provides better definition to some terms which originated in prior statutes, like the Condo Act and the HOA Act. Terms like record, misconduct, written, and benefitted have increased definition than in their predecessor statutes. As such, such terms in the prior statutes, or in older Declarations could borrow the new definition, or the new definition could be argued to be what the legislature intended in 1990 or 1995 when the prior statutes were adopted. Amending your Declaration to adopt a specific meaning for an ambiguous term is one way to avoid the problem all together.

So, the constant challenge is to balance length and precision against brevity and ease in reading the document. It is impossible to anticipate every situation that might arise or to include specific criteria to direct the community in every situation. Creating a short document that refers to other documents or statutes may mean Owners actually read it, but also requires referencing those other documents to understand what it all means. However, copying statutory provisions into the documents creates lengthy documents that Owners are less likely to read, but are more likely to cover a specific scenario that comes up. Short broad provisions require Boards to make more subjective evaluations about whether the facts of specific situations are reasonable or if there are violations of the documents.

5--Practical Tips on Changing Your Documents

Before making changes to your documents, understand what percentage of Owners must approve the change. It may be easier to get Owners to approve a single purpose amendment; though this does increase the chance of accidentally drafting conflicting provisions. Getting Owner approval will be easier if Owners understand the changes and why the amendment is necessary. Town Hall style meetings, "get out the vote" efforts, and making voting easy will also help get Owner approval. If the Owners vote against the amendment, ask them why and adjust accordingly before trying again. Finally, keep in mind the cost of the amendment and balance against the potential benefits to the community. Many amendments pay for themselves the first time an event like a water leak occurs.

Declarations typically specify the required approval by the Owners of the property necessary to amend them. This is typically a supermajority of 60%¹ (minimum required for Old Act condos), 67% (minimum required of New Act condos² and WUCIOA³), or some other stated majority. Seventy-five percent is common.

Some revisions require every Owner to approve. Statutes and Declarations may state that 100% is required to make certain revisions like changing boundaries or restricting the use of a condo Unit. HOAs require 100% to change an essential quality of the document, which is often not certain until a court rules.⁴ If the wrong percentage is obtained, the amendment will be invalid.

This approval percentage is based on the total number of votes, not just those who cast votes. Voting for most condominiums is based on the percentage ownership interest each Owner has in the community. New Act condos and WUCIOA⁵ communities can have voting percentages that differ from that, and it is common to give each Owner an equal vote.⁶ HOAs are almost always one

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vote for each property owned, though we have seen some with one vote per Owner, regardless of the number of Lots owned.

Bylaws must be amended by the terms stated within them (though the Declaration may have a different requirement.) Bylaws often require the same supermajority vote as the Declaration, but Bylaws can by their own terms allow for a simple majority of all Owners, a majority or supermajority of all Owners present at a meeting (where a Quorum is present), or amendment by the Board alone. Getting the approval of members who appear at a meeting is easier than getting approval from all Owners. Some communities have attempted a single purpose amendment to reduce the required approval for future amendments, hoping to make future amendments easier to pass.

Single purpose amendments are relatively easy to pass. One issue before the membership; one vote. Sometimes only a single paragraph or sentence is changed. That makes it easy for Owners to understand and make decisions. A caution on such simple amendments though; many Declaration amendments have created a conflict with another portion of the document. This becomes problematic because two separate provisions clearly lead to different outcomes for a question presented, and disputes can arise about the intent of the document.

Amendments to shift insurance deductibles to Owners in condominiums are a popular example of a problematic single purpose amendment. The goals are to make Owners responsible for things they do and control, and to shift high deductibles for HOA insurance policies to Owners, who can insure those amounts at low cost on individual policies. (This can be a "win-win" in reducing unplanned repair expenses for the Association).

An amendment that changes how insurance is handled by the Association should touch on sections within the document about how assessments are made (for the deductible or uninsured amounts) and should address the damage and destruction section (on how repair costs are allocated among Owners). Frequently, the new insurance section will clearly allocate the deductible to be an expense borne by the Unit Owner, but the damage and

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destruction section may just as clearly allocate the cost in excess of insurance proceeds to the community as a common expense. It is not possible to reconcile the two. It is important to make sure that a single purpose amendment considers, and is consistent with, the rest of the document.

The problem in getting most amendments passed, and especially a complete Restatement passed, is apathy of the vast majority of Owners. Most Owners do not care about the documents, have not read them, and, unless they have been accused of violating them, do not give them a second thought. These “apathetic many” are the greatest obstacle to successful revision of your documents.

One new twist is that, as of July 2018, your community can change its Governing Statute to WUCIOA. This change provides the community the rights and obligations of that statute and can be adopted with as little as 30% participation, if 67% of the votes agree. For many older condos, and most HOAs, this statute provides better clarification and protections for both Owners and the Association as a whole.

There is an effective process for getting amendments done that require community approval:

1 – Identify Needs and Goals

First, identify the need. Many communities suffer through several events where they cannot understand the documents, or where the documents lead to conclusions they do not like, before considering a change. Some learn about changes other communities have made and like those ideas. Often, they will then seek assistance in trying to determine if there are other changes that they might consider while they are working on the issues they already know. Some attorneys offer a service of reviewing the documents to advise the Association about problems they identify, opportunities for taking advantage of new laws, and generally make recommendations as to the content and readability of the documents. This is often the first step our clients take.

It is difficult to assist a client who does not have some goals or specific changes in mind. Decide if you are looking to make it

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easier to read, looking to provide missing provisions, or looking to change rights and obligations. Knowing what you want makes the process easier and more efficient.

Some communities want to have all risk of living in the community shifted to the Owners who are responsible or affected. Other communities consider this a truly shared community, where everyone shares in expenses and contributes when any individual Owner is affected. There is not a "right" way to balance risk, obligations, and costs among Owners; what you do should reflect the values and desires of your community (not those of the developer or your attorney).

An attorney can make suggestions about possible changes and provide options for addressing particular issues, but Boards or committees should do the final decision making about what will be changed. The attorney can then use the Association's proposed list of changes to redraft the documents.

Exercise caution before adopting a law firm's boilerplate Declaration, which simply matches the firm's most current version of what they provide to other clients or to developers of new communities, with little regard for your particular values, customs and practices which have evolved with your community over time. When this is done, we have seen provisions that Associations relied on for decades lost (for example the ability of Old Act condos to terminate utilities for nonpayment of dues). On the other hand, adopting model language, or statutory language which is on point, may substantially reduce the cost for an Association to significantly improve their documents.

You also need to confirm that any restated documents read in a way that you understand and accomplish your objectives. If you cannot understand the documents, neither will the Owners.

2 – Simplify the Process for Your Owners

Prepare a short summary of the changes for Owners. We advise no more than two pages of bullet point terms to explain the major changes. This includes explaining philosophical changes and pointing out key provisions like rental restrictions or changes in

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insurance deductible allocation. This document summarizes the Declaration changes the way that a voter pamphlet summarizes proposed laws. You need a document that Owners are likely to read, because they often will not read the full Declaration.

3 – Communicate with Your Members

Distribute information to the Owners about the proposed changes. This can be done early in bullet point terms to get feedback from Owners, though some Boards and committees choose not to present a lot of options to the membership. Fewer issues before the Owners means less confusion.

Town hall meetings are an excellent way to gain support for amendments and to make sure that the changes you propose are acceptable to the community. We have seen good success with communities that take a summary of proposed changes, perhaps including those from an attorney review, to the membership in advance of starting the project. This introduces the membership to the process, so it is not a surprise when they are asked to vote and allows them to contribute early on if they want to participate or would object to particular changes. Often having an attorney or Association manager present is helpful. Keep in mind though, that some people distrust attorneys, and would be more receptive to information from Board members or managers they trust.

A second town hall meeting might be conducted after an initial draft of the new document is prepared and approved by the Board. This meeting is generally intended for answering questions, allowing Owners to voice concerns, and to get final opinions from the community prior to finalizing the documents for a vote. Again, this gives Owners advanced notice of an upcoming vote and helps them understand the process and the need for their participation. Having the attorney who drafted the document present to answer questions and provide options for revision of controversial provisions can be helpful.

Sometimes, communities hold a third Association meeting when the actual vote is held. To allow the best chance of a successful vote, collect directed Proxies (like mail in votes) well in advance of

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the meeting. If done properly, this meeting is simply to collect the votes, but it may draw in the apathetic many who ignored the process previously and now are concerned about how the changes may affect them. You will need to explain again all the reasons for the changes. Again, the presence of your attorney and manager may make such a meeting easier.

4 – Get Out the Vote

Door to door requests to vote or personal phone calls to Owners are almost always required. Close-knit condos usually have an easier time getting votes than HOAs, because more people know their neighbors and Board Members, and are more likely to trust that their interests are being taken into consideration. Volunteers who go door to door need not be Board Members but do need to know what they are encouraging their neighbors to vote on.

Collecting written consents or directed Proxies early is important. Most Owners who receive a packet of papers and a ballot, usually more than 50 pages of documents, will set it aside. Even the most responsible Owners may forget about it. Visits, emails and phone calls help remind them. Keep track of those who have responded and stay vigilant in contacting unresponsive Owners.

5 – Be Timely

If you approach the date of your deadline for voting short of approval, the Board usually has the authority to change the voting deadline. Give yourself enough time to make another pass at getting votes from unresponsive Owners. Some communities have open ended voting and take more than a year to collect enough votes to pass amendments. However, when that much time passes, it is harder to assert that the required percentage of Owners agreed to the amendment(s) at one point in time. If a Unit or home sells before the required approval is achieved, the new Owner must cast a new vote. The first vote is void because the person is no longer an Owner. WUCIOA has set a new standard of eleven months to collect written consent for an amendment.⁷

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6 – Adjust as Needed

If amendments do not pass because Owners vote against them, ask for feedback from dissenting Owners and revise to address specific concerns. If influential opposition exists, invite them to the process of editing the documents so that they can better understand the revisions and why they are being made, or so they can help edit to address specific concerns. If you can achieve support from influential members of the community, it may lead to votes from some of the apathetic Owners.

7 – Separate Issues

Often Owners will reject the document because of a single provision or the wording of a few sentences. Sometimes different Owners reject different sections. Voting separately on separate sections could allow you to adopt portions of a restated Declaration, even if you do not pass every provision proposed. Restatements may fail because a few Owners object to different things, even though a majority may agree on every provision.

Decide whether to have a ballot with a single yes/no on a Restatement, or several separate yes/no votes on particular sections or issues. You balance simplicity of a single vote (yes/no) against more likely success of some changes if you vote on each section separately. How the Board chooses to structure the vote largely depends on the level of trust the Owners put into their Board and the process used. The more trust is instilled in the Board, the more likely a single vote is to succeed.

Another reason to have multiple votes is that some amendments contained in a Restatement require different voting percentages. New Act condos may provide that most amendments can be made with a 67% approval of the membership, but others require 90%. Changes in restrictions on use require 90% approval and, if the existing Declaration provides that renting is a “use”, a rental cap requires 90% approval (See *Filmore v. Centre Pointe*). Requiring approval of the Restatement with a single vote would virtually ensure failure because 90% is difficult to achieve. In this kind of case, we would typically recommend at least two separate

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items on the ballots, one for adoption of the rental cap and related provisions and one for adoption of the rest of the Restatement.

8 – Make Voting Easy

Allowing voting by written consent or directed Proxies can reduce the urgency of getting enough Owners to attend a meeting in person or gathering enough votes by a specific date. Make sure that the process used is sufficient, because the easiest thing for a dissenting or unhappy Owner to challenge is the process used to vote. Often Associations will collect votes until enough votes are received to pass, or enough votes are cast in opposition that approval is impossible.

Allow votes to be changed if you are extending the time for acceptance. Your objective is the required approval at the same time. If you allow Owners who did not vote to continue voting, or allow nay voters to vote yea, then you need to also allow yea voters to change their minds.

9 – Balance Cost and Value

So how long will this process take and how much will it cost? The process is daunting and is not inexpensive. You can ask your attorney for an estimate of the cost for doing a Restatement of your Declaration. Some attorneys quote low prices to put your name on their boilerplate Restatements (under \$5,000) and some attorneys quote over \$15,000 to assist with the document revision. You may have a difficult time getting a fixed flat fee, because there are so many variables on the amount of time it will take the attorney to produce a first draft, the number of revisions that will be made, the number of meetings that must be attended, etc. How your community functions with the process is the biggest variable that the attorneys cannot control. Remember that the cost is being spread among the whole community, and on a per Owner basis it may be very reasonable. If you are looking to shift costs, like the insurance deductible, the money saved for a single damage event will often cover the entire cost of revising the documents.

Despite the challenges we described, there is great value to having a set of Governing Documents that are free of conflicts that

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make resolution of disputes difficult or impossible. This is especially important when some disputes are likely to repeat themselves, such as allocating responsibility for water leaks into or from condo Units. We have seen train wrecks where communities have disputes with interpretation of vague, ambiguous, or conflicting provisions, resulting in years of expensive litigation, and warring factions within the community. If you know you have a problem, we suggest that you fix it with a cooperative process rather than find yourself in court one day or sitting in your attorney's office being told that what you want to do or already have done cannot be supported by your existing documents.

The Governing Documents should reflect the values of your community and how the community wants to govern itself. They should be updated to reflect changes in technology and the industry in a manner desired by your individual community. If they can also be made easier to read and to understand, all the better.

¹ RCW 64.32.090(13). ("The declaration shall contain the following...The method by which the declaration may be amended, consistent with this chapter: PROVIDED, That not less than sixty percent of the apartment owners shall consent to any amendment except that any amendment altering the value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities shall require the unanimous consent of the apartment owners.")

² RCW 64.34.264(1). ("...the declaration...may be amended only by vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated, or any larger percentage the declaration specifies: PROVIDED, That the declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential use.")

³ RCW 64.90.285(1)(a). ("...the declaration may be amended only by vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated, unless the declaration specifies a different percentage not to exceed ninety percent for all amendments or for specific subjects of amendment. For purposes of this section, "amendment" means any change to the declaration, including adding, removing, or modifying restrictions contained in a declaration.")

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⁴ *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wash.2d 241, 256 (2014). (“A prohibition on short-term rentals is unrelated to the 1988/1992 covenants and therefore cannot be adopted by a simple majority vote. We do not hold that homeowners can never limit the duration of rentals, as the dissent believes, just that a majority of Chiwawa homeowners cannot force a new restriction on a minority of unsuspecting Chiwawa homeowners unrelated to any existing covenant...”)

⁵ RCW 64.90.235(1)(a) (“The declaration must allocate to each unit: In a condominium, a fraction or percentage of undivided interests in the common elements and in the common expenses of the association and a portion of the votes in the association”)

⁶ RCW 64.34.224(1). (“The declaration shall allocate a fraction or percentage of undivided interests in the common elements and in the common expenses of the association, and a portion of the votes in the association, to each unit and state the formulas or methods used to establish those allocations. Those allocations may not discriminate in favor of units owned by the declarant or an affiliate of the declarant.”)

⁷ RCW 64.90.455(5)(g). (“If the association does not receive a sufficient number of votes to constitute a quorum or to approve the proposal by the date and time established for return of ballots, the board may extend the deadline for a reasonable period not to exceed eleven months upon further notice to all members in accordance with (b) of this subsection. In that event, all votes previously cast on the proposal must be counted unless subsequently revoked as provided in this section.”)

6--How Does a Community Adopt WUCIOA?

For currently existing condos, co-ops, and HOAs, there is a process to adopt the Washington Uniform Common Interest Ownership Act ("WUCIOA").¹ First the Owners must vote to amend the Declaration and choose to be governed by WUCIOA. Second, the Board must vote to amend the Declaration to remove provisions which directly conflict with WUCIOA. Finally, the Owners can vote to adopt optional WUCIOA provisions, and delete or change non-conflicting provisions in the Declaration.

1. Switch the communities Governing Statute to WUCIOA. This process is outlined in RCW 64.90.095.² To make this change:
 - a) The Board must prepare an amendment to the Declaration and send it to all the Owners. This is a short document.
 - b) The Board must wait 30 or more days then hold an Association meeting on the amendment.
 - c) Next, the Board must set a deadline for the Owners to complete voting and send the Owners the final proposed amendment with a ballot for their vote.
 - d) The amendment will pass if at least 30% of the Owners vote and 67% of votes approve.
 - e) The amendment is effective when recorded.

2. Bring the Declaration in line with the provisions of WUCIOA as instructed by RCW 64.90.285(11)(d)³. To do so the Board must:
 - a) Draft a Declaration amendment to delete and replace provisions which conflict with WUCIOA.⁴
 - b) Send the amendment to the Owners along with notice that in 30 or more days an Association meeting will be held.
 - c) The Owners must have an opportunity to comment on the amendment at this meeting.

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- d) The amendment may then be approved by two-thirds of the Board.⁵
 - e) The amendment is effective when recorded.
3. Adopt the optional WUCIOA provisions and remove old Declaration provisions not in conflict with WUCIOA. This step is not mandatory but allows the Association to:
- a) Remove Declarant rights, and Declarant control references;
 - b) Consolidate governance issues in the Bylaws;
 - c) allocate expenses against the Units which benefit from those expenses;⁶
 - d) assess the HOA insurance deductible to Unit Owners;⁷ and
 - e) assess expenses to a Unit for their or their guest's ordinary negligence.⁸

To make these changes, the Association must amend the Declaration by following the steps in the statute. ⁹ These changes will be effective when recorded.

¹ RCW 64.90.080

(1) Except for a nonresidential common interest community described in section 121 of this act, sections 120 and 326 of this act apply, and any inconsistent provisions of chapter 59.18, 64.32, 64.34, or 64.38 RCW do not apply, to a common interest community created in this state before the effective date of this section.

(2) Except to the extent provided in this subsection, the sections listed in subsection (1) of this section apply only to events and circumstances occurring after the effective date of this section and do not invalidate existing provisions of the governing documents of those common interest communities. To protect the public interest, sections 120 and 326 of this act supersede existing provisions of the governing documents of all plat communities and miscellaneous communities previously subject to chapter 64.38 RCW.

² RCW 64.90.095(3):

(1) The declaration of any common interest community created before the effective date of this section may be amended to provide that this chapter will apply to the common interest community, regardless of what applicable law provided before this act was adopted.

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(2) Except as provided otherwise in subsection (3) of this section or in section 218 (9), (10), or (11) of this act, an amendment to the governing documents authorized under this section must be adopted in conformity with any procedures and requirements for amending the instruments specified by those instruments and in conformity with the amendment procedures of this chapter. If the governing documents do not contain provisions authorizing amendment, the amendment procedures of this chapter apply. If an amendment grants to a person a right, power, or privilege permitted under this chapter, any correlative obligation, liability, or restriction in this chapter also applies to the person.

(3) Notwithstanding any provision in the governing documents of a common interest community that govern the procedures and requirements for amending the governing documents, an amendment under subsection (1) of this section may be made as follows:

(a) The board shall propose such amendment to the owners if the board deems it appropriate or if owners holding twenty percent or more of the votes in the association request such an amendment in writing to the board;

(b) Upon satisfaction of the foregoing requirements, the board shall prepare a proposed amendment and shall provide the owners with a notice in a record containing the proposed amendment and at least thirty days' advance notice of a meeting to discuss the proposed amendment;

(c) Following such meeting, the board shall provide the owners with a notice in a record containing the proposed amendment and a ballot to approve or reject the amendment;

(d) The amendment shall be deemed approved if owners holding at least thirty percent of the votes in the association participate in the voting process, and at least sixty-seven percent of the votes cast by participating owners are in favor of the proposed amendment.

³ RCW 64.90.285(11) "Upon thirty-day advance notice to unit owners, the association may, upon a vote of two-thirds of the members of the board, without a vote of the unit owners, adopt, execute, and record an amendment to the declaration for the following purposes:...(d) To remove any other language and otherwise amend as necessary to effect the removal of language purporting to limit the rights of the association or its unit owners in direct conflict with this chapter."

⁴ This will be a large amendment and we advise the board to work with an attorney to make this second amendment.

⁵ The board is not required to provide the owners with an opportunity vote.

⁶ RCW 64.90.480(4):

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The declaration may provide that any of the following expenses of the association must be assessed against the units on some basis other than common expense liability. If and to the extent the declaration so provides, the association must assess:

- (a) Expenses associated with the operation, maintenance, repair, or replacement of any specified limited common element against the units to which that limited common element is assigned, equally or in any other proportion that the declaration provides;
- (b) Expenses specified in the declaration as benefiting fewer than all of the units or their unit owners exclusively against the units benefited in proportion to their common expense liability or in any other proportion that the declaration provides...

⁷ RCW 64.90.480 (8) In the event of a loss or damage to a unit that would be covered by the association's property insurance policy, excluding policies for earthquake, flood, or similar losses that have higher than standard deductibles, but that is within the deductible under that policy and if the declaration so provides, the association may assess the amount of the loss up to the deductible against that unit.

⁸ RCW 64.90.480 (6) "To the extent that any expense of the association is caused by willful misconduct or gross negligence of any unit owner or that unit owner's tenant, guest, invitee, or occupant, the association may assess that expense against the unit owner's unit after notice and an opportunity to be heard, even if the association maintains insurance with respect to that damage or common expense;" and WUCIOA, SSB 6175 § 317(7) "If the declaration so provides, to the extent that any expense of the association is caused by the negligence of any unit owner or that unit owner's tenant, guest, invitee, or occupant, the association may assess that expense against the unit owner's unit after notice and an opportunity to be heard, to the extent of the association's deductible and any expenses not covered under an insurance policy issued to the association."

⁹ RCW 64.90.285

(1)(a) ...the declaration may be amended only by vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated, unless the declaration specifies a different percentage not to exceed ninety percent for all amendments or for specific subjects of amendment. For purposes of this section, "amendment" means any change to the declaration, including adding, removing, or modifying restrictions contained in a declaration.

7--May an Association Ban or Restrict Animals?

An Association may ban or restrict animals, if the restriction is: reasonable¹; enforced uniformly; and included in the Governing Documents.² The Fair Housing Act and Washington Law Against Discrimination provide that an Association must permit service animals. There is a question as to what extent an Association must permit emotional support animals.

Service Animals

An Association may not ban service animals.³ A service animal is an animal⁴ that is trained for to assist or accommodate a disabled person's disability. There are no legal requirements for service animals to be specially identified.⁵ Service animals are not required to have any special harnesses, badges, or certifications.⁶

To establish a right to a service animal, a resident must notify the Association that he or she is disabled and that a service animal is required in order to use and enjoy their home in the same way that a non-disabled resident would. The Association is permitted to ask only for information necessary to determine whether the animal is a reasonable accommodation because of a disability.⁷ If the disability is not obvious, the Board may ask for documentation that the resident is disabled but may not ask what the disability is. The Board may also ask for documentation that the animal is necessary to help the resident cope with the disability.

"Emotional Support" Animals

An emotional support animal is an animal that is not specially trained to assist a disabled person, but instead allows a person with a mental health disability to function better or normally.⁸

The Washington Law Against Discrimination (WLAD) does not define nor does it mention "emotional support" animals. "Service

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animals” are required to have special training under the WLAD, and “emotional support” animals do not possess special training, so it seems that Washington law does not preclude Associations from banning “emotional support” animals.

The Fair Housing Act (FHA) does not mention or define “emotional support” animals. However, the FHA’s definition for “service animal” does not require that the animal have special training. Under the FHA, a “service animal” is an animal that is a necessary reasonable accommodation for a person with a disability. Under this definition, a resident’s animal is a “service animal” if:

- (1) the resident has a disability,
- (2) the resident requests the animal as a reasonable accommodation for that disability, and
- (3) the animal is necessary because of the resident’s disability⁹

An “emotional support” animal would likely be considered a “service animal” under the FHA’s broader definition.

Under the FHA, if a resident claims a disability and has an animal that meets the definition of a “service animal,” that animal should be allowed in the resident’s dwelling even if the Association has a “no pets” policy. There should be no charge or “pet fee.” If a resident does not provide any information about how the animal assists with a disability, the animal may be prohibited, but the risk to the Association of denying a claimed service animal is high.¹⁰

¹ No Washington court has ruled on this exact issue, but Washington cases ruling on other kinds of restrictions, as well as cases from other jurisdictions regarding pet restrictions, support this conclusion. See, for example, *Shorewood West Condo. Assn. v. Sadri*, 140 Wn. 2d 47 (2000) (citing *Noble v. Murphy*, 34 Mass. App. Ct. 452 (1993) (upholding pet restriction) and *Nahrstedt v. Lakeside Village Condominium Assn.*, 8 Cal. 4th 361 (1994) (pet restrictions enforceable if reasonable and uniformly enforced).

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² RCW 64.34.216, RCW 64.32.090 and RCW 64.90.225 provide that any restrictions on use of a condominium be included in the Declaration. For this reason, if the Declaration does not already contain a pet restriction and a community wishes to restrict pets, it is probably best to vote on and pass an amendment to the Declaration. If a pet is a nuisance or threat, it may be restricted by rules based on specific facts and circumstances.

³ This is true under both federal and state law.

RCW 49.60.224(1) (Real property contract provisions restricting conveyance, encumbrance, occupancy, or use to persons of particular race, disability, etc., void - Unfair practice) provides, in pertinent part:

Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, occupancy, or lease thereof to individuals of a specified race, creed, color, sex, national origin, sexual orientation, families with children status, honorably discharged veteran or military status, or with any sensory, mental, or physical disability **or the use of a trained dog guide or service animal by a person who is blind, deaf, or physically disabled**, and every condition, restriction, or prohibition, including a right of entry or possibility of reverter, which directly or indirectly limits the use or occupancy of real property on the basis of race, creed, color, sex, national origin, sexual orientation, families with children status, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability **or the use of a trained dog guide or service animal by a person who is blind, deaf, or physically disabled** is void.

RCW 49.60.040 (Definitions) provides, in relevant part:

(7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:

- (i) Is medically cognizable or diagnosable; or
- (ii) Exists as a record or history; or
- (iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

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(c) For purposes of this definition, "impairment" includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(24) "Service animal" means an animal that is trained for the purpose of assisting or accommodating a sensory, mental, or physical disability of a person with a disability.

RCW 49.60.222 (Unfair practices with respect to real estate transactions, facilities, or services) contains similar provisions relating to real estate transactions (such as sale of a unit).

⁴ It should be noted that RCW 49.60.218(3)(a) (Use of dog guide or service animal – Unfair practice – Definitions) defines "service animal" as ". . . any **dog** that is individually trained to do work or perform tasks for the benefit of an individual with a disability . . ." (emphasis added). However, RCW 49.60.040 (Definitions) defines "service animal" as ". . . any **animal** that is trained for the purpose of assisting or accommodating a disability . . ." (emphasis added). However, the definition of "service animal" in RCW 49.60.218(3)(a) is only applicable to provisions within RCW 49.60.218, whereas the broader definition of "service animal" in RCW 49.60.040 is applicable to all other sections of RCW 49.60.

⁵ See, *Storms v. Fred Meyer Stores Inc.*, 129 Wn. App. 820 (2005); *Timberlane Park v. Human Rights Comm'n*, 122 Wn. App. 896 (2006). The animal must have some training specific to assisting a disabled person that sets it apart from an ordinary pet. No particular kind or amount of training is required by law; the owner must demonstrate that there is a relationship between his or her ability to function and the companionship of the animal. See, e.g., *Majors v. Housing Authority of the County of DeKalb*, 652 F.2d 454 (5th Cir. 1981) (Federal court determined that the act may require an apartment building to accommodate a woman's depression by modifying their no pet policy.); *Housing Authority of the City of New London v. Tarrant*, 12480, 1997 WL

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30320, at *1 (Conn. Super. Ct. Jan. 14, 1997) (Connecticut court determined that an apartment may be required to permit animals in building but that the facts of this case do not support the tenant.); *Whittier Terrace v. Hampshire*, 532 N.E.2d 712 (Mass. App. Ct. 1989) (Massachusetts court permitted a woman with an diagnosed mental condition to retain her cat arguing “[i]f the overall costs are reasonable in light of the anticipated benefits, and the burdens imposed are not undue, then it can be reasonably concluded the handicapped have suffered discrimination...”); *Durkee v. Staszak*, 636 N.Y.S.2d 880 (N.Y.App.Div. 1996); *Crossroads Apartments v. LeBoo*, 578 N.Y.S.2d 1004 (City Court of Rochester, N.Y. 1991). (A New York court determined that a no pet clause may need to be suspended if a tenant has a disability.)

⁶ For more information, the following websites may be helpful:

http://www.ada.gov/service_animals_2010.htm (this site discusses the ADA which does not apply, but many courts refer to the ADA's definitions when discussing service animals and emotional support animals under the FHA)

http://www.hud.gov/offices/fheo/FINALRULE/Pet_Ownership_Final_Rule.pdf (discussing the HUD rules about service and emotional support animals)

⁷ *Overlook Mut. Homes, Inc. v. Spencer*, 666 F. Supp. 2d 850 at 856 (2009). (“[P]rovider of housing is entitled to obtain only that information necessary to determine whether the requested accommodation is necessary because of a disability.”)

⁸ *Ass'n of Apt. Owners of Liliuokalani Gardens v. Taylor*, 892 F. Supp. 2d 1268, 1270-71 (D. Haw. 2012).

⁹ *Guide to Service Animals and The Washington State Law Against Discrimination*, Washington State Human Rights Commission, (Oct 2013) at 7.

¹⁰ Our experience is that the Washington Human Rights Commission leans heavily in favor of any individual claiming a need for accommodation.

8--Sex Offenders and Criminals: Can They Be Banned by a Community?

Associations generally have the right to regulate their communities. In Washington, this probably includes the right to ban registered sex offenders¹ and other persons with criminal history from living in the community. However, an Association's right to evict existing occupants based on their status as a sex offender is less clear. In addition, Associations considering a covenant banning occupants with criminal history must consider several sources of potential liability.

Banning Prospective Occupants with Sex Offender Status and Other Criminal History: The Fair Housing Act

The federal Fair Housing Act prohibits discrimination in housing based on race, color, religion, sex, national origin, familial status, and disability.² State and local enforcement agencies may extend this protection to other classes.³

No federal, state or local protections applicable to Washington communities specifically prohibit discrimination based on an individual's criminal history or status as a sex offender.^{4 5} No Washington court has ruled on the issue of whether an Association may ban such individuals from moving into their communities. However, guidance published by the Department of Housing and Urban Development ("HUD") warns that such bans can still violate the Fair Housing Act's prohibition on racial discrimination. A finding of discrimination would not require a finding of intentional discrimination. Instead, courts will strike the ban if they find that it disproportionately affects a protected group and that the ban is not the least restrictive means of obtaining a legitimate, non-discriminatory objective.⁶ Critically, HUD warns Associations that blanket bans of Owners with criminal records

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are likely to be construed by the courts as discriminatory, and that the objective of ensuring the safety of the community can be obtained through less restrictive means. To support this conclusion, HUD cited to federal cases which have rejected similar justifications for blanket bans on offering employment to convicted criminals.⁷

Fortunately, HUD's guidance makes it clear that it is possible for communities to construct bans which would likely survive a challenge on the basis of disparate impact on a protected class. First, HUD advises avoiding blanket bans on the basis of a history of arrests without conviction. Second, the Association should demonstrate that there was some consideration as to whether the prior conviction actually demonstrates a risk to the community. As such, avoid blanket bans on criminal convictions, and instead focus on specific categories of criminal activity, such as violent crimes or sex offenses. Third, HUD recommends that Associations consider how recently the crime was committed. According to HUD, bans on criminal convictions which have occurred more recently are more likely to survive a challenge. Lastly, this disparate impact analysis does not apply to individuals convicted of the manufacture or distribution of a controlled substance. Therefore, it is perfectly acceptable for a community to ban individuals convicted of the illegal manufacture or sale drugs.

Given the current state of the law in Washington, it appears an Association may ban registered sex offenders or other criminals from residing in their community. Because restrictions on use or occupancy of a Unit or Lot must be in the community's Declaration, a provision prohibiting registered sex offenders or others with criminal history would have to be in the Declaration (or the Declaration would have to be amended in accordance with the Association's Governing Documents and state law).⁸

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Association Membership

No Washington court has considered whether an Association has any recourse when a registered sex offender or person with other criminal history purchases a home in the community. However, it would be unlikely that an Association could either force a sale of the property or block the new Owner's membership in the Association.⁹

Eviction of Existing Tenants with Sex Offender Status or Other Criminal History

In at least one Washington case, a registered sex offender was evicted from low-income housing operated by a religious entity landlord that had been unaware of the tenant's sex offender status at the time of rental.¹⁰ If a court were to apply the rationale used in that case, a tenant's failure to disclose criminal history might be grounds for eviction if, in the interest of resident safety, the tenant's landlord enacted a rule banning residents with certain criminal history.

Potential Liability

If an Association decides to impose a residential ban on registered sex offenders or persons with other criminal history, there are several risks to consider. First, the Covenant may give residents a false sense of security and put them at additional risk. Although an Association has no general duty to control or protect residents from criminals, this promise of safety may give rise to a greater duty to protect.¹¹ In addition, if an Association enacts a ban against registered sex offenders, an offender may challenge the ban in court, subjecting the Association to litigation costs.

On the other hand, if an Association allows registered sex offenders or persons with other criminal history to live in the community, it is well advised to consider neighborhood safety issues, including protection of the sex offender from potential harassment.

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Other Considerations

Real estate sales require that a seller provide buyers notice that information relating to registered sex offenders can be obtained from local law enforcement.¹² This is not part of the Association's Resale Certificate. Information on registered sex offenders may be found online at:

- A) The national sex offender site:
<http://www.nsopw.gov/Core/Portal.aspx>
- B) The Washington state site:
<http://www.icrimewatch.net/washington.php>

Information obtained through these websites may not be used to threaten, harass, or intimidate anyone.

Registered sex offenders convicted of certain crimes may not live within 880 feet of the facilities and grounds of a public or private school.¹³ Certain offenders may also be prohibited from entering places like the neighborhood pool, playground, park, community center, and the like, if written notice is provided to the offender.

¹ Under Washington law, convicted sex offenders and persons convicted of certain other crimes, such as kidnapping, must register with the state. RCW 9A.44.130(1)(a) (Registration of sex offenders and kidnapping offenders -- Procedures -- Definition -- Penalties). Any felony committed with sexual motivation is also an offense requiring registration. RCW 9.94A.030(46)(c), (47) (Definitions). And anyone who is found not guilty by reason of insanity of a sex offense or kidnapping offense must also register. RCW 9A.44.130(3)(vi).

² 42 USC § 3604, et seq.

³ For example, the King County Office of Civil Rights investigates and resolves complaints of housing discrimination based on Section 8 housing subsidy, sexual orientation, and age, in addition to the classifications protected under the Fair Housing Act. See <http://www.kingcounty.gov/exec/CivilRights/FH.aspx>. The Seattle Office for Civil Rights provides additional protection against housing

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discrimination based on political ideology, gender identity, and military/veteran status. See <http://www.seattle.gov/civilrights/fair-housing>.

⁴ The Fair Housing Act expressly notes that “nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals.” 42 USC § 3604(9). This may be a fact-specific analysis on a case by case basis. See American Civil Liberties Union of Washington State: Second Chances Project Homepage (<https://aclu-wa.org/second-chances>).

⁵ We note that in June 2016, the City of Seattle adopted Resolution 31669, which affirms the City’s commitment to assisting those with criminal backgrounds find housing and provides landlords with a list of best practices for conducting criminal background checks and guidelines for assessing an applicant’s criminal background. See City of Seattle Res. 31669, *available at* <http://seattle.legistar.com/LegislationDetail.aspx?ID=2737445&GUID=4E0573F5-8990-47D2-BE8D-85BE81C1E83B&FullText=1>. However, to date the City has not passed an ordinance prohibiting landlords from rejecting applicants based on their criminal records. Thus, an Association who chooses to ban anyone with a criminal record would not face penalties.

⁶ Kanovsky, Helen, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (April 4, 2016)

⁷ See, *Green v. Missouri Pacific Railroad Company*, 523 F.2d 1290 (8th Circ. 1975).

⁸ RCW 64.34.216 (Contents of Declaration) provides, in relevant part:
(1) The Declaration for a condominium must contain:
(n) Any restrictions in the Declaration on use, occupancy, or alienation of the units

RCW 64.32.090 (Contents of Declaration) provides, in relevant part:
The Declaration shall contain the following:

(7) A statement of the purposes for which the building and each of the apartments are intended and restricted as to use

Procedures for amending a condo association’s Declaration are set forth in RCW 64.34.264 (Amendment of Declaration) for New Act condo associations, and in RCW 64.32.090(13) (Contents of Declaration) for

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Old Act condo associations. Each community's Governing Documents must also be examined for additional requirements. Under RCW 64.34.264, restrictions on use require approval by 90% of the unit owners and the owner(s) of every affected unit.

⁹ Under both the New Act and the HOA Act, all owners are entitled to be members of the association. RCW 64.34.300 ("The membership of the association at all times shall consist exclusively of all the unit owners" (RCW 64.34.300); RCW 64.38.015 "The membership of an association at all times shall consist exclusively of the owners of all real property over which the association has jurisdiction, both developed and undeveloped.") Thus, while an association could prohibit a new owner who was a registered sex offender from actually residing in the community, it would be unable to exclude the owner from association meetings solely based on his or her status as a registered sex offender.

¹⁰ In *Archdiocesan Hous. Auth. v. Demmings*, 108 Wn. App. 1035 (2001), the court upheld the eviction of a registered sex offender, stating that a landlord may adopt any rule and apply it to current tenants with 30 days' notice, so long as the rule is reasonable. The court found that the landlord's blanket rule prohibiting sex offenders was reasonable in that case, noting that both state and federal governments have recognized that recidivism in sex offenders presents an increased risk to the public and that, accordingly, registered sex offenders are precluded from federally subsidized housing. Although the case provides traction for landlords arguing that they are entitled to evict tenants based on sex offender status, the unpublished case is of little precedential value. Additionally, the case is unhelpful in cases where a tenant disclosed his or her sex offender status at the time of rental.

¹¹ See Chapter 30: "Association Duties: Does an Association Have a Duty to Prevent Crime in Common Areas under Its Control?"

¹² RCW 64.06.015 (Unimproved residential real property—Seller's duty—Format of disclosure statement—Minimum information); 64.06.020 (Improved residential real property—Seller's duty—Format of disclosure statement—Minimum information); 64.06.021 (Notice regarding sex offenders).

¹³ RCW 9.94A.030 (Definitions); RCW 9.94A.703 (Community custody – Conditions).

9--Smoking: Can an Association Ban Smoking?

An Association may enact a rule banning smoking in common areas. Whether smoking can be banned inside of individual Units/homes likely depends on the statute governing your particular community. For an existing HOA it is probably not possible to ban smoking in the homes. For condominiums organized under RCW 64.34, we believe that banning smoking within the Units would be considered a restriction on use which would need to be done through an amendment of the Declaration with 90% approval of the Owners. For those communities organized under RCW 64.32 or WUCIOA, our opinion is that the restriction would need to be implemented pursuant to the regular procedures for amending the Declaration. Further, an Association must consider several potential risks and benefits before enacting such a restriction. We generally treat tobacco, marijuana, and vaping any substance the same way in adopting rules.

Association's Authority to Enact No-Smoking Rules

Neither federal nor state anti-discrimination laws prevent Associations from adopting no-smoking rules for all parts of the community, including individual residential Units. Smokers are not a protected category of persons, and smoking is not a protected right or activity under the federal Fair Housing Act¹ or Washington's Law Against Discrimination². Attempts by smokers to be considered disabled due to an addiction to nicotine have not been successful, so tobacco smokers do not receive protection or reasonable accommodation under federal³ or state⁴ disability statutes. Marijuana smokers also do not qualify for accommodation.⁵

There is a growing trend towards banning smoking when it forces others to experience second-hand smoke. Washington state law expressly prohibits smoking in most public places and work

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places. A “public place” is any enclosed area open to the public. This could include a community clubhouse or store if it is open to the public. A “workplace” is every enclosed area under the control of a public or private employer that employees frequent during the course of their regular duties. This could be lobbies, hallways, community rooms, etc. In addition, smoking is prohibited within 25 feet of all business entrances, exits, operable windows and air intake vents. Further illustrating this trend, localities in California have begun banning smoking, including vaping and cannabis use, inside of Units in multi-family buildings.⁶

Given the state of the law, there is nothing to limit an Association's authority, pursuant to its Governing Documents, to establish Rules and Regulations for common areas and limited common areas. Enacting a no-smoking rule that applies in such areas will likely require no more than a vote of the Board Members. Once the rule is enacted, the Board must give notice of the rule change to Owners before enforcement.

Washington courts have yet to determine whether an Association may prohibit smoking inside an Owner's Unit or home—an area that is not generally subject to the Board's authority. However, a Colorado court concluded that Condominium Associations have the authority to adopt an amendment to the Declaration prohibiting smoking within Units where a resident's smoking inside a Unit interferes with the neighbors' use and enjoyment of their own Units.⁷ Given the growing trend toward a smoke-free society, the ubiquitous understanding of the health risks related to secondhand smoke, and the fact that no laws expressly prohibit Associations from banning smoking in Units or homes, Washington courts are likely to apply this reasoning. This would probably be considered a “restriction on use” and require a Declaration amendment.

In light of the growing trend towards legalization of marijuana,⁸ Associations who adopt no-smoking rules should ensure that the language does not refer to “tobacco” specifically, but rather to both tobacco and marijuana smoke. With respect to medical marijuana

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specifically, it is unlikely that any Washington court would require an Association to make an accommodation to smoke marijuana on the premises.⁹ First, because marijuana is still illegal under federal law, the use of marijuana in any form would not be deemed "reasonable" under the FHA. Second, even if an Association were required to permit the use of medical marijuana in *some* form, it is unlikely the court would require an Association to permit *smoking* marijuana because the resident could use marijuana in other forms that were less offensive to other residents.¹⁰

Methods of Enacting a No-Smoking Rule

There are three ways to enact a no-smoking rule:

- 1) Amendment to Declaration/CC&Rs: This method is likely the most difficult and costly way to enact a smoking ban, but it will be given the most deference by courts and be relatively strong in the face of legal challenges.
- 2) Amendment to Bylaws: This is the wrong place for a use restriction, and no more enforceable than a rule.
- 3) Board rule or resolution: A new rule or resolution is the easiest way to implement a smoking ban but may only be effective for common areas and limited common areas and may not be enforceable to prevent smoking in individual Units or homes.

Risks and Benefits of a No-Smoking Rule

An Association that allows smoking might face a potential legal challenge from an individual with a serious health condition that is affected by exposure to secondhand smoke. The offended occupant might ask for relief by using one of the disability statutes. If the courts find that: 1) the requesting occupant is disabled; and 2) a smoking ban is a reasonable accommodation, the Association may be required to impose one.

A resident would be unlikely to succeed in a lawsuit against either the Association or smoking residents on common law nuisance grounds. Washington courts have rejected efforts by homeowners

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who pursue nuisance claims against neighbors smoking on their private residences.¹¹ However, a resident bothered by secondhand smoke might be able to pursue an action to enforce a nuisance clause contained in a Governing Document, prohibiting an Owner (or resident) from engaging in an activity that affects the use and enjoyment of another Owner's property.

A no-smoking rule could have several benefits to the Association:

- 1) Increased desirability and demand for the community;
- 2) Cost savings from not having to deal with cigarette related damage and cleaning;
- 3) Reduction of fire risks (and possible insurance discounts); and,
- 4) Avoidance of nuisance claims and reasonable accommodation requests.

¹ 42 U.S.C. 3601, *et seq.*

² RCW 49.60 (Discrimination — Human Rights Commission).

³ Americans With Disabilities Act of 1990 (ADA) (42 U.S.C. §12101, *et seq.*; 47 U.S.C. §225, *et seq.*)

⁴ Washington's Law Against Discrimination (RCW 49.60).

⁵ Because the ADA does not define ongoing use and addiction to illegal drugs as a "disability" and marijuana is still illegal under federal law, marijuana addiction is not a basis for protection under the ADA. 42 U.S.C. § 12114(a) (1994); 29 C.F.R. § 1630.3(a) (1999). *See, e.g., Shafer v. Preston Mem'l Hosp. Corp.*, 107 F.3d 274 (4th Cir. 1997) (current illegal drug user is not covered). And the Washington Supreme Court has held (in the context of employment) that, due to the federal prohibition of possession of marijuana, allowing medical marijuana use in violation of a stated drug (or smoking) policy would not be considered a reasonable accommodation of a disability. *See, Roe v. Teletech*, 171 Wn.2d 736 (2011) (The Court held that the Washington State Medical Use of Marijuana Act does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use).

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⁶ See, Kelly, Kevin. *Smoking Ban: Buildings in Redwood City with At Least 2 Housing Units Restricted*. Bay Area News Group. (October 4, 2017).

⁷ See, *Christiansen, et al., v. Heritage Hills #1 Condo. Ass'n (Colo. Dist. Ct. 2006)* (In this case, a condo association successfully defended its smoking ban against two residents that refused to smoke outdoors. The court acknowledged that smoking is not illegal but likened it to "excessively loud noise." The ban was upheld because it "was reasonably investigated, drafted and passed by three out of four owners after years of trying to address the problem by other means.")

⁸ 29 states have now legalized medical marijuana, and 8 of the 29 have legalized the use of marijuana for recreational purposes.
<http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>

⁹ The Washington Human Rights Commission has issued guidelines stating that "the use of medical marijuana is not a reasonable accommodation for a disability; this applies in the areas of employment, housing, and public accommodation." *Guide to Disability and Washington State Nondiscrimination Laws Washington Non-discrimination Laws and the Use of Medical Marijuana* at.
http://www.hum.wa.gov/media/dynamic/files/160_medical%20marijuana.pdf.

¹⁰ Massachusetts is the only state to permit a plaintiff to pursue a discrimination claim under state law for failure to accommodate the use of medical marijuana. However, in that case the defendant was: 1) an employer, and: 2) had fired the plaintiff for failing a drug test, not for smoking marijuana or being impaired at work. *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (2017).

¹¹ In *Boffoli v. Orton*, the Court of Appeals held that while a homeowner could pursue a claim for smoke generated by a business under a nuisance theory, it could not pursue a similar claim against an individual lawfully smoking cigarettes on private property. 155 Wash. App. 1031 (Wash. App. Div. 1 2010) (unpublished). The court noted that the statute prohibiting smoking within 25 feet of public places and places of employment, states that a private residence does not qualify as a "public place." *Id.* at 3. Accordingly, the court found that the statute did not provide a basis for the plaintiff to seek relief under a nuisance theory. *Id.*

10--What Are Limited Common Elements?

Under the New Act and Old Act, limited common elements or areas are defined as a subset of common elements or areas.¹ Specifically, limited common elements are the portion of common elements (owned by everyone) that are designated in the Declaration for use by fewer than all Units.² The Declaration may permit certain “limited common elements” to be treated as common elements or as part of the Unit.³

Common Elements Versus Limited Common Elements

Limited common elements are a subset of common elements. Limited common elements are allocated, in the Declaration or by statute.⁴ Limited common elements are parts of the common elements that serve only one or some Units. Except as provided by the Declaration, all chutes, flues, ducts, wires, conduits, bearing walls, bearing columns, and other fixtures serving only one Unit, and lying “partially within and partially outside the designated boundaries of a unit,” shall be limited common elements.⁵ (We don't know why “pipes” are not listed, but believe water and drain pipes are included in this list.) Portions of the building components serving a single Unit are designated as limited common elements allocated solely to the Unit they serve, while portions of the building components serving two or more Units or “any portion of the common elements” are designated as common elements.

All shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures that are designed to “serve a single unit” but are not located within the boundaries of the Unit shall be limited common elements allocated exclusively to the Unit they serve.⁶ Because limited common elements are a subset of common elements, a Declaration stating that windows and doors are common elements does not conflict with the statutes. If a Declaration is otherwise

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silent about windows and doors, they are limited common elements assigned to the Unit they serve.

With some exceptions, the Declaration is required to specify the limited common elements and the Units to which all limited common elements are allocated.⁷ An Association is permitted to modify its existing definition of "limited common elements" only to the extent that every Owner giving up a limited common element, or being assigned a limited common element, agrees.

The Old Act does not specify that any building components are limited common elements. "Common areas and facilities" are defined to include "all other parts of the property necessary or convenient to its existence, maintenance and safety or normally in common use."⁸ Under the Old Act, everything outside the Unit boundary is a common element, and each Declaration may specify some common elements to be limited common elements.

Limited Common Elements: Spaces or Things?

"Limited common elements" can be spaces or things. Parking spots are an example of "spaces" that are frequently defined as "limited common elements" in an Association's Governing Documents.⁹ Parking spaces are essentially blocks of air surrounded by common elements and lines drawn on pavement. In most cases, the boundary of the limited common element is the surface of the pavement, and not the pavement itself.¹⁰

Similarly, unless your Declaration says otherwise, limited common element balconies and patios are spaces surrounded by common element building components. Most Declarations don't specify the boundaries of limited common elements. In that case, we will most often apply the boundary of a Unit. Thus, the boundary of a limited common element balcony is usually the interior of the unfinished surfaces around it. The structure of a balcony, and its handrail, are not a part of the limited common element space.

Windows and doors are examples of things (building components) that can be "limited common elements." Unless the Declaration

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specifically provides otherwise, the building components (wires, conduits, windows, etc.) are part of the limited common elements.¹¹

The Declaration could provide more things be allocated as limited common elements. Handrails serving decks, and even deck coatings and deck structures could be specifically allocated in the Declaration as limited common elements.

Assessments for the Repair, Maintenance, and Replacement of Limited Common Elements

The exclusive right to use a limited common element is not the same as an obligation to pay for maintenance and repair of the limited common element. The Declaration may impose assessments for limited common areas against individual Owners.¹² However, these assessments must be expressly authorized by the Declaration. In most Declarations, repair costs for limited common elements are a common expense for the Association, because repair costs are not specifically assigned.¹³

Some Declarations may require the Owners of assigned Units to pay for expenses incurred to repair, maintain, or replace limited common elements. Because limited common elements are a subset of common elements, Declarations may impose on individual Unit Owners assessments for expenses related to the upkeep of limited common elements.¹⁴ Declarations may also require all expenses incurred to repair, maintain, or replace limited common elements to be assessed as expenses that only benefit some Owners. The assessments must be imposed in accordance with the terms specified in the Association's Declaration. The Board may have the authority to undertake repairs to and replacement of limited common elements, then bill Owners for the costs, but only if this is specified in the Declaration.

Associations may not normally undertake repairs, maintenance, or replacement of building components located within the Unit boundaries since these are not "common elements" or "limited common elements." Expenses related to the upkeep of these items are the sole responsibility of the individual Unit Owner.

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Building components that are outside the Unit boundary, and not defined as limited common elements, will be assessed as a common expense. No Washington court has addressed this specific question, but case law from other states provides some insight into the reasoning that may be applied. In Cedar Cove Efficiency, the court held that an Association was “obligated to provide repair and maintenance [to doors and balconies] as the board may deem appropriate” when the Declaration was inconsistent with respect to whether doors and balconies were “limited common elements” or fixtures within the vertical boundaries of a Unit.¹⁵ Since the Governing Documents did not specify how expenses for limited common elements would be assessed and limited common elements constituted a subset of common elements, the court held that the Association had the authority to assess all Owners for the costs of repairs to balconies that it deemed necessary to the structural integrity of the building.¹⁶

¹ The HOA Act does not define “limited common elements” and the term has no real application outside of condos.

² The New Act default definition of unit boundaries is as follows:

“The walls, floors, or ceilings...and all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof...and all other portions of the walls, floors, or ceilings are part of the common elements.” RCW 64.34.204(1)

The Old Act definition of unit boundaries is contained within the definition of “apartment” in RCW 64.32.010(1). In relevant part:

“The boundaries of an apartment located in a building are the interior surfaces of the perimeter walls, floors, ceilings, windows and doors thereof, and the apartment includes both portions of the building so described and the air space so encompassed.”

³ RCW 64.34.204 provides:

Except as provided by the Declaration:

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- (1) The walls, floors, or ceilings are the boundaries of a unit,...
- (2) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element allocated solely to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.
- (3) Subject to the provisions of subsection (2) of this section, all spaces, interior partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit.
- (4) Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but which are located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

⁴ RCW 64.34.020(27). ("Limited common element' means a portion of the common elements allocated by the declaration or by operation of RCW 64.34.204 (2) or (4) for the exclusive use of one or more but fewer than all of the units.")

RCW 64.90.010(30). ("Limited common element' means a portion of the common elements allocated by the declaration or by operation of RCW 64.90.210 (1)(b) or (2) for the exclusive use of one or more, but fewer than all, of the unit owners.")

⁵ RCW 64.34.204(2). ("If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element allocated solely to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.")

RCW 64.90.210(1)(b). ("If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element allocated solely to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.")

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⁶ RCW 64.34.204(4). ("Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but which are located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.")

RCW 64.90.210(3) ("Any fireplaces, shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, decks, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit's boundaries, are limited common elements allocated exclusively to that unit")

⁷ RCW 64.34.228

- (1) Except for the limited common elements described in RCW 64.34.204 (2) and (4), the declaration shall specify to which unit or units each limited common element is allocated.
- (2) Except in the case of a reallocation being made by a declarant pursuant to a development right reserved in the declaration, a limited common element may only be reallocated between units with the approval of the board of directors and
- (3) Unless otherwise provided in the declaration, the owners of units to which at least sixty-seven percent of the votes are allocated, including the owner of the unit to which the limited common element will be assigned or incorporated, must agree to reallocate a common element as a limited common element or to incorporate a common element or a limited common element into an existing unit. Such reallocation or incorporation shall be reflected in an amendment to the declaration, survey map, or plans.

RCW 64.90.240

- (1)(a) Except for the limited common elements described in RCW 64.90.210 (1)(b) and (3), the declaration must specify to which unit or units each limited common element is allocated.

(b) An allocation of a limited common element may not be altered without the consent of the owners of the units from which and to which the limited common element is allocated.
- (2)(a) Except in the case of a reallocation being made by a declarant pursuant to a development right reserved in the declaration, a limited common element may be reallocated between units only with the approval of the board and by an amendment to the declaration executed by the unit owners between or among whose units the reallocation is made.

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(b) The board must approve the request of the unit owner or owners under this subsection (2) within thirty days, or within such other period provided by the declaration, unless the proposed reallocation does not comply with this chapter or the declaration. The failure of the board to act upon a request within such period is deemed an approval of the request.

(c) The amendment must be executed and recorded by the association and be recorded in the name of the common interest community.

(3) Unless provided otherwise in the declaration, the unit owners of units to which at least sixty-seven percent of the votes are allocated, including the unit owner of the unit to which the common element or limited common element will be assigned or incorporated, must agree to reallocate a common element as a limited common element or to incorporate a common element or a limited common element into an existing unit. Such reallocation or incorporation must be reflected in an amendment to the declaration and the map.

⁸ RCW 64.32.010(h).

⁹ See, e.g., *Bellevue Pacific Center Ltd. Partnership v. Bellevue Pacific Tower Condominium Owners Ass'n.*, 171 Wn. App. 499, 517 (2012) (Declaration defined nine parking spaces as "limited common elements").

¹⁰ *Id.* The Declaration in *Bellevue Pacific* did not designate the specific owners to which each of the individual nine spaces was to be allotted, but the nine spaces were collectively defined as "limited common elements" because they could be assigned later.

¹¹ *Lisali Revocable Trust v. Tiara de Lago Homeowners' Ass'n.*, 155 Wn. App. 1043 (2010) is an example of how RCW 64.34.204(4) will operate when the Declaration is silent with respect to how fixtures are defined. *Lisali* involved a dispute over the costs to repair patio doors and windows. The court held that the sliding glass doors were "limited common elements" under the New Act (and thus that the owner was responsible for all costs associated with repairing them under the Declaration).

¹² RCW 64.34.360(3)(a) ("To the extent required by the declaration: Any common expense associated with the operation, maintenance, repair, or replacement of a limited common element shall be paid by the owner of or assessed against the units to which that limited common element is

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assigned, equally, or in any other proportion that the declaration provides..."

RCW 64.90.440(1). ("Except to the extent provided by the declaration, subsections (2) and (4) of this section, or RCW 64.90.470(8), the association must maintain, repair, and replace the common elements, including limited common elements, and each unit owner must maintain, repair, and replace that owner's unit.")

¹³ *Leo v. Diana Court Owners Association*, 1 Wash.App.2d 1002 at *5 (Wash. App. Ct. 2017). ("The Declaration does not provide for assessments for limited common areas. Because the Declaration does not so provide, RCW 64.34.360(3) does not authorize the imposition of assessments for limited common areas.")

¹⁴ In *Cedar Cove Efficiency Condominium Ass'n., Inc. v. Cedar Cove Properties, Inc.*, 558 So. 2d 475 (Fla. Dist. Ct. App. 1990), the court, construing a statute similar to Washington's Condo Acts, held that "[t]he Act's definition of 'limited common elements' implies they are a subset of 'common elements' and therefore a 'common expense' properly within the scope of the association's authority. Washington's Condo Acts, like the Florida Condo Act, similarly define "limited common elements" as a subset of the common elements.

¹⁵ 558 So. 2d at 479.

¹⁶ *Id.* at 480.

11--Restrictions on Use: What Percentage of Owners Must Approve a Rental Restriction in a Community?

Short Answer

For New Act Condo Associations, state law requires that 90% of Owners (and every affected Owner) vote for a restriction on use.¹ We believe a rental cap is a restriction on use.

For Old Act Condo Associations, state law only requires that 60% of Owners' consent to any change in restrictions on use, including rental restrictions (though individual Declarations may require a greater percentage).²

For HOA Act Communities, the answer will depend on how a court interprets the Governing Documents of the community. A court may require unanimous approval of a new restriction regardless of the amendment procedures outlined by the documents.³

For communities governed by the Washington Uniform Common Interest Ownership Act (WUCIOA) the minimum consent required is 67%, the Declaration is permitted to set the percentage between 67% and 90%.⁴ In establishing new restrictions, the Association must protect uses permitted prior to the amendment.⁵ The Board, on its own, can adopt rental restrictions to conform to the leasing requirements of secondary mortgage markets like Fannie Mae, and Freddie Mac.⁶

New Act Condos

The Washington State Supreme Court, in *Filmore LLLP v. Unit Owners Ass'n of Centre Pointe Condo*, classified a rental restriction as a restriction on use.⁷ Failure to get the required vote makes the restriction invalid and unenforceable. The Washington Supreme Court's ruling in *Filmore* was very narrow. The Court specifically stated that its decision did not address the

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interpretation of "restrictions on use" from the statute and based its decision only on the interpretation of Centre Pointe's Declaration.

The *Filmore* decision left several unanswered questions. The court did not address the language requiring approval of "each unit particularly affected," which could, in effect, require approval of 100% of an Association's Unit Owners. The court also failed to address whether leasing-related requirements other than pure rental caps constitute use restrictions, and whether rental restrictions adopted more than one year earlier, would be void.⁸

The court has since determined that Owners only have a one-year period to challenge an amendment of the Declaration. In *Bilanko v. Barclay Court Owners Ass'n*, 185 Wash.2d 443 (2016), the plaintiff contested a similar leasing restriction as invalid because the Association failed to obtain a 90 percent vote. The court upheld dismissal of the plaintiff's claim as time-barred and thus did not reach the question of validity of the amendment. The court determined that, absent fraud or a similar act which voided the amendment, Owners only had one year from the recording of the amendment to bring their challenge.

We continue to advise that New Act condos must obtain approval from 90% of the Owners to adopt a valid rental cap.

Old Act Condos

Under RCW 64.32, restrictions on use must be documented in the Declaration.⁹ An amendment to add a restriction must be approved by at least 60% of the Owners.¹⁰ Before the restriction is effective, it must be recorded.¹¹ The Supreme Court ruled in *Shorewood West Condominium Ass'n v. Sadri*,¹² that a rental restriction must be implemented pursuant to these procedures.

In *Sadri*, the court examined the issue of rental restrictions in condominiums governed by RCW 64.32. In that case, the Association adopted the rental restrictions in the Bylaws rather

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than the Declaration. The court ruled that a rental restriction must be placed in the recorded Declaration. Since the community failed to do so, the restriction could not be enforced. While not directly reaching the issue, the court's opinion supports rental restrictions recorded in the Declaration so long as they were added through procedures consistent with the statute.

HOA Communities

The Supreme Court has determined that the Governing Documents control and the court will look to enforce the procedures outlined in those documents so long as the restrictions are reasonable and consistent with the plan of development.¹³ Therefore, the Governing Documents may provide for the creation of new restrictions after the approval of a simple majority of the Owners. However, things become more complicated if the covenants are silent about the creation of new restrictive covenants.

In *Wilkinson v. Chiwawa Communities Association*, the Supreme Court determined that a rental restriction was not covered by the restriction on commercial use under the terms of the community's Declaration. Further, it held that the Governing Documents did not provide for the means of establishing new restrictions but only permitted for the modification of the covenants already in existence.¹⁴ In this situation, the court prioritized protecting the Owners' expectations under the Declaration.¹⁵ The court worried that, at the time the Owners purchased the property, they would not have expected that a simple majority could impose new restrictions on their use of the property.¹⁶ Therefore, under the *Chiwawa* Declaration a majority of Owners could not add new covenants which had no relation to an already existing covenant.¹⁷ Because the *Chiwawa* Declaration did not provide for a means of creating a new covenant, the Association could not adopt a new restriction without the unanimous consent of the Owners.¹⁸

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WUCIOA

Consistent with the material already presented, it seems likely that, under WUCIOA, the court will treat new rental restrictions as a restriction of use. WUCIOA permits the Declaration to establish the threshold for approving new restrictions. However, it outlines some limits to the Association's discretion. First, no new restriction can be created without at least 67% of the Owners' votes approving of the restriction.¹⁹ Second, WUCIOA provides that the Declaration may require up to 90% of the votes to approve a new restriction.²⁰ Finally, the statute requires that property rights existing before the amendment must be protected.²¹

Outside of the normal process for implementing restrictions, the statute explicitly provides that the Board may adopt rules restricting the leasing of residential Units as needed to meet the underwriting requirements of the secondary mortgage markets.²² Rental caps which are more restrictive than what is required by institutional lenders may not be enforceable. Currently the secondary mortgage markets will allow 50% of the Units to be rentals

¹ RCW 64.34.264(4) (Amendment of Declaration) (“[N]o amendment may . . . change . . . the uses to which any unit is restricted, in the absence of the vote or agreement of the owner of each unit particularly affected and the owners of units to which at least ninety percent of the votes in the Association are allocated other than the declarant or such larger percentage as the Declaration provides.”).

² Washington courts have not considered this issue for Old Act condo associations. See RCW 64.32.090(13) (Contents of Declaration) (“[N]ot less than sixty percent of the apartment owners shall consent to any amendment . . .”). However, as the court noted in *Filmore, supra* n.2, it interpreted the term “use” under the Old Act the same way in *Shorewood West Condominium Ass’n v. Sadri*, 140 Wash.2d 47 (2000). *Filmore* at 349. Although the issue presented in that case did not have to do with the percentage of the vote required to impose a rental cap, the court concluded that “one should read ‘use’ in RCW 64.32.090(7) to mean all uses and not just general categories of use such as residential use or commercial use.” *Id.* at 56.

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³ See, *Wilkinson v. Chiwawa Communities Association*.

⁴ RCW 64.90.285(1) and (6) (“the declaration may be amended only by vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated, unless the declaration specifies a different percentage not to exceed ninety percent for all amendments or for specific subjects of amendment... The declaration may require a higher percentage of unit owner approval for an amendment that is intended to prohibit or materially restrict the uses of units permitted under the applicable zoning ... a declaration may not require, as a condition for amendment, approval by more than ninety percent of the votes in the association or by all but one unit owner...”)

⁵ *Id.*

⁶ RCW 64.90.510(9)(c). (“An association may adopt rules that affect the use or occupancy of or behavior in units that may be used for residential purposes, only to... restrict the leasing of residential units to the extent those rules are reasonably designed to meet underwriting requirements of institutional lenders that regularly make loans secured by first mortgages on units in comparable common interest communities or that regularly purchase those mortgages.”)

⁷ See, *Filmore LLLP v. Unit Owners Ass'n of Centre Pointe Condo.*, 183 Wash.App. 328 (2014) (court affirmed the appellate court's ruling that a lease restriction via Declaration amendment for the Centre Pointe community requires a 90 percent vote because RCW 64.34.264(4) requires a 90% vote for restrictions on use), and this Declaration defined “use” to include rental restrictions.

⁸ Subsequent case law seems to indicate that RCW 64.34.264(2), the one-year statute of limitations, would save these amendments.

⁹ RCW 64.32.090(7) “(The declaration shall contain... [a] statement of the purposes for which the building and each of the apartments are intended and restricted as to use...”)

¹⁰ RCW 64.32.090(13) “(The declaration shall contain...[t]he method by which the declaration may be amended, consistent with this chapter: PROVIDED, That not less than sixty percent of the apartment owners shall consent to any amendment except that any amendment altering the value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities shall require the unanimous consent of the apartment owners”)

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¹¹ RCW 64.32.140 (“The declaration, any amendment thereto, any instrument by which the property may be removed from this chapter and every instrument affecting the property or any apartment shall be entitled to be recorded in the office of the auditor of the county in which the property is located. Neither the declaration nor any amendment thereof shall be valid unless duly recorded.”)

¹² 140 Wash.2d 47 (2000).

¹³ *Wilkinson*, 180 Wash.2d at 256

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* At 258

¹⁹ WUCIOA, 64.90.285(1)(a). (“...the declaration may be amended only by vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated, unless the declaration specifies a different percentage not to exceed ninety percent for all amendments or for specific subjects of amendment...”)

²⁰ WUCIOA, 64.90.285(6). (“The declaration may require a higher percentage of unit owner approval for an amendment that is intended to prohibit or materially restrict the uses of units permitted under the applicable zoning ordinances, or to protect the interests of members of a defined class of owners, or to protect other legitimate interests of the association or its members. Subject to subsection (13) of this section, a declaration may not require, as a condition for amendment, approval by more than ninety percent of the votes in the association or by all but one unit owner, whichever is less.”)

²¹ *Id.*

²² SSB 6175 § 323(9)(c).

12--Can Property Owners Be Bound by Unrecorded Restrictions, Rights, and Obligations?

A property may be restricted by unrecorded equitable servitudes. An equitable servitude is an enforceable restriction on the property that is not properly recorded. They arise when a property developer with authority to burden a property makes representations about a property within a development to help sell other homes. Washington courts clearly recognize that the court may enforce these promises against subsequent purchasers who have knowledge of the restrictions.¹

In many cases, a developer may intend that certain Lots in a subdivision be limited to a specific use, whether to increase property values, attract prospective buyers, or for some other purpose. For example, a developer may market a community as a golf course community, with a promise that some property within the subdivision will be maintained as a golf course. Or the developer may attract buyers with a promise that the subdivision will be comprised strictly of single-family residences.

Under Washington law, there are two mechanisms for limiting the use of property:

Real Covenants

A real covenant is created when a limitation on property use is written into individual deeds or restrictive covenants, signed by the parties to be bound, and recorded.² A valid real covenant is a contract for an encumbrance on the property. As with other valid contracts, a real covenant may be enforced by the parties on its terms. And, if a real covenant limiting the use of property “runs with the land,”³ it will bind subsequent Owners even if they were not party to the original contract. Real covenants running with the

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land are generally found in deeds, condo Declarations, CC&Rs and other documents recorded with the county.

Equitable Servitudes

Even where a deed does not contain a properly recorded covenant, courts may find that an *unrecorded* covenant is enforceable as an equitable servitude, and thus that the property Owner is still bound by the restrictions.⁴ Courts may find an implied equitable servitude based on a seller's representations about the property.⁵ Unlike a covenant, an equitable servitude is not a recorded contract for an encumbrance on property. Rather, it is a basis for a remedy derived from Washington courts' power to do what is just and fair under the circumstances. In the interests of justice and fair play, courts may use their discretion to enforce an Owner's promise to limit the use of its property or fashion another appropriate remedy.⁶

The recognition of equitable servitudes is very fact specific. Factors a court might consider in determining whether to impose an equitable servitude include: acquiescence by property Owners, time, the relative visibility of the intended restriction, and the extent of the burden being created.⁷ Additionally, a court may impose a limited equitable servitude when an Owner makes use of a benefit such as a shared road.⁸ Washington courts have made clear that equitable servitudes are likely to be implied and enforced when an Owner makes representations about a property's restricted use in order to facilitate the sale of a property.⁹ Moreover, equitable servitudes are binding on subsequent Owners who take the property with notice of the intended restriction.¹⁰

Enforcement of Other Promises by Property Owners in the Interests of Justice and Fair Play

Equitable servitudes, in a nutshell, create an enforceable interest in the property of another party based on that party's promises related to the use of the property. A party's representations about related considerations, such as the scope of an Association's

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powers or Owners' liability for assessments, can also create an enforceable obligation.

If a homeowner acquiesces to an Association's authority over a period of years, the Owner is unlikely to prevail if the Owner later asserts that the Association lacked authority.¹¹

And, if a homeowner accepts the benefits of Association membership, such as access to amenities and the resulting increase in property value, the Owner is unlikely to prevail if the Owner attempts to skirt the responsibilities of membership, including payment of assessments.¹²

Conclusion

In the interests of justice and fairness, courts have authority to enforce a seller's promises related to the property and to recognize the powers of an HOA. Property Owners should be aware of such non-contractual rights and obligations when buying and selling property and when enforcing their property rights as against other Owners.

¹ *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888 (2014) (Supporting the equitable right to enjoin the removal of a golf course, the court determined "...that an equitable servitude may be implied..." because some owners may have been induced to purchase their property on the promise of living in a golf course community.); *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 466 (1920). (A property owner sued to prevent a church from being built on a neighboring property. The neighboring property was not subject to a restrictive covenant but much of the rest of the neighborhood was restricted to residential purposes. Court determined that the church knew of the general nature of the community and the existence of the restrictive covenants, that the church would disrupt the residential plan for the neighborhood, and equity barred the use of the property for a church.)

² The Statute of Frauds (RCW 64.04.010 and .020) governs conveyances and encumbrances of real estate, including covenants. RCW 64.04.010 provides that such conveyances and encumbrances must be by deed. Under RCW 64.04.020, the deed must be "in writing, signed by the party bound thereby, and acknowledged by the party

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before some person authorized...to take acknowledgments of deeds” (notarized).

³ A covenant “runs with the land” and binds subsequent owners if it is: (1) a promise, in writing, which is enforceable between the original parties; (2) which touches and concerns the land or which the parties intend to bind successors; and (3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession; (4) who has notice of the covenant. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 691 (1999). A covenant “touches and concerns the land if it is connected with the use and enjoyment of the land.” *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 258 (2009). Additionally, the covenant must “touch and concern both the land to be benefitted and the land to be burdened.” *Dean v. Miller*, 34501-7-III, 2017 WL 2484027, at *3 (Wash. Ct. App. June 8, 2017) (citing *Lake Arrowhead Cmty. Club, Inc. v. Looney*, 112 Wn.2d 288, 295 (1989)). In other words, a covenant that only benefits or burdens a specific owner but not the land itself would fail to satisfy the requirement.

⁴ Under Washington law, an equitable servitude will be found when there is: (1) a promise, in writing, which is enforceable between the original parties; (2) which touches and concerns the land or which the parties intend to bind successors; and (3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession; (4) who has notice of the covenant. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 691 (1999) (citing *Stoebuck*, 52 Wash. L. Rev. at 909–10)).

⁵ A seller’s representations may enable a party to obtain relief in the absence of a written covenant. However, if the original parties to the covenant put the restrictions or requirements in writing, a court will find that an equitable servitude exists regardless of the seller’s representations. See, e.g., *Dean v. Miller* (rejecting appellants’ argument that an equitable servitude may be implied only if the buyer relied on the covenants sought to be enforced). In short, the seller’s representations may be useful to a party who could not otherwise obtain relief due the lack of a written document providing evidence of the covenant.

⁶ Although a court finding an implied equitable servitude would most likely enforce the restriction intended by the parties by way of an injunction, the court is not limited to this remedy. And in some cases, injunction might, in itself, produce an inequity. This was the case in *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888 (2014), where the homeowners presented evidence of an implied equitable servitude restricting the development of a golf course marketed as a

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community fixture, but the developers presented evidence that the golf course was unprofitable. Acknowledging that forcing the developers to operate an unprofitable golf course may be inequitable, the Washington Supreme Court noted that, once an equitable servitude was definitively established, the “parties [would] be free to present evidence and argument as to the nature and scope of any appropriate equitable and injunctive relief.” *Riverview Cmty.*, 181 Wn.2d at 899.

⁷ A court may find an equitable servitude exists absent any of these factors when the covenant appears in a written document signed by the two parties. See *Dean v. Miller*, *supra* n.5. Many courts will discuss these factors even when the covenant is expressed in writing; however, they are not necessary to establish the existence of an equitable servitude. In effect, they are a substitute for a written covenant that courts will rely on when doing so is the only method of providing a party with equitable relief.

⁸ In *Bowers v. Dunn*, 198 Wn. App. 1034 (2017), the court upheld an order requiring joint users of a road to equally share the costs of maintaining a road, finding that “the joint use of an easement gives rise to an obligation to contribute jointly to repair and maintenance costs.” (citing Restatement (Third) of Property: Servitudes § 4.13(3) (2000)). See also *Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wn. App. 702 (2013) (affirming order requiring owner near housing development who used adjoining roadways to pay ongoing maintenance costs to HOA).

⁹ In *Riverview Cmty.*, when a community group representing several homeowners in a subdivision sued the developers to prevent them from building apartment houses on the community golf course, the Supreme Court explained that an equitable servitude could be implied from the words “golf course” on one of three recorded plats for the subdivision, as well as several homeowners’ sworn testimony that the developers had promised the golf course complex would remain a permanent fixture of the community.

The Washington Supreme Court has also acknowledged this trend in other states. For example, in Oregon, an appellate court found an implied equitable servitude where “prospective buyers who asked for assurances that the golf course would remain in place were told that the golf course would continue to be there and that there was no need to worry about it.” *Mountain High Homeowners Ass'n v. J.L. Ward Co.*, 228 Or. App. 424, 427, 209 P.3d 347 (2009).

¹⁰ Thus, in *Johnson*, when a subdivision was marketed as “residences only” and buyers paid a fifteen to twenty percent premium as a result of

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the restriction, a lot owner who repeatedly acknowledged the limited use prior to purchasing the property was prohibited from building a church on the lot, even though the owner's deed did not expressly state the restriction.

¹¹ *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787 (2007) (Homeowners disagreed with the association's assessment of fees for association activities. They challenged the association's authority to make the assessments, arguing that the Bylaw amendment that created the association was invalid. The court held that the homeowners' acquiescence to the association's authority for over three years, which included attendance and voting at meetings as well as payment of assessments, constituted a ratification of the amendment. Accordingly, the homeowners were estopped from challenging the amendment or the association's authority thereunder.)

¹² In *Lake Limerick v. Hunt Mfd. Homes*, 120 Wn. App. 246 (2004), the court ruled against a homeowner claiming that he was not obligated to pay association assessments because he had not personally contracted to do so and the covenant to do so did not "run with the land." The court noted that the homeowner had accepted the benefits of association membership, including access to a golf course and the related increase in value to his property, and that allowing the homeowner to keep these benefits without fulfilling the correlated promise to pay assessments would result in unjust enrichment. The court held that, under these circumstances, an "implied in law" contract could arise, by which the homeowner had both the right to enjoy certain common facilities and the obligation to pay for it.

13--Does a Person Need to Be an Owner to Serve on the Board?

Washington law allows non-Owners to serve on an Association's Board. However, an Association is free to prevent non-Owners from serving on the Board by including qualifications in its Governing Documents that Board Members must be Owners.¹

Similarly, Washington law does not prohibit more than one Owner per Unit or Lot from serving on an Association's Board, so in theory a Board could include two members from the same Unit or Lot. However, this may be undesirable since it would give members with identical interests in the Association a disproportionate amount of control over the community. Due to this concern, an Association could draft its Governing Documents to limit one person per Unit or Lot to serving on the Board.

Most Associations in Washington are incorporated under the Nonprofit Corporation Acts.² Under those laws, Associations may restrict Board membership to Owners in the Declaration or Bylaws.

For Condo Associations, any person who is a partner, director, or officer in an entity that owns a Unit is considered an Owner of the Unit (unless the Condo Association's Declaration or Bylaws provide otherwise) for purposes of determining a person's qualifications for serving on the Board.³

The HOA Act is silent on whether partners, directors, or officers in entities that own a home are considered homeowners for purposes of determining qualifications for an Association's Board.⁴ It would be best for the Bylaws to state if these people qualify to serve on the Board. However, if the Bylaws are also silent on the matter, Washington courts would likely conclude that, like condos,

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any person who is a partner, director, or officer in an entity that owns a home is able to serve on the Board.

WUCIOA adopts the same language as found in the New Act at RCW 64.34.324(3).⁵ Therefore, under WUCIOA a “unit owner” may include partners, directors or officers of an entity that owns a Unit. However, the community may modify the definition of “unit owner” in their Declaration.

¹ RCW 64.34.324(1) (Bylaws) provides:

Unless provided for in the Declaration, the Bylaws of the Association shall provide for:

(a) The number, qualifications, powers and duties, terms of office, and manner of electing and removing the Board of directors and officers and filling vacancies;

RCW 64.38.030 (Association Bylaws) provides:

Unless provided for in the Governing Documents, the Bylaws of the Association shall provide for:

(1) The number, qualifications, powers and duties, terms of office, and manner of electing and removing the Board of directors and officers and filling vacancies;

The Old Act is silent on qualifications for Board members.

² 24.03.095 (Board of directors) provides:

Directors need not be . . . members of the corporation unless the articles of incorporation or the Bylaws so require. The articles of incorporation or the Bylaws may prescribe other qualifications for directors.

24.06.125 (Board of directors) provides:

Directors need not be . . . shareholders of the corporation unless the articles of incorporation or the Bylaws so require. The articles of incorporation or the Bylaws may prescribe other qualifications for directors.

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³ RCW 64.34.324(3) (Bylaws) provides:

In determining the qualifications of any officer or director of the Association, the term "unit owner" . . . shall, unless the Declaration or Bylaws otherwise provide, be deemed to include any director, officer, partner in, or trustee of any person, who is, either alone or in conjunction with another person or persons, a unit owner. Any officer or director of the Association who would not be eligible to serve as such if he or she were not a director, officer, partner in, or trustee of such a person shall be disqualified from continuing in office if he or she ceases to have any such affiliation with that person, or if that person would have been disqualified from continuing in such office as a natural person.

⁴ See RCW 64.38.030.

⁵ RCW 64.90.410(2)

...the board must be comprised of at least three members, at least a majority of whom must be unit owners. However, the number of board members need not exceed the number of units then in the common interest community...

(d) In determining the qualifications of any officer or board member of the association, "unit owner" includes, unless the declaration or organizational documents provide otherwise, any board member, officer, member, partner, or trustee of any person, who is, either alone or in conjunction with another person or persons, a unit owner.

(e) Any officer or board member of the association who would not be eligible to serve as such if he or she were not a board member, officer, partner in, or trustee of such a person is disqualified from continuing in office if he or she ceases to have any such affiliation with that person or that person would have been disqualified from continuing in such office as a natural person.

14--Can Board Members Be Elected Without a Quorum?

A Quorum is required for an election of Board Members (or any other action) at an Association's meeting to have effect. Each Association's Governing Documents should specify the procedures for electing Board Members, including the number of votes constituting a Quorum.¹

If a Quorum is not met, an Association has two options for filling vacant Board Member positions:

- 1) The Association may set another meeting for a later date to elect the Board.² If there are incumbents on the Board, those directors will continue holding office until an election with a proper Quorum is held;³ or
- 2) The existing Board Members may appoint new members to fill Board vacancies for the duration of their unexpired terms, provided that the Governing Documents do not limit their authority to do so.⁴ For all Associations, the Board has the power to fill vacancies unless the Bylaws or Articles provide a different method.

Board Members remain in office until their terms have expired, and continue in office after that until a new director is either "elected" or appointed.⁵ It is not uncommon for an Association's Board to be comprised of directors appointed by other directors and to have no "elected" Board Members because a community cannot get a Quorum of Association members over a period of many years. Washington courts are unlikely to invalidate actions taken by an unelected Board, provided that the members have attempted to obtain a Quorum to hold annual elections pursuant to

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their Bylaws and have acted consistent with relevant statutory requirements.

In December of 2016, a Washington appellate court looked at the issue of a Board comprised only of appointed members. It held that even though the Association failed to reach a Quorum for at least seven years, while the Board Members' terms were for one year, the appointed Board Members had full legal authority to act for the Association and impose assessments.⁶ The court noted that the Association had attempted, every year, to reach a Quorum and elect new Board Members. In the absence of a Quorum necessary to hold new elections, the court found that the Board Members were entitled to—and indeed had no other choice—but to continue holding their respective positions or appoint new members when someone resigned.

If an Association has difficulty achieving a Quorum to elect a Board, its members may amend the Governing Documents to lower the Quorum requirement. The Association may also use Proxies or directed Proxies to effectively allow for voting without attending the meeting.⁷ Those Proxies or directed Proxies may be returned by mail, email, fax, etc. WUCIOA also authorizes voting through absentee ballots and some Governing Documents set out a process for nominating and electing Board Members by mail.⁸ More members may submit votes if they do not have to appear in person.

¹ The Old Act is silent on the manner of electing Board members. RCW 64.32.250(2) (Application of chapter, Declaration and Bylaws) provides:

All agreements, decisions and determinations made by the association of [unit] owners under the provisions of this chapter, the Declaration, or the Bylaws and in accordance with the voting percentages established in this chapter, the Declaration, or the Bylaws, shall be deemed to be binding on all [unit] owners.

The New Act, at RCW 64.34.324 (Bylaws), requires that:

(1) Unless provided for in the Declaration, the Bylaws of the association shall provide for:

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- (a) The number, qualifications, powers and duties, terms of office, and manner of electing and removing the board of directors and officers and filling vacancies...

The HOA Act, at RCW 64.38.030 (Association Bylaws), similarly requires that:

Unless provided for in the Governing Documents, the Bylaws of the association shall provide for:

- (1) The number, qualifications, powers and duties, terms of office, and manner of electing and removing the board of directors and officers and filling vacancies;

WUCIOA, RCW 64.90.435 mimics these provisions, stating:

(1) Unless provided for in the declaration, the organizational documents of the association must:

- (c) Specify the qualifications, powers and duties, terms of office, and manner of electing and removing board members and officers and filling vacancies in accordance with RCW 64.90.410 of this act...

² Each community's Governing Documents must be examined to determine the rules specific to that community.

³ *Parker Estates Homeowners Ass'n v. Pattison*, 198 Wn.2d 16, 28-29 (2016) ("Thus, when no board member is elected, as occurs when no quorum can be garnered, directors can continue to serve until an election occurs.")

⁴ The New Act, at RCW 64.34.308(2) (Board of directors and officers), provides, in relevant part, that "the Board of directors may fill vacancies in its membership of the unexpired portion of any term."

The HOA Act, at RCW 64.38.025(2), provides, in relevant part, that "the board of directors may fill vacancies in its membership of the unexpired portion of any term."

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RCW 24.06.135 (Vacancies) provides:

Any vacancy occurring in the board of directors and any directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors unless the articles of incorporation or the Bylaws provide that a vacancy or directorship so created shall be filled in some other manner. A director elected or appointed, as the case may be, to fill a vacancy, shall be elected or appointed for the unexpired term of his or her predecessor in office.

RCW 24.03.105 (Vacancies) provides:

Any vacancy occurring in the board of directors and any directorship to be filled by reason of an increase in the number of directors may be filled by the affirmative vote of a majority of the remaining board of directors even though less than a quorum is present unless the articles of incorporation or the Bylaws provide that a vacancy or directorship so created shall be filled in some other manner, in which case such provision shall control. A director elected or appointed, as the case may be, to fill a vacancy shall be elected or appointed for the unexpired term of his or her predecessor in office.

"Stated simply, until a valid election for a director position, the term of the director does not expire, so the board can continue to appoint willing individuals to fill vacancies in such positions." *Parker Estates* at 29.

WUCIOA, RCW 64.90.310 continues this practice:

- (4) The board may not, without vote or agreement of the unit owners:
 - (d) Elect members of the board, but may fill vacancies in its membership not resulting from removal for the unexpired portion of any term or, if earlier, until the next regularly scheduled election of board members...

⁵ For associations incorporated under the Nonprofit Corp. Act, RCW 24.03.100 (Number and election or appointment of directors) provides, in pertinent part, that "each director shall hold office for the term for which the director is elected or appointed and until the director's successor shall have been selected and qualified."

For associations incorporated under the Nonprofit Misc. Mutual Corp. Act, RCW 24.06.130 (Number and election of directors) provides, in relevant part:

... directors shall be elected or appointed in the manner and for the terms provided in the articles of incorporation or the Bylaws. In the absence of a provision fixing the term of office, the term of office of a director shall be one year.

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This has been confirmed by the courts. *Parker Estates* at 29. ("The effect of [the statutory appointment power and Bylaw 3.4] is that an officer's term of office is for one year or, if no election occurs, extends until the election of his or her successor.")

WUCIOA, RCW 64.90.310(1) addresses this issue directly and also approves, stating:

- (c) Unless provided otherwise in the declaration or organizational documents, board members and officers must take office upon adjournment of the meeting at which they were elected or appointed or, if not elected or appointed at a meeting, at the time of such election or appointment, **and must serve until their successor takes office.**

⁶ *Parker Estates*, 198 Wn. App. 16, 22 (2016). The association had failed to obtain a quorum and hold an election for the previous six years, and thus the Board members had either held their positions since the previous election or had been appointed by the Board when their respective predecessors resigned. The court rejected the owners' argument that the board lacked the authority absent an election, finding that the association had "attempted to duly elect board members every year" and that "in the absence of a quorum of its membership, it [was] permitted to remedy that situation by interpreting and acting pursuant to [its] Bylaw[s], RCW 64.38.025(2), [and] RCW 24.03.105," all of which allowed the board members to continue serving in their respective positions, or to appoint others to replace them, until a quorum could be achieved and a new election held. *Id.* at 31.

⁷ RCW 64.34.340 (Voting – Proxies) (applicable to New Act and Old Act condos.)

⁸ WUCIOA, RCW 64.90.455

- (3)(d) Whenever proposals or board members are to be voted upon at a meeting, a unit owner may vote by duly executed absentee ballot if:
 - (i) The name of each candidate and the text of each proposal to be voted upon are set forth in a writing accompanying or contained in the notice of meeting; and
 - (ii) A ballot is provided by the association for such purpose.
- (4) When a unit owner votes by absentee ballot, the association must be able to verify that the ballot is cast by the unit owner having the right to do so.

15--What Is a Board Member's Duty of Care?

Board Members and officers of both HOAs and Condo Associations owe a duty of care to their Associations and to individual Owners. They also owe a lesser duty of care to members of the general public. The specific statute which governs the Association will set forth the duty and standard of care owed by the Board Members.

The duty of the Board of Directors of a Home Owners' Association organized under chapter 64.38 of the RCW is the same as the degree of care owed by "an officer or director of a corporation organized under chapter 24.03 RCW".¹ Chapter 24.03 requires that a director serve "in good faith, in a manner such director believes to be in the best interests of the corporation, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances."² The courts have latched onto the reasonable inquiry requirement when deciding if Board Members have performed their duties.³

The Washington Uniform Common Interest Ownership Act ("WUCIOA") takes a similar approach as RCW 64.38. WUCIOA cites directly to the standard of care found in chapter 24.06 of the RCW.⁴ The language of RCW 24.06 is almost identical to that found in RCW 24.03 and any differences are likely a matter of form rather than substance. RCW 24.06 states that a director must exercise their authority:

- (a) In good faith;
- (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances;
- and

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- (c) In a manner the director or officer reasonably believes to be in the best interests of the corporation.⁵

Both RCW 24.03 and RCW 24.06 permit Board Members to satisfy their duty by relying on reports prepared by officers or employees of the Association, or by professionals working within their area of expertise.⁶ However, it is clear that the Board must conduct a reasonable investigation to ensure that the information inside the reports is accurate and not misleading.⁷ Failure to do so could invalidate the Board's decision and expose individual members of the Board to liability for the Board's actions.⁸

Condominium Boards organized under either RCW 64.34 or 64.32 are governed by the provisions found at chapter 64.34.308 of the RCW. When appointed by the Declarant, the Board must exercise the level of care required of a fiduciary⁹ of the Unit Owners.¹⁰ Once the Board has been elected by the Unit Owners, the directors are held to the lower standard of ordinary and reasonable care.¹¹ The separate standards reflect concerns that there is a potential for conflicts of interest between the Unit Owners and the Declarant, and a desire to encourage owners to serve as members of the Board.¹² Despite these concerns, this distinction does not appear to have been carried over into WUCOIA.

Board Members' duty of care is owed to the Association itself and to individual homeowners. It does not extend to future purchasers or to members of the general public, to whom a Board Member owes only the duty to avoid gross negligence.¹³

¹ RCW 64.38.025(1)

² RCW 24.03.127

³ See, *Riss v. Angel*, 131 Wash.2d 612, 681 (1997)

Note: This standard allows a Board member to rely on the information or opinions presented by:

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- A) Other officers whom the Board member believes to be reliable and competent in the specific matter;
- B) Counsel, public accountants, or others if the Board member believes the matter to be within the person's professional/expert competence;
- C) A committee of the Board on which the Board member does not serve if the matter is within the committee's authority (and the Board member acts in good faith, after reasonable inquiry, and without knowledge that reliance is undeserved.)

⁴ RCW 64.90.410(1)(b) (“...officers and board members must exercise the degree of care and loyalty to the association required of an officer or director of a corporation organized...under chapter 24.06 RCW. The standards of care and loyalty described in this section apply regardless of the form in which the association is organized.”)

⁵ RCW 24.06.153(1)

⁶ See, RCW 24.03.127(1)-(2); and RCW 24.06.153(2)

⁷ See, *Riss*, 131 Wash.2d at 684.

⁸ *Id.*

⁹ A fiduciary is one who has the power and obligation to act for another under circumstances which require total trust, good faith and honesty. If you are appointed to a Board by the declarant, you must act with the care that a fiduciary of the unit owners would take.

¹⁰ RCW 64.34.308(2)(a)

¹¹ RCW 64.34.308(2)(b)

¹² *Washington Condominium Act Official Comments*, p. 52.

¹³ *Alexander v. Sanford*, 181 Wn. App. 135, 169-70 (2014) (denying unit owners' breach of fiduciary duty claims against Board members because, at the time of the alleged breaches, owners had not yet purchased property within the community); *Waltz v. Tanager*, 183 Wn. App. 85, 91 (2014) (noting that Board members are only liable to parties other than the Association and its members under a standard of gross negligence).

16--Can Board Members Be Held Personally Liable for Their Actions?

Individual Board Members can be held personally liable for their actions. Board Members and officers of common interest communities owe a duty of care to their Associations and to individual Owners. They owe a lesser duty of care to members of the public. An Association can be held liable if its Board Members breach their duty, but courts avoid holding a Board Member personally liable unless the member engages in intentional misconduct, self-dealing, or otherwise operates in bad faith.

Liability of the Association

In most cases, individual Board Members are protected by statute¹ from personal liability for breach of the duty of care. However, the statute does not protect the Association itself from liability for the Board Members' acts or omissions. Thus, courts have recognized an Owner's right to recover from the Association for a Board Member's breach of his or her duty of care.² However, courts are hesitant to substitute their judgment for that of a Board on matters related to the execution of Board related duties. It is unlikely a court would find a breach of duty without an affirmative showing of fraud, dishonesty, or incompetence.³

Board Members' Personal Liability

Under certain circumstances, as described further below, individual Board Members may be held liable for breach of their duty of care. By statute,⁴ Board Members of an Association incorporated as a nonprofit corporation may be held personally liable to members of the general public for acts and omissions that amount to gross negligence. They can be liable to Association members for ordinary negligence, i.e., failure to fulfill Board related duties with ordinary and reasonable care.⁵

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HOA Board Members subject to RCW 24.06 can be held personally liable for “acts or omissions that involve intentional misconduct or a knowing violation of the law, or that involve a transaction from which the Board Member or officer will personally receive a benefit in money, property, or services to which the Board Member or officer is not legally entitled.”⁶

Likewise, if an “officer or [Board Member] commits or condones a wrongful act in the course of carrying out his duties...and a lack of good faith can be shown,” courts may “pierce the corporate veil” of the Association and impose individual liability on the offending Board Member.⁷ In other words, a Board Member’s failure to act in good faith would constitute gross negligence (and possibly worse), and accordingly a breach of the duty of care.⁸

Association’s Assumption of Risk for Board Member Liability

Regardless of the legal standards for a Board Member’s personal liability, most Associations are required by their Governing Documents to indemnify (protect) volunteer Board Members from liability arising from the performance of their duties as Board Members⁹. Indemnification provisions generally cover nearly all circumstances except willful misconduct and criminal acts by a Board Member. A Board Member for an Association with a valid indemnification provision is protected financially even if a court finds the Board Member personally liable. In that case, the Association is responsible for any judgment against the Board Member arising from a breach of their duty of care.

¹ RCW 4.24.264(1) (“a member of the [Board] or an officer of any nonprofit corporation is not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity as [Board member] or officer unless the decision or failure to decide constitutes gross negligence”); *Waltz*, 183 Wn.2d at 91.

² For example, in *Alexander v. Sanford*, 181 Wn. App. 135 and *Schwarzmann v. Ass’n of Apt. Owners*, 33 Wn. App. 397. In both cases, the Washington Court of Appeals acknowledged the owners’ right to

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recover from the association if it could prove a Board member's breach of the duty of care and resulting injury.

³ See *Schwarzmann*, 33 Wn. App. at 403, where the court refused to "second-guess the actions of directors" of a condo association without evidence of bad faith or improper motive by the Board members.

⁴ RCW 4.24.264(1).

⁵ See also, *Waltz v. Tanager Estates Homeowner's Ass'n*, 183 Wn. App. 85 (2014) (In this case, owners challenged an HOA Board's denial of their building plans. The court agreed with the owners that the association and/or individual Board members could be found liable to the owners for ordinary negligence (i.e. the failure to exercise the care of an ordinarily prudent person under the circumstances). But, interpreting RCW 4.24.264, the court also acknowledged that a higher standard of gross negligence governed Association and Board member liability for harm to members of the general public.)

⁶ RCW 24.06.035(2).

⁷ *Schwarzmann*, 33 Wn. App. at 403. ("[Piercing the corporate veil] is only appropriate where an officer or director commits or condones a wrongful act in the course of carrying out his duties and a lack of good faith can be shown.")

⁸ Actions alleging discrimination are a context in which board members could be subject to personal liability for breaching their duty of care. In *Fielder v. Sterling Park Homeowners Ass'n*, 914 F.Supp.2d 1222 (W.D. Wash. 2012), the court found that alleged discrimination, if true, was sufficient to show the board member's actions were grossly negligent. ("Taking Plaintiff's allegations as true, the Court has no trouble finding that the board member's actions could constitute gross negligence. For example, violations of the [Washington Law Against Discrimination] can never be made in good faith." *Fielder* at 1229 (citing RCW 49.60.010)). *Fielder* illuminates the connection between the standard of care and the substantive claim: where a substantive violation can be established by a showing of bad faith, a board member who committed the substantive violation will probably be found to have acted in a grossly negligent way.

⁹ RCW 64.34.304 (m) allows for indemnify board members. RCW 64.90.405 (m) allows for indemnify board members. Both Non-Profit Corporation Acts also allow for indemnification of board members.

17--What Is the Board's Authority to Adopt Rules and Assess Fines?

The Declaration, Bylaws, and relevant Statutes grant Associations regulatory powers and define the breadth and limits of those powers. With some exceptions, only the Board can act on behalf of the Association. To exercise these powers, the Board must first act to implement and publish rules. Before the Board fines an Owner, it must establish a Fine Schedule, distribute it to all Owners, and provide an Owner with the opportunity to be heard.

The law grants Homeowners' and Condominium Associations the power to pass rules necessary and proper for the governance and operation of the Association.¹ The Governing Documents serve as the primary limitation on the Association's rule making power.² A limitation on the Association's rule making power may be express or inferred from the Governing Documents.³ The courts will require that any rule must be reasonable in purpose and in application.⁴ A rule will be reasonable if it promotes the health, happiness and peace of mind of the Unit Owners, and is not selectively enforced.⁵

Generally, only the Board can act on behalf of the Association. However, the Board may not amend the Declaration or pass rules that conflict with the Declaration. To undertake such actions, a Declaration amendment must be approved by the Owners. Statutes and the Declaration outline the amendment process.

To implement a rule, the Board must first engage in a rule making process. The Declaration and Bylaws may establish the Board's rule making procedures, but most are silent, as are the statutes. WUCIOA contains specific procedures for rule making which must be followed unless the Declaration provides otherwise.⁶ Under WUCIOA, the Board must provide the Owners notice of its intent

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to pass, remove or otherwise modify a rule, and it must give the Owners the opportunity to comment before adopting the change.

The Board must actually pass a rule before it can take effect. Communities run into trouble where the Governing Documents direct the Board to regulate certain areas, but the Board never passes any rules addressing them. For example, the Governing Documents may indicate that pets may be kept only as provided in rules established by the Board. This provision was likely passed to limit the size, type, and breed of pets that the Owners may keep. But, the community cannot enforce any limitations until the Board defines them in a rule. In another example, an HOA adopts an amendment allowing the Board to set standards for replacement of hot water heaters, but the Board never sets a standard. The Board then wants a homeowner to replace his water heater. Unfortunately, because the Board never adopted standards for water heater replacement, it does not have any authority to require the Owner to replace the heater.

Prior Board action is particularly important when the community seeks to enforce its rules through the use of fines. Under Washington law, Homeowners' Associations and Condominium Associations cannot collect fines unless the Board of Directors has established a Fine Schedule.⁷ Because the statutes give the Board the authority to make rules and assess fines, a Board may do so, even if the Declaration is silent. The Board does not need to pass a specific rule to enforce a provision of the Governing Documents. As an example, the Board does not need to pass a rule in order to enforce the "noxious and offensive behavior" provisions in the Declaration. However, fines still may not be assessed unless the Board has established and distributed a Fine Schedule.

Washington law requires that the Board provide an Owner with "notice and an opportunity to be heard" before they may be fined. Washington courts have not addressed what these statutes

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specifically require, but other states have examined similar statutes. Indiana requires that Associations strictly comply with the notice requirements in their Declaration. "We decline to hold the requirement [of the declaration] to wait ten days after giving notice was a 'nonessential condition'...if [the association] wished to impose the sanctions, it was obliged to follow the process outlined in the covenants..."⁸ Florida courts also enforce strict compliance with notice requirements, stating "that strict compliance with the notice provision of the statute was a necessary prerequisite for HOA to impose fines" while holding that 13 days' notice was insufficient when the statute called for 14 days.⁹

Connecticut courts determined that opportunity to be heard requires that the Association provide the Owner with a hearing. Finding that "the trial court, having heard evidence that the defendant was not afforded a hearing before the plaintiff imposed fines against him, improperly concluded that the fines 'were validly assessed.'"¹⁰ The Owner's failure to attend the hearing does not prevent the Board from issuing the fine.

The statute says an Owner must have an opportunity to be heard. Some Declarations, like in *Congress Street*, require an actual hearing be scheduled and held, whether the Owner requests it or not, and whether the Owner attends or not. We recommend that any violation notice offer an Owner the opportunity to be heard before the Board or its agent, and every fine be applied with a delay, and an offer to the Owner for a hearing. It is usually not enough to fine and offer an appeal process.

¹ RCW 64.34.304(1) ("...the association may: adopt and amend bylaws, rules, and regulations...exercise any other powers conferred by the declaration or bylaws...exercise all other powers that may be exercised in this state by the same type of corporation as the association; and exercise any other powers necessary and proper for the governance and operation of the association...")

RCW 64.38.020(1) ("...an association may: adopt and amend bylaws, rules, and regulations...exercise any other powers conferred by the

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bylaws...exercise all other powers that may be exercised in this state by the same type of corporation as the association; and exercise any other powers necessary and proper for the governance and operation of the association.”)

RCW 64.90.405(2). (“...the association may: amend organizational documents and adopt and amend rules...exercise any other powers conferred by the declaration or organizational documents; exercise all other powers that may be exercised in this state by the same type of entity as the association; exercise any other powers necessary and proper for the governance and operation of the association...”)

² *Hardy v. Fairwood Greens Homeowners' Ass'n, Inc.* 120 Wash.App. 1040, at *3 (Wash. App. Ct. 2004). (“The major requirement in adopting such rules and regulations is that they must not be inconsistent with the governing documents.”)

³ *Id.* at *4. (Declaration provision permitting the regulation of vehicles over 6,000 pounds implied that the association did not have the power to regulate vehicles under 6,000 pounds.)

⁴ *Kawawakis v. Academy Square Condominium Association*, 176 Wash.App. 1038 at *5 (2013). (“We must first consider whether the house rule here...is reasonable in purpose and then we must determine whether it is reasonable in application.”)

⁵ *Id.* (“A house rule has a reasonable purpose when it is one that is reasonably related to the promotion of the health, happiness, and peace of mind of the unit owners...To be reasonable in application, a house rule must not be selectively enforce.”) (Internal Quotation Omitted)

⁶ RCW 64.90.505

- (1) Unless the declaration provides otherwise, the board must, before adopting, amending, or repealing any rule, give all unit owners notice of:
 - (a) Its intention to adopt, amend, or repeal a rule and provide the text of the rule or the proposed change; and
 - (b) A date on which the board will act on the proposed rule or amendment after considering comments from unit owners.
- (2) Following adoption, amendment, or repeal of a rule, the association must give notice to the unit owners of its action and provide a copy of any new or revised rule.
- (3) If the declaration so provides, an association may adopt rules to establish and enforce construction and design criteria and aesthetic

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standards and, if so, must adopt procedures for enforcement of those standards and for approval of construction applications, including a reasonable time within which the association must act after an application is submitted and the consequences of its failure to act.

- (4) An association's internal business operating procedures need not be adopted as rules.
- (5) Every rule must be reasonable.

⁷ RCW 64.34.304(1)(k). ("Impose and collect charges for late payment of assessments pursuant to RCW 64.34.364(13) and, after notice and an opportunity to be heard by the board of directors or by such representative designated by the board of directors and in accordance with such procedures as provided in the declaration or bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule thereof adopted by the board of directors and furnished to the owners for violations of the declaration, bylaws, and rules and regulations of the association...")

RCW 64.38.020(11). ("Impose and collect charges for late payments of assessments and, after notice and an opportunity to be heard by the board of directors or by the representative designated by the board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association...")

RCW 64.90.405(2)(l). (...the association may...enforce the governing documents and, after notice and opportunity to be heard, impose and collect reasonable fines for violations of the governing documents in accordance with previously established schedule of fines adopted by the board of directors and furnished to owners...")

⁸ *Bixeman v. hunter's Run Homeowners Association*, 36 N.E.3d 1074, 1078 (Ind. Ct. App. 2015).

⁹ *Dwork v. Executive Estates of Boynton Beach Homeowners Association, Inc.*, 219 So.3d 858, 859 (Fla. 4th DCA 2017).

¹⁰ *Congress Street Condominium Association, Inc. v. Anderson, et al.*, 156 Conn.App. 117, 123-24 (Conn. App. Ct. 2015).

18--How does a Community Delegate Powers to a Committee?

Washington law permits communities to create committees and delegate powers to them. For communities not governed by WUCIOA, committee member may be appointed by either the Board or the Governing Documents. WUCIOA only permits the Board to appoint committee members. Board created committees must be composed of two or more Board Members. WUCIOA permits the creation of advisory committees which are not staffed by Board Members, but they are not authorized to exercise Board powers. Decisions made by improperly constituted committees may be invalid.

The Condominium Act and Homeowners' Associations Act
The *Horizontal Property Regimes Act*, *Condominium Act*, and *Homeowners' Associations Act* do not mention the formation of Board committees. Instead, the Governing Documents, *Washington Nonprofit Corporation Act*, RCW 24.03, and *Nonprofit Miscellaneous and Mutual Corporations Act*, RCW 24.06, govern the creation of committees. RCW 24.03 permits a community to create two types of committees: member committees and Board committees.¹ Member committees are created through the Governing Documents. It is not necessary for Board Members to be seated on a properly constituted member committee. Board committees also must be authorized by the Governing Documents. If so authorized, a majority of the Board may create and appoint a committee with the power to act on behalf of the Board. The committee must consist of at least two Board Members. The statutes limit what powers the Board may delegate to a committee.² The Governing Documents may place further restrictions on the Board's power to create committees and appoint members. RCW 24.06 also authorizes Board committees.³

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Board committees must be composed of two or more Board Members. As demonstrated in *Harstene Pointe Maintenance Ass'n v. Diehl*, failure to satisfy this requirement renders the committee's decisions invalid.⁴ In *Diehl*, an Architectural Control Committee denied an Owner's request to cut down a tree. The Owner cut down the tree anyway, and the committee fined him. The committee only contained one Board Member at the time it denied the request. The court held that because the committee was improperly composed under Washington law its denial of the Owner's request was invalid.

The courts do not require member committees to be composed of Board Members. In *Canterwood Homeowners Association v. Hill Design and Construction, Inc.*,⁵ the Court of Appeals permitted the community to enforce decisions made by its Architectural Control Committee even though it was not staffed by Board Members.⁶ This ruling upheld the distinction between Board committees and member committees. It reasoned that because the committee was formed through the Governing Documents, without the participation of the Board, it was a member committee authorized by 24.03.065 and not controlled by *Diehl*.

The Washington Uniform Common Interest Ownership Act WUCIOA, RCW 64.90, does not defer to 24.03 or 24.06 but directly controls the formation of committees.⁷ It provides that the Governing Documents may instruct the Board to create a committee or otherwise outline the rules for the formation and appointment of committee members. However, WUCIOA, exclusively reserves for the Board the power to appoint members to a committee. The committee also must consist of at least two Board Members and only those Board Members may have voting power for the committee.

While WUCIOA does not permit for the formation of a member committee, it does allow for the creation of an advisory committee.

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The advisory committee does not have to contain any Board Members, but it also does not have any powers. Instead, the advisory committee may advise the Board on specific issues facing the community. Therefore, the Governing Documents may direct the Board to create advisory committees devoted towards studying issues such as landscaping, social, parking, etc. The advisory committee may brief the Board on these issues and suggest appropriate actions to the Board. The Board may then, at its discretion, make decisions based on the advisory committee's recommendations. If a Board committee is improperly constituted, it will be treated as an advisory committee.

¹ *Members—Member Committees*, RCW 24.06.065(2) (“A corporation may have one or more member committees. The creation, makeup, authority, and operating procedures of any member committee or committees must be addressed in the corporation’s articles of incorporation or by laws.

Committees, RCW 24.03.115 (“If the articles of incorporation or the bylaws so provide, the board of directors, by resolution adopted by a majority of the directors in office, may designate and appoint one or more committees each of which shall consist of two or more directors, which committees, to the extent provided in such resolution, in the articles of incorporation or in the bylaws of the corporation, shall have and exercise the authority of the board of directors in the management of the corporation...”)

² RCW 24.03.115 (“...no such committee shall have the authority of the board of directors in reference to amending, altering, or repealing the bylaws; electing, appointing, or removing any member of any such committee or any director or officer of the corporation; amending the articles of incorporation; adopting a plan of merger or adopting a plan of consolidation with another corporation; authorizing the sale, lease, or exchange of all or substantially all of the property and assets of the corporation not in the ordinary course of business; authorizing the voluntary dissolution of the corporation or revoking proceedings therefor; adopting a plan for the distribution of the assets of the corporation; or amending, altering, or repealing any resolution of the board of directors which by its terms provides that it shall not be amended, altered, or repealed by such committee...”)

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RCW 24.03.145 (“...no such committee shall have the authority of the board of directors in reference to:

(1) Amending, altering, or repealing the bylaws; (2) Electing, appointing, or removing any member of any such committee or any director or officer of the corporation; (3) Amending the articles of incorporation; (4) Adopting a plan of merger or a plan of consolidation with another corporation; (5) Authorizing the sale, lease, exchange, or mortgage, of all or substantially all of the property and assets of the corporation; (6) Authorizing the voluntary dissolution of the corporation or revoking proceedings therefor; or (7) Amending, altering, or repealing any resolution of the board of directors which by its terms provides that it shall not be amended, altered, or repealed by such committee.

³ *Committees*, RCW 24.06.145 (“If the articles of incorporation or the bylaws so provide, the board of directors, by resolution adopted by a majority of the directors in office, may designate and appoint one or more committees each of which shall consist of two or more directors, which committees, to the extent provided in such resolution, in the articles of incorporation, or in the bylaws of the corporation, shall have and exercise the authority of the board of directors in the management of the corporation...”)

⁴ 95 Wash.App. 399 (1999).

⁵ 133 Wash.App. 1001 (2006).

⁶ *Id.* at *2 (“RCW 24.03.115 does not apply to committees designated and appointed by a nonprofit corporation’s articles of incorporation or membership.”)

⁷ *Board Members, Officers, and Committees*, RCW 64.90.410. (“...all committees of the association must be appointed by the board. Committees authorized to exercise any power reserved to the board must include at least two board members who have exclusive voting power for that committee. Committees that are not so composed may not exercise the authority of the board and are advisory only.)

19--Must the Board Resolve Neighbor Disputes?

The Board is not required to intervene in disputes between neighbors. Most Declarations provide individual Owners with the power to bring a suit against their neighbor directly to enforce community rules. Entering into the dispute on behalf of one Owner generally does not benefit the community, sets a bad precedent and can result in costly litigation. Sometimes the Board must determine if the Governing Documents have been violated, but it need not be involved further. If the Board wants to help resolve a dispute, they could help Owners mediate or negotiate a resolution.

The Board is not required to intervene in a dispute between Owners, and generally we advise against intervention. Even if your documents provide the Board with the power to resolve the dispute, this reservation of power will generally not require the Board to act. For example, many Declarations will provide that the Association has the right to enter onto an Owner's property to repair, maintain and restore the conditions. If an Owner is not trimming the trees on his property, this grant of authority would permit the Association to enter the property, trim the trees and then assess the costs to the Owner. However, it does not obligate the Board to exercise this power, and a neighbor may not use this provision to force the Association to act. The Board has every right to not act.

We generally advise that the Board allow Owners to resolve disputes on their own. Board intervention may escalate the situation and drag the community into costly and time-consuming litigation. Returning to the above, example, if the Board chose to enter onto the Owner's property to trim the trees, the Owner could refuse to allow the Association access or refuse to pay the

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assessment. The Board would then need to initiate a lawsuit to enforce the Board's decision. This lawsuit could cost the Association thousands of dollars. Therefore, the best course of action may be to let the Owners resolve the issue themselves. There is usually little cost to the community taking a wait-and-see approach, and the community may still intervene to enforce the community rules at a later date.

A Board may want to be more proactive. All Associations have the authority to issue fines for violations of the Governing Documents.¹ However, before a fine can be issued, a Fine Schedule must have been distributed to the Owners, and the Board must offer a hearing to the offending Owner. Of course, the Owner may dispute the fines and force the Association to bring a collections action, or they may choose to pay the fines rather than correct the issue.

Rather than escalate a neighbor dispute through Board enforcement, the Board may want to take action to assist the Owners' efforts to resolve the issue on their own. First, the Board should send a letter to the Owners indicating if there is an actual violation of the Governing Documents. This letter may help resolve a dispute as to whether a violation even exists, and it will provide a basis to move towards a resolution of the conflict. The Board may also serve as a mediator to facilitate in-person communication. Board mediation will not cost the Association any money and it may help build a sense of community. The Board may use its role as a mediator to highlight the importance of the Owners satisfying their obligations and working together to achieve their shared vision for the community. Sometimes it is easier for Owners to recognize the need to comply with the community rules when they are face-to-face with the Board and their neighbors, and not alone at home responding to less personal communications.

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The Board can also suggest third party mediation to assist the neighbors. Many counties have Dispute Resolution Centers which offer free or low-cost mediation. The local Law schools both have free mediation clinics. There are multiple professional mediation and arbitration companies that can assist.

¹ RCW 64.32.060. ("Each apartment owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either may be lawfully amended from time to time, and with the covenants, conditions, and restrictions set forth in the declaration or in the deed to his or her apartment. Failure to comply with any of the foregoing shall be ground for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of apartment owners or by a particularly aggrieved apartment owner.")

RCW 64.34.304(1)(k). ("...the association may...impose and collect charges for late payment of assessments pursuant to RCW 64.34.364(13) and, after notice and an opportunity to be heard by the board of directors or by such representative designated by the board of directors and in accordance with such procedures as provided in the declaration or bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule thereof adopted by the board of directors and furnished to the owners for violations of the declaration, bylaws, and rules and regulations of the association...")

RCW 64.38.020(11). ("...an association may...impose and collect charges for late payments of assessments and, after notice and an opportunity to be heard by the board of directors or by the representative designated by the board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association...")

RCW 64.90.405(2)(l). ("the association may...enforce the governing documents and, after notice and opportunity to be heard, impose and collect reasonable fines for violations of the governing documents in accordance with a previously established schedule of fines adopted by the board of directors and furnished to the owners...")

20--Can an Association Be Held Liable for Harassment of a Community Member by Another Resident?

Under the Fair Housing Act ("FHA"), an Association may be held liable for discriminatory harassment committed by its Board, directors, employees, or its residents. The Department of Housing and Urban Development ("HUD") requires that an Association promptly investigate and respond to any claim of discriminatory harassment brought to its attention. If the Association confirms a case of harassment by one Owner against another that requires action, it can generally sanction the harasser under the nuisance provisions in the Governing Documents.

Liability

The FHA makes it illegal for an Association to discriminate against a person because of race, color, religion, sex, handicap, familial status, or national origin.¹ HUD has determined that an Association may be directly liable for discriminatory housing practices which they know or should know about, or which result from their own acts. HUD has ruled that an Association may be liable for failing to correct and end discrimination by: 1) their employee or agent; or 2) a third-party when the Association has the power to correct it.²

What Is Harassment?

What constitutes harassment covered under the FHA is a fact intensive evaluation and will depend on context surrounding the complaint. In 2016, HUD passed regulations identifying two forms of harassment: Quid Pro Quo and Hostile Environment.³ A single act may qualify as either or both types of harassment.

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Quid pro quo harassment occurs when an improper demand is made of a person and their housing benefit is conditioned on submission to the request.⁴ The demand may be explicit or implicit and it is irrelevant whether the person submits to the demand. Quid pro quo harassment frequently (though not necessarily) occurs when one party demands sexual services before conferring a benefit. As an example, it would likely be quid pro quo harassment if, after an Owner asked for a guest pass, the building manager responded: "Come by my office wearing something nice and we'll see what we can do."

Hostile environment occurs when a person is exposed to improper conduct which sufficiently interferes with the person's ability to enjoy a benefit guaranteed under the FHA.⁵ The FHA does not require victims to suffer actual physical or psychological harm, and the harassment may be written, verbal or any other conduct. For example, a resident may create a hostile environment by vandalizing their neighbor's property because their neighbor is a member of a protected class.

What Should the Board Do?

As previously discussed, an Association may be liable if they know or should know of a discriminatory practice by a third-party and the Association does not take prompt action to correct the problem.⁶ To avoid liability an Association should educate Board Members, employees and managers about the FHA so that they can swiftly identify and respond to complaints about harassment. Appropriate actions include investigating and recording the complaints received and using the enforcement provisions of the CC&R to correct and stop any harassment these investigations reveal. Written warnings and fines may be appropriate, as well as reporting the behavior to the police. Boards may also mediate disputes between residents. Further, HUD recommends the Association consider putting together an anti-discrimination policy and publishing it to the community. This policy should define harassment, outline how a complaint can be made, how the

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Association will go about investigating a complaint, and what the potential penalties are for violations of the policy.

¹ 24 CFR § 100.5. (“No person shall be subjected to discrimination because of race, color, religion, sex, handicap, familial status, or national origin in the sale, rental or advertising of dwellings, in the provision of brokerage services, or in the availability of residential real estate-related transactions.”)

² 24 CFR § 100.7(a). (“A person is directly liable for: (i) The person’s own conduct...(ii) Failing to take prompt action to correct and end a discriminatory housing practice by that person’s employee or agent...(iii) Failing...to correct and end a discriminatory housing practice by a third-party...”)

³ 24 CFR § 100.600. (“Quid pro quo and hostile environment harassment because of race, color, religion, sex, familial status, national origin or handicap may violate...the act...”)

⁴ 24 CFR § 100.600(a)(1). (Quid pro quo harassment refers to [a]...demand to engage in conduct where submission... is made a condition related to: the sale, rental or availability of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision of services or facilities in connection therewith; or the availability, terms or conditions of a residential real estate-related transaction.”)

⁵ 24 CFR § 100.600(a)(2). (“Hostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive as to interfere with: The availability, sale, rental, use or enjoyment of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision or enjoyment of services or facilities in connection therewith; or the availability, terms or conditions of a residential real estate transaction.”)

⁶ 24 CFR § 100.7(a)(iii). (“A person is directly liable for: ...Failing...to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it.”)

21--Can We Remove an Offensive Board Member?

A Board Member can be removed with or without cause by a vote of the Unit Owners. The specific voting requirements will depend on the statute governing your community and your individual Governing Documents. There is no statutory ground for a community to ask a Washington court to remove a Board Member. It is best to avoid placing abusive individuals on the Board in the first place by requiring a vote even when someone runs unopposed.

Removal by Vote of the Owners

If a Board Member is offensive or otherwise abusive, that Board Member may be removed after a vote by the Owners. There does not need to be a specific reason given, so long as the action is supported by a vote of the Unit Owners and the proper procedures are followed. The voting procedures are outlined in the statute governing your community.

Under the *Washington Condominium Act*, RCW 64.34, a removal vote may be taken at any meeting of the Unit Owners at which a Quorum is present. The Board Member will be removed if two-thirds of the voters present vote to remove.¹ Your particular condominium might allow a smaller majority to remove a Board Member. This removal process does not apply to condominiums created before July 1, 1990.

The *Horizontal Property Regimes Act*, RCW 64.32, does not address how to remove a Board Member. The *Washington Nonprofit Corporation Act*, RCW 24.03, allows for removal of Board Members by two-thirds vote of members present at a members meeting.² The *Nonprofit Miscellaneous and Mutual*

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Corporations Act, RCW 24.06, only provides that the Articles of Incorporation must define the removal procedures.³

For Homeowners' Associations, RCW 64.38 also allows a vote to occur at an Owner's meeting where a Quorum of the Owners is present. However, for HOAs only a majority of votes present must be in support of removal in order to oust a Board Member.⁴

The rules established under WUCIOA are more detailed. Like the other statutes discussed, the removal vote must occur at an Owner's meeting with a Quorum present. However, the statute is explicit that removal may not be considered unless the subject was listed in the notice of the meeting. The Board Member must also be given an opportunity to speak before the vote. WUCIOA allows removal if the vote meets the lesser:

1. A majority of the votes in the Association, or
2. Two-thirds of the votes cast at the meeting.⁵

The following examples illustrate the WUCIOA vote requirement:

Example 1: There are 99 votes in the Association and all votes are present at the meeting. A majority of votes in the Association is 50 votes, while two-thirds of those present is 66 votes. In this case, 50 votes are needed to remove the Board Member.

Example 2: There are 99 votes in the Association but only 51 votes are present. A majority of the votes in the Association remains 50 votes. However, two-thirds of those present is now 34 votes. 34 votes are needed to remove the Board Member.

Removal by the Courts

Washington courts will likely decline to use their authority to remove a Board Member because the community has a clear process to do so. While not analyzing the statutes already

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discussed, this issue was addressed in response to a non-profit corporation organized under RCW 24.03.⁶ That statute provides for the removal of a director using a voting process almost identical to that for Condominium Associations under RCW 64.34.⁷ The Court of Appeals reasoned that if the legislature wanted to give the court the power to remove a director, then the legislature would have expressly granted the court that power. As the statute was silent, the court held that it did not have the power to remove a director. None of the statutes governing common interest communities provides for a judicial mechanism to remove a Board Member. Most likely the courts would follow its prior precedent and refuse to create a judicial removal process.

Some states authorize their courts to remove a Board Member. For instance, Pennsylvania law provides a statutory judicial removal process.⁸ However, Pennsylvanian courts are hesitant to exercise this power.⁹ In one case, a Board Member abused and harassed the community. The Board feared that the member's conduct exposed the Association to a lawsuit. The Board turned to the court to remove the director. The court ruled that unless the Board Member engaged in "illegal conduct, fraud, dishonesty or extreme mismanagement" the community is responsible for removing the Board Member.¹⁰ The opinion suggests that even if the Board Member's conduct was sufficient to sustain a discrimination action against the Association, it was still the responsibility of the community, and not the courts, to remove the Board Member from his position.¹¹

Preventing the Situation

Courts do not want to get involved in disputes over Board seats. Once someone gets onto the Board the options are to vote them off of the Board or let them complete their term. For this reason, it is important to ensure potential Board Members possess the proper temperament before allowing them onto the Board. When you do not have more candidates than vacant positions, we recommend that all candidates for a Board are subjected to a yes

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or no vote by the Owners, even if they are running unopposed. If an unopposed candidate does not get a majority of the votes cast approving them, they do not get elected, and the seat remains vacant. We recommend against sticking any random volunteer on the Board when you have a vacancy.

¹ *Board of Directors and Officers*, 64.34.308(8). ("Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a two-thirds vote of the voting power in the association present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the board of directors with or without cause, other than a member appointed by the declarant.")

² *Removal of Directors*, RCW 24.03.103(1). ("Any director elected by members may be removed, with or without cause, by two-thirds of the votes cast by members having voting rights with regard to the election of any director, represented in person or by proxy at a meeting of members at which a quorum is present...")

³ RCW 24.06.130. ("...A director may be removed from office pursuant to any procedure therefor provided in the articles of incorporation.")

⁴ *Board of Directors—Standard of Care – Restrictions – Budget – Removal from Board*, 64.38.025(5). ("The owners by a majority vote of the voting power in the association present, in person or by proxy, and entitled to vote at any meeting of the owners at which a quorum is present, may remove any member of the board of directors with or without cause.")

⁵ *Officers and Board Members—Removal*, RCW 64.90.520

- (1) Unit owners present in person, by proxy, or by absentee ballot at any meeting of the unit owners at which a quorum is present may remove any board member and any officer elected by the unit owners, with or without cause, if the number of votes in favor of removal cast by unit owners entitled to vote for election of the board member or officer proposed to be removed is at least the lesser of
- (a) a majority of the votes in the association held by such unit owners or
 - (b) two-thirds of the votes cast by such unit owners at the meeting, but:
 - (i) A board member appointed by the declarant may not be removed by a unit owner vote during any period of declarant control;

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- (ii) A board member appointed under RCW 64.90.420(3) of this act may be removed only by the person that appointed that member; and
 - (iii) The unit owners may not consider whether to remove a board member or officer at a meeting of the unit owners unless that subject was listed in the notice of the meeting.
- (2) At any meeting at which a vote to remove a board member or officer is to be taken, the board member or officer being considered for removal must have a reasonable opportunity to speak before the vote.

⁶ *Lyzanchuk v. Yakima Ranches Owners Ass'n, Phase II, Inc.*, 73 Wash.App. 1 (1994).

⁷ *Washington Nonprofit Corporation Act*, RCW 24.03.103(1) (“Any director elected by members may be removed, with or without cause, by two-thirds of the votes cast by members having voting rights with regard to the election of any director, represented in person or by proxy at a meeting of members at which a quorum is present “)

⁸ 15 PA Cons Stat § 5726(c) (2014). (“Upon application of any member or director, the court may remove from office any director in case of fraudulent or dishonest acts, or gross abuse of authority or discretion with reference to the corporation, or for any other proper cause, and may bar from office any director so removed for a period prescribed by the court...”)

⁹ See, *Pocono Country Place Property Owners Association, Inc. v. Kowalski*, No. 904 C.D. 2017, 2018 WL 2089881 (Pa. Commw. Ct. May 7, 2018). (“[A]bsent proof of illegal conduct, fraud, dishonesty or extreme mismanagement” the court would not remove a board member.)

¹⁰ *Kowalski*, 2018 WL 2089881 at *5.

¹¹ *Id.* (“If the Board was concerned that Kowalski’s continuation as a director created an unacceptable risk, it could have acted to remove him under Section 5726(b), rather than seeking removal by the court.”)

22--Who Holds the Attorney-Client Privilege—the Board or Individual Board Members?

Washington law protects confidential communications between clients and attorneys from disclosure. The privilege extends to agents of the clients, and therefore protects communications not only between Boards and their attorneys, but also between employees and professionals hired by an Association. Only the client can waive the privilege because the privilege “belongs” to the client.¹ The Association, the Board or its members, is the client of the Association’s attorney. Accordingly, it is the Board as a whole (not individual members, employees, or agents) that holds the attorney-client privilege, and the power to waive the privilege.²

Any communication disclosed without the client’s consent will remain privileged, meaning that opposing parties will not be permitted to use them or the information they contain.³ A Board Member who discloses confidential information to the Board’s attorney cannot waive the privilege even with respect to his or her own communications. The communications were made in the Board Member’s capacity as an agent of the Board, to further the interest of the Board, not in his or her individual capacity.

WUCIOA has specifically listed attorney-client communications as a class of information which may be withheld from Owners.⁴

Board Members May Be Personally Liable for the Unauthorized Disclosure of Privileged Information

Board Members of both Condo Associations and HOAs owe a duty of care to both Associations and individual Owners. To discharge their duty, Board Members must act in good faith, and must exercise reasonable and ordinary care.⁵ In some cases, the

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disclosure of information protected by attorney-client privilege will constitute a breach of the duty of care. A Board Member fails to act in good faith if he discloses information vindictively or to further his own interests (i.e. self-dealing Board Members). Board Members who disclose privileged information in the belief that they are permitted to do so, or because they believe the Board is doing the wrong thing and they decide to “blow the whistle,” may still be breaching their duty of care. If an “ordinarily prudent person” in similar circumstances would not disclose the information, or if their belief that they are acting in the best interests of the Association are not objectively reasonable, the disclosure will qualify as a breach. As such, the Member(s) who disclosed the information may be subject to personal liability for any harm the Association suffers as a result of the breach.

Individual Board Members Must Not Disclose Documents Prepared by or for the Association's Attorney(s)

Attorney-client privilege protects documents prepared by attorneys, as well as documents prepared for attorneys by their agents and employees.⁶ The privilege extends not only to documents containing communications that, if oral, would be privileged, but also to documents providing the client with legal advice, laying out different options, etc. For example, opinions on collections and other legal opinions provide Associations with legal advice and therefore are privileged. Documents prepared by professionals hired by the attorney that discuss different repair options available to an Association would also be privileged.⁷ Individual Board Members may not disclose these documents to anyone who is not authorized by the full Board to have access to them. Just as Board Members may be personally liable for harm to the Association resulting from the unauthorized disclosure of privileged communications with an attorney, they may also be personally liable for harm resulting from the unauthorized disclosure of documents prepared by or for an attorney.

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¹ RCW 5.60.060(2)(a) provides that “[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.” Disclosures made without the client’s consent do not waive privilege.

² See, e.g., *State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 833 (1964) (“...the attorney-client privilege is not absolute, for it can be waived by the client.”); *State v. Pam*, 31 Wn.App. 692 (1982), *rev’d on other grounds*; *State v. Marshall*, 83 Wn.App. 741 (1996).

³ *Soter v. Cowles Publ’g Co.*, 131 Wn. App. 882, 903 (Wash. Ct. App. 2006). (A client’s communication with his or her lawyer through an agent is privileged when the communication is made in confidence for the purpose of legal advice.).

⁴ RCW 64.90.495(3)(e). (“Records retained by an association may be withheld from inspection and copying to the extent that they concern...Legal advice or communications that are otherwise protected by the attorney-client privilege or the attorney work product doctrine, including communications with the managing agent or other agent of the association...”)

⁵ Board members appointed by declarants may be required to exercise the care of a fiduciary of the unit owners.

⁶ *Pappas v. Holloway*, 114 Wn.2d 198, 203 (1990). (“The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents which contain a privileged communication.”)

⁷ Documents prepared by professionals hired directly by an association, without any involvement of the association’s attorney(s), would not be protected by attorney-client privilege, but may still be exempt from disclosure under other laws.

23--Are Communications Between an Attorney and an Association's Manager Privileged?

The attorney-client privilege may extend to managers if the manager is communicating as an agent of the community and the communication is necessary for the lawyer to provide the community with legal advice. Attorney-client privilege protects communications from clients to attorneys, as well as communications from attorneys to clients, provided that the communications occur "in the course of [the attorney's] professional employment."¹ The privilege also extends to agents of both clients and attorneys when the agents are necessary to the communication. Association managers should qualify as such agents. Privilege applies only to confidential communications, meaning that the presence of a third party who is not an agent of the client or attorney will destroy any privilege that otherwise would have existed.² The burden of establishing a communication is protected by attorney-client privilege rests with the party claiming it.³

Whether privilege exists is a highly fact-specific inquiry, and thus it is difficult to predict how a court will rule based on prior decisions. Nevertheless, cases from Washington and other states offer some guidance on when a court may find that communications between an Association's management company and attorney(s) are privileged.

One federal case, *Greenlake Condominium Association v. Allstate Insurance Co.*, offers some insight into the factors courts will consider when assessing whether communications between management companies and an Association's attorney(s) are privileged.⁴ In *Greenlake*, the defendant insurance company

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sought to compel disclosure of emails between the Association's property manager and its attorneys. The court denied defendant's request, finding that the property manager was "a necessary and customary participant in the consultative process between Plaintiff and Plaintiff's attorney."⁵ The Association, "like many condominium boards, ha[d] no employees and [was] governed by a volunteer board of directors" who "relied on [the property manager] to handle day-to-day operation of the property and to act as a repository of information concerning ongoing issues affecting the property."⁶ In other words, the property manager was acting as an agent of the Association and, as such, her communications with the attorneys were entitled to the same privilege extended to communications directly between the Board Members and attorneys.

Washington courts have extended attorney-client privilege to communications between attorneys, and interpreters and claims adjusters, respectively, under what is sometimes referred to as the "Intermediary Doctrine," which protects communications between attorneys and the agents of their clients provided that the agent is "effectuating the client's purpose of receiving legal advice."⁷ Our firm would argue that these third parties are similar to an Association's management company in that they are "necessary parties" to the provision of legal advice and services and are therefore protected by the attorney-client privilege. Other state and federal courts have applied similar rules regarding the extension of the attorney-client privilege to third parties or agents.⁸

Managers and employees whose job function requires them to provide attorneys with facts and information necessary for giving legal advice are third parties who will not destroy the privilege. Employees whose job function does not involve communicating with attorneys or relating legal advice from an attorney to the Unit Owners (such as a management company's bookkeeper or a management company's receptionist) may destroy the privilege.

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Associations should also keep in mind that Unit Owners are considered third parties whose presence will destroy the privilege.

WUCIOA recognizes the need to protect communications that include the manager from Owners. RCW 64.90.495(3)(e) specifically allows Associations to withhold from Owners any communication between the managing agent and the attorney.

It is advised that an Association's Board and the management company (if one is employed) should exercise caution and be aware of the risk of sharing information and documents from an attorney with third parties (including Unit Owners). Documents and invoices from an attorney should be safeguarded. If any documents or information from an attorney are shared with third parties (again, including Unit Owners) the privilege is lost.⁹

¹ Washington courts interpret RCW 5.60.060(2) as providing two-way protection of all communications and advice between attorney and client, including communications from the attorney to the client. (See, *Soter v. Cowles Publ'g Co.*, 131 Wn. App. 882, 903 (Wash. Ct. App. 2006).)

² *Ramsey v. Mading*, 36 Wn.2d 303, 312 (Wash. 1950) (Trial court erred in admitting the testimony of appellants' attorney because the communication between appellants and the attorney were intended to be confidential.).

³ *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 332, (Wash. Ct. App. 2005) (Remanded with the instruction that the trial court must determine whether the party claiming attorney-client privilege applied to certain documents had met the burden of establishing the privilege applied to those documents.).

⁴ 14-CV-01860-BJR, 2015 WL 11921419, at *1 (W.D. Wash. Oct. 30, 2015).

⁵ *Id.*

⁶ *Id.*

⁷ See, *Soter* 131 Wn. App. at 903 (Wash. Ct. App. 2006) (A client's communication with his or her lawyer through an agent is privileged

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when the communication is made in confidence for the purpose of legal advice.); *State v. Aquino-Cervantes*, 88 Wn. App. 699, 708 (Wash. Ct. App. 1997) (Attorney-client privilege applied to communications in presence of client's interpreter because the interpreter was the client's agent, and necessary for the attorney-client communication.); *Bronsink v. Allied Prop. & Cas. Ins.*, 2010 U.S. Dist. 09-751 MJP 2010 WL 786016, at *1 (W.D. Wash. Mar. 4, 2010) (An attorney acting as a claims adjuster, and not as legal advisor, could still claim the privilege if that attorney was an agent necessary for the provision of legal advice.).

⁸ See, *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. N.Y. 1961) (A client's accountant can be necessary for the giving of legal advice.); *Miller v. Haulmark Transp. Sys.*, 104 F.R.D. 442, 445 (E.D. Pa. 1984) (Attorney-client privilege applied to communications in presence of client's insurance agent.); *Golden Trade v. Lee Ansarel Co.*, 143 F.R.D. 514, 518 (S.D.N.Y. 1992) (Attorney-client privilege protects communications between a client's agent and the client's attorney if the communication was intended to be confidential, and if the purpose of the communication is to facilitate the rendering of legal services by the attorney.); *CoorsTek, Inc. v. Reiber*, CIVA08CV01133KMTCBS, 2010 WL 1332845, at *1 (D. Colo. Apr. 5, 2010) (The presence of a third party will not destroy the attorney-client privilege if the third party is the attorney's or client's agent or possesses commonality of interest with the client.).

⁹ The risk of losing the privilege increases as more third parties are made privy to documents and information from attorneys.

24--How Should the Board Deal with an Adverse Party Who Is Also a Board Member?

Boards must prevent sharing privileged information with a Board Member who is in conflict with the Association. The Board can ask Owners to remove the adverse member. Short of removal, Board should only discuss the dispute in executive sessions that do not include the adverse Board Member. The Board must meticulously follow procedures and comply with statutes and Governing Documents to avoid creating valid claims against the Association.

When a Board Member disagrees with the Board, they are not an adverse party. But if they “lawyer up,” sue, or threaten to sue, they become a party in opposition. When this happens, a conflict of interest arises that may result in the Board Member placing their interests over that of the Association. Further, by nature of their position they may gain access to privileged information that may benefit them in their suit against the Association and that they otherwise would not be entitled to under law. Any activities taken by the Board must be designed to remedy these concerns.

A Board Member has a legal duty to act in the best interest of the Association.¹ When a director is engaged in a dispute with the Association, their personal interests conflict with the Association's. For instance, the Board has the power to authorize a lawsuit against an Owner or to settle such a lawsuit. As such, a Board Member has the power to vote against filing a lawsuit or to approve a beneficial settlement (*vis-à-vis* the adverse director). This conflict renders them incapable of performing their duty to the Association. This is a compelling argument that might cause Owners to remove the director.

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Some Board Members believe that they can set aside this conflict and put the Association's interest ahead of their own. Even if this is true, they still have access to privileged information pertaining to their dispute with the Association. For example, reports to the Board from their attorney (which an opponent in a dispute is not entitled to view). Only the Board as a whole may waive attorney-client privilege.² Permitting an adverse director access to privileged information is a violation of the Board's duty to protect privileged information.

The best response to this type of conflict is to remove the adverse director from the Board. The easiest way to achieve this is to ask the Board Member to resign. If they refuse, call a membership meeting to remove the adverse Member. The process to do so is in the Governing Documents or in the Governing Statute.³ Generally, removal will require a vote by the Owners.

Removal can be difficult, time consuming, or impossible. In such cases, the Board should screen the adverse party from information related to the dispute. The Board should exclude the member from any discussions and Board actions related to the dispute. The Board should only discuss the dispute in an executive session that excludes the adverse Board Member. The Board may make decisions in the executive session without the adverse Board Member. The Board can also create a "legal committee" with at least two Board Members and delegate to the committee all authority to deal with the situation.

This situation presents a difficult issue for the Board to navigate. It is best to work in tandem with the Association's attorney, who will identify privileged information and recommend appropriate steps given the situation. Other Board Members should avoid speaking to the adverse member about the dispute unless authorized and only after consultation with the rest of the Board and its attorney. It is best for the Association if the Board addresses the dispute with a unified and decisive voice.

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¹ See, RCW 24.03.127; RCW 24.06.153(1); RCW 64.34.308.

² While there is no Washington case law on this point, it stands to reason that the power to waive a corporation's attorney-client privilege must be exercised by its board of directors. This reasoning is supported in cases out of Wisconsin and the United States Supreme Court. See, *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 348 (1985) (the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors.) and *Lane v. Sharp Packaging Systems, Inc.*, 251 Wis.2d 68 (2002) ("A dissident director...has no authority to pierce or otherwise frustrate the attorney-client privilege...")

³ RCW 24.03.103.

The bylaws or articles of incorporation may contain a procedure for removal of directors. If the articles of incorporation or bylaws provide for the election of any director or directors by members, then in the absence of any provision regarding removal of directors:

- (1) Any director elected by members may be removed, with or without cause, by two-thirds of the votes cast by members having voting rights with regard to the election of any director, represented in person or by proxy at a meeting of members at which a quorum is present;
- (2) In the case of a corporation having cumulative voting, ...; and
- (3) Whenever the members of any class are entitled to elect one or more directors by the provisions of the articles of incorporation, the provisions of this section shall apply, in respect to the removal of a director

RCW 24.06.130. ("...A director may be removed from office pursuant to any procedure therefor provided in the articles of incorporation.")

RCW 64.38.025(5) ("The owners by a majority vote of the voting power in the association present, in person or by proxy, and entitled to vote at any meeting of the owners at which a quorum is present, may remove any member of the board of directors with or without cause.")

RCW 64.90.520(1) ("Unit owners present in person, by proxy, or by absentee ballot at any meeting of the unit owners at which a quorum is present may remove any board member and any officer elected by the unit owners, with or without cause, if the number of votes in favor of removal cast by unit owners entitled to vote for election of the board member or officer proposed to be removed is at least the lesser of (a) a majority of the votes in the association held by such unit owners or (b) two-thirds of the votes cast by such unit owners at the meeting...")

25--Can the Board Exclude an Adversarial Board Member from Board Meetings?

If the Board has reason to believe the Board Member is likely to initiate litigation on a matter, the Board may exclude the Board Member from certain Board Meetings where the issue is discussed. In addition, the adversarial Board Member is not entitled to advice or counsel from the Association's attorney on the matter. If the adversarial Board Member threatens or initiates litigation on the matter, Boards may have the additional option of forming a litigation committee, exclusive of the adversarial director, to handle the matter.

Exclusion of Adversarial Directors from Board Meetings

Most Associations are incorporated under either the Nonprofit Corp. Act¹ or the Nonprofit Misc. Mutual Corp. Act.² Under these laws, Board Members are generally entitled to attend Board Meetings and must be notified of each meeting in the manner set forth in the Association's Bylaws.³ However, the Board may exclude a Board Member who is both in opposition to the Board on the matter to be discussed in the meeting and likely to initiate litigation against the Associations on the issue.⁴ The Board is also entitled to withhold documents related to the matter and prevent the adversarial Board Member from conferring with the Association's attorney on the issue.⁵

In a recent unpublished opinion, the Washington Court of Appeals explained that a Board has no right to exclude individual Board Members from all Board Meetings. However, under certain circumstances, exclusion is appropriate. The court directed Boards considering exclusion of a Board Member to consider the following questions:

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- 1) Is the adversarial Board Member acting solely in her capacity as an Owner rather than her capacity as a Board Member?
- 2) Is the adversarial Board Member likely to bring litigation against the Association?

If both questions can be answered affirmatively, then the Board is entitled to bar an adversarial Board Member from Board Meetings that are not open to the membership at large and are related to the subject of potential litigation.

The Court of Appeals found that where a Board Member was acting on his own behalf as an Owner-Member of the Association, not on behalf of the Association as one of its Board Members, and was likely to bring litigation against the Association regarding a policy adopted by the Board, the Board could exclude the adversarial Board Member from the portions of meetings during which the Board consulted with legal counsel regarding the subject of the potential litigation. The court explained, since the Board Member “was acting as an adversarial and in his capacity as Owner-Member during the times at issue, he was not a Board Member entitled to such information.”⁶

Likewise, the court held that the Board Member was not entitled to disclosure of documents or other communications from the Association's attorney on the issue. The court explained that, while a Board Member generally has a right to receive such information on request, when the Board Member is acting solely in the capacity of Owner-Member, he forfeits this right.⁷

Litigation Committees

Once an adversarial Board Member has threatened a lawsuit against the Association, the Board may form a committee to handle the litigation.⁸ Forming a litigation committee that does not include the adversarial Board Member would effectively ensure the Association could handle the matter without conveying confidential or privileged information to the adversarial Board

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Member. A litigation committee would also benefit the Association by allowing the Board to make quick decisions when necessary, such as when time-sensitive settlement offers are on the table.

¹ RCW 24.03.

² RCW 24.06.

³ RCW 24.03.120; RCW 24.06.150.

⁴ *Hartstene Pointe Maint. Ass'n v. Diehl*, 188 Wn. App. 1028 (2015), *review denied*, 184 Wn.2d 1030, 364 P.3d 119 (2016) (a Board member on an HOA Board objected to the Board's newly-enacted hazardous tree policy, which had been imposed over his lone objection pursuant to the association's Governing Documents).

Note: Although *Hartstene* involved an HOA and whether the exclusion of a Board member comported with the HOA Act's open meeting requirements, the case provides persuasive authority for the exclusion of Board members from condo association Board meetings as well.

⁵ *Hartstene*, 188 Wn. App. 1028 at ¶ 25.

⁶ *Hartstene*, 188 Wn. App. 1028 at ¶ 25.

⁷ *Hartstene*, 188 Wn. App. 1028 at ¶ 25.

⁸ If the Articles of Incorporation or Bylaws allow, a majority of the Board may designate or appoint a committee that includes at least two Board members with powers enumerated in the Articles or Bylaws and not prohibited under RCW 24.03.115 or RCW 24.06.145.

26--Does WUCIOA Affect My Community's Budget Approval Process?

WUCIOA affects the budget approval process of all preexisting communities. The budget and assessment provisions replace any conflicting provisions which exist in the prior statutes covering common interest communities already on the books. For HOAs governed by RCW 64.38, WUCIOA also replaces all existing budget and assessment terms in the community's Governing Documents. So now, Old Act condominiums must ratify budgets, and the WUCIOA budget process replaces an HOA's budget process, removing any restrictions on assessment increases in the CC&Rs.

WUCIOA outlines the budget and approval process at RCW 64.90.525.¹ RCW 64.90.080 provides that RCW 64.90.525 will apply to all preexisting communities.² As a result, even if your community has not adopted WUCIOA, WUCIOA will replace the portions of the statute governing your community that deal with approving budgets or assessments. Communities need to be aware of several changes. For instance, the Board must now provide a copy of the budget, not just a summary, and the budget must include specific topics.³ Additionally, the Owners meeting to consider the budget must be held within 50 days, rather than 60 days, of the budget being sent to the Owners.

Perhaps most importantly, WUCIOA makes it easier for the Board to pass assessments. First, unless the Owners reject the budget, both the budget and **any assessments included in the budget** are ratified.⁴ Second, WUCIOA explicitly authorizes the Board to propose special assessments.⁵ These assessments are ratified in the same manner as the annual budget.

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For HOAs governed by the *Homeowners Association Act* RCW 64.38, RCW 64.90.525 will also **replace** provisions of the community's Declaration related to budgets and assessments.⁶ Once again, this occurs even if the community does not adopt WUCIOA. We believe the legislative intent was to remove any restrictions on increasing dues contained in the CC&Rs of existing single-family communities.

¹ RCW 64.90.525 Budgets—Assessments—Special assessments.

- (1) (a) Within thirty days after adoption of any proposed budget for the common interest community, the board must provide a copy of the budget to all the unit owners and set a date for a meeting of the unit owners to consider ratification of the budget not less than fourteen nor more than fifty days after providing the budget. Unless at that meeting the unit owners of units to which a majority of the votes in the association are allocated or any larger percentage specified in the declaration reject the budget, the budget and the assessments against the units included in the budget are ratified, whether or not a quorum is present.
 - (b) If the proposed budget is rejected or the required notice is not given, the periodic budget last ratified by the unit owners continues until the unit owners ratify a subsequent budget proposed by the board.
- (2) The budget must include:
 - (a) The projected income to the association by category;
 - (b) The projected common expenses and those specially allocated expenses that are subject to being budgeted, both by category;
 - (c) The amount of the assessments per unit and the date the assessments are due;
 - (d) The current amount of regular assessments budgeted for contribution to the reserve account;
 - (e) A statement of whether the association has a reserve study that meets the requirements of RCW 64.90.550 and, if so, the extent to which the budget meets or deviates from the recommendations of that reserve study; and
 - (f) The current deficiency or surplus in reserve funding expressed on a per unit basis.
- (3) The board, at any time, may propose a special assessment. The assessment is effective only if the board follows the procedures for ratification of a budget described in subsection (1) of this section and the unit owners do not reject the proposed assessment. The board may provide that the special assessment may be due and payable in

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installments over any period it determines and may provide a discount for early payment.

² RCW 64.90.080(1) (“Except for a nonresidential common interest community described in RCW 64.90.100, RCW 64.90.095 and **64.90.525 apply, and any inconsistent provisions of chapter 59.18, 64.32, 64.34, or 64.38 RCW do not apply**, to a common interest community created in this state before July 1, 2018.”)

³ RCW 64.90.525(2) (“The budget must include:(a) The projected income to the association by category; (b) The projected common expenses and those specially allocated expenses that are subject to being budgeted, both by category; (c) The amount of the assessments per unit and the date the assessments are due; (d) The current amount of regular assessments budgeted for contribution to the reserve account; (e) A statement of whether the association has a reserve study that meets the requirements of RCW 64.90.550 and, if so, the extent to which the budget meets or deviates from the recommendations of that reserve study; and (f) The current deficiency or surplus in reserve funding expressed on a per unit basis.

⁴ RCW 64.90.525(1) (“...Unless...the unit owners...reject the budget, **the budget and the assessments** against the units included in the budget are ratified...”)

⁵ RCW 64.90.525(3) (“The board, at any time, may propose a special assessment. The assessment is effective only if the board follows the procedures for ratification of a budget described in subsection (1) of this section and the unit owners do not reject the proposed assessment. The board may provide that the special assessment may be due and payable in installments over any period it determines and may provide a discount for early payment.”)

⁶ RCW 64.90.080(2) (“Except to the extent provided in this subsection, the sections listed in subsection (1) of this section apply only to events and circumstances occurring after July 1, 2018, and do not invalidate existing provisions of the governing documents of those common interest communities. **To protect the public interest, RCW 64.90.095 and 64.90.525 supersede existing provisions of the governing documents of all plat communities and miscellaneous communities previously subject to chapter 64.38 RCW.**”)

27--What Statutes of Limitation are Applicable to Common Legal Disputes?

A court will examine the specific facts of a case before it determines what statute of limitation applies. Some common statutes of limitation are: one year to challenge the validity of a Declaration amendment; ten years to defend against adverse possession; six years for written contract claims; three years for claims on oral contracts and tort claims; and two years for claims not otherwise specified by law. Associations have either three years or six years to bring a collections action, depending on the Governing Statute. Some Declarations contain specific limitations on actions against Owners, often in relation to Architectural Control. It is difficult to make a general statement as to what statute of limitation will apply to any given case. A lawyer must examine the facts of the case to properly advise your Association.

Validity of an Amendment to the Governing Documents

Both *the Washington Condominium Act*¹ and *The Washington Uniform Common Interest Ownership Act*² ("WUCIOA") contain provisions which require any "challenge to the validity of an amendment by the association" to be brought within one year from when the amendment is recorded. However, the one-year time bar does not apply for fraudulent amendments.³ When fraud is not present the failure to adhere to the proper amendment process renders the amendment voidable, but any challenge must be brought within one year.⁴ WUCIOA only provides one year to challenge an amendment so long as there is no evidence of fraud.

Limitations on Actions Contained in the Declaration

An Association may lose their right to bring an enforcement action if they fail to bring suit within the timeframe contained in the

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Governing Documents. In an unpublished case, *Flying H Ranch Homeowners Association v. Geary*,⁵ the Governing Documents stated that the Homeowners' Association must sue to stop an Owners' improper construction prior to the completion of the construction. The court found that the Association waived its right to bring an enforcement action against the Owner by waiting until construction had been completed. The court's determination was based solely on Association's obligations under the Declaration. The case suggests that the Governing Documents may reduce the time frame the Association has to bring an enforcement action against an Owner. This case is unpublished, decided on poorly worded conflicting documents, and legal reasoning which is questionable, but does demonstrate the risk that valid claims can be lost if the time in the Declaration is ignored.

Actions to Recover Real Property

A claim to recover real property has a statute of limitations of 10 years.⁶ *Shoah Highlands, Inc. v. Dougherty*,⁷ a case out of Florida provides an illustration of how this type of action might occur. In that case, an Owner built an enclosure on common property. Another Owner objected and sued to have the enclosure removed. The court found that the claim could give rise to both a cause of action for the recovery of real property and to enforce a contract. The court found that the plaintiff's contract claim was time barred, but the lawsuit to recover real property was timely. So, to prevent adverse possession, you must sue before ten years are up, and to sue to confirm adverse possession, you must wait more than ten years.

Contractual Obligations

Claims on contracts that are not in writing must be brought within three years.⁸ An agreement will be considered an oral contract subject to a three-year statute of limitation if the essential elements of the agreement are not in writing.⁹ Washington courts do not require that the essential elements be contained within one signed document. In one case, the court found that the reports,

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plans and invoices provided by an inspector were sufficient to establish a written contract, subject to the six-year statute of limitations, between an inspector and a condominium developer.¹⁰

Under Washington law, the Declaration is not a contract.¹¹ Courts have, at times, treated the Declaration as “[a]kin to a master deed.”¹² Courts apply the six-year statute of limitation found at RCW 4.16.040 to suits to enforce the express and implied obligations in a deed.¹³ Whether RCW 4.16.040 applies to a Declaration is not directly addressed by the courts, but they would likely apply the six year statute of limitation.

Tort Actions

An Association may be sued for property damage and personal injuries which arise due to the Association's failure to maintain or repair common areas. Under Washington law, actions for personal injury must be brought within three years.¹⁴ Often these suits arise in the context of a slip and fall in the common areas of a condominium building.¹⁵ However, the duty to maintain and repair common elements can lead to liability under other fact patterns.

For instance, in *Siu v. West Green Condominium Ass'n*,¹⁶ the Washington Court of Appeals permitted a suit for personal injuries and property damage resulting from a fire which started in a Unit Owner's apartment. The fire started when the tenant left a pot of grease boiling on the stove. The fire injured the Owner of an adjoining Unit. Fire alarms did not provide warning. The alarms were hardwired and the wiring was a common element. A question of fact existed as to whether the Owner of the Unit where the fire started had tampered with the wires. The court found that even if the wires had been tampered with, the Association may have still have had a duty to inspect and repair the wiring.

A lawsuit may implicate both contract and tort claims. The determining question is whether the injury can be traced to the breach of both a written obligation and a separate and

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independent legal duty.¹⁷ In their Governing Documents, Associations frequently promise to maintain the common areas. Even without these promises, an Association may have an independent duty to exercise reasonable care to protect against dangers the Association knows of or should have discovered.¹⁸ This duty may require the Association to remedy or warn of the danger.¹⁹ If an Owner is injured as a result of the Association's failure to maintain, the Owner may allege two claims: one based on the failure to perform obligations in the Governing Documents, and another based on the Association's breach of its duty of care. The courts may allow a lawsuit which was not brought within the three-year statute of limitation for tort claims to proceed within the six-year statute of limitation applicable to written agreements.

Actions Not Otherwise Provided For By Statute

If a Washington court finds that the claim is not provided for by statute it will apply a two-year statute of limitation.²⁰ In a case from New York, *Stein v. Garfield Regency Condominium*²¹ the court was unable to classify the plaintiff's cause of action. The case involved a lawsuit brought to declare that the roof area above an apartment was a limited common element, an injunction preventing the construction of any structures on this portion of the roof, and an order voiding a recent amendment of the Declaration. The court determined that New York law did not provide a specific limitation period for these claims. If such a claim had been brought in Washington, it would have defaulted to a two-year limit.

Collections Actions

Associations also have a limited time to bring collection actions against Unit Owners. The period in which the Association must bring a collection action is outlined in the Governing Statutes. Under the *Washington Condominium Act*, the Association has three years from when an assessment becomes due to bring a collection proceeding.²² This provision covers both Old Act and New Act condominiums.²³ Homeowners' Associations have six years to initiate a collection action. For communities organized

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under WUCIOA, proceedings to collect assessments must be brought within six years after the assessment becomes due.²⁴

We believe monetary claims related to assessments against an Association by an Owner would mirror the timelines for assessment recovery by the Association.

¹ RCW 64.34.264(2). ("No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.")

² SSB 6175 § 218(2). ("In the absence of fraud, any action to challenge the validity of an amendment adopted by the association may not be brought more than one year after the amendment is recorded.")

³ *Club Envy of Spokane, LLC v. Ridpath Tower Condominium Assoc.*, 184 Wash.App. 593 (Wash. Ct. App. 2014). (The court determined that the amendment could be challenged at any time because it had not been properly adopted pursuant to RCW 64.34.264, and was therefore void.)

⁴ *Bilanko v. Barclay Court Owners Ass'n*, 185 Wash.2d 443 (2016). (Distinguishing *Club Envy*, court held that, unlike in *Club Envy*, there was no evidence of fraud only rendered the improperly passed amendment to be voidable and barred the challenge because it had not been brought within the statute of limitation.)

⁵ 153 Wash.App. 1009 (Wash. Ct. App. 2009).

⁶ RCW 4.16.020. ("The period prescribed for the commencement of actions shall be...Within ten years...For actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appears that the plaintiff, his or her ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action.")

⁷ 837 So.2d 579 (2009).

⁸ RCW 4.16.080(3). ("The following actions shall be commenced within three years...an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument...")

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⁹ *Grand View Homes LLC v. Cascade Testing Laboratory, Inc.* 146 Wash.App. 1044 at *3 (Wash. Ct. App. 2008). (“If a material element of a written contract must be proved by extrinsic evidence, the contract is partly oral and the three-year statute of limitations applies.”)

¹⁰ *Id.* at * 5. (“Because the ex parte writings contain all the essential elements of a written contract between Cascade and Grand View, the six-year statute of limitations governs and Grand View’s breach of contract claim is not barred.”)

¹¹ See, *Lake v. Woodcreek Homeowners Association*, 169 Wash.2d 516, (2010).

¹² *Id.* at 521. “Akin to a master deed, a declaration describes the condominium property and contains the covenants defining the property rights and legal obligations of the property owner.”)

¹³ See, *Foley v. Smith*, 14 Wash.App. 285 (Wash. Ct. App. 1975). (“The six year statute of limitations on the covenants of warranty and quiet enjoyment in a deed did not commence to run until the specific performance decree evicting the covenantors and covenantees had become final...It was, therefore, not barred by RCW 4.16.040.”)

¹⁴ RCW 4.16.080(2). (“The following actions shall be commenced within three years... An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated...”)

¹⁵ See, *Garron v. Pier Point Condominiums*, 151 Wash.App. 1030 (Wash. Ct. App. 2009). (Injured worker hired by a unit owner to clean the unit sued association for personal injuries which she claimed resulted from wet tiles on a walkway that the association knew about but failed to repair.”)

¹⁶ 123 Wash. App. 1012 (Wash. App. Ct. 2004).

¹⁷ *Eastwood v. Horse Harbor Foundation, Inc.* 170 Wash.2d 380 (“The test is not simply whether an injury is an economic loss arising from a breach of contract, but rather whether the injury is traceable also to a breach of tort law duty of care arising independently of the contract.”)

¹⁸ See, *Garron*, 151 Wash.App. 1030 at *3. (“The Association is liable to an invitee for dangerous condition of the common areas if the Association: (a) knows or by the exercise of reasonable care would

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discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.”)

¹⁹ *Id.*

²⁰ RCW 4.16.130. (“An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued.”)

²¹ 886 N.Y.S.2d 54 (N.Y. App. Div. 2009).

²² RCW 64.34.364(8). (“A lien for unpaid assessments and the personal liability for payment of assessments is extinguished unless proceedings to enforce the lien or collect the debt are instituted within three years after the amount of the assessments sought to be recovered becomes due.”)

²³ RCW 64.34.010 (“RCW 64.34.364 (lien for assessments)... to the extent necessary in construing any of those sections, apply to all condominiums created in this state before July 1, 1990; but those sections apply only with respect to events and circumstances occurring after July 1, 1990, and do not invalidate or supersede existing, inconsistent provisions of the declaration, bylaws, or survey maps or plans of those condominiums.”)

²⁴ RCW 64.690.485(9) (“A lien for unpaid assessments and the personal liability for payment of those assessments are extinguished unless proceedings to enforce the lien or collect the debt are instituted within six years after the full amount of the assessments sought to be recovered becomes due.”)

28--Quorums: What Are They and How Are They Met?

A Quorum is the number of votes¹ required to be in attendance for actions at a meeting of the Association or Board to have effect. Each Association's Governing Documents should specify the number of votes that constitute a Quorum. Statutes impose the minimum requirements to achieve a Quorum if the Governing Documents are silent.

Sometimes members of an Association or Board will strategically decline to be present at a meeting so that a Quorum cannot be established, preventing a vote. Usually a Quorum is established at the beginning of the meeting.² If people leave during the meeting, the remaining members can usually still take action.

Quorum for Association Meetings

A member can vote in person at the meeting or by Proxy (if the applicable statutes and the Association's Governing Documents permit); Proxy votes count towards Quorum requirements. This is true with respect to every kind of Association meeting: Proxy votes are not inferior to votes cast by members themselves and have the same effect as votes not cast by Proxy.

Unless otherwise provided for in the Declaration or Bylaws, Quorum requirements for Association meetings (not Board Meetings) are:

- A) for New Act Condo Associations, 25% (or more if specified in Bylaws);³
- B) for Old Act Condo Associations incorporated under the Nonprofit Corporations Act, 10% (or more if specified in Bylaws);⁴

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- C) for Old Act Condo Associations incorporated under the Nonprofit Miscellaneous and Mutual Corporations Act, 25% (or more if specified in Bylaws);⁵ and
- D) for HOAs, 34% (unless Bylaws provide otherwise).⁶
- E) for WUCIOA, 20%.⁷ WUCIOA also allows absentee ballots to count towards a Quorum.

Quorum for Board Meetings

Quorum requirements for Board Meetings are:

- A) for New Act Condo Associations, at least 50%;⁸
- B) for Old Act Condo Associations under both the Nonprofit Corporation Acts, at least 33.33%, or more if specified in the Bylaws or Articles of Incorporation; if not so specified, then a Quorum is a majority;⁹
- C) for HOAs incorporated under the Nonprofit Corporation Acts, at least 33.33%, or more if specified in the Bylaws or Articles of Incorporation; if not so specified, then a Quorum is a majority.¹⁰
- D) for WUCIOA, a majority of the votes on the Board.¹¹ WUCIOA requires a Quorum of the Board for every vote taken.

The bottom line is that for Association meetings, the presence of a duly appointed Proxy will satisfy the same requirements as the presence of the member delegating the power. It would be prudent for an Association to confirm, prior to a vote, that Proxies are valid. Proxies cannot be used at Board Meetings.

¹ A condo Association's Declaration specifies how votes are allocated among Unit Owners. Usually the votes are allocated according to the percent ownership interest. For Board meetings, each Board member gets one vote.

² See RCW 64.38.040 (Quorum for meeting); RCW 64.34.336 (Quorums); RCW 64.90.450 (Quorum). The Old Act is silent on Quorum requirements, but, if an Old Act condo is incorporated under a Nonprofit Corp. Act, it must satisfy the Quorum requirements from the statute.

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³ RCW 64.34.336(1) (Quorums) provides:

Unless the Bylaws specify a larger percentage, a quorum is present throughout any meeting of the Association if the owners of units to which 25% of the votes of the Association are allocated are present in person or by proxy at the beginning of the meeting.

If the Units are assigned a percentage of the vote based on the size of their Units, it would be possible that a Quorum of votes is not present even if twenty-five percent of the Owners are present.

⁴ RCW 24.03.090 (Quorum). Because it is usually not possible to tell which statute a condo Association was incorporated under, we recommend that condo Associations comply with the more restrictive statute. In this case, this means a minimum 25% Quorum requirement.

⁵ RCW 24.06.115 (Quorum).

⁶ RCW 64.38.040 (Quorum for meeting) provides:

Unless the Governing Documents specify a different percentage, a quorum is present throughout any meeting of the association if the owners to which 34% of the votes of the association are allocated are present in person or by proxy at the beginning of the meeting.

Under the HOA Act, it appears that the Bylaws may specify that any percentage of the votes constitutes a Quorum; there is no minimum requirement. However, if the HOA is incorporated, the applicable corporate statute will provide a minimum requirement.

⁷ RCW 64.90.450(1)

Unless the organizational documents provide otherwise, a quorum is present throughout any meeting of the unit owners if persons entitled to cast twenty percent of the votes in the association: (a) Are present in person or by proxy at the beginning of the meeting; (b) Have voted by absentee ballot; or (c) Are present by any combination of (a) and (b) of this subsection.

⁸ RCW 64.34.336(2) (Quorums) provides:

Unless the Bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the board of directors if persons entitled to cast fifty percent of the votes on the board of directors are present at the beginning of the meeting.

⁹ RCW 24.03.110 (Quorum of directors) provides:

A majority of the number of directors fixed by, or in the manner provided in the Bylaws, or in the absence of a bylaw fixing or providing

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for the number of directors, then of the number fixed by or in the manner provided in the articles of incorporation, shall constitute a quorum for the transaction of business, unless otherwise provided in the articles of incorporation or the Bylaws; but in no event shall a quorum consist of less than one-third of the number of directors so fixed or stated. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by this chapter, the articles of incorporation or the Bylaws.

RCW 24.06.140 (Quorum of directors) provides:

A majority of the number of directors fixed by the Bylaws, or in the absence of a bylaw fixing the number of directors, then of the number stated in the articles of incorporation, shall constitute a quorum for the transaction of business, unless otherwise provided in the articles of incorporation or the Bylaws, provided that a quorum shall never consist of less than one-third of the number of directors so fixed or stated. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by this chapter, the articles of incorporation, or the Bylaws.

¹⁰ Quorum requirements for HOA Board meetings are not specified in the HOA Act; however, for HOAs that are incorporated as nonprofits, the requirements are specified in the corporate statute. See RCW 24.03.110 (Quorum of directors); RCW 24.06.140 (Quorum).

¹¹ RCW 64.90.450(2)

Unless the organizational documents specify a larger number, a quorum of the board is present for purposes of determining the validity of any action taken at a meeting of the board only if individuals entitled to cast a majority of the votes on that board are present at the time a vote regarding that action is taken. If a quorum is present when a vote is taken, the affirmative vote of a majority of the board members present is the act of the board unless a greater vote is required by the organizational documents.”)

29--Proxies: When Are They Valid?

Washington law allows Association members to vote by Proxy.¹ Proxies cannot be used for Board Meetings. Aside from the specific requirements below, each community's Governing Documents must be examined for additional requirements.

Condo Associations

For Condo Associations, a Proxy must satisfy all of the following requirements:

- A) It must be on paper or in some other kind of tangible form (or can be by electronic transmission, such as email);²
- B) It must be in writing;
- C) It must be dated;³
- D) It must be executed (or if by email, sufficiently identify the sender);^{4 5 6}
- E) It cannot specify that it is revocable without notice.⁷

HOAs

The HOA Act does not contain specific requirements for Proxies. However, if an HOA is a nonprofit corporation, requirements for Proxies may be authorized in the Articles of Incorporation or the Bylaws,⁸ and must satisfy the following requirements:

- A) It must be on paper or in some other kind of tangible form (or can be by electronic transmission, such as email);⁹
- B) It must be in writing;¹⁰ and
- C) It must be executed (or if by email, sufficient to identify the sender).¹¹

WUCIOA Communities¹²

WUCIOA provides that, unless the Governing Documents provide otherwise, a Unit Owner may vote by Proxy in the manner outlined in RCW 24.06.110.¹³

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Therefore, WUCIOA requires that a Proxy must be given:

- A) In a writing
- B) Signed (in person or electronically) by the Owner or an authorized director of the Owner (if a corporation); and
- C) Must be dated.¹⁴

Tangible Versus Electronic Proxies

Under Washington law, both facsimiles and scanned documents qualify as "tangible medium[s]." Thus, a copy of a written, signed Proxy that has been faxed or scanned and sent to an Association would be treated the same as the original, signed document. In other words, if the original, signed document was valid, a faxed or scanned copy of the document would be valid as well.

A Proxy sent via email would likely be treated the same as a Proxy executed via a tangible medium. A simple email (i.e. one that did not contain a digital signature as defined under Washington law) is still a validly executed Proxy under RCW 24.03.005(14), as long as it contains enough information to "determine the sender's identity." Because it could be harder to determine the sender's identity in a simple email, courts might be more likely to invalidate a Proxy executed via email. If the invalidated Proxy had cast the deciding vote, or if the Proxy's presence were necessary for the Association to have a Quorum, it would invalidate the election result. Under WUCIOA and RCW 26.06 a digital signature is required in an email.

Duration and Use of Proxies

A Proxy is valid for eleven months, unless otherwise stated in the Proxy. Proxy votes by Association members do count towards Quorum requirements.

Proxies cannot be used for Board Meetings. While Washington's statutes neither specifically authorize nor prohibit voting by Proxy for Board Members, it is generally accepted that allowing Proxy voting by Board Members is inconsistent with the duties and responsibilities entrusted personally to them.¹⁵ WUCIOA specifically states that Board Members may not vote by Proxy or absentee ballot.¹⁶

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¹ RCW 64.34.340(1), (2) provides, in relevant part:
t...Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner....

This provision applies to both New and Old Act condos. RCW 64.34.010.

RCW 64.38.025(3), (5), provides, in relevant part:
...Unless at that meeting the owners of a majority of the votes in the association are allocated or any larger percentage specified in the Governing Documents reject the budget, **in person or by proxy**, the budget is ratified, whether or not a quorum is present...The owners of a majority of the voting power in the association present, **in person or by proxy**, and entitled to vote at any meeting of the owners at which a quorum is present, may remove any member of the board of directors with or without cause.

RCW 64.90.455(5)(a) ("Votes allocated to a unit may be cast pursuant to a directed or undirected proxy duly executed by a unit owner in the same manner as provided in RCW 24.06.110.")

² RCW 24.03.005(11):
"Execute," "executes," or "executed" means **(a) signed**, with respect to a written record or **(b) electronically transmitted along with sufficient information to determine the sender's identity**, with respect to an electronic transmission, or (c) filed in compliance with the standards for filing with the office of the secretary of state as prescribed by the secretary of state, with respect to a record to be filed with the secretary of state.

RCW 24.03.005(9):
"Electronic transmission" means an electronic communication (a) not directly involving the physical transfer of a record in a tangible medium and (b) that may be retained, retrieved, and reviewed by the sender and the recipient thereof, and that may be directly reproduced in a tangible medium by a sender and recipient.

RCW 24.03.005(20):
"Tangible medium" means a writing, copy of a writing, facsimile, or a physical reproduction, each on paper or on other tangible material.

³ RCW 64.34.340. (See Footnote #1)

⁴ RCW 24.03.005(9), and (20); RCW 64.34.340.

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⁵ Under Washington law, a digital signature is sufficient when it is:

- 1) Verified by reference to the public key listed in a valid certificate issued by a licensed certification authority;
- 2) Affixed by the signer with the intention of signing the message; and
- 3) The recipient has no knowledge or notice that the signer either:
 - a. Breached a duty as a subscriber; or
 - b. Does not rightly hold the private key used to affix the digital signature.

Generally, an email will fail to satisfy the first requirement because it will not reference a public key in a certificate issued by a licensing authority. Even when an email did satisfy these requirements, however, an association is not obligated to accept it as a digital signature unless it is contained in a certified court document as defined in RCW 19.34.321. Additionally, associations are free to establish their own rules "establishing the conditions under which the recipient will accept a digital signature." RCW 19.34.300(2)(c).

⁶ "Executed" and "signed" do not have the same meaning under Washington law. "Executed" is a broader term that encompasses a "signed" document, but also includes electronic transmissions such as email. "Signed," in contrast, refers to a document on a "tangible medium" or to an electronic transmission containing a digital signature, and thus would not include most emails. *See also Footnotes 2 & 6.* RCW 24.03 and 24.06 have different definitions of what "executed" means. RCW 24.06 requires a signature of some kind.

⁷ RCW 24.03.005(14); RCW 24.06.005(17).

⁸ RCW 24.03.085(2).

⁹ RCW 24.03.085 (Voting); RCW 24.06.110 (Voting).

¹⁰ RCW 24.03.005(11); RCW 24.03.085; RCW 24.06.110; RCW 24.06.005(17).

¹¹ *Id.* But again, "executed" has a different meaning under the two non-profit corporations acts.

¹² RCW 64.90.455(5)

Except as provided otherwise in the declaration or organizational documents, the following requirements apply with respect to proxy voting:

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(a) Votes allocated to a unit may be cast pursuant to a directed or undirected proxy duly executed by a unit owner in the same manner as provided in RCW 24.06.110.

¹³ RCW 24.06.110

...If a member or shareholder may vote by proxy, the proxy may be given by:

(1) Executing a writing authorizing another person or persons to act for the member or shareholder as proxy. Execution may be accomplished by the member or shareholder or the member's or shareholder's authorized officer, director, employee, or agent **signing the writing or causing his or her signature to be affixed** to the writing by any reasonable means including, but not limited to, facsimile signature;

¹⁴ RCW 64.90.455(5)(d).

A proxy is void if it is not dated or purports to be revocable without notice.

¹⁵ Board members vote after receiving and reviewing information provided to them by an association manager, subcommittee, or other person or entity, and after discussion of an issue at the board meeting. If they are not present, they cannot be fully informed and a "proxy" vote could not be a vote made after adequate inquiry.

¹⁶ RCW 64.90.445(2)(m).

"A board member may not vote by proxy or absentee ballot."

30--Does WUCIOA Eliminate Restrictions on Assessments in an HOA's CC&Rs?

We believe that section 64.90.525 of the Washington Uniform Common Interest Ownership Act¹ ("WUCIOA") eliminates any restriction on assessment increases within the CC&Rs of an existing HOA (but not condominiums). Our legal argument is strongest in cases of a special assessment. However, the argument applies to dues increases contained within the regular budget. The argument works best if the Association can demonstrate that the restrictions are out of date and do not reflect the current financial needs of the community, and statutory obligations imposed after the CC&Rs were recorded.

RCW 64.90.525 applies to all existing HOAs and establishes the process for ratifying a budget and the accompanying assessments. RCW 64.90.525 provides that a proposed budget is approved unless a majority of Owners (or a larger number if required by the Declaration) reject the budget.² A restriction on dues increases conflicts with the budget and assessment provisions as drafted by the Washington State legislature. The statute allows the current Owners to serve as the arbiters of whether the proposed budget and assessments are reasonable.

RCW 64.90.525 represents an evolution of the budget approval process found in the HOA Act.³ Like WUCIOA, the HOA Act allows a majority of Owners to block the budget proposed by the Board and allows for the approval of the budget without the participation of a Quorum of the Owners. In most respects WUCIOA proscribes the same budgeting process as the HOA Act, except as it comes to special assessments. The HOA Act does not directly address the Board's power to pass a special assessment. WUCIOA changes this and expressly gives the

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Board the right to levy a special assessment if ratified by the Owners.⁴ This change indicates that the legislature wanted to protect the power of the Board to raise funds for the community.

RCW 64.90.525 overrides the CC&Rs of an HOA because of section 64.90.080 of WUCIOA⁵. To protect the public interest the legislature chose to supersede the existing provision of an HOA's Governing Documents with RCW 64.90.525.⁶ Where provisions within the HOA's Governing Documents differ from RCW 64.90.525, they will be wiped out and RCW 64.90.525 will replace the existing provisions. This particular section does not apply to condominiums and is not contained within the model legislation that served as the inspiration for WUCIOA. These facts suggest that the legislature was particularly concerned with an HOA's ability to adopt a realistic budget, and an acknowledgement that many existing CC&Rs prohibited Boards from doing so.

The argument is strongest when the Board seeks to raise funds through a special assessment because RCW 64.90.525 specifically empowers the Board to propose a special assessment and ratify it through the new statutory budget process.⁷ Any provisions that limit the Board's power to levy a special assessment would necessarily conflict with RCW 64.90.525. As a result, the provisions would be superseded⁸ to ensure the Board could propose a special assessment as it saw fit, subject only to the obligation to hold a meeting to allow Owners to vote it down.

A large dues increase could invite a legal challenge by an Owner. There is less risk of a legal challenge if the restrictions are stale and hinder the management of the property. Owners are also less likely to challenge assessment increases if they are applied over time, rather than in one large jump. We are confident that our interpretation of WUCIOA will be upheld by the courts. However, nothing in this chapter or book can be considered legal advice. The budget process and the validity of any assessment will depend on a number of factors. We would need to review your

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Governing Documents and understand the needs of your community before we could provide a specific legal opinion.

¹ RCW 64.90.525

- (1)(a) Within thirty days after adoption of any proposed budget for the common interest community, the board must provide a copy of the budget to all the unit owners and set a date for a meeting of the unit owners to consider ratification of the budget not less than fourteen nor more than fifty days after providing the budget. Unless at that meeting the unit owners of units to which a majority of the votes in the association are allocated or any larger percentage specified in the declaration reject the budget, the budget and the assessments against the units included in the budget are ratified, whether or not a quorum is present.
- (b) If the proposed budget is rejected or the required notice is not given, the periodic budget last ratified by the unit owners continues until the unit owners ratify a subsequent budget proposed by the board.
- (2) The budget must include:
- (a) The projected income to the association by category;
 - (b) The projected common expenses and those specially allocated expenses that are subject to being budgeted, both by category;
 - (c) The amount of the assessments per unit and the date the assessments are due;
 - (d) The current amount of regular assessments budgeted for contribution to the reserve account;
 - (e) A statement of whether the association has a reserve study that meets the requirements of section 331 of this act and, if so, the extent to which the budget meets or deviates from the recommendations of that reserve study; and
 - (f) The current deficiency or surplus in reserve funding expressed on a per unit basis.
- (3) The board, at any time, may propose a special assessment. The assessment is effective only if the board follows the procedures for ratification of a budget described in subsection (1) of this section and the unit owners do not reject the proposed assessment. The board may provide that the special assessment may be due and payable in installments over any period it determines and may provide a discount for early payment.

² RCW 64.90.525(1)(a).

³ RCW 64.38.025(3) (Which no longer applies to budgets) Within thirty days after adoption by the board of directors of any proposed regular or special budget of the association, the board shall set a date for a

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meeting of the owners to consider ratification of the budget not less than fourteen nor more than sixty days after mailing of the summary. Unless at that meeting the owners of a majority of the votes in the association are allocated or any larger percentage specified in the governing documents reject the budget, in person or by proxy, the budget is ratified, whether or not a quorum is present. In the event the proposed budget is rejected, or the required notice is not given, the periodic budget last ratified by the owners shall be continued until such time as the owners ratify a subsequent budget proposed by the board of directors.

⁴ RCW 64.90.525(3) "(The board, at any time, may propose a special assessment. The assessment is effective only if the board follows the procedures for ratification of a budget described in subsection (1) of this section and the unit owners do not reject the proposed assessment. The board may provide that the special assessment may be due and payable in installments over any period it determines and may provide a discount for early payment.")

⁵ RCW 64.90.080.

(1) Except for a nonresidential common interest community described in RCW 64.90.100, RCW 64.90.095 and 64.90.525 apply, and any inconsistent provisions of chapter 59.18, 64.32, 64.34, or 64.38 RCW do not apply, to a common interest community created in this state before July 1, 2018.

(2) Except to the extent provided in this subsection, the sections listed in subsection (1) of this section apply only to events and circumstances occurring after July 1, 2018, and do not invalidate existing provisions of the governing documents of those common interest communities. **To protect the public interest, RCW 64.90.095 and 64.90.525 supersede existing provisions of the governing documents of all plat communities and miscellaneous communities previously subject to chapter 64.38 RCW.**

⁶ RCW 64.90.080(2). ("To protect the public interest...RCW 64.90.525 supersede[s] existing provisions of the governing documents...")

⁷ RCW 64.90.525(3). ("The board, at any time, may propose a special assessment.")

⁸ Supersede means to cause to be set aside, or to take the place or position of. *Meriam-Webster*, <https://www.merriam-webster.com>

31--How Are Costs Allocated Among Owners?

Washington law requires that a community allocate the common expenses amongst the Owners according to a formula outlined in communities Declaration. The specific formula is typically established by the Declarant. However, the formula may not favor Units owned by the Declarant.

Statutes give Associations the authority to collect assessments from Owners for common expenses, in accordance with the Governing Documents.¹ Regular assessments are usually estimates of future expenses but may be for reimbursement of common expenses already paid by the Association. Actual expenses may vary between Owners and some Owners could have additional expenses if a Declaration provides for it. A condo or WUCIOA Declaration can provide that some services may be assessed or charged based on usage and expenses that benefit only some Owners can be assessed to only those Owners.²

For example, decks and patios attached to individual Units or shared by some, but not all, Units may only benefit the Owners who have access to them. As such, Associations would be permitted to assess expenses against just the benefitted Owners to repair and maintain these decks and balconies. The Declaration must specifically provide for this kind of cost allocation.³ The Condo Act does not define the term "Benefitted." WUCIOA states that "expenses specified in the declaration as benefiting fewer than all of the units" can be assessed to the Units.⁴ This implies that for WUCIOA communities, specific kinds of expenses must be stated in the Declaration to benefit only some Units.

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For both New Act and Old Act Condo Associations, common expenses are assessed by default according to the percentage of each Owner's allocation of common expenses as specified in the Declaration.⁵ For New Act Condo Associations, cost allocation may be different than the percentage of ownership interest.⁶ For Old Act Condo Associations (which have not adopted the New Act provisions), allocation of common expense liabilities, votes in the Association, and common element ownership interest must all be determined by a single common formula that is related to the original value of the Units.⁷

Under WUCIOA the default expense allocation must be included in the Declaration and will be in accordance with the common expense liabilities stated in the document.⁸

The New Act, and WUCIOA, allow the allocation of common expense liabilities, votes in the Association, and ownership interests to be made on different bases that can be unrelated to value of the Units (as long as the bases are explained and do not favor Units owned by the Declarant).⁹

For New Act, Old Act and WUCIOA Associations, the Declaration may provide for a different method of allocating costs with respect to limited common element maintenance, insurance, and utilities.¹⁰ Costs related to collection of unpaid assessments may be assessed against individual delinquent Units.¹¹

New Act Condos and WUCIOA communities can assess expenses incurred by the Association as a result of an Owner's misconduct to the Owner.¹² The Condo Act does not define what misconduct means. WUCIOA defines it to be "Willful Misconduct or gross negligence," but allows the Declaration to expand that definition to include "ordinary negligence."¹³ WUCIOA also expands the ability to assess for misconduct to extend to an Owner's tenant, guest, invitee or occupant, but also requires that prior to such an assessment, that an opportunity to be heard must

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be given to the Owner.¹⁴ It is unclear whether under WUCIOA an Association could choose not to file an insurance claim, and instead assess damage or other expenses against an individual Owner caused by their willful misconduct or gross negligence.¹⁵ For ordinary negligence, such an assessment can only be made for damages not covered by the Association's insurance.¹⁶

Under the HOA Act, the CC&Rs may provide for a reasonable method of allocating common expenses, including allocating expenses that benefit only some homeowners against only those homeowners. In addition, costs related to the collection of unpaid assessments may be assessed against individual Owners.¹⁷ Associations may only change the allocations of costs among homeowners in accordance with the provisions of the Governing Documents.

Association under the HOA Act can assess costs of collection to individual Owners. Failure by an Owner to pay "entitles an aggrieved party to any remedy provided by law or in equity," and the court may award reasonable attorneys' fees to the prevailing party.¹⁸

WUCIOA requires that the Declaration allocate the undivided interests in common elements and common expenses of the Association, and the portion of votes amongst the individual Units.¹⁹ The Declaration must state the formulas used to determine how the allocations are made between the Units.²⁰ No specific formula is assigned but the allocations may not discriminate in favor of the Declarant.²¹

¹ RCW 64.34.304(b) (Unit owners' Association– Powers); 64.32.080 (Common profits and expenses); RCW 64.38.020(2) (Association powers).

² RCW 64.34.360(3) (Common expenses – Assessments).
To the extent required by the declaration:

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- (a) Any common expense associated with the operation, maintenance, repair, or replacement of a limited common element shall be paid by the owner of or assessed against the units to which that limited common element is assigned, equally, or in any other proportion that the declaration provides;
- (b) Any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited;
- (c) The costs of insurance must be assessed in proportion to risk; and
- (d) The costs of utilities must be assessed in proportion to usage.

RCW 64.34.360(3) is one of the New Act provisions that applies retroactively to condos created before July 1, 1990. RCW 64.34.010(1). However, because the provision constitutes a significant change to the Old Act, it may only be applied retroactively to Old Act condos *if* the association approves an amendment authorizing retroactive application. *Keller v. Sixty-01 Associates of Apartment Owners*, 127 Wn. App. 614, 623 (2005).

RCW 64.90.480 Assessments and capital contributions.

(4) The declaration may provide that any of the following expenses of the association must be assessed against the units on some basis other than common expense liability. If and to the extent the declaration so provides, the association must assess:

(a) Expenses associated with the operation, maintenance, repair, or replacement of any specified limited common element against the units to which that limited common element is assigned, equally or in any other proportion that the declaration provides;

(b) Expenses specified in the declaration as benefiting fewer than all of the units or their unit owners exclusively against the units benefited in proportion to their common expense liability or in any other proportion that the declaration provides;

(c) The costs of insurance in proportion to risk; and

(d) The costs of one or more specified utilities in proportion to respective usage or upon the same basis as such utility charges are made by the utility provider.

³ RCW 64.34.360(3)(b)

⁴ RCW 64.90.445(4)(b)

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⁵ RCW 64.32.080 (Common profits and expenses); RCW 64.34.360(2) (Common expenses – Assessments).

⁶ RCW 64.34.224(1) (Common element interests, votes, and expenses – Allocation).

RCW 64.34.224, Official Comments, provides:

[RCW 64.34] departs radically from [RCW 64.32] by permitting [allocation of common element interests, votes in the Association, and common expense liabilities] to be made on different bases, and by permitting allocations which are unrelated to value... Thus, all three allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant may select, regardless of the values of those units... This section does not require that the formulas used by the declarant be justified, but it does require that the formulas be explained. The sole restriction on the formulas to be used in these allocations is that they not discriminate in favor of the units owned by the declarant or an affiliate of the declarant. Otherwise, each of the separate allocations may be made on any basis which the declarant chooses, and none of the allocations need be tied to any other allocation.

⁷ RCW 64.32.050(1) (Common areas and facilities.) provides:

Each [unit] owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the Declaration. Such percentage shall be computed by taking as a basis the value of the [unit] in relation to the value of the [entire condo property].

⁸ RCW 64.90.480(3)

⁹ RCW 64.34.224, Official Comments.

¹⁰ RCW 64.34.360(3) (applicable to Old Act and New Act condo associations). RCW 64.90.480

¹¹ RCW 64.34.364(14) (Lien for assessments) (applicable to both Old Act and New Act condo associations).

RCW 64.90.485 (19)

¹² RCW 64.34.360 (5) and RCW 64.90.480 (6)

¹³ RCW 64.90.480 (7) If the declaration so provides, to the extent that any expense of the association is caused by the negligence of any unit

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owner or that unit owner's tenant, guest, invitee, or occupant, the association may assess that expense against the unit owner's unit after notice and an opportunity to be heard, to the extent of the association's deductible and any expenses not covered under an insurance policy issued to the association.

¹⁴ RCW 64.90.480 (6) To the extent that any expense of the association is caused by willful misconduct or gross negligence of any unit owner or that unit owner's tenant, guest, invitee, or occupant, the association may assess that expense against the unit owner's unit after notice and an opportunity to be heard, even if the association maintains insurance with respect to that damage or common expense.

¹⁵ See last sentence of RCW 64.90.480(6) based on RCW 64.90.470(4)(c), an association's insurance policy is not allowed to refuse to pay due to damage caused by an owner's misconduct, but this language appears to say that an association could decline to file a claim on the association's policy, and instead assess repair costs to the responsible owner. We would recommend insurance claims be submitted in most cases.

¹⁶ See note 14. Between paragraph 6 and 7, it would appear that an association can assess more costs against owners for intentional misconduct and gross negligence than they can for ordinary negligence.

¹⁷ RCW 64.38.020 (11).

¹⁸ RCW 64.38.050 (Violation – Remedy – Attorneys' fees).

¹⁹ RCW 64.90.235 (1)

The declaration must allocate to each unit:

- (a) In a condominium, a fraction or percentage of undivided interests in the common elements and in the common expenses of the association and a portion of the votes in the association;
- (b) In a cooperative, an ownership interest in the association, a fraction or percentage of the common expenses of the association, and a portion of the votes in the association; and
- (c) In a plat community and miscellaneous community, a fraction or percentage of the common expenses of the association and a portion of the votes in the association.

²⁰ RCW 64.90.235(2).

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The declaration must state the formulas used to establish allocations of interests. Those allocations may not discriminate in favor of units owned by the declarant or an affiliate of the declarant.

²¹ RCW 64.90.235(5).

Except for minor variations due to rounding, the sum of the common expense liabilities and, in a condominium, the sum of the undivided interests in the common elements allocated at any time to all the units must each equal one if stated as a fraction or one hundred percent if stated as a percentage. In the event of discrepancy between an allocated interest and the result derived from application of the pertinent formula, the allocated interest prevails.

32--Are Major Repairs to Common Areas “Additions and Improvements” that Require Member Approval?

By statute, an Association's Board has authority to impose and collect assessments for common expenses, including necessary repairs, additions, and improvements to common areas.¹ Prior to WUCIOA, these assessment powers could be limited by the Association's Governing Documents. WUCIOA states that capital improvements “do not include making in the ordinary course of management, repairs to common elements or replacements of the common elements with substantially similar items, subject to: (A) availability of materials and products, (B) prevailing law, or (C) sound engineering and construction standards then prevailing.”²

Governing Documents often contain provisions prohibiting the Board from independently assessing Owners or paying out funds for additions or capital improvements to common areas. If such a provision exists, a Board's power to assess Owners and pay for common area construction projects, such as the installation of new siding, windows, or decks, will depend on whether the project is a repair or a capital addition or improvement. Note: the IRS definition of a capital improvement has no application to how this term is defined for an Association's Declaration.³

An unpublished decision by the Washington Court of Appeals, *Lowry v. Allenmore Ridge Condo. Ass'n*, sheds some light on this issue.⁴ In that case, a Condo Association's Board levied assessments on each Unit to cover over \$1 million in construction costs for work on the building exterior. One of the Unit Owners refused to pay and sued the Association, arguing that the Board had no authority to impose the \$1 million assessment without approval of the Owners, claiming it was an improvement. The

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Condo Association's Declaration specifically authorized the Board to make assessments for restoration, repair, or replacement of portions of the common areas, but it precluded the Board from making assessments to fund capital additions and improvements without specific approval by a percentage of the members. In order to decide whether the Board's action was authorized, the court had to determine whether the project was a "repair" or an "improvement" within the meaning of the Declaration.

The court noted that several Unit Owners had testified that the construction project was for necessary restoration, repair, and replacement of damaged components of the building envelope, which had been damaged or were nearing the end of their service life. In addition, the Association's expert had testified that: [T]he project "did not include any alterations or modifications to structural components of the buildings or construction of new buildings or property" and allowances for repair of structural damage found during construction were limited to "repair and restoration work."...He further declared that the work was "intended to repair, restore, remove and replace, in like-kind, those components of the building envelope that had been damaged or had otherwise reached or exceeded their serviceable life."

The court also noted the project manager's statements that: "Damaged structural components were removed and replaced with like-kind products. Any upgrades to components were solely for the purpose of restoring the weathertight [sic] condition of the building envelope, but all efforts were made to select products that were similar to the original materials."

Based largely on these statements, the court determined that the project was a repair, for which the Board was entitled to assess without a vote by the members; it was not a capital addition or improvement. This was true even though the exterior envelope designed and installed was substantially better (an improvement) than the original siding system.

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Although the court in *Lowry* determined that replacements (as well as some necessary upgrades) to the building envelope were repairs and not capital additions or improvements, what constitutes a repair and what constitutes a capital addition or improvement will likely vary from case to case. Courts in other states have agreed with the analysis of *Lowry*, finding that major repairs are not improvements.⁵ As in *Lowry*, the determination will depend, at least in part, on any applicable definition of the terms in the Association's Governing Documents. A court would also likely consider evidence that a significant majority of members and those involved with the project understood it to be a repair as opposed to an addition or improvement.

WUCIOA may offer assistance. RCW 64.90.485(3)(b)(ii) provides: "Capital improvements" does not include making, in the ordinary course of management, repairs to common elements or replacements of the common elements with substantially similar items, subject to: (A) Availability of materials and products, (B) prevailing law, or (C) sound engineering and construction standards then prevailing.

This definition would seem to conform to the reasoning of the court in *Lowry* and allow the community to deviate from the original plans when making repairs in response to changes in construction materials and practices. However, it is questionable whether this definition would be applicable to *Lowry's* facts. Per the statute, this definition only applies to the use of "capital improvement" in RCW 64.90.485(3)(a).⁶ The use of capital improvement elsewhere in WUCIOA is left undefined. Still, a community could copy this language when defining a capital improvement in its own documents.

¹ RCW 64.34.304 provides, in relevant, part:

(1) Except as provided in subsection (2) of this section, and subject to the provisions of the Declaration, the association may:

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- (b) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from unit owners;
- (f) Regulate the use, maintenance, repair, replacement, and modification of common elements;
- (g) Cause additional improvements to be made as a part of the common elements...

These New Act provisions are applicable to Old Act condo associations. See RCW 64.34.010.

RCW 64.38.020 provides in relevant part:

Unless otherwise provided in the Governing Documents, an association may:

- (2) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from owners;
- (6) Regulate the use, maintenance, repair, replacement, and modification of common areas;
- (7) Cause additional improvements to be made as a part of the common areas...

RCW 64.90.405 provides in relevant part:

- (1) An association must...
 - (b) Adopt budgets as provided in RCW 64.90.525;
 - (c) Impose assessments for common expenses and specially allocated expenses on the unit owners as provided in RCW 64.90.080(1) and 64.90.525...
- (2) ...the association may:
 - (b) Amend budgets under RCW 64.90.525...
 - (f) Regulate the use, maintenance, repair, replacement, and modification of common elements;
 - (g) Cause additional improvements to be made as part of the common elements...
 - (k) Collect assessments...

² RCW 64.90.485(3)(b)(ii)

(1)(a). Within thirty days after adoption of any proposed budget for the common interest community, the board must provide a copy of the budget to all the unit owners and set a date for a meeting of the unit owners to consider ratification of the budget not less than fourteen nor more than fifty days after providing the budget. Unless at that meeting the unit owners of units to which a majority of the votes in the association are allocated or any larger percentage specified in the declaration reject the budget, the budget and the

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assessments against the units included in the budget are ratified, whether or not a quorum is present...

(3) The board, at any time, may propose a special assessment. The assessment is effective only if the board follows the procedures for ratification of a budget described in subsection (1) of this section and the unit owners do not reject the proposed assessment...

³ The definitions of these terms promulgated by the IRS have no bearing on their meaning in the context of a Board's authority to make assessments, unless the Association's Governing Documents expressly adopt the IRS definitions. For more, see the IRS Capitalization v. Repairs Audit Technique Guide at <http://www.irs.gov/Businesses/Capitalization-v-Repairs-Audit-Technique-Guide#14>.

⁴ *Lowry v. Allenmore Ridge Condo. Ass'n*, 171 Wn. App. 1001 (2012)

⁵ Many courts look at whether a particular project is necessary to maintain common areas in order to determine if it constitutes a "repair" or a "capital addition or improvement." In *Behm v. Victory Lane Unit Owners' Assn., Inc.*, 133 Ohio App.3d 484 (1999) an Ohio court held that replacing the foundation underpinning of a building constituted "maintenance" rather than a "capital improvement" because it was necessary to prevent further subsidence of the building. A Florida court found that replacement of a seawall was maintenance because it was "necessary to protect the condominium common elements". *Ralph v. Envoy Point Condominium Ass'n, Inc.*, 455 So.2d 454, 455 (1984).

⁶ RCW 64.90.485(3)

(a)(i) The common expense assessments, excluding any amounts for **capital improvements**, based on the periodic budget adopted by the association pursuant to RCW 64.90.480(1), along with any specially allocated assessments that are properly assessable against the unit under such periodic budget, which would have become due in the absence of acceleration during the six months immediately preceding the institution of proceedings to foreclose either the association's lien or a security interest described in subsection (2)(b) of this section...

(b) **For the purposes of this subsection:** (ii) "Capital improvements" does not include making, in the ordinary course of management, repairs to common elements or replacements of the common elements with substantially similar items, subject to: (A) Availability of materials and products, (B) prevailing law, or (C) sound engineering and construction standards then prevailing.

33--Move-in Fees: Can Associations Charge Move-in Fees?

Associations may require Owners to pay move-in fees both when the Owners move in to their Units, and whenever new tenants move in. The move-in fees must be assessed in a way that is consistent with both the Governing Documents and all applicable statutes, and they must be directly related to the costs incurred by the Association as a result of the move. Associations may not use move-in fees to defray costs of repairing and maintaining common elements that are unrelated to the move.

No Washington court has addressed the question of whether an Association may assess Owners move-in fees when new occupants move in. However, case law from other jurisdictions provides some guidance.

Move-In Fees Must Be Directly Related to Costs Attributable to a Change in Occupancy and Be Non-Discriminatory

Move-in fees must be authorized by both the Governing Documents and the relevant statutes. With limited exceptions, Washington law requires Associations to assess common expenses against all Owners in proportion to their interest in common elements and prohibits formulas for assessing fees that discriminate in favor of the Declarant.¹ Thus, an Association would not be permitted to use move-in fees collected from a subset of Owners to cover repairs and maintenance of common elements.²

A New Jersey court, interpreting a condominium statute similar to the New Act and WUCIOA, held that an Association could not charge Owners renting Units move-in fees that were not "directly related" to the "administrative and personnel" costs incurred by the Association in connection with tenants moving in to the Units.³ Move-in fees used to defray the costs of wear to common elements caused by all Owners were, the court held,

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“discriminatory revenue-raising devices” that were not authorized by the Association's Governing Documents or state statutes.⁴

Some examples of costs that might be directly attributable to moving are: additional garbage/recycling pickups, hanging and removing padding from elevators and walls to protect them from damage, and cleaning floors that have higher traffic than usual during a move. Examples of fees that would be attributable to changes in occupancy, but not the act of moving itself, might include reprogramming intercoms, giving orientations to new residents, updating mailboxes, updating resident directories, and other administrative costs. These costs will differ with the size of a building, the amenities available in the building, the paperwork an Association requires new occupants to sign, etc. Associations should make a list of all costs associated with changes in occupancy to determine what a reasonable move-in fee would be. We successfully defended a move in fee in arbitration because we could demonstrate costs exceeding the amount of the fee.

Since courts are unlikely to uphold fees that are discriminatory with respect to a subset of Owners, Associations cannot require that only landlord Owners pay move-in fees when a change in occupancy occurs.⁵ Damage to common elements such as elevators and hallways during a move is not specific to renters; an Owner moving in to a Unit is no less likely to nick a wall or scrape an elevator door than a tenant. Similarly, fees associated with garbage and recycling when a Unit changes occupancy may be incurred when both Owners and renters move.

An Association might be permitted to charge a higher move-in fee, or a fee only to landlord Owners, if it could show that the expenses of a change in occupancy of a leased Unit were higher than those associated with an unleased Unit. For example, if garbage pickup fees were consistently higher when tenants moved in than when Owners moved in, an Association might be permitted to impose a higher move-in fee on landlord Owners. It may be difficult for an Association to show that it incurs greater

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costs due to changes in occupancy across the board with leased Units, so an Association may be better off assessing any extra expenses incurred as a fine against the landlord Owners when a tenant's move actually does result in higher costs.

An Association might also be able to require Owners to pay move-in fees, even where these do not represent actual costs incurred from changes in occupancy, provided that the Declaration states that a fee will be assessed against Owners, and states what the fee is, or how it will be calculated. In this case, the Owner would have been on notice, prior to purchasing the Unit, that he or she would be subject to a move-in fee. If an Owner chose to purchase a Unit knowing he or she would be subject to a fee, courts may be less likely to find that the fee is invalid. Owners are also unlikely to challenge fees contained in the Declaration.

Associations Cannot Recoup Move-In Fees Through Misconduct Fines

An Association may not assess move-in fees against Owners leasing their Units by treating them as remedial fees.⁶

Associations may impose assessments to cover expenses caused by an Owner's misconduct. However, costs incurred due to inevitable wear-and-tear during a typical move would not qualify as "misconduct." Similarly, costs related to garbage or recycling removal could not be assessed as misconduct in most cases.

Moves result in a higher volume of garbage and recycling because occupants inevitably unpack boxes and discard packing materials, not because they have been negligent. In the cases in which an occupant is negligent (e.g. leaving trash or furniture strewn about near the dumpster), and an Association has additional expenses because of such negligence, the Association may be able to assess these expenses against the Owner.

¹ RCW 64.32.080. ("The common profits of the property shall be distributed among, and the common expenses shall be charged to, the apartment owners according to the percentage of the undivided interest in the common areas and facilities.")

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RCW 64.34.224

- (1) The declaration shall allocate a fraction or percentage of undivided interests in the common elements and in the common expenses of the association, and a portion of the votes in the association, to each unit and state the formulas or methods used to establish those allocations. Those allocations may not discriminate in favor of units owned by the declarant or an affiliate of the declarant.

RCW 64.34.360

- (1) Until the association makes a common expense assessment, the declarant shall pay all common expenses. After any assessment has been made by the association, assessments must be made against all units, based on a budget adopted by the association.
- (2) Except for assessments under subsections (3), (4), and (5) of this section, all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to RCW 64.34.224(1). Any past due common expense assessment or installment thereof bears interest at the rate established by the association pursuant to RCW 64.34.364.
- (3) To the extent required by the declaration:
 - (a) Any common expense associated with the operation, maintenance, repair, or replacement of a limited common element shall be paid by the owner of or assessed against the units to which that limited common element is assigned, equally, or in any other proportion that the declaration provides;
 - (b) Any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited;
 - (c) The costs of insurance must be assessed in proportion to risk;
 - (d) The costs of utilities must be assessed in proportion to usage.
- (4) Assessments to pay a judgment against the association pursuant to RCW 64.34.368(1) may be made only against the units in the condominium at the time the judgment was entered in proportion to their allocated common expense liabilities at the time the judgment was entered.
- (5) To the extent that any common expense is caused by the misconduct of any unit owner, the association may assess that expense against the owner's unit.
- (6) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due shall be recalculated in accordance with the reallocated common expense liabilities.

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RCW 64.90.235

- (2) The declaration must state the formulas used to establish allocations of interests. Those allocations may not discriminate in favor of units owned by the declarant or an affiliate of the declarant.

RCW 64.90.480

- (3) Except as provided otherwise in this section, all common expenses must be assessed against all the units in accordance with their common expense liabilities, subject to the right of the declarant to delay commencement of certain common expenses under subsections (1) and (2) of this section. Any past due assessment or installment of past due assessment bears interest at the rate established by the association pursuant to RCW 64.90.485.
- (4) The declaration may provide that any of the following expenses of the association must be assessed against the units on some basis other than common expense liability. If and to the extent the declaration so provides, the association must assess:
 - (a) Expenses associated with the operation, maintenance, repair, or replacement of any specified limited common element against the units to which that limited common element is assigned, equally or in any other proportion that the declaration provides;
 - (b) Expenses specified in the declaration as benefiting fewer than all of the units or their unit owners exclusively against the units benefited in proportion to their common expense liability or in any other proportion that the declaration provides;
 - (c) The costs of insurance in proportion to risk; and
 - (d) The costs of one or more specified utilities in proportion to respective usage or upon the same basis as such utility charges are made by the utility provider.
- (6) To the extent that any expense of the association is caused by willful misconduct or gross negligence of any unit owner or that unit owner's tenant, guest, invitee, or occupant, the association may assess that expense against the unit owner's unit after notice and an opportunity to be heard, even if the association maintains insurance with respect to that damage or common expense.
- (7) If the declaration so provides, to the extent that any expense of the association is caused by the negligence of any unit owner or that unit owner's tenant, guest, invitee, or occupant, the association may assess that expense against the unit owner's unit after notice and an opportunity to be heard, to the extent of the association's deductible and any expenses not covered under an insurance policy issued to the association.
- (8) In the event of a loss or damage to a unit that would be covered by the association's property insurance policy, excluding policies for earthquake, flood, or similar losses that have higher than standard

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deductibles, but that is within the deductible under that policy and if the declaration so provides, the association may assess the amount of the loss up to the deductible against that unit. This subsection does not prevent a unit owner from asserting a claim against another person for the amount assessed if that other person would be liable for the damages under general legal principles.

² In *Westbridge Condominium Ass'n, Inc. v. Lawrence*, 554 A.2d 1163 (1989), the District of Columbia court of appeals invalidated a move-in fee imposed against owners as an alternative method of assessing fees to repair and maintain common elements. "[T]he pro rata assessment method provided in the condominium documents," the court held, "establishes the exclusive means for recovering common elements expenses such as those incurred by [defendant's] move-in" except in cases of "negligence, misuse, or neglect of common elements." The method of assessing common elements expenses could not be modified by the board absent an amendment adopted in accordance with the requisite procedures.

See also *Miesch v. Ocean Dunes Homeowners Ass'n, Inc.*, 464 S.E.2d 64 (1995) (holding that move-in fees assessed only against owners renting their units on a short-term basis were prohibited because they "amount[ed] to an additional assessment for common expenses against invitees of only certain units' owners."

³ *Chin v. Coventry Square Condominium Ass'n.*, 637 A.2d 197, 201 (1994). (Condominium instituted a fee which appeared designed to discourage rental of units. Trial court permitted the condominium to implement a fee associated with unit rentals but required that the fee be reasonably related to the rental activity.)

⁴ *Id.* See also *Westbridge*, 554 A.2d at 1165-66 (holding that a move-in fee assessed by an association "represented a double charge for services [defendant] had already paid in annual condominium dues."

Miesch, 464 S.E.2d 64 at 560. (A North Carolina appellate court similarly found a move-in fee assessed only against owners leasing their units for less than 28 days to be invalid because it "impermissibly created two different classes of unit owners.")

⁵ *Id.*

⁶ *Chin*, 637 A.2d at 200.

34--Can Associations Borrow Money?

Associations are permitted to borrow money, but this power is subject to any limitations in the Declaration.¹ Most Associations do not own property and can only secure a loan by assigning their right to collect future income as collateral. The power to borrow money does not mean the Association can assign its right to future income to a lender. WUCIOA communities are permitted to assign their right to collect future income by statute.² Secured loans under this statute must follow special approval processes.³ Condominium Associations may only assign their right to collect future income if specifically provided for in the Declaration. The HOA Act is silent about the ability to assign future income.

Associations are permitted to borrow money. For all common interest communities organized under Washington law, the Governing Statutes authorize the Association to borrow money under the broad power granted to corporations in this state. The Declaration may limit the Association's power to borrow money. But having the corporate authority to borrow is different than having the authority to create collateral sufficient for a bank to loan the Association money.

Most lending institutions will not lend money without receiving some form of security on the loan. Most Associations do not own property in the community, and therefore cannot use it to secure a loan. Instead, the Association must secure its loan by assigning its right to future income. By assigning this right to the bank, the bank gains the right to collect the community's assessments if the Association fails to pay back the loan. The ability to assign the right to future income is not included in the authorization to borrow money and must be authorized separately by statutory provisions or the Governing Documents.

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For Old and New Act condominiums, an Association may assign its rights to future income if the Declaration permits it. ⁴ These communities cannot assign their right to collect future interests unless the Declaration expressly authorizes it. WUCIOA allows communities under its governance to assign their right but requires special Owners' ratification. The HOA Act is silent. So, for an HOA to borrow may be mostly dependent on the bank's terms and an attorney's willingness to declare in a legal opinion that the HOA has the authority to perform that contract.

Under WUCIOA, Owners must ratify a loan secured through the right to collect a future interest. The Board must provide notice of the intent to borrow to all Unit Owners. In the notice the Board must describe: 1) the purpose of the loan and how the money will be spent; 2) the amount, term, and interest rate of the loan; 3) the amount and term of any assessments required to repay the loan; and 4) the date of the Owners meeting at which the loan may be ratified. The date of the meeting must be between 14 and 60 days after the mailing of the notice. The loan will be ratified unless a majority of votes in the Association (or more if required by the Declaration) reject the proposal to borrow funds.

The best practice is to conduct proper Reserve Studies as required by law and collect a sufficient reserve fund to avoid the need to borrow. This process will save money as the community will not need to pay interest (and will actually earn interest) on the money in the reserve fund. It is also considered fair to Owners, as it spreads the costs out over time and ensures that the Owners who actually caused the wear to the common elements are the ones paying for their repair. If a community has not maintained sufficient reserves, they can instead consider a lump sum special assessment. This may place a burden on current Owners that may not be viewed as fair, but it will save the community money by avoiding the interest payments on the loan. If a community considers a loan, it should also consider levying a special assessment to reduce or eliminate a loan.

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¹ RCW 64.34.304(1). (“...subject to the provisions of the declaration, the association may...(e) Make contracts and incur liabilities...”)

RCW 64.38.020(5). (“Unless otherwise provided in the governing documents, an association may...make contracts and incur liabilities...”)

RCW 64.90.530(2). (“...subject to the provisions of the declaration, the association may...(e) make contracts and incur liabilities subject to subsection 4 of this section...”)

² 64.34.304(1)(n). (“...the association may...Assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration provides...”)

64.90.405(2)(p). (“...the association may...subject to subsection (4) of this section, assign its right to future income, including the right to receive assessments...”)

³ RCW 64.90.405

- (4) Any borrowing by an association that is to be secured by an assignment of the association's right to receive future income pursuant to subsection (2)(e) and (p) of this section requires ratification by the unit owners as provided in this subsection.
- (a) The board must provide notice of the intent to borrow to all unit owners. The notice must include the purpose and maximum amount of the loan, the estimated amount and term of any assessments required to repay the loan, a reasonably detailed projection of how the money will be expended, and the interest rate and term of the loan.
 - (b) In the notice, the board must set a date for a meeting of the unit owners, which must not be less than fourteen and no more than sixty days after mailing of the notice, to consider ratification of the borrowing.
 - (c) Unless at that meeting, whether or not a quorum is present, unit owners holding a majority of the votes in the association or any larger percentage specified in the declaration reject the proposal to borrow funds, the association may proceed to borrow the funds in substantial accordance with the terms contained in the notice.

⁴ RCW 64.34.304(n). (“Assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration provides...”)

35--How Should Association Minutes and Records Be Maintained?

Associations must keep meeting minutes for Board Meetings, Board committee meetings and Association meetings.¹ Meeting minutes serve as the official (and legal) record of decisions made and actions taken at a Board Meeting or an Association meeting.² Associations organized under WUCIOA, the New Act and the HOA Act are required to keep meeting minutes for Board Meetings and Association meetings.³ Old Act Condo Associations are only required to keep meeting minutes for Board Meetings and Association meetings if the Association is incorporated under one of the Nonprofit Corp. Acts.⁴ The Governing Statutes provide little guidance on what must be included in the minutes.

Under WUCIOA the minutes must record:

- (1) The decision on each matter voted upon at a Board Meeting or Unit Owner meeting must be recorded in the minutes.⁵
- (2) The removal of a Board Member or elected officer by the Board.⁶
- (3) A record of Unit Owner votes must be kept with the minutes of the Association meetings.⁷

The content that an Association is required to include in its meeting minutes may be determined by the Association's Governing Documents. Associations may require their meeting minutes to include any information they want, but Associations typically should require the following information be included:

- (1) the type of meeting (i.e. "regular" or "special"),

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- (2) the name of the body that held the meeting (i.e. the Board or the Association),
- (3) the date of the meeting,
- (4) the location of the meeting (if it is not always the same),
- (5) the names of those present (and those who were not present) for Board Meetings, and whether a Quorum was present if an Association meeting,
- (6) whether the minutes of the previous meeting were approved (including the date of the previous meeting),
- (7) all motions (resolutions) made (excluding withdrawn motions), points of order, and appeals including vote tallies for both approved and defeated motions, and
- (8) the time the meeting began and adjourned.

Before the minutes are official they must be approved by the entity that held the meeting.

The purpose of meeting minutes is to provide interested parties (i.e. Owners in an Association) with a record of what action was taken at a given meeting. Meeting minutes also allow the Association (read: the Board) and Owners to keep track of the status of resolutions and projects, and meeting minutes can also resolve disputes (as they are the official record of what occurred at a meeting).

The minutes are the official record of what happened. What they say happened is what legally happened (even if you think it is not what actually happened). When the minutes are approved, it is the majority of the Board (or Association as appropriate) agreeing that they accurately reflect what happened.

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Minutes are not a narrative about who said what. They should reflect actions considered by the Board (motions made) and the outcome of each. Some Associations keep records of all passed motions in a "Book of Resolutions" to have a single source of the actions taken by the Board. This book would list the resolutions that affect the community. It would not list routine motions like approval of minutes.

How long an Association keeps its meeting minutes, where and in what form (electronic or paper) they are kept, and who is ultimately responsible for their retention and preservation can all be determined by the Association's Governing Documents. There are no statutory requirements for any of these issues.

Typically, the meeting minutes are the responsibility of the secretary of the Board. If the Governing Documents do not specify how long meeting minutes should be kept, we advise that meeting minutes are a permanent record of the Association.

Meeting minutes do not have to be filed with any government entities and they can (and should) be kept with the Association's Declaration and Bylaws. Meeting minutes should be kept in a bound ledger with numbered pages. Traditionally, meeting minutes were hand-written, but most people type (electronically) meeting minutes now. Some Associations keep electronic copies of minutes and some post all minutes to a private website for access by community members.

¹ See RCW 24.03.135 (Required documents in the form of a record — Inspection — Copying); RCW 24.06.160 (Books and records); RCW 64.34.300 (Unit owners' association — Organization); RCW 64.38.035 (Association meetings — Notice — Board of directors).

RCW 64.90.445(3). ("Minutes of all unit owner meetings and board meetings, excluding executive sessions, must be maintained in a record. The decision on each matter voted upon at a board meeting or unit owner meeting must be recorded in the minutes.")

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RCW 64.90.495(1)(b). (“An association must retain the following...Minutes of all meetings of its unit owners and board other than executive sessions, a record of all actions taken by the unit owners or board without a meeting, and a record of all actions taken by a committee in place of the board on behalf of the association...”)

² Board actions or decisions are referred to as resolutions. Association actions or decisions are typically approval of or ratification of Board resolutions. For example, Associations ratify budgets proposed by Boards.

³ See RCW 24.03.135 (Required documents in the form of a record — Inspection — Copying); RCW 24.06.160 (Books and records); RCW 64.34.300 (Unit owners' association — Organization); RCW 64.38.035 (Association meetings — Notice — Board of directors); RCW 64.90.445 (Meetings); RCW 64.90.495 (Association Records).

⁴ See RCW 24.03.135; RCW 24.06.160.

⁵ RCW 64.90.455.

⁶ RCW 64.90.520(4). (“The board may, without a unit owner vote, remove from the board a board member or officer elected by the unit owners if (a) the board member or officer is delinquent in the payment of assessments more than sixty days and (b) the board member or officer has not cured the delinquency within thirty days after receiving notice of the board's intent to remove the board member or officer. Unless provided otherwise by the governing documents, the board may remove an officer elected by the board at any time, with or without cause. *The removal must be recorded in the minutes of the next board meeting.*”)

⁷ RCW 64.90.455(6)(j). (“When an action is taken pursuant to this subsection, a record of the action, including the ballots or a report of the persons appointed to tabulate such ballots, must be kept with the minutes of meetings of the association.”)

36--What Can an Association Do About a Terrible Neighbor?

Boards have the authority to issue fines for neighbors who violate the Governing Documents, and usually have the authority to sue for failure to comply with the Governing Documents. For offensive behavior that violates the law, Owners and Board Members can contact the police, but often the behavior is not severe enough for the police to take action. Boards can ask a neighbor to change their behavior, and may try to involve an outside party, like a professional mediator, to help resolve disputes. Boards may also decide not to get involved in a dispute between neighbors, because the investment of time and energy may be unproductive. The Board may want to consider upgrading their security.

If the resident's conduct violates the law, we recommend calling the police immediately. Even if the police do nothing, they will write a report about the incident that can become evidence for other enforcement action by the Association. Sometimes a conversation with the police will change an occupant's behavior. Other times the result will be unsatisfying, because the police take no action. Example: a member of one community was shooting a gun off of his balcony. The police came, talked with him, and left. Example: a community member threw her TV off her balcony 5 times and harassed neighbors based on their sex and religion. Police knew of the resident and had spoken to her many times. But because they did not consider her conduct to be a threat to herself or to others, they could not do anything about the behavior.

Boards and managers want us to stop the behavior immediately, and often believe we have magical powers that will stop the neighbor's conduct. Certainly, there are times where an Owner was not aware that their conduct was disturbing others or was not allowed. So, one of our first questions to the client may be to ask if

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anyone has spoken to the resident and asked them to stop the offensive behavior. Often, the resident willingly corrects the behavior because their intent is not to offend. We recommend that the first formal contact (in writing) from the Association assume that the Owner is not aware that their conduct is a problem, and attempt to educate the Owner, and ask for their compliance.

Even if a letter comes from an attorney, it is often intended to educate the Owner about the problematic behavior, and to cite specific provisions in the Governing Documents that prohibit the behavior, and to ask for compliance within some specific period of time. Example: Owner and boyfriend open an internet gun shop, selling firearms out of their third-floor condo Unit. An attorney letter may also state what actions will be taken (and when) if the offending Owner does not comply with the request.

Consider that there may be a solution (to what the Board is certain is a clear violation) which solves the problem for the neighbors, but also accommodates the needs of the Owner who is in violation. Noise problems often fall into this category. Example: loud piano. A professional pianist moves into a townhome, and one of her neighbors doesn't like hearing the piano play 20 plus hours a week. The Board approached as a strict violation and prohibited the piano being played. The pianist did not want to offend and looked at ways of reducing the sound levels of the piano to within what should be expected by her neighbors living in multi-family housing. Example: Sometimes behavior modifications like wearing slippers and using carefully placed carpets can make noise from a hardwood floor acceptable to the neighbors below.

Sometimes a third party can assist with resolving the problem. Family members and friends may be able to help deal with a problem Owner. Example: hoarding Owner, whose family did help. Example: paranoid Owner whose father agreed to intervene. There are neighborhood dispute resolution centers, and mediation programs at the local law schools, who might be able to help at little or no cost. There are also professional mediators, often

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lawyers or retired judges, who can help Owners and Boards come to some kind of resolution and help calm tempers.

If asking and problem solving do not work, every community Association can issue fines for violations of its Rules, Regulations, and other Governing Documents. This is true even if the Declaration or CC&Rs are silent, because the authority comes from statutes.¹ The Board **MUST** follow the procedures required by the statutes giving fining authority, meaning that there must be a Fine Schedule distributed (in advance) to the Owners, and you must give an opportunity to be heard before a fine is assessed. It is not enough to allow an appeal; give them a period of time to request a hearing, then you can assess the fine.

The process of fining can at times be very unsatisfying. Some Owners will simply pay the fine and continue to violate the rules. Example: we have had Owners with multiple pets, in excess of those allowed by the community, simply pay fines rather than give up their pets. Example: we have had landlord Owners who find it more cost effective to pay fines than properly rent their homes.

So, what other options does the Board have? Litigation is usually an option but check your Governing Documents to be sure. Many developers installed provisions in the Declarations to protect themselves from being sued, by inserting binding arbitration as a substitute for the courts. Arbitration can be much faster and may reach resolution at a lower cost than the court but can still be unsatisfying in how long it takes, and how well it works.

The statutes and most Governing Documents allow the Association or any aggrieved Owner to sue a neighbor to get compliance with the Governing Documents. We generally recommend against going to court until you have made reasonable attempts to resolve the problem cooperatively.² When we go before any judge, we want to be able to demonstrate that the Board is being reasonable in its request.³

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Most Declarations, and the statutes that govern community Associations, provide that attorney fees may be awarded to a prevailing party in litigation. Virtually every Board is certain that it will be the prevailing party, and so may be willing to spend the money required to force compliance. But an uncooperative Owner can make litigation a protracted and expensive process. Trial courts routinely grant attorney's fees in the neighborhood of \$25,000⁴ and it is not uncommon to see attorney fees in appellate court cases exceed \$100,000.⁵ Those amounts may be less than an Association actually spends.

Our experience is that sometimes, when a lawsuit is actually served on an Owner, they become incredibly cooperative. Example: one Owner we sued, because he refused access to his condo Unit to allow a fire alarm to be installed, contacted the manager within minutes of being served to arrange a time for the installation. Example: Owner evaded service for weeks, and when finally served at his place of employment, retained a lawyer to try and work out a solution, and offered to reimburse the Association's attorney fees.

Filing a lawsuit does not usually provide the instant gratification and results that clients imagine will happen. In most cases, conduct and behavior are not so severe that a court will skip due process to make any decision. Even the most straightforward cases can take months before any hearing can be obtained in front of a judge. And if there are disputed facts, it can require a trial to establish what the facts "really are," before a court can find a violation and order some change. And court procedures provide an opportunity for offensive Owners to make life more difficult for the Association and its manager. Example: we have a case where a judge ordered the Association to produce every complaint by the Association or any Owner against any other Owner for the past four years. Example: we had a case where every email from or to a Board Member that mentioned the Association had to be produced. It was over 3,000 emails.

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If an Owner is threatening his neighbors, those neighbors may be able to get an anti-harassment order in a short period of time, but the Association is typically not able to get a temporary order, and especially not an order that would prohibit an Owner from returning to his home. If the Owner's conduct is a significant threat to the community, we can try and get a court to agree to impose temporary measures but cannot make any guarantees that a court will agree. Our client where the gun shop was opened was prepared to take that to court, but fortunately for everyone, the Owner agreed to shut the shop down before that step was taken.

Increasing security by installing cameras or hiring security guards may ease some of the community's concerns. These measures will also help document the behavior making it easier to confront the Owner or take other actions. Example: one community installed cameras that monitored the path an Owner took from the front door of her home all the way to her parking spot; allowing the community to monitor her whenever she left her home.

And then there are cases of bad neighbor conduct that a Board either cannot determine are actually a problem, or cannot justify the time, energy and expense of enforcing for the benefit of the neighbors. The statutes give Boards the power to enforce the Governing Documents, but not the obligation to.⁶ The statutes also give any aggrieved member of the community the same power to enforce the documents that the Association has. Many Owners read the enforcement requirements of their Governing Documents to require the Board to sue their neighbor for them. WUCIOA specifically comments on a Board's option to choose not to enforce every infraction.⁷

Sometimes we advise our client Boards that they may have an obligation to determine if a violation of the documents has occurred, but that does not create an obligation to enforce the documents against one neighbor on behalf of another. Example: If the documents prohibit a tree from blocking a "view of significance," it probably falls to the Board or architectural control

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committee to decide if a tree does actually block a “view of significance.” The Association has to have people go to the homes to evaluate the claim.⁸ The Board must adequately inquire to fulfill its duty of reasonable and ordinary care in making the decision. But then the Board can decline to take other enforcement measures and leave the resolution of the dispute to the Owners.⁹

Declining to enforce will of course anger the Owner who wants the protection of the documents as they interpret them. And it is certainly true that when an Owner sues his neighbor over something like a tree, the Owner will usually also sue the Association for failing to enforce the documents for them. This is a reason for every Association to have Directors and Officers Liability Insurance, because the value of a defense by the insurance company can be considerable. There will not always be insurance though; read your policies and determine if they will cover non-monetary claims. We recently had an Association that was sued to quiet title to a piece of land owned by the Association, and their insurance declined because no money was sought by the Owner who brought the suit.

¹ RCW 64.34.304(1)(k). (“...the association may...levy reasonable fines in accordance with a previously established schedule thereof adopted by the board of directors and furnished to the owners for violations of the declaration, bylaws, and rules and regulations of the association...”)

RCW 64.38.020(11). (“...the association may...levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association...”)

RCW 64.90.405(2)(l). (...the association may...enforce the governing documents and, after notice and opportunity to be heard, impose and collect reasonable fines for violations of the governing documents in accordance with previously established schedule of fines adopted by the board of directors and furnished to owners...”)

² *Christiansen, et al. v. Heritage Hills 1 Condominium Ass'n*. No. 06CV1256, (Colo. Dist. Ct. 2006). (“It is apparent that the shared

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airspace in the soffit area permits smoke or smoke smell to migrate. Thousands of dollars of contract work has not solved the problem. The smoking ban was reasonably investigated, drafted and passed by three out of four owners after years of trying to address the problem by other means. There can be no finding that the passage was arbitrary or capricious or done in bad faith.”)

³ *Kawawaki v. Academy Square Condominium Ass'n*, 176 Wash.App. 1038 (Wash. Ct. App. 2013). (“We must first consider whether the House Rule here...is reasonable in purpose and...application. A house rule has a reasonable purpose when it is one that is reasonably related to the promotion of the health, happiness, and peace of mind of the unit owners. To be reasonable in application, a house rule must not be selectively enforced...” (Internal Quotation Omitted) (Internal Citation Omitted)).

⁴ *Fairway Estates Ass'n of Apartment Owners v. Unknown Heirs, Devisees of Young*, 172 Wash.App. 168 (Wash. App. Ct. 2012). (“Appellate court affirmed award of \$24,196.”); *White v. Lakeland Homeowners Ass'n*, 187 Wash.App. 1040 (Wash. App. Ct. 2015) (Appellate court affirmed trial court's award of \$24,774.98.); *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wash. App. 697 (Wash. App. Ct. 2000) (Appellate court affirmed trial court's award of \$25,000.)

⁵ *Riss v. Angel*, 131 Wash.2d 612 (1997). (Trial court awarded \$103,989.85, 20 years ago.)

⁶ RCW 64.32.060. (“Each apartment owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either may be lawfully amended from time to time, and with the covenants, conditions, and restrictions set forth in the declaration or in the deed to his or her apartment. Failure to comply with any of the foregoing shall be ground for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of apartment owners or by a particularly aggrieved apartment owner.”)

RCW 64.34.304(1)(k). (“...the association may...impose and collect charges for late payment of assessments pursuant to RCW 64.34.364(13) and, after notice and an opportunity to be heard by the board of directors or by such representative designated by the board of directors and in accordance with such procedures as provided in the declaration or bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule thereof adopted by the board of directors and

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furnished to the owners for violations of the declaration, bylaws, and rules and regulations of the association..."

RCW 64.38.020(11). ("...an association may...impose and collect charges for late payments of assessments and, after notice and an opportunity to be heard by the board of directors or by the representative designated by the board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association...")

RCW 64.90.405(2)(l). ("the association may...enforce the governing documents and, after notice and opportunity to be heard, impose and collect reasonable fines for violations of the governing documents in accordance with a previously established schedule of fines adopted by the board of directors and furnished to the owners...")

⁷ RCW 64.90.405

(8) The board does not have a duty to take enforcement action if it determines that, under the facts and circumstances presented:

- (a) The association's legal position does not justify taking any or further enforcement action;
- (b) The covenant, restriction, or rule being enforced is, or is likely to be construed as, inconsistent with law;
- (c) Although a violation may exist or may have occurred, it is not so material as to be objectionable to a reasonable person or to justify expending the association's resources; or
- (d) It is not in the association's best interests to pursue an enforcement action.

⁸ *Riss v. Angel*, 131 Wash.2d 612 (1997). ("However, the association's decision was unreasonable and arbitrary and in violation of the covenants because it was made without adequate investigation and was based upon inaccurate information.")

⁹ See, *Ducharme v. City of Bellevue*, No. 15-2-1106-0 SEA (Wash. Super. Ct. 2016) (The court sided with City and HOA and against the homeowner who instituted the lawsuit on his own. The court found that the owner was not entitled to sightlines he claimed was blocked by trees owned by the city.)

37--How to Respond to a Request for a Fair Housing Act Accommodation?

Short Answer

The Fair Housing Act ("FHA") requires communities to permit reasonable modifications to the structure or otherwise reasonably accommodate an individual with a disability. The Board may investigate the request but only to the extent necessary to confirm the disability and identify the connection between the disability and the request. It is permissible to deny the request when it is unrelated to the disability, would impose an undue burden on the community, or alter the community's operations. You can ask if a person is disabled but not what the disability is.

Who Must Be Accommodated?

Under the FHA a disability means:

- 1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
- 2) a record of having such an impairment, or
- 3) being regarded as having such an impairment,

The protections extend not just to a disabled Owner but to an Owner who has disabled friends, family, or associates and failure to accommodate these individuals would impair the Owner's use and enjoyment of their homes.¹

An addiction to controlled substances is not a disability.² The FHA does not require accommodation of a person who creates a direct threat to the community.³ A direct threat is a significant risk to the health or safety of others which cannot be eliminated through a reasonable accommodation.⁴ This determination must be made on a case-by-case basis supported by objective evidence.⁵

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What Is a Reasonable Accommodation?

A reasonable accommodation is a change to the community's rules or policies which allows the disabled to make equal use and enjoyment of the property.⁶

Examples include:⁷

- 1) Providing an assigned parking space in front of an Owner's Unit even though parking is handled on a first-come basis. You may not charge any additional fees for a handicapped spot.
- 2) Modifying the community's pet policy to provide for therapy and service animals. Service animals are not pets under the law and no fees may be assessed for service animals.

What Is a Reasonable Modification?

A reasonable modification is a structural change to the premises which permits a person with a disability to fully enjoy the property.⁸ The Owner must request and obtain permission before modifying an area outside of their control. The community must approve a reasonable request reasonably related to the claimed disability.

Assuming that the modification was not otherwise required by law, the community may require the Owner to pay for the requested modification.⁹ The costs of maintaining the modification depends on where the modification is located. Inside the Owner's Unit, the Owner must maintain the modification. However, in a common area, the community is responsible for its maintenance.

Examples of a reasonable modification include:

- 1) Installing a wheelchair ramp at the entrance to the building.
- 2) The replacement of handles on doors to common areas to make it easier for an Owner with arthritis to operate them.

When Can I deny a Request for an Accommodation or Modification?

The request may be denied if: 1) there is no disability; 2) the request is not related to the claimed disability; or 3) it is

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unreasonable. An unreasonable request is one that would impose an undue financial or administrative burden, or that would fundamentally alter the nature of the community's operation. The community must determine the reasonableness of each request case-by-case and attempt to find alternative accommodations.

Examples of unreasonable requests include:

1. An Owner requests the community hire support staff to pick-up trash from her Unit because her disability makes it difficult to access her assigned trash dumpster. The cost of hiring someone may be an undue financial burden, but the community must propose an alternate solution.
2. An Owner with a mobility disability requests the community arrange for delivery of his groceries. The community does not provide this service to any other residents. This constitutes a fundamental alteration to the operations. The community should work with the Owner and offer to provide him with a more accessible parking space or facilitate access to the Owner's Unit by a third-party delivery service.

May the Community Investigate the Request?

The community may request information necessary to confirm the disability, identify the needed accommodation, and establish the relationship between the disability and accommodation. The requests should be limited and not seek any medical information beyond confirmation that the claimed disability exists. If the disability is obvious or already known to the community, even requesting medical confirmation may violate the FHA. Any written document from a healthcare professional which states a person is disabled and needs the accommodation will be enough to require an Association to accommodate if a request is not unreasonable.

¹ H.R. Rep. 100-711-24 ("The committee intends these provisions to prohibit not only discrimination against the primary purchaser or named lessee, but also to prohibit denials of housing opportunities to applicants

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because they have children, parents, friends, spouses, roommates, patients, subtenants or other associates who have disabilities.

² 42 U.S.C. § 3602(h) (“...such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of title 21).”)

³ 24 C.F.R. § 9.131(a) “This part does not require the agency to permit an individual to participate in, or benefit from the goods, services, facilities, privileges, advantages and accommodations of that agency when that individual poses a direct threat to the health or safety of others.”

⁴ 24 C.F.R. § 9.131(b) “Direct threat” means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.”

⁵ 24 C.F.R. § 9.131(c) “In determining whether an individual poses a direct threat to the health or safety of others, the agency must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

⁶ 42 U.S.C. § 3604(f)(3)(B)
“...discrimination includes...a refusal to make reasonable accommodations in rules, policies, practices, or services...necessary to afford such person equal opportunity to use and enjoy a dwelling...”

⁷ See, *Joint Statement of the Dep’t of Housing and Urban Dev. and the Dep’t of Justice – Reasonable Accommodations Under FHA*. (May 17, 2004).

⁸ 42 U.S.C. § 3604(f)(3)(A)
“...discrimination includes...a refusal to permit... reasonable modifications of existing premises ...if such modifications may be necessary to afford such person full enjoyment of the premises ...”

⁹ *Joint Statement of the Dep’t of Housing and Urban Dev. and the Dep’t of Justice – Reasonable Modifications Under FHA*, p.8 (March 5, 2008).

38--What Is Considered an Association Record?

WUCIOA contains an extensive list of what qualifies as a record and what records maybe withheld from an Owner. The three older acts are not as specific but do require Associations to keep records related to the operation, governance, and finances of the condominium, the Units, and the Association itself.¹ These Associations will need to determine, first, whether a particular document qualifies as a “record” under the relevant statute. If it is a “record,” a separate question is whether it is a record that must be made available to Owners. The WUCIOA lists may provide guidance to older Associations trying to resolve these issues.

Financial Records

The New Act requires Associations to “keep financial records sufficiently detailed” to enable them to prepare a Resale Certificate containing the items enumerated in the statute.² The reference to the Resale Certificate indicates that any information an Association would be required to maintain for preparing a Resale Certificate is likely a “financial record” under the statute.

The information required for Resale Certificate constitutes only a subset of the “financial records” an Association will maintain and retain. Other examples of “financial records” cited in the three older acts include checks, bank records, invoices, and receipts.³ However, all three statutes make it clear that these examples are not intended to be an exhaustive list of “financial records.” WUCIOA provides better clarity.

Given that there is no precise definition of “financial record” in the three older statutes, Associations should err on the side of caution and consider all records related to their finances, income, and

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expenses to be financial records. This could include estimates for repairs and maintenance, contracts, salary records, receipts, delinquency reports, budgets, tax returns, and anything else that either affected the property, or documents income or an expense of the Association.

What Qualifies as an "Other Record"?

New Act, Old Act and HOA Act do not say what qualifies, but WUCIOA (RCW 64.90.495) does.⁴ This list appears to be intended to settle future disputes over records and may be a guide for preexisting communities.

Washington, like most states, also references "other records of the association." Washington courts have had little occasion to rule on questions of what constitutes an "other record" of an Association, but case law from other states is instructive. Although Washington statutes governing Condo Associations are not identical to those in other states, they use very similar language with respect to provisions regarding the availability of Association records.⁵

Virginia courts held that records on wages paid to an Association's top employees, management contracts, and contracts for services provided to maintain facilities qualify as "financial and other records." In *Grillo*, the Virginia Supreme Court held that specific salary information of the Association's ten highest paid employees constituted a "book or record" under the Virginia Condominium Act. The court specifically rejected the Association's argument that it was only general information, such as the salary ranges of the employees, that qualified as "records." Specific salaries, the court found, were "detailed records" related to the "operation and administration of the condominium."⁶

Management contracts and contracts for services, such as housekeeping records, have also been construed as "records." A Colorado court held that housekeeping records qualify as "other records under the Condominium Act."⁷ Similarly, a Pennsylvania

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court held that landscaping, snow removal, and property management contracts constitute "other records" of the Association.⁸

A Texas court also found that correspondence between Board Members qualifies as "other records of [an] association." In *Shiolen v. Sandpiper Condominiums Council of Owners, Inc.*, the court held that an Association was required to make not only general ledgers and account registers available to the Owner, but also "all correspondence" between certain Board Members during a specific date range.⁹ The Association did not contest that the correspondence was a "record" under Texas law, but rather argued that it should be able to withhold it because the Owner had requested it for an improper purpose. (Our firm would have argued that the correspondence was not a record.)

The takeaway from these cases is that courts are likely to deem all documents related to the operations of Associations and the communities they govern as "financial and other records."¹⁰ Other examples of documents that would likely qualify as "financial and other records" include Declarations, Bylaws, Rules and Regulations, policies, meeting minutes, rosters of Owners, financial reports, delinquency reports, budgets, car registrations, and names and addresses of Owners.

In contrast, documents such as evaluations of an Association's management prepared by students would not be Association records. Email communications between Board Members, and between managers and Board Members, probably wouldn't qualify as Association records because they do not reflect action taken by the Board (the meeting minutes would reflect Board actions). The fact that decisions preceding Board action were discussed via email rather than in undocumented oral discussions would not transform those discussions into "records." Finally, drafts (e.g. budget drafts or policies drafts) and unapproved meeting minutes may not be construed as records under the statutes.

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The fact that certain documents qualify as “records” does not mean that Associations will be required to make them *available* to Owners. WUCIOA, specifically, allows some documents to be excluded.¹¹ For example, an Association would not be required to make certain contact information for Owners, such as unlisted phone numbers and email addresses, available, even though the information would qualify as an Association record.¹²

Establishing policies for document retention and for review by members to ensure that financial and other records are properly preserved and available is a best practice that could protect Associations and HOAs from future litigation involving records. The document retention policy should also cover documents such as email communications and drafts because, although these would not qualify as “records,” they are almost certain to be subject to discovery in litigation. As such, they, like Association records, should be handled in accordance with an official document retention policy.¹³

When Does a Record Belong to an Association?

The New Act and HOA Act both refer to records “of the association” (i.e. records belonging to the Association). But not every record in an Association’s possession will necessarily be an Association record. Records prepared by an Association clearly belong to it, but what about records held or prepared by others?

No Washington appellate court has addressed the question of when a record is “of the association” but courts in other jurisdictions have held that any records prepared by agents of an Association, for the Association, qualify even when they legally “belong” to the entity that prepared them. In *Glenwright v. St. James Place Condominium Ass’n*, a Colorado court held that “a record in the possession of an association’s agent” qualified as an “other record” under Colorado’s Condo Act, provided that the record “reflect[ed] the activity of the agent in performing any of the association’s powers or responsibilities under CCIOA [the

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Colorado Common Interest Ownership Act], the association's declaration or by-laws [sic], or its agreement with that agent."¹⁴

Given that Associations frequently hire managers and other professionals, such as CPAs, to provide services for the property and Association, it is likely that Washington courts would apply the same rule the Colorado court applied in *Glenwright* and hold that records prepared by agents of the Association qualified as "other records." Thus, Associations should take care to ensure that records prepared for them by other entities are handled appropriately.

¹ Under Washington law, a condo association must "keep financial records sufficiently detailed to enable the association to comply with RCW 64.34.425 [the statute governing resale certificates]. All financial and other records of the association, including but not limited to checks, bank records, and invoices, are the property of the association..." See RCW 64.34.372. This provision of the New Act applies to Old Act condos as well.

The Old Act imposes a similar requirement. RCW 64.32.170 requires that "the manager or board of directors...shall keep complete and accurate books and records of the receipts and expenditures affecting the common areas and facilities, specifying and itemizing the maintenance and repair expenses of the common areas and facilities and any other expenses incurred."

The HOA Act says "[t]he association or its managing agent shall keep financial and other records sufficiently detailed to enable the association to fully declare to each owner the true statement of its financial status." RCW 64.38.045

² RCW 64.34.425 requires unit owners who do not qualify for one of the statutory exemptions to furnish to a purchaser a resale certificate, "signed by an officer or authorized agent of the association and based on the books and records of the association and the actual knowledge of the person signing the certificate," that must, at a minimum, contain 19 different statements or reports.

³ RCW 64.34.372, RCW 64.32.170

⁴ *Association Records*, RCW 64.90.495(1)

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An Association must retain the following:

- (a) The current budget, detailed records of receipts and expenditures affecting the operation and administration of the association, and other appropriate accounting records within the last seven years;
- (b) Minutes of all meetings of its unit owners and board other than executive sessions, a record of all actions taken by the unit owners or board without a meeting, and a record of all actions taken by a committee in place of the board on behalf of the association;
- (c) The names of current unit owners, addresses used by the association to communicate with them, and the number of votes allocated to each unit;
- (d) Its original or restated declaration, organizational documents, all amendments to the declaration and organizational documents, and all rules currently in effect;
- (e) All financial statements and tax returns of the association for the past seven years;
- (f) A list of the names and addresses of its current board members and officers;
- (g) Its most recent annual report delivered to the secretary of state, if any;
- (h) Financial and other records sufficiently detailed to enable the association to comply with [the resale certificate requirements at] RCW 64.90.640;
- (i) Copies of contracts to which it is or was a party within the last seven years;
- (j) Materials relied upon by the board or any committee to approve or deny any requests for design or architectural approval for a period of seven years after the decision is made;
- (k) Materials relied upon by the board or any committee concerning a decision to enforce the governing documents for a period of seven years after the decision is made;
- (l) Copies of insurance policies under which the association is a named insured;
- (m) Any current warranties provided to the association;
- (n) Copies of all notices provided to unit owners or the association in accordance with this chapter or the governing documents; and

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- (o) Ballots, proxies, absentee ballots, and other records related to voting by unit owners for one year after the election, action, or vote to which they relate.

⁵ In Virginia, associations and HOAs cannot define “records” in their Governing Documents in a way that is narrower than the statutory definition as a means of avoiding the requirement that they make records available to owners. *Grillo v. Montebello Condominium Unit Owners Ass’n.*, 243 Va. 475, 478, 416 S.E.2d 444 (1992). Thus, whether a document constitutes a “record” is based on the relevant state statute and case law, not on an association’s Governing Documents. *Id.* (“It is without question that an administrative resolution adopted by a condominium owners’ association cannot defeat a statutory right created by the General Assembly.”) However, nothing would bar an association or HOA from including in its Governing Documents a broader definition of “record” than the one provided in the relevant statutes.

⁶ *Id.* at 478.

⁷ In *Glenwright v. St. James Place Condominium Ass’n.*, 197 P.3d 264 (2008), the court noted that the housekeeping services at issue were funded with money from the assessments paid by unit owners, and thus that the records of those services were related to the Association’s budget and financial management. It is unclear whether the court would have reached a different conclusion if the owners did not contribute in any way to the cost of the housekeeping services. However, assuming that the request was not made for an improper purpose (i.e. that the owner had a legitimate reason, as a unit owner, to examine the records), the outcome likely would have been the same.

⁸ *Rosianski v. Four Seasons at Farmington Condominium Ass’n.*, 2014-C-745, Pa. Dist. & Cnty. Dec. LEXIS 379 (2015)

⁹ The question before the court was not whether the email correspondence between board members constituted a “record” at all, but rather whether the association was permitted to withhold the correspondence. We believe the correspondence would not have been subject to disclosure to the owner if it were not already deemed to be a “record of the association.” *Shiolen* at 4-5, 2008 WL 2764530.

¹⁰ This is true of electronically stored information (ESI) as well as hard copy documents: a document that would qualify as a “record” if it were handwritten or printed would not be treated any differently solely because it was stored electronically and had not previously been printed.

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Accordingly, associations should ensure that ESI is preserved with the same level of care as hard copy documents.

¹¹ RCW 64.90.495(3)

Records retained by an association may be withheld from inspection and copying to the extent that they concern:

- (a) Personnel and medical records relating to specific individuals;
- (b) Contracts, leases, and other commercial transactions to purchase or provide goods or services currently being negotiated;
- (c) Existing or potential litigation or mediation, arbitration, or administrative proceedings;
- (d) Existing or potential matters involving federal, state, or local administrative or other formal proceedings before a governmental tribunal for enforcement of the governing documents;
- (e) Legal advice or communications that are otherwise protected by the attorney-client privilege or the attorney work product doctrine, including communications with the managing agent or other agent of the association;
- (f) Information the disclosure of which would violate a court order or law;
- (g) Records of an executive session of the board;
- (h) Individual unit files other than those of the requesting unit owner;
- (i) Unlisted telephone number or electronic address of any unit owner or resident;
- (j) Security access information provided to the association for emergency purposes; or
- (k) Agreements that for good cause prohibit disclosure to the members.

¹² RCW 64.38.045(2), the HOA Act, prohibits associations from releasing unlisted telephone numbers of owners. Email addresses would likely be treated as unlisted phone numbers given that they are not published in anything like a phone book. This is the law under WUCIOA, RCW 64.90.495(3)(i).

¹³ Associations should also ensure that their document retention policies are applied to electronically stored information (ESI) to prevent the loss of electronic records through auto-archiving, auto-deletion, etc. Furthermore, associations should include separate provisions governing the retention of ESI to ensure that electronic records are preserved in a forensically sound manner that complies with any relevant data privacy laws. For example, ESI containing social security numbers or financial account information may need to be handled and stored differently than ESI containing less sensitive information.

¹⁴ *Glenwright*, 197 P.3d 264, 267-68 (2008)

39--Can an Association Prohibit a Member from Inspecting Association Records?

Associations cannot prohibit members from inspecting most financial and other records related to management, operation, and financial health of the property and the Association itself.¹

Associations can prohibit members from accessing records the Owner has requested for an improper purpose.² Additionally, if an Association or HOA believes it has legitimate reasons for withholding records based on the specific circumstances surrounding the Owner's request, it can seek a protective order from a court.³ Finally, Associations can adopt procedures members are required to follow to request records, require members to pay for copies of records, and impose other reasonable limits related to the time and place the records are inspected.⁴

Records Requests Made for an Improper Purpose

An Owner's right to inspect Association records derives from his or her status as a member who owns property in the community. Thus, an Owner does not have a right to inspect records for *any* purpose he or she may have, only for any "proper purpose."⁵ A proper purpose would be one "reasonably related to [the owner's] membership interests."⁶ Other states have determined that "a proper purpose is shown when an Owner has an honest motive, is acting in good faith, and is not proceeding for vexatious or speculative reasons."⁷

It is important to note, however, that an Owner requesting to inspect records does not need to prove that his or her purpose is proper, or even say what the purpose is.⁸ In other words, there is a presumption that an Owner requesting access to Association records is doing so for a proper purpose, and the burden is on the

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Association to show otherwise. An Association may require an Owner to fill out a form stating the records he or she wants to inspect and why, but the Association may not require a detailed explanation or proof of the purpose the Owner states. For example, an Owner could simply state that he or she wanted to inspect the records to gain a better understanding of the Association's expenses, and this would likely be sufficient.

If an Association believes that the Owner's purpose is improper, it must provide the court with evidence establishing the lack of propriety.⁹ Merely asserting that records were withheld because the Owner has an improper purpose does not shift the burden of proof to the Owner.

Since the burden is on the Association to show that the Owner's purpose in requesting the records is improper, it will likely be difficult for an Association to withhold records for this reason. For example, an Owner who requested records on employees of the housekeeping service because he or she was stalking the employee would lack a proper purpose.

Although it will be rare for an Owner to request records for an improper purpose, Associations should nevertheless remember that this is a basis for denying an Owner's request in appropriate circumstances.

Board Member Communications

Associations can most likely withhold emails and transcripts of oral communications between Board Members because they would not qualify as "records" at all.¹⁰ (See Chapter 38, "Association Records: What Is Considered an Association Record?") Conversations do not become records simply because they are memorialized in writing. Emails may contain information that itself constitutes a record (e.g. invoices contained in the body of an email), but in these cases the Owner could request "the July housekeeping invoice" and not "all emails between Board

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members in July.” As such, the Association could simply provide the Owner with access to the specific email containing the invoice. Associations should keep in mind that emails and transcripts of oral communications could still be disclosed to Owners during the discovery phase of litigation. The fact that they are not “records” under the Condo Acts or HOA Act only means that Associations have no statutory duty to make them available to Owners, not that they are privileged and exempt from disclosure under all circumstances.

Limiting Availability of Records

Associations not covered by WUCIOA are required to make records “reasonably available” to Owners. Thus, these Associations may adopt certain policies and procedures regarding an Owner’s inspection of records, provided that the policies and procedures are reasonable. WUCIOA is more specific in what is deemed reasonable and requires the documents be made available during reasonable business hours, at the Association’s or its manager’s office.¹¹

Associations may also require that Owners provide reasonable advance notice that they want to inspect certain records. There is no specific number of days that is defined to be “reasonable advance notice” and what is considered “reasonable” may vary depending on factors such as the location of the records, the quantity of records, and the time required to prepare them for the owner. However, requiring an Owner to give more than a month’s notice is likely to be deemed unreasonable under all circumstances because a court is unlikely to find that an Association has a justifiable reason to take more than a month to locate and gather records in its possession.¹²

For the New Act, Old Act and HOA Act there was no explicit requirement to make the records available electronically.¹³ WUCIOA provides that an Owner may request a copy of the records be delivered “through an electronic transmission if

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available.”¹⁴ This language suggests that if a record is stored electronically and can be emailed, then an Association cannot refuse to send the record to the Owner by email. However, there is not an obligation to digitize the record just so that it can be emailed to an Owner.

Associations may limit the availability of records containing unpublished phone numbers and email addresses. Phone numbers of Owners qualify as “records,” but we believe they should not be released. WUCIOA expressly permits the Association to withhold records related to:¹⁵

- (a) Personnel and medical records;
- (b) Contracts, leases, and other commercial transactions being negotiated;
- (c) Existing or potential litigation or mediation, arbitration, or administrative proceedings;
- (d) Existing or potential matters involving federal, state, or local administrative or other formal proceedings before a governmental tribunal for enforcement of the Governing Documents;
- (e) Legal advice or communications;
- (f) Information the disclosure of which would violate a court order or law;
- (g) Records of an executive session of the Board;
- (h) Individual Unit files other than those of the requesting Unit Owner;
- (i) Unlisted telephone number or electronic address of any Unit Owner or resident;
- (j) Security access information provided to the Association for emergency purposes; or
- (k) Agreements that for good cause prohibit disclosure to the members.

Associations may also be able to limit the availability of records containing information on employees, Board Members, or other

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Owners who could be in danger due to concerns such as domestic violence or stalking. Apart from withholding records from a specific individual the Association believes has an improper purpose for making the request (e.g. stalking), an Association may be able to withhold all records containing certain information (e.g. contact information, locations an employee is scheduled to be at certain times, etc.) about specific people where there are legitimate safety concerns. The Violence Against Women Act (VAWA) extends various protections to victims of domestic violence, and an individual who has a restraining order under VAWA (or similar state statutes) could submit documentation to an Association requesting that all information that could be used to identify and harm him or her be withheld from *all* Owners.¹⁶

Establishing Procedures for Records Requests

Associations can establish reasonable procedures Owners must follow to request and inspect records. For example, Associations can require Owners to inspect records in the Association's office during normal business hours.¹⁷ Associations may also require Owners to submit a written request or complete a form listing the records they are requesting to inspect and the purpose of the inspection.¹⁸ However, Associations should keep in mind that the purpose of the written request or form is not to act as a barrier to giving the Owner the access to which he or she is entitled, but rather to ensure that the request is processed accurately and in a timely manner by the Association. Accordingly, an Association cannot require Owners to give a lengthy explanation of their purpose or prove that their purpose is proper.

Finally, Associations may require Owners to pay for copies and other reasonable costs incurred by the Association in providing access to the records. There is no case law addressing what constitutes a reasonable cost, but courts would likely find it reasonable for an Association to charge an Owner for the cost of photocopies at the rate charged to the Association, and to pay for a clerical employee to gather documents for review.

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¹ Under the New Act, "All financial and other records of the association...are the property of the association, but shall be made reasonably available for *examination and copying* by the manager of the association, any unit owner, or the owner's authorized agents." RCW 64.34.372

This New Act provision is applicable to Old Act condos. RCW 64.34.010.

The HOA Act states that "all records of the association, including the names and addresses of owners and other occupants of the lots, shall be available for examination by all owners, holders of mortgages on the lots, and their respective authorized agents on reasonable advance notice during normal working hours at the offices of the association or its managing agent." RCW 64.38.045

² Neither the Condo Acts nor the HOA Act state that the owner must have a "proper purpose" for inspecting the records. However, both RCW 24.03.135 and RCW 24.06.160, under which condo associations and HOAs are incorporated, qualify the owner's right to inspect records:

"Any such member must have a purpose for inspection reasonably related to membership interests." RCW 24.03.135

"All books and records of a corporation may be inspected by any member or shareholder, or his or her agent or attorney, for any proper purpose at any reasonable time." RCW 24.06.160

³ Alternatively, an association could deny the owner's request and move for a protective order if the owner sues the Association.

⁴ The HOA Act and WUCIOA permit associations to "impose and collect a reasonable charge for copies and any reasonable costs incurred by the association in providing access to records." RCW 64.38.045(2). *See also*, RCW 64.90.495(4). ("An association may charge a reasonable fee for producing and providing copies of any records under this section and for supervising the unit owner's inspection.")

The Condo Acts make no reference to the cost of copies or other costs associated with records, but an association incorporated under RCW 24.03 could require owners to cover the costs of inspecting and copying all records other than the articles and Bylaws, which must be provided to owners free of charge. "Cost of inspecting or copying shall be borne by such member except for costs for copies of articles or Bylaws." RCW 24.03.135(5)

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RCW 24.06.160, the provision of the Nonprofit Miscellaneous and Mutual Corporations Act dealing with records, is silent on the cost of copying records, but given that RCW 24.03 and the HOA permit Associations to charge owners for copies of records other than articles and Bylaws, there is no reason to think a court would not permit an Association incorporated under RCW 24.06 to do the same thing.

⁵ RCW 24.06.160

⁶ RCW 24.03.135

⁷ *Oviedo v. 1270 S. Blue Island Condominium Ass'n*, 2014 IL App (1st) 133460 at 240-41 (2014).

⁸ No Washington appellate court has directly addressed this question under any of the statutes governing common interest communities. Further, the Condo Acts and HOA Act are both silent with respect to the "proper purpose" requirement, and the nonprofit corporation statutes include no provisions imposing a requirement that members state, let alone prove, what their purpose is in inspecting records. The Supreme Court has recognized that under the common law, "the burden of showing improper motives on the part of the shareholder in demanding an inspection of the books and records of the corporation is upon the [corporation]." *State ex rel. Grismer v. Merger Mines Corp.*, 3 Wash.2d 417, 420-21 (1940).

⁹ In *Shiolen v. Sandpiper Condominiums Council of Owners, Inc.*, a Texas court rejected the defendant association's contention that it had withheld records because the plaintiff wanted them for an improper purpose. The court stated that the association had failed to "provide any evidence to support its conclusory statement that Shiolen had failed to establish a proper purpose." 13-07-00312-CV, 2008 WL 2764530 1, 4.

¹⁰ The court in *Shiolen* held that correspondence between board members must be made available to the owner. However, the court does not discuss why the correspondence constituted "records" and the association did not contest this point, but rather argued that they should be withheld on different grounds. Thus, it is unclear whether the correspondence contained info that would be deemed "records", whether Texas law defines "records" in such a way that correspondence between board members is necessarily included, or whether the question simply didn't arise because both parties and the court just assumed they were records. *Shiolen* at 6.

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¹¹ RCW 64.90.495(2). (“...all records required to be retained by an association must be made available for examination and copying by all unit owners, holders of mortgages on the units, and their respective authorized agents as follows, unless agreed otherwise: (a) During reasonable business hours or at a mutually convenient time and location; and (b) At the offices of the association or its managing agent.”)

¹² There is a lack of case law on what is considered to be a reasonable amount of time, but the *Shiolen* court found that a delay of four months between an owner's request and the association's grant of access was unreasonable as a matter of law. The court also found it unreasonable for the association to tell the owner the records would only be available on a Saturday that was the date he had notified the association he was scheduled to leave town. *Shiolen* at 7.

¹³ The statutes are silent as to the form in which association records must be made available to owners. Other states permit associations to provide copies of records in electronic form (see, e.g., Title XL §718.111 (Florida), Civil Code 5200-5240(h) (California), and the HOA Act permits Associations to notify owners of meetings via email. WUCIOA provides that an owner is entitled “to receive copies by photocopying or other means, including through an electronic transmission if available...”

As associations and management companies tend to store increasingly more information electronically, associations may choose to provide owners with electronic copies of at least some documents. Associations that do this should ensure that the copies provided are protected or saved as “read-only” to ensure that metadata such as the “date created” and “date modified” is not inadvertently changed, as this could be a problem for an Association involved in litigation in the future.

¹⁴ RCW 64.90.495(5). (“A right to copy records under this section includes the right to receive copies by photocopying or other means, including through an electronic transmission if available upon request by the unit owner.”)

¹⁵ RCW 64.90.495(3).

¹⁶ 42 USC §§ 13701-14040. The concern is not that all owners pose a risk to the person, but rather that the information provided to a nonthreatening owner could inadvertently end up in the wrong hands.

¹⁷ The HOA Act makes this explicit, stating that association records shall be available “during normal working hours at the offices of the association or its managing agent.” RCW 64.38.045(5). The Old Act also

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qualifies the duty to make records available to owners, stating that associations shall do so “at any reasonable time or times.” RCW 64.32.170

The New Act does not refer to time in the records provision, but states that records “shall be made reasonably available,” and courts are unlikely to construe a requirement that owners examine records during normal business hours as unreasonable. RCW 64.34.368. Furthermore, Washington’s Nonprofit Corporations acts both include the phrase “at any reasonable time,” and it’s unlikely a court would find it unreasonable for an association to refuse to allow an owner to examine records outside of its normal business hours.

¹⁸ In *Shiolen*, the Texas Condo Act actually stated that an association was to make records available upon “written demand.” Washington law does not require a written request; however, it is very unlikely any Washington court would find it unreasonable for an association to request that an owner submit a written request listing the records they wanted to inspect and providing a brief statement of the purpose of the request.

40--Why Is Hardwood Flooring So Much Noisier than Carpet and What Can a Community Do About It?

Hardwood flooring is much less effective than carpeting at insulating against the transmission of sound and produces impact noise when it is walked upon. Even if properly installed, "hard surface" floorings can result in noise issues for the Unit below. A community can adopt policies that ensure Unit flooring meets appropriate noise reduction standards and minimize the cost of investigating complaints and bringing noise enforcement actions against Owners who choose to install hard surface floor. Building code sets minimum standards for floors. Associations can adopt higher standards, even if the Declaration fails to restrict flooring. The Department of Housing and Urban Development ("HUD") established standards in 1967, which are widely used today.

How Is Noise Transmission Measured?

Floors are evaluated on two noise reduction characteristics: impact insulation and sound transmission. The Impact Insulation Class ("IIC") of the partition indicates how well it reduces structure borne sounds transmissions such as footsteps. The Sound Transmission Class ("STC") indicates how well the partition reduces airborne sound transmission such as a television. The ratings approximate the sound reduction, in decibels, of the floor assembly. The sound testing uses a logarithmic scale and an increase of 10 points represents about a 50% reduction in perceived loudness. The higher the rating the better the material is at reducing noise.

Sound transmission can be accurately and objectively tested. To determine a floor assembly's actual performance, an acoustic professional will test the partition's Apparent Impact Insulation

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Class ("AIIIC"). AIIIC is a new standard that has replaced Field Impact Insulation Class ("FIIC").¹ AIIIC is measured through on-site testing after the flooring has been installed. AIIIC is the best indication of the floor assembly's noise reduction performance.

What Surfaces Perform Best?

Cushioning impacts is the cheapest and most efficient way to prevent noise transfer through the floor. On a floor covered by a carpet and a pad, the floor is well cushioned and less noisy. When the flooring is hard, the only way to reduce the transmission of impact sounds is through the construction of the floor structure.²

In one of the most poorly constructed buildings we have worked with, a floor with carpet and pad tested at an AIIIC rating of 58, but a "cork floor," over one of the best sound pads, tested at only 40. Another building with carpet over concrete tested at over 70, but without the carpet it tested at less than 30. Carpeting offers a clear advantage in noise reduction and can be used to remedy impact-based noise issues. This option is available to an Owner even after the floor has been installed. Some Owners solve noise problems with the use of area rugs, or by modifying their use of the floor (like wearing slippers). We believe that if a certain surface material cannot meet the requirements of the flooring policy or causes a nuisance or annoyance, the Unit Owner must choose a different material for the floor surface.

What Guidelines Already Exist?

The Department of Housing and Urban Development ("HUD") has established guidelines which classify multi-family housing into three grades: Luxury, Average or Minimum.³ For each grade, floor and wall partitions must meet certain IIC and STC ratings. The specific requirements will depend on the floor plans of the upper and lower Units. However, for an average grade, at the minimum, the floor assembly above a bedroom must have STC and IIC ratings of 52. For luxury grade, the standards call for a minimum STC and IIC rating of 55 but can call for a rating as high as 65.

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The International Building Code sets minimum sound transmission requirements for multi-family buildings. The code requires designed STC⁴ and IIC⁵ ratings of 50, or actual performance of 45 if field tested.⁶ These code requirements are 10 points lower than the qualifying standards for a HUD luxury rating. This would mean that a building only meeting the Building Code would seem about twice as loud as a luxury rated building using the HUD standard. Many of our clients adopt even higher standards. We generally recommend that a standard set at the same performance as the original construction (with carpet) is reasonable.

What Should Your Policy Contain?

First, these tests and standards can be useful even if you do not have hard floor policies or prohibitions. Testing the floor can help a Board evaluate if the floor violates nuisance or annoyance provisions of the Declaration. A more thorough policy is helpful because it clarifies the standards that will be applied.

A flooring policy should reference specific standards to establish an objective measure for approving design plans and determining a violation. By adopting widely used standards, it will be easier to enforce the policy, and to defend an installing Owner's claim of unreasonable standards. Widely accepted standards come with established testing protocols, which means Owners will be able to determine *before construction begins* whether their desired flooring can conform to the rules of the community. This will help prevent conflicts from occurring in the first place.

To enforce the policy, a community should require that Owners request written permission before they make alterations to their floors. The request should include the material components of the new floor assembly and the new assembly's designed IIC rating. Sound pads by themselves have no IIC rating; products are sold to reduce sound, and most will (deceptively)⁷ claim high sound ratings based on the building structure's ability to reduce sound. The claimed ratings are impossible to achieve in any wood framed

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building. Before approving construction, the community could require the Owner to assume the responsibilities and risks associated with the installation of a hard surface floor. This should include making the Owner responsible to hire an acoustical engineer to investigate any noise complaints that may be made and require that the Owner remedy any violation of the flooring and noise policies at their own expense.

¹ ASTM E1007-16, Standard Test Method for Field Measurement of Tapping Machine Impact Sound Transmission Through Floor-Ceiling Assemblies and Associated Support Structures, ASTM International, West Conshohocken, PA, 2016, www.astm.org.

² *A Guide to Airborne, Impact, and Structure Borne Noise - Control in Multi Family Dwellings*, U.S. Department of Housing and Urban Development, § 7-3 (September 1967).

³ *Id.* at § 10-8, *et seq.*

⁴ *Air-borne sound*, Seattle Building Code § 1207.2 (“Walls, partitions and floor/ceiling assemblies separating *dwelling units* and *sleeping units* from each other or from public or service areas shall have a sound transmission class of not less than 50, or not less than 45 if field tested, for air-borne noise when tested in accordance with ASTM E90.”)

⁵ *Structure-borne sound*, Seattle Building Code § 1207.3 (“Floor/ceiling assemblies between *dwelling units* and *sleeping units* or between a *dwelling unit* or *sleeping unit* and a public or service area within the structure shall have an impact insulation class rating of not less than 50, or not less than 45 if field tested, when tested in accordance with ASTM E492.”)

⁶ See, *Structure-borne Sound*, 2018 International Building Code § 1206.3 (“Floor-ceiling assemblies between *dwelling units* or *sleeping units* and a public or service area within the structure shall have an impact insulation class rating of not less than 50, or not less than 45 if field tested, where tested in accordance with ASTM E492...”)

⁷ Whisper mat claims in its advertising to have an IIC of up to 72, but in its technical data, reports only 50 using the test required by the building code.

41--Are There Objective Standards to Evaluate If Noise Is an Annoyance, Nuisance or Offensive?

Most Declarations prohibit Owners from using their Units in a manner that will annoy or otherwise interfere with the peaceful possession and, enjoyment of other Unit Owners. This is a subjective evaluation and leads to disputes about whether one Owner is too loud or the other is too sensitive. One objective standard for noise can be found in the San Francisco Noise Ordinance. This standard outlines the procedure for measuring noise levels and sets levels that qualify as automatic violations of the city's noise ordinance. These standards can be a model used by an Association to adopt measurable criteria to help a Board evaluate noise complaints.

Subjective Standards

Noise complaints have long been an issue faced by Boards and a common source of conflict between Owners. Unfortunately, different people have different tolerances for noise. Many Associations want to establish some standard that will provide Owners with notice that their conduct is a "nuisance or annoyance." Most Association standards do not specifically speak to noise but instead says Owners should not annoy or otherwise interfere with the peaceful possession, enjoyment or proper use of the property by other Unit Owners. This standard is sufficient to authorize Board action; but without an objective way to measure the harm, the offending Owner will argue that their use of their property does not violate the community standards. Subjective standards make investigations and enforcement difficult, and depend on time, frequency and quality of the sound. Some sounds, like a piano, may bother some residents, yet be welcomed by others.

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Objective Standards

To prevent an Owner's ability to dispute a Board's enforcement action, a Board should consider adopting a measurable standard which will determine when a Unit's use is in violation of the community's noise policy. The community's noise policy will place limits on the amount of noise an Owner may produce in their Unit. A comprehensive policy must consider a number of factors such as how and when the noise level is to be measured, and the normal ambient noise level in the community. A community might also wish to accommodate different noise levels for night-time and day-time. Adopting an already existing standard can help a community avoid potential issues.

You can consider the San Francisco Noise Ordinance.¹ This ordinance prohibits producing excessive noise which can be detected in a neighbor's property.² To measure the noise level, a sound level meter is used in the neighbor's living area. The meter's microphone must be placed at least three feet from the wall and must measure the sound levels at three separate points in the room. The average of these separate measurements is used to determine the noise level.³

A recent client adapted part of the San Francisco standard for their community. They permitted a maximum noise level of 5 decibels over the ambient noise in the home.⁴ This policy was useful in resolving a dispute between two Owners over the sound of a piano. You can buy suitable sound meters for less than \$20 on Amazon. The community purchased the sound level meter and gave it to the Unit Owner to measure the noise levels within the apartment. The meter provided evidence of a violation and the offending Owner agreed to work with the Board to implement sound reduction measures. A hand-held meter is helpful when investigating noise complaints, but if attorneys are involved, you may need to hire a professional acoustical consultant to perform the testing.

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Absent an objective standard and use of a sound meter, Boards can still determine that a sound is a nuisance or annoyance. They must still investigate, which probably means Board Members experience the sound personally, or have multiple people complain. Relying on a single neighbor to find a violation likely does not meet the Board's duty of care to investigate.

¹ *Regulation of Noise*, San Francisco Police Code, art. 29 § 2900, *et seq.*

² *Id.* at § 2909(a) (“No person shall produce or allow to be produced ... a noise level more than five dBA above the local ambient three feet from any wall, floor, or ceiling inside any dwelling unit on the same property, when the windows and doors of the dwelling unit are closed, except within the dwelling unit in which the noise...”)

³ *Id.* at § 2902. (“A person measuring the inside noise level measurements shall take measurements with the microphone at least three feet distant from any wall, and the average measurement of at least three microphone positions throughout the room shall be used to determine the inside noise level measurement.”)

⁴ The City of Seattle has put together a helpful reference which compares dBA levels to common daily experiences. Some illustrations from the chart are:

- 115 dBA – Maximum Vocal Effort – Possible hearing damage in short time period
- 85 dBA – noise of a chain-saw at 10 meters – Sustained listening may result in hearing damage
- 70 dBA – noise level of a main road – Difficult to use a telephone
- 60 dBA – level of a noisy lawn mower at 10 meters – intrusive
- 45 dBA – normal background noise level
- 10 dBA – sound of leaves rustling – just audible

Typical Environment Noises Sound Levels and Human Responses,
www.seattle.gov/dpd/cs/groups/pan/@pan/documents/web_informational/p2081596.pdf

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GLOSSARY OF COMMUNITY ASSOCIATION TERMS

TERM	SIMPLE DESCRIPTION (not a substitute for definitions contained in the RCW or specific Declaration)
Allocated interest	The percentage of the physical property owned by a particular Unit Owner. The total of all Owners of a condo must add up to 100%. This often determines the Unit Owner's share of common Assessments, and the votes Unit Owners have for any matter decided by the Association.
Amendment	A legal change to a document that affects the rights or obligations of the Owners. Any Governing Document can be amended by some method: some by a simple vote of the Board, others by 100% approval by the Owners and the lenders for the Units.
Apartment	"Old Act" term for a Unit in the "New Act". This is a piece of property owned exclusively by a member of the Association for his or her personal use.
Articles of Incorporation	Legal documents filed with the Secretary of State to create a Corporation. "New Act" condominiums must be corporations. WUCIOA Associations may be organized as for-profit or nonprofit corporations or limited liability companies.
Assessment	Any money the Association requires an Owner to pay to the Association.

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	Construction projects or unanticipated expenditures may have Special Assessments. Fines and late fees are Assessments against only one Unit.
Association	The group of all Owners of a community. Most are non-profit corporations.
Board, or Board of Directors	The elected members of the Association who make decisions and act for the Association.
Board Meeting	A meeting of just the Board Members to conduct the business of the Association. Typically monthly, but could be more or less frequent.
Board Members	The members of the Association elected to manage the affairs of the Association. Typically, a President, Vice President, Treasurer, and Secretary are selected (by the Board) from among the Board Members. The Bylaws establish the number and election procedures.
Budget	A forward projection of common expenses for the next year, used to set the monthly Assessments for each Unit. Includes all expenses for insurance, utilities, management, landscaping, repairs, etc. Special Assessments have budgets too.
Bylaws	The procedures by which the Association governs its business. Typically deals with meetings, elections, voting, proxies, etc.

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CGL Insurance	Commercial General Liability: One type of insurance carried by most Associations and contractors. It insures the policy holder for acts and omissions, and negligence.
Common Area	See Common Element.
Common Element	Portion of the physical property owned collectively by all the members of the Association. Typically includes the roof, exterior walls, floor structures, parking lots, and anything not part of the individual Units. Sometimes thought of as the physical areas like a parking lot or playground rather than something like the roof.
Common Expense	Any expense of the Association allocated to all of the Unit Owners.
Common Interest Community	A form of real property characterized by the shared ownership of some property, with the rights and obligations of ownership outlined by statute and in Governing Documents and managed by an Association comprised of the Owners. Examples include condominiums, Homeowners' Associations, and cooperatives.
Condominium	A real property development in which property can be divided by lines on the ground like traditional real estate, and horizontal planes like the floors of a building.
Cooperative	A common interest community in which the real estate is owned by an Association; each member is entitled

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	by virtue of a proprietary lease to exclusive possession of a Unit.
D&O Insurance	Directors' and Officers' Liability Insurance. Protects the Association and individual Board Members from lawsuits for their conduct acting on behalf of the Association. Will not protect them from intentional bad acts or acting outside their authority.
Declarant	The person or entity that forms the community by recording a Declaration or Covenants, Conditions and Restrictions (CC&Rs). More commonly known as the Developer.
Declaration	The document that is recorded with the county to describe the physical property that is the community, and to describe Owners' rights and obligations must include any restrictions and procedures that affect the property.
Deductible	The amount of money that an insurance policy holder must pay out of pocket before the insurance company will pay for any covered claims. The policy holder "self-insures" this amount.
Due Process	A phrase that stands for the right of an individual to be heard on a matter before a decision that affects them is final. May relate to fines assessed or permission denied.
Fine Schedule	A list of fines which can be assessed against Owners for violations of the Governing Documents. Enforceable if

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	provided to all Unit Owners in advance.
Governing Documents	Collectively the documents that control the ownership and use of the property and the Association. Includes Declaration, Survey Maps, Bylaws, Rules and Regulations, and Articles of Incorporation.
Governing Statute	The chapter of the Revised Code of Washington which outlines the default rules for managing a common interest community. May refer to one or more of RCWs 64.32, 64.34, 64.38, and 64.90.
HOA	Homeowners Association.
Limited Common Element	Portion of the physical property owned collectively by all members of a Condo Association, but the use of which is restricted to one or only some members. Examples: decks; parking spaces; or storage lockers.
Lot	Per RCW 64.38.010 (12) a Lot is a physical portion of the real property located within an Association and designated for separate ownership. It is the same as Unit in WUCIOA.
New Act	Washington Condominium Act. RCW 64.34, effective in 1990.
Nonprofit Corporation Acts	A legal entity governed by RCW 24.03 and/or RCW 24.06.
Old Act	Horizontal Regime Property Act. RCW 64.32, effective in 1963.

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Organizational Documents	Documents filed with the state to create and govern a common interest community Association.
Owner	The "person" that holds title to a property in the community. This may be a single person, a married couple, a corporation, trust, or some other legal entity, and includes the Declarant.
Personal Property	Things that are not tied to real estate or physical property. Includes cars, furniture, kitchen utensils and clothes. May include appliances like refrigerators and washing machines.
Property Insurance	This insures the physical property of a community against physical loss or damage. Does not include the contents of the Units, but often includes carpet and fixtures within condominium Units. For HOAs, it includes all property owned by the Association.
Proxy	Writing by one Association Member giving its vote to another person. May be for a specific vote or may be a general power to vote on any matter.
Quorum	The minimum number of Association (or Board) Members required to meet together to take action for the Association (or Board).
Ratification	The act by the Owners giving their formal consent of an Association action initiated by the Board.

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RCW	Revised Code of Washington. The state laws that govern all activities in the State of Washington.
Records	Includes (but is not necessarily limited to) financial statements, paid bills, cancelled checks, meeting minutes, contracts, or any other written document received by, created by, or sent out from the Association, but does not include Board Member emails. WUCIOA better defines records.
Resale Certificate	Document prepared by the Association for potential buyers meant to provide adequate information for making an informed purchasing decision. Tells the buyer all the rights and restrictions of ownership. Required for condominiums and WUCIOA communities.
Reserve Study	A long-term future projection of major maintenance and repair expenses to help the Association budget. Its contents are now specified by statute.
Rules and Regulations	Documents that govern use of the Common Areas and Units/lots. Typically adopted by the Board.
Security Interest	Bank's right to foreclose on property.
Tenant	A person who rents the physical property that is the Unit.
Unit	"New Act" term for Apartment in the "Old Act". This is the piece of the property owned exclusively by each

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member of the Association. WUCIOA defines it as a physical portion of the common interest community designated for separate ownership or occupancy.

WUCIOA

Washington Uniform Common Interest Ownership Act. RCW 64.90.