CONDOLAW'S 2019 HANDBOOK FOR COMMUNITY ASSOCIATIONS

A Resource for Washington State Condominium and Homeowners' Associations

Ken Harer

Published and Distributed by:

Condominium Law Group, PLLC.

Seattle, Washington

206-633-1520

With thanks to our many talented attorneys and staff, and in particular, Thea Reinert, who helped research and edit the topics within this publication, and who made your reading this possible.

Contents

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 Concepts" 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 six attorneys and eight 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 Assessment recovery and everything in between.

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 created after June 2018, and those older communities that vote to adopt it. 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 are governed by the HOA Act (RCW 64.38). Additionally, many Associations are organized as nonprofit corporations and therefore will also 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 land, roofs, lobbies, elevators, recreational facilities, hallways, parking garages, 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 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. Where Board powers have been delegated to the manager by the Board, managers may act on behalf of the Association without further Board consultation.

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 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. These usually predate the passage of the Condominium Statutes.

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 uniform 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 property Owners 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.

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 almost 30 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 is some language 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--Glossary of Community Association Terms

TERM	UPDATED DEFINITION (2019 HANDBOOK)
Allocated interest	The percentage of the physical property owned by a particular Unit Owner. The total of all Owners 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.[1]
Amendment	A legal change to a document that affects the rights or obligations of 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.[2]
Apartment	"Old Act" term for a Unit in WUCIOA and the "New Act". This is a piece of property owned exclusively by a member of the Association for his or her personal use.[3]
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 corporations or limited liability companies.[4]
Assessment	Any money the Association requires an Owner to pay to the Association. Construction projects or unanticipated expenditures may have Special Assessments. Fines and late fees are Assessments against only one Unit.[5]
Association	The group of all Owners of a community. Most are non-profit corporations.[6]
Board, or Board of Directors	The elected members of the Association who make decisions and act for the Association.[7]
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.[8]

Board Members or Directors	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.[9]
Budget	A 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 may have Budgets too.[10]
Bylaws	The procedures by which the Association governs its business. Typically deals with meetings, elections, voting, proxies, etc.[11]
CGL Insurance	Commercial General Liability: One type of insurance Associations are required to carry by WUCIOA. Also carried by most contractors and individual owners. It insures the policy holder for acts omissions, and negligence.[12]
Common Area	See Common Element.[13]
Common Element	Portion of the physical property owned collectively in a Condominium or Cooperative, or by the Association in an HOA. 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.[14]
Common Expense	Any expense of the Association allocated to all of the Unit Owners.[15]
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.[16]

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. Each Unit is owned separately; common areas collectively.[17]
Cooperative	A Common Interest Community in which the real estate is owned by an Association; each member is entitled by virtue of a proprietary lease to exclusive possession of a Unit.[18]
D&O Insurance	Directors' and Officers' Liability Insurance. Protects Associations and Board Members from lawsuits for their conduct acting on behalf of the Association. Will not protect them from intentional bad acts outside of their authority.[19]
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.[20]
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.[21]
Deductible	Amount of money 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.[22]
Electronic Transmission	An Association can notify Owners of an upcoming Association meeting through an Electronic Transmission (for example: email) if the Owner delivered Written consent to the Association beforehand.[23]
Fine Schedule	A list of fines which can be assessed against Owners for violations. Enforceable if provided to all Unit Owners in advance.[24]

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, Conditions and Restrictions, and Articles of Incorporation.[25]
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 RCW 64.32, RCW 64.34, RCW 64.38, and RCW 64.90.
HOA	Homeowners Association. In this book, HOA does not include Condo Associations, only single-family home communities.[26]
Liability Insurance	Insurance to cover injury or damage to persons or property caused by actions or omissions of the insured party.[27]
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.[28]
Lot	In the HOA Act, a Lot is land located within an Association and designated for separate ownership. It is the same as Unit in WUCIOA.[29]
Misconduct	Misconduct is unacceptable or bad behavior.[30]
New Act	Washington Condominium Act. RCW 64.34, effective in 1990.
Nonprofit Corporation Acts	RCW 24.03 and/or RCW 24.06.
Old Act	Horizontal Regime Property Act. RCW 64.32, effective in 1963.
Organizational Documents	Documents filed with the state to create and govern a Common Interest Community Association.[31]
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.[32]

Person (Legally)	A person (legally) is a human, corporation, partnership, Association or other legal entity that is capable of participating in business transactions.[33]
Person (so as to Serve on the Board)	A human person needs to be serving on the Board, either representing themselves or as an agent of a corporate entity.[34]
Personal Property	Things that are not tied to real estate or land. Includes cars, furniture, kitchen utensils and clothes. May include appliances like refrigerators and washing machines.[35]
Property Insurance	Insurance for the physical property of a community against physical loss or damage. Does not include the contents of the property, but often includes carpet and fixtures within Condominium Units. For HOAs, it includes all real property owned by the Association.[36]
Proxy	Writing by one Association Member giving its vote to another person. May be for a specific vote or a general power to vote on any matter.[37]
Quorum	The minimum number of Association (or Board) Members required to meet together to take action for the Association (or Board).[38]
Ratification	The process Owners giving their formal consent to an Association action initiated by the Board.[39]
RCW	Revised Code of Washington. The laws that govern all activities in the State of Washington.
Record	A Record is information inscribed on a Tangible Medium (usually paper) or contained in an Electronic Transmission (usually email).[40]
Records of the Association	Includes (not limited to) financial statements, paid bills, cancelled checks, meeting minutes, contracts, or any other Written document received by, created by, or sent out by the Association, but does not include Board Member emails. WUCIOA better defines Records.[41]

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.[42]
Reserve Study	A 30 year future projection of major repair expenses to help the Association budget. Its contents are specified by statute.[43]
Rules and Regulations	Documents that govern use of the Common Areas and Units/Lots. Typically adopted by the Board.[44]
Specially Allocated Expenses	Expenses that are assessed on units in a different way than Common Expense liability. May include expenses from maintenance of Limited Common Elements, variable insurance risk, costs of collection, attorney fees or differing utility charge usage.[45]
Security Interest	Bank's right to foreclose on property.[46]
Tangible Medium	Tangible Medium is a Written document, copy or fax.[47]
Tenant	A person who rents the physical property of another person.[48]
Unit	WUCIOA and New Act term for Apartment in the Old Act. It replaces the term "Lot" in the HOA Act. This is the real property owned exclusively by each member of the Association. WUCIOA adds that Units may have separate occupancy.[49]
Units Benefited	The Units that may have to pay an additional Assessment fee if they have access to an amenity or service that not all of the Units have.[50]
Written Writing	Writing on a physical object, usually paper. It includes faxes or copies.[51]
WUCIOA	Washington Uniform Common Interest Ownership Act. RCW 64.90.

[1] The New Act definition does not apply to Old Act condos.
64.32.010 uses "undivided interest."
64.34.020(2) ("'Allocated interests' means the undivided interest in the common elements, the common expense liability, and votes in the association allocated to each unit.");
64.38.015 ("The membership of an association at all times shall consist exclusively of the owners…")
64.38.020 ("[A]n association may… (6) Regulate the use…of common areas"). Owners in an HOA under 64.38 own their homes and effectively own an equal share of common areas.
64.90.010(2) ("'Allocated interests' means the following interests allocated to each unit:

(a) In a condominium, the undivided interest in the common elements, the common expense liability, and votes in the association;

(b) In a cooperative, the common expense liability, the ownership interest, and votes in the association; and

(c) In a plat community and miscellaneous community, the common expense liability and the votes in the association, and also the undivided interest in the common elements if owned in common by the unit owners rather than an association.")

[2] The New Act amendment method does not apply to Old Act condos. See **64.32.090(13)** ("The method by which the declaration may be amended…");
64.34.264 [Amendment of Declaration];
64.38 is silent on amendments except to remove offensive provisions.
64.90.285 [Amendment of Declaration].

[3] **64.32.010** ("(1) 'Apartment' means a part of the property intended for any type of independent use...");

[4] The New Act incorporation rule doesn't apply to Old Act condos.
64.32 does not mention Articles of Incorporation.
64.34.300 ("The association shall be organized as a profit or nonprofit corporation.");
64.38.010(10) mentions Articles of Incorporation ("'Governing documents' means the articles of incorporation"), and that the Board can't change them for the Association in 64.38.025(2**)**, and that proposed amendments to them should be on the Board meeting agenda in 64.38.035(3);
64.90.400(3) ("The association must have a board and be organized as a for-profit or nonprofit corporation or limited liability company.");
24.03.025 ("The articles of incorporation shall set forth:

(1) The name of the corporation.

(2) The period of duration.... [and]
(3) The purpose or purposes for which the corporation is organized.")

[5] The New Act definition applies to Old Act condos for events after July 1, 1990. **64.34.010(1).**
64.32.200(1) ("The declaration may provide for the collection of all sums assessed by the association...");
64.34.020(3) ("'Assessment' means all sums chargeable by the association against a unit including, without limitation:
(a) Regular and special assessments for common expenses, charges, and fines imposed by the association;
(b) interest and late charges on any delinquent account; and
(c) costs of collection, including reasonable attorneys' fees, incurred by the association in connection with the collection of a delinquent owner's account.");
64.38.010(1) ("'Assessment' means all sums chargeable to an owner by an association in accordance with 64.38.020 [Association Powers].");
64.90.010(3) ("'Assessment' means all sums chargeable by the association against a unit,").

[6] The New Act definition does not apply to Old Act condos.
64.32.010(4) ("'Association of apartment owners' means all of the apartment owners acting as a group…");
64.34.020(4) ("'Association' or 'unit owners' association' means the unit owners' association organized under 64.34.300.");
64.38.010(11) ("'Homeowners' association' or 'association' means a...legal entity, each member of which is an owner of residential real property located within the association's jurisdiction,...and...is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member.");
64.90.010(4) ("'Association' or 'unit owners association' means the unit owners association.")

[7] The New Act definition does not apply to Old Act condos.
64.32.090(11) ("A provision requiring the adoption of bylaws for the administration of the property…which may include whether administration of the property shall be by a board of directors elected from among the apartment owners…").
64.34.020(6) and **64.38.010(3)** have identical definitions. ("'Board of directors' means the body, regardless of name, with primary authority to manage the affairs of the association.");

64.90.010(6) ("'Board' means the body, regardless of name, designated in the declaration, map, or organizational documents, with primary authority to manage the affairs of the association.").

[8] Board meetings are not explicitly defined in any of the Acts, but WUCIOA requires them to have specific traits. A Board meeting must involve conducting Association business (**64.90.445(2)(c)**), be open to Owners (**64.90.445(2)(a)**), except executive sessions), take place at a convenient place to the community (**64.90.445(2)(d)**) and provide an Owner comment period (**64.90.445(2)(e)**). The Association must inform Owners of the date of the Board meeting, either via a schedule or by notifying them at least 14 days before the meeting, unless it is an emergency (**64.90.445(2)(f)**).

[9] **24.03.005(7**) ("'Board of directors' means the group of persons vested with the management of the affairs of the corporation irrespective of the name by which such group is designated in the articles or bylaws.");
24.06.005(10) ("'Board of directors' means the group of persons vested with the management of the affairs of the corporation irrespective of the name by which such group is designated.")

[10] The term "budget" is not in **64.32.** The New Act definition applies to Old Act condos, but WUCIOA's budget provision applies to all communities.
64.34.304(1) ("Except as provided in subsection (2) of this section, and subject to the provisions of the declaration, the association may: … (b) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from unit owners");
64.38.020 ("[A]n association may: ... (2) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from owners;");
64.90.405(1) ("An association must: …(b) Adopt budgets as provided in 64.90.525;")

[11] The New Act definition doesn't apply to Old Act condos.
64.34.324(1) ("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;");
64.38.020(11) ("…[A]s provided in the bylaws or rules,");
64.90.010(35) ("'Organizational documents' means the instruments filed with the secretary of state to create an entity and the instruments governing the internal affairs of the entity including...bylaws,");

24.03.005(5)/24.06.005(6) ("'Bylaws' means the code or codes of rules adopted for the regulation or management of the affairs of the corporation irrespective of the name or names by which such rules are designated.")

[12] See Endnote 28.

[13] Old Act/HOA Act term for common elements.
64.32.010(6) ("'Common areas and facilities'…includes: (a) The land on which the building is located; (b) The foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes, and entrances and exits of the building...");
64.38.010(4) ("'Common areas' means property owned, or otherwise maintained, repaired or administered by the association.")

[14] New Act/WUCIOA term for what used to be the common area. The New Act definition doesn't apply to Old Act condos.
64.34.020(7) ("'Common elements' means all portions of a condominium other than the units.");
64.90.010(7) ("'Common elements' means:
(a) In a condominium or cooperative, all portions of the common interest community other than the units;
(b) In a plat community or miscellaneous community, any real estate other than a unit within a plat community or miscellaneous community that is owned or leased either by the association or in common by the unit owners rather than an association; and (c) In all common interest communities, any other interests in real estate for the benefit of any unit owners that are subject to the declaration.")

[15] The New Act definition doesn't apply to Old Act condos, but the part about unequal distribution of common expenses (64.34.360(3)) does apply.
64.32.010(7) ("'Common expenses' include:
(a) All sums lawfully assessed against the apartment owners by the association of apartment owners;
(b) Expenses of administration, maintenance, repair, or replacement of the common areas and facilities;
(c) Expenses agreed upon as common expenses by the association of apartment owners");
64.34.020(9) ("'Common expenses' means expenditures made by or financial liabilities of the association, together with any allocations to reserves.");
64.38.010(5) ("'Common expense' means the costs incurred by the association to exercise any of the powers provided for in this chapter.");

64.90.010(8) ("'Common expense' means any expense of the association, including allocations to reserves, allocated to all of the unit owners in accordance with common expense liability.")

[16] Inclusive term created in WUCIOA.
64.90.010(10) ("'Common interest community' means real estate...which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, or improvement of, or services or other expenses related to, common elements, other units, or other real estate described in the declaration.")

[17] Not specifically defined in the Old Act but mentioned. Not mentioned in the HOA Act. The New Act definition doesn't apply to Old Act condos.
64.34.020(10) ("'Condominium' means real property, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions.");
64.90.010(11) ("'Condominium' means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions. A common interest community is not a condominium unless the undivided interests in the common elements are vested in the unit owners.")

[18] Not mentioned in the Old Act, the New Act, or the HOA Act.
64.90.010(15) (""Cooperative" means a common interest community in which the real estate is owned by an association, each member of which is entitled by virtue of the member's ownership interest in the association and by a proprietary lease to exclusive possession of a unit.")

[19] D&O Insurance is a type of liability insurance that Associations can choose to purchase for the Association and for Board Members that reimburses for loss or advances defense costs.

[20] Not mentioned in the Old Act or the HOA Act. The New Act definition doesn't apply to Old Act condos.
64.34.020(15) ("'Declarant' means: (a) Any person who executes as declarant a declaration as defined in subsection (17) of this section...");
64.90.010 (17) ("'Declarant' means: (a) Any person who executes as declarant a declaration...")

[21] The New Act definition doesn't apply to Old Act condos.
64.32.090 ("The declaration shall contain the following:
(1) A description of the land ...

(2) A description of the building...
(3) The apartment number of each apartment...
(4) A description of the common areas and facilities;
(5) A description of the limited common areas and facilities");
64.34.216(1) ("The declaration for a condominium must contain:
(a) The name of the condominium…
(b) A legal description of the real property included in the condominium....
(n) Any restrictions in the declaration on use, occupancy, or alienation of the units;");
64.38.010(10) ("'Governing documents' means the articles of incorporation, bylaws, plat, declaration of covenants...");
64.90.225(1) ("The declaration must contain:
(a) The names of the common interest community and the association and…
(b) A legal description of the real estate included in the common interest community;
(c) A statement of the number of units...
(e) A description of any limited common elements...
(k) Any restrictions on alienation of the units...")

[22] Consists of giving parties notice of an action and an opportunity to be heard if required. The New Act due process requirement applies to Old Act condos for events after July 1, 1990. 64.34.010(1).
64.34.304(1)(k) ("…[T]he association may…after notice and an opportunity to be heard…"):
64.38.020 ("…[A]n association may: …after notice and an opportunity to be heard…");
64.90.405 ("…[T]he association may…. after notice and opportunity to be heard, impose and collect reasonable fines for violations of the governing documents…")

[23] "Electronic Transmission' is not found in the Old Act or the New Act.
64.38.035(2)(c) ("… [The secretary…shall provide written notice to each owner of record by: .... (c) Electronic transmission to an address, location, or system designated in writing by the owner. Notice to owners by an electronic transmission complies with this section only with respect to those owners who have delivered to the secretary or other officers specified in the bylaws a written record consenting to receive electronically transmitted notices,");
64.90.515(3) ("Notice may be provided in an electronic transmission…");
24.03.005(12) ("'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.");
24.06.005(17) (""Electronic transmission" or "electronically transmitted" means any process of electronic communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction of the transmitted information by the recipient.")

[24] The New Act ability to levy fines in accordance with a fine schedule applies to Old Act condos. **64.34.010(1).**
64.34.304(1)(k) ("The association may…(k)…levy reasonable fines in accordance with a previously established schedule");
64.38.020 ("…[A]n association may:…(11)...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;");
64.90.405(2) ("…[T]he association may:...(l) 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;")

[25] **64.38.010(10)** ("'Governing documents' means the articles of incorporation, bylaws, plat, declaration of covenants, conditions, and restrictions, rules and regulations of the association, or other written instrument by which the association has the authority to exercise any of the powers provided for in this chapter or to manage, maintain, or otherwise affect the property under its jurisdiction.");
64.90.010(27) ("'Governing documents' means the organizational documents, map, declaration, rules, or other written instrument by which the association has the authority to exercise any of the powers provided for in this chapter or to manage, maintain, or otherwise affect the property under its jurisdiction.")

[26] **64.38.010(11)** ("'Homeowners' association' or 'association' means a corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member. 'Homeowners' association' does not mean an association created under chapter 64.32 or 64.34.");
64.90.010(4) ("'Association' or 'unit owners association' means the unit owners association organized under 64.90.400 and, to the extent

necessary to construe sections of this chapter made applicable to common interest communities pursuant to 64.90.080, 64.90.090, or 64.90.095, the association organized or created to administer such common interest communities.")

[27] The New Act and WUCIOA both require CGL and allow the Association to buy D&O insurance for itself. Liability insurance is not mentioned in the Old Act or the HOA Act. The New Act liability insurance clause doesn't apply to Old Act condos.
64.34.352(1) ("[T]he association shall maintain, to the extent reasonably available: ...(b) Liability insurance...covering all occurrences commonly insured against for death, bodily injury, and property damage arising out of or in connection with the use, ownership, or maintenance of the common elements.");
64.90.405(2) ("Except as provided otherwise in subsection (4) of this section and subject to the provisions of the declaration, the association may: (o) Maintain directors' and officers' liability insurance;");
64.90.470 ("[T]he association must maintain in its own name...(b) Commercial general liability insurance,")

[28] The New Act definition doesn't apply to Old Act condos.
64.32.010(11) ("'Limited common areas and facilities' includes those common areas and facilities designated in the declaration…as reserved for use of certain apartment or apartments to the exclusion of the other apartments.");
64.34.020(27) ("'Limited common element' means a portion of the common elements allocated by the declaration or by operation of 64.34.204 (2) or (4) for the exclusive use of one or more but fewer than all of the units.");
64.90.010(30) ("'Limited common element' means a portion of the common elements allocated by the declaration or by operation of 64.90.210 (1)(b) or (2) for the exclusive use of one or more, but fewer than all, of the unit owners.")

[29] "Lot" is not used in the Old Act, the New Act, or WUCIOA.
64.38.010(12) (""Lot" means a physical portion of the real property located within an association's jurisdiction designated for separate ownership.")

[30] The term is not mentioned in the Old Act or the HOA Act. The term misconduct is not defined in 64.34. The New Act misconduct clause doesn't apply to Old Act condos.

64.34.360(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.");
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,);

[31] Typically the Articles of Incorporation, Declaration and Bylaws. The term "organizational documents" is not found in the Old Act, the New Act or the HOA Act.
64.90.010(35) ("'Organizational documents' means the instruments filed with the secretary of state to create an entity and the instruments governing the internal affairs of the entity including, but not limited to, any articles of incorporation, certificate of formation, bylaws, and limited liability company or partnership agreement.…")

[32] The New Act definition doesn't apply to Old Act condos.
64.32.010(2) ("'Apartment owner' means the person or persons owning an apartment…");
64.34.020(42) ("'Unit owner' means a declarant or other person who owns a unit…");
64.38.010(13) ("'Owner' means the owner of a lot.");
64.90.010(58) ("a) 'Unit owner' means (i) a declarant or other person that owns a unit...");

[33] Person is not defined in the HOA Act. The New Act definition doesn't apply to Old Act condos.
64.32.010(13) ("'Person' includes any individual, corporation, partnership, association, trustee, or other legal entity.");
64.34.020(30) ("'Person' means a natural person, corporation, partnership, limited partnership, trust, governmental subdivision or agency, or other legal entity.");
64.90.010(36) ("'Person' means an individual, corporation, business trust, estate, the trustee or beneficiary of a trust that is not a business trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal entity,");

[34] Not found in Old Act, HOA Act or the Nonprofit Acts. The New Act definition doesn't apply to Old Act condos.
64.34.324(3) ("In determining the qualifications of any officer or director of the association…the term "unit owner" in such context shall…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….");
64.90.410(2) ("the board must be comprised of at least 3 members, at least a majority of whom must be unit owners…(d) In determining the qualifications of any officer or board member of the association, "unit owner" includes…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.")

[35] Personal property, according to Merriam Webster's Dictionary, is property belonging to a particular person that is movable. It does not include land or buildings.

[36] Not found in HOA Act. The New Act insurance provision doesn't apply to Old Act condos.
64.32.220 ("The manager or board of directors…shall obtain insurance for the property against loss or damage by fire and such other hazards…");
64.34.352(1) ("The association shall maintain, to the extent reasonably available: (a) Property insurance on the condominium, which may, but need not, include equipment, improvements…");
64.90.470 ("(1) The association must maintain in its own name...(a) Property insurance on the common elements and, in a plat community or miscellaneous community, also on property that must become common elements, insuring against risks of direct physical loss commonly insured against…")

[37] Term not found in the Old Act**.** The New Act proxy rules doesn't apply to Old Act condos.
64.34.336(2) ("Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner.");
64.38.040 ("A quorum is present…in person or by proxy at the beginning of the meeting.");
64.90.445(2)(m) ("A board member may not vote by proxy or absentee ballot.");
64.90.455(5) ("The following requirements apply with respect to [unit owner] proxy voting: (a) Votes allocated to a unit may be cast pursuant to a directed or undirected proxy duly executed by a unit owner...");
24.03.085(2) ("A member may vote in person or, if so authorized by the articles of incorporation or the bylaws, may vote by…proxy... ");
24.03.090 ("The bylaws may provide the number or percentage of members entitled to vote represented in person or by proxy...")

[38] Term not found in the Old Act. The New Act definition doesn't apply to Old Act condos.
64.34.336 ("(1) 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.
(2) 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 50% of the votes on the board of directors are present at the beginning of the meeting.");
64.38.040 ("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.");
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 20% 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...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.");
24.03.090 ("The bylaws may provide the number or percentage of members entitled to vote represented in person or by proxy, or the number or percentage of votes represented in person or by proxy, which shall constitute a quorum at a meeting of members....");
24.06.115 ("The articles of incorporation or the bylaws may provide the number or percentage of votes which members or shareholders are entitled to cast in person, by mail, by electronic transmission, or by proxy, which shall constitute a quorum at meetings of shareholders or members. However, in no event shall a quorum be less than one-fourth, or in the case of consumer cooperatives, five percent, of the votes which members or shareholders are entitled to cast in person, by mail, by electronic transmission, or by proxy… ")

[39] Not found in the Old Act or the Nonprofit Acts. In the New Act & the HOA Act, ratification is for budgets. In WUCIOA, ratification is for budgets and borrowing. **64.90.080** requires all communities to comply with WUCIOA's budget process in **64.90.525**. See Chapter 31—How Does My Community Adopt a Budget? **64.90.525(1)(a); 64.90.405(4).**

[40] **64.90.010(43)** ("'Record' when used as a noun, means information inscribed on a tangible medium or contained in an electronic transmission.");
24.03.005(18) (""Record" means information inscribed on a tangible medium or contained in an electronic transmission.")

[41] **64.32.170** ("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,");
64.38.045(1) ("All financial and other records of the association, including but not limited to checks, bank records, and invoices, in whatever form they are kept, are the property of the association.");
RCW 64.90.495 ("1) An association must retain …The current budget…other appropriate accounting records within the last 7 years;(b) Minutes of all meetings…current unit owners…organizational documents…All financial statements and tax returns…current board members and officers…Copies of contracts…Copies of all notices provided to unit owners or the association… other records related to voting by unit owners for 1 year after the election…").

[42] Applies to New Act and WUCIOA communities. The New Act resale certificate requirement doesn't apply to Old Act condos.
64.34.425(1) ("[A] unit owner shall furnish to a purchaser before execution of any contract for sale of a unit...");
64.90.640(1) ("[A] unit owner must furnish to a purchaser before execution of any contract for sale of a unit...a resale certificate...")

[43] WUCIOA was amended in 2019 to add that 64.90.545 [Reserve Study] applies to all existing communities and inconsistent provisions of the Condo and HOA Acts no longer apply. There is now only one standard for how reserve studies are to be conducted, and that is the WUCIOA standard.
64.90.080 ("…RCW 64.90.095, 64.90.405(1)(b) and (c),64.90.525 and 64.90.545 apply, and any inconsistent provisions of chapter 58.19, 64.32, 64.34, or 64.38 RCW do not apply, to a common interest community created in this state before July 1, 2018.")

[44] Rules and Regulations is a catch-all for the rules of daily living in the community, separate from the Bylaws (covering how the community is run) and the Covenants, Conditions and Restrictions, ("CC&Rs", covering the legal obligations of the Association and Owners). Rules about swimming pools or pets would be in the Rules and Regulations.

[45] Term is not found in the HOA Act. Some of the New Act provision about expenses applies to Old Act condos.
64.34.360 ("(3) To the extent required by the declaration: (a) Any common expense associated with…");
64.90.010(52) ("'Specially allocated expense' means any expense of the association, including allocations to reserves, allocated to some or all of the unit owners pursuant to 64.90.480 (4) through (8).");
64.90.480(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....

> (a) Expenses associated with the operation, maintenance, repair, or replacement of any specified limited common element...
> (b) Expenses specified in the declaration as benefiting fewer than all of the units...
> (c) The costs of insurance in proportion to risk; and
> (d) The costs of one or more specified utilities in proportion to respective usage,").

[46] "Security Interest" term not found in the HOA Act **64.38**. The New Act addresses taking a security interest in the common elements and does not apply to Old Act condos.
64.34.304(1) ("The association may…(h) Acquire, hold, encumber, and convey in its own name any…interest to real or personal property, but common elements may be conveyed or subjected to a security interest only pursuant to RCW 64.34.348 [Common Elements Conveyance]");
64.90.010(50) ("'Security interest' means an interest in real estate or personal property, created by contract or conveyance that secures payment or performance of an obligation...")

[47] The term "tangible medium" is not in the New Act or the HOA Act. It is mentioned incidentally in the Old Act requiring proof of insurance coverage to be in a tangible medium.
64.90.010(54) ("'Tangible medium' means a writing, copy of a writing, facsimile, or a physical reproduction, each on paper or on other tangible material.");
24.03.005(19) ("'Tangible medium' means a writing, copy of a writing, facsimile, or a physical reproduction, each on paper or on other tangible material.")

[48] **59.18.030(32)** [Residential Landlord-Tenant Act] ("A "tenant" is any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement.")

[49] Under the Old Act, "apartment" means "unit."

64.32.010(1) ("'Apartment' means a part of the property intended for any type of independent use...");
64.34.020(41) ("'Unit' means a physical portion of the condominium designated for separate ownership,");
64.38.010(12) ("'Lot' means a physical portion of the real property …designated for separate ownership.");
64.90.010(57)(a) ("'Unit' means a physical portion of the common interest community designated for separate ownership or occupancy,").

[50] "Units benefited" are not found in the HOA Act. The New Act statute mentioning units benefitted applies to Old Act condos.
64.34.360(3)(b) ("Any common expense or portion [limited common element] thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited;"); The term is not further defined.
64.90.480(4) ("If....so..., the association must assess:...(b) Expenses specified in the declaration as benefiting fewer than all of the units...in proportion to their common expense liability or in any other proportion that the declaration provides;") This is more restricted than the New Act.

[51] Not specifically defined in the Old Act, the New Act, or the HOA Act. The "New Act "& HOA Act require many requests to be written. A printed email counts as written once it is printed.
64.90.010 ("(60) 'Writing' does not include an electronic transmission. (61) 'Written' means embodied in a tangible medium.");
24.03.005 ("(19) 'Tangible medium' means a writing, copy of a writing, facsimile, or a physical reproduction, each on paper or on other tangible material. (20) 'Writing' does not include an electronic transmission. (21) 'Written' means embodied in a tangible medium.");
24.06.240(2) ('Written or printed notice or, if specifically permitted by the articles of incorporation or bylaws of the corporation,")

3--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 each Owner and 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. 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 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 maps 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 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 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.

If your Declaration truly has no provision for Amendment, the Association can adopt WUCIOA (which requires at least 30% of the Owners to vote, and 67% of those votes to approve) which then sets out procedures for Amendment.

4--What is WUCIOA?

WUCIOA (the Washington Uniform Common Interest Ownership Act) is a law that defines the rights and obligations of Owners in communities with shared ownership of property created on or after July 1, 2018, and those older communities that vote to adopt it. Unlike earlier laws, WUCIOA covers Condominiums, Cooperatives and Homeowner Associations under the same statute. WUCIOA describes creating and managing Common Interest Communities. This includes ownership, Association powers, meetings, voting and Budgets. Common Interest Communities are communities with shared ownership, like Condominiums, Homeowners' Associations (plat communities) and Cooperatives.[1]

WUCIOA is a "uniform" act. Uniform acts are intended to be adopted by multiple states so that the law is the same regarding a specific subject. A variety of legal issues regularly go beyond state lines, making a predictable and equivalent set of laws across states helpful. Our legislature may have intended "uniform" to mean a consistent law applicable to all types of Common Interest Communities.

The Community Associations Institute (CAI), an international membership organization representing Homeowner and Condominium Associations, recommends state adoption of the Uniform Common Interest Ownership Act because earlier state statutes do not deal adequately and completely with the normal issues faced by community Associations.[2] Nine states have passed a version of the Uniform Common Interest Ownership Act, including Washington.[3]

WUCIOA is not an exhaustive list of all the daily rules a community may use to function. For example, it does not cover swimming pool rules, lawn decoration or flag placement.[4] But it establishes a framework with the rights and obligation of each Owner and the Association.

[1] WUCIOA also covers miscellaneous communities.
64.90.010(33) ("'Miscellaneous community' means a common interest community in which units are lawfully created in a manner not inconsistent with chapter 58.17 RCW and that is not a condominium, cooperative, or plat community.")

[2] See https://www.caionline.org/Advocacy/PublicPolicies/Pages/Support-for-the-Uniform-Acts.aspx.

[3] Connecticut, Delaware, Vermont and Washington adopted modified versions of the 2008 Uniform Common Interest Ownership Act. Alaska, Colorado, Minnesota, Nevada and West Virginia adopted an earlier version. See https://www.caionline.org/Advocacy/StateAdvocacy/PriorityIssues/UniformActs/Pages/default.aspx.

[4] The HOA Act governs flag placement.
64.38.033(1) ("The governing documents may not prohibit the outdoor display of the flag of the United States…").

5--How Did WUCIOA Change in 2019?

The state legislature revised WUCIOA one year after its adoption.[1] **Most 2019 changes don't affect any existing communities, but the Reserve Study provisions now apply to every existing Condo and HOA**. Other changes apply only to Common Interest Communities created after July 1, 2018. Lawmakers were concerned about having too many construction-defect cases. They revised WUCIOA to reduce developers' liability and the Board Members' liability for defective construction to promote construction of more affordable housing.

All Reserve Studies Must Comply with WUCIOA

RCW Section 64.90.080 was edited to add that RCW 64.90.545 applies to all existing communities and inconsistent provisions of the Condo and HOA Acts no longer apply. RCW 64.90.545 says that all Reserve Studies must comply with "this chapter" (WUCIOA).

That means:

1) Different standards of determining if your community requires a Reserve Study.
2) The only exemptions are for non-residential communities, or when the Reserve Study costs more than 10% of the Association's annual Budget.
3) Contents and format must comply with WUCIOA.
4) Reserve Studies must calculate the deficit or surplus of reserves for every Unit in a community.

The revised RCW 64.90.080 effectively sweeps RCW 64.90.545, 64.90.550, 64.90.555 and 64.90.560 into application for all pre-existing communities. There is now only one standard for how Reserve Studies are to be conducted, and that is the WUCIOA standard.[2]

Reducing Developer Liability

A warranty is a legal guarantee that something will happen as promised. When a developer sells a Unit to a purchaser, they are promising that the Unit is suitable to be used for the purpose it is

sold as.[3] This is one type of warranty. The statute also contains a 4-year warranty of construction quality.

Under the prior statute, the developer had to promise that any improvements would have no defective materials, be built in accordance with sound engineering and construction standards, be built in a workmanlike manner and in accordance with all laws at the time.[4] In the revised WUCIOA, a developer does not have to construct a Condominium in compliance with all laws at the time of construction. Instead, they can just construct it in accordance with engineering standards generally accepted at the time it was constructed.[5] This makes it harder to prove construction defects.

If a Unit Owner or Association does sue the developer for a construction defect, it will be harder to win. Under the old WUCIOA, to prove a construction defect, you had to prove that it caused an adverse effect on performance that was more than technical and would be significant to a reasonable person.[6] You did not have to prove that it made the Unit uninhabitable or the Common Element unfit.[7]

The revised WUCIOA adds a definition of what an "adverse effect" is and establishes the purchaser's burden of proof. You must prove the breach has/will cause physical damage, materially affects the performance of building equipment, or presents an unreasonable safety risk to the Unit occupants.[8] The assurance about not needing to prove the Unit was uninhabitable or a Common Element is unfit was deleted. The obligation to comply with all laws applicable to the project was deleted.

Clarifying Board Member Immunity from Liability

Board Members of Common Interest Communities are now more clearly protected from personal liability. Lawmakers were worried that some Board Members may have filed construction defect cases to protect themselves from personal liability. The story goes that lawyers threatened to sue Condo Board Members for any defects if the Board Members did not adequately investigate and sue the developer before time ran out.

Board Members have a duty to act in good faith, as an ordinarily prudent person would and in what a reasonable person would think was in the best interests of the corporation.[9] With the revision, they have the same immunities as Board Members under the Nonprofit Miscellaneous Act RCW 24.06.[10] A Board Member is not personally liable as long as they avoid doing something (or failing to do something) that is intentional Misconduct, a knowing violation of the law or a transaction that they will personally benefit from.[11] Developer representatives who serve on Association boards would be equally protected as individuals as purchasers serving on the Board.

Other Minor Changes/Corrections

- Requires horizontal Unit boundaries on maps to be attached to specific Units;[12]
- Requires more detailed list of Limited Common Elements;[13]
- Now the Board only has 50 days to call a meeting ratifying loans;[14]
- WUCIOA doesn't apply to communities if they are annexed by a community created before July 2018;[15]
- If a developer delivered a public offering statement to a purchaser before WUCIOA for a community created after WUCIOA, they don't need to deliver a second public offering statement to comply with WUCIOA;[16]
- Communities created before WUCIOA must adopt Budgets, impose Assessments and make Reserve Studies under WUCIOA.[17]

---

[1] Washington State Senate Bill 5334, Effective July 28, 2019.

[2] **64.90.545** ("(1) Unless exempt under subsection (2) of this section, an association must prepare and update a reserve study in accordance with this chapter. An initial reserve study must be prepared by a reserve study professional and based upon either a reserve study professional's visual site inspection of completed improvements or a review of plans and specifications of or for unbuilt improvements, or both when construction of some but not all of the improvements is complete. An updated reserve

study must be prepared annually. An updated reserve study must be prepared at least every third year by a reserve study professional and based upon a visual site inspection conducted by the reserve study professional.
(2) Unless the governing documents require otherwise, subsection (1) of this section does not apply (a) to common interest communities containing units that are restricted in the declaration to nonresidential use, (b) to common interest communities that have only nominal reserve costs, or (c) when the cost of the reserve study or update exceeds ten percent of the association's annual budget.
(3) The governing documents may impose greater requirements on the board.")

[3] **64.90.670(2)** ("A declarant and any dealer impliedly warrants to a purchaser of a condominium unit that the unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type.")

[4] Original RCW 64.90.670(2) ("[A]ny improvements made or contracted for by such declarant or dealer will be:
(a) Free from defective materials;
(b) Constructed in accordance with sound engineering and construction standards;
(c) Constructed in a workmanlike manner; and
(d) Constructed in compliance with all laws then applicable to such improvements.")

[5] Revised **64.90.670(2)** ("[A]ny improvements made or contracted for by such declarant or dealer will be:
(a) Free from defective materials;
(b) Constructed in accordance with engineering and construction standards**,** including applicable building codes, generally accepted in the state of Washington at the time of construction; and
(c) Constructed in a workmanlike manner;

[6] Original RCW 64.90.670(7)(a) ("In a proceeding for breach of any of the obligations arising under this section, the plaintiff must show that the alleged breach has adversely affected or will adversely affect the performance of that portion of the unit or common elements alleged to be in breach. (b) As used in this subsection, an adverse effect must be more than technical and must be significant to a reasonable person. To establish an adverse effect, the person alleging the breach is not required to prove that the breach renders the unit or common element uninhabitable or unfit for its intended purpose.")

[7] *Id.*

[8] Revised **64.90.670(7)(b)** ("To establish an adverse effect on performance, the purchaser is required to prove that the alleged breach (i) Is more than technical; (ii) Is significant to a reasonable person; and (iii) Has caused or will cause physical damage to the unit or common elements; has materially impaired the performance of mechanical, electrical, plumbing, elevator, or similar building equipment; or presents an actual, unreasonable safety risk to the occupants of the condominium.")

[9] WUCIOA **64.90.410(1)(b)** requires Board Members to act the way directors do under RCW 24.06. ("(b) In the performance of their duties, 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.") RCW 24.06.153(1) requires Board Members to act in good faith, as an ordinarily prudent person would in what they believe is the best interests of the corporation.

[10] **24.06.035(2)** ("Unless the articles of incorporation provide otherwise, a member of the board of directors or an officer of the corporation is not individually liable to the corporation or its shareholders or members in their capacity as shareholders or members for conduct within his or her official capacity as a director or officer after July 22, 2001, except for acts or omissions that involve intentional misconduct or a knowing violation of the law, or that involve a transaction from which the director or officer will personally receive a benefit in money, property, or services to which the director or officer is not legally entitled.")

[11] *Id.*

[12] Revised RCW **64.90.245(8)**.

[13] Revised RCW **64.90.225(1)**.

[14] Revised RCW **64.90.405(4)(b)**.

[15] Revised RCW **64.90.075(4)**.

[16] **64.90.090(2)**.

[17] **64.90.080(1)**

6--What Changes Come with Adoption of WUCIOA?

We get a lot of questions about what changes come with a community choosing to adopt the Washington Common Interest Ownership Act (WUCIOA). We are asked by clients if they should adopt the statute. This is a complex question that might be answered differently for different communities.

Generally, we believe that WUCIOA is better than the HOA Act, and better than the Old Act. But there are some specific provisions in WUCIOA that some clients object to. We have some Condo clients that object to the open meeting requirements and additional administrative burden. We have some Condo clients that don't want to give up the ability to use utility termination as a collection remedy. We have other clients that want some specific provision of WUCIOA, so will adopt it for the specific provision. The ability to pledge future income as collateral for a loan is one. The definitions of Limited Common Elements and Unit boundaries is another. With a limited participation of their community (at least 30%) and approval of 67% of the participants, WUCIOA can apply, and accomplish a specific want or need of the community.

For most New Act Condominiums, there is a lot of overlap with WUCIOA, so the benefits of changing the statute are less clear. All community types do better with regard to collections activities under WUCIOA, because the statute of limitations is six years, the super-priority lien applies, and you can recover some attorney fees from banks that don't pay the priority lien. But we don't know that those changes are significant enough to warrant making the change in statute. There is no question that WUCIOA contains more detail about Records and administration of the community, but we don't know that these issues are of concern to many of our clients. If a New Act Condo wants a rental cap, WUCIOA may lower the approval requirement from 90% to a lower number.

Below is a summary of favorable and potentially unfavorable consequences for existing communities should they choose to adopt WUCIOA. This is NOT legal advice, because we cannot know what your current documents require, or what needs you have for your community. We would recommend you consult with an experienced community Association lawyer to advise you if you are looking to change statute or otherwise revise your Governing Documents. Remember that adoption of WUCIOA by itself (which is pretty easy) does NOT revise the conflicting provisions of your existing Declaration, nor adopt optional or elective provisions from WUCIOA. See the chapter on how to adopt WUCIOA for more information about that.

Changes that come with adoption of WUCIOA

Note: The How to Adopt WUCIOA (RCW 64.90.095) and Budget Ratification (RCW 64.90.525) sections apply to all existing communities, even if they don't adopt WUCIOA. See chapter entitled "How Does My Community Adopt a Budget?"

As of July 28, 2019, the Reserve Study requirements of WUCIOA apply to every existing community as well (RCW 64.90.545). See chapter entitled "How Did WUCIOA Change in 2019?"

Favorable consequences for most communities (but this is not legal advice!)

1. More definitions – 64.90.010
    - Eligible mortgagee; Record; Writing; Written; Electronic Transmission; etc.
2. Allows Limited Common Elements (LCE) to be reallocated without all owners voting – 64.90.240
3. Makes windows & doors in Condos LCE – 64.90.210
4. Prohibits challenge to Declaration Amendments after one year – 64.90.285
5. Eliminates 90% approval for restrictions on use (rental caps) – 64.90.285
6. Allows corrective Amendments by Board – 64.90.285
7. Specifies all powers and duties – 64.90.405
    a. Allows all Associations to assign future income to allow borrowing
    b. Allows enforcement against tenants

   c. Clarifies Board discretion in enforcement
8. Sets more requirements for Bylaws – 64.90.610
9. Provides authority to inspect Units – 64.90.440
10. Specifies ability to have executive sessions of Board Meetings – 64.90.445
11. Challenges to Board Meeting process must be done within 90 days - 64.90.445
12. Allows voting by Written ballot, and up to 11 months to collect them - 64.90.455
13. Allows costs due to Misconduct to be assessed directly to units – 64.90.480
14. Provides super-priority lien for all communities – 64.90.485
15. Provides for some attorney fees if banks don't pay super-priority lien – 64.90.485
16. Provides 6 years for the Association to pursue unpaid Assessments – 64.90.485
17. Allows non-judicial foreclosure to be included in the Declaration – 64.90.485
18. Defines what Records are and the rules for retaining them – 64.90.010 and 64.90.475
19. States specifically what Records can be withheld from owners – 64.90.495
20. Allows rules to limit rentals, but only to meet bank standards – 64.90.510
21. Allows notice by Electronic Transmission – 64.90.515
22. Says failure to give notice does not invalidate meeting actions – 64.90.445
23. Allows the Board to remove a delinquent Board Member – 64.90.520

Potentially unfavorable consequences of adopting WUCIOA. (But this is not legal advice!)

1. Must be a corporation or LLC – 64.90.400
2. Prohibits suspension of delinquent Owner voting rights – 64.90.405
3. Requires ratification of any loan, similar to ratifying a Budget – 64.90.405
4. Requires both Board and committee Meetings be open – 64.90.445

5. Requires notice of Board and committee Meetings to Owners – 64.90.445
6. Requires reasonable Owner comment period at Board and Owner Meetings 64.90.445
7. Specifies Board Meetings must be at or near the community – 64.90.445
8. Requires materials distributed for Board Meetings be available to Owners – 64.90.445
9. Limits Board decisions by Written consent to "ministerial" actions – 64.90.445
10. Sets standards for voting by mail – 64.90.455
11. Defines Misconduct to mean "Gross Negligence" when causing expenses to the Association– 64.90.480
12. Defines what Records are and the rules for retaining them – 64.90.010 and 64.90.475
13. Requires rules be published to Owners before Board adopts – 64.90.505
14. Requires CPA audit annually unless Budget is under $50,000 – 64.90.530
15. Requires notice to Owners of reserve fund use not for common repair – 64.90.540
16. Requires Resale Certificates for all communities – 64.90.640

7--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.
   d) The Amendment may then be approved by two-thirds of the Board, at or after the meeting.[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, including expenses to maintain Limited Common Elements;[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] **64.90.080** ("(1) Except for a nonresidential common interest community described in RCW 64.90.100, RCW 64.90.095, 64.90.405(1) (b) and (c), 64.90.525 and 64.90.545 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, 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.")

[2] **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.

(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] **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 to vote.

[6] **64.90.480(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…").

[7] **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] **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 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] **64.90.285(1)(a)** ("[T]he declaration may be amended only by vote or agreement of unit owners of units to which at least 67% of the votes in the association are allocated, unless the declaration specifies a different percentage not to exceed 90% 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.")

8--What Are the Key Terms in Any Contract?

Our goals in reviewing contracts are to confirm that our client and the vendor have a common understanding of the key terms of their agreement. The main key terms are what you are buying and how much will it cost. The other key terms describe how each party will perform and answers questions about what happens when different unexpected events occur.

The minimum terms needed to form a contract are an offer, an acceptance of that offer and consideration.[1] The acceptance can be spoken, Written or by a sign (like a handshake) as long as it shows an intent to be bound by the terms of the offer.[2] "Consideration" means doing something, ending a legal relationship or promising something.[3] A common example is when an Association promises to pay in exchange for a contractors' promise to perform a service. Contracts exist for many services, and Associations (Boards) should read and understand them all. Contracts might cover construction, landscaping, management, alarm monitoring, cable tv, legal services, accounting, security, consulting, or any other service provided to a community.

What Are You Buying and What Will it Cost?

What you are buying is the scope of work, often provided by an outside consultant or the vendor. It describes the vendor obligation. The contract should specify the price for each service in detail. A scope of "replace roof" is NOT adequate to describe the work to be performed in evaluating the contractor's performance. An inadequate scope is the most common problem we have come to our office when Boards come to our office with contract problems. A scope can be better defined by adding the specific products to be used, and specifying that those products must be installed in accordance with the manufacturer's recommendations.

What is the Term and How Can You End the Contract?

The contract should also be specific about how to end a contractual relationship with a contractor and the consequences of

doing so (if you are not happy with the contractor). The contract may specify that it can only be terminated "for cause," when a material clause is broken. Some contracts allow termination without cause (for convenience). You should know if there is a penalty for termination. If the contract is terminated, the contract should specify what happens next. Depending on the service provided, it may be important for the service to be continuous (for example elevator maintenance or Association management). Continuous coverage will require the replacement company to start as soon as the terminated company stops.

How Does the Contract Allocate Risk?

How does the contract shift risk about how long the contract takes to perform? How does the contract allocate risk for accidents (does it have insurance requirements) and mistakes (professionals may have boilerplate contracts that severely limit their liability for errors)? Vendors may quote hours rather than tasks as the measure of their performance. An hourly contract means the Association is taking the risk that it may take longer than expected to finish the project but would also benefit if the project finishes early. In a fixed price contract, the contractor is taking that risk. In exchange for taking on more of the risk, the contractor may charge more in the form of a risk premium.

Whose Insurance Covers What Risks?

Contracts should say what insurance for injury or damages each party must have, and how or if the other party is an additional insured. If materials are stolen from a jobsite, who will pay to replace them? Building materials are usually not covered by the Association's insurance because they are not physically attached to the property yet. Contractors don't want to cover that cost out-of-pocket. Builder's risk insurance may be bought by the contractor or the Association to insure losses in materials while the building is under construction.

Are Special Licenses and Permits Required/Covered?

The Association may hire contractors to perform building work: constructing, remodeling or repairing a property or structure.[4] In Washington, contractors are separated into general contractors

(performing multiple kinds of building work) or specialty contractors (performing only one kind of building work).[5] Both types of contractors need a license. A licensed contractor in Washington must carry general liability insurance and have a bond protecting employees, vendors and customers.[6]

What if There Are Changes During the Contract Period?
Sometimes the situation changes during a project and the contract needs to be updated. The duration of the project may need to be extended or the specific tasks the contractor needs to do may be different. If both the Association and the contractor agree on the change, a change order is used to amend the contract and change its scope and/or price. If they disagree on the change, a construction change directive can be used (if the contract provides for one). A construction change directive requires the contractor to perform the additional work with a formula for payment agreed to in advance.[7] We recommend such a provision for all construction contracts.

When Are Payments Due?
Make sure the payment terms are specific. Some contracts specify that a certain percentage of the fees must be paid in advance. We generally counsel clients not to make large payments before work on the project begins. Other contracts specify payment is due simultaneously with performance. The Association could agree to "pay for performance as completed." A different contract may specify payment is due at the completion of the project. The contract should specify how many days the Association has to provide payment after receiving an invoice from the contractor. The contract should also specify if there are late fees and if interest is charged on past due bills.[8]

What If One of the Parties Fails to Perform?
If the Association or the contractor does not do what they are obligated to do, they have breached the contract. The breach may be material, or insignificant, depending on the circumstances.[9] The breach is material if the broken promise largely defeats the purpose of the contract, or relates to an essential element of the contract, and deprives the injured party of a benefit that they

reasonably expected.[10] A material breach may excuse the other party from performing and allow them to abandon the contract.[11]

How Will You Resolve Conflicts During the Contract?
The contract should specify what happens if there is a dispute. Disputes may be solved by a mediator, in court, by arbitration or initially by a specific person. Some construction contracts specify that the architect will be the initial decision maker to speed up dispute resolution.

You should read every contract before it is signed, and if you can't afford to lose the entire price of the contract, you should have it reviewed by a lawyer. You can agree to any contract you want but should know what you are getting into. Different kinds of contracts may have additional important terms.

---

[1] See, *Christiano v. Spokane County Health Dist.,* 93 Wash.App. 90, 95, 969 P.2d 1078 (1998). Written contracts are only required by the Statute of Frauds if the contract concerns: performance for longer than 1 year; covering another's debt/misdeeds; marriage; estate executors personally paying estate debts; selling a land interest and selling things for over $500. See **RCW § 19.36.010** and **RCW § 62A.2-201**.

[2] *Plouse v. Bud Clary of Yakima, Inc.,* 128 Wash.App. 644, 648, 116 P.3d 1039 (2005).

[3] See, *King v. Riveland,* 886 P.2d 160, 164 (Wash. 1994); ("Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange.") Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange.

[4] **RCW 18.27.010 (1)(a)** (""Contractor" includes any person, firm, corporation, or other entity who…offers to undertake…to, construct, alter, repair, add to, subtract from, improve, develop, move, wreck, or demolish any building…road…other structure, project…or improvement attached to real estate…including the installation of carpeting …the installation or repair of roofing or siding, [and] performing tree removal services.")

[5] **RCW 18.27.010(5)** (""General contractor" means a contractor whose business operations require the use of more than one building trade or craft upon a single job or project or under a single building permit… (12)

"Specialty contractor" means a contractor whose operations do not fall within the definition of "general contractor".")

[6] Contractors in Washington are required to have general liability insurance ($50,000 property damage coverage and $200,000 public liability coverage, or $250,00 of combined single limit coverage.) See **RCW 18.27.050(1).** Contractors are required to have a bond of $12,000 (general contractor) or $6,000 (specialty contractor) under **RCW 18.27.040(1).** The bond shows they will pay their employees, employee benefits, state taxes and suppliers. They will also "pay all amounts that may be adjudged against the contractor by reason of breach of contract including improper work in the conduct of the contracting business." *Id.*

[7] The industry standard for construction change directives is the cost of the additional labor and materials and a 15%-20% profit. See Art. §13.2 of the AIA A104-2017 Standard Abbreviated Form of Agreement Between Owner and Contractor."

[8] There is a 12% cap for the interest that can be charged on a consumer loan, but unfortunately condominiums don't count as consumers. See **RCW 19.52.020(1).**

[9] The question of materiality depends on the circumstances of each particular case. *Vacova Co. v. Farrell*, 62 Wn.App. 386, 403, 814 P.2d 255 (1991).

[10] "Material Breach—Definition, 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 302.03 (7th ed.)

[11] "A 'material breach' is a breach that is serious enough to justify the other party in abandoning the contract. *Id.*

9--What Statute of Limitations Is 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 dispute. A lawyer must examine the facts of the dispute to properly advise your Association.

Validity of an Amendment to the Governing Documents

Both the New Act[1] and WUCIOA[2] 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]

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 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 the 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. 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 probably 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, 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 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 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, requesting an injunction preventing the construction of any structures on this portion of the roof, and requesting 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 New Act, the Condos have 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 governed by 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] **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] **64.90.285(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] **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] **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…")

[9] *Grand View Homes LLC v. Cascade Testing Laboratory, Inc.* 146 Wash.App. 1044 at *3 (Wash. Ct. App. 2008) (unpublished). ("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] **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 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 m

[19] *Id*.

[20] **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] 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] **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] **64.90.485(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.")

10--How Can You Reduce Board Member Time Spent Managing the Community?

You can reduce the time that volunteer Board Members spend managing the community by making meetings more efficient and easier to attend remotely. The Board can delegate day-to-day management duties to the managing agent and committees and hire professionals for any projects that require extensive efforts.

Streamline Time in Meetings
Consider switching to a "consent agenda" to make your Board Meetings more efficient. A "consent agenda" is a list of motions before the Board which are published in advance, and which are adopted as a group with a single motion at the start of the meeting.

The consent agenda should include routine things, like approval of the prior meeting minutes. It should also include ratification of every action taken via email since the last meeting. It could include approval of things the managing agent has recommended, like selecting a specific vendor or Certified Public Accountant. It could also include approval of collections actions and enforcement actions. There must be enough information in the Board packet for the Board to make informed decisions, and any Board Member can remove items from the "consent agenda" for full Board discussion.

Adopt a communication policy for your community that allows individual Owner concerns to reach the Board while conserving the Board's time. All suggestions, comments and complaints should be Written and directed to the management company first. Then the management company or assigned Board member collects relevant information related to the issue for the Board to consider. If it is more than a week until the next Board Meeting, it will go on the agenda. The policy should clearly state that any phone calls or visits to any individual Board Member about an issue are inappropriate. Individual Board Members do not have

the authority to take action on their own, so any request for Board action must be directed to the full Board.

Under WUCIOA, every Board meeting must have an Owner comment period.[1] The agenda can limit the required comment period to a reasonable time (perhaps 10-15 minutes total or 2-3 minutes per person).

Make it Easier to Attend Meetings

Allow Board Members to participate in meetings remotely. This can be by telephone, video or some other videoconferencing system.[2] This is allowed unless your Organizational Documents prohibit it.

Delegate Specific Management Duties to the Managing Agent

Your community can make a resolution to delegate many day-to-day duties of the Association to the managing agent. Collections, including referring Owners to collections action, assessing late fees and negotiating payment plans, can be delegated.[3] The Association can refer some enforcement actions like sending violation notices to Owners and indicating which fines apply in accordance with the community's existing fine policy. Owners may need to be given an opportunity to be heard before fines can be assessed. Some Association documents allow the hearing to be delegated to a manager or committee. The managing agent can also be authorized to supervise maintenance of the common areas and hire vendors.

For most communities, the Bylaws must state what powers may be delegated to managers or committees. The Board can set limits on the managing agent's authority. The managing agent should regularly (i.e. monthly) report back to the Association about what they have been doing and must be supervised. Ultimately, the Board remains responsible for all actions.

Using Committees

Board committees with 2 or more Board Members are useful for any project that involves in-depth research, like replacing roofing in the complex or repaving the parking lot. The committee needs

to have at least two Board Members on it if it is going to be exercising any Board powers.[4] For more information, see the chapter entitled "11--How Do I Delegate Board Duties?" Advisory committees of non-Board Members may be able to research issues and advise Boards to spread the burden off of the Board, while leaving the Board with all decision making authority.

Other Ways to Save Time

Using an action item list in the meeting will help keep the meeting on track. An action item is a task that needs to be decided on by the Board or performed by the Board, a manager, or a committee before the next meeting. For example, the Board may need to choose a vendor or decide whether maintenance is needed for the common area. Usually, a specific person is assigned to perform or report back about an action item.

You can amend the Governing Documents to eliminate cumbersome provisions. For example, notice by mail or requiring signatures on Board action taken outside a meeting, can be eliminated. Amending to allow for electronic notice may also be helpful. Establishing policies and procedures on how to do recurring tasks may be helpful. Budgeting and insurance renewal happen every year. If you write down the process used to help the next Board, you will get better and more consistent results, with less stress and time required for the Board.

It may take an investment of time to establish procedures and practices to reduce time spent by Board members, but the payoff over the long term can be significant, and will encourage more owners to serve on the board.

---

[1] **64.90.445(2)** ("The following requirements apply to meetings of the board and committees authorized to act for the board…(e) At each board meeting, the board must provide a reasonable opportunity for unit owners to comment regarding matters affecting the common interest community and the association.")

[2] **64.90.445(2)(h)(i)** ("Unless the organizational documents provide otherwise, the board may meet by participation of all board members by telephonic, video, or other conferencing process if:
(i) The meeting notice states the conferencing process to be used and provides information explaining how unit owners may participate in the conference directly or by meeting at a central location or conference connection; and
(ii) The process provides all unit owners the opportunity to hear or perceive the discussion and to comment as provided in (e) of this subsection.");
24.03.075 ("…[M]embers and any committee of members of the corporation may participate in a meeting by conference telephone or similar communications equipment so that all persons participating in the meeting can hear each other at the same time.")

[3] The Association should already have a Collection Policy that the Managing Agent is implementing.

[4] The Old Act does not mention delegation or committees. The HOA act does not mention committees and the New Act does not specify committee composition. Without two Board Members, it is just an advisory committee under WUCIOA. Both of the Nonprofit Acts require 2 directors (Board Members) to be on the committee.
64.90.410(6) ("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.");
24.03.115 ("The board of directors…may designate and appoint 1 or more committees each of which shall consist of 2 or more directors, which...shall have and exercise the authority of the board of directors…").

11--How Do I Delegate Board Duties?

A Board can delegate Board duties by deciding what powers to delegate and confirming the Bylaws allow those powers to be delegated. The Governing Documents may allow the Board to delegate some of its powers to a committee. If so, the Board can prepare and adopt a resolution or committee charter. When delegating to a committee, the Board can appoint committee members, but two must also be Board Members. A Board may be able to delegate some Board duties to a manager, a committee or an individual Board Member. Day-to-day management duties may be delegated to the managing agent, and usually is by the terms of the management contract. The Board can make a resolution to delegate specific authority to an individual Board Member, usually within some limits.

Delegating to a Committee

In order to delegate to a committee, the Governing Documents of you community must explicitly allow the Board to delegate the committee's powers. If the committee is exercising powers given to the Board, the committee needs to have at least two Board Members on it.[1] All the members of the committee must be appointed by the Board.[2] The Board remains responsible for committee actions.[3] For every committee, the Board should clearly spell out, in a Written document, the responsibilities and duties of the committee and its individual members. The document could be a committee charter, a Board resolution or a motion in the Board meeting minutes. The document should establish the relationship between the committee and the Board and set forth the limitations on the committee's authority. There are specific activities that a committee cannot perform under the Nonprofit Acts.[4] The Declaration may further define powers or limits for some committees.

Delegating to a Manager

Your Board can make a resolution to delegate the day-to-day management duties of the Association to the managing agent.[5] A Board policy or resolution must specify the authority delegated to the manager, including limits. Most management contracts contain

delegated duties, but Boards usually fail to reflect such delegation in Board Meeting minutes. Collections, including referring Owners for collections action, assessing late fees and negotiating payment plans, can be delegated.[6] Owners need to be given an opportunity to be heard before fines can be assessed.[7] (Late fees are not fines, and do not have the same requirement.) Depending on your documents, the opportunity to be heard may or may not be delegated to a manager. The Board remains responsible for all manager actions taken on behalf of the Board and should review them regularly.

Delegating to an Individual Board Member

The Board can delegate specific authority to an individual Board Member during the Board Meeting via a resolution. The specific tasks that the individual Board Member may do should be laid out clearly and include limits on the individual's authority and reporting back their progress to the Board. Depending on circumstances, an individual may be delegated authority to make decisions on delinquencies consistent with a pre-existing policy. They may be authorized to deal with a vendor, like landscapers. They may be given authority to communicate with an attorney or consultant.

The Board's power is in working as a group. Each person serving on the Board does not have authority to act alone unless there is a resolution or Board decision giving them that power. Some Governing Documents will spell out some specific powers assigned (delegated) to individual officers of the Association, such as the president presiding over all meetings. Beyond that, we recommend policies, resolutions or other Written documents setting out any specific authority granted to an office or person.

---

[1] The Old Act does not mention delegation or committees. The HOA act does not mention committees and the New Act does not specify committee composition. Without two Board Members, it is just an advisory committee under WUCIOA. Both Nonprofit Acts require two (2) Board Members to be on any committee exercising Board powers. **64.90.410(6)** ("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.")
24.03.115 ("The board of directors…may designate and appoint 1 or more committees each of which shall consist of 2 or more directors, which...shall have and exercise the authority of the board of directors…").

[2] The Nonprofit Acts clause requiring that a committee be appointed is identical.
64.90.410(6) ("…[A]ll committees of the association must be appointed by the board.");
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").

[3] **24.03.115** ("The designation and appointment of any such committee and the delegation thereto of authority shall not operate to relieve the board of directors, or any individual director of any responsibility imposed upon it or him or her by law.")

[4] **24.06.145** ("…No such committee shall have the authority of the board of directors…").
[5] **64.38.030** ("Unless provided for in the governing documents, the bylaws of the association shall provide for…(3) Which, if any, of its powers the board of directors or officers may delegate to other persons or to a managing agent;");
64.34.324 ("The bylaws of the association shall provide for…(c) Which, if any, of its powers the board of directors or officers may delegate to other persons or to a managing agent;");
64.90.435(1) ("Unless provided for in the declaration, the organizational documents of the association must…(d) Specify the powers the board or officers may delegate to other persons or to a managing agent…");
24.03.115 ("If the articles of incorporation or the bylaws so provide, the board of directors…may designate and appoint one or more committees…");
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").

[6] The Association should already have a Collection Policy that the Managing Agent is implementing. RCW 64.90.405(2).

[7] WUCIOA, the HOA Act and the New Act require "notice and an opportunity to be heard" for levying fines, but not for late fees.

12--How Do We Switch Our Communications to Electronic Means?

Under the HOA Act, WUCIOA and the Nonprofit Corporations Act, the Association can notify Owners and Board Members electronically if they get their Written permission beforehand.[1] "Electronic transmission" will usually be email. You can use websites and email now to communicate and distribute information, it just doesn't count as legal notice. Some communications, like notice of Budget Ratification, must be done in full compliance with the Governing Documents for the actions to be binding on the Owners. To establish electronic notice, Condos must amend their Declarations (and possibly their Bylaws). They must also keep a Record of the Amendment on file. HOAs should amend their CC&Rs (and possibly their Bylaws) and get Written consent from Owners.

Can the Association Notify Owners and Board Members Electronically?

The HOA Act and WUCIOA allow Electronic Transmission to be effective notice in some form. WUCIOA's rules about Electronic Transmission are almost identical to the Nonprofit Corporations Act. Unlike those, the HOA Act does not specifically allow for notification by posting electronically, with an accompanying email.

The Written permission to notify Owners electronically must be in the form of a Record, which includes email.[2] It needs to identify the specific address where the Electronic Transmission should be sent.[3] If the Electronic Transmission fails twice, it revokes the Owner or Board Member's consent to receive notice via Electronic Transmission.[4] The Nonprofit Miscellaneous Corporations Act requires the Bylaws or the Articles of Incorporation to specifically permit electronic notice, but does not go into further detail.[5]

Communities under WUCIOA and the Nonprofit Corporation Act, and consumer Cooperatives under the Nonprofit Miscellaneous Act, can also notify by posting electronically. [6] The Association can choose to notify those who have consented to receive Electronic

Transmission by posting the information on an electronic network (i.e., an electronic message board). But the Association must send a separate notice (email) with instructions on how to access the posting on the electronic network.

The Association should maintain an email list of Owners. The Association should still use postal mail or personal delivery for anything where proof of notice may be necessary. This includes late notices and violations.

Email can still be used for general communications by any community without it being legal notice. Legal "notice" is only required for "official" communications as required by your Governing Documents or law.

Establishing Electronic Notice in Your Community
Steps for Condos (Not Under WUCIOA)

1. Check if electronic notice is already allowed in the Condo Declaration.[7] If yes, continue to Step 3.
2. Prepare an Amendment to the Declaration containing the electronic notice provisions from the Corporations Act which applies to your community. Amend using the method found in the Declaration.
3. If the Condo is incorporated under the Nonprofit Miscellaneous Corporations Act, electronic notice must be in the Bylaws or Articles of Incorporation.[8]
    a. Prepare an Amendment to the Bylaws and amend as provided in the Declaration or the Bylaws.
4. Distribute forms or emails to Owners asking for consent to electronic notice with a space for the Owners' email address.
5. Owners can return the consent for electronic notice in the form of emails, faxes or scans, as well as paper documents.[9]
6. The Association must keep track of who has consented to electronic notice and who has not.
7. The Association must consider when a communication requires formal notice and must be mailed to those who have not consented to electronic notice (an email advising about landscaping work may not require formal notice, but the annual meeting notification does).

Steps for HOAs (Not Under WUCIOA)

1. Check if electronic notice is already allowed in the HOA Governing Documents.[10] If yes, continue to Step 3.
2. It is unclear if provisions in the HOA Act about electronic notice override the CC&Rs, so we recommend including it specifically. Prepare an Amendment to the CC&Rs containing the electronic notice provisions from the Corporations Act under with the Association is incorporated.
    a. Amend by having the Unit Owners vote or the method found in the Governing Documents.
3. If the HOA is incorporated under the Nonprofit Miscellaneous Act, electronic notice must be allowed in the Bylaws or Articles of Incorporation.
    a. Prepare an Amendment to the Bylaws and follow the Amendment process in the Declaration or the Bylaws.
4. Distribute forms to Owners authorizing and consenting to electronic notice with a space for the Owners' email address.
5. Collect forms from Owners, in the form of emails, faxes, scans or paper documents.[11]
6. The Association must keep track of who has consented to electronic notice and who has not.

Steps for WUCIOA Communities

1. WUCIO allows electronic notice without Amendment.
2. If the community is incorporated under the Nonprofit Miscellaneous Act, electronic notice must be in the Bylaws or Articles of Incorporation.
    a. Prepare an Amendment to the Bylaws and follow the Amendment process in the Governing Documents.
    b. The Amendment should include the electronic notice provisions from WUCIOA, RCW 64.90.515(3); (5)(b).
3. Distribute forms to Owners authorizing and consenting to electronic notice with a space for the Owners' email address.
4. Collect forms from Owners, in the form of emails, faxes, scans or paper.
5. The Association must keep track of who has consented to electronic notice and who has not.

[1] **64.38.035(2)(c)** ("Notice to owners by an electronic transmission complies with this section only with respect to those owners who have delivered to the secretary or other officers specified in the bylaws a written record consenting to receive electronically transmitted notices."); **64.90.515(3)(a)** ("Notice to unit owners or board members by electronic transmission is effective only upon unit owners and board members who have consented, in the form of a record, to receive electronically transmitted notices.…"); **24.03.009(2)** ("Notice to members and directors in an electronic transmission…is effective only with respect to members and directors who have consented, in the form of a record, to receive electronically transmitted notices under this chapter")

[2] WUCIOA and the Nonprofit Corporations Act allow emails, faxes and scans to count as records. Record includes an electronic transmission. Record is not defined in the Nonprofit Miscellaneous Corporations Act. **64.90.010(43)** ("'Record,' when used as a noun, means information inscribed on a tangible medium or contained in an electronic transmission [email]."); **64.90.010(54)** ("'Tangible medium' means a writing, copy of a writing, facsimile [fax], or a physical reproduction, each on paper or on other tangible material."); **24.03.005(18)** ("'Record' means information inscribed on a tangible medium or contained in an electronic transmission.")

[3] See Endnote 1.

[4] **64.38.035(2)(c)** ("Consent is deemed revoked if the secretary or other officer specified in the bylaws is unable to electronically transmit two consecutive notices given in accordance with the consent."); **64.90.515(d)** ("The consent of any unit owner or board member is revoked if: The association is unable to electronically transmit two consecutive notices given by the association in accordance with the consent, and this inability becomes known to the secretary of the association or any other person responsible for giving the notice."); **24.03.009(2)(d)** ("The consent of any member or director is revoked if the corporation is unable to electronically transmit two consecutive notices given by the corporation in accordance with the consent, and this inability becomes known to the secretary of the corporation or other person responsible for giving the notice.")

[5] **24.06.105** ("Written or printed notice or, if specifically permitted by the articles of incorporation or bylaws of the corporation, notice given by electronic transmission…").

[6] **64.90.515(3)(e)** ("Notice to unit owners or board members who have consented to receipt of electronically transmitted notices may be provided by posting the notice on an electronic network and delivering to the unit owner or board member a separate record of the posting, together with comprehensible instructions regarding how to obtain access to the posting on the electronic network.");
24.03.009(3) ("[M]embers or directors…may be provided notice by posting the notice on an electronic network and delivering to the member or director a separate record of the posting, together with comprehensible instructions regarding how to obtain access to this posting on the electronic network.");
24.06.032(2)(b) ("A consumer cooperative organized under this chapter may satisfy any provisions of this chapter requiring that certain information or materials must be set forth in a writing accompanying or contained in the notice of a meeting of its members, by: (i) Posting the information or materials on an electronic network…").

[7] For condos not under WUCIOA, we believe that electronic notice is not available if it is not in the declaration.

[8] **24.06.105** ("[I]f specifically permitted by the articles of incorporation or bylaws of the corporation, notice given by electronic transmission…).

[9] The Nonprofit Miscellaneous Act does not go into detail what steps are needed for electronic transmission.

[10] The HOA Act is silent about whether the electronic notice provision overrides the CC&Rs. The process of amending governing documents beyond discriminatory provisions (64.38.028) is barely mentioned.

[11] The HOA Act requires that the consent be a written record, but does not define further, so printed emails, scans and faxes should be adequate. See Endnote 1.

13--Should Your Association Have a Written Anti-Harassment Policy?

Every Association should consider having a Written anti-harassment policy to protect itself from liability. The Fair Housing Act ("FHA") prohibits discrimination against a person because of race, color, religion, sex, handicap, familial status, or national origin.[1] The Department of Housing and Urban Development ("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 promptly correct and end discrimination by: 1) their employee or agent; or 2) a third-party, including the residents, when the Association has the power to correct it.[2]

A Written anti-harassment policy protects the Association by reminding property Owners of what behavior is unacceptable and giving people a clear process to report harassment.

What Is Harassment?
What constitutes harassment covered under the FHA is a fact intensive evaluation and will depend on the 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.

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 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, op posting inflammatory signs.

What Should Be in the Written Anti-Harassment Policy?
The policy should recognize the sensitive nature of harassment and specifically outline what it is. This might include types of conduct, speech, emails and offensive communication. The policy should state that harassment will not be tolerated. It should state whether to report the incident to the property manager, an Association Board Member, or an employee.[6]

The policy should have a clear procedure for what happens next. Appropriate actions include investigating each complaint and preparing a confidential report. The Association may be able to use the enforcement provisions of the CC&Rs to correct and stop any harassment the investigations reveal. Further consequences may range from fines to disciplinary proceedings or dismissal (of an employee).[7]

What Else Should the Board Do?
It is not enough to have a policy. To avoid liability an Association should educate Board Members, Owners, employees and managers about the FHA so that they can identify and respond to complaints about harassment.

Any illegal conduct, including threats, should be reported to the police. The Board does not have police powers and should not attempt to take on obligations beyond its capability. Individuals can request protection orders from courts to protect themselves, but the Association cannot provide that to Owners. (See also Chapter 17—What Types of Protection Orders Are Available to Members of My Community?)

[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."); A hostile environment housing claim is actionable when the offensive behavior unreasonably interferes with use and enjoyment of the premises by being "sufficiently severe or pervasive" enough to alter the conditions of the housing arrangement. *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993); *See also Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1413 (10th Cir. 1987).

[6] Some policies allow employees to bypass reporting their immediate supervisor for someone more senior, if the supervisor is the problem.

[7] The policy should specify that fines will be treated as assessments against an Owner. The Association must give the Owner notice and an opportunity to be heard, while maintaining appropriate confidentiality.

14--Why Is Hardwood Flooring So Much Noisier than Carpet and What Can a Community Do About It?

Hardwood flooring is much less effective then 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 flooring. The current Building Code sets minimum standards for new 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 still 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 floor assembly 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 people talking or 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 Class ("AIIC"). AIIC is a new standard that has replaced Field Impact Insulation Class ("FIIC").[1] AIIC is measured through on-site testing after the flooring has been installed. AIIC 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 AIIC 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 with the carpet removed (because the Owner did not "install" a hard surface) 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, even if the Declaration does not restrict floor finishes.

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.

The International Building Code sets minimum sound transmission requirements for multi-family buildings. The code requires designed STC[4] and IIC[5] 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 installation of 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 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 could 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] In 2018, Whisper mat claimed 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. Many products claim "up to" some number, but do not indicate the existing floor structure required to meet that number. Frequently they only report results for a 6" thick concrete slab floor, with insulation and a drywall ceiling on resilient channel below.

15--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.

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 could 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 3 feet from the wall and must measure the sound levels at 3 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.

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 5 dBA above the local ambient 3 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 3 feet distant from any wall, and the average measurement of at least 3 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.

16--What Should an Association Do to Comply with the Asbestos Laws?

An Association that is undertaking a construction, renovation, remodeling, maintenance, demolition or repair project is required to provide a report to all contractors about asbestos. You may need to hire an asbestos inspector to see if there is a risk of disturbing asbestos. Building owners have an obligation to identify all Presumed Asbestos Containing Material ("PACM") or Asbestos Containing Material ("ACM") before beginning a project. The age of the building and the type of project will guide what amount of testing is reasonable. If any ACM is found, the Association will need to hire an abatement specialist to supervise or perform removal if necessary. We recommend testing in advance of any emergency need.

What is Asbestos?
Asbestos is natural silica fibers able to resist heat and corrosion that easily disintegrate into microscopic dust.[1] Asbestos dust can cause lung damage and cancer.[2] The potential for asbestos to release breathable fibers depends on whether it is friable, meaning that the material can be crumbled by hand and is therefore likely to emit fibers/dust.[3]

Asbestos was used widely as a building material and insulation material. It was partially phased out in the US, but it still remains in many older buildings and as insulation around pipes.[4] Buildings constructed before 1981 are presumed to contain asbestos.[5] The Department of Labor and Industries, which administers the code related to asbestos, does not distinguish between buildings constructed before or after 1981.

Is an Inspection Required?
Building owners have an obligation to identify all PACM or ACM before they begin a construction, renovation, remodeling, maintenance, demolition or repair project.[6] The good faith asbestos inspection must be done by an accredited inspector, which can be expensive.[7] The inspection must be documented by

a Written report. If the building owner does not attempt to identify all PACM/ACM, they can be fined $250 per violation per day.[8] Washington's Department of Labor and Industries enforces the law and can fine building owners.

You can find an asbestos inspector in your area by searching for "asbestos inspector" directly or for private companies that provide environmental services. Most companies that offer asbestos reduction ("abatement") also do asbestos inspections. There will be a site visit fee and an additional fee for each sample tested. A building owner should expect to pay $28-$45 per sample. A full inspection may range from $800-$1200.

What is a "reasonable" amount of testing depends on the time the building was built, the prevalence of asbestos at that time and the type of project. For a hypothetical building built in 1970 containing 40 Units, every Unit may need to be tested. We recommend that Owners wait on the initial testing results before deciding to test every Unit. In contrast, for a hypothetical building built in 2005 containing 40 Units, the inspector may take 2-3 samples of drywall in the common area and 2 samples of the roof. If a sample is negative, the Owner should keep the test result as proof that sampling isn't needed for future similar projects.

An inspection is not required if the Owner is reasonably certain that asbestos will not be disturbed by the project or the PACM will be handled correctly by an abatement specialist.[9] The Owner can be reasonably certain if there was a previous survey done that found no asbestos in the building material, or if the building was certified as being built with no asbestos-containing materials.[10] If the work only effects materials made of wood, metal or glass, the owner can also be reasonably certain that asbestos will not be disturbed by the project. If the sidings and floors do not contain asbestos (e.g. hardwood floors), the Owner should take pictures as proof.

Many companies that test for asbestos also test for lead, but building Owners are not required to test for lead.[11] Lead paints use to be common before 1978.[12]

What Projects Require an Abatement Specialist?
In general, any project that requires disturbing an easily crumbled (friable) material containing asbestos or cutting into ACM may release asbestos dust (airborne fibers) and requires an abatement specialist. If asbestos is found, you may be able to modify the project to avoid disturbing the asbestos.

The fibrous or fluffy sprayed-on asbestos materials used for fireproofing, insulation, or sound proofing are friable, and they easily release asbestos dust if disturbed. Materials like vinyl-asbestos floor tile or roofing felts are considered nonfriable and generally do not release asbestos dust unless cut, sawed or sanded. Asbestos-cement pipe or sheet can release asbestos dust if they are cut or sawed, or if they are broken during demolition operations.[13]

There are different classes of asbestos abatement specialists (workers). A Class I Abatement Specialist can deal with physically removing, but not cutting into, thermal system insulation and surfacing (a sprayed or troweled surface material) containing more than 1% asbestos.[14] A Class II Abatement specialist can remove all of the other types of ACM and PACM.[15] Some examples of Class II work are removing roofing shingles or floor tiles.[16] A Class III Abatement Specialist does repair or maintenance work that is likely to disturb asbestos or surfacing materials containing more than 1% ACM and PACM.[17] Class I and Class II work are low risk, while Class III work is higher risk. If material is tested, it is no longer PCAM (it is either ACM or does not contain asbestos).

Must You Provide Asbestos Reports to Contractors?
An Association must provide Written reports to all contractors that intend to undertake construction, renovation, remodeling, maintenance, repair or demolition before they bid/apply for the project.[18] If the building Owner does not provide the Written report, the contractor can also be fined $250 per violation, per day when work is being performed.

If there was an inspection, the Association must provide a Written inspection report. If there was not an inspection, the Written report should say either there is a reasonable certainty that asbestos will not be disturbed or that there is PACM.

---

[1] See *OSHA Fact Sheet: Asbestos,* available at https://www.osha.gov/Publications/OSHA3507.html.

[2] The cancer caused by asbestos is mesothelioma. See Washington Department of Labor and Industries *Building Owner Information Asbestos in Construction*, available at http://www.lni.wa.gov/safety/topics/atoz/asbestos/AsbestosSurveys.pdf .

[3] Wash. Admin. Code 296-62-07747.

[4] The Environmental Protection Agency's Asbestos Ban and Phase Out Rule of 1989 was intended to ban all use of asbestos. It was overturned by the federal 5th Circuit Appellate Court in *Corrosion Proof Fittings v. Environmental Protection Agency* (1991), for not being the "least burdensome alternative" to regulating asbestos. Asbestos are not usually used in new construction, but they remain common in insulation, roofing, ceiling tiles and vinyl floor tiles. See Asbestos Toxicity, Agency for Toxic Substances & Disease Registry, available at https://www.atsdr.cdc.gov/csem/csem.asp?csem=29&po=5.

[5] Wash. Admin. Code 296-62-07721(1)(b) ("Asphalt and vinyl flooring installed no later than 1980 also must be treated as asbestos-containing."); Asbestos presumably is in these materials: thermal system insulation, roofing and siding shingles, vinyl floor tiles, plaster, cement, putties and caulk, ceiling tiles and spray-on coatings, industrial pipe wrapping and heat-resistant textiles. See *OSHA Fact Sheet: Asbestos,* available at https://www.osha.gov/Publications/OSHA3507.html.

[6] Washington Admin. Code 296-62-07721(1)(c)(ii) ("Before authorizing or allowing any construction, renovation, remodeling, maintenance, repair, or demolition project, an owner or owner's agent must perform, or cause to be performed, a good faith inspection to determine whether materials to be worked on or removed contain asbestos.")

[7] Wash. Admin. Code 296-62-07721(1)(c)(ii)(A) ("The good faith inspection must be conducted by an accredited inspector.")

[8] Wash. Admin. Code 296-62-07721(1)(c)(iv) ("Any owner or owner's agent who fails to comply with (c)(ii) [inspection] and (iii) [written report] of this subsection must be subject to a mandatory fine of not less than $250 for each violation. Each day the violation continues must be considered a separate violation. In addition, any construction, renovation, remodeling, maintenance, repair, or demolition which was started without meeting the requirements of this section must be halted immediately and cannot be resumed before meeting such requirements.")

[9] Wash. Admin. Code 296-62-07721(1)(c)(ii)(B) ("**Such good faith inspection is not required if the owner or owner's agent is reasonably certain that asbestos will not be disturbed by the project** or the owner or owner's agent assumes that the suspect material contains asbestos and handles the material in accordance with WAC 296-62-07701 through 296-62-07753.")

[10] The Washington Department of Labor and Industries recommends that owners get an engineer to certify a building as being built with no asbestos-containing materials.

[11] If an employer believes there is lead, any possibly exposed employee must be tested and all employees must wear protective gear. See Wash. Admin. Code 296-155-17603 to 296-155-17654.

[12] See *Prevent Lead Poisoning, Wash. State Dept. of Health* available at https://www.doh.wa.gov/YouandYourFamily/InfantsandChildren/ProtectKidsfromToxicChemicals/PreventLeadPoisoning.

[13] Wash. Admin. Code 296-62-07747.

[14] Wash. Admin. Code 296-62-07703 ("Class I asbestos work. Activities involving the removal of thermal system insulation or surfacing ACM/PACM.")

[15] *Id.* ("Class II asbestos work. Activities involving the removal of ACM which is not thermal system insulation or surfacing material. This includes, but is not limited to, the removal of asbestos-containing wallboard, floor tile and sheeting, roofing and siding shingles, and construction mastics.")

[16] If the floor tiles or roof shingles can be removed "intact", without crumbling or deteriorating, it may be possible to have an uncertified contractor do the work with a Certified Asbestos Supervisor providing oversight. The worker must undergo 8 hours of asbestos training.

Likewise, if the project is very small (> 1 square foot), it may be done with 8 hours of training. Wash. Admin. Code 296-62-07722(3)(a)(ii)("**The following Class II asbestos work is not considered an asbestos project and is excluded from asbestos worker certification:** (A) All Class II asbestos work involving intact asbestos containing materials (for example, intact roofing materials, bituminous or asphalt pipeline coatings, and intact flooring/decking materials); (B) All Class II asbestos work of less than one square foot of asbestos containing materials;").

[17] *Id.* ("Class III asbestos work. Repair and maintenance operations where "ACM," including TSI [Thermal System Insulation] and surfacing ACM and PACM, may be disturbed.")

[18] Wash. Admin. Code 296-62-07721(1)(c)(iii) ("The owner or owner's agent must provide, to all contractors submitting a bid to undertake any construction, renovation, remodeling, maintenance, repair, or demolition project, the written statement either of the reasonable certainty of nondisturbance of asbestos or of assumption of the presence of asbestos. Contractors must be provided with the written report before they apply or bid to work.")

17--What Types of Protection Orders Are Available to Members of My Community?

Protection orders (PO) involve a person (the "target") seeking protection from the actions of another person. The Association as an entity cannot usually get a PO, but an employee of the Association or a community member can get a PO.[1] That person can obtain an Anti-Harassment Order, Stalking PO or Vulnerable Adult PO depending on who or what is being targeted, the specific behavior of the unsafe person (the "respondent") and whether the target already has substantial emotional distress. For each type of PO, the necessary forms must be filled out and filed with the court, a hearing date set, and the respondent must have notice of the court date. The person seeking the PO must prove to the court that the respondent is dangerous enough to merit a court order protecting the target. The person seeking the PO should also document all communication between the respondent and the target to use in court. It is easier to get a Stalking PO than an Anti-Harassment Order because the test is more objective and doesn't require actual harm.

Protection Orders in General

POs (called restraining orders in some states) are civil orders from the court protecting a target from specific bad actions by another person (the respondent) who may be a danger to them. Types of POs include domestic violence, anti-harassment, stalking, sexual assault, vulnerable adult and extreme risk. In Washington, the process for getting a PO is the same regardless of the type of PO sought.[2]

An Anti-Harassment Order guards against unlawful harassment, which is a series of willful acts that alarm, annoy, harass or harm the target without serving a legitimate purpose.[3] The acts must reasonably cause the target to suffer substantial emotional distress. Stalking can include email and phone contacts.

A Stalking PO guards against someone intentionally and repeatedly harassing, contacting or following a target making the

target afraid the respondent intends to injure them, someone else or property.[4] The respondent must intend to frighten, intimidate or harass the target or reasonably should know the target would feel that way.[5]

A Vulnerable Adult PO guards a person who is particularly vulnerable from abuse by others. The person may be vulnerable because they are elderly, incapable of caring for themselves, are developmentally disabled or declared incapacitated by a judge.[6] The potential abuse may be actual or threatened abandonment, personal exploitation, improper use of restraints, neglect or financial exploitation. An interested person or guardian can file for the PO on behalf of the vulnerable adult, if they have a good faith belief that the court's intervention is necessary and can show that the adult is unable to protect their own interests.[7]

POs are usually not available to Associations because the Association is not a human person. A Domestic Violence PO guards against physical harm, bodily injury, assault or stalking between family or household members.[8] It also protects against making someone fear the same. A Sexual Assault PO guards a victim from the person who has sexually assaulted them.[9] An Extreme Risk PO allows removal of a firearm from someone who poses a significant danger of causing personal injury to himself/herself or others soon by having, purchasing, possessing, or receiving a firearm.[10] The Domestic Violence PO and the Extreme Risk PO require a housemate, family or romantic relationship between the respondent and the target, so a representative of the Association does not qualify.

If the community member targeted is cooperative, the Association may be able to help them get a PO for themselves. Our office does not work on POs often because we represent Associations, not individual people, but we did once get a PO to prevent an Owner's boyfriend from entering the Condominium because the Owner cooperated.

Usefulness for Community Associations

It is harder to get an Anti-Harassment Order compared to a Stalking PO because the test for getting an Anti-Harassment Order is more subjective and there must be actual harm (substantial emotional distress).[11] The court decides whether the respondent's conduct serves any legitimate or lawful purpose by weighing several factors including who initiated contact, whether the respondent was told to stop, if the respondent seems like they are trying to alarm/annoy/harass the target, and whether the respondent is trying to protect property, enforce the law or meet specific statutory duties.[12] We were unsuccessful in getting a PO for one Board Member against another, because the judge ruled that the behavior, which was clearly harassment, was related to the management of the Association, and was thus not "unlawful" harassment.

A Stalking PO is easier to get because the test is more objective than the test for an Anti-Harassment Order. Repeated following of a target, or repeated communication, can be documented. If the respondent only threatens property, a Stalking PO is still available. The target only needs to reasonably fear injury. The Anti-Harassment Order requires substantial emotional distress before the order is granted.

How to Get a Protection Order

1. Determine which PO is appropriate.
    a. Who is the target of contact?
        i. An employee of the Association Stalking PO or Anti-Harassment
        ii. Vulnerable adult in your community: Vulnerable Adult PO
    b. What is threatened?
        i. Injury to property: Stalking PO
        ii. Injury to a person: Stalking PO or Anti-Harassment Order
    c. What is the behavior?
        i. Following the target: Stalking PO
        ii. Harming the target: Anti-Harassment Order

iii. Threatening/scaring the target: Stalking PO or Anti-Harassment Order

d. The Anti-Harassment Order and Stalking PO are unavailable if respondent is:
   i. Serving a legitimate purpose; or
   ii. Acting with legal authority.

2. Fill out the necessary forms.[13]
3. If there is immediate danger, you may be able to get a temporary order from the judge or commissioner without the respondent being present (called an ex parte hearing).
4. The court will choose a court date for deciding whether to grant the order, usually within two weeks.
5. Have the respondent served with notice of the hearing. Do not attempt to serve them yourself.
6. File the necessary papers with the court:
   a. Copy of the petition for the specific PO wanted
   b. The Law Enforcement Information Sheet[14]
   c. Copy of the temporary order (if applicable)
7. Attend the full court hearing and explain to the court why you need the PO.
8. If the judge decides that you are more likely than not to prevail at a trial, the court will grant a preliminary PO.
9. A permanent PO is only available after you have won at a court trial, which can be a year after the paperwork was first filed.[15] Usually, the process does not get that far.

Other Options

A no-trespassing order is much easier to get. In Washington, a person is guilty of criminal trespass in the first degree if they knowingly enter or remain unlawfully in a building.[16] (It is not criminal trespass if the premises are open to the public and the person complied with conditions required to remain in the premises, they reasonable believed that the Owner of the premises would have allowed them to enter or remain or they are a process server.[17]

The Association can give the unwanted person a verbal or Written notice barring them from the private common areas. If the unwanted person remains or tries to enter again, the Association

can call the police to remove them. The Association cannot issue a no-trespass order to Owners because the Owners have a partial ownership interest in the common areas. Individual Owner "A" can give a no-trespass order against another Owner "B" to prevent the B from entering A's Unit, Lot, or Limited Common Element.

---

[1] None of the statutes define "person", but most mention that a person must seek the PO. It is unclear whether an entity can seek an Anti-Harassment Order.
7.92.040 ("A petition for a stalking protection order may be filed by a person… who is a victim of stalking…. On behalf of any of the following persons who is a victim of stalking conduct…(b) A vulnerable adult as defined in RCW 74.34.020 and where the petitioner is an interested person as defined in *RCW 74.34.020(12)");
74.34.020(12) ("'Interested person' means a person who demonstrates to the court's satisfaction that the person is interested in the welfare of the vulnerable adult…);
26.50.020(1)(a) (""Any person may seek relief…alleging that the person has been the victim of domestic violence…"");

[2] The procedure for obtaining POs is found in RCW 10.14.010-10.14.800.

[3] **10.14.020(2)** ("'Unlawful harassment' means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose…[it] would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.")

[4] **7.92.020(3)** ("'Stalking conduct' means any of the following: (a) Any act of stalking as defined under RCW 9A.46.110; (b) Any act of cyberstalking as defined under RCW 9.61.260; (c) Any course of conduct involving repeated or continuing contacts, attempts to contact, monitoring, tracking, keeping under observation, or following of another that: (i) Would cause a reasonable person to feel intimidated, frightened, or threatened and that actually causes such a feeling; (ii) Serves no lawful purpose; and (iii) The stalker knows or reasonably should know threatens, frightens, or intimidates the person, even if the stalker did not intend to intimidate, frighten, or threaten the person.")

[5] *Id.*

[6] **74.34.020(22)** ("'Vulnerable adult' includes a person: (a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or (b) Found incapacitated under chapter 11.88 RCW; or (c) Who has a developmental disability as defined under RCW 71A.10.020; or (d) Admitted to any facility; or (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or (f) Receiving services from an individual provider; or (g) Who self-directs his or her own care and receives services from a personal aide...").

[7] **74.34.020(12).**

[8] **26.50.010(3)** ("'Domestic violence' means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, sexual assault, or stalking as defined in RCW 9A.46.110 of one intimate partner by another intimate partner; or (b) physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, sexual assault, or stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.")

[9] **7.90.030(1)** ("A petition for a sexual assault protection order may be filed by a person (a) Who does not qualify for a protection order under chapter 26.50 RCW and who is a victim of nonconsensual sexual conduct or nonconsensual sexual penetration, including a single incident of nonconsensual sexual conduct or nonconsensual sexual penetration;")

[10] **7.94.030** ("A petition for an extreme risk protection order may be filed by (a) a family or household member of the respondent or (b) a law enforcement officer or agency…(4) A petition must: (a) Allege that the respondent poses a significant danger of causing personal injury to self or others by having in his or her custody or control, purchasing, possessing, accessing, or receiving a firearm, and be accompanied by an affidavit made under oath stating the specific statements, actions, or facts that give rise to a reasonable fear of future dangerous acts by the respondent;").

[11] See Endnote 2.

[12] **10.14.030** ("In determining whether the course of conduct serves any legitimate or lawful purpose, the court should consider whether: (1) Any current contact between the parties was initiated by the respondent only or was initiated by both parties; (2) The respondent has been given clear notice that all further contact with the petitioner is unwanted; (3) The

respondent's course of conduct appears designed to alarm, annoy, or harass the petitioner; (4) The respondent is acting pursuant to any statutory authority, including but not limited to acts which are reasonably necessary to: (a) Protect property or liberty interests; (b) Enforce the law; or (c) Meet specific statutory duties or requirements; (5) The respondent's course of conduct has the purpose or effect of unreasonably interfering with the petitioner's privacy or the purpose or effect of creating an intimidating, hostile, or offensive living environment for the petitioner; (6) Contact by the respondent with the petitioner or the petitioner's family has been limited in any manner by any previous court order.")

[13] Available at https://www.womenslaw.org/laws/wa/preparing-court/download-court-forms.

[14] This is not shown to the respondent. Available at https://www.courts.wa.gov/forms/documents/All%20Cases%2001_0400.pdf.

[15] The court may require you to post a significant bond before trial.

[16] **9A.52.070.**

[17] **9A.52.**090 ("[I]t is a defense that: (1) A building involved …was abandoned; or (2) The premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or (3) The actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain; or (4) The actor was attempting to serve legal process which includes any document required or allowed to be served upon persons or property, by any statute, rule, ordinance, regulation, or court order, excluding delivery by the mails of the United States.")

18--Inspections and Repairs: How Can an Association Gain Entry to an Owner's Property for Inspection or Repair?

An Association can gain entry into a property to make repairs or to inspect the property by reasonably notifying the Owner and any occupants of the need to gain access to the property (to inspect or repair) and obtaining the Owner's voluntary compliance (ask first). If occupants refuse access, then fines may be appropriate. If occupants continue to refuse access, the Association can get a court order requiring the Owner to allow entry as authorized by the Declaration. The Association's Governing Documents may expressly provide the required notice for gaining access to an Owner's property. If they do, follow the process exactly. If the Governing Documents are silent, Washington courts will default to the general rule that the notice must be reasonable. What is considered "reasonable" will depend on the specific facts of each case. The reason for entry, the process for notice and the actual method of entry all must be reasonable when reviewed by a court after the fact.

Gaining Entry to the Unit

1. Make sure:
    a. The Governing Documents provide an easement or right of entry.
    b. The purpose of the entry is consistent with the easement or right of entry.
    c. There is enough time. We recommend at least five days before the desired entry date.
    d. If the Declaration has a process, follow that number of days, method and timing of notice.
2. Ask for permission to enter if possible (email/phone).
3. At the same time:
    a. Mail notice of any required entry to the Owner and occupants.
    b. Post the notice on the door of the property.

Unless the Owner or occupant objects, it would be reasonable to enter the home, using a locksmith if necessary. We do not recommend forced entry into an occupied home against the objections of the occupant. If an occupant refuses access, then the Association can assess fines. A court order may be available if the Association has a valid right of entry/easement and the purpose is consistent with that right of entry/easement.

Legal Background

By statute, Associations are charged with maintaining and repairing common areas and limited common areas.[1] Most Declarations provide access to Units and Lots as needed to perform repairs of common areas and for the Association to make repairs to an individual Unit if the owner fails to do so.[2] Owners and occupying tenants must allow an Association and its agents to have access to their homes in order to make repairs.[3] Few Declarations specify a right of entry to inspect an individual Owner's property.

An Association's access to a Unit or Lot must be reasonable. The New Act and Old Act do not clarify what "reasonable" means.[4] The HOA Act does not mention "reasonable" in this context. There is no Washington case law which clarifies what "reasonable" means in the context of an Association's need to gain access to an Owner's property. However, Washington's Residential Landlord-Tenant Act sets forth the respective rights and obligations of landlords and tenants, including the notice requirements landlords are required to provide to tenants under various conditions.[5] Accordingly, it can serve as a guide to Associations for what reasonable procedures for access might be.

The Landlord-Tenant Act requires tenants to allow landlords to have access to the rented premises to make necessary repairs or to inspect the premises.[6] The Act also requires landlords to provide tenants with at least two days' Written notice that they intend to enter the premises unless there is an emergency or it is "impracticable" for the landlord to do so.[7] Furthermore, the landlord is required to enter the tenant's unit "only at reasonable

times."[8] The notice must state the exact time and date(s) for when the entry will occur.[9]

There are two exceptions where a landlord does not have to give reasonable (at least two days) notice before entering a tenant-occupied property: if it is an emergency, or if a landlord needs to allow a code enforcement official to inspect the premises to determine the presence of an unsafe building condition or a building code violation.[10] An example of an emergency is where a pipe has burst and the leaking water is causing immediate damage to the property or to the property of others. The building code violation exception is unlikely to be relevant for community Associations.

Hoarding

For a suspected hoarding issue, the Association and the Board should start with the least intrusive measures available and then escalate, if needed. An agent of the Association (a Board member or managing agent) should first discuss the issue with the Owner, in a non-threatening, non-judgmental way. They can explain that the clutter has created a nuisance (violating the nuisance provision of the Governing Documents, if applicable) or a health or safety concern. There must be a Tangible basis for the Board to act, with the clutter either visible from the exterior or from a neighboring residence or posing a potential danger to the health or safety of other residents. Noxious odors or a rodent infestation would qualify.

The Association can offer to find a cleanup service or pay for a dumpster. Any plan should specify a timetable for the cleanup and require periodic inspections for a period after the Unit has been restored. If the initial outreach is rebuffed, the Board or its attorney should write a letter stating that the Owner is violating the applicable provisions of the Governing Documents (likely the nuisance and maintenance provisions) and specifying a time period to cure the violation. The letter can also assess fines, but the fines are unlikely to motivate the Owner to clean (although they may offset cleanup costs). Hoarding is considered a mental illness. Hoarders are not willfully ignoring orders to clean; they

don't clean up because they think they can't. The Board may want to reach out to family members of the Owner or social service agencies to help the Owner comply.

If the Owner does not comply, the Board can seek a court order (injunction) for entry, for requiring the Owner to clean up or for authorizing the Board to clean up. The court will require persuasive evidence that a hoarding situation exists, or there is a good reason to suspect conditions that threaten the health and safety of the community and its residents. Evidence could be pictures, or affidavits from a third party (manager, vendor, other person) who has seen the problem first-hand. The court will also want to see that the Board has tried to resolve the problem through non-judicial means.

---

[1] **64.32.050(5)** ("The necessary work of maintenance, repair and replacement of the common areas…shall be carried out only as provided in this chapter and in the bylaws.");
64.34.328(1) (***"***…[T]he association is responsible for maintenance, repair, and replacement of the common elements, including the limited common elements...");
64.38.020 ("…[A]n association may…(6) Regulate the use, maintenance, repair, replacement, and modification of common areas…").

[2] These provisions will contain a right to gain entry to repair, but usually are silent regarding inspection.

[3] **64.32.050(6)** ("The Association of [unit] owners shall have the irrevocable right… to have access to each [unit]…during reasonable hours as may be necessary for the maintenance, repair, or replacement of any of the common areas..."); **64.34.328(1)** (**"**…[T]he association is responsible for maintenance, repair, and replacement of the common elements, including the limited common elements …Each unit owner shall afford to the association …and to their agents or employees, access through the owner's unit and limited common elements reasonably necessary for those purposes."); The **HOA Act** does not have an entry to repair/inspect provision. **64.90.440(3)** ("Upon prior notice, except in case of an emergency, each unit owner must afford to the association and…to their agents…access through that owner's unit and limited common elements reasonably necessary for the purposes stated in subsections (1)[Repairing common elements, limited common elements]…including necessary inspections by the association.")

[4] The Old Act specifies further that "reasonable" entails "reasonable hours" of the day. See Endnote 3.

[5] **59.18** [Residential Landlord-Tenant Act].

[6] **59.18.150(1)** ("The tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises, make…repairs, alterations, or improvements…").

[7] An exception to the two-day notice requirement exists where the landlord is showing the unit to prospective buyers or renters. This provision would not apply to associations.

[8] *Id.*

[9] **59.18.150(6)** ("The notice must state the exact time and date or dates of entry or specify a period of time during that date or dates in which the entry will occur, in which case the notice must specify the earliest and latest possible times of entry. The notice must also specify the telephone number to which the tenant may communicate any objection or request to reschedule the entry.")

[10] **59.18.150(5)** ("The landlord may enter the dwelling unit without consent of the tenant in case of emergency or abandonment.") **59.18.150(4)(a).** ("A search warrant may be issued by a judge…to determine the presence of an unsafe building condition or a violation of any building regulation, statute, or ordinance.")

19--How Should You Evaluate Your Management Company and When?

Just as employees and students receive evaluations of their performance, Boards can evaluate their managers. For every evaluation, the Board must compare the performance against what services the manager is contracted to perform. One goal is to balance the cost against the services provided, adjusting service levels (up or down) to meet the Association's needs. Another goal is to measure the performance for services actually contracted for. The Board should determine what is important to it in the services it receives, which may include financial recordkeeping, communication with the Board and members, appearance of the property, enforcement, and oversight of services performed for the Association. An evaluation prior to the annual renewal of a management contract can allow adjustments to the contract, and for the manager and Board to agree on expected performance and goals for the coming year.

Providing Services as Promised

The Board should revisit the management contract as part of this process. What services does the contract say the manager will provide? Is the manager providing those services? Typical management contracts require the management company to handle the financial aspects of the Association, hire and supervise Association vendors and provide regular reports on the Association's finances, insurance and maintenance. Some contracts specify the manager's role in evaluating and procuring insurance, preparing specifications for projects and ongoing services, and inspecting the property for either required maintenance or enforcement of the Governing Documents. Evaluating the services contracted for is an integral part of the performance evaluation process.

The Board should also investigate how responsive the management company is to Owners and Board Members. The management contract may specify how long it will take to get a response to an inquiry. To determine how responsive the

management company is to owners, a Board member can follow the same process the Owners use to complain. How are phone calls and emails responded to? How responsive is the manager to performing the duties it is contracted to provide? (Remember to evaluate performance against what you have contracted for.)

The management company should be monitoring the Association's insurance policies and service contracts and notifying the Association of any upcoming renewal dates. The manager should keep the Board informed about circumstances that could lead to claims against the Association and inform insurance providers accordingly. Try to evaluate how well the manager is keeping the Board informed about its activities on behalf of the Association. Even if the Board has delegated some Board powers and responsibilities to the manager, the Board is ultimately responsible for the manager's actions.

Evaluate whether the manager brings in contractors with appropriate licenses and insurance. Are they getting professional assistance from accountants, engineers, lawyers, and insurance professionals to make sure you are appropriately cared for? Is the balance of cost to reduce risk, and the risk accepted by the manager the right fit for your Association? Is the balance of quick or timely response against getting the best price for the best service appropriate?

The Board could ask the manager what procedures the manager follows to prevent fraud. These could include requiring two Board Members to sign checks, spending limits for managers, or having a Board Member receive an original copy of the monthly bank statements (in addition to the statement sent to the management company).

How Often should you perform an evaluation?
We recommend you evaluate your management company annually, prior to renewal of your management contract. If you have not evaluated them before, it may take some time to establish the specific criteria to judge the management company. But because many of the concerns the Board may have relate to

the level of service you are contracting for it is important to evaluate the contract and the manager's performance together.

There will almost always be a trade-off between quality/quantity of services and price. A cheaper management company may not be able to offer the fastest response to inquiries or the widest variety of services. Many management companies now offer additional services at additional fees, such as project management services, or providing minutes of Board Meetings.

Have realistic expectations. I sat with one of our Boards in evaluating their manager, which was done much like a full employee evaluation. The Board had evaluated the assigned manager and the management company very harshly, finding the performance unacceptable. I knew from having worked with dozens of managers that the manager and firm were performing at or above industry standards. There was a clear disconnect between the expectations of the Board, and what reasonable performance was. There was also a poor delivery of the evaluation, in failing to recognize performance that the Board was satisfied or please with.

I have also counseled many clients who were unhappy with their manager's performance that they can, and should, change managers or management companies to get better performance, but they have been unwilling to consider a change, and were unwilling to even express their dissatisfaction with the manger because of concerns that a change would cost more money, or would be disruptive to the community. Even if you don't want to change managers, providing constructive feedback to your manager, or asking them to modify their conduct to better meet your needs, should be a routine part of the relationship between a Board and is manager.

20--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 Act[1] or Washington's Law[2]. 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 federal[3] or state[4] 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 workplaces. 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, but does NOT include most Condos or HOAs. 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 for public buildings. 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 trend toward a smoke-free society, 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 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 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 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. This has not been tested in our courts.

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). *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); However, Massachusetts came to a different conclusion in *Barbuto v. Advantage Sales and Mktg., LLC*, 78 N.E.3d 37, 45 (Mass. 2017). (The Supreme Judicial Court of Massachusetts held that the Massachusetts Medical Marijuana Initiative did require a private employer to consider physician-authorized off-site medical marijuana use as a reasonable accommodation for a handicapped employee under that state's unlawful discrimination statute).

[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."); See *Davis v. Echo Valley Condo. Assn*., 349 F. Supp. 3d 645 (E.D. Mich. 2018) (A disabled Michigan resident sued the condo association for not banning smoking after an amendment to ban smoking had failed. The court held that banning smoking was not a reasonable accommodation.)

[8] 34 states have now legalized medical marijuana, and 11 of the 34 have legalized the use of marijuana for recreational purposes. Both of these numbers are up from the prior year.

[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 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. The defendant was: 1) an employer, and: 2) chastised for not attempting to consider offsite marijuana use as a reasonable accommodation. The court did not rule on whether it was a reasonable accommodation. *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 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 relief. *Id.*

21--What Are Limited Common Elements?

Under the New Act, Old Act and WUCIOA, 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. The Declaration may permit certain "limited common elements" to be treated as Common Elements or as part of the Unit.[2]

Common Elements Versus Limited Common Elements
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."[3] 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 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 for New Act and WUCIOA Condos. 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. (We don't know why "pipes" are not listed but believe water and drainpipes are included in this list.) For WUCIOA alone, fireplaces and decks are Limited Common Elements.[5] 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.

For New Act and WUCIOA, 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 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.

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.[8] 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 does not include the pavement itself.[9]

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 specifically provides otherwise, the building components (wires, conduits, windows, etc.) are part of the Limited Common Elements under the New Act and WUCIOA.[10]

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.[11] 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 those repair costs are not specifically assigned.[12]

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.[13] 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. 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.[14] 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.[15]

---

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

[2] **64.34.204** provides:

> Except as provided by the Declaration:
>
> (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.

[3] **64.32.010(h)**.

[4] **64.32.010(11)** ("'Limited common areas and facilities' includes those common areas and facilities designated in the declaration, as it is duly recorded or as it may be lawfully amended, as reserved for use of certain apartment or apartments to the exclusion of the other apartments.")
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.")
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] **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.")
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.")

[6] **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.")
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] **64.32.090** ("The declaration shall contain…[a] description of the limited common areas and facilities, if any, stating to which apartments their use is reserved;")
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.")
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.")

[8] *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").

[9] *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.

[10] *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).

[11] **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 assigned, equally, or in any other proportion that the declaration provides…"
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.")

[12] *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.")

[13] 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.

[14] 558 So. 2d at 479.

[15] *Id.* at 480.

22--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 and equitable servitudes.

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 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 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 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 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 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.

23--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, or establish other qualifications.

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, 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] The Old Act is silent on qualifications for Board members.

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;")

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;")

[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.")

[3] **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] **64.38.030.**

[5] **64.90.410(2)** ("[T]he 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.")

24--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] But failing a Quorum, board members continue to serve, and may appoint successors.

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. Basically, the old Board Members appoint their replacements.

Board Members remain in office until their terms have expired, and continue in office 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 such an "unelected Board," provided that the members have attempted to obtain a Quorum to hold annual elections pursuant to 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.

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.

64.34.324 (Bylaws), requires that:

> (1) 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…
>
> **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;
>
> **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] **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."
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."

24.06.135 (Vacancies): 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.
24.03.105 (Vacancies): 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.
Parker Estates at 29. "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."
64.90.310 (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] **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."
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.
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.")
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] **64.34.340** (Voting – Proxies) (applicable to New Act and Old Act condos.)

[8] **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.

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

Individual Board Members can be held personally liable for their actions, but only under special circumstances. 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. Most Associations must indemnify (protect) board members for all actions taken in good faith.

Liability of the Association

In most cases, individual Board Members are protected by statute from personal liability for breach of the duty of care.[1] 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]

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 Members[9]. 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] **4.24.264(1)** ("a member of the [Board]…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 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] **4.24.264(1)** ("[A] member of the board of directors…is not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity as director or officer unless the decision or failure to decide constitutes gross negligence.")

[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] **24.06.035(2)** ("[A] member of the board of directors …is not individually liable…for conduct within his or her official capacity as a director or officer after July 22, 2001, except for acts or omissions that involve intentional misconduct or a knowing violation of the law, or that involve a transaction from which the director or officer will personally receive a benefit in money, property, or services to which the director or officer is not legally entitled.")

[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. *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] **64.90.405(m)** allows for indemnifying board members. Both Non-Profit Corporation Acts also allow for indemnification of board members.

26--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 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 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 adopt 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 adopts 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 has no authority to require the Owner to replace the heater.

Prior Board action is important when the community seeks to enforce rules through fines. HOAs and Condos 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.

Our law requires Boards to provide Owners with "notice and an opportunity to be heard" before they may be fined. Washington courts have not addressed what these statutes specifically require, but other states have examined similar statutes. Indiana requires Associations to strictly comply with notice requirements. "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] Illinois courts determined that a Board did not give notice to an Owner because it did not provide a complete list of alleged Misconduct before assessing fines.[10]

Connecticut courts determined that opportunity to be heard requires that the Association provide the Owner with a hearing. "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.'"[11] 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 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] **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…")
64.38.020(1) ("…an association may: adopt and amend bylaws, rules, and regulations…exercise any other powers conferred by the 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.")
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] **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 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] **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…") **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…") **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] *Boucher v. 111 E. Chestnut Condo. Assn., Inc.*, 117 N.E.3d 1123, 1135 (Ill. App. 1st Dist. 2018), *appeal denied*, 108 N.E.3d 871 (Ill. 2018) ("Some of the defendants…admitted that, in assessing the fines against Boucher, they relied on alleged misconduct not mentioned in the letters sent to Boucher … Thus, the evidence in the record can support a finding that, because the board did not give Boucher notice of all the charges they intended to consider in connection with possible discipline, the board did not meet even the minimal [notice] requirements of section 18.4(*l*).")

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

27--Can Committees Act on Behalf of the Community?

Washington law permits communities to create committees and delegate powers to them. For communities not governed by WUCIOA, committee members may be appointed by either the Board or the Governing Documents. WUCIOA only permits the Board to appoint committee members. Board created committees must include two or more Board Members, and only those Board members can vote on committee matters. 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. There are no restrictions on use of committees which only advise the exercise no Board powers.

Condos and HOAs not under WUCIOA

The Old Act, New Act, and HOA 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 if the Association is incorporated. 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 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 include 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]

Board committees must be composed of two or more Board Members. The courts held in *Harstene Pointe Maintenance Ass'n v. Diehl* that 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*.

WUCIOA Communities

WUCIOA, RCW 64.90, does not defer to 24.03 or 24.06 but directly controls 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 include at least two Board Members and only those Board Members may have voting power for the committee.

While WUCIOA does not permit the formation of a member committee, it does allow for the creation of an advisory committee. 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. The Governing Documents may direct the Board to create advisory committees devoted to studying issues such as landscaping, social activities, 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] **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…"); **24.03.065(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 bylaws.")

[2] The Nonprofit Corporations Act and the Nonprofit Miscellaneous Act both stop a Board committee from changing the bylaws, changing the membership of committees/the corporate officers, changing the articles of incorporation, merging or dissolving the corporation, authorizing property deals that involve most of the corporate assets and changing any Board resolution that explicitly can't be changed, See RCW 24.03.115; RCW 24.06.145.

[3] **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. 339 (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] **64.90.410.** ("[A]ll 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.")

28--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 for their benefit. Boards cannot take legal action on behalf of a single Owner.[1]

We generally advise that the Board allow or require 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 Assessment. The Board would then need to initiate a lawsuit to enforce the Board's decision. This lawsuit could cost the Association many thousands of dollars. Usually, the best course of action is to let the Owners resolve the issue themselves. There is usually little cost to the community in taking a wait-and-see

approach, and the community may still intervene to enforce the community rules at a later date if it chooses to.

A Board may want to be more proactive. All Associations have the authority to issue fines for violations of the Governing Documents.[2] Before a fine can be issued, a Fine Schedule must be distributed to the Owners, and the Board must offer a hearing to the offending Owner.[3] 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. 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.

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 have free mediation clinics. There are multiple professional mediation and arbitration companies that can assist.

---

[1] **64.34.304(1)** ("[T]he association may: …(d) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or 2 or more unit owners on matters affecting the condominium;");
64.38.020 ("[A]n association may:…(4) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself

or 2 or more owners on matters affecting the homeowners' association, but not on behalf of owners involved in disputes that are not the responsibility of the association;");
64.90.405(2) ("[T]he association may:…(d) Institute, defend, or intervene in litigation or in arbitration, mediation, or administrative proceedings or any other legal proceeding in its own name on behalf of itself or 2 or more unit owners on matters affecting the common interest community;").

[2] **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.")
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…"
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…")
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…")

[3] *Id.*

29--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 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. 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.[9] 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.[10]

---

[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 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] ("Records retained by an association may be withheld from inspection and copying to the extent that they concern…(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").

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

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

WUCIOA affects the Budget approval process of all preexisting communities (every existing Condo and HOA). The Budget and Assessment provisions replace any inconsistent provisions which exist in the prior statutes covering Common Interest Communities already on the books. For HOAs governed by RCW 64.38, WUCIOA replaces all existing Budget and Assessment provisions in the community's Governing Documents. So now, Old Act and New 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. It is our belief that the legislature intended to replace the Budget approval sections for all Condos and HOAs (including RCW 64.34.308(3) & (4) and RCW 64.68.025(3) & (4)).[3]

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.[4] Additionally, an Owners meeting to consider the Budget must be held within 50 days, rather than 60 days, of the Budget being sent to the Owners.

Under WUCIOA, any reserve account deficit or surplus needs to be calculated for each individual Unit.[5] Previously, communities did not need to calculate deficits or surpluses individually (or at all) under RCW 64.34.308(4) and RCW 64.68.025(4).[6] It is our belief that the deficit or surplus per Unit is intended to be a simple and straightforward replacement for the confusing Reserve Study disclosures included in RCW 64.34.308(4) and RCW

64.68.025(4). For a Condominium with different Allocated Interests for the Units, the Budget must state the deficit or surplus for every Unit, not an average.[7]

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.[8] Second, WUCIOA explicitly authorizes the Board to propose special Assessments.[9] These Assessments are ratified in the same manner as the annual Budget.[10]

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.[11] 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] **64.90.525.** See Chapter 31 -- How Does My Community Adopt a Budget.

[2] Under RCW 64.90.080, the budget provisions of RCW 64.90.525 replace budget provisions for New Act, Old Act and HOA Act communities created before July 2018 (except for nonresidential common interest communities). 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] **64.90.525(1)**, RCW 64.38.025(3) and RCW 64.34.308(3) cover the same subjects (deadlines, providing summary/copy of budget and ratification). It seems clear that the legislature intended for RCW 64.90.525(1) to replace 64.34.308(3) and RCW 64.38.035(3).
We believe that the legislature intended for RCW 64.90.525(2)(f) to replace RCW 64.34.308(4) and RCW 64.38.035(4) because they cover the same subject (reserve adequacy) and the immediately preceding sections are also duplicative (see above).

[4] **64.90.525(2)**. See Chapter 31 -- How Does My Community Adopt a Budget.

[5] **64.90.550(2)(l)** ("The amount is calculated by subtracting the association's reserve account balance as of the date of the study from the fully funded balance, and then multiplying the result by the fraction or percentage of the common expenses of the association allocable to each unit; except **that if the fraction or percentage of the common expenses of the association allocable vary by unit, the association must calculate any current deficit or surplus in a manner that reflects the variation**.")

[6] The budget had to specify how the community would fix a deficit, but the resulting assessments did not have to be tailored to the specific conditions of each individual unit. See the identical clause in both RCW 64.34.308(4)(d) and RCW 64.68.025(4)(d) ("If reserve account balances are not projected to be sufficient, what additional assessments may be necessary…the approximate dates assessments may be due, and the amount of the assessments per owner per month or year.")

[7] **64.90.550(2)(l)**.

[8] **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…")

[9] **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.")

[10] *Id.*

[11] **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**.")

31--How Does My Community Adopt a Budget?

All Common Interest Communities must now adopt Budgets as outlined in WUCIOA, regardless of which statute generally governs their community.[1]

Process

A Board will propose an annual Budget and adopt it.[2] The Board has up to 30 days to provide Owners with a copy of the proposed Budget and related disclosures.[3] After sending out copies, the Board must schedule a date for a Unit Owner's meeting within 14-50 days.[4] At that meeting, the Owners may vote to reject the Budget. The Budget and Assessments against individual Units are voted together as a package. The only way to reject the proposed Budget is by a majority of all voting power to reject it.[5]

There is no need for a Quorum to be present at the Owners meeting to ratify the Budget.[6] If the required notice was not given or the Owners reject the Budget, the last Budget ratified by the Owners continues until a new Budget is passed.

Contents of the Budget

The proposed Budget should include:

1. By category:
    a. The projected income to the Association;[7]
    b. The projected Common Expenses;[8]
    c. Specially allocated expenses that are subject to being budgeted;[9]
2. Assessments:
    a. Amount per Unit;[10]
    b. Due date;[11]
    c. Amount of regular Assessments budgeted for going into the reserve account;[12]
3. A statement about whether the Reserve Study meets the standards of RCW 64.90.550 [Reserve Study][13]

   a. If yes, it should also include how much the Budget meets or deviates from the Reserve Study recommendations.
4. A statement or table showing the reserve funding deficiency/surplus per Unit.[14]

The Board may include a special Assessment, subject to the same Budget ratification process.[15] This can be proposed anytime, not just with the Budget.

This Is the Statute You Must Comply With:
WUCIOA 64.90.525 – Budgets
"(1)(a) Within 30 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 14 nor more than 50 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 installments over any period it determines and may provide a discount for early payment."

---

[1] **64.90.080** ("Except for a nonresidential common interest community described in RCW 64.90.100, RCW 64.90.095 and 64.90.525 [Budgets] 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] The Board proposes the budget under the New Act, the Condo Act and WUCIOA. The Old Act is silent about who proposes the budget.

[3] **64.90.525(1)(a)**.

[4] *Id.*

[5] The Declaration may require a higher percentage to reject a budget. 64.90.525(1)(a).

[6] *Id.*

[7] **64.90.525(2)** ("The budget must include: (a) The projected income to the association by category;")

[8] **64.90.525(2)** ("The budget must include:… (b) The projected common expenses and those specially allocated expenses that are subject to being budgeted, both by category;")

[9] *Id.*

[10] **64.90.525(2)** ("The budget must include:…(c) The amount of the assessments per unit and the date the assessments are due;")

[11] *Id.*

[12] **64.90.525(2)** ("The budget must include:… (d) The current amount of regular assessments budgeted for contribution to the reserve account;")

[13] **64.90.525(2)** ("The budget must include:… (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").

[14] **64.90.525(2)** ("The budget must include:… (f) The current deficiency or surplus in reserve funding expressed on a per unit basis.") The calculation method is described in 64.90.550.

[15] **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.")

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

A Quorum is the number of votes[1] 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 or the percentage of the total 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 (except Board meetings). 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]
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% (unless Bylaws provide otherwise).[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 unless the organizational documents specify a larger percentage.[11] WUCIOA requires a Quorum of the Board for every vote taken.

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. The bottom line is that for Association meetings, the presence of a duly appointed Proxy will satisfy the same requirements as the physical 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] 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 that statute.
64.34.336 (Quorums);
64.38.040 (Quorum for meeting); and

64.90.450 (Quorum).

[3] **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 25% of the Owners are present.

[4] **24.03.090** ("The bylaws may provide…the number or percentage of votes represented in person or by proxy, which shall constitute a quorum at a meeting of members. In the absence of any such provision, members holding 1/10 of the votes entitled to be cast represented in person or by proxy shall constitute a quorum.")

[5] **24.06.115** (Quorum).

[6] **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] **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] **64.34.336(2)** ("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] **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 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.")

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] **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.")

33--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 (Not Under WUCIOA)
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, (might not a signature);[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 (if by email, sufficient to identify the sender).[11]

WUCIOA Communities[12]
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]

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 and printed 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.

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 earlier Washington statues neither specifically authorize nor prohibit voting by Proxy by 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]

[1] **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.
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.
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] **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.

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.

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] **64.34.340**. (See Endnote #1)

[4] **24.03.005(9)**, and **(20)**; **64.34.340**.

[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] **24.03.005(14)**;
24.06.005(17).

[8] **24.03.085(2)**.

[9] **24.03.085** (Voting);
24.06.110 (Voting).

[10] **24.03.005(11)**;
24.03.085;
24.06.110;
24.06.005(17).

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

[12] **64.90.455(5)** Except as provided otherwise in the declaration or organizational documents, the following requirements apply with respect to proxy voting:

(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] **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] **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] **64.90.445(2)(m).** "A board member may not vote by proxy or absentee ballot."

34--Can Association Voting Be Switched to Electronic Transmission?

Association members can vote by Electronic Transmission under the Nonprofit Corporation Act if it is allowed by the Articles of Incorporation or the Bylaws.[1] Under the Nonprofit Miscellaneous Act, Association members can vote by Electronic Transmission unless their Governing Documents opt-out.[2] Under both Nonprofit Acts, members who vote via Electronic Transmission count as present for the sake of Quorum.[3] The HOA Act does not address Electronic Transmissions and voting.

We believe that all communities can amend their Governing Documents to provide for Electronic Voting, but they must also provide a means of notifying all owners (who don't accept electronic notice) and providing those owners a means of voting as well (probably with a paper ballot).

---

[1] **24.03.085(2**) ("A member may vote in person or, if so authorized by the articles of incorporation or the bylaws, may vote…by electronic transmission…").

[2] **24.06.110** ("A member or shareholder…unless the articles of incorporation or the bylaws otherwise provide, may vote…by electronic transmission…").

[3] **24.03.085(3)** ("Members voting by mail or electronic transmission are present for all purposes of quorum....");
24.06.110(2) ("Persons voting by mail or by electronic transmission shall be deemed present for all purposes of quorum…").

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

Section RCW 64.90.080 of the Washington Uniform Common Interest Ownership Act[1] ("WUCIOA") eliminates any restriction on Assessment increases within the CC&Rs of an existing HOA (but not Condominiums). It is clearest in cases of a special Assessment, but applies to dues increases contained within the regular Budget. The legislature determined such restrictions are out of date and do not reflect the current financial needs of all HOA communities, and the statutory obligations imposed after the CC&Rs were recorded.

RCW 64.90.080 makes 64.90.525 applies to all existing HOAs and establishes the process for ratifying a Budget and the accompanying Assessments (and replacing any different provisions in the CC&Rs or Bylaws). 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] Any restriction on dues increases conflicts with the Budget and Assessment provisions as drafted by the Washington State legislature in 64.90.525. The statute still allows the current Owners to serve as the arbiters of whether the proposed Budget and Assessments are reasonable (by a majority banding together to reject a proposed Budget) but removes all other recorded limitations on dues increases or approval by the owners contained in an HOA's Governing Documents.

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 ratification 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 Board the right to levy a special Assessment if ratified by the

Owners. 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 WUCIOA[4]. To protect the public interest the legislature chose to supersede the existing provision of every HOA's Governing Documents with RCW 64.90.525.[5] 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.

Section RCW 64.90.525 eliminates any restriction on Assessment increases when the Board seeks to raise funds through a special Assessment. It specifically empowers the Board to propose a special Assessment and ratify it through the new statutory Budget process.[6] 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 superseded[7] and the Board can propose a special Assessment as it sees 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 if challenged, 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 Governing Documents and understand the needs of your

community before we could provide a specific legal opinion on a Budget or special Assessment adopted by your community.

---

[1] **64.90.525.** See Chapter 31—How Does My Community Adopt a Budget?

[2] **64.90.525(3)**.

[3] **64.38.025(3)** (Which no longer applies to budgets) ("Within 30 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 meeting of the owners to consider ratification of the budget not less than 14 nor more than 60 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] **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.")**

[5] **64.90.080(2).** ("To protect the public interest…RCW 64.90.525 supersede[s] existing provisions of the governing documents…")

[6] **64.90.525(3)**. ("The board, at any time, may propose a special assessment.")

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

36--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 the community's 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.

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 asses 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 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.

Associations 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, Common Expenses of the Association, and votes amongst the individual Units.[19] The Declaration must state the formulas used to determine the allocations between the Units.[20] No specific formula is assigned but the allocations may not discriminate in favor of the Declarant.[21]

---

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

[2] **64.34.360(3)** (Common expenses – Assessments).
("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; and
(d) The costs of utilities must be assessed in proportion to usage.")
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).

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] **64.34.360(3)(b).**

[4] **64.90.445(4)(b)**.

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

[6] **64.34.224(1)** (Common element interests, votes, and expenses – Allocation).

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] **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] **64.90.480(3)**.

[9] **64.34.224**, Official Comments.

[10] **64.34.360(3)** (applicable to Old Act and New Act condo associations).
64.90.480.

[11] **64.34.364(14)** (Lien for assessments) (applicable to both Old Act and New Act condo associations).
64.90.485(19).

[12] **64.34.360(5)**
64.90.480(6).

[13] **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 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] **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.

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

[17] **64.38.020(11)**.

[18] **64.38.050** (Violation – Remedy – Attorneys' fees).

[19] **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] **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.")

[21] **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.")

37--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 Washington opinion, *Sunrise Village Condominium Tract E v. Lambert*, is instructive.[4] The Condominium Board levied a $4,500 Assessment for external repair of areas of rot and deterioration, repair of external siding and cleaning and caulking in preparation for a "total repaint" of the buildings. The Unit Owner argued that it was a capital improvement and the Board should have had the Unit Owners ratify it. The court noted that under the Sunrise Village covenants, an Assessment levied to pay for repairs to common areas does not require an authorizing vote by the Unit Owners, but a major payment for capital improvements does.[5]

According to the plain language of the Sunrise Village covenants, it did not matter whether the work done counted as a capital improvement. The external repair work was done on a common area (the exterior of the Condominium building) and therefore did not require a vote.[6]

A second unpublished decision by the Washington Court of Appeals, *Lowry v. Allenmore Ridge Condo. Ass'n*, sheds additional light on this issue.[7] 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 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.

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 varies from case to case. Courts in other states have agreed with the analysis of *Lowry*, finding that major repairs are not improvements.[8] 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 construction 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). 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.

Note: While the repair expenditures did not require a vote of the owners in *Sunrise Village,* a special Assessment would now require ratification in accordance with RCW 64.90.525.[9] So while the repair does not require approval by the members, the members must ratify any Budget or special Assessment to pay for the repair.

---

[1] **64.34.304(1)** provides, in relevant, part: ("Except as provided in subsection (2) of this section, and subject to the provisions of the Declaration, the association may:…

> (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.

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...");

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…")

[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 Capitalization of Tangible Property at https://www.irs.gov/pub/irs-utl/tangiblepropertyatg9142016.pdf.

[4] *Sunrise Village Condo. Tract E v. Lambert*, 135 Wash. App. 1024 (Wash. App. Div. 1 2006).

[5] The relevant sections of the Sunrise Village covenants read as follows:

Section 9.4.1(i) ("[T]he Board shall have no authority to acquire and pay for out of the maintenance fund *capital additions and improvements (other than for purposes of restoring, repairing, or replacing portions of the common areas)* having a total cost in excess of One Thousand Dollars ($1,000), without first obtaining the affirmative vote of the owners,"),

Section 11.2 ("*If the sum estimated and budgeted at any time proves inadequate for any reason* (including nonpayment for any reason of any owner's assessment), *the Board may at any time levy a further assessment, which shall be assessed to the owners in like proportions.*")

[6] The scope of work covered the "decks and all areas of the building." *Sunrise Village Condo. Tract E v. Lambert*, 135 Wash. App. 1024 (Wash. App. Div. 1 2006).

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

[8] 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). A different Florida court found that extending elevator service to the 11th floor penthouse was not maintenance of the common elements. *In re Bayshore Yacht & Tennis Club Condo. Ass'n., Inc*., 336 B.R. 866, 871 (Bankr. S.D. Fla. 2006).

[9] **64.90.525 ("(1)(a)**. Within 30 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 14 nor more than 50 days after providing the budget. Unless at that meeting the unit owners…. reject the budget, the budget and the assessments against the units included in the budget are ratified….
(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...")

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

Associations may require Owners to pay move-in fees both when the Owners move into 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. Fees not specifically referenced in recorded documents 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, "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 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 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. Some Declarations specifically require capital contributions to be paid by each new purchaser of a unit.

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.[7] 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 for New Act and WUCIOA communities.

---

[1] **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.");
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.");

64.34.360

("(1)…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)….

(3) **To the extent required by the declaration:**…

(b) Any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited…

(d) The costs of utilities must be assessed in proportion to usage...

(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.");

64.90.235.

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…

(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:

(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;

(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.

---

[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.

[7] **64.34.360(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.");
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…

(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.")

39--How Should Association Minutes and Records Be Maintained?

Associations should keep 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 Acts.[4] 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.[5]
(2) The removal of a Board Member or elected officer by the Board.[6]
(3) A Record of Unit Owner votes along with the minutes of the Association meetings.[7]
(4) A Record of all actions taken without a meeting or by committees.[8]

The content that an Association is required to include in its meeting minutes may be determined by the Association's Governing Documents but usually is not. 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");
(2) The name of the body that held the meeting (i.e. the Board, the Association, or committee);
(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 and committee Meetings, and whether a Quorum was present (for all meetings);
(6) Whether the minutes of the previous meeting were approved (including the date of the previous meeting);
(7) All motions (resolutions or "actions taken") made, points of order, and appeals, including vote tallies for both approved and defeated motions; and
(8) The time the meeting began and adjourned (ended).

Before the minutes are official, they must be approved by the same 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.

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.[9]

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] **24.03.135** (Required documents in the form of a record — Inspection — Copying);
24.06.160 (Books and records);
64.34.300 (Unit owners' association — Organization);
64.38.035 (Association meetings — Notice — Board of directors).
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.")
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] *Id.*

[4] **24.03.135**;
24.06.160.

[5] **64.90.455**.

[6] **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] **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.")

[8] WUCIOA does not require committee minutes be kept, but if the committee takes any action for the Board, it must be written and kept like minutes.
64.90.495(1) ("An association must retain the following:…(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;")

[9] **64.90.495(1)** implies that minutes are permanent records. It explicitly directs the Association to keep budget records for the preceding 7 years but puts no limits on meeting minutes. ("An association must retain the following: (a) The current budget, detailed records of receipts and expenditures … 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;")

40--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]

What Is a Reasonable Accommodation?
A reasonable accommodation is a change to the community's rules or policies which allows the disabled person 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 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 of the community. 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 because they have children, parents, friends, spouses, roommates, patients, subtenants or other associates who have disabilities.")

[2] 42 U.S.C. § 3602(h) ("…[S]uch 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) ("[D]iscrimination 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) ("[D]iscrimination 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).

41--What Is Considered an Association Record?

WUCIOA contains an extensive list of what qualifies as a Record and what Records may be 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 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 in *Grillo* that Records on wages paid to an Association's top employees, management contracts, and facility maintenance service contracts 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 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 *Shioleno 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, 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.

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 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 **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 **64.34.372**. This provision of the New Act applies to Old Act condos as well.
The Old Act imposes a similar requirement. **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."
64.38.045 "[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.".

[2] **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] **64.32.170,**
64.34.372.

[4] **64.90.495(1)** Association Records,
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
(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 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." *Shioleno* 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. Accordingly, associations should ensure that ESI is preserved with the same level of care as hard copy documents.

[11] **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] The HOA Act, **64.38.045(2)**, 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).

42--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] 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]

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] 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 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. 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 41--"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 members in July." As such, the Association could simply provide the Owner with access to 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, HOA Act or WUCIOA only means that Associations have no statutory duty to make them available to Owners, not that they are privileged and exempt from disclosure under court procedures.

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 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 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 them 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.

---

[1] Under WUCIOA, ("[A]ll 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,") RCW 64.90.495(2). 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 WUCIOA, the New Act, the Old Act 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 Old Act and the New Act 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. RCW 24.03.135(5) ("Cost of inspecting or copying shall be borne by such member except for costs for copies of articles or Bylaws.")

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] **24.06.160**

[6] **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, HOA Act and WUCIOA are 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. Our 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 *Shioleno 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 Shioleno had failed to establish a proper purpose." 13-07-00312-CV, 2008 WL 2764530 1, 4.

[10] The court in *Shioleno* 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. *Shioleno* at 6.

[11] **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 *Shioleno* 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. *Shioleno* 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] **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] **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 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 *Shioleno*, 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.