CONDOLAW'S 2017 HANDBOOK FOR COMMUNITY ASSOCIATIONS

A Resource for Washington State Condominium and Homeowners' Associations

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Table of Contents

***New chapters designated in bold**

****Chapters containing significant revisions based on new law designated in bold italics***

BOARD DUTIES AND ACTION

ASSOCIATION ACTION

OWNERS' AND OCCUPANTS' RIGHTS AND OBLIGATIONS

PREFACE

This book is made up of a selection of topics we believe associations will find useful and informative. These were written after we asked ourselves, “What topics keep coming up with our clients over and over again?” We also included chapters aimed at providing information we think all association managers should have, but often do not.

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. Each topic is intended to be useful standing alone, but some are complementary. We recommend that you read the section entitled “Basic Legal Information” first.

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

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BASIC LEGAL CONCEPTS AND INFORMATION

Condos

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

A condominium is the collection of units, which are the 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, would be 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 of the association and the management of the physical property. These managers are agents of the association and act at the direction of the Board, or where Board powers have been delegated to the manager by the Board, they may act on behalf of the association without further consultation with the Board.

HOAs

Many residential developments that are not condominiums are governed as “homeowners’ associations” or “HOAs.” 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 recoded 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.

Which Laws Apply?

Associations of owners of property that are not condos 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 after July 1, 1990, (meaning the declaration was recorded on or after that date) are governed by the Washington Condominium Act, RCW 64.34 (the “New Act”). It is now 27 years old, but is still “new” compared to the prior statute.

Condos and their owners' associations that were created before July 1, 1990, are generally 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 stringent of the two in any given case 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.

1
Animals: May a Community Ban or Restrict Them?

An Association may ban or restrict animals, if the restriction is:

A) reasonable[1];
B) enforced uniformly; and
C) included in the governing documents.[2]

However, there are some exceptions:

Service animals
An Association may not ban service animals.[3] A service animal is an animal[4] that is trained for the purpose of assisting or accommodating a disabled person's disability. There are no legal requirements for service animals to be specially identified.[5] There are no special cards, harnesses, badges, or certifications that a service animal must have.[6]

To establish entitlement to a service animal, a resident must notify the Association that he or she is disabled and that a service animal is required in order to use and enjoy their home in the same way that a non-disabled resident would.[7] The Association is permitted to ask only for information necessary to determine whether the animal is a reasonable accommodation because of a disability.[8] If the disability is not obvious, the board may ask for documentation that the resident is disabled, but may not ask what the disability is. The board may also ask for documentation that the animal is necessary to help the resident cope with the disability.

"Emotional support" animals
An emotional support animal is an animal that is not specially trained to assist a disabled person, but instead allows a person

with a mental health-related disability to function better or normally.[9]

The Washington Law Against Discrimination (WLAD) does not define nor does it mention "emotional support" animals. "Service animals" are required to have special training under the WLAD, and "emotional support" animals do not possess special training, so it seems that Washington law does not preclude Associations from banning "emotional support" animals.

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

(1) the resident has a disability,
(2) the resident requests the animal as a reasonable accommodation for that disability, and
(3) the animal is necessary because of the resident's disability[10]

An "emotional support" animal would likely be considered a "service animal" under the FHA's broader definition.

Under the FHA, if a resident claims a disability and has an animal that meets the definition of a "service animal," then that animal should be allowed in the resident's dwelling even if the association has a "no pets" policy. There should be no charge or "pet fee." If a resident does not provide any information about how the animal assists with a disability, the animal may be prohibited, but the risk to the Association of denying a claimed service animal is high.[11]

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[1] No Washington court has ruled on this exact issue, but Washington cases ruling on other kinds of restrictions, as well as cases from other

jurisdictions regarding pet restrictions, support this conclusion. See, for example, *Shorewood West Condo. Assn. v. Sadri*, 140 Wn. 2d 47 (2000) (citing *Noble v. Murphy*, 34 Mass. App. Ct. 452 (1993) (upholding pet restriction) and *Nahrstedt v. Lakeside Village Condominium Assn*., 8 Cal. 4th 361(1994) (pet restrictions enforceable if reasonable and uniformly enforced).

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

[3] This is true under both federal and state law.

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

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

RCW 49.60.040 (Definitions) provides, in relevant part:

> (7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:
>
> (i) Is medically cognizable or diagnosable; or
>
> (ii) Exists as a record or history; or
>
> (iii) Is perceived to exist whether or not it exists in fact.

> (b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.
>
> (c) For purposes of this definition, "impairment" includes, but is not limited to:
>
> (i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
>
> (24) "Service animal" means an animal that is trained for the purpose of assisting or accommodating a sensory, mental, or physical disability of a person with a disability.

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

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

[5] See, *Storms v. Fred Meyer Stores Inc.*, 129 Wn. App. 820 (2005); *Timberlane Park v. Human Rights Comm'n*, 122 Wn. App. 896 (2006). The animal must have some training specific to assisting a disabled person that sets it apart from an ordinary pet. No particular kind or amount of training is required by law; the owner must demonstrate that there is a relationship between his or her ability to function and the

companionship of the animal. See, e.g., *Majors v. Housing Authority of the County of Dekalb*, 652 F.2d 454 (5th Cir. 1981); *Housing Authority of the City of New London v. Tarrant*, 12480, 1997 WL 30320, at *1 (Conn. Super. Ct. Jan. 14, 1997); *Whittier Terrace v. Hampshire*, 532 N.E.2d 712 (Mass. App. Ct. 1989); *Durkee v. Staszak*, 636 N.Y.S.2d 880 (N.Y.App.Div. 1996); *Crossroads Apartments v. LeBoo*, 578 N.Y.S.2d 1004 (City Court of Rochester, N.Y. 1991).

[6] For more information, the following websites may be helpful:
http://www.ada.gov/service_animals_2010.htm (this site discusses the ADA which does not apply, but many courts refer to the ADA's definitions when discussing service animals and emotional support animals under the FHA)

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

[7] *Bryant Woods Inn v. Howard County*, 124 F.3d 597 (1997).

[8] *Overlook Mut. Homes, Inc. v. Spencer*, 666 F. Supp. 2d 850 at 856 (2009).

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

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

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

2
Sex Offenders and Criminals: Can They Be Banned by a Community?

Associations generally have the right to regulate their communities. In Washington, this probably includes the right to ban registered sex offenders[1] and other persons with criminal history from living in the community. However, an association's right to evict existing occupants based on their status as a sex offender is less clear. In addition, associations considering a covenant banning occupants with criminal history must consider several sources of potential liability.

Banning prospective occupants with sex offender status and other criminal history: The Fair Housing Act

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

No federal, state or local protections applicable to Washington communities specifically prohibit discrimination based on an individual's criminal history or status as a sex offender.[4] [5] No Washington court has ruled on the issue of whether an association may ban such individuals from moving into their communities.

Given the current state of the law in Washington, it appears an association may ban registered sex offenders or other criminals from residing in their community (If restricting criminals, consider defining what level of criminal would be prohibited. Convicted felons? Persons with a history of violent crimes?). Because restrictions on use or occupancy of a unit or lot must be in the community's Declaration, a provision prohibiting registered sex

offenders or others with criminal history would have to be in the Declaration (or the Declaration would have to be amended in accordance with the association's Governing Documents and state law).[6]

Association membership

No Washington court has considered whether an association has any recourse when a registered sex offender or person with other criminal history purchases a home in the community. However, it would be unlikely that an association could either force a sale of the property or block the new owner's membership in the association.[7]

Eviction of existing tenants with sex offender status or other criminal history

In at least one Washington case, a registered sex offender was evicted from low-income housing operated by a religious entity landlord that had been unaware of the tenant's sex offender status at the time of rental.[8] If a court were to apply the rationale used in that case, a tenant's failure to disclose criminal history might be grounds for eviction if, in the interest of resident safety, the tenant's landlord enacted a rule banning residents with certain criminal history.

Potential liability

If an association decides to impose a residential ban on registered sex offenders or persons with other criminal history, there are several risks to consider. First, the covenant may give residents a false sense of security and put them at additional risk. Although an association has no general duty to control or protect residents from criminals, this promise of safety may give rise to a greater duty to protect.[9] In addition, if an association enacts a ban against registered sex offenders, an offender may challenge the ban in court, subjecting the association to litigation costs.

On the other hand, if an association allows registered sex offenders or persons with other criminal history to live in the

community, it is well advised to consider neighborhood safety issues, including protection of the sex offender from potential harassment.

Other considerations

Real estate sales require that a seller provide buyers notice that information relating to registered sex offenders can be obtained from local law enforcement.[10] This is not part of the association's resale certificate. Information on registered sex offenders may be found online at:

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

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

Registered sex offenders convicted of certain crimes may not live within 880 feet of the facilities and grounds of a public or private school.[11] Certain offenders may also be prohibited from entering places like the neighborhood pool, playground, park, community center, and the like, if written notice is provided to the offender.

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

[2] 42 USC § 3604, et seq.

[3] For example, the King County Office of Civil Rights investigates and resolves complaints of housing discrimination based on Section 8 housing subsidy, sexual orientation, and age, in addition to the

classifications protected under the Fair Housing Act. *See* http://www.kingcounty.gov/exec/CivilRights/FH.aspx. The Seattle Office for Civil Rights provides additional protection against housing discrimination based on political ideology, gender identity, and military/veteran status. *See* http://www.seattle.gov/civilrights/fair-housing.

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

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

[6] RCW 64.34.216 (Contents of Declaration) provides, in relevant part:

> (1) The Declaration for a condominium must contain:
>
> (n) Any restrictions in the Declaration on use, occupancy, or alienation of the units

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

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

Procedures for amending a condo association's Declaration are set forth in RCW 64.34.264 (Amendment of Declaration) for New Act condo associations, and in RCW 64.32.090(13) (Contents of Declaration) for Old Act condo associations. Each community's Governing Documents must also be examined for additional requirements. Under RCW 64.34.264, restrictions on use require approval by 90% of the unit owners and the owner(s) of every affected unit.

[7] Under both the New Act and the HOA Act, all owners are entitled to be members of the association. RCW 64.34.300 ("The membership of the

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

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

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

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

[11] RCW 9.94A.030 (Definitions); RCW 9.94A.703 (Community custody – Conditions).

3
Smoking: Can an Association Ban Smoking?

An association may enact a rule banning smoking in common areas, and can probably ban it in individual units/homes as well. However, an association must consider several potential risks and benefits before enacting such a rule. 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 Against Discrimination[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]

Additionally, Washington state law expressly prohibits smoking in most public places and work places. A "public place" is any enclosed area open to the public. This could include a community clubhouse or store if it is open to the public. A "workplace" is every enclosed area under the control of a public or private employer that employees frequent during the course of their regular duties. This could be lobbies, hallways, community rooms, etc. In addition, smoking is prohibited within 25 feet of all business entrances, exits, operable windows and air intake vents.

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 majority of 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.[6] Given the growing trend toward a smoke-free society, the ubiquitous understanding of the health risks related to secondhand smoke, and the fact that no laws expressly prohibit associations from banning smoking in units or homes, Washington courts are likely to apply this reasoning. This would probably be considered a "restriction on use" and require a Declaration amendment.

In light of the growing trend towards legalization of marijuana,[7] 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.[8] 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.[9]

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

1) Amendment to Declaration/CC&Rs: This method is likely the most difficult and costly way to enact a smoking ban, but it will be given the most deference by courts and be relatively strong in the face of legal challenges.

2) Amendment to Bylaws: This is the wrong place for a use restriction, and no more enforceable than a rule.

3) Board rule or resolution: A new rule or resolution is the easiest way to implement a smoking ban, but would only be effective for common areas and limited common areas and would 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.[10] However, a resident bothered by secondhand smoke might be able to pursue an action against the association to enforce a nuisance clause contained in a Governing Document, prohibiting an owner (or resident) from engaging in an activity that affects the use and enjoyment of another owner's property.

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

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

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[1] 42 U.S.C. 3601, *et seq.*

[2] RCW 49.60 (Discrimination — Human Rights Commission).

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

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

[5]Because the ADA does not define ongoing use and addiction to illegal drugs as a "disability" and marijuana is still illegal under federal law, marijuana addiction is not a basis for protection under the ADA. 42 U.S.C. § 12114(a) (1994); 29 C.F.R. § 1630.3(a) (1999). *See*, *e.g.*, *Shafer v. Preston Mem'l Hosp. Corp*., 107 F.3d 274 (4th Cir. 1997) (current illegal drug user is not covered). And the Washington Supreme Court has held (in the context of employment) that, due to the federal prohibition of possession of marijuana, allowing medical marijuana use in violation of a stated drug (or smoking) policy would not be considered a reasonable accommodation of a disability. *See, Roe v. Teletech*, 171 Wn.2d 736 (2011) (In this case, an employee claimed his employer failed to accommodate his disability after he was discharged for violating the employer's drug use policy. The Court disagreed, holding 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).

[6] *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 smokers, who occupied one of the four units in the community, challenged the ban the other three owners had approved, arguing that it interfered with their right to conduct legal activities within their home. The court acknowledged that smoking is not illegal, but likened it to "excessively loud noise." Like noise, the court said, smoke can't be

confined within a unit and can create a nuisance that the Association had the authority to regulate. 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.")

[7] 29 states have now legalized medical marijuana, and 8 of the 29 have legalized the use of marijuana for recreational purposes. http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html

[8] The Washington Human Rights Commission has issued guidelines stating that "the use of medical marijuana is not a reasonable accommodation for a disability; this applies in the areas of employment, housing, and public accommodation." *Guide to Disability and Washington State Nondiscrimination Laws Washington Non-discrimination Laws and the Use of Medical Marijuana* at. http://www.hum.wa.gov/media/dynamic/files/160_medical%20marijuana.pdf. As the Commission notes, its guidelines do not prohibit a plaintiff from seeking a remedy in state or federal court. However, no Washington court to date has permitted a plaintiff to proceed on a discrimination claim based on failure to accommodate the use of medical marijuana.

[9] Massachusetts is the only state to permit a plaintiff to pursue a discrimination claim under state law for failure to accommodate the use of medical marijuana. However, in that case the defendant was: 1) an employer, and: 2) had fired the plaintiff for failing a drug test, not for smoking marijuana or being impaired at work. *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (2017). Thus, even if Washington courts followed Massachusetts and permitted a similar claim to move forward, they would be unlikely to extend the decision to require housing providers to accommodate smoking marijuana on the premises.

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

4
What Are Limited Common Elements?

Under the New Act and Old Act, limited common elements or areas are defined as a subset of common elements or areas.[1] Specifically, limited common elements are the portion of common elements (owned by everyone) that are designated in the Declaration for use by fewer than all units.[2] The New Act also defines certain building components as "limited common elements," but permits the Declaration to modify this and include those components as "common elements" or as part of the unit.[3]

Common elements versus limited common elements
Limited common elements are a subset of common elements. Limited common elements are allocated, in the declaration or under RCW 64.34.204(2) or (4), "for the exclusive use of one or more but fewer than all of the units."[4] In other words, limited common elements are parts of the common elements that serve only one or some units. Except as provided by the Declaration, RCW 64.34.204(2) provides that 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 drain pipes are included in this list.) Portions of the building components serving a single unit are designated as limited common elements allocated solely to the unit they serve, while portions of the building components serving two or more units or "any portion of the common elements" are designated as common elements.

RCW 64.34.204(4) further provides that 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. Because limited common elements are a subset of common elements, a Declaration stating that windows and doors are common elements does not conflict with RCW 64.34.204(4). If a New Act Declaration is otherwise silent about windows and doors, they are limited common elements assigned to the unit they serve.

Except for those limited common elements defined in RCW 64.34.204(2) and (4),[5] the Declaration is required to specify the limited common elements and the units to which all limited common elements are allocated. 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.[6]

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.”[7] Under the Old Act, everything outside the unit boundary is a common element, and each Declaration may specify some common elements to be limited common elements.

Limited common elements: spaces or things?

“Limited common elements” can be spaces or things. Parking spots are an example of “spaces” that are frequently defined as “limited common elements” in an association’s Governing Documents.[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 not 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, every part of the building components (wires, conduits, windows, etc.) described in RCW 64.34.201(2) and (4) are part of the limited common elements.[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, but this cannot be done by rule or regulation.

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. In most Declarations, repair costs for limited common elements are a common expense for the association, because repair costs are not specifically assigned as permitted by RCW 64.34.360(3).

Some Declarations may require the owners of assigned units to pay for expenses incurred to repair, maintain, or replace limited common elements. (See Chapter 23, "Cost Allocation: How Are Costs Allocated among Owners?") 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.[11] 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.[12] 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.[13] 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.[14]

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

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

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

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

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

[3] RCW 64.34.204 provides:

> Except as provided by the Declaration:
>
> (1) The walls, floors, or ceilings are the boundaries of a unit, and all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements.
>
> (2) (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) (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) (4) Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but which are located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

[4] RCW 64.34.020(27); RCW 64.34.228.

[5] 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. RCW 64.34.228(1).

[6] RCW 64.34.2282(2) and (3) provide:

> (2) Except in the case of a reallocation being made by a declarant pursuant to a development right reserved in the Declaration, a limited common element may only be reallocated between units with the approval of the board of directors and by an amendment to the Declaration executed by the owners of the units to which the limited common element was and will be allocated. The board of directors shall approve the request of the owner or owners under this subsection within thirty days, or within such other period provided by the Declaration, unless the proposed reallocation does not comply with this chapter or the Declaration. The failure of the board of directors to act upon a request within such period shall be deemed approval thereof. The amendment shall be recorded in the names of the parties and of the condominium.
>
> (3) Unless otherwise provided in the Declaration, the owners of units to which at least sixty-seven percent of the votes are allocated, including the owner of the unit to which the limited common element will be assigned or incorporated, must agree to reallocate a common element as a limited common element or to incorporate a common element or a limited common element into an existing unit. Such reallocation or incorporation shall be reflected in an amendment to the Declaration, survey map, or plans.

[7] RCW 64.32.010(h).

[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] RCW 64.34.360(3). 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.

[12] RCW 64.34.360(3)(a) allows that "[a]ny 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; and RCW 64.34.360(3)(b) allows that "[a]ny common expense or portion thereof benefitting fewer than all of the units must be assessed exclusively against the units benefitted." These cost allocations must be specifically provided for in the Declaration.

[13] 558 So. 2d at 479.

[14] *Id.* at 480.

5
Satellite Dishes: Can an Association Restrict the Installation or Use of Satellite Dishes?

An association can adopt limited restrictions on the installation or use of satellite dishes.

Federal regulations greatly restrict the ability of associations to regulate satellite dishes.[1] These regulations apply to owners of condominium units, single family homeowners, and their tenants.

An association cannot:

A) prohibit satellite dishes on property that is reserved to the exclusive use and control of a homeowner, unit owner, or resident like in limited common areas or lots;[2] or

B) require prior approval of installation for reasons other than safety or historic preservation.

However, an association may:[3]

A) prohibit satellite dishes in common areas;

B) prohibit satellite dishes bigger than one meter in diameter;

C) require prior approval of installation if necessary for safety or historic preservation purposes;

D) limit the number of satellite dishes per unit/home;[4] and

E) make rules regarding placement preferences[5] of satellite dishes, as long as the rules do not impair the right to install,

maintain, or use the dish. An association's rule impairs these rights if it:

(1) unreasonably delays or prevents installation, maintenance, or use of the satellite dish;

(2) unreasonably increases cost; or

(3) prevents an acceptable quality signal.[6]

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[1] 47 CFR 1.4000 (Restrictions impairing reception of television broadcast signals, direct broadcast satellite services or multichannel multipoint distribution services). This law preempts state and local regulations, as well as any limitations set forth in an association's Governing Documents.

[2] An association can prohibit bolting or otherwise attaching a satellite dish to roofs, railings, walls, or other limited common areas or elements. A satellite dish on a stand held by concrete blocks on a limited common element such as a deck or patio must be allowed.

[3] When establishing the validity of a restriction on satellite dishes, the burden of proof is on the association, not the owner or tenant.

[4] This is true unless multiple dishes are needed to get an acceptable quality signal. If multiple dishes are not necessary for this purpose, the association need not allow them.

[5] For example, an association might wish to enact a rule stating that a satellite dish should be placed in the location least visible from the street, if there is more than one possible location for the dish. We recommend finding a preferred way to allow dishes.

[6] 47 CFR 1.4000(a)(3).

6
Restrictions on Use: Can an Association Restrict Use of a Swimming Pool/Other Amenities to "Adults Only" for Part of the Day?

An association in Washington probably cannot restrict use of an amenity (i.e. a swimming pool) to "adults only" for any part of the day, unless there are identical amenities available for use by children. Such a restriction would likely constitute discrimination based on age, which is prohibited by the federal Fair Housing Act.[1] [2] But an association can restrict certain activities in the amenity (such as splashing or roughhousing) or the types of use (such as "laps only"), so long as the restriction is uniformly enforced without regard to age.

No Washington court has considered whether associations can restrict use of amenities to "adults only", but the California Court of Appeals has held that restricting use of an amenity to "adults only" does not discriminate against children if the restriction is not a total exclusion and the restriction is not unreasonable.[3] Our experience with fair housing agencies in Washington is that they will find any restriction based on age or family status to be a violation of the Fair Housing Act.

An exception to this rule applies to associations that qualify as "housing for older persons," which are not subject to the Fair Housing Act age discrimination provisions.[4] An association will qualify as "housing for older persons" if:

(1) The association's housing is provided under any State or Federal program that the Secretary of Housing and Urban Development (HUD) determines is specially designed and operated to assist elderly persons; or

(2) The association's housing is intended for, and solely occupied by, persons 62 years of age or older; or
(3) The association's housing is intended and operated for occupancy by persons 55 years of age or older, and
    - at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older; and
    - the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent that the housing be restricted to persons 55 and older; and
    - the housing facility or community complies with rules issued by the Secretary of HUD for verification[5] of occupancy.[6] [7]

Although associations generally may not restrict all use of an amenity based on age, they can probably restrict certain activities (such as splashing) if the restriction is uniformly enforced against children and adults. Associations can also probably limit swimming pools to "laps only" or to "quiet swim only" if the restriction is reasonable and does not amount to a total exclusion for children (i.e. the restriction is only for certain times of day, or the restriction is in effect at all times but there are other unrestricted pools available for children). Additionally, associations can probably prohibit the use of beach balls, rafts, and other water toys, provided that the prohibition applies to both children and adults.[8]

Finally, associations can probably impose restrictions on children's use of pools and other amenities that are reasonable in light of legitimate health and safety concerns. Following rules by government entities is almost always safe. For example, an association can probably require children under the age of 13 to have adult supervision in swimming pools due to legitimate concerns regarding *their own* safety. However, a rule requiring adult supervision of children under the age of 13 may be deemed

unreasonable since children over 13 are no more likely to drown than adults would be.[9]

Similarly, an association can probably adopt a rule requiring that bathers who use diapers wear rubber pants and bathing suits in the pool. An association adopting such a rule should ensure that it does not refer only to “children” in diapers, since the health concern the rule aims to address would apply equally to incontinent adults.[10]

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[1] 42 U.S.C. 3604 (Discrimination in sale or rental of housing and other prohibited practices). As made applicable by section 803 of this title and except as exempted by sections 803(b) and 807 of this title, it shall be unlawful—

> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

[2] 42 U.S.C. 3602 (Fair Housing Act) (Definitions) (k) "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—

> (1) a parent or another person having legal custody of such individual or individuals; or
>
> (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

[3] *Sunrise Country Club Ass'n v. Proud*, 190 Cal. App. 3d 377 (Cal. Ct. App. 1987) (an Association that made 10 swimming pools “adults only” did not discriminate against children because making 10 of 21 swimming pools “adults only” was not unreasonable, and it was not a total exclusion).

[4] 42 U.S.C. 3607(b)(1) (Religious organization or private club exemption) provides: “Nor does any provision in this title regarding familial status apply with respect to housing for older persons.”

[5] Must include reliable surveys and affidavits, and examples of the types of policies and procedures relevant to a determination of compliance. 42 U.S.C. 3607(b)(2)(C)(iii).

[6] 42 U.S.C. 3607(b)(2) (Religious organization or private club exemption).

[7] 42 U.S.C. 3607(b)(3) (Religious organization or private club exemption) provides: Housing shall not fail to meet the requirements for housing for older persons by reason of:

> (A) persons residing in such housing as of the date of enactment of this Act who do not meet the age requirements of subsections (2)(B) or (C):Provided, That new occupants of such housing meet the age requirements of sections (2)(B) or (C); or
> (B) unoccupied units: Provided, That such units are reserved for occupancy by persons who meet the age requirements of subsections (2)(B) or (C).

[8] See, e.g., *Barkhordar v. Century Park Place Condominium Association*, 2016 WL 6102323 (C.D. Cal. 2016) 1,7 (holding that plaintiffs failed to state a viable claim under the FHA when Association's prohibition of pool toys applied to all residents, not just children).

[9] In *Barkhordar*, the California court found that plaintiffs failed to show evidence of discrimination by an Association that required adult supervision of children under age 14 in the pool given that state law required pools to post signs stating "Children Under the Age of 14 Should Not Use Pool Without Adult in Attendance." The court distinguished the case from one requiring supervision of all children under 18 as unreasonable because that rule was not the least restrictive means of achieving the Association's legitimate safety concerns. *Id.* at 7.

King County publishes its own rules for use by facilities, such as condominiums, that offer "limited use pools". *See* http://www.kingcounty.gov/depts/health/environmental-health/healthy-communities/water-recreation/~/media/depts/health/environmental-health/documents/water-recreation/limited-use-swimming-pool-rules.ashx. Thus, an association located in King County could adopt identical restrictions without opening itself to liability for age-based discrimination.

[10] The *Barkhordar* court upheld a rule requiring "children" in diapers to wear rubber pants and a bathing suit without addressing the question of adult incontinence. *Id.* However, given that the legitimate health concern the rule aimed to address would apply equally to incontinent adults and children, an Association should draft such a restriction to refer to "residents using diapers" rather than singling out children.

7
Restrictions on Use: What Percentage of Owners Must Approve a Rental Restriction in a Condominium?

For New Act condo associations, state law requires that 90% of owners (and every affected owner) vote for a restriction on use.[1] The Washington State Supreme Court, in *Filmore LLLP v. Unit Owners Ass'n of Centre Pointe Condo*, recently classified a rental restriction as a restriction on use.[2] Failure to get the required vote makes the restriction invalid and unenforceable.

For Old Act condo associations, state law only requires that 60% of owners' consent to any change in restrictions on use, including rental restrictions (though individual declarations may require a greater percentage).[3]

The Washington Supreme Court's ruling in *Filmore* was very narrow. The Court specifically stated that its decision did not address the interpretation of "restrictions on use" from the statute and based its decision only on the interpretation of Centre Pointe's Declaration.

The *Filmore* decision left several unanswered questions. The court did not address the language requiring approval of "each unit particularly affected," which could, in effect, require approval of 100% of an association's unit owners. The court also failed to address whether leasing-related requirements other than pure rental caps constitute use restrictions, and whether rental restrictions adopted more than one year ago, would be void. That second issue was addressed by the court recently.[4]
We continue to advise that New Act condos must obtain approval from 90% of the owners to adopt a valid rental cap.

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

[2] *See, Filmore LLLP v. Unit Owners Ass'n of Centre Pointe Condo.,* 183 Wash.App. 328 (2014)` (court affirmed the appellate court's ruling that a lease restriction via Declaration amendment for the Centre Pointe community requires a 90 percent vote because RCW 64.34.264(4) requires a 90% vote for restrictions on use), and this Declaration defined "use" to include rental restrictions. In *Bilanko v. Barclay Court Owners Ass'n*, 185 Wash.2d 443 (2016), the plaintiff contested a similar leasing restriction as invalid because the Association failed to obtain a 90 percent vote. The court upheld dismissal of plaintiff's claim as time-barred and thus did not reach the question of validity of the amendment. However, it is worth noting that the trial court found that Bilanko likely would have prevailed had she timely filed her claim.

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

[4] Subsequent case law seems to indicate that RCW 64.34.264(2), the one-year statute of limitations, would save these amendments. *See* Chapter 12, "Statutes of Limitations: How Long after an Amendment Is Recorded Can It Be Challenged Successfully?"

8
Restrictions on Use: Can an Association Prohibit Short-Term Rentals?

An HOA can prohibit short-term rentals if the original Covenants, Conditions, and Restrictions (CC&Rs) allow it to do so. A developer is free to include a prohibition on short-term rentals in its CC&Rs (along with any other lawful restrictions on use). HOAs may amend their existing CC&Rs to prohibit short-term rentals in some cases.

Washington courts have held an HOA may amend its CC&Rs to prohibit short-term renting with a majority vote only if homeowners had notice at the time they purchased their homes that the HOA could limit or prohibit renting of the homes.[1] Otherwise, an HOA may only amend its CC&Rs to prohibit short-term renting if all HOA members approve the amendment.[2] This is an evolving legal issue and very fact specific.

The Washington Supreme Court case, *Wilkinson v. Chiwawa Cmtys. Ass'n*, ruled that the restriction of short term rentals in that HOA community required every owner's approval. An Idaho Supreme Court case, *Adams v. Kimberley One Townhouse Owner's Ass'n,*[3] provided a different answer to what appears to be an identical question. The different results may be because of differences between Washington and Idaho law, or the facts presented in these cases may provide guidance to HOAs in answering this question for their communities.

The courts identified two situations where an HOA may validly amend its CC&Rs to prohibit short-term rentals without approval of all homeowners:

1) If the HOA's CC&Rs already contain a provision that limits the renting of homes, the HOA can amend its CC&Rs to prohibit

short-term rentals with a majority vote (as provided by the CC&Rs) so long as its CC&Rs specifically grant the HOA authority to amend existing covenants.[4]

2) If the HOA's CC&Rs grant the HOA authority to create new covenants, the HOA can amend its CC&Rs to prohibit short-term rentals with a majority vote (as provided by the CC&Rs) whether or not the CC&Rs already contain a provision that limits renting of homes.

The Idaho Supreme Court decision (*Adams*) is at odds with *Wilkinson* in its conclusion about short-term rentals. In *Adams,* the court determined that an amendment to prohibit short-term rentals was valid against all homes even though the HOA's CC&Rs did not contain an existing covenant that limited or prohibited rentals.[5]

An analysis of the facts of each case may shed light on why the courts came to opposite conclusions on a seemingly identical question (keeping in mind that Idaho law does not control in Washington):

In the *Wilkinson* case, the CC&Rs only allowed the HOA to amend existing covenants. The court in *Wilkinson* determined that homeowners did not have notice that the HOA could restrict or limit the renting of homes because there was no mention of a limitation on rentals in the covenants and the reference to "for rent" signs in the CC&Rs indicated the developer's intent to allow rentals in the community. In *Adams*, the CC&Rs allowed the HOA to make general amendments, which the court interpreted to include creation of new covenants. The court in *Adams* determined that homeowners **did** have notice that the HOA could restrict or the limit renting of homes.

In *Wilkinson,* the CC&Rs limited use of the homes to "single family residential purposes," and limited rentals to "single family residential purposes" (the rentals could not be for "commercial

purposes.") The court in *Wilkinson* determined a short-term rental is still a "single family residential purpose."[6] In *Adams*, the CC&Rs also limited use of the homes to "single family residential purposes," but the court determined the amendment was valid because the document clarified what "single family residential purposes" meant for that community.[7]

Subsequent Washington cases indicate that the definition of the term "single family residential purpose(s)" is critical to whether the court sides with the unit owner or the Association. In *White v. Lakeland Homeowners Ass'n*, 187 Wn. App. 1040, the court held that a restriction prohibiting the lease of "single family homes" within the first year of purchase was inapplicable to condominiums inside of this Master Community.[8] Construing the term to apply to condominiums (in this community) was inconsistent with the definitions of "single family," "home," and "condominium" contained in the Master Community's declaration. *Id.* If "single family homes" were interpreted to apply to condominiums in this community, the term "condominium" would be rendered meaningless. *Id.*

Long-standing practice with respect to the rental of homes in the community also appears to play an important role when courts are assessing the validity of leasing restrictions. In *Wilkinson,* homeowners in the HOA had rented their homes as vacation homes (short-term and long-term) for decades. In *Adams*, homeowners in the HOA had never rented their homes as vacation homes (short-term or long-term). Virgil Adams, the appellant, had only rented his home as a vacation home for a few months before the amendment was adopted.

Both cases seem to stand for the proposition that an HOA cannot amend its CC&Rs to prohibit short-term rentals unless the homeowners have notice that the HOA could do so. An HOA cannot amend its CC&Rs to prohibit short-term rentals if short-term rentals are consistent with the HOA's definition of "single family residential purposes" (assuming the HOA limits use of the

homes to "single family residential purposes"). Finally, it appears that courts likely will not allow an HOA to amend its CC&Rs to prohibit short-term rentals if the HOA has historically allowed short-term rentals.

See also the chapter entitled: "Restrictions on Use: What is required to create new covenants in an HOA?"

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[1] *Wilkinson v. Chiwawa Cmtys. Ass'n*, 180 Wn.2d 241 (2014) (holding that an HOA could not prohibit short-term rentals because the Governing Documents did not give homeowners notice that the HOA could do so).

[2] *Id*.

[3] *Adams v. Kimberley One Townhouse Owner's Ass'n*, 352 P.3d 492 (Idaho 2015) (a new restriction on short-term rentals was valid, even though the HOA had not obtained unanimous approval from homeowners, because the CC&Rs contained a provision allowing general amendments to the CC&Rs which included creation of new covenants unrelated to existing covenants).

[4] *Wilkinson*,180 Wn.2d 241.

[5] *Adams*, 352 P.3d 492.

[6] Prior Washington cases have defined "residential use." *See, Ross v. Bennett*, 148 Wn. App. 40 (Wash. Ct. App. 2008) (a tenant's use of a property is a "residential use" because it is identical to a homeowner's use of the property).

[7] See *Garrett v. Sympson*, in which the court found that a short-term vacation rental did not violate a restrictive covenant limiting the use of lots to "single family residence [sic] purposes." 02-16-00437-CV, 2017 WL 2471098, *1, 4 (Tex. App.--Fort Worth June 8, 2017). The Texas court, citing *Wilkinson*, found that a vacation rental qualified as a "single family residential purpose."

[8] *White* is an unpublished opinion and thus cannot be cited as binding precedent, but the reasoning may be persuasive since Washington and other state courts considering the validity of leasing restrictions give great weight to the definition of "single family home(s)" and, accordingly, "single family residential purposes."

9
Restrictions on Use: Can Associations Limit "Airbnb" Rentals of an Owner's Home or Part of the Home?

Associations can prohibit or limit vacation and other short-term rentals, such as those advertised through Airbnb and VRBO, provided that the restriction on use is contained in the Declaration or the Covenants, Conditions, and Restrictions (CC&Rs). Language prohibiting "all rentals," "short-term rentals," or "transient use" should be enforceable by an association as a valid restriction on an owner's use of services like Airbnb. Associations may also include language expressly prohibiting rentals under a specific duration (e.g. 30 days) or rentals through specific companies (e.g. Airbnb, VRBO, etc.). CC&Rs prohibiting the use of property for business or commercial purposes, or restricting the use of property "for residential purposes," may also be invoked to prohibit short-term rentals. However, because the phrase "residential purposes" is ambiguous,[1] courts will look at other provisions of the CC&Rs and extrinsic evidence to determine whether the restriction was intended to bar short-term rentals.

Restrictions barring short-term rentals or use for purposes other than private dwellings

A developer is free to include an express prohibition or limitation on all rentals, short-term rentals, rentals under a specific duration, and rentals through a specific company in its Declaration or CC&Rs (along with any other lawful restrictions on use). Many Declarations and CC&Rs prohibit transient use of units or operating units "like a hotel."

If such a provision exists, an Association should be able to prohibit Airbnb rentals or any other shared or short-term tenancies, even if the owner lives in the unit during such use. The fact that an owner is sleeping in the unit at the same time as an Airbnb tenant, for example, does not change the fact that the latter is a "renter" or "transient guest." And, the presence of the owner in the unit would not render the lease any less of a violation. Language restricting use to "a private dwelling for one family only" may also suffice to

bar owners from having paid guests. In *Fick v. Weedon* for example, an Illinois Court of Appeals held that the use of a property as a bed and breakfast didn't fall within the plain meaning of "a private dwelling for one family only." It made no difference to the court that the owner also lived on the premises. [2] [3]

Restrictions barring use of property for business purposes or requiring use for residential purposes

Some Declarations and CC&Rs have no express prohibition against short term rentals or transient use, but restrict use of properties to "residential purposes" or "single family residential purposes," or prohibit the use of property "for business and commercial purposes." Washington courts have defined "residential use" to include a tenant's use of a property.[4] The court specifically stated that short and long term rentals were equally residential.[5]

Given the ambiguity in the phrase "residential purposes," this language alone is not enough to prohibit owners from renting their units through sites like Airbnb.[6] Whether it is construed to prohibit short-term rentals will instead depend on other provisions of the Declaration and extrinsic evidence. If a declaration stated the minimum rental term was 30 days, and an owner offered the home through Airbnb for terms of 30 days or more, there would be no violation.

If a declaration restricts use to "single-family residential purposes" or prohibits the use of any unit or lot for "business or commercial purposes," but contains other provisions indicating that rentals are permitted, courts are unlikely to find that short-term rentals violate the covenants. In *Gadd v. Hensley*, a Kentucky court held that a restriction limiting the use of lots to "single family residential use purposes" did not prohibit rentals as short as a single night when the deed also expressly permitted owners to post signs "advertising the sale or rental" of their homes.[7] The Kentucky court noted that, in assessing whether a particular use was residential versus commercial, "[t]he focus is not on the duration of the occupation but on the purposes of the occupation…Whether a property is being used for residential purposes focuses not on the intended duration of the stay but on the actual use and activities on the property."[8] Because the short-term renters used the property the same way an owner or long-term tenant would (e.g.

eating, sleeping, relaxing), the deed expressly provided for rentals, and no minimum duration for rentals was specified in the deed, the court held that the phrase “single family residential use purposes” could not be construed to prohibit an owner from renting his property for as short as a single night.[9]

If no other provisions of a CC&R shed light on whether phrases like “residential purposes” were intended to prohibit short-term rentals, courts may look at extrinsic evidence, such as testimony from the developer and the historical use of the property by other owners. In *Ross v. Bennett*, one of the developers testified that a restrictive covenant requiring property to be used for residential purposes was modeled after similar covenants in nearby communities where vacation rentals were allowed. Furthermore, the developer testified that he and other developers had never discussed prohibiting “summer or short term [sic] rentals.” The court held that the developer’s testimony, in conjunction with the historical use of property in the area for vacation rentals, did not show that the covenants were drafted with the intent of barring rentals, regardless of the duration.

If the restriction was not recorded at the time the owner acquired the property, it will be enforceable only if it was adopted by an amendment of the association’s Declaration approved in accordance with the procedures set forth in the Governing Documents and the relevant statutes. (See Chapter 8, “Restrictions on Use: Can an Association Prohibit Short-Term Rentals?”) Washington courts are mixed in their decisions about restrictions on rentals. In some cases, they hold that owners were sufficiently notified that the association could amend the declaration to restrict rentals,[10] and in other cases held that such a “new” restriction could not be recorded absent the express consent of every owner.[11]

In short, Washington courts would likely consider “Airbnb” rentals (and other shared and short-term rentals) to fall within the definition of “single family residential purposes” absent language evincing a clear intent to bar such rentals. Thus, associations that want to prohibit vacation or other short-term rentals may want to specify in their governing documents that short-term rentals or rentals of a specific duration are not permitted. Associations could also specify that use of property for transient housing, bed-and-

breakfasts, or rooming houses are prohibited. Associations that have not included this express language, but have included provisions requiring use for residential purposes, may still be able to bar short-term rentals if they can establish that the drafter intended to restrict such rentals.[12] However, if other owners have rented their units through Airbnb or other similar sites and the association has not contested this use, courts are unlikely to enforce new restrictions against specific owners.

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[1] *See, e.g., Yogman v. Parrott*, 937 P.2d 1019, 1021 (1997) ("The ordinary meaning of 'residential' does not resolve the issue between the parties…because a 'residence' can refer simply to a building used as a dwelling place, or it can refer to a place where one intends to live for a long time."); *Dunn v.Aamodt*, 695 F.3d 797 (8th Cir. 2012) ("We agree with the [appellees] that the phrase 'residential purposes' is ambiguous as to the short-term rental of property."); *Houston v. Wilson Mesa Ranch Homeowners Ass'n, Inc.*, 360 P.3d 255, 258 (2015) ("Although 'residential' unambiguously refers to use for living purposes, courts have recognized ambiguity in the term in cases involving short-term rentals or other situations where those residing in the property are living there only temporarily, not permanently."); *Scott v. Walker*, 645 S.E.2d 278, 284 ("Instead, we find the restrictive covenant, in particular the phrase 'residential purposes,' to be ambiguous in several respects.")

[2] *Fick v. Weedon*, 244 Ill. App. 3d 413 (1993).

[3] Illinois case law does not control in Washington, but it may be persuasive to Washington courts.

[4] *See, Ross v. Bennett*, 148 Wn. App. 40 (Wash. Ct. App. 2008) (a tenant's use of a property is a "residential use" because it is identical to a homeowner's use of the property- the use is for sleeping, eating, and other residential purposes).

[5] Courts in many other jurisdictions hold that vacation and other short-term rentals qualify as "residential use" because it is not the duration of the stay, but rather how the property is used, that determines whether the use is residential in nature. In *Santa Monica Beach Property Ass'n. Inc. v. Acord*, a Florida court held that "the critical issue…is whether the renters are using the property for ordinary living purposes such as sleeping and eating, not the duration of the rental." 219 So. 3d 111, 114 (Fla. Dist. Ct. App. 2017), *reh'g denied* (May 12, 2017) Similarly, the Virginia Supreme Court held that the duration of a renter's stay was not relevant to assessing whether his or her use qualified as residential. *Scott v. Walker*, 274 Va. 209 (2007). The court also noted that even if the

phrase “residential purposes” contained an implied “’duration of use’ component,” it was not at all clear “when a rental of the property moves from short-term to long-term.” *Id*. at 281-82.

[6] In *Cummings v. Roth*, the Hawaii Supreme Court held that an owner had violated a leasing restriction requiring that all units be “occupied and used for residential purposes only” and prohibiting the use of any unit “as a rooming house or in connection with the carrying on of any trade or business whatsoever.” It is significant that the restriction at issue in *Cummings* expressly prohibited the use of the units as “rooming house[s]” because it removes the ambiguity surrounding the meaning of “residential purposes” that typically arises in disputes over leasing restrictions. The fact that the prohibition on use as rooming houses appeared in the same sentence as the restriction requiring the use of units for “residential purposes” supported the association’s position that “residential purposes” was intended by the drafter to exclude short-term rentals. Other case law from around the country suggests that the *Cummings* court might have reached a different conclusion if the covenant had not included the additional restriction expressly referring to “rooming house[s].”

[7] *Gadd v. Hensley*, 2015-CA-001948-MR, 2017 WL 1102982, at *2 (Ky. Ct. App. Mar. 24, 2017), not to be published (Aug. 16, 2017).

[8] *Id.* at *5.

[9] *Id.*

[10] In *Shorewood West Condominium Ass’n v. Sadri*, the Washington Supreme Court held that an Association could amend its Declaration to impose new leasing restrictions when the Declaration contained a provision that put prospective owners on notice that it could be amended. Although the Sadri court invalidated the leasing restriction at issue, it was because the Association had only amended its *Bylaws* rather than the Declaration itself. Because the Declaration permitted owners to lease their units, it, and not merely the Bylaws, needed to be amended for the restriction on use to be valid.140 Wn.2d 47, 57 (2000) (“The proper procedure for amending a bylaw must be followed; an association seeking to restrict a use in a bylaw must first amend its Declaration if the Declaration allows the use…Since use restrictions must be in the Declaration and any unrecorded amendments to the Declaration are invalid (RCW 54.32.140), use restrictions appearing in unrecorded amendments to Bylaws and not in the Declaration are invalid.”

[11] *See Wilkinson v. Chiwawa Cmtys. Ass’n.*, 180 Wn.2d 241 (2014) (holding that unanimous approval of owners was required to adopt new

prohibitions on short-term rentals because it constituted a new restriction on use); *Fillmore LLLP v. Unit Owners Ass'n. of Centre Pointe Condo.*, 183 Wn. App. 328 (2014), *aff'd*. 184 Wn.2d 170 (2015).

[12] "When we construe restrictive covenants, our primary task is to determine the drafter's intent." *Ross*, 148 Wn.App. at 49. Washington has abandoned the rule that ambiguity in a restrictive covenant should be construed against the drafter. *Id.* ("Historically, Washington courts have also held that restrictive covenants, being in derogation of the common law right to use land for all lawful purposes, will not be extended to any use not clearly expressed, and doubts must be resolved in favor of the free use of land…But, in conflicts between homeowners as to interpretation of restrictive covenants, courts should place special emphasis on arriving at an interpretation that protects homeowners' collective interest.") Because Washington has abandoned the common law rule favoring the unrestricted use of property, courts here may be more likely to hold that language restricting use to "residential purposes" or prohibiting use for "business or commercial purposes" should be construed to bar short-term rentals. However, cases like *Ross* and *Gadd* indicate that, in the absence of language referring to short-term rentals or evidence that the restrictions were intended to bar short-term rentals, courts are unlikely to find that construing these restrictions to bar short-term rentals is necessary to protect the collective interest of owners in the community. *Ross* at 51; *Gadd* at *4. This is especially true when the owner continues to use the property for residential purposes. Ross at 51 ("[Appellee] proposes a rental of the property that is identical to his own use of the property, as a residence, or the use made by a long-term tenant. The owner's receipt of rental income either from short or long-term rentals, in no way detracts or changes the residential characteristics of the use by the tenant.")

10
Restrictions on Use: What Is Required to Create New Covenants in a Community?

An HOA may always adopt a new covenant[1] that restricts homeowners' use of their property if all affected homeowners approve the new restrictive covenant (100% approval).

Alternatively, an HOA may adopt a new restrictive covenant that restricts use for all owners with majority approval as provided by the CC&Rs, if:

(a) the CC&Rs expressly grant the HOA authority to create new restrictive covenants with a majority vote;[2]
(b) the HOA exercises its authority (to create new covenants) "in a reasonable manner consistent with the general plan of the development;" [3] and
(c) purchasers had notice (i.e. in the recorded CC&Rs) that the HOA could amend the CC&Rs to create new rights and obligations, not merely modify existing ones.[4]

If an HOA's CC&Rs do not already grant the HOA authority to create new restrictive covenants with majority[5] approval from homeowners, then the HOA may be able to amend its CC&Rs to grant that authority.[6] If an HOA opts to amend its CC&Rs to grant it this authority, then it will have the authority to create the new covenant only if the amendment is validly adopted.[7] Additionally, the HOA's ability to create new covenants will still be constrained by the requirement that it exercise this authority reasonably and in a manner consistent with the general development plan.[8] [9] To determine whether an HOA's exercise of authority is "in a reasonable manner consistent with the general plan of the development," Washington courts look to the language of the covenants, the importance of those covenants, and the surrounding facts.[10]

[1] "A party may enforce a real covenant if it meets the following conditions:

> (1) the covenant must have been enforceable between the original parties . . . ;
> (2) the covenant must 'touch and concern' both the land to be benefitted and the land to be burdened;
> (3) the covenanting parties must have intended to bind their successors in interest;
> (4) there must be vertical privity of estate, *i.e.*, privity between the original parties to the covenant and the present disputants; and
> (5) there must be horizontal privity of estate, or privity between the original parties."

Weaver v. Ryderwood Improvement & Serv. Ass'n, 157 Wn. App. 1038 at 13-14 (2010).

"A party seeking enforcement of an equitable covenant must establish:

> (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."

Weaver at 13-14.

[2] *Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263 (2014) (An HOA which was located on an island adopted a covenant which authorized the Association to form an LLC to lease and operate a marina, and to collect assessments from homeowners to pay for the operation. The court held the Association's action was valid because: (1) a majority of owners approved the action, (2) the Association exercised its authority in a reasonable manner, and (3) the lease and operation of a marina was consistent with the general plan of the development.)

[3] *Roats*, 169 Wn. App. 263.

[4] *Wilkinson v. Chiwawa Cmtys. Ass'n*, 180 Wn.2d 241 (2014) (a new restriction on short-term rentals was invalid because "homeowners cannot force a new restriction on a minority of unsuspecting homeowners unrelated to any existing covenant").

[5] The language in the covenants must specify the percent of votes permitted to approve amendments. In *Halme v. Walsh*, 192 Wn. App. 893, 906 (2016), the court noted that even if the covenant in question

had granted the association the authority to adopt amendments, the language referring only to "the owners" could not be interpreted to permit amendments by less than a unanimous vote of the owners. *Id.* at 907. "In the absence of language providing how the [Road Maintenance & Use Agreement] could be amended," the court stated, "the only reasonable interpretation of the first paragraph is that all of the lot owners would have to agree to an amendment." *Id.* (citing *Wilkinson* at 327)

[6]*See*, *Roats* 169 Wn. App. 263 at 281.

[7] The amendment must be adopted in accordance with the amendment procedure(s) provided by the CC&Rs.

[8] To determine whether an HOA's exercise of authority is "in a reasonable manner consistent with the general plan of the development," Washington courts look to the language of the covenants, the importance of those covenants, and the surrounding facts. *See Anderson v. Brown*, 192 Wn. App. 1076 (2016), *review denied*, 186 Wn.2d 1003 (2016) ("Because the covenants did not include any restriction on subdivision of lots, the 2008 amendment created a new restriction and was therefore subject to the rule announced in *Wilkinson*. Because the amendment was not unanimously approved by the current owners of all original lots, the trial court was correct that the amendment was not validly adopted under *Wilkinson*.")

[9] *Weaver,* 157 Wn. App. 1038 (2010) (An association adopted a new covenant with majority approval, but not 100% approval, which restricted ownership of properties in the community to persons 55 years or older. The court held the new covenant was valid because it was consistent with the community's general plan to function as a retirement community, and the facts surrounding the new covenant demonstrated that the change in language was necessary to preserve the community's status as a retirement community without violating state and federal housing discrimination laws.)

[10] *Id.*

11
Restrictions on Use: Can Property Owners Be Bound by Unrecorded Restrictions, Rights, and Obligations?

If a property developer with authority to burden a property makes representations about a property within a development to help sell other homes, such representations may impose an equitable servitude — an enforceable restriction on the property that is not properly recorded. Washington courts clearly recognize such obligations as covenants that run with the land to bind subsequent purchasers with knowledge of the restriction.[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 property within the subdivision will be maintained as a golf course. Or the developer may attract buyers with a promise that the subdivision will be comprised strictly of single-family residences.

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

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

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] However, 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.

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[1] *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888 (2014); and *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 466 (1920).

[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.

12
Statutes of Limitations: How Long after an Amendment Is Recorded Can It Be Challenged Successfully?

New Act condos

Amendments adopted by New Act associations cannot be challenged more than one year after the date they were recorded, absent fraud that rendered them invalid at the time of recording. An amendment that may be voidable because it was adopted, without the requisite percent of the vote required by the Governing Documents or statute, or similar defects, cannot be challenged more than one year after recording.[1] [2] However, the statute of limitations does not bar challenges to amendments that were "void from their inception," meaning that they were never valid and could not have become valid through recording or any other procedure.[3]

Courts distinguish between amendments that are void and voidable. Amendments that are void lack validity from the start because the board acted in bad faith.[4] Typically a void amendment is one that was recorded without any vote or one that was recorded when the board knew it had not been adopted by proper procedures.[5] The statute of limitations may not apply to void amendments because the passage of time cannot cure defects such as fraud, and the law will not reward those who act in bad faith.[6]

In *Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n*, for example, a Washington appellate court held that a plaintiff owner's challenge to an amendment fraudulently recorded by a board president was not time-barred.[7] The association in that case had never voted on the amendment; the board member had drafted and recorded it without anyone's knowledge.[8] Because no vote

had ever occurred and the board member fraudulently claimed it had been approved, the court held that it was void, not merely voidable, and thus could be challenged at any time.[9]

Voidable amendments, in contrast, are those that are invalid due to defects in the approval process resulting from good faith error. Amendments adopted without the requisite number of votes and without proper notice, for example, would be *voidable* but not *void*, provided that the board acted in good faith (i.e. did not know of the defects).

In *Bilanko v. Barclay Court Owners Ass'n*, the Washington Supreme Court distinguished void amendments, such as the one in Club Envy, from voidable amendments.[10] In *Bilanko*, the plaintiff alleged that an amendment imposing leasing restrictions on her unit was invalid because it had been approved by only 67% of the vote rather than the 90% required to impose new restrictions on use. The court held that the plaintiff's challenge was time-barred by the statute of limitations because the error, if there were any, was made in good faith: the board did not know that 90% approval was required and the vote approving the amendment had otherwise conformed to the requirements of the statute and the governing documents.[11]

This amendment, the court held, was unlike the one in Club Envy, which had been recorded absent any vote and without the knowledge of the other board members.[12] There, the board member had committed fraud in drafting the amendment and recording it, and the amendment was thus "void ab initio."[13] In *Bilanko*, in contrast, the board had acted in good faith.[14] Although the amendment might have been invalid at the time because it was not approved by a 90% vote, it was no longer voidable when more than a year had passed since it was recorded.[15]

Most challenges to amendments recorded by an association will fall into the category of voidable because it is rare for owners to allege that a Board member acted fraudulently. Cases like *Club Envy*, in which an amendment is held to be void because of bad

faith on the part of a board member, do not arise often, in part because other board members act to check those who might commit fraud or otherwise act in bad faith.

Old Act condos

The Old Act does not contain a statute of limitations.[16] Thus, an Amendment adopted by an Old Act condo association (an association formed before July 1, 1990) might be successfully challenged at any time after it is recorded, unless the Declaration provides otherwise, Washington courts have invalidated an improperly adopted Amendment subject to the Old Act that was challenged ten years after it was recorded.[17] Even though the Old Act does not include a statute of limitations, challenges to old amendments will be less likely to succeed because of equitable defenses such as the doctrine of laches.[18] Laches would be available as a defense when an owner's failure to challenge an amendment had changed the condition of the association such that it would be unfair to undo the effects of the amendment.[19] In most cases, an association would likely be able to show that its condition, or the condition of other owners, has changed as a result of the existence of the unchallenged amendment. If laches were inapplicable, courts may apply other equitable principles and hold that an owner's challenge to an old amendment is time-barred.

HOAs

Washington courts have not stated whether all improperly adopted Amendments (regardless of how long ago they were recorded) can be successfully challenged. In 1998, the Washington Court of Appeals determined that an improperly adopted HOA covenant which was recorded nineteen years before it was challenged could not be voided.[20]

Courts would likely apply equitable principles to HOAs, just as they would to Old Act condos, and assess whether a challenge raised after substantial time was reasonable. Washington courts would likely affirm an improperly adopted Amendment if the

challenger had notice of the Amendment before purchasing, and the challenger's conduct demonstrated acceptance or ratification of the Amendment (e.g. an owner probably cannot successfully challenge an Amendment if the owner knew about the Amendment before purchasing and initially complied with the Amendment before challenging its validity).

Associations should take care to follow the correct process and voting procedure(s) when amending their Declaration or CC&Rs. Although challenges to most amendments will be less successful the more time has passed since recording, associations can avoid unnecessary costs of litigation by ensuring that they follow proper procedures for amending their Governing Documents in the first place.

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

[2] *Bilanko v. Barclay Court Owners Ass'n.*, 185 Wn.2d 443 (2016).

[3] *Id*. at 450-52; *Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n*, 184 Wn. App. 593, 600 (2014) (an improperly passed Amendment is "void ab initio" (void from the time it is adopted), and RCW 64.34.264(2)'s one year statute of limitations does not prohibit challenges to improperly passed Amendments).

[4] *Bilanko* at 451-52. ("In this case, however, there is nothing in the record to suggest that Barclay Court committed fraud, seriously offended public policy, or exceeded its legal authority in passing the amendment. Accordingly, the amendment is not void ab initio.") The court's discussion in Bilanko suggests that an amendment contrary to public policy would also be void.

[5] *Club Envy* at 600.

[6] *Bilanko* at 451.

[7] *Club Envy* at 600.

[8] *Id.*

[9] *Id.*

[10] *Bilanko* at 451-52.

[11] *Id.*

[12] *Id.*at 449-52.

[13] *Club Envy* at 600-01.

[14] *Bilanko* at 451.

[15] Because the plaintiff's claim was time-barred, the *Bilanko* court did not reach the question of whether a 90% vote would have been required to impose new leasing restrictions.

[16] *See, Keller v. Sixty-01 Ass'n of Apartment Owners*, 127 Wn.App. 614 (2005). *Keller* involved challenge to a Declaration Amendment that altered how expenses would be allocated for a condominium Association governed under the Old Act. The Keller court remanded the case to the trial court to determine whether the amendment was void or merely voidable because the statute of limitations would bar challenges to voidable amendments, but not to void ones.
[17] *See, Keller*, 127 Wn.App. 614 (2005).

[18] Laches applies "when a party, knowing his rights, takes no steps to enforce them and the condition of the other party has in good faith become so changed that he cannot be restored to his former state.) *Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372, 375–76, 680 P.2d 453, 456 (1984) (citing *Crodle v. Dodge*, 99 Wn.2d. 121, 132 (1917)).

[19] *Id.*

[20] *Bishop v. Twin Lakes Golf & Country Club*, 89 Wn. App. 1024 (1998) (a homeowner was time-barred from challenging an improperly adopted covenant because his predecessor's conduct demonstrated ratification and acceptance of the amended covenant. The predecessor purchased the home "subject to all easements, restrictions and reservations of record," and paid the dues imposed by the covenant- and the covenant was recorded so the homeowner knew about it before purchasing the home).

13
Board of Directors: 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,[1] [2] [3] including the number of votes constituting a quorum.

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.[4] If there are incumbents on the Board, those directors will continue holding office until an election with a proper quorum is held;[5] 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.[6] [7] [8] [9] For all associations, the Board has the power to fill vacancies unless the Bylaws or Articles provide a different method.

Board members remain in office until their terms have expired, and continue in office after that until a new director is either "elected" or appointed.[10] [11] 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 to elect the Board over a period of many years. Washington courts are unlikely to invalidate actions taken by an unelected Board, provided that the members have attempted to obtain a quorum to hold annual

elections pursuant to 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.[12] 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.[13] 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. Those proxies or directed proxies may be returned by mail, email, fax, etc. More members may submit votes if they do not have to appear in person.[14]

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[1] RCW 64.34.324 (Bylaws) provides:

> (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…

[2] RCW 64.38.030 (Association Bylaws) provides:

> Unless provided for in the Governing Documents, the Bylaws of the association shall provide for:
>
> > (1) The number, qualifications, powers and duties, terms of office, and manner of electing and removing the board of directors and officers and filling vacancies;

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

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

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

[5] *Parker Estates Homeonwers 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.")

[6] RCW 64.34.308(2) (Board of directors and officers) provides, in relevant part, that "the Board of directors may fill vacancies in its membership of the unexpired portion of any term."

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

[7] RCW 24.06.135 (Vacancies) provides:

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

[8] RCW 24.03.105 (Vacancies) provides:

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

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

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

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

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

[11] "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." *Parker Estates* at 29.

[12] In *Parker Estates*, owners of a unit argued that the association's Board of Directors lacked the authority to enforce Bylaws because the members did not hold their positions pursuant to an election as required by the Bylaws and RCW 64.38. 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. *Id*.

[13] The *Parker Estates* 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.

[14] RCW 64.34.340 (Voting – Proxies) (applicable to New Act and Old Act condos). For more information, see Chapter 22, "Proxies: When Are They Valid?"

14
Board of Directors: What Is a Board Member's Duty of Care?

Board members and officers of both HOAs and condo associations owe a duty of care to their associations and to individual owners. They also owe a lesser duty of care to members of the general public.

HOA Boards are generally incorporated under and governed by either the Nonprofit Corp. Act[1] or the Nonprofit Misc. Mutual Corp. Act.[2] Under each of these statutes, Board members and officers owe a duty to discharge their duties:

A) in good faith;
B) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
C) in a manner the Board member or officer reasonably believes to be in the best interests of the corporation.[3]

Condo associations are bound by a statutory duty of care, set forth at RCW 64.34.308(1).[4] The statute requires Board members to exercise ordinary and reasonable care if they are elected by the unit owners. Declarant-appointed Board members have a heightened standard requiring them to act with the care required of *fiduciaries*[5] of the unit owners.[6]

While the governing statutes and at least one Washington Supreme Court case imply that Board members are protected from liability from innocent mistakes and errors of judgment, the duty imposed by statute still requires that decisions and the exercise of discretion be "reasonable."[7] Board member actions are likely to be considered unreasonable and in breach of the duty of care if Board members fail to adequately investigate before acting or make decisions based on inaccurate or unreliable information.[8]

Board members' duty of care is owed to the association itself and to individual homeowners. It does not extend to future purchasers or to members of the general public, to whom a Board member owes only the duty to avoid gross negligence.[9]

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[1] RCW 24.03.

[2] RCW 24.06. Most HOAs are incorporated as nonprofit corporations under one of these two statutes. However, they need not be incorporated and can also take the form of some other legal entity.

[3] RCW 24.06.153(1) (Duties of director or officer-Standards-Liability); RCW 64.38.025(1) (Board of directors-Standard of care-Restrictions-Budget-Removal from Board) (citing RCW 24.03).

[4] This provision is applicable to Old Act condo associations. *See* RCW 64.34.010(1).

[5] A fiduciary is one who has the power and obligation to act for another under circumstances which require total trust, good faith and honesty. If you are appointed to a Board by the declarant of a condominium project, you should be aware of this heightened standard and adjust your policies and decision-making process accordingly. In all things, you must act with the care that a fiduciary of the unit owners would take.

[6] For additional discussion of the duty of care owed by condo association and HOA Board members, *See* blog post entitled "Standard of Care for Boards" at: http://www.condolawgroup.com/2010/10/16/161/.

[7] *Riss v. Angel*, 131 Wn.2d 612, 6801-81 (1997) (the Washington Supreme Court sided with homeowners who challenged an HOA's denial of their building plans, noting that the HOA's decision, made without investigation and based on incorrect information, was an unreasonable exercise of discretion).

[8] *Riss*, 131 Wn.2d at 681.

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

A) Other officers whom the Board member believes to be reliable and competent in the specific matter;
B) Counsel, public accountants, or others if the Board member believes the matter to be within the person's professional/expert competence;

C) A committee of the Board on which the Board member does not serve if the matter is within the committee's authority (and the Board member acts in good faith, after reasonable inquiry, and without knowledge that reliance is undeserved.)

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

15
Board of Directors: Can Board Members Be Held Personally Liable for Their Actions?

Board members and officers of both HOAs and condo associations owe a duty of care to their associations and to individual owners. They also owe a lesser duty of care to members of the general public.[1] An association can be held liable if its Board members breach the applicable duty and, under certain circumstances, individual Board members can also be held personally liable for their actions.

Liability of the association

In most cases, individual Board members are protected by statute[2] from personal liability for breach of the duty of care. However, the statute does not protect the association itself from liability for the Board members' acts or omissions. Thus, courts have recognized an owner's right to recover from the association for a Board member's breach of his or her duty of care.[3] 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.[4]

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,[5] 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.[6]

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."[7]

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.[8] 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.[9]

Association's assumption of risk for board member liability

Regardless of the standards set by statute and the courts for a Board member's personal liability, most associations are required by their Governing Documents to indemnify (protect) volunteer Board members from any liability arising from the performance of their duties as Board members. Indemnification provisions generally cover virtually all circumstances except willful misconduct and criminal acts by the Board member. A Board member for an association with a valid indemnification provision would be protected financially even if a court found the Board member personally liable. In that case, the association would be responsible for any judgment against the Board member arising from a breach of the Board member's duty of care.

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[1] See Chapter 14, "Board of Directors: What Is a Board Member's Duty of Care?"

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

[3] 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.

[4] Such was the case in *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.

[5] RCW 4.24.264(1).

[6] *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.)

[7] RCW 24.06.035(2).

[8] *Schwarzmann*, 33 Wn. App. at 403.

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

16
Board of Directors: Can the Board Exclude an Adversarial Board Member from Board Meetings?

In certain cases, an individual Board member may oppose some Board action. If the Board has reason to believe the Board member is likely to initiate litigation on the matter, the Board may exclude the Board member from certain Board meetings where the issue is discussed. In addition, the adversarial Board member is not entitled to advice or counsel from the association's attorney on the matter. If the adversarial Board member threatens or initiates litigation on the matter, Boards may have the additional option of forming a litigation committee, exclusive of the adversarial director, to handle the matter.

Exclusion of adversarial directors from Board meetings

Most associations are incorporated under either the Nonprofit Corp. Act[1] or the Nonprofit Misc. Mutual Corp. Act.[2] Under these laws, Board members are generally entitled to attend Board meetings and must be notified of each meeting in the manner set forth in the association's bylaws.[3] However, the Board may exclude a Board member who is both in opposition to the Board on the matter to be discussed in the meeting and likely to initiate litigation against the associations on the issue.[4] The Board is also entitled to withhold documents related to the matter and prevent the adversarial Board member from conferring with the association's attorney on the issue.[5]

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

1) Is the adversarial Board member acting solely in her capacity as an owner rather than her capacity as a Board member?
2) Is the adversarial Board member likely to bring litigation against the association?

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

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

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

Litigation committees

Once an adversarial Board member has threatened a lawsuit against the associations, the Board may form a committee to handle the litigation.[8] Forming a litigation committee that does not include the adversarial Board member would effectively ensure the association could handle the matter without conveying confidential or privileged information to the adversarial Board member. A litigation committee would also benefit the association

by allowing the Board to make quick decisions when necessary, such as when time-sensitive settlement offers are on the table.

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[1] RCW 24.03.

[2] RCW 24.06.

[3] RCW 24.03.120; RCW 24.06.150.

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

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

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

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

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

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

17
Board Member Qualifications: 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] [2] [3]

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.[4] [5] Under those laws, associations may restrict Board membership to owners in the Declaration or Bylaws. For condo associations, any person who is a partner, director, or officer in an entity that owns a unit is considered an owner of the unit (unless the condo association's Declaration or Bylaws provide otherwise) for purposes of determining a person's qualifications for serving on the Board.[6]

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.[7] 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.

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[1] RCW 64.34.324(1) (Bylaws) provides:

> Unless provided for in the Declaration, the Bylaws of the Association shall provide for:
>
> (a) The number, qualifications, powers and duties, terms of office, and manner of electing and removing the Board of directors and officers and filling vacancies;

[2] RCW 64.38.030 (Association Bylaws) provides:

> Unless provided for in the Governing Documents, the Bylaws of the Association shall provide for:
>
> (1) The number, qualifications, powers and duties, terms of office, and manner of electing and removing the Board of directors and officers and filling vacancies;

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

[4] 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.

[5] 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.

[6] RCW 64.34.324(3) (Bylaws) provides:

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

[7] *See* RCW 64.38.030.

18
Board Member Qualifications: Can you Prevent Some People from Serving on the Board?

An association may set qualifications it deems appropriate for a person to serve on its Board.[1] [2] [3] Those qualifications must be in the association's Governing Documents and comply with federal discrimination laws to be valid.[4]

Under federal law, an association cannot prevent a person from serving on its Board on the basis of race, national origin, ethnic background, age, sexual orientation, religious beliefs, sex, or disability.[5] An association can prevent a person in one of the above protected classes from serving on its Board if the association's basis for preventing service on the Board is not the person's status as a member of one of the above protected classes, but rather because the person does not meet the association's other, permissible qualifications.[6]

Some examples of qualifications that an association might require for a person to serve on its Board include:

(1) Board members must attend meetings;
(2) There can be only one Board member from each building;
(3) Board members cannot have a criminal history (typically felony convictions);
(4) Board members cannot be delinquent on their assessments;
(5) Board members cannot be owners in frequent violation of the Association's governing documents;
(6) Board members cannot be people who an insurance company will not bond;
(7) Board members cannot be out-of-state owners;

(8) Board members must be owners; or
(9) No more than one board member can be elected from owners of a single unit or lot.

So how does this relate to owners who are not natural persons (if the documents require that board members must be owners)? Under the Condo Act, a condo association cannot prevent a person who is a partner, director, or officer in an entity that owns a unit from serving on its Board unless the condo association's Declaration or bylaws provide otherwise.[7] Although the HOA Act is silent on the issue, an HOA probably cannot prevent a person who is a partner, director, or officer in an entity that owns a home from serving on its Board unless the HOA's Declaration or bylaws provide otherwise.[8]

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[1] RCW 64.34.324(1) (Bylaws) provides:

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

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

[2] RCW 64.38.030 (Association Bylaws) provides:

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

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

[3] The Old Act is silent on Board member eligibility and qualifications.

[4] Boards are prohibited from determining qualifications, powers, duties, or terms of office for the Board without unit owner approval. *See* RCW 64.34.308(2); RCW 64.38.025(2); RCW 64.32.250.

[5] *See* 42 U.S.C. Chapter 21 Civil Rights.

6 42 U.S.C. 21 only requires entities to not discriminate on the basis of the person's protected class status. Entities are free to deny persons in a protected class for a different reason, so long as the stated reason is valid and not pretext to justify denial on the basis of the person's protected class status. *See, Hollingsworth v. Wash. Mut. Sav. Bank*, 37 Wn. App. 386 (Wash. Ct. App. 1984) (An employee argued the employer's stated justification for the employee's discharge was merely a pretext for the employer's discriminatory reason. The court held determination of which story was more credible was a question of fact for the jury.)

[7] RCW 64.34.324(3) (Bylaws) provides:

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

[8] *See* RCW 64.38.030 (Association Bylaws). The HOA Act is silent on whether partners, directors, or officers in entities that own a home are considered homeowners for purposes of determining Board qualifications.

19
Governing Documents: What Is the Hierarchy of Control?

Associations are regulated by laws and Governing Documents that work together in a hierarchy. If lower level documents conflict with upper level documents, the upper level documents control. All Governing Documents must be consistent with both state and federal law. The order of control from highest to lowest is:

(1) Federal law

Federal laws supersede any state laws or association documents which conflict with them. Examples of federal laws applicable to Associations are the Fair Housing Act,[1] the United States Constitution, and the FCC's regulations.[2] Placement of satellite dishes and placement of political campaign signs are governed by federal law.

(2) State law

State laws supersede any association documents (including the declaration) which conflict with them. State law governs the placement of solar panels on homes. Numerous state laws apply to associations. In particular:

A) The Washington State Constitution
B) The Washington Horizontal Property Regimes Act (Old Act)[3] applies to condominiums created before July 1, 1990. These are "Old Act" condo associations.
C) The Washington Condominium Act (New Act)[4] applies to condominiums created on or after July 1, 1990; these are "New Act" condo associations. Several of the WCA's provisions also apply to condominiums created before July 1, 1990[5]
D) Most condo associations are incorporated as nonprofit corporations under one of the Nonprofit Corporation Acts.

New Act condo associations are required to be incorporated.[6] If a provision of either of the Nonprofit Corporation Acts conflicts with the Condo Acts, the Condo Acts govern.[7]

E) The Washington Homeowners' Association Act (HOA Act)[8] applies to HOAs.

(3) City/County laws

The laws of the City and County where the community is located will also supersede any association documents. Some examples include:

A) The City's building code;
B) In Seattle, the Seattle Energy Benchmarking and Reporting Program;[9]
C) The City's rental inspection laws; and
D) Local discrimination laws (which may have additional protected classes).

(4) Survey maps and plans or plat maps

Survey maps and plans are often recorded at the same time as the Declaration and/or CC&Rs, but the survey maps and plans are sometimes recorded earlier. The surveys and maps or Plat Maps may also contain obligations not found in the Declaration or CC&Rs. Some recorded obligations may predate the community's maps and plans by decades.

(5) Condominium Declaration or recorded CC&Rs

These documents are created by the developer when the community is formed. Recording these documents (the Declaration or CC&Rs) with the County creates the condominium development or the homeowners' association.[10] These documents govern property rights and obligations.

(6) Articles of Incorporation

The Articles of Incorporation is the official document that create a corporation.[11] These are typically filed with the Secretary of State when the association is created by the developer, but they are

often silent on most matters except the name of the organization and the names of the directors. Many communities are not incorporated until years after their formation.

(7) Bylaws

Bylaws relate to the administrative operation and management of the association.[12] These are typically not recorded, but are kept by the association. They are usually created by the developer when the association is initially formed.

(8) Rules & Regulations

Rules and regulations may be adopted by an association after its creation and then amended as necessary. The rules and regulations may govern daily life, addressing things like parking, quiet hours, and fines for rule violations. These are often created by the developer, but they can be changed by the Board at any time. The rules and regulations must be distributed to all owners so they have notice of the rules, and can comply with them. The rules and regulations will likely evolve over time according to the needs of the community. They must not conflict with any higher-level document, but may clarify them.

(9) Policies

Policies are usually used by the Board to be consistent in how it administers the affairs of the association. The policies may or may not be distributed to all owners. Policies can relate to collections, fines and opportunities to be heard, reserves for major repairs, investments of reserves, etc. These are almost always adopted over extended periods of time by the Board.

(10) Resolutions

Resolutions are decisions by the Board that are reflected in the minutes of the Board meetings. Resolutions typically relate to one-time decisions or issues that come up infrequently which require a decision from the Board.

[1] 42 USC §3601 *et seq.* The Fair Housing Act prohibits certain kinds of discrimination (such as that based on race, religion, or sex) in sales, rentals, and other transactions relating to real estate.

[2] For example, 47 CFR 1.4000 (satellite dishes). See Chapter 5, "Satellite Dishes: May an Association Restrict Their Installation or Use?" for more information about this regulation.

[3] RCW 64.32 *et seq.*

[4] RCW 64.34 *et seq.*

[5] RCW 64.34.010 (Applicability).

[6] RCW 64.34.300 (Unit owners' Association – Organization).

[7] RCW 64.34.070 (Law applicable – General principles). There is no specific analogous provision applicable to Old Act condos.

[8] RCW 64.38 et seq.

[9] This is an ordinance relating to energy conservation requiring owners of multi-family buildings to measure and disclose energy performance. See Seattle Municipal Code 22.920 *et seq.*, or *see* http://www.seattle.gov/environment/benchmarking.htm for information.

[10] RCW 64.34.200 (Creation of condominium); RCW 64.32.140 (Recording). To determine what a condominium Declaration must contain, *See* RCW 64.34.216 (Contents of Declaration) for New Act condos, or RCW 64.32.090 (Contents of Declaration) for Old Act condos. The person or entity who records the Declaration is called the Declarant.

[11] RCW 24.03.145 (Filing of articles of incorporation); RCW 24.03.150 (Effect of filing the articles of incorporation); RCW 24.06.025 (Articles of incorporation).

[12] RCW 64.34.208 (Declaration and Bylaws – Construction and validity) (applicable to Old Act condo associations) provides that the Declaration prevails over the Bylaws if they are inconsistent. RCW 24.03.070 (Bylaws) and RCW (24.06.095) (Bylaws) relate to Bylaws of nonprofit corporations. RCW 24.03.025 and RCW 24.06.025 provide that the Articles of Incorporation prevail over the Bylaws if they are inconsistent.

20
Governing Documents: How Do You Deal with Conflicts between Statutes and Governing Documents?

If there is a conflict between an applicable statute and an association's Governing Documents, the association should (and must) follow the statute. Some statutes were adopted by the legislature after almost every community was created. Those statutes were meant to apply to communities that were created before the statutes were enacted.

The HOA Act from 1995 applies to all HOAs, regardless of their name, and regardless of the date the HOA was formed. Sections of the New Act, effective in 1990, have provisions that apply automatically to all Old Act condo associations. Those provisions apply whether a condo association's Declaration is amended to include them or not.[1]

If there is a conflict between an association's rules and the Declaration or Bylaws, the association should (and must) follow the Declaration or Bylaws. In the event that there is a conflict, associations should change their rules to be consistent with the Declaration and Bylaws. Rules that are not consistent with the Declaration cannot be enforced.

If there is a conflict between the Declaration and Bylaws, associations must follow the Declaration.

If the statute says "as provided in the Declaration or Bylaws" but the association's Declaration or Bylaws are silent, the association cannot do the specified action. Associations can probably amend their Governing Documents to allow for the action.

If the statute says "except as provided by the Declarations or Bylaws" and the association's Governing Documents are silent, the association must follow the statute. Associations can probably amend their Governing Documents to allow for the action.

If a statute says an association must do something (like a CPA audit, resale certificate, or reserve study) and the association's Declaration is silent, the association still must to do the action.

If an association's Declaration says the association can do something that is prohibited by statutes, the association cannot do the action.

If there are conflicts within an association's Declaration, the document must be read in its entirety to determine what the Declaration allows or requires on the particular issue. Courts will usually look to the intent of the person who wrote the document to resolve any conflicts.[2] But, in conflicts between homeowners as to interpretation of restrictive covenants, courts should place special emphasis on arriving at an interpretation that protects homeowners' collective interest.[3]

An association's Board can write rules to clarify the intent of a document and resolve any ambiguities, but the best course of action in the event of a conflict within the Declaration is to amend the document to eliminate the conflict.[4] Examples:

1. One section clearly says that unit owners pay for limited common elements, and another section clearly says that maintenance and repair of limited common elements are a common expense.

2. One section says that the association is not responsible for damage from water leaks, but another says that the association must restore any damage to the property (which includes the units) as a common expense.

It is critical to avoid interpreting individual sentences or phases to the exclusion of the rest of the document.[5] Further, ambiguities and conclusions that do not make sense should not be read into the document. Examples:

1. Just because one section says that owners are responsible for the maintenance and repair of their unit does NOT mean that when insured events happen (fires, sudden water events) the association does not have to file an insurance claim or restore the unit.

2. If a section says that owners pay for maintenance and repair of limited common areas, that does NOT mean that the owners repave their own parking stalls, or are responsible for the structure of the building around their decks. Look at the boundaries of the limited common area.

3. Just because there is an arbitration provision does not mean that the Board cannot enforce the Governing Documents with fines (following an opportunity to be heard), levy late fees, or find violations of the Governing Documents.

An association's Declaration should reflect how the community wants the rights and obligations to be determined. If an association wants its community to operate in a manner that is different from the documents, the association should amend the documents. Either the conduct of the Board and owners should comply with the association's Governing Documents as written, or the Governing Documents should be changed.

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[1] Look to RCW 64.34.010 to know what sections apply.

[2] Washington differs from many jurisdictions in its approach to resolving conflicts and ambiguity in Governing Documents of condo and homeowners' associations. Many state courts still apply the principle that conflict should be resolved "in favor of the free use of land," but Washington courts have expressly rejected this approach in favor of one

that aims to effectuate the drafters' intent and "protect the homeowners' collective interests." *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 249-50, (2014) ("While Washington courts once strictly construed covenants in favor of the free use of land, we no longer apply this rule where the dispute is between homeowners who are jointly governed by the covenants…Courts place special emphasis on arriving at an interpretation that protects the homeowners' collective interests." (quoting *Riss v. Angel*, 131 Wn.2d 612, 621-24 (1997).

[3] *Ross v. Bennett*, 148 Wn. App. 40 (Wash. Ct. App. 2008)

[4] An association amending Governing Documents to resolve internal conflicts must determine whether the amendment imposes a new obligation or restriction versus modifying an existing one, then take care to follow the appropriate procedure for making the amendment. If the association makes the amendment via the procedure for modifying existing rules and a court later determines that the amendment actually created new ones, the amendment will likely be deemed invalid. See, e.g., *Wilkinson v. Chiwawa* (invalidating an amendment prohibiting short-term rentals because it created a new restriction rather than merely modifying an existing one, and the association had not followed the procedure required to adopt an amendment imposing new rules on owners). *Id.* at 241, 253-57.

[5] "We examine the language of the restrictive covenant and consider the instrument in its entirety." *Wilkinson v. Chiwawa* at 250 (citing *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 696 (1999)).

21
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 constituting a quorum for each type of meeting. 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.[3] This is true with respect to every kind of association meeting: proxy votes are not inferior to votes cast by members themselves and have the same effect as votes not cast by proxy.[4]

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);[5]
B) for Old Act condo associations incorporated under the Nonprofit Corporations Act, 10% (or more if specified in Bylaws);[6]

C) for Old Act condo associations incorporated under the Nonprofit Miscellaneous and Mutual Corporations Act, 25% (or more if specified in Bylaws);[7] and
D) for HOAs, 34% (unless Bylaws provide otherwise).[8]

Quorum for Board meetings

Quorum requirements for Board meetings are:

A) for New Act condo associations, at least 50%;[9]
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;[10]
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.[11] [12]

The bottom line is that for association meetings, the presence of a duly appointed proxy will satisfy the same requirements as the presence of the member delegating the power. (Proxies cannot be used at Board meetings.) It would be prudent for an association to confirm, prior to a vote, that proxies are valid. The association would not be liable for a member's failure to properly execute a proxy or to ensure it did not expire.

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[1] The number of votes for association meetings is not always the same as the number of people present at the meeting. The condo association's Declaration specifies how votes are allocated among unit owners. Usually the votes are allocated according to the percent ownership interest. It is important to examine the association's Governing Documents to determine how many units are needed to make up a quorum. For Board meetings, each Board member gets one vote.

[2] *See* RCW 64.38.040 (Quorum for meeting); RCW 64.34.336 (Quorums). The Old Act is silent on quorum requirements, but, if an Old Act condo association is incorporated under one of the Nonprofit Corp. Acts, it must satisfy the quorum requirements from the applicable statute.

[3] See Chapter 22, "Proxies: When Are They Valid?" for more details.

[4] This is not stated expressly in the New Act or the Nonprofit Corporation Act. However, the relevant provisions on voting, RCW 64.34.340 and RCW 24.03.085, do not qualify or restrict the authority of valid proxies. Proxy votes have the same effect as votes cast by members, provided the proxy was duly executed, has not expired or been revoked by the member, and did not have limits imposed on its authority by the member granting the proxy.

[5] RCW 64.34.336(1) (Quorums) provides:

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

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

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

[7] RCW 24.06.115 (Quorum).

[8] RCW 64.38.040 (Quorum for meeting) provides:

> Unless the Governing Documents specify a different percentage, a quorum is present throughout any meeting of the association if the owners to which thirty-four percent 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.

[9] RCW 64.34.336(2) (Quorums) provides:

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

> the board of directors are present at the beginning of the meeting.

[10] RCW 24.03.110 (Quorum of directors) provides:

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

RCW 24.06.140 (Quorum of directors) provides:

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

[11] *See* RCW 24.03.110 (Quorum of directors); RCW 24.06.140 (Quorum).

[12] 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.

22
Proxies: When Are They Valid?

Washington law allows association members to vote by proxy.[1] Proxies cannot be used for board meetings. Aside from the specific requirements below, each community's Governing Documents must be examined for additional requirements.

Condo associations
For condo associations, a proxy must satisfy all of the following requirements:

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

A proxy representing one owner of a unit with multiple owners may cast all the votes allocated to that unit if no other owners (or their proxies) are in attendance.[8]

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,[9] 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);[10]
B) It must be in writing;[11] and
C) It must be executed (or if by email, sufficient to identify the sender).[12]

Tangible versus electronic proxies
Under Washington law, both facsimiles and scanned documents qualify as "tangible medium[s]." Thus, a copy of a written, signed proxy that has been faxed or scanned and sent to an association

would be treated the same as the original, signed document. In other words, if the original, signed document was valid, a faxed or scanned copy of the document would be valid as well.

A proxy sent via email would likely be treated the same as a proxy executed via a tangible medium, unless the association's governing documents stated that it would not accept proxies executed electronically. 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.

Duration and Use of Proxies

A proxy is only valid for eleven months, unless otherwise stated in the proxy.[13] Proxy votes by association members do count towards quorum requirements.[14]

Proxies cannot be used for Board meetings. While Washington's statues neither specifically authorize nor prohibit voting by proxy for Board members, it is generally accepted that allowing proxy voting by Board members is inconsistent with the duties and responsibilities entrusted personally to them.[15]

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[1] RCW 64.34.340(1), (2) provides, in relevant part:

> If only one of the multiple owners of a unit is present at a meeting of the association or has delivered a written ballot or proxy to the association secretary, the owner is entitled to cast all the votes allocated to that unit…Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner…A unit owner may not revoke a proxy given pursuant to this section except by actual notice of revocation to the person presiding over a meeting of the association. A proxy is void if it is not dated or purports to be revocable without notice. Unless stated otherwise in the proxy, a proxy terminates eleven months after its date of issuance.

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

RCW 64.38.025(3), (5), provides, in relevant part:

> …Unless at that meeting the owners of a majority of the votes in the association are allocated or any larger percentage specified in the Governing Documents reject the budget, in person or by proxy, the budget is ratified, whether or not a quorum is present…The owners of a majority of the voting power in the association present, in person or by proxy, and entitled to vote at any meeting of the owners at which a quorum is present, may remove any member of the board of directors with or without cause.

[2] RCW 24.03.005(14):

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

RCW 24.03.005(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.

RCW 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.

[3] RCW 64.34.340.

[4] RCW 24.03.005(12), (19); RCW 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 supra* n. 2, 6.

[7] *See* n. 1; RCW 24.03.005(14); RCW 24.06.005(17).

[8] If multiple owners attend and do not vote the same way, votes allocated to the unit "may be cast only in accordance with the majority in interest of the multiple owners, unless the Declaration provides otherwise." RCW 64.34.340(1).

[9] RCW 24.03.085(2).

[10] *See* n. 1; RCW 24.03.085 (Voting); RCW 24.06.110 (Voting).

[11] RCW 24.03.005(14); RCW 24.03.085; RCW 24.06.110; RCW 24.06.005(17).

[12] *Id*.

[13] *See* n. 1.

[14] See Chapter 21, "Quorums: What Are They and How Are They Met?" for more details.

[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.

23
Cost Allocation: How Are Costs Allocated Among Owners?

An association's Governing Documents determine how costs are allocated among owners in a particular community. However, some requirements are imposed by statute.

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 and some owners could have additional expenses if a Declaration provides for it. A condo 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] [3] 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.

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.[4] For New Act condo associations, cost allocation may be different than the percentage of ownership interest.[5] [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]

The New Act allows 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).[8]

For both New Act and Old Act condo associations, the Declaration may provide for a different method of allocating costs with respect to limited common element maintenance, insurance, utilities, and other expenses that benefit fewer than all of the units.[9] Statutes allow expenses that benefit only some units or those caused by unit owners to be allocated only to those units.[10] [11] Costs related to collection of unpaid assessments may be assessed against individual delinquent units.[12]

For HOAs, 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.[13] Associations may only change the allocations of costs among homeowners in accordance with the provisions of the Governing Documents.

All associations 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.[14]

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

[2] RCW 64.34.360(3) (Common expenses – Assessments).

[3] RCW 64.34.360(3) is one of the New Act provisions that applies retroactively to condos created before July 1, 1990. RCW 64.34.010(1). However, because the provision constitutes a significant change to the Old Act, it may only be applied retroactively to Old Act condos *if* the

association approves an amendment authorizing retroactive application. *Keller v. Sixty-01 Associates of Apartment Owners*, 127 Wn. App. 614, 623 (2005).

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

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

[6] RCW 64.34.224, Official Comments, provides:

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

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

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

[8] RCW 64.34.224, Official Comments.

[9] RCW 64.34.360(3) (applicable to Old Act and New Act condo associations).

[10] RCW 64.34.360(3) (applicable to Old Act and New Act condo associations). For example, assessments for insurance could be made in accordance with risk; and utility assessments in accordance with use.

[11] RCW 64.34.360(5) (applicable to New Act condo associations only). Assessments for expenses due to misconduct by a unit owner can be assessed solely against that owner.

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

[13] RCW 64.38.020 (11).

[14] RCW 64.38.050 (Violation – Remedy – Attorneys' fees).

24
Association Budgets: Are Major Repairs to Common Areas "Additions and Improvements" that Require Member Approval?

By statute, an association's Board generally has authority to impose and collect assessments for common expenses, including necessary repairs, additions, and improvements to common areas.[1] These assessments must follow the requirements for adoption of budgets as required by the Governing Documents and Statutes. However, these statutory assessment powers may be limited by the provisions of the association's Governing Documents.

The Governing Documents of many associations contain provisions that prohibit the Board from independently assessing owners or paying out funds for additions or capital improvements to the common area. If such a provision exists, then 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.[2]

An unpublished decision by the Washington Court of Appeals, *Lowry v. Allenmore Ridge Condo. Ass'n*, sheds some light on this issue.[3] 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 similar 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 will likely vary from case to case. Courts in other states have agreed with the analysis of *Lowry*, finding that major repairs are not improvements.[4] 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.

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[1] RCW 34.34.304 provides, in relevant, part:

> (1) Except as provided in subsection (2) of this section, and subject to the provisions of the Declaration, the association may:
>
> > (b) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from unit owners;
> > (f) Regulate the use, maintenance, repair, replacement, and modification of common elements;
> > (g) Cause additional improvements to be made as a part of the common elements…

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

RCW 64.38.020 provides in relevant part:

> Unless otherwise provided in the Governing Documents, an association may:
>
> > (2) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from owners;

> (6) Regulate the use, maintenance, repair, replacement, and modification of common areas;
> (7) Cause additional improvements to be made as a part of the common areas...

[2] The IRS draws a distinction between "repairs" and "capital improvements" for purposes of federal income tax. Namely, it allows an immediate full tax deduction for repairs, but not for capital improvements or "capitalization." 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 information on the IRS definitions of repairs and capital improvements, *see* the IRS Capitalization v. Repairs Audit Technique Guide at http://www.irs.gov/Businesses/Capitalization-v-Repairs-Audit-Technique-Guide#14.

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

[4] 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. Similarly, a Florida court found that replacement of a seawall was "necessary to protect the condominium common elements" and thus qualified as "maintenance" rather than a capital improvement. "Simply because necessary work for maintenance may also constitute alterations or improvements," the court found, "does not nullify a condominium board's authority and duty to maintain the condominium elements." *Ralph v. Envoy Point Condominium Ass'n, Inc.,* 455 So.2d 454, 455 (1984).

25
Association Budgets: Must an Association Ratify a New Budget If the Board Proposes a Spending Change?

A Board may impose a new spending plan without ratification by the membership so long as the new spending plan does not result in a change in the members' assessment[1] obligations.

The HOA Act requires that any regular or special budget proposed by an HOA Board must be submitted to the owners for ratification within thirty days.[2] This ratification procedure also applies to proposed changes to a previously approved budget that will result in a change in assessment obligations.[3]

The New Act, likewise, requires that members be notified of, and vote on, any proposed changes in a previously approved budget that result in a change in assessment obligations.[4] [5]

However, the Washington Court of Appeals has made clear that where proposed changes to a budget will not result in a change in assessment obligations, a Board is not required to notify owners or seek ratification of an amended budget.[6]

Under these standards, if a Board were to adopt a spending plan that would ultimately increase owners' assessment obligation, the plan would be invalid unless ratified as a revised budget in accordance with statute and the Association's Governing Documents. If, however, a Board were to adopt a spending plan that reduced or maintained expenditures, either to match actual revenue or because actual costs were lower than projected, the spending plan would not result in a change in assessment obligations, and the statutory notice and ratification requirements would not apply.

[1] The HOA Act defines "assessment" as "all sums chargeable to an owner by an Association," including "for common expenses." RCW 64.38.010 and .020(2). The New Act defines "assessment" similarly as "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." RCW 64.34.020(3).

[2] RCW 64.38.025(3) provides:

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

[3] RCW 64.38.035(3).

[4] RCW 64.34.308(3).

[5] The Old Act is silent on whether a Board can adopt a spending change without unit owner approval. The Old Act does not require the Board to get unit owner approval for any budget decisions, unless the Governing Documents require such approval. *See* RCW 64.32.250(2).

[6] In *Casey v. Sudden Valley Community Association*, 182 Wn. App. 315 (2014), the court interpreted the HOA Act and determined that the notice and ratification provisions applied only to proposed spending changes that increased assessments on individual owners. The court noted that assessments under the New Act, unlike the HOA Act, must be "based on the budget." However, the issue of whether a Board was required to notify owners and seek ratification of a proposed spending change was not before the court. For the reasons discussed in this chapter, condo Boards, like HOA Boards, are free from any such obligation so long as the proposed spending change does not affect assessment obligations.

26
Move-in Fees: Can Associations Charge Move-in Fees for Owners and Tenants?

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

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

Move-In fees must be directly related to costs attributable to a change in occupancy and be non-discriminatory
Move-in fees must be authorized by both the Governing Documents and the relevant statutes. With limited exceptions, Washington law requires associations to assess common expenses against all owners in proportion to their interest in common elements, and also prohibits formulas for assessing fees that discriminate in favor of specific unit owners.[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 Washington's New Act, 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 fees that might be directly attributable to moving are: additional garbage and recycling pickups, hanging and removing padding from elevators and walls to protect them from damage, and cleaning floors that have higher traffic than usual during a move. Examples of fees that would be attributable to changes in occupancy, but not the act of moving itself, might include reprogramming intercoms, giving orientations to new residents, updating mailboxes, updating directories with information on new residents, 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.

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.

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 are permitted to impose assessments to cover expenses caused by an owner's misconduct. However, costs incurred due to inevitable wear-and-tear during a typical move would not qualify as "misconduct." Similarly, costs related to garbage or recycling removal could not be assessed as misconduct in most cases. Moves result in a higher volume of garbage and recycling because occupants inevitably unpack boxes and discard packing materials, not because they have been negligent. In the cases in which an occupant is negligent (e.g. leaving trash or furniture strewn about near the dumpster), and an association has additional expenses because of such negligence, the association may be able to assess these expenses against the owner.

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[1] RCW 64.34.224(1), (2); RCW 64.34.360; RCW 64.32.080.

[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).

[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 for in her annual condominium dues." 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." *Miesch* at 560.

[5] *Id.*

[6] *Chin,* 637 A.2d at 200.

27
Accounting Methods: What Are They, and Is an Association Required to Use One Method?

There are two standard methods of accounting: cash-based accounting and accrual-based accounting. Washington's Condo Acts require condo associations to use accrual accounting. Although the HOA Act does not mandate that HOAs use this method, they are, nonetheless, advised to do so.

Accounting methods

Under the cash-based accounting method income is recorded when money is deposited, and expenses are recorded when actually paid. If the association has agreed to pay for something but has not yet actually paid, the expense will not appear on the financial statements until the funds are in fact paid out. Assessments owed by owners will not show as income until actually received.

Under the accrual-based accounting method, on the other hand, costs and income are recorded when incurred and due, not when actually received or paid. For instance, if the association has agreed to pay for something but has not yet actually paid, the expense will appear on the financial statement anyway. Assessments will appear as income when they are due, even if not paid by the owners.

Does Washington law require one method over the other?

Washington law requires that condo associations prepare an annual financial statement of the association "in accordance with Generally Accepted Accounting Principles"[1] ("GAAP"). GAAP requires accrual-based financial statements instead of cash-based.[2] Additionally, condo associations must prepare a resale

certificate contain a balance sheet and a revenue and expense statement of the association on an accrual basis.[3]

The HOA Act does not mention GAAP, and it is not clear that one accounting method is favored over the other.[4] Nevertheless, because Washington courts often interpret the HOA in accordance with the Condo Act where the HOA is silent, HOAs would be well advised to use the accrual-based method discussed above.

Recently, associations with significant delinquencies have been challenged with the problem of how to account for unpaid assessments using accrual accounting. We recommend consulting with your CPA and making adjustments for "bad debt" or uncollectible funds so that an accrual based financial statement accurately reflects the association's true financial situation.

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[1] RCW 64.34.372(1) (Association Records – Funds). This provision is applicable to Old Act condo associations. *See* RCW 64.34.010(1) (Applicability).

[2] Catherine Kuhn, "The World According to 'GAAP,'" CAI JOURNAL NOV/DEC 2007 (available at http://www.wscai.org/hoa/assn294/documents/world%20according%20to%20gaap.pdf).

[3] RCW 64.34.425(1)(i) (Resale of unit) This provision is applicable to Old Act condo associations. *See* RCW 64.34.010(1) (Applicability).

[4] *See* RCW 64.38.045(1) (Financial and other records — Property of Association — Copies — Examination — Annual financial statement — Accounts).

28
Association Property Insurance: Is Damage within a Condo Association's Property Insurance Deductible Considered Uninsured Damage?

Costs to repair damage that is covered by an association's property insurance policy, but are within the deductible amount are considered "self-insured." The policy holder has chosen to pay a limited amount for repair of damage before the policy kicks in. When damage is self-insured, the association's Governing Documents and the statutes determine who must pay the repair costs. The default under the statute would be that the deductible is paid as a common expense of the association, even if damage is limited to a single unit.

"Uninsured" damage, by contrast, is damage that is not covered by an association's property insurance policy or that is in excess of the policy limits. Even if the cost of repair exceeds the deductible amount, uninsured damage will never be covered by insurance. The repair costs for uninsured damage to common elements is usually a common expense.[1] [2]

Condo associations are required to carry insurance that covers damage to common elements and limited common elements.[3] New Act condo associations MAY extend coverage of their property insurance to cover damage to units (and most do).[4] Old Act condo associations MUST extend the coverage of their property insurance to cover damage to units if the association has property insurance.[5]

If an insured event[6] occurs, associations typically file a claim and pay to repair damage with proceeds from the insurance policy. The party responsible for payment of the deductible is determined

by an association's Governing Documents. If the Declaration does not specifically allocate the deductible, it is a common expense.

New Act condo associations

A condo Declaration may have specifics on how the association's deductible is allocated to owners. If the insured event involves a limited common element, owners who have the right to use the limited common element may be solely responsible for the deductible (equally or in any other proportion that the association's Declaration provides), but only if the Declaration provides for that.[7] If an owner's misconduct caused the insured event, that owner could be responsible for the deductible.[8] If the Declaration is silent, the deductible is a common expense.

Old Act condo associations

For all insured events, the association's Governing Documents will determine who is responsible for the deductible in a given situation. If the Declaration is silent, the deductible is a common expense.

Owners in New Act condo associations may obtain insurance to cover their units and it is advised that owners carry at least enough insurance to cover the association's deductible in the event that the owner is responsible for the deductible. Old Act condo associations may also require owners to carry insurance on their units.[9] Many associations are adopting amendments to their declarations requiring owners to purchase property insurance to cover their units, or damage they cause, in an amount equal to the association's deductible amount.

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[1] RCW 64.34.352(7) (Insurance) provides, in relevant part: "The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense."

[2] RCW 64.34.020(9) (Definitions) provides:

"Common expenses" means expenditures made by or financial liabilities of the association, together with any allocations to reserves." RCW 64.34.020(9) is applicable to Old Act condo associations.

[3] RCW 64.34.352(1)(a) (Insurance).

[4] *See* RCW 64.34.352(2) (Insurance).

[5] *See* RCW 64.32.220 (Insurance).

[6] An insured event is an occurrence, usually sudden and catastrophic, which causes damage to a unit which is covered by the association's property insurance policy.

[7] *See* RCW 64.34.360(3)(a) (Common expenses — Assessments).

[8] *See* RCW 64.34.360(5) (Common expenses — Assessments).

[9] Old Act condo associations are required to extend their insurance to cover the units if they have insurance. RCW 64.32.220 (Insurance).

29
Association Records: How Should Association Minutes and Records Be Maintained?

Associations must keep meeting minutes for Board meetings, Board committee meetings and association meetings.[1] Meeting minutes serve as the official (and legal) record of decisions made and actions taken at a Board meeting or an association meeting.[2] New Act condo associations and HOAs are required to keep meeting minutes for Board meetings and association meetings.[3] Old Act condo associations are only required to keep meeting minutes for Board meetings and association meetings if the association is incorporated under one of the Nonprofit Corp. Acts.[4] All of the Acts are silent on the required content for meeting minutes.

The content that an association is required to include in its meeting minutes may be determined by the association's Governing Documents. Associations may require their meeting minutes to include any information they want, but associations typically should require the following information be included:

(1) the type of meeting (i.e. "regular" or "special"),
(2) the name of the body that held the meeting (i.e. the Board or the association),
(3) the date of the meeting,
(4) the location of the meeting (if it is not always the same),
(5) the names of those present (and those who were not present) for Board meetings, and whether a quorum was present if an association meeting,
(6) whether the minutes of the previous meeting were approved (including the date of the previous meeting),

(7) all motions (resolutions) made (excluding withdrawn motions), points of order, and appeals including vote tallies for both approved and defeated motions, and
(8) the time the meeting began and adjourned.

Before the minutes are official they must be approved by the entity that held the meeting.

The purpose of meeting minutes is to provide interested parties (i.e. owners in an association) with a record of what action was taken at a given meeting. Meeting minutes also allow the association (read: the Board) and owners to keep track of the status of resolutions and projects, and meeting minutes can also resolve disputes (as they are the official record of what occurred at a meeting).

The minutes are the official record of what happened. What they say happened is what legally happened (even if you think it is not what actually happened). When the minutes are approved, it is the majority of the board (or association as appropriate) agreeing that they accurately reflect what happened.

Minutes are not a narrative about who said what. They should reflect actions considered by the Board (motions made) and the outcome of each. Some associations keep records of all passed motions in a "Book of Resolutions" to have a single source of the actions taken by the Board. This book would list the resolutions that affect the community. It would not list routine motions like approval of minutes.

How long an association keeps its meeting minutes, where and in what form (electronic or paper) they are kept, and who is ultimately responsible for their retention and preservation can all be determined by the association's Governing Documents. There are no statutory requirements for any of these issues.

Typically the meeting minutes are the responsibility of the secretary of the Board. If the Governing Documents do not specify how long meeting minutes should be kept, we advise that meeting minutes are a permanent record of the Association.

Meeting minutes do not have to be filed with any government entities and they can (and should) be kept with the Association's Declaration and Bylaws. Meeting minutes should be kept in a bound ledger with numbered pages. Traditionally, meeting minutes were hand-written, but most people type (electronically) meeting minutes now. Some Associations keep electronic copies of minutes and some post all minutes to a private website for access by community members.

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

[2] Board actions or decisions are referred to as resolutions. Association actions or decisions are typically approval of or ratification of Board resolutions. For example, Associations ratify budgets proposed by Boards.

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

[4] *See* RCW 24.03.135; RCW 24.06.160.

30
Association Duties: Does an Association Have a Duty to Prevent Crime in Common Areas Under Its Control?

An association in Washington likely has a duty to take measures against foreseeable crime in a common area under its control, but there is no obligation to prevent criminal activity that the association has no reason to anticipate, unless the association volunteers or promises to do so.

Duty to safeguard against foreseeable crimes

Washington law is silent as to whether an association has a specific obligation to safeguard owners or members of the public from criminal activity within the community. However, one of the most notable cases relating to the obligations of associations and their Boards with respect to criminal activity, *Frances T. v. Village Green Owners Ass'n*[1], is instructive.

In that California case, an owner had repeatedly informed the Board that external lighting on a green belt near her unit was insufficient (at one point, there was no light at all). The owner's unit had previously been burglarized, which the association was aware of. Given the inadequate lighting and a spike in crime in the area, the owner was concerned she would once again be the victim of criminal activity. The association did not address the lighting issue and, when the owner erected her own makeshift lights, the association informed her that the lighting structure violated the community's CC&Rs and instructed her to remove it. The same night the owner complied with the Board's order, she was raped and brutally beaten by an intruder in her unit.

The California Supreme Court held that the Board was liable for damages to the owner because the Board's refusal to address a known dangerous condition (insufficient lighting that provided a

safe harbor for criminals) was unreasonable under the circumstances. It explained:

> When the only persons in a position to remedy a hazardous condition are made specifically aware of the danger to third parties, then their unreasonable failure to avoid the harm may result in personal liability.

If they apply this same rationale, Washington courts are likely to conclude that a Board's refusal to remedy known hazardous conditions that foreseeably increase the risk of criminal activity is unreasonable, in violation of the duty of care owed to owners. (See Chapter 14, "Board of Directors: What Is a Board Member's Duty of Care?")

Although the *Frances T.* case recognizes an association's duty to safeguard against foreseeable crime, it does not require an Association to prevent all crimes within its community. It requires only that associations take reasonable measures to protect residents from crimes the Association knows or should know have a high risk of being committed in the community. In *Frances T.*, the Association could likely have fulfilled this duty by installing better lighting in the common areas, as the unit owner repeatedly requested it to do. In an Association experiencing a wave of car theft, the Association might be expected to advise the owners of the problem and, perhaps, install security cameras or hire a guard to patrol the parking areas. The specific measures required will vary with the circumstances; however, the Board should remember that it is at risk if it fails to respond to foreseeable criminal activity in the community.[2] The Board must be reasonable. We advise Boards investigate circumstances when owners raise concerns about criminal or safety issues.

Finally, an association may be able to avoid liability even for foreseeable criminal activity occurring on the premises by amending its declaration or bylaws to expressly disavow any duty to provide security on the premises. In *Bradford Square*, the

owners had voted to amend the declaration to expressly state that the association had no duty to provide security on the property and that the individual owners were responsible to provide security for themselves.[3] The amendment to the declaration did not conflict with the Georgia Condo Act, and thus the court found that it had effectively terminated any liability the association otherwise might have had.[4]

Duty to prevent crime when association voluntarily agrees to provide security

An association that chooses to provide security or that markets the property as more secure, high-security, or a similar description, will have a heightened duty to prevent crime on its premises, whether or not it's foreseeable. In *Vazquez v. Lago Grande Homeowners Ass'n*, the developer had advertised the property as more secure, hired a private security company to screen guests, and collected fees from unit owners for the security services.[5] The security company failed to adequately screen guests and permitted a man who guards were told was not allowed on the property to enter the building. The man killed his ex-wife and then committed suicide. In a wrongful death action against the association, the court held that the association could be liable even though there was no evidence of "prior such crimes" because the association had voluntarily undertaken to provide security, thereby creating a heightened obligation to protect residents from any crime, foreseeable or not.[6] Foreseeability based on prior offenses was not relevant, the court found, when the association had chosen to impose upon itself a greater duty to protect owners.[7]

The lesson of *Vazquez* is that an association that chooses to provide security may be liable for the negligence of guards, whether employed directly by the association or by a separate company. Furthermore, even if an association does not hire security guards for the premises, it may be held to a heightened standard of care if it markets itself as a high-security building, especially when a portion of the fees it collects from owners are

designated specifically for security equipment such as cameras, gates, etc.

Neighborhood watch and the perils of vigilante justice

As discussed, an association generally is not liable for damages simply because a crime, which was not foreseeable to the association, happens on its grounds, but if an association warrants that it will prevent all crimes, or a given type of crime, a court may hold the association to its promise by recognizing a so-called “gratuitous duty.”

Likewise, if an association holds out one resident or a group of residents, such as a neighborhood watch group, as a resource for residents to contact instead of law enforcement regarding crime, the association may be opening itself up to potential liability if that resident or group fails to protect residents or, in doing so, uses unlawful force or causes harm.

Associations should be careful not to step into the role of law enforcement or encourage residents to do so by investigating, tailing, or otherwise chasing down suspected criminals. This type of vigilante action is almost always beyond the association’s authority. Not only could it expose the association to potential liability to both the alleged criminal and victim, but the individual vigilante involved could face personal civil and criminal liability as well.[8]

A better course of action would be for the Board to initiate a dialogue about neighborhood safety and how owners should respond to crime if it occurs, namely by contacting law enforcement. The association could also take additional passive security measures, such as installing better lighting and security cameras or hiring professional security. An association is also in a good position to advocate for the owners with law enforcement agencies, reporting incidents and requesting additional police presence in the community as needed.

[1] *Frances T. v. Vill. Green Owners Assn.*, 42 Cal. 3d 490 (1986) (court found that appellant had alleged facts sufficient to show that association could have been negligent by failing to respond to the need for additional lighting and by ordering her to disconnect her additional lights.

[2] Criminal activity is not foreseeable merely because one could have imagined it occurring. In Frances T., the criminal activity was foreseeable because the owner had been the victim of a burglary before, and the association was aware of this. Contrast this with *Bradford Square Condominium Ass'n, Inc. v. Miller*, in which a Georgia court held that an Association had no liability for the murder of an owner that occurred in the parking lot even though security gates and additional lighting may have prevented his death. In that case, the perpetrators had followed the owners into the parking lot from a public street, and there was no history of similar incidents occurring on the property, so the crime was *conceivable*, but not *foreseeable*. 258 Ga.App. 240, 242-43 (2002).

[3] *Bradford Square* at 246-47.

[4] *Id.* at 247-48.

[5] *Vazquez v. Lago Grande Homeowners Ass'n,,* 900 So.2d 587, 589-90.

[6] "…since the very purpose of what the association and Centurion [the security company] agreed to do was exercise reasonable care to prevent any criminal incident from occurring, it cannot matter that the deadly incident in question was the first one." *Id.* at 593.

[7] "In the situation in which a duty to prevent harm from criminal activity arises only as an aspect of the common law duty to exercise reasonable care to keep the premises safe, prior offenses, giving rise to the foreseeability of future ones, may be deemed indispensable to recovery…In contrast, the duty to guard against crime in this case is founded upon particular undertakings and hence obligations of the defendants to do so." *Id.* at 592-93.

[8] An example is the now infamous 2012 Trayvon Martin incident, in which George Zimmerman, a neighborhood watch leader in a Florida HOA, shot and killed an unarmed teenager who was walking through the community. The HOA had empowered Zimmerman, who was not a law enforcement officer, to deal with suspected crime in the community. It had also recommended in the community newsletter that residents contact Zimmerman regarding criminal activity. The Martin family sued the HOA, which settled for a sum believed to be over $1 million.

31
Association Businesses: Can an Association Operate a Business to Support the Community?

An association may operate a retail or service business, such as a general store, athletic club or boat marina to serve the community so long as the Governing Documents grant the association authority to do so and all requirements for operation of the business set forth in the Governing Documents are complied with. Moreover, an association may generally impose assessments for any common expenses arising from the business operation.

In a case involving an owner's challenge to an assessment for common expenses arising from the lease and operation of a commercial boat marina by an association, the Washington Court of Appeals held that the assessment was valid because: (1) the association's Governing Documents granted it authority to operate a community marina; (2) the Governing Documents granted the association authority to make assessments for marina-related common expenses; and (3) the association had complied with all relevant provisions on owner approval prior to opening the marina.[1]

In ruling on the matter, the court made clear that Washington courts will apply the so-called "context rule" of contract interpretation in determining whether an association's Governing Documents grant it authority to operate a business. This means that courts will consider extrinsic evidence, such as the circumstances leading to the execution of the documents, the subsequent conduct of the parties, and the reasonableness of the parties' respective interpretations, in addition to the express language of the documents

[1] *Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263 (2012)

This case involved a lawsuit by homeowners alleging that an HOA's assessments for common expenses were unauthorized. The owners lived in a residential subdivision located on Blakely Island, WA that was governed by an HOA. The HOA owned and maintained property separate from the residential lots, including an airport landing strip, tennis courts, all non-private roads designated on the plat, a fire station, a water treatment system, the right to draw water from nearby Horseshoe Lake, two parks, a recycling center, and a beach access lot.

In 2005, the association began contemplating leasing and operating the privately owned Blakely Island Marina when the marina's owner announced that it would cease operating certain marina facilities and offered to lease those facilities to the Association. The marina consisted of a dock, fuel dispensers for cars and boats, and a general store. These were the only amenities of their kind on the island.

The association sought to gauge its members' interest in operating the marina, so it created a special committee and surveyed its membership. In November 2005, the association held a special meeting to determine whether to lease the marina facilities and create a subsidiary to oversee related operations. At the meeting, a majority of the membership approved a motion to authorize the Board to negotiate a lease of the marina. Thereafter, the Board negotiated the lease, which entitled the association to operate the marina facilities "in support of the Blakely community."

In early 2009, the association mailed an annual assessment to its members. The assessment included the 2008 marina-related expenses, estimated to be $1,123.70 per lot. The plaintiffs refused to pay the portion of their assessment related to marina expenses. When the association threatened to file a lien against the plaintiffs' property based on the unpaid assessment, they brought suit alleging the association had no authority to lease and operate the marina and levy related expenses. Interpreting the association's Governing Documents, the Court of Appeals disagreed.

32
Fines and Enforcement: What Procedures Must the Association Follow when Issuing Sanctions to Enforce Covenants?

When imposing fines or other sanctions for noncompliance, the association must not apply arbitrary, capricious, or unreasonable standards and must provide owners with notice and a meaningful opportunity to be heard before fines may be assessed. Fines must also be reasonable, and consistent with a schedule furnished to all owners in advance.

The Old Act[1] did not specifically authorize condo associations to impose fines for violations of Governing Documents, and before 1995, there was no statutory authority for HOAs to do so. Unless an association's Governing Documents provided otherwise, an association's only recourse for enforcing its Governing Documents was a lawsuit for damages or injunctive relief.

The New Act[2] and the HOA Act[3] have given all associations an alternative to lawsuits for enforcing their Declarations, CC&Rs and their internal rules and regulations. Under the statutes, associations may adopt fines for enforcement. The challenge is to ensure that the procedures, and the association's implementation of the procedures, comply with the requirements for fundamental fairness by providing notice and a meaningful opportunity to be heard; in other words, "due process."[4] The opportunity to be heard must occur *before* a fine can be imposed. Offering an appeal *after* a fine is imposed may not comply with the statute.

In order for the due process requirement to be satisfied, rules enforcement efforts must include, at a minimum:

1) Notice to the offending owner of the pending sanction (See Chapter 34, "Notice: What Does 'Notice' Mean?");

2) An opportunity for a hearing before the sanction is issued (See Chapter 33, "Fines and Enforcement: What Does 'Opportunity to be Heard' Mean?");
3) Hearing procedures that are enumerated in the association's Governing Documents or are inherently fair; and,
4) A previously published schedule of reasonable fines.[5]

Additionally, due process requires that the rule to be enforced is not arbitrary, capricious or unreasonable and that the means selected to achieve the desired end bears a reasonable and substantial relationship to the rule.[6]

The precise amount of process that is required may vary with the circumstances. As a general rule, an association's need for efficiency and finality will be weighed against the gravity of the right at stake.[7] In addition, the courts often look to the enforcement procedures set forth in an association's Governing Documents as the measure of the process required.[8]

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[1] RCW 64.32.060 provides, in relevant part:

> Each [Unit] 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 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 manger or Board of directors on behalf of the Association of the [unit] owners or by a particularly aggrieved [unit] owner.

[2] RCW 64.34.304 provides in relevant part:

> (1) Except as provided in subsection (2) of this section, and subject to the provisions of the Declaration, the Association may:
>
> (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 by laws 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…

This applies to Old Act condo associations. *See* RCW 64.34.010(1).

[3] Under RCW 64.38.020(11), a homeowners' 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…

[4] The Washington Supreme Court has held that contracts, which may include Declarations and CC&Rs, contain an implied duty of good faith and fair dealing. *See*, *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102 (2014). RCW 64.34.090 imposes an obligation of good faith on all enforcement of a Declaration.

[5] The legislature explained its intent in drafting the RCW 64.34.304(1)(k) due process requirement in Official Comment 5 to the section:

> The powers granted the association in subsection (k) to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the condominium community. The power to impose sanctions for violations of the association's Governing Documents is subject to a requirement of minimum "due process" for the accused violator. These due process procedures include notice of the alleged violation and an opportunity for a hearing before either the Board of directors or another person or body which has been designated by the Board of directors to conduct the hearing. This section also requires that the procedures for enforcement be set forth in the association's Governing Documents and that the Board of directors has previously adopted a fine schedule and communicated it to the owners. The powers granted under this subsection are intended to be in addition to any rights which the Association may have under other law.

[6] *See Riss v. Angel*, 131 Wn.2d 612, 628-29 (1997) (reversing Board action disproving homeowners' building plans because it was unreasonable, based on inadequate inquiry and incorrect information); *see also*, *Kawawaki v. Academy Square Condominium Association,* 176 Wn. App. 1038 (2013) (finding a rule changing rental restrictions to be a use restriction and holding it must be contained in the Declaration, but noting, in the alternative, that the rule was also invalid as an unreasonable house rule.).

[7] No Washington court has considered the issue of the amount of process due before an association can sanction an owner. But the Court of Appeals has given some guidance on the amount of process that is due in a given circumstance. Although the precise nature of the process due will vary, the court explained:

> We must balance competing interests of an efficient and reasonable administrative process with the [respondent's] right to a meaningful hearing…Clearly, at least notice and an opportunity to be heard are required. In addition, the [respondent] must be given a written copy of any information on which the…[sanction] is based in time to prepare to address that information at the hearing. The [respondent] should be given the opportunity to present and rebut evidence, and the hearing must be conducted by an objective decision maker. The [respondent has the right to be represented by counsel and to have a record made of the hearing for review purposes. Finally the [respondent] has the right to a written decision from the hearing Board setting forth its determination of contested facts and the basis for its decision…

Conrad v. University of Washington, 62 Wn. App. 664 (1991). When the necessity for a hearing on proposed sanctions arises, the hearing must be conducted with these minimum due process safeguards. Otherwise, the opportunity for a hearing may be meaningless and the association's enforcement efforts may be undone by a court reviewing the action.

[8] *See, e.g., Bixeman v. Hunter's Run Homeowners Ass'n. of St. John, Inc.*, 36 N.E.3d 1074 (Ind. Ct. App. 2015); *see also*, *Raintree Homeowners' Ass'n v. The Dreyfus Interstate Dev. Corp.*, C3-00-2202, 2001 WL 712019, at *1 (Minn. Ct. App. June 26, 2001) (a condo association's assessment on an owner was invalid because the association did not follow the provisions of its Declaration and Bylaws requiring ten days' notice).

33
Fines and Enforcement: What Does "Opportunity to be Heard" Mean?

"Opportunity to be heard," as it applies to Washington community associations[1] [2] means a meaningful right to a fair hearing in front of an objective Board or hearing panel where the owner can present evidence to support her position and confront evidence against her position.[3] Before an association may impose fines on an owner,[4] the Board must provide the owner with notice[5] that the owner has the option to request a hearing.[6] [7]

This phrase is most often used for enforcement actions. Before an association can deprive an owner of a property right or assess fines against them, the association must satisfy due process.[8] There are two aspects of due process that associations must satisfy: procedural due process[9] and substantive due process.[10] [11]

No Washington court has addressed the question of what an association must do to ensure that an owner has a "meaningful opportunity to be heard." Other states construing statutes similar to Washington's Condo Acts have clarified what an "opportunity to be heard" means. The Minnesota Court of Appeals held that an "opportunity to be heard" means that an owner is provided with an opportunity to respond to the specific allegations that are the basis for the association imposing fines.[12] [13] The Connecticut Court of Appeals held that "opportunity to be heard" means providing a hearing, either formal or informal (as provided in the association's governing documents), that is fair.[14]

It is important to remember that an "opportunity to be heard" does not necessarily require an association conduct a hearing before the association takes an action. "Opportunity to be heard" requires an association to notify an owner that the owner has the *option to request a hearing* before the association can impose a

fine. A hearing is necessary only if the owner, upon receipt of timely notice, requests one.[15] The notice should state the specific rule the owner has violated so that he or she knows what the basis for the proposed fine is and has an opportunity to gather evidence and prepare a response for the hearing, if one is requested.[16]

"Opportunity to be heard" may be satisfied even if the owner fails to appear at the hearing. There are no Washington cases that address this specific issue, and the issue has not been addressed by other states. However, other states have addressed whether due process is satisfied if a party fails to appear at the hearing. The Indiana Court of Appeals has held that when a party does not attend a hearing, due process is satisfied if the party had notice of when and where the hearing was to be held and the party did not have good cause for missing the hearing.[17]

An association will probably satisfy the "opportunity to be heard" requirement if, before it takes an action that could be considered a deprivation of a property right, the association provides the owner with an option to request a hearing, complies with the hearing procedures in its own governing documents, and the hearing is reasonable. This determination is fact specific.

Washington courts probably will find that an owner had an "opportunity to be heard" where no hearing is held if the association offered the option for a hearing, but the owner failed to request one. Similarly, Washington courts will probably find that an owner had an "opportunity to be heard" where the owner is not present at the hearing if the owner had notice of when and where the hearing was to be held, and did not have a good reason for missing the hearing.

Washington courts probably will not find that an association has satisfied the "opportunity to be heard" requirement where an association only offers an owner the opportunity to request a hearing to *appeal* a fine after it has already been imposed. The

statute clearly and unambiguously states that associations may impose fines “after” the owner has been provided with notice and an opportunity to be heard.[18] If an owner is only given an opportunity to appeal the imposition of a fine, this would constitute the association fining the owner *before* providing him or her with an opportunity to be heard.

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[1] RCW 64.34.304(k) (Unit owners' Association — Powers) provides:

> . . . [An Association may] **. . .** , after notice and an opportunity to be heard by the Board of directors or [a representative of 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 . . .

[2] RCW 64.38.020(11) (Association powers) provides:

> . . . [An Association may] . . . , after notice and an opportunity to be heard by the Board of directors or [a representative of 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 . . .

[3] *Cuddy* at 19.

[4] Examples of deprivations of a property right include levying fines, and limiting or restricting use of the property.

[5] See Chapter 34, “Notice: What Does ‘Notice’ Mean?”

[6] *Cuddy v. State, Dept. of Public Assistance*, 74 Wn.2d 17, 19 (1968).

[7] Associations are not required to provide owners with an opportunity to be heard prior to charging late fees for assessments, or for fines an owner either agreed to pay or was ordered to pay after an opportunity to be heard with respect to the violation resulting in the fine. Associations also are not required to provide owners with an opportunity to be hard prior to foreclosing liens. In the case of foreclosure, owners have an opportunity to be heard in court, and a judicial hearing is sufficient to satisfy the requirements of due process.

[8] *Evans v. Newton*, 382 U.S. 296 (1966) (private groups or individuals that are granted power(s) and functions by the state which are governmental in nature, are agencies or instrumentalities of the state and subject to constitutional limitations including due process).

[9] Procedural due process requires that the tribunal or committee making a determination on a matter must be competent to pass judgment on the matter. Owners have a right to be present before the committee or tribunal making the determination on the matter. Owners have a right to give testimony on the matter. Owners have a right to controvert, by proof, every material fact which bears on the matter. "The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). "The constitutional elements of procedural due process, and thus of a fair hearing, are: notice; an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; an opportunity to known the claims of opposing parties and to meet them; and a reasonable time for preparation of one's case." *Cuddy* at 19.

[10] "Substantive due process protects against arbitrary * and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures*." Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 218–19 (2006) (quoting *Halverson v. Skagit County,* 42 F.3d 1257, 1261 (9th Cir.1994)). Substantive due process requires that a rule must not be arbitrary, capricious, or unreasonable, and the tribunal or committee making the determination on the matter must use adequate inquiry and use of objective information, and which bears a reasonable and substantial relationship to the matter. *See, e.g., Riss v. Angel*, 131 Wn.2d 612 (1997).

[11] Washington courts have not expressly ruled that substantive due process and procedural due process are applicable to the enforcement of an Association's rules, but other states have*. See, e.g.*, *Majestic View Condo. Ass'n v. Bolotin*, 429 So. 2d 438, 438 (Fla. Dist. Ct. App. 1983) (the Association satisfied the requirements for enforcement of restrictive covenants because the homeowner was on notice of the regulation, received notice from the Association of the violation, and the homeowner had a reasonable opportunity to be heard).

[12] *Hamline House Ass'n. v. Eibensteiner*, 402 N.W.2d 832, 835 (Minn. Ct. App. 1987) (holding that an Association had failed to provide an owner with an opportunity to be heard with respect to the violation of a particular rule when it failed to cite *that* rule in its notice informing the owner of his opportunity to be heard for violating *other* rules).

[13] Minnesota case law does not control in Washington, but it may be persuasive to Washington courts.

[14] *Congress Street Condominium Association Inc. v. Anderson,* 156 Conn. App. 117 (2015) (The requirement for a hearing is not a mere formality, and the unit owner hearing must occur before fines can be imposed. "Due process of law requires not only that there be due notice of the hearing but that at the hearing the parties involved have a right to produce relevant evidence, and an opportunity to know the facts on which the [Association] is asked to act, to cross-examine witnesses and to offer rebuttal evidence.").

[15] No Washington courts have addressed this specific issue, but courts in other states hold that "opportunity to be heard" only requires providing the option to request a hearing. *See, Thorndale Beach N. Condo. Ass'n v. Berar*, 2014 IL App (1st) 123587-U (2014) (the court affirmed fines levied by an Association on an owner because the Association notified the owner about the violations (and fines) and gave the owner an opportunity to be heard, but the owner did not request a hearing).

[16] *Hamline House* at 835.

[17] *S.S. v. Review Bd. of the Ind. Dep't of Workforce Dev.*, 941 N.E.2d 550 (Ind. Ct. App. 2011) (Party who missed a hearing for a dispute of unemployment benefits was not deprived due process because she had notice of when and where the hearing was to be held, and she did not have a good cause reason for missing the hearing). The Minnesota court's discussion in *Hamline House* suggests that it too would have found that an owner was not deprived of due process when he failed to appear without a good cause reason. Although the court did not reach that question because the Association had failed to inform the owner of the specific rule he had violated, and therefore had failed to provide him with an opportunity to be heard on that issue, it appears that the court would have upheld the fine if he had been informed of the specific rule he violated and failed to appear. *Id*. at 833, 835.

[18] RCW 64.34.304(k); RCW 64.38.020(11).

34
Notice: What Does "Notice" Mean?

Aside from a few specific definitions of "notice" defined by statute, "notice" typically means whatever an association's Governing Documents define it to mean. Most Governing Documents contain a specific "notice" provision, stating how notice is given, but the term "notice" typically appears throughout the Governing Documents, sometimes as a verb and sometimes as a noun.[1] Associations should strictly comply with notice provisions set forth in statutes and their own Governing Documents.

"Notice" may mean more than one thing. It may mean "what" the association is informing an owner about (i.e. a fine schedule, unpaid assessments, a violation, a budget, or a report). There may be specific guidance on what the contents must be for some communications and documents. For example, the required contents of a budget disclosure[2] are defined by statute, as are the required contents of a resale certificate.[3] Those things which are required to have "notice" are identified in the statutes or Declaration (as in "notice and opportunity to be heard," "notice of the annual assessment," and "notice of damage and destruction"). If the required content of the notice is stated in a statute or in the Declaration, that specific content must be provided.[4]

"Notice" can also mean the process of "how" and "when" an owner must be informed of something of some importance. This process is often specified in the Declaration, and sometimes in statutes. Sometimes the word "notice" is not used, but the same required process by the association would apply (i.e. must be "furnished" as with fine schedules, must be "mailed" as with the annual budget prior to a meeting).[5]

How much time an association is required to provide for notice is often confusing. Sometimes a specific time period is stated (e.g. 14 to 60 days' notice for budget ratification), but another section of the declaration or statute may add time for delivery of notice. If a specific number of days is not specified, then notice must be "reasonable.'

Beyond the definition(s) of "notice" in an Association's Governing Documents, the New Act and the HOA Act provide specific "notice" requirements for three Association duties and actions:

1) Notice before assessing fines

Before an association may levy a fine on an owner, the association must notify the owner of the alleged violations and the corresponding fines, and provide the owner with an opportunity to be heard. (See Chapter 33, "Fines and Enforcement: What Does "Opportunity to be Heard" Mean?") "Notice" under state law that authorizes fines includes an obligation that an association adopt a fine schedule and communicate (publish) that schedule to the owners.[6] However, statutes do not further define "notice."

An association will probably satisfy its "notice" requirement(s) if the association complies with the written notice requirements in its own Governing Documents, if those notice requirements are reasonable and don't conflict with the statute. This determination is fact specific.

2) Notice of budgets

Most Boards must provide a summary of a budget to all owners within thirty days after the Board adopts the budget. New Act condo associations and HOAs must also set a date for an owners' meeting to ratify the budget not less than fourteen days or more than sixty days after mailing the budget summary.[7] [8]

The manner in which the Board must notify the owners of the meeting is determined by the association's Governing Documents, but must not be less than the minimum number of days or more

than the maximum number of days required by statute.[9] Because both statutes discuss the number of days after "mailing," no additional time need be added for the notice to be deemed "delivered."

3) Notice of annual meetings and special meetings

Associations must hold a meeting at least once each year.[10] For New Act condominium associations, the Board must give owners at least ten days' notice (but not more than sixty days' advance notice) of the meeting.[11] (Budget ratification requires at least 14 days' notice.) The notice must be delivered to the owners by either:

(1) Hand-delivery to the owner's mailing address; or
(2) Prepaid first-class US mail to the owner's mailing address.[12]

For homeowner associations, the Board must give owners at least fourteen days' notice (but not more than sixty day's advance notice) of the meeting. The notice must be delivered to the owners by either:

(1) Hand-delivery to the owner's mailing address;
(2) Prepaid first-class US mail to the owner's mailing address; or
(3) Electronic transmission to an address location, or system designated in writing by the owner. [13]

The notice for any New Act condominium or HOA meeting must state the time and place of the meeting and the items on the agenda to be voted on by the members, including the general nature of any proposed amendment to the declaration or bylaws, changes in the previously approved budget that result in a change in assessment obligations, and any proposal to remove a director or officer.[14]

The degree of specificity required with respect to the agenda items stated in the notice will vary with the circumstances. In *Graham v. Rankos*, a Washington appellate court held that notice of the association's agenda was sufficient, even though it did not list removal of board members, when it stated that the association would "review and ratify" minutes from a meeting held 15 days prior to the scheduled meeting.[15] The members contesting the validity of the second meeting (former board members who had been removed at the first meeting), initiated a new vote at the second meeting, and were again voted out. They subsequently argued that the vote at the second meeting was invalid because the notice had failed to list "board member removal" as an agenda item. The court found that the notice was adequate because plaintiffs had attended the first meeting, and thus knew that board member removal would be one of the actions reviewed and ratified during the second meeting.[16]

Even if a Board complies with the association's notice requirements, as provided in its Governing Documents, failure to comply with the notice requirements provided by the statute(s) in the above three situations may result in an invalidation of the action. In *Tyra Summit Condominiums II Associations, Inc. v. Clancy*, a Colorado appellate court held that an association's notice to members was defective because it failed to comply with the Colorado Common Interest Ownership Act's requirements regarding *content* and *timeliness*. The association in that case planned to vote on proposed revisions to its Declaration and was required under state law to provide the owners with notice of "the general nature of any proposed amendment to the declaration or bylaws" at least ten days prior to the meeting.[17] The association provided owners with two notices: the first stated that proposed amendments to the declaration would be voted on at the upcoming meeting, and the second notice—sent to homeowners three days before the meeting—provided them with a copy of the amendments.[18] *Both* notices were defective. The first notice failed to state the "general nature of the proposed changes."[19] The second was only provided to owners three days before the

meeting, not ten days as the statute required.[20] Thus, the association failed to satisfy the statutory requirement.

Case law from other states demonstrates that courts will strictly construe statutory notice provisions. In *Dwork v. Executive Estates of Boynton Beach Homeowners Ass'n, Inc.*, a Florida court invalidated a lien an association recorded against a delinquent owner because the association had only provided the owner with 13 days' notice rather than the 14 days required by statute.[21] The court rejected the association's argument that it had substantially complied with the statute. The court held that the "statute specifically require[d] without exception at least fourteen days' written notice of a scheduled hearing."[22] The court also found that it was irrelevant that the owner had not been prejudiced by the association's noncompliance with the notice provision. The statute was "clear and unambiguous," and, as such, "must be strictly construed."[23]

"Notice" is intended to inform owners and provide them time to respond to or participate in association activities. Notice is also intended to inform owners about rights and obligations as they change. Notice must be reasonable and be expected to reach the owners.[24]

4) Notice of foreclosure and inapplicability of homestead exemption

In some cases, the notice associations are required to give homeowners is dictated by statutes other than the Condo Acts and HOA Act. An association that intends to rely on the statutory exemption barring an owner from invoking the homestead exemption to remain in his or her unit/lot after foreclosure of a lien for nonpayment of assessments must provide all owners with notice that nonpayment of the assessments may result in foreclosure of the association's lien and that the homestead protection will not apply.[25] "New owners" must be provided with

the notice within 30 days of the date the association learns that they have acquired title.[26]

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[1] A search of one 2011 Condominium Declaration had the word “notice” appear over 70 times.

[2] *See* RCW 64.34.308(4) (Board of directors and officers); RCW 64.38.025(4) (Board of directors — Standard of care — Restrictions — Budget — Removal from Board).

[3] *See* RCW 64.34.425 (Resale of unit).

[4] Fine schedules must contain a list of the fines that can be assessed against an owner. Budgets must contain specific information about reserves. Often Governing Documents will contain specifics about violation letters. Liens require specific information about the property and the amount owed.

[5] So, for example, if the Governing Documents provide that (1) “notice is deemed ‘delivered’ three days after the notice is sent” and (2) “notice for a meeting must be ‘delivered’ to owners at least ten days before the meeting,” then the notice must be sent (mailed) thirteen days in advance so it will be “delivered” at least ten days before the date of the meeting.

[6] RCW 64.34.304(k) (Unit owners' Association — Powers) provides:

> . . . [An Association may] **. . .** , after notice and an opportunity to be heard by the Board of directors or [a representative of 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 . . .

[7] RCW 64.34.308(3) (Board of directors and officers) provides:

> Within thirty days after adoption of any proposed budget for the condominium, the Board of directors shall provide a summary of the budget to all the unit owners and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than fourteen nor more than sixty days after mailing of the summary.

[8] RCW 64.38.025(3) (Board of directors — Standard of care — Restrictions — Budget — Removal from Board) provides:

> Within thirty days after adoption by the Board of directors of any proposed regular or special budget of the Association, the Board shall set a date for a meeting of the owners to consider ratification of the budget not less than fourteen nor more than sixty days after mailing of the summary.

[9] If a Board fails to comply with the notice requirements in the Association's Governing Documents, then the budget that was last ratified by the owners will continue to be the budget until a new budget is properly ratified by the owners. RCW 64.34.308(3); RCW 64.38.025(3).

[10] Special meetings may be called by the president, a majority of the Board, or by voting owners who have 10% of the total votes (for homeowner Associations) or by voting owners who have 20% of the total votes or any lower percentage specified in the Declaration or Bylaws (for condominium Associations). RCW 64.38.035(1); RCW 64.34.332.

[11] RCW 64.34.332 (Meetings) provides:

> . . . the secretary or other officer specified in the Bylaws shall cause notice to be hand-delivered or sent prepaid by first-class United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner.

[12] RCW 64.34.332 (Meetings).

[13] See RCW 64.38.035(2) (Association meetings — Notice — Board of directors).

[14] RCW 64.38.035(3); RCW 64.34.332.

[15] 193 Wn. App. 1051 (2016).

[16] *Id.* The court also found it significant that the two former board members contesting the validity of the notice for the second meeting were the ones who had initiated a new vote, and that the association had not intended to hold a new vote on board member removal. As the court noted, "[i]t would be disingenuous for the Grahams to complain of lack of notice of a removal vote in January when the Grahams instigated the vote after the meeting started. The Association did not anticipate or plan for a new vote." *Id.* at 1052.

[17] 16CA1381, 2017 WL 2191098, at *4 (Colo. App. May 18, 2017), *reh'g denied* (June 15, 2017).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] 219 So.3d 858 (Fla. Dist. Ct. App. 2017).

[22] *Id.* at 861.

[23] *Id.* at 860-61.

[24] RCW 64.34.090 provides that "[e]very contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." Notice that was unreasonable or not expected to reach owners would likely be a breach of the Board's obligation to perform its contract with the association in good faith.

[25] RCW 6.13.080(6).

[26] *Id.; Hadaller v. David,* 197 Wn. App. 1048 (2017).

35
Can an Association Evict a Disruptive Owner?

Absent an express provision in the Governing Documents, an association probably wouldn't be able to evict an owner or force him or her to sell the unit. No Washington statute provides for the eviction or foreclosure of a disruptive unit owner, and no Washington court has addressed the question of whether an association would be permitted to evict or foreclose on an owner who is paying his or her assessments. An association might be able to evict or foreclose on a disruptive owner if the Governing Documents provide for eviction or foreclosure as a remedy available to the association when the owner repeatedly violates any covenants or restrictions contained therein.[1]

There is nothing in the New Act, Old Act, or HOA Act expressly authorizing an association to evict or foreclose on an owner as a remedy for disruptive behavior or violations of the Governing Documents. Similarly, nothing prohibits an association from doing so either, but this is an untested issue of law. Essentially, a court would have to find that eviction was an equitable remedy given the facts and circumstances of the specific case.

Illinois appears to be the only state expressly providing for eviction as a remedy available to an association against an owner for noncompliance with the association rules and regulations.[2] No Washington court has addressed the question of whether an association could evict or foreclose on an owner for disruptive behavior or other violations of the Governing Documents. The lack of statutory or judicial authority would not bar an association from seeking eviction or forced sale as a remedy against a disruptive owner if fines and other enforcement actions are ineffective. Because forcing an owner to relinquish his or her property is a drastic measure, it would likely be disfavored by most courts, and

thus a remedy an association should be wary of pursuing before it has exhausted all other remedies (e.g. an order enjoining the owner's behavior, fines for violating the rules and regulations, etc.). If you are going to court to enforce the Governing Documents, it may not hurt to ask for eviction as a remedy.

Courts would probably be more likely to issue an order evicting or foreclosing on a unit owner if an association included in its Declaration a provision authorizing the Board to pursue this remedy in the event of noncompliance with Governing Documents.[3] If the Declaration included a provision like this, an owner would have had notice prior to purchasing the unit that failure to comply with the terms of the Governing Documents could result in eviction or foreclosure. As such, the owner's decision to continue engaging in disruptive behavior in violation of the rules would be made with full knowledge that he or she could be forced to leave or sell the unit. As such, courts would be more likely to authorize the eviction of an owner or forced sale of a unit than they would be if the Board pursued this remedy against owners who had no notice that they might be evicted.

Rather than seeking eviction or forced sale, a Board dealing with a disruptive owner who repeatedly fails to comply with the community rules could instead impose fines in accordance with the Declaration. If the owner refuses to pay the fines, the Board will have a lien on the unit that it can foreclose upon, which could eventually lead to a sale and the owner's removal, but it could take a couple of years. In the rare cases in which an owner refuses to stop engaging in disruptive behavior but pays the fines imposed by the Board, thereby preventing foreclosure, an association could attempt to seek an order for eviction. It could also seek an injunction prohibiting the owner from engaging in specific behaviors, and the owner's failure to comply with the injunction would constitute contempt potentially punishable by imprisonment.[4] We believe the court would have the power to evict an owner on equitable grounds; the question is whether the behavior warrants eviction *in the eyes of the court*. But we also

note that one Florida court concluded the only remedies available for continued violation were fines and incarceration for violation of a court order.[5]

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[1] *See, e.g. Pheasant Hills Eldridge Condominium Owners and Facilities Ass'n. v. Ray*, 886 N.W.2d 616 (Iowa Ct. App. 2016). *Pheasant Hills* is an Iowa case, but Washington courts might enforce a similar provision in a Declaration as long as it was sufficiently clear to put the owner on notice that the association would seek a forced sale for repeated violations of the covenants and restrictions, the association had pursued less drastic remedies prior to seeking the forced sale, and the owner had been provided with notice and an opportunity to be heard regarding the allegations that were the basis for the forced sale.

[2] 735 Ill. Comp. Stat. Ann. 5/9-102, in relevant part:

> "The person entitled to the possession of lands or tenements may be restored thereto under any of the following circumstances…When any property is subject to the provisions of the Condominium Property Act,2 the owner of a unit fails or refuses to pay when due his or her proportionate share of the common expenses of such property, or of any other expenses lawfully agreed upon or any unpaid fine, the Board of Managers or its agents have served the demand set forth in Section 9-104.1 of this Article in the manner provided for in that Section and the unit owner has failed to pay the amount claimed within the time prescribed in the demand; or if the lessor-owner of a unit fails to comply with the leasing requirements prescribed by subsection (n) of Section 18 of the Condominium Property Act or by the Declaration, by-laws, and rules and regulations of the condominium, or if a lessee of an owner is in breach of any covenants, rules, regulations, or by-laws of the condominium, and the Board of Managers or its agents have served the demand set forth in Section 9-104.2 of this Article in the manner provided in that Section.

[3] *See* n. 1.

[4] *See, e.g., Kittel-Glass v. Oceans Four Condo. Ass'n.*, 648 So. 2d 827 (Fla. Dist. Ct. App. 1995) (holding that the remedies available to the trial court for an owner's failure to comply with an injunction were limited to "fines and incarceration," not a "judicially forced sale or lease of [plaintiff's] unit."

[5] *Id.*

36
Disruptive Owners: Can the Board Expel a Disruptive Owner from an Open Meeting?

Under the HOA Act[1], association Board meetings must be open to all members.[2] Similarly, although the Old Act[3] and New Act[4] are silent on the issue, the Governing Documents of many condo associations contain provisions requiring Board meetings to be open to all members. Despite these requirements, however, Boards do not have to tolerate an unruly member's disruptive conduct at a meeting.[5]

No Washington court has ruled on whether a disruptive association member can be expelled from an association meeting, but the Washington Supreme Court has given some guidance in a case arising under Washington's Open Public Meetings Act (OPMA) (Ch. 42.30 RCW), which has an open meetings requirement similar to that in the HOA Act and many condo association governing documents.[6]

The case, *In re Recall of Kast*, arose from a public bidding process on a Pierce County fire system project.[7] A citizen, Luke Osterhouse, attended an open public meeting on the project and the bidding process. At some point during the meeting, Osterhouse interrupted proceedings to ask "whether the fire system would protect the fire district from the real thieves who had already stolen documents from the fire district." Kast, the fire commissioner running the meeting, ordered that Osterhouse be removed from the meeting.

Osterhouse sued the commissioner, arguing, among other things, a violation of the OPMA, but the Court rejected Osterhouse's claim that his removal violated the OPMA, noting that the members of the convening body had discretion to order

Osterhouse's removal because he had been disruptive in the meeting. The court explained further:

> It is also significant that Osterhouse had interrupted the fire district Board's discussion of the security system; his comment was out of order and should have been held until after their discussion. The Open Public Meetings Act does not purport to grant citizens the right to interrupt meetings as they see fit; rather, citizens are granted a privilege to be present during public meetings so that they can remain informed of an agency's actions.

In addition to expulsion from meetings, Board members have several options for dealing with an unruly member[8] who is disruptive, shouts, uses excessive profanity, or otherwise interferes with the conduct of the meeting:

1) First and foremost, the Board should reassess the manner in which it runs meetings. Sometimes the best fix is to reform the way meetings are conducted to better control owner conduct.[9]
2) The Board may impose fines after appropriate due process,[10] provided it has adopted rules of conduct for meetings and informed members of the rules.
3) The Board may use the "Rules of Order"[11] to its own advantage. For example, rather than eject someone from a particularly contentious meeting, the Board could call for a vote to close discussion or to move the comment portion of the meeting to the very beginning or end of the meeting.
4) The Board may choose to bring in a visible security presence.[12]
5) If the meeting is not one in which a vote of the membership or opportunity to comment is required, it could be broadcast to the membership in lieu of allowing attendance in person.
6) The meeting can be moved to an individual member's home. If the homeowner asks the disruptive member to

leave, failing to do so would be trespassing. The homeowner could seek police assistance and, in extreme cases, a restraining order against the disruptive member.

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[1] RCW 64.38 (Homeowners' Association Act).

[2] RCW 64.38.035(4).

[3] RCW 64.32 (Horizontal Property Regimes Act).

[4] RCW 64.34 (Condominium Act).

[5] Boards are also permitted to meet in closed sessions and exclude adversarial members regardless of whether or not they are behaving in a disruptive manner. In *Hartstene Pointe Maintenance Ass'n v. Diehl*, 188. Wn. App. 1028 (2015), the court held that RCW 64.38.035 allowed the board to meet in a "closed executive session" and exclude a member who was "likely to bring litigation" against the association while they [sic] consulted with legal counsel regarding the subject of the potential litigation." Although *Hartstene Pointe* involved an HOA rather than a condo association, it is likely that Washington courts would apply the same reasoning to condo associations. For a further discussion of the exclusion of adversarial board members, see Chapter 16, "Board of Directors: Can the Board Exclude an Adversarial Board Member from Board Meetings?"

[6] The OPMA provides: "All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter." RCW 42.30.030.

[7] 144 Wn.2d 807, 816-19 (2001).

[8] Washington law does not require that non-members be allowed to attend meetings. Thus, disruptive non-members may be excluded from meetings altogether. RCW 64.34.332 (Meetings); RCW 64.38.035(4) (Association meetings-Notice-Board of directors)

Disruptive Board members may be censured as set forth in the association's Governing Documents and, in severe cases, recalled by a vote of the members.

[9] For example, the Board could require owners wishing to speak to sign in, be recognized in order, and be limited to a specific time, i.e. two or three minutes. The Board could also limit owner comments to a short

period of time, such as 15 minutes, at the very beginning or end of the meeting.

[10] See Chapter 32, "Fines and Enforcement: What Procedures Must the Association Follow When Issuing Sanctions to Enforce Covenants?"

[11] Association meetings are generally run according to parliamentary procedures, such as Robert's Rules of Order, a discussion of which may be found at: http://www.condolawgroup.com/2011/02/08/roberts-rules-of-order/. The purpose of using Robert's Rules of Order or some other rules of parliamentary procedure is to allow a group to make decisions, allow all members of the group an opportunity to speak, and to do so in an orderly and controlled fashion.

[12] We have had clients hire off-duty police officers to attend meetings to provide a "calming presence" and resolve any hostility that might arise.

37
Withholding Assessments: Can Owners Withhold Assessments If They Do Not Use Amenities or Have Disputes with the Association?

An owner may not withhold assessments for his or her share of common expenses.

The HOA Act and the Condo Acts allow associations to impose assessments on owners for their share of common expenses even if an owner does not use the association's amenities or has a dispute with the association.[1] [2] The Acts also grant associations the power to impose late fees for overdue assessments.[3] [4] [5] The HOA Act and Condo Acts allow associations to alter these default rules in their Governing Documents. But an owner has no general right to withhold assessment payments without a provision for withholding in the Governing Documents.[6] [7]

Although an owner cannot withhold assessment payments, they are entitled, on request, to a hearing to dispute their assessments.[8] If the hearing provided by the Board is not meaningful (or if no hearing is provided), then the owner's remedy is to sue the Board for breach of its duty of care.

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[1] Old Act: RCW 64.32.080 (Common profits and expenses) provides:

> . . . common expenses shall be charged to the [unit] owners according to the percentage of the undivided interest in the common areas and facilities.

New Act: RCW 64.34.304(1) provides:

> (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…

[2] RCW 64.38.020 (Association powers) 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;

[3] RCW 64.32.200(1) (Assessments for common expenses…) provides, in relevant part:

> The Declaration may provide for the collection of all sums assessed by the Association of [unit] owners for the share of the common expenses chargeable to any [unit] and the collection may be enforced in any manner provided in the Declaration . . .

[4] RCW 64.34.304 (Unit owners' Association — Powers) provides, in relevant part:

> (1) Except as provided in subsection (2) of this section, and subject to the provisions of the Declaration, the Association may:
>
> (k) Impose and collect charges for late payment of assessments pursuant to RCW 64.34.364(13) . . .

[5] RCW 64.38.020 (Association powers) provides, in relevant part:

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

> (11) Impose and collect charges for late payments of assessments.

[6] *See, Panther Lake Ass'n v. Juergensen*, 76 Wn. App. 586 (1995) (Defects in an association's capital improvements do not provide members with a defense to withholding payment of assessments).

[7] *See, Farm Homeowners Ass'n v. Hanson*, 97 Wn. App. 1081 (1999) (Court held the owner could not lawfully withhold assessments from the association as self-help to offset against alleged money the association owed the owner.)

[8] *See* RCW 64.38.020 (11) (Association powers); RCW 64.34.304(k) (Unit owners' Association — Powers); RCW 64.34.010(1) (Applicability) RCW 64.34.304(k) is applicable to Old Act condo associations.

38
Inspection 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. The association's Governing Documents can (but usually do not) expressly provide the required notice for gaining access to an owner's property. If the Governing Documents are silent as to what notice is required to gain access to a property to inspect or repair, 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.

By statute, associations are charged with maintaining and repairing common areas and limited common areas.[1] [2] Most Declarations provide for the association to make repairs to an individual home or Lot if the owner fails to do so (these provisions will contain a right to gain entry to repair, but usually are silent regarding inspection). Owners and occupying tenants must allow an association and its agents to have access to their homes in order to make repairs.

An association's access to a unit or lot must be reasonable. The New Act and Old Act do not clarify what "reasonable" means.[3] 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[4] 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.

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.[5] 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.[6] [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 (or dates) for when the entry will occur.[9]

There are two exceptions where a landlord does not have to give reasonable notice (meaning at least two days' notice) before entering a tenant-occupied property: if it is an emergency,[10] 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.[11] 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 second exception probably has no application for community associations.

We recommend personal contact to ask for permission to enter if you can (email or phone). If that is not effective, send notice of any required entry by mail to the owner and occupants, and also post the notice on the door of the property at least two days in advance. 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 fines or a court order may be necessary.

[1] Old Act: RCW 64.32.050(6) (Common areas and facilities) provides:

> The Association of [unit] owners shall have the irrevocable right, to be exercised by the manager or board of directors, to have access to each [unit] from time to time during reasonable hours as may be necessary for the maintenance, repair, or replacement of any of the common areas and facilities therein or accessible therefrom, or for making emergency repairs therein necessary to prevent damage to the common areas and facilities or to another [unit] or [units].

New Act: RCW 64.34.328(1) (Upkeep of condominium) provides in relevant part:

> Except to the extent provided by the Declaration, subsection (2) of this section, or RCW 64.34.352(7), the association is responsible for maintenance, repair, and replacement of the common elements, including the limited common elements, and each unit owner is responsible for maintenance, repair, and replacement of the owner's unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through the owner's unit and limited common elements reasonably necessary for those purposes.

[2] HOAs: RCW 64.38.020 ("Unless otherwise provided in the Governing Documents, an association may…(6) Regulate the use, maintenance, repair, replacement, and modification of common areas…")

[3] The Old Act does go further than the New Act in that it specifies that "reasonable" entails "reasonable hours" of the day.

[4] RCW 59.18 (Residential Landlord-Tenant Act).

[5] RCW 59.18.150(1) (Landlord's right of entry — Purposes — Searches by fire officials…) provides, in relevant part:

> The tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to . . . make necessary or agreed repairs, alterations, or improvements . . .

[6] RCW 59.18.150(6)

[7] An exception to the two-day notice requirement exists where the landlord is showing the unit to prospective buyers or renters. RCW 59.19.150(6) states:

> "The tenant shall not unreasonably withhold consent to the landlord to enter the dwelling unit at a specified time where the landlord has given at least one day's notice of intent to enter to exhibit the dwelling unit to prospective or actual purchasers or tenants."

This provision would not apply to associations, however, since the "landlord" under the Act would be the unit owner and not the association.

8 *Id.*

[9] RCW 59.18.150(6) (Landlord's right of entry…) provides:

> 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] RCW 59.18.150(5) (Landlord's right of entry …) provides: "The landlord may enter the dwelling unit without consent of the tenant in case of emergency or abandonment."

[11] RCW 59.18.150(4)(a).

39
Pets: How Does the Association Remove an Offensive or Neglected Pet from a Home?

One option to remove an offensive or neglected pet from an owner's home is to contact the local animal control agency to have them remove the pet. If the situation warrants, animal control has the authority to remove a pet,[1] but animal control may not be willing to remove a pet that is merely annoying its neighbors.

A second option is for the association to ask the owner to voluntarily remove the offensive or neglected pet.

A third option is for the association to require removal of the offensive or neglected pet. However, before any action is taken by the association, the owner should be given notice and an opportunity to be heard.

The New Act, Old Act and HOA Act do not specifically address removal of pets. The Acts allow associations to make rules in their Governing Documents.[2] [3] [4] Associations may make rules that specifically address removal of offensive or neglected pets from owners' homes. The Acts also grant associations power to take any action reasonably necessary for the governance of the association.[5] [6] [7]

If an association's Governing Documents allow removal of an offensive or neglected pet, then the action should be valid. Usually associations' Governing Documents are silent as to whether the association can enter an owner's home to remove an offensive or neglected pet. There is no Washington case law that addresses this issue. A Washington court may decide removal of an offensive or neglected pet from an owner's home is a reasonable action, but the determination will be fact specific.

Even if removing an offensive or neglected pet from an owner's home is an action that the association can validly take, the association should not remove the pet without first providing the owner with notice and an opportunity to be heard. At this point the association can ask the owner to remove the pet, but that is different from forcibly removing the pet.

Requiring an owner to voluntarily remove a pet is a deprivation of the owner's property rights because pets are property. Whenever an owner is deprived of a property right, the association must satisfy due process.[8] The association must provide the owner with the option to pursue some kind of hearing to contest the association's decision before the action can be (validly) taken. The owner must be informed of the evidence against him and be given an opportunity to present evidence and testimony in his defense (i.e., evidence showing the pet is not offensive or neglected).

Associations that wish to remove a pet that has been deemed offensive or neglected should first attempt to ask the owner to voluntarily remove the pet. It can then require that the pet be removed. If the owner refuses, the association should levy fines (after notice and an opportunity to be heard) for failure to remove the pet. If the owner refuses to remove the pet, and fines do not elicit the desired result (removal of the pet), the association can take the owner to court. Entering the owner's home to remove a pet is not recommended.

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[1] The pet will likely have to be dangerous or neglected, as defined by local ordinances and animal control regulations. In some situations animal control may only have authority to remove a neglected pet.

[2] RCW 64.34.304(1) (Unit owners' Association — Powers) provides:

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

(a) Adopt and amend Bylaws, rules, and regulations;

[3] RCW 64.38.020 (Association powers) provides:

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

> (1) Adopt and amend Bylaws, rules, and regulations;

[4] RCW 64.34.304(1)(a) applies to Old Act condo associations. *See* RCW 64.34.010(1) (Applicability).

[5] RCW 64.34.304(1) (Unit owners' Association — Powers) provides:

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

> (t) Exercise any other powers necessary and proper for the governance and operation of the Association.

[6] RCW 64.38.020 (Association powers) provides:

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

> (14) Exercise any other powers necessary and proper for the governance and operation of the Association.

[7] RCW 64.34.304(1)(t) applies to Old Act condo associations. *See* RCW 64.34.010(1).

[8] See Chapter 32, “Fines and Enforcement: What Procedures Must the Association Follow When Issuing Sanctions to Enforce Covenants?”

40
Disabled Parking: Must an Association Provide Parking for Disabled Residents?

It will depend on the specific facts of the request and your declaration. Under the federal Fair Housing Act (FHA)[1] and Washington state law,[2] residents with disabilities may request reasonable accommodations that enable them to use and enjoy their units in the same way that non-disabled residents would. An association must make a reasonable accommodation for a disabled resident. Failing to do so is unlawful discrimination, but an association need not make accommodations that are unreasonable.

To establish a claim of unlawful discrimination under the FHA, a resident must show[3] that:

(A) The resident is handicapped;[4]
(B) The Association knew, or should have known, of the handicap;
(C) The resident requested a particular accommodation that is reasonable and necessary to allow the resident an equal opportunity to use and enjoy his unit; and
(D) The association refused to make the accommodation.

Reasonableness

Whether a request is reasonable is determined on a case by case basis. Cost is a factor. If the requesting owner is willing to pay any costs involved, that factor is eliminated from the analysis. If a cost is small, like the cost of putting up a "Handicapped Parking" sign, the association may have to absorb it. However, asking an association to absorb a significant cost is unreasonable.[5]
An accommodation may also be unreasonable if it would provide benefits to a disabled owner that other owners do not get. An example is an owner asking for extra parking spaces to which

other residents are not entitled.[6] Whether an Association must grant a resident exclusive use of a particular parking space depends upon what types of parking spaces exist within the community.

(1) Unassigned parking spaces in common areas

An association probably must accommodate disabled residents by allowing the residents to use particular spots that are suited to their needs.[7] Such a spot could be the spot closest to a resident's unit, or a spot that is large enough to allow parking a special van equipped for wheelchairs.

(2) Assigned parking spaces in common areas

An association probably must also attempt to accommodate a disabled resident even if the common area parking spaces are assigned to particular units (assuming the board has discretion in the assignment of parking spaces rather than them being assigned in the Declaration). One possible way to accomplish this is to ask whether another resident is willing to trade parking space assignments with the disabled resident.

(3) Parking spaces in limited common areas

An association has no obligation to and cannot take away a parking space that is a limited common element reserved to a particular unit by the Declaration. An association may still attempt to provide accommodation by asking a resident to trade parking spaces with a disabled resident.

If the association has no common area spaces, it would likely have no obligation to create a disabled parking space for a resident. It would also be unreasonable to require other owners to give up their right to parking spaces provided for them in the Governing Documents.

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[1] 42 USC § 3601 *et seq*. Note that the Americans with Disabilities Act (ADA) does not apply to condominiums, because condominiums are not places of "public accommodation" as defined by the ADA. 42 USC § 12181 (Definitions). Some courts will discuss the ADA when interpreting

the FHA with respect to disability accommodations because the two Acts contain similar provisions, but this does not affect the ADA's applicability to condominiums. *See,* for example, *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565 (2d Cir. Conn. 2003) (court held the city failed to grant the plaintiff's reasonable accommodation).

42 USC § 3604(f) (Discrimination in the sale or rental of housing and other prohibited practices) provides, in relevant part, that it is unlawful:

> (1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of –
>
> (A) that buyer or renter;
> (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
> (C) any person associated with that buyer or renter.
>
> (2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of –
>
> (A) that person; or
> (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
> (C) any person associated with that person.
>
> (3) For purposes of this subsection, discrimination includes—
>
> (A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

[2] RCW 49.60 *et seq*.

[3] *Astralis Condo. Ass'n v. Sec'y, United States Dep't of Hous. & Urban Dev.*, 620 F.3d 62 (1st Cir. Puerto Rico 2010) (court held the complainants were handicapped, that the association knew of their

handicaps, that the complainants requested a reasonable accommodation, and that the association refused to honor their request).

[4] "Handicap" is defined in 42 USC § 3602(h) as:

> "Handicap" means, with respect to a person—
>
> > (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,
> > but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

[5] Courts are unlikely to require an association to subsidize the cost of parking for a disabled owner who is unwilling to pay. In *Philippeaux v. Apartment Inv. And Management Co.*, 598 Fed.Appx. 640 (2015), an owner sued an association for failing to provide him with a parking spot on the ground level of a parking garage that was leased to a third-party vendor and that residents were permitted to use only if they were willing to pay an hourly valet rate. The resident was unwilling to pay the hourly rate, and the court found that his request for the association to subsidize the cost or break its lease agreement with the third-party valet company was unreasonable. "…requiring MCZ [the complex] to either break its lease agreement with the third-party valet vendor, or pay the hourly valet parking fees charged by the vendor so that Mr. Philippeaux could park on the ground level, would place an undue financial burden upon MCZ. And…an accommodation is not reasonable if it imposes an undue financial burden on the landlord." *Id.* at 644. Although *Philippeaux* involved an apartment complex rather than a condo, it is unlikely that a court would apply the law differently to a condo under the same facts.

[6] Associations only have an obligation to provide reasonable accommodations that ensure the resident has an equal opportunity to enjoy his or her unit. An association is permitted to deny requests for accommodations that would give the resident benefits above and beyond those enjoyed by other owners. In *Temple v. Hudson View Owners Corp.*, 222 F. Supp. 3d 318 (S.D.N.Y. 2016), the court held that the plaintiffs' request to keep *two* parking spaces was not reasonable. In *Temple*, the plaintiffs, a married couple, had two parking spaces and were notified by the association that they would be required to give one of them up to another resident. Plaintiffs claimed that both parking spaces were necessary to accommodate the wife's disability, but failed to provide any evidence or explain why one parking space wasn't sufficient. The court found that their complaint was "no different than that

of any other couple with only one on-site parking space: that it would be an inconvenience for two independent people to have to share a car." *Temple* at 324. As the court noted, federal disability statutes "are not intended to elevate Plaintiffs above their fellow residents. The law requires only equality, not that a 'superior *advantage'* be given." *Id.* at 325 (qtng *Bryant Woods Inn, Inc. v. Howard Cty.,* 124 F.3d 597, 605 (4th Cir. 1997). See also *Philippeaux*, supra n. 3 at 644, holding that "providing [a resident] a ground-level parking space at no cost or at a reduced rate would place him in a better position than all other residents, disabled and non-disabled alike."

[7] No Washington court has ruled on this issue, but courts in other jurisdictions have. *See, Astralis Condo. Ass'n,* 620 F.3d 62, two residents of a unit in a condominium had various ailments causing them mobility problems (they both had government-issued handicapped parking placards). The residents owned the unit and two parking spaces located 230 feet from their unit. Other owners within the condominium owned parking spaces, but there were also many unallocated parking spaces owned by the Association, including ten designated handicapped spaces. Two of these unallocated handicapped spaces were 45 feet from the residents' unit, and the residents asked the Association to assign those two spaces to their exclusive use. The Board denied their request. An administrative law judge determined that the Association had violated the FHA, directed the Board to assign the two handicapped spaces to the residents, and awarded monetary damages; the First Circuit Court of Appeals affirmed.

For other examples, *see, Solodar v. Old Port Cove Lake Point Tower Condo. Ass'n, Inc.*, 12-80040-CIV, 2012 WL 1570063, at *1 (S.D. Fla. May 2, 2012) (Denying summary judgment to condominium Board on claim of failure to accommodate disability by reassigning parking spaces); *Wilstein v. San Tropai Condo Ass'n*., 189 F.R.D. 371 (N.D. Ill. 1999) (Affirming grant of summary judgment to board in a parking space accommodation case).

41
Association Records: What Is Considered an Association Record?

Washington law requires condo associations to keep records related to the operation, governance, and finances of the condominium, the units, and the association itself.[1] HOAs are also required to keep similar records with respect to their communities.[2] However, the term "records" is not defined in any of the statutes, so an association will need to determine, first, whether a particular document qualifies as a "record" under the relevant statute. If it is a "record," it is a separate question whether it is a record that must be made available to owners. (See Chapter 42, "Association Records: Can an Association Prohibit Members from Inspecting Association Records?")

Financial records

The New Act requires associations to "keep financial records sufficiently detailed" to enable them to prepare a resale certificate containing, at a minimum, the specific items enumerated in the statute.[3] The reference to the resale certificate indicates that any information an association would be required to maintain for purposes of preparing the certificate would qualify as a "financial record" under the statute.

The information required for the resale certificate constitutes only a subset of the "financial records" an association will maintain and retain. Other examples of "financial records" cited in the New Act, Old Act, and HOA Act include checks, bank records, invoices, and receipts.[4] However, all three statutes make it clear that these examples are not intended to be an exhaustive list of "financial records."

Given that there is no precise definition of "financial record" in any of the 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"?

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 have held that records on wages paid to association employees, management contracts, and contracts for services provided to maintain facilities qualify as "financial and other records." In *Grillo*, the Virginia Supreme Court held that specific salary information of the association's ten highest paid employees constituted a "book or record" under the Virginia Condominium Act. The court specifically rejected the association's argument that it was only general information, such as the salary ranges of the employees, that qualified as "records." Specific salaries, the court found, were "detailed records" related to the "operation and administration of the condominium."[6]

Management contracts and contracts for services, such as housekeeping records, have also been construed as "records." A Colorado court held that housekeeping records qualify as "other records under the Condominium Act."[7] Similarly, a Pennsylvania 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, car registrations, and full names of and contact information for owners. (See Chapter 42, "Association Records: Can an Association Prohibit a Member from Inspecting Association Records?")

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 either 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. 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.[11]

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.[12]

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.”[13]

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."[14] Thus, associations should take care to ensure that records prepared for them by other entities are handled appropriately.

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[1] Under Washington law, a condo association must "keep financial records sufficiently detailed to enable the association to comply with RCW 64.34.425 [the statute governing resale certificates]. All financial and other records of the association, including but not limited to checks, bank records, and invoices, are the property of the association…" See RCW 64.34.372. This provision of the New Act applies to Old Act condos as well.

The Old Act imposes a similar requirement. RCW 64.32.170 requires that "the manager or board of directors…shall keep complete and accurate books and records of the receipts and expenditures affecting the common areas and facilities, specifying and itemizing the maintenance and repair expenses of the common areas and facilities and any other expenses incurred."

[2] The HOA Act says "[t]he association or its managing agent shall keep financial and other records sufficiently detailed to enable the association to fully declare to each owner the true statement of its financial status." RCW 64.38.045

[3] RCW 64.34.425 requires unit owners who do not qualify for one of the statutory exemptions to furnish to a purchaser a resale certificate, "signed by an officer or authorized agent of the association and based on the books and records of the association and the actual knowledge of the person signing the certificate," that must, at a minimum, contain 19 different statements or reports.

[4] RCW 64.34.372, RCW 64.32.170

[5] In Virginia, associations and HOAs cannot define "records" in their Governing Documents in a way that is narrower than the statutory definition as a means of avoiding the requirement that they make records available to owners. *Grillo v. Montebello Condominium Unit Owners*

Ass'n., 243 Va. 475, 478, 416 S.E.2d 444 (1992). Thus, whether a document constitutes a "record" is based on the relevant state statute and case law, not on an association's Governing Documents. *Id.* ("It is without question that an administrative resolution adopted by a condominium owners' association cannot defeat a statutory right created by the General Assembly.") However, nothing would bar an association or HOA from including in its Governing Documents a broader definition of "record" than the one provided in the relevant statutes.

[6] *Id.* at 478.

[7] In *Glenwright v. St. James Place Condominium Ass'n*., 197 P.3d 264 (2008), the court noted that the housekeeping services at issue were funded with money from the assessments paid by unit owners, and thus that the records of those services were related to the Association's budget and financial management. It is unclear whether the court would have reached a different conclusion if the owners did not contribute in any way to the cost of the housekeeping services. However, assuming that the request was not made for an improper purpose (i.e. that the owner had a legitimate reason, as a unit owner, to examine the records), the outcome likely would have been the same.

[8] *Rosianski v. Four Seasons at Farmington Condominium Ass'n.*, 2014-C-745, Pa. Dist. & Cnty. Dec. LEXIS 379 (2015)

[9] The question before the court was not whether the email correspondence between board members constituted a "record" at all, but rather whether the association was permitted to withhold the correspondence. We believe the correspondence would not have been subject to disclosure to the owner if it were not already deemed to be a "record of the association." *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] RCW 64.38.045(2), the HOA Act, prohibits associations from releasing unlisted telephone numbers of owners. Email addresses would likely be treated as unlisted phone numbers given that they are not published in anything like a phone book. See Chapter 43, "Is an Owner Entitled to Phone Numbers and Email Addresses of Community Members?" for a more in-depth discussion.

[12] 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.

[13] *Glenwright*, 197 P.3d 264, 267-68 (2008)

[14] Courts will look to agency law, not the Condo Acts or HOA Act, to determine when an individual or entity is acting as an "agent" of an association.

42
Association Records: Can an Association Prohibit a Member from Inspecting Association Records?

Associations cannot prohibit members from inspecting most financial and other records related to management, operation, and financial health of the property and the association itself.[1] Associations can prohibit members from accessing records the owner has requested for an improper purpose.[2] Additionally, if an association or HOA believes it has legitimate reasons for withholding records based on the specific circumstances surrounding the owner's request, it can seek a protective order from a court.[3] Finally, associations can adopt procedures members are required to follow to request records, require members to pay for copies of records, and impose other reasonable limits related to the time and place the records are inspected.[4]

Records requests made for an improper purpose

An owner's right to inspect association records derives from his or her status as a member who owns property in the community. Thus, an owner does not have a right to inspect records for *any* purpose he or she may have, only for any "proper purpose."[5] A proper purpose would be one "reasonably related to [the owner's] membership interests."[6]

It is important to note, however, that an owner requesting to inspect records does not need to prove that his or her purpose is proper, or even say what the purpose is.[7] In other words, there is a presumption that an owner requesting access to association records is doing so for a proper purpose, and the burden is on the association to show otherwise. An association may require an owner to fill out a form stating the records he or she wants to inspect and why, but the association may not require a detailed

explanation or proof of the purpose the owner states. For example, an owner could simply state that he or she wanted to inspect the records to gain a better understanding of the association's expenses, and this would likely be sufficient.

If an association believes that the owner's purpose is improper, it must provide the court with evidence establishing the lack of propriety.[8] 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.[9] (See Chapter 41, "Association Records: What Is Considered an Association Record?") Conversations do not become records simply because they are memorialized in writing. Emails may contain information that itself constitutes a record (e.g. invoices contained in the body of an email), but in these cases the owner could request "the July housekeeping invoice" and not "all emails between board members in July." As such, the association could simply provide the owner with access to the specific email containing the invoice. Associations should keep in mind that emails and transcripts of oral communications could still be disclosed to owners during the discovery phase of litigation. The fact that they are not "records"

under the Condo Acts or HOA Act only means that associations have no statutory duty to make them available to owners, not that they are privileged and exempt from disclosure under all circumstances.

Limiting availability of records

Associations are required to make records "reasonably available" to owners, not to make them immediately available whenever an owner requests them, nor provide electronic copies via email (though this may in some cases be a better option than having the owner in your home or office).[10] Thus, associations may adopt certain policies and procedures regarding an owner's inspection of records, provided that the policies and procedures are reasonable. 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.[11]

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. (See Chapter 43, "Association Records: Is an Owner Entitled to Phone Numbers and Email Addresses of Community Members?" for a discussion of unpublished phone numbers and email addresses of owners.)

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 him or her be withheld from *all* owners.[12]

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.[13] 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.[14] 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.[15] There is no case law addressing what constitutes a reasonable cost, but courts would likely find it reasonable for an association to charge an owner for the cost of photocopies at the rate charged to the association, and to pay for a clerical employee to gather documents for review.

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[1] Under the New Act, "All financial and other records of the association…are the property of the association, but shall be made reasonably available for

examination and copying by the manager of the association, any unit owner, or the owner's authorized agents." RCW 64.34.372

This New Act provision is applicable to Old Act condos. RCW 64.34.010.

The HOA Act states that "all records of the association, including the names and addresses of owners and other occupants of the lots, shall be available for examination by all owners, holders of mortgages on the lots, and their respective authorized agents on reasonable advance notice during normal working hours at the offices of the association or its managing agent." RCW 64.38.045

[2] Neither the Condo Acts nor the HOA Act state that the owner must have a "proper purpose" for inspecting the records. However, both RCW 24.03.135 and RCW 24.06.160, under which condo associations and HOAs are incorporated, qualify the owner's right to inspect records:

> "Any such member must have a purpose for inspection reasonably related to membership interests." RCW 24.03.135
>
> "All books and records of a corporation may be inspected by any member or shareholder, or his or her agent or attorney, for any proper purpose at any reasonable time." RCW 24.06.160

[3] Alternatively, an association could deny the owner's request and move for a protective order if the owner sues the Association.

[4] The HOA Act permits 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).

The Condo Acts make no reference to the cost of copies or other costs associated with records, but an association incorporated under RCW 24.03 could require owners to cover the costs of inspecting and copying all records other than the articles and Bylaws, which must be provided to owners free of charge. "Cost of inspecting or copying shall be borne by such member except for costs for copies of articles or Bylaws." RCW 24.03.135(5)

RCW 24.06.160, the provision of the Nonprofit Miscellaneous and Mutual Corporations Act dealing with records, is silent on the cost of copying records, but given that RCW 24.03 and the HOA permit Associations to charge owners for copies of records other than articles and Bylaws, there is no reason to think a court would not permit an Association incorporated under RCW 24.06 to do the same thing

[5] RCW 24.06.160

[6] RCW 24.03.135

[7] No Washington appellate court has addressed this question, but the Condo Acts and HOA Act are both silent with respect to the "proper purpose" requirement, and the nonprofit corporation statutes include no provisions imposing a requirement that members state, let alone prove, what their purpose is in inspecting records.

[8] 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.

[9] 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.

[10] 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.

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.

[11] 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.

[12] 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.

[13] 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.

[14] 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.

[15] *See* n. 5.

43
Association Records: Is an Owner Entitled to Phone Numbers and Email Addresses of Community Members?

Owners are not entitled to association records disclosing the unpublished phone numbers and email addresses of other members of the community. Associations should not disclose this information to owners unless a member has consented to the disclosure. If an owner seeks to compel disclosure of unpublished phone numbers and email addresses of other community members, an association could contest the motion on the grounds that the owner is requesting these records for an improper purpose or that the risk to members justifies withholding the information.

The condominium statutes neither expressly permit nor prohibit an association from releasing the unpublished phone numbers and email addresses of other members in the community, and no Washington court has addressed this issue. The HOA Act exempts unpublished phone numbers from disclosure.[1] However, it is unlikely that the legislature intended statutory provisions regarding an association's disclosure of financial records to be construed to require the release of private information such as unpublished phone numbers and email addresses. Washington law imposes extensive requirements on businesses and other entities regarding the retention, disclosure, and disposal of private information, and entities that fail to comply with these requirements may face severe penalties.[2] This reflects a strong public policy in favor of safeguarding the private information of Washington residents.

Other states have codified the protection of private information retained by associations into their Condominium Acts. The Florida Condominium Act expressly states that personally identifying

information of any person, including email addresses, is not available to unit owners.[3]

The statute does permit an association to publish and distribute a directory listing the name, address, and phone numbers of each owner, unless an owner has requested that his or her phone number be excluded.[4] An association in Florida would likely be required to notify owners that it intended to publish a directory, prior to doing so.[5] An owner is not *entitled* to this information *unless* the association actually publishes a directory.

Even in the absence of a statute exempting unpublished phone numbers and email addresses from disclosure, courts are likely to hold that this information is not something an association member is entitled to view. In *Wu v. Carleton Condominium Corp.*, a Canadian court, interpreting a statute similar to Washington's Condo Acts, held that email addresses were not included among the records to which the plaintiff owner was entitled.[6]

Many states define "personal information" to include email addresses and unpublished phone numbers and also have statutes governing the retention, use, and disposal of personally identifiable information (PII). California's Condominium Act does not include a provision specifically addressing the disclosure of private information. However, telephone numbers and email addresses qualify as "personal information" under California law, and all businesses are required to "implement and maintain reasonable security procedures and practices" to protect personal information from unauthorized disclosure.[7] A condo association is a "business" under California law, and is therefore under a statutory duty to protect all personal information in its possession from unauthorized disclosure.

Associations in Washington, like those in California, are subject to a statutory duty to safeguard personal information.[8] Condo associations qualify as "entities" under Washington law, and, as such, are required to take reasonable steps to prevent the

unauthorized disclosure of personal information.[9] If an entity fails to comply, the statute authorizes the Attorney General's Office to pursue a civil action against the entity.[10] Given Washington's strong public policy in favor of protecting personal information, courts would be unlikely to hold that an owner is entitled to the phone numbers and email addresses of all other owners, and may even hold an association that discloses this information liable for unreasonably disclosing personal information.

How should an association respond if an owner seeks to compel disclosure of personal information on other owners? If an owner requests that an association provide email addresses and unpublished phone numbers of other community members, an association should deny the request and inform the owner that it will not release personal information without the consent of the individuals to whom it belongs. If the owner files a motion to compel disclosure in court, the association could contest the motion on the grounds that the owner does not have a proper purpose for requesting the information, and thus is not entitled to it. The association can also cite its obligations to protect private information of its members.

Under Washington law, owners are entitled to examine and copy "[a]ll financial and other records of the association."[11] However, this right derives from the owner's status as a member who owns property in the community and thus is not absolute; the owner only has the right to inspect records for a "proper purpose," meaning one that is reasonably related to the owner's interest as a member of the community.[12] Unpublished phone numbers and email addresses of community members *do* qualify as "other records of the association," but an association should, in most cases, be able to establish that the owner has no proper purpose in requesting copies of these records that would override statutes which protect such information from disclosure. An association responding to a motion to compel disclosure of these records should cite its statutory duty to safeguard private information and explain why, based on the specific facts, the owner's request is unreasonable.[13]

For example, if an owner's stated purpose is to contact other owners regarding matters affecting the community, the association might respond that it has provided the owner with a list of the names and addresses of all other members, that this is sufficient to enable the owner to contact the other members, and that the owner's request to have additional ways to contact other members is unreasonable in light of the association's statutory duty to safeguard the personal information of its members.

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[1] "The association shall not release the unlisted telephone number of any owner." RCW 64.38.045(2). Email addresses are more like unpublished numbers than published phone numbers since there is no "email directory" published, either in hard copy or electronically, that would be similar to a phone book containing published phone numbers.

[2] RCW 19.25.010(6) does not define "personal information," but excludes from the definition of a "record" all "publicly available directories containing information an individual has voluntarily consented to have publicly disseminated or listed, such as name, address, or telephone number." Thus, although "personal information" is not expressly defined, the provision defining "record" indicates that documents containing unpublished phone numbers and email addresses would constitute "record[s]" containing "personal information."

[3] Fla. Stat. Ann. §718.111(12)(e).

[4] *Id.*

[5] If associations were permitted to publish a directory containing phone numbers without notifying owners and giving them an opportunity to request that their numbers be withheld, the opt-out provision would be meaningless.

[6] 2016 CanLII 30096.

[7] Cal. Civ. Code § 1798.80; Cal. Civ. Code § 1798.81.5.

[8] RCW 19.215(020) specifically deals with the disposal of personal information and is applicable to all entities. The requirements regarding the retention and disclosure of personal information vary based on the type of information and the type of entity. See Title 19: Business Regulations—Miscellaneous. Although there is no provision specifically referencing condo associations, all entities are required to take

reasonable measures to prevent the unauthorized disclosure of personal information.

[9] RCW 19.215.010(1) defines an entity as "a sole proprietor, partnership, corporation, limited liability company, trust, association, financial institution, governmental entity…however organized and whether organized to operate at a profit." Thus, any community qualifies as an entity under Washington law.

[10] RCW 19.215(020)(6).

[11] RCW 64.34.372(1) provides, in relevant part, that "[a]ll financial and other records of the association…shall be made reasonably available for examination and copying by…any unit owner, or the owner's authorized agents."

[12] RCW 24.03.135.

[13] An owner is presumed to have a proper purpose in requesting records from an association. Therefore, an association must explain why, specifically, the owner's request is improper under the circumstances. It is not enough for the association to simply assert that the owner's purpose is improper, and a general statement that the record requested contains personal information probably would not be sufficient. The association should instead state that the record contains personal information and explain why the owner's purpose in requesting the info *in light of his or her goal of contacting other owners* is not proper.

44
Association Records: Must an Association Disclose Names of Delinquent Owners?

By statute, associations are required to allow examination of financial records to unit owners and their agents on request. These records include information on owners who are delinquent in their assessment payments. However, no statutory provision gives associations license to publicize the names or other identifying information of delinquent owners and associations are advised to avoid such “shame sheets” for a number of reasons.

Required disclosure of delinquent owner information
Several statutory provisions mandate that associations maintain records of delinquent accounts and provide unit owners with reasonable access to those records on request.[1] [2] [3] [4]

These provisions require associations to keep detailed records of receipts and expenditures, which would include payments of assessments showing payment was received (or owing). Thus, Washington law requires associations to maintain information on delinquent owners and to disclose the information to other owners upon a reasonable[5] request to view them.[6]

Potential conflict and liability related to “shame sheets”
There is a difference between an association’s statutorily mandated disclosure of delinquent owner names to other owners upon request, and publication of delinquent owner names by the association itself (i.e., in a newsletter or on the internet) in an effort to induce payment. Although there is no law prohibiting an association from publicizing who is delinquent, we recommend associations avoid these tactics.

Mistakes can happen and a homeowner may be the victim of a bookkeeping error or a simple oversight. Even without an error,

information that was accurate when published could remain online or in print long after it has become stale (i.e., because the delinquent owner pays his or her account) which opens the Association up to potential liability for publishing inaccurate information.

Additionally, for every homeowner the publicity might shame into paying, there may be others who will become hostile toward the Board.

Best practices

There is no need for an association to risk liability or conflict by publishing a list of delinquent accounts. Condo associations hold a statutory lien on a unit for any unpaid assessments.[7] HOAs generally have a similar right to record a lien for assessments in the association's CC&Rs. Although the association need not record the lien for it to be valid, it may do so, and recording the lien (or foreclosing it) results in the lien becoming public record. The King County Recorder's Office, for example, has an online records search feature where any member of the public can view every lien recorded by the association.[8]

Additionally, most homeowners are less concerned about which neighbors are delinquent than they are about the Board's plan for recovering outstanding assessments. The Board could address this concern by reporting the number of delinquencies and the total amount of the delinquent funds, along with the Board's plan to collect. This can be done while keeping names and even addresses of delinquent owners confidential.

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[1] Under the New Act, an association must maintain and disclose to owners on request financial records including information on the unpaid common expenses or special assessments for the owner's unit and any other unit in the development. RCW 64.34.372(1). This provision is applicable to Old Act associations. RCW 64.34.010(1).

[2] RCW 64.34.425 sets forth the required elements of the resale certificate.

[3] The HOA Act has a similar requirement that Associations maintain financial records "sufficiently detailed to enable it to fully declare to each owner the true statement of its financial status" and to disclose such records to owners and their agents upon request RCW 64.38.045(1), (2).

[4] Associations incorporated under the Nonprofit Corp. Act or the Nonprofit Misc. Mutual Corp. Act have an additional statutory mandate to maintain accurate and complete records of accounts, which must generally be made available to members of the Association for inspection. RCW 24.03; RCW 24.06; RCW 24.03.135; RCW 24.06.160.

[5] Each of the laws discussed above require an owner's request for an Association's financial records to be reasonable and provide that the Association need only make reasonable accommodation for the request, i.e., by making the records available for viewing or copying at the owner's expense during normal business hours. RCW 24.03.135, 24.06.160; RCW64.34.72(1); RCW 64.38.045(2).

[6] The Kansas court reached a similar conclusion recently when it interpreted similar statutory language in *Frobish v. Cedar Lakes Village Condominium Association*, 353 P.3d 469 (Kan. Ct. App. 2015), *review denied* (Jan. 29, 2016). In an unpublished opinion, the court interpreted the Kansas Uniform Common Interest Owners Bill of Rights Act (Act). The Act contained language similar to that discussed in this chapter, which required Associations to keep "detailed records of receipts and expenditures affecting the operation and administration of the Association and other accounting records" and to disclose the information to unit owners on request. The court held that this language required Associations to maintain records of the names of delinquent property owners and to disclose that information to other unit owners when asked.

[7] RCW 64.34.364.

[8] http://www.kingcounty.gov/depts/records-licensing/Recorders-Office/records-search.aspx.

45
Can an Association Stop a Member from Recording Meetings?

Probably not, because discussion at association meetings would not be deemed "private conversation" under Washington law.[1] In a case like this, an association could adopt rules prohibiting members from recording meetings and then remove a member who refuses to comply. (See Chapter 36, "Disruptive Owners: Can the Board Expel a Disruptive Owner from a Meeting?") The statutory prohibition on recording private conversations alone would not be sufficient basis to prohibit recording. But, Boards may be able to shut down meetings if owners are recording against the Board's wishes. An association probably has no legal remedy against a member who *secretly records* association meetings or *refuses to stop recording* meetings. An association probably could take legal action against a Board member who secretly recorded *Board* meetings because the discussions in these meetings, unlike those in association meetings, would normally qualify as private.

Under Washington law, private conversations may not be recorded without the consent of every party.[2] The term "private conversation" is not defined in the statute. Washington courts apply a two-part test to determine whether a conversation is private:

(1) "Whether the parties manifest a subjective intent to have a private conversation, and
(2) Whether such intent is objectively reasonable."[3]

Courts consider three factors in assessing whether both prongs of the test are satisfied: (1) the "duration and subject matter," (2) where the communication occurs and the potential for third parties to be present, and (3) the "role of the nonconsenting party and his or her relationship to the consenting party."[4] Courts are more likely to find that longer conversations on subjects related to business

transactions are intended to be private, and that this intent is objectively reasonable.[5] An association meeting might be deemed to involve communications intended to be private because it is of a fairly long duration and the items discussed constitute official business of the association.

The second factor would likely weigh most heavily against an association. An association meeting held in a public location, such as a Starbucks, where third parties could overhear the conversation, would render it objectively unreasonable for members to intend their communications to be private, even if such subjective intent could be established.[6]

Even meetings occurring within a unit or another room in the condominium could be overheard by third parties (i.e. nonmembers). Most associations do not have rules preventing members from bringing friends or relatives to meetings, and in large communities, it is impossible to know all other owners, so the presence of a third party would likely go unnoticed. As such, even if every member testified that they intended the conversation in the meeting to be private, a court would likely find that the potential for third parties to overhear the conversation was high enough that their intent for the communications to be private was not *objectively* reasonable.

The third factor, the relationship between the parties, would likely undermine an association's claim that any expectation of privacy was objectively reasonable, though this might depend on the size of the association. When people communicate with unknown individuals who are not acting in any official capacity, courts typically find that it is not objectively reasonable for them to expect that their communications will be private.[7] In a community of three units, where all members of the association know each other, courts might find that it was objectively reasonable for members to intend their communications to be private. In larger communities, courts would be less likely to find it objectively reasonable for members to expect conversations during meetings to be private.

No Washington court has addressed the specific question of whether association meetings constitute "private communications" that cannot legally be recorded without everyone's permission. However, state and federal courts have held that staff meetings, even in secured facilities accessible only to employees, do not constitute "private conversation[s]" and thus may legally be recorded.[8] [9]

In *Holland v. Protection One Alarm Monitoring, Inc.*, a former employee alleged that his employer had violated RCW 9.73.030 by recording him without his knowledge or consent during a staff meeting attended by at least four people.[10] The discharged employee sought to suppress the recording of him yelling and using profanity during the meeting, and sought damages for violating his right to privacy.[11] The court held that the staff meeting did not qualify as a "private communication" because, although the employee might have intended his communications to be private, this expectation was not reasonable.[12] Although the court does not provide much discussion of the three factors used to determine whether someone has a reasonable expectation of privacy, it refers to the fact that the employee raised his voice and that the meeting was attended by "multiple employees."[13] This suggests that the court found the adversarial nature of the relationship, along with the fact that there were more than two people in attendance, to render it objectively unreasonable for the employee to expect his communications to be private.

Houser v. City of Redmond supports the conclusion that the presence of multiple employees in a staff meeting would render any expectation of privacy objectively unreasonable, but that one on one conversations are private. In *Houser*, the plaintiff, a discharged police officer, sued the City of Redmond for tortious interference with his employment contract.[14] The plaintiff was terminated for recording conversations with other individual officers in violation of RCW 9.73.030.[15] The court denied his claim, holding that the City had not breached the employment contract

because the conversations recorded were “private communications” protected by Washington law.[16] Importantly, the recorded communications were informal conversations in the workplace, not conversations that took place in staff meetings or official meetings between employees.

Neither the *Holland* court nor the *Houser* court discusses the role of formal or official communications in assessing whether an employee’s expectation of privacy is objectively reasonable, and thus whether the communications qualify as “private” under RCW 9.73.030. Given the different conclusions reached by both courts, though, along with the references to “staff meetings” in Holland and “conversations of fellow officers” in Houser, it appears that Washington courts treat official communications differently than unofficial communications. The key difference between recording one’s coworkers in a staff meeting versus recording them in a break room appears to be that communications in staff meetings are made in a more formal context in which the employees are acting in their capacity as employees, whereas conversations occurring in break rooms or hallways are not.

Courts would likely view association meetings as analogous to official staff meetings rather than informal conversations between employees.[17] First, association meetings are scheduled for the purpose of discussing official business related to the community, such as rules and regulations, repairs, etc. Second, members must be notified in advance of the date, and the subject matter, of the meeting. Third, associations are required to keep meeting minutes documenting matters discussed and any action taken by the association. The last factor—the documentation of association meetings—would likely undermine a reasonable expectation of the meetings being “private.”

Although an association probably couldn’t take legal action against a member for recording meetings, this does not mean an association must allow members to record. An association could adjourn a meeting if a member refused to stop recording, and an

association might be able to remove a member for repeatedly violating rules against recording or requests not to record, if the member's behavior were disrupting the meetings.

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[1] RCW 9.73.030 makes it unlawful to record "private conversation…without first obtaining the consent of all the persons engaged in the conversation." And while association meetings may not qualify as "private," it appears that conversations between an owner and one or two board members, or a manager, would qualify as private.

[2] *Id.*

[3] *State v. Christensen*, 153 Wn.2d 186, 188 (2004); *State v. Babcock*, 168 Wn. App. 598, 605 (2012) (citing *State v. Townsend*, 147 Wn.2d 666 (2002)).

[4] *Babcock* at 605.

[5] *Babcock* at 606.

[6] *Id. (*objectively unreasonable to expect privacy for a conversation occurring in a visitors' room with cubicles divided but not sound-proofed).

[7] *Babcock* at 606 (individual communicating with an undercover agent he believed was a hitman had "no reason to trust that [he] was really a hit man" because the agent was unknown to him).

[8] Laws other than RCW 9.73.030 might prohibit employees from recording staff meetings (e.g. HIPAA might prohibit healthcare employees from recording), and an employee who signed an agreement promising not to record internal communications might be sued for breach of contract. Neither of these situations would apply to associations because there are no federal or state privacy laws specifically governing the privacy of communications between association members, and association members do not sign contracts regarding the confidentiality of their communications.

[9] Most of the cases arising under RCW 9.73.030 involve criminal defendants or inmates whose conversations were recorded by state officials or individuals acting on behalf of the state. Since inmates have a lower expectation of privacy than other individuals (see, e.g., *Babcock* at 605), criminal cases provide less insight than employment litigation into how courts would treat communications made during association meetings.

[10] C15-259 RSM, 2016 WL 1449204 at *1 (W.D. Wash. Apr. 13, 2016).

[11] *Id.* at *3.

[12] The *Holland* court provides little discussion of the three factors used to determine whether the expectation of privacy is objectively reasonable because it found that the employee couldn't prove that the recording was authorized by the defendant-employer, as opposed to another employee acting on his or her own, without the knowledge or consent of management. However, the court states in its opinion that "[t]he Court thus finds that this was not a 'private conversation' within the meaning of the statute," and refers to the presence of "multiple employees" at the meeting. It is therefore clear that the court would not have upheld the employee's violation of privacy claim against any defendant, including the one who actually made the recording.

[13] *Id.* at *9-10.

[14] 91 Wn.2d 36 (1978).

[15] *Id.*

[16] *Id.* at 40.

[17] The analogy to an informal conversation between employees in a hallway or break room would be a conversation between association members in a hallway or other common area.

46
Attorney-Client Privilege: Are Communications Between an Attorney and an Association's Manager Privileged?

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] [8] [9] 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.[10] [11] [12] [13] [14]

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.

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.[15]

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[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.

[8] *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.).

[9] *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.).

[10] *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.)

[12] *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.).

[13] *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.).

[14] *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.).

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

47
Attorney-Client Privilege: Who Holds the Attorney-Client Privilege—the Board or Individual Board Members?

Washington law protects confidential communications between clients and attorneys from disclosure. The privilege extends to agents of the clients, and therefore protects communications not only between condo and HOA boards and their attorneys, but also between employees and professionals hired by an association. (See Chapter 46, "Attorney-Client Privilege: Are Communications between an Attorney and an Association's Management Company Protected by Attorney-Client Privilege?") Only the client can waive the privilege because it is the client, not the attorney, who holds it.[1] The association, not board members, is the clients of attorneys representing associations. Accordingly, it is the board, which acts on behalf of the association, not individual board members, employees, or agents, who hold the attorney-client privilege. As such, the privilege can only be waived by the board collectively, and not by individual Board members, employees, or agents of the association. Board members must not share privileged information that they learn.

It is well established that under Washington law, attorney-client privilege is held by the client and, as such, can only be waived by the client.[2] Any communications disclosed without the client's consent will remain privileged, meaning that opposing parties will not be permitted to use them or the information they contain.[3]

Privilege cannot be waived by individual Board members or other Board agents. It is the Board as a whole that is the client, and thus only the Board acting as a whole can waive the attorney-client privilege. A Board member who discloses confidential information to the Board's attorney cannot waive the privilege even with respect to his or her own communications. The communications

were made in the Board member's capacity as an agent of the Board, to further the interest of the Board, not in his or her individual capacity to further individual interests.

Board members may be personally liable for the unauthorized disclosure of privileged information

Board members of both condo associations and HOAs owe a duty of care to both associations and individual owners. (See Chapter 14, "Board of Directors: What Is a Board Member's Duty of Care?") To discharge their duty, Board members must act in good faith, and must exercise reasonable and ordinary care.[4] In some cases, the disclosure of information protected by attorney-client privilege will constitute a breach of the duty of care. Board members who disclose information vindictively or to further their own interests (i.e. self-dealing Board members), would not be acting in good faith. Board members who disclose privileged information in the belief that they are permitted to do so, or because they believe the Board is doing the wrong thing and they decide to "blow the whistle," may still be breaching their duty of care. If an "ordinarily prudent person" in similar circumstances would not disclose the information, or if their belief that they are acting in the best interests of the association are not objectively reasonable, the disclosure will qualify as a breach. As such, the member(s) who disclosed the information may be subject to personal liability for any harm the association suffers as a result of the breach.

Individual board members must not disclose documents prepared by or for the association's attorney(s)

Attorney-client privilege protects documents prepared by attorneys, as well as documents prepared for attorneys by their agents and employees.[5] The privilege extends not only to documents containing communications that, if oral, would be privileged, but also to documents providing the client with legal advice, laying out different options, etc. For example, opinions on collections and other legal opinions provide associations with legal advice and therefore are privileged. Documents prepared by

professionals hired by the attorney that discuss different repair options available to an association would also be privileged.[6] Individual Board members may not disclose these documents to anyone who is not authorized by the full Board to have access to them. Just as Board members may be personally liable for harm to the association resulting from the unauthorized disclosure of privileged communications with an attorney, they may also be personally liable for harm resulting from the unauthorized disclosure of documents prepared by or for an attorney.

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

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

[3] When the disclosure is made by a third party who was present during communications between the client and attorney, and who was not acting as an agent of either one, the communications were never privileged to begin with. (See Ch. 43, Attorney-Client Privilege: Are communications between an attorney and association's management company protected by attorney-client privilege?") In this case, disclosure by a third party does not waive privilege. Rather, privilege never attached to the communications in the first place.

[4] Board members appointed by declarants are subject to an even higher standard of care: they must exercise the care of a fiduciary of the unit owners. Thus, behavior that would constitute a breach under the lower standard of care would also constitute a breach of the higher standard.

[5] *Pappas v. Holloway*, 114 Wn.2d 198, 202 (1990).

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

48
Tenants' Rights: What Rights Does a Tenant Have Relative to the Association?

The relationship between owners and their tenants is subject to the contract between them (the lease), the Residential Landlord-Tenant Act,[1] and Washington case law, which provide that landlords must allow tenants to have use and enjoyment of the leased premises for the full duration of the lease. There is no contract between the Association and an owner-landlord's tenant. Associations are not "landlords" under the Landlord-Tenant Act and thus do not have the rights it gives to landlords. Tenants, however, receive the protection of the statute and, as such, may have several rights as against associations.

What rights does a tenant have if the tenant occupies an Association property and the Association prohibits rentals?
If a tenant occupies a property under a valid lease agreement, even if the association prohibits rentals, the association may not be able to force the tenant to vacate the property because the tenant is protected by Washington's Landlord-Tenant laws but the association is not.[2] Some cities, like Seattle, provide even greater protections to tenants than state law alone. Accordingly, although courts in other states have held that tenants must vacate when the owner-landlords are leasing units in violation of the Governing Documents,[3] courts in Washington, a tenant-friendly state, are unlikely to do so.

What rights and obligations does a tenant have if an owner is in violation of association rules or late on assessments?
A tenant is obligated to follow the rules of the community as set forth by the association, but tenants are not responsible for assessments, even for common amenities that the tenant enjoys. In most cases, only owners will be liable for assessments or late fees. There are two exceptions to this rule. First, many

associations' Governing Documents provide for "rent intercept" where the tenant must pay rent directly to the association if the owner-landlord is delinquent on assessments. If such a provision exists, the association can demand rent payments directly from the tenant until the owner-landlord's delinquency is satisfied. Second, some associations require tenants to enter an agreement with the association in which they promise to pay assessments (owing or delinquent). In such cases, the tenant, in addition to the owner-landlord, is responsible for assessment amounts in accordance with the agreement.

Washington courts have not addressed the issue, but tenants probably have the same rights that an owner would have in terms of notice[4] and an opportunity to be heard[5] before an association may levy fines or take action directly against the tenant(s).

If an owner or tenant violates an association rule, that owner can be fined or penalized in accordance with the association's Governing Documents.[6] However, unless the Declaration, CC&Rs, or Bylaws allow it, a tenant cannot be penalized for an owner-landlord's violation.

What rights does a tenant have if an association forecloses on a property occupied by the tenant?

Under the Protecting Tenants at Foreclosure Act, a tenant's lease survives a foreclosure.[7] If the purchaser of the property intends to live in the property, the purchaser may force the tenant to vacate before the end of the lease by giving the tenant 90 days' notice.[8] A month-to-month tenant is also entitled to 90 days' notice. Tenants occupying a property an association has foreclosed on have a right to continue occupying the property until the end of their lease if the tenants pay their rent to the association.

What rights does a tenant have if an Old Act condo association terminates utilities?

Many Old Act condo associations have the right to terminate a unit's utilities if the owner has not paid assessments.[9] An Old Act

condo retains this power even if the unit is occupied by a tenant. However, prior to shut off, the Old Act condo must provide the tenant written notice of the shut-off and an opportunity to be heard.[10]

What rights does an association have for tenant violations of the Governing Documents?

Associations usually do not have a contractual relationship with a tenant who occupies an owner-landlord's property. Associations possess only indirect enforcement power with regard to tenants. Associations have the authority to enforce their Governing Documents against owners, but they do not have the authority to enforce their Governing Documents against owners' tenants. The action which can be taken against the owner-landlord depends on the violation and the Governing Documents, but may include notices of the violations, fines and, if the violation involves nonpayment of assessments, imposing a lien on the property. There is usually no direct action which an association can take against a tenant, though some Declarations grant the association the power to evict tenants for repeated violations of the Governing Documents, as the "attorney in fact" of the owner.

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[1] RCW 59.18.030(9) (Definitions) provides, in relevant part:

"Landlord" means the owner, lessor, or sublessor of the dwelling unit or the property of which it is a part. . ."

RCW 59.18.030(21) provides:

"A "tenant" is any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement."

[2] *Id*.

[3] *Preserve at Forrest Crossing Townhome Ass'n v. Devaughn*, M2011-02755-COA-R3CV, 2013 WL 396000, at *1 (Tenn. Ct. App. Jan. 30, 2013) (court held the Association could prohibit rentals because the owner knew the Declaration could be amended to prohibit rentals at the time she purchased the property). This case underscores the asymmetry with respect to the application of landlord-tenant law to tenants versus associations. Because associations do not qualify as "landlords" but the lessees of units do qualify as "tenants," tenants are protected while associations are not. The Tennessee court found that the Declaration barring the owner from renting allowed for the immediate eviction of the tenants, but in states like Washington, that are extremely tenant-friendly, a court presented with the same facts would be more likely to permit the tenant to remain. The court would likely give an innocent tenant the benefit of his or her lease.

[4] See Chapter 34, "Notice: What Does 'Notice' Mean?"

[5] See Chapter 33, "Fines and Enforcement: What Does 'Opportunity to be Heard' Mean?" for more information.

[6] *See* RCW 64.34.304(r) (Common expenses — Assessments); RCW 64.38.020(12) (Association powers).

[7] PREVENT MORTGAGE FORECLOSURES AND ENHANCE MORTGAGE CREDIT AVAILABILITY, PL 111-22, May 20, 2009, 123 Stat 1632, in relevant part:

In General- In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to—

> (2) the rights of any bona fide tenant—
>
> (A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90-day notice under paragraph (1); or
>
> (B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90-day notice under subsection (1), except that nothing under this section shall

affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.

[8] In General- In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to—

(1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice;

PREVENT MORTGAGE FORECLOSURES AND ENHANCE MORTGAGE CREDIT AVAILABILITY, PL 111-22, May 20, 2009, 123 Stat 1632.

[9] RCW 64.32.200(1) (Assessments for common expenses — Enforcement of collection — Liens and foreclosures — Liability of mortgagee or purchaser) provides, in relevant part:

> . . . ten days' notice shall be given the delinquent [unit] owner to the effect that unless such assessment is paid within ten days any or all utility services will be forthwith severed and shall remain severed until such assessment is paid . . .

[10] Because, in this situation, the utilities are provided through common elements, the association, as provider, should give the tenant written notice of a threatened shut-off and a chance to assume responsibility for current and future assessments. However, the association probably cannot force the tenant to pay the owner-landlord's past due assessments. This might induce a tenant to pay rent due to the association under the rent-intercept provision of the Declaration.