CONDOLAW'S 2015 HANDBOOK FOR COMMUNITY ASSOCIATIONS

A Resource for Washington State Condominium and Homeowners' Associations

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PREFACE

This book is made up of a selection of topics we believe Associations will find useful and informative. 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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Should you desire legal advice on these or other areas of law pertaining to a condominium or homeowners' association in Washington State, please consider Condominium Law Group, PLLC.

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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 Members. 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 Members, 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 governed by an HOA. 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.

Which Laws Apply?

Associations of owners of property that are not condos are governed by the Homeowners' Association Act (Chapter 64.39 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 25 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 provision 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]

"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 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) that 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.
>
> (8) "Dog guide" means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons.
>
> (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*, 1997 Conn. Super. LEXIS 120 (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*, 2012 U.S. Dist. LEXIS 124418 (D. Haw. Aug. 31, 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] 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 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).[5]

Association Membership

No Washington court has considered whether an Association has any recourse when a registered sex offender or person with other criminal history successfully 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.[6]

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.[7] 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.[8] In addition, if an Association enacts a ban against

registered sex offenders, the 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 the seller provide the buyer notice that information relating to registered sex offenders can be obtained from local law enforcement.[9] 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.[10] Certain offenders may also be prohibited from entering places like the neighborhood pool, playground, park, community center, and the like if written notice is provided to the offender.

[1] Under Washington law, convicted sex offenders and persons convicted of certain other crimes, such as kidnapping, must register with the state. RCW 9A.44.130(1)(a) (Registration of sex offenders and kidnapping offenders -- Procedures -- Definition – Penalties). Any felony committed

with sexual motivation is also an offense requiring registration. RCW 9.94A.030(46)(c), (47) (Definitions). And anyone who is found not guilty by reason of insanity of a sex offense or kidnapping offense must also register. RCW 9A.44.130(3)(vi).

[2] 42 USC § 3604, et seq.

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

[6] 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.

[7] In the case, *Archdiocesan Hous. Auth. v. Demmings*, 2001 Wash. App. LEXIS 2276, 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.

[8] *See* chapter entitled: "Association Duties: Does an Association have a duty to prevent crime in common areas under its control?"

[9] 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). The pertinent part of the language required in RCW 64.060.020 is:

NOTICE TO THE BUYER
INFORMATION REGARDING REGISTERED SEX OFFENDERS MAY BE OBTAINED FROM LOCAL LAW ENFORCEMENT AGENCIES. THIS NOTICE IS INTENDED ONLY TO INFORM YOU OF WHERE TO OBTAIN THIS INFORMATION AND IS NOT AN INDICATION OF THE PRESENCE OF REGISTERED SEX OFFENDERS.

[10] 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.

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. An individual's status as a smoker is not a protected category of persons, therefore 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 nicotine smokers do not receive protection or reasonable accommodation under federal[3] or state[4] disability statutes.[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 abridge an Association Board's general authority, pursuant to their 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 may be considered a "restriction on use" and require a Declaration amendment.

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

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 faces two potential legal challenges. First, a resident could sue either the Association or smoking residents on nuisance grounds. Most Governing Documents contain a generic nuisance clause stating that an owner (or resident) cannot engage in an activity that affects the use and enjoyment of another owner's property. A resident bothered by secondhand smoke could bring an action against the Association to enforce this provision of the Declaration.

Second, if an individual has a serious health condition that is affected by exposure to secondhand smoke, he or she may be able to ask for relief by using one of the disability statutes. If the courts find that the condition is a disability, then the resident is entitled to a reasonable accommodation, which could include imposition of a no-smoking rule.

While a no-smoking rule could help an Association avoid these issues, it could raise others, namely legal challenges to the rule from owners and residents who wish to smoke in the community.

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

1) Increased desirability and demand for the community;

2) Cost savings from not having to deal with cigarette related damage and cleaning;

3) Reduction of fire risks (and possible insurance discounts); and

4) Avoidance of nuisance claims and reasonable accommodation requests.

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

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

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

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

[5] Notably, this rule also applies to marijuana smokers. 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 who 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); *See also,* Washington State Human Rights Commission's *Guide* to Disability and Washington State Nondiscrimination Laws: Washington Non-discrimination Laws and the Use of Medical Marijuana at http://www.hum.wa.gov/Disability/medical%20marijuana.pdf.

[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. After unsuccessful attempts to eliminate secondhand smoke drift, the condo Association had enacted a total smoking ban within the units. 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 for others 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.")

4

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]

---

[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).

5

Solar Panels: Can an Association restrict the installation or use of solar panels?

An HOA generally cannot prohibit the installation of solar panels, but it can regulate the use and installation of solar panels under certain circumstances. Condos can effectively prohibit them in most cases.

Under the HOA Act,[1] an HOA cannot prohibit an owner's use or installation of solar panels if:

1) the solar panel(s) meet state and local health and safety standards;
2) the solar panel(s) is (are) used to heat water, and are certified by a nationally recognized certification agency; or
3) the solar panel(s) is (are) used to produce electricity, and meet applicable safety and performance standards.[2]

But if an HOA's Governing Documents give the HOA authority to regulate the use or installation of solar panels, it may do so as follows:[3]

1) An HOA may prohibit the visibility of any part of a roof-mounted solar energy panel above the roof line;
2) An HOA may limit the attachment of a solar energy panel to the slope of a roof facing a street unless the solar energy panel conforms to the slope of the roof;

3) An HOA may limit the attachment of a solar energy panel to the slope of a roof facing a street unless the top edge of the solar energy panel is parallel to the roof ridge;
4) An HOA may require a solar energy panel frame, a support bracket, or any visible piping or wiring to be painted to coordinate with the roofing material;
5) An HOA may require an owner or resident to shield a ground-mounted solar energy panel if shielding the panel does not prohibit economic installation of the solar energy panel or degrade the operational performance quality of the solar energy panel by more than ten percent; and
6) An HOA may require owners or residents who install solar energy panels to indemnify or reimburse the association or its members for loss or damage caused by the installation, maintenance, or use of a solar energy panel.

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[1] The statute does not apply to condos, which appear to have full discretion in regulating the installation and use of solar panels within their communities. It is uncertain how a court might respond to a suit by a unit owner seeking permission to install solar panels on the roof or deck above her unit. Though condo Associations ordinarily have wide discretion in controlling and regulating common and limited common elements, some judges might be persuaded by a public policy argument favoring the use of green energy.

The safest route for a condo Association would be to adopt a resolution that expressly bars the installation of solar panels, whether attached to a unit or limited common element. Conversely, some condo Associations may lean the other way and wish to install such panels and devices on the common elements or limited common elements. Whatever a condo Association's preference, it should draft and adopt rules and regulations before disputes arise.

[2] RCW 64.38.055(1).

[3] These provisions are set forth at RCW 64.38.055(2).

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 State 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 required under this subparagraph; and
- the housing facility or community complies with rules issued by the Secretary of State 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 or jumping around) 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 swimming pools available that do not have such a restriction that children can use).

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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).

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.[4]

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

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[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.,* 2015 Wash. LEXIS 949 (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.

[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 . . .").

[4] Subsequent case law seems to indicate that RCW 64.34.264(2), the one-year statute of limitations, would not save these amendments. *See* chapter entitled: "Statute of Limitations: How long after an amendment is recorded can it be challenged successfully?"

8

Restrictions on Use: Can an HOA 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 required every owner's approval in that community. An Idaho Supreme Court case, *Adams v. Kimberley One Townhouse Owner's Ass'n,*[3] [4] 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.[5]

2) If the HOA's CC&Rs grant the HOA authority to create new covenants,[6] 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.

A recent 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.[7]

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 HOA'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."[8] 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 it clarified what "single family residential purposes" meant for that community.

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?"

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

[2] *Wilkinson*, 180 Wn.2d 241 (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").

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

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

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

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

[8] 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- the use is for sleeping, eating, and other residential purposes).

9

Restrictions on Use: Can Associations limit "Airbnb" rentals of an owner's home, or part of the home, if the owner lives there?

An Association can prohibit or limit "Airbnb rentals (and other shared or short-term rentals) in some circumstances. It depends on the associations' Declaration or Covenants, Conditions, and Restrictions (CC&Rs). "Airbnb" is a website for people to list, find, and rent lodging (essentially a bed and breakfast facilitation site).

A developer is free to include an express prohibition or limitation on Airbnb, bed and breakfast, or other short term rentals in its Declaration or CC&Rs (along with any other lawful restrictions on use). Many Declarations and CC&Rs prohibit transient use of the 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 the rental.

Some Declarations and CC&Rs have no express prohibition against short term rentals or transient use, but restrict use of properties to "single family residential purposes." Although Washington courts have defined "residential use" to include a tenant's use of a property,[1] they are unlikely to find that the use by unrelated Airbnb, bed and breakfast, or other short term tenants is a "single family" use. Thus, where the Governing Documents restrict use to single family, Associations can likely prevent short term rentals.

Alternatively, an association may amend its existing Declaration or CC&Rs to prohibit "Airbnb" rentals in some cases.

Most condo associations' Declarations state that if the owner lives in the unit, others who live there are not considered renters. This would seem to indicate the association could not prohibit paying guests in the owner's home. There is no Washington case law that specifically addresses whether an association can prohibit or limit bed and breakfast rentals if the owner lives in the property and operates a bed and breakfast. Other states have addressed this issue.

The Hawaii Court of Appeals held an owner who lived in a property and operated a bed and breakfast was in violation of a use restriction which limited use of the property to "residential purposes only." It made no difference to the court that the owner also lived on the premises. [2] [3]

The Illinois Court of Appeals held use of a property as a bed and breakfast does not 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. [4] [5]

Washington courts might consider "Airbnb" rentals (and other shared and short-term rentals) to fall within the definition of "single family residential purposes." However, if an association's Governing Documents specifically exclude bed and breakfast rentals (or other shared and short-term rentals) from the definition of "single family residential purposes" or if an association specifies in its Governing Documents that owners may not operate businesses in the property, then "Airbnb" rentals should fall outside the definition of "single family residential purposes" and the association will be able to limit or prohibit "Airbnb" rentals.

Additionally, if an association's Governing Documents do not expressly exclude owners who both occupy and rent-out the premises from the association's definition of "rental," then the association will likely be able to regulate them the same as other rentals. Washington courts may consider an "Airbnb" rental or other shared or short-term rentals to be in violation of the Declaration even if the owner lives in the unit. It will depend on the specific facts of each case.

[1] *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).

[2] *Cummings v. Roth*, 2009 Haw. App. LEXIS 780, *17 (Haw. Ct. App. Dec. 22, 2009). The court found the Declaration clearly and unambiguously required the property to be occupied and used for residential purposes only, and prohibited the property from being used as a rooming house or in connection with the carrying on of any trade or business. The court also found the Declaration only authorized the owner to lease the entire property, not a room within the property.

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

[4] *Fick v. Weedon*, 244 Ill. App. 3d 413 (1993) (the court found the bed and breakfast was a commercial use prohibited by the express language of the deed).

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

10

Restrictions on Use: What is required to create new covenants in an HOA?

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%).

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 that the HOA could amend the CC&Rs (i.e. the HOA's CC&Rs are recorded, and expressly grant the HOA authority to create new covenants).[4]

If an HOA's CC&Rs do not already grant the HOA authority to create new restrictive covenants with majority approval from homeowners, then the HOA may be able to amend its CC&Rs to grant that authority.[5] If an HOA opts to amend its CC&Rs to grant it the authority to create new restrictive covenants with majority approval, then the HOA will only have the authority to create the new covenant if the amendment is validly adopted.[6]

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.[7]

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[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, 2010 Wash. App. LEXIS 1869 at 13-14.

"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 2010 Wash. App. LEXIS 1869 at 13-14.

[2] *Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263 (Wash. App. Ct. 2014) (A homeowners' Association 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 homeowners 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 a development that was only accessible by boat or plane.)

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

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

[7] *Weaver*, 2010 Wash. App. LEXIS 1869 (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.).

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 in the deed. 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, 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, the property owner may still be bound by restrictions on the use of the property. Courts may find an implied equitable servitude based on a seller's representations about the property. 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.[4]

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. 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.[5] Moreover, equitable servitudes are binding on subsequent owners who take the property with notice of the intended restriction.[6]

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.[7]

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.[8]

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; *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, 974 P.2d 836, 841 (1999).

[4] 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, 337 P.3d 1076 (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.

[5] 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).

[6] 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.

[7] *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.)

[8] *Lake Limerick v. Hunt Mfd. Homes*, 120 Wn. App. 246 (2004) (Court ruled against a homeowner arguing 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

Board of Directors: Is an Association required to have a Board?

New Act condo Associations must elect a Board with at least three members, a majority of whom must be unit owners.[1] The Board must act on behalf of the Association; it cannot delegate all of its authority and duties to another person or entity.[2]

Old Act condo Associations are not specifically required to have a Board. An Old Act condo Association must adopt Bylaws specifying whether the property will be managed by a Board, a manager, or some other person or entity.[3] An unincorporated[4] Old Act condo Association might be able to delegate all of its responsibilities to a manager, if its Governing Documents allow.

An HOA must elect a Board, and must adopt Bylaws specifying how many Board members the Board should have and what powers it may delegate.[5]

Washington law allows Board members to delegate some of their authority,[6] but each Association's Governing Documents, especially the Bylaws, must be examined to determine the Board's authority to delegate its powers specific to that community. Each Board member has a duty of care and must act in the best interests of the Association when delegating authority.

[1] RCW 64.34.308(7) (Board of directors and officers).

[2] RCW 64.34.308(1).

[3] RCW 64.32.090(11) (Contents of declaration).

[4] Most Associations are incorporated to reduce risk to the Association members. Many Associations are incorporated as nonprofits under one of two statutes. An Association incorporated under the Nonprofit Corp. Act must be managed by a Board. The Board must have at least one member. An Association incorporated under the Nonprofit Misc. Mutual Corp. Act must be managed by a Board. The Board must have at least three members.

Because it is often not possible to tell which statute an Association is incorporated under, it is recommended that the more restrictive statute be complied with. Combining these statutes, any New Act condo Association, Old Act condo Association, or HOA that is incorporated, should have a Board of at least three, and cannot delegate all of its responsibilities to a manager.

[5] RCW 64.38.030 (Association bylaws).

[6] In general, a Board may not delegate decision-making tasks, but may delegate more ministerial or information-gathering tasks, such as taking meeting minutes or preparing budgets.

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.[4]

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.[5] If there are incumbents on the Board, those directors will continue holding office until an election with a proper quorum is held; 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] 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.[9] 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 years.

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.[10]

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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] For detailed information about quorums, *see* chapter entitled: "Quorums: What are they and how are they met?"

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

[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] 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." The Governing Documents may provide that appointed Board members serve only until the next election.

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.

[10] RCW 64.34.340 (Voting – Proxies) (applicable to New Act and Old Act condos). For more information, *See* chapter entitled: "Proxies: How is their validity determined?"

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 reasonable and ordinary 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 exercises 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 HOAs 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 in instances of gross negligence).

15

Board of Directors: Can Board members be held 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 owners' right to recover from the Association for Board members' breach of their duty of care.[3]

However, courts are hesitant to substitute their judgment for that of Board members 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 the 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]

If an Association is not incorporated under the laws of Washington, Board members do not have the same protection from personal liability for breach of the duty of care.

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 fulfillment 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.

[1] *See* chapter entitled: "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. That is 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.

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*, 2015 Wn. App. LEXIS 1350 (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*, 2015 Wn. App. LEXIS 1350.

[6] *Hartstene*, 2015 Wn. App. LEXIS 1350 at ¶ 25.

[7] *Hartstene*, 2015 Wn. App. LEXIS 1350 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 Eligibility: Does a person have to be an owner to serve on the Board?

Washington law does not prohibit non-owners from serving on an Association's Board. However, an Association is free to prevent non-owners from serving on the Board by including a requirement in its Governing Documents that Board members must be owners.[1] [2] [3]

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 an owner.

[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 and who can be a Board member. *See* RCW 64.32.

[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 Eligibility: 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; or
(7) Board members cannot be out-of-state owners.

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 version 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: 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 also 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 with the County creates the condominium development (the Declaration) or the homeowners' Association (the CC&Rs).[10] These documents govern property rights and obligations.

(6) Articles of Incorporation

The Articles of Incorporation are the official documents 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.

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[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 entitled: "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 to 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 look to the intent of the person who wrote the document to correct any conflicts. An Association's Board can write rules to clarify intent 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. 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. 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 and Bylaws 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.

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

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 and supplement 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]

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);[4]

B) for Old Act condo Associations incorporated under the Nonprofit Corporations Act, 10% (or more if specified in Bylaws);[5]
C) for Old Act condo Associations incorporated under the Nonprofit Miscellaneous and Mutual Corporations Act, 25% (or more if specified in Bylaws);[6] and
D) for HOAs, 34% (unless Bylaws provide otherwise).[7]

Quorum for Board Meetings

Quorum requirements for Board meetings are:

E) for New Act condo Associations, at least 50%;[8]
F) for Old Act condo Associations under both the Nonprofit Corporation Acts, at least 33.33%, or more if specified in the Bylaws or articles of incorporation; if not so specified, then a quorum is a majority;[9]
G) for HOAs incorporated under the Nonprofit Corporation Acts, at least 33.33%, or more if specified in the Bylaws or articles of incorporation; if not so specified, then a quorum is a majority.[10] [11]

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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. Sometimes, each unit gets one vote; but usually the votes are allocated according to the size of the units or some other factor. Thus, 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 entitled: "Proxies: How is their validity determined?" for more details.

[4] 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, for example, each unit is assigned one vote, then twenty-five percent of the unit owners (assuming there is one owner per unit) must be present to make up a quorum. But 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 unit owners are present; those unit owners might represent less than twenty-five percent of the votes.

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

[6] RCW 24.06.115 (Quorum).

[7] 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 statute will provide a minimum requirement.

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

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

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

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

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

RCW 24.06.140 (Quorum of directors) provides:

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

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

[11] 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.

22

Proxies: When are they valid?

Washington law allows Association members to vote by proxy if authorized by the community's Governing Documents. 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)[1]
B) It must be in writing[2]
C) It must be dated[3]
D) It must be signed (or if by email, sufficiently identify the sender)[4]
E) It cannot specify that it is revocable without notice[5]

HOAs
The HOA Act does not contain specific requirements for proxies. However, if an HOA is a nonprofit corporation, its proxies 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);[6]
B) It must be in writing;[7] and
C) It must be signed (or if by email, sufficient to identify the sender)[8]

Duration and Use of Proxies
A proxy is only valid for eleven months, unless otherwise stated in the proxy.[9]

Proxy votes by Association members may count towards quorum requirements.[10]

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.[11]

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[1] RCW 24.03.005 (Definitions); RCW 24.03.085 (Voting); RCW 24.06.005 (Definitions); RCW 24.06.110 (Voting).

[2] RCW 24.03.005; RCW 24.03.085; RCW 24.06.110; RCW 24.06.005.

[3] RCW 64.34.340 (Voting – Proxies) (applicable to New Act and Old Act condos).

[4] RCW 24.03.005(12)-(21); RCW 24.03.085; RCW 24.06.110; RCW 24.06.005.

[5] RCW 24.03.005(14), RCW 24.06.005(17).

[6] RCW 24.03.005 (Definitions); RCW 24.03.085 (Voting); RCW 24.06.005 (Definitions); RCW 24.06.110 (Voting).

[7] RCW 24.03.005; RCW 24.03.085; RCW 24.06.110; RCW 24.06.005.

[8] RCW 24.03.005(14), RCW 24.06.005(17).

[9] RCW 64.34.340(2).

[10] *See* chapter entitled: "Quorums: What are they and how are they met?" for more details.

[11] Board members may vote after receiving and reviewing information provided to them by an Association manager, subcommittee, or other person or entity, but cannot give their vote to another person.

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 condo Declaration provides for it. Some services may be assessed or charged based on usage and expenses that benefit only some owners can be assessed to only those owners.[2]

For both New Act and Old Act condo Associations, common expenses are assessed against the units according to the percentage of each owner's allocation of common expenses as specified in the Declaration.[3] For New Act condo Associations only, cost allocation may be different than the percentage of ownership interest.[4] [5] For Old Act condo Associations only, allocation of common expense liabilities, votes in the Association, and common element interests must all be determined by a single common formula that is related to the original value of the units.[6]

The New Act allows the allocation of common expense liabilities, votes in the Association, and common element 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).[7]

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 and repair, insurance, utilities, and other expenses that benefit fewer than all of the units.[8] Statutes allow expenses that benefit only some units or those caused by unit owners to be allocated only to those units.[9] [10] Costs related to collection of unpaid assessments may be assessed against individual delinquent units.[11]

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.[12] Associations may only change the allocations of costs among homeowners in accordance with the provisions of the Governing Documents.

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.[13]

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

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

[5] 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.

[6] 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].

[7] RCW 64.34.224, Official Comments.

[8] RCW 64.34.360(3) (applicable to Old Act and New Act condo Associations).

[9] 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.

[10] 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.

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

[12] RCW 64.38.020 (11).

[13] 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) over 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 improvements, what constitutes a repair and what constitutes a capital addition or improvement will likely vary from case to case. 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 also 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] 2012 Wn. App. LEXIS 2372.

25

Association Budget: 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[2] requires that any regular or special budget proposed by an HOA Board must be submitted to the owners for ratification within thirty days.[3] This ratification procedure also applies to proposed changes to a previously approved budget that will result in a change in assessment obligations.[4]

The New Act[5], 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.[6] [7]

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.[8]

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.

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[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 (Homeowners' Association Act).

[3] 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.

[4] RCW 64.38.035(3).

[5] RCW 64.34 (Condominium Act).

[6] RCW 64.34.308(3).

[7] The Old Act is silent on whether a Board can adopt a spending change without unit owner approval. The Old Act does require the Board to get unit owner approval for any decisions, if the Old Act requires such approval (which it does not for spending changes) or if the Governing Documents require such approval. *See* RCW 64.32.250(2) (Application of chapter, declaration and bylaws).

[8] 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." (citing RCW 64.34.360). However, the issue of whether a condo Association 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 Association Boards, like HOA Boards, are free from any such obligation so long as the proposed spending change does not affect assessment obligations.

26

Accounting Methods: What are they, and is an Association required to use one method or the other?

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).

27

Association Property Insurance: Who is insured?

The Association is the named insured for an Association's property insurance policy.[1] In the case of condos, there is a statutory presumption that every unit owner is also an insured under the policy.[2] [3] In addition, the Washington Court of Appeals has clarified that a commercial or residential tenant in a condo is also presumed to be an insured under the policy.[4]

A unit owner and tenant are presumed to be named insureds even if the insurance policy is maintained by a condo Association instead of by the unit owner.[5] Washington courts appear to provide an opportunity for landlords and tenants to change this result through their rental contracts. However, it is unclear why any landlord would wish to do so, as this action could result in the landlord's liability for uninsured damage.

Washington law prohibits an insurer from suing its insured and requires an insurer to waive its right to subrogation (reimbursement) under the policy against a unit owner or any lessee of the owner.[6] A tenant in a unit covered by an owner's insurance policy is covered by the owner's policy unless the parties specifically agree otherwise.[7] The *Kalles* case expands this to include condo policies.

In *Kalles*, the particular property policy at issue covered real property owned by the Association and the unit owner, but there

could be variations to this type of coverage. Individual insurance policies should be carefully reviewed.

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[1] Most insurance provisions in an Association's Governing Document are broad and vague, giving the Board some discretion to obtain insurance that it deems to be prudent. Others will specifically state the quality of insurance company that must be used, and specific policy minimums, or obligations to comply with some industry standards for insurance.

[2] RCW 64.34.352(3)(a),(c)(Insurance).

[3] Note that although the unit owner may be insured, the unit itself may not be covered property under the Association policy. *See* RCW 64.34.352. For example, the policy could extend coverage to common areas only, and not cover the interior of the units.

[4] *Comm'y Ass'n Underwriters of America v. Kalles*, 164 Wn. App. 30, 36 (2011). A tenant was alleged to have started a fire that damaged the condo unit and common areas. The insurance company covered the loss but sued the tenant to recover its cost of repair. The court held that the insurance company could not recover from the tenant, who was deemed an insured under the Association's policy.

[5] *Kalles*, 164 Wn. App. at 36-37.

[6] RCW 64.34.352(3)(b).

[7] *Cascade Trailer Court v. Beeson*, 50 Wn. App. 678, 686 (1988). A landlord has an ownership interest in the premises, and a tenant has a possessory interest in the premises, so the tenant should reasonably expect to be covered by the insurance.

28

Association Property Insurance: Is damage within a condo Association's property insurance policy 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.

"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 Association's Governing Documents. If the Declaration does not specifically allocate the deductible, it is a common expense.

New Act condo Associations

If the insured event involves a limited common element, owners who have the right to use the limited common element will be solely responsible for the deductible (equally or in any other proportion that the Association's Declaration provides) 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]

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]

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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

Statute of Limitations: How long after an amendment is recorded can it be challenged successfully?

1. New Act Condos

An Amendment properly adopted by a New Act condo Association (an Association formed after July 1, 1990) in accordance with the requirements of the New Act cannot be successfully challenged more than one year after it is recorded.[1]

But the New Act's one year statute of limitations does not apply to an Amendment that was "void from its inception."[2] An Amendment that was improperly adopted under the New Act can be successfully challenged more than one year after it is recorded, because it was invalid at the time of recording.[3]

2. Old Act Condos

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. The Old Act does not contain a statute of limitations.[4]

3. HOA

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.[5]

The Court's holding suggests that Washington courts likely will affirm an improperly adopted Amendment if the challenger has 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 he initially complies with the Amendment before challenging its validity and if the owner knew about the Amendment before purchasing).

Washington courts have invalidated an improperly adopted Amendment subject to the New Act that was challenged five years after it was recorded[6], and invalidated an improperly adopted Amendment subject to the Old Act that was challenged ten years after it was recorded.[7]

It is possible the Washington Court of Appeals could interpret RCW 64.34.262(2)'s application to improperly adopted Amendments differently in the future, and it will probably depend on specific facts and circumstances. The real lesson from these cases is that an Association should follow the correct process and voting procedure(s) when amending its Declaration or CC&Rs.

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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] *Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n*, 184 Wn. App. 593, 600 (Wash. Ct. App. 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).

[3] Some people believe the *Club Envy* court based its reasoning on two cases which did not involve application of RCW 64.34.262(2) or the WCA. Neither case supports the Court's holding that the plain meaning of the WCA indicates that an improperly adopted Amendment is not barred by the statute's one-year statute of limitations. Additionally, the

Court's holding constitutes circular reasoning: an Amendment not properly adopted is not subject to the one-year limitation because it was not properly adopted. Brief On Behalf Of Community Associations Institute at 3-4.

[4] *See, Keller v. Sixty-01 Ass'n of Apartment Owners*, 2008 Wn. App. LEXIS 734, unpublished (2008). *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 case does not stand for the proposition that every invalidated declaration Amendment is void at its adoption and therefore not subject to RCW 64.34.264(2)'s safe harbor protection. They also argue that a case from Rhode Island (*America Condominium Association*) similarly is unsupportive.

[5] *Bishop v. Twin Lakes Golf & Country Club*, 1998 Wash. App. LEXIS 241 (Wash. Ct. App. Feb. 17, 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).

[6] *See, Club Envy of Spokane* 184 Wn. App. 593.

[7] *See, Keller*, 2008 Wn. App. LEXIS 734 (court upheld the trial court's jury instruction that if the condominium Declaration Amendment was improperly passed, the Amendment was void).

30

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 for HOAs.

[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.

31

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 entitled: "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. The Board must be reasonable.

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.[2]

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 more 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.

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[1] *Frances T. v. Vill. Green Owners Assn.*, 42 Cal. 3d 490 (1986) (court found that appellant had alleged facts sufficient to show the existence of

a duty, that respondents could have breached that duty of care by failing to respond in a timely manner to the need for additional lighting and by ordering her to disconnect her additional lights, and that this negligence -- if established -- was the legal cause of her injuries).

[2] 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, where he had been visiting family. The HOA had empowered Zimmerman, who was not a law enforcement officer, to pursue suspected crime in the community. It had also recommended in the community newsletter that residents contact Zimmerman regarding any criminal activity in the community so that he could address the issue. Following the shooting, the Martin family filed a wrongful death lawsuit against the HOA, which settled for an undisclosed sum believed to be over $1 million. Zimmerman was also prosecuted for second degree murder arising from his actions.

32

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

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[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.).

33

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 on the matter.

Before July 1, 1990, 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. 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.

Since July 1, 1990, however, the New Act[2] and the HOA Act[3] have given Associations an alternative to lawsuits for enforcing their CC&Rs and their internal rules and regulations. Under the New Act and HOA Act, Associations may adopt internal enforcement procedures in their Governing Documents, which may include the imposition of fines. 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 internal enforcement provisions of the New Act and HOA Act each have "due process" requirements, which ensure that owners facing sanctions will be treated fairly. In order for the due process requirement to be satisfied, internal rules enforcement efforts should include, at a minimum:

1) Notice to the offending owner of the pending sanction (*See* chapter entitled: "Notice: What does 'notice' mean?");
2) An opportunity for a hearing before the sanction is issued (*See* chapter entitled: "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 due will 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 provision is applicable 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) (where a contract gave one party discretion over how a particular provision could be satisfied in the future, the court determined the party had an implied duty of good faith and fair dealing in performing that provision).

[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. It comment explains:

> 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,* 2013 Wn. App. LEXIS 2294, *1 (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 Association of St. John, Inc.*, 2015 Ind. App. LEXIS 457; *see also*, *Raintree Homeowners' Ass'n v. Dreyfus Interstate Dev. Corp.*, 2001 Minn. App. LEXIS 739, *3 (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).

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.[1] Associations are required to reasonably comply with their own notice provisions.[2] [3]

"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, 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[4] are defined by statute, as are the required contents of a resale certificate.[5] 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.[6]

"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).[7]

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. "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. [8] [9] 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. 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 Condominium 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.[10] [11]

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.[12]

3) Notice of annual meetings and special meetings

Associations must hold a meeting at least once each year.[13] 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.[14] 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.[15]

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:

(3) Hand-delivery to the owner's mailing address;
(4) Prepaid first-class US mail to the owner's mailing address; or
(5) Electronic transmission to an address location, or system designated in writing by the owner. [16]

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.[17]

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.

"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.

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

[2] *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102 (2014) (all contracts contain an implied duty of good faith and fair dealing).

[3] RCW 64.34.090 (Obligation of good faith) "Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement."

[4] *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).

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

[6] 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.

[7] In this 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.

[8] 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 . . .

[9] 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 . . .

[10] 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.

[11] 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.

[12] 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 ratified by the owners. RCW 64.34.308(3); RCW 64.38.025(3).

[13] 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.

[14] 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.

[15] RCW 64.34.332 (Meetings).

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

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

35

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 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. Before an Association may take any action against an owner's interest,[3] the Board must give the owner the option to request some kind of hearing (the Board must provide the owner with notice[4] that the owner has the option to request a hearing).

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.[5] There are two aspects of due process that Associations must satisfy: procedural due process[6] and substantive due process.[7] [8]

The Washington Court of Appeals has held that a meaningful opportunity to be heard includes giving an owner an opportunity to present objections to a competent tribunal before the Association can take an action that adversely affects the owner's property rights.[9] Other states have also clarified what "opportunity to be heard" means. The Minnesota Court of Appeals held "opportunity to be heard" is determined by an Association's governing documents.[10] [11] The Connecticut Court of Appeals held "opportunity to be heard" means providing a hearing, either formal or informal (as provided in the Association's governing documents), that is fair.[12]

It is important to remember that an "opportunity to be heard" does not necessarily require an Association to give an owner a hearing before the Association takes an action. "Opportunity to be heard" merely requires an Association to notify an owner that the owner has the option to request a hearing before the Association can take an action that deprives the owner of a property right. A hearing is necessary only if the owner, upon receipt of timely notice, requests one.[13]

"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.[14]

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 will probably 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 a hearing. 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.

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

[4] *See* chapter entitled: "Notice: What does 'notice' mean?"

[5] *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).

[6] 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.

[7] 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, Riss v. Angel*, 131 Wn.2d 612 (1997).

[8] 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).

[9] *Fairwood Greens Homeowners Asso v. Young*, 26 Wn. App. 758 (Wash. Ct. App. 1980) (a homeowner was allowed to park a motor home on the property despite a restrictive covenant that prohibited motor homes because an earlier covenant did not restrict parking a motor home on the lot, and the homeowners bought the motor home in reliance on the covenants in place when they bought their lot).

[10] *Southview Greens Condominium Asso. v. Finley*, 413 N.W.2d 554 (Minn. Ct. App. 1987) (a condo Association's assessments on an owner were invalid because the Association did not provide the owner with the requisite opportunity to be heard, as required by its bylaws, before levying the assessments).

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

[12] *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.").

[13] There are no Washington cases that have ruled on this specific issue, but courts in other states have concluded "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).

[14] *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).

36

Disruptive Owners: Can the Board expel a disruptive owner from a meeting?

Under the HOA Act[1], Association meetings and 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 all Association 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.

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.[5]

The case, *In re Recall of Kast*, arose from a public bidding process on a Pierce County fire system project.[6] 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[7] 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.[8]
2) The Board may impose fines after appropriate due process,[9] provided it has adopted rules of conduct for meetings and informed members of the rules.
3) The Board may use the "Rules of Order"[10] 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.[11]
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] 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 42.030.

[6] 144 Wn.2d 807, 816-19 (2001).

[7] 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.

[8] 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 to 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.

[9] *See* chapter entitled: "Fines and Enforcement: What procedures must the Association follow when issuing sanctions to enforce covenants?"

[10] 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.

[11] 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 an owner withhold assessments if he does not use the Association's amenities or if the owner has a dispute 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) (Unit owners' association—Powers) 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 imposed to pay for the improvements.)

[7] *See, Farm Homeowners Ass'n v. Burley*, 1999 Wash. App. LEXIS 1911 (Wash. Ct. App. Nov. 8, 1999) (Court held the owner could not lawfully withhold assessments from the Association as self-help to offset against alleged money owed to the owner by the Association.)

[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 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] and case law addressing landlord repairs and inspection of rented premises can serve as a guide for what reasonable might mean in this context.

The Landlord-Tenant Act requires tenants to reasonably allow landlords to have access to the rented premises to make necessary repairs or to inspect the premises.[5] Washington courts have defined "reasonable" to mean that a landlord must give the tenant at least two days' notice of the landlord's intent to enter the premises.[6] The notice must state the exact time and date (or dates) for when the entry will occur.[7]

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[8] 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.[9] An example of an emergency is where a pipe has burst and the leaking water is causing immediate damage to the owner's property or to the property of other owners or to common elements. 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), sending notice of any required entry by mail to the owner and also posting the notice on the door of the property.

[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] *Henry v. Henry*, 2001 Wn. App. LEXIS 411, *12 (Wash. Ct. App. Mar. 13, 2001) (tenant alleged the landlord entered the premises without notice several times, but the court affirmed the trial court's holding that the facts presented by the tenant were insufficient to find for the tenant).

[7] 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.

[8] 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."

[9] RCW 59.18.150(4)(a) (Landlord's right of entry…) provides: "A judge must issue a search warrant before the official may enter the premises."

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 must 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. These rules should appear in the Association's Governing Documents to be valid (and enforceable). 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 cannot 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.

[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 entitled: "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?

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 constitutes unlawful discrimination, but an Association need not make accommodations that are unreasonable.[3]

To establish a claim of unlawful discrimination under the FHA, a resident must show[4] that:

(A) The resident is handicapped;[5]
(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.

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.[6] 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 whether a resident will 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 an owner, as it would be unreasonable to request that other owners give up their right to the parking spaces as 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] What is reasonable is specific to each request and the ability of the Association to accommodate. If there is a cost involved usually the requesting owner must pay.

[4] *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).

[5] "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)).

[6] 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*, 2012 US Dist. LEXIS 61680 (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*., 1999 US Dist. LEXIS 7031 (1999) (Affirming grant of summary judgment to board in a parking space accommodation case).

41

Association Records: Must an Association disclose names of delinquent owners?

By statute, Associations are required to disclose financial records to unit owners and their agents on request. These records necessarily 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.

Under the New Act[1], 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.[2]

The HOA Act has a similar requirement that Associations maintain financial records "sufficiently detailed to enable the Association 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.[3]

Associations incorporated under the Nonprofit Corp. Act[4] or the Nonprofit Misc. Mutual Corp. Act[5] 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.[6]

These provisions require Associations to keep detailed records of receipts and expenditures, which would necessarily include a ledger itemizing specific payments of assessments. Presumably, the ledger would indicate the date, amount, and from whom payment was received (or owing). Thus, Washington law requires Associations to maintain information on delinquent owners and to disclose the information to other owners on receipt of a reasonable[7] request to view them.[8]

Potential Conflict and Liability Related to "Shame Sheets"
It is important to note the difference between an Association's statutorily mandated disclosure of delinquent owner names to other owners upon request, and the widespread publication of delinquent owner names by the Association itself (i.e., in a newsletter or on the internet) in an effort to induce payment. For a number of reasons, Associations should avoid these tactics.

First, mistakes can happen and a homeowner may be the victim of a bookkeeper posting a payment to the wrong account or a simple oversight. Even without such an error, it is entirely possible that information that was accurate when published will remain online or in print long after it has become stale, i.e., because the delinquent owner pays or settles 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 many more who never pay and instead become hostile and obstructionist toward the Board.

Best Practices

There is no need for an Association to risk liability or conflict by publishing a list of delinquent accounts on its own. In the case of condos, Associations hold a statutory lien on a unit for any assessments levied against a unit from the time the assessment is due until the time it is paid.[9] HOAs generally have a similar right to assess a lien for assessments set forth in the Association's CC&Rs. Although the Association generally need not record the lien for it to be valid, it may do so if it wishes, and recording the lien (or foreclosing it) results in the lien becoming public record, often disclosed in newspapers and on county websites. The King County Recorder's Office, for example, has an online records search feature where, by searching the name of an Association, any member of the public can view a record of every lien recorded by the Association.[10]

Additionally, most homeowners are less concerned about which of their neighbors is delinquent than they are about the Board's plan for recovering outstanding assessments. The Board could address this concern by making available the number of delinquencies and the total amount of the delinquent funds, along with the Board's plan to collect. For example, the Board could publish information to state: $12,000 total outstanding; $7,000 in foreclosure or lien status; $5,000 in attorney-written notice; $1,000 in Board-written notice status. This can be done while keeping names and even addresses of delinquent owners confidential.

Conclusion

Although Associations have a statutory duty to maintain records of delinquent owners and disclose the information to other owners on request, this duty does not require Associations to publicize delinquent owner information.

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[1] RCW 64.34.372(1). This provision is applicable to Old Act condo Associations. *See* RCW 64.34.010(1).

[2] RCW 64.34.372(1); RCW 64.34.425.

[3] RCW 64.38.045(1)-(2).

[4] RCW 24.03.

[5] RCW 24.06.

[6] RCW 24.03.135; RCW 24.06.160.

[7] 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 to 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).

[8] The Kansas court reached a similar conclusion recently when it interpreted similar statutory language in *Frobish v. Cedar Lakes Village Condominium Association*, 2015 Kan. App. LEXIS 519. 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.

[9] RCW 64.34.364.

[10] http://www.kingcounty.gov/depts/records-licensing/Recorders-Office/records-search.aspx.

42

Association Records: Are emails and electronic documents Association records?

Associations and managers are increasingly using email and electronic storage and often have accounting software and databases that contain information specific to Associations. Additionally, Associations and managers are increasingly relying on email to communicate and distribute information. The question is: how many of these are "association records" that owners have a right to review?

Associations are required to keep official records. Condo Associations are required to keep governing documents, meeting minutes, budgets, and financial records.[1] Old Act Condo Associations must also keep "complete and accurate books and records of the receipts and expenditures affecting the common areas and facilities."[2] HOAs are required to keep "financial and other records sufficiently detailed to enable the association to fully declare to each owner the true statement of its financial status."[3]

The statutory description of association records is very broad and has the potential to be interpreted as anything related to association business, including email, etc.
Washington law does not yet specifically address whether emails or other electronic records regarding association business are association records.[4]

Our law firm takes the position that emails are not association records because Boards can only take action in Board meetings, and the minutes of those meetings are the official "record" of the association. No emails or other discussions about decisions would change that.

Our firm also takes the position that electronically stored information which would otherwise be considered association records, are association records if the information that is electronically stored consists of Board meeting minutes, the association's budget(s), or other relevant association financial records. Since associations are required to make the above information reasonably available to owners upon request[5], electronically stored versions of the above may be considered association records. Certainly printed copies of these documents would be association records.

The statutes are silent as to the form in which association records must be made available to owners. Traditionally, physical copies are made available, but because associations and management companies tend to store information electronically, electronic copies may be an acceptable substitute (there is no Washington law that supports or refutes this).

Other states allow associations to provide owners with electronic copies of association records[6] and in 2013, the HOA Act was updated to allow HOAs to inform owners of association meetings via email,[7] so it appears that Washington is becoming more accepting of electronic communications.

Emails between Board members, or between Board members and managers are not association records, so owners do not have a right to see those emails. As stated above, association records include Board meeting minutes, budget(s), and association financial records. Records would include paid invoices, contracts, and consultant reports. So, unless the information in the email serves as the official record of a Board member's approval of

action taken without a meeting, an owner will not have a right to see emails between Board members or between Board members and managers.

Just because an email is not an association record does not mean the email could not be discovered in litigation. A Board could refuse to provide a requested email to an owner, but if the owner were to sue the association the owner would probably be entitled to discover all email communications whether or not they are Association records.

Emails between the association's attorney and Board members or association managers are subject to an attorney-client privilege[8] that can be waived if it is not preserved. Disclosure of such emails is often not in the best interest of the association and may make those emails subject to disclosure in future legal action. Simply copying an attorney on the email does not necessarily subject the communication to an attorney-client privilege. Emails with an association's attorney may also be protected by the work product doctrine, which applies to material prepared in anticipation of litigation.

Our recommendation at the time of this writing: If any association record is scanned to electronic form, it is still an association record. Emails between Board members and/or managers are not association records. Anything prepared for an attorney or in anticipation of litigation is privileged and not reviewable, even if it is a record. Data inside software, like Quick Books, are not association records. Reports printed out from that data are association records (like a balance sheet or a list of all owners), but just because it can be printed does not make it an association record. Data inside management software is not an association record. Information posted to websites is an association record, even websites limited to owners. If a website is limited to Board members only, the documents may not be association records.

[1] RCW 64.34.372(1)(Association Records – Funds). This applies to Old Act condo Associations. *See* RCW 64.34.010 (Applicability).

[2] RCW 64.32.170 (Records and books – Availability for examination – Audits).

[3] RCW 64.38.045(1) (Financial and other records – Property of Association – Copies – Examination – Annual financial statement – Accounts).

[4] Treating emails as Association records would raise logistical issues in addition to concerns about privacy, privilege, and free communication between parties that may unnecessarily complicate the task of Association record-keeping. An Association could adopt a policy to define what records are, and clarify if emails are or are not records.

5 RCW 64.34.372 (Association records — Funds); RCW 64.38.045 (Financial and other records — Property of Association — Copies — Examination — Annual financial statement — Accounts); RCW 64.32.170 (Records and books — Availability for examination — Audits).

[6] *See* Title XL (Real and Personal property) 718.111 (Florida); Civil Code 5200-5240 (h) (California).

[7] *See* RCW 64.38.035(3) (Association meetings—Notice—Board of directors).

[8] *See* chapter entitled: "Attorney-Client Privilege: Are communications between an attorney and an Association's management company protected by attorney-client privilege?"

43

Attorney-Client Privilege: Are communications between an attorney and an Association's management company protected by attorney-client privilege?

There is no case law in Washington that specifically addresses whether or not communications between an attorney and an Association's management company are protected by attorney-client privilege. However, Washington courts have recognized several situations where communications with a third party, similar as an Association's management company, are protected by the attorney-client privilege.[1] [2]

In Washington, communication(s) from the client to the attorney and communication(s) from the attorney to the client are both treated as privileged.[3] Communications between an attorney and client are only protected by attorney-client privilege if the communications are confidential.[4] Generally, if a third party is present during the communication(s), intentionally or unintentionally, those communications lose the privilege.

However, if a third party is an agent of the attorney or the client and that agent is essential or necessary to the giving of legal advice then the privilege is not lost.[5] The burden of establishing a communication is protected by attorney-client privilege rests with the party claiming it.[6]

Other state and federal courts have applied similar rules regarding the extension of the attorney-client privilege to third parties or

agents.[7] [8] Others have applied the "Intermediary Doctrine"[9] to find that communication between an attorney and a client's agent is privileged.[10] [11] [12]

When an attorney represents an Association the client is the Association. However, in most instances an attorney provides counsel and advice directly to the Board. The Board is *not* the client. However, the Board receives attorney communications and gives direction to the attorney and the Association. If an Association employs a management company, then that management company is the Association's agent. Communications between an agent and an attorney are privileged. Employees of the management company who are deemed necessary for the giving of legal advice will not 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.[13]

An Association's management company is similar to an interpreter or an accountant in that all are agents who may be necessary for an attorney to give proper and effective legal advice to the client. Though the courts in Washington have not explicitly stated communications between an attorney and an Association's management company are protected by attorney-client privilege, it is likely that Washington courts would consider an Association's management company to be the Association's agent, and necessary for the giving of legal advice to the Association.

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. And remember that unit owners are also considered third parties who will destroy the privilege.

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[1] *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.).

[2] *Bronsink v. Allied Prop. & Cas. Ins*., 2010 U.S. Dist. LEXIS 29166, *5 (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.).

[3] Washington courts interpret RCW 5.60.060(2)[3] 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).)

[4] *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.).

[5] *Aquino-Cervante*, 88 Wn. App. at 708.

[6] *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.).

[7] *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.).

[8] *CoorsTek, Inc. v. Reiber*, 2010 U.S. Dist. LEXIS 42594, 12 (D. Colo. Apr. 5, 2010) (The presence of a third party will not destroy the attorney-client privilege if the third party is the attorney's or client's agent or possesses commonality of interest with the client.).

[9] *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. The agent must be effectuating the client's purpose of receiving 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] The risk of losing the privilege increases as more third parties are made privy to documents and information from attorneys.

44

Delinquent Owners: Can an Association recover an owner's delinquent assessments from a tenant living in the unit?

Owners, rather than their tenants, are members of the Association and therefore responsible for paying assessments.[1] A tenant's lease creates a legal obligation to pay rent to an owner-landlord, but tenants generally have no legal obligations to the Association, except to follow the Association rules. The Washington Court of Appeals has held that a tenant has no obligation to pay assessments where an owner has failed to do so.[2] Nevertheless, an Association may have options for encouraging a tenant to pay delinquent Association assessments owed by the unit owner.

First, many Associations require both tenants and the unit owner to sign an agreement, either included in or in addition to the lease, that obligates the tenant to pay delinquent assessments (through interception of rent, discussed below, or otherwise) if the owner fails to do so. That way, there is a contract between all of the parties to make clear the obligations of the tenant, who would not otherwise be bound by the terms of the Association's Governing Documents.

Associations may also be able to intercept rent paid for delinquent units. Many Governing Documents give Associations authority to demand that tenants submit rent directly to them when the owner is delinquent without taking additional legal action and, in some

cases, the Governing Documents even grant the Association power to evict tenants who fail to submit rent payments.[3]

Next, an Association can limit a delinquent owner and his or her tenant's rights to use certain common areas and amenities, such as a community pool or cabana if their Governing Documents specifically authorize such an act.[4] If an Old Act condo provides utilities for the community (i.e., water, gas, electrical, cable) it may be able to shut off service to the delinquent unit, so long as it provides the tenant written notice of the shut-off and an opportunity to appeal.[5]

While these actions will not make the tenant legally responsible for the owner's delinquent assessments, they might help reduce further shortfalls by inducing the tenant to pay their rent to the Association and the interruption in services would almost certainly cause the tenant to complain to the owner about the loss of these services. The owner, in turn, might opt to pay the delinquent assessments rather than lose the tenant's rental income.

Finally, if an Association has filed a foreclosure lawsuit against the delinquent owner, it is entitled to ask the court to appoint a "custodial receiver" who takes over the property, rents it out, and pays the proceeds consistent with statutory guidelines. (They would in effect become the new landlord for any existing tenant). Under Washington law, the proceeds of a custodial receivership have to be applied in this order:

1) First to the costs of receivership and attorneys' fees connected to the receivership.
2) Then to the cost of refurbishing unit, if necessary.
3) Then to "applicable charges" (including ongoing assessments, any utility charges, etc.).
4) Then to costs, fees, and charges of the foreclosure lawsuit.
5) Then to payment of delinquent assessments.

Receivership can be an effective way to pay down a delinquency or, at the very least, "stop the bleeding" on a delinquent unit. Anytime you are dealing with a unit that is not owner-occupied, your attorney should take you through the analysis of whether a receivership is a viable option to assist in recovery of the balance due. In the last several years, we have seen the majority of receiverships produce a good result for our clients. If this is an option you are unfamiliar with, be sure to ask your attorney for more information.[6]

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[1] *See, Graville Condo. Homeowners Ass'n v. Kuehner*, 177 Wn. App. 543 (2013) (Where a condo Association sought to recover unpaid assessments from an tenant, the Washington Court of Appeals held that the Association could not recover because the tenant was not liable for assessments under the terms of the declaration or the Condo Act.)

[2] *See, Graville Condo. Homeowners Ass'n*, 177 Wn. App. 543 (2013).

[3] For more information on an Association's right to intercept rent from a tenant, See,Condominium Law Group blog article entitled "Can condo Associations intercept rent from a tenant living in an owner's unit?" at http://www.condolawgroup.com/2012/12/24/rent-interception/.

[4] *Note:* Regardless of what the Governing Documents say, an Association probably cannot restrict a delinquent owner's (or his or her tenant's) access to common areas if the restriction unreasonably interferes with the owner's use of the land. Thus, an Association probably could not deactivate a delinquent owner's entry gate remote control to prevent the owner's use of the common area roads to get to the owner's home, especially if the common road was the only means of accessing the home. *See* Condominium Law Group blog article entitled "Restricting access to common area roads: a "high risk" activity for Washington HOAs" at http://www.condolawgroup.com/2013/11/12/restricting-access-to-common-area-roads-a-high-risk-activity-for-washington-hoas/.

[5] *Note:* Because, in this situation, the common element wires and pipes provide utilities. The Association does not contact the public utility provider, it simply disconnects the common element that serves the unit. The Association must give the occupants written notice of a threatened shut-off and a chance to pay their rent to the Association. However, the

Association cannot force the tenant to pay the owner-landlord's past due assessments.

[6] For more information on receivership, *See* Condominium Law Group blog article entitled "Receivership-Brief Overview" at http://www.condolawgroup.com/2013/11/14/receivership-brief-overview/.

45

Tenant' Rights: What rights does a tenant have relative to the Association?

The relationship between an owner and their tenant 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.[2] There is no contract between the Association and an owner-landlord's tenant. However, a tenant has several rights against the Association.

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.[3] Some cities, like Seattle, provide even greater protections to tenants. Although courts in other states have held differently, [4] 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. If there is an assessment due or a late fee, the owner-landlord will be responsible for paying it.

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.

For more information on an Association's ability to collect assessments from tenants, *see* chapter entitled: "Delinquent Owners: Can an Association recover delinquent assessments from a tenant living in a unit?"

Washington courts have not addressed this issue, but tenants probably have the same rights that an owner would have in terms of an Association's obligation to give notice[5] and an opportunity to be heard[6] before levying fines or taking 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.[7] 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[8], a tenant's lease survives a foreclosure.[9] 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.[10] A month-to-month tenant is also entitled to ninety 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.[11] [12] 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 appeal.[13]

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 their owners, but they do not have the authority to enforce their Governing Documents against their 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, potentially imposing a lien on the owner-landlord's 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] *613 Fairview Ave., L.L.C. v. Pong's Corp.*, 2003 Wash. App. LEXIS 74 (2003) (landlord breached the implied covenant of quiet enjoyment by blocking the parking lot with a locked chain).

[3] *See 613 Fairview Ave*, 2003 Wash. App. LEXIS 74.

[4] *Preserve at Forrest Crossing Townhome Ass'n v. Devaughn*, 2013 Tenn. App. LEXIS 59 (Tenn. Ct. App. 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).

[5] *See* chapter entitled: "Notice: What does 'notice' mean?" for more information.

[6] *See* chapter entitled: "Fines and Enforcement: What does 'opportunity to be heard' mean?" for more information.

[7] *See* RCW 64.34.304(r) (Common expenses — Assessments); RCW 64.38.020(12) (Association powers).

[8] Public Law 111-22 Title VII--Protecting Tenants At Foreclosure Act.

[9] Public Law 111-22 Title VII Sec. 702.(a) (Effect of Foreclosure on Preexisting Tenancy) provides, 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.

[10] Public Law 111-22 Title VII Sec. 702.(a) (Effect of Foreclosure on Preexisting Tenancy.) provides:

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;

[11] 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 . . .

[12] For more information, *see* chapter entitled: "Delinquent Owners: Can an Association recover delinquent assessments from a tenant living in the unit?"

[13] ***Note:*** 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 future utility bills. However, the Association probably cannot force the tenant to pay the owner-landlord's past due assessments.

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Solar Panels: Can owners get tax credits for use and installation of solar panels in a condominium?

State[1] and federal[2] tax incentives are available to individuals, households, businesses, and local governmental entities that produce electricity via a renewable energy system such as solar panels. An individual owner or group of owners may claim either incentive for solar panels purchased and installed on property owned by the owner. However, the two incentives treat solar panels installed by an Association differently. Individual owners may not claim the Washington incentive for solar panels installed by an Association on common elements, though the Association itself will be able to claim it in some circumstances. In contrast, an Association can never claim a federal tax credit for solar panels it installs on common elements, though it may "pass along" the credit to individual owners, each of whom may claim a proportionate share.

Washington Renewable Energy System Cost Recovery Program[3]

Under Washington's solar energy incentive program, the state essentially buys each kilowatt-hour produced by solar energy systems (and other qualified renewable energy systems) in order to offset the costs associated with the purchase of the system. Under this program, the state will make incentive payments to persons who install solar panels, up to $5,000.[4]

A person applying for the program must certify that they own the solar energy system and that they own the property on which that system is situated. Owners and Associations who invest in solar panels face different standards for satisfying this "unity of ownership" requirement.

If a single owner in a planned community installs solar panels, the owner is eligible for the incentive up to the $5,000 cap if:

1) the individual owns the panels; and
2) the individual owns either the property on which the panels are installed OR a fractional interest therein.

If a group of owners pool their resources to purchase solar panels to benefit the units they own, installing them units on a common element or joint limited common element, each owner in the group is eligible for the incentive up to the $5,000 cap if:

1) the group collectively owns the panels; and
2) each member of the group owns a fractional interest of the common element or joint limited common element where the panels are installed.

If an Association installs the solar panels, as opposed to individual owners, the Association — but not individual owners — will be eligible for the incentive up to the $5,000 cap if:

1) the Association, in its corporate capacity, owns the panels; and
2) the Association has an ownership interest in the common element or joint limited common element where the panels are installed.

Federal Solar Investment Tax Credit[5]

The federal government offers homeowners a thirty percent federal tax credit for the purchase and installation of solar panels.

The credit is a dollar-for-dollar reduction in the income taxes that a person claiming the credit would otherwise pay the federal government based on the amount of investment in solar property, with no monetary cap on the amount of credit. If the federal tax credit exceeds an individual's federal income tax liability for the year the solar energy system is installed, the individual may carry the tax credit forward to the next year.

As with the Washington incentive program, individual owners, or groups of owners who pool their resources, may claim the credit for solar panels installed on property they own. Unlike the Washington incentive program, however, individual owners may also claim a proportionate share of the tax credit for solar panels installed by the Association on common elements.[6]

Note: As with other tax related matters, Associations and owners are advised to consult with their accountant or tax preparer for concerns related to tax liability and eligibility for credits or other incentives.

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[1] Washington has a renewable energy system cost recovery program set forth at RCW 82.16.110 to .130 and WAC 458-20-273.

[2] The Energy Policy Act of 2005 (109 P.L. 58 § 25D) provides a federal tax credit for residential energy property, including solar-electric systems.

[3] For more detailed information for condo dwellers regarding Washington's incentive program, including examples, *see*, the Washington Department of Revenue's Excise Tax Advisory 3197.2015, available at http://dor.wa.gov/Docs/Rules/eta3000/ETA31972015FINAL.pdf.

[4] WAC 458-20-273.

[5] For more information on the Solar Investment Tax Credit, *see* http://www.seia.org/policy/finance-tax/solar-investment-tax-credit.

[6] But, for the owners to qualify for the credit, the community must be primarily owner-occupied and the Association must be a "homeowners association" as defined in section 528(c) of the federal tax code, which provides:

(1) **Homeowners association**
The term "homeowners association" means an organization which is a condominium management association, a residential real estate management association, or a timeshare association if—

(A) such organization is organized and operated to provide for the acquisition, construction, management, maintenance, and care of association property,
(B) 60 percent or more of the gross income of such organization for the taxable year consists solely of amounts received as membership dues, fees, or assessments from—

(i) owners of residential units in the case of a condominium management association,
(ii) owners of residences or residential lots in the case of a residential real estate management association, or
(iii) owners of timeshare rights to use, or timeshare ownership interests in, association property in the case of a timeshare association,

(C) 90 percent or more of the expenditures of the organization for the taxable year are expenditures for the acquisition, construction, management, maintenance, and care of association property and, in the case of a timeshare association, for activities provided to or on behalf of members of the association,
(D) no part of the net earnings of such organization inures (other than by acquiring, constructing, or providing management, maintenance, and care of association property, and other than by a rebate of excess membership dues, fees, or assessments) to the benefit of any private shareholder or individual, and
(E) such organization elects (at such time and in such manner as the Secretary by regulations prescribes) to have this section apply for the taxable year.

26 U.S.C. § 528(c)(1).

GLOSSARY

TERM	SIMPLE DESCRIPTION[1]
Allocated interest	The percentage of the physical property owned by a particular Unit Owner. The total of all owners of an association must add up to 100%.This often determines the Unit Owner's share of common Assessments, and the votes unit owners have for any matter decided by the Association.
Amendment	A legal change to a document that affects the rights or obligations of the owners. Any governing document can be amended by some method: some by a simple vote of the Board, others by 100% approval by the owners and the lenders for the Units.
Annual Meeting	Meeting of all members of the Association at which time information is shared and action items may be voted on by the full Association. Usually held about the same time each year, and usually includes the election of Board Members.
Apartment	"Old Act" term for a Unit in the "New Act". This is a piece of property owned exclusively by a member of the Association for his or her personal use.
Articles of Incorporation	The legal documents filed with the Secretary of State to create a Corporation. "New Act" condos are required to be a Corporation.

Assessment	Any money the Association requires a unit owner to pay to the Association. The annual budget is typically broken into equal monthly assessments for each Unit. Construction projects or unanticipated expenditures may have Special Assessments. Fines are an Assessment against only one unit.
Association	The group of all owners of individual condos or homes. By statute, each owner is a member of the Association. Most Associations are non-profit corporations.
Board, or Board of Directors	The elected members of the Association who have the power to make decisions and take action for the Association.
Board Meeting	A meeting of just the Board Members to conduct the business of the Association. Typically will occur monthly, but could be more or less frequent.
Board Members	The members of the Association elected to manage the affairs of the Association. Typically a President, one or more Vice Presidents, Treasurer, and Secretary are selected (by the board) from among the board members elected by the membership. The Bylaws establish the number and voting procedures.
Budget	A forward projection of expenses for the next year, used to set the monthly Assessments for each unit. Includes all expenses for insurance, utilities, management fees, cleaning, landscaping, repairs, etc.

Bylaws	The procedures by which the Association conducts its business. Typically discusses meetings, elections of Board Members, powers of the Board, etc. This must be adopted by the Association and can typically be amended only by a vote of the Association.
CC&Rs	Covenants, Conditions, and Restrictions.
CGL Insurance	"Commercial General Liability". Describes one type of insurance policy carried by most Associations and contractors. It insures the Association for acts and omissions, and negligence by the association.
Collection Policy	Established procedures adopted by the Association or Board to keep collection activities fair and consistent.
Common Area	See Common Element. Sometimes thought of as the physical areas like a parking lot or playground rather than something like the roof. They are all Common Elements.
Common Element	Portion of the physical property owned collectively by all the members of the Association. Typically includes the roof, exterior walls, floor structures, parking lots, and anything not part of the individual units.
Condominium/Condo	The physical property. Includes the buildings, the units, and all other common real property owned by the members of the association.

Condo Act	RCW 64.34, or the "New Act", governs condos created on or after July 1, 1990. In this book, one of two "Condo Acts" that govern all Washington condos.
CPA	Certified Public Accountant.
D&O Insurance	Directors' and Officers' Liability Insurance. Protects the Association and individual Board members from lawsuits for their conduct acting on behalf of the Association. Will not protect them from intentional bad acts or acting outside their authority.
Declaration	The document that is recorded with the county to describe the physical property that is the condo, and to describe each Unit within the condom. Includes many restrictions and procedures that affect the property. This is what creates the condo and all of the Units.
Deductible	The amount of money that an insurance policy holder must pay out of pocket before the insurance company will pay for any covered claims. The policy holder self-insures this amount.
Director	A member of the Board of Directors.
Due Process	A phrase that stands for the right of an individual to be heard on a matter before a decision that affects them is final. May relate to fines assessed or permission denied.
Fine Schedule	A list of fines payable by owners for failures to comply with the Governing Documents.

Financial Statements	Collectively the Balance Sheet, Income Statement, and Statement of Cash Flow, which tell the story of the Association's financial position.
Fine Schedule	A list of fines Assessed against Owners for violations of the governing documents. Often enforceable only if published and provided to all Unit Owners.
GAAP	Generally accepted accounting principles.
Governing Documents	Collectively the documents that control the governance of an Association and the ownership and use of property within the Association's authority. The Governing Documents may include a Declaration, Survey Maps, Bylaws, Rules and Regulations, and Articles of Incorporation.
HOA	Homeowners' Association.
Homeowner	The "person" that holds title to a home. This may be a single person, a married couple, a corporation, trust, or some other form of legal entity.
Horizontal Property Regimes Act	RCW 64.32, or the "Old Act," effective 1963.
Limited Common Element	Portion of the physical property owned collectively by all members of the Association, but the use of which is restricted to one or only some members. Examples: a deck next to a unit; a parking space; or a storage locker.

Meeting Minutes	Document that reflects the actions taken and matters considered by the Association or Board at its meetings.
Member	Every Unit Owner is a Member of the Association automatically.
New Act	Washington Condominium Act. RCW 64.34. In this book, one of two "Condo Acts" that govern all Washington condos.
Nonprofit Corporation Acts	RCW 24.03 (Nonprofit Corporation Act) and/or RCW 24.06 (Nonprofit Miscellaneous and Mutual Corporations Act).
Officer	A member of the Board of Directors who has specific duties assigned, such as the President or Secretary.
Old Act	Horizontal Regime Property Act. RCW 64.32. Governs condos created before July 1, 1990. In this book, one of two "Condo Acts" that govern all Washington condos.
Personal Property	Things that are not tied to real estate or physical property. Includes cars, furniture, kitchen utensils and clothes. May include appliances like refrigerators and washing machines. Unit owners must insure personal property for themselves.
Property Insurance	This insures the physical property of the condo or HOA, and usually the individual Units or Homes, against physical loss or damage. Does not include the contents of the Units or Homes, but often includes carpet and fixtures within condo Units.

Proxy	Writing by one Association Member giving its vote to another person. May be for a specific vote, or may be a general power to vote for that person on any matter.
Quorum	The minimum number of Association (or Board) Members required to meet together to take action for the Association (or Board).
RCW	Revised Code of Washington. The state laws that govern all activities in the State of Washington.
Records	Includes (but is not necessarily limited to) Financial Statements, paid bills, cancelled checks, meeting minutes, contracts, or any other written document Received by, created by, or sent out from the Association.
Resale Certificate	Document prepared by the Association for potential buyers meant to provide adequate information for making an informed purchasing decision. Tells the buyer all the rights and restrictions of ownership. Prepared for every sale after the first sale.
Reserve Study	A long term future projection of major maintenance and repair expenses to help the Association budget. Its contents are now specified by statute.
Resident	A person living within a Unit or Home.
Rules and Regulations	Documents that govern ownership and use of the Condominium/HOA and individual Units/Homes, typically adopted by the Board or the Association by a majority vote.

Tenant	A person who rents the physical property that is the Unit.
Unit	"New Act" term for Apartment in the "Old Act". This is the piece of the property owned exclusively by each member of the Association.
Unit Owner	The "person" that holds title to a Unit. This may be a single person, a married couple, a corporation, trust, or some other form of legal entity.

[1] ***Note:*** The descriptions contained in this glossary should not be substituted for definitions set forth in the RCW, other applicable statutes, or an Association's Governing Documents.