

THE WASHINGTON UNIFORM COMMON INTEREST OWNERSHIP ACT: AN INTRODUCTION FOR CLT DEVELOPERS

Presented by
Joseph P. McCarthy, Stoel Rives LLP
May 23, 2019

INTRODUCTION

Washington Uniform Common Interest Ownership Act (“WUCIOA”)

- Act effective on July 1, 2018
- Codified at Chapter 64.90 RCW
- Amendments Effective on July 28, 2019

WHAT IS A COMMON INTEREST COMMUNITY

- “Common interest community” means real estate described in a declaration with respect to which a person, by virtue of the person’s ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, or improvement of, or services or other expenses related to, common elements, other units, or other real estate described in the declaration

WHAT IS A COMMON INTEREST COMMUNITY

- Condominium
- Cooperative
- Planned Community
 - Plat Community
 - Miscellaneous Community

WHAT IS A COMMON INTEREST COMMUNITY

- “Condominium” means a common interest community in which portions of the real estate are designated for common ownership solely by the owners of those portions. A common interest community is not a condominium unless the undivided interests in the common elements are vested in the unit owners

WHAT IS A COMMON INTEREST COMMUNITY

- “Cooperative” means a common interest community in which the real estate is owned by an association, each member of which is entitled by virtue of the member’s ownership interest in the association and by a proprietary lease to exclusive possession of a unit

WHAT IS A COMMON INTEREST COMMUNITY

- “Planned community” means a common interest community that is not a condominium or a cooperative. A condominium or cooperative may be a part of a planned community

WHAT IS A COMMON INTEREST COMMUNITY

- “Plat community” means a common interest community in which units have been created by subdivision or short subdivision as both are defined in RCW 58.17.020 and in which the boundaries of units are established pursuant to chapter 58.17 RCW

WHAT IS A COMMON INTEREST COMMUNITY

- “Miscellaneous community” means a common interest community in which units are lawfully created in a manner not inconsistent with chapter 58.17 RCW and that is not a condominium, cooperative, or plat community

STRUCTURE OF WUCIOA

- Article 1: Definitions, applicability, relationship with other law, interpretation, etc.
- Article 2: Creation, alteration and termination of the CIC
- Article 3: Management of the CIC and association
- Article 4: Consumer protection

STRUCTURE OF WUCIOA

RCW 64.90.015: No Variation by Agreement

- Except as expressly provided in this chapter, the effect of the provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived. Except as provided otherwise in RCW 64.90.110, a declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this chapter or the declaration

APPLICABILITY

New Communities

- Applies to any CIC created after July 1, 2018
- The Land Development Act, Chapter 58.19 RCW, the HPRA, Chapter 64.32 RCW, the WCA, Chapter 64.34 RCW, and the HAA, Chapter 64.38 RCW, do not apply to CICs created after July 1, 2018

APPLICABILITY

New Small Planned Communities

- If 12 units or less, and
- Average annual assessment is \$300 or less, then:
- Only subject to RCW 64.90.020 (Separate Titles and Taxation, RCW 64.90.025 (Local Ordinances) and RCW 64.90.030 (Eminent Domain)
- Unless the declaration opts in

APPLICABILITY

Existing Communities

- Three provisions apply to events and circumstances in pre-existing residential CICs occurring after the effective date of WUCIOA
- RCW 64.90.095: Allows opt-in
 - Special Procedure in RCW 64.90.080
- RCW RCW 64.90.405(1)(a) and (c) and RCW 64.90.525: Require annual budgets and member ratification, and require assessments in accordance with budget.
 - Sudden Valley case

APPLICABILITY

Opt-in Procedure under RCW 64.90.095

- Regardless of amendment procedures in existing governing documents
- Owners can opt-in with a 67% vote if
- At least 30% of the members participate in the vote

APPLICABILITY

Annual Budgets under RCW 64.90.525

- Intended to overrule Casey v. Sudden Valley Community Ass'n, 182 Wn. App. 315, 329, P.3d 919 (2014)
- Board must prepare an annual budget
- Budget is ratified unless rejected by majority vote
- Assessments must be based on a budget

CREATION OF COMMON INTEREST COMMUNITIES

Declaration and Map

- May only be created by recording a declaration AND a map
- Will change prevailing practice for
 - Certain short subdivisions
 - Unit lot subdivisions in the City of Seattle

CREATION OF COMMON INTEREST COMMUNITIES

Mandatory Provisions of Declaration

- Identify as a condominium, cooperative, plat community, or miscellaneous community
- Describe the real estate included in the common interest community
- State number of units created and maximum number of additional units
- Identify limited common elements, other than porches, etc.

CREATION OF COMMON INTEREST COMMUNITIES

Mandatory Provisions of Declaration

- Identify real estate that may be allocated as limited common elements
- Describe any development right and any other special declarant rights reserved by the declarant, and
- Describe the real property affected by those rights, and
- State a time limit within which each of those rights must be exercised

CREATION OF COMMON INTEREST COMMUNITIES

Mandatory Provisions of Declaration

- State whether development rights may be exercised on different parcels at different times; and
- State where and when they may be exercised or that no assurances are made in those regards; and
- State whether, if development right is exercised somewhere, it must be exercised elsewhere.
- State other conditions or limitations under which the rights described may be exercised or will lapse

CREATION OF COMMON INTEREST COMMUNITIES

Mandatory Provisions of Declaration

- Allocate to allocated interests to each unit in the manner described in RCW 64.90.235
- Any restrictions on:
 - Alienation of units
 - Amount for which a unit may be sold, or
 - Amount that may be received by owner on sale, condemnation, casualty loss or termination

CREATION OF COMMON INTEREST COMMUNITIES

Mandatory Provisions of Declaration

- Any authorization for association to establish and enforce construction and design criteria and aesthetic standards as provided in RCW 64.90.505

SPECIAL DECLARANT RIGHTS

Rights reserved for the benefit of a declarant to:

- Complete any improvements indicated on the map or described in the declaration or public offering statement pursuant to RCW 64.90.610(1)(h)
- Exercise any development right
- Maintain sales offices, management offices, signs advertising the CIC, and models

SPECIAL DECLARANT RIGHTS

- Use easements through the common elements for the purpose of making improvements within the CIC or within real estate that may be added to the CIC
- Make the CIC subject to a master association
- Merge or consolidate a CIC with another CIC of the same form of ownership

SPECIAL DECLARANT RIGHTS

- Appoint or remove any officer or board member of the association or any master association, pursuant to RCW 64.90.415(1)
- Control any construction, design review, or aesthetic standards committee or process
- Attend meetings of the unit owners and, except during an executive session, the executive board
- Have access to the records of the association to the same extent as a unit owner

DEVELOPMENT RIGHTS

Rights reserved by a declarant to:

- Add real estate or improvements to the CIC
- Create units, common elements, or limited common elements within the CIC
- Subdivide or combine units or convert units to common elements
- Withdraw real estate from a CIC
- Reallocate limited common elements with respect to unsold units

DECLARANT CONTROL

- Optional
- Appoint remove or approve directors or officers
- Terminates on earliest of:
 - Sixty days after 75% of units sold
 - Two years after last unit sale
 - Voluntary surrender
- Member-elected directors: 1/4 at 25% sold; 1/3 at 50% sold
- Transition meeting and election

ALLOCATED INTERESTS

- Four Allocated Interests (RCW 64.90.235)
 - A share of undivided interest in the common elements
 - A share of the common expenses of the association
 - A share of the votes in the association
 - A share of the ownership interests in the association
- Must state formula used

ASSOCIATION GOVERNANCE – POWERS AND DUTIES

➤ Association MUST:

- Adopt organizational documents (no unincorporated associations)
 - Riss v. Angel, 131 Wn.2d 612 (1997): Members liable.
- Adopt budgets as provided in RCW 64.90.525
- Impose assessments based on a budget
- Impose assessments on CEL except as permitted by the Act
- Prepare financial statements as provided in RCW 64.90.530
- Deposit and maintain funds as provided in RCW 64.90.530

ASSOCIATION GOVERNANCE – POWERS AND DUTIES

➤ Association may:

- Require non-binding ADR before litigation
- Suspend owner rights for delinquency, but NOT voting rights
- Obtain a loan, after notice to and ratification by owners
- Enforce directly against tenants (fines) and evict (if in Declaration)
- Refrain from enforcement action after consideration of factors

ASSOCIATION GOVERNANCE - AUTHORITY AND LIMITATIONS

- RCW 64.90.445: Meetings
 - Board meetings: 14 day notice to owners, opportunity to comment
 - Association meetings: 14-50 days' notice
- RCW 64.90.450: Quorum – 20%, unless different in gov docs
- RCW 64.90.455: Voting
 - At a meeting – in person, by proxy or absentee ballot
 - Without a meeting - unless limited by gov docs and follow procedure

ASSOCIATION GOVERNANCE - AUTHORITY AND LIMITATIONS

- RCW 64.90.430: Right to Terminate Contracts
- RCW 64.90.495: Association records
- RCW 64.90.505: Standards and limits on rulemaking
- RCW 64.90.510: Flags, political signs and solar panels

ASSOCIATION GOVERNANCE - AUTHORITY AND LIMITATIONS

- RCW 64.90.515: Notices and electronic notices
- RCW 64.90.530: Financial statements and audits
- RCW 64.90.535 - .540: Reserve accounts

ASSOCIATION GOVERNANCE – ASSESSMENTS

- Assessments must commence on all units that have been created upon the conveyance of the first unit in the common interest community
- Declarant may delay commencement of assessments but must pay all of the expenses that have been delayed
- Cannot exempt unsold units from assessments
- Assessments must be imposed in accordance with the unit's allocated share of common expenses, except for “specially allocated expenses”

ASSOCIATION GOVERNANCE - RESERVES

- Association must obtain and update a reserve study unless:
 - Reserve costs are nominal, or
 - Cost of study or update exceeds 10% of annual budget
- Initial reserve study: prepared by reserve study professional and based on a visual inspection, or on plans and specs if not yet built
- Annual update
- Tri-annual update: prepared by reserve study professional and based on a visual inspection

ASSOCIATION GOVERNANCE - RESERVES

- Association must establish one or more reserve accounts for the replacement of reserve components
- Funds may be withdrawn for other purposes only if:
 - Notice to unit owners
 - Board adopts a repayment schedule (24 month max.)
 - Annual notice of withdrawal, statement of deficiency in account, and copy of repayment schedule

ASSOCIATION GOVERNANCE – LIENS

- 6 year statute of limitations
- May be foreclosed judicially or non-judicially
 - Only after 3 months and with specific Board approval
- Prior to all other liens except:
 - Liens recorded prior to recording of the declaration
 - Unit mortgage recorded prior to assessment due date, and
 - Tax liens

ASSOCIATION GOVERNANCE – LIENS

- “Super Priority” over Unit mortgage for:
 - Six months of assessments, excluding capital improvements
 - Actual costs and reasonable attorneys’ fees incurred in foreclosing lien after required notice to the lender (\$2k max)

ASSOCIATION GOVERNANCE – DECLARANT RESPONSIBILITIES

- Before Turnover
 - Appoint directors (declarant)
 - Prepare reserve study (declarant)
 - Collect working capital (declarant)
 - Hold meetings (board)
 - Prepare reserve study updates (board)
 - Adopt budgets (board)
 - Collect assessments (board)
 - Keep association books and records (board)

ASSOCIATION GOVERNANCE – DECLARANT RESPONSIBILITIES

- At Turnover
 - Board must call a transition meeting to elect new directors
 - Declarant must deliver documents to association. See Appendix B
 - Association must audit the association records
 - Association may (for two years) terminate contracts entered into before transition
 - Management, maintenance, operations, etc. contracts
 - Contracts or leases between association and declarant or affiliate

AMENDMENT OF GOVERNING DOCUMENTS

- A general requirement for a 67% vote to amend the governing documents
- A maximum requirement of 90%
- Unanimous voting requirements are prohibited
- Process for requesting judicial intervention
- Allows specific amendments by Board with notice to owners

AMENDMENT OF GOVERNING DOCUMENTS

- Requires a 90% vote for amendments that:
 - Create or increase special declarant rights
 - Increase the number of units
 - Change the boundaries of any unit, or
 - Change the allocated interests of a unit
- Limits validity challenges to one year, unless there is fraud

CONSUMER PROTECTION

Public Offering Statement

- Declarant and Dealer must provide to purchaser (RCW 64.90.605)
- POS must contain (RCW 64.90.610 - .620)
 - Notices to the buyer
 - Information concerning the declarant and community, and
 - Copies of certain documents relating to the community

CONSUMER PROTECTION

Public Offering Statement

- Prospective purchaser has seven days after receipt to cancel contract without penalty.
- Prospective purchaser may extend closing to obtain a full seven days
- No right to cancel upon receipt of an amendment, except under generally applicable contract law

CONSUMER PROTECTION

Escrow of Deposits

- Any earnest money deposit as defined in RCW 64.04.005 or reservation deposit must be placed in escrow until:
 - Delivered to the declarant at closing
 - Delivered to the declarant because of the purchaser's default under the purchase contract
 - Refunded to the purchaser, or
 - Delivered to a court in connection with an interpleader
- Only applies if seller is required to deliver POS: not to resales

CONSUMER PROTECTION

Escrow of Deposits: Definition of Earnest Money

- RCW 64.04.005: “Earnest money deposit” means any deposit, deposits, payment, or payments of a part of the purchase price for the property, made in the form of cash, check, promissory note or other things of value for the purpose of binding the purchaser to the agreement and identified in the agreement as an earnest money deposit, and does not include other deposits or payments made by the purchaser

CONSUMER PROTECTION

Resale certificates

- Required for all sales unless the seller is obligated to deliver a public offering statement.
- Seller must deliver; Association must prepare upon request
- Resale certificate must include (RCW 64.90.640)
 - Copies of the governing documents and
 - Disclosures about assessments, fees, association finances, liabilities and insurance.
- Purchaser has five days after receipt (but no longer than closing) to cancel the contract without penalty

CONSUMER PROTECTION

Implied Warranties

- Only apply to condominiums
- Only apply to declarants and dealers
- Made to purchaser
- Automatically transferred to next purchaser
- Four year statute of limitations (from first unit closing, as to common elements)

CONSUMER PROTECTION

Implied Warranties

- Unit will be in as good condition at closing as it was at contracting
- Unit and Common Elements suitable for habitation
- Unit and Common Elements will be:
 - Free from defective materials
 - Constructed in accordance with generally accepted engineering and construction standards
 - Constructed in a workmanlike manner
- Any existing residential use contemplated by the parties will be legal

- **Implied Warranties**
- Alleged breach must have an “adverse effect” on performance
- Adverse effect means
 - Has or will cause physical damage to the unit or common elements
 - Has materially impaired the performance of major equipment
 - Presents an actual unreasonable safety risk to occupants