

31--How Are Costs Allocated Among Owners?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RCW 64.90.480 Assessments and capital contributions.

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

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

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

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

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

³ RCW 64.34.360(3)(b)

⁴ RCW 64.90.445(4)(b)

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

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

RCW 64.34.224, Official Comments, provides:

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

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

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

⁸ RCW 64.90.480(3)

⁹ RCW 64.34.224, Official Comments.

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

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

RCW 64.90.485 (19)

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

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

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

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

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

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

¹⁷ RCW 64.38.020 (11).

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

¹⁹ RCW 64.90.235 (1)

The declaration must allocate to each unit:

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

²⁰ RCW 64.90.235(2).

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

²¹ RCW 64.90.235(5).

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