

## **32--Are Major Repairs to Common Areas “Additions and Improvements” that Require Member Approval?**

By statute, an Association's Board has authority to impose and collect assessments for common expenses, including necessary repairs, additions, and improvements to common areas.<sup>1</sup> Prior to WUCIOA, these assessment powers could be limited by the Association's Governing Documents. WUCIOA states that capital improvements “do not include making in the ordinary course of management, repairs to common elements or replacements of the common elements with substantially similar items, subject to: (A) availability of materials and products, (B) prevailing law, or (C) sound engineering and construction standards then prevailing.”<sup>2</sup>

Governing Documents often contain provisions prohibiting the Board from independently assessing Owners or paying out funds for additions or capital improvements to common areas. If such a provision exists, a Board's power to assess Owners and pay for common area construction projects, such as the installation of new siding, windows, or decks, will depend on whether the project is a repair or a capital addition or improvement. Note: the IRS definition of a capital improvement has no application to how this term is defined for an Association's Declaration.<sup>3</sup>

An unpublished decision by the Washington Court of Appeals, *Lowry v. Allenmore Ridge Condo. Ass'n*, sheds some light on this issue.<sup>4</sup> 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

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Condo Association's Declaration specifically authorized the Board to make assessments for restoration, repair, or replacement of portions of the common areas, but it precluded the Board from making assessments to fund capital additions and improvements without specific approval by a percentage of the members. In order to decide whether the Board's action was authorized, the court had to determine whether the project was a "repair" or an "improvement" within the meaning of the Declaration.

The court noted that several Unit Owners had testified that the construction project was for necessary restoration, repair, and replacement of damaged components of the building envelope, which had been damaged or were nearing the end of their service life. In addition, the Association's expert had testified that: [T]he project "did not include any alterations or modifications to structural components of the buildings or construction of new buildings or property" and allowances for repair of structural damage found during construction were limited to "repair and restoration work."...He further declared that the work was "intended to repair, restore, remove and replace, in like-kind, those components of the building envelope that had been damaged or had otherwise reached or exceeded their serviceable life."

The court also noted the project manager's statements that: "Damaged structural components were removed and replaced with like-kind products. Any upgrades to components were solely for the purpose of restoring the weathertight [sic] condition of the building envelope, but all efforts were made to select products that were similar to the original materials."

Based largely on these statements, the court determined that the project was a repair, for which the Board was entitled to assess without a vote by the members; it was not a capital addition or improvement. This was true even though the exterior envelope designed and installed was substantially better (an improvement) than the original siding system.

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Although the court in *Lowry* determined that replacements (as well as some necessary upgrades) to the building envelope were repairs and not capital additions or improvements, what constitutes a repair and what constitutes a capital addition or improvement will likely vary from case to case. Courts in other states have agreed with the analysis of *Lowry*, finding that major repairs are not improvements.<sup>5</sup> As in *Lowry*, the determination will depend, at least in part, on any applicable definition of the terms in the Association's Governing Documents. A court would also likely consider evidence that a significant majority of members and those involved with the project understood it to be a repair as opposed to an addition or improvement.

WUCIOA may offer assistance. RCW 64.90.485(3)(b)(ii) provides: "Capital improvements" does not include making, in the ordinary course of management, repairs to common elements or replacements of the common elements with substantially similar items, subject to: (A) Availability of materials and products, (B) prevailing law, or (C) sound engineering and construction standards then prevailing.

This definition would seem to conform to the reasoning of the court in *Lowry* and allow the community to deviate from the original plans when making repairs in response to changes in construction materials and practices. However, it is questionable whether this definition would be applicable to *Lowry's* facts. Per the statute, this definition only applies to the use of "capital improvement" in RCW 64.90.485(3)(a).<sup>6</sup> The use of capital improvement elsewhere in WUCIOA is left undefined. Still, a community could copy this language when defining a capital improvement in its own documents.

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<sup>1</sup> 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:

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- (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...

RCW 64.90.405 provides in relevant part:

- (1) An association must...
  - (b) Adopt budgets as provided in RCW 64.90.525;
  - (c) Impose assessments for common expenses and specially allocated expenses on the unit owners as provided in RCW 64.90.080(1) and 64.90.525...
- (2) ...the association may:
  - (b) Amend budgets under RCW 64.90.525...
  - (f) Regulate the use, maintenance, repair, replacement, and modification of common elements;
  - (g) Cause additional improvements to be made as part of the common elements...
  - (k) Collect assessments...

<sup>2</sup> RCW 64.90.485(3)(b)(ii)

(1)(a). Within thirty days after adoption of any proposed budget for the common interest community, the board must provide a copy of the budget to all the unit owners and set a date for a meeting of the unit owners to consider ratification of the budget not less than fourteen nor more than fifty days after providing the budget. Unless at that meeting the unit owners of units to which a majority of the votes in the association are allocated or any larger percentage specified in the declaration reject the budget, the budget and the

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assessments against the units included in the budget are ratified, whether or not a quorum is present...

(3) The board, at any time, may propose a special assessment. The assessment is effective only if the board follows the procedures for ratification of a budget described in subsection (1) of this section and the unit owners do not reject the proposed assessment...

<sup>3</sup> The definitions of these terms promulgated by the IRS have no bearing on their meaning in the context of a Board's authority to make assessments, unless the Association's Governing Documents expressly adopt the IRS definitions. For more, see the IRS Capitalization v. Repairs Audit Technique Guide at <http://www.irs.gov/Businesses/Capitalization-v-Repairs-Audit-Technique-Guide#14>.

<sup>4</sup> *Lowry v. Allenmore Ridge Condo. Ass'n*, 171 Wn. App. 1001 (2012)

<sup>5</sup> Many courts look at whether a particular project is necessary to maintain common areas in order to determine if it constitutes a "repair" or a "capital addition or improvement." In *Behm v. Victory Lane Unit Owners' Assn., Inc.*, 133 Ohio App.3d 484 (1999) an Ohio court held that replacing the foundation underpinning of a building constituted "maintenance" rather than a "capital improvement" because it was necessary to prevent further subsidence of the building. A Florida court found that replacement of a seawall was maintenance because it was "necessary to protect the condominium common elements". *Ralph v. Envoy Point Condominium Ass'n, Inc.*, 455 So.2d 454, 455 (1984).

<sup>6</sup> RCW 64.90.485(3)

(a)(i) The common expense assessments, excluding any amounts for **capital improvements**, based on the periodic budget adopted by the association pursuant to RCW 64.90.480(1), along with any specially allocated assessments that are properly assessable against the unit under such periodic budget, which would have become due in the absence of acceleration during the six months immediately preceding the institution of proceedings to foreclose either the association's lien or a security interest described in subsection (2)(b) of this section...

(b) **For the purposes of this subsection:** (ii) "Capital improvements" does not include making, in the ordinary course of management, repairs to common elements or replacements of the common elements with substantially similar items, subject to: (A) Availability of materials and products, (B) prevailing law, or (C) sound engineering and construction standards then prevailing.