33--Move-in Fees: Can Associations Charge Move-in Fees?

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

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

Move-In Fees Must Be Directly Related to Costs Attributable to a Change in Occupancy and Be Non-Discriminatory
Move-in fees must be authorized by both the Governing Documents and the relevant statutes. With limited exceptions, Washington law requires Associations to assess common expenses against all Owners in proportion to their interest in common elements and prohibits formulas for assessing fees that discriminate in favor of the Declarant.[1] Thus, an Association would not be permitted to use move-in fees collected from a subset of Owners to cover repairs and maintenance of common elements.[2]

A New Jersey court, interpreting a condominium statute similar to the New Act and WUCIOA, held that an Association could not charge Owners renting Units move-in fees that were not "directly related" to the "administrative and personnel" costs incurred by the Association in connection with tenants moving in to the Units.[3] Move-in fees used to defray the costs of wear to common elements caused by all Owners were, the court held,

"discriminatory revenue-raising devices" that were not authorized by the Association's Governing Documents or state statutes.[4]

Some examples of costs that might be directly attributable to moving are: additional garbage/recycling pickups, hanging and removing padding from elevators and walls to protect them from damage, and cleaning floors that have higher traffic than usual during a move. Examples of fees that would be attributable to changes in occupancy, but not the act of moving itself, might include reprogramming intercoms, giving orientations to new residents, updating mailboxes, updating resident directories, and other administrative costs. These costs will differ with the size of a building, the amenities available in the building, the paperwork an Association requires new occupants to sign, etc. Associations should make a list of all costs associated with changes in occupancy to determine what a reasonable move-in fee would be. We successfully defended a move in fee in arbitration because we could demonstrate costs exceeding the amount of the fee.

Since courts are unlikely to uphold fees that are discriminatory with respect to a subset of Owners, Associations cannot require that only landlord Owners pay move-in fees when a change in occupancy occurs.[5] Damage to common elements such as elevators and hallways during a move is not specific to renters; an Owner moving in to a Unit is no less likely to nick a wall or scrape an elevator door than a tenant. Similarly, fees associated with garbage and recycling when a Unit changes occupancy may be incurred when both Owners and renters move.

An Association might be permitted to charge a higher move-in fee, or a fee only to landlord Owners, if it could show that the expenses of a change in occupancy of a leased Unit were higher than those associated with an unleased Unit. For example, if garbage pickup fees were consistently higher when tenants moved in than when Owners moved in, an Association might be permitted to impose a higher move-in fee on landlord Owners. It may be difficult for an Association to show that it incurs greater

costs due to changes in occupancy across the board with leased Units, so an Association may be better off assessing any extra expenses incurred as a fine against the landlord Owners when a tenant's move actually does result in higher costs.

An Association might also be able to require Owners to pay move-in fees, even where these do not represent actual costs incurred from changes in occupancy, provided that the Declaration states that a fee will be assessed against Owners, and states what the fee is, or how it will be calculated. In this case, the Owner would have been on notice, prior to purchasing the Unit, that he or she would be subject to a move-in fee. If an Owner chose to purchase a Unit knowing he or she would be subject to a fee, courts may be less likely to find that the fee is invalid. Owners are also unlikely to challenge fees contained in the Declaration.

Associations Cannot Recoup Move-In Fees Through Misconduct Fines

An Association may not assess move-in fees against Owners leasing their Units by treating them as remedial fees.[6] Associations may impose assessments to cover expenses caused by an Owner's misconduct. However, costs incurred due to inevitable wear-and-tear during a typical move would not qualify as "misconduct." Similarly, costs related to garbage or recycling removal could not be assessed as misconduct in most cases. Moves result in a higher volume of garbage and recycling because occupants inevitably unpack boxes and discard packing materials, not because they have been negligent. In the cases in which an occupant is negligent (e.g. leaving trash or furniture strewn about near the dumpster), and an Association has additional expenses because of such negligence, the Association may be able to assess these expenses against the Owner.

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[1] RCW 64.32.080. ("The common profits of the property shall be distributed among, and the common expenses shall be charged to, the apartment owners according to the percentage of the undivided interest in the common areas and facilities.")

RCW 64.34.224

(1) The declaration shall allocate 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, to each unit and state the formulas or methods used to establish those allocations. Those allocations may not discriminate in favor of units owned by the declarant or an affiliate of the declarant.

RCW 64.34.360

(1) Until the association makes a common expense assessment, the declarant shall pay all common expenses. After any assessment has been made by the association, assessments must be made against all units, based on a budget adopted by the association.

(2) Except for assessments under subsections (3), (4), and (5) of this section, all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to RCW 64.34.224(1). Any past due common expense assessment or installment thereof bears interest at the rate established by the association pursuant to RCW 64.34.364.

(3) To the extent required by the declaration:

(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;

(d) The costs of utilities must be assessed in proportion to usage.

(4) Assessments to pay a judgment against the association pursuant to RCW 64.34.368(1) may be made only against the units in the condominium at the time the judgment was entered in proportion to their allocated common expense liabilities at the time the judgment was entered.

(5) To the extent that any common expense is caused by the misconduct of any unit owner, the association may assess that expense against the owner's unit.

(6) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due shall be recalculated in accordance with the reallocated common expense liabilities.

RCW 64.90.235

(2) 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.

RCW 64.90.480

(3) Except as provided otherwise in this section, all common expenses must be assessed against all the units in accordance with their common expense liabilities, subject to the right of the declarant to delay commencement of certain common expenses under subsections (1) and (2) of this section. Any past due assessment or installment of past due assessment bears interest at the rate established by the association pursuant to RCW 64.90.485.

(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.

(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.

(7) If the declaration so provides, to the extent that any expense of the association is caused by the 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, to the extent of the association's deductible and any expenses not covered under an insurance policy issued to the association.

(8) In the event of a loss or damage to a unit that would be covered by the association's property insurance policy, excluding policies for earthquake, flood, or similar losses that have higher than standard

> deductibles, but that is within the deductible under that policy and if the declaration so provides, the association may assess the amount of the loss up to the deductible against that unit. This subsection does not prevent a unit owner from asserting a claim against another person for the amount assessed if that other person would be liable for the damages under general legal principles.

[2] In *Westbridge Condominium Ass'n, Inc. v. Lawrence*, 554 A.2d 1163 (1989), the District of Columbia court of appeals invalidated a move-in fee imposed against owners as an alternative method of assessing fees to repair and maintain common elements. "[T]he pro rata assessment method provided in the condominium documents," the court held, "establishes the exclusive means for recovering common elements expenses such as those incurred by [defendant's] move-in" except in cases of "negligence, misuse, or neglect of common elements." The method of assessing common elements expenses could not be modified by the board absent an amendment adopted in accordance with the requisite procedures.

See also *Miesch v. Ocean Dunes Homeowners Ass'n, Inc.*, 464 S.E.2d 64 (1995) (holding that move-in fees assessed only against owners renting their units on a short-term basis were prohibited because they "amount[ed] to an additional assessment for common expenses against invitees of only certain units' owners."

[3] *Chin v. Coventry Square Condominium Ass'n.*, 637 A.2d 197, 201 (1994). (Condominium instituted a fee which appeared designed to discourage rental of units. Trial court permitted the condominium to implement a fee associated with unit rentals but required that the fee be reasonably related to the rental activity.)

[4] *Id.* See also Westbridge, 554 A.2d at 1165-66 (holding that a move-in fee assessed by an association "represented a double charge for services [defendant] had already paid in annual condominium dues."

Miesch, 464 S.E.2d 64 at 560. (A North Carolina appellate court similarly found a move-in fee assessed only against owners leasing their units for less than 28 days to be invalid because it "impermissibly created two different classes of unit owners.")

[5] *Id.*

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