

# **Homeowner Association Act Committee**

## **Final Report**

December 2007

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## **I. INTRODUCTION**

### **A. Background**

Homeowner Associations are a rapidly growing form of housing in Washington State. These associations are typically formed as a result of restrictive covenants that developers record against property in subdivisions. The association's members are the owners of lots within the boundaries of the property subject to the covenants. Once the developer has relinquished control, associations are managed by its board of directors elected by the association's members. The rights and obligations of the association, its members and its board of directors are defined by state law and by the covenants recorded for the subdivision. In addition, the associations may have Articles of Incorporation if it is incorporated, bylaws, and rules and regulations. These documents collectively establish the manner in which the association will be governed, and how it will carry out its primary function which, generally speaking, is the management, maintenance, repair and replacement of common areas and structures (e.g. recreational facilities) and design review and architectural control.

Unlike condominiums and condominium associations, there are no mandatory statutory requirements for the contents of the restrictive covenants that are recorded against residential subdivisions. This permits a great deal of variation between associations. To provide greater uniformity for associations, especially on vital management issues, the Legislature adopted the Homeowners' Associations Act (the "Act") in 1995.

Since that time, an increasing number of proposals to modify the Act have come before the Legislature in response to constituent concerns. During the 2005-06 Biennium alone, 12 bills were introduced to address issues such as removal of discriminatory language from restrictive covenants, displays of political yard signs and of the United States flag, restrictions concerning roofing materials, the process for amending restrictive covenants, disclosure of homeowner information, and alternative dispute resolution mechanisms.

To ensure a comprehensive approach to modification of the Act and opportunities for public input, in 2006 the Legislature established a study committee known as the Homeowner Association Act Committee (the "Committee"). (A copy of the Resolution establishing the Committee is attached as Exhibit 1.) The Legislature ensured that the Committee's composition would provide a balance of perspectives. Members were selected based on their experience with homeowners associations, both as homeowners and board members, and on familiarity with this area of the law.

### **B. Committee's Work**

#### **1. Tasks**

The Committee was asked to review the Act, the Uniform Common Interest Ownership Act, and various issues concerning homeowners' associations and to evaluate whether any changes should be made to the Act. The Legislature specifically requested review of the issues such as:

- Required disclosures on the sale of real property within homeowners associations
- Alternative dispute resolution mechanisms
- Methods for amending restrictive covenants
- Budget ratification and assessment (i.e. "dues") collection processes

## 2. Committee Members

The Committee originally consisted of 10 members, but two resigned in 2006 and the balance of the Committee's work was performed by 8 individuals. They are (in the order listed in SCR 8423):

- Marion Morgenstern, attorney experienced in representing homeowners and homeowners Associations, Chair
- Senator Karen Fraser, member, Washington State Senate
- Rep. Toby Nixon, member, Washington House of Representatives (2006)
- Rep. Larry Springer, member, Washington House of Representatives (2007)
- Terry Leahy, representative of the Community Associations Institute, Washington Chapter
- Todd Hobert, representative of the Washington Homeowners Coalition
- Steve Rovig, representative of the residential development industry
- Sanford Levy, attorney experienced in representing homeowners
- Nancy Rust, member of a homeowners associations

## 3. Meetings

The Committee met for the first time on July 24, 2006. Meetings we held monthly and then twice per month, the last meeting held on August 20, 2007. It is safe to say that Committee members spent thousands of volunteer hours on the Committee's work during the past 14 months.

The Committee's meetings were open to the public and were regularly attended by interested individuals and stakeholder groups. Once per month a portion of the Committee's meeting was set aside to receive public comment. The Committee's work, including its decisions, meeting minutes and draft recommendations were also communicated to the public at large via a Yahoo Group website. More than 200 members of the Yahoo Group have monitored the Committee's work and provided input, suggestions and comments on the draft recommendations. The Yahoo Group members include homeowners, board members, realtors, attorneys representing developers, homeowners and associations and other interested stakeholder groups.

## 4. Decision Making Process

The issues the Committee was asked to address necessarily involve balancing the needs and interests of the individual against the needs and interests of the group as a whole. These are not easy matters to decide as striking the "right" balance is often difficult to define and to achieve. In its work, the Committee was guided by three overarching principles: (1) avoid recommending changes to the Act that could have unintended adverse consequences; (2) consider the competing needs of associations and their members and find an appropriate, equitable balance, and (3) adopt recommendations through unanimous agreement whenever possible. For the most part, the Committee's work and recommendations were unanimous. Unanimity was not easily achieved. It required a great deal of discussion, debate and compromise by the Committee acted through formal motions and majority vote.

Balancing the competing needs and interests involved in the issues under consideration required compromise by all Committee members. To honor those compromises, the Committee agreed at the beginning of its work (and reaffirmed at the end) that its recommendations would be presented to the Legislature as a "package" and would be accompanied with a request that the Legislature adopt or reject the recommendations as a whole.

We recognize that the Legislature bears the final responsibility for turning the Committee’s recommendations into law should it chose to do so, and for the nature of any changes that are made to the Act. As the legislature takes up that responsibility in the upcoming session, the Committee would like to emphasize that the Committee’s recommendations are the product of hard-won compromises and the thousands of hours devoted by the Legislature’s uncompensated appointees. We urge the Legislature to consider the Committee’s recommendations carefully, to honor the compromises that they reflect, and to not cherry-pick the less controversial recommendations from among those that might be more controversial.

**C. Committee Recommendations**

Our recommendations, set out below, form the basis for the specific recommended statutory changes embodied in the attached restated Homeowners Association Act.

Each recommendation is intended to address a specific issue. The specific issue a recommendation addresses is stated in bold above the recommendation. In addition, we have provided commentary which is not part of our recommendations, but which may be helpful in understanding what we intended or why we did what we did.

Living in an association means abiding by its standards. Those standards are found in the law and in an association’s own governing documents. The Committee heard of numerous problems involving associations and thought of various solutions.

We found problems in the standards themselves. We found problems in how the standards are applied. We found some buyers misunderstand what becoming an association member means. And we found some complaints about associations are ill suited to a legislative fix.

To more clearly present our recommended solutions, we group our recommendations based on the four categories just mentioned:

- (1) Problems with the standards themselves;
- (2) Problems with how the standards are applied;
- (3) Problems arising from buyer misunderstandings; and
- (4) Problems best addressed through means other than legislation.

**II. SUMMARY AND EXPLANATION OF RECOMMENDATIONS**

**A. Problems With The Standards Themselves**

1. The Law Is Unclear

<b>Recommendations:</b>	<b>Comments:</b>
<b>R-1. Add definitions.</b> The Act should be amended to add definitions for certain terms, including “governing documents,” “lot,” “owner,” “assessment” and “rules,” and to add language that the dollar amounts stated in the resale certificate part of the statute can be	Disputes sometimes arise between association volunteers (e.g., board members) and homeowner members because the intended meaning of terms contained in the Act is not clear. By defining important terms used in the Act, the intended meaning of provisions in the

Recommendations:	Comments:
adjusted for inflation based on some specified index (e.g., the Consumer Price Index).	Act will be better understood by those who must comply with the Act.
<p><b>R-2: Reconcile conflicting laws.</b> The Act should be amended to change existing sections of the Act that set notice periods that are inconsistent with the notice periods established in the non-profit corporations statutes for the same actions.</p>	<p>The Committee also recommends that the Act, at RCW 64.38.025(3) and 64.38.035(1), be amended to provide for a ten day to sixty day notice period, so that the notice period for these actions in the Act matches the notice periods for these actions in the non-profit corporations statutes.</p>
<p><b>R-3: Require “good faith” conduct.</b> The Act should be changed to add a requirement that every contract or duty governed by the Act imposes an obligation of good faith in its performance or enforcement.</p>	<p>An association acts largely through decisions of its elected board. Board decision making necessarily involves exercising discretion. Some owners complained to the Committee that boards in their associations abused their discretion in making decisions and taking actions that affected owners. Both UCOIA and the Washington Condominium Act obligate boards to act in “good faith” when exercising association authority. Good faith, as used in this Act, means observance of two standards, “honesty in fact” and observance of reasonable standards of fair dealing. While the term is not defined, the term is derived from and used in the same manner as Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code.</p>
<p><b>R-4. Use “Safe Harbors” to Guide Conduct.</b></p> <p>The Act should create <i>optional</i> processes which, if followed by an association, will be deemed to satisfy a general standard imposed by the Act. Specifically, this approach is used by the Committee in setting out optional “safe harbor” processes that an association can employ in creating rules, in imposing fines and in resolving disputes through mediation.</p>	<p>A recurring problem in setting legal standards for associations is that little guidance is given on what an association must do to actually comply with the standards. Many associations lack resources to consult with lawyers on what they must do to meet standards. On the other hand, many associations that had the resources worked with their professionals to craft procedures that suited the needs of their particular communities. The Committee, throughout its recommendations, uses the “safe harbor” approach. That is, the Committee sets out an <i>optional</i> procedure associations can elect to follow to comply with some duty the Act creates. Using the optional procedure is per se compliance with the Act. An association can use a procedure of its own creation, but it then runs the risk that it might one day need to demonstrate that its procedure complies with the Act.</p>
<p><b>R-5: Establish a standard for determining a rule’s validity.</b> The Act should be amended to provided that a rule adopted by a board is valid and enforceable if certain requirements</p>	<p>An association’s enforcement of its rules is a significant source of disputes between associations and their members. These disputes frequently involve challenges not only</p>

Recommendations:	Comments:
<p>are satisfied. The requirements are that the rule be in writing, the rule be consistent with the governing documents, the rule be adopted in substantial compliance with the requirements of the Act, and that the association's members have been provided advance notice of the rule, and an opportunity to comment on the rule, before the rule can be enforced.</p>	<p>to the association's enforcement process, but challenges to the validity of the rule that the association is trying to enforce. The Committee saw a need to articulate a standard by which challenges to the validity of a rule might be determined. (This is also one change to the Act where the Committee created a "safe harbor" procedure an association could follow in creating a rule and, in so doing, establish compliance with this standard.) In addition, the Committee saw a need to provide owners with greater involvement in the rule-making process. To address this need, the recommendation includes a process through which the association's members can reject a proposed rule. <i>See R-14 below.</i></p>
<p><b>R-6. Make it easier for owners to call a meeting.</b> The Act, at RCW 64.38.035(1), should be amended to provide that owners having 5% of the votes in the association can trigger the calling of a special meeting of the membership.</p>	<p>The Committee recommends the threshold that owners must satisfy in order to trigger the association's obligation to call a special meeting of owners be lowered from 10% to 5% of the total votes in the association. By lowering the threshold, it will make it easier for owners who have an issue with an action of the board to cause a meeting of the membership to be called. Lowering this threshold does not impact the percentage of votes needed to establish a quorum or to conduct certain items of business such as the election or removal of directors, or the amendment of the governing documents.</p>
<p><b>R-7. Make it easier for owners to conduct business at a membership meeting.</b> The Act, at RCW 64.38.040, should be amended to provide that owners having 25% of the votes in the association can constitute a quorum, thus enabling the owners to conduct general business at a meeting of the association membership.</p>	<p>The Committee recommends that the quorum threshold that owners must satisfy in order to conduct business at a meeting of the association membership be lowered from 34% to 25%, thus preventing general owner apathy from frustrating the association's ability to hold association meetings and elections. Lowering the quorum requirement does not affect the percentage of votes needed to conduct certain items of business such as the amendment of the governing documents.</p>
<p><b>R-8. Allow for incorporation.</b> The Act should be amended to authorize a board to incorporate an association.</p>	<p>Although incorporation confers benefits on members, unlike the condominium act, the Act does not require associations to be incorporated. To eliminate any doubt about a board's authority, the Committee recommends that the Act specifically authorize the board to incorporate an association.</p>

Recommendations:	Comments:
<p><b>R-9: Set a time limit on challenging a change to the declaration.</b> The Act should be amended to provide that an action challenging the validity of a declaration amendment be brought within one year of the recording of the amendment, (as provided in § 2-117(b) of UCIOA.).</p>	<p>Association members' need to be able to change their declaration to better meet their needs is dealt with below. But changing a declaration for the better is of limited utility if the validity of the change is open to challenge for a number of years. Though affording an opportunity to challenge the validity of a change to a declaration is important, the need to afford that opportunity must be balanced against the need for finality. Association members and volunteers need to know that, at some point, the declaration change that the owners approved is now final. In UCOIA and in the Washington Condominium Act, this problem was solved by providing potential challengers with one year within which to bring their challenge to the validity of a change to a declaration. The Committee recommends that the Act be amended to bring it into conformity with that one year standard.</p>
<p><b>R-10. Do not change the budgeting provision of the Act.</b> The Act, at RCW 64.38.025(3), should <b>not</b> be amended to change the existing requirements for ratification of an association's budget.</p>	<p>The Committee did consider requests that it recommend changes to the Act's existing provisions on budget ratification. The Committee decided against recommending a change to the Act's existing budget ratification provision because the existing provision, which conforms to the budget ratification provision in UCOIA and in the Washington Condominium Act, strikes the appropriate balance between an association's need to fund its operations and the membership's need to reject a budget that does not reflect the intentions of most association members. The Committee also decided against making any recommendations for changes to association lien rights for unpaid homeowners dues. Whether and to what extent an association has lien rights is determined in the association's declaration and is left to the discretion of its members.</p>

2. Some Declarations Are Too Hard To Change

Recommendations:	Comments:
<p><b>R-11: Make Changing Existing Declarations Easier.</b> The Act should be amended to create a means by which owners can seek judicial relief from a requirement, in an existing declaration, that 75% or more approve a change to the declaration. Specifically, the Act should be amended to permit 67% of owners affected by such an</p>	<p>Many existing declarations require exceedingly high votes of the homeowners to approve amendments. Many other declarations are simply silent on the process for adopting amendments and thus require unanimous consent. Such provisions frustrate the homeowners' ability to change their declarations to meet current needs. The</p>

<p>existing declaration to seek a court order reducing the approval required to 67% where the court determines that the higher existing approval requirement is an unreasonable burden on the ability of owners to amend their declaration and to administer the property under their jurisdiction.</p>	<p>Committee’s recommendation would create a process for asking a judge to declare that older declarations, requiring 75% or 100% approval of any change, can now be amended by only 67% of the total votes. The proposal also streamlines the ways in which homeowners can vote to approve an amendment.</p>
<p><b>R-12: Make Changing Future Declarations Easier.</b> The Act should be amended to provide that declarations subsequently recorded may be amended by 67% approval of the owners, (as provided in §2-117 of the Uniform Common Interest Ownership Act (“UCIOA”)).</p>	<p>Unlike condominiums, no statute exists that specifies a minimum or maximum vote requirement for changes to declarations. This leaves developers and their counsel without guidance. As a result, declarations are drafted that (a) do not specify how amendments can be made, or (b) require unanimous consent to adopt amendments. The new statutory provision is intended to provide uniformity in the drafting of declarations and to provide homeowners with the flexibility to periodically change the declaration. The required 67% approval is high enough to make declaration changes difficult, but not impossible, and is based on § 2-117 of UCIOA, which adopts a minimum vote of 67% for covenant changes.</p>

3. Some Bylaws And Rules Are Too Easy To Change.

<p><b>Recommendations:</b></p>	<p><b>Comments:</b></p>
<p><b>R-13: Let owners ratify a board’s changes to bylaws.</b> The Act should be amended to provide that, where an association’s existing bylaws allow its board to amend the bylaws without owner approval, any future board action to change such bylaws should be subject to a ratification vote by the owners. The Act should further be amended to establish a mandatory ratification process. This mandatory ratification process should include requirements that text of the bylaw change and a notice of meeting be given to owners a set number of days before the owners’ meeting at which the ratification vote is to take place.</p>	<p>The bylaws of some associations allow the bylaws to be changed by board action alone. An owner impacted by a change the board made to the association’s bylaws has limited recourse. The owner can file suit to challenge the board action or the owner can petition to recall the board and, if successful, help elect a new board that can then make its own changes to the bylaws. Owners expressed to the Committee their concern that boards with the power to amend bylaws might do so in ways that impact owners, without owners having any say in the creation of those changes. The Committee recognized this concern as similar to the concerns that previously led the Legislature to create the budget ratification process contained in the Act. The Committee drew upon that solution to create a bylaws amendment ratification process. Key to both ratification processes is a careful balancing of the need of an association to conduct its business efficiently and the need for impacted owners to have an opportunity to undo a bylaws change that is out of step with the majority of owners in the community.</p>

<p><b>R-14: Let owners ratify a board’s changes to rules.</b> The Act should be amended to require that a rule change not take effect until (1) owners are given notice of the change and an opportunity to comment on the rule and (2) owners are subsequently given notice of the rule’s adoption. (An exception is made for an “emergency rule.”) Owners should have the right, through a petition of 20% of the total votes in the association within 30 days of the notice of adoption, to request a ratification vote on the rule. The rule becomes effective unless a majority of the total votes in the association act to reject the rule.</p>	<p>Association rules are simultaneously necessary and a source of disputes between associations and their members. The Act and UCOIA give association boards authority to make rules. Some owners expressed concern to the Committee that board-created rules can significantly impact owners and that the Act gives owners no voice in the creation of those rules. The Committee believes that affording owners an opportunity to comment on a proposed rule before a board takes action to adopt the rule will allow a board to make a more informed decision when it acts to adopt the rule. (This “notice and opportunity to comment” requirement is another one on which the Committee has employed the “safe harbor” approach, as the Committee has recommended a “notice and comment” process which, if followed by an association, will establish compliance with the Act’s standards regarding validity of a rule.) The Committee also believes that, by creating an opportunity for a group of owners to trigger a ratification vote on the rule a board adopts, owners are provided with a means by which a majority of the membership can reject a rule the community does not want.</p>
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**B. Problems With Applying The Standards**

1. Owners Should Be Given Due Process

Recommendations:	Comments:
<p><b>R-15: Guide Boards on how to provide due process.</b> The Committee recommends adding a new section to the Act to establish an optional “safe harbor” due process procedure. The “safe harbor” procedure (a) specifies contents of the notice an owner must be sent, (b) requires the violation notice be based on first hand knowledge of a person who witnessed the violation, (c) provides the owner a right to timely request a hearing on the violation, (d) requires the association to furnish information to an owner who timely requests a hearing, (e) permits an owner to be represented at the hearing, (f) permits the hearing board to continue the hearing to gather more information and (g) requires the association’s decision to be issued in writing within 30 days of the hearing.</p>	<p>The Act currently provides, at RCW 64.38.020(13), that an association can impose a fine, provided that the owner has been given notice and an opportunity to be heard. But disputes arise over procedures associations follow to comply with the Act’s requirement that the owner be given “notice and an opportunity to be heard.” Some associations, with more resources, have developed their procedures with the help of their lawyers. Other associations, with limited resources, have developed procedures as best they can. The Committee concluded that it should create a procedure an association could use with knowledge that, by using the procedure, the association would be giving the “notice and opportunity to be heard” that the Act requires. This procedure is a “safe harbor” procedure. That means an association can use a different procedure. But if it uses the “safe harbor”</p>

	procedure, it will be deemed to have provided the “notice and opportunity to be heard” required by the Act.
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2. Disputes Should Be Resolved Non-Judicially

Recommendations:	Comments:
<p><b>R-16: Most disputes should be resolved through mediation:</b> The Act should be amended to add a new section requiring mediation of most disputes arising after the new section is added to the Act, with certain claims exempted. The Act should permit associations to follow reasonable mediation processes contained in the association’s declaration or adopted by a majority vote of the non-declarant members of the association. If an association has not created its own mediation process, then the Act’s mediation procedure must be followed. The Act’s mediation process provides for (1) the qualifications and selection of a mediator, (2) the exchange of a “request,” a “response,” and a “reply” between the parties, (3) the content of, and timing for delivery of, each of those documents, and (4) the allocation of mediation fees and costs among the participants. Finally, the Act should provide that, where a party refuses to participate in mediation, the other party can proceed to court and ask the court to order the party to participate in mediation and, where appropriate, to impose sanctions on the party who refused to participate in mediation.</p>	<p>The Committee identified the need for a means by which disputes between association members, or between an association and its member(s) might be resolved expeditiously and inexpensively through the use of mediation. (The Committee considered mandatory binding arbitration as a possible method for resolving disputes but ultimately decided to recommend against creating a mandatory binding arbitration requirement. In reaching this decision, the Committee noted that: (1) access to courts, including access to a trial by jury, is considered a fundamental right; (2) disputes and issues which arise in the association context frequently involve requests for injunctive relief and courts, rather than arbitrators, are better equipped to deal with requests for injunctions and other equitable relief; (3) the perceived benefit of a less expensive resolution may be illusory as arbitration is an expensive process; and (4) the perceived benefit of finality may also be illusory as arbitration decisions are frequently appealed.) The Committee again used a version of the “safe harbor” approach, allowing associations flexibility to create their own mediation processes, provided they created their own process using one of two acceptable methods, and establishing a process that is mandatory for those associations that elected not to create their own mediation processes. The Committee recognized that, while mediation is well suited to resolving many types of disputes within associations, there are some disputes that do not lend themselves to being effectively and efficiently resolved through the mediation process. Those ill-suited disputes were exempted from the general requirement that disputes be submitted to mediation. And, recognizing that even mandatory mediation is “voluntary” in the sense that, for a mediation to produce a resolution, the parties to the mediation must participate in the mediation process. Where a person declines to take part in the mediation process, the Committee has provided the court with authority to take appropriate action,</p>

	including that of ordering the party to participate in mediation, or in an appropriate case, to impose sanctions on the party who refused to participate in the mediation process.
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**C. Problems Born of The Uninformed Buyer**

1. A Buyer Should Be Told What Being An Association Member Generally Means

<b>Recommendations</b>	<b>Comments:</b>
<p><b>R-17. Give buyers a “Notice to Buyers.”</b>  Subject to the exclusions set forth below, any purchase and sale agreement for residential real property in which the owner is a member of a homeowners’ association as defined in RCW 64.38.010(1) shall include a Notice to Buyer. The Notice advises buyers that they are purchasing a home in a homeowners association and that, among other things, the association may collect dues and regulate the use of property within the association. (See <i>Exhibit A for the full content of the Notice to Buyer</i>). This Notice to Buyer is not required in transactions which are (i) between commercial buyers and sellers or (ii) excluded from the requirement for a disclosure statement pursuant to RCW 64.06.010.</p>	<p>Buyers who have not previously owned a home located within a homeowners’ association often do not understand what buying into an association actually means. This general lack of awareness can cause later disputes when new owners are asked to fulfill obligations they were not aware they, by buying a home within an association, had undertaken. One way to alert buyers that, by buying a particular home, they will become a member of an association, is to explicitly state that in the purchase and sale agreement the buyer enters into. The Committee has drafted language for a Notice to Buyer and recommends that the Act be amended to require use of the Notice to Buyer in purchase and sale agreements for homes within associations.</p>
<p><b>R-18. Give buyers a FAQ pamphlet.</b> RCW 64.06.020 (and other sections as necessary) should be changed to require the distribution of a buyer information pamphlet (“Frequently Asked Questions”) along with the disclosure form required by RCW 64.06.020 for the sale of any residential real property in which the seller is a member of a homeowners’ association as defined in RCW 64.38.010(1). (See <i>Exhibit B – Frequently Asked Questions.</i>)</p>	<p>In addition to alerting a buyer to the fact that, by buying a particular home, the buyer will become an association member, there is a need to inform the buyer, in general terms, what being an association member most likely will entail. The Committee has prepared an easy to understand series of questions and answers designed to impart a general understanding of the nature of association membership. The Committee recommends the Act be amended to require the distribution of this pamphlet to buyers who are buying a home within an association.</p>

2. A Buyer Should Know Enough About This Association To Make An Informed Decision

<b>Recommendations:</b>	<b>Comments:</b>
<p><b>R-19. Give buyers a resale certificate.</b>  Unless waived in writing by the buyer, a resale certificate and mandatory disclosures shall be required for all transfers of residential real estate subject to the Act other than those</p>	<p>Buyers who generally understand what buying into an association means may not understand what buying into a particular homeowners’ association means. The Act does not currently require an association or a seller to provide a</p>

<p>listed in RCW 64.06.010 (part of the Form 17 requirements).</p>	<p>buyer with a resale certificate containing important documents and financial information from which a buyer could make a more informed decision about becoming a member of a particular homeowners' association. The Committee recommends that the Act require a resale certificate to be provided to a buyer unless the buyer waives the right to receive the certificate.</p>
<p><b>R-20. Amend RCW 64.06 to implement this.</b> RCW 64.06 should be amended to require delivery of the resale certificate form and exhibits mandated in ch. 64.38 and be amended as otherwise necessary to implement the disclosure provisions of ch. 64.38.</p>	<p>RCW 64.06 requires disclosure of certain information to a buyer so that the buyer's decision to purchase residential property is an informed decision. Amending the Act to require disclosures, as the Committee recommends, means that RCW 64.06 should also be amended so the established disclosure process is updated to include these association related disclosures.</p>

**D. Problems Best Solved By Other Means**

<b>Recommendations:</b>	<b>Comments:</b>
<p><b>R-21: Investigate the feasibility of creating an ombudsman.</b> The Committee recommends that the Legislature establish a study committee to determine whether an ombudsman program is needed to provide associations and their members with a resource for addressing problems that legislation, litigation or mediation are not well suited to address and, if it determines such a program is needed, then to make recommendations about how the Legislature create such a program.</p>	<p>Numerous participants in the Committee's public-input process stated that association members would benefit from an ombudsman program that could serve as a resource that could receive member complaints and, where appropriate, assist in addressing the complaint.</p>
<p><b>R-22: Treat these recommendations as an interwoven whole.</b> These recommendations listed above and embodied in the attached restated version of the Act are, in the Committee's view, an interwoven set of recommendations. For example, certain recommendations particularly favorable to owners are made by the Committee because other recommendations that favor an association are also made, with each recommendation serving as a counter-balance to the other. Likewise, numerous requests were made by owners and by associations to make additional recommendations. The absence of a recommendation above that advances a "solution" dear to the heart of this group or that is the product of the Committee's consideration of, but rejection of, the proffered</p>	

<p>“solution.” The Committee feels compelled to make this statement in anticipation of well-intentioned requests by interest groups that this change or that be added to list of recommended changes to address some problem “the Committee overlooked.”</p>	
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### **III. DRAFT PROPOSED STATUTORY LANGUAGE**

To implement its recommendations, the Committee further recommends that the Homeowners Association Act be revised as follows:

#### **RCW 64.38.005 Intent**

The intent of this chapter is to provide consistent laws regarding the formation and legal administration of homeowners' associations. Unless otherwise provided in this chapter, this chapter applies to all homeowners associations in the state.<sup>1</sup>

#### **NEW SECTION: Obligation of Good Faith**

(1) Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.<sup>2</sup>

(2) This section sets forth a basic principle running throughout this Chapter: in all transactions involving declarants, associations, and their members, good faith is required in the performance and enforcement of all contracts and duties. Good faith, as used in this Chapter, means observance of honesty in fact and reasonable standards of fair dealing and is used in the same manner as Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code.<sup>3</sup>

#### **RCW 64.38.010 Definitions**

For purposes of this chapter:

(1) “Assessment” means all sums chargeable by the association against a lot 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. [Applicability: This definition and statutory change is effective immediately, would apply to all homeowners associations and would supersede any inconsistent provisions in the association's governing documents.]<sup>4</sup>

(2) “Association” or “homeowners' association” means a corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and, by virtue of membership, the owner is obligated to pay assessments pursuant to the governing documents. “Homeowners' association” does not mean an association created under chapter 64.32 or 64.34 RCW.

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<sup>1</sup> Decided 5/7/07.

<sup>2</sup> Decided 1/8/07.

<sup>3</sup> Decided 8/20/07.

<sup>4</sup> Decided 5/7/07 and 6/4/07.

(3) "Board of directors" or "board" means the body, regardless of name, with primary authority to manage the affairs of the association.

(4) "Common areas" means property owned, or otherwise maintained, repaired or administered by the association.

(5) "Common expense" means the costs incurred by the association to exercise any of the powers provided for in this chapter.

(6) "Community" means residential real property which is subject to a declaration pursuant to which an association is established for governance of the community.

(7) "Cooperative" means a community in which the residential real property is owned by an association, each of whose members is entitled by virtue of its ownership interest in the association to exclusive possession of a portion of such property.

(8) "Declarant" means any person who executes as declarant a declaration as defined herein or who succeeds to the rights of a declarant pursuant to an instrument recorded in the real property records of every county in which any portion of the community located.

(9) "Declaration" means the declaration of covenants, conditions, and restrictions or any other document, however denominated, that is recorded in every county in which any portion of the community is located and that provides for the establishment of an association to govern the community. In the case of cooperative, declaration shall mean the document or documents, however denominated, that create the cooperative housing association that owns the residential real property comprising the cooperative, whether or not recorded.

(10) "Governing documents" means the declaration, articles of incorporation, bylaws, rules and regulations of the association, or other written instrument by which the association has the authority to exercise any of the powers provided for in this chapter or to manage, maintain, or otherwise affect the property under its jurisdiction.

(11) "Lot" means a physical portion of a community designated for separate ownership or occupancy and designated for residential use, the boundaries of which are described in the real property records of every county in which any portion of the community is located. Within a cooperative, a lot shall mean that portion of the community designated for exclusive possession by a member of the cooperative's association. Lot does not mean an apartment created under chapter 64.32 RCW or a unit created under chapter 64.34 RCW.

(12) "Owner" means a declarant or other person who owns a lot but does not include a person who has an interest in a lot solely as security for an obligation. "Owner" means the vendee, not the vendor of a lot under a real estate contract.

(13) "Person" means a natural person, corporation, partnership, limited partnership, trust, governmental subdivision or agency, or other legal entity.

(14) "Residential real property" means any real property, the use of which is limited by law, covenant or otherwise to primarily residential or recreational purposes.

#### **RCW 64.38.015 Association Membership**

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 or, in the case of a cooperative, the members of the association who by virtue of their ownership interest in the association have exclusive possession of a lot.

**RCW 64.38.020 Association powers**

Unless otherwise provided in the declaration, an association may:

(1) Adopt and amend bylaws, resolutions, policies, rules, and regulations not inconsistent with the declaration or with this chapter;

(2) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from owners;

(3) Hire and discharge or contract with managing agents and other employees, agents, and independent contractors;

(4) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more owners on matters affecting the homeowners' association, but not on behalf of owners involved in disputes that are not the responsibility of the association;

(5) Make contracts and incur liabilities;

(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;

(8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property;

(9) Grant easements, leases, licenses, and concessions through or over the common areas and petition for or consent to the vacation of streets and alleys;

(10) Impose and collect any payments, fees, or charges for the use, rental, or operation of the common areas;

(11) Impose and collect charges for late payments of assessments;

(12) Take enforcement action with respect to any violation of the governing documents;<sup>5</sup>

(13) 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 governing documents, 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 governing documents;<sup>6</sup>

(14) Exercise any other powers conferred by the declaration, articles or bylaws;<sup>7</sup>

(15) Exercise all other powers that may be exercised in this state by the same type of legal entity as the association; and

(16) Exercise any other powers necessary and proper for the governance and operation of the association.

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<sup>5</sup> Decided 7/23/07.

<sup>6</sup> Decided 7/23/07.

<sup>7</sup> Decided 7/23/07.

### **RCW 64.38.025 Board of directors--Standard of care--Restrictions**

(1) Except as provided in the association's governing documents or this chapter, the board of directors shall act in all instances on behalf of the association. In the performance of their duties, the officers of the association and members of the board of directors shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 24.03 RCW.

(2) The board of directors shall not act on behalf of the association to amend the articles of incorporation, to take any action that requires the vote or approval of the owners, to terminate the association, to elect members of the board of directors, or to determine the qualifications, powers, and duties, or terms of office of members of the board of directors; but the board of directors may fill vacancies in its membership of the unexpired portion of any term.<sup>8</sup>

### **NEW SECTION: Board Authorized to Incorporate Association**

A board of directors may by majority vote incorporate an unincorporated homeowners association as a non-profit corporation.<sup>9</sup>

### **NEW SECTION: Removal of directors.**

Any member of the board of directors may be removed with or without cause by a vote of a majority of the votes of the owners entitled to elect such board member and present, in person or by proxy, and entitled to vote at any regular or special meeting of the owners at which a quorum is present.<sup>10</sup>

### **RCW 64.38.030 Association bylaws**

Unless otherwise provided for in the declaration, the bylaws of the association shall contain provisions not inconsistent with this chapter which provide for:

(1) The number, qualifications, powers and duties, terms of office, and manner of electing and removing the board of directors and officers of the association and filling vacancies;

(2) Election by the board of directors of the officers of the association as the bylaws specify;

(3) Which, if any, of its powers the board of directors or officers of the association may delegate to other persons or to a managing agent;

(4) Which of its officers may prepare, execute, certify, and record amendments to the governing documents on behalf of the association;

(5) The method of amending the bylaws; and

(6) Any other matters the association deems necessary and appropriate.

### **NEW SECTION: Resale Certificate Disclosures**

(1) Unless waived in writing by the buyer, a resale certificate and mandatory disclosures as set forth below are required for all transfers of residential real estate subject to the Act other than those listed in RCW 64.06.010 (*part of the Form 17 requirements*).

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<sup>8</sup> Recommend that (4), dealing with the removal of directors, be set forth in a separate statute.

<sup>9</sup> Decided 3/29/07.

<sup>10</sup> Decided 7/9/07.

(2) In a transaction for the sale of a lot, the seller shall, unless the buyer has expressly waived the right to receive a resale certificate, and except for those transfers listed in RCW 64.06.010, furnish to the buyer before execution of any contract for sale of the lot, or otherwise before conveyance, a resale certificate, signed by an officer or authorized agent of the association and based on the books and records of the association and the actual knowledge of the person signing the certificate, containing:

(a) A statement setting forth the amount of the annual assessment due from the selling lot owner, and any unpaid assessment currently due and payable from the selling owner and a statement of any special assessments that have been levied against the lot which have not been paid even though not yet due;

(b) A statement, which shall be current to within forty-five days, of whether the sum of assessments which are delinquent, under the association's reasonable delinquency policy, exceeds ten percent of the association's annual budgeted revenue and, if so, the total number of lots which are delinquent under such delinquency policy.

(c) A statement, which shall be current to within forty-five days, of whether any obligation or liability of the association in excess of the lesser of ten thousand dollars or five percent of the association's budgeted annual expenditures is sixty or more days past due and, if so, the circumstances that account for such delinquency.

(d) A statement of any anticipated repair or replacement cost in excess of five percent of the association's budgeted annual expenditures which repair or replacement cost has been approved by the board of directors;

(e) A statement of the amount of any reserves for repair or replacement and of any portions of those reserves currently designated by the association for any specified projects;

(f) The annual financial statement of the association, including the audit report if it has been prepared, for the year immediately preceding the current year;

(g) A balance sheet and a revenue and expense statement of the association, which shall be current to within one hundred twenty days;

(h) The current ratified budget of the association;

(i) A statement of any unsatisfied judgments against the association and the status of any pending suits or legal proceedings in which the association is a plaintiff or defendant;

(j) A statement describing any insurance coverage maintained by the association

(k) A statement as to whether there are any alterations or improvements to the lot being sold by the owner that the association has determined violate any provision of the governing documents;

(l) A statement of the number of lots, if any, still owned by the declarant, whether the declarant has transferred control of the association to the owners, and the date of such transfer;

(m) A statement as to whether there are any known and currently existing violations of the health or building codes with respect to the lot or improvements thereon or any portions of the common areas and or improvements thereon located on common areas;

(n) A copy of the governing documents (including, e.g. , the recorded plat maps and declaration of covenants or easements, the articles of incorporation, if any, bylaws, rules and regulations, including architectural and construction standards and guidelines and the association's current fine schedule), minutes of the most recent meeting of the members of the association, minutes of the previous six meetings of the board of directors, *provided* that minutes of board meetings that occurred more than three years before the date of the resale certificate required by this section need not be provided, and any other information reasonably requested by mortgagees of prospective purchasers. Information requested generally by the federal national mortgage association, the federal home loan bank board, the government national mortgage association, the veterans administration and the department of housing and urban development shall be deemed reasonable, provided such information is reasonably available to the association. The association may charge a fee for photocopying costs not to exceed fifteen cents per page for providing copies of governing documents. The duty to provide copies of documents that are recorded in the county in which the lot is located will be deemed satisfied if the association identifies in the resale certificate a link to a website through which a copy of the recorded document can be obtained. The duty to provide copies of the governing documents will be deemed satisfied if the association provides the documents via electronic transmission to the email address provided by the owner who requests issuance of a resale certificate.

(3) The association, within ten days after a request by an owner, and subject to payment of a reasonable fee not to exceed one hundred fifty dollars, shall furnish a resale certificate signed by an officer or authorized agent of the association and containing the information necessary to enable the owner to comply with this section. The association may charge an owner a nominal fee for updating a resale certificate within six months of the owner's request. The owner shall also sign the certificate but the owner is not liable to the buyer for any erroneous information provided by the association and included in the certificate unless and to the extent the owner had actual knowledge thereof.

(4) The dollar amounts stated above can be adjusted for inflation based on the Consumer Price Index.

**NEW SECTION: Notice to Buyer**

Subject to the exclusions set forth below, any purchase and sale agreement for residential real property in which the owner is a member of a homeowners' association shall include the following notice:

BY PURCHASING THE RESIDENTIAL PROPERTY WHICH IS THE SUBJECT OF THIS AGREEMENT, YOU WILL BECOME A MEMBER OF A HOMEOWNERS' ASSOCIATION WHICH GOVERNS THE COMMUNITY IN WHICH THE PROPERTY IS LOCATED. SUCH ASSOCIATIONS MAY MAINTAIN AND REPAIR COMMON AREAS, RESTRICT USE OF YOUR PROPERTY, COLLECT DUES, AND APPROVE OR DISAPPROVE BUILDING PLANS. UNLESS YOU WAIVE YOUR RIGHT IN WRITING, YOU ARE ENTITLED TO RECEIVE FROM THE SELLER AS PART OF THE DISCLOSURE STATEMENT REQUIRED BY RCW CHAPTER 64.06 A CERTIFICATE SIGNED BY AN OFFICER OR AUTHORIZED AGENT OF THE HOMEOWNERS' ASSOCIATION PROVIDING CERTAIN FINANCIAL AND OTHER DISCLOSURES ABOUT THE ASSOCIATION. IMPORTANT INFORMATION REGARDING THE PURCHASE OF A HOME WHICH IS

SUBJECT TO MEMBERSHIP IN A HOMEOWNERS ASSOCIATION IS  
AVAILABLE AT WWW.XYZ.GOV.<sup>11</sup>

The foregoing notice is not required in transactions which are (i) between commercial buyers and sellers or (ii) excluded from the requirement for a disclosure statement pursuant to RCW 64.06.010.

**NEW SECTION: Association Budgets and Assessments.**

(1) 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 ten<sup>12</sup> nor more than sixty days after mailing of the summary. Unless at that meeting the proposed budget is rejected, in person or by proxy, by a vote of a majority of all the votes in the association, or any larger percentage specified in the governing documents, the proposed budget is ratified and approved, whether or not a quorum is present at the meeting. 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.

(2) To the extent authorized in the declaration, an association's lien rights may include liens to secure payment of fines validly imposed.<sup>13</sup>

(3) A lien for unpaid assessments and the personal liability for payment of assessments is extinguished unless proceedings to enforce the lien or collect the debt are instituted within six years after the amount of the assessments sought to be recovered becomes due.<sup>14</sup>

(3) This section shall be construed to apply retroactively to any governing documents in effect on the effective date of this section and shall supersede any provisions of the governing documents that are inconsistent with this section. All such inconsistent provisions of the governing documents shall be void and unenforceable.

**RCW 44.38.033 Flag of the United States--Outdoor display--Governing Documents**

(1) The governing documents may not prohibit the outdoor display of the flag of the United States by an owner or resident on the owner's or resident's property if the flag is displayed in a manner consistent with federal flag display law, 4 U.S.C. Sec. 1 et seq. The governing documents may include reasonable rules and regulations, consistent with 4 U.S.C. Sec. 1 et seq., regarding the placement and manner of display of the flag of the United States.

(2) The governing documents may not prohibit the installation of a flagpole for the display of the flag of the United States. The governing documents may include reasonable rules and regulations regarding the location and the size of the flagpole.

(3) For purposes of this section, "flag of the United States" means the flag of the United States as defined in federal flag display law, 4 U.S.C. Sec. 1 et seq., that is made of fabric, cloth, or paper and that is displayed from a staff or flagpole or in a window. For purposes of this section, "flag of the United States" does not mean a flag depiction or emblem made of lights, paint,

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<sup>11</sup> The Committee recommends that a website be established, perhaps by the Consumer Protection Division of the Office of the Attorney General to provide additional information concerning homeowners associations.

<sup>12</sup> Decided 7/9/07.

<sup>13</sup> Decided 6/4/07.

<sup>14</sup> Decided 6/4/07.

roofing, siding, paving materials, flora, or balloons, or of any similar building, landscaping, or decorative component.

(4) The provisions of this section shall be construed to apply retroactively to any governing documents in effect on June 10, 2004. Any provision in a governing document in effect on June 10, 2004, that is inconsistent with this section shall be void and unenforceable.

**RCW 64.38.034 Political yard signs--Governing documents**

(1) The governing documents may not prohibit the outdoor display of political yard signs by an owner or resident on the owner's or resident's property before any primary or general election. The governing documents may include reasonable rules and regulations regarding the placement and manner of display of political yard signs.

(2) This section applies retroactively to any governing documents in effect on July 24, 2005. Any provision in a governing document in effect on July 24, 2005, that is inconsistent with this section is void and unenforceable.

**RCW 64.38.035 Association meetings--Notice**

(1) A meeting of the association must be held at least once each year.

(2) Notwithstanding any applicable statute or provision in the governing documents to the contrary, a special meeting of the association may be called by the president, a majority of the board of directors, or by owners having five percent of the votes in the association. This section supersedes any inconsistent provisions of the governing documents or applicable statute.<sup>15</sup>

(3) Not less than ten nor more than sixty days in advance of any meeting, the secretary or other officers 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 owner or to any other mailing address designated in writing by the owner. The notice of any meeting shall state the time and place of the meeting and the business to be placed on the agenda by the board of directors for a vote by the owners, including the general nature of any proposed amendment to the articles of incorporation, bylaws, any budget or changes in the previously approved budget that result in a change in assessment obligation, and any proposal to remove a director.

**NEW SECTION: Board of Directors Meetings.**<sup>16</sup>

Except as provided in this subsection, all meetings of the board of directors shall be open for observation by all owners of record and their authorized agents. The board of directors shall keep minutes of all actions taken by the board, which shall be available to all owners. Upon the affirmative vote in open meeting to assemble in closed session, the board of directors may convene in closed executive session to consider personnel matters; consult with legal counsel or consider communications with legal counsel; and discuss likely or pending litigation, matters involving possible violations of the governing documents of the association, and matters involving the possible liability of an owner to the association. The motion shall state specifically the purpose for the closed session. Reference to the motion and the stated purpose for the closed session shall be included in the minutes. The board of directors shall restrict the consideration of matters during the closed portions of meetings only to those purposes specifically exempted and stated in the motion. No motion, or other action adopted, passed, or agreed to in closed session may become effective unless the board of directors, following the closed session, reconvenes in open meeting and votes in the open meeting on such motion, or other action which is reasonably

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<sup>15</sup> Decided 7/9/07.

<sup>16</sup> This is the existing text of 64.38.035(2), but for ease of reference and use, it has been broken out into a separate section.

identified. The requirements of this subsection shall not require the disclosure of information in violation of law or which is otherwise exempt from disclosure.

**RCW 64.38.040 Quorum for meetings of association members**

Unless the governing documents specify a smaller percentage, a quorum is present throughout any meeting of the association if the owners 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.<sup>17</sup>

**RCW 64.38.045 Financial and other records--Property of association--Copies--Examination--Annual financial statement--Accounts**

(1) The association or its managing agent shall keep financial and other records sufficiently detailed to enable the association to fully declare to each owner the true statement of its financial status. All financial and other records of the association, including but not limited to checks, bank records, and invoices, in whatever form they are kept, are the property of the association. Each association managing agent shall turn over all original books and records to the association immediately upon termination of the management relationship with the association, or upon such other demand as is made by the board of directors. An association managing agent is entitled to keep copies of association records. All records which the managing agent has turned over to the association shall be made reasonably available for the examination and copying by the managing agent.

(2) All records of the association, including the names and addresses of owners and other occupants of the lots, shall be available for examination by all owners, holders of mortgages on the lots, and their respective authorized agents on reasonable advance notice during normal working hours at the offices of the association or its managing agent. The association shall not release the unlisted telephone number of any owner. The association may impose and collect a

reasonable charge for copies and any reasonable costs incurred by the association in providing access to records.

(3) At least annually, the association shall prepare, or cause to be prepared, a financial statement of the association. The financial statements of associations with annual assessments of fifty thousand dollars or more shall be audited at least annually by an independent certified public accountant, but the audit may be waived if sixty-seven percent of the votes cast by owners, in person or by proxy, at a meeting of the association at which a quorum is present, vote each year to waive the audit.

(4) The funds of the association shall be kept in accounts in the name of the association and shall not be commingled with the funds of any other association, nor with the funds of any manager of the association or any other person responsible for the custody of such funds.

**NEW SECTION: Action to Reduce Voting Requirement for Amendment of Declaration**

(1) This section applies to declarations recorded prior to [the effective date of the new Act].

(2) If a declaration requires more than seventy-five percent of the votes in the association to approve any amendment to the declaration, the homeowners association shall, if so directed by owners holding not less than sixty-seven percent of the votes in the association,

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<sup>17</sup> Decided 7/9/07.

bring an action in the superior court for the county in which any portion of the real property subject to the declaration is located to have the percentage of votes required to amend the declaration reduced. The owners' decision to bring such an action may, notwithstanding anything to the contrary in the declaration, be made by votes cast at a meeting duly called, or by written consent, or by any combination thereof. The action shall be an *in rem* declaratory judgment action whose title shall be the description of the property subject to the declaration.

(3) If the court finds that the percentage of votes set forth in the declaration is an unreasonable burden on the ability of the owners to amend the declaration and of the association to administer the property under its jurisdiction, the court shall enter an order striking such percentage of votes from the declaration and substituting in lieu thereof the percentage of votes which the court determines to be appropriate in the circumstances. In no event shall the court mandate approval of less than sixty-seven percent of the votes in the association to amend any provision of the declaration.

**NEW SECTION: Amendment of Declarations Recorded After [the effective date of this section]**

(1) Declarations recorded after the effective date of the statute<sup>18</sup> can be amended with the approval of sixty-seven percent of the total votes in the association, or any larger percentage specified in the declaration.<sup>19</sup>

(2) Notwithstanding the foregoing provision, to the extent provided in the declaration, the declarant may, to the extent provided in the declaration, unilaterally amend the declaration but only if such amendment is for one of the following purposes: (a) subjecting additional property to the declaration pursuant to a plan of expansion set forth therein, (b) withdrawing property from the declaration if the withdrawal is allowed under the terms of the declaration and if the property to be withdrawn is not owned by any third party, (c) bringing any provision of the declaration into compliance with any applicable governmental statute, rule, regulation or judicial determination, (d) enabling any title insurance company to issue title insurance coverage for the lots, (e) enabling any institutional or governmental lender, purchaser, insurer or guarantor of mortgage loans, including, for example, the Federal National Mortgage Association, to make, purchase, insure or guarantee mortgage loans for the lots, or (f) satisfying the requirements of any local, state or federal governmental agency. However, no such amendment shall adversely affect the title to any lot unless the owner thereof consents to it in writing.

(3) The declaration may require all or a specified number or percentage of the eligible mortgagees who hold first lien security interests encumbering lots to approve specified actions of the owners or association as a condition to the effectiveness of those actions, but no requirement for approval may operate to (a) deny or delegate control of the general administrative affairs of the association by the owners or the board of directors or (b) prevent the association or the board of directors from commencing, intervening in or settling any litigation or proceeding or (c) prevent any insurance trustee or the association from receiving and distributing any insurance proceeds. For purposes of this provision, an eligible mortgagee shall mean the holder of a mortgage on a lot that has filed with the secretary of the association a written request that it be given copies of notices of any action by the association that requires the consent of mortgagees, which request shall include the lot number and address of the property subject to the mortgage.

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<sup>18</sup> This provision is intended to operate prospectively, and to apply only to covenants recorded after the effective date of the statutory change.

<sup>19</sup> The Committee considered the concept of establishing different voting requirements for different categories of amendments. The Committee rejected the concept due to the difficulty of adequately describing categories of amendments and the desire to avoid creating additional ambiguity and uncertainty.

Notwithstanding anything to the contrary herein, if an eligible mortgagee fails to respond to a request for approval as provided herein within thirty days following the association's issuance of a notice requesting such approval, the eligible mortgagee's approval shall be deemed to have been granted.

(4) The declaration may permit the associations members to approve an amendment through a combination of votes conducted during meetings or through a written consent process.<sup>20</sup>

(5) The declaration may require that all declaration amendments must be (a) signed by an officer of the association or, if applicable, by the declarant, (b) acknowledged, and (c) recorded in the records of each county in which any portion of the property is located to be effective.

**NEW SECTION: Challenges to Validity of Covenant Amendments.**

(1) No action to challenge the validity of a declaration amendment adopted by the association pursuant to this chapter may be brought more than one year after the amendment is recorded.

(2) This section applies to amendments adopted after the effective date of this section.<sup>21</sup>

**NEW SECTION: Member Approval of Bylaws Adopted or Amended by the Board**

(1) This section applies to associations in which the declaration or the bylaws authorize only the board of directors to adopt, amend or rescind bylaws and to do so without a vote of the members, and with respect to those associations, to all bylaws adopted or amended by the board of directors after the effective date of this section.

(2) No bylaw adopted, amended or rescinded by the board of directors shall be valid or enforceable until it is ratified by the association's members as set forth below:

(a) The board of directors shall submit all bylaws adopted, amended or rescinded by the board to a vote of the members. The vote must be held at the next regularly scheduled annual meeting of the association, or at a special meeting held before the next annual meeting.

(b) The notice of the annual or special meeting must include the text of any existing bylaw which the board has approved for amendment or rescission and the text of any new or amended bylaw approved by the board.

(c) Unless the governing documents specify a longer advance notice period for a meeting, notice of the meeting at which the proposed bylaw change will be voted upon must be given not less than fourteen days in advance of the meeting and shall not be given more than sixty days in advance of the meeting.

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<sup>20</sup> The Committee considered and rejected the concept of permitting homeowners to approve covenant amendment approvals via electronic mail. Because covenants contain restrictions affecting homeowners' abilities to use their properties and must be recorded, and there are still too many technical issues with voting by email, it was felt that the process for adopting amendments should be more formal and that owner approvals should be given in a manner that permits easier verification.

<sup>21</sup> Decided 8/6/07.

(d) The proposed bylaw change will be deemed approved and ratified by the members unless a majority of all the votes in the association vote at the meeting, in person or by proxy, to reject the bylaw change approved by the board.

(3) All bylaw changes ratified by the members in accordance with this section will take effect on the day after the annual or special meeting at which they were ratified.

**NEW SECTION: Association Rule-Making - Member Approval of Rules**

(1) This section applies to rules and policies, or amendments thereto, that are adopted after the effective date of this section.

(2) A rule adopted by the board is valid and enforceable if all the following requirements are satisfied: (a) the rule is in writing; (b) the rule is required by law or within the authority of the board conferred by law or by the declaration; (c) the rule is consistent with the governing documents; and (d) the rule is adopted or amended in substantial compliance with the requirements of this chapter. For purposes of this section, a rule shall include any new rule or policy, or an amendment to an existing rule or policy.

(3) Except for emergency rules, the board of directors must provide the association's members with notice and an opportunity to comment on any proposed new or amended rule before the board is authorized to adopt or enforce that rule. For purposes of this section, an "emergency rule" is one that is necessary for the immediate preservation of health and safety. Emergency rules become effective immediately, subject to the members' right to request a ratification vote pursuant to subsection (4) below.

(4) With the exception of emergency rules, rules adopted by the board of directors following notice and an opportunity for comment become effective thirty days after notice of the rules is given to the members in the manner authorized by the governing documents unless a written petition signed by twenty percent of the total votes in the association is submitted to the board within that thirty-day period requesting a ratification vote on the proposed rule. If a ratification vote is requested, the association shall use the following process for the ratification vote:

(a) The board of directors shall submit the rules on which a ratification vote has been requested to a vote of the members, which vote must be conducted at the next regularly scheduled annual meeting of the association, or at a special meeting held before the next annual meeting.

(b) The notice of the meeting at which the ratification vote will be conducted meeting must include the text of the proposed rules.

(c) Unless the governing documents specify a longer advance notice period for an association meeting, notice of the meeting at which the ratification vote will be conducted must be given not less than days in advance of the meeting and shall not be given more than sixty days in advance of the meeting.

(d) The proposed rule change will be deemed approved and ratified by the members unless a majority of all the votes in the association vote at the meeting, in person or by proxy, to reject the rule change approved by the board.

(e) All rule changes ratified by the members in accordance with this section will take effect on the original effective date or such later effective date established by the board.<sup>22</sup>

(5) The board is not required to use the following optional rulemaking process. However, use of this process establishes compliance with the requirements of RCW 64.38.\_\_\_\_(2) above. For purposes of this section, "rule change" means the adoption or amendment of a rule by the board.

(a) The board shall give notice of a proposed rule change to the owners. The notice shall include all of the following information: (i) the text of the proposed rule change; (ii) a description of the purpose and effect of the proposed rule change; and (iii) the deadline for submission of a comment on the proposed rule change.

(b) For a period of not less than thirty days following actual or constructive delivery of a notice of a proposed rule change, the board shall accept written comments from owners on the proposed rule change.

(c) The board shall consider any comments it receives and shall make a decision on a proposed rule change at a board meeting. With the exception of emergency rules, a decision on a rule shall not be made until after the comment submission deadline.

(d) The board shall give notice of a rule change to the owners. The notice shall set out the text of the rule change and state the date the rule change takes effect. With the exception of emergency rules, the date the rule change takes effect shall not be less than thirty days after notice of the rule change is given in the manner authorized in the governing documents.

**NEW SECTION: Enforcement of Governing Documents** (NOTE: *This Section is not yet in statutory language form.*)

(A) This section establishes procedures which, if followed by an association in the enforcement of its governing documents, will be deemed to have provided the notice and opportunity to be heard that is required by RCW 64.38.020(13). These enforcement procedures are not mandatory and this proposal is not intended to require an association to change its existing enforcement procedures. These procedures are as follows:

- A. The association must provide the owner with a notice of violation that contains the following information:
- A reference to the rules that are alleged to have been violated
  - A short statement of the evidence of the rule violation
  - The name of a person with first hand knowledge of the facts that support the determination that a violation took place
  - A short statement of the remedy being sought, including the amount of any fine being imposed, subject to the owner's right to request a hearing
  - A statement that, if the person cited desires to contest or explain the violation, the person must, within fifteen days of delivery of the notice of violation, submit to the association a written request for a hearing
  - The owner's procedural rights (e.g., right to request a hearing, right to attend the hearing, right to be represented, right to review the evidence supporting the alleged violation)

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<sup>22</sup> Decided 8/20/07.

- B. The violation notice must be based on the first hand knowledge of a person who witnessed the facts establishing the violation and the violation notice must specifically identify such person by name in the notice . (The intent is to eliminate fines based on anonymous complaints. The identity of a person who advises a board member or manager of a violation can be withheld, but no complaint can be pursued and no fine can be issued unless someone with first hand knowledge of the violation is identified by name in the notice of violation.)
- C. If an owner timely requests a hearing, the association shall set the hearing for a date no sooner than thirty days, and no later than sixty days, from its receipt of the request. The association shall notify the owner of the hearing date not less than twenty days prior to the hearing and shall include in such notification a copy of the association's rules of procedure for conducting its hearing. If an owner does not timely request a hearing, the fine imposed in the notice of violation stands.
- D. Upon timely request by the owner who has requested a hearing, the association must, no later than ten days before the date of the hearing, either provide the owner a copy of all its evidence concerning the alleged violation, including copies of the complaint signed by a witness with first hand knowledge, or identify a time and place at which the owner may inspect such evidence.
- E. The owner has the right to be represented at the hearing.
- F. The chair of the hearing may adjourn or continue the hearing if doing so is necessary to gather additional information that the association needs in order to make a decision.
- G. The association must provide the owner with a written decision, which includes a statement of the reasons for the decision, within thirty days after the hearing.

The notice provision contained in the governing documents of the association shall govern with respect to the calculation of dates and the delivery of any notice or other document required or permitted to be given.

**NEW SECTION: Alternative Dispute Resolution – Mediation**

(1) This section applies to disputes that arise after the effective date of this section and does not apply to any judicial or other legal proceedings pending prior to the effective date of this section.<sup>23</sup>

(2) With the exception of the claims listed below, claims between owners or between owners and their association which involve the governing documents must be submitted to mediation before any party may pursue the claim through court proceedings.

(3) The following categories of claims are exempted from this pre-litigation mediation requirement:

- (a) Claims in which the statute of limitations will soon expire, except that any party to the lawsuit can file a motion with the court requesting that the judge order the parties to mediate before allowing them to proceed with the lawsuit and temporarily staying the litigation proceedings pending the outcome of mediation.

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<sup>23</sup> Decided 8/6/07.

- (b) Claims for injunctive relief, except that any party to the lawsuit can file a motion with the court requesting that the judge order the parties to mediate before allowing them to proceed with the lawsuit and temporarily staying the litigation proceedings pending the outcome of mediation.
- (c) Claims for declaratory judgment.<sup>24</sup>
- (d) Assessment collection and foreclosure claims.
- (e) Claims for defects in construction of homes and other improvements, whether individually owned or part of the common areas.<sup>25</sup>
- (f) Claims that involve parties who are not subject to the covenants – i.e., claims that involve parties who are not either the association or members of the association.
- (g) Claims between members of the association where the claims are not related to the governing documents.
- (h) Claims or issues that have been the subject of a previous mediation Request, Response or mediation conference pursuant to [this statutory provision] within the earlier of twelve months of the date of the most recent Request, Response, or mediation conference.

(3) Unless another reasonable alternative dispute resolution process is set forth in the declaration or adopted by a majority vote of the non-declarant members of the association, the process set forth below shall govern.

- (a) The party requesting mediation (“Requestor”) must submit a request for mediation (“Request”) to the other parties (“Recipient(s”).
- (b) The request can be made in any form (writing, email, fax, etc.) provided that the Requestor can prove the request was received by the Recipient.
- (c) If mediation occurs, it shall be conducted by one mediator, unless the parties otherwise agree. The mediator shall be selected as provided below. Unless all parties to the mediation agree otherwise, the mediation conference must be held within ninety days of the date the Request is received by all Recipients.
- (d) The Request must state the issues the Requestor wishes to mediate, certify that the Requestor is willing to meet in good faith, and provide full contact information (name, address, phone, fax, email) for the Requestor’s proposed mediator.
- (e) No later than thirty days after the Request is received by all Recipients, the Recipients must respond to the Requestor. The Response can be made in any form (writing, email, fax, etc.) that enables the Recipient to prove that the

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<sup>24</sup> The Committee discussed the concept of allowing any party to ask the court for an order enforcing a mediation requirement for declaratory judgment claims. The concept was rejected because claims for declaratory judgment concerning the governing documents go to the very heart of the parties’ rights and their obligations to one another and should therefore be decided first, and by a judge.

<sup>25</sup> This requirement is intended to exempt disputes between builders and buyers, or builders and the homeowners association, for construction defects. It is not intended to exempt disputes between associations or their members concerning architectural or design revision provisions in the governing documents,

Response was received by the Requestor.

- (f) If the Recipient agrees to mediate, the Response must include a statement of any additional issues the Recipient wishes to mediate, a statement whether the mediator proposed by the Requestor is acceptable to the Recipient and, if not, contact information for an alternate mediator proposed by the Requestor. If the Recipient does not agree to mediate, the Response must so indicate and must include a statement of the reasons that the Recipient declines to mediate.
- (g) The Requestor must reply (the "Reply") to the Response within fifteen days of receiving the Response. If the Response identifies additional issues the Recipient wishes to address at mediation, the Reply must state whether the Requestor agrees to mediate those issues. If the Requestor does not agree to mediate those issues, the Reply must so indicate and must include a statement of the reasons that the Requestor declines to mediate the issues identified by the Recipient. The Requestor's refusal to mediate the issues identified in the Reply is subject to the provisions of Section 4 below.
- (h) If the Recipient has proposed an alternative mediator, the Reply must state whether the alternate mediator is acceptable to the Requestor. If not, the Requestor must contact the two proposed mediators within fifteen days of delivering the Reply to ask them to choose a third person who is available within the timeframe required [by this section of the statute] to act as mediator.
- (i) The mediator may, but need not be, an attorney or judge. The mediator's primary function is to assist the parties in communicating with one another and to find ways to resolve the disputed issues by agreement.

(4) Although the intent of this section is to encourage mediation before either party may litigate, it is recognized that there are legitimate reasons for one party or the other to decline mediation. For that reason, either the Recipient or the Requestor can decline mediation. If mediation is declined, or a party fails to participate in a scheduled mediation conference, the other party may proceed with filing a legal action. That party may ask the court, and the court is authorized to:

- (a) Enter an order compelling the parties to participate in a mediation conference if the Court determines that mediation would be productive or useful, and
- (b) Impose appropriate remedies for a party's unjustified failure to mediate claims subject to mandatory mediation requirements imposed [under this section] including, without limitation, requiring that party to pay all mediation fees and costs charged by the mediator, reimburse the plaintiff for the costs of filing suit, reimburse the plaintiff for process service costs, and reimburse the plaintiff for some or all of plaintiffs' attorneys fees and costs. This fee and cost shifting authorization is intended to supersede any inconsistent provisions in association governing documents (covenants, articles of incorporation, bylaws, rules or policies).

The standard of review for a trial court's decision pursuant to this section is abuse of discretion.

(5) Unless the parties agree otherwise, the fees and costs of mediation will be shared equally by all parties to the mediation. If the mediator requires pre-payment of all or a portion of the anticipated fees and costs all parties to the mediation must comply with that requirement. The fee and cost provisions of this Section 5 supersede any inconsistent provisions in association governing documents and may not be varied from in the governing documents. No association may condition mediation on a member's payment of any charges, costs or fees.

**NEW SECTION: Notices.**

All notices required under this chapter or the governing documents shall be sent pursuant to the requirements of RCW 64.38.035.<sup>26</sup>

**RCW 64.38.050 Violation--Remedy--Attorneys' fees**

Any violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or in equity. The court, in an appropriate case, may award reasonable attorneys' fees to the prevailing party.

**RECOMMENDED CHANGES TO RCW 64.06.020**

**Form 17 Changes:** Change RCW 64.06.020 (and other sections as necessary) to require that the resale certificate form and exhibits mandated in ch. 64.38 be attached to the seller disclosure form required by RCW 64.06.020 (the "Form 17"). Further revise RCW ch. 64.06 to require the delivery of the resale certificate (unless waived by the buyer) in the case of the sale of unimproved Lots that are subject to RCW ch. 64.38 but that otherwise remain exempt from the delivery of a disclosure statement under RCW 64.06. In addition, revise RCW ch. 64.06 to clarify that a delivery of the resale certificate is subject to the provisions of RCW 64.06.030 regarding delivery, RCW 64.06.040 regarding additional information after delivery of the initial disclosure statement, RCW 64.06.050 regarding errors, inaccuracies, or omissions and liability, RCW 64.06.060 regarding consumer protection and RCW 64.06.070 regarding buyers rights and remedies.

Change RCW 64.06.020 (and other sections as necessary) to require the distribution of the attached buyer information pamphlet ("Frequently Asked Questions") along with the disclosure form required by RCW 64.06.020 for the sale of any residential real property in which the seller is a member of a homeowners' association as defined in RCW 64.38.010(1).

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<sup>26</sup> Decided 6/18/07.

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SENATE CONCURRENT RESOLUTION 8423

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Passed Legislature - 2006 Regular Session

State of Washington

59th Legislature

2006 Regular Session

By Senator Fairley

Read first time . Referred to .

1           NOW, THEREFORE, BE IT RESOLVED, By the Senate of the State of  
2 Washington, the House of Representatives concurring, That:

3           (1) The homeowners' association act committee is created. The  
4 purpose of the committee is to review the homeowners' association act,  
5 chapter 64.38 RCW, the uniform common interest ownership act, and  
6 current issues concerning homeowners' associations as defined in RCW  
7 64.38.010 including, without limitation, the method and manner of  
8 amending restrictive covenants, voting, alternative dispute resolution  
9 mechanisms, communications between homeowners' association boards and  
10 association members, the budget ratification process, potential  
11 conflicts between the homeowners' association act and other laws that  
12 may be applicable to the organizational form of the association, and  
13 the need for reforms regarding the process, in which liens are placed  
14 on property for unpaid association dues against a new seller for a  
15 previous owner's delinquencies, as well as a review of the required  
16 disclosures on the sale of real property within a homeowners'  
17 association.

18           (2) The committee shall consist of the following ten members:

19           (a) One member of the Senate appointed by the President of the  
20 Senate;

EXHIBIT   1

1 (b) One member of the House of Representatives appointed by the  
2 Speaker of the House of Representatives;

3 (c) The following six members appointed by the governor:

4 (i) A representative of the Washington state chapter of the  
5 community associations institute;

6 (ii) A representative of the Washington homeowners' coalition;

7 (iii) A representative of the residential development industry;

8 (iv) A lawyer experienced in representing the interests of  
9 homeowners' associations in their dealings with homeowners;

10 (v) A lawyer experienced in representing the interests of  
11 homeowners in their dealings with the boards of homeowners'  
12 associations; and

13 (vi) A person, who shall serve as the chair of the committee, who  
14 has expertise in homeowners' association law; and

15 (d) The following two members appointed by the governor upon  
16 recommendation of the chair of the senate financial institutions,  
17 housing and consumer protection committee, and the chair of the house  
18 judiciary committee: Two constituents who are members of a homeowners'  
19 association and who are not serving on a homeowners' association board.

20 (3) Legislative members of the committee shall be reimbursed for  
21 travel expenses in accordance with RCW 44.04.120.

22 (4) The committee shall examine the issues referenced in subsection  
23 (1) and whether any changes should be made to the homeowners'  
24 association act. The committee shall deliver a report of its findings  
25 and conclusions and any proposed implementing legislation to the  
26 appropriate committees of the Senate and House of Representatives by  
27 September 1, 2007.

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