

HOUSE BILL REPORT

SSB 6175

As Reported by House Committee On:
Judiciary

Title: An act relating to the Washington uniform common interest ownership act.

Brief Description: Concerning the Washington uniform common interest ownership act.

Sponsors: Senate Committee on Financial Institutions & Insurance (originally sponsored by Senators Pedersen, Rivers and Mullet; by request of Uniform Law Commission).

Brief History:

Committee Activity:

Judiciary: 2/15/18, 2/22/18 [DPA].

**Brief Summary of Substitute Bill
(As Amended by Committee)**

- Creates the Washington Uniform Common Interest Ownership Act which contains provisions for the formation, management, and termination of common interest communities, as well as purchaser protections.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 9 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Graves, Assistant Ranking Minority Member; Hansen, Kirby, Muri, Orwall and Valdez.

Minority Report: Do not pass. Signed by 3 members: Representatives Haler, Klippert and Shea.

Minority Report: Without recommendation. Signed by 1 member: Representative Goodman.

Staff: Cece Clynch (786-7195).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Uniform Common Interest Ownership Act.

The Uniform Law Commission (ULC) is composed of state commissions on uniform laws. The purpose of the ULC is to determine which areas of law should be made uniform, and to promote uniformity by drafting and proposing uniform statutes. States decide whether to enact a uniform law or not.

The ULC promulgated the original version of the Uniform Common Interest Ownership Act (UCIOA) in 1982; in 2008 and again in 2014, the ULC approved a number of amendments to the UCIOA. The UCIOA succeeds and incorporates some older ULC acts that focused on individual types of common interest communities (CICs) such as the Uniform Condominium Act. The UCIOA governs all sorts of CICs including condominiums, plat communities, and cooperatives. To date, it has been enacted in Connecticut, Delaware, and Vermont.

Business and Nonprofit Entities in Washington.

There are a variety of business and nonprofit entity forms authorized in Washington. These include business corporations, nonprofit corporations, partnerships and limited partnerships, limited liability companies, and cooperative associations, among others.

Chapter 23.86 RCW governs cooperative associations in general. It is not specific to real estate or housing cooperative associations. Rather, any number of persons may join together to advance any lawful business. Cooperative associations are formed by the filing of articles of incorporation with the Office of the Secretary of State. They consist of the members of the cooperative association and are governed by a board of directors and officers.

Homeowners Associations.

A homeowners' association (HOA) is a legal entity with membership comprised of the owners of residential real property located within a development or other specified area. An HOA is typically created by a land developer or builder of a planned residential development pursuant to a declaration of covenants, conditions, and restrictions.

An HOA is not required to organize as a particular legal entity. The power and duties of an HOA in Washington are defined by: (1) the Homeowners' Association Act (Act); (2) the HOA's declaration, bylaws, rules, and other governing documents; and (3) the law governing the HOA's legal entity, such as the state Business Corporation Act or Nonprofit Corporation Act.

Under the Act, an HOA may: adopt and amend bylaws, rules, regulations, and budgets; make hiring and personnel decisions; engage in legal actions on behalf of the HOA; make contracts and incur liabilities; regulate activities involving the maintenance and use of common areas; acquire and convey property rights; and impose and collect any payments, fees, or charges for the use, rental, or operation of common areas.

Homeowners' associations have the responsibility to hold meetings annually; furnish notice of meeting times to HOA members; provide for the number, duties, and terms of HOA officers and directors; set out procedures for officer elections; act with loyalty and care on behalf of the HOA; provide homeowners with notice and a ratification process for the annual budget; prepare annual financial statements; and fulfill other HOA duties required by law.

A homeowner aggrieved by a violation of the Act may file a private lawsuit and may be awarded attorney's fees. In addition, the governing documents of an HOA may provide other means of dispute resolution.

Condominium Associations.

The Washington Condominium Act (WCA) governs the management of residential condominiums built in Washington after July 1, 1990. Generally, the Horizontal Property Regimes Act (HPRA) governs those built before July 1, 1990; however, some provisions of the WCA apply to these older condominiums.

Under the WCA, a unit owners' association must be organized no later than the date the first unit is conveyed and must take the form of a profit or nonprofit association. (The HPRA is silent on this.) The membership of the association consists exclusively of all the unit owners. As with HOAs, condominium associations are managed by a board of directors elected by the unit owners.

The powers and duties of an association are defined by the WCA and the HPRA, the governing documents specific to a particular association, and the laws governing the association's legal entity. Pursuant to the WCA, an association may, among other things:

- adopt and amend bylaws, rules, and regulations;
- adopt and amend budgets and impose and collect assessments;
- hire and discharge employees;
- institute, defend, or intervene in litigation in its own name on behalf of itself or two or more unit owners on matters affecting the condominium;
- make contracts and incur liabilities;
- regulate the use, maintenance, and repair of common elements;
- impose and collect any payments, fees, or charges for the use, rental, or operation of common elements; and
- impose and collect charges for late payments of assessments.

Condominium associations have the responsibility to hold certain meetings and provide the requisite notice of those meetings. Other statutory responsibilities include: maintaining insurance; keeping certain records and making them reasonably available for inspection; and taking certain actions with respect to reserve studies.

Warranties.

There are no statutory warranties applicable to new home construction except in the case of condominiums. The WCA establishes the following implied warranties: the condominium is suitable for the ordinary uses of real estate of its type and is free from defective materials; and the condominium has been constructed in accordance with sound engineering and construction standards, in a workmanlike manner, and in compliance with all applicable laws. Damages are recoverable only if the breach of the implied warranty had an adverse effect that is more than technical and that would be significant to a reasonable person. Damages that may be awarded for a breach are the cost of repairs. However, if those costs are clearly disproportionate to the diminution in the condominium's market value, damages are limited to the loss in market value.

Summary of Amended Bill:

A new chapter, known as the Washington Uniform Common Interest Ownership Act (WUCIOA) is created. "Common interest community" means real estate described in a declaration (the instrument that creates a common interest community (CIC)) with respect to which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, or improvement of, or services or other expenses related to, common elements, other units, or other real estate described in the declaration. The term includes:

- Condominiums: A CIC in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions. A CIC is not a condominium unless the undivided interests in the common elements are vested in the unit owners.
- Cooperatives: A CIC in which the real estate is owned by an association, each member of which is entitled by virtue of the member's ownership interest in the association and by a proprietary lease to exclusive possession of a unit.
- Leasehold CIC: A CIC in which all or a portion of the real estate is subject to a lease the expiration or termination of which will terminate the CIC or reduce its size.
- Miscellaneous communities: A CIC in which units are lawfully created in a manner not inconsistent with chapter 58.17 RCW (Plats and Subdivisions) and that is not a condominium, cooperative, or plat community.
- Plat communities: A CIC in which units have been created by subdivision or short subdivision as both are defined in chapter 58.17 RCW and in which the boundaries of units are established pursuant to that chapter.

The WUCIOA is organized into four parts:

Part I. Definitions, Applicability, and Other General Provisions.

In general, the WUCIOA applies to all residential CICs created after the effective date, and the Act, the Washington Condominium Act (WCA), and the Horizontal Property Regimes Act are not applicable. A CIC created before the effective date may elect to amend its declaration to provide that the WUCIOA applies. Two sections, one governing adoption of budgets, assessments, and special assessments and another providing a process for an existing CIC to elect to come under the WUCIOA, apply to all CICs, whether created before or after the effective date, and regardless of election.

Among the general provisions are three which are applicable even to certain small (no more than 12 units, not subject to development rights, and the average annual assessment does not exceed \$300) plat and miscellaneous communities that are excepted from the WUCIOA:

1. a requirement that in condominium, and plat and miscellaneous communities, a unit owner's interest in the unit and its interest in the common elements is a separate parcel of real estate and must be taxed and assessed separately; and that, absent a declaration that says otherwise, a unit owner's interest in a cooperative is personal property;
2. a prohibition on local regulations that impose a requirement upon a CIC that would not be imposed on a physically identical development under a different form of ownership; and

3. general rules for situations in which part or all of a unit or the common elements are acquired by condemnation.

Part II. Creation, Alteration, and Termination of Common Interest Communities.

A CIC may be created only by recording a declaration and a map and, with respect to a cooperative, the real estate must be conveyed subject to that declaration to the association. A declaration must contain the 14 elements outlined in the WUCIOA, including: the name; the type of CIC; a legal description of the real estate; the number of units created and whether the declarant has reserved the right to create additional units; and any restrictions on alienation of units, including any restrictions on leasing units. The declaration must allocate interests to each unit and set forth the formula used to establish allocations. If there are limited common elements, these must be specified and the unit to which each is allocated identified.

The parameters for exercise of development rights are set forth. Although new development rights may be reserved within new real estate that is added to the CIC, the original time limits on the exercise of these rights as set forth in the declaration may not be extended.

Provisions are included governing: the alteration of common elements and units, and the relocation of unit boundaries; amendments to the declaration; rights of secured lenders; mergers of CICs; termination of CICs by agreement of unit owners of at least 80 percent of the votes are allocated; and judicial termination in the event that substantially all of the units in a CIC have been destroyed or abandoned or are uninhabitable.

Part III. Management of the Common Interest Community.

An association must be organized no later than the date the first unit is conveyed to a purchaser. The membership of the association at all times consists exclusively of all unit owners. The association must have a board and be organized as a for-profit or nonprofit corporation or limited liability company. If there is a conflict between state statutes governing a particular business entity form and the WUCIOA, the WUCIOA controls.

The WUCIOA includes 33 separate provisions governing management of a CIC, some of which are briefly outlined below. An association must:

- adopt organizational documents;
- adopt budgets;
- impose assessments for common expenses;
- prepare financial statements; and
- deposit and maintain association funds in accounts as prescribed.

In addition, subject to the declaration, an association has discretionary authority to undertake numerous actions, such as making contracts and causing improvements to be made. The association may require that disputes between the association and unit owners or between two or more unit owners, other than construction defect actions, be submitted to nonbinding alternative dispute resolution as a prerequisite to taking judicial action.

An association must comply with requirements pertinent to construction defect actions; a board must notify unit owners promptly of any legal proceeding in which the association is a

party, other than a proceeding involving enforcement of rules or to recover unpaid assessments or other sums.

Requirements are specified with respect to both unit owners and board meetings. A meeting of the association must be held at least once per year; however, failure to do so does not give cause for dissolution and does not affect otherwise valid acts. Special meetings must be called if 20 percent of unit owners, the president, or a majority of the board so request. Detailed specifications are included regarding notice and conduct of meetings. An action by the board that is not done in compliance with the meeting requirements is valid unless set aside by a court.

Quorum is defined. Unless the organizational documents say otherwise:

- A quorum is present if persons entitled to cast 20 percent of the votes are present in person or proxy, have voted by absentee ballot, or are present by a combination of these.
- For the board, a quorum is present if a majority of the votes on the board are present, and if a quorum is present when the vote is taken, the affirmative vote of a majority of the board members present is the act of the board.

The WUCIOA includes provisions governing adoption of a budget, assessments, and special assessments. Within 30 days after adoption of any proposed budget, the board must provide a copy to all unit owners and set a date for a meeting to consider ratification. Unless at that meeting the owners of units to which a majority of the votes in the association are allocated reject the budget, the budget and the assessments are ratified whether or not a quorum is present. If the budget is rejected, then the periodic budget last ratified by the unit owners continues until a new budget is ratified.

An association has a statutory lien on each unit for any unpaid assessment against the unit. The WUCIOA spells out the priority of association liens vis a vis other liens.

Reserve study requirements are also included. One or more unit owners may bring an action to enforce them. A court may order specific performance and may award reasonable attorneys' fees to the prevailing party.

Part IV. Protection of Purchasers.

The WUCIOA sets forth a long list of information that must be provided to each purchaser before he or she contracts to purchase a unit. Required disclosures include, among other things: a general description of the CIC; the schedule for commencement and completion; a copy of the declaration, bylaws, and any rules and regulations; an estimate of any assessment required to be paid at closing; and a statement of any litigation. Generally, a purchaser may cancel a contract for the purchase of the unit within seven days after first receiving the public offering statement.

The WUCIOA also specifies what a unit owner must furnish to a purchaser before sale. Some of the documentation must first be obtained from the association, and the association is directed to furnish a resale certificate within 10 days after a request by a unit owner and subject to the payment of any fees imposed. A reasonable charge for preparation of the

certificate may not exceed \$275, and may not exceed \$100 for an update within six months of the request.

Included in the WUCIOA are warranty provisions that apply only to condominiums and are similar to those found in the WCA.

Finally, a declarant, association, unit owner, or any other person subject to the WUCIOA may bring an action to enforce a right granted or obligation imposed. A court may award reasonable attorneys' fees. Parties may instead agree to resolve a dispute by binding or nonbinding alternative dispute resolution.

Amended Bill Compared to Substitute Bill:

The amended bill retains the underlying substitute bill with the following changes:

- amends section 120 (Election of Preexisting Common Interest Communities to be Governed by this Chapter) of the act with respect to the opt-in procedure for amending the governing documents of an existing common interest community (CIC) to provide that the CIC will be governed by the new Washington Uniform Common Interest Ownership Act (WUCIOA) chapter, setting forth a step-by-step process regarding who can propose or request opt-in, preparation of the amendment, notices, meeting, and the votes required;
- amends section 318 (Lien for Sums Due Association - Enforcement) to: add a provision that an association's lien for unpaid assessments does not affect the priority of mechanics' or material suppliers' liens to the extent that law of this state other than WUCIOA gives priority to such liens, or the priority of liens for other assessments made by the association; clarify the priority when two or more associations have liens for assessments created at any time on the same property; strike the provision that an association must give notice required by statute, or if not specified, reasonable notice, to lienholders; strike the provision that specified the order in which associations must apply any sums paid by unit owners who are delinquent in paying assessments; and add a provision that every aspect of a collection, foreclosure, sale, or other conveyance under section 318 must be commercially reasonable;
- makes changes in warranty sections 415-417 of the act to: refer to "proceedings" rather than "judicial proceedings;" use the term "disclaimer" rather than "instrument;" and strike redundant language requiring a signature by the purchaser;
- rewords sections 503-505 of the act regarding when current law governing CICs applies or does not apply, providing that current chapters do not apply to: CICs created after the effective date of the act or to CICs that have amended their governing documents to provide that the new WUCIOA chapter applies. Similarly rewords section 502 of the act regarding proprietary leases and the application of the Residential Landlord Tenant Act (RLTA); and
- corrects a statutory reference to the RLTA.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect on July 1, 2018.

Staff Summary of Public Testimony:

(In support) It was brought to the Legislature's attention several years ago that there are substantial problems with the Homeowners' Association Act. Between then and now, there has been: a task force that looked at the issues; a Washington State Bar Association (WSBA) committee that spent more than five years looking into the issues; and two Judiciary Committee hearings at which the WSBA committee reported. There have been a variety of stakeholders at the table working on this bill; there are just a couple more issues outstanding that need to be worked out: (1) binding arbitration, and whether parties can agree in advance to that form of alternative dispute resolution; and (2) the super-priority lien. Passage of this bill will mark a substantial improvement in the law. It is good for everyone.

The drafting process that led to the current Washington Condominium Act (WCA) took five years. At that time, in the 1990s, the most acute problems were with condominiums. Since the enactment of the WCA, things have gone well by and large. Cooperatives and homeowners' associations face similar issues to those faced by condominiums and should be brought in under a similar law such as this. Over the eight- to 10-year drafting process that has gone into this, there has been a lot of compromising. No one is entirely happy. The parties should be able to agree to alternative dispute resolution. The board governs the corporation and must be able to continue to govern. A mere allegation of a problem should not keep the board from functioning. There are provisions for an award of attorneys' fees if suit is brought and the court sets aside the board's action. This incentivizes good behavior and discourse when an issue is raised. This bill grapples with issues that have been around for years. Once enacted, Washington will have the best law in the country with respect to common interest communities.

(Opposed) Owners' rights are compromised in this bill. For instance, in section 310 it provides that even if the board does not exactly follow the correct and required process, the board's action is valid unless set aside by a court. The owners should not have to go to court and bear all of the cost and the burden. There must be a deterrent that causes the board to follow the requirements. This virtually immunizes the board. The bill should not be passed.

(Other) There is support from the Community Associations Institute for a uniform act, and the fact that the concerns of all of the stakeholders were balanced is appreciated. There are a couple of questions that are asked when looking at legislation in this arena: (1) whether it is consistent with current laws; and (2) if not, whether the legislation brings clarity. Section 318 regarding the super-priority lien needs some revisions; it should not be limited to \$2,000. Associations should not be required to provide 60 days notice. Section 418 currently says that the parties may, at any time, agree to binding or nonbinding arbitration. This does not match the Uniform Common Interest Ownership Act (UCIOA). In condominium disputes, the disputants are often the association on the one hand and the declarant on the other, and the declarant controls. The UCIOA language is preferred rather than language that provides for "any form of alternative dispute resolution." "Vigorously neutral" describes the Building Industry Association of Washington's position. One big concern was with the warranties, and making sure they only applied to condominiums. This bill is headed on the right path.

Persons Testifying: (In support) Senator Pedersen, prime sponsor; Gary Ackerman; Joe McCarthy; Hugh Lewis; and David Rockwell.

(Opposed) Joseph Mendoza.

(Other) Katheryn Hedrick, Theresa Torgesen, and Jeremy Stilwell, Washington State Chapter of Community Associations Institute; and Bill Stauffacher, Building Industry Association of Washington.

Persons Signed In To Testify But Not Testifying: None.