

December 29, 2023

Sent by email only to Steve@thirdstreetlaw.com.

Mr. Stephen W. Hansen
1636 Third Street, Suite A
Marysville, WA 98270

RE: *Lake Cushman Maintenance Company*
Your Client: Betty Widing

Dear Mr. Hansen:

As noted previously by email, this law firm represents the Lake Cushman Maintenance Company (LCMC). This letter responds to your letter to the LCMC Board of Directors (Board) dated December 11, 2023.

As background, our law firm represents community associations almost exclusively. We have been in operation for 25 years and currently serve more than 800 community association clients. Our attorneys are extremely active in the Washington State Community Association Institute (WSCAI), the trade group in our state involved in legislative advocacy for community associations. One of our attorneys currently serves on WSCAI's Board of Directors, and another serves on its Legislative Action Committee. We also frequently write and present on the topic of budget ratification, and also routinely advise clients with respect to budget ratification, and assist with preparation of budget-ratification packets.

Our attorneys are very familiar with the background and intent regarding the adoption of the Washington State Uniform Common Interest Ownership Act, RCW 64.90 (WUCIOA), the subject of your letter. We have professional relationships with the WSCAI lobbyists and attorney members who were involved in the drafting and passage of WUCIOA. Our firm was also to an extent involved with the court case that drove adoption of the WUCIOA budget provisions.

The LCMC Board of Directors indeed selected our law firm to provide community association law guidance based on our extensive breadth of experience and involvement in the community association industry and practice area, including with respect to the effect of new statutory language on budgeting requirements.

WUCIOA, adopted in March 27, 2018 and effective July 1, 2018, includes a provision expressly addressing its application to communities that preexisted its effective date.

RCW 64.90.080 states:

*(1) Except for a nonresidential common interest community described in RCW 64.90.100, RCW 64.90.095, 64.90.405(1) (b) and (c), **64.90.525** and 64.90.545 apply, and any inconsistent*

provisions of chapter 58.19, 64.32, 64.34, or 64.38 RCW do not apply, to a common interest community created in this state before July 1, 2018.

*(2) Except to the extent provided in this subsection, the sections listed in subsection (1) of this section apply only to events and circumstances occurring on or after July 1, 2018, and do not invalidate existing provisions of the governing documents of those common interest communities. **To protect the public interest, RCW 64.90.095 and 64.90.525 supersede existing provisions of the governing documents of all plat communities and miscellaneous communities previously subject to chapter 64.38 RCW.***

[Emphasis added.]

Because LCMC is a “common interest community created in this state before July 1, 2018,” RCW 64.90.525 controls LCMC budget processes by statutory fiat. Per RCW 64.90.080(2), its application was not retroactive, but instead applies to “events and circumstances occurring on or after July 1, 2018.”

RCW 64.90.080(2) sets forth the default rule that the WUCIOA provisions that do apply under RCW 64.90.080(1) do not “invalidate existing provisions of the governing documents” of preexisting communities. However, RCW 64.90.080(2) sets forth an exception to this default rule: “To protect the public interest, RCW 64.90.095 and RCW 64.90.525 **supersede existing provisions of the governing documents** of all plat communities and miscellaneous communities previously subject to” RCW 64.38. [Emphasis added.]

RCW 64.38 is the Washington State Homeowners’ Associations Act. Lake Cushman is one of the “plat communities and miscellaneous communities previously subject to RCW 64.38.” (The other type of common interest communities in our state not subject to RCW 64.38 is condominiums, obviously inapplicable here.) RCW 64.90.525 accordingly expressly preempts “existing” provisions of LCMC’s governing documents.

RCW 64.90.525 addresses budgets, assessments, and special assessments, with RCW 64.90.525(1)(a) specifically controlling budget ratification procedures:

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

(This language mirrors the budget ratification procedures set forth in the HOA Act, RCW 64.38.025(3).)

The LCMC Declaration and its amendments do not address assessments. Assessments are addressed in the Bylaws, which have been amended and restated seven times since their original adoption in 1966.

The current Bylaws version, adopted in 2022, simply gives the Board the authority to determine and levy assessments “pursuant to the Articles of Incorporation” and the Bylaws “and subject to the provisions of” the Articles and Bylaws, with no owner vote required. (Bylaws, Article VIII(1)).

Article II of the Articles addresses assessments. It states that one of the purposes for which LCMC was formed is to: “[F]ix, establish, levy, and collect annually such charges and/or assessments as may be necessary, in the judgment of the board of trustees to carry out any or all of the purposes for which this corporation is formed, but not in excess of the maximum from time to time fixed by the By-laws.”

Article VIII(2) was adopted by amendment to the Bylaws in 2002. It provides that “[r]egular, annual maintenance fee charges shall be limited to an increase equal to not more than 5% without a vote of the members.” The five percent amount was an arbitrary amount with no nexus to the community funding needs. Article VIII(3) similarly states that “[s]pecial assessments or increases in fees in excess of the above limits may be made at any time by a vote of the membership.” (Article VIII(3) was also adopted in 2002).

Historically, LCMC has avoided adoption of an annual budget with a five percent increase. This has resulted in severe underfunding of the community for many years. Underfunding is a serious concern for the Lake Cushman community, given that it leases and operates a significant number of common areas and amenities, including without limitation streets, offices, parks, boat launches, a clubhouse and golf course. Underfunding has become an acute concern as infrastructure is aging and reaching the end of (or are beyond) its useful life, and as costs generally have increased significantly, from snow removal costs to staffing.

In recent years, LCMC has tried to rectify its chronic underfunding by adopting special assessments in conjunction with a general budget. The special assessment and general budget have been ratified in compliance with the HOA Act’s budget-ratification procedures, which, again, mirror the WUCIOA procedures. Not one owner has objected to the approval of the special assessments by ratification vote. The special assessments were an attempt to provide critical funding to the LCMC without increasing the general assessment amounts, as owners were sensitive to increases in the latter based on a concern that general assessment increases would be permanent.

For 2024, the Board, with the assistance of staff and counsel in compliance with RCW 24.03A.495(3)(a), made the decision to move forward with a general budget that accurately reflects the financial needs of the community, rather than patching funding gaps with special assessments each year. To that end, the general budget reflected an increase needed to move toward sufficient funding of the community, and no special assessment was adopted. (Realistically, the amount assessed to each lot would likely have been similar if not the same in any event had the LCMC gone ahead with its previous general-assessment-plus -special-assessment plan in 2024.)

Prior to drafting, adoption, and ratification of the 2024 Budget, the Board was mindful of the applicability of RCW 64.90.525 and the fact that it supersedes “existing provisions” of its governing documents under RCW 64.80.080(2). Indeed, the Board spent several months educating the LCMC

membership about this circumstance, including by having counsel address the topic at its October 26, 2023 Board meeting, attended virtually and in person by hundreds of owners, including your client.

LCMC complied with WUCIOA ratification procedures for the 2024 budget, which was ratified on December 16, 2023 with 937 “no” votes out of 2346 eligible lots (1174 “no” votes were required to reject the budget).

The Board is sensitive to the fact that there are people with differing income levels in this community. However, Board members are tasked with making decisions they reasonably believe to be “in the best interests of the nonprofit corporation.” (RCW 24.03A.495). This means adopting a budget that is designed to properly fund the needs of the community pursuant to applicable statute and governing document language. Indeed, continuing to underfund the community in order to pacify fears about increasing assessments is not in the best interests of the community. And of course, budget language applicable to this (and every other community association I am aware of in the state) does not call or allow for adjusted assessment responsibility based on member income.

Notably, LCMC did not even violate the express terms of Bylaws Articles VIII(2) and (3) by adoption of the 2024 budget pursuant to statutory ratification procedures. Those Bylaws provisions require a “vote of the membership” to adopt a budget with an increase of more than five percent. Here, a vote of the membership occurred pursuant to statute. (Again, notably, no owners objected to a ratification vote of the recent special assessments, presumably based on the perception that special assessments would not result in a long-term assessment increase even though special assessments were being levied annually to stem the bleeding.)

Even if LCMC did not comply with Articles VIII(2) and (3), if an affirmative vote requirement was implied, such provisions would be superseded by RCW 64.90.080(2). RCW 64.90.080(2) states that RCW 64.90.525 “supersede[s] existing provisions of the governing documents...” This is the case whether or not such provisions “contradict or clash” with the statutory language, and whether or not they could be somehow read in conjunction with the statute such that both the ratification requirement and an affirmative vote requirement are somehow mutually operable.

The argument that a conflicting vote requirement triggered by certain budget threshold somehow escapes being superseded by WUCIOA’s blanket language because such a requirement is not “procedural” does not track. RCW 64.90.525 addresses both budget procedures and content. And a voting requirement is procedural in nature in any event.

Further, the context and background of WUCIOA’s adoption confirms that its superseding language was specifically intended to enable HOA communities with significant infrastructure like LCMC to properly fund operations despite onerous affirmative budget voting requirements in governing documents. The retroactive budget language was tailored to address the crippling financial situation faced by the Sudden Valley community described in *Casey v. Sudden Valley Cmty. Ass’n*, 182 Wn. App. 315 (Div. 1, 2014). Sudden Valley is an HOA-operated community in Whatcom County with extensive common amenities including a golf course, private roads and community buildings. The Sudden Valley Community

Association was incorporated in 1973. Its bylaws required approval of annual assessments or special assessments by 60 percent of the members voting at a meeting. Obtaining a 60 percent affirmative vote was not possible, and as a result the Association struggled with funding. The Court of Appeals determined that this affirmative vote requirement was not superseded by the budget ratification language of RCW 64.38. As a result, the Association could not obtain the funding it needed to properly care for its significant, aging infrastructure.

RCW 64.38 did not in 2014, and does not now, include express language stating that its budget language supersedes existing governing document provisions. In contrast, WUCIOA makes clear that its budget provision supersedes an HOA's governing documents. This was intentional: to do away with affirmative voting requirements that would hamper an HOA's ability to properly maintain, repair, and replace its common areas. This intent is evidenced by the use of the phrase to "protect the public interest" in RCW 64.90.080(2) with respect to non-condominium communities like Lake Cushman. It is also evidenced by the fact that RCW 64.90.080(2) provides blanket superseding language in contrast to the circumscribed superseding language in RCW 64.90.080(1), which applies to all residential common interest communities.

Our firm is aware of several communities—including large-scale, recreational communities like Lake Cushman—that have properly interpreted the effect of RCW 64.90.080 and used statutory procedures to ratify regular and special budgets despite existing affirmative voting requirements in their governing documents.

Indeed, while preparing this letter, I reached out to an attorney who was directly involved in the adoption of WUCIOA, and to quote that attorney: "I can confirm that the language...from RCW 64.90.080(2) was specifically included in WUCIOA to address the Sudden Valley case and similar circumstances." There are also likely legislative records available confirming that specific intent. Anticipating that, should your client wish to pursue this matter through litigation, LCMC's position would be supported by amicus briefs supplied by community association attorneys in our state, including those who were involved with the adoption of WUCIOA.

Board directors do not have individual legal exposure in this matter. Board members have the right to rely on the input of competent professionals pursuant to RCW 24.03A.495(3). Further, they are protected by the business judgment rule, which limits the liability of directors where 1) the decision to act is within the power of the board, and 2) there is a reasonable basis to indicate the act was taken in good faith. On that basis, a plaintiff may only challenge a decision if made through fraud, dishonesty, or incompetence. The rule is based on the idea that directors are not liable for mere mistakes or errors of judgment, either of law or fact. It applies to personal liability of individual board members. See *Bangerter v. Hat Island Comty Ass'n*, 14 Wn.App.2d 718 (2020). (This matter was reversed in part on other grounds by *Bangerter v. Hat Island Comty Ass'n*, 14 Wn.App.2d 718 (2020), in which the Washington State Supreme Court adopted a rule in part out of "the avoidance of interfering with associations' ability to meet their financial obligations." Such a consideration would likely be in play if the WUCIOA budget language was at issue in litigation.)

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Letter from Allison Peryea
1/15/2024

The LCMC Board recognizes that this is a new era where focus has shifted to properly funding vital upkeep of common areas and operations of a community. This new reality understandably makes it uncomfortable for community members who have become accustomed to and benefitted in the short term from artificially low assessments. But LCMC has the right and the obligation to adjust assessments to responsibly fund the needs of its community. Applicable statutory language and intent is clear that its 2024 budget was properly adopted. Litigation to contest the validity of the budget will simply confirm its validity at great expense to those involved.

Sincerely,
PERYEA SILVER TAYLOR

A handwritten signature in black ink, appearing to read "Allison Peryea", written in a cursive style.

Allison Peryea
Attorney for the Lake Cushman Maintenance
Company

Encls. as stated

cc: Board of Directors, Lake Cushman Maintenance Company