No. 90879-6

SUPREME COURT OF THE STATE OF WASHINGTON

No. 70013-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

FILMORE LLLP,

A Washington limited liability limited partnership,

Respondents,

vs.

UNIT OWNERS ASSOCIATION OF CENTRE POINTE CONDOMINIUM,

Petitioner.

AMENDED AMICUS CURIAE MEMORANDUM BY BARCLAY COURT OWNERS ASSOCIATION IN SUPPORT OF REVIEW

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I. INTRODUCTION

Amicus Curiae Barclay Court Homeowners Association ("Barclay Court") supports the Petition for Review. The opinion[1] decides an issue of first impression under the Washington Condominium Act ("the Condo Act"). It merits review because it portends widespread consequences for condominium owner associations across Washington.

Petitioner states that the Court of Appeals decision implicates a substantial public interest because many condominium owner associations have adopted by a 67% supermajority a cap on the number of units that may be rented, which caps are subject to invalidation by the landmark holding in *Filmore* that a 90% approval was required. This is true. Barclay Court files this supportive memorandum as one such association.

II. INTEREST OF AMICUS CURIAE

Barclay Court is a condominium owners association for 28 residential units located at the foot of Queen Anne hill in Seattle. It is governed by a declaration recorded in 2001. In 2008, Barclay Court passed and recorded an amendment placing a cap on the number of units that can be rented. After considered deliberation, Barclay Court adopted the rental cap to preserve the building as a primarily owner-occupied

[1] *Filmore LLLP v. Unit Owners Association of Centre Point Condominium*, No. 70013-8-I, 2014 Wash. App. LEXIS 2181 (Sept. 2, 2014) ("Filmore").

condominium. The amendment caps leasing at seven units, which is twenty-five percent. The amendment institutes a waitlist system for owners who express an interest in leasing their units. The Board may grant waivers to the cap and permit an owner to lease if that owner demonstrates a "substantial hardship, not of the Owner's making, such that a waiver is warranted in view of the Owner's particular circumstances" or "[a]n Owner's particular circumstances result in the Owner's temporary absence from a Unit."

As expressly stated in the amendment, the purpose behind the amendment was to protect "the availability of buyer financing which, in turn, is influenced by the existence and extent of Leasing activity in the Condominium as a whole[,]"; "[t]he sense of community which is fostered by a shared common purpose, including a shared perspective that the Condominium is the shared residence of Owners (and not just an "investment" they hold in common)"; and "[t]he ability to self-govern, through management by a Board comprised of Owner-volunteers[.]"

Barclay Court is aware that many condo associations have adopted similar restrictions on leasing to preserve the owner-occupied features of a condominium owners association and to distinguish the condominium from apartment buildings or investment properties. This effort by condominium owners associations to preserve the unique features of their

condominiums is related in part to enactment by the Federal Housing Authority of new lending policies in 2008 that concerned condominiums. Federal regulations and guidelines restrict FHA-insured financing and conventional loans through FNMA (Fannie Mae) or FHLMC (Freddie Mac) for condominium developments in which a majority of the individual units are leased (i.e., low "owner-occupancy" ratios). *See* e.g., 24 CFR 203.41; FHA Condominium Project Approval & Processing Guide 3.5 (June 30, 2011).

When Barclay Court adopted the amendment, it obtained legal advice and followed the recommendation of counsel that 67% was the proper percentage for an amendment that would limit the number of units that could be leased. This advice was based on the language in the Condo Act (presumably the textual analysis provided in the Petition at 8-12 demonstrating that RCW 64.36.264(4) requiring 90% approval does not apply to a rental cap when the Legislature used the terms "uses and use restrictions" differently than "restrictions...on renting or leasing of units") and also on express language in Barclay Court's original declaration requiring 67% approval to impose "any restrictions on leasing of Units." This language when included in the original declaration was considered to be consistent with the Condo Act, not contrary to it as courts now would be required to hold if the *Filmore* decision stands.

Before the Court of Appeals decided *Filmore*, a unit owner sued Barclay Court regarding enforceability of the rental cap amendment. *See Carolyn Bilanko v. Barclay Court Homeowners Association*, King County Superior Court No. 14-2-18902-8 SEA. This litigation is pending. The plaintiff challenges Barclay Court's 2008 amendment on the grounds at issue in this case: whether a rental cap amendment passed by a 67% supermajority complies with the Condo Act. In Barclay Court's case, unlike in the *Filmore* case, the plaintiff purchased her unit with notice of the rental cap, which had been recorded one year prior to her purchase; she did not sue to invalidate the amendment until six years later.[2]

III. STATEMENT OF THE CASE

Barclay Court incorporates Petitioner's Statement of the Case. *Petition* 1-4. The facts underlying *Filmore* are unique. Barclay Court offers its circumstances as an example of different factual events that have led to a similar legal dispute that will be subject to the same legal interpretation of the Condo Act. Many condominium owners associations

[2] Barclay Court has raised several defenses, including the one-year time bar set forth at RCW 64.36.264(2). This time bar either is a statute of limitations or, more likely, a statute of repose. *See 1000 Virginia Ltd. P'ship v. Vertecs*, 158 Wn.2d 566, 574–75, 146 P.3d 423 (2006) (A statute of repose is distinct from a statute of limitations and "terminates a right of action after a specified time, even if the injury has not yet occurred.") Petitioner addresses the time bar in RCW 64.36.264(2) in its Petition. *See Petition* 7-8, n.7. The Court of Appeals did not consider the time bar in *Filmore* because the amendment at issue had not been recorded for one year at the time of the action.

likely to suffer invalidation of their governing documents or become embroiled in litigation following *Filmore* are likely to have declarations or amendments adopted in circumstances similar to Barclay Court's.

Barclay Court members gave considerable thought to the rental cap and adopted it for meaningful reasons that benefit their community, help maintain their property values, and ensure that affordable financing will be available for purchase of their units. (Not unlike the reasons cited by Petitioner in the Declaration of Debbie Haddad. CP 234.) In Barclay Court's case, unlike in *Filmore*, the party seeking to invalidate the amendment had notice of the amendment prior to purchase of her unit. She also abided by the amendment for six years before challenging it. Barclay Court's case does not involve the expectations of an owner that were upset by a subsequent amendment. Yet, the Court of Appeals' interpretation of the Condo Act will be controlling if not reviewed.

IV. ARGUMENT SUPPORTING REVIEW

This Court should accept review pursuant to RAP 13.4(b)(4) of the Court of Appeals' interpretation of the Condo Act. Review is justified to ensure a correct legal holding that will bind condominium owners associations and impact the rights and property values of many condominium owners throughout the state. The opinion has the potential to result in widespread invalidation of rental caps adopted by associations

throughout Washington. This Court should decide whether this is the result required by the Condo Act.

A. The Petition presents an issue of substantial public importance because the landmark opinion deciding an issue of first impression under the Condo Act substantially alters the status quo and portends widespread consequences for condominium owners associations with similar rental caps.

This Court should accept review because the Petition presents issues of substantial public importance. The statutory interpretation announced in *Filmore* is of supreme importance to condominium owners associations throughout Washington, such as Barclay Court. This Court should decide the strictly legal issue of first impression whether adoption of a rental cap through amendment requires a 67% supermajority, as many parties heretofore have interpreted the Condominium Act, or, as the Court of Appeals held despite use of the relevant terms by the Legislature that contradicts that interpretation, requires a 90% approval as a restriction on "use."

The Court of Appeals may not have considered the profound and widespread ramifications of its holding. This Court should. *Filmore* significantly alters the legal landscape concerning the enforceability of rental caps in declarations governing condominium associations. *Filmore* creates great uncertainty and the potential for widespread invalidation of

rental caps adopted in good faith by condominium owners associations based on their right to self-govern and their belief that rental caps benefit condominiums and their owners. Barclay Court is an example of an association that studied the issue, consulted attorneys and adopted a rental cap to preserve important property characteristics, maintain the availability of financing and maintain the property values of condominiums. Barclay Court passed the amendment with the 67% supermajority required by an express provision in its declaration considered to be consistent with the Condo Act. The *Filmore* decision unexpectedly pulls the rug out.

The Petition presents a strong case that the Court of Appeals reached the wrong legal decision. This Court may well arrive at a different interpretation of the Condo Act if it accepts review. This Court should be concerned that if *Filmore* is wrongly decided, many condo owners associations likely will suffer invalidation of their rental caps incorrectly. The harmful fallout from *Filmore* can be avoided if this Court accepts review. Condominium owners associations have a real and substantial interest in this Court accepting review and finally resolving the disputed legal issues.

Respondent Filmore, LLLP opposes review claiming that the decision turns only on construction of the unique declaration at issue in the

case. See *Respondent Filmore, LLLP's Response to Petition for Review*, 1 (Issue Presented), 7-8, 13. Respondent Filmore explains that the Court of Appeals went beyond the holding of the trial court to interpret the Condo Act, and that the interpretation of the Condo Act is "an advisory opinion" because construction of the declaration alone would have resolved the dispute *Id.* at 7-8. This is a misguided argument. While the Court of Appeals might have been able to decide the case without reaching interpretation of the Condo Act, it did reach and interpret the Condo Act. The decision on its face turns on the Court of Appeals' interpretation of the Condo Act. Unfortunately for many condominium associations like Barclay Court, the holding by the Court of Appeals is that the Condo Act requires a 90% approval of a rental cap, regardless of the content of an association's own declaration. Respondent Filmore cannot minimize the impact of the decision on the public by pointing out that it might have been resolved on more limited grounds. It was not.

Petitioner has made a robust showing that many parties in Washington State are substantially impacted by the legal holding in the opinion. RAP 13.4(b)(4) is met.

B. Immediate resolution will settle this area of law, eliminate uncertainty, and potentially avoid the incorrect invalidation of condominium governing documents.

This Court should accept review to promptly resolve the statutory interpretation issue. Many associations, like Barclay Court, reasonably interpreted the Condominium Act to require a 67% supermajority for approval of a rental cap. This Court should decide whether the text of the statute—when read as a whole—supports the Court of Appeals's contrary interpretation. This Court should satisfy itself that the *Filmore* holding is correct before its consequences are felt by condominium owners associations throughout the state.

Immediate review is necessary to restore stability and predictability in this area of law. Parties like Barclay Court are in the midst of litigating the same issue presented here. Other parties not already in litigation must determine whether to enforce existing rental caps and must resolve upon an appropriate course for themselves or their associations in light of the unexpected holding in *Filmore*. A flurry of litigation in this area, including litigation of related issues or defenses, can be cut short if this Court acts to review the decision and make a controlling determination. No grounds suggest that delaying review of the issue would be beneficial. Because the holding has immediate

ramifications for many similarly situated parties, immediate review by this Court is justified.

A timely decision by this Court will benefit the public—including current condominium owners and those who might wish to buy a condominium in the future. Many owners associations do not have the resources to face significant exposure or finance litigation against their members. These associations are managed by voluntary board members whose interests also are served by guidance from this Court and a certain resolution. These concerns further support review.

V. CONCLUSION

The Court should review the significant statutory interpretation of first impression to ensure that the Condo Act is appropriately applied throughout Washington. *De novo* review of this purely legal issue is

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merited where many parties in addition to Petitioner, such as Barclay Court, have similar rights at stake.

Respectfully submitted on this 12th day of January, 2015.

SCHWABE, WILLIAMSON & WYATT, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 2015, I caused to be served *E-Mail and U.S. Mail* of the foregoing AMENDED AMICUS MEMORANDUM BY BARCLAY COURT HOMEOWNERS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW on the following parties at the following addresses:

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Dear Clerk:

As directed by this Court in its letter of January 8, 2015, please find for filing an amended amicus memorandum without an appended declaration.

Thank you,

Mary

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