70013-8

70013-8

No. 70013-8-I

COURT OF APPEALS
DIVISION ONE
OF THE STATE OF WASHINGTON

FILMORE LLLP, a Washington limited liability limited partnership,

Respondent,

v.

UNIT OWNERS ASSOCIATION OF
CENTRE POINTE CONDOMINIUM,
a Washington nonprofit miscellaneous corporation,

Appellant.

RESPONDENT'S APPELLATE BRIEF

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I. IDENTITY OF RESPONDING PARTY

The respondent is Filmore LLLP (Filmore). Filmore is the plaintiff below.

II. DECISION ON APPEAL

The Appellant Unit Owners Association of Centre Pointe Condominium (Association) has appealed the trial court's Order on Summary Judgment entered on February 8, 2013.

III. ISSUES PRESENTED FOR REVIEW

A. Whether the Twelfth Amendment to the Declaration is void because of the Association's failure to obtain 90% approval required by the Centre Pointe Declaration.

B. Whether the Twelfth Amendment to the Declaration is void because of the Association's failure to obtain 90% approval required by RCW 64.34.264(4).

C. Whether the Association failed to establish that Filmore is equitably estopped from asserting its legal rights pursuant to RCW 64.34.264(2).

IV. STATEMENT OF CASE

Centre Pointe Condominium is a residential condominium complex in Bellingham (the Condominium) that was created in

2003.[1] This is a multi-phased project with each phase consisting of a separate building of residential units. The first three phases were completed and sold to individual unit owners. In due course, the fourth phase was created and defined as a separate Unit-Development Unit D-3 (Unit D-3).[2] Respondent Filmore LLLP (Filmore) purchased Unit D-3 in 2011.[3] This Development Unit included the air space above an already constructed concrete parking garage, within which a new building of residential units was to be built.

After purchasing Unit D-3, Filmore borrowed over $3,600,000[4] to construct Building D. The condominium documents were then recorded to divide Building D into 35 individual residential units.[5]

From 2003 until the summer of 2012, the Declaration specifically provided that leasing was an **approved use** of the units. Section 9 of the Declaration entitled "Permitted Uses/ Architectural Uniformity" provides:

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[1] CP 30-90. The Declaration of Condominium Subdivision and Covenants, Conditions, Restrictions and Reservations for Mellenia Residences, a condominium.
[2] CP 101. This unit was created through the 1st Amendment to the SMP.
[3] CP 139 and 142-44.
[4] CP 145-155.
[5] CP 104-122. The Fourteenth Amendment to Declaration and 5th Amendment to SMP.

> *9.1.1 Permitted Uses: Other than provided in 9.1.2 hereof, the buildings and Units hereof shall be used for residential purposes only, and for common social, residential or other reasonable uses normally incident to such purposes.*
>
> ....
>
> *9.1.14 Lease Restrictions: Any lease agreement shall be required and deemed to provide that the terms of the lease shall be subject in all respects to the provisions of the Condominium Instruments, and that any failure by the Lessee to comply with such provisions shall be a default under the lease, entitling the Association to enforce such provisions as a real party in interest. All leases shall be in writing and a copy of each lease must be supplied to the Association. No lease shall have a term of less than one year. Other than the foregoing,* ***there is no restriction on the right of any Unit Owner to lease his or her Unit.*** *Any tenant or subtenant of any portion of a Unit shall be deemed to have assumed all the responsibilities of an Owner under this Section of the Declaration.*[6]

A large number of owners of units took full advantage of that right over the first nine years of the project by purchasing units as investors and leasing out the same.[7]

Between Filmore's purchase of Unit D-3 and the completion of construction, the Association adopted the Twelfth Amendment to the Declaration.[8] The Twelfth Amendment changed "Article IX: Use Restrictions," subparagraph 9.1.14 entirely by introducing a

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[6] CP 52-53. Declaration, Section 9.1.14. Emphasis added.

[7] CP 140. Over 35 units in the three existing buildings were rented in 2012.

[8] CP 123-127. The Twelfth Amendment to Declaration and Covenants, Conditions, Restrictions and Reservations for Centre Pointe Condominium.

myriad of new use restrictions, exemptions, classes of owners and other details restricting all unit owners' ability to rent/lease their units. The changes include:

- Prohibition against renting/leasing units if 30% of the total number of units in the Condominium are already rented — 9.1.14(b)(i);
- Creating a new class of unit owners: Investor-Owners – 9.1.14(b)(i);
- Creation of a "hardship" exemption to the rental restriction granting deference to the Board for the authority to approve exemptions – 9.1.14(b)(ii);
- Creation of a new class of owners exempt from the rental restrictions based upon "grandfathering" – 9.1.14(b)(iii);
- Creation of an exemption to the rental restriction to *Bona Fide* sellers – 9.1.14(b)(iv);
- Creation of an exemption from the rental restriction to the Association for an undefined period after foreclosure of assessment lien – 9.1.14(b)(v);
- Creation of an exemption from the rental restriction to institutional lenders for an undefined period after foreclosure of a first mortgage – 9.1.14(b)(v);

- Creation of an exemption from the rental restriction if the lease is to "immediate family members" – 9.1.14(b)(v);

(collectively referred to as "the Rental Restrictions").[9] The Rental Restrictions are a direct restriction on all unit owners' ability to use their units as rentals.

The adoption of this amendment was completed with no meeting of the members, no formal discussion of the amendment and no formal vote. Instead, the property manager for the Association hired counsel, had the Amendment prepared, and then took it door to door to selected members to obtain 67% approval.[10] And recall the timing — the Twelfth Amendment was prepared and circulated after Filmore purchased the Development Unit.

The Declaration (and the Condominium Act) requires that any change in **"the uses to which any Unit is restricted"** be adopted with a 90% vote of all unit owners.[11] The Twelfth Amendment was adopted with only 67% of the unit owners.[12] Just prior to Filmore's occupancy of the building (late-2012), the

[9] *Id.*

[10] CP 139. Note that the Association concedes this point and cannot produce any meeting agenda, minutes or other documentation showing a discussion, meeting or vote regarding the Twelfth Amendment.

[11] CP 69. Section 17.3; RCW 64.34.264(4).

[12] CP 124. Twelfth Amendment, pg. 2, second "Whereas." This is not a stipulation and may be a disputed fact for Respondent does not know if even 67% approval was properly obtained. But this fact is assumed as true for the purpose of this pleading.

Association informed Filmore that its use of the units as rentals was restricted by the Twelfth Amendment. The Association stated at one point that Filmore could rent out a maximum of 4 of the 35 units in Building D.[13]

Filmore filed this action to have the Twelfth Amendment declared void.[14] The Association filed an answer and counterclaim.[15] The Trial Court granted summary judgment that the Twelfth Amendment was void because of the failure to obtain the required 90% approval.

V. STANDARD OF REVIEW

The order on appeal is an Order on Summary Judgment. Accordingly, this court reviews the trial court's decision *de novo.*[16]

VI. LEGAL ARGUMENT

A. Summary Judgment is Appropriate: All of the facts are undisputed regarding both issues before the court:

- *Definition of Use:* All of the facts are set forth in recorded documents and/or in undisputed declarations.
- *Equitable Estoppel:* For the purposes of this appeal, Filmore and this court should assume all the facts asserted by the

[13] CP 139-140. Andre Molnar Declaration.
[14] CP 4-10. The Complaint.
[15] CP 314-323.
[16] Ski Acres, Inc. v. Kittitas County, 118 Wn.2d 852, 827 P.2d 1000 (1992).

Association are true and not disputed.

With no disputed issues of material fact, summary judgment is appropriate to resolve the issues of law before the court.

B. Twelfth Amendment Void for Failing to Obtain 90% Approval.

1. *Consumer Protection Purpose of The Act Requires that "Uses" Include Rental Restrictions.* To understand and analyze unit owners' rights regarding condominiums, the Condominium Act's (Act) strong policy and purpose to protect individual residential condominium purchasers and owners must be recognized.[17] Condominiums are creatures of statute that involve complex interlocking legal rights and obligations. Our legislature acknowledged that given this complexity, the Act must provide heightened protections to condominium purchasers and owners. In addition to the specific text noted below, the legislature included an entire section entitled "Protection of Condominium Purchasers."[18] Further, the Official Comments to the Act state:

> *The best "consumer protection" that the law can provide to any purchaser is to ensure that such purchaser has an opportunity to acquire an*

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[17] One Pacific Towers Homeowners' Ass'n. v. HAL Real Estate Investments, Inc., 148 Wn.2d 319, 61 P.3d 1094 (2002). An entire section of the Act falls under the title "Protection of Condominium Purchasers."
[18] RCW 64.34, Article 4.

understanding of the nature of the products which it is purchasing.

The intent is clear — require clear disclosure in the condominium documents so that the buyer/owner knows what they are, and are not, purchasing.

One of the most important rights that can be compromised through condominium ownership are restrictions upon use. Residential owners/buyers intend to live in their condominiums with certain expectations of their allowed use. But unlike typical single family homes, a residential condominium unit may have all types of restrictions on use: Over 55 only, no/limited leasing, timesharing restrictions, pet or smoking restrictions, *etc.* So a principal area where protection of the consumer is necessary is the clear and written disclosures of all restrictions on use.

The legislature established specific protection to accomplish this. First, restrictions on use must be in the Declaration:

> *(1) The declaration for a condominium must contain:*
> *"(n) Any restrictions in the declaration on use, occupancy or alienation of the units;"*[19]

Second, restrictions on use must be listed in the public offering statement (along with a more detailed list of restrictions). Third,

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[19] RCW 64.34.216(1).

any amendment of the Declaration of the "uses to which a unit is restricted" requires an affirmative vote of 90% of the unit owners.[20]

The intent of the Act in this area is clear: Protect consumers so that they have a full understanding of any use restrictions and that such understanding cannot be changed without a supermajority vote. This intent must guide interpretation of the Centre Pointe Declaration and the Act.

2. *Centre Pointe Declaration Defines Leasing as a "Use to which Units are Restricted."* The Condominium Act itself does not define "use" or "uses to which any Unit is restricted." But the Centre Pointe Declaration does: It has an entire section of use restrictions specifically identified: Section IX *"Permitted Use; Architectural Uniformity."*[21] A subsection of that is clearly identified as *"9.1 Permitted Uses."* This subsection is included to specifically comply with RCW 64.34.216(1) — a clear and definitive statement of the uses to which the condominiums are allowed/restricted. There are two portions confirming that rental restrictions are considered a "use" under this Declaration.

a. <u>Section 9.1.1</u>. Under the heading of "Residential Uses," paragraph 9.1.1 provides that all *"other*

[20] RCW 64.34.264(4).
[21] Article IX of the Declaration.

reasonable uses normally incidental to such [residential] purposes" are allowed. Leasing of a residential unit is a reasonable use that is normally incidental to residential purposes. This is undisputed since over 35 of the units in the complex had been rented in Buildings A, B and C prior to passage of the Twelfth Amendment.[22] This is a direct grant of the right to lease. The grant of this right of use requires a supermajority to take it away.

b. Section 9.1.14. This subsection is entitled "Lease Restrictions" and sets forth specific restrictions on the use of units for leasing — leases must be in writing and be for at least one year and the tenants are subject to the Declaration. But then that section provides:

> *"Other than the foregoing, there is no restriction on the right of any Unit Owner to lease his or her Unit."*[23]

This unambiguous language of the Declaration leaves no room for interpretation — leasing is a use that is restricted to a certain level, but beyond that, all unit owners have no other restrictions on use of their units for leasing.

c. Construction of Declaration. In addition to these unambiguous references to leasing as a use that is

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[22] CP 139-140. See footnote 8.
[23] CP 55.

restricted, the structure of the Declaration is informative. Subsection 9.1.1 sets out 16 paragraphs of use restrictions. This specific listing establishes the clear and unambiguous intent that the Declarant considered these as use restrictions that must be identified in the Declaration per RCW 64.34.216(1)(n).

The Association's statement that a "title is not determinative of its legal effect" is incorrect. Our courts have always recognized that captions are part of the contract and are to be reviewed to determine the intent of the parties.[24]

> *We look at both the text and the captions in a policy to determine the policy's coverage.*[25]

In the Stanley v. Safeco Ins. Co. of America case, the court was faced with a situation where the caption and the body of the policy created ambiguity. The court found that the body of the contract should control. But both the majority and the dissent recognized that to interpret the contract, the captions are an important facet.

But here, the titles, the structure and the associated text are all consistent in establishing the intent of the original Declarant:

- The Article and Section titles clearly identify the restrictions as "Use Restrictions;

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[24] Stanley v. Safeco Ins. Co. of America, 109 Wn.2d 738, 747 P.2d 1091 (1988).
[25] *Id. at* 745, Dissent.

- 9.1.1 grants to unit owners all uses normally incidental to residential use, which must include renting/leasing;
- 9.1.14 limits the foregoing grant to require leases of at least one year/be in writing, but then confirms no other restriction;
- The other restrictions in 9.1 clearly address use restrictions.

The unambiguous language and structure leave but one conclusion possible — in this condominium, leasing is a use to which restrictions were imposed.

Because the Declaration defined leasing as a use that is restricted, 17.3 applies to any amendment of such use. Accordingly, the Twelfth Amendment is void for failing to receive 90% approval.

d. Association Position Violates Basic Contract Interpretation. The Association asserts that the Declaration should be read so that the restrictions on leasing in the Declaration are not restrictions on the use of a unit. Such an interpretation violates a basic rule of contract interpretation:

> *An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used.*[26]

[26] Snohomish County Public Transp. Benefit Area Corp. v. FirstGroup, 173 Wn.2d 829, 840, 271 P.3d 850 (2012).

The Association's position would require this court to:

- Ignore the title of the Article and Section stating that these are "Permitted Uses;"
- Ignore the portion of 9.1.1 granting to the unit owners all uses incidental to residential purposes (for leasing is certainly one);
- Interpret Section 9.1.3-9.1.16 as not being use restrictions.[27]

Such a decision would put buyers/owners of condominiums at severe risk: What you read in plain English in the Declaration *may not* be truly binding.

e. Conclusion. Although not binding upon this court, Judge Snyder's analysis was simple, direct and correct:

> *"If you're going to restrict what they've already granted, you have to have the 90 percentage vote."*[28]

Judge Snyder then looked to the Centre Pointe Declaration and noted Section 9.1.14 of the lease where the right to lease was specifically granted. He continued:

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[27] If these paragraphs are not "use" restrictions, then they need not be in the Declaration. Would they then be merely gratuitous? For this the Association has no explanation.

[28] VP 30, lines 1-3.

"This is a restriction on an existing use."[29]

He rightly concluded that under this Declaration, since the right to use the unit for leasing was granted, it takes a 90% vote to take it away. Judge Snyder did so looking to the language of this specific Declaration, not the statute's general language.

Filmore requests that this court hold that the Twelfth Amendment is void upon the same basis as Judge Snyder: The Centre Pointe Declaration identifies leasing as a "use" that is restricted and that any change in such use restriction required a 90% vote. Pursuant to Section 17.3 of the Declaration, the Twelfth Amendment is void.

3. *Leasing is a "Use" Pursuant to the Act.* Filmore asserts that this case can and should be decided upon the specific language of this Declaration, and not upon interpretation of the Act. Regardless, if the court desires to proceed to this issue, leasing is clearly one of the "uses" referenced in RCW 64.34.080 (1)(n) and .264(4).

a. <u>*Sadri* defines Use</u>: The Washington State Supreme Court did determine under the Horizontal Property Regime Act (RCW 64.32) that use restrictions must include rental

[29] *Id. at* line 24.

restrictions. In Shorewood West Condominium Association v. Sadri,[30] a Declaration created a condominium under the Horizontal Property Regime Act. The Declaration contained a restriction on use as follows:

> *"The property, units and limited common areas as described herein are restricted and intended to be utilized solely for residential purposes, and no rental or lease shall be permitted for less than a 30 day term.*[31]

The association adopted an amendment to its Bylaws imposing a rental restriction, with no amendment of the Declaration. The association sued an owner, Sadri, to prohibit her from leasing her unit. In that case, the association asserted that only general limitations on use are required to be in the Declaration, not specific use restrictions (*i.e.*, only residential *versus* non-residential). The association asserted that it was general practice for courts around the country to only require reference to general limitations on use, not specific, in the Declaration. The court disagreed, noting almost a full page of other cases where the restrictions in declarations were much more specific. It further noted that even the Shorewood declaration had more specific description of uses. Upon this review

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[30] Shorewood West Condominium Association vs. Sadri, 140 Wn.2d 47, 992 P.2d 1008 (2000).
[31] *Id. at* 50.

the court disagreed:

> *"Therefore, one should read "use" in RCW 64.32.090(7) to mean all uses and not just general categories of use such as residential use or commercial use. The provisions require that all restrictions on use should be in the declaration's statement of purpose."*[32]

Recognizing rental restrictions as a restriction on use, the court confirmed such change had to be implemented through an amendment of the Declaration. The rental restriction was void.[33]

This interpretation of the word "use" under the Horizontal Property Regime Act should be the same under the Condominium Act. The same logic is applicable and such interpretation fulfills the primary goal to protect consumers. Importantly, in the 13 years since the court's decision, the legislature has not amended the language of the Act to restrict "use" to just residential *versus* non-residential.

b. <u>The Act Requires Broad Definition of "Uses"</u>:

i. *Consumer Protection:* Any interpretation of the Act must fulfill the legislature's clear intent to

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[32] *Id. at* 56. The referenced statute in the quote is the requirement under the old Act regarding the requirement to define uses in the Declaration: RCW 64.32.090(7) *"A statement of the purposes for which the building and each of the apartments are intended and restricted as to use."*
[33] *Id. at* 57.

provide the significant consumer protection.[34] The legislature must have considered what "uses" are important to the consumer when writing the Act. Obviously, the distinction between residential/non-residential is not one of primary concern: A residential buyer would only be looking at condominiums that are built for residential uses, so the concern of converting to non-residential uses is not of significant risk. What really matters to these consumers are limitations of the uses within the residential context — leasing, timeshare, age restrictions, *etc.* Recognition of the practical concerns makes it clear — for the Act to protect residential owners/buyers, the definition of "uses" must address the concerns this consuming public would have. Leasing is a key use of concern.

ii. *Statutory Language:* The legislative intent to have a very broad application of "uses" is unambiguously established by the language of the two applicable statutes and requires a broad meaning of "uses." The Act utilized the adjective *any* when setting the breadth of use restrictions.[35] "Any" is extremely broad, is in no means restrictive and means

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[34] See Section VI.B(1) above.
[35] RCW 64.34.216(1)(n).

three or more.[36] Certainly not just one distinction between residential/non-residential as asserted by the Association. In the section requiring a supermajority for amendments,[37] the statute utilizes the plural, not the singular – "use**s**."[38] By using the plural, the legislature recognized that more than one type of use distinction could be restricted, requiring a supermajority. Further, in both sections, the noun "use" is used — a word that is exceedingly broad.[39] At no time did the legislature include adjectives or modifiers of the word "use" in either statute that would support a narrow construction.

iii. Other Basis for Broad Interpretation: Over the years, the question of rental restrictions being a "use" has been an issue in this and other states. The expert commentators in this state agree that leasing restrictions are "use restrictions" that require a 90% approval by the unit owners.[40]

Other states have confirmed that "use" means much more than residential *versus* non-residential. The Minnesota court of appeals held that rental restriction is a reasonable restriction on the

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[36] American Heritage Dictionary, Houghton, Mifflin Co., pg. 59 (1981).
[37] RCW 64.34.264(4).
[38] RCW 64.34.264(4).
[39] See Black's Law Dictionary, 4th Ed., pg. 1382 (1979).
[40] CP 127-138, CP 294-300, CP 304-306.

use of a unit.[41] The court **rejected** the claim that a rental restriction is a restraint on alienation.[42] The court noted that other jurisdictions had also concluded that rental restrictions are restrictions on use and not restraints on alienation and confirmed the same.[43]

Also instructive is the fact that New York considers a limitation on pets a "use" restriction.[44] If the ability to have pets is important enough to be called a use, then surely the right to rent must be as well.

All aspects of the Act require an interpretation of "uses" that includes rental restrictions: The Act's defined intent, the specific language of the statutes, expert commentators and the Sadri case all support one conclusion: "Uses" must include rental restrictions.

c. No Basis for Association's Position: The

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[41] Breezy Point Holiday Harbor Lodge-Beachside Apartment Owners' Association vs. BP Partnership, 531 N.W.2d 917 (1995).

[42] *Id. at* 919. The Minnesota court recognized that a restraint on alienation is one that limits an owner's right to convey a fee interest. *See* Stoebuck and Weaver: *Real Estate: Property Law, Sec. 1.26: Restraints on Alienation,* 17 Wash. Prac. 50-53 (2004). Professor Stoebuck defines restraints on alienation similarly as a restriction on the right to convey fee interest and which would not include restricting an owner from granting a possessory interest pursuant to a lease. Further the citations listed in support of Appellant's position (footnote 11 in Appellant's Opening Brief) do not support its claim. The Washington cases cited involved bargained for restrictions on assignment of leases by a tenant. The law review article cited is 20 years old, does not in any manner interpret the applicable statute and relies solely upon a 1982 ALR article that specifically limited its review to court decisions and not statutory provisions. None of this is applicable to the interpretation of the Washington Condominium Act.

[43] *Id. at* 919-920.

[44] Board of Managers of Village View Condominium vs. Forman, 78 AD.3d 627 (New York 2010).

Association asserts that the only "use" description that need be in the Declaration and that requires a supermajority is residential *versus* non-residential. None of their arguments have merit.

There is nothing in the Act supporting such a narrow interpretation of "uses." The Association pointed out numerous times the legislature specifically inserted "residential" and/or "non-residential" when modifying "use" in other section. If the legislature's intent had been to so limit "use" to this one distinction in RCW 64.34.216 and .264(4), the language in the two pertinent sections would have been similarly restrictive. Instead the language is written broadly without any such limitation.

The Association's reliance upon application of "residential" or "non-residential" relative to the word "use" in other areas of the Act has no application here. Instead of counting words, one must look at the organization of the Act and <u>where</u> the words are used. The Act is broken up into five separate Articles,[45] with the fourth article entitled "Protection of Condominium Purchasers." That Article[46] is applicable to all condominiums *except* certain non-residential condominiums. Mandatory application of these protections to

[45] Article 1 - General Provisions; Article 2 – Creation, Alteration, and Termination of Condominiums; Article 3 – Management of Condominium; Article 4 – Protection of Condominium Purchasers; and Article 5 – Miscellaneous.
[46] RCW 64.34.400.

residential uses is appropriate, for such buyers are less sophisticated. So the distinction between "residential use" and "non-residential use" highlighted by the word counting by the Association does not define or restrict the scope of "use," but instead denotes heightened protection for residential users and uses, while still providing adequate flexibility from the stringent requirement of the Act for non-residential condominiums.

The Association's reliance upon the portion of the Act applicable to the Public Offering Statement is equally inappropriate. The Public Offering Statement is meant to be a short, clear and concise document which will increase the likelihood that prospective unit purchasers will both read and understand it (for Declarations are so long and complicated). To promote the consumer protection goals of the Act, the legislature requires an expanded and more detailed disclosure in the Public Offering Statement. The denial of the right to rent takes away a substantial legal right in the "bundle of sticks." This justifies a separate disclosure provision required for rentals. Similarly, there is a separate required disclosure in the public offering statement for "whether timesharing is restricted or prohibited," RCW 64.34.410(u), and "any rights of first refusal to lease or purchase

any unit or any of the common elements," RCW 64.34.410(c). These are all substantial legal use rights that justify a separate disclosure. But this additional protection provided in the Public Offering Statement does not, in any manner, support a narrow reading of the Act so that consumer protection is diminished.

Finally, reference to other condominiums' declarations, and improper actions is equally irrelevant.[47] What the Association failed to recognize is that there is a practical reason why other associations (and probably this Association) adopted rental restriction amendments with a 67% vote. As noted in the declarations in support, it is extremely hard for an association to obtain 90% because so many unit owners do not want to lose the right to rent. Associations are advised as to the applicable law and that there is a one year statute of limitations. Boards then take the risk, adopt a rental restriction without complying with the Act, and do so knowing that if no one sues within one year, the invalidity becomes irrelevant.[48] This exact argument was likewise raised and

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[47] But note that the language of a different declaration for a separate condominium quoted on page 10 of Appellant's Brief is restrictive: The author of the declaration must have known that if "uses" were to be restricted to just residential *versus* non-residential, then very specific language is required.
[48] CP 294-302. Declaration of Ken Harer; CP 303-313, Declaration of Chester Lackey.

rejected in the Sadri case.[49]

The court must look ahead to the impacts that would result from adopting the Association's view. If only residential *versus* non-residential use restriction distinction need be included in the Declaration and require a supermajority, then all other possible restrictions need not even be referenced in the Declaration. All other possible restrictions on use would be legally adopted simply by a board for an association as part of their rules **without a vote of the unit owners**.[50] Thereafter, any future board could merely change their rules and the restrictions on use again with no vote of the owners. That would mean that none of the following would be open to a vote of the unit owners and subject to the whim of the then current board: Age, rental, timeshare, smoking, or pet restrictions. These are exactly the type of restrictions that residential condominium buyer/owners care deeply about, and for which all protection for predictability and control would be lost.

To allow control of use rights so important to condominium owners to be taken away from their control and granted to board members is inconsistent with the defined consumer protection

[49] Sadri *at* 55.
[50] RCW 64.34.304(1)(a). Since these would not qualify as a "use" pursuant to RCW 64.34.216(1)(n), no amendment of the Declaration is necessary to change and no vote of the owners would be required.

purposes of the Act.

4. *One Conclusion Possible: Use includes Leasing.*

Under the specific Declaration for Centre Pointe and pursuant to the Act, there is but one conclusion — "use" and "uses to which any unit is restricted" must include rental and leasing restrictions. As such, any alteration of such use restriction required a 90% vote of all the unit owners.[51] Because the Twelfth Amendment did not receive the required 90% approval, it is void as a matter of law.

C. The Association Failed to Establish Equitable Estoppel.

The burden is on the Association to establish all of the facts necessary to establish each and every element of equitable estoppel by clear, cogent and convincing evidence:

> *1. An admission, statement or act inconsistent with the claim afterward asserted;*
> *2. Action by the other party in reasonable reliance upon such admission, statement or act; and*
> *3. Injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act.*[52]

[51] RCW 64.34.264(4); Declaration, Section 17.3.
[52] Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc., 168 Wn. App. 56, 277 P.3d 18 (2012). *See* DeWolf, Allen &

Equitable estoppel is an affirmative defense that is not favored by the court.[53] Importantly, only those parties who have a **right to rely** upon acts and representations may take advantage of equitable estoppel. Based upon these fundamental elements, the Appellant fails to establish a *prima facie* case for this affirmative defense.[54]

First the Association alleges only one "act" by Mr. Molnar (the principal for Filmore) substantiating equitable estoppel: His silence in response to the Association's discussion regarding the Twelfth Amendment.[55] Such a claim is insufficient as a matter of law:

> *Moreover, our Supreme Court has explained that "mere silence or acquiescence will not operate to work an estoppel where the other party has constructive notice of public records which disclose the true facts."*[56]

Caruso, *Contract Law and Practice, Performance and Non-Performance*, Washington Practice Series, Chapters 10, 11 (2012).

[53] *Id.*

[54] Though in fact disputed, Filmore agrees that for the purposes of summary judgment, the facts asserted by the Association are presumed true so there is no claim of dispute of material fact. This is not an admission or stipulation as to the actual truth of the allegations.

[55] Appellant's Opening Brief, pg. 29. The Association also makes reference to Mr. Molnar's general statements about his intent to build and sell. As it turns out, his actions were entirely consistent with his statements: He did build with intent to sell, he listed and attempt to sell, (CP 244-248) but because of the bad market, he had to rent. CP 140 and 235.

[56] Newport Yacht Basin Ass'n. of Condominium Owners v. Supreme Northwest, Inc., 168 Wn. App. 56, 79-80, 277 P.3d 18 (2012), *quoting* Waltrip v. Olympia Oyster Co., 40 Wn.2d 469, 476, 244 P.2d 273 (1952).

In the Newport case cited above, Seattle Boat purchased a piece of property adjacent to a condominium association's marina. In pre-purchase discussions, the association never asserted an ownership interest in the property. Both prior to and immediately after the purchase, the principals with Seattle Boat and the association discussed the proposed redevelopment project for the property. After the purchase, Seattle Boat submitted for permit approval to develop the property. The Association was initially supportive of the application. In the months after the application, the principals with the two parties discussed aspects of the project that would affect them both: Parking, ingress, egress and traffic. Only after initial permit approval was granted did the association formally object to the application.

After this, the association located a recorded quit claim deed in its safe that purportedly put key portions of Seattle Boat's land into the association's ownership. Litigation ensued with the association suing to quiet title based upon the quit claim deed. Seattle Boat defended in part that the association was equitably estopped from asserting ownership because of its "silence"

regarding its claimed ownership of the land.[57]

The supreme court rejected Seattle Boat's position. The court noted that both parties had equal access and constructive knowledge of the "true facts" regarding ownership: The recorded quit claim deed. With equal means of knowledge, there can be no estoppel in favor of either party. [58]

That is the exact situation here, except this Association had actual firsthand knowledge of all the "true facts." The Association had the Declaration that sets forth the existing lease restrictions and requirements for amendments to the Declaration. The Association retained legal counsel who presumably prepared the Twelfth Amendment. The Association controlled all aspects of its approval, including limiting the approval to just 67%. Finally, all the documents were recorded with the Whatcom County Auditor. With actual knowledge of the "true facts" sufficient to establish the validity/invalidity of the Twelfth Amendment, the Association cannot rely upon equitable estoppel as a defense.

Second, there was no action by the Association. The facts

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[57] The silence was the association's failure to affirmative assert ownership for decades after the quit claim deed was filed, the association's silence regarding ownership before and after Seattle Boat's purchase, and the association's initial silence of ownership during the permit submittal and review process. *Id. at* 77-81.

[58] *Id.*

asserted by the Association are simply:

> *"If Mr. Molnar had stated this [*Twelfth *Amendment not valid] ... we would have sought a 90% approval vote in order to remove any basis he had for objection."*[59]

The Association concedes there was no "action" because of the silence. For instance, the Association cannot claim that it stopped a re-vote to obtain 90% because of Filmore's silence. The Association did nothing in response to the claimed silence. Without any factual allegation of any **action by the Association,** there can be no equitable estoppel.

Third, the Association had no right to rely upon Mr. Molnar's silence. The validity of the Twelfth Amendment is a legal determination. Mr. Molnar is not an attorney and has no specific knowledge on the law regarding condominiums. By contrast, the Association had its own attorney who presumably did have the duty to provide them correct and actual advice about the Twelfth Amendment. Further, Ms. Haddad confirms that by the meeting in February, the Association was adverse to Filmore — the Association did not want more rentals, had passed the Twelfth Amendment in fear of Filmore implementing rentals, and had been told at the meeting that Mr. Molnar was thinking of renting, and the

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[59] CP 236. Declaration of Debbie Haddad.

Association challenged him that he could not rent because of the Twelfth Amendment.[60] This is not a relationship that would grant the Association to rely upon Mr. Molnar's silence as a legal opinion concerning the validity of the Twelfth Amendment.

Fourth, there is no showing that there is any injury. The Association never even alleges it could have obtained the 90% required. Ms. Haddad just asserts they could have tried. Success at the 90% level was not even alleged, for such is completely speculative. This is not a dispute of fact for the Association never alleges that the 90% approval upon a re-vote could have been achieved.

Even if all of the facts asserted in appellant Association's declarations are deemed as true for the purpose of this appeal, its affirmative defense of equitable estoppel must fail as a matter of law.

D. <u>Filmore Entitled to Attorney's Fees</u>. Pursuant to RAP 18.1, Filmore requests this court to rule that Filmore is the prevailing party and is entitled to attorney's fees and costs on appeal. The specific award of attorney's fees and costs should be

[60] CP 235-7. Ms. Haddad confirms that later in the year, the two were directly adverse regarding parking and yet the Association still did not act to validate the Twelfth Amendment.

determined by the trial court upon remand. The basis for such award is Article XIII of the Declaration[61] and RCW 64.34.455 and the Order on Summary Judgment (reserving award of attorney's fees to later hearing before the trial court).

VII. CONCLUSION

The trial court should be affirmed in all respects and remanded for award of attorney's fees and costs to Filmore, with the amount to be determined by the trial court.

Respectfully submitted this day of December, 2013.

BELCHER SWANSON LAW FIRM, P.L.L.C.

By ______________________________
DOUGLAS K. ROBERTSON, WSBA #16421
Attorney for Respondent

[61] Paragraph 7.4 of the Bylaws provides for attorney's fees and costs to the prevailing party.

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

FILMORE LLLP, a Washington limited liability limited partnership, Respondent, vs. UNIT OWNERS ASSOCIATION OF CENTRE POINTE CONDOMINIUM, a Washington non-profit miscellaneous corporation, Petitioner.	No. 70013-8-I Whatcom County Superior Court No.: 12-2-02766-4 DECLARATION OF SERVICE

I, Kathie Street, hereby certify as follows:

I am employed in the County of Whatcom, State of Washington. I am over the age of 18 and not a party to the within action. My business place of employment is Belcher Swanson Law Firm, PLLC, 900 Dupont Street, Bellingham, Washington 98225.

On the date set forth below, I served the following documents on the interested parties in this action in the manner

described below and addressed as follows:

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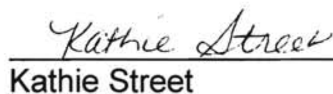
1. ***Respondent's Appellate Brief;***

2. ***Declaration of Service.***

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 11th day of December, 2013, at Bellingham, Washington.



Kathie Street