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COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

SUROWIECKI FAMILY LP II

Petitioner,

v.

HAT ISLAND COMMUNITY ASSOCIATION, a Washington nonprofit
corporation,

Respondent.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent Hat Island Community Association (“HICA”) seeks review of the Court of Appeals decision set forth in Paragraph B.

B. COURT OF APPEALS DECISION

The Court of Appeals, Division One, issued an unpublished opinion in Cause No. 79775-1-I on September 21, 202.

C. ISSUES PRESENTED FOR REVIEW

1. Does the “context rule” require exclusion of the homeowner association’s bylaws as evidence that an amendment is a new covenant unrelated to the original and inconsistent with the general plan of development when the original covenants give the homeowner association authority to charge and assess its members and the bylaws set forth its process by which that association exercises that authority? *Hollis v. Garwall, Inc.*, 147 Wn.2d 683, 974 P.2d 836 (1999).

2. Is Division One’s decision in conflict with *Wilkinson* or *Meresse* when the Div. J Amendment, if valid, would divest HICA of authority to levy assessments to some of its members (those that happen to own in Div. J), create a new assessment structure (unrelated to the structure set forth in the original Restrictive Covenants Running with Land and Easements, and only applicable to Div. J), and impose new assessment on Div. J owners that are inconsistent with the original Restrictive

Covenants Running with Land and Easements and could not have been reasonably anticipated Div. J owners?

D. STATEMENT OF THE CASE

Hat Island is a private island off the coast of Everett, Washington. CP 184. HICA is the homeowners' association that owns, maintains and operates the island's infrastructure and amenities including the roads, parks, a golf course, marina, the private water system and other real property. CP 185. The 974 lots owned by HICA's members are grouped into divisions that are subject to "Restrictive Covenants Running with Land and Easements" (RC&Es) for each division. CP 93-4, 184, 346-94. The parties filed cross motions for summary judgment based on application of RC&Es, primarily paragraph 21, which includes HICA's "power to charge and assess its members" and paragraph 16, which includes the amendment authority. CP 426-44, 304-15. While photocopies of the original recorded RC&Es can be difficult to read, ¶ 21 provides, in part, as follows:

21. **There shall be easements** for roads for ingress and egress and for utilities for all lot owners of the said plat on all roads as shown on the plat referred to above, as well as on any plat or plats hereafter recorded by the grantors covering property located on Hat Island, also known as Gedney Island, Snohomish County, Washington. **The Hat Island Development Company shall construct all roads** shown on said plat or plats, develop **water supply**, develop and construct the golf course and, if feasible, an air strip, and water supply, and shall **provide electric service and maintain said facilities** until same are conveyed to Hat Island Country Club, Inc. Thereafter said **club shall**

maintain and operate said facilities together with such additional recreational or other facilities as it shall by proper authorization from its membership undertake to provide. The said **club shall have the power to charge and assess its members on an equitable basis for the operation and maintenance of the said facilities** originally provided by Hat Island Development Company and to charge and assess its members on an equitable basis for such additional recreational or other facilities as shall be duly authorized by its membership for the mutual benefit of all its members.

CP 376 (Emphasis added).

The parties agree that ¶ 16 defines and limits the authority to amend the RC&Es. Paragraph 16 states:

16. **These covenants** are to run with the land and shall be binding on all parties and all persons claiming under them for a period of thirty years from the date these covenants are recorded, after which time said covenants shall be automatically extended for successive periods of ten years **unless an instrument signed by a majority of the then-owners of the lots has been recorded, agreeing to change said covenants in whole or in part.**

CP 375 (Emphasis added.).

On September 20, 2018, Matt Surowiecki, Sr. recorded an amendment to paragraph 21 of the Div. J Covenants and Easements (“Div. J Amendment”), purportedly on behalf of a majority of Div. J owners and purportedly pursuant to authority set forth in paragraph 16 of the Div. J Covenants and Easements. CP 454-55, 465. The Div. J Amendment would add the following language to the easement in paragraph 21:

For purposes of these Covenants, the club’s assessment of its members on an equitable basis shall be determined for each lot within Division J as follows: Each lot shall be

assessed a pro rata share of the total charges and assessments for all lots in Division J (excluding usage fees) in accordance with that lot's tax assessed value divided by the tax assessed values of all lots in Division J. Tax assessed values shall be determined based on Snohomish County Assessor's records, including both the value of the land and improvements thereon, for the year prior to the year in which the assessments are ratified.

CP 465.

Under the original RC&Es, HICA has authority to charge and assesses its members on an equitable basis for the operation and maintenance of its infrastructure and amenities. CP376. HICA carries out its authority to "charge and assesses its members on an equitable basis for the operation and maintenance of facilities" by developing a budget for the community. CP 138-40, 200-202. Each year, in order to adopt a budget as required by RCW 64.90.525 and Article VIII, Section 1 of its bylaws, the HICA Board estimates the Association's expenses and anticipated income.¹ CP 138. As part of this process the Board evaluates anticipated income from its two primary sources: assessments and charges, CP 138-40.

The HICA Board employs a combination of use-based charges (that allocate more of HICA's expenses to those members who use the amenities more) and assessments (that allocate a portion of HICA's assessments to all lots owners equally, regardless of how often they use

¹ Prior to July 1, 2019, RCW 64.38.025 applied to HOAs in Washington for purposes of adopting and ratifying budgets. See RCW 64.90.080.

the amenities and irrespective of whether or not the lot is improved). *Id.* This combination of use-based charges and assessments allocates some of HICA’s expenses to all lot owners and more of its expenses to those owners that use the HICA amenities more frequently. *Id.*

Division One held that “HICA’s bylaws and RC&Es evidence a general plan of development that grants HICA the authority to determine what assessment structure is ‘equitable’ for each lot – not for each division.” *Op.* at 9. The Div. J Amendment, if valid, would prevent HICA from assessing members (but only those members in Div. J) in the amount determined by HICA’s Board pursuant to Article VIII, Section 1 of its bylaws. CP 465. The Division J Amendment would create a new assessment scheme that requires HICA to first determine the per lot assessment pursuant to its bylaws, calculate the gross total amount that would have been assessed to individual Division J owners and then reallocate the total gross amount to Division J lots based on pro-rata tax assessed values. CP 376, 465.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

Petitioner claims that Division One’s opinion is irreconcilable with *Wilkinson v. Chiwawa Community Ass’n*, 180 Wn. 2d 241, 327 P.3d 614 (2014). It is not. *Wilkinson* held that when the covenants permit a majority

to change the covenants but not create new ones, a simple majority cannot add new restrictive covenants that are inconsistent with the general plan of development or have no relation to existing covenants. *Id.* at 255-56. Division One relied on the plain language of the RC&Es and the Div. J Amendment to find that the Div. J Amendment, if valid, would create a new covenant unrelated to an existing covenant and is inconsistent with the general plan of development. *Op.* at 9.

1. HICA's bylaws are governing documents, not extrinsic evidence relied on to interpret governing documents.

Surowiecki claims that Division One committed error because it considered HICA's bylaws when determining whether or not the Division J Amendment created a "new covenant" and when determining whether or not the Div. J Amendment was "consistent with the general plan of development." The RC&Es state: "HICA shall have the power to charge and assess its members on an equitable basis." CP 376. This language puts owners on notice of HICA's authority to charge and assess its "members." HICA's "members" are the owners of lots in the multiple divisions under its jurisdiction, not just Div. J. Because the RC&Es put owners on notice of their obligation to pay assessments as members of HICA (not as Div. J owners), it is clear that the owners' assessment obligations will be determined pursuant to their HICA membership obligations. The plain language of the RC&Es reflect the intent of the

original drafter and Division One adhered to *Riss* and *Wilkinson* by interpreting the RC&Es to give the covenant language its ordinary and common meaning. *Riss v. Angel*, 131 Wn. 2d 612, 934 P.2d 669 (1997); *Wilkinson v. Chiwawa Community Ass'n*, 180 Wn. 2d 241, 250, 327 P.3d 614 (2014) .

The RC&Es put owners on notice of HICA's authority to charge and assess its members. CP 376. HICA's bylaws are the governing documents, adopted by the HICA membership (which include Div. J owners), that govern HICA's exercise of that authority. CP 199-202. As such, HICA's bylaws are not evidence of one party's unilateral intent or an attempt to redraft or add language to the RC&Es that would require application of the "context rule" under *Hollis v. Garwall, Inc.*, 147 Wn.2d 683, 974 P.2d 836 (1999). The bylaws are HICA's exercise of discretionary authority pursuant to the RC&Es and a component of the governing documents, not extrinsic evidence considered to interpret the governing documents. RCW 64.38.010(10). Division One properly considered HICA's bylaws and there is no conflict with the evidentiary rules set out in *Hollis* and *Riss*.

2. *The Division J Amendment created a new covenant unrelated to the original RC&Es.*

Division One correctly interpreted the original RC&Es as giving HICA the power to impose assessments on its members in a manner it determines equitable. Op. at 9. The Div. J Amendment would take that authority away from HICA and create a new assessment structure, but only for Div. J owners. Under the original RC&Es, Div. J owners are assessed as in accordance with their rights and obligations as HICA members. CP 376. The Div. J Amendment would create a new assessment obligation, separate from any HICA membership obligation, that would significantly increase the liability of a minority of lot owners in Division J without their consent. CP 237-38, 465. Applying *Meresse* and *Wilkinson*, Division One relied on the plain language of the RC&Es to find that “nothing in the RC&Es put owners on notice that they may have been burdened, without their assent, to such a significant change in annual assessments without the approval of HICA and its members.” Op. at 9. Division One properly applied this Court’s holding in *Wilkinson* to find the Div. J Amendment invalid. There is no inconsistent opinion for this Court to review.

3. *The Div. J Amendments are inconsistent with HICA’s general plan of development.*

Surowiecki claims that Division One erred by considering the general plan of development for HICA instead of focusing solely on

Div. J. Treating Div. J. as a standalone community for purposes of assessments would require the court to ignore the plain language of the RC&Es, bylaws, and over 50 years of practice with respect to assessments. CP 185, 200-02, 465. Div. J does not own the community infrastructure or amenities. HICA does. The RC&Es grant HICA authority to charge and assess its members (all of them) to operate and maintain HICA property. CP 376. This broad grant of authority is carried out by HICA pursuant to its bylaws. CP 200-02. If valid, the Div. J Amendment would remove HICA's authority to determine assessments, but only for Division J. CP 465. If the Div. J Amendments were valid then Div. J owners would be the only HICA members assessed in proportion to their tax assessed value, with significant negative impact on owners for no reason other than the fact they happen to own property in Division J, instead of some other division. CP 237-38, 465. Division One correctly applied *Wilkinson* and concluded that the amendment was inconsistent with the general plan of development and therefore invalid under Washington law. Op at 11.

The facts distinguish this case from *Save Sea Lawn Acres Ass'n v. Mercer*, 140 Wn. App. 411, 166 P.3d 770 (2007). The *Mercer* case involved a challenge by the owners in one division of a community against the owners in another division who voted to revoke view covenants that restricted the use of their property. *Save Sea Lawn Acres Ass'n v. Mercer*, 140 Wn. App. 411, 166 P.3d 770 (2007). *Mercer* might be instructive if the Division J owners attempted to amend covenants that restrict the use of lots in Div. J and owners in other HICA divisions challenged the

amendment. The Div. J Amendment at issue in this case involve would remove HICA's authority to levy assessment pursuant to its bylaws and force HICA to apply a new tax assessment scheme that singles out a few of its members based solely on the fact they own a lot in Division J. These facts completely distinguish the *Mercer* case and its holding does not conflict with Division One's opinion in this case.

F. CONCLUSION

Division One of the Court of Appeals correctly applied the law to the undisputed facts in this case. The Div. J Amendment is an invalid attempt to add a new covenant that is unrelated to the original RC&Es because it would create a new assessment structure that divests HICA its authority to determine assessment and impose new assessment obligations on Div. J owners without notice. The Div. J Amendment is also invalid because it is inconsistent with HICA's general plan of development. Division properly applied applicable law in reaching these conclusions and review should be denied.

Respectfully submitted this 20th day of November, 2020.

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/s/ Jeremy Stilwell

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