99139-1

No. 79775-1-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

SUROWIECKI FAMILY L.P., II,

Petitioner,

v.

HAT ISLAND COMMUNITY ASSOCIATION,
a Washington non-profit corporation,

Respondent.

PETITION FOR REVIEW

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A. INTRODUCTION

This case raises questions about property rights that matter to everyone who wants to buy or already owns property in a residential subdivision. In such a community, unanimous consent is generally required for a covenant amendment that is unrelated to an existing covenant or would conflict with the general plan of development. This rule protects owners from majoritarian whims, but dissenters can exploit it to veto sensible changes. Given this rule's importance, this Court's guidance to prospective buyers, current owners, and homeowners' associations ("HOAs") is essential. But this Court has yet to decide two critical points: *first*, the extent to which extrinsic evidence may be used when applying the rule, and *second*, the standard for determining when a covenant amendment improperly conflicts with the general plan of development. In *Wilkinson v. Chiwawa Cmtys. Ass'n,* 180 Wn.2d 241, 327 P.3d 614 (2014), a divided Court left these matters unresolved.

Without this Court's guidance, Division I struck down a covenant amendment meant to make HOA assessments fairer in a subdivision near Everett. The HOA's prior scheme had required owners of dirt lots to pay assessments at a rate of 20% of their property's value, while owners of more valuable, developed lots paid as little as 2.9%. The subdivision's covenants already limited the HOA to charging assessments on an "equitable basis."

But thanks to voting restrictions in the bylaws, undeveloped lot owners were underrepresented in decisions on the HOA budget. Undeveloped lot owners became fed up with their skyrocketing assessments and exercised their right to amend the subdivision's covenants. The amendment specified that an "equitable basis" means an assessment based on property values, just like local government *ad valorem* property taxes. The HOA objected on behalf of developed lot owners, and Division I held the amendment was invalid. In doing so, Division I neglected the 1964 covenants' text, intent, and purposes, focusing instead on recent practices and the 2010 bylaws. The court also conflated the incorporated HOA with the subdivision itself. A decision with such troubling and far-reaching implications should not stand without review. Having deferred in *Wilkinson*, this Court should now provide guidance to the public. RAP 13.4(b).

B. IDENTITY OF PETITIONER

Surowiecki Family L.P., II ("Surowiecki") asks this Court to accept review of the Court of Appeals decision designated in Part C.

C. COURT OF APPEALS DECISION

Division I issued an unpublished opinion in Cause No. 79775-1-I on September 21, 2020. It is in the Appendix ("App.") at A-1 to A-11.

D. ISSUES PRESENTED FOR REVIEW

1. When courts determine the validity of an amendment to covenants, can extrinsic evidence, including the HOA's bylaws and current

practices, be used to determine the general plan of development and the owners' reasonable expectations, without regard to the covenants?

2. What is the standard for determining if an amendment to a subdivision's covenants conflicts with the general plan of development?

E. STATEMENT OF CASE

After *Wilkinson*, a majority of lot owners within a subdivision on Hat Island, near Everett, approved an amendment to the subdivision's recorded declaration of covenants, conditions, and restrictions ("CC&Rs"). CP 465-66; App. at A-14 to -16. This subdivision, known as "Division J," had CC&Rs that allowed the Hat Island Community Association ("HICA")'s predecessor, the Hat Island Country Club, Inc., to "charge and assess its members on an equitable basis." CP 323; App. at A-14. Division J's CC&Rs did not prescribe any procedure for members to vote on assessments. *See* CP 321-23; App. at A-12 to -14. The CC&Rs also did not guarantee that each member would pay an identical amount; did not cap year-to-year increases; and did not assure Division J lot owners that the HOA would use the same methodology for calculating Division J's assessments as for the 11 other subdivisions affiliated with the HOA. *See id.* Division J's CC&Rs allowed "a majority … to change said covenants in whole or in part." CP 322; App. at A-13.

A majority of the Division J owners, mindful of *Wilkinson*'s limitations on new subdivision covenants, 180 Wn.2d at 255-56, decided to

amend the *existing* provision for assessments. This amendment established a formula for determining an "equitable basis" for assessments on Division J lot owners: "[e]ach 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 value of all lots in Division J." App. at A-15. HICA objected, wanting to levy assessments at a flat rate per lot regardless of the property's value.

Some more background sheds light on the parties' positions. Hat Island is divided into 21 separate subdivisions with 974 total lots. CP 184, 340, 344. Starting in 1908, the 21 subdivisions were platted in piecemeal fashion, and only 12, known as Divisions A, B, C, D, E, F, G, H, J, K, M, and N, are affiliated with HICA. CP 318-19, 334-35, 340-42, 395, 398-425. These 12 subdivisions all have separately recorded plats and separately recorded CC&Rs. CP 346-425. The 12's CC&Rs are substantively the same. *See id.*

In 1961, investors thought the Island had development potential (only 30 cabins had been built) and formed the Hat Island Development Company. The Company bought 367 acres, platted many subdivisions, and promised buyers a golf course, a runway for small planes, a marina, a theatre, a tennis court, and other amenities. While the Company succeeded in buying a ferry and building a marina, golf course, and other amenities, it

spent more money on advertising than on practical needs and went bankrupt. Few houses had been built. The people who had bought lots then formed a substitute organization that eventually became HICA.[1]

Today, Hat Island remains mostly undeveloped while saddled with expensive amenities. The Island's water system currently can support only up to 400 lots. CP 258. Even if there were water available for them, many lots would still be unbuildable: they have a steep grade, are vulnerable to high tides, or have some other impediment to construction. CP 258. Within Division J, the subdivision at issue here, only 14 of the 101 lots have been developed with a home; the remaining 87 lots are undeveloped. CP 245, 252-54. Every HICA-affiliated subdivision's CC&Rs prohibit lot owners from placing a trailer, a temporary structure, or even a tent on their properties, App. at A-13, rendering undevelopable lots essentially useless.

As a result, property values vary sharply among individual lots. Within Division J, the 14 developed lots had a total tax-assessed value of $3,287,900 in 2018, for an average of $234,850, or 78.4% of the total tax-assessed value of all 101 lots in Division J. CP 245. By comparison, the 87 undeveloped lots had a total tax-assessed value of $908,200 in 2018, an average of only $10,439. CP 245. Most undeveloped lots in Division J had

[1] *See generally*, Robert A. Brunjes, *Hat Island History* 5-7, *available at* https://www.hatisland.org/wp-content/uploads/library/scrapbook/hat_island_history.pdf (last accessed Oct. 14, 2020).

a tax-assessed value of $6,600 or less, with 14 undeveloped lots having a tax-assessed value in 2018 of $5,400. CP 252-54.

Despite these disparities, HICA has levied assessments at a flat rate per lot rather than per dollar of property value. Assessments were once $5 per lot but spiked over the years, going up from $339 per lot per year in 2008 to $1,200 in 2018. CP 93, 209, 252-54. While the owners of developed lots controlled 78.4% of the property value in Division J, HICA's assessment scheme allowed these owners to pay only 13.9% of the assessments charged to Division J. In 2018, HICA charged the owner of the most-valuable property in Division J at an effective operating assessment rate of only 2.9%. At the same time, HICA charged the owners of most undeveloped lots at an effective rate of over 20% of tax-assessed value.[2]

HICA's bylaws consolidated voting power so that lot owners had only one vote even if they owned more than one lot. CP 196. Surowiecki owned many lots (a majority in Division J) but most were unvaluable lots. So Surowiecki funded a disproportionate percentage of HICA's budget despite having limited voting power. With no other recourse, Surowiecki looked to the Division J's CC&Rs' "equitable basis" standard and to the right of "a majority of the then-owners … to change said covenants." CP

[2] The percentages discussed in this paragraph are arithmetic calculations based on the information in the record. CP 252-54.

322; App. at A-13. The Division J amendment was approved by majority vote. App. at A-15 to -17.

The Court of Appeals, Division I, affirmed the trial court's summary judgment in HICA's favor. Beforehand, this Court had recognized in *Wilkinson* that "no Washington case has described the precise contours of when an amendment would be 'consistent with the general plan of development.'" 180 Wn.2d at 256. But this Court tabled the matter, saying, "we need not provide that guidance here." *Id.* Without this Court's guidance, Division I applied an *ad hoc* analysis rooted in extrinsic evidence. Holding that the covenant amendment conflicted with the general plan of development, Division I made two analytical choices. First, it used HICA, rather than Division J's CC&Rs, as the unit of analysis. Op. at 9. The "development" was HICA, a nonprofit corporation, not the residential subdivision that HICA served, according to Division I. *Id.* at 9, 11. Second, forgoing any analysis of the CC&Rs' text, structure, and evident purposes, the court selectively analyzed only extrinsic evidence—the bylaws and HICA's practices. *Id.* at 9-10. Relying on these sources to determine the general plan, the Court found that the covenant amendment conflicted with HICA's assessment system. *Id.*

Division I also invalidated the amendment because, the court believed, it was "not related to the ['equitable basis'] assessment covenant"

that the amendment had modified. Op. at 8. The court acknowledged "[t]here may be circumstances in which adding definitional language to a pre-existing covenant does not create a new covenant." *Id.* But the court ruled that the Division J amendment did not "fall[] into this category." *Id.* The court believed the amendment was "not sufficiently related" to the existing assessment covenant it amended, because the minority owners lacked "notice" about such a potential change. *Id.* at 9. In determining what the Division J owners might have expected, the court relied on some extrinsic evidence—HICA's then-current bylaws and the court's perception of HICA's "historic (*sic*) practice." *Id.* at 8-9. The court did not quote or otherwise examine Division J's recorded covenants or the grantor's intent as to assessments, nor did the court acknowledge that HICA allowed some other subdivisions and members to pay different assessments. *See id.*

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court's review is warranted. The decision below cannot be reconciled with *Wilkinson* or the well-established interpretive principles for real estate covenants. RAP 13.4(b)(1). After *Wilkinson*, great uncertainty remained about whether majority property owners have any ability left to modify their community's covenants to address problems. Division I's decision has only exacerbated the uncertainty. Because these issues touch every residential community governed by CC&Rs, this Court should step in

to provide guidance. RAP 13.4(b)(4). Otherwise, Division I's unfair, unpredictable, and unworkable approach would stand without scrutiny.

(1) Division I's Decision Is Irreconcilable with *Wilkinson*

In *Wilkinson*, the parties' dispute arose after most property owners in the Chiwawa River Pines subdivision became concerned about proliferating short-term rentals in their residential community. 180 Wn.2d at 245, 247. Chiwawa's CC&Rs authorized the property owners "'to change these protective restrictions and covenants in whole or in part' by majority vote." *Id.* at 246 (quoting record). Under this provision, the HOA then amended the CC&Rs by majority vote to prohibit rentals lasting fewer than 30 days. *Id.* at 248. A small group of property owners then sued, arguing that (i) unfettered short-term rentals were consistent with Chiwawa's plan of development, and (ii) a majority of the property owners could not limit short-term rentals in their community. *Id.* at 249.

This Court issued a divided 5-4 majority opinion nullifying the amendment. *Id.* at 258. This Court recognized a subdivision's covenants may permit a simple majority to approve new restrictions, in which case the common law sets only two limits: *first*, any new covenant must be reasonable; and *second*, it must be "consistent with the general plan of the development." *Wilkinson*, 180 Wn.2d at 256 (quotation omitted). Along with these limits, when the covenants permit a simple majority to "to change

the covenants but not create new ones," as in Chiwawa's CC&Rs and in the ones here, any amendment is invalid if it has "no relation to existing covenants." *Id.* (citations omitted). This restriction, explained this Court, protects "the reasonable, settled expectations of landowners." *Id.*

After delineating the general rule, *Wilkinson* declined to "describe[] the precise contours of when an amendment would be 'consistent with the general plan of development.'" *Id.* at 256. The Court also did not expressly define a test for a sufficient "relation to existing covenants" or for ascertaining homeowners' reasonable expectations, although the Court mentioned the relevance of "notice." *Id.* at 256, 259.

Even though *Wilkinson* left some issues unresolved, Division I's decision cannot be reconciled with what *Wilkinson* did say. Start with the "general plan of development" standard, which encompasses two concepts—(i) the "development" and (ii) its "general plan." Here, Division I conflated HICA with the planned community on the ground, deciding that HICA, not Division J, was the relevant "development." Op. at 9, 11. Never in *Wilkinson* did this Court take this approach. *See* 180 Wn.2d at 255-58. Nor did the Court of Appeals in *Save Sea Lawn Acres Ass'n v. Mercer*, 140 Wn. App. 411, 166 P.3d 770 (2007), *review denied*, 163 Wn.2d 1047 (2008), a case where a developer platted more than one subdivision, like here. Quite the opposite. In *Mercer*, the court held that where separate plats

and CC&Rs are recorded for each subdivision in a master development, the subdivisions must be considered on their own terms. *Id.* at 422. Otherwise, the recording statutes' purpose—"to provide constructive notice to land possessors"—would be undermined. *Id. Mercer* confirms review is warranted. RAP 13.4(b)(2). To be consistent with *Wilkinson* and *Mercer*, any test for an irreconcilable conflict between an amendment and the general plan of development must focus on the community, not its HOA.

Division I also departed from *Wilkinson* when it relied on HICA's bylaws and the court's perception of historical practices to determine the development's "general plan" and whether the Division J amendment was related to existing CC&Rs. Op. at 8-10. While *Wilkinson* acknowledged that "surrounding circumstances" may illuminate the general plan, nothing in *Wilkinson* suggests that extrinsic evidence may be used to find a general plan independent of the recorded CC&Rs. 180 Wn.2d at 258. In fact, *Wilkinson* extensively analyzed Chiwawa's CC&Rs to determine whether short-term vacation rentals were consistent with them. *Id.* at 249-55. Then this Court referred back to that analysis as having been about "the Chiwawa general plan of development." *Id.* at 257. Thus, *Wilkinson* presumed the CC&Rs supplied the general plan. Likewise, *Wilkinson* analyzed the recorded CC&Rs, not bylaws or current practices, to determine whether the homeowners had "notice" that short-term rentals could be banned. 180

Wn.2d at 258. In short, *Wilkinson*'s foundation was the community's written CC&Rs, not the bylaws or current practices.

Division I's evidentiary choices also conflict with *Wilkinson*'s anti-majoritarian purposes. HICA's budgets are approved with a simple majority vote of just a quorum (15%) of at a meeting, and its bylaws can be amended by a two-thirds vote of such a quorum CP 198, 200, 202. And again, HICA's voting rules stripped voting power from those who owned more than one lot. CP 196. But Division I based its determination of the "general plan," and any conflict with that plan, on such practices and bylaws. *See* CP 203, 210. If less than a majority of lot owners could fashion their communities' "general plan" in this way, then *Wilkinson*'s goals of protecting minorities and providing predictability would be undermined. This logical rupture in Division I's opinion confirms that this Court's review is warranted.

(2) Division I's Decision Conflicts with the Interpretive Rules Set Out in *Hollis* and *Riss* for Real Estate Covenants

While Division I properly recognized as a general proposition that Washington courts "employ rules of contract interpretation to determine the drafter's intent" when interpreting real estate covenants, op. at 7, Division I did not cite or apply the context rule for using extrinsic evidence. In *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999), this Court adopted the context rule for real estate covenants—the same rule that applies to

contracts in general. 137 Wn.2d at 696 (citing *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990)). Under this rule, "extrinsic evidence may be relevant in discerning intent, where the evidence gives meaning to words used in the contract." *Id.* at 695 (citation omitted). But extrinsic evidence may *not* be used to show "a party's unilateral or subjective intent as to the meaning of a contract work or term," to show "an intention independent of the instrument," to "vary, contradict or modify the written word," or to "add to the language of the covenant." *Id.* at 695, 697. The context rule applies under *Wilkinson,* 180 Wn.2d at 251-52, although disagreement between *Wilkinson*'s majority and dissent about the particular extrinsic evidence in that case may have led to confusion below. Review would bring clarity.

Division I's decision departed from this context rule, both when determining whether the amendment was sufficiently related to an existing covenant and when determining consistency with the general plan of development. At every turn, Division I used selective extrinsic evidence—the bylaws and HICA's practices—to divine the mental state of the current owners and to find a general plan of development independent of the recorded CC&Rs. *See* Op. at 8-10. In this way, Division I's decision conflicts with *Hollis*'s command "to look to the surrounding circumstances of the *original* parties to determine the meaning of specific words and terms *used in the covenants*." 137 Wn.2d at 696 (emphasis added). Division I cited

no authority—and Surowiecki is aware of none—condoning the use of bylaws past 50 years after the CC&Rs were recorded as extrinsic evidence. Thus, the context rule appears to foreclose what Division I did here—using bylaws enacted in 2010 to construe a set of covenants recorded in 1964.

The *Hollis* context rule is sound because it serves a core principle for subdivisions: covenants are the foundation of owners' property rights. A community's covenants run with the land, and bylaws must be consistent with the community's covenants, not the other way around. *See* RCW 64.38.030. When Division I placed so much weight on HICA's bylaws, enacted 46 years after Division J's CC&Rs, it was the tail wagging the dog.

Besides *Hollis*, Division I failed to apply the interpretive rule requiring that subdivision covenants be construed to further their purposes and original intent. Before *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997), this Court required strict construction of restrictive covenants in favor of the free use of land. *See id.* at 621-22. But this Court abandoned that rule when the parties to the dispute are all homeowners in the same subdivision. *Id.* at 623-24. In place of the old doctrine, this Court concluded that "the intent, or purpose, of the covenants … is the paramount consideration in construing restrictive covenants." *Id.* at 623. If anyone doubted *whose* intent and purposes mattered—those of the original drafters or of current property owners—*Riss* put those doubts to rest: "The relevant

intent, or purposes, is that of *those establishing the covenants*," *id.* at 621 (citing Robert G. Natelson, *Law of Property Owners Associations* § 2.5 at 61 (1989)) (emphasis added), not of the current owners 50 years later.

Division I's opinion clashes with *Riss*. Of course, *Wilkinson* suggests that a lack of "notice," or a conflict with current owners' "reasonable, settled expectations," may prove that an amendment is a new covenant unrelated to any existing covenants. *Wilkinson*, 180 Wn.2d at 257. But *Wilkinson* does not open the door to a free-wheeling exploration of extrinsic evidence that focuses on current owners' subjective intent. Against the backdrop of *Hollis* and *Riss*, when *Wilkinson* speaks about owners' "notice" and "settled expectation[s]" as measures of whether an amendment is properly related to an existing covenant, 180 Wn.2d at 256-257, those must be understood to be objective standards. *Cf. Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262, 267 (2005) (Washington courts "follow the objective manifestation theory of contacts"). Put another way, what owners should reasonably know and expect must be linked to the original drafter's intent and purposes, as revealed by the recorded CC&Rs. After all, Washington law gives no other method for construing "the contract they entered," which *Wilkinson* confirmed is the chief concern. 180 Wn.2d at 257. But here Division I never said, or even asked, what the original intent and purposes were behind the

CC&Rs. Instead, Division I hypothesized about the beliefs of the current owners of developed lots in Division J and emphasized the actions of HICA's current board members. *See* Op. at 8-10. Thus, Division I's decision conflicted with *Riss*. The test for whether current owners lacked notice, or have a reasonable expectation for a different plan, should be whether a covenant amendment is reasonably related to an existing covenant.

Riss also might provide a helpful reference point when this Court provides the guidance that it postponed in *Wilkinson*—the test for an improper conflict between a covenant amendment and the general plan of development. As *Riss* holds, "in Washington the intent, or purpose, of the covenants … is the *paramount* consideration in construing restrictive covenants." *Id.* at 623 (emphasis added). Thus, an amendment should be permissible as long as it does not irreconcilably defeat the original drafter's intent and purposes, as revealed by the recorded CC&Rs' text and structure.

Here, because Division I paid so little attention to Division J's recorded CC&Rs, it failed to see that nothing in the CC&Rs supported the "general plan" or "expectations" that Division I divined. For the court, all that mattered was that the owners of Division J's valuable lots did not vote on, and HICA did not approve, an amendment that would have the practical effect of increasing their assessments. Op. at 8-9. But Division J's CC&Rs said nothing about members voting on assessments. *See* CP 321-23; App.

at A-12 to -14. The CC&Rs also imposed no restriction on amendments changing significantly on a year-over-year basis, as long as the assessments were on an "equitable basis." *Id.* The CC&Rs said nothing about whether Division J lot owners should expect the HOA to use the same methodology for calculating Division J's assessments as for the other 11 subdivisions. *See id.* The CC&Rs also were silent on what budget processes HICA might use. *See id.* The original intent and purposes behind the CC&Rs were evident: to afford great flexibility, as long as assessment remained anchored to the "equitable basis" standard. The amendment was consistent with that general plan, and it did not unsettled those limited expectations. Indeed, after the amendment, HICA would still levy assessments on an equitable basis. The contrary "general plan" and "notice" that Division I found have nothing to do with the CC&Rs, only with a selective reading of the extrinsic evidence.

This Court should grant review to address Division I's conflict with *Riss* and *Hollis* and to confirm that extrinsic evidence may not be used as Division I did when applying *Wilkinson*. RAP 13.4(b)(1).

(3) <u>This Court Should Decide the Important Question Whether Minority Owners Should Have Veto Rights Over Covenants Reasonably Related to Existing Provisions</u>

This Court also should grant review under RAP 13.4(b)(4) to provide the guidance that it suggested in *Wilkinson* should be given. The

issues are of substantial public interest because, as *Riss* recognized, subdivisions' CC&Rs are an important method for setting property owners' expectations and creating desirable residential communities. But as Division I's opinion shows, uncertainty in the law has followed this Court's divided opinion in *Wilkinson*, even though established principles strongly suggest that Division I's analysis was wrong. Without this Court's guidance, at least two intractable problems will fester.

First, if the text of the CC&Rs matter so little, property rights become less certain. Prospective owners cannot look at the face of the recorded document to determine the community's general plan or to understand what they might reasonably expect to change in the future. As *Mercer* recognized, this state's recording statutes are meant "to provide constructive notice." 140 Wn. App. at 442. A subdivision's CC&Rs are recorded; its bylaws usually are not. When a judge-made rule allows the recorded CC&Rs to be disregarded in favor of extrinsic evidence, the statutes' purpose is undermined. By contrast, *Riss* and *Hollis* support the goal of providing constructive notice, because they hold that the original intent and purposes, as found in the *recorded* CC&Rs, are what matter

This case demonstrates the problem. Because Division I did not anchor its analysis in the CC&R's text or the grantor's original intent, Division I picked and chose among the extrinsic evidence. For instance, the

court ignored HICA's practice of non-uniform assessments across the 12 subdivisions that have joined HICA. HICA's bylaws expressly allow for "special assessments" whose amount may vary by lot. CP 201. Besides that, HICA has approved a unique "H" assessment for Division H lots, and HICA has a side agreement with Division N. CP 147-48, 340-41, 388-93. On top of this disregarded extrinsic evidence of non-uniform assessments, the original grantor of the 1964 CC&Rs wanted assessments to remain low, not to balloon on the backs of undeveloped lot owners. As this case shows, unless the *Wilkinson* tests are anchored firmly in the recorded CC&Rs, the analysis becomes too improvisational and results too uncertain.

Second, if Division I's opinion is any hint at what the future holds, it will curtail amendments that are designed to solve community problems. Op. at 2. Division I seemed to apply *Wilkinson* so strictly that any dissenters in a residential community have permanent veto power as long as they can say that they did not envision the particular amendment, regardless of the language in the CC&Rs. Whenever property owners add an amendment to their covenants, those amendments always are new and change the general plan of development, but only in the most literal sense—the language was not there before, and now it is. Division I's decision, by approving the selective use of contemporary extrinsic evidence, allows dissenters to pick and choose evidence to demonize any unwanted amendments as a surprise.

It is hard to imagine *any* amendment meeting the *Wilkinson* tests as they were applied by Division I.

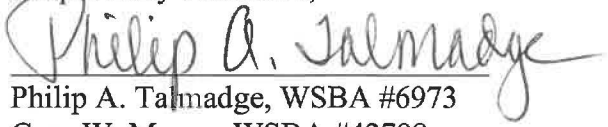
Division I's approach to extrinsic evidence also creates practical problems. Legal disputes will become more expensive, because discovery of extrinsic evidence will be critical to upholding—or defeating—an amendment. Because recorded CC&Rs might exist for decades and eventually centuries, proof problems will also arise. Memories will fade, witnesses become untraceable or die, and documents will naturally disappear. Review is critical to correct these unfortunate consequences of abandoning *Hollis*'s limits on the context rule.

G. CONCLUSION

For all these reasons, this Court should grant review. RAP 13.4(b). Without a firm anchor in the proper interpretive principles, the *Wilkinson* tests are too easy to game, as any amendment becomes too easy to portray as different from what has been done before.

DATED this 21st day of October, 2020.

Respectfully submitted,



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APPENDIX

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

SUROWIECKI FAMILY LP II, Appellant, v. HAT ISLAND COMMUNITY ASSOCIATION, a Washington nonprofit corporation, Respondent.	)	No. 79775-1-I UNPUBLISHED OPINION

ANDRUS, A.C.J. – Surowiecki Family LP II, an entity owned by Matthew Surowiecki, Sr., is a member of the Hat Island Community Association (HICA) because it owns lots within Division J of Hat Island, a private island located near Everett, Washington. Surowiecki and HICA have been litigating for years over the association's uniform, per lot assessment structure. In 2018, Surowiecki Family LP II initiated this action seeking to enforce an amendment, passed by Surowiecki as the owner of a majority of lots, to Division J's restrictive covenants purporting to modify the assessment structure for that division (Division J Amendment). The trial court invalidated the Division J Amendment on summary judgment, and Surowiecki appeals. We affirm because the Division J Amendment is inconsistent with the general plan of development for lots owned by HICA members.

FACTS

Hat Island is a private island west of Everett in Snohomish County (Island). Of the Island's 974 lots, there are 928 lots subject to the jurisdiction of the Hat Island Community Association (HICA).[1] The lots governed by HICA are grouped into 19 divisions,[2] with the plats for each recorded over time. Division J, platted in 1964, contains 101 lots. Matthew Surowiecki purchased 51 of the 101 lots within Division J in his capacity as owner or manager of Surowiecki Family LP II and dozens of other entities.[3]

All lots within Divisions A through H, and J, K, M, and N are subject to a set of identical recorded covenants, entitled "Restrictive Covenants Running with Land and Easements" (RC&Es).[4] An entity known as the Hat Island Development Company (Company) originally recorded the RC&Es against each division, including Division J. Under these covenants, the Company agreed to construct roads and to develop a water supply, golf course, and electrical system on the Island. Section 21 of the RC&Es grants an easement to lot owners to use the roads for ingress and egress.

The Company subsequently conveyed title to the roads and the other developed amenities to Hat Island Country Club, the predecessor to HICA, and the

[1] HICA was formerly known as the Hat Island Country Club. Although this occurred at some point between 1967 and 2010, it is unclear from this record when that re-naming occurred.

[2] These divisions are: A, B, C, D, E, F, G, H, J, K, M, N, and P, as well as S, U, V, W, and X. There are two additional divisions: Gedney Island Beach Tracts Div. 1 and 2, also known as Divisions T and R. These divisions are not subject to membership in HICA or under HICA's control.

[3] Surowiecki purchased 48 of the lots on Division J in his capacity as managing member or owner several limited liability companies (LLCs). Three of the lots were also purchased by Steeler, Inc., another entity controlled by Surowiecki. HICA presented evidence that the majority of Surowiecki's companies were dissolved in March 2009, and only Steeler, Inc. and Surowiecki Family LP II remain active with the Washington Secretary of State.

[4] Division I is apparently not platted.

club became responsible for assessing its members for the cost of operating and maintaining the roads and amenities:

> 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 a golf course and, if feasible, an air strip, and shall provide electric service and maintain said facilities until some 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 such additional recreational or other facilities as shall be duly authorized by its membership for the mutual benefit of all its members. . . .

(Emphasis added). Section 21 does not define the phrase "an equitable basis."

Now, HICA owns and maintains the Island's roads, golf course, marina, ferry, and water treatment and distribution facility. All HICA members, regardless of whether they live on the Island full-time, have access to all HICA amenities, including an easement over its roads. Article I, Section 2 of HICA's bylaws gives it the authority to "levy and collect assessments against its members" to operate and maintain these amenities.

HICA has historically levied annual operating assessments on a uniform, per lot basis. Surowiecki has objected to this assessment structure, arguing that a uniform, per lot assessment is not an equitable method of allocating operational costs because some of the lots are undeveloped and unbuildable, lacking access to water or power, while other waterfront lots contain large homes.

On September 20, 2018, Surowiecki, claiming a majority of Division J lot owners had voted to modify Section 21 of the RC&Es governing that division, recorded a document entitled "Amendment to Restrictive Covenants Running with the Land and Easements for the Plat of Hat Island, Division 'J'." The Division J Amendment added the following language to Section 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 value 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.

In effect, Surowiecki changed HICA's assessment structure from the uniform, per lot method to a method based on the tax assessed value of the lots, but only for lots within Division J. The Division J Amendment, if valid, would redistribute assessments to decrease Surowiecki's liability, on average, from $1,200 per lot to an average of $300 per lot. But for the owners of the 13 developed lots in Division J, their estimated assessments would increase, on average from $1,200 per lot to $7,393 per lot.

Surowiecki relied on Section 16 of the RC&Es as the basis for the modification. Section 16 provides:

> 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 <u>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</u>.

(Emphasis added).

HICA, through its counsel, notified Surowiecki and the other HICA members that the Division J Amendment was "void, unenforceable and/or does not alter HICA's assessment authority or the obligations of Division J owners."

Surowiecki filed this declaratory judgment action seeking a judicial determination that the Division J Amendment is valid. On March 1, 2019, the parties filed cross motions for summary judgment, the sole issue of which was whether a majority of Division J owners could change HICA's assessment structure for their lots. On March 29, 2019, the trial court granted HICA's motion for summary judgment, holding that the Division J Amendment was invalid, and denied Surowiecki's cross motion. Surowiecki appeals.

ANALYSIS

Surowiecki contends the trial court erred in invalidating the Division J Amendment. This court reviews cross motions on summary judgment and the legal validity of restrictive covenants de novo. Wilkinson v. Chiwawa Communities Ass'n, 180 Wn.2d 241, 249, 327 P.3d 614 (2014).

Surowiecki raises two arguments on appeal. First, he maintains that Section 16 authorized the lot owners to amend Section 21 through a majority vote. Second, he contends the amendment relates to an existing covenant and is consistent with the general plan of development for Division J under the test set out in Wilkinson. HICA argues that Section 21 is not a "covenant" subject to modification under Section 16 and that the amendment is contrary to the general

plan of development on Hat Island. We conclude HICA has the more persuasive argument here.

We will assume, without deciding, that Section 21's provision relating to HICA's authority to levy equitable assessments is a "covenant" subject to amendment by Section 16 of the RC&Es. In Washington, however, "the authority of a simple majority of homeowners to adopt new covenants or amend existing ones in order to place new restrictions on the use of private property is limited." Wilkinson, 180 Wn.2d at 255-56. When the covenants authorize the creation of new restrictions that are unrelated to existing ones, "majority rule prevails 'provided that such power is exercised in a reasonable manner consistent with the general plan of the development.'" Id. at 256 (quoting Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc., 76 Wn. App. 267, 273-74, 883 P.2d 1387 (1994)). But "when the general plan of development permits 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.; see also Ebel v. Fairwood Park II Homeowners' Ass'n, 136 Wn. App. 787, 793, 150 P.3d 1163 (2007) (amendment to covenant "may not create a new covenant that has no relation to the existing covenants"). "This rule protects the reasonable, settled expectation of landowners by giving them the power to block new covenants which have no relation to existing ones and deprive them of their property rights." Id. at 256 (internal quotation marks omitted) (quoting Meresse v. Stelma, 100 Wn. App. 857, 866, 999 P.2d 1267 (2000)).

Under Wilkinson, the first question is whether the RC&Es granted Division J lot owners the power to adopt new covenants unrelated to any existing ones or simply to make changes to pre-existing covenants. 180 Wn.2d at 255-56. If Division J owners only have the power to change existing covenants, the second question is whether the change relates to an existing covenant and whether it is consistent with HICA's general plan of development. Id. at 256.

We conclude Section 16 does not permit lot owners to create new restrictive covenants, but it allows them to modify existing ones. Interpreting restrictive covenants is a question of law, and we employ rules of contract interpretation to determine the drafter's intent, which is a question of fact. Id. at 249-50. In determining the drafter's intent, we give covenant language its ordinary and common use and will not construe a term in such a way so as to defeat its plain and obvious meaning. Id. at 250-51.

Here, Section 16 of the RC&Es provides that the "covenants shall be automatically extended for successive periods of ten years unless an instrument signed by majority of the then-owners of the lots has been recorded, agreeing to change said covenants in whole or in part." (Emphasis added). To "change" means "to make different . . . to make different in some particular but short of conversion into something else." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 373 (2002). In Wilkinson, the restrictive covenants at issue similarly authorized a majority of owners "to change these protective restrictions and covenants in whole or in part." 180 Wn.2d at 256. The court held that this language allowed amendments but not the imposition of new restrictive covenants.

Id. The language of Section 16, which is identical to the language at issue in Wilkinson, is thus an authorization to modify existing covenants, but it does not permit a majority of owners to adopt completely new ones.

Surowiecki contends the Division J Amendment did not create a new covenant but merely defined the phrase "equitable basis," an otherwise undefined term within that section, and thus relates to the existing covenant relating to the levying of assessments. There may be circumstances in which adding definitional language to a pre-existing covenant does not create a new covenant. But we cannot agree with Surowiecki that his amendment falls into this category.

Section 21 gives HICA the power to impose assessments on its members in a manner it determines to be equitable; the Division J Amendment takes that power away from HICA. Article VIII, Section 1 of HICA's bylaws requires its board of trustees to "annually determine the proposed amount for the annual operating assessment against each and every lot for the subsequent year." (Emphasis added). The amendment not only diminishes HICA's authority as set out in Section 21, but it is a radical departure from HICA's historic practice. HICA—through its board of trustees and a vote of its entire membership—has always determined what an "equitable" assessment would be for its members. Although HICA could do so, it has never delegated that authority to each division to make that decision for itself and its lot owners. And the amendment significantly increases the liability of a minority of the lot owners in Division J without any evidence they consented to this change.

Division Two's decision in Meresse v. Stelma, 100 Wn. App. 857, 999 P.2d 1267 (2000) is instructive here. In that case, a majority of homeowners in a road association voted to amend the road maintenance agreement to change the location of the road and to require lot owners to maintain a 20-foot scenic easement on each side of the road. Id. at 862. The court invalidated the amendment because it was an "unexpected expansion of the subdivision owners' obligations to share in road maintenance." Id. at 866. As the Supreme Court explained in Wilkinson, the Meresse court determined the amendment was not sufficiently related to the existing road maintenance covenant because it "[did] not place a purchaser or owner on notice that he or she might be burdened, without assent, by road relocation at the majority's whim, especially in light of the apparent permanence of the road in its long-standing, existing location." Id. at 867.

As in Meresse, we conclude the Division J Amendment is not sufficiently related to the existing covenants because nothing in the RC&Es put owners on notice that they may be burdened, without their assent, to such a significant change in annual assessments without the approval of HICA and its members.

Even if the Division J Amendment related to the assessment covenant, we nevertheless conclude it is invalid because it does not conform to HICA's general plan of development. HICA's bylaws and the 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. The undisputed evidence demonstrates that the owners of all lots in Divisions A through H, J, M and N are members of HICA. Article VIII, Section 1 of HICA's bylaws requires its

board of trustees to "annually determine the proposed amount of the annual operating assessment against each and every lot for the subsequent year." (Emphasis added). To make this determination, the board evaluates the total estimated operating expenses and the total estimated income from use-based fees charged in the form of green fees for the golf course, moorage fees at its marina, fees for water use, annual water hook-up fees, and ferry ticket sales. According to HICA, the annual assessments cover approximately half of HICA's expenses. After estimating the use-based fees HICA is likely to receive in the subsequent year, it evaluates the anticipated income from annual operating assessments levied against each lot.

The board is then required to present the budget to the association members for ratification. If the budget proposes an increase in annual operating assessments, then a vote of the ownership is required. If the members do not approve an assessment increase, then the previous year's assessment amount continues. Members are liable for the payment of any assessments "applicable to their respective lots." Any unpaid assessment constitutes a lien on the lot in the amount levied by HICA.

The Division J Amendment conflicts with this assessment structure and cannot be harmonized with it. First, the Division J Amendment delegates authority to a majority of lot owners in each division to determine what is an "equitable" assessment, thus removing that authority from HICA, as otherwise contemplated by Section 21 and HICA's bylaws. Second, the amendment mandates that the assessments in Division J, unlike any other division on Hat Island, be levied in

proportion to each lot's tax assessed value, even if a majority within HICA deemed that structure inequitable. Both aspects of the amendment are inconsistent with HICA's general plan of development.

Because we conclude that the Division J Amendment is unrelated to an existing covenant and does not conform to HICA's general plan of development, it is invalid under Washington law. The trial court did not err in granting summary judgment to HICA.

Affirmed.

Andrus, A.C.J.

WE CONCUR:

Chun, J.

Appelwick, J.

Misc RESTRICTIVE COVENANTS RUNNING WITH LAND AND EASEMENTS

THIS INDENTURE AND DECLARATION OF COVENANTS RUNNING WITH THE LAND, MADE THIS 28TH DAY OF MAY, 1964, BY HAT ISLAND DEVELOPMENT COMPANY, WASHINGTON CORPORATION, ROBERT FANKHAUSER AND THELMA FANKHAUSER, HIS WIFE, AND KARL FANKHAUSER AND VIRGINIA FANKHAUSER, HIS WIFE,

W I T N E S S E T H:

WHEREAS, SAID PARTIES ARE THE OWNERS IN FEE OF HAT ISLAND DIVISION "J", AN ADDITION TO SNOHOMISH COUNTY, WASHINGTON, AS RECORDED IN VOLUME 23 OF PLATS, PAGES 106 AND 107, RECORDS OF SNOHOMISH COUNTY, WHICH PROPERTY IS LOCATED IN SNOHOMISH COUNTY, WASHINGTON, AND

WHEREAS, IT IS THE DESIRE OF SAID PARTIES THAT SAID COVENANTS BE RECORDED AND THAT SAID RESTRICTIVE COVENANTS BE THEREBY IMPRESSED UPON SAID LAND, NOW, THEREFORE,

1701149

IT IS HEREBY MADE KNOWN THAT SAID PARTIES DO BY THESE PRESENTS MAKE, ESTABLISH, CONFIRM AND HEREBY IMPRESS UPON HAT ISLAND DIVISION "J", AN ADDITION TO SNOHOMISH COUNTY, WASHINGTON, ACCORDING TO PLAT THEREOF RECORDED IN VOLUME 23 OF PLATS, PAGES 106 AND 107, RECORDS OF SNOHOMISH COUNTY, WASHINGTON, WHICH PROPERTY IS ALL LOCATED IN SAID SNOHOMISH COUNTY, WASHINGTON, THE FOLLOWING RESTRICTIVE COVENANTS TO RUN WITH SAID LAND, AND DO HEREBY BIND SAID PARTIES AND ALL OF THEIR FUTURE GRANTEES, ASSIGNEES AND SUCCESSORS TO SAID COVENANTS FOR THE TERMS HEREINAFTER STATED AND AS FOLLOWS:

1. THE AREA COVERED BY THESE COVENANTS IS THE ENTIRE AREA DESCRIBED ABOVE.

2. NO LOT SHALL BE USED EXCEPT FOR RESIDENTIAL PURPOSES UNLESS ZONED OTHERWISE, AND NO BUILDING SHALL BE ERECTED, ALTERED, PLACED OR PERMITTED TO REMAIN ON ANY LOT, AS PLATTED, OTHER THAN ONE DETACHED SINGLE-FAMILY DWELLING NOT TO EXCEED 30 FEET IN HEIGHT AND A PRIVATE GARAGE FOR NOT MORE THAN TWO CARS; EXCEPTING THAT NOTHING HEREIN SHALL BE DEEMED TO PROHIBIT THE CONSTRUCTION, OPERATION AND MAINTENANCE OF ANY STRUCTURES, FACILITIES AND APPURTENANCES REASONABLY REQUIRED FOR WATER AND ELECTRIC SUPPLY, AND/OR OTHER UTILITIES AND SERVICES CONFORMING TO THE APPROVED DEVELOPMENT PLAN FOR THE ISLAND.

3. NO BUILDING SHALL BE ERECTED, PLACED OR ALTERED ON ANY LOT UNTIL THE CONSTRUCTION PLANS AND SPECIFICATIONS AND A PLAN SHOWING THE LOCATION OF THE STRUCTURE HAVE BEEN APPROVED BY THE ARCHITECTURAL CONTROL COMMITTEE AS TO QUALITY OF WORKMANSHIP AND MATERIALS, HARMONY OF EXTERNAL DESIGN WITH EXISTING STRUCTURES, AND AS TO LOCATION WITH RESPECT TO TOPOGRAPHY AND FINISH GRADE ELEVATION. NO FENCE OR WALL SHALL BE ERECTED, PLACED OR ALTERED ON ANY LOT UNLESS APPROVED BY SAID COMMITTEE. THE ARCHITECTURAL CONTROL COMMITTEE IS C. EDWIN JOHNSTON, E. G. VERMENTIN AND JAMES H. REID. THE ARCHITECTURAL CONTROL COMMITTEE SHALL HAVE THE ABSOLUTE RIGHT TO RESTRICT OR PROHIBIT THE CONSTRUCTION OF ANY BUILDING EVEN THOUGH SUCH A BUILDING IS NOT OTHERWISE RESTRICTED OR PROHIBITED HEREIN, IF IN THEIR SOLE DISCRETION SUCH BUILDING WOULD BE DETRIMENTAL TO THE DEVELOPMENT OF THE PLAT.

A MAJORITY OF THE COMMITTEE MAY DESIGNATE A REPRESENTATIVE TO ACT FOR IT. IN THE EVENT OF DEATH OR RESIGNATION OF ANY MEMBER OF THE COMMITTEE, THE REMAINING MEMBERS SHALL HAVE FULL AUTHORITY TO DESIGNATE A SUCCESSOR.

THE COMMITTEE'S APPROVAL OR DISAPPROVAL AS REQUIRED IN THESE COVENANTS SHALL BE IN WRITING.

4. NO DWELLING SHALL BE PERMITTED ON ANY LOT EXCEPT IN ACCORDANCE WITH THESE RESTRICTIONS AND AS APPROVED BY THE ARCHITECTURAL CONTROL COMMITTEE. THE GROUND FLOOR AREA OF THE MAIN STRUCTURE, EXCLUSIVE OF ONE STORY OPEN PORCHES AND GARAGES, SHALL BE NOT LESS THAN 800 SQUARE FEET FOR A ONE-STORY BUILDING, NOR LESS THAN 500 SQUARE FEET ON THE FIRST FLOOR FOR A DWELLING OF MORE THAN ONE STORY.

5. IN ANY EVENT, NO BUILDING SHALL BE LOCATED ON ANY LOT NEARER THAN 25 FEET TO THE FRONT LOT LINE, OR NEARER THAN 5 FEET TO ANY SIDE STREET LINE. NO BUILDING

SHALL BE LOCATED NEARER THAN 5 FEET TO AN INTERIOR LOT LINE, EXCEPT THAT NO SIDE YARD SHALL BE REQUIRED FOR A GARAGE OR OTHER PERMITTED ACCESSORY BUILDING LOCATED 50 FEET OR MORE FROM THE MINIMUM BUILDING SETBACK LINE. NO DWELLING SHALL BE LOCATED ON ANY INTERIOR LOT NEARER THAN 20 FEET TO THE REAR LOT LINE. FOR THE PURPOSES OF THIS COVENANT, EAVES, STEPS AND OPEN PORCHES SHALL NOT BE CONSIDERED AS PART OF A BUILDING, PROVIDED HOWEVER, THAT THIS SHALL NOT BE CONSTRUED TO PERMIT ANY PORTION OF A BUILDING ON A LOT TO ENCROACH UPON ANOTHER LOT.

6. NO DWELLING SHALL BE ERECTED OR PLACED ON ANY LOT HAVING A WIDTH OF LESS THAN 60 FEET AT THE MINIMUM BUILDING SETBACK LINE.

7. EASEMENTS FOR INSTALLATION AND MAINTENANCE OF UTILITIES AND DRAINAGE FACILITIES ARE RESERVED AS SHOWN ON THE RECORDED PLAT AND, IN ADDITION, EASEMENTS FOR DRAINAGE AND UTILITIES FACILITIES ARE RESERVED OVER A [illegible] FOOT WIDE STRIP ALONG EACH SIDE OF INTERIOR LOT LINES AND OVER THE REAR FIVE FEET OF EACH LOT. EASEMENTS FOR INSTALLATION AND MAINTENANCE OF OTHER UTILITIES ARE RESERVED AS SHOWN ON THE RECORDED PLAT OR OTHER INSTRUMENT OF PUBLIC RECORD.

8. NO NOXIOUS OR OFFENSIVE ACTIVITY SHALL BE CARRIED ON UPON ANY LOT, NOR SHALL ANYTHING BE DONE THEREON WHICH MAY BE OR MAY BECOME A NUISANCE TO THE NEIGHBORHOOD.

9. NO STRUCTURE OF A TEMPORARY CHARACTER, TRAILER, BASEMENT, TENT, SHACK, GARAGE, BARN OR ANY OTHER OUTBUILDING SHALL BE USED ON ANY LOT AT ANY TIME AS A RESIDENCE, EITHER TEMPORARILY OR PERMANENTLY, EXCEPT TRAILERS MAY BE USED TEMPORARILY WITH THE APPROVAL OF THE ARCHITECTURAL CONTROL COMMITTEE.

10. ANY DWELLING OR STRUCTURE ERECTED OR PLACED ON ANY LOT IN THIS SUBDIVISION SHALL BE COMPLETED AS TO EXTERNAL APPEARANCE, INCLUDING FINISH PAINTING, WITHIN 9 MONTHS FROM DATE OF START OF CONSTRUCTION, EXCEPT FOR REASONS BEYOND CONTROL, IN WHICH CASE A LONGER PERIOD MAY BE PERMITTED BY THE ARCHITECTURAL CONTROL COMMITTEE.

11. NO SIGN OF ANY KIND SHALL BE DISPLAYED TO THE PUBLIC VIEW ON ANY LOT EXCEPT ONE PROFESSIONAL SIGN OF NOT MORE THAN ONE SQUARE FOOT, ONE SIGN OF NOT MORE THAN FIVE SQUARE FEET ADVERTISING THE PROPERTY FOR SALE OR RENT, BUT NOT EXCLUDING SIGNS USED BY THE EXCLUSIVE SALES AGENT OR A BUILDER TO ADVERTISE THE PROPERTY DURING THE CONSTRUCTION AND SALES PERIOD.

12. NO ANIMALS, LIVESTOCK OR POULTRY OF ANY KIND SHALL BE RAISED, BRED OR KEPT ON ANY LOT, EXCEPT THAT DOGS, CATS OR OTHER HOUSEHOLD PETS MAY BE KEPT, PROVIDED THAT THEY ARE NOT KEPT, BRED OR MAINTAINED FOR ANY COMMERCIAL PURPOSE.

13. NO LOT SHALL BE USED OR MAINTAINED AS A DUMPING GROUND FOR RUBBISH, TRASH, GARBAGE OR OTHER WASTE SHALL NOT BE KEPT EXCEPT IN SANITARY CONTAINERS. ALL INCINERATORS OR OTHER EQUIPMENT FOR THE STORAGE OR DISPOSAL OF SUCH MATERIAL SHALL BE KEPT IN A CLEAN AND SANITARY CONDITION.

14. HAT ISLAND DEVELOPMENT COMPANY SHALL PROVIDE A REASONABLE SOURCE OF WATER SUPPLY FOR THE OWNERS OF EACH LOT NOT LATER THAN TWO YEARS FROM THE DATE OF THIS INSTRUMENT. NO WELLS OF ANY KIND SHALL BE ALLOWED EXCEPT THOSE OWNED AND OPERATED BY HAT ISLAND DEVELOPMENT COMPANY OR HAT ISLAND COUNTRY CLUB, INC., OR THEIR SUCCESSORS, AS THE CASE MAY BE, FOR THE GENERAL WATER SUPPLY.

15. NO INDIVIDUAL SEWAGE DISPOSAL SYSTEM SHALL BE PERMITTED ON ANY LOT UNLESS THE SYSTEM IS DESIGNED, LOCATED AND CONSTRUCTED IN ACCORDANCE WITH THE REQUIREMENTS, STANDARDS AND RECOMMENDATIONS OF THE SNOHOMISH COUNTY HEALTH DEPARTMENT. APPROVAL OF SUCH SYSTEM AS INSTALLED SHALL BE OBTAINED FROM SUCH AUTHORITY.

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.

17. ENFORCEMENT SHALL BE BY PROCEEDINGS AT LAW OR IN EQUITY AGAINST ANY PERSON OR PERSONS VIOLATING OR ATTEMPTING TO VIOLATE ANY COVENANT, EITHER TO RESTRAIN VIOLATION OR TO RECOVER DAMAGES, OR BOTH.

18. INVALIDATION OF ANY ONE OF THESE COVENANTS BY JUDGMENT OR COURT ORDERS SHALL IN NO WISE AFFECT ANY OF THE OTHER PROVISIONS WHICH SHALL REMAIN IN FULL FORCE AND EFFECT.

19. THE ARCHITECTURAL CONTROL COMMITTEE SHALL HAVE DISCRETION TO ALLOW EXCEPTIONS TO ANY PROVISION OF THIS DOCUMENT.

20. ALL WATERFRONT PIERS, WHARVES, BULKHEADS AND SIMILAR STRUCTURES SHALL BE SUBJECT TO ARCHITECTURAL CONTROL COMMITTEE APPROVAL AS WELL AS THE APPROVAL OF SUCH GOVERNMENT AGENCIES HAVING AUTHORITY IN SUCH MATTERS.

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 GEONEY 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 A GOLF COURSE AND, IF FEASIBLE, AN AIR STRIP, 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. THE HAT ISLAND DEVELOPMENT COMPANY SHALL PROVIDE TRANSPORTATION TO AND FROM THE SAID ISLAND ON A REASONABLE BASIS FOR A PERIOD OF NOT LESS THAN EIGHTEEN (18) MONTHS FROM DATE HEREOF AND IN THE EVENT PUBLIC TRANSPORTATION TO AND FROM THE SAID ISLAND IS NOT AVAILABLE AFTER THE EXPIRATION OF THE SAID PERIOD, HAT ISLAND DEVELOPMENT COMPANY SHALL FURNISH THE SHIP KNOWN AS THE HOLIDAY NOW OWNED BY THE SAID COMPANY TO THE CLUB AT A REASONABLE RENTAL THEREFORE UNTIL SUCH TIME AS PUBLIC TRANSPORTATION IS AVAILABLE OR SOME OTHER SUITABLE MEANS HAS BEEN PROVIDED FOR TRANSPORTATION TO AND FROM THE SAID ISLAND. THE HAT ISLAND DEVELOPMENT COMPANY SHALL PROVIDE THE SAID CLUB WITH CERTAIN BEACH AREAS AS SPECIFIED UPON THE PLAT OR PLATS HEREAFTER RECORDED BY IT BUT THE DEVELOPMENT AND CONSTRUCTION OF ANY BEACH FACILITIES OR POOLS SHALL BE THE RESPONSIBILITY OF THE SAID CLUB. THE HAT ISLAND DEVELOPMENT COMPANY SHALL HAVE THE RIGHT TO LEASE THE AIR STRIP AND GOLF COURSE TO THE SAID CLUB FOR A REASONABLE RENTAL.

22. THERE SHALL BE AN EASEMENT FOR INGRESS AND EGRESS ACROSS THE BEACH ON SAID PLATS BETWEEN MEAN HIGH TIDE AND EXTREME LOW TIDE FOR BEACH LOT OWNERS ONLY WHOSE PROPERTY ABUTS UPON AND INCLUDES SECOND CLASS TIDELANDS.

23. ALL OIL, GAS AND MINERAL RIGHTS IN THE SAID LAND ARE HEREBY RESERVED TO HAT ISLAND DEVELOPMENT COMPANY.

IN WITNESS WHEREOF, THE UNDERSIGNED HAVE AFFIXED THEIR SIGNATURES.

Karl E Funkhauser — Robert S Funkhauser

Virginia C. Funkhauser — Helen M Funkhauser

HAT ISLAND DEVELOPMENT COMPANY

EVERETT TRUST & SAVINGS BANK

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AMENDMENT TO RESTRICTIVE COVENANTS RUNNING WITH THE LAND AND EASEMENTS FOR THE PLAT OF HAT ISLAND, DIVISION "J"

THIS AMENDMENT to the Restrictive Covenants Running with the Land and Easements for the Plat of Hat Island, Division "J," is made this 20th day of September, 2018.

RECITALS

WHEREAS, the Plat for Hat Island Division "J" was recorded on May 15, 1964, in Volume 23 of Plats, Pages 106 and 107, records of Snohomish County, under Snohomish County Auditor no. 1700583;

WHEREAS, an instrument entitled "Restrictive Covenants Running with the Land and Easements" for the Plat of Hat Island, Division "J," was recorded on July 19, 1965, under Snohomish County Auditor's No. 1701149 (hereinafter, "Covenants"); and

WHEREAS, pursuant to Section 16 of the Covenants, a majority of the owners of the lots within Hat Island Division "J" have signed this instrument consenting to amendment of the Covenants.

NOW, THEREFORE, the Covenants are amended in the following particulars:

A. The following language is added to Section 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 value 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."

This AMENDMENT TO RESTRICTIVE COVENANTS RUNNING WITH THE LAND AND EASEMENTS FOR THE PLAT OF HAT ISLAND, DIVISION "J," shall take effect upon recording. Except as amended by this instrument, the Covenants shall remain in full force and effect.

Matt Surowiecki Sr., majority owners of lots in Hat Island Division "J"

< notary acknowledgment on following page >

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this 20th day of September, 2018, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Matthew Surowiecki Sr., the person who executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of a majority of the lot owners of Hat Island Division "J," as identified on the signed written consent forms attached hereto as Exhibit C, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

Print Name: Christina Vargas
NOTARY PUBLIC in and for the State of Washington.
Residing at: Kent, WA
My Commission Expires: 1/9/21

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 79775-1-I to the following:

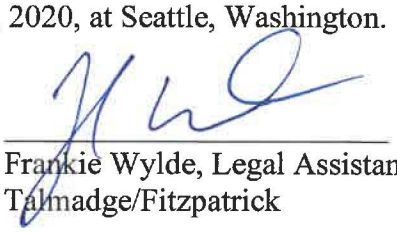
J. David Huhs, WSBA #37990
Laurel Law Group, PLLC
5806 119th Avenue SE, Suite A #288
Bellevue, WA 98006

Jeremy L. Stilwell, WSBA #31666
Barker Martin PS
719 Pike Street, Suite 1150
Seattle, WA 98101-3946

Original electronically filed via appellate portal with:
Court of Appeals, Division I
Clerk's Office

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

DATED: October 21, 2020, at Seattle, Washington.



Frankie Wylde, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

October 21, 2020 - 4:32 PM

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Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	79775-1
Appellate Court Case Title:	Surowiekci Family L.P., II, Appellant v. Hat Island Community Assoc., Respondent
Superior Court Case Number:	18-2-09739-6

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