

Case No. _____

81873-8

SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA LAKE,

Appellant

v.

WOODCREEK HOMEOWNERS ASSOCIATION,
a Washington homeowners association;
and GLEN R. CLAUSING, a single man,

Respondent.

FILED
JUL 23 2008

CLERK OF SUPREME COURT
STATE OF WASHINGTON

COMBINED ANSWER TO
WOODCREEK HOMEOWNERS ASSOCIATION
AND GLEN R. CLAUSING'S
PETITIONS FOR DISCRETIONARY REVIEW

CLERK

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STATE OF WASHINGTON

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I. STATEMENT OF THE CASE

Sandra Lake owns a condominium and lives at the Woodcreek townhouse condominiums in Bellevue, Washington. (CP 76.) Her two-story end unit had territorial views and natural light. (CP 843; *see also* CP 838, 844, 845.) She previously owned and lived in another unit within the Woodcreek condominiums, and she purchased her current unit in 1996 to take advantage of the light and views. (*See* CP 430-34, 826, 844, 845.) These amenities are important to her lifestyle and her work as an artist. (*See* CP 840, 843-44, 845.)

In July 2004, Petitioner Glen Clausing, an attorney who lives in a one-story unit in the building only a few feet across a pathway from Ms. Lake's unit, began construction of a second story addition that blocked Ms. Lake's light and view. (*See* CP 77-78, 839, 840, 843-44, 845.) Instead of a view, she now looks out on a two-story uninterrupted wall that significantly reduces the light entering her home. (CP 838, 839, 840.) Mr. Clausing built this second story after the Board of Directors of Petitioner Woodcreek Homeowners Association peremptorily reviewed and approved his request to build without any investigation, inquiry, or notice to Ms. Lake or the Association membership of its intent to consider Mr. Clausing's request. (CP 6, 26.) The second story addition is referred to as a "bonus room". (*See* CP 386.)

Between 1972 and 1976 the Woodcreek condominiums were built over three phases. (CP 205-09, 279-80, 344, 386.) The development consists of 33 buildings with varying styles of units in each building, four units in most buildings, and a total of 150 units. (See CP 277, 342, 385.) Both single story and two story units exist in the same buildings. (CP 277, 385.) A recreation facility with a swimming pool, clubhouse, and tennis courts is available for all units to enjoy. (See CP 281, 387.) All unit owners are members of the Woodcreek Homeowners Association with voting powers and common expense obligations. (CP 283, 387-88.)

Woodcreek Homeowners Associates, the original owners of the property, recorded the original Declaration for the Woodcreek condominiums in 1972. (CP 218-66.) Subsequent amendments to the Declaration were recorded in 1973, 1974, and 1976 at the completion of each of three phases of the development, (CP 273-326, 341-64, 383-93), with a further amendment recorded in 1977, (CP 395-96).¹ The Woodcreek Declaration governs the homeowners' rights and responsibilities as required by the Horizontal Regimes Property Act, RCW 64.32 et seq.

¹ Additional amendments revising portions of the Declaration were recorded in 1987 and 1992. The content of those amendments is not relevant; they are provided in the clerk's papers at 398-405.

On May 19, 2004, Mr. Clausing submitted a request for approval from the Board to add a “bonus room” to his unit. (*See* CP 5, 6, 15, 16, 26, 27, 54.) The Board considered and approved Mr. Clausing’s request at a regular meeting on May 20, 2004, **the day after** Mr. Clausing submitted the request. (*See id.*) On July 10, 2004, Ms. Lake received notice of the Board’s approval of Mr. Clausing’s bonus room and the pending construction. (CP 77) Construction began within the next day or so. (CP 77; *see also* CP 835.)

Ms. Lake immediately attempted to contact the President of the Board, voiced her objections to two other Board members, and contacted the Association manager. (CP 77; CP 836.) Ms. Lake attended the next Board meeting on July 15, 2004, and again raised her objections to the Board’s actions. The Board responded that their decision was justified and proper. (CP 77; *see also* CP 63, 837, 843.)

Mr. Clausing’s bonus room was completed in the Fall of 2004. (CP 125; *see also* CP 6, 27.) The bonus room created a solid wall from the ground to the second floor roof in place of Ms. Lake’s former territorial views of a mountain, tree tops, and sky from her family room, office, front door, and hall window, and blocked much of the natural light Ms. Lake enjoyed. (CP 838, 839, 840, 843-44, 845.)

On December 5, 2005, Ms. Lake filed an action against Woodcreek and Mr. Clausing. (CP 1-10.) In its Answer, Woodcreek admitted many material facts and actions supporting Ms. Lake's claim of liability. (See CP 5, 6, 7-9, 15, 16, 17, 18-19.) Ms. Lake filed a motion for summary judgment based on Woodcreek's admissions. (CP 46-75.) Mr. Clausing filed a combined response to Ms. Lake's motion for summary judgment and his own cross-motion for summary judgment dismissal of Ms. Lake's claims and Woodcreek's cross claims. (CP 101-123.) Despite its admissions, Woodcreek joined in Mr. Clausing's cross-motion for summary judgment against Ms. Lake and then moved to amend its Answer retracting admissions, changing factual allegations, changing the relief sought, and adding affirmative defenses not previously pled. (CP 617-637, 664-65.) One week before the scheduled hearing on summary judgment, the trial court granted Woodcreek's motion to amend its Answer over Ms. Lake's objections. (CP 638-650, 720-722.) On November 22, 2006, the trial court heard and granted Mr. Clausing's motion for summary judgment dismissal of Ms. Lake's claims. (CP 777-781.) Ms. Lake appealed to the Court of Appeals Division One and prevailed. *Lake v. Woodcreek Homeowners Assoc.*, 142 Wn. App. 356, 174 P.3d 1442 (2007).

II. ARGUMENT WHY THE PETITIONS SHOULD BE DENIED

A. The Petitions Should Be Denied Because Ms. Lake Prevails Whether Or Not *Lake* And *McLendon* Conflict.

Section 12 of the 1973 amended Woodcreek Declaration, which is the provision required by RCW 64.32.090(10), does not govern Ms. Lake's claim. Section 12 of the 1973 amended Woodcreek Declaration, states, in relevant part,

Except as this Declaration may be amended as provided herein, no subdivision or combination of any apartment unit or units or of the common area or facilities or limited common areas or facilities may be accomplished except by authorization by the affirmative vote of 51% of the voting power of the owners of the apartment units

(CP 289 (emphasis added).) The emphasized language explicitly designates Section 12 inferior to Section 19 of the 1973 amendment to the Declaration. Section 19 corresponds to RCW 64.32.090(13) and provides, in part,

19. AMENDMENT TO DECLARATION: This Declaration may be amended consistent with the laws of 1963, Chapter 156 (RCW 64.32) upon securing the written consent of sixty (60) percent of the apartment owners; provided, however, that *any amendment altering the value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities shall require unanimous written consent of all apartment owners....*

(CP 298 (emphasis added).) Therefore, in this case, the result for Ms. Lake is the same whether *Lake v. Woodcreek Homeowners Assoc.*, 142

Wn. App. 356, 174 P.3d 1442 (2007), and *McLendon v. Snowblaze Recreational Club Owners Assoc.*, 84 Wn. App. 629, 929 P.2d 1140 (1997), conflict over the interpretation of RCW 64.32.090(10)² and, if they conflict, regardless of which decision correctly interprets RCW 64.32.090(10).³

Lake also addresses the questions whether Mr. Clausing's bonus room **created new common area** changing the undivided percentage interest each owner has in the property and concludes it did. *Lake*, 142 Wn. App. at 365-66. As a result, the approval of Mr. Clausing's bonus room required a unanimous vote. *Id.* at 366. *McLendon* does not address the question of newly created common area. *McLendon*, 84 Wn. App. 629. It could not do so because the lease of common area to be used as private apartment area involves a previously existing common area storage space. No **new** common area was constructed. *Id.* at 631. The question

² Mr. Clausing states that the *Lake* decision creates a split regarding the interpretation of "other provisions of the HPRA." (Clausing Petition 7.) Mr. Clausing does not identify the "other provisions" he refers to and does not support this statement with argument.

³ The provisions in the *McLendon* and *Lake* declarations corresponding to RCW 64.32.090(10) are not identical. The *McLendon* court considered the following language from the declaration,

Apartment owners having sixty percent (60%) of the votes may provide for the subdivision of [sic] combination or both, of any apartment or apartments or of the common areas, or any parts thereof [sic], and the means for accomplishing such subdivision or combination or both....

The initial clause rendering Section 12 of the 1973 amended Woodcreek Declaration inferior to Section 19 is not included in the *McLendon* declaration as quoted by the *McLendon* court.

of newly created common area alone leads to the result in *Lake*, even if *Lake* and *McLendon* otherwise conflict. This Court would, therefore, not reach the questions whether *Lake* and *McLendon* conflict over the reading of RCW 64.32.090(10) and what is the correct interpretation.

Mr. Clausing claims that building new structures does not create new common area and that, instead, it improves existing common area. He offers no support for this theory. Moreover, a new structure **does** create common area where none previously existed. (RCW 64.32.250; CP 282-83 (Section 5 of 1973 amended Declaration defining common area)).

B. The Construction Of Mr. Clausing's Bonus Room Necessarily Changed The Values and Undivided Percentage Interests Recorded In The Declaration.

Woodcreek Homeowners Association and Mr. Clausing confuse and misstate the purpose for establishing in the Declaration the "value" of the total property and of each unit and the percentage of undivided interest owned by each unit in the common area. The purpose is to state the values (meaning in this instance, the number or mathematical value) to be used in calculating each unit's relative percentage of interest in the common areas, and therefore, each unit's share of common expense obligation and recording that on title in the declaration. See RCW 64.32.050(1), 080, 64.32.090, 64.32.140. The calculation is made by the developer who establishes the "value" of each unit. See RCW 64.32.090(6). The "value"

of each unit is determined by a variety of factors including location within the condo project and/or building, view, orientation, floor in the building, size of the unit, etcetera. The overall value of the property and the individual values for each unit are not necessarily related to fair market value, which is controlled by factors created by market demand, financing, and time. The actual sale price of a unit does not impact or change the individual unit value or the total property value recorded in the declaration. This fact is true even as units are resold over time. The total of all unit "values" equals the total value of the condominium property (100 percent). *See* RCW 64.32.050(1).

The developer then allocates the share of common expense obligation (and other benefits and burdens, *i.e.* voting) to each unit by calculating the ratio of the individual value of the unit to the total value of all units. *See id.*, RCW 64.32.050(1), 080. This calculation establishes the undivided percentage interest in the common area that is the basis of the percentage share of common expense obligation for each unit. RCW 64.32.080.

Again, the subsequent sale of units at different sale prices does not affect the "value" stated in the Declaration and accordingly does not affect the undivided percentage in the common area, and therefore, the percent of common area expenses to be paid by each unit. The question in this

case is whether there is a change in common expense obligations that is caused by the conversion of common area and the creation of new structural common area for Mr. Clausing's exclusive use. Therefore, to focus on "value" as the driving force, as Mr. Clausing and Woodcreek do, is to focus on the wrong portion of the equation.

If there is a relative change in either the initial value or the undivided percentage in the common area, and therefore the percent of common area expense allocation, RCW 64.32.090(13) and the Declaration both require unanimous homeowner approval of the change. Regardless of the fact that adding 458 square feet of living space to a unit would increase its fair market value, the construction of a bonus room has at least two effects on the common area controlled by the Declaration. First, previously existing common area was converted to apartment area for the exclusive control and benefit of Mr. Clausing. Second, the bonus room created additional new common area structure that affects the allocation of common expense obligations in terms of maintenance and repairs.

The Woodcreek Board acknowledged the increase in common area resulting from the bonus room by increasing Mr. Clausing's monthly common area assessment. In doing so, the Board effectively reallocated the percentage of common area expense obligations that are paid by each unit when calculated based on the total (100 percent) established by the

Declaration for all common area expense allocations. By imposing an additional obligation on Mr. Clausing to pay for the additional common area, the Board increased his relative percentage interest in the common area. *See* RCW 64.32.050(1), 64.32.080. Because the total must total 100 percent, a corresponding decrease must be made for all other units.

Therefore, a reallocation of percentage in common area interest results in an automatic recalculation of the value for each unit based on the total value of the property (100 percent of all units) recorded in the Declaration. *See id.* The taking away common area that is owned by all and giving it to an individual causes this change because the conversion of common area into a unit decreases the total common area and therefore each unit's percentage of undivided interest in it. For example, if three owners have a 33.33 percent interest in one-hundred percent of common area and one of the owners appropriates three percent of the total common area for his exclusive use, then all three of the owners are left with only a 33.33 percent interest in the remaining total common area which is 97 percent of the 100 percent that was previously common area. Although the stated number "33.33" has not necessarily changed, it's worth or value has. By converting part of the Woodcreek common area into Mr. Clausing's apartment for his exclusive use, the total common area that each owner has an undivided percentage interest in has decreased.

RCW 64.32.080 states, “[T]he common expenses [of the property] shall be charged to, the apartment owners according to the percentage of undivided interest in the common areas and facilities.” As a result, common area and common expenses are **necessarily linked** to the undivided percentage interest each owner has in the property. *See Keller v. Sixty-01 Associates of Apartment Owners*, 127 Wn. App. 614, 623-24, 112 P.3d 544 (2005). “[O]ne [can] not be changed without the other being changed as well.” *Id.* at 623. Sections 6 and 15 of the 1973 amended Declaration and Article IV, Section 2 of the Bylaws impose assessments on unit owners for maintenance and repair of common area and those assessments are based on each owner’s undivided percentage interest. (CP 283, 294, 413.)

When Mr. Clausing constructed his bonus room he appropriated the common area above the elevation level of the ceiling height recorded in the Declaration and enclosed that space, thereby converting common area into an area for his exclusive use. Mr. Clausing’s bonus room also created new common area (*e.g.*, walls, wiring, siding, and exterior) and new common expenses (*e.g.*, maintenance and replacement of siding and painting of exterior) at Woodcreek. RCW 64.32.050(1), 64.32.080, and the Declaration dictate that Mr. Clausing’s construction of a bonus room results in a change to common expense obligations that, in turn,

automatically result in a change in the allocation of unit values as compared to the total property value recorded in the Declaration. Division One correctly analyzed these questions. *Lake*, 142 Wn. App. 356.

Mr. Clausing asserts that section 12 of the 1973 amended Declaration provides that the declared values do not change. (Clausing Pet. at 13.) The language of section 12 does not support this assertion.⁴ It requires that in order to combine units a number of factors must be included in the plan that is filed and recorded. Value is one of these factors, and recording a revised plan necessarily modifies the original Declaration, which sets forth value and undivided percentage interest, as well as square footage, and metes and bounds. Some or all of these factors may change; it is a fact specific question. In addition, Section 12 dictates changes in the ownership of the percentage of undivided interest of a unit as well as the recorded metes and bounds description. The purpose of these changes is to modify the recorded descriptions of the units and property and the declared undivided percentage interest associated with one unit or another. Section 12 is designed for the reallocation of the identical percentage interest as described by metes and bounds and prohibits an increase in the undivided interest in common areas and facilities greater than existed previously for a particular unit. Therefore, in

⁴ The text of section 12 of the 1973 amended Declaration is included in the appendix.

contrast to section 19 of the 1973 amended Declaration which requires a unanimous vote for changing the undivided percentage interest, section 12 is only for the situation when the whole undivided percentage interest remains unchanged and portions are reallocated among unit owners. This is not the case with Mr. Clausing's bonus room which added space to his unit taken from common area. There is no undivided percentage interest to reallocate in this instance, it is newly created and therefore, implicates the unanimous consent required by section 19. Likewise, Woodcreek asserts that section 12 does not dictate any effect on the percentage of undivided ownership when common area is combined with a unit. (Woodcreek Pet. at 4-5.) However, RCW 64.32.050(1) and .080 do.

The Petitioners also claim that because an explicit vote of the homeowners to amend the values and percentages in the Declaration was not held the values and percentages did not change. The declared values and percentages can be affected by actions other than an explicit vote to alter the assigned numbers representing the values and percentages. As discussed *supra*, value, the percentage of undivided interest in the common areas, voting power, and the allocation of common expenses are all tied to each other. *See* RCW 64.32.050(1), 64.32.080, 64.32.090(6); *see also* CP 283, 290-91, 294 (Sections 6, 13(E) & (F), & 15 of the 1973 amended Declaration obligating the entire association to maintain

common area and assessing a common area maintenance fee to each homeowner). Actions that alter these items affect the others. Conversion of common area to apartment area or creation of new common area changes the basis from which common expenses arise. This change in basis results in a change to the values and undivided percentage interests recorded on title in the Declaration.

Woodcreek and Mr. Clausing focus on the argument that the square footage added does not affect the value because the original developer did not use only square footage to assigning values and percentage interests. The Petitioners' comparison of the value and undivided percentage interest of units with bonus rooms to units without bonus rooms cannot show more than that the developer used other and/or additional means to determine value. It is not known how the developer actually determined the values or the percentage interests and the record contains no evidence supporting a list of factors or more specifically whether the bonus rooms were the sole factor. Thus, the Petitioners' analysis is futile.

Even if the record supported Woodcreek and Mr. Clausing's analysis, after the developer completed the final phase and recorded the final amended Declaration the rationale of the developer is no longer relevant. Once the Association took over governance of the

condominium, the developer's actions had been recorded on title and completed. Whether the developer was precise, used exact criteria or used a different rationale has no relevance now. The question is whether the addition of a bonus room results in a change in undivided percentage interests under the Declaration that the developer recorded and that the Association is bound by today.

Once the developer recorded the final amended Declaration the Woodcreek homeowners, including Ms. Lake, have the right to rely, without change except as authorized by the Declaration, on the undivided percentage interests that are set forth in the Declaration. Mr. Clausing's bonus room creates new common area, new limited common area, changes the square footage of the complex, increases square footage for the tax assessment, adds height to the elevation tables, changes his unit from a single story to a two story and takes the view away from his neighbor. Such changes alter the basis from which common expense obligations arise and are not authorized by the Declaration except by unanimous consent. (CP 298.)

C. **The Petitions Should Be Denied Because *Lake* And *McLendon* Do Not Conflict.**

McLendon stands for the general proposition that areas of a condominium may be combined. *McLendon*, 84 Wn. App. at 632. *Lake*

concludes that **if** the character of an area is converted, unanimous approval is required when the percentage of undivided interest in the common areas is changed by that act. *Lake*, 142 Wn. App. at 363. It is because Mr. Clausing appropriated common area and now has exclusive private use of it that the difference in the use of the term “converting” versus “combining” is significant. As Division One points out, the **character** of the area above Mr. Clausing’s garage changed from common area air space that provided light and views for common enjoyment into a bonus room that is integrated into Mr. Clausing’s unit and now encloses that space for his sole use and enjoyment. *See Lake*, 142 Wn. App at 361-62. As discussed *supra*, the conversion of the character of common area to apartment area changes the percentage of undivided interest each unit has in the common area and consequently changes the value of each unit.

Moreover, even if combining areas and converting the character of an area are, in fact, the same action, the analysis in *Lake* extends beyond the *McLendon* decision. *McLendon* does not address the voting requirements when an owner’s undivided percentage interest in the property is changed. Because the cases address different questions, there is no conflict between *McLendon* and *Lake*. As a result condominiums geographically located in different divisions of the Court of Appeals are

not faced with different governing schemes. Therefore, the petitions should be denied.

The Petitioners base their arguments that *Lake* and *McLendon* conflict on assumptions that can not be substantiated. They assume that because the *McLendon* court disagrees that a provision (which is not set forth in the decision) governing amendment to the declaration does not apply that court must have, therefore, “held” that combining common area and an apartment does not change the value or undivided percentage interest in the property, and correspondingly, that unanimous consent is not required by statute or the declaration. (See Clausing Pet. 8, 9; see also Woodcreek Pet. 12-13.) To argue that *McLendon* rejects what *Lake* concludes and that *McLendon* is therefore in conflict with *Lake* takes the *McLendon* decision, and its dicta, well beyond the stated analysis.

Any conflict between *McLendon* and *Lake* is based solely on dicta from both cases and both cases are limited by the language in the declarations they examined. *McLendon* does not provide enough information about what provision was contemplated when it states,

... McLendon argues that section 30 of the 1987 Declaration requires unanimous approval to combine the apartment and common area ... That provision, or at least the portions addressed by the parties here, controls amendment of the entire declaration. It does not address the question before us: voting requirements for combining a common area and an apartment.

McLendon, 84 Wn. App. at 632-33. The court offers no additional information or analysis.

Even if, as Woodcreek suggests, the declaration language in *McLendon* must have mirrored RCW 64.32.090(13), the *McLendon* court's statement (1) does not establish precedent on the issue of voting requirements when an owner's undivided percentage interest is changed and (2) is dicta. See *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 262 fn 4, 11 P.3d 762, 809 (2000). *McLendon* considers whether subdivision and/or combining of areas is possible and answers in the affirmative. It does not, in any manner setting precedent, consider or discuss whether the combination of areas changes the percentage of undivided interest in the common areas. Furthermore, the language relied on by Woodcreek in the *Lake* decision is also dicta.⁵ See *Lake*, 142 Wn. App. at 364-65.

D. Current Case Law Provides Condominium Associations With Certainty.

Woodcreek and Mr. Clausing's position would allow those few people who control the board of a homeowner association to control the majority of interests by making material changes to allocations of common

⁵ The language that concerns Mr. Clausing is from C.J. Applewick's concurrence, as is much of the language from the *Lake* opinion that Mr. Clausing complains about (see Clausing Petition 2, 7, 10, 14-15, 20), and plainly has no precedential value. Mr. Clausing's petition should not be granted on the basis of C.J. Applewick's concurrence.

area benefits to the exclusive benefit of select individuals. However, the power of homeowner associations and their boards, and the rights of individual homeowners in an association, is limited by statutory law and the recorded declaration of each condominium. *See* RCW 64.32 et seq., *Shorewood West Condo Ass'n. v. Sadri*, 140 Wn.2d 47, 52, 992 P.2d 1008 (2000); (CP 218-66, 273-326, 341-64, 383-93, 395-96 (Woodcreek Declaration)). This limitation of powers is, in fact, demonstrated by RCW 64.32.090(10) and Section 12 of the 1973 amended Declaration which require a vote of, at a minimum fifty-one percent, all the voting power in the condominium (and not just the Board's approval) in order for two owners to subdivide and combine their exclusive private unit areas, or for that matter, one owner of two units to subdivide or combine his exclusive private unit areas.

When an owner's undivided percentage interest in the property as stated in the declaration is changed, *Lake* does not prohibit either combination or conversion of areas. It requires faithfulness to the governing statutes including RCW 64.32.090(10) and (13), and the corresponding governing language in the declaration that requires unanimous approval of all homeowners. *Lake* and *Bogomolov* provide condominium associations and their boards certainty on this question. *See Bogomolov v. Lake Villas Condominium Association*, 131 Wn. App. 353,

370, 127 P.3d 762 (2006) (construction on common area that limits the use of common area and reserves exclusive rights to the common area to specific owners converts the common area to limited common area).

Lake, Bogomolov, and Keller, provide sufficient guidance to condominium associations and their boards on what the law requires when various structural modifications are made. If structural modifications, such as skylights, hot water tanks, or garden boxes, convert common area to apartment area for the exclusive benefit of one unit and change the declared percentages of undivided interest in the common area, then these cases govern. If structural modifications do not convert common area to apartment area for the exclusive benefit of one unit and do not change the declared percentages of undivided interest in the common area, then the question is beyond the scope of issues raised in *Lake*.

Finally, *Lake* does not ignore principles of statutory construction. Mr. Clausen's argument that the *Lake* discussion of RCW 64.32.090(10) creates a conflict with RCW 64.34.228(3) in violation of principles of statutory construction is a *non sequitur*. RCW 64.32.090(10) and 64.34.228(3) necessarily govern different condominiums. They cannot apply to the same condominium at the same time, and therefore cannot be read to conflict as Mr. Clausen implies. See RCW 64.34.010(1) (the Condominium Act applies only to condominiums created after July 1,

1990 with certain provisions, not including 64.34.228(3), in the Condominium Act applying to condominiums created before July 1, 1990 only in limited circumstances); RCW 64.34.010(2) (Chapter 64.32 RCW does not apply to condominiums created after July 1, 1990); *see also Beckman v. Wilcox*, 96 Wn. App. 355, 364-65, 979 P.2d 890 (1999) (statutes must be construed together when they relate to the same person or thing). Moreover, if the Legislature intended for RCW 64.34.228(3) to apply to condominiums governed by HPRA, it could have so designated, as it has for at least 23 other provisions, or portions thereof, from Chapter 64.34 RCW. *See* RCW 64.34.010(1).

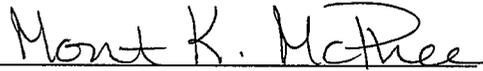
III. CONCLUSION

Ms. Lake requests that the Court deny the Petitions for Discretionary Review from Woodcreek Homeowners Association and Glen R. Clausing. The Petitions do not meet the standard for granting discretionary review. RAP 13.4(b). The Court will not reach the question whether the decisions in *Lake* and *McLendon* conflict because Ms. Lake prevails on two theories unrelated to the *McLendon* decision. Moreover, *Lake* and *McLendon* do not conflict. The *Lake* decision takes the law governing condominiums to the next analytical step in the line of cases including *McLendon*, *Keller*, and *Bogomolov*. The current case law, including *Lake*, provides certainty to condominium associations when the

character of an area is converted and the undivided percentage interests in the common area, as stated in the declaration, are changed. Therefore, the decision handed down by Division One should stand and the Petitions should be denied.

RESPECTFULLY SUBMITTED this 23rd day of July, 2008.

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APPENDIX

RCW 64.32.050

(1) Each apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the declaration. Such percentage shall be computed by taking as a basis the value of the apartment in relation to the value of the property.

RCW 64.32.080

The common profits of the property shall be distributed among, and the common expenses shall be charged to, the apartment owners according to the percentage of the undivided interest in the common areas and facilities.

RCW 64.32.090

The declaration shall contain the following:

(6) The value of the property and of each apartment, and the percentage of undivided interest in the common areas and facilities appertaining to each apartment and its owner for all purposes, including voting.

(10) A provision authorizing and establishing procedures for the subdividing and/or combining of any apartment or apartments, common areas and facilities or limited common areas and facilities, which procedures may provide for the accomplishment thereof through means of a metes and bounds description.

(13) The method by which the declaration may be amended, consistent with this chapter: PROVIDED, That not less than sixty percent of the apartment owners shall consent to any amendment except that any amendment altering the value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities shall require the unanimous consent of the apartment owners.

RCW 64.32.250

(1) All apartment owners, tenants of such owners, employees of such owners and tenants, and any other person that may in any manner use the property or any part thereof submitted to the provisions of this chapter, shall be subject to this chapter and to the declaration and bylaws of the association of apartment owners adopted pursuant to the provisions of this chapter.

(2) All agreements, decisions and determinations made by the association of apartment owners under the provisions of this chapter, the declaration, or the bylaws and in accordance with the voting percentages established in this chapter, the declaration, or the bylaws, shall be deemed to be binding on all apartment owners.

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10. SERVICE OF PROCESS: William J. Boyce, whose business address is 1164 Olympic National Life Building, Seattle, Washington 98104 is hereby designated as the person to receive service of process in the cases provided in the laws of 1963, Chapter 156.

11. PERCENTAGE OF VOTES REQUIRED IN CERTAIN CASES:
Any decision on the question of whether to rebuild, repair, restore or sell the property in the event of damage or destruction of all or part of the property shall require the affirmative vote of 51% of the voting power of all owners of apartments.

12. PROCEDURES FOR SUBDIVISIONS AND/OR COMBINING:
Except as this Declaration may be amended as provided for herein, no subdivision or combination of any apartment unit or units or of the common areas or facilities or limited common areas or facilities may be accomplished except by authorization by the affirmative vote of 51% of the voting power of the owners of the apartment units at a meeting called upon written notice which notice shall contain a general description of the proposed action and the time and place of meeting. If so approved, any such division or combination shall be the subject of a filed revised plan consistent herewith, and such subdivision or combination shall be ineffective for any purpose until so filed of record. When an apartment is subdivided the area deleted from the original apartment shall be described by notes and bounds measured upon the floor of the original apartment, and the new owner, if any, of the area so deleted shall, until the next periodic appraisal, have and acquire a percentage of undivided interest in the common areas and facilities equal to the ratio of the sale price of such deleted area to the value of the property; or in

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the case of a gift, the new owner's percentage of undivided interest in such common areas and facilities shall equal the ratio of the donor's cost or other basis for the portion of such apartment so conveyed for Federal Gift Tax purposes to the value of the property until the next periodic appraisal; provided, that in no case shall such new owner, if any, of a subdivided portion of an apartment acquire by such transfer an undivided interest in such common areas and facilities greater than that which appertained to the original apartment immediately before subdivision.

Correspondingly, the owner of an apartment from which a portion is subdivided and conveyed shall, until the next periodic appraisal, retain a percentage of an undivided interest in the common areas and facilities equal to his original percentage, less that passing to the grantee of such subdivided portion as set forth above.

An apartment owner who retains title to the whole of a subdivided apartment shall retain his percentage of undivided interest in the common areas and facilities appertaining to said apartment immediately before subdivision.

13. AUTHORITY OF THE BOARD: The Board for the benefit of the condominium and the owners shall enforce the provisions of this Declaration and of the By-Laws and shall acquire and shall pay out of the common expense fund hereinafter provided for, all goods and services requisite for the proper functioning of the condominium including but not limited to the following:

- A. Water, sewer, garbage collection, electrical, and any other utility service for the common area. If