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No. 86870-1

SUPREME COURT
OF THE STATE OF WASHINGTON

ROSS WILKINSON and CINDY WILKINSON; MONTE KARNES and
KIMBERLY KARNES; DAVID BETHEL and JEANIE BETHEL;
DARRELL MCLEAN; JIM PAULUS and KATHY PAULUS; JOE HARGIS
and LINDA HARGIS; DANIEL MACINDOE and ISIDRA MACINDOE;
TED TREPANIER and RUBY AKINS-TREPANIER,

Respondents,

vs.

CHIWAWA COMMUNITIES ASSOCIATION,
a Washington Non-Profit corporation,

Appellant.

RESPONDENTS' BRIEF IN RESPONSE TO
AMICUS CURIAE BRIEF

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CP - Clerk's Papers

A. COUNTER-STATEMENT OF THE CASE.

The Appellant and the Respondents have previously set forth their respective Statements of the Case. Those Statements are incorporated herein. To the extent that Amicus sets forth a Statement of the Case that relates to its own particular facts, the Respondents object on the basis that they have no knowledge of the accuracy or inaccuracy of those facts and, in addition, that those facts are not relevant to the issues before the Court.

B. ARGUMENT.

(1) Response to Amicus Argument that “Short-Term Transient Rentals are Not Consistent with a Single-Family Residential Use and Are a Commercial Use.”¹

In light of (1) the uncontested material facts of this case both as evidenced within and without the four corners of the covenants; (2) applicable rules of construction; and (3) other court holdings, the Appellant (and, therefore, the Amicus) bears the burden of proof to substantiate that the drafters of the covenants at issue intended the above result. However, after evaluating the above factors, this Court should reach the same conclusion that was so patently obvious to the trial court – that is, that the drafter’s intent in formulating a general plan of development was to allow rentals of any

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duration within Chiwawa River Pines.

(a) The four corners of the written covenants:

First, the original developer, Pope and Talbot, expressly “certified” and “declared” that it was establishing a “general plan of development for the development, improvement, maintenance and protection” of Chiwawa River Pines with the covenants to not only “constitute a servitude upon” the subject real property but to “likewise be for the benefit of” the subject real property.²

Second, the Land Uses provision of both the Pope and Talbot covenants for Divisions 3-6 and the 1988 Amendment consolidating all of the separately formed divisions stated that the “single family residential use consisting of a single residential dwelling” was to be consistent with the property being used as a “permanent *or recreational residence*.”³ In other words, the covenant drafters acknowledged that the subject lots might be used for short term vacation purposes as opposed to full time occupancy.

Third, while only the Pope and Talbot covenants for the Division 2 lots referenced the “for rent” sign restriction, (CP 797) the 1988 Amendment

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CP 796, 799, 805, 808, 822.

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CP 801, 806, 809, 812.

that consolidated all of the Chiwawa six divisions under one umbrella included the “for rent” sign restriction as applicable to all lots. (CP 819)

Fourth, the 1988 Amendment incorporated all of the other specific covenants (including the Land Uses paragraph) word for word as set forth in the Pope and Talbot covenants. (CP 817-820)

**(b) Outside the four corners of the written covenants
– the extrinsic evidence⁴:**

First, the subject real property is located in a geographical area of the state (Chelan, Lake Wenatchee, and Leavenworth) that is known for its recreational, tourism, and vacation rental opportunities. (CP 528, 574-598)

Second, both before the adoption of the 1988 Amendment and after the 1988 Amendment, some lot owners within Chiwawa River Pines regularly rented their properties to third parties as vacation rentals. (CP 483, 485)

Third, several other vacation rental companies have managed or do manage vacation rental properties within Chiwawa River Pines. (CP 553-554)

Fourth, from 1994 to 1996, the wife of one of the Chiwawa’s former

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Contrary to the argument of Amicus, extrinsic evidence like the Landlord-Tenant Act of 1973, WAC 458-20-166(2) and WAC 458-20-118 both of which were not enacted until 1970 could not have been considered by the Pope & Talbot drafters as they did not exist when the Chiwawa Divisions were created.

Board members owned and operated one of those agencies which managed vacation rentals within Chiwawa. (CP 485-486)

Fifth, before purchasing property within Chiwawa River Pines, at least one of the existing Board members personally rented a vacation rental within Chiwawa River Pines. (CP 870) In fact, one current Board member rented her property as a vacation rental for more than a 10-year period up to March, 2009 during which she rented her property 30-39 nights during the first quarter of each year. (CP 870, 872-883)

Sixth, when the Pope and Talbot covenants were adopted, the Chelan County Code defined the term “family” in a much broader way than what the Appellant’s dictionary definition would limit the term to. (CP 913)

Seventh, the Respondents have never operated their vacation rentals as a bed and breakfast, a hotel or as day-to-day lodging facilities. (See pages 8-9 of Respondent’s Brief for a description of the vacation rental process and characteristics.)

(c) Applicable rules of construction:

While many applicable rules of construction have been cited by both parties to this appeal, others of equal importance and applicability to the facts set forth above are set forth below. First –

A fundamental rule in the construction of a written instrument is that every word or phrase must be presumed to have been

employed with a purpose and must be given meaning and effect whenever possible. *Ball v. Stokely Foods, Inc.*, 37 Wash.2d 79, 221 P.2d 832 (1950); *Hollingsworth v. Robe Lumber Co.*, 182 Wash. 74, 45 P.2d 614 (1935). Words should not be treated as surplusage if it can be avoided.⁵

Therefore, even assuming that the Amicus premise that “short term rentals are not consistent with a single family residential use and are a commercial use” were true in a vacuum, outside of that vacuum the inclusion of the rental sign restriction in the covenants can only be reconciled by concluding either (1) that rentals were considered incidental to single family residential use and therefore, a residential use – not a commercial use; or (2) if a commercial use, they were considered a permitted commercial use.⁶

Second, the historical use of properties within Chiwawa River Pines as vacation rentals also belies the covenant interpretation by the Amicus:

[I]n discerning the parties' intent, subsequent conduct of the contracting parties may be of aid⁷

Third, to reach the same interpretation as urged by the Amicus requires one to ignore the obvious – that is, if the intention of the covenant

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Lenhoff v. Birch Bay Real Estate, Inc., 22 Wash. App.70, 79, 587 P.2d 1087, 1093 (1978)

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By definition, a permitted use could hardly constitute a “nuisance”.

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Berg v. Hudesman, 115 Wash. 2d 657, 668, 801 P.2d 222, 229 (1990)

drafters was to make a distinction between (1) vacation rentals of less than 30 days and (2) longer term rentals, then why wasn't it done on or before 1988 when the obvious opportunity existed to do so:

In discerning the parties' intent, . . . the reasonableness of the parties' respective interpretations may also be a factor in interpreting a written contract.⁸

Under the Amicus view, we are left with a strained, convoluted and obtuse interpretation that is not only contrary to the fact that vacation rentals have always historically existed but also contrary to good sense.

Fourth, but most importantly, the Amicus interpretation is contrary to the "ordinary and common meaning" rule of construction which was applied by Division III when it, after viewing the same rental sign covenant history as now before this Court, stated as follows:

The 1988 Covenants also contained a sign restriction under the section entitled "Trash Disposal" CP at 286. Except for this sign restriction, 1988 Covenants are silent as to the rental of residential property. **The sign restriction clearly assumes that rentals were allowed in the community.** (CP 791) (Emphasis provided.)

The issue on appeal is limited to whether the court erred by rewriting the 2008 Amendment to prohibit rentals of less than one month. If named homeowners are successful, the covenants will contain no restrictions on the length of rentals. (CP 793)

The above interpretation is consistent with the trial court's interpretation in

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Berg v. Hudesman, 115 Wash. 2d 657, 668, 801 P.2d 222, 229 (1990)

this case and, from the standpoint of the Respondents, is the only interpretation that “reasonable minds” could reach.⁹

(d) Case authority:

First, even if one ignores the rental sign restriction as set forth in the 1988 Covenants, Division I has held, under facts like the facts of this case, that a vacation rental does not constitute a business use:

Ross and Schwartzberg argue that the term “residential” or “residence purposes” in a restrictive covenant prohibits any business use. . . . The cases cited by Ross and Schwartzberg¹⁰, do not compel this court to conclude that a vacation rental is a business use. Bennett proposes a rental of the property that is identical to his own use of the property, as a residence, or the use made by a long-term tenant. The owner’s receipt of rental income from either short or long-term rentals, in no way detracts or changes the residential characteristics of the use made by the tenant.¹¹

Second, as Division III pointed out in its unpublished decision, which, along with the corresponding decision of the trial court, is the law of this case –

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Page 8 of Gold Beach’s Amicus Brief citing *Owen v. Burlington*, 153 Wn. 2d 780 (2005).

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Mains Farm Homeowners Ass’n v. Worthington, 121 Wn.2d 810 (1993); *Metzner v. WOJDYLA*, 125 Wash.2d, 445, 450, 886 P.2d (1994); and *Hagemann v. Worth*, 56 Wn. App. 85 (1989)

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Ross v Bennett, 148 Wash. App. 40, 51 (2008)

Named homeowners [the Respondents herein] agree with the portion of the trial court's decision invalidating the 2008 Amendment, which prohibited rentals of less than six months.¹² But named homeowners challenge the trial court's decision prohibiting rentals of less than one month. Although the trial court invalidated the CCA-supported 2008 Amendment, CCA [the Appellant herein] does not challenge that portion of the court's decision. While named homeowners challenge the ruling prohibiting rentals of less than one month, CCA agrees with this ruling.

ANALYSIS

The issue on appeal is limited to whether the court erred by rewriting the 2008 Amendment to prohibit rentals of less than one month. **If named homeowners are successful, the covenants will contain no restrictions on the length of rentals.**¹³ (Emphasis provided.)

And while the “named homeowners” were successful on appeal, the Amicus (and the Appellant) continue to inappropriately argue that Division III was wrong when it concluded that the covenants contain no restrictions on the length of rentals:

Chiwawa’s 1988/1992 covenants do not allow transient vacation rentals.¹⁴

(2) Response to Amicus Argument that “[T]here Is No Legal

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Division III, at CP 790, stated as follows: “The trial court concluded that the 2008 Amendment was invalid. We agree.”

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Wilkinson v. Chiwawa Communities Ass'n, 160 Wash. App. 1038 (2011), reconsideration granted (May 26, 2011)

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Page 8 of Gold Beach’s Amicus Brief.

Reason or Public Policy to Distinguish Between the Authority of Condominium and Single Family Homeowner Associations to Pass Leasing Restrictions.”

This argument presents itself if this Court concludes that rentals of any duration (including vacation rentals) are allowed as part of a general plan of development. And *Shorewood v Sadri*, 140 Wn. 2d 47 (2000) answers the question posed by the Amicus. It is true that the *Sadri* Court upheld the condominium association’s right to prohibit rentals of any duration provided that the prohibition was properly adopted but the reason this Court supported that right is what limits its application to the facts of this case:

All condominiums are statutorily created. . . In Washington, the statutory form of condominium was first authorized with the passage of the Horizontal Property Regimes Act. 2 Washington State Bar Ass'n, *Real Property Deskbook* § 41.5 (2d ed.1986). All condominiums created in this state after July 1, 1990 come under another regime: the Condominium Act, RCW 64.34. RCW 64.34.010. Since Shorewood West Condominium was created in 1978, it is governed by the older act.

Because condominiums are statutory creations, the rights and duties of condominium unit owners are not the same as those of real property owners at common law. *McElveen-Hunter v. Fountain Manor Ass'n, Inc.*, 96 N.C.App. 627, 386 S.E.2d 435, 436 (1989), *aff'd*, 328 N.C. 84, 399 S.E.2d 112 (1991). Central to the concept of condominium ownership is the principle that each owner, in exchange for the benefits of association with other owners, must give up a certain degree of freedom of choice which he [or she] might otherwise enjoy in separate, privately owned property. (Citations Omitted.) **The rights given up by the unit owners are determined by the statute.** RCW 64.32 makes all owners subject to the chapter and to the declaration and bylaws of the association of apartment owners adopted pursuant to the provisions of this chapter. RCW

64.32.250(1). The chapter also states that each owner “shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either may be lawfully amended from time to time....” RCW 64.32.060.

The court in *McElveen-Hunter* applied a statute similar to RCW 64.32 to a declaration amendment which restricted leasing and which was being challenged by a plaintiff who had bought her unit before the amendment was adopted. *McElveen-Hunter*, 386 S.E.2d 435. Like the Horizontal Property Regimes Act, the North Carolina statute permits restrictions to be imposed by the declaration or recorded instrument which submits the property to the provisions of the chapter and allows the unit owners to amend the declaration by following the procedures prescribed and makes the rules adopted binding upon all owners. *Id.* at 436. The court found that the amendment restricting leasing does not infringe upon any legal right of the plaintiff's because she had notice before the units were bought that the declaration was changeable. *Id.* Other cases have held that a duly adopted amendment either restricting occupancy or leasing is binding upon condominium unit owners who bought their units before the amendments were effective. See *Hill v. Fontaine Condominium Ass'n*, 255 Ga. 24, 334 S.E.2d 690 (1985); *Ritchey v. Villa Nueva Condominium Ass'n*, 81 Cal.App.3d 688, 146 Cal.Rptr. 695, 100 A.L.R.3d 231 (1978); *Seagate Condominium Ass'n v. Duffy*, 330 So.2d 484 (Fla.App.1976); *Kroop v. Caravelle Condominium, Inc.*, 323 So.2d 307 (Fla.App.1975).

The property rights that owners of individual condominium units have in their units are creations of the condominium statute and are subject to the statute, the declaration, the bylaws of the condominium association, and lawful amendments of the declaration and bylaws. An association may apply a restriction on leasing, if adopted in accordance with the statute, to current owners.¹⁵ (Emphasis supplied.)

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Shorewood W. Condo. Ass'n v. Sadri, 140 Wash. 2d 47, 52-54, 992 P.2d 1008, 1011-12 (2000)

But at common law, the property rights that are given up by property owners within, for example, Chiwawa River Pines are determined not by the legislature through the legislative process, but through the covenants. And then, to avoid the tyranny of the majority, the ability to amend those covenants are subject to standards of review in any case where less than 100% of those with authority to vote have approved the amendment:

The relators conceded at oral argument that if a valid agreement expressly reserves the power to less than 100 percent of affected property owners to adopt new restrictions respecting the use of privately-owned property within the development, such restrictions are enforceable against all property owners. This concession is appropriate in light of the overwhelming, albeit out-of-state, authority to this effect. *See Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994); *see also Hanchett v. East Sunnyside Civic League*, 696 S.W.2d 613 (Tex.App.1985); *cf.* 5 Richard R. Powell et al., *Powell on Real Property* 677 (1991); *Hening v. Maynard*, 227 Va. 113, 313 S.E.2d 379 (1984). For its part, Sandy Hook concedes that it must exercise its power to adopt new restrictions respecting the use of privately owned land “in a reasonable manner [so] as not to destroy the general scheme or plan of development.” *Lakemoor Comm'ty Club, Inc. v. Swanson*, 24 Wash.App. 10, 15, 600 P.2d 1022, *review denied*, 93 Wash.2d 1001 (1979) (quoting *Flamingo Ranch Estates, Inc. v. Sunshine Ranches Homeowners, Inc.*, 303 So.2d 665, 666 (Fla.Dist.Ct.App.1974)).

We agree with these concessions and take the opportunity to hold that an express reservation of power authorizing less than 100 percent of property owners within a subdivision to adopt new restrictions respecting the use of privately-owned property is valid, provided that such power is exercised in a reasonable

manner consistent with the general plan of the development.¹⁶

In this case, it is clear that the adoption of a rule that expressly prohibits the lot owners from renting their properties as vacation rentals despite the authority to do so being part of the project's general plan of development is unreasonable as a matter of law – particularly so when the Appellant ignored not only its own initial reaction to regulate vacation rentals –

Mike Standley [Board member] suggested that a separate committee be formed to come up with a list of rules and send them out in the next mailing to the property owners. If the people who are renting their properties out to others and the renters do not comply with the rules the committee will move forward to force the property owners to not rent the property. Art suggested charging the rental owners more for the annual assessment. Mike said he will bring it up at the

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Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc., 76 Wash. App. 267, 273-274, 883 P.2d 1387, 1392 (1994). See also page 13 of the Amicus Brief where Amicus cites the same case and the same language. See also *Ebel vs. Fairwood*, 36 Wash. App. 787, 792-793, 150 P.3rd 1163 (2007) where the court stated as follows:

Amendments to covenants are permissible. *Meresse v. Stelma*, 100 Wash.App. 857, 865, 999 P.2d 1267 (2000); *Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wash.App. 267, 273, 883 P.2d 1387 (1994), *review denied*, 127 Wash.2d 1003, 898 P.2d 308 (1995). In order for an amendment to be valid, it must be adopted according to the procedures set up in the covenants and it must be consistent with the general plan of the development. *Shafer*, 76 Wash.App. at 273-74, 883 P.2d 1387. But an amendment may not create a new covenant that has no relation to the existing covenants. *Meresse*, 100 Wash.App. at 866, 999 P.2d 1267

semi-annual meeting to form a committee to oversee the issue of rentals in the community. Rules will be drawn out from the by-laws and presented to the rental owners. If they do not comply with them, steps will be made to have the rentals removed from the community.¹⁷

but also ignored the subsequent proposal of the Respondents in support of regulation as an alternative to an outright ban.¹⁸

C. CONCLUSION.

First, the Amicus (and the Appellant) both argue that the operation of vacation rentals “changes the character of a residential community” and “negatively impacts” it.¹⁹ The facts upon which that conclusion is based are disputed by the Respondents. (CP 568 - 570 and CP 559 - 567)

Second, the Amicus (and the Appellant) have attempted to characterize the Respondents (as well as other owners who rent their units out to vacation renters) as operating in the same identical manner. To the contrary, as testified by one of the Respondents at CP 554 - 555:

8. I am also familiar with each of the Plaintiffs’ cabins. In that regard I would point out that they are owned and managed differently. For example, some will generate more frequent rentals than others which can be a function of the desirability of the cabin

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CP 488, 516.

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CP 534-535 and Exhibits located at CP 540 and 543.

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Page 11 of Gold Beach’s Amicus Brief.

itself as well as how frequently the owners want to rent them or use them for their own personal use. Also, some will use professional managers to manage them while others will not. And not all are used as short term rentals but rather, the owners wish to retain that option to meet future needs. Also, I am aware that some owners have obtained business licenses while others have not and some own their cabins as members in a Limited Liability Company while others own their cabins outright. Bottom line, it is hard to classify them as being all in one particular category or the other.

Finally, the Amicus (and the Appellant) wish this Court to believe that there are hordes of people who are occupying the vacation rental properties at any one time. However, that conclusion is not based upon any undisputed factual evidence. For instance, property manager Darlyn McCarty testified as follows first in her deposition and second by Declaration:

Q. And do you know if the people who rent it, are they single families or what kind of people rent it?

A. I would say on the general average that everybody in there are single family pertaining to the person that rents it. And they may at their choosing have a friend stay with. But for the most part, it's single families.

* * * *

Q. What is the purpose of renting the cabin?

A. The purposes range from going to a wedding, recreating of some type. In the summer its hiking, biking, going to the lake. In the winter it's snowmobiling, cross country skiing, going up to the pass. For the most part, it's family oriented. In fact, I would say all of it is family oriented.²⁰

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5. Finally, as to properties that I have managed in Chiwawa, the number of people accommodated in any one rental has always been commensurate with the size of the property and the number of bedrooms available.²¹

Instead, the real issues on appeal are (1) does the general plan of development allow the rental of properties without regard to the duration of the rental; and, if so (2) can the covenants be amended to prevent rentals of less than 30 days without 100% approval of those owners entitled to vote? The Respondents submit that the answer to the first question is “yes” and “no” to the second question.

Respectfully submitted this 11th day of March, 2013.

DENNIS JORDAN & ASSOCIATES,
INC., P.S.

By 

Dennis Jordan, WSBA # 4904
Attorney for Respondents

DECLARATION OF SERVICE

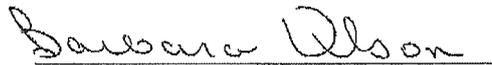
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