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NO. 90879-6

THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILMORE LLLP, a Washington limited liability limited partnership,

Respondent,

v.

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

Appellant.

**APPELLANT UNIT OWNERS ASSOCIATION OF CENTRE
POINTE CONDOMINIUM'S SUPPLEMENTAL BRIEF**

ROCKEY STRATTON, P.S.
Steven A. Rockey, WSBA 14508
Attorneys for Appellant

200 West Mercer Street, Suite 208
Seattle, WA 98119-3994
(206) 223-1688

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I. Introduction

Filmore LLLP (“Filmore”), as successor declarant of Centre Pointe Condominium, developed the fourth residential building at the condominium. Filmore obtained its construction financing December 27, 2011, knowing of the “rental cap” in the Twelfth Amendment to the declaration of condominium that unit owners had approved by a 67% supermajority and recorded on October 20, 2011. CP 145, 250-51. Filmore asserts it could not make sales – not surprisingly since it had unreasonably high prices at its “presale” event in mid-October 2012, CP 237-38, 244-45 – and says therefore had to rent its units in the building, CP 140. It filed this lawsuit on October 15, 2012 against Appellant Unit Owners Association of Centre Pointe Condominium (the “Association”) alleging invalidity of the Twelfth Amendment, CP 9-10, obtained summary judgment, and rented the 35 units in the building.

The general requirement for unit owners to amend the declaration of condominium is 67% supermajority approval under RCW 64.34.264(1) and the corresponding Section 17.1 (CP 33) in the Centre Pointe declaration of condominium.¹ Filmore argues these provisions do not apply to an amendment that restricts leasing of units, but instead that

¹ The Clerk’s Papers (“CP”) contain a copy of the Declaration of Condominium (hereafter “the Declaration”) at CP 30-90. A copy of the Twelfth Amendment appears in CP 123-27.

RCW 64.34.264(4) and Section 17.3 of the declaration (CP 34), which tracks .264(4)'s wording, apply. Each states five types of exceptional amendments for which 90% approval is required –viz., amendments that “create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or *the uses to which any unit is restricted.*” [Italics added.] See Appendix 1 hereto & CP 34. This last clause is at issue in the present appeal. Filmore contends leasing is a “use” to which the clause applies. The correct interpretation, however, based on the context in which “use[s]” appears repeatedly in the Washington Condominium Act, RCW 64.34 (“WCA”) and other principles of statutory interpretation, is that the “use” of a unit, regardless of whether a tenant or owner lives in it, is residential use, and that the clause at issue means a restriction based on a land use classification.

II. Assignment of Error

The Court of Appeals erred in affirming the Superior Court’s order (CP 339-42) that granted the CR 56 motion of Filmore LLLP (“Filmore”) and stated a declaratory judgment “[t]hat the Twelfth Amendment to the Declaration [of Centre Pointe Condominium] is void and shall not be enforceable for lack of 90% approval.”²

² The reported decision below is *Filmore LLLP v. Unit Owners Ass’n of Centre Pointe Condominium*, 183 Wn. App. 328, 333 P.3d 498 (2014). This Court by Order dated March 4, 2015 granted the Association’s Petition for Discretionary Review of the affirmance by the court below of the CR 56 order. Filmore did not cross-appeal the

III. Issue Pertaining to Assignment of Error

Does an amendment to the declaration of condominium that creates a “rental cap” on the number of units that owners can lease to tenants require unit owner approval by a supermajority of 67% under RCW 64.34.264(1) (and the like requirement of Section 17.1 of the Declaration)? Or does the higher 90% approval requirement contained in RCW 64.34.264(4) (and in the Declaration’s Section 17.3 that mirrors .264(4)’s statutory language) apply to such an amendment?

The standard of review is *de novo*, based on this appeal being a summary judgment order and involving a lower court’s interpretation of a statute.³

IV. Statement of the Case

The Association adopts and incorporates by reference the Statement of the Case in its Petition for Discretionary Review, dated October 2, 2014 (hereafter “Pet’n for Rev.”), at 1-4 and its Opening Brief below filed September 16, 2013 (“Opening Br.”) at 3-7. Certain erroneous statements in Filmore’s opposition to the petition for discretionary review⁴ in this Court and in the decision below require a supplemental response herein, however. Filmore stated “until the Summer of 2012” the declaration of condominium permitted rentals with no cap, Opp’n to

denial in the decision below of Filmore’s request for an award of attorneys’ fees, 183 Wn. App. at 352-53, which denial was based on “the debatable issues of law presented in this case,” and other reasons. *Id.*

³ See, e.g., *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

⁴ See Filmore, LLLP’s Response to Motion for Review, dated October 30, 2014 (“Opp’n to Disc. Rev.”).

Disc. Rev. at 2. There is no dispute that October 20, 2011 was the recording date for the Twelfth Amendment, however.⁵ Filmore states “[j]ust prior to Filmore’s occupancy of the building, the Association informed Filmore that its use of the units as rentals was restricted by the Twelfth Amendment.” Opp’n to Disc. Rev. at 5-6. But Filmore’s owner had discussed the amendment more than ten months earlier at the Association’s annual meeting on February 22, 2012, CP 235 & 250; and Filmore was informed of the amendment when it was proposed in 2011, CP 250. *See* also CP 251 (copy of amendment provided to Filmore’s lender when Filmore sought construction financing in December 2011).⁶

V. Argument and Authority

A. Well-Established Rules of Statutory Construction Show “Use” in the WCA Does Not Mean Leasing.

In the Petition for Discretionary Review and in its Opening Brief below, the Association stated the well-established principles of statutory interpretation under which “the uses to which any unit is restricted”

⁵ CP 123 & 127; Opening Br. at 3. *See also* Reply Brief of Appellant filed February 3, 2014 in the court below (“Reply Br.”) at 2-3. The decision below in one place stated the correct recording date, 183 Wn. App. at 336, but elsewhere twice indicated “summer 2012” or “2012” as the time of the amendment’s passage. *Id.* at 332, 347.

⁶ Filmore makes additional unsupported allegations of fact in Opp’n to Disc. Rev. at 5, that were addressed in Reply Br. at 3-4. Filmore filed the CR 56 motion that led to the order under appeal. As the nonmoving party; the Association is entitled to all reasonable inferences in its favor on any matters of factual dispute. *See, e.g., Berrocal, supra* n.3.

means common land use classifications, *e.g.*, residential and non-residential, *i.e.*, commercial (including retail or other business) and potentially other classifications (*e.g.*, agricultural) not normally present in an urban condominium. *See* Opening Br. at 11-17; Pet'n for Rev. at 9-12. These principles invoked the surrounding context in which the word "use[s]" repeatedly appears in the WCA, and in particular the numerous places within sections or subsections addressed to units that the word appears in conjunction with "residential" or "non-residential." This contextual guidance is particularly compelling when the provisions containing "units... restricted... to use[s]" are examined. *Id.* at 11-12. The statutory analysis also is based on the principle of avoiding an unreasonable or absurd interpretation that would have subsection .264(4) apply widely and indiscriminately. *Id.* at 12-14, Opening Br. at 18-21.

Filmore's contention that "[u]se' must include all aspects to which a buyer may intend and/or expect to utilize his/her unit," *see* Pet'n for Rev. at 13 (citing record), is contrary to these principles. The same is true of its argument that "use" of a unit must include a lease by an owner to a tenant because, at common law, "one of the 'sticks in the bundle' of real property rights" is the ability to transfer possession in exchange for

rents. *Id.* at 6, citing CP 23. Exercising a common law right related to real property is not the same as the “use” of the real property.⁷

In this Supplemental Brief pursuant to RAP 13.7(d), the Association relies on its petition for discretionary review and its briefs below, and does not repeat this basic statutory analysis. The remainder of this brief addresses three aspects of this appeal on which supplemental discussion is appropriate. These are (1) the improper survey of dictionaries on the word “use” and the *ad hoc* method of interpretation that resulted, (2) this Court’s April 2014 decision in *Wilkinson v. Chiwawa Comm. Ass’n*, and (3) Filmore’s contention that Section 17.3 in the Declaration should be interpreted differently than the RCW 64.34.264(4) – despite their virtually identical wording – to require 90% approval of the amendment at issue even absent such a requirement in the statute.

B. Surveying Dictionaries Does Not Clarify the Meaning of “Use,” and Causes Subsection .264(4) to Have Extreme Ambiguity and Reach in Its Fifth Clause.

A conspicuous characteristic of the phrase “change... the uses to which any unit is restricted,” in RCW 64.34.264(4), is that the phrase appears in a list of five exceptional types of amendments for which 90%

⁷ Important statutes in the WCA on public offering statements and declarations of condominium distinguish between use and leasing. *See* Pet’n for Disc. Rev. at 9-10, quoting citing RCW 64.34.410(1)(g),(h) and RCW 64.34.216(1)(n).

approval, rather than 67%, is required. The first four have a self-evident narrow and ascertainable scope – *i.e.*, amendments that “create or increase special declarant rights, increase the number of units, change boundaries of any unit, [or] the allocated interests of a unit.” The last exceptional type – the phrase at issue – should likewise be narrow and ascertainable, to harmonize with the remainder of .264(4) and to avoid having the phrase swallow the general rule of 67% supermajority approval, RCW 64.34.264(1). Pet’n for Rev. at 12-14.

The method of Filmore, and also the court below, in consulting dictionaries led, however, to the opposite result. Filmore asserted “[u]se’ under its ordinary definition is exceedingly broad,”⁸ and relied on several pages from the *American Heritage Dictionary of English Language* and *Black’s Law Dictionary*. CP 275 & 283-88. It did not quote or cite any actual definition for the word. Instead, it said “[t]he breadth of the common meaning of ‘use’ is obvious, and must include rentals,” CP 275, relying, it appears, on the sheer length of the dictionaries’ entries and multiple definitions for the word. The method is reductionist and preemptorily terminates further analysis.

⁸ See Respondent’s Answer to Appellant’s Motion for Discretionary Review, filed April 25, 2013 in the court below, at 9. (The editions of the dictionaries Filmore had cited, CP 275, were not stated, although the pages Filmore submitted from Black’s Law Dictionary appear clearly to be from the Fifth Edition (1979), CP 285.)

The decision below also cited two dictionaries, Black's Law Dictionary (Ninth Ed. 2009) and Webster's Third New International Dictionary (2002). Each has long entries for "use."⁹ After quoting definitions selected from the dictionaries, the court below stated "[t]he plain meaning of 'use' as defined in the dictionary is broad." 183 Wn. App. at 340. From that initial observation, the court's method was to *de facto* place the burden of "persuas[ion]" on the Association to show "evidence" the legislature intended that leasing not be a "use." Pet'n for Review at 15, citing 183 Wn. App. at 344-45. This led directly and inevitably to the holding below – a holding that causes the fifth clause in RCW 64.34.264(4) to dwarf the other four in its impact. The fifth clause would have indeterminate reach because the reasoning by which the decision below interpreted "use" is untethered to any principle that would limit how far the word reaches. This is not changed by the disclaimer in the opinion below that "we express no opinion as to whether or to what extent other types of uses [than leasing] are subject to the 90% requirement." 183 Wn. App. at 344. So stating does not change the method that led to the holding below. That method extends to much

⁹ The pertinent pages from the two dictionaries are in Appendices 3 and 2 to Pet'n for Rev., respectively.

more than leasing unless and until in future cases on other amendments affecting units it is curtailed on an *ad hoc* basis.

The court below provided no elaboration on the definitions it selected from Black's and Webster's or how they applied to the issue at hand, other than its observation they were "broad." While a court "may" look to a discretionary definition, it is not required to do so, *see Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 817, 854 P.2d 1072 (1993). It should not do so when the definitions are so expansive as to only muddle the question presented to the court. *Id.*¹⁰ In *Matthews v. Penn-America Ins. Co.*, 106 Wn. App. 745, 25 P.3d 451 (2001), the court stated: "the dissent fails to heed the Supreme Court's warning against simply surveying dictionary definitions." *Id.* at 751, citing *Mains Farm* (and further "caution[ing] against a mechanical survey of possible dictionary definitions"). In *Mains Farm*, this court was faced with interpreting the word "family," and observed "it is impossible to arrive at a single all-purpose definition... [A]ttempting to use one of the many dictionary classifications solves nothing." *Id.* at 817. *See also Hansen v.*

¹⁰ The definitions quoted in the decision below were "[t]he application or employment of something; esp., a long-continued possession and employment of a thing for the purposes for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional," 183 Wn. App. at 340 (quoting Black's L. Dict.), and "the legal enjoyment of property that consists in its employment, occupation, exercise or practice,' 'a particular service or end: purpose, object, function,' and 'the quality of being suitable for employment: capability of filling a need or promoting an advantage: usefulness, utility,'" *id.* at 340 (quoting Webster's).

Virginia Mason Medical Center, 113 Wn. App. 199, 53 P.3d 60 (2002) (declining to apply dictionary definition of “promise” in interpreting RCW 7.70.030(2) and observing “promise is a term of art in contract law”).¹¹

Interpreting “use” in RCW 64.34.264 presents no less complexity in regard to the imposing array of dictionary definitions. Furthermore, dictionary definitions should not be applied when doing so would “flip the basic structure of the [subject legislative] Act on its head” or be “inconsistent with the basic structure of the [subject] Act,” *Collins v. Gee West Seattle, LLC*, 631 F.3d 1001, 1005 (9th Cir. 2011). Nor should they be used where doing so “provides us [the court] with no further explanation” but “instead casts another ambiguity into our search.” *Gainer v. C.I.R.*, 893 F.2d 225, 227 (9th Cir. 1990). Reliance the “meaning of use as defined in the dictionary is broad” as reasoning for the decision below raises exactly the problems pointed out in *Mains Farm* and the other cases cited above. It “flips” the structure of subsection .264(4), and indeed RCW 64.34.264 as a whole, on its head because “use” will be so amorphous as to bring a multitude of declaration

¹¹ The word “use[s] when it appears in connection with real property can be expected to have a more refined meaning than with respect to property generally, including tangible personal property and intangible property. The context in which the word makes its appearance in the WCA, particularly in connection with “units” shows this to be the case. Pet’n for Rev. at 9-12. *See also infra* at 11-12; Opening Br. at 15.

amendments within the 90% requirement of .264(4), rather than the exceptional types that the structure of .264(4) indicates the subsection was to govern.¹²

C. *Wilkinson v. Chiwawa Communities Ass'n* States “Use” Is Residential Regardless of Whether a Tenant or Owner Lives in the Real Property; The Decision Below’s Citation to Chiwawa for a Different Point Is Inapposite in Light of the Statutory Origin and Character of Condominiums.

This Court’s opinion in *Wilkinson v. Chiwawa Communities Ass’n*, 180 Wn.2d 241, 327 P.3d 614 (2014), issued after briefing to the court below was complete, but is cited in the decision below, 183 Wn. App. at 350. The *Chiwawa* decision supports the meaning of “use” advanced by the Association herein. *Chiwawa* involved a dispute between certain owners of houses on separate lots, and the homeowners association to which they belonged, over whether vacation rentals of houses violated a prohibition contained in the recorded protective covenants for the lots. The Court stated:

If a vacation renter uses a home “for the purposes of eating, sleeping, and other residential purposes,” this use is residential, not commercial, no matter how short the rental duration. *Ross*,

¹² As a result, there likely will be widespread litigation on amendments to declarations. The one year limitations period in RCW 64.34.264(2) would not apply if the challenge to an amendment asserts the amendment is void *ab initio* due to lack of unit owners’ approval required by RCW 64.34.264(4). *Club Envy of Spokane, LLC v. The Ridpath Tower Condominium Ass’n*, 184 Wn. App. 593, 337 P.3d 1131, 1134 (2014) (holding void a declarant’s unilateral amending declaration to alter percentage interests of the unit owners).

148 Wash. App. at 51–52, 203 P.3d 383 (holding rental use was residential not commercial because such use “is identical to [the homeowner's] use of the property, as a residence, or the use made by a long-term tenant”). “The owner's receipt of rental income either from short-or long-term rentals in no way detracts or changes the residential characteristics of the use by the tenant.” *Id.* at 51, 203 P.3d 383. Nor does the payment of business and occupation taxes or lodging taxes detract from the residential character of such use to make the use commercial in character. *See id.* (determining that “whether the short-term rental is subject to state tax does not alter the nature of the use”).

Chiwawa, 180 Wn.2d at 252-53. The earlier case of *Ross v. Bennett*, 148 Wn. App. 40, 203 P.2d 383 (2009), cited by *Chiwawa*, reached the same conclusion in a similar dispute between owners on houses on separate lots. *Ross*, 148 Wn. App. at 51-52. In the present case, the interpretation of RCW 64.34.264(4), argued by the Association relies on the fact that, regardless of whether a condominium unit is occupied by its owner or a tenant, the “use” of the unit is the same – *i.e.*, residential.

The opinion below cited *Chiwawa* for a different purpose – *viz.*, that requiring 90% approval of the Twelfth Amendment “protects condominium owners’ reasonable and settled expectations.” 183 Wn. App. at 351. The court below characterized *Chiwawa* as involving an “analogous context of restrictive covenants governing a homeowners association.”¹³ There is, however, a major difference between houses on

¹³ *Id.* at 350. This part of *Chiwawa* involved a second issue, beyond the interpretation of the community association’s already existing protective covenants.

distinct lots and condominiums. The latter did not exist at common law. The fundamental characteristic of condominiums as stated by this Court as:

Because condominiums are statutory creations, the rights and duties of condominium owners are not the same as real property owners at common law. “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.’ ” [Brackets by Court.]¹⁴

To apply common law developed for owners of separate lots to condominiums, as suggested in the decision below, would undermine this central tenet of the condominium form of ownership. Additionally, a majority vote does not suffice to amend a declaration of condominium under the WCA, but rather a 67% supermajority must be attained, RCW 64.34.264(1); and the Twelfth Amendment did not prohibit leasing of condominium units but imposed a 30% cap subject to exceptions. CP 125. The part of the *Chiwawa* opinion cited by the court below dealt, in

The lot owners in the *Chiwawa* association had the power, by simple majority vote, to change their protective covenants, per a grant of authority in the covenants themselves. *Chiwawa*, 180 Wn.2d at 256-57. The lot owners therefore passed a covenant to explicitly bar all vacation rentals. The *Chiwawa* opinion stated that this power of a simple majority was to change existing covenants, but not to add new covenants.

¹⁴ *Shorewood West Condominium Ass'n v. Sadri*, 140 Wn.2d 47, 53, 992 P.2d 1008 (2000) (citations omitted). See also *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 535, 243 P.3d 1283 (2010).

contrast, with a ban on vacation rentals in a covenant passed by a simple majority.

In a similar vein, Filmore argued below that the “consumer protection” purpose of Article 4 of the WCA was a basis for voiding the Twelfth Amendment.¹⁵ This is a novel twist on Article 4. Filmore is by its own admission the successor declarant. CP 105. Article 4 grants certain protections to unit purchasers from unlawful acts by the declarant. The decision below nevertheless relied upon the “consumer protection” purpose of the WCA as support for its stating that a 90% requirement for a rental cap amendment protects “reasonable and settled expectations,” 183 Wn. App. at 349, citing *One Pacific Towers Homeowners Ass’n v. HAL Real Estate Investments, Inc.*, 148 Wn.2d 319, 330-31, 61 P.3d 1094 (2002). The *HAL* decision, however, held against the successor declarant and in favor of the homeowners association in a dispute involving the failure by the former to provide a public offering statement (“POS”) to the purchasers as required by the WCA. *HAL*, 148 Wn.2d at 324, 337. The *HAL* court noted the “consumer protection flavor” of the WCA, *id.* at 330-31, which was appropriate in light of the POS requirement in Article 4 of the WCA, *see* RCW 64.34.405, .410, and the conduct at issue being

¹⁵ *See* Respondent’s Brief filed December 12, 2013 in the court below (“Resp. Br.”), at 7-9, 16-17 & 23-24.

that of the declarant. The Association is not a declarant, and RCW 64.34.264(4) is not within Article 4 of the WCA.

The irony of Filmore's "consumer protection" argument is that it ignores the ordinary owners who purchased units at Centre Pointe. Its effect has been to diminish the ability for them to find buyers for their units – because of the loss of FHA certification when rentals exceeded 50% of total units.¹⁶ One of the main purposes in the Association's passing the Twelfth Amendment was to protect FHA certification. CP 234.

D. Section 17.3 of the Declaration Corresponds to RCW 64.34.264(4) Tracks Its Wording and Has the Same Meaning.

Section 17.3 of the Centre Pointe Declaration tracks nearly verbatim the language of its corresponding statute, RCW 64.34.264(4).¹⁷

¹⁶ *Amicus Curiae* Brief on behalf of Community Associations Institute in Support of Petition for Review at 5-6. CP 234 & 251-52.

¹⁷ See Pet'n for Rev. at 3 n.4 & 17 n.21. Section 17.3 states:

Except to the extent expressly permitted or required by other provisions of this Declaration, or of the Condominium Act, no amendment may create or increase Special Declarant Rights, increase the number of Units, change the boundaries of any Unit, the Allocated Interests of a Unit, or the uses to which any Unit is restricted, in the absence of the vote or agreement of the Owner of each Unit particularly affected and his or her Mortgagee and the Owners of Units to which at least ninety percent (90%) of the votes in the Association are allocated other than the Declarant, and that percentage of Eligible Mortgagees and/or Eligible Insurers specified in Article XV hereof. No amendment may restrict, eliminate, or otherwise modify any Special Declarant Right provided in the Declaration without the consent of the Declarant and any mortgagee of record with a security interest in the Special Declarant Right or in any real

Interpretation of Section 17.3 is therefore guided by the meaning of .264(4). *Lake*, 169 Wn.2d at 530. The court below agreed, 183 Wn. App. at 347. Unfortunately for the Association, the holding below was that .264(4) required 90% supermajority approval for the Twelfth Amendment, which mandated the same interpretation of Section 17.3. *Id.* Filmore has asserted that if the decision below is reversed in its interpretation of .264(4) and 67% is held to be the statutorily required level of approval, then Section 17.3 should be interpreted differently from the statute, and as requiring 90% approval. Opp. to Disc. Rev. at 8.

Filmore's argument for a separate and contrary interpretation of Section 17.3 should be rejected. As a threshold and dispositive point based on *Lake, supra*, the linguistic resemblance between Section 17.3 and .264(4) is extremely close, so much as to clearly be intentional. If, despite the conscious importing of statutory language, speculation that the draftsman intended an independent interpretation, with a markedly different result, is entertained, many sections in condominium declarations that track corresponding language in the WCA will be thrown into confusion. Obviously, drafting declarations will become more difficult. More importantly, there will be uncertainty and negative

property subject thereto, excluding mortgagees of Units owned by persons other than the Declarant. [CP 69 (*italics added*).]

practical effects on administration of condominiums, and also in spawning litigation on heretofore unquestioned sections of declarations.

The result of interpreting the two provisions harmoniously is that unit owners in an association such as Centre Pointe's are able, if a 67% supermajority can be attained, to then amend their declaration, except for the five exceptional types of amendments carved out in .264(4). This is consistent with the fundamental characteristic of the condominium form of real property ownership quoted *supra* at 13. The fact that existing constraints in the declaration on leasing can be made stronger by such an amendment reflects that principle, and is consistent with the expectations of unit purchasers. *Sadri*, 140 Wn.2d at 54.¹⁸

Filmore's argument that Section 17.3 in Article 17¹⁹ should be interpreted differently than its corresponding statute was based on the fact that "Permitted Uses" is in the title of Article 9, *see* Resp. Br. at 9-10, citing CP 52. The legal principle that a "contract's title is not

¹⁸ The *Sadri* court held that a restriction on leasing, if adopted by an amendment to the declaration rather than by a change to an Association's bylaws, would be applicable to existing unit owners, not just subsequent purchasers, who are presumed to know of the possibility of an amendment. 140 Wn.2d at 52-54. *See generally* the discussion of *Sadri* in Pet'n for Rev. at 4-5 & 17-20, Opening Br. at 22-25.

¹⁹ The Articles in the Declaration, CP 30-90, are numbered with Roman numerals, but for simplicity ordinary numbers are substituted herein.

determinative of its legal effect” is well established, however.²⁰ The word “use[s]” does not appear in the text of Section 9.1.14. Filmore places weight on the double negative “no restriction” in the sentence within the section stating “[o]ther than the foregoing, there is no restriction on the right of any Unit owner to lease his or her Unit,” Opp’n to Disc. Rev. at 3. The sentence does not say or imply that leasing is a “use.” Nor does it say or imply that the section has immunity, or any heightened resistance, to being amended. Filmore’s argument thus necessarily rests on its attempt to incorporate the title of Article 9 into Section 9.1.14, which is improper, *see supra* n.20.²¹

If Filmore’s argument were accepted – *viz.*, that Section 17.3 is different from the corresponding statute and requires 90% supermajority approval for every amendment that affects a section in Article 9 – there

²⁰ *See* Opening Br. at 26, citing *Pardee v. Jolly*, 163 Wn.2d 558, 573-74, 182 P.3d 967 (2008) and *Ledaura, LLC v. Gould*, 155 Wn. App. 786, 801, 237 P.3d 914 (2010). Filmore’s reliance on a dissenting opinion in a decision by this Court as purported support for a contrary approach is meaningless given that the majority in that decision explicitly addressed and rejected that aspect of the dissent. *See* Reply Br. at 7, discussing *Stanley v. Safeco Ins. Co. of America*, 109 Wn.2d 738, 742 & 745, 747 P.2d 1091 (1988).

²¹ In addition, there is the noteworthy fact that the “67% rental cap” amendment for Bayview Court Condominium in Whatcom County in 2011 (CP 176-184), drafted by the firm representing Filmore herein (*see* Pet’n for Rev. at 3-4 & 9 n.10, CP 176, 183 & 27), faced the same title in Article 9 of Bayview Court’s existing declaration, CP 225. That was not an obstacle, however, to the insertion of a paragraph in the Bayview Court amendment (CP 181) stating the same interpretation of the Section 17.3 in Bayview Court’s declaration (CP 230) that the Association urges for the identically worded Section 17.3 in the Centre Pointe Declaration. *See* Pet’n for Rev. at 9.

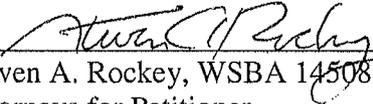
would be unreasonable results. It would mean the declaration itself makes it virtually impossible, if not totally so, any amendment addressed to hazardous substances, signage, antennas, security systems, private garden areas, storage spaces, animals and timesharing, which all are addressed in Article 9. (Notably, a lesser 80% supermajority of owners suffices to terminate the condominium. *See* CP 70; RCW 64.34.268.) It would mean the draftsman who deliberately imports the wording of a statute into a declaration's section addressed to the same subject will face long afterward challenges on whether titles in a remote part of the declaration indicates the statute meaning was not intended, despite the clear mimicry in wording. The legal propositions the Association advances, that a declaration's section has the meaning of the statute to which it corresponds and tracks, and that titles are not taken to be part of the text of a contract or legal instrument, are established principles and far sounder in their reasoning and effects.

VI. Conclusion

For the reasons stated herein and in the Association's Petition for Discretionary Review, the ruling below that held the Twelfth Amendment invalid should be reversed, and this case remanded to the Superior Court for further proceedings consistent therewith.

RESPECTFULLY SUBMITTED on April 3, 2015.

ROCKEY STRATTON, P.S.



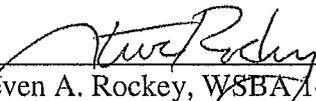
Steven A. Rockey, WSBA 14508
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that service of a copy of Appellant's Supplemental Brief to which this certificate of service is attached is being made on the 3rd day of April, 2015, by (a) emailing a true copy thereof to the attorneys of record for respondent Filmore LLLP and of attorneys of record for the *amicus curiae* in this appeal and (b) mailing same via the United States Postal Service to the same attorneys of record, first class postage prepaid.

DATED this 3rd day of April, 2015.

ROCKEY STRATTON, P.S.



Steven A. Rockey, WSBA 14508
200 West Mercer Street, Suite 208
Seattle, WA 98119-3994
(206)223-1688
Attorneys for Petitioner

RCW 64.34.264

Amendment of declaration.

(1) Except in cases of amendments that may be executed by a declarant under RCW 64.34.232(6) or 64.34.236; the association under RCW 64.34.060, 64.34.220(5), 64.34.228(3), 64.34.244(1), 64.34.248, or 64.34.268(8); or certain unit owners under RCW 64.34.228(2), 64.34.244(1), 64.34.248(2), or 64.34.268(2), and except as limited by subsection (4) of this section, the declaration, including the survey maps and plans, may be amended only by vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated, or any larger percentage the declaration specifies: PROVIDED, That the declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential use.

(2) No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.

(3) Every amendment to the declaration must be recorded in every county in which any portion of the condominium is located, and is effective only upon recording. An amendment shall be indexed in the name of the condominium and shall contain a cross-reference by recording number to the declaration and each previously recorded amendment thereto.

(4) Except to the extent expressly permitted or required by other provisions of this chapter, no amendment may create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or the uses to which any unit is restricted, in the absence of the vote or agreement of the owner of each unit particularly affected and the owners of units to which at least ninety percent of the votes in the association are allocated other than the declarant or such larger percentage as the declaration provides.

(5) Amendments to the declaration required by this chapter to be recorded by the association shall be prepared, executed, recorded, and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association.

(6) No amendment may restrict, eliminate, or otherwise modify any special declarant right provided in the declaration without the consent of the declarant and any mortgagee of record with a security interest in the special declarant right or in any real property subject thereto, excluding mortgagees of units owned by persons other than the declarant.

[1989 c 43 § 2-117.]

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Dear Sir or Madam:

By this email, I submit for filing the attached Appellant Unit Owners Association of Centre Pointe Condominium's Supplemental Brief. The Case is No. 90879-6, captioned Filmore LLLP, Respondent/Appellee, v. Unit Owners Association of Centre Pointe Condominium, Petitioner/Appellant. Mr. Rockey's WSBA number is 14508, and telephone number and email address are 206-223-1688 and SteveR@erslaw.com . Thank you for your assistance.

Nacole DiJulio
Legal Assistant
ROCKEY STRATTON, P.S.
200 West Mercer Street, Suite 208
Seattle, WA 98119-3994
(206)223-1688
(206)223-0946 fax
dndijulio@erslaw.com