

NO. 91247-5

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SUPREME COURT OF THE STATE OF WASHINGTON

CAROLYN ROBBS BILANKO, an individual,

Plaintiff/Respondent,

vs.

BARCLAY COURT OWNERS ASSOCIATION, a Washington non-
profit corporation,

Defendant/Appellant.

**RESPONDENT BILANKO'S
SUPPLEMENTAL APPELLATE BRIEF ADDRESSING
WASHINGTON SUPREME COURT'S DECISION IN *FILMORE***

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As permitted by this Court's letter of September 14, 2015, Respondent Carolyn Robbs Bilanko hereby supplements her appellate brief to address the Court's recent opinion in *Filmore LLLP v. Unit Owners Assoc. of Centre Pointe Condo.*, 355 P.3d 1128 (Wash. 2015).¹

A. This Court's holding in the factually analogous *Filmore* case confirms that Amendment No. 1 constituted a change in use that required 90 percent owner approval to be valid.

As the parties discussed at length in their original appellate briefs, one year ago, the Washington Court of Appeals unanimously held that a condominium declaration amendment purporting to impose a rental cap on unit owners constituted a change in the units' "use" as defined by both RCW 64.34.264(4) of the Washington Condominium Act ("WCA") and Section 9.1 of the Centre Point Condominium Declaration, and thus required at least 90 percent owner approval under both the WCA and Declaration. *See Filmore LLLP v. Unit Owners Assoc. of Centre Pointe Condominium*, 183 Wn. App. 328 at 347-48, 333 P.3d 498 (2014).

On September 3, 2015, this Court unanimously upheld the Court of Appeals' ruling in *Filmore*. Specifically, this Court agreed that a

¹ The Court's letter was emailed to the parties at 2:55 PM on September 14, just one court day after Appellant Barclay Court moved for leave to submit supplemental briefing. As a result, Ms. Bilanko had drafted but not yet filed a response to Barclay Court's request. Had Ms. Bilanko been given even a full court day to file her response, she would have asked this Court to schedule her supplemental brief deadline for after Barclay Court's, thereby allowing her (as respondent in this action) the fair and proper opportunity to respond to Barclay Court's new arguments. Ms. Bilanko thus reserves the right to seek leave to file a surreply in the event that Barclay Court raises any new, unanticipated arguments in its supplemental brief.

condominium declaration could define for itself the “uses” of its units, and agreed that Section 9.1 of the Centre Point Declaration specifically defined “use” to include leasing. *See Filmore*, 355 P.3d at 1131. Accordingly, the Court found that the rental cap declaration amendment at issue constituted a change in “use” as defined by the Centre Point Declaration itself, and thus required 90 percent owner approval under both the WCA and the Declaration to be valid. *Id.*

The facts and result in *Filmore* are analogous and applicable to the present matter. In determining that the Centre Point Declaration defined “use” to contain leasing, this Court’s entire reasoning began as follows:

Under the Declaration’s article IX, “Permitted Uses; Architectural Uniformity” and section 9.1, “Permitted Uses,” section 9.1.14 provides, “Lease Restrictions.” The positioning of section 9.1.14 within the section 9.1 “Permitted Uses” heading indicates that, for the purposes of this Declaration, a provision on leasing is one restricting the “use” of a unit—an amendment that requires a 90 percent vote under section 17.3.

See 355 P.3d at 1131 (internal CP citations omitted, emphasis added). Notably, nearly identical headings and content also is found in the Barclay Court Declaration. Specifically, the Barclay Court Declaration also has an Article 9 titled “Permitted Uses,” under which Section 9.2, titled “Leases,” discusses certain leasing requirements. CP 110-11. Just as this Court found in *Filmore*, the “positioning” of a section discussing “Leases” under

a heading titled “Permitted Uses” indicates that, “for the purposes of [the declaration at issue],” leasing is a contemplated “use” of a unit. *See* 355 P.3d at 1131.

This Court’s reasoning in *Filmore* continued:

This interpretation is bolstered by the fact that section 9.1.14 also provides that there is “no restriction on the right of any Unit Owner to lease his or her Unit” other than the restrictions set forth in Section 9.1.14, such as that “[a]ll leases shall be in writing” and “[n]o lease shall have a term of less than one year,” and nothing in section 9.1.14 limits the number of units that may be leased.

Id. (internal CP citation omitted). Once again, substantively identical provisions exist in the Barclay Court Declaration. Therein, Section 9.2, “Leases,” also provides that “[a]ll leases and rental agreements shall be in writing,” does nothing to limit the number of units that may be leased, and then states: “Other than as stated in this Section, there is no restriction on the right of any Owner to lease or otherwise rent its Unit.” CP 111.

As the above-quoted language was sufficient to satisfy this Court that the Centre Point Declaration defined “use” to include leasing, it also should be sufficient to satisfy this Court that the Barclay Court Declaration defines “use” to include leasing. Yet, the Barclay Court Declaration goes even farther than the Centre Point Declaration to clarify that leasing is a contemplated “use” of Barclay Court units. Specifically, nestled under Article 9, “Permitted Uses,” is the following language:

Section 9.1 Residential Use The Condominium is intended for and restricted primarily to residential *uses*, on an ownership, *rental, or lease* basis, and for social, recreational, or other reasonable activities normally incident to such *uses*

CP 110 (emphasis added). Based on the plain language of its own Declaration, the Barclay Court condominiums were indisputably built, designed, and intended to be leased. As a result, just as this Court determined in *Filmore*, any Barclay Court Declaration amendment that would “change” an owner’s existing right to lease requires at least 90 percent approval of the owners under both RCW 64.34.264(4) of the WCA and Section 25.2.2 of the Barclay Court Declaration (requiring 90 percent approval to “change... the uses to which any unit is restricted”).

Ms. Bilanko anticipates that Barclay Court will try to distinguish this matter from *Filmore* by focusing on Barclay Court Declaration Section 25.2.1(k), which requires only 67 percent owner approval for the “imposition of any restrictions on leasing of Units.” Ms. Bilanko already explained how Section 25.2.1(k) and Section 25.2.2 need not conflict with one another in her original appellate brief. *See* Bilanko App. Br. 22-23.² But even if this Court determines that there is a conflict between these provisions, as long as this Court agrees that Article 9 of the Barclay Court

² As discussed therein, a declaration amendment that bans the majority of unit owners from *using* their units as rental units is to be distinguished from less serious rental *restrictions* such as requiring leases to be in writing or requiring background checks.

Declaration defines “use” to include leasing, then any “change” to that use (e.g., Amendment No. 1) must receive at least 90 percent owner approval to comply with RCW 64.34.264(4). *See* RCW 64.34.030 (“[P]rovisions of this chapter [the WCA] may not be varied by agreement, and rights conferred by this chapter may not be waived.”); *cf. Filmore*, 355 P.3d at 1131 (where declaration defined “use” to include leasing, rental cap amendment required 90 percent approval under both RCW 64.34.264(4) of the WCA and Section 17.3 of the Declaration to be valid).

B. This Court’s holding in *Filmore* left the Court of Appeals’ interpretation of the WCA undisturbed.

As Ms. Bilanko demonstrated in her original appellate brief, pursuant to the Court of Appeals’ opinion in *Filmore*, Barclay Court’s cap on leasing also constituted a change in the units’ “use” under the WCA. The appellate court specifically found that the term “use” in RCW 64.34.264(4) includes leasing, and this Court’s review of *Filmore* left the Court of Appeals’ ruling on that issue untouched. *See Filmore*, 355 P.3d at 1131 (the Court “need not interpret” whether the WCA defines “use” to include leasing because the Centre Point Declaration does so). Because Division One’s interpretation of the WCA is undisturbed by this Court to date, it remains good law, and provides yet another reason to determine that Amendment No. 1 to the Barclay Court Declaration is invalid.

Respectfully submitted this 12th day of October 2015.



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PROOF OF SERVICE

I declare that on October 12, 2015, I caused a true copy of the foregoing RESPONDENT BILANKO'S SUPPLEMENTAL APPELLATE BRIEF ADDRESSING WASHINGTON SUPREME COURT'S DECISION IN *FILMORE* to be served on the following in the manner indicated:

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