NO. 90879-6

SUPREME COURT OF THE STATE OF WASHINGTON
[Court of Appeals No. 70013-8-I]

FILMORE LLLP,
a Washington limited liability limited partnership,

Respondents,

vs.

UNIT OWNERS ASSOCIATION OF CENTRE POINTE CONDOMINIUM,

Petitioner.

RESPONDENT FILMORE, LLLP'S ANSWER TO AMICUS CURIAE MEMORANDUM OF BARCLAY COURT OWNERS ASSOCIATION AND COMMUNITY ASSOCIATIONS INSTITUTE

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I. IDENTITY OF RESPONDING PARTY

The respondent is Filmore LLLP (Filmore). Filmore is the plaintiff in the Trial Court and was the Respondent before the Court of Appeals.

II. ISSUES PRESENTED FOR REVIEW

Whether this Court should deny review because the alleged public interest matter asseted by *amicus* is not at issue in this case and because both the Trial Court and the Court of Appeals held that the specific language of the Declaration for this Condominium defined "use" to include leasing.

III. STATEMENT OF CASE

Respondent Filmore, LLLP adopts and incorporates the Statement of Facts as set forth in Respondent Filmore, LLLP's Response to Petition for Review.

IV. ARGUMENT

1. Financing not a Subject of the Appeal.

    a. *New Issue Raised Solely by Amicus Curiae Brief Should Not be Considered.*

The speculative claims regarding potential impacts of "use" restrictions upon financing are not before this Court and not ripe for appeal. This issue was not raised before the Trial Court or the

Court of Appeals. As a matter of law, this issue cannot be adjudicated in this matter. "We do not consider issues raised first and only by *amicus*."[1]

b. *Financing Not an Issue Before the Centre Pointe Unit Owners.*

Additionally, this is the wrong record to even consider issues of use restrictions and finance. The record is clear that concerns over financing had **absolutely nothing** to do with the restriction:

- There are no Association documents (letters, meeting minutes, agendas, or proposals) where concerns over financing were ever raised at all (and certainly not in relation to the adoption of the Twelfth Amendment);[2]
- The Association never had a meeting where the Twelfth Amendment's impact upon financing was even mentioned;
- At the time the Twelfth Amendment was passed, the existing buildings already had 35 units rented, which jeopardized FHA financing, without apparent concern of anyone.[3]

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[1] Mains Farm Homeowners Association v. Worthington, 121 Wn.2d 810, 826, 854 P.2d 1072 (1993) *citing* Coburn v. Seda, 101 Wn.2d 270, 279, 677 P.2d 173 (1984).

[2] The self-serving Declaration of Ms. Haddad references her concern over financing only. There is no evidence that anyone else had that concern.

[3] CP 140 — 35 units in Building A, B and C were leased in 2012, before Building D was even started (Affidavit of Andre Molnar).

- The Twelfth Amendment provided for so many exceptions to the rental cap that no one could ever expect it to actually limit the overall number of units rented.

With this record there is simply no basis to assert that the unit owners had any concern about financing as the basis to pass the Twelfth Amendment. Nor is there any showing that without or with the rental cap, the FHA requirements would or would not be met.

Simply put, the possible impacts of the Twelfth Amendment on financing were not been an issue at Centre Pointe. So this is the wrong case to approach this topic.

2. No Change of Status Quo.

a. *Decision Consistent with this Court's Decision in Shorewood*[4] *and Ross.*[5]

The Court of Appeals' decision[6] sets forth its consistency and conformance with all prior case law. The decision specifically contrasts this case with Shorewood and is meticulous in establishing the continuity of the two decisions with the same logic and legal reasoning. The Court of Appeals thwarted *amicus*'

[4] Shorewood West Condominium Association v. Sadri, 140 Wn.2d 47, 992 P.2d 1008 (2000).
[5] Ross v. Bennett, 148 Wn.App. 40, 203 P.3d 383 (2008).
[6] Filmore LLLP v. Unit Owners Association of Centre Pointe Condominium, 183 Wn.App, 328, 333 P.3d 498 (2014).

"slippery slope" argument by specifying that the decision is limited to restrictions regarding use.[7]

Furthermore, the Court of Appeals decision is consistent with the ruling in Ross. There the court similarly held that when a restrictive covenant identifies renting as an approved residential use, that same covenant must be interpreted in a manner consistent with such specific delineation — that a short term rental is still a residential use, not a business use.[8] The court in this case followed exactly the same reasoning: the Centre Point Declaration allows leasing as an approved "use," so any restriction of leasing must be a restriction of a "use."

b. *Decision Consistent With Consumer Protection Purpose.*

Not only is the Decision consistent with existing case law, it is also consistent with the Consumer Protection section of the WCA. The Decision recognized that any interpretation of the WCA must also fulfill the legislature's clear intent to provide significant consumer protection.[9] "Uses" must be considered as those important to the consumers. A buyer of a place to live has already

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[7] Filmore, 333 P.3d *at* 506.
[8] Ross *at* 52.
[9] *See* Section VI.B(1) above.

limited his/her search to residential units. So limiting the word "use" to residential *versus* non-residential would be pointless.

3. Any Decision Would Not Affect Public Interest.

a. *Amicus Fails to Address the Unambiguous Declaration.*

Like the Petitioner, both *amicus* fail to address the unambiguous language of the Centre Pointe Declaration: because the Declaration specifically defines leasing as a "use," the resolution of this matter is not determined by the statute alone. The language is cited here, for this language is so clear.[10]

> *9. Permitted Uses/ Architectural Uniformity:*
>
> *9.1.1 Permitted Uses: Other than provided in 9.1.2 hereof, the buildings and Units hereof shall be used for residential purposes only, and for common social, residential or other reasonable uses normally incident to such purposes.*
>
> ....
>
> *9.1.14 Lease Restrictions: Any lease agreement shall be required and deemed to provide that the terms of the lease shall be subject in all respects to the provisions of the Condominium Instruments, and that any failure by the Lessee to comply with such provisions shall be a default under the lease, entitling the Association to enforce such provisions as a real party in interest. All leases shall be in writing and a copy of each lease must be supplied to the Association. No lease shall have a term of less than one year. Other than the foregoing,* ***there is no restriction on the right of any Unit Owner to lease his or her Unit.*** *Any tenant or*

[10] Filmore, 333 P.3d *at* 506.

> *subtenant of any portion of a Unit shall be deemed to have assumed all the responsibilities of an Owner under this Section of the Declaration.*[11]

The Court of Appeals specifically held that even if the statute was read to limit "use" to residential or nonresidential, "here the declarant treated leasing as a permitted use and set forth a 90 percent voter approval rule..." to change such use restrictions[12]. Upon this, the Court of Appeals held that the Twelfth Amendment was void for violating this specific Declaration (in addition to the WCA).

So even if the claims by amicus were of sufficient public interest, **this case is not.** RAP 13.4(b)(4) cannot be met when the foundation of the decision on appeal is based upon private contract that is not applicable to other condominiums. Here any interpretation of the WCA in this matter would be at best advisory for the unambiguous Declaration controls.

4. Not a Case of Substantial Public Interest.

The dispute between these parties does not give rise to any public interest. The record is very limited, and what record is available confirms that the Association had never even considered

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[11] CP 52-53. Declaration, Section 9.1.14. Emphasis added.
[12] Filmore, 333 P.3d *at* 507, footnote 14.

the impacts of leasing restrictions upon financing and, instead, enjoyed robust leasing prior to Filmore's purchase without any concern. What can be gleaned from the record is that the Twelfth Amendment was a retaliatory action taken in fear of a developer buying what was a failed project.

The only thing that is without question is that the private contract (the Declaration) for Condominium unambiguously identifies leasing as a "use" to which restrictions are imposed. So the 90% vote is required pursuant to the Declaration. The failure of the Association to obtain the required level to pass the amendment renders it void — *regardless of interpretation of the applicable statutes.* This is simply not a matter of substantial public interest.

V. CONCLUSION

The Decision does not involve an issue of substantial public interest and importance because it is premised upon the specific language of this Condominium's Declaration. Notwithstanding the foregoing, the lack of any substantive foundation in law or fact establishing that the Court of Appeals was incorrect, vitiates any reason why this court should review such decision.

Respectfully submitted this 4 day of February 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of February, 2015, I caused to be served via Email and via U.S. Mail postage prepaid the foregoing Respondent Filmore, LLLP's Answer to *Amicus Curiae* Memorandum of Barclay Court Owners Association and Community Associations Institute on the following parties at the following addresses:

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