70013-8

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NO. 70013-8-I

[Whatcom County Superior Court No. 12-2-02766-4]

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

FILMORE LLLP, a Washington limited liability limited partnership,

Plaintiff/Respondent,

v.

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

Defendant/Petitioner.

APPELLANT'S REPLY BRIEF

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

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

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Appellant Unit Owners' Association of Centre Pointe Condominium (the "Association") submits this Brief in Reply to that of Respondent Filmore, LLLP ("Filmore").

Filmore's brief omits any discussion of a key defect in its argument: the lack of any principle to discern how far "use" of a unit extends in Filmore's interpretation. Filmore has previously advocated to this court that the "'[u]se' must include all aspects to which a buyer may intend and/or expect to utilize his/her unit," *see* Opening Mo. at 20. If there are any boundaries to "use" under that definition, no criteria to show what they are is apparent from Filmore's brief. Filmore continues to have this view, even if not explicitly repeating it in its brief – if Filmore did, it has offered no alternative statutory meaning. The Association pointed out the legal and practical problems created in RCW 64.32.264 by Filmore's approach – that the fifth and last exception to the general requirement of 67% approval to amend a declaration of condominium would dwarf the previous 4 exceptions in its scope and extreme malleability, be inconsistent with them, and relegate the statute stating 67% as the generally required supermajority to being superfluous and miniscule in effect; and further that the resulting need for 90% approval for virtually all amendments to declarations would make

meaningless the central tenet of condominium ownership law. Opening Br.[1] at 20-21. Filmore makes no response to this.

Second, the Association stated fundamental and well known tools of statutory construction, Opening Br. at 9-12 & 18-19, with which Filmore has expressed no disagreement. The Association then applied those tools to the central issue, the statutory meaning of "uses to which any unit is restricted," *id.* at 12-18. Filmore likewise does not dispute the analysis, in any of its specifics or with regard to accuracy. It simply and pejoratively labels the analysis a "counting words" exercise, Opp. Br. at 20, even though the tools of statutory construction – to examine the context of the statute in which the words at issue are found, and of related provisions with the same words – appear to have its implicit approval.

Turning to the arguments Filmore presents, they are not well founded, as stated more fully below.

1. Material Misstatements in Filmore's Statement of the Case

Filmore's Statement of the Case contains factual mistakes. It was not in "the summer of 2012" that the 12th Amendment passed, Opp. Br. at 2.[2] That amendment was approved and recorded in October 2011. *See*

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[1] "Opening Br." herein refers to the Brief of Appellant Unit Owners Association of Centre Pointe Condominium, dated September 13, 2013.

[2] "Opp. Br." herein refers to the Brief of Respondent Filmore, LLLP, dated December 11, 2013.

CP 123 & 127. The accompanying suggestion by Filmore that it was already constructing Building D when the 12th Amendment passed is likewise inaccurate.[3] Filmore had not obtained its construction financing until very late December 2011, CP 145 (Construction Loan Deed of Trust recorded December 27, 2011).

Filmore's contention that it was "[j]ust prior to occupancy (late 2012)" when Filmore learned of the 12th Amendment from the Association, Opp. Br. at 5-6, is completely contradicted in the record. The filing of this lawsuit on October 15, 2012 was itself well before any occupancy, but Filmore's knowledge long predated that filing, and even more so the occupancy.[4] There was no dispute below that André Molnar, who owns and controls Filmore, discussed the amendment with Association members in February 2012 at the Association's annual meeting, CP 235, 250, a fact reflected in the minutes, CP 254; nor any dispute that even earlier, four weeks prior to the construction loan in December 2011, Molnar's banker had a resale certificate containing the 12th Amendment, in connection with Filmore's loan application. CP 257.

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[3] *See* Opp. Br. at 3 (asserting "between Filmore's purchase .... and the completion of construction, the Association adopted the Twelfth Amendment").

[4] By "late 2012" Filmore presumably means December 31, 2012, which was the date an occupancy permit issued for Building D. There was no citation to the record by Filmore for this statement, but Filmore's owner stated below on January 9, 2013 that "Filmore must lease individual condominium units and is doing so as of January 1st [2013]." CP 140.

Those facts were not contested even if Filmore disputes the additional proof in the record showing it knew of the 12th Amendment at the same time it was submitted to owners, prior to passage of the amendment in October, 2011. CP 250.

Filmore asserts the 12th Amendment "was completed with no meeting of the members, no formal discussion of the amendment and no formal vote." Opp. Br. at 5. The record reflects the distribution of the ballots and the resulting 67% supermajority received when the ballots were tallied.[5] Filmore has never contended that a meeting of the Association's members was required to adopt an amendment to the Declaration of Condominium (it is not), and Filmore also told the court below that the basis for its CR 56 motion was **solely** its view that 90% approval was required for the amendment, *see* CP 19 n.14. *See generally* CP 19-26. As for Filmore's assertion that the Association "cannot produce any meeting agenda, minutes or other documentation showing a discussion, meeting or vote regarding the 12th Amendment," Opp. Br. at 5 n.10, it is meaningless (and untrue) – the Association was not asked to

[5] CP 234-35 (Declaration of Debbie Haddad, an Association member at all material times and its President when Filmore filed this lawsuit in October 2012); CP 250 (Declaration of the Association's professional manager Cindy Mehler, whose company mailed the proposed Twelfth Amendment and the ballots to owners). *See also* CP 234 (D. Haddad's description of the Association's reasons for engaging an attorney to draft the Twelfth Amendment and submitting it to the owners).

produce such items because Filmore's CR 56 motion was so explicitly limited to the 90% versus 67% issue. [6]

Filmore states "over 35 units were rented prior to the passage of the 12th Amendment," Opp. Br. at 10, citing CP 139. The record does not support that assertion, which is untrue and also not pertinent to the issue on this appeal.

2. Leasing Restrictions Are a Restraint On Alienation; RCW 64.34.216(1)(n) Distinguishes Between "Use," "Occupancy," and "Alienation"

Filmore is not helped by its citation to §1.26 "Restraints on Alienation" of W. Stoebuck & J. Weaver, 17 Washington Practice, *Real Estate: Property Law,* in Filmore's argument that the term "restraint on alienation" means solely a restriction on the right to "convey [a] fee interest," not one on the right to convey a "possessory interest pursuant to a lease." Opp. Br. at 19. Stoebuck & Weaver does not so state. Furthermore, the authors discuss restrictions on transferring a leasehold interest as a type of restraint on alienation, in particular a type that usually is found lawful. They state: "Because the policy against restraints is not absolute, there are some important exceptions. In general, these

[6] Filmore also asserts wrongly "the property manager for the Association ... took it [the Twelfth Amendment] door to door to selected members to obtain 67% approval." Opp. Br. at 5. Filmore's purported support for this untrue statement was the hearsay belief of its owner Andre Molnar, *id.*, citing CP 139, but even Mr. Molnar, in offering his hearsay belief, did not state or imply "select[ivity]" of any kind, nor make any reference to the property manager. *Id.*

exceptions exist in situations in which the courts feel a transferor has a strong interest in prohibiting the transferee's alienating. The most frequent example is in leasing, where courts, including Washington's, routinely uphold a clause of the promissory – disabling kind..." [citation omitted].[7]

The Washington decisions previously cited by the Association are examples of restraints on alienation in the area of leasing. Opening Br. at 13. The fact that leasing restrictions are a type of restraint on alienation is important to the core statutory construction issue in this appeal, because a key provision in the WCA[8] stating the required contents of a Declaration of Condominium refers separately to "use," "occupancy," and "alienation" of the condominium units in requiring certain restrictions to be stated. *See* RCW 64.34.216(1)(n).[9]

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[7] W. Stoebuck & J. Weaver, 17 Wash. Practice, Real Estate: Property Law (2nd ed. 2004), §1.26 ("Restraints on Alienation"), at 52.

[8] Washington Condominium Act, RCW chap. 64.34.

[9] *See* Opening Brief at 12-13 quoting and discussing § 64.34.216(1)(n) and also RCW 64.34.410(1)(g),(h) (separate statutory subparts that address, respectively, "use restrictions pertaining to the units" and "restrictions ... on the renting or leasing of units.").

3. *Stanley v. Safeco* Does Not Support Filmore; Furthermore Filmore Ignores Contrary Washington Case Law in Arguing that Section 17.3 of the Declaration Means Something Different Than the Corresponding Statute in the WCA

Filmore cites the dissent in *Stanley v. Safeco Ins. Co. of America*, 109 Wn.2d 738, 745, 747 P.2d 1091 (1988), to say "[w]e look at both the text and the captions in a policy to determine the policy's coverage." Opp. Br. at 11, citing 109 Wn. 2d at 745. The majority in *Stanley* rejected the argument that the title or caption affected interpretation of the insurance policy, however. *Stanley*, 109 Wn.2d at 742.

Filmore relied on *Stanley v. Safeco* as its only authority for contending there is a "Use Restrictions" title in Article IX of the declaration of condominium that mandates Section 17.3 in Article XVII be interpreted in Filmore's favor. Opp. Br. at 11. The actual title is "Permitted Uses" in Article IX. CP 52. The defects in Filmore's argument go well beyond that correction, however. The cases the Association previously cited, Opening Br. at 26, and also *Stanley v. Safeco*, hold that this title does not determine the interpretation of Section 17.3 in Article 17, on the subject of amending the declaration. Furthermore, Filmore's argument never addresses the authority of *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 530-31, 243 P.3d 1283 (2010) —*viz.*, for a section in the declaration of condominium that tracks

the language of a corresponding statute in the WCA, construction of it is guided by the meaning of the corresponding statute, Opening Br. at 25. It further ignores the fact that Filmore's attorneys themselves drafted and recorded in 2011 a "rental cap" amendment, with 67% approval, *see* Opening Br. at 6 (n.3) & 9, CP 176-184, for a different condominium that had a declaration with the same title in its Article IX and the same Section 17.3 as are in Centre Pointe's declaration. CP 225 & 230.[10]

Filmore also makes a new argument regarding Article IX not presented below. It asserts "all 'other reasonable uses normally incidental to such [residential] purposes,'" are authorized in Section 9.1.1 of Centre Pointe's Declaration of Condominium, and that "leasing of a residential unit" is "normally incidental to such [residential] purposes." Opp. Br. at 9-10, quoting §9.1.1 (brackets by Filmore). The adjective "all" that Filmore inserted before the phrase it excerpted from Section 9.1.1 is an exaggeration, particularly since the full sentence contains other words immediately preceding that phrase, which are illustrative and limiting. The full sentence states:

> Other than as provided in Section 9.1.2 hereof, the buildings and Units shall be used for residential purposes only, and for **common social, recreational** or other reasonable uses normally incident to such purposes.

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[10] *See* Opening Br. at 10-11, quoting from the 2011 amendment to Section 17.3 of the declaration for Bayview Court Condominium.

CP 52 (boldface added). The principle of *ejusdem genesis*[11] holds that "other" has a meaning akin to "social" or "recreational" – *viz.*, an activity by individuals in the unit that routinely, even necessarily, results from the unit being a dwelling. Exercising a common law right to lease does not fit in that category.

4. Filmore's "Consumer" Argument Does Not Alter the Statutory Analysis Presented By the Association

Filmore argues in several places that the "consumer protection" purpose of Article 4 in the WCA (§§ 64.34.400 through 64.34.465) is a basis to rule in its favor. *See* Opp. Br. at 7-9, 16-17 & 23-24. This is a novel twist on Article 4: Filmore is a successor declarant, by its own admission. CP 105. Article 4 grants certain protections to individual unit purchasers from unlawful acts of the declarant. More importantly, nothing in Article 4, or Filmore's theory that the Article somehow benefits it as declarant, militates against the fundamental tools of statutory construction, and the results they lead to, previously set forth by the Association. *See* Opening Br. at 9-18. The statute quoted by Filmore at the start of its consumer argument as purported support, RCW

[11] *See, e.g., Bowie v. Wash. Dept. of Revenue*, 171 Wn.2d 1, 12, 248 P.3d 504 (2011), *In re Guardianship of Knutson*, 160 Wn.App 854, 867-68, 250 P.3d 1072 (2011).

§64.34.216(1)(n), Opp. Br. at 8, is not from Article 4 of the WCA.[12]

Filmore later amplifies its consumer argument: it contends that if the Association's position is accepted, then "subject to the whim" of a board of directors, restrictive "rules" would be enacted, and "[t]hat would mean that none of the following would be open to a vote of the unit owners. . . : Age, rental, timeshare, smoking or pet restrictions." Opp. Br. at 23. Its premise is that the declaration of condominium would be silent on such subjects. As to "rental," however, the declaration "must contain" "any restrictions . . . on . . . alienation of units." *See supra* at 6; Opening Br. at 13. For "timeshare," the same is true.[13] Filmore's listing of "[a]ge" is unclear: assuming Filmore means an age test to determine who can be an occupant of a unit or a transferee, the same statute, RCW 64.34.216(1)(n), would require such a provision to be in the declaration of condominium. Provisions on these subjects can be changed only by an amendment to the declaration. As to "smoking" and "pets," declarations of condominium are not required by any Washington statute or case law

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[12] The statute is in Article 2 and states the subjects to be contained in a declaration of condominium. Subpart (n), which Filmore quotes, is not helpful to Filmore's position, *see* discussion in Opening Br. at 12-13.

[13] For "timeshare," the word "occupancy" in RCW 64.34.216(1)(n), immediately before "alienation," would be the pertinent term, assuming that by "timeshare" Filmore means the statutory definition in the Timeshare Act, RCW 64.36.010(11). The word "alienation" may come into play, if by "timeshare" Filmore means eligibility criteria for potential transferees of units.

to address such subjects, nor many others.[14] Certainly a potential purchaser is free to prefer a condominium having a declaration that does address smoking and/or pets, if that is important.

But even assuming a declaration of condominium does not address smoking, pets, or other subjects not required to be in a declaration, and that rules on such subjects could potentially be implemented by a future board of directors, two points refute Filmore's hypothesis "that none of [such subjects] would be open to a vote of the unit owners." First, nothing precludes unit owners from exercising their voting power directly to establish in the bylaws provisions on such subjects, *see* RCW 64.34.332, .324(2), .304(1)(a), or conceivably, even in the declaration itself. Second, if the board of directors chose on a "whim" to implement rules contrary to bylaws or to the collective will of the owners, the owners' voting power can be exercised to elect new directors and/or call a special meeting of owners to remedy the issue. RCW 64.34.322, .308(6)-(7).

The WCA's section on approval of amendments to the declaration of condominium, RCW 64.34.264, is not within Article 4 of the WCA. But even if it were, the *Sadri* court's quotation of the basic principle of

[14] Centre Pointe's argument admits no logical stopping point for additional subjects – its list could have gone on to include items such as unit owners' barbequing, putting in wood flooring, heating with a space heater, and more.

the condominiums addresses and resolves Filmore's "consumer" argument.[15] The *Sadri* court invoked this principle in rejecting an argument similar to Filmore's, and holding that unit owners who purchased prior to a "rental cap" would not be exempt upon such a cap being added through a properly approved amendment to the declaration of condominium. 140 Wn. 2d at 52-54.

Lastly, there is an irony in Filmore's consumer protection theme that should not escape notice. Filmore purports to speak for individuals that own units and who may want to lease. But the result of Filmore's position has been to deprive the individual unit owners at Centre Pointe Condominiums of any realistic ability to make a sale of their units. This is because FHA approved financing is not presently available at Centre Pointe Condominiums due to the FHA's standard on the maximum percentage of leased units allowed being exceeded.[16]

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[15] *Shorewood West Condo. Ass'n v. Sadri*, 140 Wn. 2d 47, 53, 992 P.2d 1008 (2000) stated:

> 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. The rights given up by the unit owners are determined by the statute. [Brackets by court, internal quotation marks and citations omitted.]

[16] All 35 units in Building D are presently leased, and the condominium is not able to meet the FHA standard. Unfortunately, in the present day economy, very few prospective condominium unit purchasers can make a 20% down payment, and thus there is a crucial need for FHA approved financing, which is, however, now unavailable.

But if the common law right to lease real property is a "use" by a unit owner, as Filmore asserts, then surely the right to sell would also be a "use." But, unfortunately, it is not one that Filmore's argument would have any concern about preserving for the individuals who own units at Centre Pointe Condominiums.

5. Filmore Argues *Sadri* in Conclusory Fashion and Does Not Address the Differences Between the HPRA and the WCA

Filmore argues the *Sadri* decision, as it did below, but does not address the differences between the WCA and the Horizontal Property Regimes Act, RCW 64.32, *see* Opening Br. at 22-24. It says simply the two Acts "should be the same" as to the statutory interpretation issue at hand, Opp. Br. at 16, Filmore gives no heed, or even mention, to the different wording between how the Acts state the required contents of a declaration, *see* Opening Br. at 24, nor to the far more frequent and different way "use" appears in the WCA. *Id.* at 23 & 13-14.

Filmore also calls it "important[] [that] in the 13 years since the [*Sadri*] court's decision, the legislature has not acted to make a change." Opp. Br. at 16. But *Sadri* made it clear that if an amendment to the declaration of condominium is pursued, rather than a bylaw change, an association can lawfully create a rental cap upon a 60% supermajority

vote of the owners to approve.[17] If "importance" is to be found, it is in the legislature's not changing the HPRA in that regard. And to the extent a legislative intent on the WCA can be discerned in not acting to legislatively alter the *Sadri* decision, the more evident intent is that the legislature regards a supermajority of 67% as sufficient to approve a rental cap amendment. This is not only consistent with standard tools of statutory construction, Opening Br. at 9-13, but also is a reasonable percentage and thus avoids the large disparity that otherwise would exist between HPRA and WCA condominium associations in their respective abilities to pass such an amendment.

6. Filmore's Arguments Regarding "Any" and On Singular-Plural Do Not Withstand Scrutiny

Filmore points out the adjective "any" appears in RCW 64.34.216(1)(n) and that a dictionary defines "any" as "three or more." On that basis Filmore concludes that distinguishing between residential and non-residential "use" cannot be proper statutory interpretation. Opp. Br. at 17-18. But the word "any" modifies "restrictions in §.216(1)(n), not "use," *see* Opening Br. at 12-13. Even if it modified "use," the fact that there are land use classifications within the classes residential and

[17] 140 Wn.2d at 55. Sixty percent was the threshold in the HPRA for amendments to the declaration generally. RCW 64.32.090(13). Under the WCA, 67% is the corresponding figure. RCW 64.34.264(1).

non-residential (*e.g.*, retail, commercial) would address Filmore's argument.

Filmore also attaches significance to plural versus singular, i.e. between "uses" and "use." Opp. Br. at 18. Both appear throughout the WCA. But a basic rule of statutory construction codified in Washington is that plural embraces the singular and vice-versa. RCW 1.12.050.

7. Filmore's Reliance on "Expert Commentators" Is Misplaced

Filmore says "[t]he expert commentators ... agree" with it, Opp. Br. at 18. It does not address the fact that the three practicing attorneys in question are not "experts" and the website printouts and business development that documents Filmore submitted are not "commentary" as the words normally are used. *See* Opening Br. at 7, n.6. The law firm of one of the "commentators" (the one who provided a declaration in Filmore's reply papers below) does not refrain from drafting or recording rental cap amendments with 67% approval. *Id.*[18]

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[18] Filmore previously asserted that "all commentators" agreed with it. Respondent's Answer to Appellant's Motion for Discretionary Review at 7. However, James Strichartz, regarded as the dean of Washington condominium law attorneys and one who was deeply involved in the lawyers' group that drafted the WCA for consideration by the 1989 legislature, favors the interpretation advanced by the Association. CP 352-53 & 355 (which are the expected CP page numbers for the Declaration of Steven A. Rockey in Support of Defendant's Motion for RAP 2.3(b)(4) Certification, sub. no. 41, designated as a supplemental clerk's paper on January 31, 2014).

Filmore labels "irrelevant," Opp. Br. at 22, the large preponderance of 67% rental cap amendments, *see* Opening Br. at 6, n.3. Its explanation for why they exist is that "[a]ssociations are advised as to the applicable law and that there is a one-year statute of limitations. Boards then take the risk, adopt a rental restriction without complying with the Act, and do so knowing that if no one sues within a year, the invalidity becomes irrelevant." Opp. Br. at 22. This contention is undermined by the following:

- Filmore's explanation cannot plausibly justify an attorney's drafting such an amendment if there is "but one conclusion" that can be reached, Opp. Br. at 24, which in Filmore's view is that amendment would be unlawful.
- There is no certainty that the one-year time period in RCW 64.34.264(2) would preclude a later challenge against a "void *ab initio*" amendment, as contrasted with one being approved with a technical irregularity.

The latter issue has not been addressed in a published Washington decision.

8. <u>The Minnesota and New York Cases Cited by Filmore Involve Foreign Law and Are Not Persuasive</u>

Filmore cites two out-of-state cases. In the first, from

Minnesota,[19] the court **upheld** a time restriction on rentals added by amendment to a declaration of condominium, as not contrary to Minnesota law governing condominiums. As one of two alternative bases to reach that conclusion, Minnesota's Court of Appeals addressed the time restriction on rentals as a "use" restriction rather than a "restraint on alienation," which Filmore points out. Opp. Br. at 19. (The challengers had argued that Minnesota law on "restraint-on-alienation" would hold the time limitation unreasonable.) The court also held that the restriction was valid if it was regarded as a restraint on alienation, however. 531 N.W. 2d at 919. The opinion does not discuss or indicate "use" was a statutory term. But if it was, it should be pointed out that the condominium was governed by Minnesota's older Condominium Act, not its later enactment of the Uniform Condominium Act. *Id.*, 531 N.W.2d at 918 & 920. There is no indication in the decision itself (or in Filmore's discussion of it) that this older Condominium Act in Minnesota bears any resemblance to the WCA, which is Washington's version of the Uniform Act. There likewise is no indication that Minnesota's case law on restraints on alienation resembles that of Washington.

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[19] Opp. Br. at 19, citing *Breezy Point Holiday Harbor Lodge – Beachside Apt. Owners Ass'n v. B.P. Partnership,* 531 N.W.2d 917, 920 (Minn. App. 1995).

Filmore also cites a New York case involving an owner who was allowed to keep a small dog in her unit over the objection of the Association.[20] Opp. Br. at 19. Filmore's believe is that if keeping a dog is a "use," then *per force* exercising a right to rent "surely… must be." *Id.*[21] New York does not have the Uniform Condominium Act. Filmore provides no explanation of whether or how New York law bears any resemblance to Washington law. From the case, it apparently does not. The statute quoted in *Forman* required that Bylaws "set forth '[s]uch restrictions on and requirements respecting the use and maintenance of the units … as are designed to prevent unreasonable interference with the use of their respective units and of the common elements by the several unit owners.'" 78 A.D.3d at 630. There is no similar requirement for Bylaws in the WCA. *See* RCW 64.34.324. And if Filmore is contending that this New York statute on Bylaws should be equated with the WCA provision on declarations of condominium in RCW 64.34.216(1)(n), the material differences in their wording are readily apparent, *see* Opening Br. at 12-13.

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[20] *Board of Mgrs. of Village View Condominium v. Forman*, 78 A.D.3d 627, 911 N.Y.Supp.2d 378 (App. Div. 2010).

[21] Filmore implicitly indicates the right to rent is the more "important" of the two, *see id.* That is subjective, but regardless, a fundamental difference between the two is that one involves an activity in the unit by its inhabitants, while the other involves exercising a common law property right.

9. Prima Facie Evidence For Equitable Estoppel Was Presented

As stated in Opening Br. at 27, if it is determined that 67% is the required approval level under the WCA for the 12th Amendment, then it is not necessary to reach the Association's equitable estoppel defense. If the court holds that 90% is required, the Association replies as follows to Opp. Br. at 24-29 on that defense.

Filmore relies exclusively on *Newport Yacht*[22], Opp. Br. at 25-27, to dispute case law holding that silence can create an estoppel, *see* Opening Br. at 28-30. The issue in *Newport Yacht* was the plaintiff association's having been silent about the fact it had an ownership interest in real property based on a quit claim deed recorded many years earlier. The court held that the recorded deed operated as notice to all concerned persons of the Association's ownership rights, and that an estoppel by silence therefore could not arise. There is no similar recorded document in the present case. The fact that Filmore's owner Andre Molnar had a plan for large scale renting of Building D, indeed 100% of it at present, and also his objection and plan to challenge the 12th Amendment were uniquely within Mr. Molnar's knowledge.

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[22] *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn.App. 56, 79-80, 277 P.3d 18 (2012).

Filmore states that Molnar did not mislead the Association about his plan to rent Building D because "his actions were entirely consistent with his statements." Opp. Br. at 25, n.55. This is closing argument at trial. The declarations and exhibits to same of Debbie Haddad and Cindy Mehler, CP 235-38, 240-48 & 250-56, show a pattern of minimizing and misleading, culminating in a very brief "pre-sale" event for Building D at a time when Filmore had already filed suit to invalidate the 12th Amendment (secretly, since no service or notice of it was given to the Association for an extended period), and that even this short pre-sale was prior to completion of the Building and at hugely inflated prices. Filmore asserts that it and the Association were "adverse" and that the Association therefore had "no right to rely" on Molnar's statements, or his silence. Opp. Br. at 28. In fact, however, they were not adverse at the time, CP 235-36 (Haddad Decl.); and Molnar made statements to the Association President who preceded Ms. Haddad to hide the adversity he intended. CP 240-41.[23]

Filmore says the Association took "no action," Opp. Br. at 27, and estoppel therefore cannot lie. The Association refrained from seeking

[23] As part of this argument, Filmore says without citation, that the Association "passed the 12th Amendment in fear of Filmore implementing rentals." Opp. Br. at 28. Nothing in the record supports that statement, which is not true. The passage of the 12th Amendment was completed by mid-October 2011. Filmore may be thinking erroneously that it was passed in 2012, *see supra* at 2.

90% approval, however. Opening Br. at 29. Refraining from an action that otherwise would be taken satisfies this element of equitable estoppel.[24]

Filmore denies there is injury. Opp. Br. at 29. There was in fact injury from Filmore's challenge to the 12th Amendment in the detrimental effects on the ability to sell units, meeting FHA standards, and values of units. CP 234 & 238 (Haddad Decl.), 252 (Mehler Decl.). Filmore says whether 90% approval could be obtained is "speculative." Opp. Br. at 28. Filmore's acts removed the opportunity to do so. Its "speculation" argument, if accepted, is so far reaching as to effectively read equitable estoppel out of the law in all cases that involve "refraining" to take a necessary act.

10. Filmore's Request For an Award of Attorney Fees on Appeal Should Be Denied

Filmore perfunctorily requests attorneys' fees on appeal in three sentences at the end of its brief. Opp. Br. at 29-30. No argument is submitted, nor any rationale beyond bare citations to Article XIII of the Declaration and RCW 64.34.455. Filmore's request is insufficient: "there

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[24] *See In re Marriage of Barber*, 106 Wn.App. 390, 395, 23 P.3d 1106 (2001) ("equitable estoppel rests on the principle that where a person, by his acts or representations, causes another to change his position or refrain from performing a necessary act to such person's detriment..."), citing *Hartman v. Smith*, 100 Wn. 2d 766, 769, 674 P.2d 176 (1984). *See also Nickell v. Southview Homeowners Ass'n*, 167 Wn.App. 42, 53, 271 P.3d 973 (2012) (same).

must be more than a bald request for fees; argument and citation to authority are necessary to inform this court of the appropriate grounds for attorney fees .... Here, although each party cited the rule and statutory or code authority for an attorney fees award, they provided no argument for application of that authority." *Richards v. Pullman*, 134 Wn.App. 876, 884, 142 P.3d 1121 (2006). *See also In re Marriage of Coy*, 160 Wn.App. 797, 808, 248 P.3d 1101 (2011) ("rule requires more than a bald request for attorney fees on appeal .... Argument and citation to authority are required..."). That defect is sufficient to deny Filmore's request. The Association notes further, however, that Article XIII of the Declaration does not authorize Filmore's request, CP 65; and Filmore as a declarant is not among the beneficiaries of RCW 64.34.455. Even if it were, the statute is highly discretionary, in its use of "in an appropriate case" and "may award." Filmore's request for fees should be denied.[25]

CONCLUSION

For the reasons stated above and in the Association's Opening Brief, the CR 56 order of the court below should be reversed.

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[25] Filmore also refers to a Bylaw that is not in the record, Opp. Br. at 30 n.61 (the Association would not agree even if the Bylaw were in the record that it provides for any fee award to Filmore); and to the CR 56 order below. The latter did not award any fees, nor was any request for an award made to the court below. It simply preserved such rights as each side had with respect to the making of any future requests for a fee award. CP 341.

RESPECTFULLY SUBMITTED this 1st day of February, 2014.

ROCKEY STRATTON, P.S.

Steven A. Rockey, WSBA 14508
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that service of a copy of Appellant's Reply Brief to which this certificate of service is attached is being made on the 3 day of February, 2014, by mailing same via the United States Postal Service to the attorneys of record for plaintiff/respondent, first class postage prepaid.

DATED this 3 day of February, 2014.

ROCKEY STRATTON, P.S.

Steven A. Rockey, WSBA 14508
Attorneys for Petitioner