NO. 93013-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA L. ANDERSON, TRUSTEES OF THE DALE E. ANDERSON AND LETA L. ANDERSON FAMILY TRUST; and RIVER PROPERTY, LLC,

Appellants,

v.

JAMES W. BROWN; ROBERT D. DAVIS; KAE HOWARD, TRUSTEE OF THE KAE HOWARD TRUST; MICHAEL J. and CRISTI D. DEFREES, husband and wife; TUAN TRAN and KATHY HOANG, husband and wife; VINCENT and SHELLY HUFFSTUTTER, husband and wife; THOMAS J. and GLORIA S. KINGZETT, husband and wife; LARRY R. and SUSAN I. MACKIN, husband and wife; TOD E. McCLASKEY, JR. and VERONICA A. McCLASKEY, TRUSTEES OF THE McCLASKEY FAMILY TRUST—FUND A; CRAIG STEIN; and RICHARD and CAROL TERRELL, husband and wife,

Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN NICHOLS

RESPONSE TO PETITION FOR REVIEW

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I. Identity of Respondents.

This Response to Petition for Review is filed on behalf of Dale E. Anderson and Leta L. Anderson; Dale E. Anderson and Leta L. Anderson, Trustees of the Dale E. Anderson and Leta L. Anderson Family Trust; and River Property, LLC (collectively, the Andersons).

II. Court of Appeals Decision.

Certain of the Defendants (the Neighbors) have sought review of the Court of Appeals' unpublished decision in this matter. That decision is attached to the Petition for Review as an appendix.[1]

III. Issues Presented for Review.

This case concerns the validity of an amendment to covenants of Rivershore Phase-I precluding division of existing lots (the 2008 Amendment). The Neighbors have presented certain issues for review. These will be discussed below.

The Court of Appeals decided this matter without reaching certain of the issues raised by the Andersons on appeal. If the Supreme Court takes review, it should also consider these issues. They are the following:

[1] Only three of the Andersons' neighbors are pursuing review. These are Michael DeFrees and Cristi DeFrees, owners of Lot 3, and Craig Stein, the owner of Lot 5.

1. Was the 2008 Amendment valid when it was not agreed to by 80% of the owners of lots in the subdivision?

2. Were the Neighbors estopped to approve the 2008 Amendment by delaying in taking the action until the Andersons had purchased Lot 2 with the intent of dividing it?

IV. Statement of the Case.

The decision of the Court of Appeals accurately states some of the facts of this case. The Neighbors' correction is also accurate. The Court of Appeals' decision does not discuss the facts surrounding the issues that the it did not reach. Those will be set out here.

In 2008, Kae Howard as the Trustee of the Kae Howard Trust was the owner of Lot 1. Also in 2008, Tod McClaskey and Veronica McClaskey as Trustees of the McClaskey Trust-Fund A, dated December 1, 2006, were the owners of Lot 8. Ms. Howard and the McClaskeys signed the 2008 amendment as individuals and not in their capacities as trustees of their respective trusts. Prior to doing so, they had not delegated their duties as trustees to themselves as individuals and had not as trustees

executed powers of attorney to themselves to take action for themselves as trustees. (CP 23, FF3; CP 26-27, FF16-18)[2]

Gerald Davis and Roberta Davis, husband and wife, purchased Lot 9 of Rivershore in 1990. (CP 27, FF19) Mr. Davis died in 2001. His will created a "credit shelter" trust and a "QTIP" trust. All of his assets were left to those trusts. Ms. Davis was the beneficiary of those trusts for her life with the remainder going to her children on her passing. David Jahn, Morris Bush, and Michael Yount were designated co-executors of the will and co-trustees of the trust. (CP 23, FF2; Ex. 1, Tab 41) Mr. Davis' will was admitted to probate on August 30, 2001. (Ex. 1, Tab 42) The three personal representatives executed and filed a Declaration of Completion of Probate on November 12, 2003. (Ex. 1, Tab 43) No deed has ever been executed or delivered conveying Mr. Davis' interest in Lot 9 of Rivershore to any person or entity. (CP 27, FF21)

The trial court made certain Findings of Fact and Conclusions of Law. Included in these was Finding of Fact No. 10 which reads as follows:

> On October 15, 2008, the First Amendment to Declarations of Covenants and Restrictions of Rivershore, which is Exhibit 4 and will be referred to as the 2008 Amendment,

[2] All factual references are taken from the findings of fact that the trial court made and to which no party assigned error. The legend "FF" refers to "Findings of Fact." The record also consisted of one exhibit, a three ring binder with numbered tabs. Reference is also made to the tab number.

> was recorded with the Clark County Auditor. It was not signed by the Andersons as owners of Lot 2 or as the owners of Lot 4. It was also not signed on behalf of River Property, LLC. There was no meeting of all the owners of lots in Rivershore prior to its being signed or filed. The prohibition on further division within its language represented a new restriction on the use of lots within Rivershore at that time.

On appeal, the Neighbors did not assign error to this Finding of Fact or claim that it was a conclusion of law.

In their Petition for Review, the Neighbors attempt to distinguish the leading case that governs the issue between the parties, *Wilkinson v. Chiwawa Communities Associations,* 180 Wn.2d 241, 327 P.3d 614 (2014). They ask the Court to sanction changes to covenants that impose a new restriction is approved by more than a simple majority of subdivision owners and when it is consistent with the general plan of development. They did not present similar arguments in the Brief of Respondents which is attached as Appendix I without its voluminous appendices.[3]

[3] The Court of Appeals decided the case without oral argument.

V. Argument.

a. The Supreme Court Should Not Accept Review of the Issues Related to the Validity of the 2008 Amendment.

i. Introduction.

The Neighbors ask the Court to take review on the following two related questions concerning the validity of the 2008 Amendment:

1. Whether a new restriction can be added with less than a unanimous vote by all affected homeowners when it is consistent with the general plan of development; and

2. Whether a new restriction can be added based on the vote of more than a simple majority.

They ask for review on the basis that these related issues present questions of public interest. RAP 13.4(b)(4) Review should not be granted on these issues for several reasons. First of all, the Neighbors did not raise either issue in the Court of Appeals. Secondly, rules governing each issue were clearly set out in *Wilkinson v. Chiwawa Communities Associations, supra.* Third, the Court of Appeals decided the matter correctly based on the rules set out in *Wilkinson v. Chiwawa Communities Associations, supra.* Finally, deciding these issues contrary to the holding

of the Court of Appeals would require overruling *Wilkinson v. Chiwawa Communities Associations, supra.*

ii. The Neighbors Did Not Raise These Issues before the Court of Appeals.

In a number of opinions, the Supreme Court has stated that it will not take review of issues not presented to the Court of Appeals. See, e.g., *People's National Bank v. Peterson,* 82 Wn.2d 822, 830, 514 P.2d 159 (1973); *State v. Cunningham,* 93 Wn.2d 823, 837-38, 613 P.2d 1159 (1980); *Bender v. City of Seattle,* 99 Wn.2d 582, 598-99, 664 P.2d 492 (1983); *Fisher v. Allstate Insurance Company,* 136 Wn.2d 240, 252, 961 P.2d 350 (1998) The Neighbors did not raise either of these issues in the Court of Appeals. Their brief did not address them. Therefore, and for that reason alone, the Court should not accept review of these questions.

iii. The Opinion in *Wilkinson v. Chiwawa Communities Associations* Set Out Clear Rules Applicable Here.

The Court in *Wilkinson v. Chiwawa Communities Associations, supra,* held that covenants could not be amended to add a restriction on duration of rental when the covenants allowed a majority only to change the restrictions as opposed to creating new restrictions. 180 Wn.2d at 256 It also stated that the amendment in question required

unanimous consent. 180 Wn.2d at 258 The Court made it clear that a new restriction could be added by less than all owners only if the covenants explicitly allow less than all owners to add new restrictions by amendment. 180 Wn.2d at 257 The Court based its decision on the expectations of an unwilling minority who would buy into a subdivision based on what was in the covenants in the following language:

> In Washington, the authority of a simple majority of homeowners to adopt new covenants or amend existing ones in order to place new restrictions on the use of private property is limited. When the governing covenants authorize a majority of homeowners to *create* new restrictions unrelated to existing ones, majority rule prevails "provided that such power is exercised in a reasonable manner consistent with the general plan of the development. . ." However, when the general plan of development permits a majority to *change* the covenants but not create new ones, a simple majority cannot add new restrictive covenants that are inconsistent with the general plan of development or have no relation to existing covenants . . . This rule protects the reasonable, settled expectation of landowners by giving them the power to block " 'new covenants which have no relation to existing ones' " and deprive them of their property rights. . . As the Court of Appeals observed, " '[t]he law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land. . .' "

The decision thus sets out the following clear direction concerning changes to covenants in a subdivision or other development:

1. Covenants can be amended to add new restrictions by the vote of less than all homeowners only if there is language in the covenants specifically allowing that action.

2. In the absence of language in the covenants that allows the imposition of new restrictions without the consent of all owners, any amendment creating new restrictions without unanimous homeowner approval is not valid.

This decision provides clear drafting guidance for those preparing covenants and wanting to allow amendment to impose new restrictions. It also lets homeowners know how to evaluate the requirements for amending covenants to add new restrictions.

As the language quoted above makes clear, the Court's opinion was based on the policy of protecting the property rights and expectations of the minority who purchase their parcels based on language within covenants.

As will be discussed below, the Neighbors want to change the rule set out in *Wilkinson v. Chiwawa Communities Associations, supra.* The Supreme Court decided that case in April of 2014. When a decision of the Supreme Court sets out unambiguous guidance for the public and the lower courts and rests its decision on a clear policy basis, there is no need for the Court to consider the matter

further. To the contrary, the public interest is advanced by the predictability that a Supreme Court decision gives. Once a decision is made and a rule established, the Court should not change the rule within two or three years.

The Neighbors do not suggest that the Court of Appeals incorrectly decided this case based on the rule set out in *Wilkinson v. Chiwawa Communities Associations, supra.* They want to change the rules set out in that case. The public interest will not be advanced by granting review to do so. Therefore, the Court should deny review.

iv. The Court of Appeals' Decision Was Correct.

Our case was correctly decided under the rule set out in *Wilkinson v. Chiwawa Communities Associations, supra.* If anything, it presents a stronger and clearer case for application of the rule than did *Wilkinson v. Chiwawa Communities Associations, supra.*

The covenants in our case allow for their amendment in the following language:

> . . .(I)f. . .it appears to the advantage of this platted subdivision should be modified, then, and in that event, any modification desired may be made by the affirmative vote of 80% of the then owners of lots within this subdivision and evidenced by a suitable instrument filed for public record. . .

(Ex. 1, Tab 1) The language allows for modification of existing restrictions by an 80% vote but does not mention creation of new restrictions. Nothing in the covenants addresses division of lots. This was the opinion of the attorney contacted when Mr. Brown decided to divide Lot 13. The trial court made the same determination in Finding of Fact No. 10. The Neighbors did not assign error to this finding and claim that it was a conclusion of law. The Court of Appeals came to this conclusion in two separate decisions.

The Andersons relied on the existing language in the covenants to purchase Lot 2. They would not have bought the lot if the covenants had contained a restriction on division. (CP 26 FF11)

The 2008 Amendment eliminated an owner's right to divide an existing lot. This amounted to a new restriction. It had no relation to any existing restriction because there is nothing in the covenants that deals with land division. Based on all these facts, the Court of Appeals ruled that the 2008 Amendment was invalid because it created a new restriction and because the covenants did not allow for the creation of new restrictions with less than unanimous approval. Opinion, pps.10-11 The decision of the Court of Appeals was correct under the rule set out

in *Wilkinson v. Chiwawa Communities Associations, supra.* The Neighbors do not contend to the contrary.

Our case presents a clearer and stronger case for the application of the rule set out in *Wilkinson v. Chiwawa Communities Associations, supra.* In that case, the amendment concerned duration of vacation rentals. The covenants mentioned rental of houses but did not discuss duration. By contrast, there is absolutely nothing in the covenants here that addresses division of existing lots. In *Wilkinson v. Chiwawa Communities Associations, supra,* the covenants provided that they could be "changed" by a majority vote. In our case, the covenants can only be modified. Presumably, a "change" could include the creation of a new restriction. A modification, however, must revise an existing covenant.

The Andersons relied on the language of the covenants in purchasing Lot 2. They would not have made the purchase if there had been a restriction on division. Invalidating the 2008 Amendment advances the policy behind the decision in *Wilkinson v. Chiwawa Communities Associations, supra,* protecting the expectations of the minority owners who purchased property based on the existing covenants. No similar facts were adduced in *Wilkinson v. Chiwawa Communities Associations, supra.*

There is no need for the Supreme Court to take review of a case that was correctly decided in the Court of Appeals. The decision of the Court of Appeals on this point was obviously correct.

v. The Neighbors Are Asking the Court to Overule *Wilkinson v. Chiwawa Communities Associations.*

The Neighbors ask the Supreme Court to take review to determine whether the 2008 Amendment was consistent with the subdivision's general plan of development. They contend that it was. However, the trial court made no findings of fact, one way or the other on this point. They contend for a rule similar to that expressed in the dissenting opinions of Justices Madsen and Gordon McCloud in *Wilkinson v. Chiwawa Communities Associations, supra.* Each of those two opinions states that the validity of an amendment should be based on its consistency with the general plan of development and that this must be determined at trial. Opinion of Madsen, J., 180 Wn.2d at 268; Opinion of Gordon McCloud, J., 180 Wn.2d at 271 Justice Madsen further disagreed with the majority's distinction between amendment provisions that allow for modification and amendment provisions that allow for creation of new restrictions.

The Neighbors are clearly asking for reconsideration and overruling of the rule expressed by the majority in

Wilkinson v. Chiwawa Communities Associations, supra. They are seeking a different rule—that any amendment imposing new restrictions can be adopted without the consent of all homeowners as long as it is consistent with the general plan of development. As discussed above, there is no reason for the Supreme Court to revisit a matter it ruled on only two years ago.

In any event, and as the majority opinion makes clear, the general plan of development includes the provisions within the covenants that allow for amendment:

> While we recognize, as does the dissent, that no Washington case has described the precise contours of when an amendment would be "consistent with the general plan of development," we need not provide that guidance here because the Chiwawa general plan did not authorize a majority of owners to adopt new covenants. The Chiwawa general plan of development merely authorized a majority of owners "to change these protective restrictions and covenants in whole or in part."

180 Wn.2d at 258 The Neighbors argument is self-defeating. Since the subdivision's general plan of development does not allow imposition of new restrictions without unanimous approval, it cannot possibly allow the 2008 Amendment.

As the above passage recognizes, the Court did not decide what is required for an amendment to be consistent with the general plan of development. This is the wrong case to decide that question. It should be decided in a case where the covenants allow imposition of new restrictions without unanimity and the facts concerning consistency with a general plan are developed in the trial court. That did not occur here. The trial court made no findings of fact on that subject.

The Neighbors would also revise the rule stated in *Wilkinson v. Chiwawa Associations Communities, supra,* to allow new restrictions to be imposed by more than a simple majority. There is nothing in the majority opinion in *Wilkinson v. Chiwawa Associations Communities, supra,* that would allow for such a limitation of the opinion's thrust. The Court desired to protect the expectations of the minority of owners. Those expectations and the need to protect them are no different if that minority is large—49% if a simple majority must approve—or small, as here, when 80% can approve an amendment. Furthermore, the Court discussed *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.,* 76 Wn.App. 267, 883 P.2d 1387 (1994)—a case where 60% of owners/association members had to approve any new restriction—without any mention that a supermajority was required for amendment in that case. 180 Wn.2d at 256

More to the point, the rule the Neighbors seek is not something the Court can determine. What level of supermajority is needed to overcome objections by a minority? Is 52% enough, or would it have to be 95%? There is no logical distinction between a majority, a relatively small supermajority such as 52%, or a very large supermajority such as 95%. Therefore, the sufficiency of any supermajority would have to be set by that branch of government that makes comparable determinations—the legislature. Courts should not be setting the standard for the supermajority. See, *e.g., Rousso v. State,* 170 Wn.2d 70, 239 P.3d 1084 (2010)

In seeking this new rule, the Neighbors question the entire premise of the decision in *Wilkinson v. Chiwawa Associations Communities,* supra—protection of property rights and minority rights. Once again, they seek to overrule the entire thrust of the Court's decision.

vi. Conclusion.

The Neighbors contend that this case presents questions of public interest. It does not. It a dispute among a very few people on how to apply the rule set out in a Supreme Court decision to a specific set of circumstances. The decision of the Court of Appeals is also unpublished. If anything, the public interest requires that review not be taken so that there is no interference with the predictability that clear rules

set out in *Wilkinson v. Chiwawa Communities Associations, supra,* gave us. The Supreme Court should deny review on these related issues.

b. The Supreme Court Should Not Take Review of the "Law of the Case" Issue.

The Neighbors also believe that the Court of Appeals improperly applied the "Law of the Case" doctrine. They do not claim that the decision is inconsistent with any decision of the Supreme Court or any other decision of the Court of Appeals. In fact, there is no inconsistency. Therefore, the Supreme Court should not take review. RAP 13.4(b)(2), (3)

The "Law of the Case" doctrine precludes reconsideration of decisions the appellate court has made in a prior appeal of the same case. *Bunn v. Bates,* 36 Wn.2d 100, 216 P.2d 741 (1950); *Roberson v. Perez,* 156 Wn.2d 33, 41, 123 P.3d 844 (2005) The doctrine's application is limited to questions that have been presented and decided on the former appeal and those necessarily involved with the decision. *Junkin v. Anderson,* 21 Wn.2d 256, 150 P.2d 678 (1944); *Columbia Steel Co. v. State,* 34 Wn.2d 700, 706, 209 P.2d 482 (1949). When an issue is not decided in the first appeal, the doctrine does not prevent it being decided in the second appeal. *Riley v. Sturdivant,* 12 Wn.App. 808, 532 P.2d 640

(1975); *Holst v. Fireside Realty, Inc.,* 89 Wn.App. 245, 948 P.2d 858 (1997)

The Court of Appeals ruled the "Law of the Case" doctrine did not preclude a decision on whether the 2008 Amendment was infirm because all homeowners did not agree to it. It made this decision on the basis that it did not decide this question in the first appeal, *Anderson v. Brown,* 2013 WL 4774132 (2013). The Court of Appeals pointed to language in the first appeal to support that conclusion. Opinion, p. 7 In coming to this conclusion, the Court was not merely relying on language in the prior opinion. The author of the current opinion, Judge Bjorgen, was one of the three judges that decided the first appeal. If anyone would know the intentions of the judges who decided the first appeal and what was or was not decided, it would be one of the judges that rendered the decision. It is therefore difficult to question the Court of Appeals' decision in this regard.

Even if the Court of Appeals did somehow decide this issue in the first appeal, RAP 2.5(c)(2) gave that Court discretion to consider whether unanimity was required for the 2008 Amendment to be effective. It is allowed to do this if it determines that the first decision was clearly

erroneous or if there has been an intervening change in controlling precedent. *Roberson v. Perez, supra,* 156 Wn.2d at 33, 42-43[4] In their briefing, the Andersons argued that the first decision by the Court of Appeals was clearly erroneous if it was read to allow in the amendment to be effective in the absence of unanimity among the Rivershore owners and that it can be said to represent a change to existing precedent. The Neighbors did not dispute that notion in the Brief of Respondents.

To summarize, the "Law of the Case" doctrine allows consideration of issues not decided in the prior appeal. The Court of Appeals—in a decision authored by one of the judges involved in the prior appeal—stated that it had not decided in the previous appeal whether the 2008 Amendment was infirm because it was not approved by all homeowners. The Neighbors don't dispute the rule underlying the Court of Appeals decision or allege that the application is somehow inconsistent with any opinion from either the Supreme Court or the Court of Appeals. They simply ask the Supreme Court to second guess the Court of Appeals on whether it decided the relevant question in the prior appeal. Under these circumstances, the Supreme Court should not accept review.

[4] The Court of Appeals did not reach this question since it determined that the issue had not been decided in the first appeal. Opinion, pps. 9-10, fn.2

c. If the Supreme Court Takes Review, It Should also Consider Other Issues Raised by the Andersons.

The Andersons argued to the trial court and to the Court of Appeals that the 2008 Amendment was infirm because an affirmative vote for that Amendment did not come from 80% of the owners. The 80% threshold was not reached because there was no vote in favor from the owners of Lots 1, 8, and 9. There was no affirmative vote by the owners of Lots 1 and 9 because the signatures on the 2008 Amendment from Ms. Howard for Lot 1 and the McClaskeys for Lot 8 did not come from the owner. The McClaskeys and Ms. Howard owned the lots in their capacities as trustees but signed the 2008 Amendment in their individual capacities. Only Ms. Davis signed the 2008 Amendment for Lot 9. Mr. Davis' interest was, at that time, the property of his estate. But neither his personal representative nor any of the trustees of his trust signed the 2008 Amendment. That means that there was no signature from the true owners of Lot 9 either.

The Andersons also contended that the Neighbors were estopped from making the 2008 Amendment by their failure to take that action immediately after Mr. Brown subdivided his lot. The trial court ruled that no estoppel had occurred and that propriety of the signatures on the 2008 Amendment was concluded by the first decision of the Court of

Appeals based on the "Law of the Case" doctrine. That Court of Appeals did not address those issues. Opinion, p. 11

If the Supreme Court decides to take review, that review should include these issues for one and only one very simple reason—the Andersons have not had the benefit of any appellate review of these matters.

VI. Conclusion.

The Supreme Court should deny review of this case. If it grants review, it should also consider the issues that the Andersons raised but were not reached by the Court of Appeals.

DATED this 6 day of May, 2016.

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No. 47126-4-11

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA L. ANDERSON, TRUSTEES OF THE DALE E. ANDERSON AND LETA L. ANDERSON FAMILY TRUST; and RIVER PROPERTY, LLC,

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Respondents.

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Rules and Statutory Provisions

I. INTRODUCTION

This case concerns plaintiffs' attempt to relitigate an issue that was decided by this Court in 2013; namely, that more than 80 percent of the homeowners in Rivershore[1] validly adopted an amendment to the Rivershore Declaration so as to preclude the further subdivision of any lots in Rivershore, including the lot plaintiffs seek to divide in this action. Plaintiffs now try to avoid the law of the case doctrine and to make arguments that they both raised and could and should have raised in connection with the prior appeal.

The Court should decline to reconsider or revisit its 2013 holding. With a proper application of the law of the case doctrine, the trial court's findings of fact, conclusions of law, and judgment should be affirmed.

On the merits, plaintiffs' challenges to the validity of the approval of the owners of three lots to the amendment fails. Each challenged signature was from someone who had an interest in the lot at issue. Each signature clearly was in favor of the amendment. The conclusion that the amendment was legally adopted and is valid should stand.

Plaintiffs also briefly contend that equitable estoppel should have been found to bar the owners from amending the CC&R's. Plaintiffs did not come close to proving the elements of equitable estoppel at trial, let

[1] "Rivershore" refers to Rivershore Estates Phase I, a very upscale and exclusive development on the shore of the Columbia River in Vancouver, Washington.

alone by clear and convincing evidence. The trial court properly ruled in favor of defendants on plaintiffs' estoppel claim.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Response to Assignments of Error 1-4: The trial court acted properly and in accordance with the evidence and law, and in accordance with the prior holding of this Court, when it entered its Memorandum of Opinion, its Conclusions of Law, and the Judgment, relying on the law of the case doctrine.

Response to Assignment of Error 5: The trial court properly found that plaintiffs did not prove the elements of equitable estoppel.

III. RESPONSE TO ISSUES PRESENTED

1. The question of whether the 2008 amendment required the approval of all homeowners within the subdivision has already been decided by this Court, and the law of the case doctrine requires that decision to be followed.

2. Whether the owners of Lots 1, 8 and 9 validly assented to the 2008 amendment is an issue that could and should have been raised in the prior appeal such that the law of the case doctrine precludes the Court from deciding those issues in this appeal.

3. Even if the law of the case doctrine was to be deemed inapplicable to this case, the owners of Lots 1, 8, and 9 unambiguously

consented to the adoption of the 2008 amendment, and their votes should stand.

4. Defendants did not act or fail to act in any way that would justify the application of equitable estoppel to invalidate their assent to the 2008 amendment.

IV. STATEMENT OF THE CASE

In the prior appeal, the principal issue before the Court was whether the trial court erred in granting plaintiffs' motion for partial summary judgment and concluding that the 2008 amendment was invalid. Defendants argued on appeal that the owners of 10 lots voted in favor of the modification and that the vote satisfied the language in the declaration that reserved the power to modify the CC&R's to the votes of 80 percent of the lot owners. *See* Appendix, at A24-26.

In their responsive brief on appeal, plaintiffs contended that the defendants "failed to muster the requisite number of votes necessary to amend." A51. Although plaintiffs cited both *Shafer v. The Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267 (1994) and *Meresse v. Stelma*, 100 Wn. App. 857 (2000), plaintiffs did not argue that the 2008 amendment had to be passed by a unanimous vote.

In an unpublished opinion, this Court held in favor of defendants and upheld the validity of the 2008 amendment. See A71.

> We conclude that the amendment to the covenants was valid because, in conformance with the covenants, it was approved by owners holding more than 80 percent of current ownership interest in the lots in the subdivision....We also conclude that the Andersons' equitable claims must be remanded for further proceedings. We retain jurisdiction so that, should the Andersons be successful in these proceedings, we may consider whether the Andersons' application will need to be processed as a plat alteration or as a short plat.

The court concluded its discussion of the issue, at A83, as follows:

> We hold that each of the two lots within former lot 13 has a one-half vote for purposes of amending the Covenants, and thus the 2008 amendment to the Covenants was approved by an 80.7 percent vote. The trial court's ruling that the amendment was invalid is reversed.

In their motion for reconsideration, plaintiffs belatedly contended that they were still entitled to argue whether the signatures on the amendment were legally valid. A63. On reconsideration, this Court agreed to refer to the signatures as "purported." A69. The Court did not change its fundamental conclusion, however, that the 2008 amendment was legally valid.

Following a trial to the court on remand, the trial court entered its memorandum of opinion on December 22, 2014. CP 16-21. The court found that plaintiffs' issues regarding the signatures of the owners of Lots 1, 8 and 9 had already been resolved by the 2013 opinion. CP 16-17:

> Preliminarily, from the rulings of the appellant [sic] court certain issues can be accepted as verities by this court.

1. The amendment to the covenant was valid.

* * *

> The court further ruled that the signatures "purporting" to be those of the respective lot owners were properly affixed to the amendment. Any issue regarding the authority of the signatures would apparently be validated by this ruling. Consequently plaintiffs would be estopped from challenging the validity of the voting process.

The trial court also found that plaintiffs' contention that the 2008 amendment had to be adopted unanimously had previously been raised but not argued by plaintiffs, such that the argument did not present a new statement of precedent that would justify not adhering to the law of the case doctrine. CP 18-19. The trial court agreed that this issue had been resolved by the 2013 opinion and that issues regarding the validity of the amendment could not be raised on remand. CP 20:

> The vote on the amendment was valid despite questions concerning the signatures of the various owners' capacity as "trustees/assignees." This issue was resolved by the Court of Appeals.

The court then entered findings of fact (none of which are challenged here) and conclusions of law. CP 22-28. There, the court incorporated its memorandum of opinion as the conclusions of law.

Finally, the trial court entered a judgment, confirming that the 2008 amendment "is legally valid, and operates to preclude plaintiffs Anderson from subdividing Lot 2 in Rivershore Phase 1." CP 29-31. The

court also entered a money judgment in favor of defendants for their taxable costs. *Id.*

V. ARGUMENT[2]

A. The Law of the Case Doctrine Precludes Plaintiffs from Challenging the Validity of the 2008 Amendment.

Plaintiffs' attempt to challenge the validity of the 2008 amendment is improper because this Court ruled in 2013 that the 2008 amendment had been legally adopted and was valid. In light of that holding, the law of the case doctrine precludes plaintiffs from again challenging the validity of the 2008 amendment in this appeal.

The law of the case doctrine was summarized in *Columbia Steel Company v. State*, 34 Wn.2d 700, 705 (1949):

> The law is well settled in this state that on a second appeal we will not review questions decided by us on the former appeal. Upon the retrial the parties and the trial court were all bound by the law as made by the decision on the first appeal. On appeal therefrom the parties and this court are bound by that decision unless and until authoritatively overruled.
>
> ...The case having been here upon a former appeal, as to every question that was determined upon that appeal and as to every question that might have been determined, the opinion became what is called the law of the case upon the second trial, and cannot again be considered by this court upon a second appeal. (Citations omitted.)

[2] Defendants agree with plaintiffs' statement of the standard of review. *See* Brief of Appellants, at 9.

See also Folsom v. County of Spokane, 111 Wn.2d 256, 263 (1988) ("Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes re-deciding the same legal issues in a subsequent appeal"); *Groverson v. Perez*, 156 Wn.2d 33, 41 (2005) ("...the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent states of the same litigation"); *State v. Worl*, 129 Wn.2d 416, 424 (1996) ("...the parties, the trial court, and [the Supreme] Court are bound by the holdings of the court on the prior appeal until such time as they are 'authoritatively overruled'").

Holst v. Fireside Realty, Inc., 89 Wn. App. 245 (1997), is an example of the court finding that the law of the case doctrine was inapplicable. There, the court in the first appeal held that <u>if</u> a realtor was acting as a party's agent, the realtor did not adequately disclose that fact. *Id.* at 258. This finding did not implicate the law of the case on the second appeal, however, because the court did not decide in the first appeal <u>whether</u> the realtor was in fact acting as the party's agent. The question presented on the second appeal had not been decided in the first appeal.

This case does not present a similar situation. In 2013, this Court did not decide that the 2008 amendment was legally valid if trustee owners approved the amendment by signing in a certain capacity or if the Davis lot owner, due to probate issues, approved the amendment with authority to do so. This Court found, without reservation, that the 2008 amendment was legally valid. It remanded the case for the sole purpose of allowing plaintiffs to try their claim of equitable estoppel to the court. *See* A83-85:

> Because the evidence regarding estoppel is underdeveloped in this case, we affirm the trial court's denial of summary judgment for the Andersons on this issue and remand for further proceedings. The Andersons' success on this issue would permit them to move forward with an application to subdivide lot 2 despite the valid Covenant amendment prohibiting further divisions of lots within Rivershore....
>
> * * *
>
> ...the outcome of this case still depends on whether the Andersons prevail on their equitable claims on remand...

Despite the prior decision of the Court of Appeals, plaintiffs have belatedly asserted that they intend to challenge defendants' signatures on the amendment, including that Ms. Howard and the McClaskeys did not write "trustee" after their signatures. Plaintiffs also contest the signature for Lot 9, which was affixed by one of the owners of that lot. Plaintiffs have waived any right they may have had to raise these contentions.

Plaintiffs' complaint for declaratory relief contains no allegations regarding the signatures or the signators' authority to sign the document adopting the 2008 amendment. CP 1-3. Defendants' amended answer then affirmatively alleged that "[t]he amendment to the CC&R's is effective to prohibit plaintiffs' efforts to subdivide or short plat lot 2." CP 5. Plaintiffs filed a reply to defendants' affirmative defenses, but again failed to allege that there was any issue with the signatures adopting the amendment. SUPP. CP 102-103.

Plaintiffs later filed a motion for partial summary judgment. SUPP. CP 35-45. In their supporting memorandum, plaintiffs offhandedly included a sentence stating that the signatures had to be made in the owners' proper capacity. SUPP. CP 38. Nowhere else in plaintiffs' moving or reply pleadings (SUPP. CP 35-45, 104-112) is this sentence expanded upon. The concept is not even mentioned again, let alone argued.

By failing to raise the signature issue in their reply to defendants' affirmative defenses, plaintiffs waived their right to assert the issue. CR 8. *See also Harting v. Barton*, 101 Wn. App. 954 (2000). Plaintiffs also waived any right to rely on this issue by failing to present further argument to the trial court or to the Court of Appeals. *See, e.g., Skagit County Public Hospital District No. 1 v. Dept. of Revenue*, 158 Wn. App.

426, 440 (2010) ("An appellant waives an assignment of error if it fails to present argument or citation to authority in support of that assignment").

Plaintiffs similarly did not raise the issue on appeal until after the appellate court had ruled, when plaintiffs filed their motion for reconsideration and clarification. A63-67. Again, plaintiffs' attempt to create an issue regarding the signatures came too late, and the issue was waived. Plaintiffs cannot generally use a motion for reconsideration to raise an issue for the first time. *See Howe v. Douglas County*, 146 Wn.2d 183, 185 n.1 (2002).

It is noteworthy that plaintiffs had earlier filed a "motion to strike defenses not pleaded" in February 2010. SUPP. CP 113-115. Plaintiffs therefore recognized that unplead affirmative defenses cannot be asserted. Plaintiffs must be held to the same standard. The invalidity of one or more signatures on the amendment is an affirmative defense to defendants' claim that the 2008 amendment was valid. Having failed to assert the defense properly, plaintiffs have waived the defense.

In their brief in the first appeal, plaintiffs addressed defendants' contention that the 2008 amendment was valid at 12-14. A19-21. They made no contention that any signatures were invalid. This was certainly a contention which should have been made, given that defendants were asking the Court of Appeals to find that the 2008 amendment was legal,

valid, and enforceable. The validity of the signatures, if in issue, was necessarily an element to be raised in resolving that issue. Plaintiffs were aware of this potential issue, given that they had mentioned it in their motion for partial summary judgment.

The purpose of the law of the case doctrine is "to promote finality and efficiency in the judicial process." *Roberson v. Perez*, 156 Wn.2d 33, 41 (2005). *See also* RAP 2.5(c)(2). This purpose would be ill-served by allowing plaintiffs to now challenge this court's 2013 opinion with arguments that were known and that should have been made at the time. As Division III recently noted, "We may also refuse under the doctrine to address issues that could have been raised in a prior appeal." *Sambasivan v. Kadlec Medical Center*, 184 Wn. App. 567, 576 (2014). *See also Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64 (1988). Under the circumstances of this case, the Court in its discretion should apply the law of the case doctrine and preclude plaintiffs' belated challenge to the signatures on the documents approving the 2008 amendment.

B. There Was No Intervening Change in Controlling Precedent to Justify not Applying the Law of the Case Doctrine.

Plaintiffs erroneously contend that the decision in *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241 (2014) was a change in controlling precedent, justifying a departure from the law of the case

doctrine. Where there has been an intervening change in controlling precedent between the times of the first and second appeals, the court may choose to disregard the law of the case doctrine. *Roberson*, 156 Wn.2d at 42-43. Plaintiffs' argument fails because *Wilkinson* does not represent a change in controlling precedent. The trial court properly reached that conclusion.

In the first appeal, plaintiffs relied on *Shafer v. The Board of Trustees of Sandy Hook Yacht Club Estates*, 76 Wn. App. 267 (1994) and *Meresse v. Stelma*, 100 Wn. App. 857 (2000) in support of their challenge to the validity of the 2008 amendment. *Shafer* concerned the adoption of new restrictive covenants without the agreement of all affected property owners. While the court ultimately found that the development documents expressly reserved the power for less than 100 percent of the property owners to adopt new restrictions, the proposition being relied upon was the same as that relied on by the *Wilkinson* court: If the governing documents do not reserve the power in less than 100 percent of owners to adopt new restrictions, then the adoption of new restrictions must be unanimous.

Meresse was to similar effect. There, through interpretation of the restrictive covenants, the court held that a majority lot owner could not subject the dissenting minority owner to a major change (relocation

of an access road). In other words, the major change could only be put into effect if there was unanimous approval.

While *Wilkinson* clarified these holdings, it did not announce a new principle of law representing a change in controlling precedent.[3] The court held, as in *Meresse*, that a majority of owners could not impose a new restriction on the dissenting minority owners where the new restriction was unrelated to any existing covenant. *Wilkinson*, 180 Wn.2d at 255.

Wilkinson did not change precedent or open the door for plaintiffs to renew their objection to the validity of the 2008 amendment. The law of the case doctrine should still be applied to foreclose plaintiff's attempt to overcome the 2013 holding that the 2008 amendment was legal and valid.

C. In Any Event, Plaintiffs' Challenge to the Signatures is Without Merit.

Although the issue is precluded by the law of the case doctrine, defendants will briefly address plaintiffs' contentions regarding the signatures from the owners of Lots 1, 8, and 9.

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[3] The trial court properly so found, stating: "Contrary to plaintiffs [sic] assertions this does not appear to be a case of first impression as *Meresse* and others were cited as authority." CP 18.

Kae Howard, the owner of Lot 1, signed an approval to the 2008 amendment. Ex. 1, at Tab 6.[4] Todd and Veronica McClaskey, the owners of Lot 8, also signed an approval of the 2008 amendment. *Id.* So did Roberta Davis, the owner of Lot 9. *Id.*

Plaintiffs contend that the Howard and McClaskey signatures are invalid because they owned their lots through trusts, rather than as individuals, and they did not handwrite "trustee" after their signatures.[5] However, the authorities relied upon by plaintiffs concern attempts to convey real property. Such conveyances have specific and detailed requirements to be valid. *See* RCW 64.04.020 (requiring all deeds to be "signed by the party bound thereby"). No conveyance is at issue in this case. Instead, the owners were merely signifying their assent to the 2008 amendment. Their signatures are valid for that purpose.[6]

As for Lot 9, plaintiffs contend that Ms. Davis' signature is invalid because she only held a one-half interest in the lot. There is no evidence in the record that the owners of the other one-half interest were opposed to the 2008 amendment. In the absence of such evidence,

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[4] All trial exhibits have been transmitted as part of the record on appeal as "Exhibit 1."
[5] The only legal effect of a trustee not placing the word "trustee" after his signature is to prevent the trustee from asserting that he has no personal liability on a contract. *See* RCW 11.98.110(2). Plaintiffs in effect have no right or standing to contest the manner in which the McClaskeys and Ms. Howard signed the amendment to the CC&R's.
[6] At a minimum, Ms. Howard and the trustees should be considered to be agents of their trusts for purposes of signifying their approval of the amendment.

Ms. Davis' signature should be deemed sufficient to signify approval by the owners of Lot 9 of the 2008 amendment.[7]

Even if the Court were to consider the signatures issue on the merits, all of the evidence in the record supports the conclusion that the owners of Lots 1, 8, and 9 were in favor of and approved the 2008 amendment. Their vote should stand.

D. The Trial Court Correctly Concluded That Plaintiffs Had Not Established a Claim of Equitable Estoppel.

The sole issue for trial on remand was whether defendants should be deemed equitably estoppped from challenging plaintiffs' attempt to short plat their lot. Plaintiffs' sole basis for claiming equitable estoppel arose from the late James Brown's division of Lot 13 into two lots in 2003-04. Plaintiffs argued that the other Rivershore residents did not fight hard enough to keep Mr. Brown from dividing his lot, and therefore should have been precluded from challenging plaintiffs' attempt to divide their lot. The trial court found that plaintiff did not establish the elements of equitable estoppel. CP 20:

> Regarding the estoppel argument, plaintiffs argue that since some lot owners indicated at one time that they would not seek legal action to restrict Brown's short plat, they are now restrictive from barring similar action by plaintiffs. While acknowledging evidence that plaintiffs would [not] have purchased an additional lot based on this perception, this

[7] Again, at a minimum Ms. Davis should be considered to be acting as the agent for all the owners of the Lot 9 property.

> would not constitute a waiver of defendants' right to vote on any amendments. The covenants prescribe that any past waiver is not binding on any future enforcement. Further, a waiver on one's voting rights would have to comport to the voluntary, willing, and knowing forfeiture of a known right standard. The evidence would not support this claim.

This conclusion was supported by unchallenged Finding of Fact No. 6, which summarized the estoppel evidence. CP 24-25:

> Dale Anderson contacted Zachary Stoumbos, an attorney in Vancouver, to attempt to stop the division of Lot 13, in approximately September of 2002. Ms. Howard, Ms. Andrist, Ms. Davis, Mr. Stein, and Mr. Huffstutter joined in the retention of Mr. Stoumbos as per Exhibit 29. They unsuccessfully attempted to convince the City of Vancouver not to approve the proposed division. After Mr. Stoumbos' letter to Mr. Anderson of April 8, 2003, (Exhibit 36) and after his letter of April 23, 2003, to the Andersons, Ms. Howard, Ms. Andrist, Ms. Davis, Mr. Stein, and Mr. Huffstutter on April 23, 2003, which included a copy of the April 8, 2003, letter (Exhibit 37), the group chose not to pursue litigation to stop the division of Lot 13.

A decision not to file suit, appeal, or otherwise proceed through formal legal means does not amount to an estoppel. *See, e.g., State Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19-20 (2002) (declining to find equitable estoppel where Ecology did not appeal a 1986 short plat determination). The trial court properly concluded that defendants were not estopped from challenging plaintiffs' proposed division by their decision to halt their legal challenge after receiving an adverse result at the City level.

Equitable estoppel also does not apply to this situation because Mr. Anderson was the key member of the group that chose not to continue the legal fight against Mr. Brown. *See Kramarevcky v. DSHS*, 122 Wn.2d 738, 743 n.1 (1993):

> A party may not base a claim of estoppel on conduct, omissions, or representations induced by his or her own conduct, concealment, or representations. This principle is known as the "clean hands" doctrine. (Citations omitted.)

See also Mutual of Enumclaw Ins. Co. v. Cox, 110 Wn.2d 643, 650-51 (1988) ("...the doctrine of equitable estoppel is available to innocent parties only.") Plaintiffs may not rely upon a decision that was made by a group of which Mr. Anderson was a key participant to support a claim of equitable estoppel.

The trial court properly concluded that plaintiffs failed to establish the three elements of equitable estoppel by the requisite clear, cogent, and convincing evidence. *Kramarevcky, supra*, at 743-744:

> The elements of equitable estoppel are: (1) a party's admission, statement, or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement, or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission.

First, none of the defendants made a statement or acted in a manner inconsistent with their objection to plaintiffs' subdivision. The defendants

either participated in the challenge to Mr. Brown's application or took no action one way or the other. There was no evidence presented that any defendant said or did anything to support the Brown application. At most, they chose to halt the legal challenge in reliance on an opinion from counsel. There was simply no evidence of any inconsistent act or statement by any defendant.

Plaintiffs also had no right to rely on anything the defendants did. Mr. Anderson was the leader of the opposition group. He was the point person for the communications with Stoumbos. He was the sole addressee on the Stoumbos opinion letter. The fact that the remainder of the group went along with the decision not to continue the legal challenge in no way creates a situation that Mr. Anderson was entitled to rely upon to his detriment. There can be no estoppel where Mr. Anderson had knowledge of all of the facts. *See Leonard v. Washington Employers, Inc.*, 77 Wn.2d 271, 280 (1969), *quoting Wechner v. Dorchester*, 83 Wash. 118 (1915):

> In order to create an estoppel it is necessary that: "The party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties or both have the same means of ascertaining the truth there can be no estoppel.

See also *Patterson v. Horton*, 84 Wn. App. 531, 544 (1997).

In sum, after considering all of the evidence (primarily contained in the trial exhibits), the trial court properly concluded that plaintiffs had failed to prove any right to relief on their claim of equitable estoppel.

VI. DEFENDANTS ARE ENTITLED TO AN AWARD OF REASONABLE ATTORNEY'S FEES FOR BOTH APPEALS

Following the recent trial of the above-captioned cause, it is clear that defendants are the prevailing parties in this action, and are entitled to an award of reasonable attorney fees per RAP 18.1. Pursuant to Section 19 of the Declaration of Covenants and Restrictions for Rivershore (Trial Exhibit 1), defendants are entitled to an award of reasonable attorney fees and costs. Section 19 provides, in relevant part:

> Should any suit or action be instituted by any of said parties to enforce any of said reservations, conditions, agreements, covenants and restrictions, or to restrain the violation of any thereof, after demand for compliance therewith or for the cessation of such violation, events and whether such suit or action be entitled to recover from the defendants therein such sum as the court may adjudge reasonable attorney fees in such suit or action, in addition to statutory costs and disbursements.

The CC&R's are expressly applicable to all owners in Rivershore, and they expressly run with the land. Trial Exhibit 1, at 1. Thus, "said parties" refers to the owners of land in Rivershore. Defendants are such owners.

Defendants' positon in this case was obviously to restrain the violation of the first amendment to the CC&R's (Trial Exhibit 4). Defendants were successful in that regard. Because the attorney provision is reciprocal by law, defendants are entitled to an attorney fee award.

VII. CONCLUSION

For the foregoing reasons, the trial court's memorandum of opinion, findings of fact, conclusions of law, and judgment should be affirmed.

DATED this 21 day of May, 2015.

HEURLIN, POTTER, JAHN, LEATHAM,
HOLTMANN & STOKER, P.S.

Stephen G. Leatham, WSBA #15572
Of Attorneys for Respondents

NO. 93019-9
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA L. ANDERSON, TRUSTEES OF THE DALE E. ANDERSON AND LETA L. ANDERSON FAMILY TRUST; and RIVER PROPERTY, LLC,

Appellants,

v.

JAMES W. BROWN; ROBERT D. DAVIS; KAE HOWARD, TRUSTEE OF THE KAE HOWARD TRUST; MICHAEL J. and CRISTI D. DEFREES, husband and wife; TUAN TRAN and KATHY HOANG, husband and wife; VINCENT and SHELLY HUFFSTUTTER, husband and wife; THOMAS J. and GLORIA S. KINGZETT, husband and wife; LARRY R. and SUSAN I. MACKIN, husband and wife; TOD E. McCLASKEY, JR. and VERONICA A. McCLASKEY, TRUSTEES OF THE McCLASKEY FAMILY TRUST—FUND A; CRAIG STEIN; and RICHARD and CAROL TERRELL, husband and wife,

Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN NICHOLS

DECLARATON OF MAILING

BEN SHAFTON
Attorney for Defendant/Appellant
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001

COMES NOW Amy Arnold and declares as follows:

1. My name is Amy Arnold. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.

2. On May 6, 2016, I deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of the Response to Petition for Review to the following person(s):

Mr. Stephen Leatham, Attorney at Law
PO Box 611
Vancouver, WA 98666-0611

I DECLARE UNDER PENALTY OF PERJURY AND THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED at Vancouver, Washington, this 6 day of May, 2016.

AMY ARNOLD