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SUPREME COURT
OF THE STATE OF WASHINGTON

SEASHORE VILLA ASSOCIATION, a Washington non-profit corporation; PATRICIA CRANE, an individual; SALLY STEWART, an individual; LOUIS MILLER, an individual; LAUREL JENSEN, an individual; DOROTHY HEDRICK, an individual; SANDEE McBRIDE, an individual; WOLFGANG PRIEBE, an individual; MARK BRAZAS, an individual; STANLEY KOOI, an individual; MARY HANNON, an individual; DEBORAH DODGE, an individual; MARIE SUNDENE, an individual; DORIS REINHARD, an individual; TOM DARLING, an individual; JOHN TWELVES, an individual; W.F. McCORD, an individual; and JULANNE V. LARSEN, an individual,

Respondents,

vs.

HAGGLUND FAMILY LIMITED PARTNERSHIP, a Washington limited partnership; THE SALVATION ARMY, a California corporation, as trustee for the Hagglund Charitable Remainder Unitrust dated 6/19/79; and PCF MANAGEMENT SERVICES, INC., a Washington corporation, as agent,

Appellants.

EMERALD PROPERTIES LLC, a Washington limited liability company, d/b/a SEASHORE VILLA MOBILE HOME PARK,

Appellant,

vs.

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

JOHN DOE DODGE and JANE DOE DODGE; LEE HASTIG and JOHN
DOE HASTIG; RUTH JORDAN and JOHN DOE JORDAN; MARY
ELLEN HANNON and JOHN DOE HANNON; LOUIS MILLER and
JANE DOE MILLER; JULIE LARSON and JOHN DOE LARSON;
JOHN TWELVES and MARJ TWELVES; JERRY CROWDER and
DOROTHY CROWDER; PAT CRANE and JANE DOE CRANE;
MARIE SUNDENE and JOHN DOE SUNDENE; STANLEY KOOI and
JANE DOE KOOI; FLORENCE BRAZAS and JOHN DOE BRAZAS;
LAUREL JENSEN and JOHN DOE JENSEN; MARCIA HAMILTON
and JOHN DOE HAMILTON; WALTER PRIEBE and GERDA PRIEBE;
WILLIAM MCCORD and JANE DOE MCCORD; DORIS REINHARD
and JOHN DOE REINHARD; THOMAS DARLING and JANE DOE
DARLING; SAN DEE MCBRIDE and JOHN DOE MCBRIDE,

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A. INTRODUCTION

The brief of respondent Seashore Villa Association (“SVA”) is rife with glaring logic flaws. For example, SVA argues on the one hand that its interpretation of RCW 59.20.135(2) does not require a mobile home park owner to offer an amenity such as a carport or shed in perpetuity, but then it argues that the only way a park owner can cease to offer an amenity once offered at any point to a tenant in the park is *to cease doing business as a mobile home park!* SVA’s illogical and impractical reading of the statute is unsustainable.

Moreover, even SVA recognizes that the trial court’s decision that a contract implied in fact existed in this case, requiring park owners to offer park amenities in perpetuity, cannot withstand any serious legal analysis in light of the existence of an extensive written contract between the parties.

Finally, SVA’s response to the owners and manager of Seashore Villa Mobile Park’s (“Emerald”) constitutional argument is to complain that it was somehow raised too late, although the trial court addressed and ruled on it, and then to argue RCW 59.20.135(2) was an acceptable police power enactment. SVA, however, entirely mischaracterizes this Court’s decision in *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000) (“*MHCW*”) where this Court

expressly *rejected* a similar police power argument and held a mobile home statute to be an unconstitutional taking, and invalidating the statute.

Nothing in SVA's brief should dissuade this Court from finding that RCW 59.20.135(2) does not require a mobile home park owner to maintain a park amenity beyond the duration of the express lease term agreed to by the park owner and the tenant. To the extent the statute inhibits the right of the park owner to lease what it chooses to lease, such a statutory inhibition is a taking just like the statutory mandate of a right of first refusal to tenants was determined by the *MHCW* court to be a taking.

B. COUNTERSTATEMENT TO SVA FACTS

SVA concedes that the facts in this case are largely undisputed. Br. of Resp'ts at 4. Nevertheless, it offers an extensive restatement of the case, *id.* at 13, and complains that Emerald failed in its opening brief to adequately explain how the findings to which Emerald assigned error were unsupported by substantial evidence. SVA's restatement of the case does not comport with the mandate of RAP 10.3(a)(5) that it submit a fair recitation of the facts and procedure without argument. Its factual recitation all too frequently is unsupported by the record. Its claim that Emerald failed to explain how the findings were unsupported by substantial evidence is baseless from a fair reading of Emerald's opening brief.

First, SVA's restatement of the case contains long passages that are not supported by citations to the record. *See, e.g.*, Br. of Resp'ts at 5.

Second, SVA's restatement of the case misleads the Court regarding the procedures below, particularly the interaction of the decisions of Judge Strophy and Judge Wickham. SVA implies that Judge Strophy's decisions have continuing force and effect. Judge Strophy's grant of a permanent injunction in his June 8, 2007 order was described by Judge Wickham in his June 2, 2009 letter ruling as going "too far" in foreclosing removal of permanent structures at the end of a lease term. CP 459. Judge Wickham correctly discerned that "[p]reventing the landlord from removing the structures at the end of the term would be bestowing on the tenant a private benefit, which is impermissible," citing this Court's decision in *MHCW*. CP 460.¹ In his July 24, 2009 letter ruling, Judge Wickham revised Judge Strophy's injunction, again noting the constitutional issue. He stated the application of Judge Strophy's injunction would be invalid under this Court's *MHCW* decision. CP 579-80. Instead, he implied a contract term that the permanent structures would never be altered based on a contract implied in fact. CP 581-82. *See also*, CP 555 (CL 7).

¹ SVA complains about the fact that the constitutional issue was raised late in the trial court proceedings. Br. of Resp'ts at 8, 10, 45. The trial court, however,

Third, the trial court observed that many of the tenants added substantial improvements to the carports and sheds at their own expense. CP 553 (FF 11). The court, nonetheless, stated that this fact, plainly reflecting the tenants' belief that they owned the structures, "is not sufficient to change the ownership of the underlying structures." *Id.* This contradicts this Court's analysis in *United States v. 19.7 Acres of Land, More or Less, in the County of Okanogan*, 103 Wn.2d 296, 302, 692 P.2d 809 (1984) that outbuildings or other improvements to mobile homes "are usually considered to be fixtures removable by the tenant."

Finally, SVA asserts that Emerald did not explain in its opening brief how the trial court's findings to which it objected were not supported by substantial evidence. Br. of Resp'ts at 18-21. Apparently, SVA did not carefully read Emerald's opening brief. The trial court's findings in many instances presume that the carports and sheds could *never* be removed. *See, e.g.*, findings 6, 10.

C. ARGUMENT

(1) Standard of Review

SVA largely agrees with Emerald's recitation of the standard of review. Br. of Appellants at 13-14; Br. of Resp'ts at 17. *Nowhere* in its

considered the issue and ruled on it. CP 578-81. Nothing barred the trial court from doing so. That issue is properly before this Court.

brief does SVA deny that the main issues in the case were resolved on summary judgment both by Judge Strophy and Judge Wickham.

What is interesting about SVA's argument, however, is that it feels the need to argue that an appellate court can affirm on any grounds raised in the trial court. Br. of Resp'ts at 17-18. Obviously, SVA feels that the trial court's decision here rested on indefensible grounds, in particular the trial court's *sua sponte* addition of contract terms under the contract implied in fact doctrine. It is correct in that belief. But SVA then tries to argue for a position not supported in the law. It asserts that this Court can affirm on the basis of a theory "not raised at trial." *Id.* at 17. This goes too far.

While an appellate court can affirm a trial court judgment on any theory established by the pleadings and supported by the proof, even if a trial court did not consider that theory, a party must present proof on that theory in the trial court. *See LaMon v. Butler*, 112 Wn.2d 193, 201 n.6, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989) (party raised issue not addressed by trial court in its summary judgment brief); *Weiss v. Glemp*, 127 Wn.2d 726, 730, 903 P.2d 455 (1995) (case was resolved on motion and motion pleadings raised various grounds for resolution of case; Supreme Court affirmed on one of those other grounds than the one employed by the trial court). SVA wants to short circuit the entire process

of this case – the multiple summary judgment motions and the trial – to raise an issue it did not even submit to the trial court at trial to sustain the judgment. It cannot lie in the weeds so long. SVA’s argument violates the spirit of RAP 2.5(a) which forecloses consideration by this Court of issues raised for the first time on appeal.

(2) SVA Misstates the Purpose of the MHLTA

SVA asserts that the purpose of the Manufactured/Mobile Home Landlord Tenant Act, RCW 59.20 (“MHLTA”) can be discerned from legislative findings associated with RCW 59.22,² and a dissenting opinion in *MHCW*. SVA overreaches in so doing.

First, RCW 59.20 does not have any legislative findings of intent. RCW 59.22.010, to which SVA refers in its brief at 22, is a statute pertaining to mobile home park *conversions*. It is a stretch to discern anything about the Legislature’s intent regarding the enactment of the MHLTA from a statute that addresses the elimination of tenancies all together.

In any event, the Legislature’s intent with respect to *a statute must be gleaned from the statute as a whole*. *King County v. Central Puget Sound Growth Mgmt. Hearings Board*, 142 Wn.2d 543, 560, 14 P.3d 133

² In enacting RCW 59.22 in 1995, the Legislature repealed its predecessor statute, RCW 59.21, Laws of 1995, ch. 122, § 13, which this Court declared unconstitutional in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993).

(2000). While *one* aspect of the MHLTA could be to provide a stable, long-term tenancy for park residents, as the Court of Appeals discerned in *Little Mountain Estates Tenants Ass'n v. Little Mountain Estates MHC*, 146 Wn. App. 546, 558, 192 P.2d 378 (2008), *review granted*, 166 Wn.2d 1001 (2009),³ there are other purposes in the MHLTA, most notably protection of the park owners' property interests. RCW 59.20.080, for example, recognizes the authority of a park owner to terminate a lease for a variety of tenant actions and further recognizes that an owner may cease operating a mobile home park entirely. RCW 59.20.080(1)(e). *See also*, RCW 59.20.090 (landlord may increase rent).

Finally, SVA cites to a dissent in *MHCW* regarding the nature of mobile homes. Br. of Resp'ts at 22-23. This is a childish cheap shot at Emerald's counsel. The citation is ultimately unavailing to SVA as it was a dissenting opinion.

(3) RCW 59.20.135 Does Not Apply Retroactively to the Leases Here

As noted in Emerald's opening brief at 17-20, RCW 59.20.135 applies prospectively to tenancies first commenced in 1994. SVA

³ This Court has granted review in *Little Mountain* and heard oral argument in the case on March 16, 2010. This Court may discern a different legislative purpose in the MHLTA than did the Court of Appeals.

contends that the statute is not retroactive, but, if it is, it is remedial or curative and may be applied retroactively. Br. of Resp'ts at 39-43.

For the reasons articulated in Emerald's opening brief, RCW 59.20.135 is clearly not curative; it is not clarifying or correcting another ambiguous statute. Nor is it remedial; it is not a statute addressing practice or procedure.

Most critically, SVA's argument on retroactivity demonstrates its inconsistent analysis of the MHLTA. Throughout its brief, SVA contends that a lease once executed is essentially perpetual, unless one of the grounds in the MHLTA for terminating a contract is met. But it is only in this retroactivity section of its brief that it appears to concede that leases are renewed annually. It sees great significance in the post-1994 renewals of the leases between SVA members and Emerald, ignoring the fact that the *initial* leases long pre-dated March 1994, the effective date of RCW 59.20.135, and it was these leases that first confirmed that it was the tenants' obligation to maintain the carports and sheds. *See, e.g.*, Ex. 1 at 5, 7.

To be consistent, if SVA is correct that RCW 59.20.135 is not retroactive because the lease renewals after 1994 were, in effect, new contracts, then Emerald's argument that it was entitled to alter the lease terms in these new contracts at renewal is plainly valid.

(4) SVA and the Trial Court Misinterpret RCW 51.20.135⁴

SVA contends that RCW 51.20.135 is crystal clear and Emerald violated it in sending letters to SVA's tenants regarding the carports and sheds here. Br. of Resp'ts at 23-44. But SVA never really analyzes the actual language of RCW 59.20.135 or its context in the MHLTA. In lieu of a serious analysis of the statute, SVA provides a multiplicity of arguments, some bearing on the statute, some bearing on Emerald's constitutional argument. *Id.* Such imprecision makes a response to SVA's contentions difficult.

Far from being clear, SVA's argument on RCW 59.20.135 only highlights the statute's fundamental ambiguity. Various, SVA argues that the statute does not compel maintenance of park amenities in perpetuity and yet, it contends that Emerald had to maintain such amenities in perpetuity or at least until Emerald discontinued operating Seashore Villa as a mobile home park.

⁴ SVA does not dispute Emerald's analysis of statutory interpretation principles. Br. of Appellants at 14-17. To discern the plain meaning of a statute, this Court looks to the ordinary meaning of the statutory language, the context of the statute, and the statutory scheme as a whole. *Lake v. Woodcreek Homeowners Ass'n*, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 1492580 (2010).

Turning to an interpretation of the statute, a careful examination of RCW 59.20.135 reveals that on its face, it is ambiguous.⁵ On the one hand, the statute says that a park owner may never transfer “responsibility for the maintenance or care of permanent structures within the mobile home park to the tenants of the park.” RCW 59.20.135(2). However, a park owner may transfer responsibility for the maintenance or care of permanent structures to an organization of park tenants or individual tenants when requested by the organization or the tenants. RCW 59.20.135(4). The statute is silent on several key matters. It says *nothing* about whether and when a park owner may decide to no longer provide a “permanent structure” for the tenants’ use.⁶ Such “permanent structures,” as defined in RCW 59.20.135(3), could include a variety of facilities – swimming pools, basketball hoops, tool shops, libraries, playground equipment, just to name a few. Plainly, circumstances like the present case where the park owner decides to alter the terms of the tenancy are implicated by the statute. If the owner does so, how does the owner advise

⁵ SVA’s contention that Emerald failed to show how the statute was ambiguous, br. of resp’ts at 23 n.9, is oblivious to the lengthy discussion of the statute’s ambiguity in the brief of appellants at 15-17, 20-25.

⁶ By contrast, Washington’s condominium law, RCW 64.32, as this Court noted in *Lake, supra*, allowed for substantial alterations in common areas. Once provided, common areas in condominiums are not immutable, as SVA would have this Court rule for mobile home parks.

the tenants of any right they might choose to exercise under RCW 59.20.135(4) in lieu of the park owner simply removing the amenity?

Thus, there are three distinct ways to read the overall effect of RCW 59.20.135, particularly when it is read in *pari materia* with RCW 59.20.090(1). One is to take RCW 59.20.135(2) literally to mean that the statute bars any transfer of responsibility for park amenities to the tenants *ever*. A second feature of the statute, however, is that a park may transfer responsibility for such amenities if requested to do so by tenants or a tenants' organization. RCW 59.20.135(4). Lastly, the statutes do not prohibit a park owner from removing permanent structures at the time of the lease's renewal. These three aspects of the statutes must be harmonized by this Court to honor the disparate directives of the Legislature in RCW 59.20.135(2) and (4). *State v. Chapman*, 140 Wn.2d 436, 452, 998 P.2d 282 (2000) ("Statutes read together should be harmonized to give force and effect to each.").

(5) The Trial Court Erred in Concluding Additional Contract Terms Could Be Implied

The trial court concluded that the doctrine of contract implied in fact could be employed here to sustain an alleged promise by the park owners to provide amenities in perpetuity to SVA members based on

course of dealings or trade usage. CP 580-81.⁷ Of course, this means the trial court tacitly admits such a requirement *is not in the parties' actual lease*. This legal conclusion was the basis for the trial court to avoid the constitutional issue it repeatedly acknowledged was present in RCW 59.20.135, and to issue its permanent injunction. CP 559-60.

SVA offers the briefest possible defense of the trial court's *sua sponte* employment of contract implied in fact principles to support the ruling in SVA's favor. Br. of Resp'ts at 31-33. Various, it argues that trade usage and course of dealing are relevant to contractual interpretation and that Emerald, not SVA, first made a contract implied in fact argument. Neither argument sustains the trial court's improper use of equitable principles to "supplement" the terms of the parties' extensive, detailed written leases, particularly where the parties had extensive lease agreements, as SVA itself *concedes*. *Id.* at 30.

SVA cites two cases decided by this Court more than sixty years ago, *Ammerman v. Old National Bank of Spokane*, 28 Wn.2d 239, 182 P.2d 75 (1947) and *Ross v. Raymer*, 32 Wn.2d 128, 201 P.2d 129 (1948).

⁷ SVA cites cases like *Geonerco, Inc. v. Grand Ridge Props. IV LLC*, 146 Wn. App. 459, 191 P.3d 76 (2008) and *Puget Sound Financial LLC v. Unisearch, Inc.*, 146 Wn.2d 428, 47 P.3d 540 (2002), for the unremarkable proposition that trade usage or course of dealing may be relevant to interpreting an existing contract or determining if its terms are enforceable. But such a concept cannot, and does not, permit the addition of contract provisions to an existing contract by applying the contract implied in fact doctrine.

The cases involved the provision of services without a written agreement. Neither involves efforts to supplement the terms of an express written contract with terms based on contracts implied in fact. In *Ammerman*, there actually was a written contract that predated the provision of the services at issue. This Court stated that a nurse could not recover under a contract implied in fact for services rendered during her employer's last illness in addition to the services expressly addressed in the original contract of employment.

SVA also cites *Douglas Northwest, Inc. v. Bill O'Brien & Sons Construction, Inc.*, 64 Wn. App. 661, 828 P.2d 565 (1992), a case in which the Court of Appeals held that a quantum meruit recovery for work performed by a subcontractor was not antithetical to the provisions of a written agreement. The agreement there was silent on the type of remedy for the claim addressed in the written contract. *Id.* at 685. The Court of Appeals correctly observed that a claim in quantum meruit must be dismissed as a matter of law when the claim is addressed in the contract's provisions. *Id.* at 683.

None of the above cases supports SVA's argument. In fact, these cases undermine it. Also, SVA has *no answer* to cases like *Chandler v. Washington Toll Bridge Authority*, 17 Wn.2d 591, 608, 137 P.2d 97 (1943) where this Court held that where an express, enforceable contract

exists, courts will not imply additional contract terms. *See also, Little Mountain*, 146 Wn. App. at 546 (rejecting contract implied in fact where lease existed between parties).⁸ The Court of Appeals in *Little Mountain* further observed that “Generally, an advertisement is not an offer.” *Id.* at 561. Advertisements, the only basis for the trial court’s ruling here on contract implied in fact, CP 580, do not sustain a mutual intent to enter into a contract.

Similarly, SVA has *no answer* to this Court’s reasoning in *McKevitt v. Golden Age Breweries, Inc.*, 14 Wn. App. 50, 52, 126 P.2d 1077 (1942) that a contract implied in fact must be rooted in *an agreement*. SVA points to no “agreement” on the added contract terms implied by the trial court here.

The trial court erred in determining that contractual “terms” in addition to those in the leases existed, salvaging the constitutionality of its imposition of a permanent injunction to bar Emerald from removing the carports and sheds. Precisely as the trial court noted, if RCW 59.20.135 directs that a park owner may never alter the terms of the leasehold, it is unconstitutional under article I, § 16. If the trial court’s permanent injunction is based on a term implied in fact, rendering the provision of

⁸ Although this Court granted review in *Little Mountain*, the question of contract implied in fact is not before the Court so that the Court of Appeals opinion on that issue is final. RAP 13.7(b).

amenities like carports and sheds perpetual, it is unsupported and must be reversed.

(6) Emerald Did Not Violate RCW 59.20.135

SVA contends that Emerald violated RCW 59.20.135 by sending letters to its members indicating that it believed the tenants owned the carports and sheds or, if it owned them, Emerald no longer intended to offer the carports and sheds as part of the lease. Br. of Resp'ts at 28-31. SVA offers hyperbole to claim Emerald "forced" its members to assume responsibility for the carports and sheds. *Id.* at 28 ("While the letter was not accompanied by armed thugs, the effect was the same."). Alternatively, it claims Emerald owned the carports and sheds on the basis of trade usage and course of dealings. *Id.* at 31-32.

As noted *supra*, the imposition of a perpetual obligation on the part of a park owner to provide carports and sheds to SVA members based on contract implied in fact is unsupported here. Concepts of trade usage and course of dealings are best left to contracts involving commercial entities in the UCC setting.

Notwithstanding SVA's repeated hyperbole about Emerald's letters to its members, such letters tracked with RCW 59.20.135 and did not constitute contracts of adhesion. The trial court's conclusion on this question is not supported by a fair reading of those letters. CP 556 (CL 9).

First, RCW 59.20.135(2) states that a park owner cannot transfer responsibility for permanent structures in a park to a tenant, although RCW 59.20.135(4) allows tenants to request such a transfer.

Second, Emerald's letters to tenants indicated that if the tenant owned the carport or shed, the tenant, not Emerald, must maintain them. Exs. 206-07. There had been some controversy in Emerald's view as to whether the park owner or the tenants owned such structures.

Third, regardless of that controversy, if the park owner owned the structures, Emerald's letter advised that it intended to remove them at the end of the lease term, *id.*, something Judge Wickham expressly concluded in his letter rulings that Emerald had a right to do under the MHLTA. CP 459-60. Emerald's letter to SVA members offered them the alternative of assuming responsibility for the structures in lieu of their removal. Exs. 206-07.

If Emerald's letters offered SVA's members an opportunity to exercise choice, as they did, they are not "contracts of adhesion." Contracts of adhesion are defined in Washington law as a standardized contract which gives a party with weaker bargaining power no opportunity to bargain and no realistic choice as to the contract terms. DeWolf, Allen, Caruso, 25 *Wash. Practice* § 1:12. They usually are seen in the insurance setting. Here, SVA members had a choice.

Emerald was entitled to invoke its right to alter the terms of the leasehold by removing the carports and sheds. It did not violate RCW 59.20.135 by so advising SVA's members and offering them a choice consistent with the terms of RCW 59.20.135(4).

(7) RCW 51.20.135 Violates Article I, § 16 of the Washington Constitution

If SVA's and the trial court's interpretation of RCW 59.20.135 is correct, that statute effects a taking of Emerald's property under article I, § 16.⁹ SVA contends for the first time in this case that park owners could not remove carports and sheds at the end of a tenant's lease because those leases, in effect, never end, *id.* at 33-34, and park owners may never enter upon a tenant's premises to remove the carports or sheds under RCW 59.20.130(7).

SVA also justifies RCW 59.20.135 under article I, § 16 as a protection of public health and safety and therefore the statute falls within the police power of the State. But SVA's police power argument, br. of resp'ts at 24-28, is notable for its silence with respect to this Court's *MHCW* decision where the Court *rejected* the very same police power

⁹ This Court can avoid this constitutional issue by properly interpreting RCW 59.20.090(1)/RCW 59.20.135 and eschewing the trial court's *sua sponte* addition of contract terms based on contract implied in fact principles. A park owner should be permitted to alter the terms of a lease at the time of the lease's renewal. This Court has

argument SVA now advances. 142 Wn.2d at 355. A police power justification for a statute cannot overcome the directive of article I, § 16 that a statute, in the guise of an exercise of police power may not take a property owner's rights in connection with property.¹⁰

SVA contends that Emerald must offer an amenity in perpetuity under the MHLTA or by virtue of a contract implied in fact. It arrives at this analysis on the basis of RCW 59.20.090(1) and *Holiday Resorts Community Ass'n v. Echo Lakes Assoc., LLC*, 134 Wn. App. 210, 135 P.3d 499 (2006), *review denied*, 160 Wn.2d 1019 (2007), theorizing that leases under the MHLTA are renewable in perpetuity. Br. of Resp'ts at 33. It contends that *McGahuey v. Hwang*, 104 Wn. App. 176, 15 P.3d 672, *review denied*, 144 Wn.2d 1004 (2001) does not allow the modification of lease terms at the end of the one year lease required by RCW 59.20.090(1). Br. of Resp'ts at 37-38. Finally, for the first time on appeal, in violation of RAP 2.5(a), SVA contends that RCW 59.20.130(7) forecloses Emerald from entering on the premises of its members to remove the carports or sheds. Br. of Resp'ts at 34-37. In each instance it

frequently noted that it will interpret statutes to avoid constitutional infirmities in such statutes. *See, e.g., In re Matter of Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993).

¹⁰ SVA's police power argument would be more compelling if the structures at issue here were more integral to the tenancy. The permanent structures are "amenities," RCW 59.20.135(3), not necessities. Unlike, for example, roads, pads, or the like, carports and sheds are not intrinsic to the very nature of a mobile home leasehold.

is wrong. But if it is correct, it is clear that a park owner's right to lease its premises as it chooses is so impaired, a taking is present under the Washington Constitution, article I, § 16, as this Court determined in *MHCW*.

(a) SVA Misinterprets RCW 59.20.090(1)

SVA misinterprets RCW 59.20.090(1). Although it asserts that the leases at issue here are not frozen in time or perpetual in their duration, br. of resp'ts at 30, it nevertheless argues, based on *Holiday Resorts*, that the leases in question must be automatically renewed essentially forever, unless good cause for eviction is demonstrated. *Id.* at 33-34. It also contends that *McGahuey* does not stand for the proposition that a park owner can change the terms of the lease at the anniversary date of the lease upon notice to the tenant. *Id.* at 37-38. Coupled with its newly-advanced argument about entry on the premises by the park owner under RCW 59.20.130(7), if SVA is correct, a park owner may *never* alter the terms of a lease or the park amenities offered pursuant it, once a lease is initially offered. SVA is wrong.

Emerald agrees that the *Holiday Resorts* court held that RCW 59.20.090(1) compels a park owner to renew a lease for at least one year automatically. *Holiday Resorts*, 134 Wn. App. at 223 ("At the end of the initial year, a mobile home lot rental agreement is automatically renewed

for a one-year term unless the tenant enters into an agreement that provides a different term.”).¹¹ See also, *Gillette v. Zakarison*, 68 Wn. App. 838, 842, 846 P.2d 574 (1993) (in absence of written lease, MHLTA required one year rental term).

However, the critical factor affecting any takings analysis is whether a park owner may, at the time of lease renewal, alter the terms of the leasehold. SVA says no, arguing the lease terms are immutable from their initial inception.

First, SVA’s argument is contrary to the MHLTA. RCW 59.20.060 contains an *extensive* list of mandatory contents to a rental agreement. *Nothing* in that statute indicates that amenities are a mandatory aspect of a lease. RCW 59.20.060(1). Furthermore, *nothing* in that statute bars a park owner including a provision in the lease redefining the scope of the leasehold upon renewal. RCW 59.20.060(2). Similarly, *nothing* in RCW 59.20.130 setting forth a park owner’s duties prevents the

¹¹ Of course, a landlord can evict a tenant under RCW 59.20.080 for good cause, but that statute is interpreted in favor of the tenant. *Commonwealth Real Estate Servs. v. Padilla*, 149 Wn. App. 757, 205 P.3d 937 (2009) (park owner waives good cause for eviction if landlord accepts rent knowing of good cause basis for eviction). Moreover, the lease is terminated if a park owner chooses not to continue using his/her property for a mobile home park, upon one year’s notice to the tenants. RCW 59.20.080(1)(e). Even at that many municipalities like Snohomish County and Tumwater are enacting ordinances that essentially force park owners to use their property *only* as mobile home parks. See *Laurel Park Community LLC v. City of Tumwater* (U.S. Dist. Ct. No. C09-5312 BHS) (challenging constitutionality of Tumwater ordinances).

owner from choosing to dispense with offering carports or sheds as part of the leasehold.

The Court of Appeals decision in *McGahuey* is also to contrary to SVA's argument. SVA claims *McGahuey* is confined solely to utility charges. Br. of Resp'ts at 37-38. The court's reasoning is clearly broader. In *McGahuey*, the Court of Appeals held that a park owner did not violate the MHLTA when, upon the renewal of the lease pursuant to RCW 59.20.090, the owner raised rent and required tenants to pay for utilities and a vehicle fee. What is critical is that the original lease provided that the park owner, not the tenant, would pay for utilities, and that lease did not provide for a vehicle fee. The tenants contended that the MHLTA prohibited any fee increase or addition of any fee when the lease expired and was subject to renewal under RCW 59.20.090(1). 104 Wn. App. at 181. The court rejected this argument as "untenable." *Id.* at 182. The court further stated:

[The Legislature] recognized that mobile homes are difficult and expensive to move and, to protect tenants from the instability inherent in most rental arrangements, it provided for automatic renewal and a long notice period for rent increases. But it did not require that all original lease terms remain in force through every automatic renewal because renewals could extend for countless years. By not regulating them, the Legislature did allow changes in the lease terms to permit the landlord to charge for utilities, so long as they were limited to the actual cost. This is nothing

more than a practical acknowledgement that costs increase and those using a service may be required to pay for it.

Id. at 183. In upholding the *addition* of fees, whether utility charges or vehicle fees at renewal of the lease, the court's analysis applies with equal vigor to the *subtraction* or *alteration* of the amenities or other lease terms. SVA fails to distinguish the *McGahuey* court's analysis of RCW 59.20.090(1).

(b) RCW 59.20.130(7), if Before the Court, Does Not Prevent Removal by a Park Owner of Amenities from the Lease

A further rationale offered by SVA for its view that lease terms under the MHLTA are immutable is that RCW 59.20.130(7) forbids a park owner's entry on a tenant's property during the lease. Br. of Resp'ts at 34-37.

This Court should not consider this argument as it was *never* raised below at any time. RAP 2.5(a). The trial court's many rulings and its findings of fact make no reference to it.

Even if the Court were to consider the argument, it is baseless, both because it *assumes* leases under the MHLTA are immutable and it is illogical, given SVA's contention that the carports and sheds belong to the park owner here.

RCW 59.20.130(7) itself recognizes that a park owner may enter a mobile home to “ensure compliance with . . . the rental agreement and the rules of the park.” As the MHLTA carefully differentiates between a mobile home lot and a mobile home, RCW 59.20.030, the MHLTA permits a park owner entry upon a *mobile home lot*, which includes the shed or carport. RCW 59.20.130(7) speaks *only* to the mobile or manufactured home itself.¹²

Moreover, as Emerald contends, it is entitled to remove an amenity from the leasehold at the time of renewal, it would be entitled to enter the

¹² RCW 59.20.030(6) defines a manufactured home as “a single-family dwelling built according to the United States department of housing and urban development manufactured home construction and safety standards act, which is a national preemptive building code. A manufactured home also: (a) Includes plumbing, air conditioning, and electrical systems; (b) is built on a permanent chassis; and (c) can be transported in one or more sections with each section at least eight feet wide and forty feet long when transported, or when installed on the site is three hundred twenty square feet or greater.”

Similarly, RCW 59.20.030(8) defines “a mobile home as a factory-built dwelling built prior to June 15, 1976, to standards other than the United States department of housing and urban development code, and acceptable under applicable state codes in effect at the time of construction or introduction of the home into the state. Mobile homes have not been built since the introduction of the United States department of housing and urban development manufactured home construction and safety act.”

By contrast, a mobile home lot is “a portion of a mobile home park or manufactured housing community designated as the location of one mobile home, manufactured home, or park model and its accessory buildings, and intended for the exclusive use as a primary residence by the occupants of that mobile home, manufactured home, or park model.”

RCW 59.20.130(7) speaks *only* to the right of entry to “a mobile home, manufactured home, or park model,” *not* to the mobile home lot on which the carports or sheds are located.

tenant's premises to effectuate the lease terms, i.e., to remove a carport and/or a shed.

Finally, SVA argues that RCW 59.20.130(7) does not affect a park owner's ability to modify amenities in common areas, but it fails to address the central issue that bears upon the constitutional issue: can the park owner choose to alter the leasehold by altering an amenity found in a common area? If the answer is no, whether based on statute or the trial court's belated contract implied in fact analysis, a taking has occurred.

(c) If a Park Owner Must Provide Amenities in Perpetuity as SVA Claims, the Owner's Property Has Been Taken

To the extent that SVA's argument that RCW 59.20.090(1) and RCW 59.20.090(1) and RCW 59.20.135 in combination with the trial court's additional contract terms mandated by principles of contract applied sustain an injunction that permanently bars Emerald from removing carports or sheds, Emerald's property has been taken. *See* Br. of Resp'ts at 43-49. Despite the *broad* injunction issued by the trial court barring Emerald from *ever* removing the carports or sheds (unless it closes the park), CP 560, SVA tries to argue that the Court should only consider the transfer of the sheds/carports to the tenants. "RCW 59.20.135 does not address the disposition of permanent structures in mobile home parks."

Id. at 44. *See also*, Br. of Resp'ts at 48. Given the breadth of the trial court's injunction, more is at stake in this case.

To advance its argument, SVA cites inapplicable cases or pre-*MHCW* authority. For example, it cites a Fifth Amendment case on rent control, *Yee v. City of Escondido*, 503 U.S. 519, 122 S. Ct. 1522, 118 L.Ed.2d 153 (1992). *Yee* was recently called into question by *Guggenheim v. City of Goleta*, 582 F.3d 996 (9th Cir. 2009), although that decision is not precedential, at this time.¹³ In any event, article I, § 16 is more protective of property rights than the Fifth Amendment. *MHCW*, 142 Wn.2d at 356-62.

SVA cites *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993), *cert. denied*, 510 U.S. 1176 (1994), another case arising under the Fifth and Fourteenth Amendments. Br. of Resp'ts at 47. Although this Court found that a statutory mandate that park owner contribution to a tenant relocation fund before a park could be sold did not violate the Fifth Amendment, this Court *struck down* the statute on substantive due process grounds. Like *Yee* and unlike *Guggenheim*, *Guimont* was a physical invasion takings case. *Guimont v. City of Seattle*, 77 Wn. App. 74, 896

¹³ The Ninth Circuit granted rehearing en banc in *Guggenheim* and directed that the opinion be held in abeyance and not cited as precedent pending disposition of the case. 598 F.3d 1061 (9th Cir. 2010).

P.2d 70 (1995), also cited by SVA, long predated *MHCW* and was resolved on Fifth and Fourteenth Amendment grounds.

Finally, SVA cites *City of Des Moines v. Gray Businesses LLC*, 130 Wn. App. 600, 124 P.3d 324 (2005), *review denied*, 158 Wn.2d 1024 (2006), for the proposition that a park owner has no absolute right to operate a mobile home park. There, in a 2-1 opinion, the Court of Appeals rejected a taking claim under the Washington Constitution of a mobile home park owner who had operated a park in Des Moines for 30 years as a nonconforming use. The city adopted an ordinance requiring a site plan for the park in order to renew its business license, but the park owner did not submit the site plan. The city ultimately refused to allow further homes in the park. The court held a taking had not occurred because the park owner conceded the city had police power to adopt the site plan ordinance and the ordinance did not take the park owner's property rights and confer such rights on others like the tenants, as occurred in *MHCW*.

SVA fails to seriously confront this Court's holding in *MHCW* under article I, § 16, apparently contending that despite its interpretation of RCW 59.20.090(1)/RCW 59.20.135 as conferring a permanent right on the tenants to insist that a landlord lease amenities like carports and sheds, such an interpretation does not alter the park owner's right to lease its property. SVA is wrong.

This Court interpreted article I, § 16 in *MHCW* in a very broad fashion. To the extent that any stick in the “bundle of sticks” is damaged or seized by government, a taking under the Washington Constitution is present. In *MHCW*, a statute that conferred a right of first refusal on tenants upon the park owner’s decision to sell the park constituted a taking because the park owner’s ability to alienate its property to a buyer of its choosing was impinged upon the statute. Here, the trial court’s interpretation of RCW 59.20.090(1)/RCW 59.20.135 and its sua sponte contract implied in fact result in a similar infringement of a park owner’s ability to alienate its property. The park owner is forced by statute and equity to offer a lease with amenities it does not want to provide. In effect, the trial court’s statutory interpretation/equitable analysis has, by government action, transferred to the tenants the right to insist upon features of the leasehold, features to be provided against the park owner’s will. This is a taking after *MHCW*.

(8) Emerald, Not SVA, Is Entitled to Its Attorney Fees at Trial and on Appeal

SVA argues it is entitled to attorney fees on appeal pursuant to RAP 18.1. It offers nothing to dispute the authorities cited in Emerald’s opening brief at 33-35 that Emerald is entitled to its fees here if the Court agrees with Emerald’s arguments.

D. CONCLUSION

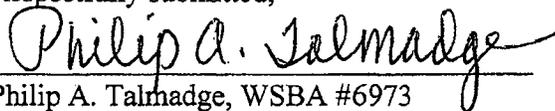
At SVA's insistence, the trial court misinterpreted RCW 59.20.090 and RCW 59.20.135 to require Emerald to maintain carports and storage sheds at Seashore Villa Mobile Home Park in perpetuity. The trial court erred in finding additional lease terms beyond those in the leases based on a contract implied in fact.

If RCW 59.20.090(1)/RCW 59.20.135 or a contract implied in fact mandate that amenities, once offered by a park owner to tenants, are part of the leasehold in perpetuity, Emerald's property has been taken here.

This Court should reverse the trial court's judgment, and dissolve the trial court's injunction against the removal of carports and storage sheds at Seashore Villa. Costs on appeal, including reasonable attorney fees, should be awarded to Emerald.

DATED this 13th day of May, 2010.

Respectfully submitted,



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DECLARATION OF SERVICE

On this day said forth below, I deposited in the U.S. Mail a true and accurate copy of: Motion for Over-Length Reply Brief of Appellants and Reply Brief of Appellants in Cause No. 83729-5 to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 13, 2010, at Tukwila, Washington.

Christine Jones
Christine Jones
Talmadge/Fitzpatrick

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Attached for filing in Supreme Court case number 83729-5 is appellants' motion for over-length reply brief and reply brief of appellants.

Thank you, Christine.

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