

Court of Appeals No. 42982-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

ACADEMY SQUARE CONDOMINIUM ASSOCIATION

Appellant

v.

KEITH KAWAWAKI and NICOLE KAWAWAKI

Respondents

RESPONDENT'S BRIEF

GRANT C. BROER, WSBA NO. 25588
BROER & PASSANNANTE, P.S.
8904 NE Hazel Dell Avenue
Vancouver, Washington 98665
(360) 576-7947
Attorney for Respondent

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I. INTRODUCTION

This is not a case of first impression. The issue of whether the Appellants (hereinafter “Academy Square”) had authority to amend the *Declaration of Condominium and Covenants, Conditions & Restrictions for Academy Square Condominiums* (hereinafter the “Declaration”) by recording a “House Rule” was addressed in *Shorewood West Condominium Association v. Sadri*, 140 Wash.2d 47, 992 P.2d 1008 (2000) and codified under RCW 64.34.264.

No evidence was presented to the trial court regarding the allegations in the second paragraph in the Introduction section of Academy Squares’s Opening Brief and it therefore should be disregarded.¹

The third paragraph in the Introduction of Academy Square’s Opening Brief omits the important intervening fact that another unit sold in 2006. The sale of this other unit is the triggering moment in this case because the Respondents (hereinafter “Kawawaki”) contend that they should have been moved from the “wait list” to “rental status” as a result of this sale in 2006, while the Academy Square contends that rental status

¹RAP 9.12

remained with the unit and vested in the new owner.

II. RESTATEMENT OF THE CASE

Kawawaki purchased a condominium at 1209 C Street, Unit B of Academy Square Condominiums, in Vancouver, Clark County, Washington on December 16, 2005, for \$136,700. Academy Square Apartments, LLC (the original declarant) was the seller. Tom Young was the principal of the LLC/Seller and Diane Sines was the realtor for the LLC/Seller. Both Young and Sines personally owned units in the complex at the time of the Kawawaki's purchase. CP 7.

The Declaration was recorded on June 8, 2005, under Clark County auditor's file number 3999389. CP 8.

Pursuant to Article X, Section 13 of the CC&R's:

"The Leasing or Renting of a Unit by its Owner shall be governed by the provisions of this Article X Section 13. No more than twenty-five (25%) of the Units may be used as rental Units at any time. In the event an Owner desires to rent a Unit and at least twenty-five (25%) of the Units are then being used as rental Units, such Owner shall be added to a waiting list, first-come, first-served. All Owners desiring to rent a Unit must submit an Association-approved credit and background application completed by the prospective party who desires to rent the Unit prior to entering into any rental agreement." CP 8.

At some point in 2005 prior to Kawawaki's purchase, nine of the thirty six units (25%) were apparently conferred "rental status" by Academy Square, including units owned by Young and Sines.

Kawawaki purchased their unit for future investment and with the intention of keeping the unit as a rental. On December 21, 2005, Kawawaki submitted a formal written request to Academy Square to be put on the "waiting list", to which they were inserted at the top of said list. CP 8.

At the end of February 2006, Sines purchased Unit 306A, which was one of the units with "rental status". Kawawaki assumed, based on representations from the Academy Square representatives including Sines, that due to the sale of a unit they would move from the "waiting list" into "rental status". CP 8.

After learning that they were not moved from the "waiting list" into "rental status", on April 12, 2006, Kawawaki sent a letter to Academy Square requesting that they review and clarify the policy regarding "rental status" of units and how/whether they are passed to subsequent purchasers. CP 9, 14.

On February 5, 2008, Academy Square recorded an *“Amendment to the CC&R’s”* (hereinafter referred to as the “House Rule”) under Clark County Auditor File No. 4419493. The House Rule added the following language to Article X, Section 13 of the Declaration:

“Any Unit that qualifies as an approved rental unit hereunder may be transferred, conveyed, and/or sold to a third party as a “rental unit” by such Unit Owner without further Board review or approval provided such new owner provides the Association with any information otherwise required under this Declaration.” CP 9, 24, 25, 26, 27.

On June 19, 2008, Academy Square sent Kawawaki a certified letter declaring them to be in violation of the Declaration for renting their unit. CP 9.

On or about January 28, 2009, Academy Square recorded a *Notice Default/Assessment Pursuant to Covenants, Conditions & Restrictions* under Clark County auditor number 4526114, alleging that Kawawaki was in default under the Declaration for renting their unit. Kawawaki was not served with said Notice and only became aware of it when they attempted to refinance their unit in 2010. CP 10.

After Cross-Motions for Summary Judgment, the trial court found in favor of Kawawaki and ordered that they be conferred rental-status retroactive to the 2006 sale, that the lien filed by Academy Square be

released, and awarded attorney's fees to Kawawaki in the amount of \$3,500.00.

III. ARGUMENT

A. The Board did not have authority to amend the Declaration by recording a "House Rule".

1. The Board's Authority Under Governing Documents.

Pursuant to Article XX, Section 1 of the Declaration , the Declaration may be amended "only by vote or agreement of Owners of Units to which at least sixty-seven percent (67%) of the votes in the Association are allocated." CP 105.

The House Rule that purported to amend the Declaration was not voted upon by the membership and was simply a recorded document prepared by the Academy Square attorney and signed by the secretary (Sines), as reflected in the Academy Square meeting minutes, to wit:

House Rule—Amendment

The Attorney for the HOA—Cassie Crawford prepared the attached House Rule to amend the Declaration of Covenants, Condition and Restrictions; this instrument has been recorded with the Clark County Auditor's office. Please read the House Rule that has been amended to the ccr's so you are up to date

with the current with correction information. Attached for your review.
CP 23.

Per the meeting minutes, it is evident that the owners of units had not even seen the House Rule, let alone voted on it. CP 23.

Furthermore, the *Recitals* to the House Rule directly contradict the requirements of Article XX, Section 1 of the Declaration, to wit:

Recitals:

A. This House Rule is intended to amend the Declaration of Covenants, Conditions and Restrictions recorded as Clark County Auditor File No. 3999389 as specifically set forth herein (collectively the “Declaration”). CP 14.

Academy Square did not have the authority to amend the Declaration by recording a House Rule that was never voted upon, nor reviewed prior to recording, by the owners.

2. The Board’s Authority Under Statute.

RCW 64.34.264(1) states:

The declaration, including the survey maps and plans, may be amended only by vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated, or any larger percentage the declaration specifies.

RCW 64.34.264(4) states:

no amendment may.....change....the uses to which any unit is restricted, in the absence of the vote or agreement of the owner of each unit particularly affected and the owners of the units to which at least ninety percent of the votes in the association are allocated.

The House Rule recorded by Academy Square attempted to change the use to which any unit is restricted. Creating “waiting lists” and “rental status” for some units and not others, and then attempting to amend the same via House Rule is tantamount to restrictions on use that fall within the ambit of RCW 64.34.264(4).

3. The Board’s Authority Under *Shorewood*

The Washington Supreme Court in *Shorewood West*

Condominium Associatn v. Sadri, 140 Wash.2d 47 (2000), held that the

“Association may not promulgate a restriction on leasing in a bylaw without first amending its declaration. The bylaw restricting leasing is invalid and his court may not enforce it.”

In *Shorewood*, the Association went so far as to promulgate and properly pass, through the vote of the owners, a bylaw to restrict the leasing of units. Even with this proper procedure, the Court found the bylaw void because the Association should have amended it’s Declaration

by proper vote and procedure in order to validly restrict the leasing of units. In the present case, Academy Square's attempt to amend the Declaration by House Rule falls far below the failed standard set in *Shorewood*.

B. The Board's interpretation of the Declaration and the Amendment thereto was unreasonable.

Restrictions of use on condominium units, whether imposed by amendment or by rules promulgated by the governing body, are reviewed by the court for reasonableness. A reasonable restriction is one that is "reasonably related to the promotion of the health, happiness, and peace of mind of the unit owners." *Shorewood West Condominium Association v. Sadri*, 92 Wash.App. 752 (1998), quoting *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d 637 (Fla. 4th Dist.Ct.App.1981).

The trial court found that Academy Square's interpretation of the Declaration and subsequent Amendment thereto was not a reasonable restriction under the Basso test announced in *Hidden Harbour Estates, Inc.*

Under Academy Square's interpretation an owner from the "waiting list" is unlikely to ever achieve "rental status" and become part of

the 25% group of owners. It is difficult to imagine a scenario where a seller of a unit that has “rental status” (i.e. one of the 25%) would demand that their unit be “de-listed” from said status, thereby freeing up the status for the owner on the “waiting-list”. A seller in such a circumstances has no incentive or interest in requiring that their property be de-listed, as they are about to sell and move out of the condominium complex.

Likewise, it is even more unlikely that a purchaser will demand that their to-be-purchased unit be removed from “rental status”. A prospective purchaser would want to retain as many rights as possible in their unit, and would therefore insist on maintaining “rental status” instead of allowing the transfer of said status to the person on the waiting-list.

The effect of the Association’s position is to create a class of owners (25%) that retain “rental status”, while the remaining owners (75%) can never hope to achieve said status. This reality is borne out by the fact that Kawawaki has not moved from first place on the wait-list (where they have been since 2005), to rental-unit status, despite the sale of multiple units over the past 7 years. This hierarchical tier of ownership is contrary to the notion of a restriction that is “reasonably related to the promotion of the health, happiness, and peace of mind of the unit owners.”

required in Basso and confirmed in Shorewood. The only unit owners that benefit from the “House Rule” are the 25% of owners that have been in place since the creation of the Rule (and the Declaration for that matter).

Under the Kawawaki interpretation of the Declaration, upon the sale of a rental-status unit, the unit is removed from the 25%, and the first person on the waiting list is conferred rental-status for their unit. This interpretation creates far more participation from the “waiting list” owners (75% of owners), compared to the 25% of owners that have remained in rental-status from the date of the Declaration. The Kawawaki interpretation of the Declaration provision aligns with the Basso test that defines a reasonable restriction as one that is reasonably related to the promotion of the health, happiness, and peace of mind of the unit owners.

IV. CONCLUSION

The attempt by Academy Square to amend the Declaration by “House Rule”, without vote of the owners, should be deemed void pursuant to the terms of the governing documents, RCW 64.34.264, and the *Shorewood* outcome. The trial court’s decision made on these same bases should be upheld.

To the extent the court applies the *Basso* reasonableness test, the trial court's decision that the Kawawaki's interpretation of Article X, paragraph 13, was more reasonable than that promoted by Academy Square, should be affirmed.

Pursuant to RAP 18.1(a) and Article XI, Section 9 of the Declaration, Kawawaki should be entitled to recover their attorney's fees and costs incurred herein.

DATED this 6th day of September, 2012.

Broer & Passannante, P.S.

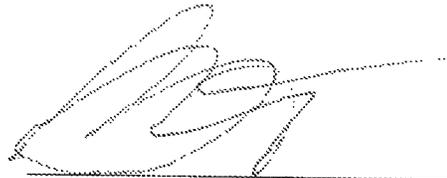


Grant C. Broer, WSBA#25588
Of Attorneys for Respondents

CERTIFICATE OF MAILING

I hereby certify that on September 6, 2012, I delivered a true and correct copy of the foregoing Respondent's Brief by depositing in the U.S. Mail, postage prepaid to the following person(s) at the addresses listed below:

Cassie Crawford
Vancouver Land Law
310 W. 11th Street
P.O. Box 61488
Vancouver, WA 98666

A handwritten signature in black ink, appearing to read 'Grant C. Broer', is written over a horizontal dotted line.

Grant C. Broer