

Case No. 81873-8

SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA LAKE,

Respondent

v.

WOODCREEK HOMEOWNERS ASSOCIATION,
a Washington homeowners association;
and GLEN R. CLAUSING, a single man,

Petitioners.

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SUPPLEMENTAL BRIEF OF RESPONDENT SANDRA LAKE

Marianne K. Jones, WSBA #21034
Mona K. McPhee, WSBA #30305
JONES LAW GROUP, P.L.L.C.
11819 NE 34th Street
Bellevue, WA 98005
(425) 576-8899
Co-counsel for Respondent

Christopher Brain, WSBA #5054
TOUSLEY BRAIN STEPHENS
1700 7th Ave, Ste 2200
Seattle, WA 98101-4416
(206) 682-5600
Co-counsel for Respondent

ORIGINAL

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Respondent Sandra Lake submits the following brief pursuant to RAP 13.7 to supplement her arguments presented in the lower courts and in her Combined Answer To Woodcreek Homeowners Association And Glen R. Clausing's Petitions For Discretionary Review previously filed with this Court.

SUPPLEMENTAL ARGUMENT

A. **The Reasoning And Analysis Employed In *McLendon v. Snowblaze Recreational Owners Ass'n* Is Flawed And Should Not Be Relied On In This Case.**

McLendon v. Snowblaze Recreational Owners Ass'n, 84 Wn. App. 629, 929 P.2d 1140 (1997) does not apply to Ms. Lake's case, and to the extent it conflicts with the reasoning in *Lake v. Woodcreek Homeowners Ass'n*, 142 Wn. App. 356, 174 P.3d 1224 (2007) and *Bogomolov v. Lake Villas Condo. Ass'n of Apartment Owners*, 131 Wn. App. 353, 127 P.3d 762 (2006), it should be overturned.

The condominium association board in *McLendon* leased a common area, a storage room attached to a unit, to a unit owner who planned to convert the area into a bedroom. *Id.* at 631. At issue was the percentage of ownership required to approve the combination of common area with an apartment. *See id.* at 632. The *McLendon* court concluded RCW 64.32.090(10) governed the combination of common areas with

apartment area, and that the corresponding language in the association's declaration applied. *Id.* at 633. The section of the Declaration relied on by Division III in *McLendon* states,

“[A]partment owners having sixty percent (60%) of the votes may provide for the subdivisions of [sic] combination or both, of any apartment or apartments or of the common areas, or any parts thereof [sic], and the means for accomplishing such subdivision or combination, or both....”

Id. at 632. To the extent this section of the Declaration in *McLendon* adds the word “and” or can be read to permit the combination of apartments with common areas, it was neither properly written, nor properly interpreted in light of the plain language of RCW 64.32.090(10). RCW 64.32.090(10) provides that a declaration shall contain:

A provision authorizing and establishing procedures for the subdividing and/or combining of any apartment or apartments, common areas and facilities or limited common areas and facilities, which procedures may provide for the accomplishment thereof through means of a metes and bounds description.

McLendon, thus, rests on a grammatical error in the interpretation of the plain language of RCW 64.32.090(10): reading the word “or” conjunctively, as the word “and,” and therefore concluding RCW 64.32.090(10) governed the combination of common area with apartments, as opposed to the subdivision of apartments, combining apartments with apartments, or combining common areas with other

common areas. *See Cerillo v. Esparza*, 158 Wn.2d 194, 204, 142 P.3d 155 (2006) (noting the Court “has consistently read clauses separated by the word ‘or’ or a semicolon disjunctively”); *see also Teroso Refining & Mktg. Co. v. Dep’t of Revenue*, 164 Wn.2d 310, 319-320, 190 P.3d 28 (2008) (rejecting appellant’s argument that the word “or” in statutory provision meant “and” as there was no legislative intent indicating “or” was properly read as “and”).

The *McLendon* court interpreted the language of RCW 64.32.090(10) as governing the combination of apartment area with common area or limited common area, and such a reading of the statutory provision is only possible when “and” is substituted for “or”. *See McLendon*, 84 Wn. App. at 633. This reading is in error because, “‘Or’ is presumed to be used disjunctively in a statute unless there is clear legislative intent to the contrary... The word ‘or’ does not mean ‘and.’” *State v. Bolar*, 129 Wn.2d 361, 365-366, 917 P.2d 125 (1996) (citations omitted). There is no legislative intent, however, supporting such a substitution in RCW 64.32.090(10). The *McLendon* court’s decision to read “or” conjunctively was error. Thus, Division One in *Lake v. Woodcreek Homeowners Ass’n*, 142 Wn. App. 356, 364, 174 P.3d 1224 (2007), accurately notes that,

[Section 12 of the 1973 amended Woodcreek Declaration, which corresponds to RCW 64.32.090(10),] permits combining or subdividing areas of like quality, such as apartments and apartments. Such combinations and subdivisions do not change the total ownership interests in the property, they merely realign them. Section 12 does not authorize combining areas of different ownership quality, such as common areas and apartments.

See also id. 142 Wn. App. at 365 (“The declaration provision permitting combinations and subdivisions and its governing authority, RCW 64.32.090(10), allow for subdividing apartments, combining apartments with apartments, or combining common areas with other common areas, all of which cause no net difference in the total for each type of area.”)

Section 12 of the 1973 amended Woodcreek Declaration states,

Except as this Declaration may be amended as provided herein, no subdivision or combination of any apartment unit or units or of the common area or facilities or limited common areas or facilities may be accomplished except by authorization by the affirmative vote of 51% of the voting power of the owners of the apartment units at a meeting called upon written notice which notice shall contain a general description of the proposed action and the time and place of the meeting....

(CP 289.) Section 12, although not identical to RCW 64.32.090(10), accurately reflects the disjunctive requirement of that statute and distinguishes the Woodcreek Declaration from the one considered in *McLendon*.

Neither did the *McLendon* court address the application of RCW 64.32.090(13) to the combination of a common storage area with a unit.

Subsection (13) provides a declaration shall contain:

The method by which the declaration may be amended, consistent with this chapter: PROVIDED, That not less than sixty percent of the apartment owners shall consent to any amendment *except that any amendment altering the value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities shall require the unanimous consent of the apartment owners.*

(Emphasis added).

As the concurrence in *Lake* recognized, combining a common area with a unit “necessarily changes the ownership interests of all owners relative to one another.” *Id.* at 142 Wn. App. at 369. As a result, under RCW 64.32.090(13), unanimous consent of the homeowners must be obtained. Approval of such a combination without unanimous approval is otherwise *ultra vires*.

The *McLendon* court rejected the argument that the combination of the common storage area with one owner’s unit required unanimous approval of all homeowners based on its interpretation of the condominium *declaration*, but it did not consider RCW 64.32.090(13). *McLendon*, 84 Wn. App. at 632-33. Further, the *McLendon* court failed to provide the content of the section of the declaration which the dissenting

homeowner relied upon in contesting the combination of common area with apartment area.¹ *Id.* (noting “Mr. McLendon argues that section 30 of the 1987 Declaration requires unanimous approval to combine the apartment and common area” and concluding McLendon “is mistaken” because section 30 “does not address the question before us” but failing to cite the operative language of section 30).

It is possible that Division III did not consider RCW 64.32.090(13) to be applicable because the common storage area at issue was to be leased to the unit owner, not sold. Technically, therefore, the percentage of ownership in the condominium would not change. But as the *Bogomolov* court makes clear, the practical effect of the board’s actions govern, not technical labels. *Id.*, 131 Wn. App. at 367 (“[I]t is the fact that newly constructed common areas proposed here are in reality being converted to limited common areas under the propos[ed 99 year leases] that requires the values stated in the Declaration to be changed.”).

As this Court’s prior decisions make clear, condominium owners’ rights are determined by statute – in this case, RCW 64.32 *et seq.*, the

¹ In his brief to the Court of Appeals Mr. Clausing states: “Section 30 of the Snowblaze Declaration is the same as paragraph 19 of Woodcreek’s Declaration, [CP 240 / Appendix B page B-4]. . . .” Brief of Respondent Glen R. Clausing at 35-36. Because the *McLendon* court does not include the language of Section 30 of the governing Declaration, it can not be concluded that it is the same as section 19 of the 1973 amended Woodcreek Declaration.

Horizontal Property Regimes Act – and by the declaration and bylaws adopted by the owners’ association. *See, e.g. Shorewood West Condo. Ass’n v. Sadri*, 140 Wn.2d 47, 53, 992 P.2d 1008 (2000) (citing RCW 64.32.250(1)). Analysis of both the declaration and the statutory language is paramount in cases like this one.

The *McLendon* court failed to analyze the legal impact of RCW 64.32.090(13) on the lease transaction at issue and whether leasing the common area rather than selling it changed the percentage of ownership of the unit owners, hence requiring a unanimous vote. Moreover, the *McLendon* court did not set forth the language of the declaration provision requiring unanimous consent to change the declaration and offered scant information or analysis on that provision. Therefore, Woodcreek’s suggestion that this undisclosed provision must have mirrored that in the Woodcreek Declaration falls flat. One cannot realistically compare the actual, operative language here to *imagined* language from *McLendon*.

B. The Woodcreek Declaration Is The Master Deed Reflecting Each Owners’ Interest In The Property.

In her opening brief before the Court of Appeals, Ms. Lake notes that the Woodcreek Declaration is recorded and included on the title of each and every homeowner within the Woodcreek Homeowners Association by incorporating the Certificate of Amendment to the

Woodcreek Declaration incorporates each specific phase. (See CP 388-89, 429.) She also points out that the restrictions found in the Survey Maps and Plans, which are part of the Declaration, run with the land, (CP 388), and that the Woodcreek Declaration is similar to restrictive covenants on title. See Lake's Revised Opening Brief at 34-39.

Condominium declarations govern the interest in title for condominium owners. "Declarations are the operative documents for condominiums and in some states are referred to as 'master deed[s].'" *Gold Creek North Ltd. Partnership v. Gold Creek Umbrella Ass'n*, 143 Wn. App. 191, 203-204, 177 P.3d 201 (2008) citing 15A Am.Jur.2d *Condominiums & Cooperative Apartments* § 7, at 779 (2d ed.2000). "[T]hey spell out the true extent of the purchased interest. Declarations ... serve to give notice to individual buyers of the significant terms of any encumbrances, easements, liens, and matters of title affecting the condominium development." *Id.* at 204 citing generally 4 Frederic White, *Thompson on Real Property Condominiums & Cooperatives* § 36.09(j), at 258 (2d Thomas ed.2004) (other citations omitted).

The approval and construction of Mr. Clausing's bonus room contradicts the Woodcreek Declaration, and the failure of Woodcreek to properly amend the Declaration means that current and future

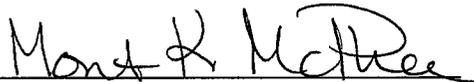
homeowners do not have accurate notice of the matters of title affecting the Woodcreek townhouse condominiums.

C. **Ms. Lake Requests An Award of Attorney Fees and Costs On Appeal.**

Ms. Lake re-states her request raised in her opening brief before the Court of Appeals for an award of attorney fees and costs for bringing this appeal pursuant to RCW 64.34.455 and RAP 18.1. Ms. Lake brings a meritorious case and seeks to enforce the statutory guarantees afforded condominium owners.

RESPECTFULLY SUBMITTED this 5th day of February, 2009.

JONES LAW GROUP, PLLC



MARIANNE K. JONES, WSBA #21034

MONA K. MCPHEE, WSBA #30305

and

TOUSLEY BRAIN STEPHENS PLLC

CHRISTOPHER BRAIN, WSBA #5054

Counsel for Appellant Sandra Lake