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STATE OF WASHINGTON
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No. 86870-1

(Chelan County Superior Court Cause No. 11-2-00678-1)

SUPREME COURT
OF THE STATE OF WASHINGTON

ROSS WILKINSON and CINDY WILKINSON; MONTE KARNES and
KIMBERLY KARNES; DAVID BETHEL and JEANIE BETHEL;
DARRELL MCLEAN; JIM PAULUS and KATHY PAULUS; JOE HARGIS
and LINDA HARGIS; DANIEL MACINDOE and ISIARA MACINDOE;
TED TREPANIER and RUBY AKINS-TREPANIER,

Respondents,

vs.

CHIWAHA COMMUNITIES ASSOCIATION,
a Washington Non-Profit corporation,

Appellant.

BRIEF OF RESPONDENT

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ORIGINAL

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A. INTRODUCTION

This appeal arises from an ongoing dispute between the Respondents who, from time to time, rent out their vacation/second homes to others for periods of less than 30 days in Chiwawa River Pines near Leavenworth and the Appellant, the Chiwawa Communities Association which, by an amendment to its 1988/1992 Protective Covenants following a majority vote of its members, seeks to prohibit residential vacation rentals of less than 30 days.

The Protective Covenants restrict the use of lots within Chiwawa to "single family residential use." Commercial uses are expressly prohibited. It is the position of the Respondents (as supported by the Court of Appeals as discussed below) that residential rentals having any duration are an allowed use that a majority vote of the Appellants members amending the Protective Covenants cannot take away. On the other hand, the Appellant takes the position that a 2011 Amendment to the Protective Covenants that defines rentals of any duration to constitute a prohibited commercial use but which allows an exception for rentals of more than 30 days is valid.

Throughout its Appellate Brief, the Appellant confuses the issues in this case by failing to distinguish between the act of rental (i.e. advertising and marketing; taking reservations; entering into a rental agreement; the

collecting of rent; and the payment of taxes on the rent received – all conducted offsite) with the actual residential use to which the Respondents' tenants put the property. The Respondents each believe that if the tenant puts the property to a residential use, the "residential use" restriction is satisfied and would only be violated if the tenant conducts a business on the premises during that occupancy. In other words, an allowed residential use does not become a prohibited commercial use simply because the tenant pays rent or because of the way that the owner markets or manages the property as long as the tenant has exclusive occupancy during the term of the tenancy. If the contrary were true, then all residential rentals no matter the duration would violate a residential use restriction.

Further, the Appellants fail to even mention in their Appellate Brief anything about certain language contained in the 1988 Covenants that clearly assumes that rentals were allowed in the community – an omission that simply can't be explained other than as a tactical omission.¹

This Court should deny the relief requested by the Appellant and affirm the trial court's entry of Summary Judgment in favor of the Respondents.

B. COUNTER-STATEMENT OF THE CASE

¹

When the Appellant does finally address the issue, it will likely be through its Reply Brief and the Respondents will not have an opportunity to respond.

While generally accurate, Appellant's Statement of the Case does omit certain key/critical facts and misstates others. Therefore, this Counter-Statement will supplement Appellant's Statement Of The Case with additional and/or more accurate information as needed.

1. **Through the recording of Covenants, it is undisputed that the Chiwawa River Pines developer, Pope & Talbot, intended to establish a General Plan of Development:**

Each of the five recordings of the Pope & Talbot Protective Restrictions and Covenants that occurred between January, 1964 - May, 1968 for phases 2 - 5 of Chiwawa River Pines expressly recited that their purpose was to establish a "general plan of development" for the "development, improvement, maintenance and protection" of the properties in that particular phase (CP 448, 796 - 813):

Know all men by these presents: That Pope & Talbot, Inc., a corporation which has heretofore platted Chiwawa River Pines No. [*here the appropriate phase number was inserted*], hereby certifies and declares that it is the owner in fee simple of the Plat of Chiwawa River Pines No. [*here the appropriate phase number was inserted*], and further does hereby certify and declare that **it has established and does hereby establish a general plan for the development, improvement, maintenance and protection of all the real property included in Chiwawa River Pines No. [*here the appropriate phase number was inserted*]**, according to the Plat thereof recorded on Pages [*here the appropriate phase number was inserted*] of Plats, records of Chelan County, Washington, hereinafter called the "Plat," and does hereby establish the Protective Restrictions and Covenants hereinafter set forth subject to which all tracts, parcels, lots, building sites, and areas in the Plat shall be held and sold. (Emphasis supplied.) (CP 796, 799, 805, 808, 811)

2. **By limiting the size of “For Rent” signs that could be displayed on any one lot, the Pope & Talbot General Plan of Development for phase 2 expressly acknowledged the rental rights of Chiwawa owners – at least for that phase:**

The phase 2 Pope & Talbot Covenants, recorded on January 10, 1964, included the following restriction on the size of signs allowed to be displayed within the community:

No sign of any kind shall be displayed to the public view on any lot, tract, or subdivision thereof in the Plat except one sign of not more than three (3) square feet giving the names of the occupants of the lot, tract, or approved subdivision thereof, and one (1) sign of not more than six (6) square feet advertising the property for sale or rent . . . (CP 797)

Giving the words of that sign restriction their “ordinary, usual and popular meaning,”² it is clear that residential rentals³ were allowed – at least in phase 2.⁴

3. **The Pope & Talbot General Plan of Development for phases 3 - 6 contained no rental restrictions:**

First, while the phase 3 - 6 Covenants (CP 276-798) differed materially from the phase 2 Covenants (CP 799-813) in both their scope and their detail,

² *Hearst v. Seattle Times*, 154 Wn.2d 493, 504 (2005). (See also page 16 of Appellant’s Appellate Brief.)

³ As opposed to rentals where the premises would be used for “commercial” purposes given that commercial uses were prohibited.

⁴ The Respondents Trepaniers’ vacation home rental is located in phase 2. (CP 768)

the phase 3 - 6 Covenants were essentially mirror images of each other.

Second, while the phase 3 - 6 Covenants did not contain a like sign restriction provision as was set forth in the phase 2 Covenants, at the same time, none of the phase 3 - 6 Covenants set forth any express limitations on the use of the covered properties as residential rentals. (CP 799 - 813)

Third, none of the Covenants set forth any definitions of the terms “residential,” “residential use,” “commercial use,” “nuisance,” “offensive use” or “single family.” (CP 796 - 813)

For over 20 years following their initial recording, the Pope & Talbot Covenants for phases 2 - 6 remained unchanged until 1988 when, through a vote of its members, the Appellant consolidated all of the Pope & Talbot phases under a single set of covenants known herein as the “1988 Covenants.” (CP 817 - 820) In their consolidated form, the resulting Covenants mirrored the Pope & Talbot Covenants recorded for phases 3 - 6 except for the addition of the sign restriction language previously only included in the phase 2 Covenants.

4. The 1988 Covenants expressly acknowledged the rental rights of all Chiwawa owners no matter which phase their property was located in:

As stated above, the following language, previously included only in phase 2, was added to the 1988 Covenants as applicable to all phases:

. . . No sign of any kind shall be displayed to the public view on any lot, tract or subdivision thereof in the plat, except one sign of not more than 3 feet square giving the names of the occupants of the lot, tract, or approved subdivision thereof, and one sign of not more than 6 square feet advertising the property for sale or rent.⁵ (CP 819)

Again, giving the words of that sign restriction their plain “ordinary, usual and popular meaning” as the Appellant suggests be done,⁶ it is clear that the language assumes that residential rentals were allowed in Chiwawa River Pines.

5. **The significance of the inclusion of the sign restriction language in the 1988 Covenants was acknowledged by the Court of Appeals in *Wilkinson v Chiwawa*, 160 Wash. App. 1038 (2011) (CP 790-794), an unpublished decision involving the same parties and like issues as presented in this case:**

In 2008, through a majority vote of its members, the Appellant passed an amendment to the Covenants (hereinafter the “2008 Amendment”) that “permitted” residential rentals but only if they were for a period of six months or more. (CP 136, 791-792) “Residential rentals” (no matter what their duration) were defined by the 2008 Amendment to be a “commercial use.” (CP 136, 791-792) Therefore, while residential rentals of six months

⁵ Despite its significance to the interpretation of the Covenants at issue, the addition of this language to the 1988 Covenants and/or its inclusion as part of the phase 2 Covenants was not even mentioned in Appellant’s Brief.

⁶ Appellant’s Brief, page 16.

or more were allowed under the 2008 Amendment, they were only permitted as “exceptions” to what was otherwise classified as prohibited commercial activity. (CP 136, 791-792)

On Summary Judgment the trial court declared the covenant prohibiting residential rentals of less than six months to be invalid but then proceeded to re-write the covenant to limit its enforcement to residential rentals of less than 30 days. (CP 790)

Appellant herein did not appeal the trial court’s decision declaring invalid the six month restriction on residential rentals. (CP 790) However, the Respondents herein did appeal the trial court’s re-writing of the 2008 Amendment. (CP 790) The Court of Appeals reversed the trial court on that issue. (CP 790) Rendering its decision the Court of Appeals stated as follows:

The trial court concluded that the 2008 Amendment was invalid. We agree. (CP 790)

* * * *

The 1988 Covenants also contained a sign restriction under the section entitled “Trash Disposal.” Except for this sign restriction, the 1988 Covenants are silent as to the rental of residential property. The sign restriction clearly assumes that rentals were allowed in the community. . . . (CP 791)

* * * *

If named homeowners are successful [in this appeal], the covenants will contain no restrictions on the length of rentals. (CP 793)

The Appellant herein did not seek any further review of the decision of

the Court of Appeals. Instead, the Appellant thereafter passed a 2011 Amendment to the Covenants that was essentially a mirror image of the 2008 Amendment except that this time residential rentals were expressly allowed as an exception to the commercial use prohibition as long as they were of a duration of 30 days or more as opposed to six months or more. (CP 136, 172-176)

6. Contrary to the unsupported statements of the Appellant, the Respondents' vacation home rentals do not resemble the operation of a bed and breakfast, a motel, a hotel or day-to-day transient lodging.

As each Respondent testified none of them seek to operate a bed and breakfast, an inn, a motel, a hotel or a resort or day-to-day transient lodging. (CP 455, 476-481, 483, 493) Rather the Respondents herein seek to preserve their right to rent their vacation/second homes where the rentals have the following characteristics:

(1) Written rental agreements are entered into for a specific rental period— that is, tenancies are not day-to-day at the option of the tenant (CP 492);

(2) A rental fee for that fixed rental period is charged and received prior to the beginning of the fixed rental period either via mail or via the internet (CP 492);

(3) During the fixed rental period, the tenant has exclusive possession, use and control of the entire residence (CP 492);

(4) The written rental agreements expressly require the tenant to respect their neighbors and abide by the rules of the community (CP

492);

(5) The tenant is responsible for damages during the term of their occupancy (CP 492);

(6) All contact associated with the rental of a residence is conducted offsite – that is, unlike a motel, hotel or resort, no residence is open to the public for on-site or walk up type rental and no business is conducted at the site (CP 492);

(7) All reservations and confirmations of reservations are handled by mail, by phone or via the internet (CP 492);

(8) The maximum number of occupants during any one rental period is limited by the size of the residence and the number of bedrooms it has ⁷ (CP 456, 476-481, 483-484, 493);

(9) Notwithstanding their ability to do so, no signs or other identification of the property's availability as a vacation rental are posted on any of the properties by any of the Respondents (CP 492);

(10) The Respondents use their vacation/second homes when they are not otherwise rented. Friends (who are unrelated by blood or marriage) are often invited to spend time overnight/weekend with the owners. In other words, the use made of their vacation homes as a vacation rental (whether by another family, two couples, or two families or anyone else) is no different from the use that the Respondents make of it themselves. That is, before leaving their principal residences wherever located, the Respondents pack their bags, drive to their vacation home, unpack, stay a few days or sometimes a week or so, pack their bags, leave and drive home. (CP 484-485, 492)

Bottom line, as testified to by the Respondents, what occurs on the properties that are rented by the Plaintiffs for occupancy of less than 30 days does not

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See also the Declaration of property manager Darlyn McCarty at CP 870-871.

constitute any greater infringement on the residential character of the subdivision than what would occur with a large family living full time on the property as an owner or a month-to-month tenant.⁸ (CP 492)

7. **Contrary to the implications as set forth in its Appeal Brief at page 6, the Appellant has not historically treated residential rentals (whether short term or long term) as constituting a prohibited commercial use.**

It is true that there is evidence that the Appellant informed certain owners that they could not operate a bed and breakfast in their home (CP 180) – a proposed use which the Respondents agree would have constituted a prohibited commercial use.

It is also true that there is evidence that the Appellant informed another owner that “lodging” facilities also constituted a prohibited commercial use (CP 226) – again, a proposed use which the Respondents agree would have constituted a prohibited commercial use based upon the following definition of a lodging house:

A building where lodging with or without meals is provided for not less than three (3) nor more than ten (10) persons in addition to members of the family occupying such building.⁹

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See Appellant’s footnote 10 page 20.

⁹

(CP 912) The definition of a “lodging house” seems to also include a bed and breakfast style facility except that meals are provided.

Finally, it is also true that prior to the enactment of the 1988 Covenants there is evidence that the Appellant sought to prevent one owner from renting his home on a daily basis (CP 180, 221) – an activity that the Respondents do not engage in.¹⁰ However, none of the above actions by the Appellant are evidence of (1) a characterization of a vacation home rental as a prohibited commercial use, or, (2) an enforcement action by the Appellant against the rental of vacation homes.

In fact, on August 25, 2007, prior to the passage of the 2008 Amendment prohibiting residential rentals of less than six months, the Appellant's Board raised the issue of whether or not "rentals are considered to be [a] commercial use." (CP 487-488, 516) The discussion that ensued clearly indicated that no one knew the answer to that question. (CP 516) But, at the same time during that same meeting, Appellant's Board recognized that "various owners within Chiwawa own rentals." (CP 516)

Further, between 1990 and 1998, Melinda Unger, the wife of one former

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The Respondents have no opinion as to whether or not the specifics of that particular action would have constituted a violation of the prohibition on commercial use particularly if the tenant had the exclusive use of the premises during the day to day rental of the residence. (It should be noted, however, that the Board action seemed more related to the fact that there were two houses on a single lot – a clear violation of the Covenants which expressly allow only a "single residential dwelling" on a single lot. (CP 854-855, 659))

Board member, owned and operated a vacation home rental agency within the community wherein one of the current Board members (Judy Van Eyke) who owned a rental property along with her own separate home within the Chiwawa subdivision had had her rental property listed with the agency as a vacation home rental for well over ten years. (CP 483-485, 870) During the 1st quarter of each year through 2009 alone, her property was rented between 30-39 nights. (CP 882-883) In addition, Mike Stanley, also a current Board member, rented a vacation rental in 2004 while he was building his own home. (CP 870)

Therefore, there is substantial evidence that vacation rentals have always been operated within Chiwawa while there is no evidence that they haven't. Also, until the enactment of the 2008 Amendment, there is no evidence that anyone connected with this litigation, including prior HOA Boards, considered a vacation rental to constitute a prohibited commercial use.

C. ARGUMENT

1. Rules of Construction:

On pages 15 and 16 of its Appeal Brief, the Appellant accurately sets forth some of the pertinent rules of construction applicable to covenant/contract interpretation. Additional rules of construction not mentioned by the Appellant but applicable to the facts of this case are set

forth in the following paragraphs. First, not only is the use of “surrounding circumstances” to determine a drafter’s intent only available if the language being interpreted is unclear and ambiguous, but only those “surrounding circumstances” that existed at the time that the drafting occurred is relevant. On point is *Bauman v. Turpin*, 139 Wn.App. 78, 88-89 (2007) where the court held as follows:

Courts are to determine the drafter's intent by examining the clear and unambiguous language of a covenant. We must consider the instrument in its entirety and, **when the meaning is unclear**, the surrounding circumstances that tend to reflect the intent of the drafter and the purpose of a covenant that runs with the land. While the interpretation of a restrictive covenant is a question of law, intent is a question of fact. Extrinsic evidence of intent is admissible if relevant to interpreting the restrictive covenant. In *Hollis v. Garwall*, the Supreme Court applied the *Berg v. Hudesman* context rule to interpreting restrictive covenants. Under this rule, evidence of the **surrounding circumstances of the original parties** is admissible to determine the meaning of the specific words and terms used in the covenants.¹¹ (Emphasis supplied.)

In keeping with the above, the court held that because neither the 1997 Uniform Building Code nor the 1997 Seattle Building Code were in effect when the covenants in that case were drafted, those codes could not be used to “define the intent or purpose of a covenant” drafted before 1997. This rule is specifically mentioned because the Appellant’s Motion for Summary

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Bauman, supra at 88-89.

Judgment made numerous references to “surrounding circumstances” that did not exist when the Pope & Talbot Covenants were enacted, including the obligation to pay B & O taxes specifically referenced by the Appellant in paragraph 1 of its Issues Pertaining to Assignments of Error.¹²

Second, even assuming that proof of such relevant “surrounding circumstances” existed (and the Appellant has offered none that existed at the time that the Pope & Talbot Covenants were drafted), the Appellant has the burden to establish that the original drafters relied on those “circumstances” in drafting the covenants at issue:

Second, Ross and Schwartzberg argue that vacation rentals are businesses, subject to State excise tax. We disagree because vacation rentals, unlike long-term rentals, are subject to excise tax, they are prohibited by the CPE Covenant. Ross and Schwartzberg fail to establish that Washington business classifications for tax purposes were relied on by the drafters of the covenant.¹³

Third, under *Granger v Boulls*, 21 Wash.2d, 597, 599 (1944), it is clear that a restriction that runs with the land will not be enlarged or extended by construction even to accomplish what it may be thought the parties would

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For example, (1) the enactment of RCW Chapter 59.18 (CP 106); (2) Department of Revenue regulations under WAC 458-20-166(2) (CP 107); (3) Chelan County Code 14.98.020 (CP 107); (4) William Stoebeck’s article (CP 107); and (5) Chelan County Commissioners’ Resolutions 78-125 and 78-124 and letter dated April 1, 1989 (CP 110).

¹³

Ross v. Bennett, *infra* at 51.

have desired had a situation which later developed been foreseen:

The rule is:

Nor will a restriction be enlarged or extended by construction, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written 18 C.J. 386, Sec. 450.¹⁴

Therefore, under *Granger*, if a residential rental of any duration constituted a residential use when the Covenants were implemented, the subsequent advent of the internet allowing mass advertising thereby resulting in an increase in the volume of rentals between the date of implementation and now cannot, as argued by the Plaintiffs, be used as a basis to limit that which was always permitted. (CP 109-110)

Fourth, because the construction/interpretation of covenants in general requires that they be viewed in their entirety, Appellant's failure to even mention the existence of the sign restriction language in its opening Brief doesn't make sense unless as previously stated, the omission is intended to be a tactical one:

The court's primary objective in interpreting restrictive covenants is to determine the intent of the parties. *Metzner v. Wojdyla*, 125 Wash.2d 445, 450, 886 P.2d 154 (1994); *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wash.2d 810, 815, 854 P.2d 1072 (1993); *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wash.App. 177, 179,

¹⁴

Granger, supra at 599.

810 P.2d 27, *review denied*, 117 Wash.2d 1013, 816 P.2d 1224 (1991). In determining intent, language is given its ordinary and common meaning. *Metzner*, 125 Wash.2d at 450, 886 P.2d 154; *Mains Farm*, 121 Wash.2d at 815, 854 P.2d 1072; *Krein v. Smith*, 60 Wash.App. 809, 811, 807 P.2d 906, *review denied*, 117 Wash.2d 1002, 815 P.2d 266 (1991). **The document is construed in its entirety.** *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wash.2d 337, 344, 883 P.2d 1383 (1994); *Burton v. Douglas County*, 65 Wash.2d 619, 622, 399 P.2d 68 (1965). The relevant intent, or purposes, is that of those establishing the covenants. Robert G. Natelson, *Law of Property Owners Associations* § 2.5, at 61 (1989). (Emphasis supplied.)¹⁵

Finally, if there is more than one reasonable interpretation of covenants is possible, the court must adopt an interpretation “that avoids frustrating the reasonable expectations of those affected by the covenants' provisions:

Our goal here is to construe these restrictive covenants by reading them in their entirety to ultimately determine the intent of the parties. *Riss v. Angel*, 131 *Mack v. Armstrong*, 147 Wash. App. 522, 527, 195 P.3d 1027, 1029-30 (2008) Wash.2d 612, 621, 934 P.2d 669 (1997). “[I]f more than one reasonable interpretation of the covenants is possible regarding an issue, we must favor that interpretation which avoids frustrating the reasonable expectations of those affected by the covenants' provisions.” 1030 *Green v. Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wash.App. 665, 683, 151 P.3d 1038 (2007), *review denied*, 163 Wash.2d 1003, 180 P.3d 783 (2008).¹⁶

In this case, the Covenants restrict the use of the subject real estate to “single family residential use . . . as consistent with [a] permanent or recreational

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Riss v. Angel, 131 Wash.2d 612, 621 (1997).

¹⁶

Mack v. Armstrong, 147 Wash. App. 522, 527 (2008).

residence.”¹⁷ Under that language, it is the position of the Respondents that they “reasonably expected” that they would be entitled to rent their properties as long as the main use and purpose of the rental satisfied the above “use” restriction.¹⁸ In this regard, *Mains Farm Homeowners Ass’n v Worthington*, 121 Wash 2d 810 (1993) and *Metzner v Wojdyla*, 125 Wash.2d 445 (1994) are each instructive.

First, it matters not what the use is called because the restriction at issue in this case, like that in *Mains*, is not against names, but purposes:

. . . , the *Hunter* case points up exactly what is wrong with the defendant's theory in this case. First, it explains what the nuns called the place was immaterial. Equally immaterial is the fact that defendant is licensed as an adult family “home”. The court said: “The restriction is not against names, but purposes.” *Hunter*, at 114, 167 P. 100. Exactly so here. The purpose here is to run a paid, full-time, State-licensed business. The name is not material.¹⁹

Therefore, the name tag “rental businesses” that the Appellant has attached to the Respondents’ action should be disregarded in favor of an objective

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The meaning of the phrase “single family” is discussed on pages 27 - 31 of this Response.

¹⁸

The “reasonableness” of this expectation is even clearer when considering the inclusion of the sign restriction language as set forth in the 1988 Covenant as well as the lack of any enforcement action against rentals whether short term or long term.

¹⁹

Mains, supra at 819.

analysis of the use being made of their properties by the Respondents.

Second, the Court in *Mains* also pointed out that there is a wide difference between an occasional and an habitual and customary use:

Second, and more important, in *Hunter*, it was complained that the nuns invited the public on one occasion to observe admission of certain persons into the sisterhood. The court rejected that argument, but in so doing drew an important distinction—a distinction which demonstrates clearly that *Hunter* does not support the defendant. The court stated: “It seems to us there is a wide difference between an occasional and an habitual and customary use. The first is a mere incidental use, the second may, **under proper facts**, be considered as the main use and purpose.” *Hunter*, at 115, 167 P. 100. In this case the “main use and purpose” is not to provide a single family residence, but to provide 24-hour protective care and supervision in exchange for money.²⁰ (Emphasis supplied.)

Clearly, a residential rental (no matter what its duration is) has a commercial element to it – that is, payment is made for the “use” of the residence. But the key question is what specifically is the “use” for which payment is being made and has that use overpowered the residential characteristics of the use? Alternatively stated, does the payment of rent whether for occupancy lasting for less than 30 days or for more than 30 days characterize the “use” or does the character of the physical “use” of the property during the period of the tenancy control?:

The Wojdylas argue that *Mains Farm* requires a further inquiry into

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Mains, supra at 820.

whether operation of their day care center was the primary use or an incidental use of their property. We do not agree. Defendants in *Mains Farm* made a similar argument, citing *Hunter Tract Imp. Co. v. Corporation of Catholic Bishop*. The issue there was whether operation of a convent for Catholic nuns constituted a residential use. The court in *Mains Farm* rejected the argument that *Hunter* controlled, saying the cases were different and *Hagemann* was more on point. Although the court said it might well apply the primary/incidental test, it reached the same result for the same reason as in *Hagemann*: it looked at the clear distinction between business and residential use and found the business use incompatible with the covenant restricting use of the property to residential purposes. We use that same reasoning to reach the same result.²¹

Bottom line, whatever the approach (“primary vs incidental use” or “business use incompatible with residential restriction”), under the facts of this case, the “use” by a tenant of the vacation home property is no different than that of the owner or a long term tenant.

2. The *Mains Farm*, *Metzner* and *Hagemann* holdings do not require this Court to characterize the Respondents’ residential rental activities as constituting a prohibited commercial use.

In each of the above described cases, the owners of the residence at issue not only occupied the residence themselves but, in addition, provided day-to-day/hour-by-hour services (for pay) to other unrelated occupants. In *Mains Farm* it was an adult family home; in *Metzner* it was a licensed child care facility; and in *Hagemann* it was an elderly foster care home. On the other

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Metzner v. Wojdyla, 125 Wash. 2d 445, 452 (1994)

hand, under the facts of this case, the occupancy of a vacation home rental, like a long term rental, is exclusive to the tenant and the owner does not co-occupy the premises or provide services to the tenant during that occupancy period. Specifically in keeping with this Court's holding in *Metzner, supra* at 452, the "business" aspect to the rental of a vacation home is not carried on within the premises; rather, the "use" of the premises is as required by the covenants – that is, as a residence.

In addition, for essentially the same reasons, the Court of Appeals in *Ross v Bennett*, 148 Wash. App 40 (2008/2009) held the above cases did not compel it to conclude that a vacation rental constituted a business use:

Ross and Schwartzberg argue that the term "residential" or "residence purposes" in a restrictive covenant prohibits any business use. *Metzner v. Wojdyla*, 125 Wash.2d 445, 886 P.2d 154 (1994) (operation of licensed child daycare facility violated covenants restricting use of property to residential purposes only); *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wash.2d 810, 854 P.2d 1072 (1993) (for profit adult family home violated covenant stating "lots ... shall be used for single family residential purposes only" due to the commercial nature of the use); *Hagemann v. Worth*, 56 Wash.App. 85, 91, 782 P.2d 1072 (1989) (defendant was enjoined from operating a business providing foster care to elderly people on property when restrictive covenant prohibited "business, industry or commercial enterprise of any kind or nature"). The cases cited by Ross and Schwartzberg, do not compel this court to conclude that a vacation rental is a business use. Bennett proposes a rental of the property that is identical to his own use of the property, as a residence, or the use made by a long-term tenant. The owner's receipt of rental income either from short or long-term rentals, in no way detracts or changes the residential characteristics of the use by the

tenant.²²

In that case, the properties within the Cattle Point Estates (“CPE”) were subject to a CPE Covenant that limited the use of “all parcels. . . . to residence purposes only and only one single family residence may be erected on each such parcel.” (*Ross*, supra at 44.) However, in 2002, the Cattle Point Owners Association “issued a transient rentals policy stating that a lease/rental shall not be for a period of less than 30 days.” (*Ross*, supra at 44.) The defendant in that case used his property to generate income by renting to persons for less than 30 days. On a Motion for Summary Judgment, the trial court concluded that rentals for less than 30 days constituted a business use, not a residential use. After concluding that all business uses of property in CPE, including rentals of less than 30 days, were violations of the CPE Covenant, the trial court permanently enjoined the defendant from renting his property for periods of time of less than 30 days. The defendant appealed the summary judgment ruling. *Id.* at 45, 203 P.3d 383.

The Court of Appeals reversed the trial court’s grant of summary judgment and remanded for entry of a judgment in favor of the defendant. First, the Court of Appeals rejected the Plaintiff’s argument that “a vacation

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Ross v. Bennett, 148 Wash. App. 40, 51, 203 P.3d 383, 388 (2008).

rental is a business use.” *Id.* at 51, 203 P.3d 383.

[The Defendant] proposes a rental of the property that is identical to his own use of the property, as a residence, or the use made by a long-term tenant. The owner's receipt of rental income either from short or long-term rentals, in no way detracts or changes the residential characteristics of the use by the tenant. (*Id.* at 51, 203 P.3d 383.)

Next, the Court declined to make a distinction between long and short term rentals where the CPE Covenants themselves had not done so expressly:

We agree with [the Defendant] that the trial court erred in finding that short-term vacation rentals were prohibited by the CPE Covenant. On its face, the CPE Covenant does not prohibit the short-term rental of Bennett's house to a single family who resides in the home. The CPE Covenant merely restricts use of the property to residential purposes. Renting the [Defendants] home to people who use it for the purposes of eating, sleeping, and other residential purposes is consistent with the plain language of the CPE Covenant. **The transitory or temporary nature of such use by vacation renters does not defeat the residential status.** (*Id.* at 51-52, 203 P.3d 383. (Emphasis supplied.))

Therefore, absent any express prohibition against rentals of less than 30 days being included as part of the general plan of Chiwawa's subdivision and, under the authority of the *Ross* case cited above, it is clear that rentals of less than 30 days under the Pope & Talbot Covenants and the 1988 and 1992 Covenants constituted an allowed or incidental residential use, not a prohibited commercial use.

Finally, in those cases, the characterization of the use as “commercial” or “residential” was not aided by covenant language that

actually authorized the particular use at issue. In this case, the Court of Appeals in *Wilkinson v. Chiwawa* (CP 790-794) giving the words of the Covenants “their ordinary, usual and popular meaning” concluded the obvious – that is that the sign restriction set forth in the 1988 Covenants “clearly assumes that rentals were allowed in the [Chiwawa] community” and that the Covenants themselves contained “no restrictions on the length of rentals.”

3. **By less than a 100% affirmative vote of all of its members, the Appellant does not have the authority to amend the Covenants unless that power is exercised in a reasonable manner consistent with the general plan of development.**

The Appellant acknowledges the validity of the above proposition when, at page 27 of its Appellate Brief, it cites *Shafer*, *infra*, for the following proposition:

We agree with these concessions and take the opportunity to hold that an express reservation of power authorizing less than 100 percent of property owners within a subdivision to adopt new restrictions respecting the use of privately-owned property is valid, **provided that such power is exercised in a reasonable manner consistent with the general plan of the development.**²³

(The Court of Appeals, in *Meresse v. Stelma*, 100 Wn. App 857, 865 (2000)

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Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc., 76 Wash. App. 267, 273-74, 883 P.2d 1387, 1392 (1994) (See page 27 of Appellant’s Brief.)

held to the same rule.²⁴⁾

That the Covenants at issue were intended to establish a “general plan of development” for each of the Chiwawa River Pines subdivisions is undisputed given that the Pope & Talbot Covenants expressly so state.²⁵ Therefore, as pointed out on page 29 of Appellant’s Brief, “the only issue, then, is whether the [2011] amendment . . . was consistent with Chiwawa’s general plan of development.”

4. **The 2012 Amendment is inconsistent with Chiwawa’s General Plan of Development.**

Here, the 1988/1992 covenants evidence Pope & Talbot’s intent to create a quiet, single-family residential community by explicitly banning commercial and requiring that properties be occupied on a single-family basis. CP 30, 33-36. The rental businesses’ short-term vacation rentals are inconsistent with the residential character that Pope & Talbot intended to create for Chiwawa.²⁶

The 1988/1992 covenants contained a strong and emphatic statement that the residential restrictions were intended to prohibit any type of commercial or business use of properties within Chiwawa.²⁷

Following this Court’s historical example, a use is either residential

²⁴ See page 30 of Appellant’s Brief.

²⁵ See page 3 of this Response.)

²⁶ See page 19 of Appellant’s Brief.

²⁷ See page 20 of Appellant’s Brief.

or commercial, but not both.²⁸

The above represents the stated position of the Appellant. Again, however, the Appellant fails to even mention, refer to or take into account the sign restriction added to the 1988 Covenants and the impact of that language on the interpretation of those Covenants when viewed in their entirety. If, indeed, the inclusion of the sign language in the 1988 Covenants “clearly assumes that rentals were allowed in the community” as acknowledged by the Court of Appeals, then the above stated positions of the Appellant are simply not supportable.

Next, the Appellant argues that Pope & Talbot’s intent was to create a “quiet” community. The term “quiet” simply appears in Appellant’s briefing as though it were just pulled out of the air. Certainly the Appellant can’t mean that if commercial activity of any degree were allowed that the community would no longer be “quiet” since one of the purposes of the 2008 Amendment was to expressly allow certain previously prohibited commercial activity. In any event, besides having just pulled the term out of the air, Appellant fails to explain how vacation rentals are inconsistent with the community being a “quiet” one. Indeed, on a factual level, the Respondents

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See page 21 of Appellant’s Brief.

have testified that any such related issues within the community have been created by the either the permanent residents and/or the vacation owners and not by vacation rental tenants. (CP 527-528, 533-534, 559-567, 569-570)

5. ***Shorewood West Condominium v Sadir*, 140 Wn.2d 47 (2000) is not applicable to non-condominium cases.**

On pages 32 - 33 of its Appeal Brief, the Appellant argues that the *Shorewood* case “cannot be harmonized” with the trial court’s decision in this case:

More critically, the trial court’s decision cannot be harmonized with this Court’s decisions holding that homeowners associations in analogous property regimes may adopt provisions restricting the ability of owners to lease their properties given the benefit of owner-occupied units. (Page 32)

That property owners reside in condominiums rather than single-family residences does not change the fact that rental businesses in both may be subject to restrictive covenants that may be amended. (Page 33)

However, this Court in *Shorewood* expressly stated that condominiums are not governed by common law but rather are creatures of statutory enactment and therein lies the reason why the Appellant is wrong in the above conclusions:

All condominiums are statutorily created. Lewis A. Schiller, *Limitations on the Enforceability of Condominium Rules*, 22 Stetson L.Rev. 1133, 1135 (1993). In Washington, the statutory form of condominium was first authorized with the passage of the Horizontal Property Regimes Act. 2 Washington State Bar Ass'n, *Real Property Deskbook* § 41.5 (2d ed.1986). All condominiums created in this state

after July 1, 1990 come under another regime: the Condominium Act, RCW 64.34. RCW 64.34.010. Since Shorewood West Condominium was created in 1978, it is governed by the older act.

Because condominiums are statutory creations, the rights and duties of condominium unit owners are not the same as those of real property owners at common law. *McElveen-Hunter v. Fountain Manor Ass'n, Inc.*, 96 N.C.App. 627, 386 S.E.2d 435, 436 (1989), *aff'd*, 328 N.C. 84, 399 S.E.2d 112 (1991). "Central to the concept of condominium ownership is the principle that each owner, in exchange for the benefits of association with other owners, 'must give up a certain degree of freedom of choice which he [or she] might otherwise enjoy in separate, privately owned property.' " *Noble v. Murphy*, 34 Mass.App.Ct. 452, 456, 612 N.E.2d 266 (1993) (quoting *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180, 182, 72 A.L.R.3d 305 (Fla.Dist.Ct.App.1975)). The rights given up by the unit owners are determined by the statute. RCW 64.32 makes all owners subject to the chapter and "to the declaration and bylaws of the association of apartment owners adopted pursuant to the provisions of this chapter." RCW 64.32.250(1).²⁹ (Emphasis supplied.)

6. **The Appellant asserts that the Respondents do not rent to single families and that the trial court erred "by failing to rule that the rental businesses do not rent to single families."**³⁰

It was the Appellant who, through its Counterclaim, raised the "single family" issue:

Defendant requests that judgment be entered as follows:

²⁹ *Shorewood, supra* at 52-53. (The court went on to hold at page 57, however, that the leasing restriction amendment at issue in that case was not enforceable because the Association amended its bylaws rather than the Declaration.)

³⁰ Appellant's Brief, page 21.

1.8 Declaring that Plaintiffs are not renting to “single families”; (CP 47)

It was also the Appellant who sought affirmative relief on that issue through its Motion for Summary Judgment. (CP 89)

The Respondents themselves did not seek any affirmative relief in their favor on that issue either in their Complaint, their Answer to the Appellant’s Counterclaim, or in their own Motion for Summary Judgment; rather, in response to the Appellant’s Motion for Summary Judgment on the issue, the Respondents simply defended against any such determination being entered. (CP 863 - 865)

In any event, the Respondents have never asserted that they do not rent to “single families.” Rather, first they have asserted that they do not know what the definition of a single family is. For instance, the Appellant argues in favor of the dictionary meaning of the term but has offered no evidence that the dictionary definition is the meaning adopted by the Pope & Talbot drafters particularly in light of the fact that the zoning definition for “family” that existed when the Pope & Talbot Covenants were enacted was as follows:

16. Family. An individual, or two or more persons related by blood, marriage, adoption, or legal guardianship, living together in a dwelling unit in which meals or lodging may also be provided for not more than two additional persons excluding servants; or a group of not more than three unrelated persons living together in a dwelling

unit.³¹

Further, in response to discovery requests, the Respondents admitted that if asked to rent to a group of unrelated parties who did not share a common address outside of Chiwawa, that they would not reject such a proposal:

Question: Admit or deny that you have rented to groups of unrelated parties during the same rental period and these groups of people do not share a residence outside of Chiwawa River Pines.

Answer: Plaintiffs admit that at one time or another a group consisting of unrelated parties who do not share a common address outside of Chiwawa River Pines have probably rented the subject property on a short term basis at one time or another. Specifically, the Plaintiffs would not reject such a rental proposal.³²

However, per the zoning code definition of “family”, a group of two or three friends, for instance, who don’t share a common address outside of Chiwawa River Pines would, under the definition of family in effect in Chelan County at the time that these covenants were put in place, constitute a family. In any event, the point is that there was no admission by the Respondents that they “do not” rent to single families – whatever the definition of a single family is

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CP 913.

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CP 239 - 268.

in the context of the Covenants at issue.

Further, Darlyn McCarty, a rental manager for at least one of the Respondents, testified as follows:

Q. And do you know if the people who rent it, are they single families or what kind of people rent it?

A. I would say on the general average that everybody in there are single family pertaining to the person that rents it. And they may at their choosing have a friend stay with. But for the most part, it's single families.³³

* * * *

Q. What is the purpose of renting the cabin?

A. The purposes range from going to a wedding, recreating of some type. In the summer its hiking, biking, going to the lake. In the winter it's snowmobiling, cross country skiing, going up to the pass. For the most part, it's family oriented. In fact, I would say all of it is family oriented.³⁴

In any event, the collective position of the Respondents is that the definition of what constitutes a "single family" for purposes of the application of the subject Covenants was and remains an issue of fact but that whatever it is, it is also applicable to homeowners occupying their own property. Therefore, can two unrelated co-owners occupy the subject real property at the same time? Can one homeowner have unrelated guests stay overnight? Can a

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CP 864, 378.

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CP 864, 379.

tenant who has signed a tenancy agreement have unrelated friends stay with him?

7. Collateral estoppel bars the Appellant from contradicting or challenging certain ultimate facts already determined by Judge Small and by the Court of Appeals.

The doctrine of collateral estoppel bars the Appellant in this case from contradicting certain “ultimate facts” that have already been determined by the trial court in Chelan County Cause Number 09-2-00896-0 and in the companion Court of Appeals decision:

Collateral estoppel promotes the policy of ending disputes by preventing the relitigation of an issue or determinative fact after the party estopped has had a full and fair opportunity to present a case. *In re Marriage of Mudgett*, 41 Wash.App. 337, 342, 704 P.2d 169 (1985); *Seattle-First Nat'l Bank v. Cannon*, 26 Wash.App. 922, 927, 615 P.2d 1316 (1980). In order for collateral estoppel to apply, the following questions must be answered affirmatively:

(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Rains v. State, 100 Wash.2d 660, 665, 674 P.2d 165 (1983); *Lucas v. Velikanje*, 2 Wash.App. 888, 894, 471 P.2d 103 (1970). The burden of proof is on the party asserting estoppel. *Alaska Marine Trucking v. Carnation Co.*, 30 Wash.App. 144, 633 P.2d 105 (1981), cert. denied 456 U.S. 964, 102 S.Ct. 2045, 72 L.Ed.2d 490 (1982)

* * *

Finally, collateral estoppel extends only to “ultimate facts”, *i.e.*, those facts directly at issue in the first controversy upon which the claim rests, and not to “evidentiary facts” which are merely collateral to the original claim. *Trautman, supra*, at 833-34; 259 *Seattle-First 306 Nat'l Bank v. Kawachi*, 91 Wash.2d 223, 588 P.2d 725 (1978); *Beagles v. Seattle-First Nat'l Bank*, 25 925, 931 (1980).³⁵

In this case, the following issues and/or ultimate facts have already been resolved: First, by virtue of the trial court’s decision under Chelan County Cause No. 09-2-00896-0, that residential rentals constitute an allowed residential use, not a commercial use (CP 790); second, that the 1988 Covenant’s sign restriction provision “clearly assumes that rentals were allowed in the community” (CP 791); and third, that prior to the 2011 Amendment, the covenants did not contain any restrictions on the length of rentals (CP 792):

The issue on appeal is limited to whether the court erred by rewriting the 2008 Amendment to prohibit rentals of less than one month. If named homeowners are successful, the covenants will contain no restrictions on the length of rentals.

Under the doctrine of collateral estoppel, the Defendant is prevented from asserting to the contrary.

8. The trial court properly struck portions of the evidence that the Appellant offered on Summary Judgment.

The Respondents did not object to results of the survey only the

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McDaniels v. Carlson, 108 Wash. 2d 299, 305-06 (1987).

“Comment” section. Clearly, if the intent of the Appellant was to have those comments admitted into evidence for the truth of what was stated, they are inadmissible as hearsay. At no time did the Appellant seek to have the comments admitted for any other purpose except that now, on page 36 of its Appellate Brief, the Appellant makes the following argument:

The comments are relevant to the Association’s contentions and should have been admitted.

What contentions? Even now, assuming that the Comments were not intended to be submitted for the truth of the matter, the Appellant does not identify the relevancy of the Comments to the issues before the trial court. The trial court properly struck the Comment section of the survey. (In fact, it should be noted that the Comment section does not even identify the persons who made the comments making the validity of the comments impossible to investigate.) The probative value of the Comments is simply outweighed by their presumed unreliability due to lack of identification of the persons making the comments.

As to the Van Eyk testimony, she certainly could have testified to her own experience as an owner of an investment property in Chiwawa, but she was not competent to testify to the experiences of others.

As to the Padden testimony, unless he could testify directly as to the intent of the drafters of the Pope & Talbot Covenants, his lack of

participation in that drafting and, therefore, his lack of personal knowledge of the drafter's intent results in his testimony being irrelevant to the purposes of the Cross Motions for Summary Judgment of the parties.

As to the Fisk testimony, her conclusionary testimony is inconsistent with the Appellant's business records and her attempt to explain away the significance of the 1988 Covenant's sign restriction and the failure to include, at that time, a durational limitation on rental periods is and was transparent.

D. CONCLUSION

As previously stated, the Appellant leaves out of its argument in favor of reversal of the trial court's grant of Summary Judgment in favor of the Respondents any argument, explanation or reference to the 1988 Covenants and the inclusion of the "for rent" sign restriction. Without providing an answer to the question about why the Appellant chooses to ignore that language as part of its Appeal Brief, the Respondents can only assume that the Appellant has no satisfactory explanation as to why it chooses to ignore the language which the Court of Appeals has described to be "clear" in what it means. In any event, even if that language were absent, the fact remains that the use made of any vacation rental property is equivalent to the use that the owner or any long term tenant would make of it. And while any rental of a residential property does have some element of commercialism to it vis-a-

vis the payment of rent, the resemblance clearly stops there. This Court should dismiss the Appeal and affirm the trial court's entry of Summary Judgment in favor of the Respondents.

Respectfully submitted on this 10th day of July, 2012,

DENNIS JORDAN & ASSOCIATES,
INC., P.S.

By


Dennis Jordan, WSBA # 4904
Attorney for Respondents

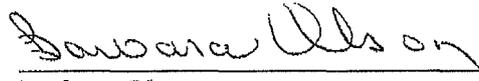
DECLARATION OF SERVICE

I declare under the penalty of perjury of the laws of the State of Washington that a copy of the foregoing Reply Brief of Respondents was on this day transmitted via Email as well as deposited in the U. S. mail to:

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Executed at Everett, Washington on this 10th day of July, 2012.


Barbara Olson

OFFICE RECEPTIONIST, CLERK

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