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No. 90879-6

No. 70013-8-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

FILMORE LLLP, a Washington limited liability limited partnership,

Respondent/Plaintiff below,

v.

UNIT OWNERS ASSOCIATION OF CENTRE POINTE CONDOMINIUM, a Washington nonprofit miscellaneous corporation,

Appellant/Defendant below.

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APPELLANT'S OPENING BRIEF

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I. Introduction

The Washington Condominium Act, RCW ch. 64.34, states the general rule that a 67% supermajority vote is required to amend the declaration of condominium. RCW 64.34.264(1). This is subject to a carve-out in .264(4) for exceptional amendments on which both a 90% yes vote and "the vote or approval of the owner of each unit particularly affected" are required — *viz.,* amendments that "create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, *or the uses to which any unit is restricted.*" Well established principles of statutory construction demonstrate that the phrase "the uses to which any unit is restricted" refers to the land use classifications of residential and nonresidential. Filmore's contention, that "'[u]se' must include all aspects to which a buyer may intend and/or expect to utilize his/her unit," is contrary to such principles and would reach so broadly as to swallow the general rule. Accordingly, a condominium association may amend the declaration by a 67% vote to create a "rental cap" — a limit on the number of units that can be leased to tenants — because the use of the units remains the same, *i.e.*, residential. The Twelfth Amendment to the declaration of the appellant Unit Owners Association of Centre Pointe Condominium (the "Association") therefore satisfies RCW 64.34.264.

II. Assignment of Error and Issues Pertaining Thereto

A. Assignment of Error

The court below erred in entering its Order of February 8, 2013, which granted the CR 56 motion of plaintiff Filmore LLLP ("Filmore") and stated a declaratory judgment in its favor, as follows: "That the Twelfth Amendment to the Declaration [of Centre Pointe Condominium] is void and shall not be enforceable for lack of 90% approval." A copy of this order is in the Clerk's Papers ("CP") at 339-42.

B. Issues Pertaining to Assignment of Error

The primary issue involves interpretation of subsections (1) and (4) of RCW 64.34.264 and is as follows.

> 1. Does an amendment to the declaration of condominium that creates a "rental cap" on the number of units that owners can lease to tenants require unit owner approval by a supermajority of 67% under RCW 64.34.264(1)? Or must the higher 90% level in RCW 64.34.264(4), and also its requirement of "the agreement or vote of the owner of each unit particularly affected," *id.*, be obtained for approval?

This issue turns on the meaning of the word "use[s]" in the Washington Condominium Act, RCW chapter 64.34 (the "WCA"), and in particular in the phrase within RCW 64.34.264(4), "change . . . the uses to which any unit is restricted."

Based on the analysis *infra*, 67% is the statutorily required level

of approval, not 90%. If the Court so holds, then the CR 56 order below must be reversed, and it is not necessary to reach the second issue. If the Court holds otherwise, then the second issue is:

> 2. Under the doctrine of equitable estoppel, does the conduct of Filmore LLLP estop it, or at minimum, raise triable issues of fact as to whether it is estopped, from asserting the Twelfth Amendment to the Centre Point Declaration of Condominium is void and unenforceable for lack of 90% approval?

III. Standard of Review

The standard of review is *de novo,* in this appeal from a summary judgment order. *See Johnson v. Ubar, LLC*, 150 Wn. App. 533, 537, 210 P.3d 1021 (2009) In addition, *de novo* review is accorded a lower court's interpretation of a statute. *See, e.g., In re Marriage of Brown*, 159 Wn. App. 931, 935, 247 P.3d 466 (2011).

IV. Statement of the Case

Centre Pointe Condominium was formed in 2003 by a Declaration of Condominium recorded in Whatcom County.[1] CP 30. (Its original name, "Millenia Residences," was later changed to its current name. CP 104.) Three residential buildings with 97 units, and also a clubhouse, were built prior to 2011. CP 106. On October 20, 2011, the Association

[1] The governing legislation for Centre Pointe Condominium therefore is the WCA, ch. 64.34, which applies to all condominiums formed after July 1, 1990. *See* RCW 64.34.010(1). The older Horizontal Property Regimes Act, RCW ch. 64.32, applies to condominiums formed prior to July 1, 1990.

recorded the Twelfth Amendment to the declaration of condominium. CP 123-27. It states the amendment is made pursuant to RCW 64.34.264(1) and Section 17.1 of the declaration, and further, that it was approved by owners of units to which at least 67% of the votes in the condominium association were allocated. CP 124, 235. The 67% margin is the required approval level stated in RCW 64.34.264(1) and Section 17.1 of the declaration. CP 68. The Twelfth Amendment created a "rental cap"; *viz.,* it stated that the number of units in Centre Pointe Condominium permitted to be leased shall not exceed 30% of the total number of units, subject to certain limited exceptions. CP 125.

The Association engaged attorney Greg Thulin to draft the Twelfth Amendment. *See* declaration of the immediate past president of the Association, Debbie Haddad. CP 234. Ms. Haddad also stated the Association's purposes in adopting the Twelfth Amendment, *id.*, which included the facts that the ability of the members of the Association to sell the units depends upon the availability of prospective buyers to obtain financing, and that the FHA and lenders have guidelines under which their funds' willingness to make or guarantee loans is decreased or nonexistent if there is extensive leasing at a condominium. CP 234.

Filmore had purchased the Building D pad and accompanying development rights from a bank, which had foreclosed on a prior

declarant's interest. CP 105,142. Filmore states that it is a successor declarant. CP 105. On December 27, 2011, the Construction Deed of Trust by which Filmore secured financing for its construction of Building D was recorded. CP 145. On September 28, 2012, Filmore, as successor declarant, recorded the Fourteenth Amendment to the declaration, CP 104-07, which established 35 residential units in Building D. Construction of the units was still going on. CP 237. On October 20-21, 2011, Filmore held its "grand opening" 'pre-sale' event by showing display units in Building D. The Association made available to him its clubhouse as a reception area to hold an open house for the event. CP 237-38, 245-46. No units were sold because they were overpriced. CP 140, 237, 242.

Several days earlier, on October 15, 2012, Filmore had filed its Complaint in the instant case, praying for a declaratory judgment and damages and alleging that the adoption of the Twelfth Amendment violated RCW 64.34.264(4) and Section 17.3 in the declaration. CP 4-10. As discussed below, Subsection (4) in RCW 64.34.264 states certain exceptions to the general requirement of 67% approval from unit owners of amendments to the declaration and, for such exceptions, requires a 90% level of approval and, further, that "the vote or agreement of the

owner of each unit particularly affected" be obtained.[2] Filmore kept its filing of the lawsuit secret from the Association until the following month. CP 237.

On January 9, 2013, Filmore moved for summary judgment. The court below granted the motion in the February 8, 2013 Order to which error is assigned. The Association petitioned for discretionary review of the February 8, 2013 order, which this Court granted by order entered June 17, 2013.

The briefing to the court below (and this Court in seeking discretionary review) pointed out that "rental cap" amendments to condominium declarations have commonly been adopted by the 67% approval level specified in RCW 64.34.263(1) of the WCA.[3] The reason for doing so was to refute Filmore's contention that no reasonable conclusion could be reached other than that which Filmore advocates.[4]

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[2] Section 17.3 of the Centre Pointe declaration of condominium quotes the statutory language of RCW 64.34.264(4) almost verbatim. CP 69.

[3] During the period of time from 36 months before the Twelfth Amendment to the Centre Point declaration (10/20/2011) took effect to 12 months after, there were at least ten other "rental cap" amendments for condominiums, besides Centre Pointe's, recorded in Whatcom County that were approved by a 67% level under RCW 64.34.264(1). CP 261, 158-59, 164-221. These were drafted and recorded by five different attorneys in Whatcom County, CP 261, one of whom is with the firm representing plaintiff Filmore in this matter and filed a declaration in support Filmore's CR 56 motion. CP 27, 164, 176, 204.

[4] CP 22, 260; *see also* Respondent's Answer to Appellant's Petition Motion for Discretionary Review, filed April 25, 2013 at 7 (asserting the statutory interpretation Filmore seeks is "so obvious")

The fact that such a preponderance of amendments[5] had been passed and recorded by associations with 67% approval (including three in which the law firm representing Filmore herein had been the drafter and recording agent) belied Filmore's argument. The Association, in this appeal, does not suggest that this Court should base its decision on the present custom or practice of attorneys in Whatcom County or elsewhere in Washington. But the Association herein notes this predominant practice to make clear that the Association does not back away from or disavow this prominent aspect of the briefing below. In the same vein, Filmore should not try to sway this Court with its contention — made in CR 56 opening and reply papers below — that all "commentators" endorse Filmore's position. *See* CP 25; Respondents' Answer to Appellant's Motion for Discretionary Review at 7.[6]

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[5] It is not a unanimous practice. Filmore cited two Whatcom County rental cap amendments from 2007 and 2010 that were enacted with 90% approval. CP 306-13.

[6] Filmore's "commentators" are not law professors (and the "comments" are not law review publications), but rather attorneys in practice, all admitted since 2000. Filmore submitted website printouts and/or business development documents created by three such attorneys, CP 28, and also (from one of them) a declaration in its CR 56 reply papers below, CP 294. The Association does not agree that such comments qualify as persuasive authority to inform a Washington court's ruling on a CR 56 motion. In addition, the firm of the attorney from whom Filmore submitted below a declaration on reply has not abstained from drafting or recording rental cap amendments with 67% approval. CP 327-28 & 331-36.

V. Legal Authority and Argument

A. Under the WCA, 67% Is the Required Level of Approval for a Rental Cap Amendment

The WCA states 67% is the required approval level for amendments to condominium declarations generally:

> (1) Except . . . as limited by subsection (4) of this section, 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: PROVIDED, That the declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential use.

RCW 64.34.264(1) (boldface and italics added). As indicated by the opening clause in the above subsection, certain exceptional amendments require a 90% level of approval, and an additional requirement:

> (4) Except to the extent expressly permitted or required by other provisions of this chapter, no amendment may **create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit,** ***or 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 units to which at least **ninety percent of the votes** in the association are allocated other than the declarant or such larger percentage as the declaration provides.

RCW 64.34.264(4) (boldface and italics added).

The WCA does not contain an explicit definition of "use." Well-established principles of statutory construction demonstrate, however,

that subsection .264(4) does not apply to a rental cap amendment.

Filmore's position is that "use" of a unit means something different than the fundamental function or activity that goes on in it — *i.e.,* residing in it or, alternatively, carrying on a business or commerce. Instead, Filmore has argued that "use" of a unit includes a lease by an owner to a tenant because, at common law, "one of the 'sticks in the bundle' of real property rights" is the ability to transfer possession in exchange for rents. CP 23.[7] The Association disagrees. The correct meaning is that regardless of whether it is an owner or a tenant who lives in a unit, the "use" is the same — residential; and regardless of whether an owner or tenant carries on a retail or commercial business in the unit, the "use" is nonresidential.

1. Well Established Rules of Statutory Construction Show "Use" in the WCA Does Not Mean Lease

The "fundamental objective in construing a statute is to ascertain and carry out the intent of the legislature." *Federal Way Sch. Dist. No. 2010 v. Vinson*, 172 Wn.2d 756, 765, 261 P.3d 145 (2011). "We construe the meaning of a statute by reading it in its entirety, and considering the entire sequence of all statutes relating to the same subject matter. *Id.*

[7] More generally, Filmore's position is that "'use' must include all aspects to which a buyer may intend and/or expect to utilize his/her unit." *See infra* at 18-20.

(citation omitted); *see also Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 266-67, 189 P.3d 793 (2008) (legislative intent "glean[ed] . . . by considering the legislation as a whole and interpreting the words in context"); *In re Estate of Blessing*, 174 Wn.2d 228, 231, 273 P.3d 975 (2012) ("Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions and the statutory scheme as a whole"); *City of Auburn v. Gauntt*, 174 Wn.2d 321, 274 P.3d 1033 (2012) ("When interpreting statutes, we do not read words in isolation[, but] we read words within the context of the whole statute and larger statutory scheme").

The reason why 67% is the required level of approval for a rental cap amendment was recognized prior to Centre Pointe's Twelfth Amendment, by counsel different from the attorney who drafted the rental cap for Centre Pointe. The basis, concisely stated, is:

> 9.1.11.10. Uses. "The uses to which any unit is restricted," as the phrase is used in Section 17.3 of the Declaration, means **a restriction based on a land use classification of residential or nonresidential** (such as those restrictions described in the Washington Condominium Act at RCW 64.34.216(1)(e), 264(1), 268(1), 348(1), 352(8), 400(1) and 400(2)[)].

CP 181 (boldface added). This paragraph appeared in a rental cap amendment that was recorded by the same law firm presently

representing Filmore in this lawsuit, for Bayview Court Condominium Association. CP 176, 183. (The referenced Section 17.3 in the Bayview Court declaration tracked virtually verbatim the statutory language in RCW 64.34.264(4) in stating the exceptional types of amendments for which a 90% vote supermajority rather than 67% is required. CP 230.[8]) Under this meaning of "uses," the Bayview Court rental cap amendment was passed by a 67% vote, like that of Centre Pointe.

The above-quoted paragraph correctly identifies the meaning of the phrase "the uses to which any unit is restricted," It conforms to well-established principles of statutory construction. As is stated in *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 243 P.3d 1283 (2010):

> Statutory interpretation begins with the statute's plain meaning. Plain meaning is to be discerned from the ordinary meaning of the language at issue, the **context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole**.

Id. at 526[9] (boldface added; internal quotation marks omitted). The *Lake* court further stated:

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[8] It also is identical to Section 17.3 of the Centre Pointe Declaration. CP 69. The original declarations of both condominiums were drafted by the same attorney. CP 30, 223.

[9] The *Lake* court was construing the Horizontal Property Regimes Act, RCW ch. 64.32, for a pre-1990 condominium. While there are important differences between the Horizontal Property Regimes Act, passed by the legislature in 1963, and the WCA, some of which are discussed *infra*, the general principles and the tools of statutory construction should not vary.

> **Usually, the intended meaning is apparent from the surrounding context.**
>
> **Here, we look to the context of the other provisions of the HPRA.**

Id. at 528-29 (boldface added). "When the same words are used in related statutes, we must presume the legislature intended the words to have the same meaning." *Clipse v. Michels Pipeline Constr., Inc.*, 154 Wn. App. 573, 579, 225 P.3d 492 (2010); *see also State v. Gonzalez*, 168 Wn.2d 256, 264, 226 P.3d 131, 135 (2010) ("[w]hen similar words are used in different parts of a statute, 'the meaning is presumed to be the same throughout'"); *Bank of America, N.A. v. Owens,* 173 Wn.2d 40, 53-54, 266 P.3d 211 (2011) (same).

Looking to such "other provisions" in the WCA, two sections state the disclosures required of the declarant to purchasers and the required content of a declaration, respectively. As to the first:

> (1) A public offering statement shall contain the following information:
>
> . . .
>
> (g) A brief description of the permitted **uses and use restrictions** pertaining to the units and the common elements;
>
> (h) A brief description of the restrictions, if any, on the **renting or leasing** of units by the declarant or other unit owners, together with the rights, if any, of the declarant to rent or lease at least a majority of units; . . . .

RCW 64.34.410(1)(g), (h) (boldface added). As to the second, RCW 64.34.216(1)(n) states:

> (1) The declaration for a condominium must contain:
>
> . . .
>
> (n) Any restrictions in the declaration on **use, occupancy,** or **alienation** of the units; . . . .

Id. (boldface added). Both provisions show that "use" has a different meaning than "leasing." The first has separate subparts for the two terms. The second has three different words — "use," "occupancy" and "alienation" — in listing the "restrictions" to be stated. A "well-settled principle of statutory construction is that 'each word of a statute is to be accorded meaning.'"[10] Limits on the right to lease, to sublease, or to assign a leasehold are a restriction or restraint on "alienation."[11]

2. <u>The Terms "Residential Use" and "Nonresidential Use" Occur Repeatedly in the WCA</u>

The conclusion that "use" has a different statutory meaning than "leasing" is reinforced by reviewing the other instances in the WCA

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[10] *See, e.g., State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (holding further "'[T]he drafters of legislation . . . are presumed to have used no superfluous words and we must accord meaning, if possible to every word in a statute,'" ellipsis and brackets by court).

[11] *See Shoemaker v. Shaug*, 5 Wn. App. 700, 701 & 704, 490 P.2d 439 (1971) (addressing a covenant precluding subleasing or assignment of premises); *Ernst Home Center, Inc. v. Sato*, 80 Wn. App. 473, 476 & 486, 910 P.2d 486 (1996) (same), citing *Restatement (Second) of Property, Landlord and Tenant* § 15.2; *see also Shorewood West Condo Ass'n v. Sadri,* 92 Wn. App. 752, 759, 966 P.2d 372 (1998) (observing "[r]estrictions on leasing have been upheld as reasonable restraints on alienation"), *rev'd on other grounds*, 140 Wn.2d 47, 992 P.2d 1008 (2000); L. Schiller, "Limitations on the Enforceability of Condominium Rules," 22 Stetson L. Rev. 1133, 1158 (1993)

where the word "use[s]" appears in the statutory text, with particular focus on where the word appears in conjunction with "units." **In 13 WCA sections, the word "residential" or "nonresidential" appears immediately before "use[s]."** One is in the statute at issue, RCW 64.34.264, in the proviso at the end of .264(1), *see supra* at 8. The other 12 are:

64.34.216(1)(e) ("nonresidential use")	64.34.415(2) ("residential use")
64.34.268(1) ("nonresidential uses")	64.34.440(2) (both appear)
64.34.348(1) ("nonresidential uses")	64.34.440(6)(f)(i) ("residential use")
64.34.352(8) ("nonresidential use")	64.34.445(3) ("residential use")
64.34.380(4) ("nonresidential use")	64.34.450(1) ("nonresidential use")
64.34.400(1) ("nonresidential use")	64.34.450(2) ("residential use")

Thus, throughout the WCA, repeatedly, the context in which "use[s]" appears is immediately next to "residential" or "nonresidential." And, in particular, for eight of these 13, the entire phrase "unit[s] . . . restricted . . . to . . . use[s]" appears, with "residential" or "nonresidential" appearing immediately before "use[s]" in all of them. These eight entries are § 64.34.264(1), *supra* at 8, along with the six in the left-hand column of the above chart, and the second appearance of "use" in § 64.34.440(2).

Additional support can be found in examining the remaining sections in the WCA where "use" appears in the statutory text. These other instances relate not specifically to "units," but rather are focused on the common elements or condominiums generally. While the context

differs in that respect, the guidance available from these sections supports Centre Pointe's position.

For example, Section 64.34.050(1) states "no provision of this chapter invalidates or modifies any provision of any zoning, subdivision, building code, or other **real property use law** . . . ," a body of law in which the distinction between residential and nonresidential is prominent. RCW 64.34.020(37) is a definition stating "'[r]esidential purposes' means **use for a dwelling or recreational purposes,** or both," which points to "use"'s denoting the basic internal activity in or on the area in question.[12]

Eight sections relating to "common elements" also have the word "use." They support the same point, in that most juxtapose "use" with other words — and in particular, two indicate "use" is different from "rental" and from "ownership." Specifically, RCW 64.34.304(1)(j) grants authority to "[i]mpose . . . fees, or charges for the **use, rental, or operation** of the common elements . . . ." RCW 64.34.352(1)(b) refers to "the **use, ownership, or maintenance** of the common elements" in

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[12] Land use codes define "use" in such a way. *See Department of Devel. & Enviro. Services v. King County*, 177 Wn.2d 636, 641, 305 P.2d 240 (2013) ("The use of a property is defined by the activity for which the building or lot is intended, designed, arranged, occupied, or maintained," citing the county code); *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 210, 810 P.3d 31 (1991) ("'Use' means . . . the type of activity . . . to which land is devoted or may be devoted" (ellipses by the court and citing county code)).

regard to a requirement that the association carry liability insurance. *See also* § 64.34.304(1)(f) (authority to "[r]egulate the use, maintenance, repair, replacement and modification of common elements"); § 64.34.328(2) (Association to pay "expenses associated with the operation, maintenance, repair, and replacement of a common element that the owners have a right to use"); § 64.34.278(1) ("where those unit owners share the exclusive use of one or more limited common elements . . . ," in section addressing delegation of powers to a subassociation); § 64.34.020(27) (definition of ["[l]imited common element" as a "portion of the common elements allocated . . . for the exclusive use of one or more but fewer than all of the units"); § 64.34.020(39)(d) ("[s]pecial declarant rights means rights . . . to . . . (d) use easements through the common elements [to] make improvements"); § 64.34.443(g)(i)(B) (With regard to conversion of an existing apartment house to a condominium, "a declarant . . . may begin construction . . . to interior portions of an occupied building . . . (B) to repair or remodel a vacant unit or common area for use as a sales office"). The word "use" in these sections refers to activity in or on the common or limited common elements. None suggest the word includes leasing.[13]

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[13] One further section with the word "use," which regulates public offering statements and impliedly relates to common elements, is RCW 64.34.415(1)(a) (requiring a "report . . . describ[ing] . . . the present condition of all structural

There also are two sections that contain the word in addressing warranties by a declarant to purchasers.[14] The first of them, in .443(1)(a), refers separately to "the unit, **its use, or rights appurtenant thereto,**" in stating "written affirmations" as to the same create an express warranty. This phrasing indicates by the separate references that leasing and other rights in the "bundle of sticks" to which Filmore refers are not encompassed by "use."[15] The second section, .445(2) ("declarant . . . impliedly warrants that a unit and the common elements . . . are suitable for the ordinary uses of real estate of its type") also does not in any way suggest "uses" would include leasing.

(Lastly, the WCA has three more sections where "use" appears. However, none of those three pertain to buildings, common area, units or land. *See* RCW 64.34.030 ("[a] declarant may not . . . use any other device to evade . . . the prohibitions of this chapter"), .202 (stating "a person may reserve the exclusive right to use a particular [condominium] name"), .452(1) (stating limitation periods for suit "may not be reduced

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components and mechanical and electrical installations material to the use and enjoyment of the condominium").

[14] *See* RCW 64.34.443(1)(a) & (d); RCW 64.34.445(2).

[15] The other subpart in .443(1) containing "use" states "[a] written provision that the buyer may put a unit only to a specified use is an express warranty that the specified use is lawful," the context of which again connotes a land use meaning. RCW 64.34.443(1)(d).

. . . through the use of contractual claims or notice procedures"). These three sections are essentially uninformative.)

Thus, the context provided by the many sections of the WCA where "use" appears, and especially those sections that pertain to "units," is compelling. It shows that the word means "nonresidential" uses on the one hand, *viz.*, retail or commercial, and "residential" uses on the other, such as dwelling or recreation. The word does not mean exercising a common law right to lease a unit in exchange for rents.

3. Filmore's Interpretation of "Use" Is So Broad that Subsection (4) in RCW 64.34.264 Would Apply Indiscriminately

The conclusion above on the statutory meaning of "the uses to which any unit is restricted" also harmonizes with an important characteristic of RCW 64.34.264(4). This is the fact that .264(4) states with particularity the other exceptional types of amendments for which the extraordinary 90% approval level is required. These are amendments to "create or increase special declarant rights, increase the number of units, change the boundaries of any unit, [or] the allocated interests of a unit." RCW 64.34.264(4). So also should the clause at issue have a definite meaning, and not one so amorphous as to make it indeterminable how far subsection (4) reaches. In the same vein, the clause in .264(4) that requires also "the agreement of the owner of each unit particularly

affected," would then refer to a specific limited subgroup of units in the condominium, rather than encompassing all 100% of the units.[16] Interpreting disputed legislative language in harmony with the adjacent terms in the statute is a well recognized principle of statutory construction. In *Roggenkamp*, the court stated:

> A principle consistent with this view [of avoiding the "dismembering" of statutory terms] is that of noscitur a sociis, which provides that a single word in a statute should not be read in isolation, and that the meaning of words may be indicated or controlled by those with which they are associated. In *Jackson*, we applied this principle and held that the word "shelter" in the phrase "food, water, shelter, clothing and medically necessary health care," should not be isolated and analyzed apart from the words surrounding it. In interpreting statutory terms, a court should take into consideration the meaning naturally attaching to them from the context, and . . . adopt the sense of the words which best harmonizes with the context.

Roggenkamp, 153 Wn.2d at 623 (citation and internal quotation marks omitted; ellipsis by the court); *see also In re Guardianship of Knutson*, 160 Wn. App. 854, 867-68, 250 P.3d 1072 (2011) ("[t]he maxim noscitur a sociss, that a word is known by the company it keeps, is often wisely applied where a word is capable of many meanings to avoid the giving of unintended breadth to the Acts of Congress").

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[16] Filmore stated in the opening papers of its CR 56 motion below that 100% of the votes are required to approve a rental cap amendment because each unit owner's ability to lease would be affected. CP 25.

In contrast, the core of Filmore's argument has been its startlingly broad contention that "'[u]se' must include all aspects to which a buyer may intend and/or expect to utilize his/her unit."[17] Filmore's interpretation, pushing all limits of malleability, is such that RCW 64.34.264(4) would become the exception that swallows the rule. Virtually every declaration amendment that in some way relates to a unit or units would become a "use" restriction and require 90% approval (or *de facto* 100% since every unit would be affected). The argument admits no basis to discern what would not be a "use." Subsection (1) in RCW 64.34.264, stating the general rule of 67% approval for a declaration amendment, would become virtually superfluous as a result; and a central tenet of condominium ownership law would become meaningless.[18] The principle that "[a]n interpretation that produces 'absurd consequences' must be rejected, since such results would belie legislative intent" shows

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[17] *See* Respondent's Answers to Appellant's Motion for Discretionary Review, at 9.

[18] "All condominiums are statutorily created. The rights and duties of condominium unit owners are not the same as those of real property owners at common law, and are instead determined by the governing statutes, the condominium declaration, and the bylaws of the condominium association. In exchange for the benefits of association with other owners, condominium purchasers give up a certain degree of freedom of choice which [they] might otherwise enjoy in separate, privately owned property." *Lake v. Woodcreek Homeowners Association,* 142 Wn. App. 356, 360-61, 174 P.3d 1224 (2007) (internal quotation marks and footnotes omitted), *rev'd on other grounds*, 169 Wn.2d 516 (2010), citing *Shorewood Crest Condo. Ass'n v. Sadri,* 140 Wn. 2d 47, 52, 992 P.2d 1008 (2000).

the defect in Filmore's interpretation. *Troxell v. Rainier Public School Dist.,* 154 Wn.2d 345, 350, 111 P.3d 1173 (2005).

Filmore has in a similar vein asserted that "'[u]se' under its ordinary definition is exceedingly broad."[19] In the court below, Filmore did not refer to any dictionary definition of "use" until its reply brief, when it submitted several pages copied from the *American Heritage Dictionary of English Language* and *Black's Law Dictionary.* CP 283-88. However, it not quote or cite any dictionary definitions for the word. Rather, it said "[t]he breadth of the common meaning of 'use' is obvious, and must include rentals," CP 275, relying, it appears, on the sheer length of the dictionaries' entries for the word. The approach is reductionist in the extreme, to a level that would trump, absurdly, any other argument and require no statutory construction, or indeed, briefing, at all.[20]

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[19] *See* Respondents Answer to Appellants Motion for Discretionary Review, filed April 25, 2013, at 11-12.

[20] The court "may" look to a dictionary definition, but is not required to resort to one. *See Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 817, 854 P.2d 1072 (1993) (dictionary definitions not helpful on the word "family"); *see also In re Blessing*, 174 Wn.2d at 231-32. The pages Filmore put in the record below, CP 283-88, are not particularly edifying. However, to the extent guidance can be gleaned, the *American Heritage Dictionary*'s leading definitions of the noun "use" would indicate the word denotes an activity with, in or on the object at issue. *See* definitions nos. 1, 2, at CP 284: ("—*n.* (yoos). **1. a.** The act of using; the application or employment of something for some purpose: *the use of a pencil for writing.* **b.** The condition or fact of being used. **2.** The manner of using; usage: *the proper use of power tools. . . .*")

4. Filmore's Arguments that an HPRA Decision Should Be Applied and that Section 17.3 of the Declaration Means Something Different than the Corresponding Statute in the WCA Are Not Persuasive

Filmore has not disputed the legal authority that the context in which a word or phrase is used elsewhere in the WCA is a guide to construing its meaning. Filmore instead has relied principally on two different legal arguments: First, that a decision under the Horizontal Property Regimes Act, RCW ch. 64.32 (the "HPRA"), enacted in 1963, should be extended to the WCA and would hold "use" of a unit includes leasing of it; and, second, that regardless of the statutory meaning of "use" in the WCA, the word as it appears in Section 17.3 of the Centre Pointe declaration includes "leasing" because a section title in Article 9 of the declaration mandates such an interpretation. Both arguments lack merit.

a. The *Sadri* Decision Under the HPRA Does Not Apply to the WCA

Filmore relies on a case in which an association's bylaw created the rental cap, *Shorewood West Condo. Ass'n v. Sadri*, 140 Wn.2d 47, 992 P.2d 1008 (2000). The condominium in *Sadri* predated 1990 and thus was governed by the HPRA. *Sadri* held that, under the HPRA, an amendment to the declaration of condominium was required to create a

rental cap. Filmore cited *Sadri* below as holding that "use" in the HPRA included leasing. It argued this should be extended to the WCA. The law and facts in *Sadri* did not support the argument.

In the WCA, the word "use[s]" appears often. This is particularly so in sections relating to units, where consistently the word is preceded by "residential" or "nonresidential." *See supra* at 11-15. In the HPRA, "use" appears rarely,[21] and not at all near "residential" or "nonresidential."

Furthermore, *Sadri* did not involve a dispute over the percentage approval required. The issue was whether a bylaw change could create a rental cap. (It was uncontested in *Sadri* that had an amendment to the declaration been pursued, 60% approval would have sufficed under the HPRA. *See* 140 Wn.2d at 55, citing RCW 64.32.090(13).) The *Sadri* parties appear not to have argued any rules of statutory construction. Instead, the association contended generally:

> The declaration is supposed to contain only the general outline of prohibitions with the specific prohibitions being contained in the bylaws and rules and regulations.

140 Wn.2d at 55. In response, the *Sadri* court observed that the paragraph in that association's own declaration impeached its contention:

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[21] The sections in the HPRA that contain the word "use[s]" are RCW 64.32.010(1), (6), (10)-(11), (14); RCW 64.32.050(4); RCW 64.32.090(5), (7); RCW 64.32.100(1); RCW 64.32.120(3); RCW 64.32.180; and RCW 64.32.250(1).

> [T]he [Shorewood] Association's declaration itself contains specific use restrictions beyond the general restriction of use to residential use only.

Id. at 56. On that basis, the *Sadri* court concluded:

> Therefore, one should read 'use' in RCW 64.32.090(7) to mean all uses and not just general categories of use such as residential use or commercial use. The provision requires that all restrictions on use should be in the declaration's statement of purpose.

Sadri, 140 Wn.2d at 56. This above-cited HPRA section, RCW 64.32.090(7), required that the declaration of condominium contain "[a] statement of the purposes for which the building and each of the apartments are intended and restricted as to use." It differs from the WCA section that states "Any restrictions in the declaration on **use, occupancy, or alienation** of the units" are required content of the declaration. RCW 64.34.216(7)(n) (boldface added). *See supra* at 12-13.

Lastly, the HPRA permitted passage of a rental cap amendment by 60% approval, as *Sadri* noted. 140 Wn.2d at 55. With Filmore's argument, no rental cap could feasibly be passed under the WCA: 90% approval would be an exceedingly high hurdle, and 100%, which Filmore asserted below was required, App. at 39, impossible. This would contradict the fundamental principle, stated in *Sadri,* that

> 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.

Sadri, 140 Wn.2d at 53 (brackets by court). This principle was essential to the *Sadri* court's holding that a newly enacted rental cap could lawfully apply to the existing owners as well as future buyers of units, if done via an amendment to the declaration. 140 Wn.2d at 54. Nothing suggests the Legislature abandoned this principle when the WCA took effect on July 1, 1990.

b. <u>Filmore's Argument that Paragraph 17.3 in the Declaration Is More Restrictive than RCW 64.34.264(4) Is Contrary to Case Law and Logic</u>

In an attempt to sidestep the statutory meaning of "use," Filmore fashioned an argument from a title or point heading in Article 9 of the Centre Pointe declaration of condominium that reads "Permitted Uses." CP 52. Filmore says that since one of the 16 paragraphs following this point heading is 9.1.14 (*see* CP 55), which addresses leases, *per force* in the later Section 17.3 within Article 17 of the declaration, the phrase "uses to which any unit is restricted" includes leasing. CP 25.

Section 17.3 of the Centre Pointe declaration, *see* CP 69, tracks the text of RCW 64.34.264(4). The *Lake* court held that construction of a paragraph of a declaration is guided by the meaning of the corresponding statute. 169 Wn.2d at 530-31.

Second, "[a] contract's title is not determinative of its legal effect."[22] The same principle applies to a real estate instrument, such as a declaration of condominium. The word "use[s]" does not appear in paragraph 9.1.14 on leasing. CP 55. Nor does it appear anywhere in the text of the other Article 9 paragraphs under the point heading in question, *see* CP 52-55, except for paragraphs 9.1.1 and 9.1.2 (entitled "Residential Use" and "Commercial Use" respectively), CP 52-53, and in no. 9.1.3 on parking spaces, CP 53.

Third, Filmore's argument would produce unreasonable results. It would mean the declaration itself makes virtually impossible any amendment that addresses hazardous substances, signage, antennas, animals, security systems, private garden areas, storage spaces, and timesharing — all governed by paragraphs in Article 9. CP 53-55.

Neither the *Sadri* decision under the HPRA nor Filmore's illogical contention that Section 17.3 differs from its corresponding statute counsels that 90% approval is required for a rental cap. Filmore's arguments are particularly unpersuasive in light of the context in which

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[22] *Pardee v. Jolley*, 163 Wn.2d 558, 573-74, 182 P.3d 967 (2008); *see also Ledaura, LLC v. Gould*, 155 Wn. App. 786, 801, 237 P.3d 914 (2010) (holding that notwithstanding a caption that contained the words "Lease[,] Option to Buy[,] and Purchase and Sale Agreement," the text of the document did not "modify the option or otherwise connect it to the lease").

"use" appears in the WCA and the application of the rules of statutory construction discussed above.

B. The Court Below Erred in Granting Summary Judgment Against the Defense that Filmore Was Estopped by Its Inequitable Conduct To Challenge the Twelfth Amendment for Lack of 90% Approval

Section 64.34.264 in the WCA, properly construed, states 67% as the required approval for the Twelfth amendment, as set forth *supra* at 8-26. If the Court decides otherwise, however, then the issue is raised of whether Filmore, by its inequitable conduct, was estopped from asserting a requirement of 90%. The court below erred in its Order in granting Filmore's CR 56 motion over this defense.

André Molnar (Filmore's controlling person[23]) says he "did not learn about the leasing restriction until **after** the Peoples Bank Loan was taken out." CP 139 (boldface added). That loan was made in late December 2011.[24] The Twelfth Amendment had passed and was recorded two months earlier, on October 20, 2011. CP 123. Not later than December 1, 2011, a copy of it was in the possession of Molnar's bank. CP 251. When the Association's membership convened on

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[23] *See* CP 138. André Molnar is the President of Clifton Investments Corporation, which is the general partner of Sexton LLLP, which is the general partner of respondent Filmore LLLP. CP 107.

[24] The recording date on the construction deed of trust is December 27, 2011. CP 145.

February 22, 2012 for their annual meeting, Molnar said that "in order to obtain financing" from a bank he had "declared the project as a 'rental project.'" CP 250, 254. It is inconceivable Molnar and his bank did not discuss the Twelfth amendment prior to the loan. On February 22, 2012, Centre Pointe's board member Debbie Haddad directly raised the rental cap with Molnar. He did not indicate any surprise; did not say he had lacked notice of it; and did not say more than 67% approval was required. CP 235. Four days later, Molnar wrote:

> It is a misunderstanding, I am building a Condominium building and intend to sell it. At the meeting [I] was referring to the market, my plan has not changed, the condo market is weak presently, it will improve with time. In any case please reassure al[l] concerned that it is a condo.

CP 235, 240. Despite many contacts with Ms. Haddad and others on the board between then and November 2011, Molnar did not say anything in that period further indicating he was going to rent units in Building D. CP 236. Similarly, despite the many contacts, Molnar did not at any time reveal his contentions about the Twelfth amendment prior to filing suit on October 15, 2012. CP 236-37. Even on the day suit was filed (and for weeks afterward), he did not tell the board, while at the same time accepting the Association's helpful cooperation with his "presale," in which, however, no units were sold. CP 237-38.

If on February 22, 2012, if Molnar had told the Association his position that 90% approval was required, or of any lack of notice, the Association would have had the opportunity to pursue 90% approval and to cure any purported defect. CP 236. Instead, Filmore stayed quiet, maintaining the outer appearance that it was going to sell the units. In *Peckham v. Milroy*, 104 Wn. App. 887, 17 P.3d 1256 (2001), the court stated:

> Silence can lead to equitable estoppel — "[w]here a party knows what is occurring and would be expected to speak, if he wished to protect his interest, his acquiescence manifests his tacit consent."

Id. at 892, quoting *Bd. of Regents v. Seattle*, 108 Wn.2d 545, 553-54, 741 P.2d 11 (1987).

Filmore's conduct, acting as if it was going to sell the units, together with its silence at critical times when it would have been expected to speak up, was inconsistent with its position after the instant lawsuit was served. It supports the defense that Filmore is equitably estopped from challenging the Twelfth amendment for not having 90% approval. As explained in *Nugget Properties, Inc. v. Kittitas County*, 71 Wn.2d 760, 431 P.2d 580 (1967):

> Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. The requisites of such estoppel have

> been described, A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest upon the principle: *If one maintains silence when in conscience he ought to speak, equity will debar him from speaking* when in conscience he ought to remain silent. A most important application includes all cases where an owner of property, A, stands by and knowingly permits another person, B, to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objection, ...

Id. at 767 (quoting 3 Pomeroy, *Equity Jurisprudence* § 818 (5th ed. 1941) (emphasis added).

The "elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." *Kramarevcky v. Department of Social & Health Servs.,* 122 Wn.2d 738, 743, 863 P.2d 535 (1993). The Association submitted declarations of immediate past President Debbie Haddad and of the Association's manager, CP 333-56, which established *prima facie* these elements.

The Association has suffered detriment as a result of Filmore's conduct. Filmore's seeking to void the Twelfth amendment based on lack of 90% approval threatens the values of the condominium units in Buildings A, B, and C and has other detrimental effects. CP 238, 251-

252. Regardless of whether Filmore disputes Ms. Haddad and other representatives of the Association on these issues, there were triable issues of fact raised by the equitable estoppel defense that precluded summary judgment for Filmore. Under CR 56, "[a]ny doubts as to the existence of a genuine issue of material fact are resolved against the moving party." *Westlake View Condo Ass'n v. Sixth Avenue View Partners, LLC,* 146 Wn. App. 760, 766, 193 P.3d 161 (2008). The court "consider[s] all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party. *Id.*. It is similarly well established that "[s]ummary judgment is appropriate only if, in view of all the evidence, reasonable persons could reach only one conclusion. Where different competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact." *Johnson*, 150 Wn. App. at 537 (citation omitted).

VI. <u>Conclusion</u>

The phrase "the uses to which any unit is restricted" in RCW 64.34.264(4) means a restriction of the unit to residential or nonresidential use. The context provided in RCW 64.34.264 itself and repeatedly in other sections of the WCA before and after it shows this is the proper interpretation. Well established rules of statutory construction support it. Filmore's contention that "'use' must include all aspects to

which a buyer may intend and/or expect to utilize his/her unit" is contrary to such principles and is so limitless in its reach that the standard threshold of 67% approval in RCW 64.34.264(1) to amend a declaration of condominium would effectively become meaningless. For these reasons, the Twelfth Amendment to the appellant's condominium declaration complies with the WCA and the court below erred in declaring the amendment void and unenforceable for lack of 90% approval. The summary judgment order below should be reversed on that basis, but if it is not and it is necessary to reach the second issue, a material fact issue existed as to whether Filmore was equitably estopped from raising the "90% challenge" to the Twelfth Amendment. The CR 56 order of the court below should be reversed.

RESPECTFULLY SUBMITTED this 13th day of September, 2013.

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CERTIFICATE OF SERVICE

I certify that service of a copy of Appellant's Opening Brief to which this certificate of service is attached, is being made on the 13th day of September, 2013, by mailing same via the United States Postal Service to the attorneys of record for respondent in this case, first class postage prepaid.

DATED this 13th day of September, 2013.

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