

No. 91247-5

SUPREME COURT OF THE STATE OF WASHINGTON

CAROLYN ROBBS BILANKO, an individual,

Plaintiff/Petitioner,

v.

BARCLAY COURT OWNERS ASSOCIATION, a Washington non-
profit corporation,

Defendant/Appellant.

APPELLANT BARCLAY COURT OWNERS ASSOCIATION'S
REPLY BRIEF

Averil Rothrock, WSBA #24248
Lawrence A. Costich, WSBA #32178
Milton A. Reimers, WSBA #39390
SCHWABE, WILLIAMSON & WYATT
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Tel: 206.622.1711
Fax: 206.292.0460
Attorneys for Barclay Court Owners Association

Table of Contents

	Page
I. INTRODUCTION	1
II. ARGUMENT	1
A. Bilanko’s claims are time-barred	2
1. Bilanko selectively relies on dictionary definitions of “pursuant to” to force a narrow, exacting meaning of the time-bar that this Court should reject.	3
2. Bilanko presents no basis or authority for her proposal that the time-bar never applies to “procedurally noncompliant” amendments.	7
3. The strength of the time-bar defense is compelling and has not been “waived.”	10
4. Washington's well-developed jurisprudence on the void <i>ab initio</i> doctrine shows that the doctrine does not apply here.	12
5. Bilanko does not overcome the express language in the private time-bar in the Declaration that alternatively bars Bilanko’s claims.	15
B. The rental cap amendment was properly adopted under the Condo Act and the Declaration with 67% approval.....	16
1. The Condo Act distinguishes between “use” and “leasing,” two different terms whose independent meanings have been unjustifiably eviscerated by the Court of Appeals’ <i>Filmore</i> decision.	17

2.	The terms warrant technical meanings where Washington case law and land use codes distinguish “use” from “leasing restrictions”	18
3.	Bilanko’s “very broad” definition would create an absurd result, a problem to which Bilanko has no response.....	20
4.	Bilanko cannot prevail on the Declaration when it plainly requires 67% approval for "restrictions on leasing" that include rental cap amendments.....	21
III.	REQUESTS FOR ATTORNEY FEES AND COSTS	23
IV.	CONCLUSION.....	24

TABLE OF AUTHORITIES

Page(s)

Cases

America Condominium Ass’n, Inc., v. IDC, Inc.,
844 A.2d 117 (R.I. 2004)10, 14

Burnet v. Spokane Ambulance,
131 Wn.2d 484, 933 P.2d 1036 (1997)11

Champagne v. Thurston County,
163 Wn.2d 69, 178 P.3d 936 (2008)11

Club Envy v. Ridpath,
184 Wn. App. 593, 337 P.3d 1131 (2014)4, 10, 14, 15

Ernst Home Center, Inc. v. Sato,
80 Wn. App. 473, 910 P.2d 486 (1996)17, 18

*Filmore LLLP v. Unit Owners Association of Centre Point
Condominium*,
183 Wn. App. 328, 333 P.3d 498 (2014) *passim*

Keller v. Sixty-01 Assocs.,
127 Wn. App. 614, 112 P.3d 544 (2005)13, 14

*King County, Dept. of Development & Environmental
Services v. King County*,
177 Wn.2d 636, 305 P.3d 240 (2013)19

Meridian Minerals Co. v. King County,
61 Wn. App. 195, 810 P.2d 31 (1991)19

*Old Colony Trust Co. v. Commissioner of Internal
Revenue*,
301 U.S. 379 (1937)3, 4

Shoemaker v. Shaug,
5 Wn. App. 700, 490 P.2d 439 (1971)17, 18

<i>Shorewood West Condo Ass'n v. Sadri</i> , 92 Wn. App. 752, 966 P.2d 372 (1998), <i>rev'd on other</i> <i>grounds</i> , 140 Wn.2d 47, 992 P.2d 1008 (2000).....	18
---	----

Statutes

Horizontal Property Regimes Act, Chapt. 64.32 RCW	13, 14
RCW 64.34.216(1)(n)	18
RCW 64.34.264(1).....	1, 13
RCW 64.34.264(2).....	1, 2, 8, 12
RCW 64.34.264(4).....	2, 9, 13, 17
RCW 64.34.340(4).....	15
RCW 64.34.348(4).....	15
RCW 64.34.410(1).....	17
RCW 64.34.455	23
Washington Condominium Act, RCW 64.34.	<i>passim</i>

Other Authorities

BLACK'S LAW DICTIONARY (10th ed. 2014).....	5
Civil Rule 56.....	6
RAP 2.2(a)(1).....	2
RAP 2.2(d)	2
RAP 2.4(a)	2
RAP 2.4(b)(1)	2
RAP 18.1(b).....	24
Unabridged Merriam-Webster	6

I. INTRODUCTION

Bilanko's response is unpersuasive. Her main arguments misconstrue or ignore authorities that support reversal on both legal issues. She fails to support some arguments with any authority or discussion. The result she seeks is counter to the weight of authority.

As demonstrated in the Opening Brief, the Court should reverse the trial court's judgment and direct judgment to Barclay Court because invalidation of the Amendment is contrary to law. Two strong legal grounds demonstrate that reversal is the correct outcome. First, Bilanko's challenge to the Amendment is too late. The one-year time-bar of RCW 64.34.264(2) bars Bilanko's claim. If not, the time-bar means nothing. Alternatively, on the merits the Amendment was adopted with sufficient approval. The Court's conclusion on this issue likely will turn on its resolution of the *Filmore* case. The Court should hold that a rental cap amendment is subject to the 67% approval requirement under RCW 64.34.264(1), not the higher burden of 90% approval set forth in RCW 64.34.264(4). The *Filmore* holding to the contrary fails to correctly apply rules of statutory interpretation and is inconsistent with the Condo Act.

II. ARGUMENT

Barclay Court demonstrated in its Opening Brief why it should prevail on the time-bar defense or because approval of its rental cap

amendment was sufficient. The relevant authorities and the reasonableness of Barclay Court's arguments support reversal.¹

A. Bilanko's claims are time-barred

As explained in the Opening Brief at 13-33, Bilanko's opportunity to challenge the Amendment has long since passed. The time-bars in both RCW 64.34.264(2) and the Declaration apply to prevent Bilanko's untimely challenge. Bilanko offers insufficient authority to defeat these time-bars. She fails to engage Barclay Court's authorities. Bilanko offers no satisfactory answer to the quandary her interpretation presents that in order to benefit from the time-bar and avoid litigation on the merits, a party first must demonstrate the ability to prevail on the merits. Application of the time-bar is the most reasonable result and does not oblivate the legislative choice to include a time-bar in the Condo Act to cut-off challenges to the validity of an amendment.

¹ Bilanko makes no argument that this Court should not review and decide the issues presented. Yet, Bilanko raises the spectre of an issue when she needlessly discusses procedural history related to the notice of appeal. *Resp. Br.* 9. To be clear, at this section of her brief Bilanko inaccurately describes the December 30, 2014 order as an "order on summary judgment" when it was a *partial* order on summary judgment disposing of only some of Bilanko's claims. Appeal properly was taken on January 29, 2015 once the judgment became final by the resolution of all claims on January 28, 2015. RAP 2.2(a)(1), RAP 2.2(d). The December 30, 2014 partial summary judgment order prejudicially affects the final judgment and is reviewable based upon RAP 2.4(a) and RAP 2.4(b)(1).

1. Bilanko selectively relies on dictionary definitions of “pursuant to” to force a narrow, exacting meaning of the time-bar that this Court should reject.

Bilanko attempts to rely on a “dictionary definition” argument, urging this Court to conclude that the time-bar in § 264 is inapplicable because “pursuant to” means “in conformance to,” and this means demonstrating strict conformity with all provisions in § 264. She offers no support of this reading in either the statute or Washington case law. In fact, she fails to address *Old Colony Trust Co., State v. Morley, Cathcart v. Andersen* and *In re Higgins*, all of which Barclay Court offered in support of its interpretation. *See Op. Br. 17.*² These authorities are the most germane. No counter-authority establishes that they have been overruled or questioned.

The U.S. Supreme Court’s analysis in *Old Colony Trust Co. v. Commissioner* (an authority that Judge Rogoff first relied on to rule against Bilanko before he reversed himself based on *Club Envy*) is persuasive. 301 U.S. 379 (1937). There, a trust sought tax deductions under the tax code for charitable contributions made “pursuant to the terms of” a trust instrument. 301 U.S. at 381-83 citing Revenue Act,

² Bilanko perhaps makes one reference to these authorities, but it is inadequate. She states generically that Judge Rogoff’s initial order “relied on dated Washington case law defining the term in unrelated contexts.” *Resp. Br. 27*. She provides no elaboration.

1928, § 162, 45 Stat. 838. The Court of Appeals affirmed disallowance of the tax deductions on the ground that the charitable contributions were not made “pursuant to” the trust instrument because the instrument did not direct them. 301 U.S. at 381. The U.S. Supreme Court disagreed, rejecting “the narrow meaning advocated by respondent” as being incompatible with the goal of the tax code to encourage charitable deductions and also out of step with the words’ “usual significance.” 301 U.S. at 383-84. The Court rejected the narrow meaning and held that the contributions qualified for a deduction when “pursuant to” is more generally understood as “acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according.” *Id.*

Here, like the taxing agency in *Old Colony Trust*, Bilanko tries to turn the general words “pursuant to” into a more exacting, narrow standard that serves as an *impediment* to application of the very time-bar in which it is found. This is incompatible with the purpose of subsection (2) to create a time-bar. Although Bilanko’s argument purports to rely on “general” definitions, the argument instead attempts to turn the general nature of “pursuant to” into a narrow, strict meaning inconsistent with the purpose of the provision. As it did before the U.S. Supreme Court, such an effort should fail.

Bilanko ignores the authorities cited by Judge Rogoff and Barclay Court, and instead cites Black's Law Dictionary and Merriam-Webster. *See Resp. Br.* 24-25. She addresses the definitions they provide selectively to support the narrow meaning she seeks, quoting only portions of the definitions. *See Resp. Br.* 24-25. This undermines her argument. For example, the full definition of "pursuant to" in Black's states:

pursuant to. 1. In compliance with; in accordance with; under < she filed the motion pursuant to the court's order>. 2. As authorized by; under <pursuant to Rule 56, the plaintiff moves for summary judgment>. 3. In carrying out < pursuant to his responsibilities, he ensured that all lights had been turned out>.

BLACK'S LAW DICTIONARY (10th ed. 2014). Bilanko discusses only the first definition, and within that focuses exclusively on "in compliance with." This ignores the other definitions without justification.

The complete definitions from Black's work equally well with Barclay Court's interpretation. "As authorized by" and "under" show a referential meaning, such as "No action to challenge the validity of an amendment adopted by the association under this section may be brought more than one year after the amendment is recorded." The example, "pursuant to Rule 56, the plaintiff moves for summary judgment," shows this same referential nature of the phrase. The phrase does not mean that the moving party necessarily satisfied all the requirements of Rule 56, but

that the motion is “authorized by” or brought “pursuant to” or “under” that court rule. The Black’s definitions show that an ordinary meaning is not as strict as Bilanko would like it to be.

The Merriam-Webster definition provided by Bilanko also contains definitions of “pursuant to” that Bilanko ignores. *See Resp. Br.* 25. According to Bilanko,³ the Unabridged Merriam-Webster apparently defines “pursuant to” as:

in the course of carrying out: in conformance to or agreement with: according to. <pursuant to the proposals of this note> <acted pursuant to their agreement>.

While Bilanko seizes on “in conformance to,” *see Resp. Br.* 25, the first phrase “in the course of carrying out” demonstrates that the one year time-bar applies where an association has acted “in the course of carrying out” an amendment under § 264, like Barclay Court did. In sum, neither case law nor dictionary definitions support the narrow definition advanced by Bilanko.

Bilanko argues that the context of the time-bar within the statute supports her interpretation, because the time-bar is located “in the exact same section of the Condo Act that sets forth the voting requirements for passing amendments” and “expressly incorporates them by reference.”

³ The Merriam-Webster unabridged dictionary is only available by subscription and Barclay Court relies upon the dictionary definition provided by Bilanko.

Resp. Br. 25. This is wrong. Subsection (2) does not expressly incorporate the voting requirements. Further, the context supports Barclay Court’s interpretation because the location of the time-bar in § 264 indicates that none of the challenges supportable by other provisions of § 264 are permissible more than one year from recording. If the time-bar were in another section it would be more plausible that the time-bar was not intended to apply to the requirements of § 264. The juxtaposition of the time-bar with the requirements in the surrounding subsections strongly suggests that the time-bar applies to prevent raising those requirements.

Neither the definitions nor any authority or argument cited by Bilanko demonstrate that the language creates a condition precedent to raising the time-bar or imposes an evidentiary burden on a party who would assert the time-bar, apart from establishing the required passage of time. Nothing in subsection (2) is conditional, such as by use of terms like “provided that” or “if” or “on the condition that.” The language is simply not as exacting as Bilanko would have it.

2. Bilanko presents no basis or authority for her proposal that the time-bar never applies to “procedurally noncompliant” amendments.

Bilanko argues, it appears, that her interpretation does not undermine the purposes of a time-bar because the time-bar would apply to a subset of possible challenges: substantive challenges to an amendment

based on criteria not found in RCW 64.34.264(2) provided that the association could demonstrate procedural compliance with § 264 in passing it. *Resp. Br.* 27-28. In other words, while challenges premised on noncompliance with § 264 never will be time-barred, other substantive challenges could be brought once the association demonstrated its procedural compliance with § 264. *Id.* Apparently, Bilanko urges this Court to make a distinction—not apparent on the face of the statute and inconsistent with the location of the time-bar in § 264—between procedurally and substantively noncompliant amendments. She offers no authority to support this distinction. Nothing in the statute, the legislative history of the statute, or case law supports it. The legislature could have said that. It just did not.

The legislature, moreover, chose blanket language in subsection (2) by stating “no action” “may be brought.” RCW 64.34.264(2). This is not qualified language. This language does not create subsets of challenges, some of which are barred and some of which are not.

Bilanko’s Issue B undercuts her own argument. Bilanko poses the issue whether the time-bar prohibits her challenge “when Amendment No. 1 was not *validly* adopted ‘pursuant to’ the voting requirements set forth in RCW 64.34.264(4)...” (italics added). *Resp. Br.* 3. Bilanko adds the word “validly” to describe the meaning she asks this Court to give the

statute. Yet the legislature did not use “validly” in subsection (2). Bilanko’s interpretation requires adding a word. She has to rewrite the statute to support the intent for which she argues. This shows her interpretation to be incorrect.

Barclay Court’s interpretation does not ask the Court to render “pursuant to” meaningless and read it out of the statute, as Bilanko charges. *Resp. Br. 28*. As detailed above, numerous meanings of the phrase “pursuant to” support the correct interpretation advocated by Barclay Court.

Bilanko also suggests that the legislature’s choice to run the time-bar from recordation of the amendment is not appropriately protective of owners. *See Resp. Br. 28*. Nonetheless, this is how the legislature chose to fashion the time-bar. If a different trigger would provide more needed protection, the legislature must address it, not the courts.

The legislature expressed an intent to *prohibit*, based on the passage of time, an “action to challenge” “the validity of the amendment.” Time has passed. Not only did Bilanko purchase her unit more than one year after the amendment properly was recorded, she then lived at Barclay Court for 5 years in compliance with the amendment. The time-bar bars this lawsuit.

3. The strength of the time-bar defense is compelling and has not been “waived.”

The Court should conclude that § 264(2) is a statute of repose, a conclusion that Bilanko does not explore other than to say that both *Club Envy* and *America Condominium* called it a statute of limitations without discussion. *See Resp. Br.* 35. This is an inadequate rejoinder to the compelling briefing by Barclay Court that shows the time-bar to be a statute of repose. *See Op. Br.* 18-21.

Bilanko’s lawsuit underscores why the Legislature wisely would include a statute of repose, as owners might sit on their rights for six, sixteen, or sixty years before “studying” an amendment that has come to bother them. The legislature chose not to allow owners to reach back in time and unwind amendments. The legislature desired an end point and identified it in § 264(2). This Court should require Bilanko to abide by it. Additionally, Bilanko provides no counter-argument to Barclay Court’s briefing demonstrating that Bilanko had notice of the claim when she bought her unit, so even if the time-bar was a statute of limitations, it has run. *See Op. Br.* 19-20.

The time-bar defense was pleaded and also was tried by express or implied consent. Bilanko grasps at straws by positing that Barclay Court waived its time-bar defense by pleading “statute of limitations” instead of “statute of repose.” *Resp. Br.* 35-36. This maneuver fails for many

reasons. First, she offers no authority holding that pleading “statute of limitations” is insufficient to provide notice of a time-bar defense. She offers no analysis why this Court would adopt such a technical approach in this notice-pleading jurisdiction when the Answer gave notice that a time-bar defense existed.⁴ The Court need not formally decide these issues because these deficiencies are beside the point. Bilanko herself interjected applicability of subsection (2) to the Superior Court proceedings and the issue was expressly tried. If anything, Bilanko has waived the waiver argument she now floats.

Bilanko unilaterally raised the time-bar issue herself, arguing over four pages in her motion for partial summary judgment that the time limitation in subsection (2) does not apply. CP 24-28 (“Plaintiff anticipates Defendant will argue that Plaintiff’s claim is barred by the one-year time limitation in RCW 64.34.264(2)...”). Bilanko anticipated correctly, as Barclay Court raised subsection (2) in its cross motion for

⁴ For notice pleading, Barclay Court’s statute of limitations assertion is sufficient to put Bilanko on notice of a time-bar defense. “Washington follows notice pleading rules and simply requires a ‘concise statement of the claim and the relief sought.’” *Champagne v. Thurston County*, 163 Wn.2d 69, 84, 178 P.3d 936 (2008). “[C]ourts construe pleadings ‘to do substantial justice,’ and even if a ‘claim is not a vision of precise pleading,’ it may still give the notice required by CR 8.” *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 492, 933 P.2d 1036 (1997) (quoting *Schoening v. Grays Harbor Cmty. Hosp.*, 40 Wn. App. 331, 336-37, 698 P.2d 593 (1985)).

summary judgment. CP 133-43. Bilanko never has objected that Barclay Court waived the issue of applicability of subsection (2). Moreover, she raised the time-bar in her own motion for partial summary judgment. Simply because legal analysis now demonstrates that the time-bar operates as a statute of repose does not mean Bilanko is not subject to it. Whatever relief Bilanko seeks from asserting waiver, she is entitled to none.

Barclay Court and all of its property owners, including Bilanko, have abided by the Amendment since 2008. Six years after the Amendment was adopted and recorded, Bilanko seeks to upset that *status quo* and force the current Board and owners to defend her belated challenge. Bilanko's stale claims are not permitted.

4. Washington's well-developed jurisprudence on the void *ab initio* doctrine shows that the doctrine does not apply here.

Bilanko argues that the time-bar is inapplicable because the Amendment is void *ab initio*. *Resp. Br.* 29-34. Bilanko is wrong. She ignores statutes and case law that say otherwise.

As detailed in the Opening Brief 21-24, Washington law provides that contracts failing to comply with statutory requirements are only void *ab initio* if that statute expressly states as much. Here, the legislature did not provide that amendments which fail to comply with RCW 64.34.264(1) and (4) are unenforceable. It could have, but chose not to. It

would be incorrect, therefore, to apply the void *ab initio* doctrine in these circumstances. Bilanko does not even try to explain why this Court should interpret § 264 differently than these cases direct. She offers no distinguishing principle or theory. None exists.

Rather than address these authorities, Bilanko attempts to rely entirely upon three cases. None of them support affirmance. Bilanko cites *Keller v. Sixty-01 Assocs.*, 127 Wn. App. 614, 621, 112 P.3d 544 (2005) for the proposition that a “procedurally invalid amendment is void from inception.” *Resp. Br.* 33. The case does not stand for that proposition, as Barclay Court already briefed. *Op. Br.* 24-25. *Keller v. Sixty-01 Assocs.*, concerns a condo subject to the Horizontal Property Regimes Act, Chapt. 64.32 RCW (“HPRA”), which had governed condominiums prior to the Condo Act. 127 Wn. App. at 620-21. The HPRA did not contain a time-bar, as the *Keller* court plainly noted. 127 Wn. App. at 620-21. The *Keller* court, moreover, remanded the case expressly for analysis of the void *ab initio* issue. It did not presume to know the answer and did not entertain the analysis. The *Keller* case does not stand for the proposition that an amendment noncompliant with either HPRA or § 264 of the Condo Act is void *ab initio*.

The second case upon which Bilanko relies to suggest that amendments not adopted in accord with § 264 are void *ab initio* is the

Rhode Island case *America Condominium Ass'n, Inc., v. IDC, Inc.*, 844 A.2d 117 (R.I. 2004). As detailed in Barclay Court's Opening Brief 26-27, the Rhode Island court's analysis is wholly unpersuasive. The dissent called the majority to task in *America Condominium* for its "remarkable conclusion" and explained that the majority cited no authority for it. *America Condominium Ass'n*, 844 A.2d at 136-37 (R.I. 2004) (Flanders, J., dissenting). The majority's conclusion in *America Condominium* is not only unsound under Rhode Island law, it has no applicability in Washington where the *void ab initio* jurisprudence is well-developed and contrary to the *American Condominium* holding.

Finally, Bilanko relies on *Club Envy v. Ridpath*, 184 Wn. App. 593, 337 P.3d 1131 (2014).⁵ The case has significant infirmities, as Barclay Court briefed. *Op. Br.* 27-32. Bilanko asks this Court blindly to adhere to *Club Envy*, but fails to rehabilitate its clear misreading and misapplication of *Keller*⁶ and its failure to conduct a *void ab initio* analysis even when it relied on that doctrine. Barclay Court persuasively

⁵ The parties dispute the scope and meaning of *Club Envy*. As cited to the trial court at CP 432 n. 1 (citing http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a03&docketDate=20141022), listening to the oral argument of *Club Envy* is revealing.

⁶ The *Club Envy* court incorrectly assumed that the *Keller* court's discussion of the *void ab initio* doctrine supported its holding that an amendment under the Condo Act was *void ab initio*. See *Op. Br.* 17-32.

demonstrated by case law and example statutes that—in Washington—failure to comply with a statutory requirement does not render an act void *ab initio* unless the statute so provides. *Op. Br.* 21-24. Barclay Court even offered examples within the Condo Act where the legislature designated acts void for failure to comply with the statute. *Op. Br.* 24 citing RCW 64.34.224(5), 64.34.315(5)(d), RCW 64.34.340(4), and RCW 64.34.348(4).

In the Condo Act, the legislature did not make an amendment void *ab initio* for failure to comply with requirements of § 264. The Court should hold that an amendment is not void *ab initio*, but only voidable, if all the requirements of § 264 are unmet.

5. Bilanko does not overcome the express language in the private time-bar in the Declaration that alternatively bars Bilanko's claims.

The Declaration's time-bar⁷ exists independently of the Condo Act and does not contradict it. It separately bars the lawsuit.

Putting aside the Condo Act, the amendment was adopted in strict conformity with the Declaration. If we accept for arguments' sake Bilanko's contention that "pursuant to" means in strict conformity with, here the amendment was adopted in strict conformity with the relevant

⁷ Article 25, Section 25.1 provides: "No action to challenge the validity of an amendment adopted by the Association pursuant to this Article may be brought more than one year after the amendment is recorded." CP 193-94.

article of the Declaration expressly providing that “restrictions on leasing” require 67% approval. CP 194 at Section 25.2.1(k) (“the consent of Owners holding at least Sixty-Seven Percent (67%) of the votes in the Association... shall be required to materially amend any provisions of the Declaration... which establish, provide for, govern, or regulate any of the following:... (k) imposition of any restrictions on leasing of units[.]”)

Bilanko argues that this does not mean what it says and the Court should look to other provisions. *Resp. Br.* 36-37. This is the most specific provision and it controls approval of a leasing restriction. Because it was undisputedly satisfied, the private time-bar is triggered. This independently supports reversal.

B. The rental cap amendment was properly adopted under the Condo Act and the Declaration with 67% approval

As demonstrated in the Opening Brief 34-45, the Court should also reverse because Barclay Court approved the Amendment with a 67% majority as required by the Condo Act and the Declaration for rental cap amendments.⁸ The summary judgment should be reversed on the merits.

⁸ Bilanko suggests at p. 11, fn. 1 that RCW 64.34.264(4) may require approval from 100% of the affected owners in order to be validly enacted. But this issue need not be reached because if § 264(4) applies and requires 90% approval for a rental cap amendment, the 90% requirement would invalidate the Amendment in any event. And if 67% approval is required under § 264(2) to adopt rental cap amendments, then the requirements of § 264(4) would not apply.

1. The Condo Act distinguishes between “use” and “leasing,” two different terms whose independent meanings have been unjustifiably eviscerated by the Court of Appeals’ *Filmore* decision.

The Condo Act clearly distinguishes between restrictions on “use” and “leasing” in multiple sections of the statute. *See Op. Br.* 37-39. Bilanko does not attempt to explain why the Court should interpret “use” in § 264 differently from the other sections of the Condo Act. Instead, she summarily concludes that “none of these sections qualifies or limits the meaning of use.” *Resp. Br.* 14. But these other provisions of the Condo Act, including RCW 64.34.410(1)(g) and (h) inform the meaning of “use” in § 264(4) and cannot be ignored.

Second, as it does in § 410(1)(g) and (h), the legislature again in RCW 64.34.216(1)(n) distinguishes between “use” and “leasing” when it separates “use” restrictions from restrictions on “occupancy” and “alienation.” Bilanko asks the Court to ignore this distinction. But it not only appears in the statute, it is consistent with case law concerning land use and real property. As noted in the Opening Brief, restrictions on the right to lease, to sublease, or to assign a leasehold are a restriction or restraint on “alienation.” *See Op. Br.* 44-45.

Bilanko unconvincingly attempts to distinguish these cases and suggests that these opinions cannot be relied upon because two of them (*Shoemaker v. Shaug* and *Ernst Home Center, Inc. v. Sato*) discuss

subleasing instead of leasing. *See Resp. Br.* 20. This is a distinction without a difference and is unpersuasive. Bilanko tries to discredit the third case (*Shorewood West Condo Ass'n v. Sadri*) by noting that it was overruled on other grounds, which Barclay Court acknowledged and which does not diminish the Court of Appeals' determination that restrictions on leasing amount to restraints on alienation.

Bilanko observes that other sections of the Condo Act do not qualify "use" with either "residential" or "nonresidential," including § 264(4). But this works in the association's favor because § 264(4) requires 90% approval for a "change in use" – i.e., from residential to nonresidential, or vice-versa. It makes sense that the legislature intentionally did not specify residential or nonresidential in this section, but only specified the percentage of approval necessary to change the type of use from one to the other.

Bilanko's arguments merely mimic the Court of Appeals's opinion in *Filmore*, but they do not shore it up. The Court of Appeals's conclusion is unjustified and should be reversed.

2. The terms warrant technical meanings where Washington case law and land use codes distinguish "use" from "leasing restrictions"

The Washington Supreme Court and Washington Court of Appeals have issued opinions which are instructive as to how "use" is defined.

These authorities show that the term “use” is specialized in land use and property law. *See Op. Br.* 43-44. In her response brief, Bilanko resists a technical meaning but offers no compelling reason why the Condo Act, which regulates real property interests in condominiums, should not be read consistently with land use and real property law. She cites two Washington authorities defining “use”—*King County, Dept. of Development & Environmental Services v. King County* and *Meridian Minerals Co. v. King County*—without any critique or distinction from the case at hand. *See Resp. Br.* 16-17. These cases support reversal.

The Supreme Court in *King County, Dept. of Development & Environmental Services v. King County*, 177 Wn.2d 636, 641, 305 P.3d 240 (2013), noted that “use” in the context of property law is defined by “the activity for which the building or lot is intended, designed, arranged, occupied, or maintained[.]” Similarly, in *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 210 n. 15, 810 P.2d 31 (1991) (quoting King County Code Chapter 21.04.910), the Court of Appeals observed “[u]se’ means... the type of activity... to which land is devoted or may be devoted[.]” These cases instructively define “use” as the fundamental and overarching purpose or activity to which land is devoted (e.g., residential, commercial, industrial, agricultural). “Change of use” should be read to mean a change from a residential purpose to a nonresidential purpose, or

vice-versa, not a change in leasing restrictions. Bilanko states no authority sufficient to overcome this conclusion.

3. Bilanko's "very broad" definition would create an absurd result, a problem to which Bilanko has no response

Like the Court of Appeals in its *Filmore* opinion, Bilanko endorses a dictionary definition of "use." *Resp. Br.* 13. She acknowledges this definition is "very broad." *Id.* Not only is this approach contrary to the statute and rules of statutory interpretation already discussed, but such a broad definition would create an absurd result. Any conceivable "use" of a unit—no matter how attenuated from the primary "residential" or "nonresidential" distinction—would require 90% approval to change. The generally applicable 67% approval would become the exception, and the 90% approval would replace it as the norm, up-ending the legislature's reservation of 90% approval for exceptional amendments. Bilanko offers no rationale that makes this result appetizing.

The Condo Act should work in harmony with land use and real property laws, and the terms should have consistent meanings. A rental cap amendment does not change "use" as the legislature employed the term. This supports reversal and summary judgment to Barclay Court.

4. Bilanko cannot prevail on the Declaration when it plainly requires 67% approval for “restrictions on leasing” that include rental cap amendments

If the Court reverses *Filmore* and holds that the Condo Act requires 67% approval for a rental cap amendment, as it should, Bilanko cannot alternatively prevail based on the Declaration. Bilanko cannot overcome the plain language of Section 25.2.1(k) that requires 67% approval for “imposition of any restriction on leasing.” CP 194. Section 25.2.1(k) controls the outcome of the analysis under the Declaration.

Despite this plain language, Bilanko continues to press a construction of the Declaration that would require 90% approval of a leasing restriction. *See Resp. Br.* 20-22. This effort fails. Bilanko argues that an amendment prohibiting leasing requires 90% approval, while an amendment imposing leasing restrictions requires 67% approvals. *Resp. Br.* 21-22. First, even if this were correct, the Amendment does not unequivocally *prohibit* leasing; it imposes a cap that allows limiting leasing. Bilanko’s theory, therefore, does not match the Amendment, which continues to allow restricted leasing so would fall under the 67%.

The construction argument also is substantively wrong. It relies on distinctions not present in the Declaration while asking the Court to ignore the specific and express terms of Section 25.2.1(k) that state exactly by what percentage restrictions on leasing may be approved. Section 9.2 and

Section 25.2.1(k) work together to regulate leasing, including specifying that 67% approval is required for “imposition of any restrictions on leasing of Units.” A cap on leasing is one type of restriction that might be imposed on the leasing of units. Indeed, a cap on leasing plainly falls within the very general “any restrictions on leasing.” It would be absurd to conclude that a rental cap amendment is not a restriction on leasing. The Court should conclude that Section 25.2.1(k) controls.

The relationship between Sections 9.1 and 9.2 solidifies Barclay Court’s argument. Section 9.1 is titled “Residential Use; Timesharing Prohibited.” It specifies the residential nature of use of the Condominium, stating, “The Condominium is intended for and restricted primarily to residential uses, on an ownership, rental, or lease basis[.]” CP 165. This language is consistent with the Condo Act, Washington case law and Barclay Court’s larger point that “use” in a land use and real property context refers to the type of activity to which land is devoted. Section 9.1 provides that Barclay Court is devoted to “residential use.”

Section 9.2 is not titled “Use,” it is titled “Leases.” This further distinguishes “use” from “leasing.” Section 9.2 addresses leases and regulates how an owner may lease including various requirements such as screening of tenants, provision of written leases to the Association, and how the Board shall deal with tenants who violate Association rules. CP

166. This section devoted to “Leases” specifies, “Other than as stated in this Section, there is no **restriction** on the right of any Owner **to lease** or otherwise rent its Unit.” *Id* (emphasis added). This last sentence defines the content of this section as restrictions on leasing. This language ties directly to the language in Section 25.2.1(k). Reading Section 9.2 and Section 25.2.1(k) harmoniously based on their like language leads to the inescapable conclusion that any restrictions on leasing are subject to 67% approval. The specificity of 25.2.1(k) cannot be debated and supports a construction that under the Declaration a rental cap amendment must be approved by at least 67% approval. Barclay Court’s Amendment satisfies this requirement.

III. REQUESTS FOR ATTORNEY FEES AND COSTS

If Bilanko prevails on appeal, the Court should reject her request for discretionary fees and costs under RCW 64.34.455⁹ for the same reasons the Court of Appeals declined to award fees in *Filmore*: “debatable issues of law.” 183 Wn. App. at 353. Here, when the parties’ dispute began the Court of Appeals had not decided *Filmore*. Even when the Court of Appeals published its decision several months into this lawsuit, the *Filmore* litigants continued to dispute the legal issues and

⁹ RCW 64.34.455 provides, “The court, in an appropriate case, may award reasonable attorney’s fees to the prevailing party.”

sought review, advancing meritorious arguments for reversal. The Supreme Court accepted review and set oral argument for June 2015, a sign that alone signifies the merit of the debatable issues of law.

Bilanko's position that Barclay Court should have accepted Division I's resolution of the legal issues in *Filmore* and conceded defeat is unconvincing when ultimately the Supreme Court will settle this area of law that has been fairly disputed. An award of fees and costs against Barclay Court is not appropriate in these circumstances.

Barclay Court has requested its fees and costs because Bilanko has put Barclay Court to the expense and effort of defending time-barred claims. Barclay Court distinguishes its request from that of Bilanko and the prevailing party before Division I in *Filmore* because here Barclay Court was forced to defend stale claims. In such circumstances, the equities and purposes of both the time-bar and the fee provision together support an award of fees and costs. Pursuant to RAP 18.1(b), this Court should grant its request.

IV. CONCLUSION

Bilanko's legal challenge to the Amendment asks the courts to unstrike the bargain she made when she purchased her unit in November 2009 subject to the November 2008 rental cap amendment. She entered a community bound by governing documents and an overriding principle

that community rule and not individual desires would regulate the condo. She asks the Court to wipe this bargain away. Barclay Court seeks to uphold it. Barclay Court should prevail on either of its two strong legal grounds for reversal.

Respectfully submitted on this 27th day of May, 2015.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: 
Averil Rothrock, WSBA #24248
arothrock@schwabe.com
Lawrence A. Costich, WSBA #32178
lcostich@schwabe.com
Milton A. Reimers, WSBA #39390
mreimers@schwabe.com
*Attorneys for Barclay Court Owners
Association*

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the 27th day of May, 2015, I arranged for service *via email (pursuant to the parties' written agreement)* the foregoing APPELLANT BARCLAY COURT OWNERS ASSOCIATION'S REPLY BRIEF to the parties to this action as follows:

Matthew D. Hartman
Impact Law Group PLLC
1325 Fourth Ave., Ste. 1400
Seattle, WA 98101
Email: matt@impactlawgroup.com
Attorney for Plaintiff

Carolyn Robbs Bilanko
Bracewell & Giuliani LLP
701 5th Ave., Ste. 6200
Seattle, WA 98104
Email: Carolyn.bilanko@bgllp.com
Attorney for Plaintiff

Jeffrey E. Bilanko
Gordon & Rees LLP
701 5th Ave., Ste. 2100
Seattle, WA 98104
Email: jbilanko@gordonrees.com
Attorney for Plaintiff


Mary A. Williams

PDX\113529\198903\AAR\15828368.4