

NO. 91247-5

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SUPREME COURT OF THE STATE OF WASHINGTON

CAROLYN ROBBS BILANKO, an individual,

Plaintiff/Respondent,

vs.

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

Defendant/Appellant.

**RESPONDENT BILANKO'S
APPELLATE BRIEF**

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	2
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
IV.	STATEMENT OF THE CASE	3
V.	STANDARDS OF REVIEW	9
VI.	ARGUMENT	9
	A. Amendment No. 1 was invalid because it did not receive the level of owner approval required under the WCA.	10
	1. Under the rules of statutory construction, a condominium’s “uses” include leasing.	12
	<i>a. The term "use" encompasses leasing under its plain language and common dictionary definitions.</i>	12
	<i>b. There is no evidence that the legislature intended to limit the definition of the term "use" to residential or non-residential.</i>	13
	2. Under Barclay Court’s own citations, this Court should look to the Declaration when determining the meaning of “use,” and the Declaration specifically identifies leasing as a “permitted use” of each unit.	16
	3. Restrictions on leasing are not restraints on alienation.	20
	B. Amendment No. 1 also is invalid because it did not receive the level of owner approval required under the Declaration.	20
	C. Ms. Bilanko’s claims are not barred by the statute of limitations in RCW 64.34.264(2).	23
	1. Under the rules of statutory construction, RCW 64.34.264(2) does not bar challenges like Ms. Bilanko’s.	23
	2. Barclay Court’s interpretation of “pursuant to” is unfounded and violates the rules of statutory construction.	26

3.	RCW 64.34.264(2) also does not apply because Amendment No. 1 was void from inception.....	29
4.	Both the Washington Court of Appeals and the Rhode Island Supreme Court directly support Ms. Bilanko’s interpretation of RCW 64.34.264(2).....	30
5.	Even if RCW 64.34.264(2) is a statute of repose, Ms. Bilanko’s claims are not barred.	35
D.	Ms. Bilanko’s claims are not barred by the private time-bar in the Declaration.....	36
E.	Barclay Court’s implied equitable argument is baseless. ...	38
VII.	REQUEST FOR ATTORNEY FEES AND COSTS	39
A.	The Court should award Ms. Bilanko her attorney’s fees and costs in defending this appeal and decline to award attorney’s fees to Barclay Court.....	39
VIII.	CONCLUSION	41

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>America Condominium Assoc., Inc. v. IDC, Inc.</i> , 844 A.2d 117 (R.I. 2004).....	29, 31, 34, 35
<i>Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n</i> , 184 Wn. App. 593, 337 P.3d 1131 (2014).....	passim
<i>Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet</i> , 132 Wn. App. 903, 134 P.3d 1188 (2006).....	29
<i>Ernst Home Center, Inc. v. Sato</i> , 80 Wn. App. 473, 910 P.2d 486 (1996).....	20
<i>Filmore LLLP v. Unit Owners Assoc. of Centre Pointe Condominium</i> , 183 Wn. App. 328, 333 P.3d 498 (2014).....	passim
<i>Harting v. Barton</i> , 101 Wn. App. 954, 6 P.3d 91 (2000).....	36
<i>In re Estate of Palmer</i> , 145 Wn. App. 249, 187 P.3d 758 (2008).....	35, 36
<i>Kabbae v. Dep't of Social & Health Servs.</i> , 144 Wn. App. 432, 192 P.3d 903 (2008).....	31
<i>Keller v. Sixty-01 Assoc. of Apartment Owners</i> , 127 Wn. App. 614, 112 P.3d 544 (2005).....	28, 31, 33
<i>King County, Dept. of Development & Environmental Services v. King County</i> , 17 Wn.2d 636, 305 P.3d 240 (2013).....	16
<i>Lake v. Woodcreek Homeowners Ass'n</i> , 169 Wn.2d 516, 243 P.3d 1283 (2010).....	12
<i>Marina Cove Condominium Owners Ass'n v. Isabella Estates</i> , 109 Wn. App. 230, 109 Wn. App. 230 (2001)	34

<i>Meridian Minerals Co. v. King County</i> , 61 Wn. App. 195, 810 P.2d 31 (1991).....	17
<i>Michaels v. CH2M Hill, Inc.</i> , 171 Wn.2d 587, 257 P.3d 532 (2011).....	12, 24
<i>Newport Yacht Basin Assoc. of Condo. Owners v. Supreme NW., Inc.</i> , 168 Wn. App. 56, 277 P.3d 18 (2012).....	38
<i>One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.</i> , 148 Wn.2d 319, 61 P.3d 1094 (2002)	28, 30, 33, 40
<i>Scott v. Cascade Structures</i> , 100 Wn.2d 537, 673 P.2d 179 (1983).....	16
<i>Shoemaker v. Shaug</i> , 5 Wn. App. 700, 490 P.2d 439 (1971).....	20
<i>Shorewood West Condo Ass'n v. Sadri</i> , 140 Wn.2d 47, 992 P.2d 1008 (2000).....	20
<i>Shorewood West Condo Ass'n v. Sadri</i> , 92 Wn. App. 752, 966 P.2d 372 (1998).....	20
<i>State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.</i> , 142 Wn.2d 328, 12 P.3d 134 (2000).....	25, 26
<i>State v. Chester</i> , 133 Wn.2d 15, 940 P.2d 1374 (1997).....	12, 24
<i>State v. Kintz</i> , 169 Wn.2d 537, 238 P.3d 470 (2010).....	12, 24
<i>Swinomish Indian Tribal Cmty. v. Dept. of Ecology</i> , 178 Wn.2d 571, 311 P.3d 6 (2013).....	12
<i>Thompson v. Hanson</i> , 174 P.3d 120 (Wash. Div. I 2007).....	34
STATUTES	
Camping Resorts Act (RCW 19.105.400)	35

King County Code Chapter 21A.06.1345.....	17
RCW 4.16.310	35
RCW 4.16.350	35
RCW 7.72.060	35
RCW 11.11.070(3).....	36
RCW 23B.14.340.....	35
RCW 64.34.010	11
RCW 64.34.030	10, 37
RCW 64.34.216(1).....	14
RCW 64.34.264	16, 25, 26
RCW 64.34.264(1).....	11, 21
RCW 64.34.264(2).....	passim
RCW 64.34.264(4).....	passim
RCW 64.34.264(5).....	32
RCW 64.34.410(1).....	14
RCW 64.34.443(1)(a)	14
RCW 64.34.443(1)(d).....	14
RCW 64.34.445(2).....	14
RCW 64.34.445(3).....	14
RCW 64.34.455	39
Section 264 of the RCW	passim

RULES

CR 8(c).....35
CR 12.....36
CR 12(b).....35
CR 60.....8, 38
RAP 18.1(a).....39

TREATISES

BLACK’S LAW DICTIONARY (10th ed. 2014).....13, 25
MIRRIAM-WEBSTER UNABRIDGED25
WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002).....13

I. INTRODUCTION

This case involves a challenge to Amendment No. 1 to the Barclay Court Condominium Declaration (“Declaration”) which prohibits unit owners, including Ms. Bilanko, from leasing their units. The Washington Condominium Act (“WCA”) and the Declaration require at least 90 percent owner approval to validly adopt an amendment that changes the “use” of any unit. Amendment No. 1 received the approval of only 67 percent of the Barclay Court owners and thus was invalid and/or void at its inception.

Furthermore, the WCA’s and the Declaration’s statutes of limitations for challenging amendments expressly apply only where the amendment was adopted “pursuant to,” or in accordance with, the amendment’s voting requirements. The WCA is a consumer protection statute and the voting requirements mandated therein are a necessary safeguard for condominium owners such as Ms. Bilanko. Ignorance of these requirements and the passage of time do not validate amendments that were never validly adopted.

Based upon the invalid adoption of Amendment No. 1, Barclay Court prohibited Ms. Bilanko from leasing her unit. Ms. Bilanko brought suit seeking to declare Amendment No. 1 void and to recover damages in the amount of her lost rental income. Based on two recent, unanimous

rulings from Division I and Division III of the Washington Court of Appeals, the trial court granted summary judgment for Ms. Bilanko. Of relevance to this appeal, the court held that Amendment No. 1 was void *ab initio* for failure to comply with the voting requirements in RCW 64.34.264(4) and the Barclay Court Declaration, and as a result, Ms. Bilanko's claim was not barred by the statute of limitation in RCW 64.34.264(2) or the Barclay Court Declaration.

The Court should honor the strong consumer protection features of the WCA and affirm the trial court's ruling on summary judgment and the corresponding final judgment entered in Ms. Bilanko's favor.

II. ASSIGNMENTS OF ERROR

Ms. Bilanko does not assign error to the trial court's rulings on this appeal. This Court should affirm the trial court's December 30, 2014 order granting Ms. Bilanko's Motion for Declaratory Relief and denying Barclay Court's Motion for Partial Summary Judgment, and the related Final Judgment entered in Ms. Bilanko's favor on January 20, 2015. CP 464-67, 504-07.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Ms. Bilanko does not assign any error to the trial court's rulings on this appeal. Nevertheless, the issues presented by Barclay Court on appeal are more accurately stated as follows:

ISSUE A: Did Barclay Court validly adopt Amendment No. 1 to the Barclay Court Declaration, when the Amendment prohibits owners from leasing their units, the Amendment was approved by only 67 percent of the unit owners, RCW 64.34.264(4) and Section 25.2.2 of the Declaration require at least 90 percent owner approval to adopt an amendment changing the units' uses, and Washington case law and Sections 9.1-9.2 of the Declaration define "uses" to include leasing?

ISSUE B: Does the statute of limitations set forth in RCW 64.34.264(2) or Section 25.1 of the Declaration prohibit Ms. Bilanko's challenge to the validity and enforceability of Amendment No. 1, when Amendment No. 1 was not validly adopted "pursuant to" the voting requirements set forth in RCW 64.34.264(4) and was void from inception?

IV. STATEMENT OF THE CASE

Barclay Court is a 28-unit condominium development located in Seattle, Washington. CP 97. Barclay Court's Condominium Declaration was recorded on May 2, 2001. *Id.* The following sections of the Declaration are of particular relevance to this proceeding:

- Section 9.1 expressly defines the "permitted uses" of the units to include use on a "rental[] or lease basis." CP 110.
- Section 25.2.2 provides that an amendment that "changes ... the uses to which any Unit is restricted" requires the approval of "the Owner of each Unit particularly affected"

and at least a 90 percent vote by the owners association. CP 227.

- Section 9.2 identifies several restrictions on renting (e.g., requiring tenant screening, written leases, and delivering copies to the association), and then says: “Other than as stated in this Section, there is no restriction on the right of any Owner to lease or otherwise rent its Unit.” CP 111.
- Section 25.2.1 provides that at least 67 percent of the owners association must agree to amend the Declaration’s “restrictions on leasing of Units.” CP 227.

Notably, Section 25.2.2 is modeled on a substantively identical statute in the Washington Condominium Act, which provides that “no amendment may ... change ... the uses to which any unit is restricted, in the absence of the vote or agreement of the owner of each unit particularly affected” and 90 percent of the owners association. RCW 64.34.264(4).

Respondent Bilanko has been the owner of unit 401 of Barclay Court since November of 2009. CP 88 at ¶2. In the fall of 2013, Ms. Bilanko and her husband notified the Barclay Court Board members of their need to move and desire to lease their unit. CP 89 at ¶6. In response, the Board informed Ms. Bilanko that she could not rent her unit due to the rental cap amendment to the Declaration. CP 89 at ¶7. In pertinent part, Amendment No. 1 provides that Section 9.2 of the Declaration is deleted and replaced with language prohibiting most owners from leasing their units. CP 250-54. Amendment No. 1 obtained “[n]ot less than sixty-

seven percent (67%)” of the owners’ approval and was recorded on November 3, 2008. CP 250-51.

After she received the Board’s denial, Ms. Bilanko reviewed the Amendment in conjunction with the Declaration and the WCA and determined that Amendment No. 1 had not been passed with the contractually and statutorily required level of owner approval. CP 89 at ¶8. Until this time, Ms. Bilanko had not conducted legal research to confirm the legal validity of the Amendment because she had no reason to believe that the Board—seasoned unit holders advised by counsel—would have misled its fellow owners when it asserted the amendment was valid.

On October 1, 2013, Ms. Bilanko sent the Board an email explaining that Amendment No. 1 affected a change in the units “uses,” and thus was invalid because it never received at least 90 percent owner approval as required by RCW 64.34.264(4) and Section 25.2.2 of the Declaration. CP 89 at ¶8; *see also* CP 238.

Ms. Bilanko and her husband also identified a prospective residential tenant and negotiated the material terms of a lease. CP 90 at ¶9. The lease was to commence November 1, 2013, for a term of no less than 12 months, for \$2,300.00 per month. *Id.*; *see also* CP 240.

In response to Ms. Bilanko’s email, an attorney for the Board sent Ms. Bilanko written notice prohibiting her from leasing her unit and

threatening to evict her tenant. CP 90 at ¶¶10-11. After subsequent discussions failed, Ms. Bilanko filed a complaint against Barclay Court in King County Superior Court on July 9, 2014. CP 1. Therein, Ms. Bilanko asserted claims for declaratory relief, injunctive relief, and breach of contract, among others. *Id.*

On September 2, 2014, Division I of the Washington Court of Appeals analyzed RCW 64.34.264(4) in *Filmore LLLP v. Unit Owners Assoc. of Centre Pointe Condominium*, 183 Wn. App. 328, 333 P.3d 498 (2014). Therein, the appellate court held that lease restrictions via declaration amendment constitute a change in “use” of the unit, and thus require at least 90 percent owner approval to be valid under RCW 64.34.264(4). *Id.* This is exactly the argument Ms. Bilanko made to Barclay Court almost one year prior, and which Barclay Court rejected. CP 238.

On September 19, Ms. Bilanko filed a Motion for Declaratory Relief in which she moved the trial court to declare Amendment No. 1 void from inception under the WCA, the Declaration, and *Filmore*. CP 15. That same day, Barclay Court filed a Motion for Partial Summary Judgment asserting that Ms. Bilanko’s claims were time barred by the doctrine of laches and various statutes of limitations. CP 133.

By order dated October 20, 2014, the trial court cited *Filmore* and found that “Ms. Bilanko’s substantive argument, that the Amendment was improperly passed with 67%, rather than 90%, of the homeowners’ acquiescence, is correct. On the merits, she prevails.” CP 401 at ln. 13-15. Nonetheless, the trial court denied Plaintiff’s Motion for Declaratory Relief and granted Defendant’s Motion for Partial Summary Judgment on the basis that Plaintiff’s claim was time barred by the statute of limitations in RCW 64.34.264(2). CP at 400-05. It provides:

No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.

RCW 64.34.264(2) (emphasis added). The trial court’s analysis turned on the definition of the phrase “pursuant to,” which the court defined to mean “acting in consequence or in prosecution of, or following after or following out.” CP 404 at ln. 3-4. The trial court rejected Ms. Bilanko’s assertion that “pursuant to” meant “in compliance with.” CP 401 at ln. 21-25.

Just one month later, on November 18, Division III of the Washington Court of Appeals adopted Ms. Bilanko’s interpretation of RCW 64.34.264(2) in *Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass’n*, 184 Wn. App. 593, 337 P.3d 1131 (2014). Specifically, the

appellate court held that because RCW 64.34.264(2) bars only challenges to amendments adopted “pursuant to” Section 264 of the RCW, it does not bar challenges to amendments that were passed without the votes required by RCW 64.34.264(4), and such amendments are “void *ab initio*.” *Id.* In reaching this conclusion, the court cited the same precedent Ms. Bilanko had cited in her Motion for Declaratory Relief and her Opposition to Barclay Court’s Motion for Partial Summary Judgment.

The next day, on November 19, 2014, Ms. Bilanko alerted Barclay Court to the importance of the *Club Envy* decision in conjunction with the *Filmore* decision. CP 421-22 at ln. 22-2. Notwithstanding these binding, unanimous appellate opinions on the exact issues in these proceedings, Barclay Court still maintained they did not apply. *Id.*; *see also* CP 428.

Accordingly, on December 1, 2014, Ms. Bilanko notified the trial court of the *Club Envy* decision and asked for relief from the trial court’s October 20 order under CR 60. CP 418. The trial court agreed, and on December 30, 2014, it entered an order vacating its October 20 order, denying Barclay Court’s Motion for Partial Summary Judgment on the statute of limitations issue, granting Ms. Bilanko’s Motion for Declaratory Relief as to liability, and awarding Ms. Bilanko’s damages in the amount of her lost rental income. CP 464-67. On January 20, 2015, the trial court reduced its order to a final judgment on Ms. Bilanko’s claims for

declaratory relief, injunctive relief, and breach of contract. CP 504-07. On January 28, 2015, the trial court granted the parties' joint stipulation to voluntarily dismiss Ms. Bilanko's remaining causes of action against Barclay Court. CP 518-20.

Barclay Court appealed, and this response brief follows. Although Barclay Court's Notice of Appeal sought review only of the January 20, 2015 final judgment and January 28, 2015 order of dismissal, Barclay Court's substantive briefing seeks reversal of the trial court's December 30, 2014 order on summary judgment. Accordingly, Ms. Bilanko responds to those arguments here.

V. STANDARDS OF REVIEW

The order and final judgments on appeal stem from the trial court's order on summary judgment. Ms. Bilanko agrees with Barclay Court's assertion that the standard of review is *de novo*.

VI. ARGUMENT

As detailed below, this Court should uphold the trial court's December 30, 2014 order declaring Amendment No. 1 invalid and awarding damages to Ms. Bilanko. The leasing restriction contained in Amendment No. 1 affected a change in the condominium units' "uses," and thus required approval from at least 90 percent of Barclay Court's owners under RCW 64.34.264(4) and Section 25.2.2 of the Declaration.

As it is uncontested that the Amendment obtained only 67 percent owner approval, the Amendment was invalidly adopted.

RCW 64.34.264(2)'s one-year statute of limitations does not bar Ms. Bilanko's claim. RCW 64.34.264(2) applies only to challenges to amendments adopted "pursuant to this section [264]." Amendment No. 1 did not comply with the voting requirements of RCW 64.34.264(4) and thus was void from inception. The contractual statute of limitations contained in Section 25.1 of the Declaration does not apply for substantively identical reasons.

A. Amendment No. 1 was invalid because it did not receive the level of owner approval required under the WCA.

The Court should uphold the trial court's ruling on summary judgment that Amendment No. 1 did not comply with the voting requirements set forth in the WCA.

Although a condominium declaration is a condominium's master governing document, the WCA sets forth minimum standards that cannot be waived by declaration. *See* RCW 64.34.030 ("Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived."); *see also* CP 4 [Declaration] at Art. 2 ("In the event of a conflict between the provisions of this Declaration and the Condominium Act, the

Condominium Act shall prevail.”). The WCA was enacted in 1989 and governs all condominiums created after July 1, 1990, including Barclay Court. *See* RCW 64.34.010. Section 264, which is entitled “Amendment of declaration,” provides in pertinent part:

(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 large percentage as the declaration provides.

RCW 64.34.264(4) (emphasis added). The issue before this Court is whether the language “the uses to which any unit is restricted” in RCW 64.34.264(4) encompasses leasing as a “use” of the condominium. If so, Amendment No. 1 required at least 90 percent—and possibly 100 percent¹—owner approval in order to be validly enacted under the WCA. If not, Amendment No. 1 required only 67 percent approval as required in RCW 64.34.264(1).

¹ As Division III of the Washington Court of Appeals recently determined, certain declaration amendments require the approval of all unit owners to comply with the voting requirements of RCW 64.34.264(4). *See Club Envy of Spokane, LLC v. Ridpath Tower Condominium Ass’n*, 184 Wn. App. 593, 337 P.3d 1131 (2014). At issue in *Club Envy* was whether a declaration amendment that changed the voting interests of all unit owners had been validly adopted. In its discussion of whether the amendment had complied with RCW 64.34.264(4), the court stated that since the “amendment changed the voting interests of all the members it had to be approved by all the owners.” *Id.* at 1136. In the instant matter, Amendment No. 1 changes the “uses” to which all units are restricted, and therefore similarly required approval of all Barclay Court owners.

1. Under the rules of statutory construction, a condominium's "uses" include leasing.

“When construing a statute, our goal is to determine and effectuate legislative intent. Where possible, we give effect to the plain meaning of the language used as the embodiment of legislative intent.” *Swinomish Indian Tribal Cmty. v. Dept. of Ecology*, 178 Wn.2d 571, 581, 311 P.3d 6 (2013) (citations omitted). “If the statute is unambiguous after a review of the plain meaning, the court’s inquiry is at an end.” *Lake v. Woodcreek Homeowners Ass’n.*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

a. The term “use” encompasses leasing under its plain language and common dictionary definitions.

The term “use” is undefined in the WCA. “In the absence of a specific statutory definition, words in a statute are given their common law or ordinary meaning.” *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997); *see also Lake v. Woodcreek Homeowners Ass’n.*, 169 Wn.2d 516, 528, 243 P.3d 1283 (2010). When a term is undefined by a statute the court first looks to the dictionary definition. *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). “Undefined common statutory terms are given their common dictionary meaning unless there is strong evidence the legislature intended something else.” *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 601, 257 P.3d 532 (2011).

The dictionary defines “use” as the “legal enjoyment of property that consists in its employment, occupation, exercise, or practice,” “a particular service or end: purpose, object, function,” and “the quality of being suitable for employment: capability of filling a need or promoting an advantage: usefulness, utility.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2523 (2002). “Use” is also defined as “[t]he application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is accepted, as distinguished from a possession and employment that is merely temporary or occasional. <the neighbors complained to the city about the owner’s use of the building as a dance club>.” BLACK’S LAW DICTIONARY (10th ed. 2014). Thus, contrary to Barclay Court’s narrow definition of “uses” as including only residential or nonresidential use, the dictionary definition of “use” is extremely broad. This conforms with common sense, which also dictates that leasing is a “use” when applied in the context of a condominium unit.

b. There is no evidence that the legislature intended to limit the definition of the term “use” to residential or non-residential.

An inspection of the legislative intent reveals that there is no evidence (much less “strong evidence”) the legislature intended to narrowly define “use” as residential versus non-residential uses as urged

by Barclay Court. Therefore, “uses” must be given the broad, common definition set forth in the dictionary.

Barclay Court first contends that the legislature intended to draw a distinction between the terms “use” and “leasing” in the WCA citing as examples RCW sections 64.34.410(1) and 64.34.216(1)(n), (g), and (h). However, none of these sections qualifies or limits the meaning of “use.”

Barclay Court then cites other provisions of the WCA that qualify the term “use” as either residential or non-residential. Notably, Barclay Court fails to point out the sections of the WCA that refer to “use” without specifying residential or nonresidential. *See, e.g.*, RCW 64.34.443(1)(a) (any written affirmation of fact or promise “which relate to the unit, its use, or rights appurtenant thereto... or the right to use or have the benefit of facilities not located in the condominium creates an express warranty that the unit and related rights and uses will conform to the affirmation or promise”); RCW 64.34.443(1)(d) (“A written provision that a buyer may put a unit only to a specified use is an express warranty that the specified use is lawful.”); RCW 64.34.445(2) (declarant and dealer warrant that unit and common elements are “suitable for the ordinary uses of real estate of its type”); RCW 64.34.445(3) (declarant and dealer warrant to purchaser of unit that may be used for residential use that “an existing use, continuation of which is contemplated by the parties, does not violate

applicable law”). Importantly, RCW 64.34.264(4) is not among the statutory provisions that qualify the word “use” with “residential” or “nonresidential.”

Perhaps most damning to Barclay Court’s argument is that by citing to the various sections where the word “use” is qualified with “residential” or “nonresidential” Barclay Court has proven that if the legislature had intended to qualify the term “use” in RCW 64.34.264(4), it is clear from the other provisions that it would have. But it did not.

Looking further at the statutory provisions where “use” is qualified as residential or nonresidential, common sense provides a reasonable explanation for the distinction. As Division I noted in its *Filmore* opinion, “where the legislature used ‘residential’ or ‘nonresidential’ to describe the word ‘use’, such reference relates to the differences in requirements for notice, voting percentages, insurance, the public offering statement, warranties, and reserve accounts – all of which are reasonable distinctions to make given the WCA’s strong emphasis on protecting residential buyers of condominiums.” *Filmore LLLP v. Unit Owners Ass’n of Centre Point Condos.*, 183 Wn. App. 328, 343, 333 P.3d 498 (2014).

One other source of determining the legislative intent of the meaning of the term “use” in RCW 64.34.264(4) is the legislative history of the WCA. “Legislative history may be of some interest even where the

court concludes that the statute’s plain language is unambiguous.” *Scott v. Cascade Structures*, 100 Wn.2d 537, 544, 673 P.2d 179 (1983). In ruling on the *Filmore* case, Division I reviewed the legislative bill reports, official comments to the WCA, the Uniform Common Interest Ownership Act, and its official comments. *Filmore*, 183 Wn. App. at 345. The *Filmore* court then concluded “that nothing in the WCA’s legislative history, official comments, or other related materials suggests that the legislature intended to limit ‘uses to which any unit is restricted’ in RCW 64.34.264(4) to residential versus nonresidential uses.” *Id.* at 345.

2. Under Barclay Court’s own citations, this Court should look to the Declaration when determining the meaning of “use,” and the Declaration specifically identifies leasing as a “permitted use” of each unit.

Even if this Court considers material other than RCW 64.34.264’s plain meaning, common dictionaries, and the legislature’s intent to determine the meaning of “uses,” such material further supports a definition that includes leasing.

Barclay Court argues that “use” is a term of art requiring case law and municipal codes to define that term in the context of property law. In support of this assertion, Barclay Court cites *King County, Dept. of Development & Environmental Services v. King County*, 17 Wn.2d 636, 641, 305 P.3d 240 (2013) (“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[.]”), *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 210 n. 15, 810 P.2d 31 (1991) (“Use” means... .the type of activity... to which the land is devoted or may be devoted[.]”), and King County Code Chapter 21A.06.1345 (“Use” is defined as “the purpose for which land or a structure is designed, built, arranged, intended, occupied, maintained, let or leased.”).

Thus, under Barclay Court’s own citations, the best evidence of the types of activities for which the Barclay Court condominiums were built, designed, and/or intended comes from the Barclay Court Declaration itself. In pertinent part, Article 9 of the Declaration is entitled “**Permitted Uses**; Maintenance of Units; Conveyances” and provides the following guidance for this Court:

Section 9.1 Residential Use The Condominium is intended for and restricted primarily to residential uses, on an ownership, rental, or lease basis, and for social, recreational, or other reasonable activities normally incident to such uses

CP 110 (emphasis added). Section 9.2 provides a litany of rules and requirements for residential leasing of the units and is quoted here in full.

Section 9.2 Leases. Any lease or rental agreement of a Unit must provide that its terms shall be subject in all respects to the provisions of the Declaration and the Bylaws and rules and regulations of the Association and that any failure by the tenant to comply with the terms of

such documents, rules, and regulations shall be a default under the lease or rental agreement. If any lease under this Section does not contain the foregoing provisions, such provisions shall nevertheless be deemed to be part of the lease and binding upon the Owner and the tenant by reason of their being stated in the Declaration. The Board may adopt a rule that requires any owner desiring to rent a Unit to certify or provide evidence to the Board or its designee that the prospective tenant (other than a relative of the owner) has been screened (a) by the owner for those matters that a residential landlord would normally screen as prescribed by rule or regulation of the Board or (b) by a tenant screening service designated or approved by the Board at the Owner's expense prior to entering into a lease with the prospective tenant. All leases and rental agreements shall be in writing. Copies of all leases and rental agreements shall be delivered to the Association before the tenancy commences. If any lessee or occupant of a Unit violates or permits the violation by his guests and invitees of any provisions hereof or of the Bylaws or of the rules and regulations of the Association, and the Board determines that such violations have been repeated and that a prior notice to cease has been given, the Board may give notice to the lessee or occupant of the Unit and the owner thereof to forthwith cease such violations, and if the violation is thereafter repeated, the Board shall have the authority, on behalf and at the expense of the owner, to evict the tenant or occupant if the Owner fails to do so after Notice from the Board and an Opportunity to be Heard. The Board shall have no liability to an Owner or ten for any eviction made in good faith. The Association shall have a lien against the Owner's Unit for any costs incurred by it in connection with such eviction, including reasonable attorneys' fees, which may be collected and foreclosed by the Association in the same manner as assessments are collected and foreclosed under Article 16. **Other than as stated in this Section, there is no restriction on the right of any Owner to lease or otherwise rent its Unit.**

CP 111 (emphasis added).

After reviewing the language of the Declaration it becomes clear why Barclay Court omitted any reference to the definition of “use” in the Declaration. The language in the Declaration could not be more clear on this issue. The Barclay Court Condominiums were built, designed, and intended to be leased. As a result, any Declaration amendment that would prohibit leasing requires at least 90 percent approval of the owners under RCW 64.34.264(4) of the WCA and Section 25.2.2 of the Barclay Court Declaration.

Moreover, when considered in the context of a real world application and common sense it is clear that both the Barclay Court Declaration and the WCA intended the term “use” to include leasing. Consider that condominiums are typically built by developers who take construction loans to finance the development of the condominium. Developers are the original Master Declarant and are responsible for drafting the declarations. It makes sense then that a developer, like the legislature, would want to specify leasing as a permitted “use” to allow for the possibility that not every unit in a condominium would be sold prior to or immediately upon completion of a condominium development or else run the risk of developers defaulting on their construction loans when they are prohibited from leasing unsold units.

3. Restrictions on leasing are not restraints on alienation.

Barclay Court briefly asserts that restrictions on leasing are restraints on alienation and therefore should be permitted. App. Br. 44-45. However, a closer look at the cases cited by Barclay Court reveals that there is no authority for this claim.

Barclay Court cites *Shoemaker v. Shaug*, 5 Wn. App. 700, 701 & 704, 490 P.2d 439 (1971) and *Ernst Home Center, Inc. v. Sato*, 80 Wn. App. 473, 476 & 486, 910 P.2d 486 (1996) to support its argument. But neither of those cases involves a restriction on leasing. Rather, those cases involve restrictions on sub-leasing contained in leases. Barclay Court also cites the *Shorewood West Condo Ass'n v. Sadri*, 92 Wn. App. 752, 759, 966 P.2d 372 (1998) for the proposition that “[r]estrictions on leasing have been upheld as reasonable restraints on alienation.” However, that ruling was overturned by the Washington Supreme Court in a decision which omitted the language relied upon by Barclay Court. *See Shorewood West Condo Ass'n v. Sadri*, 140 Wn.2d 47, 992 P.2d 1008 (2000).

B. Amendment No. 1 also is invalid because it did not receive the level of owner approval required under the Declaration.

The Court also should uphold the trial court’s ruling on summary judgment that Amendment No. 1 did not comply with the voting requirements set forth in the Barclay Court Declaration. Article 25 of the Declaration governs Amendments. CP 226-27. In language strikingly

similar to the voting requirements for amendments set forth in WCA, the Declaration provides as follows:

Section 25.2. Percentages of Consent Required

25.2.2. An amendment that creates or increases Development Rights or Special Declarant Rights, increases the number of Units (other than an amendment creating Units in a Subsequent Phase), changes the boundaries of any Unit, the Allocated Interests of a Unit (except in connection with the creation of new Units in a Subsequent Phase), or the uses to which any Unit is restricted shall require the vote or agreement of the Owner of each Unit particularly affected and the Owners holding at least Ninety Percent (90%) of the votes in the Association.

CP 227 (emphasis added). Thus, just like RCW 64.34.264(4), the Declaration requires at least 90 percent owner approval for “changes” in the “uses to which any Unit is restricted.” *Id.* at Section 25.2.2.

Unlike the WCA, however, the Barclay Court Declaration goes on to expressly define the “permitted uses” of its units to include “leasing.” CP 110-11 at Art. 9, §§9.1-9.2. Thus, even if this Court determines that a ban on leasing does not constitute a change in “use” as the term is used in the WCA, it plainly constitutes a change in “use” as the term is defined in the Declaration. *See* RCW 64.34.264(1) (noting that declarations are permitted to require a “larger percentage” of votes for their amendment). Because Amendment No. 1 received only 67 percent owner approval, it is

independently invalid under Section 25.2.2 and Sections 9.1-9.2 of the Declaration.

Barclay Court asserts that the 67 percent voting approval requirement found in Section 25.2.1(k) of the Declaration applies to Amendment No. 1 because the Amendment is a “leasing restriction” rather than a change in “use.” CP 227. That argument ignores the language of Article 9 of the Declaration, which plainly distinguishes between “uses” and “lease restrictions.” Section 9.1 of the Declaration clearly identifies “leas[ing]” as a “permitted use” of the condominium units. CP 110. In contrast, Section 9.2 identifies an exhaustive list of “restrictions” on leasing including, among other things, that all tenants must be screened and copies of all leases must be provided to the Association. CP 111. In case it is not self-evident that these are the types of leasing “restrictions” requiring only 67 percent approval under 25.2.1, the final sentence of Section 9.2 specifically states, “Other than as stated in this Section, there is no **restriction** on the right of any Owner to lease or otherwise rent its Unit.” CP 111 (emphasis added).

In summary, Section 9.1 in conjunction with Section 25.2.2 of the Declaration clearly provide that residential leasing is a permitted “use” and that amendments changing the uses of any unit requires at least 90 percent owner approval. Further, Section 9.2 in conjunction with Section

25.2.1(k) plainly provide that specific restrictions on leasing are contemplated by the Association and that an amendment imposing any restrictions on leasing requires approval of 67 percent owner approval. Here, Amendment No. 1 prohibits Ms. Bilanko from leasing her unit and therefore required at least 90 percent owner approval. It is undisputed that the Amendment received only 67 percent owner approval. CP 251. As a result, Amendment No. 1 is invalid under the plain terms of the Declaration.

C. Ms. Bilanko’s claims are not barred by the statute of limitations in RCW 64.34.264(2).

Barclay Court’s argument that Ms. Bilanko’s claim is barred by the statute of limitations in the WCA should be rejected, and the trial court’s holding on this issue should be affirmed. The passage of time alone gives no additional legitimacy to an amendment which was illegitimate from its inception.

1. Under the rules of statutory construction, RCW 64.34.264(2) does not bar challenges like Ms. Bilanko’s.

The statute of limitations set forth in RCW 64.34.264(2) provides in full: “No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.” (Emphasis added.) It is undisputed that the phrase “this section” refers to Title 64, Chapter 34, Section 264 of the

WCA, which includes the voting requirements set forth in RCW 64.34.264(4).

The parties do, however, dispute the meaning of “pursuant to.” This phrase is not defined in the WCA. “In the absence of a specific statutory definition, words in a statute are given their common law or ordinary meaning.” *Filmore LLLP v. Unit Owners Assoc. of Centre Pointe Condominium*, 183 Wn. App. 328, 339-40, 333 P.3d 498 (2014) (citing *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997)). “To determine the plain meaning of a term undefined by statute, ***the court first looks at the dictionary definition.***” *Filmore*, 183 Wn. App. at 340 (emphasis added) (citing *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010)). “***Undefined common statutory terms are given their common dictionary meanings unless there is strong evidence the legislature intended something else.***” *Id.* at 345, 333 P.3d 498 (emphasis added) (citing *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 601, 257 P.3d 532 (2011)).

Ms. Bilanko contends that the plain meaning of the phrase “pursuant to” in RCW 64.34.264(2) means “in compliance with” or “in accordance with.” The statute of limitations thus only runs on challenges to amendments that complied with the procedural requirements set forth in the rest of Section 264. This interpretation is supported by Black’s Law

Dictionary, which defines “pursuant to” as “*In compliance with*; in accordance with; under. <She filed the motion pursuant to the court's order>.” BLACK’S LAW DICTIONARY (10th ed. 2014) (emphasis added). Similarly, Merriam-Webster 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>.” MIRRIAM-WEBSTER UNABRIDGED, <http://unabridged.merriam-webster.com/unabridged/pursuant%20to> (last visited April 27, 2015). As there is nothing in the WCA or the legislative history of RCW 64.34.264 that suggests the legislature intended a different meaning (much less “strong evidence” thereof), “pursuant to” must be given the common dictionary meanings noted above.

Ms. Bilanko’s interpretation of “pursuant to” is further supported by its statutory context. “Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme which maintains the integrity of the respective statutes.” *State ex rel. Peninsula Neighborhood Ass’n v. Dep’t of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000) (citation and quotation marks omitted). Not only is the statute of limitations located in the exact same section of the WCA that sets forth the voting requirements for passing amendments, but it expressly incorporates them by reference. *See* RCW 64.34.264(2) (barring

challenges after one year to “amendment[s] adopted by the association pursuant to this section.”) (emphasis added). “Commentators have described the WCA as ‘precisely drafted.’” *Filmore*, 183 Wn. App. at 343 (quoting 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate Transactions* § 12.4, at 29 (2d ed. 2004)). Reading Section 264’s subsections in “harmony” requires the Court to find that RCW 64.34.264(2)’s statute of limitations does not bar challenges to amendments that never satisfied the voting requirements of RCW 64.34.264(4). *See Peninsula*, 142 Wn.2d at 342 (“The construction of two statutes shall be made with the assumption that the Legislature does not intend to create an inconsistency.”).

2. Barclay Court’s interpretation of “pursuant to” is unfounded and violates the rules of statutory construction.

Notwithstanding the above authority, Barclay Court asserts that “pursuant to” means “in pursuit of” the statute, and thus, because Barclay Court “consult[ed] with attorneys and intend[ed] to follow the Condo Act,” Amendment No. 1 was passed “pursuant to” the voting requirements set forth in Section 264. App. Br. 15. But there is no intent element in RCW 64.34.264. To the contrary, subsection (4) allows for just two exceptions to the 90 percent voting requirement: where “expressly permitted or required by other provision of this chapter,” or where the

condominium declaration has dictated an even “larger percentage.” RCW 64.34.264(4). Thus, whether Barclay Court “intended” or “tried” to comply with Section 264 is simply irrelevant to whether Amendment No. 1 in fact complied with Section 264.

Barclay Court then asserts that because “the legislature plainly included a time bar” of any sort, it must have intended it to be absolute. App. Br. 15. Notably, Barclay Court offers no authority or evidence in support of this speculative conclusion, and RCW 64.34.264(2)’s actual legislative history says nothing of the sort.

Barclay Court’s reference to the trial court’s initial order on summary judgment is similarly unpersuasive. App. Br. 16-17. That order ignored the rules of statutory construction, consulted no dictionaries or legislative history, relied on dated Washington case law defining the term in unrelated contexts, and *was ultimately overturned by the trial judge himself* after the Court of Appeals analyzed the exact same statute in *Club Envy* and interpreted it consistent with Ms. Bilanko’s position.

Barclay Court also erroneously asserts that Ms. Bilanko’s interpretation of RCW 64.34.264(2) would allow any challenge to any amendment after one year, and thus render the time bar “meaningless.” App. Br. 15-18. This is a straw man argument, for the interpretation advanced by Ms. Bilanko is not nearly so broad. Ms. Bilanko argues that

RCW 64.34.264(2) does not bar challenges to amendments that were procedurally noncompliant with the rest of Section 264. Challenges based on all other grounds, such as a substantive challenge to an amendment itself or to the Board's authority to take a certain action, remain subject to the time bar.

Indeed, it is Barclay Court's interpretation that would render part of RCW 64.34.264(2) meaningless, for it asks the Court to ignore the phrase "pursuant to this section" altogether. Only then could RCW 64.34.264(2) be a strict time bar against all challenges to amendments after one year, as Barclay Court contends. But when interpreting statutory language, all words are to be given their plain meaning and they must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Keller v. Sixty-01 Assoc. of Apartment Owners*, 127 Wn. App. 614, 624, 112 P.3d 544 (Div. I 2005).

Barclay Court's interpretation of RCW 64.34.264(2) also would lead to absurd results. If RCW 64.34.264(2) barred challenges to all amendments after one year, even amendments that received ***no owner approval at all*** would be automatically validated at the one year mark. Such a result would be inconsistent with the consumer protection features of the WCA itself. See *One Pac. Towers Homeowners' Ass'n v. HAL Real*

Estate Invs., Inc., 148 Wn.2d 319, 330-31, 61 P.3d 1094 (2002) (en banc) (noting that “one of the main purposes of the [WCA] is to provide protection for condominium purchasers”).

3. RCW 64.34.264(2) also does not apply because Amendment No. 1 was void from inception.

In addition to the plain language of RCW 64.34.264(2) stating that it does not apply to challenges such as Ms. Bilanko’s, RCW 64.34.264(2) also does not bar her claim because a “statute of limitation does not apply where an act or instrument is void at its inception.” *See Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet*, 132 Wn. App. 903, 913, 134 P.3d 1188 (2006). Barclay Court’s assertion that a declaration amendment may not be deemed void in this context is inaccurate. App. Br. 21-27. As demonstrated in the following section, both Washington and non-Washington courts have explicitly held that a declaration amendment is “void *ab initio*” where it does not receive the requisite percentage of owner approval. *See* Section VI.C.4. below (discussing, *inter alia*, *Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass’n*, 184 Wn. App. 593, 337 P.3d 1131 (2014) and *America Condominium Assoc., Inc. v. IDC, Inc.*, 844 A.2d 117 (R.I. 2004)). Such holdings acknowledge and uphold the public policy established by the Legislature when it enacted WCA. As our State Supreme Court has noted:

“Washington's Condominium Act contains extensive protections for condominium consumers. We find that the various provisions of the Act should be construed with this purpose as controlling.” *One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.*, 148 Wn.2d 319, 337, 61 P.3d 1094 (2002) (en banc). Although Barclay Court believes that it should be able to restrict its owners' rights to lease their own properties without first obtaining the deliberately high level of owner agreement required by law, “[t]he legislature could not have intended that its consumer protection provisions would be so easily disregarded.” *Id.* Amendment No. 1 was void from inception.

4. Both the Washington Court of Appeals and the Rhode Island Supreme Court directly support Ms. Bilanko's interpretation of RCW 64.34.264(2).

Ms. Bilanko's exact interpretation of RCW 64.34.264(2) was recently and unanimously confirmed by the Division III Court of Appeals in the matter of *Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n*, 184 Wn. App. 593, 337 P.3d 1131 (2014). In that case, officers and directors of Ridpath Tower Condominium Association (“Ridpath Revival”) passed a second amended declaration that, *inter alia*, lowered each association member's voting rights. *Id.* at 597. The owners (“Club Envy”) sued for declaratory relief, and asked the court to declare the amendment void for lack of approval by the requisite percentage of

owners under RCW 64.34.264(4). *Id.* at 598. Ridpath Revival filed a cross motion for summary judgment, alleging that Club Envy's claims were barred as a matter of law by RCW 64.34.264(2)'s one year statute of limitations. *Id.*

On appeal, Division III affirmed the trial court's determination that the statute of limitations did not bar Club Envy's claims because the challenged amendment was not "properly passed by the association pursuant to the WCA." *Id.* at 601. In reaching this conclusion, the appellate court relied upon "the plain meaning of RCW 64.34.264(2),"² case law from Division I of the Washington Court of Appeals, and the interpretation of an identical statute of limitations by the Rhode Island Supreme Court. *See Club Envy*, 184 Wn. App. at 600-01 (citing *Keller v. Sixty-01 Assoc. of Apartment Owners*, 127 Wn. App. 614, 112 P.3d 544 (2005) and *America Condominium Assoc., Inc. v. IDC, Inc.*, 844 A.2d 117 (R.I. 2004), each discussed further below). The appellate court then affirmed summary judgment in favor of Club Envy, agreeing with the trial court that "the second amended declaration was void *ab initio*" because it had not received the number of votes required by RCW 64.34.264(4). *Id.*

² Notably, the appellate court found the "plain meaning" of the phrase "pursuant to" to be so obvious that it did not require further definition or interpretation. *Club Envy*, 184 Wn. App. at 601; *cf. Kabbae v. Dep't of Social & Health Servs.*, 144 Wn. App. 432, 440, 192 P.3d 903 (2008) (where a "statute's meaning is plain on its face, we give effect to that plain meaning").

at 603-05. Simply put, *Club Envy* confirmed Ms. Bilanko’s position that a challenge to an amendment whose adoption did not comply with the voting requirements of RCW 64.34.264(4) is not barred by RCW 64.34.264(2)’s statute of limitations.

Barclay Court’s attempt to distinguish *Club Envy* from the current proceeding are deeply inaccurate and misleading. Barclay Court wrongly asserts that the amendment in *Club Envy* was “fraudulently and unilaterally executed” by HOA President Jeffreys, and thus was challenged solely for “noncompliance with the recording requirement” under “RCW 64.34.264(5).” App. Br. 27-28. This is demonstrably false. As this Court will learn from reading the actual opinion, it contains no discussion of Mr. Jeffreys fraudulently executing the amendment, defectively recording the amendment, or RCW 64.34.264(5).³ Instead, the “Summary Judgment” section of the opinion held that: (1) the amendment “changed the voting interests of all the members,” and thus “had to be approved by all the owners ... under RCW 64.34.264(4)”; (2) the amendment “was not passed by all members,” as evidenced by “several

³ *Club Envy*’s single reference to Mr. Jeffrey’s “fraud” is that he was “convicted on a series of federal fraud charges unrelated to these transactions” [i.e., unrelated to the challenged amendments]. 184 Wn. App. at 597 (emphasis added). This information is plainly given as background for Ridpath Revival’s separate “judicial misconduct” allegation, in which it “contends the [trial] judge should have recused herself because her prior knowledge of Mr. Jeffreys caused “actual or apparent unfairness and bias.” *Id.* at 605.

declarations by condominium owners indicating they did not approve the change”; and (3) “[a]ccordingly, the second amended declaration was void ab initio.” *Club Envy*, 184 Wn. App. at 604-05.

Although *Club Envy* was the first published Washington opinion to interpret RCW 64.34.264(2) and (4) together, the appellate court’s conclusion that a procedurally invalid amendment is void from inception is supported by prior Washington case law. For example, in *Keller v. Sixty-01 Assoc. of Apartment Owners*, 127 Wn. App. 614, 621, 112 P.3d 544 (Div. I 2005), the Court of Appeals remanded the case to the trial court to determine whether the declaration amendment at issue had received the level of voter approval required in the declaration, and noted that if it had not, and the amendment was determined to be “void,” defendant’s timeliness defense would be “moot.” *Id.* Although Barclay Court dismisses *Keller* because it involved a condominium subject to the HPRA as opposed to the WCA, it contemplated the similar situation of whether a challenge to a procedurally invalid condominium amendment can be defeated by a time bar. *Id.*

The Court of Appeals’ holding in *Club Envy* is also directly supported by non-Washington case law. The WCA is a substantial adoption of the Uniform Condominium Act. See *One Pac. Towers Homeowners’ Ass’n v. HAL Real Estate Investments, Inc.*, 148 Wn.2d 319,

328, 61 P.3d 1094 (2002); *Marina Cove Condominium Owners Ass'n v. Isabella Estates*, 109 Wn. App. 230, 241, 109 Wn. App. 230 (2001). “[T]he Washington Legislature’s express purpose in adopting the WCA was to make uniform the laws of the several states concerning condominiums.” *Marina Cove*, 109 Wn. App. at 241. Because uniformity is the purpose, “the interpretation of other states provides guidance” to Washington courts in interpreting the WCA. *Cf. Thompson v. Hanson*, 174 P.3d 120, 126 (Wash. Div. I 2007).

It is therefore appropriate to look to Rhode Island’s interpretation of its Condominium Act Section 34-36.1-2.17(b), which is identical to RCW 64.34.264(2). In *America Condominium Assoc., Inc. v. IDC, Inc.*, 844 A.2d 117, 128-131, 133 (R.I. 2004), the Rhode Island Supreme Court held: (1) that because the condominium declaration amendments at issue had not received the unanimous owner approval required by statute, they were “void *ab initio*”; and (2) “when, as here, the amendment being challenged is determined to be void *ab initio*, the one-year statute of limitations does not apply to any subsequent action taken by an interested party.” *Id.* Although Barclay Court criticizes *America Condominium* by quoting to the sole dissenting judge in that case, the Rhode Island Supreme Court’s holding is consistent with the above Washington case law and offers reasoned guidance for this Court’s consideration.

5. Even if RCW 64.34.264(2) is a statute of repose, Ms. Bilanko's claims are not barred.

Barclay Court's assertion that RCW 64.34.264(2) is a statute of repose is unpersuasive. In Washington, statutes of repose have been enacted in the specific contexts of products liability (RCW 7.72.060), the Camping Resorts Act (RCW 19.105.400), improvements on real property (RCW 4.16.310), actions against a corporation after dissolution (RCW 23B.14.340), and medical malpractice (RCW 4.16.350). *See* 15A Wash. Prac., Handbook Civil Procedure § 1.2 (2014-2015 ed.). The only case that has considered RCW 64.34.264(2) deemed it a statute of limitations. *See Club Envy*, 184 Wn. App. at 599-601, 337 P.3d at 1133-34; *accord America Condominium Assoc., Inc. v. IDC, Inc.*, 844 A.2d 117, 133 (R.I. 2004) (referring to the identical statute in Rhode Island's condominium act as a statute of limitations).

Even if this Court determines that RCW 64.34.264(2) is a statute of repose, Barclay Court has waived any defense on this basis. Under CR 8(c), a responsive pleading must set forth "any ... matter constituting an avoidance or affirmative defense." "Affirmative defenses are thus waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the parties' express or implied consent." *In re Estate of Palmer*, 145 Wn. App. 249, 258, 187 P.3d 758 (2008) (citing

Harting v. Barton, 101 Wn. App. 954, 962, 6 P.3d 91 (2000)). None of these conditions apply. In the “Affirmative Defenses” section of its Answer to Ms. Bilanko’s Complaint, Barclay Court asserted only that “Plaintiff’s claims may be barred by the statute of limitations”; it made no mention of a statute of repose. CP 11 at ln. 22. Thus, to the extent that any statute of repose bars Ms. Bilanko’s claim, that defense has been waived by Barclay Court. *See Palmer*, 145 Wn. App at 258-59 (“[E]ven if we accept that RCW 11.11.070(3) is a statute of repose ... Golden waived the time bar defense ... by failing to plead it in her answer or in a CR 12 motion.”). Finally, to the extent that this defense has not been waived, RCW 64.34.264(2) still does not apply to Ms. Bilanko because by its plain language, it does not run on challenges to amendments that were not adopted “pursuant to” Section 264. *See* Section VI.C.1 *supra*.

D. Ms. Bilanko’s claims are not barred by the private time-bar in the Declaration.

Barclay Court’s alternative argument that Ms. Bilanko’s claim is barred by the time bar in the Declaration should be rejected. The time bar in the Declaration is nearly identical to the time bar in RCW 64.34.264(2), and thus was plainly modeled on the WCA. Compare:

RCW 64.34.264(2): “No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.”

Declaration Art. 25 § 25.1: “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 226.

Indeed, the only difference between the two time bars is that the RCW requires compliance with the Section 264, whereas the Declaration requires compliance with Article 25.1. And just as a subsection of Section 264 requires at least 90 percent approval to pass amendments that would change a unit’s “uses,” so does a subsection of Article 25. *Cf.* RCW 64.34.264(4) (requiring at least 90 percent approval to change “the uses to which any unit is restricted”) *with* CP 227 [Declaration] at Art. 25 § 25.2.2 (requiring at least 90 percent approval to change “the uses to which any Unit is restricted”).

Further, as the WCA provides, “provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived.” RCW 64.34.030. Even the Declaration acknowledges that “[i]n the event of a conflict between the provisions of this Declaration and the Condominium Act, the Condominium Act shall prevail.” CP 107 [Declaration] at Art. 2. Thus, if this Court finds that Ms. Bilanko’s claim is not barred by RCW 64.34.264(2), it cannot find that her claim is barred by the private statute of limitations in the Declaration. There is no reason why the nearly identical time bars would apply to Ms. Bilanko differently.

E. Barclay Court’s implied equitable argument is baseless.

In a last ditch attempt to persuade this Court to bar Ms. Bilanko’s claims, Barclay Court erroneously asserts that Ms. Bilanko’s challenge would “irreparably damage the association,” “forever harm the association,” and “upset the expressed will of the membership.” App. Br. 32.⁴ Barclay Court does not cite any legal authority or the record to support these statements, and indeed it cannot, because they are baseless hyperbole. In fact, the actual record indicates that many Barclay Court owners did not want a leasing restriction imposed. CP 251 [Amendment No. 1 approved by only 67 percent of owners]. Although Amendment No. 1 itself contains language proclaiming the benefits of rental caps, such self-serving statements were written by the Barclay Court Board (i.e., Appellant itself) without reference or citation. The only actual evidence of damages in the record are those of Ms. Bilanko, who was improperly deprived of rental income from November 2013 through January 2015. CP 240, 479 at ¶4, 506 at ¶3.

Barclay Court’s brief also repeatedly chastises Ms. Bilanko for waiting “more than six years” to challenge Amendment No. 1. App. 32.

⁴ Barclay Court’s implicit equitable argument here echoes the explicit laches argument it made to the trial court. The trial court properly rejected that argument after finding that Barclay Court had failed to “establish by clear and convincing evidence that Plaintiff [Bilanko] was aware of facts ‘constituting a cause of action or a reasonable opportunity to discover such facts.’” 466 (CR 60 Order) at ln. 13-18 (quoting *Newport Yacht Basin Assoc. of Condo. Owners v. Supreme NW., Inc.*, 168 Wn. App. 56, 277 P.3d 18, 30-31 (2012)).

But it is undisputed that Ms. Bilanko did not discover the Amendment's deficiencies until September 2013, when the Board's denial of her request to lease her unit caused her to review the Amendment in conjunction with the Declaration and Washington state law. CP 89 at ¶¶6-8. Until that time, Ms. Bilanko had not personally researched the legal validity of the Amendment because she had no reason to believe that the Board—seasoned unit holders being advised by legal counsel—would adopt an amendment illegally. *Id.* When the parties' attempt to resolve the matter out of court stalled, Ms. Bilanko prepared and then timely commenced this lawsuit in July of 2014. This Court should reject Barclay Court's undeveloped and unsupported equitable defense.

VII. REQUEST FOR ATTORNEY FEES AND COSTS

A. The Court should award Ms. Bilanko her attorney's fees and costs in defending this appeal and decline to award attorney's fees to Barclay Court.

If Ms. Bilanko prevails on appeal, the Court should award her attorney's fees and costs incurred defending this appeal pursuant to RAP 18.1(a). The WCA provides: "The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party." RCW 64.34.455. While Division I declined to award attorney's fees in the *Filmore* case "given the debatable issues of law," 183 Wn. App. at 353, it was a case of first impression. This matter is decidedly different.

First, the *Filmore* decision came down prior to the hearing on summary judgment before the trial court in this matter. Shortly after the *Filmore* ruling, *Club Envy* was decided by Division III. Notwithstanding this unanimous, binding precedent on the identical issues presented in the instant matter, Barclay Court has continued to persist in litigating these issues at great expense to Ms. Bilanko.

Second, Ms. Bilanko is an individual homeowner while Filmore LLLP is a for-profit corporation. This is an important distinction as one of the primary purposes of the WCA is to provide protection for individual condominium purchasers. See *One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.*, 148 Wn.2d 319, 330-31, 61 P.3d 1094 (2002) (discussing the strong consumer protection features of the WCA).

Awarding a prevailing individual homeowner her attorney's fees is also reasonable considering the cost of condominium association litigation. Often times these types of cases involve a relatively small sum of monetary damages when compared to the legal costs necessary to litigate such claims. Specifically in this case, the total damage award was \$34,500, plus pre- and post-judgment interest. The fees incurred by Ms. Bilanko on appeal alone are going to wipe out that award should she prevail.

The Court also should consider the chilling effect on homeowner claims should Ms. Bilanko prevail yet be denied an award of her fees. Despite the existence of binding precedent in Ms. Bilanko's favor from both Division I and Division III of the Court of Appeals, Barclay Court, like other homeowners' associations, has the financial resources to keep litigating all the way up the appellate chain in the hope that existing case law will be reversed. While it is certainly Barclay Court's right to re-litigate and appeal settled issues, the cost of doing so should not be borne by individual homeowners who have already sustained damages as a result of the illegal actions of the homeowners' association. For this same reason, should Barclay Court prevail on appeal, the Court should decline to award the fees it incurred in doing so.

For these reasons the Court should award fees and costs to Ms. Bilanko and decline to award fees and costs to Barclay Court.

VIII. CONCLUSION

Although it took two attempts and guidance from both Division I and Division III of the Washington Court of Appeals, the trial court ultimately arrived at a sound legal conclusion. Amendment No. 1 to the Barclay Court Declaration changed a permitted "use" of Ms. Bilanko's unit, did not receive the necessary owner approval, and is therefore invalid. Ms. Bilanko's challenge to Amendment No. 1 is not time barred

because Amendment No. 1 was not adopted “pursuant to” the voting requirements of RCW 64.34.264(4) or the Declaration itself. This Court should affirm the trial court’s order on summary judgment and corresponding final judgments.

Respectfully submitted this 29th day of April 2015.



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PROOF OF SERVICE

I declare that on April 29, 2015, I caused a true copy of the foregoing document to be served on the following in the manner indicated:

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