NO. 90879-6

SUPREME COURT OF
THE STATE OF WASHINGTON

[Court of Appeals No. 70013-8-1]

FILMORE LLLP, a Washington limited liability limited partnership,

Respondents,

v.

UNIT OWNERS ASSOCIATION OF CENTER POINTE CONDOMINIUM,

Petitioner.

AMICUS CURIAE BRIEF ON BEHALF OF COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF PETITION FOR REVIEW

BARKER • MARTIN, P. S.
Daniel Zimberoff, WSBA No. 25552
719 2nd Avenue, Suite 1200
Seattle, WA 98104
(206) 381-9806
Attorneys for *Amicus* Community Associations Institute

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I. INTRODUCTION

This case presents a critical question involving condominium associations in Washington State: whether a declaration amendment that imposes a limit on the number of rentals requires 90 percent approval by the association's members.

The Court of Appeals ruled that leasing a unit changes the "use" of the unit, and therefore, under RCW 64.34.264(4), the Unit Owners Association of Centre Pointe Condominium ("Association") required approval of 90 percent of its owners in adopting an amendment that limited the number of rental units within the Condominium. The Court of Appeals then invalidated the declaration amendment that was passed by a 67 percent super-majority of the owners. The Court of Appeals' decision puts into question hundreds of rental restriction declaration amendments that have been passed by condominium associations in the state of Washington over the past few decades. As a result, this case involves an issue of substantial public interest and meets the threshold for review under RAP 14.4(b)(4).

II. IDENTITY AND INTEREST OF *AMICUS CURIAE* COMMUNITY ASSOCIATIONS INSTITUTE

Community Associations Institute ("CAI") is an organization dedicated to providing information, education and resources to community association members and managers. CAI's more than 33,000 members, located in 60 local chapters, include homeowners, professional managers, community management firms, and other professionals and companies

that provide products and services to community associations. CAI is by far the largest organization serving the over 60 million owners who live within a community association in the United States. The Washington state chapter of CAI is the second largest chapter in the country serving over 9,900 community associations within the state. All of its members either live within a Washington community association or work in the industry. Therefore, CAI's members are directly impacted by any decision that dictates the percentage of owners who must approve a condominium association's declaration amendment.

III. STATEMENT OF THE CASE

Amicus CAI adopts and incorporates the Statement of Facts as set forth in Petitioner's Petition for Discretionary Review.

IV. AUTHORITY AND ARGUMENT

A. If Left Intact, the Court of Appeals' Decision Could Unravel Decades of Condominium Association Governance.

When it invalidated Centre Pointe's Twelfth Amendment, the Court of Appeals called into question a hundred, or more, rental restriction amendments affecting thousands of Washington residents that have been passed with less than 90 percent unit owner approval. These amendments, some of which date back two or three decades, are now subject to challenge. Under the recently decided *Club Envy of Spokane, LLC v. Ridpath Tower Condominium Ass'n*, -- P.3d --, 2014 WL 6464419 (Nov

18, 2014), these associations may not be protected by the one-year safe harbor under RCW 64.34.264(2).[1]

In *Club Envy*, the developers of a large conversion condominium in Spokane filed a declaratory judgment action asking the court to invalidate a second amended and restated declaration recorded by the association. The *Club Envy* court held that the declaration amendment in question was void *ab initio*, and as such, the one-year limitation period in which to challenge the amendment under RCW 64.34.264(2) did not apply. *Id.* at *6. In reaching its conclusion, the court looked to another Court of Appeals' decision, *Keller v. Sixty–01 Associates of Apartment Owners*, 127 Wn. App. 614, 112 P.3d 544 (2005), and a Rhode Island Supreme Court opinion, *America Condominium Association, Inc. v. IDC, Inc.*, 844 A.2d 117 (R.I.2004), to summarily rule that the developers' challenge to the validity of the amendment as not being properly passed by the association pursuant to the Washington Condominium Act ("WCA") was not barred by RCW 64.34.264(2)'s one-year time bar. *Club Envy* at *3.

The *Club Envy* court's reliance upon *Keller* and *America Condo Ass'n* was misguided. *Keller* is inapposite because it did not involve RCW 64.34.264(2), or even the WCA, at all. *Keller* involved challenge to a declaration amendment that altered how expenses would be allocated for

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[1] RCW 64.34.264(2) states: "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."

a condominium association governed under the Horizontal Property Regimes Act, RCW Chapter 64.32, *et seq.* In short, the *Keller* case does not stand for the proposition that every invalidated declaration amendment is void *ab initio* and therefore not subject to RCW 64.34.264(2)'s safe harbor protection.

The value of a case from Rhode Island similarly is unpersuasive. Lastly, the *Club Envy* court's statement that the plain meaning of the statute supported a finding that an amendment not properly passed by an association pursuant to the WCA is not barred by the statute's one-year limitation or repose period constitutes circular reasoning. In essence, the *Club Envy* court said: an amendment not properly adopted is not subject to the one-year limitation because it was not properly adopted.

Regardless of the basis for the court's opinion in *Club Envy*, it is a published decision that is the law of this state. Accordingly, the decision of the Court of Appeals in the instant case has far reaching consequences for thousands of Washington state residents who live within condominiums that passed rental cap declaration amendments with less than 90 percent approval.

As demonstrated above, there is substantial public interest in reviewing the Court of Appeals' decision in this case under RAP 13.4(b)(4).

B. The Court of Appeals' Decision Has Unintended Adverse Consequences for Many Washington Residents.

Under the Court of Appeals' decision, a condominium association that desires to limit the number of leased units can only accomplish the restriction by amending its declaration with affirmative approval of at least 90 percent of its members. This requirement sets the bar at an almost unachievable level for the vast majority of Washington condominium associations.

Condominium associations in Washington are non-profit corporations governed by layperson, volunteer boards of directors.[2] Many of these associations have difficulty recruiting and retaining owners to serve on the board. Consequently, these associations often have board positions that sit vacant for years due to unit owner apathy. The problem with filling board positions is exacerbated by the difficulty in obtaining quorum at association meetings.

To combat the problems outlined above, many Washington condominium associations have placed restrictions on the number of rentals in order to maximize owners living onsite. These associations have found that owners who live onsite are more likely to serve on a board of directors, attend association meetings, vote on association business and

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[2] Most condominium association board members serve dual roles as directors and corporate officers.

take care of the property, as compared to transient renters.[3] As stated above, it is hard enough for community associations in Washington to obtain quorum at meetings, but to require 90 percent approval on a declaration amendment limiting the percentage of rentals would simply be unattainable for the majority of these communities.[4]

In addition to the adverse consequences of the Court of Appeals' decision noted above, there is an equally undermining result involving FHA financing. Under current FHA guidelines, a condominium project is eligible for FHA certification only if the owner-occupier ratio is greater than 50 percent. Once the number of onsite owners drops below the number of renters, the project loses certification; thus, FHA-backed financing becomes unavailable. This negative consequence is all too real in today's mortgage lending environment.

FHA serves predominantly low and moderate income buyers purchasing their first home. Seventy-eight percent of home-purchase mortgages supported by FHA in 2012 were for first-time home buyers, which is consistent with historical data. Further, FHA has played an

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[3] *See* Matt Drewes, "Considering Rental Restrictions Part One: What and Why?" Minnesota Community Living, Community Association Institute (2013).

[4] Though many associations' governing documents allow for voting by mail though written consent forms, such as what was done for the vote on the Twelfth Amendment conducted by Centre Pointe in this case, absentee owners still return a much lower percentage of ballots than onsite owners.

indispensable role in extending home financing to traditionally under-served populations such as minorities. Because many private lenders severely curtailed their home lending, especially to lower-income borrowers, FHA became one of few options available for consumers seeking affordable home financing. Further, in an effort to bolster the housing market, Congress several times increased the maximum loan limit that FHA could insure all the way up to $729,500 in some markets, increasing the market for FHA loans. As such, FHA's market share increased from around 5 percent of all mortgage loans before the mortgage crisis to nearly 40 percent in 2010.

If the Court of Appeals' decision is not reviewed and reversed, and condominium associations in Washington require at least 90 percent approval to adopt a rental cap, then it is highly likely many condominiums owner-occupied ratio will slip below 50 percent. Consequently, they will lose FHA-backed financing, meaning approximately 40 percent of the market of potential buyers will be lost to these owners.

The facts described above show there is substantial public interest in reviewing the Court of Appeals' decision in this case under RAP 13.4(b)(4).

C. The Court of Appeals' Decision is in Conflict with Another Decision of the Court of Appeals.

In *Ross v. Bennett*, 148 Wn. App. 40, 203 P.3d 383 (2008), subdivision homeowners brought a declaratory judgment action against a neighbor to prevent him from renting his property for less than 30 days based on CC&Rs that required the homes to be used for "residence purposes only." The court held that renting the home did not change the use of the property—that it remained an allowable residential use—and entered judgment in favor of the defendant. Although *Ross* involves single-family lots and was not decided under the WCA, its analysis and holding contradict directly with the Court of Appeals' holding here.

Additionally, the *Ross* case was cited in this Court's recent *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 252-53, 327 P.3d 614 (2014) opinion:

> If a vacation renter uses a home "for the purposes of eating, sleeping, and other residential purposes," this use is residential, not commercial, no matter how short the rental duration. *Ross*, 148 Wash.App. at 51–52, 203 P.3d 383 (holding rental use was residential not commercial because such use "is identical to [the homeowner's] use of the property, as a residence, or the use made by a long-term tenant"). "The owner's receipt of rental income either from short-or long-term rentals in no way detracts or changes the residential characteristics of the use by the tenant." *Id.* at 51, 203 P.3d 383. Nor does the payment of business and occupation taxes or lodging taxes detract from the residential character of such use to make the use commercial in character. *See id.* (determining that "whether

> the short-term rental is subject to state tax does not alter the nature of the use").

In *Ross*, the Court of Appeals concluded that (1) "eating, sleeping and other residential purposes" of a home were not changed because of leasing; (2) use of a home by a renter was identical of that by an owner; and (3) receipt of rental income "in no way detracts or changes the . . . characteristics of the use. . . ." *Ross*, 148 Wn. App. at 51–52. The court's analysis and reasoning in *Ross* contradicts its findings and holding in the instant action. If leasing a unit does not change its use from residential, as determined by the *Ross* court, then what other use would it change?

The Respondent in this case falls into the same trap as the Court of Appeals did in employing *ad hoc* reasoning to conclude leasing changes the use of a condominium unit. Respondent cites to the Court of Appeals' opinion that:

> [W]e express no opinion as to whether or to what extent other types of uses [other than leasing] are subject to the 90% requirement."

Respondent's memorandum at 13. But if the Court of Appeals in this case only examined leasing as a use, and rejected conducting analysis of any other types of use (*e.g.*, home business restrictions, pet restrictions, quiet hours, etc.), then its decision cannot be reconciled with its decision in

Ross.[5] Under RAP 13.4(b)(2), the decision of the Court of Appeals should be reviewed.

V. CONCLUSION

Based on the foregoing, *amicus* CAI requests this Court accept review of the Court of Appeals' decision in this case and rule in favor of Petitioner Unit Owners Association of Centre Pointe Condominium.

Respectfully submitted this 1st day of December, 2014.

Daniel Zimberoff, WSBA No. 25552
Attorney for *Amicus Curiae*
Community Association Institute
Washington State Chapter

[5] Moreover, by failing to moor its decision with proper case law or analytical reasoning, the Court of Appeals' decision opens the door to homeowner challenge of a wide range of condominium declaration amendments as restricting "use" of a unit far beyond merely leasing. If the instant decision is not reversed, then there likely will be a chilling effect on condominium associations amending their declarations, because in the absence of a clear definition of "use," any amendment that touches a unit could be challenged for changing its "use" under the Court of Appeals' decision here.

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Dear Clerk,

Attached, please find the following for documents for Fillmore LLLP v. Unit owners Association of Center Pointe Condominium (case no. 90879-6):

1. *Motion for Leave to File Amicus Curiae Brief of Community Associations Institute In Support of Petition for Review;*
2. *Amicus Curiae Brief on Behalf of Community Associations Institute in Support of Petition for Review; and*
3. *Certificate of Service*

The attorney filing these documents is as follows:

Daniel Zimberoff, WSBA No. 25552
BARKER • MARTIN, P. S.
dzimberoff@barkermartin.com
(206) 381-9806
Attorneys for Amicus Community Associations Institute

Thank you,

Aleena Hodges • Paralegal
Barker • Martin
719 Second Avenue, Suite 1200 Seattle, WA 98104
Direct (206) 381.9806 x114 • **Toll Free** (888) 381.9806
www.barkermartin.com