

HOA Authority to Amend Declaration to Limit Rentals:

Wilkinson v. Chiwawa Communities Association: Local Ground Tremor or Seismic Shift?

On April 17, 2014, the Washington Supreme Court issued a 5-4 decision that shook the legal landscape for homeowner associations (“HOA”). In striking down an amendment prohibiting short term leasing of homes, the Court created a new strict test for amendments of covenants that could invalidate innumerable Washington HOA covenant amendments and severely restrict associations from passing new amendments. While the magnitude of the “quake” is open to debate, one thing is certain: all Washington homeowner associations (and possibly condo associations) that are considering amendments of their declarations need to be aware of this case.

The Wilkinsons owned a house in Chiwawa River Pines, a resort community near Leavenworth. The community was created by a declaration in 1988, forming the Chiwawa Communities Association (“Association”). The original declaration restricted uses to “single family residential use”, prohibited “commercial use” and allowed a sign on each lot for “sale or rent”. The declaration gave the Association the power “to change these protective restrictions and covenants in whole or in part” by majority vote.

Over the years, the established practice among some Chiwawa owners was to rent their homes to vacationers on a short term basis. However, starting in 2007, as a result of owner complaints due to an increase in rentals, the Association considered barring short term rentals. The Association members, by a majority, duly adopted and recorded a declaration amendment barring any rentals of less than six months. The Wilkinsons and others sued the Association to have the restriction declared invalid. The trial court agreed with the Wilkinsons, but also stated that an amendment barring rentals of less than one month *would* be valid.

Subsequently, a majority of the Association members passed a declaration amendment enacting a one month rental prohibition. The Wilkinsons sued again to contest this second amendment and won. The Association appealed the case to the Supreme Court.

The Supreme Court first ruled that renting houses was not a prohibited “commercial use,” and that renting was consistent with the “single family residential use” restriction in the original declaration. It noted that the original 1988 declaration obviously contemplated rentals as it included the provision allowing “for rent” signs on lots. . In doing so, the Court affirmed the trial court’s refusal to allow the Association to present any oral testimony regarding “residential single family” use in the Chiwawa community.

Finding that the original 1988 declaration did not bar leasing was not particularly earth shaking. However, what the five justice majority did next may be seismic. Over a vigorous protest by four dissenting justices, the Court announced what may be a new test for amendments to HOA declarations.

First, the Court found that while the original 1988 declaration allowed *changes* of existing covenants by majority vote (a common provision in HOA declarations), **it did not allow a majority vote to create *new* restrictions that were “unrelated” to existing ones.** As there were no rental restrictions in the original 1988 declaration, the prohibition of leases of under one month was not a *change* but a “creation of a new restriction” and was thus invalid absent unanimous consent of the members.

Second, the Supreme Court ruled that amendments of HOA declarations by a less than unanimous vote of the members are only valid if they are “consistent with the general plan of development.” As the Court found that the Association’s amendment failed the “create versus change” test and was invalid, it did not decide whether the restriction was “consistent.”

The Court thus appears to be establishing a new two-part test for HOA declaration amendments imposing new restrictions unrelated to existing restrictions. For amendments by majority vote to be valid, they must be consistent with the general plan of development *and* related to an existing covenant. Unanimity is required when a covenant amendment does not relate to an existing covenant and is not consistent with the general plan of development.

Three of the dissenting justices warned that this decision barred any limit on duration of rentals by the Association. They also disagreed with the manner in which the majority upheld the trial court decision that rentals did not violate the “single family residential use” provision, arguing that the courts needed to take testimony on this point as each case is fact specific. They also rejected what they called the new distinction between “changing” and “creating” restrictive covenants based on the “relatedness” test. Finally, they argued for simply using the existing “consistent with the general plan of development” test as a protection of homeowners’ expectations, regardless of whether an amendment was a “change” or “new”.

The final dissenting justice noted that owners buying in the development knew that the majority of members had the right to “change” restrictions, and a simple definition of “change” included adding or subtracting restrictions. She also pointed out that this could bar relatively minor “new” restrictions while allowing a major “change” by majority vote, and agreed with the other dissenters that the Court should just use the “consistent with the general plan of development” test.

What does *Wilkinson* mean for homeowner associations wishing to amend declarations or enforce existing amendments? Legal practitioners’ opinions run the gamut from the relatively unconcerned (“it’s just a local tremor”) to the catastrophic (“it’s the Big One”).

The first group notes that this is a decision regarding homeowner associations and does not directly impact condominium associations, which are governed by comprehensive statutory regimes - including the subject of declaration amendments. The validity of post-purchase declaration amendments has been addressed in *Shorewood West v. Sadri*, 140 Wn. 2d 47, 992 P.2d 1008 (2000). Thus, amendments to condominium declarations are not strictly governed by this case. They also note that this is just one decision regarding the specific wording of one particular declaration, and does not automatically apply to all homeowners associations.

Those seeing this as a more seismic shift wonder if the Court's restriction of HOA members to change their own declaration by majority vote will impact later decisions on amendments and other issues, and be extended to condominium associations as well. They see this strict broad test governing amendments and rental restrictions as problematic for all Washington associations.

Who is right? The final answer is probably somewhere in the middle, and only time will tell. Until then, associations contemplating passing a declaration amendment (or enforcing a prior amendment) should contact their legal counsel to discuss how this decision may impact their association.