

## **Statute of Limitations: How long after an amendment is recorded can it be challenged successfully?**

### **1. New Act Condos**

An Amendment properly adopted by a New Act condo Association (an Association formed after July 1, 1990) in accordance with the requirements of the New Act cannot be successfully challenged more than one year after it is recorded.<sup>1</sup>

But the New Act's one year statute of limitations does not apply to an Amendment that was "void from its inception."<sup>2</sup> An Amendment that was improperly adopted under the New Act can be successfully challenged more than one year after it is recorded, because it was invalid at the time of recording.<sup>3</sup>

### **2. Old Act Condos**

An Amendment adopted by an Old Act condo Association (an Association formed before July 1, 1990) might be successfully challenged at any time after it is recorded, unless the Declaration provides otherwise. The Old Act does not contain a statute of limitations.<sup>4</sup>

### **3. HOA**

Washington courts have not stated whether all improperly adopted Amendments (regardless of how long ago they were recorded) can be successfully challenged. In 1998, the Washington Court of Appeals determined that an improperly adopted HOA covenant which was recorded nineteen years before it was challenged could not be voided.<sup>5</sup>

The Court's holding suggests that Washington courts likely will affirm an improperly adopted Amendment if the challenger has notice of the Amendment before purchasing, and the challenger's

conduct demonstrated acceptance or ratification of the Amendment (e.g. an owner probably cannot successfully challenge an Amendment if he initially complies with the Amendment before challenging its validity and if the owner knew about the Amendment before purchasing).

Washington courts have invalidated an improperly adopted Amendment subject to the New Act that was challenged five years after it was recorded<sup>6</sup>, and invalidated an improperly adopted Amendment subject to the Old Act that was challenged ten years after it was recorded.<sup>7</sup>

It is possible the Washington Court of Appeals could interpret RCW 64.34.262(2)'s application to improperly adopted Amendments differently in the future, and it will probably depend on specific facts and circumstances. The real lesson from these cases is that an Association should follow the correct process and voting procedure(s) when amending its Declaration or CC&Rs.

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<sup>1</sup> 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.").

<sup>2</sup> *Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n*, 184 Wn. App. 593, 600 (Wash. Ct. App. 2014) (an improperly passed Amendment is "void ab initio" (void from the time it is adopted), and RCW 64.34.264(2)'s one year statute of limitations does not prohibit challenges to improperly passed Amendments).

<sup>3</sup> Some people believe the *Club Envy* court based its reasoning on two cases which did not involve application of RCW 64.34.262(2) or the WCA. Neither case supports the Court's holding that the plain meaning of the WCA indicates that an improperly adopted Amendment is not barred by the statute's one-year statute of limitations. Additionally, the Court's holding constitutes circular reasoning: an Amendment not properly adopted is not subject to the one-year limitation because it was not properly adopted. Brief On Behalf Of Community Associations Institute at 3-4.

<sup>4</sup> See, *Keller v. Sixty-01 Ass'n of Apartment Owners*, 2008 Wn. App. LEXIS 734, unpublished (2008). *Keller* involved challenge to a declaration Amendment that altered how expenses would be allocated

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for a condominium Association governed under the Old Act. The Keller case does not stand for the proposition that every invalidated declaration Amendment is void at its adoption and therefore not subject to RCW 64.34.264(2)'s safe harbor protection. They also argue that a case from Rhode Island (*America Condominium Association*) similarly is unresponsive.

<sup>5</sup> *Bishop v. Twin Lakes Golf & Country Club*, 1998 Wash. App. LEXIS 241 (Wash. Ct. App. Feb. 17, 1998) (a homeowner was time-barred from challenging an improperly adopted covenant because his predecessor's conduct demonstrated ratification and acceptance of the amended covenant. The predecessor purchased the home "subject to all easements, restrictions and reservations of record," and paid the dues imposed by the covenant- and the covenant was recorded so the homeowner knew about it before purchasing the home).

<sup>6</sup> See, *Club Envy of Spokane* 184 Wn. App. 593.

<sup>7</sup> See, *Keller*, 2008 Wn. App. LEXIS 734 (court upheld the trial court's jury instruction that if the condominium Declaration Amendment was improperly passed, the Amendment was void).