

11--Restrictions on Use: What Percentage of Owners Must Approve a Rental Restriction in a Community?

Short Answer

For New Act Condo Associations, state law requires that 90% of Owners (and every affected Owner) vote for a restriction on use.¹ We believe a rental cap is a restriction on use.

For Old Act Condo Associations, state law only requires that 60% of Owners' consent to any change in restrictions on use, including rental restrictions (though individual Declarations may require a greater percentage).²

For HOA Act Communities, the answer will depend on how a court interprets the Governing Documents of the community. A court may require unanimous approval of a new restriction regardless of the amendment procedures outlined by the documents.³

For communities governed by the Washington Uniform Common Interest Ownership Act (WUCIOA) the minimum consent required is 67%, the Declaration is permitted to set the percentage between 67% and 90%.⁴ In establishing new restrictions, the Association must protect uses permitted prior to the amendment.⁵ The Board, on its own, can adopt rental restrictions to conform to the leasing requirements of secondary mortgage markets like Fannie Mae, and Freddie Mac.⁶

New Act Condos

The Washington State Supreme Court, in *Filmore LLLP v. Unit Owners Ass'n of Centre Pointe Condo*, classified a rental restriction as a restriction on use.⁷ Failure to get the required vote makes the restriction invalid and unenforceable. The Washington Supreme Court's ruling in *Filmore* was very narrow. The Court specifically stated that its decision did not address the

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interpretation of "restrictions on use" from the statute and based its decision only on the interpretation of Centre Pointe's Declaration.

The *Filmore* decision left several unanswered questions. The court did not address the language requiring approval of "each unit particularly affected," which could, in effect, require approval of 100% of an Association's Unit Owners. The court also failed to address whether leasing-related requirements other than pure rental caps constitute use restrictions, and whether rental restrictions adopted more than one year earlier, would be void.⁸

The court has since determined that Owners only have a one-year period to challenge an amendment of the Declaration. In *Bilanko v. Barclay Court Owners Ass'n*, 185 Wash.2d 443 (2016), the plaintiff contested a similar leasing restriction as invalid because the Association failed to obtain a 90 percent vote. The court upheld dismissal of the plaintiff's claim as time-barred and thus did not reach the question of validity of the amendment. The court determined that, absent fraud or a similar act which voided the amendment, Owners only had one year from the recording of the amendment to bring their challenge.

We continue to advise that New Act condos must obtain approval from 90% of the Owners to adopt a valid rental cap.

Old Act Condos

Under RCW 64.32, restrictions on use must be documented in the Declaration.⁹ An amendment to add a restriction must be approved by at least 60% of the Owners.¹⁰ Before the restriction is effective, it must be recorded.¹¹ The Supreme Court ruled in *Shorewood West Condominium Ass'n v. Sadri*,¹² that a rental restriction must be implemented pursuant to these procedures.

In *Sadri*, the court examined the issue of rental restrictions in condominiums governed by RCW 64.32. In that case, the Association adopted the rental restrictions in the Bylaws rather

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than the Declaration. The court ruled that a rental restriction must be placed in the recorded Declaration. Since the community failed to do so, the restriction could not be enforced. While not directly reaching the issue, the court's opinion supports rental restrictions recorded in the Declaration so long as they were added through procedures consistent with the statute.

HOA Communities

The Supreme Court has determined that the Governing Documents control and the court will look to enforce the procedures outlined in those documents so long as the restrictions are reasonable and consistent with the plan of development.¹³ Therefore, the Governing Documents may provide for the creation of new restrictions after the approval of a simple majority of the Owners. However, things become more complicated if the covenants are silent about the creation of new restrictive covenants.

In *Wilkinson v. Chiwawa Communities Association*, the Supreme Court determined that a rental restriction was not covered by the restriction on commercial use under the terms of the community's Declaration. Further, it held that the Governing Documents did not provide for the means of establishing new restrictions but only permitted for the modification of the covenants already in existence.¹⁴ In this situation, the court prioritized protecting the Owners' expectations under the Declaration.¹⁵ The court worried that, at the time the Owners purchased the property, they would not have expected that a simple majority could impose new restrictions on their use of the property.¹⁶ Therefore, under the *Chiwawa* Declaration a majority of Owners could not add new covenants which had no relation to an already existing covenant.¹⁷ Because the *Chiwawa* Declaration did not provide for a means of creating a new covenant, the Association could not adopt a new restriction without the unanimous consent of the Owners.¹⁸

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WUCIOA

Consistent with the material already presented, it seems likely that, under WUCIOA, the court will treat new rental restrictions as a restriction of use. WUCIOA permits the Declaration to establish the threshold for approving new restrictions. However, it outlines some limits to the Association's discretion. First, no new restriction can be created without at least 67% of the Owners' votes approving of the restriction.¹⁹ Second, WUCIOA provides that the Declaration may require up to 90% of the votes to approve a new restriction.²⁰ Finally, the statute requires that property rights existing before the amendment must be protected.²¹

Outside of the normal process for implementing restrictions, the statute explicitly provides that the Board may adopt rules restricting the leasing of residential Units as needed to meet the underwriting requirements of the secondary mortgage markets.²² Rental caps which are more restrictive than what is required by institutional lenders may not be enforceable. Currently the secondary mortgage markets will allow 50% of the Units to be rentals

¹ RCW 64.34.264(4) (Amendment of Declaration) (“[N]o 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 the owners of units to which at least ninety percent of the votes in the Association are allocated other than the declarant or such larger percentage as the Declaration provides.”).

² Washington courts have not considered this issue for Old Act condo associations. See RCW 64.32.090(13) (Contents of Declaration) (“[N]ot less than sixty percent of the apartment owners shall consent to any amendment . . .”). However, as the court noted in *Filmore, supra* n.2, it interpreted the term “use” under the Old Act the same way in *Shorewood West Condominium Ass’n v. Sadri*, 140 Wash.2d 47 (2000). *Filmore* at 349. Although the issue presented in that case did not have to do with the percentage of the vote required to impose a rental cap, the court concluded that “one should read ‘use’ in RCW 64.32.090(7) to mean all uses and not just general categories of use such as residential use or commercial use.” *Id.* at 56.

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³ See, *Wilkinson v. Chiwawa Communities Association*.

⁴ RCW 64.90.285(1) and (6) (“the declaration may be amended only by vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated, unless the declaration specifies a different percentage not to exceed ninety percent for all amendments or for specific subjects of amendment... The declaration may require a higher percentage of unit owner approval for an amendment that is intended to prohibit or materially restrict the uses of units permitted under the applicable zoning ... a declaration may not require, as a condition for amendment, approval by more than ninety percent of the votes in the association or by all but one unit owner...”)

⁵ *Id.*

⁶ RCW 64.90.510(9)(c). (“An association may adopt rules that affect the use or occupancy of or behavior in units that may be used for residential purposes, only to... restrict the leasing of residential units to the extent those rules are reasonably designed to meet underwriting requirements of institutional lenders that regularly make loans secured by first mortgages on units in comparable common interest communities or that regularly purchase those mortgages.”)

⁷ See, *Filmore LLLP v. Unit Owners Ass'n of Centre Pointe Condo.*, 183 Wash.App. 328 (2014) (court affirmed the appellate court's ruling that a lease restriction via Declaration amendment for the Centre Pointe community requires a 90 percent vote because RCW 64.34.264(4) requires a 90% vote for restrictions on use), and this Declaration defined “use” to include rental restrictions.

⁸ Subsequent case law seems to indicate that RCW 64.34.264(2), the one-year statute of limitations, would save these amendments.

⁹ RCW 64.32.090(7) “(The declaration shall contain... [a] statement of the purposes for which the building and each of the apartments are intended and restricted as to use...”)

¹⁰ RCW 64.32.090(13) “(The declaration shall contain...[t]he method by which the declaration may be amended, consistent with this chapter: PROVIDED, That not less than sixty percent of the apartment owners shall consent to any amendment except that any amendment altering the value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities shall require the unanimous consent of the apartment owners”)

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¹¹ RCW 64.32.140 (“The declaration, any amendment thereto, any instrument by which the property may be removed from this chapter and every instrument affecting the property or any apartment shall be entitled to be recorded in the office of the auditor of the county in which the property is located. Neither the declaration nor any amendment thereof shall be valid unless duly recorded.”)

¹² 140 Wash.2d 47 (2000).

¹³ *Wilkinson*, 180 Wash.2d at 256

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* At 258

¹⁹ WUCIOA, 64.90.285(1)(a). (“...the declaration may be amended only by vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated, unless the declaration specifies a different percentage not to exceed ninety percent for all amendments or for specific subjects of amendment...”)

²⁰ WUCIOA, 64.90.285(6). (“The declaration may require a higher percentage of unit owner approval for an amendment that is intended to prohibit or materially restrict the uses of units permitted under the applicable zoning ordinances, or to protect the interests of members of a defined class of owners, or to protect other legitimate interests of the association or its members. Subject to subsection (13) of this section, a declaration may not require, as a condition for amendment, approval by more than ninety percent of the votes in the association or by all but one unit owner, whichever is less.”)

²¹ *Id.*

²² SSB 6175 § 323(9)(c).