COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203 (720) 625-5150	
Appeal from Douglas County District Court Civil Case No.: 2017CV30537 Honorable Paul A. King	
Appellant: STROH RANCH BUSINESS CIRCLE, INC. v. **Appellee:** STROH RANCH DEVELOPMENT, LLC	**▲ COURT USE ONLY ▲**
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BRIEF OF AMICUS CURIAE COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF APPELLANT STROH RANCH BUSINESS CIRCLE, INC.

Amicus Curiae Community Associations Institute ("CAI") submits the following Brief in support of the Opening Brief of Appellant Stroh Ranch Business Circle, Inc. (the "Association").

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with all requirements of C.A.R. 28 and C.A.R. 53, including all formatting requirements set forth in these rules. Specifically, I certify that:

The brief complies with C.A.R. 53(a).

☑ It contains 3211 words.

☐ It does not exceed 12 pages.

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I. INTRODUCTION AND STATEMENT OF INTEREST

The Community Associations Institute (CAI) is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 35,000 members include homeowners, board members, association managers, community management firms and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 68 million homeowners who live in more than 380,000 community associations in the United States.

In 1991, CAI volunteers were instrumental in drafting what became the Colorado Common Interest Ownership Act ("CCIOA"), which the General Assembly enacted to guide and protect community associations, owners, homebuilders, lenders and management companies in connection with creation and operation of common interest communities. Because one of the central arguments in this case turns on the interpretation of CCIOA, CAI is uniquely suited to advise this Court as an amicus curiae under C.A.R. 29 concerning both the intent of this Act and the effect the district court's ruling may have on other communities throughout the state.

For over twenty years, CCIOA has provided law for the benefit of owner associations, owners, developers (declarants), lenders, management companies and others in relation to the creation and operation of common interest communities.

II. POSITION OF THE COMMUNITY ASSOCIATIONS INSTITUTE

CAI requests that this Court overturn the district court's ruling in the instant matter.

CAI respectfully submits that the district court erred in interpreting and applying the Colorado Supreme Court's holding in *Ryan Ranch Community Association v. Kelley*, 380 P.3d 137 (Colo. 2016). The district court interpreted *Ryan Ranch* to suggest that all annexations recorded since 1991 are subject to challenge at any time, and that any community association that attempts to enforce its covenants may be subject to penalties for recording spurious documents. CAI does not believe this is reasonable or what the Supreme Court intended when it announced *Ryan Ranch* in 2016.

If this holding stands, it will create havoc and costly litigation for many Colorado communities if property owners are permitted to contest the validity of annexations recorded years or even decades ago.

For these reasons, CAI asks that this Court overturn the district court's ruling in this matter.

III. STATEMENT OF THE CASE

CAI adopts and incorporates the Association's statement of the case.

IV. ARGUMENT

This is an important case for CAI, for Colorado community associations, developers, owners and others. A published decision in favor of Stroh Ranch Development, LLC ("SRD") would harm owners and community associations throughout Colorado. CAI requests that this Honorable Court overturn the decision of the district court and recognize the significant hardships that will be imposed if the door is opened for the judiciary to examine every declaration amendment and annexation recorded in the twenty-six years since CCIOA's enactment. The public policy and the legislative intent behind CCIOA, as first passed by the legislature and as amended, contains specific time limits for parties to challenge recorded annexation documents.

CCIOA balances rights and responsibilities among all of those involved in a common interest community, including developers (declarants), owners, owner associations, lenders, board members, management companies and third parties that do business with owner associations.

This balance of rights and responsibilities is at the core of this case, a balance SRD would have tipped in favor of declarants. The balance sought by the

Association and by CAI is the balance established by CCIOA between the rights of declarants to exercise development rights, and statutory limits for contesting the validity of recorded annexations and declaration amendments.

A. The Arguments of SRD Regarding the Retroactive and Retrospective Application of *Ryan Ranch* Would Open the Door for Property Owners to Challenge all Annexations Recorded Since 1991.

This case involves a declarant who consented to the annexation of real estate into a common interest community in 1999. Over time, disputes arose over assessments on the property, which prompted the Association to record a lien in 2017. The lien was proper under both the community's recorded covenants and CCIOA. SRD responded by suing the Association under Colorado's spurious lien statute, which allows property owners to make expedited challenges to patently frivolous liens that were neither approved by the owner nor authorized by law.

Initially, CAI notes that a lien is not spurious if there is a statutory basis for the lien. *See* C.R.S. § 38-35-201(4)(a); *and Tuscany, LLC v. Western States Excavating Pipe & Boring, LLC*, 128 P.3d 274, 278 (Colo. App. 2005) (A lien "provided for by a specific Colorado...statute" is "excluded from the definition of "spurious liens" by § 38-35- 201(4)(a) and therefore (it) cannot be invalidated on that basis," even if otherwise held to be unenforceable.) Section 316 of CCIOA sets forth the statutory powers for assessments and liens. Because the Association's

assessment lien is provided for by statute at CCIOA Section 316, as a matter of law it cannot be spurious.

Nevertheless, after a short hearing, the district court judge granted the petition. He examined the 1999 annexation form and concluded that it did not strictly comply with the requirements that the Colorado Supreme Court's would recognize seventeen years later in *Ryan Ranch Community Ass'n v. Kelley,* 380 P.3d 137 (Colo. 2016).

In *Ryan Ranch*, the Colorado Supreme Court ultimately ruled against an association seeking to enforce covenants stating that units identified on a plat would be automatically annexed to a community upon recording of a deed. In that case, the court agreed principally with the property owners' argument that units (lots) could only be annexed by recording a declaration amendment in strict compliance with all statutory requirements, including a mathematical re-calculation of allocated interests. The court invalidated the common practices of "annexation by deed" and automatic reallocation of allocated interests by reference to other recorded documents.

This case asks the Court of Appeals to decide how broadly the *Ryan Ranch* opinion should be applied. The district court has interpreted *Ryan Ranch* to mean that all annexations recorded since 1991 are subject to challenge at any time by disgruntled property owners, and that community associations may be subject to

penalties for attempting to enforce covenants. Moreover, the district court failed to consider an important distinction between the exercise of development rights (as occurred in *Ryan Ranch*) and a third party's consent to annexation of additional property (in the immediate case).

If the district court's interpretation of *Ryan Ranch* is upheld, it would undoubtedly jeopardize not only the structure of many community associations in Colorado, but also associations' practical and financial ability to govern communities by subjecting them to costly litigation if property owners are permitted to contest the validity of all prior annexations. In Colorado and many other states, communities are often developed in phases, with individual units or "chunks" of property annexed to the community over time, as the community is built out. A completely developed (built out) community may include the initial real estate, plus additional property that is added through numerous subsequent annexations.

Communities that have consistently enforced covenants and collected assessments for years or decades could be subject to a litany of potential lawsuits challenging the applicability of the covenants to individual units, and the authority of associations to enforce the covenants as to each particular unit. The result is likely to be one in which some units are excluded (because of minor deficiencies in an

annexation document), while others remain subject to a community's recorded covenants, with complex practical and financial implications.

If the door is opened for the judiciary to examine every annexation recorded in last twenty seven years since CCIOA was originally enacted, it would significantly impair or effectively prohibit associations' ability to enforce covenants in the more than 7,500 community associations in Colorado. It would defeat the concept of the common scheme or plan, and the express public policies underlying CCIOA that is the fundamental framework for all common interest communities. *See* C.R.S. § 38-33.3-102(1)(c).

This result cannot be what the Supreme Court intended when it announced *Ryan Ranch* last year. Indeed, the strict compliance standard adopted in *Ryan Ranch* was subsequently distinguished by *Perfect Place v. Semler*, 2016 COA 152, which was announced just a few weeks after *Ryan Ranch*. *Id*., ("Because minor deficiencies should not render otherwise marketable title unmarketable, we further conclude that substantial compliance with the requirements of § 38-33.3-213 is sufficient to satisfy the application procedures for subdividing a unit.") Moreover, the court of appeals also remanded the *Ryan Ranch* case for determination of whether the statute of limitations barred the owner's challenge to the annexation. However, the case settled before the court had an opportunity to review this question.

The public policy supporting reasonable time limits on when a party can challenge recorded annexation documents is obvious: to avoid the havoc and costly litigation that would inevitably result, and to preserve the equitable rights of property owners. Such limits already exist in CCIOA, as discussed further below.

There is also no public interest advanced in retroactively applying the holding of *Ryan Ranch* to this case. Such application defeats the reasonable expectations of the Association when it recorded the 1999 annexation document, who relied upon Colorado law as it existed in 1999 in recording the annexation document. Stated differently, it would have been impossible for the Association to have complied with a judicial decision that was still seventeen years in the making at the time it recorded its 1999 annexation document.

B. The District Court Failed to Consider and Apply the Applicable Statutes of Limitations for Challenging Declaration Amendments.

Public policy supports imposing reasonable limits on the rights of property owners to assert challenges to recorded annexations.

In *Ryan Ranch*, the Supreme Court noted that one of the statutory requirements for exercising development rights includes filing an amendment to the declaration, and that amendments necessary for annexation must also comply with C.R.S. § 38-33.3-217. See, *Ryan Ranch* at 144.

C.R.S. § 38-33.3-217(2) provides that "[n]o 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 was recorded." Thus, CCIOA has recognized that owners should not be able to bring challenges to recorded annexations in perpetuity. *See also Colorado State Bd. of Medical Examiners v. Jorgensen*, 198 Colo. 275, 279 (Colo. 1979) ("The purpose of a statute of limitations is to promote justice, discourage unnecessary delay and forestall the prosecution of stale claims.")

Here, the district court never explained why it refused to apply the applicable statute of limitations set forth in CCIOA to prevent SRD from repudiating an annexation recorded seventeen years ago. As a result, the district court's holding is contradictory to the express limitations in CCIOA.

Courts in other states have demonstrated a history of strictly enforcing applicable statutes of limitation for challenging the validity of declaration amendments. For example, in *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n, Inc.,* 169 So.3d 197 (Fla.App. 1 Dist. 2015), a Florida appellate court ruled that a condominium association unduly delayed in attempting to challenge an amendment recorded by the developer. In *Silver Shells*, a developer identified a beach lot as common area, but retained control over a portion of the lot to construct

future amenities. In 2000, the developer recorded an amendment to withdraw (de-annex) the beach lot from the common area so it could retain control and ownership over the property. The association objected, asserting that the developer usurped a valuable property right and property ownership in violation of the original declaration, and filed a lawsuit challenging the amendment (de-annexation) in 2009. The court held that the association's claims were time-barred because the association failed to bring its claims within the applicable five year statute of limitations.

In another Florida appellate case, *Harris v. Aberdeen Property Owners Ass'n, Inc.*, 135 So.3d 365 (Fla.App. 4 Dist. 2014), the court ruled that an owner could not challenge the validity of an amendment to a master declaration that required owners in a sub-association within the community to become members of the club. The court ruled that the owner could not challenge the validity of the amendment because the amendment was recorded more than five years before the lawsuit was filed. *See also Bishop v. Twin Lakes Golf & Country Club*, 89 Wash. App 1024 (Wash. Ct. App. 1998) (improperly adopted HOA covenant recorded nineteen years before it was challenged could not be voided where the owner's predecessor demonstrated ratification and acceptance of the amended covenant); *and Costa Serena Owners Coalition v. Cost Serena Architectural Committee*, 175 Cal.App. 4th 1175 (2000)

(challenges to the procedures by which a covenant amendment was adopted must be brought within four years of the date or recording the amendment).

In some instances, courts distinguish between covenant or declaration amendments that are "void" versus those that are "voidable." Generally, amendments that are void are considered void *ab initio*, and lack validity from inception because the association or developer acted in bad faith. Void amendments include those that are recorded without any vote, or are recorded when the board of directors knew it was not adopted in accordance with proper procedures. For example, in *Club Envy of Spokane, LLC v Ridpath Towner Condo. Ass'n,* 337 P.3d 1131 (2014), a Washington appellate court held that an owner's challenge to an amendment fraudulently recorded by a board president was not time-barred. In that case, the owners had never voted on the amendment. The board president had drafted and recorded the amendment without anyone's knowledge. Because a vote had never occurred and the board member fraudulently claimed it had been approved, the court held that it was void, and thus was subject to challenge at any time. *Id*., at 1134.

In contrast, "voidable" amendments are those that are invalid as a result of defects in the approval process resulting from good faith error. For example, voidable amendments include amendments adopted without the requisite number of

votes or without proper notice, provided that the board and the association acted in good faith. In *Bilanko v. Barclay Court Owners Ass'n,* 185 Wn.2d 443 (2016), the Washington Supreme Court precluded an owner's challenge to an amendment imposing leasing restrictions on her unit. The owner alleged that the amendment was invalid because it had been approved by only 67% of the vote rather than the 90% required to impose new use restrictions. The court held that the owner's challenge was time-barred by the statute of limitations because the error, if there were any, was made in good faith. Specifically, the board did not know that the 90% approval was required and the vote approving the amendment had otherwise conformed to the requirements of the statute and the governing documents.

The type of amendment in the instant case is clearly voidable, and not void *ab initio.* There was no fraud ever alleged, let alone proven, in connection with the execution or recording of the 1999 annexation form. Nor were there any allegations that the vote and procedures to be complied with in connection with the 1999 annexation were not compliant with Colorado law as it was at that time. Moreover, for many years prior to the filing of this lawsuit, the developer had acquiesced to and complied with the document, which substantiate the Association's equitable defenses of laches, waiver, and estoppel.

The district court wrongly concluded that the Association did not comply with the requirements that the Supreme Court would recognize seventeen years later in *Ryan Ranch Community Ass'n v. Kelley*, 380 P.3d 137 (Colo. 2016).

C. A Property Owner's Express Consent to Annexation Should Estop the Owner from Subsequently Seeking to Repudiate his Consent.

The doctrine of equitable estoppel precludes SRD from bringing this lawsuit after years of acquiescence and non-action. Both the Uniform Common Interest Ownership Act of 1982 ("UCIOA"), upon which the Colorado statute is based, and CCIOA expressly incorporates the doctrine of estoppel in the context of community associations. Specifically, C.R.S. § 38-33.3-108, which states that "[t]he principles of law and equity, including but not limited to . . . *estoppel* . . . supplement the provisions of this article." (Emphasis added). *See also* UCIOA 1982 § 1-108.

A party asserting equitable estoppel must establish that (1) the party to be estopped knew the facts and either intended the conduct to be acted on or so acted that the party asserting estoppel must have been ignorant of the true facts, and (2) the party asserting estoppel must have reasonably relied on the other party's conduct with resulting injury. *P-W Investments, Inc. v. City of Westminster*, 655 P.2d 1365, 1372 (Colo. 1982). Both elements are met here, as SRD knew of the annexation for sixteen years and only brought this lawsuit when other disagreements between the parties arose.

Equitable estoppel is based on principles of fair dealing and is designed to prevent manifest injustice. *Kruse v. Town of Castle Rock*, 192 P.3d 591, 603 (Colo. App. 2008). Injustice will inure to the Association and other communities throughout Colorado if the district court's ruling is permitted to stand. CAI knows of hundreds of communities across the United States (including Colorado) that have been relying on similar declarations for years or decades. If developers in other communities are permitted to acquiesce to the multitude of benefits provided by associations, and are later permitted to exempt themselves from paying assessments as a result of a technicality or subsequent case law announced seventeen years after the fact, this could threaten the financial stability of hundreds or even thousands of communities. Such a determination is also contradictory to another stated intent of CCIOA, which is to provide for and strengthen the financial stability of homeowners associations in common interest communities. See, C.R.S. § 38-33.3-102(1)(b).

The North Carolina Court of Appeals addressed a similar scenario in a case involving an association that sued a developer for failing to pay assessments. *See Landover Homeowners Ass'n, Inc. v Sanders,* 781 S.E.2d 488 (N.C. Ct. App. 2015). In *Landover*, the declarant developed the community in nine phases beginning in 2002. In 2006, the declarant filed articles of dissolution. Subsequently, the declarant proceeded to record an amendment to the declaration purporting to exempt the

declarant (and its successors and assigns) from paying assessments on property it owned. The declarant also recorded an assignment of declarant rights purporting to assign its declarant rights to a related entity. The Appellate Court held that the declarant was barred from asserting that it was exempt from paying assessments based on the doctrine of equitable estoppel, which prevents a person from benefitting by taking to clearly inconsistent positions.

CAI posits that the Colorado Court of Appeals should consider the reasoning in *Landover* and reach a similar conclusion based on the facts in the immediate case.

V. CONCLUSION

CAI advocated for the passage of CCIOA in 1991 because the Act conferred important rights in Colorado and established a uniform legal framework for its operation. The district court's ruling will open up twenty six years of governance actions and decisions within community associations and make them subject to challenge, which constitutes an end run around applicable the statutes of limitations. For the reasons set forth above, this Court should overturn the ruling of the district court.

Respectfully submitted this 7th day of March, 2018.

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Certificate of Service

I hereby certify that on this 7th day of March, 2018, a true and correct copy of the foregoing was served via ICCES on the following:

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