Supreme Court Case No.: S255031

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ORCHARD ESTATE HOMES, INC.

Petitioner & Respondent

v.

THE ORCHARD HOMEOWNER ALLIANCE

Objector & Appellant

After a Decision by the Court of Appeal, Fourth Appellate District, Division Two, Case No. E068064

Appeal from A Judgment of the Superior Court of California, County of Riverside, Case Number PSC 1700644

The Hon. David M. Chapman, Judge

BRIEF OF AMICUS CURIAE COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF ORCHARD ESTATES HOMES, INC.

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I.

POSITION OF COMMUNITY ASSOCIATIONS INSTITUTE

The issue presented by this Court is "When a trial court rules on a petition to reduce the votes required to pass an amendment to a homeowners association's covenants, conditions, and restrictions, what, if any, role should voter non-participation play in the court's decision?"

CAI submits that voter apathy is not an element of Civil Code § 4275, was not contemplated by the legislature, and should not be a required condition. Requiring trial courts to make a finding of voter apathy will add an ambiguous and conflicting requirement to the statute. Community associations seeking to amend their declarations ("CC&Rs") will need to determine what level of voter apathy is required to bring a petition under Civil Code § 4275 and will create an inherent conflict with Section 4275's requirement to make a "reasonably diligent effort" to permit all eligible members to vote. (Civ. Code § 4275(c)(3).)

Prior decisions by this Court and California Appellate Courts have relied on the plain meaning of the statute in interpreting provisions of the Davis Stirling Common Interest Development Act ("Act"). (*See, e.g.*, *Tract 19051 Homeowners Assn. v. Kemp* (2015) 60 Cal.4th 1135, 1143; *Retzloff v. Moulton Parkway Residents' Association, No. One* (2017) 14 Cal.App.5th 330, 336,; *Huntington Cont'l Town House Assn., Inc. v. Miner* (2014) 222 Cal.App. 4th Supp. 13, 17; *Golden Rain Foundation v. Franz* (2008) 163 Cal. App. 4th 1141, 1154; *Thaler v. Household Finance Corp.* (2000) 80 Cal.App. 4th 1093, 1100.) Those same legal principles apply here and

Section 4275 should not be read to include a requirement that is not plainly set forth in the statute.

II.

STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY

CAI adopts and incorporates the Association's statement of facts and relevant procedural history.

III.

ARGUMENT

A. A Plain Reading of Section 4275 Does Not Require a Finding of Voter Apathy.

This Court has stated that the "overriding purpose" in construing any statute is to adopt the construction that best gives effect to the legislature's intended purpose. (*Union of Med. Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal. 5th 1171, 1183.) The Court considers the words of a statute as the most reliable indicator of legislative intent. (*Id.*) Every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. (*Id.*) " 'This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.' [Citations.]" (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633, cited by *That v. Alders Maint. Assn.* (2012) 206 Cal. App. 4th 1419, 1429.)

This principle has been applied in several decisions under the Act by this Court. (*See, e.g., Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal. 4th 73, 83 (finding that a use restriction added to a CC&R amendment binds current owners); *Nahrstedt v. Lakeside Vill. Condo. Assn.*, (1994) 8 Cal. 4th 361, 380 (analyzing former § 1354 in determining enforceability of CC&R covenants); *Tract 19051 Homeowners Assn. v.*

Kemp, *supra*, 60 Cal.4th 1135, 1144 (interpreting whether former § 1354(c) allowed prevailing party attorneys' fees).)

Civil Code § 4275 was previously codified as Civil Code § 1356 before the Act was re-organized and re-numbered by AB 805 in 2012.[1] Section 1356 was part of the Act when it was originally enacted in 1985 under AB 314.[2] The Act's introduction in the 1985 Summary Digest indicates that AB 314 would "authorize amendment of the declaration by court order under specified circumstances." *See*, Statutes of California and Digests of Measures, Vol. 4, 1985-1986 Regular Session, Ch. 874, pgs. 278-279.[3]

Objector and Appellant, The Orchard Homeowner Alliance ("Appellant") argues that despite the wording of the statute, trial courts should be required to consider whether voter non-participation caused or significantly contributed to the failure of the CC&R amendment to pass in accordance with the CC&R's procedures. (Opening Brief on the Merits "OBM", pg. 8).

As Petitioner and Respondent, Orchard Estate Homes, Inc. ("Respondent") asserts, the statute's purpose is to provide homeowners associations with a court-supervised mechanism to amend their CC&Rs when the documents require a "supermajority" vote and at least a majority of the owners have voted in favor of the amendment. (Answering Brief on the Merits "ABM", pg. 6). Requiring associations to prove voter apathy is not supported by the statute and creates a consideration that is not supported, by the legislature.

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[1] Stats. 2012, Ch. 180, Sec. 2

[2] See, Stats. 1985, Ch. 874, Sec. 14

[3] Prior to the adoption of the Act, at least one community association used the court to approve CC&R amendments when it was unable to obtain the required "supermajority" vote requirement. (*Greenback Townhomes Homeowners Association v. Rizan* (1985) 166 Cal.App.3d 843, 846 (petition brought under Corp. Code § 7515 to approve CC&R amendments.)

Civil Code § 4275 lists six (6) findings a court is required to make to grant a petition. (Civ. Code § 4275 (c)(1) through (6).) None of those findings include voter apathy. Determining that trial courts need to make a finding of voter apathy when ruling on petitions brought under Section 4275 would constitute an impermissible judicial re-writing of the statute.

The language of Civil Code § 4275, setting forth the findings a trial court needs to make to exercise its discretion, is clearly contained in subsection (c):

> (c) The court may, but shall not be required to, grant the petition if it finds all of the following:
>
> (1) The petitioner has given not less than 15 days written notice of the court hearing to all members of the association, to any mortgagee of a mortgage or beneficiary of a deed of trust who is entitled to notice under the terms of the declaration, and to the city, county, or city and county in which the common interest development is located that is entitled to notice under the terms of the declaration.
>
> (2) Balloting on the proposed amendment was conducted in accordance with the governing documents, this act, and any other applicable law.
>
> (3) A reasonably diligent effort was made to permit all eligible members to vote on the proposed amendment.
>
> (4) Members having more than 50 percent of the votes, in a single class voting structure, voted in favor of the amendment. In a voting structure with more than one class, where the declaration requires a majority of more than one class to vote in favor of the amendment, members having more than 50 percent of the votes of each class required by the declaration to vote in favor of the amendment voted in favor of the amendment.
>
> (5) The amendment is reasonable.
>
> (6) Granting the petition is not improper for any reason stated in subdivision (e). (Civ. Code § 4275(c)(1) through (6).)

None of the six enumerated conditions in the statute require a finding of voter apathy. Additionally, subsection (e) states that even if a trial court makes the findings set forth in Section 4275(c)(1) through (5), it has no power to grant a petition if any of the conditions set forth in Section

4275(e)(1) through (3) apply. The situations in subsection (e) address the percentage of votes required to be obtained in each class (if multiple classes exist), elimination of the declarant's rights and impairment of security interests of mortgage holders. (Civ. Code § 4275(e)(1) through (3).) If the legislature had intended that voter apathy be considered as one of the requirements for granting a petition under Section 4275, it would have included that language in either subsection (c), subsection (e), or both. The language of Civil Code § 4275 is unambiguous and this Court should not presume that the legislature intended to include voter apathy as a condition to grant a petition.

Recent appellate court decisions interpreting other statues under the Act have upheld the plain meaning of those statutes. (*See, e.g.*, *Retzloff v. Moulton Parkway Residents' Association, No. One*, *supra* 14 Cal.App.5th 330 (plain reading of Civil Code § 5235(c) did not support an inclusion of attorney fees as "costs" to prevailing association); *see also, That v. Alders Maintenance Association* (2012) 206 Cal.App.4th 1419, 1428 (plain reading of Civil Code § 4955 [formerly 1363.09(b)] did not support award of attorney fees to association).)

As with those cases, trial courts are not required to make additional findings that are not set forth in Civil Code § 4275(c), including that voter apathy was the reason the proposed amendment did not obtain the required supermajority approval. Adding that requirement here would go against legal principles and frustrate the purpose of the statute.

B. Requiring Voter Apathy Would Impose an Ambiguous and Conflicting Standard.

The findings that courts are required to make under Section 4275(c)(1) through (6) to grant a petition are straightforward and can be made by reviewing the information which the statute specifically requires

to be included in the petition. (Civ. Code § 4275(a)(1) through (6).) Courts are able to determine whether petitioner gave the required notice of the hearing to the members, conducted the balloting in accordance with the governing documents and applicable law, whether a reasonably diligent effort was made to permit all eligible members to vote, whether members having more than 50 percent of the votes approved the amendment, whether the amendment is reasonable, and whether any of the reasons set forth in Section 4275(e) preclude granting the petition. (*See e.g., Quail Lakes Owners Association v. Kozina* (2012) 204 Cal.App.4th 1132, 1139-1140.)

Imposing an additional standard that does not exist in the statute should come from the legislature, not the courts. Moreover, adding an ambiguous "voter apathy" standard would confuse both the courts and community associations. Arguably, less than 100% participation of the members involves some level of voter apathy. This begs the question of what level of non-participation constitutes "voter apathy"? Is it five percent (5%), ten percent (10%), fifteen percent (15%) or some higher amount? Community associations seeking to employ Civil Code § 4275 to seek approval for amendments that fail to achieve the required supermajority consent will have no guidance on whether the level of non-participation of the members constitutes "voter apathy."

Furthermore, requiring associations to show that voter apathy is the reason a supermajority approval requirement failed to be obtained would create an inherent conflict in Civil Code § 4275. Currently, associations must demonstrate to the court that a "reasonably diligent" effort was made to permit all eligible members to vote on the proposed amendment. (Civ. Code § 4275(c)(3).) In *Fourth La Costa*, the court concluded that the efforts made by the association in sending three (3) reminders to owners who had not voted was sufficient to meet that standard. (*Fourth La Costa Condominium Owners Association v. Seith*, (2008) 159 Cal.App.4th 563,

574.) If voter apathy is required to grant a petition under Civil Code § 4275, community associations may be less inclined to garner sufficient member participation in such votes. This would directly conflict with the purpose of Section 4275(c)(3,) which is for associations to encourage their members to vote.

C. Voter Apathy is Not an Implied Requirement of the Statute.

Appellant asserts that the requirements of Section 4275 requiring the association providing copies of the notice and solicitation materials used to solicit member approvals and making a reasonably diligent effort to permit all eligible members to vote demonstrate an implicit requirement of voter non-participation. (OBM, pg. 26; Civ. Code § 4275 (a)(3) and (c)(3)). However, the focus on these requirements is not on the result, but rather the effort that was made by the association to meet the supermajority requirement which, if obtained, would nullify the need for court action. These requirements are to ensure that associations make a "reasonably diligent" effort to get members to vote before seeking court relief.

Notably, while Section 4275 requires associations to provide trial courts with the number or percentage of affirmative votes required for the amendment under the CC&Rs (Civ. Code § 4275(a)), the statute does not require associations to inform the court of how many members failed to participate in the vote. If non-participation was an element for courts to consider when ruling on these petitions, the statute would have required this information.

D. Prior Appellate Courts' Dicta Is Not the Basis for a New Legal Requirement.

It is well settled that an appellate decision is not authority for everything said in the opinion, but only for points actually involved and decided. (*People v. Knoller* (2007) 41 Cal.4th 139, 154-155.)

The first published decision under Civil Code § 4275's predecessor was *Blue Lagoon Community Association v. Mitchell* (1997) 55 Cal.App.4th 472. The issue in that case was whether a petition brought under the statute was an adversarial proceeding for purposes of awarding attorney's fees to the prevailing party. (*Blue Lagoon Community Association v. Mitchell, supra,* 55 Cal.App.4th at 474.) In its opinion, the appellate court characterized the statute as a "safety valve" when associations are hamstrung to adopt important amendments. (*Blue Lagoon Community Association v. Mitchell, supra*, 55 Cal.App.4th at 477.) Quoting from a CEB guide, the court further stated that the purpose of the statute is to allow community associations to adopt important amendments when voter apathy or "other reasons" prevent associations from obtaining the required supermajority approval. (*Id.*, quoting *Advising Cal. Condominium and Homeowner Associations* (Cont. Ed. Bar 1991) § 10.25, p. 459.)

The dicta set forth in *Blue Lagoon* has been quoted in every subsequent published decision concerning the petition process of Section 4275, regardless of whether voter apathy was an issue. The only case where the lack of voter apathy was raised is *Mission Shores v. Pheil,* (2008) 166 Cal.App.4th 789. The appellate court, in upholding the trial court's decision, rejected appellant's argument that the petition should have been denied since it was not a case of homeowner apathy. (*See, Mission Shores v. Pheil, supra*, 166 Cal.App.4th at 795.)

The lack of voter apathy was not an issue in any of the other published decisions. (*See, Peak Investments v. South Peak Homeowners Association, Inc.* (2006) 140 Cal.App.4th 1363 (issue was whether at least 50% of entire membership needed to approve amendment); *Fourth La Costa Condominium Owners Association v. Seith, supra,* 159 Cal.App.4th 563 (voter apathy not raised); and *Quail Lakes Owners Association v. Kozina, supra,* 204 Cal.App.4th 1132 (whether trial courts need to recite

evidence pertaining to each element of Section 4275).) Therefore, the language from *Blue Lagoon* should be viewed for what it is - dicta – and not as establishing a new requirement of the statute.

Moreover, the *Blue Lagoon* statement correctly demonstrates that there can be "other reasons" why an amendment cannot be approved by the normal procedures authorized by the CC&Rs other than voter apathy.

The Association's intent in amending the CC&Rs to prohibit short-term rentals was to avoid litigation because the enforcement action being taken against members who were violating the provision was ineffective. (1 AA 9.) Including the requirement that rentals need to be for a minimum of thirty (30) days into the CC&Rs would bolster the Association's ability to enforce such provision because it would take precedent over the rules and, upon recording, would be presumed to be reasonable. (Civ. Code § 4205, *Nahrstedt v. Lakeside Village Condominium Association* (1994) 8 Cal.4th 361, 386.)

The trial court's decision to grant the petition was based on the fact that voter apathy is not an element of Section 4275 and relied on the *Mission Shores* holding. (1 AA 200.) As with *Mission Shores*, the trial court focused on the Association's reason for the amendment - to adopt a provision to restrict short-term rentals. (1 AA 200.) The trial court was well within its discretion to determine that there were reasons other than voter apathy that justified allowing the Association to adopt this important amendment.

E. Not Requiring Voter Apathy Will Not Lead to Absurd Results

Courts granting the relief sought under Civil Code § 4275 leads to exactly the result anticipated – that in a court's discretion, important and reasonable CC&R amendments can be approved based on the number of affirmative votes received, so long as at least more than 50 percent of the members in each voting class approve. (Civ. Code § 4275(a) and (d).)

The language of Civil Code § 4275 demonstrates that in the context of amending CC&Rs, the legislature supports a majority approval threshold. (Civ. Code § 4275(a).) Notably, the only other statute in the Act that addresses CC&R amendments is Civil Code § 4270 which also supports a majority threshold. Under Section 4270(b), if the CC&Rs do not specify the percentage of members who must approve amendments, the CC&Rs may be amended by a majority of all members. These statutes recognize that a supermajority approval requirement for CC&R amendments is not desirable.

IV.

CONCLUSION

Since the Act's enactment (and before), trial courts have had the discretion to reduce a CC&R's supermajority requirement to allow important amendments, so long as certain findings, clearly articulated in the statute, are made. Imposing requirements into Civil Code § 4275 that do not exist in the plain wording of the statute is contrary to California law, and will cause confusion among trial courts and community associations seeking to file petitions in the future. For the reasons set forth above, this Court should affirm the ruling of the appellate and trial courts.

Dated: November 1, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO THE CALIFORNIA RULES OF COURT, RULE 8.204(c)

Pursuant to the California Rules of Court, Rule 8.204(c), I certify the foregoing brief contains 2,896 words, based upon the word count feature contained in the word processing program used to produce the brief (Microsoft Word 2016).

Dated: November 1, 2019

Laurie S. Poole

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action; my business address is 2566 Overland Avenue, Suite 730, Los Angeles, CA 90064.

On November 1, 2019, I served the following document described as **BRIEF OF AMICUS CURIAE COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF ORCHARD ESTATES HOMES, INC.** by placing true copies enclosed in sealed envelopes to the addresses below. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, this document will be deposited with the U.S. Postal Service on this date with postage thereon fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 1, 2019 at Los Angeles, California.

Carolyn Houtz

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