IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 230169

PALISADES PARK OWNERS ASSOCIATION, INC.,

Petitioner,

v.

KAREY BURKHOLDER and
DOUGLAS THOMPSON, JR.,

Respondents.

BRIEF OF *AMICUS CURIAE* WASHINGTON METROPOLITAN CHAPTER COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING

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INTEREST OF AMICUS CURIAE

The Washington Metropolitan Chapter Community Associations Institute ("WMCCAI") respectfully submits this brief as an *Amicus Curiae* pursuant to Virginia Supreme Court Rule 5:30 in support of the *Petition for Rehearing* submitted by Petitioner, Palisades Park Owners Association, Inc. ("Palisades").

WMCCAI is a 501(c)(6) organization situated in Falls Church, Virginia and a chapter of Community Associations Institute ("CAI"), an international organization dedicated to providing information, education, and advocacy for community association volunteer leaders, members, and professionals, with the goal of promoting successful communities through effective and responsible governance and management. Founded in 1973, WMCCAI is the largest of CAI's 63 chapters, with more than 3,000 members who reside or do business in Virginia. Nearly two million Virginia residents live and/or own property in approximately 8,700 common interest community associations, which include commercial condominiums as well as residential homeowner and condominium unit owner associations. *See* VA_FactsFigures_Info.pdf (caionline.org) (2018 figures). WMCCAI provides education, advocacy, and resources for these common interest communities.

WMCCAI has a substantial interest in fostering best practices and ensuring association boards of directors can administer and manage their associations in compliance with their recorded documents (i.e., declaration for property owners'

associations), adherence to relevant statutes (i.e., the Virginia Property Owners' Association Act, Va. Code § 55.1-1800, et seq.), and in the exercise of their best business judgment. WMCCAI believes maintaining consistent application of the tenets of community association laws is critical to avoid creating an unpredictable environment that has a chilling effect on volunteers and the industry overall.

With respect to Palisades' Petition, WMCCAI is significantly troubled by the narrow and erroneous interpretation of Va. Code § 55.1-1805 by the Court of Appeals ("CAV") and the equally curious disregard for the clear language of the Palisades Declaration, the document to which the Palisades' members and Board of Directors are contractually bound. The critical facts to these proceedings include:

- An exhibit admitted at trial demonstrated that the inspection costs at the center of the controversy are shared as a common expense paid through the Association's annual assessments, not charges against lot owners individually. (R. at 1515-16).
- Several provisions of the Declaration provide the Palisades' Board of Directors with *explicit* authority to, among other things, perform acts to enforce the community's governing documents and employ persons to manage, conduct, and perform the Palisades' obligations and duties – which is precisely what is being challenged here. (R. at 1324 (Decl. at Art. III § 3(c)(7)); R. at 1357 (Decl. Art. VI § 2(b))).

As explained further below, the error of the CAV in its combined interpretation of both Va. Code § 55.1-1805 and the Palisades' Declaration could have an extraordinary – even devastating – impact on community associations throughout the Commonwealth. This anticipated effect underpins WMCCAI's substantial interest in the outcome of this litigation and its support of Palisades' Petition.

ARGUMENT

For the reasons set forth below, WMCCAI requests that the Court grant the *Petition for Rehearing* submitted by Palisades Park.

I. The Court should grant the Petition because the CAV erroneously interpreted Va. Code § 55.1-1805 (Assignment of Error II).

The CAV's opinion is grounded in large part on its erroneous interpretation of Va. Code § 55.1-1805, which provides in relevant part that:

> Except as expressly authorized in this chapter, in the declaration, or otherwise provided by law, no association shall (i) make an assessment or impose a charge against a lot or a lot owner unless the charge is a fee for services provided or related to use of the common area . . ..

Va. Code § 55.1-1805. Importantly, the standard of review for statutory interpretation is *de novo*. *Collelo v. Geographic Servs.*, 382 Va. 56, 66 (2012).

The rules governing statutory interpretation have been established in the Court's jurisprudence and include: (i) statutes should be interpreted consistent with the plain meaning of the language used, *see Hubbard v. Henrico Ltd. Pshp.*, 255 Va. 335, 338 (1998); (ii) statutes must be read in the context of an entire act, *see Ambrogi*

v. Koontz, 224 Va. 381, 386 (1982); and (iii) when two different terms are used in the same act, it is presumed they are intended to mean different things, *see Klarfeld v. Salsburg*, 233 Va. 277, 284-85 (1987). In applying these rules of construction to Va. Code § 55.1-1805, CAV erred in its interpretation in several ways.

First, the plain language of Va. Code § 55.1-1805 clearly intends to restrict what a property owners' association may charge in any *one* instance against a *single* lot, as opposed to restricting the more general purposes for which annual assessments can be used. The entire Section is written in the singular to restrict the types of specialized charges that an association may impose against a single owner, as opposed to the regular annual assessment.

Second, Va. Code § 55.1-1805 does not by its terms require all charges to relate to common area. The plain, relevant language, when broken down grammatically, is better interpreted as stating that the charge must be "a fee for services provided **or** [a fee] related to use of the common area." (emphasis added).

Third, the General Assembly's decision to differentiate *assessment* from *charge* is purposeful and thus must be given requisite meaning. *Webster's* defines *assessment* as "the amount assessed: an amount that a person is officially required to pay especially as a tax." "Assessment" *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/assessment. Assessments have a unique meaning in the context of community associations, as

evidenced by the distinct use of the term *assessment* in Va. Code §§ 55.1-1824, 1825, and 1833; for associations, an assessment is akin to a tax levied to raise funds to carry out functions similar to those provided by local governments. *See* Restatement (Third) of Property: Servitudes § 6.5; *see also Sainani v. Belmont Glen Homeowners Ass'n*, 297 Va. 714, 727 (2019) (citing supportively the Restatement). As the Restatement acknowledges, restricting an association's authority to impose assessments would require reliance on "user charges and voluntary contributions," which can both be difficult to enforce and create free-rider problems, respectively. *Id.* at § 6.5 cmt. b. Imposing the "services provided or related to use of the common area" condition on *assessments* – as opposed to individual, separate *charges* – would undermine the essential authority of associations throughout the Commonwealth to levy assessments to carry out their duties and functions.

Fourth and finally, this Court has clarified on several occasions that "[i]n construing a statute to ascertain legislative intent, courts presume that the legislature never intends application of the statute to work irrational consequences." *F.B.C. Stores, Inc. v. Duncan*, 214 Va. 246, 249-50 (1973). Without a doubt, upholding the CAV's construction of "expressly authorized" – in which the CAV imported a higher standard of "explicit," a term *not* contained in the statute -- would result in alarmingly irrational consequences that would ripple throughout Virginia communities.

Consider waste removal. Under the CAV's rationale, because trash service benefits lots as opposed to common area, an association would not have authority to levy assessments for trash service unless the declaration "explicitly" stated that the association could assess owners for that specific service – and many, if not most, association documents do not define such common services with such granularity. Noting that nearly a quarter of Virginians reside in community associations, upholding the CAV's interpretation of Va. Code § 55.1-1805 would create an environment of confusion and ambiguity regarding what services associations can provide residents. Given the critical role community associations play in American housing, the CAV's decision must be reversed, and order restored. *See* Restatement (Third) of Prop. Servitudes §6.5 cmt. b.

II. The Court should grant the Pettition because the CAV's decision would significantly hamper the ability of Virginia common interest communities to function effectively (Assignment of Error III).

Palisades' Petition and Judge Athey's dissent correctly argue that the Declaration expressly (and explicitly) authorizes the use of annual assessments to pay for lot compliance inspections. Common interest communities throughout the Commonwealth rely on similar express authority to utilize annual assessments to pay for basic, obligatory operational functions. Here, the CAV seemingly ignored clearly stated authority throughout the Declaration to levy assessments for this common task.

Article V of the Palisades Declaration provides that the annual assessments may be used for the "implementation, administration, and **enforcement of this Declaration**." (R. at 1336, 1338 (Decl. Art. V § 3(a)(viii)) (emphasis added). Further, Article III of the Declaration empowers the Board to "employ, **enter into contracts with**, delegate authority to, and supervise such persons or entities as may be appropriate to **manage, conduct, and perform the business obligations and duties of the Association**." (R. at 1324 (Decl. Art. III § 3(c)(5)) (emphasis added). Significantly, the Declaration further provides that:

> The Association shall have the further right, **through its agents**, **employees** or committees, **to enter upon and inspect any Lot** . . . for the purpose of ascertaining whether any violation of the provisions or requirements of this Declaration exists on such Lot . . . and neither the Association nor any such **agent**, **employee** or committee member shall be deemed to have committed a trespass or other wrongful act by reason of such entry or **inspection**.

(R. at 1357 (Decl. Art. VI § 2(b)) (emphasis added).

Here, Palisades *contracted* with an *entity* for lot inspection services specifically to *enforce* the Declaration. This could not be more clearly in line with these express (and arguably "explicit") provisions. Thus, the Declaration provides clear authority to levy assessments to pay for lot inspections throughout the community.

Importantly, common interest communities throughout Virginia rely on similar authority in their governing documents to pay for various *fundamental* costs,

including waste removal, landscaping, and covenant enforcement, to name a few. Governing documents typically require an association to "maintain" the common area without getting into granular detail regarding the specific maintenance tasks. The CAV's decision would create mass confusion as to the types of maintenance activities for which an association can spend assessments. If the documents do not use the term "landscaping," a question would arise as to whether a landscaping company could be hired to tend to the common area grass, trees, and flowers. If the governing documents do not use the term "asphalt repairs," a question would arise as to whether a paving company could be hired to resurface common streets. The uncertainty wrought by the CAV's decision would inevitably extend to innumerable other basic operating costs that might not be specifically identified in the documents but are required – under those same documents – to be performed by community associations.

The CAV's decision creates a potential paradox for community association litigation regarding the most basic of association functions – covenant enforcement. Governing documents often provide for an association's duty to require covenants compliance through litigation; however, the documents do not always directly state that the association can spend assessments on attorneys' fees. Under the CAV's decision, common interest communities could have the *duty* to use litigation to ensure compliance – but no concomitant authority to spend funds for such purpose.

Such a result would be in direct conflict with Virginia's laws requiring corporations to be represented by counsel, thus absurdly encouraging the unauthorized practice of law by community associations left to represent themselves in such cases. *See* Va. Code § 54.1-3904.

Curiously, the CAV ignored the clear authority established in the Palisades Declaration, including the power to (i) use assessments to enforce its Declaration, *see* R. at 1336, 1338 (Decl. Art. V § 3(a)(viii), (ii) enter onto lots for such purpose, *see* R. at 1357 (Decl. Art. VI § 2(b), and (iii) hire agents to fulfill such enforcement obligations, *see* R. at 1324 (Decl. Art. III § 3(c)(5). To determine that the Declaration does not provide express authority to use assessments for lot inspections is simply not supported by the record, and allowing the CAV's decision to stand will have massive consequences for Virginia common interest communities as a result, not the least of which will be the inevitable increase in litigation as challenges to common community expenditures will naturally flow from the CAV's decision.

Facing a sudden, increased risk of litigation, common interest communities will be in the precarious position of pursuing amendments to their declarations in order to "create" spending authority for functions they are already performing, in some cases for decades. The Court has recognized the difficulty in amending declarations and the strict requirements imposed by Virginia's General Assembly:

> The Virginia Property Owners' Association Act authorizes the creation and enforcement of restrictive covenants against nonconsenting

> landowners in a manner unknown to the common law. The General Assembly, however, policed the imposition of these covenants with a host of strict procedural requirements . . . . In effect, the General Assembly created something entirely new to the law (the right to form private associations having power over land use) while adding precautions to honor the common law's ancient antipathy toward restrictions on the free use of private property.

See Tvardek v. Powhatan Village Homeowners Ass'n, Inc., 291 Va. 269, 279 (2016). Common interest communities should not be forced to undertake the onerous, expensive and uncertain task of seeking amendments to their documents to create more explicit authority than they have already been relying on for decades because the CAV ignored the plain meaning of these provisions in the Palisades Declaration.

If the CAV's decision stands, contrary to basic rules of construction, common interest communities would have the right and obligation to perform certain common functions, but no viable way to assess and pay for them. Given the sweeping effect of the CAV's decision, the potential unintended consequences, and the significant public policy concerns involved, the Court should grant the Palisades' Petition on Assignment of Error III to appropriately address these widespread (and possibly unconsidered) effects of the CAV's decision.

CONCLUSION

In sum, WMCCAI respectfully requests that the Court grant Palisades' Petition for Rehearing.

Respectfully Submitted,

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CERTIFICATE

Pursuant to Virginia Supreme Court Rule 5:20(c), I hereby certify the following:

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5. An electronic copy of the foregoing Brief *Amicus Curiae* was filed with the Clerk of the Supreme Court of Virginia, via VACES, and one copy was served, via electronic mail, upon counsel for Petitioner and Respondents this10th day of October, 2023

6. This Brief *Amicus Curiae* contains 10 pages

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