

NO. 47402-6-II

**IN THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

CLARK COUNTY SUPERIOR COURT NO. 13-2-00572-I

**PARKER ESTATES HOMEOWNERS' ASSOCIATION,
a Washington Nonprofit Corporation,
Appellant,**

v.

**WILLIAM PATTISON/LESLEY PATTISON,
Respondents,**

v.

**BLUESTONE & HOCKLEY REALTY, INC.
dba BLUESTONE & HOCKLEY REAL ESTATE SERVICES,
Appellant.**

**BRIEF OF AMICUS CURIAE COMMUNITY ASSOCIATIONS INSTITUTE
IN SUPPORT OF APPELLANTS**

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I. INTRODUCTION

This case addresses a critical question involving community associations in Washington: what happens to the existing Board of Directors of a corporation participation by its members is not adequate to fill vacant Board positions and meet quorum requirements for Board elections? The parties to this case have thoroughly briefed underlying issues related to this question that need not be repeated here. This brief focuses instead on: the history and purpose of statutory safeguards for nonprofit corporations; the importance and practical realities of community associations; and the unintended consequences of the trial court's decision and its public policy implications.

Community associations like Parker Estates Homeowners' Association (PEHA) serve a vital role in performing services that benefit their members, neighboring property owners, and the municipalities and counties in which they are located. Community association Boards exercise their powers to fulfill the association's obligations.

The trial court's decision is contrary to basic principles of well founded corporate law, legislative intent and sound public policy. If the trial court's decision is upheld, it would compromise innumerable Washington nonprofit corporations, whether or not they are community associations, by leaving the corporation without leadership to govern and act on behalf of the association following unsuccessful elections and providing a basis for challenging any action taken by Board members who remain in office after a failed election. As a practical matter, it could force corporations into court appointed receivership as the only method of maintaining governance and the only alternative to dissolution.

II. IDENTITY AND INTEREST OF AMICUS CURIAE COMMUNITY ASSOCIATIONS INSTITUTE

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 33,000 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 60 million homeowners who live in more than 330,000 community associations in the United States. The Washington State chapter of CAI is the second largest in the country, serving over 10,000 community associations comprised of approximately two million residents in the state.¹ Chapter members either own property in a Washington community association or work with those communities, which include homeowners associations, condominiums, cooperatives and other planned communities.

If affirmed, the trial court's decision will adversely affect the interests of CAI's members by preventing community association Boards from maintaining administrative continuity to perform the vital functions on which their residents rely. Additionally, it could potentially invalidate years of corporate governance for countless community associations that have been unable to hold successful elections in the past. It is also likely to result in a significant increase in lawsuits brought against community associations by individual members who are unhappy with Board decisions.

¹ Foundation for Community Association Research, 2014 Community Association Fact Book for Washington at 11.

III. STATEMENT OF THE CASE

Amicus CAI adopts and incorporates the Statement of the Case set forth in Appellants' Opening Brief at pages 4-9.

IV. ARGUMENT

A. *The History of Corporate and Other Statutory Safeguards*

The Washington legislature has provided statutes that specifically address the problems facing nonprofit corporations that are at issue in this case while balancing the rights of the corporation's members to maintain control over corporate governance. Community associations in Washington are generally nonprofit corporations incorporated under either the Nonprofit Corporation Act (Ch. 24.03 RCW) or the Nonprofit Miscellaneous and Mutual Corporations Act (Ch. 24.06 RCW) (collectively, the "Nonprofit Acts"). As with other nonprofit corporations, community associations are most often governed by layperson, volunteer Boards of Directors. It is a practical reality that many nonprofit corporations have difficulty recruiting and retaining individuals to serve on the Board. As a result, incumbent Board members often continue to serve for years because other members are unwilling to volunteer. This problem is exacerbated by the frequent difficulty in obtaining a quorum at member meetings, as is generally required for director elections.

The trial court's interpretation of the plain language of the PEHA Bylaws and controlling statute that specifically provide for the continuation of Board members in the absence of successful elections is contrary to basic principles of corporate law. The holdover rule, which provides for incumbent Board members to continue in office until a successor is elected and qualified, dates back more than a century in Washington case

law. The Supreme Court aptly described the holdover rule in *State ex rel. Dudley v. Daggett*, 28 Wash. 1, 15, 68 P. 340, 345 (1902)² (emphasis added):

It is usually provided by law that officers elected or appointed for a fixed term shall hold not only for that term but until their successors are elected and qualified. Where this provision is found, the office does not become vacant upon the expiration of the term if there is then no successor elected and qualified to assume it, but the present incumbent will hold until his successor is elected and qualified, even though it be beyond the term fixed by law. Where, however, no such provision is made the question of the right of the incumbent to hold over is not so clear, but the prevailing opinion in this country seems to be that, unless such holding over be expressly or impliedly prohibited, the incumbent may continue to hold until someone else is elected and qualified to assume the office. Such a rule seems to be demanded by the most obvious requirements of public policy, for without it there must frequently be cases where, from a failure to elect or a refusal or neglect to qualify, the office would be vacant and the public service entirely suspended.

Decades ago, the Washington legislature codified the holdover rule in both Nonprofit Acts to ensure continuity of administrative function in the event a successor director is not elected. (See RCW 24.03.100 and RCW 24.06.130). The Washington legislature has also given nonprofit boards the authority to appoint directors to fill vacant seats without quorum or a member vote in the Nonprofit Acts. (See RCW 24.03.105 and RCW 24.06.135). These provisions are based on the Model Nonprofit Corporations Act propounded by the American Bar Association that provides:

- (c) Except as provided in the articles of incorporation or bylaws, the term of a director elected to fill a vacancy expires at the end of the unexpired term that the director is filling.
- (d) Despite the expiration of a director's term, the director continues to serve until the director's successor is elected, appointed, or designated and until the director's successor takes office unless otherwise provided in the articles of incorporation or bylaws.

Model Nonprofit Act, Third Edition (2008), § 8.05 (c) and (d).

² Although the case was later reversed for unrelated reasons, it demonstrates the long history of the holdover rule in Washington.

It is clear from the Model Act that the ABA recognizes the potential problems corporations face when elections are unsuccessful and when there are vacancies in the Board. These safeguards do not operate to keep unwilling Board members in office or to prevent members of the corporation from electing new Board members, but they do provide for the continued operation of the corporation until successors are elected. Community association Boards in Washington rely heavily on these corporate safeguards to continue acting on behalf of the association to ensure its vitality and prevent dissolution.

There are also statutory safeguards intended to protect the rights of individual homeowners in community associations that provide for their participation should they choose to exercise those rights. The Washington Homeowners' Associations Act sets forth a budget ratification process that requires advance notice to owners of anticipated common expenditures shared by all owners and the resulting assessments against them. [See RCW 64.38.025(3)]³ It also provides owners holding a majority of the voting power in the association with the power to reject those expenditures and assessments if they believe the Board's recommended budget does not reflect their own objectives. In addition, the Nonprofit Corporation Act provides for removal of Board members by the members of the corporation (See RCW 24.03.103).

Together, all the statutory safeguards described above provide for the continued operation of community associations in the absence of adequate participation by owners while also providing owners with the opportunity to protect their own interests should they choose to participate.

³ The Washington Condominium Act contains a nearly identical provision in RCW 64.34.308(3).

B. *Importance of Community Associations and the Boards that Govern Them*

Community associations, through the Boards acting on their behalf, perform vital functions that benefit their members, neighboring property owners, and the municipalities and counties in which they are located. A community association's obligations often include maintenance work that would typically be performed by the municipalities or counties, like the maintenance, repair, replacement and preservation of sidewalks, roads, easements, natural growth protection areas, storm water drainage systems, and parks and other open areas. When these obligations are fulfilled, governmental entities are relieved of the need to raise taxes to pay for maintenance work and property values are preserved. When a Board is stripped of the power to collect assessments from owners to perform these vital functions, deferred maintenance can lead to safety hazards and increased liability, property damage, decreased property values and a host of other problems.

The Boards of community associations also perform and arrange for important services for the benefit of their members including: obtaining property and liability insurance; paying property taxes; preserving architectural integrity; maintaining buildings, recreational facilities, and grounds; planning for future maintenance; responding to emergencies; and enforcing covenants and resolving disputes between neighbors to protect owners' peaceful enjoyment of their homes. Many owners specifically choose to purchase homes in community associations because these services are provided and they are relieved of obligations for which they would be solely responsible if they owned property outside a community association.

One of the most important functions of a community association Board is the collection of assessments, particularly from delinquent owners. Owners who fail to pay their fair share continue to benefit from the services provided by the association while their neighbors are forced to pay more to make up the difference resulting from those delinquencies.

The sustainability of a community association depends entirely on the Board's ability to exercise the powers of the association and fulfill its obligations. The owners' reliance on Board governance is often the reason they become complacent and fail to participate in elections or volunteer for the Board. This complacency should not result in automatic removal of willing Board members following a failed election, leaving the association without leaders to perform necessary obligations.

C. *The Unintended Consequences of the Trial Court Decision*

Although the trial court attempted to limit its ruling to the collection of assessments against the Pattisons only (CP 364), it has potentially far-reaching implications within PEHA and beyond. If the PEHA Board is powerless to act on behalf of the association in collecting assessments solely because it was not elected in accordance with the Bylaws and some of its members were appointed to vacancies by the Board, then every decision made or action taken by the PEHA Board over the past five years is potentially invalid, regardless of whether it relates to the collection of assessments.

Since most Washington community associations and other nonprofit corporations rely on the same statutory holdover rule and vacancy provisions at issue in this case, the trial court's interpretation will have statewide repercussions affecting not only

thousands of community associations, but also countless other nonprofit corporations. If the trial court's ruling is affirmed, the frequent failure to establish quorum for Board elections will result in corporations being left without formal leadership and an inability to operate. It will also provide a basis for challenge of any holdover Board's past decisions or actions. Likewise, the actions of Boards that include members appointed to vacant positions by the Board would also be subject to challenge. Under those circumstances, a significant increase in litigation over the validity of those decision and actions is inevitable.

It is unlikely the trial court intended this result, but it is evident that affirming the trial court decision would have a detrimental effect on many nonprofit corporations in Washington.

V. CONCLUSION

The trial court's conclusion that the PEHA board lacked authority to act on behalf of the association is inconsistent with statutes that reflect corporate law principles specifically intended to address the problems faced by PEHA and other nonprofit corporations in Washington. The potentially devastating impact on community associations that provide vital services as well as other nonprofit corporations statewide cannot be ignored. For these reasons, we respectfully request this Court reverse the trial court's decision.