

Case No.: E068064

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO**

ORCHARD ESTATE HOMES, INC.

Petitioner & Respondent

v.

THE ORCHARD HOMEOWNER ALLIANCE

Objector & Appellant

Appeal from the Superior Court of California, County of Riverside

(Case Number PSC 1700644)

The Hon. David M. Chapman, Judge

**APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF
AMICUS CURIAE COMMUNITY ASSOCIATIONS INSTITUTE IN
SUPPORT OF ORCHARD ESTATE HOMES, INC.**

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TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES..... 3

**APPLICATION TO FILE BRIEF OF AMICUS CURIAE
COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF
ORCHARD ESTATES HOMES, INC. 5**

**BRIEF OF AMICUS CURIAE COMMUNITY ASSOCIATIONS
INSTITUTE IN SUPPORT OF ORCHARD ESTATES
HOMES, INC..... 7**

I. POSITION OF COMMUNITY ASSOCIATIONS INSTITUTE... 7

**II. STATEMENT OF FACTS AND RELEVANT PROCEDURAL
HISTORY 7**

III. ARGUMENT 7

A. Voter Apathy Is Not Required Under Section 4275 7

**B. Requiring Voter Apathy Would Impose an Ambiguous and
Conflicting Standard..... 10**

**C. The Trial Court Did Not Abuse Its Discretion in Granting the
Petition Based on the Association’s Reason for the Amendment. 12**

**D. Civil Code Section 4275 Does Not Reduce Supermajority
Requirements to a Majority 13**

IV. CONCLUSION..... 15

TABLE OF AUTHORITIES

Cases

<i>Blue Lagoon Community Association v. Mitchell</i> (1997) 55 Cal.App.4th 472, 64 Cal.Rptr.2d 81	12
<i>Bonome v. City of Riverside,</i> (2017) 10 Cal.App.5th, 14, 215 Cal.Rptr.3d 654.....	14
<i>Fourth La Costa Condominium Owners Assn. v. Seith,</i> (2008) 159 Cal.App.4th 563, 71 Cal.Rptr.3d 299.....	6, 11, 14
<i>Greenback Townhomes Homeowners Association v. Rizan,</i> (1985) 166 Cal.App.3d 843, 212 Cal.Rptr. 678.....	8
<i>Mission Shores Assoc. v. Pheil,</i> (2008) 166 Cal.App.4th 789, 83 Cal.Rptr.3d 108.....	5, 12, 14
<i>Nahrstedt v. Lakeside Village Condominium Association,</i> (1994) 8 Cal.4th 361, 33 Cal.Rptr.2d 63.....	13
<i>Peak Investments v. South Peak Homeowners Association, Inc.,</i> (2006) 140 Cal.App.4th 1363, 44 Cal.Rptr.3d 892.....	13
<i>Quail Lakes Owners Association v. Kozina,</i> (2012) 204 Cal.App.4th 1132, 139 Cal.Rptr.3d 389.....	5, 11, 14
<i>Retzloff v. Moulton Parkway Residents' Association, No. One,</i> (2017) 14 Cal.App.5th 330, 222 Cal.Rptr.3d 330.....	8, 10
<i>That v. Alders Maintenance Association,</i> (2012) 206 Cal.App.4th 1419, 142 Cal.Rptr.3d 458.....	10
<i>Vasquez v. State of California</i> (2008) 45 Cal.4th243, 253, 85 CalRptr.3d 466	8
<i>Wolski v. Fremont Investment & Loan,</i> (2005) 127 Cal.App.4th 347, 25 Cal.Rptr.3d 500.....	9

Statutes

California Civil Code § 4205 13

California Civil Code § 42755, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

California Civil Code § 4955 10

California Civil Code § 5235(c) 10

California Corporations Code § 7515 8

Rules

California Rules of Court, Rule 8.200(c)5, 6

California Rules of Court, Rule 8.204(c) 16

Other

Statutes of California and Digests of Measures
Vol. 4, 1985-1986 Regular Session, Ch. 874, pgs. 278-279 8

**APPLICATION TO FILE BRIEF OF AMICUS CURIAE
COMMUNITY ASSOCIATIONS INSTITUTE
IN SUPPORT OF
ORCHARD ESTATES HOMES, INC.**

Community Associations Institute (CAI), an international organization, respectfully applies for leave to file the accompanying amicus curiae brief in support of Petitioner/Respondent ORCHARD ESTATES HOMES, INC. (collectively “the Association”) pursuant to rule 8.220(c) of the California Rules of Court. CAI is familiar with the content of the parties’ briefs.

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.

CAI seeks to file this brief regarding the issue of whether voter apathy is required for a Court to grant a petition under Civil Code section 4275. A CAI volunteer and author of the attached amicus brief, has been trial court and/or appellate counsel on three (3) out of the five (5) published decisions interpreting and applying Civil Code section 4275 (previously codified as Civ. Code § 1356): *Quail Lakes Owners Association v. Kozina* (2012) 204 Cal.App.4th 1132, 139 Cal.Rptr.3d 389 (appellate court counsel); *Mission Shores Assoc. v. Pheil* (2008) 166 Cal.App.4th 789, 83

Cal.Rptr.3d 108 (trial and appellate court counsel); and *Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, 71 Cal.Rptr.3d 299 (trial court counsel). Because one of the central arguments in this case turns on the application of Civil Code section 4275, CAI is uniquely suited to advise this Court, as amicus curiae, concerning both the exercise of Civil Code section 4725 and the effect the trial court ruling may have on other communities throughout the state.

The parties and their counsel in this matter have not been involved in authoring this brief, nor have they made any monetary contributions to fund the preparation or submission of this brief. No other person or entity has made a monetary contribution intended to fund the preparation or submission of this brief. (CRC §§ 8.200(c)(3)(A) & (B).)

Dated: March 14, 2018

Respectfully submitted,

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

I.

POSITION OF COMMUNITY ASSOCIATIONS INSTITUTE

CAI respectfully requests that this Court affirm the trial court ruling in the instant matter.

CAI respectfully submits that the trial court did not abuse its discretion in granting the petition under Civil Code section 4725 and finding that voter apathy is not an element of that statute. (1 AA 200.) If the trial court’s ruling is reversed, it will add an ambiguous and conflicting requirement to the statute. Community associations seeking to amend their CC&Rs will need to determine what level of voter apathy is required to bring a petition under Civil Code section 4725 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 § 4725(c)(3).)

For these reasons, CAI asks that this Court affirm the trial court’s ruling.

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. Voter Apathy Is Not Required Under Section 4275.

Civil Code section 4275 was previously codified as Civil Code section 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

Appellant, The Orchard Homeowner Alliance ("Appellant") argues that this appeal involves an interpretation of Civil Code section 4275 and claims that voter apathy is a "primary foundational consideration" in granting a petition under that statute. (Appellant's Opening Brief "AOB", pg. 16.) Civil Code section 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. To reverse the trial court's decision in this matter because voter apathy was not found would constitute an impermissible judicial re-writing of section 4275.

In interpreting a statute, courts do not change its scope by reading into it language it does not contain. (*Retzloff v. Moulton Parkway Residents' Association, No. One* (2017) 14 Cal.App.5th 330, 336, 222 Cal.Rptr.3d 330, citing *Vasquez v. State of California* (2008) 45 Cal.4th243, 253, 85 CalRptr.3d 466, 195 P3d.1049.) Courts may not rewrite a statute to conform to an assumed intention that does not appear in its language. (*Retzloff v. Moulton Parkway Residents' Association, No. One*, supra, 14 Cal.App.5th at 336.)

If the statutory language is unambiguous, courts presume the Legislature meant what it said and the plain meaning of the statute governs.

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, 212 Cal.Rptr. 678 (petition brought under Corp. Code § 7515 to approve CC&R amendments.)

(*Wolski v. Fremont Investment & Loan* (2005) 127 Cal.App.4th 347, 352, 25 Cal.Rptr.3d 500.) Courts' authority to investigate the intent of the Legislature is subject to the precondition that the statutory language in question is ambiguous, uncertain or unclear. (*Wolski v. Fremont Investment & Loan*, supra, 127 Cal.App.4th at p. 353.)

The language of Civil Code section 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 section 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 statutes 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 section 5235(c) did not support an inclusion of attorneys fees as "costs" to prevailing association); *see also, That v. Alders Maintenance Association* (2012) 206 Cal.App.4th 1419, 1428, 142 Cal.Rptr.3d 458 (plain reading of Civil Code section 4955 [formerly 1363.09(b)] did not support award of attorneys fees to association).

As with those cases, the plain meaning of Civil Code section 4275 should be applied here. Trial courts should not be required to make additional findings that are not set forth in Civil Code section 4275(c), including that voter apathy was the reason the proposed amendment did not obtain the required supermajority approval.

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

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?

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, 139 Cal.Rptr.3d 389.) Imposing an additional standard that does not exist in the statute needs to come from the Legislature, not the courts.

Additionally, community associations seeking to employ Civil Code section 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.”

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 section 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 section 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. The Trial Court Did Not Abuse Its Discretion in Granting the Petition Based on the Association’s Reason for the Amendment.

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 holding of *Mission Shores Association v. Pheil* (2008) 166 Cal.App.4th 789, 83 Cal.Rptr.3d 108. (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 had the right to exercise its discretion in this manner.

The published cases under Civil Code section 4275 recognize 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. (*Blue Lagoon Community Association v. Mitchell* (1997) 55 Cal.App.4th 472, 64 Cal.Rptr.2d 81.) Courts have characterized Civil Code section 4275 as a “safety valve” when they are hamstrung to adopt important amendments. (*Blue Lagoon Community Association v. Mitchell*, supra, 55 Cal.App.4th at 477.)

Here, the Association demonstrated that their rules have prohibited rentals of less than thirty (30) days since the inception of the development. (1 AA 8, 26, 27, 28, 29, 30, 31, 33, 115.) However, certain members claimed that the rules were unenforceable and were violating such provision by engaging in short-term rentals. (1 AA 8, 17, 23.) The

Association stated that the proposed CC&R amendment, requiring rentals to be for a minimum of thirty (30) days, was important because it would eliminate confusion among the members. (1 AA 8, 9, 17, 23.)

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, 33 Cal.Rptr.2d 63.) 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.

D. Civil Code Section 4275 Does Not Reduce Supermajority Requirements to a Majority.

Appellant asserts that disregarding voter apathy would reduce Civil Code section 4275 to a "catch-all" statute that would virtually eliminate supermajority approval requirements. (AOB, pgs. 22-23.) This claim is completely without merit. Civil Code section 4275(d) specifically states that an order granting a petition will reduce the supermajority requirement set forth in the CC&Rs to the actual approval received in the vote:

If the court makes the findings required by subdivision (c), any order issued may confirm the amendment as being validly approved on the **basis of affirmative votes actually received during the balloting period . . .** (Civ. Code § 4275(d).) (emphasis added)

The statute's requirement that members having more than 50 percent of the votes voted in favor of a proposed amendment is the minimum threshold that needs to be met. (Civ. Code § 4275(a); *Peak Investments v. South*

Peak Homeowners Association, Inc. (2006) 140 Cal.App.4th 1363, 1367, 44 Cal.Rptr.3d 892.)

Here, the Association did obtain approval of a supermajority of the membership. Fifty-eight (58) out of the total ninety-three (93) members, constituting sixty-two percent (62%), voted in favor of the amendment. (1 AA 9.) Of those members who participated in the vote, the Association obtained approval of sixty-eight percent (68%) (58 out of 85 votes). (1 AA 9.) The trial court's order stated the amendment was approved based on the number of affirmative votes actually received. (1 AA 203). Therefore, the amendment was approved by sixty-two percent (62%), rather than the required sixty-seven percent (67%).⁴

Appellant's reliance on *Bonome v. City of Riverside* (2017) 10 Cal.App.5th, 14, 215 Cal.Rptr.3d 654 is misplaced. (AOB pg. 24.) In that case, at issue was the interpretation of a Penal Code statute pertaining to a police officer's retirement status and whether he was entitled to carry a concealed weapon. The appellate court determined that the statute defining "honorably retired" only excluded officers who accepted service retirement in lieu of termination. (*Bonome v. City of Riverside*, supra, 10 Cal.App.5th, at 22.) The court held the statute was clear and did not lead to absurd results. (*Id.*)

Similarly, not requiring voter apathy under Civil Code section 4275 does not lead to absurd results. Rather, granting the relief sought 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).)

⁴ Prior cases decided under Civil Code section 4275 also had supermajority approvals – 52% in *Fourth La Costa Condominium Association v. Seith*, supra, 159 Cal.App.4th at 569; 59% in *Mission Shores Association v. Pheil*, supra, 166 Cal.App.4th at 793, and 61% in *Quail Lakes Owners Association v. Kozina*, supra, 204 Cal.App.4th at 1135.

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 section 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 trial court.

Dated: March 14, 2018

Respectfully submitted,

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Laurie S. Poole
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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 2,640 words, based upon the word count feature contained in the word processing program used to produce the brief (Microsoft Word 2016).

Dated: March 14, 2018



Laurie S. Poole, Esq.

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 March 14, 2018, I served the foregoing document(s), described as Application to File Amicus Curiae Brief and Brief of Amicus Curiae Community Associations Institute in Support of Orchard Estate Homes, Inc. on the interested parties through the Electronic Filing System (EFS) TrueFiling Portal as follows:

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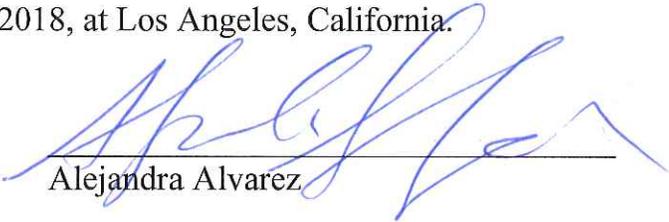
The Trial Court was served by Mail by placing a true copy thereof enclosed in a sealed envelope and addressed as follows:

The Honorable David M. Chapman
c/o Clerk of the Court
Riverside Superior Court – Palm Springs
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The California Supreme Court will be served electronically in accordance with California Rules of Court, Rule 8.212 (c)(2) via the Electronic Filing System (EFS) TrueFiling Portal.

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

Executed on March 14, 2018, at Los Angeles, California.


Alejandra Alvarez