



Amending Governing Documents: Providing Effective Legal Counsel (And Effective Amendments)

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AMENDING GOVERNING DOCUMENTS: PROVIDING EFFECTIVE LEGAL COUNSEL (AND EFFECTIVE AMENDMENTS)

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The idea of amending a community association's recorded covenants is often initially tantalizing and intriguing for clients, but board members and managers can quickly find the process intimidating and overwhelming, especially in light of budgetary concerns, owner apathy or divergent notions of ideal community association governance. The result? The client either simply shelves the idea, leaving it for a subsequent board to possibly tackle down the road, or worse, decides to cut corners, ignore "legal niceties," and end up with ineffective, unenforceable or legally void results. This is where experienced, effective legal counsel can make a difference – guiding the board and manager through the amendment process from start to finish.

Many different factors lead boards (or a group of owners) to undertake a covenant amendment project. Maybe it is a desire to modernize old, stale documents that still refer to developer rights from twenty years ago and still refer to sending notices by telegraph. Or maybe the goal is take advantage of, or avoid the consequences of, recent court decisions or legislative changes. Or possibly, it is simply a desire to have the association's founding documents reflect the members' vision for their community rather than the developer's vision (or lack of vision).

This article focuses on founding documents that typically require a homeowner vote to amend², and addresses (1) actual and perceived inadequacies in the original founding documents provided by the association's developer ("declarant"), which often lead to a need or desire to amend, (2) initial considerations for legal counsel, such as flushing out the board's goals and understanding the applicable requirements for approving the amendments, (3) providing effective legal counsel, from document drafting to guiding the association through the amendment "selling" and approval process, and (4) fairly recent court decisions of note relating to the amendment process.

Developer Documents – Seeing Room for Improvement

Although there are many well-drafted sets of founding documents and developers willing to spend money to have them tailored on a development-by-development basis, community associations continue to be confronted with confusing, poorly written, or simply outdated founding documents. Problematic developer-provided founding documents can generally be categorized into

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² For condominiums, this would typically be the Declaration (or Master Deed) and the Bylaws; for homeowners' associations or planned unit developments (PUDs), this would typically be the Declaration of Covenants and Articles of Incorporation (or corporate charter) and sometimes the Bylaws.

three categories: (1) the “dinosaur,” (2) the “one-size-fits-all,” and (3) the “do they know what a condo is” set of documents.

How do you recognize a set of “dinosaur” documents? Maybe the bylaws still refer to sending notice by telegraph or refer to overly restrictive voting or proxy requirements left over from what your state’s original condominium statute once, but no longer, required. Some of these documents may have been adequate versions when they were first recorded thirty years ago, but have not aged well over time, whether due to changes in the law, changes in best practices, or other factors. Sometimes, though, these dinosaur documents are found in relatively new communities, suggesting maybe that an inexperienced (or overly frugal) developer simply pulled an old set of documents from a rusty file cabinet and decided that if they were good enough twenty years ago, they must still be just fine.

The “one-size-fits-all” document typically comes from a developer that pays an attorney to draft one set of governing documents, and then uses that one set of documents for every single community it develops, with no regard to each community’s distinguishing characteristics. For instance, maybe the declaration of covenants gives the Association the authority to suspend the use of recreational facilities, but the Association has none – the only common area is, for instance, an entrance sign and stormwater management.

Finally, the “do they know what a condo is” document is one that is entirely inappropriate for the type of the community being developed, such as a situation when the developer apparently thought that a set of condominium documents could just be tweaked a bit and used for its new single-family homeowners’ association development – yes, this has happened.

Inadequate Delineation of Maintenance & Repair Responsibilities

Among the more common sources of problems are inadequate or poorly drafted provisions delineating maintenance and repair responsibilities, particularly when it comes to the “chart of maintenance responsibilities” frequently attached as an exhibit to the condominium declaration or bylaws (or occasionally included as part of the rules and regulations). Sometimes these descriptions of the various condominium components conflict with how the condominium declaration designates the common elements, limited common elements and unit components, which breeds confusion. Often, there are conflicting provisions within the chart itself or language that creates more ambiguity or room for dispute. Having maintenance charts that identify responsibilities for specific components (such as windows, doors, balconies, and plumping pipes) can and should be an effective way to provide clarity to the often murky determinations of who has responsibility for maintaining, repairing and replacing the various components of a condominium. However, when poorly drafted, these charts create more problems than they solve. Also, when these charts are not included as part of the declaration, a disclaimer is useful that clearly advises owners that the chart does not supersede the provisions of the declaration.³

³ The following is a sample disclaimer: “This Chart is designed as a quick-reference chart to assist owners in determining their maintenance obligations. This list is not necessarily comprehensive or exhaustive, and in the event of irreconcilable conflict with the declaration [or bylaws], the declaration [or bylaws] controls. Notwithstanding the Association’s responsibilities described in the Chart, damage caused by or due to misuse, neglect or carelessness by an Owner (or a

Outdated Provisions – Documents that Don’t Age Well

The push for amendments can also come from developer documents that have not aged well over time, whether due, for example, to unanticipated changes in the law, changes in best practices, or changes in technology. Whenever reasonably possible, founding documents should be drafted with an eye toward being flexible enough to withstand the test of time. For instance, avoid citing to a particular state code section, which might change over time. Also, why not include provisions that allow for the use of new technologies that may develop over time (to the extent allowed by applicable law), such as for sending notices or for voting, instead of stating that all notices must be sent only by one specified means or method? Why not give future boards the ability to adopt reasonable late fees or interest rates for delinquent accounts or fines for enforcement matters, rather than stating a specific late fee or interest rate in the documents, which may be reasonable when the document is first drafted, but will be wholly inadequate in ten or twenty years?

Insufficient Enforcement Tools

Another frequent issue that leads to amendment discussions are founding documents that do not give associations a sufficient array of useful, effective remedies for enforcing covenants and rules. For instance, some governing documents (particularly older versions) essentially leave association boards with the option of filing a lawsuit or basically doing nothing. While filing lawsuits keeps attorneys employed, we know that from a practical standpoint, not every violation warrants a lawsuit. Instead, associations need other tools that can be administered internally within the organization, providing an effective incentive to comply before being potentially subjected to legal action. One of the more common internal administrative remedies referenced in founding documents is the suspension of a member’s voting rights . . . will that alone really be effective in achieving compliance?

Depending on the nature and design of the particular community and depending on any limitations imposed by applicable law, other types of administrative enforcement remedies may include:

- (i) suspension of the ability to use recreational facilities, common area parking spaces and association-provided telecommunication services;
- (ii) assessment of violation charges (or fines);
- (iii) towing of noncompliant vehicles;
- (iv) disqualification from being elected to or serving on the board of directors;
- (v) use of “self-help” to repair or remove violations at the owner’s expense; and
- (vi) regarding delinquencies, express authority to charge late fees and interest and to recover collection costs, including attorneys’ fees, regardless of whether a lawsuit is filed.

When drafting these provisions in founding documents, the practical implementation of the specified remedies should also be considered – can the particular remedy, as written, actually be readily and cost-effectively implemented by the board or the community manager?

person or animal for whom the Owner is responsible) will be the responsibility of that Owner. Owners are encouraged to consult the relevant declaration sections or contact the Board or Managing Agent with any questions.

Impediments to Effective Governance

Newer founding documents used by many developers continue to improve in many respects, by increasingly recognizing the need to give boards (and owners who wish to participate) the ability to carry out association business efficiently and effectively. Allowing a large apathetic group of owners to thwart an association's ability to carry out its functions does not serve the best interests of associations. Yet, many associations find themselves with founding documents that serve as impediments to effective governance, leading to discussions of how best to amend them (including whether the limitations imposed by the founding documents also serve as impediments to amending the documents).

Examples of provisions that can impede effective governance include: unreasonably high quorum requirements (such as 50% of all owners); stringent limits on proxy voting (who and how many); a large minimum size for the board of directors; outdated caps on board-approved assessment increases or capital improvements; and overly complicated procedures for adopting rules and regulations or taking enforcement actions against non-compliant owners.

Initial Considerations for Amending Founding Documents

Before getting too deep into an amendment project, it is important for legal counsel to flesh out the board's goals, determine whether those goals are achievable (or best achieved) through document amendments, and to thoroughly research and advise the board as to the approval requirements for the particular document(s) to be amended, potential obstacles to achieving success, and the estimated cost of going through the amendment process. Only then can the board make an informed decision as to whether or how to proceed with amendment process. It also reduces the chances of an after-the-fact blame game if the amendment process fails.

What are the Client's Goals?

Presumably, boards do not start an amendment process just because they heard a neighboring association did it and thought, "why not us?" Or, just because they have extra cash in the bank and want to spend it on something. Getting a board to articulate its goals at the outset will help legal counsel best determine whether those goals are achievable, unrealistic or legally improper, determine which documents would need to be amended, and determine the applicable approval requirements and other procedural hurdles.

Often, a board's goals include clarifying maintenance and repair responsibilities, improving operational procedures, and enhancing enforcement tools. Goals may be more specific or targeted, such as being focused on rental restrictions, or specifically prohibiting certain conduct or actions arising from experiences with a few "bad apples."

Some of the more commonly desired operational or governance changes include:

- Eliminating cumulative voting
- Reducing quorum requirements and approval requirements
- Providing for more specific director qualifications

- Changing the number of required directors
- Creating staggered board terms
- Changing the timing of annual meetings
- Streamlining voting procedures and requirements
- Shifting responsibilities to the board for approving loans, acquisitions, annexations, etc.

Some of the more commonly desired changes to use restrictions and other restrictive covenants include:

- Adding rental restrictions
- Clarifying maintenance and repair responsibilities
- More clearly dealing with “people, pets and parking” matters
- Addressing nuisance/offensive behavior, smoking, noise, etc.
- Modifying architectural requirements and restrictions
- Improving assessment collection provisions
- Modernizing and clarifying insurance requirements
- Clarifying responsibilities for dealing with casualty losses in condominiums

Unfortunately, not all boards or unit owners have good intentions in mind. As reflected in reported case law from around the country, some unit owners will try to use the amendment process for their own personal benefit, or to target a particular person or group that they dislike, or will want to push an amendment through by bypassing some or all the legally-required procedures.⁴

For amendments promoted by the board, the association’s legal counsel should help steer the process toward achieving effective, reasonable amendments, through legitimate means; helping the client avoid the “us versus them” mentality that can quickly doom an amendment project.

What are the Approval Requirements?

An essential part of the amendment process (and the decision on whether to begin that process) is confirming the applicable approval requirements for the contemplated amendments. Having this information at the outset will allow the board to make an informed decision regarding the feasibility of obtaining approval for the amendment, and will also likely impact attorney fee and cost estimates for completing the amendment project.

For instance, does more than one document need to be amended? Would the amendment simply be correcting a scrivener’s error that, under applicable law, need only be approved by the board of directors?⁵ Otherwise, what percentage of owners must approve the amendment, and does

⁴ See, e.g., *Holt v. Keer*, (N.H. 2015) (owners of three of the four total units in a condominium, with a history of disputes with the fourth owner, using the amendment procedure to convert common elements into limited common elements for their own units’ exclusive use, and to give three-fourths of unit owners the ability to waive certain covenants). [copy included with materials]

⁵ See, e.g., *Belleview v. David Cutler Group*, 118 A.3d 1184 (Pa. 2015) (statute’s authorization for unilateral board amendments to correct “technical errors” did not include an amendment making lots subject to late fees, interest, costs and attorneys’ fees); and *Club Envoy of Spokane v. Ridpath Tower Condo. Ass’n*, 337 P.3d 1131 (Wash. Ct. App., 2014) (under

state statute control this or the governing documents? If an amendment would require approval of 80% of all owners, would the board still want to proceed? What if 100% owner approval is required?

Certain approval requirements can prove to be particularly troublesome. For instance, do the owners' mortgage companies also have to approve the amendment? If so, must the mortgage company information come from what is recorded in land records? Is local government approval required due to, for instance, the amendment's impact on the government-approved development plan or site plans submitted by the developer? Did the developer (declarant) retain approval or veto authority over certain types of amendments? These third-party approval requirements can, and often do, present additional obstacles to the process. Identifying unit owners' mortgage companies can be difficult or time-consuming, and can add significant expense to the overall project. In addition, if declarant approval is required, you may find that the declarant cannot be located, is unresponsive, or has since dissolved.

Providing Effective Legal Counsel

The association's legal counsel can serve a vital role in the amendment process, from start to finish – drafting the proposed amendment language, guiding the client through the process (to ensure compliance all mandates of applicable statute and the governing documents), and helping to "sell" the amendments to the membership.

Drafting the Language

Once the client's goals are confirmed, legal counsel's role in drafting the proposed amended language is critical to the success of the amendment project. Rather than having legal counsel review client-prepared language, often it is best (and more cost effective) to have legal counsel prepare the initial draft language for the client's review. In drafting the language, one needs to focus on using clear language that will achieve the client's intended purpose, will best withstand potential legal challenge, and will avoid unintended consequences when the approved amendment is implemented and enforced down the road. In many instances, proposed amended language will benefit from being written as simple and straight-forward as possible to achieve the intended result – benefitted from an increased likelihood of being understood and approved by the owners, and benefitted from being easier to implement and enforce by the board.

Compare the following two versions of a provision allowing voting by proxy. Which one is more easily understood and implemented, and is likely to be less controversial to owners? What restrictions or requirements are really necessary to have a fair voting process?

state statute, the owners rather than the board had the authority to amend the condominium declaration). [copy included in materials]

Example 1:

Proxies. A vote may be cast in person or by proxy. A proxy may be instructed (directing the proxy how to vote) or uninstructed (leaving how to vote to the proxy's discretion). Such proxies may be granted by any unit owner in favor of only another unit owner, an Officer, the Declarant or such unit owner's Mortgagee, or additionally in the case of a non-resident unit owner, the unit owner's lessee, attorney or rental agent. Only instructed proxies may be granted by any unit owner to the managing agent. No person other than the Declarant, the managing agent or an Officer shall cast votes as a proxy for more than one unit not owned by such person; provided, however, that no Officer shall cast votes as an uninstructed proxy for more than five units not owned by such person. Proxies shall be duly executed in writing, shall be acknowledged in front of a notary, shall be dated, shall be signed by a person having authority at the time of the execution thereof to execute deeds on behalf of that person, shall be valid only for the particular meeting designated therein and any continuation thereof, and must be filed with the Secretary.

Example 2:

Proxies. A unit owner's vote may be cast at an Association meeting either in person or by proxy. A proxy appointment may be instructed (directing the appointed proxy how to cast the owner's vote) or uninstructed (leaving how to vote to the appointed proxy's discretion). Any individual may be appointed as the proxy, but the appointed proxy must attend the Association meeting in person. The Association's manager may be appointed as a proxy, but can only cast a vote as a proxy pursuant to an instructed proxy. Proxy appointments must be:

- (i) In writing;
- (ii) Signed and dated by the unit owner (or in cases where the owner is more than one person, by one or more of the co-owners on behalf of all the co-owners of that unit) or by a person authorized by the unit owner who has the authority, at the time of execution, to execute deeds on behalf of the owner;
- (iii) Submitted to the Association so that it is received by the Association's manager (or if none, the Secretary) prior to or at the meeting for which the proxy was granted. A proxy appointment may be submitted by mail, by hand-delivery, or by electronic transmission in accordance with the proxy instructions included with the meeting notice.⁶

Drafting proper language can often involve a delicate balance between using "plain English" and using legalese or terms of art that have a well-defined, accepted meaning under applicable statutes or case law. For instance, when dealing with maintenance and repair responsibilities, your typical owner may not fully understand the term "limited common element" (or "limited common area") as defined in the governing documents or state statute, and thus the board may prefer to avoid using that terminology. However, using such a defined term in an amendment may be essential in achieving the client's desired result in a manner consistent with the law and that preserves important rights or obligations associated with that defined term. Usually, though, you should avoid using language best reserved for old legal treatises – words or phrases such as "heretofore," "subsequent thereto," "ab initio," and "infra."

Consideration should also be given to whether the proposed amended language would benefit from including definitions for certain terms or a real-world example of how the amended provision would be enforced or applied to particular facts. For example, if the board is proposing a prohibition on commercial vehicles, it may be prudent to define "commercial vehicle" in the amended provision to pinpoint the particular types of vehicles that have been, or most likely could be, a problem for the community. This may help increase the odds of being approved by the

⁶ Other examples of sample amendment language are included as part of the materials (in a separate document).

owners. Does the board want to only prohibit the types of vehicles that are defined in state or local laws or ordinances as “commercial vehicles,” or does the board have a broader meaning in mind? Alternatively, one might consider the odds of achieving owner approval if the meaning of “commercial vehicles” is not specifically defined but rather left to be addressed later in board-adopted rules and regulations. A conclusion on this may depend on the level of trust that has been built up (or conversely, eroded) over recent years between the board and the membership in how current or past boards have interpreted and enforced the association’s rules.

Depending on the nature of the contemplated amendments, it can also be important for legal counsel to have a good understanding of the community – practical insight into the community’s design, appearance and amenities, and the association’s management and governance structure. This will help in tailoring the language to meet the needs of that particular community, avoiding the “one-size-fits-all” approach to document drafting. Part of this process can also involve getting input from the association’s community manager regarding, for instance, any practical concerns about how the amended provision would be implemented or enforced.

For example, many communities want counsel to draft “No Smoking” provisions. A no smoking provision in a condominium with shared components such as hallways and ventilation systems can be very effective in preserving the health and safety of the residents as well as the values of the units. However, a no smoking provision in a single-family, detached housing development will most likely be viewed as overreaching or unreasonable.

Then there is the matter of enforcing these provisions. A no smoking provision is by its nature designed to regulate behavior. It is often difficult or impossible to regulate behavior, and many communities simply do not have the tools or the resolve to enforce no-smoking provisions. If a community does not intend to enforce certain provisions, they should not be placed in the amended documents. If the board or owners insist on proposals that will likely be controversial, such as a rental restriction or a limit on the weight of dogs, consider having a separate ballot item for that provision so that owners may approve the proposed amended documents and still vote against the controversial provision(s). Do not let one particularly controversial provision torpedo the entire amendment project.

Finally, it is important to know whether there have been past amendment attempts. Did they involve the same or similar topics currently under consideration? Why did those attempts fail – was it process-related or content-related? What can be done differently this time to reduce the risk of controversy and increase the chances of success? For instance, if the board previously attempted, but failed, to gain approval of an amendment increasing or improving the association’s enforcement remedies, was there a particular concern that resonated with the membership? Did a group of owners successfully portray the effort as an unfair “power grab” by the board? Having an understanding of this failed prior attempt may lead to drafting a less ambitious, or less broadly worded, amendment this time around – targeted to specific, hopefully less controversial enforcement tools. Learn from past mistakes – do not repeat them.

Guiding the Process

Another fundamental aspect of the amendment process is to ensure that the proper procedures are being followed, such as the approval method, any special notice requirements, and any execution, filing or recordation requirements once the amendment is approved. Given the time, effort and expense involved in the amendment process, it is important for boards to understand that one error in the process can ruin what otherwise appears to be a successful amendment project.

In terms of the approval method, it must be determined whether the proposed amendment requires approval by a vote of the owners at an Association meeting, or whether signed approval forms can simply be collected over time by mail or through door-to-door efforts. Also, consider whether the owners' signatures have to be witnessed or notarized, and whether state statute or the governing documents require that the proposed amendment first be approved by a board vote before being submitted to the owners for approval.

Using the wrong approval method can render the amendment voidable by a court. For instance, in a 2009 case out of Wyoming, the court invalidated an amendment that was signed and notarized only by an officer of the Association, even though over 75% of all the lot owners had approved the amendment. The declaration of covenants required that amendments be accomplished through a recorded instrument "executed and acknowledged" by 75% of the lot owners, which meant that amendment instrument itself had to include the notarized signatures of the approving lot owners.⁷

There may also be special notice requirements for the particular amendment being proposed, imposed either by state statute or by the governing documents. For example, although the bylaws may state that a special meeting of the Association requires at least 14 days' notice, there may be other provisions in the governing documents or state statute that require more notice (such as 30 days' notice), require that the notice explicitly state that the meeting is called for the purpose of voting on the amendment, and require enclosing with the notice a copy of the text of the proposed amendment. Just as with using improper approval methods, giving improper notice can also invalidate the amendment.⁸

Along these same lines, it is also important to ensure that the ballots, proxy forms and other documents used during the approval process are legally sufficient. As with drafting the amendment language itself, it is prudent to find a proper balance between, on the one hand, having notices and approval forms drafted to meet all applicable requirements to withstand legal challenge, and on the other hand, not being so complicated that they confuse owners to the point of simply deciding not to participate in the approval process.

Finally, once the amendment is approved by the owners (and mortgagees and others, if applicable), legal counsel should follow up with the board and manager to ensure that all final legal requirements are met. Do the governing documents or state statute mandate who must sign the

⁷ *Riverview Heights Homeowners Assn. v. Rislow*, 205 P.3d 1035 (Wyo. 2009) [copy included with materials]

⁸ *Manchester Oaks Homeowners Assn. v. Batt*, 732 S.E.2d 690 (VA 2012) (although the court's decision was based on defective notice, owners had also challenged the amendment based on allegations related to the applicable required vote percentage, the voting procedure, and pre-vote statements by the president) [copy included with materials]

amendment instrument and whether it must be notarized, for instance? Also, depending on which document is being amended, state law may provide that the amendment is not effective until it is signed and certified by the association's president (or other authorized officer) and recorded in the locality's land records. It is not unheard for an association to spend much time and effort to amend a governing document, only to then forget (or simply not know) that the final step was to record the amendment in land records; then a few years later the association is faced with a legal challenge over action taken by the board in reliance upon an unrecorded, and therefore legally unenforceable, amendment.

Although some boards may be inclined to have legal counsel's involvement end with the drafting of the proposed amendments, the above-noted issues reflect the importance of providing knowledgeable, effective legal counsel throughout the amendment process, helping guide the association through the process to its ultimate conclusion.

Throughout the amendment approval process, those speaking on behalf the association or the board must themselves be educated on the proposed amendments so that clear, accurate information is conveyed in all communications with owners. Doing so will help avoid allegations that the board purposely misled owners to garner approval votes. To reduce the risk of incorrect or mixed messages to owners, it can often be helpful for the board to specifically designate one individual (e.g., the president) who is authorized to speak on behalf of the Association and the board regarding the amendment project, and specifically direct that person to seek input from legal counsel on all amendment-related communications before they are finalized and transmitted.

“Selling” the Amendments

When we speak of “selling” the proposed amendments to the membership, there is no pejorative intent. Instead, it is a recognition that for most successful amendment projects, the board will need to have a plan in place (and one that is actually followed) to encourage owner involvement in the process, to educate owners about why the amendments are being proposed, and to effectively respond to owner questions and criticisms.

Encouraging or inviting early involvement of owners can prove to be critical to the success of an amendment project. Examples include giving owners a chance to comment on draft amendment language, forming an ad-hoc amendment committee (comprised of a few rational, thoughtful owners), and scheduling a board-organized Q&A session on the proposed amendments. Even if few owners end up choosing to get involved to this degree, the fact that the board gave them the opportunity to participate in and impact the process can help fend off attacks by dissenters claiming that the process was too secretive or that owners were not given enough time to fully read and understand the materials.

As an example of the importance of soliciting owner involvement early in the process, consider the following scenario based on actual events: an association's board spends approximately a year working with legal counsel to draft a complete amended and restated set of governing documents. However, during this initial drafting stage, the board does not mention the project to owners or specifically list the project as an agenda item for board meetings. The owners are not given any opportunity to provide comment on the draft amendments under consideration by the board. In fact, the first time the owners learn of the amendment project is when they receive the

annual meeting notice in the mail, which includes a copy of the final proposed amended and restated bylaws, articles of incorporation and declaration of covenants, all to be voted on at the annual meeting. A relatively small but vocal group of owners are quite unhappy with the lack of input in the process, and feel that the board is trying to “sneak by” the membership several significant amendments buried in the materials, avoiding sufficient owner debate or consideration. That group of dissenters then undertakes an effort to collect a significant number of proxy forms from fellow owners for use at the annual meeting. At the annual meeting, not only do the amendments fail, but no incumbent directors are re-elected to the board.

Another important aspect of “selling” the amendments is education. Consider recommending that the board have legal counsel prepare (or at least review and edit) a letter mailed to all owners explaining the rationale behind the proposed amendments and explaining some of the more substantive changes. Explain why the changes are beneficial or important to the association and the membership as a whole. Simple, straightforward (but legally accurate) explanations can assist in making the process a bit less intimidating for owners, hopefully increasing the level of participation.

Other ways to educate the owners during this process is for the board to hold one or more informal “town hall” type meetings, when the board has legal counsel present to explain the amendment process and respond to owner questions about specific amendments. Providing anecdotal stories or examples of how provisions work in reality can also help owners understand specific proposed revisions.

Promoting the amendments requires a group effort. Encourage all board members to be actively involved in the approval process – if the board is not fully engaged in the process, how realistic is it to think that significant number of owners will be? Board members can provide assistance, for example, in formulating a “plan of attack” that will help overcome the usual owner apathy. Promotional flyers and billboards within the community can be prepared and posted or distributed. Board members can volunteer to go door-to-door to encourage participation and, if applicable, to collect approval forms, ballots or proxy forms from resident owners.

Finally, it is important for legal counsel to assist in the process of responding to questions or criticisms from owners. Board members and managers must avoid giving incorrect or misleading responses, which can be used later to challenge the voting results. Also, Board members, managers and legal counsel can also usually anticipate which particular provisions will likely be controversial, and in some cases, which owners will be the loudest dissenters – thinking about these issues early in the process can help everyone more effectively deal with them when or if questions or concerns later arise. Again, it is best for all questions or concerns to be forwarded to one designated person, who in consultation with legal counsel and management, can make the determination of which questions or concerns need to be addressed (and whether it should be done on an individual or community-wide basis) and to then respond to them accordingly in a straightforward, professional, and legally accurate manner.

We end our discussion with the following tips for successfully representing and counseling associations during the document amendment process:

- At the outset, confirm and communicate to the board all approval requirements and procedures for the contemplated amendments
- Clearly identify the client's objectives and make sure the new documents achieve those objectives
- Don't assume a topic or issue is addressed in the governing documents in just one spot
- Have more than one set of eyes review draft documents before they are sent to the full board (and later to the owners)
- Maintain involvement throughout the amendment process – from start to finish
- Be present at meetings with owners – help the client stay "on message"
- Review all notices, ballots and other forms before the client provides them to owners

Whether due to a poorly drafted original set of founding documents, changes in the law, a community-specific issue that needs to be addressed, or a desire to follow industry-recognized best practices for effective community association governance, associations need effective and knowledgeable legal counsel to guide them through the process.

While legal counsel cannot guarantee that an amendment will get approved by the membership, the importance and effectiveness of legal counsel will be judged by the extent to which legal counsel (i) provides amendment language that legally achieves the desired result and reduces the likelihood of future disputes over its implementation and enforcement, (ii) provides guidance to ensure the association follows proper procedures, (iii) provides understandable, but legally sufficient, notices, ballots and other forms, and (iv) helps board members and the manager promote and explain the proposed amendments in a manner that places the amendment project on the best possible path toward success.

SIDE BAR:

Statutorily-Imposed Approval Requirements & UCIOA's "Vision"

Especially for condominiums, state statutes will often specify a minimum owner approval percentage and minimum procedural requirements. In some instances, state statutes will apply only if the recorded governing documents are silent on approval or procedural requirements. State statutes may also mandate that certain types of amendments require 100% owner approval.

The Uniform Common Interest Ownership Act ("UCIOA") includes amendment approval requirements that increase the ability of a vocal minority to prevent or severely hamper certain types of amendments to an association's founding documents. The official commentary states that this is in recognition of a "growing belief that restrictions on use and occupancy which unit owners would like to impose after the declaration is recorded ought to be adopted only by a super majority and only after providing protection for those whose use or occupancy will be affected by the amendment."⁹

For instance, Section 2-117 of UCIOA states:

*"An amendment to the declaration *may prohibit or materially restrict the permitted uses of or behavior in a unit or the number or other qualifications of persons who may occupy units* only by vote or agreement of unit owners of units to which *at least 80 percent of the votes* in the association are allocated, unless the declaration specifies that a larger percentage of unit owners must vote or agree to that amendment or that such an amendment may be approved by unit owners of units having at least 80 percent of the votes of a specified group of units that would be affected by the amendment. *An amendment approved under this subsection must provide reasonable protection for a use or occupancy permitted at the time the amendment was adopted.*"* [Emphasis added]

That same section of UCIOA also provides that if a declaration requires more than 80% owner approval for an amendment, one objecting owner can trigger the need for court action to bless the amendment. It states, in part, that the proposed amendment is approved if:

*"unit owners of units to which at least 80 per cent [sic] of the votes in the association are allocated vote for or agree to the proposed amendment but at least one unit owner objects to the proposed amendment and, *pursuant to an action brought by the association in [insert appropriate court] against all objecting unit owners*, the court finds that the objecting unit owners do not have an interest, different in kind from the interests of the other unit owners, that the voting requirement of the declaration was intended to protect."* [Emphasis added]

Few states have so far actually enacted these UCIOA provisions, but it is important to keep UCIOA's approach to amendments in mind. As more associations "push the envelope" in adopting controversial amendments, it may lead to disgruntled owners pressing elected officials to follow UCIOA's lead and empower the vocal minority over the will of the majority.

⁹ Official Comment 5, regarding subsection (f) of Section 2-117 of UCIOA. The UCIOA, last updated in 2014, is adopted by the National Conference of Commissioners on Uniform State Laws and "recommended for enactment in all the states." The UCIOA text and official comments can be found at www.uniformlaws.org.

SAMPLE AMENDMENTS FOR FOUNDING DOCUMENTS

By: Marion A. Aaron, Esq. (CA)¹

For reference purposes only, below are a few sample provisions for amendments to community associations' founding documents. Of course, the suitability of particular amendments (and the exact wording) will be dependent on the association's specific goals and on applicable statutory and case law in your jurisdiction.

Smoking in Condominiums (and “Vaping”)

No Smoking in Condominium. For the safety of the property and for the health, safety, and security of all Residents of the Condominium, no smoking of cigarettes, pipes, cigars, or any other tobacco product, electronic cigarettes, personal vapor devices or electronic nicotine delivery devices, marijuana or illegal substance shall be permitted anywhere in the Condominium, including in a Unit, in Common Areas, and in any Exclusive Use Common Areas. “Smoking” shall include the inhaling, exhaling, burning or carrying of any such lighted or heated prohibited product or substance within the Condominium.

Drones above Your Hot Tub

No Drones. For the safety and privacy of all occupants in the Project and to protect the improvements at the Project, no drones, unmanned aerial vehicles (UAV), or similar remote or radio controlled aerial devices shall be allowed anywhere in the Project, whether inside or outside the building. Any devices found in the common areas will be confiscated by the Association and deemed abandoned by the owner.

Hostile Neighbors

Neighbor-to-Neighbor Disputes. The Association shall not be obligated to take enforcement action when a dispute under the Declaration or rules and regulations is solely a dispute between neighbors involving an alleged nuisance or offensive behavior, not involving the Common Area and not involving a violation of the Association's architectural or maintenance standards. In any dispute between neighbors, Residents must first work in good faith with each other to resolve their differences before the complaining Owner reports an alleged violation of the governing documents to the Association. An Owner's complaint to the Association about a neighbor must: (a) be in writing; (b) give as much detail as possible concerning the dispute; (c) provide specific information about what informal efforts to resolve the matter were undertaken by the complaining Resident(s); and (d) provide the name, address, phone numbers, and email address of the complaining Resident(s).

¹ Prepared for CAI's 2016 Community Association Law Seminar, New Orleans, LA. Co-presenters: Marion A. Aaron, Esq., Berding | Weil, 2175 N. California Blvd., Suite 500, Walnut Creek, CA 94596 [www.berding-weil.com]; Allen B. Warren, Esq., Chadwick, Washington, Moriarty, Elmore & Bunn, P.C., 3201 Jermantown Road, Ste. 600, Fairfax, VA 22030 [[www.chadwickwashington.com](http://chadwickwashington.com)].

Giving a Board Member “the Boot”

Removal of Directors by the Members. Any director may be removed from the Board, with or without cause, by the vote of a Majority of a Quorum of the Members at a special meeting of the Association duly called for that purpose; *provided, however,* that no such special meeting requested by Members to remove a director shall be held by the Association where (i) the director at issue has not held office during the current term for more than 90 days, (ii) a recall election has been determined in that director’s favor within the last 12 months, (iii) that director’s term ends within 120 days or less, or (iv) within the last six months a vote to recall the entire Board was put before Members and failed.

Are you Qualified to be a Board Member?

Qualifications for Directors. Only persons who satisfy all of the following qualifications shall be eligible to be elected to or serve on the Board: (a) is a Member in Good Standing or in the case of a Member in Good Standing that is not a natural person (such as a corporation or other entity), an officer, director, principal, or authorized representative of the entity, (b) is over eighteen (18) years of age, (c) has not been found by a court of competent jurisdiction to be of unsound mind, and (d) has not been convicted of a felony. Co-Owners of one or more Units may not serve on the Board at the same time.

Director Commitment and Pledge. Annually (at the first meeting of the Board after the annual election of directors), each director shall sign and return a signed copy of a “Director Commitment and Pledge” as adopted by the Board.

Assessment Obligation when “Owner” is an Entity

Assessments Are a Personal Obligation. Assessments levied by the Association pursuant to this Declaration, together with all Additional Charges, shall be a personal debt and obligation of the Owner against whom they are assessed, and shall bind his or her heirs, devisees, personal representatives, successors, and assigns. *If the Unit is owned by an entity, such as a corporation, a limited liability company, a partnership, or other entity, the assessment levied by the Association pursuant to this Declaration, together with all Additional Charges, shall be a personal debt and obligation of each principal, partner, managing member, or officer of such entity and shall bind his or her heirs, devisees, personal representatives, successors, and assigns. Upon taking title to a Unit, the entity-Owner shall notify the Association in writing of the name(s) and provide contact information for each such owner, principal, partner, managing member, or officer, whichever the case may be.*

Expanded definition of Owner to go with above Assessment provisions pertaining to entities:

Owner. “Owner” shall mean the record owner, whether one (1) or more persons or entities, of the fee simple title to any Condominium, including Contract Sellers but excluding Contract Purchasers, and excluding those persons having such interest merely as security for the performance of an obligation. *For the purpose of Section XX (“Assessments Are a Personal Obligation”), “Owner” shall include any principal, partner, managing member, or officer of any corporation, limited liability company, partnership or other entity that is a record owner of fee simple title to any Unit. Upon taking title to a Unit, Owners shall notify the Association of the identity of each such owner,*

principal, partner, managing member or officer, if any, and shall provide the Association contact information for such persons, as the Association deems appropriate.

Accelerating Assessments after Default

Delinquent Assessments; Acceleration in the Event of Delinquency. Any installment or other portion of an Assessment not received within fifteen (15) days after its due date shall be delinquent and, to the fullest extent permitted by law, shall be subject to a late charge, in the amount of ten percent (10%) of the past due amount or Ten Dollars (\$10.00), whichever is greater, and thirty (30) days after the due date, interest not to exceed twelve percent (12%) per annum, as well as all other Additional Charges. *If any monthly installment of the Annual Assessment or any installment of a Special Assessment that has been levied or is permitted to be paid on an installment basis is delinquent for a period of sixty (60) days, the Association may, but shall not be obligated to, declare the entire balance of the Annual Assessment or the Special Assessment immediately due and payable together with all other delinquent amounts.*

Grills and Pets – Plus Board Authority to Adopt Rules

Barbecues; Open Fires. The Board may promulgate, adopt and enforce Rules regulating the use of charcoal or wood-burning open flame barbecues or other devices on Decks or Patios.

Number and Size of Pets. A reasonable number of common domestic household pets may be kept in each Unit. Unless otherwise provided in the Rules, a “reasonable number” of all dogs, cats, and birds kept in a Unit shall be deemed to be two (2) (for example, two dogs, or a dog and a cat, or a dog and a bird, or two birds). In addition to this Section XX, the Association may promulgate, adopt, and enforce Rules regulating the weight of dogs and the types of dog breeds that may be brought into the Project or kept within a Unit.

Can I grow and cultivate marijuana for my personal use?

Restriction on Crop or Plant Cultivation. For the safety and integrity of the Common Area Buildings and structures and for the purpose of preventing the accumulation of moisture and the growth and spread of mold or mildew which may cause damage to the Common Area Buildings, no Resident or Owner shall be permitted to use a Unit, or any portion of a Unit, for the cultivation or growing of any plant, crop, or vegetation, including marijuana (whether or not its intended use is for medical purposes); and no Resident or Owner shall be permitted to install or maintain hydro-phonic watering devices, heating devices, or lighting devices intended to aid or facilitate the cultivation or growing of any plant, crop, or vegetation. The foregoing is intended to prohibit the cultivation and growth of crops, including marijuana.

(For a Commercial Condominium)

Prohibited Business Uses.

- (i) No Unit shall be used for the operation of a medical marijuana facility which dispenses, permits the use of on the premises, sells, licenses the use of or dispensing of, or dispenses marijuana or medical marijuana, and no Owner or tenant may write a prescription for medical marijuana;
- (ii) No Unit shall be used for the cultivation or growing of any plant, crop, or vegetation;

Short-term Rentals and Rental Cap

No Transient Rentals. No Owner shall be permitted to lease, rent, or otherwise operate his or her Unit for transient or hotel purposes, which shall include, but is not limited to, rental for any period less than thirty (30) days or any rental (even if the term is longer than thirty days) where the occupant of a Unit is provided customary hotel services such as room service for food and beverage, maid service, periodic furnishing of clean bed linen and towels, laundry service, or bellboy services. This Section XX shall not be deemed to permit an initial lease or rental term shorter than one year as provided in Section XX (“Requirements for Renting).

Restrictions on Number of Permitted Rentals. Except as provided in Section XX (“Grandfathered Units”) or Section XX (“Hardship Waivers”), the maximum number of Units being rented within the Project shall not exceed thirty percent (30%), such that at least forty-five (45) of the Units are Owner-occupied. For purposes of this Section XX, “rented” shall mean leased or rented to or occupied, whether or not for compensation of any kind, by anyone other than (a) an Owner of the Unit together with members of his or her household or temporary guests. For purposes of this Section XX, a Resident who is a beneficiary under a trust shall be deemed to be an Owner-occupant if legal title to the Unit is in the name of the trustee(s) of the trust.

Does Owner’s Exterior Modification Impact the Common Area?

Impacts on Common Area / Changes in Code Requirements. If an Owner’s requested change to the exterior or interior of the Project would result in the need for the Association to upgrade any Common Area component or system for which the Association is ordinarily otherwise responsible (such upgrade being necessary to comply with changes in code requirements in order for appropriate governmental permits to be issued to the Owner for Owner’s proposed work and where such code upgrade would not be required but for the work proposed by Owner), the Board may condition approval upon the agreement of the Owner to pay for or contribute to the cost of the Common Area upgrade. In making a determination, the Board may consider such factors as it deems appropriate under the circumstances including, but not limited to, whether Owner’s requested work is discretionary or is required as the result of a casualty, the failure of a component in the Common Area or within a Unit; the age, condition, and remaining useful life of the component or system that

would require upgrading; the cost of upgrade; whether or not the Association has reserved for the replacement or upgrade of the system; and whether a feasible alternative to the Owner's proposed work is available that would not necessitate the Common Area code upgrade. Under no circumstances shall the Association be obligated to pay for such code upgrades if the Owner has not applied for and obtained prior architectural approval pursuant to this Article X.

Where do I Charge My Vehicle?

Electric Vehicle Charging Station. The Board may promulgate, adopt and enforce Rules providing for reasonable restrictions on electric vehicle charging stations ("EVCS"). Such Rules are permitted provided they do not significantly increase the cost of the station or significantly decrease the efficiency or specified performance. Further, such Rules may restrict installation in Common Areas and may require that the Association be indemnified for loss or damage caused by installation, maintenance, or use of EVCS. Any Owner whose application for the installation of an EVCS has been approved, must (i) comply with the Association's architectural standards for the installation of the charging station, (ii) engage a licensed and insured contractor to install the charging station, (iii) meet all applicable health and safety standards, building codes and other requirements imposed by state and local authorities, as well as all other applicable zoning, land use or other ordinances, or land use permits, (iv) within fourteen (14) days provide a certificate of insurance that names the Association as an additional insured under the Owner's insurance policy in the amount of One Million Dollars (\$1,000,000), and (v) pay for the costs to install the station and for the electricity usage associated with the charging station.

* *We suggest a corresponding provision for maintenance, repair, replacement and removal, as well as restoration of the common area.*

SAMPLE HOA/PUD
DECLARATION: AMENDMENT DRAFTING CHECKLIST

A. CLIENT:

1. Client: _____
File No. _____
Address: _____
Telephone: _____
Email: _____
2. Project Name: _____
Project Type: _____

B. Property Specifics:

1. City/County/State: _____
2. Under Declarant Control? Yes No
3. Types of Lots/Dwellings/Improvements:
 - a. Single-family detached: _____
 - b. Townhouse: _____
 - c. Duplexes: _____
 - d. Traditional Condo: _____
 - e. Mixed Use: _____
 - f. Commercial:
 - (1) Retail: _____
 - (2) Office: _____
 - (3) Hotel: _____
 - (4) Other: _____
4. Is there an umbrella/master association? Yes No
5. Amenities owned/maintained by Association:
 - Entrance Monument
 - Storm Water Management Pond(s) (wet; dry)
 - Private Streets
 - Open Space
 - Tot Lots
 - Swimming Pool
 - Tennis Courts
 - Clubhouse
 - Gym
 - Business Center/Meeting Rooms

- Gated Entry/Gatehouse
- Fencing/walls
- Landscaping
- Paths or Trails
- Retaining Walls
- Buffer Areas/Roadway Easements
- Sidewalks
- Equestrian Center
- Golf Course
- Lakes/Docks
- Other: _____

6. Exclusive Use Common Area:

- Balcony/Deck/Roof Deck
- Patio/Courtyard/Yard
- Storage Space/Locker
- Parking Space
- Other: _____

7. Services Provided for Lots/Units:

- Landscaping
- Snow removal
- Mowing/pruning
- Exterior structure repair/maintenance
- Other: _____

8. County Zoning Requirements Specific to this Development? Yes No
If yes: _____

9. Parking: on lot; on common area; mixed

- Garages
- Carports
- Guest Parking
- Unassigned/Unrestricted Parking

10. Any Special Features in Community?

11. Declaration Amendment Requirements?

Owner: _____
Declarant: _____
Mortgagee: _____
Locality: _____

12. Ancillary Documents (please provide copies if available):

- Declarations of Annexation
 - Common Area Grant Deed(s)
 - Representative Deed (Unit of Lot)
 - Supplemental Declarations
 - Amendments
 - Subdivisions Map(s)
 - Condominium Plan(s)
 - Other: _____
-

C. Client Issues/Concerns to Address:

TOPIC	DESCRIPTION
1. Definitions	
2. Common Area Use and Regulation	
3. Parking	
4. Leasing	
5. Architectural Controls	
6. Lot Maintenance	
7. Residential/Commercial Use Restrictions	
8. Pets/Animals	
9. Signs	
10. Vehicles	
11. Assessment/Budgeting	
12. Enforcement	
13. Recovery of Enforcement Costs/Attorneys' Fees	
14. Removal of No Longer Relevant/Applicable Provisions	
15. Amendment Provisions	

PRESENT: All the Justices

MANCHESTER OAKS HOMEOWNERS
ASSOCIATION, INC.

v. Record No. 111949
PATRICK K. BATT, ET AL.

OPINION BY
JUSTICE WILLIAM C. MIMS
September 14, 2012

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
Randy I. Bellows, Judge

In this appeal, we consider whether a homeowners' association violated its declaration when it assigned parking spaces in a common area to lot owners on an unequal basis. We also consider whether an award of attorneys' fees to the prevailing party in an action to enforce the declaration was proper under Code § 55-515(A).

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

The Manchester Oaks subdivision encompasses 57 townhouses, 30 of which were constructed with a garage and driveway ("the Garaged Lots") and 27 of which were constructed with an additional bedroom and bathroom in lieu of a garage ("the Ungaraged Lots"). The subdivision also includes a common area with 72 parking spaces.

The subdivision's developer incorporated the Manchester Oaks Homeowners Association, Inc. ("the HOA"). Through a Declaration of Covenants, Conditions and Restrictions ("the Declaration") recorded in 1989 pursuant to the Property Owners'

Association Act, Code § 55-508 et seq., ("the Act"), the developer conferred certain rights and obligations on each lot owner and invested the HOA with certain powers and duties consistent with the Act.

Section 3.1 of the Declaration provides that "[e]very Owner shall have a right and easement of enjoyment in and to the Common Area, which shall be appurtenant to and shall pass with the title to each such Owner's Lot," subject to enumerated conditions.¹ One such condition, set forth in Section 3.1.7, reserved to the HOA "[t]he right . . . to establish rules and regulations governing the use of the Common Area, including the right set forth in Section 2.3.17 [sic] to establish rules and regulations governing the parking lots within the Common Area."² Section 2.3.18 specifically conferred on the HOA

the right to designate a maximum of two parking spaces within the Common Area for the exclusive use of the Owner of each Lot; provided, however, that nothing herein shall require the [HOA] to make any such designations or to ensure that the parking spaces are available for the use of any particular Owner of a Lot, nor shall the [HOA] be

¹ While "Common Area" is a defined term in the Declaration, the definition merely describes the geographic territory set aside "for the common use and enjoyment" of the owners.

² The HOA's power to "make and enforce rules and regulations governing the use of parking areas within the Common Area" actually is set forth in Section 2.3.18. The parties agree that the reference to Section 2.3.17 in Section 3.1.7 was a scrivener's error.

required to supervise or administer the use of the parking lots located in the Common Areas.

Patrick K. Batt, Rudolph J. Grom, and James R. Martin, Jr., (collectively, "the Plaintiffs") each own a Garaged Lot. Batt and Grom each purchased their lots in 1990, before construction in the subdivision was complete. At that time, the roads were not finished or marked and residents parked wherever they chose. In either 1993 or 1994, the developer began marking some parking spaces in the common area as "reserved" and assigning two to each Ungaraged Lot. The remaining 18 parking spaces were designated as "visitor" parking.

Martin purchased his lot in 2006. Although he saw that the parking spaces were marked either "reserved" or "visitor," there was no indication of the purpose for which the spaces marked "reserved" were designated.

From the time the parking spaces were marked until 2009, visitor parking was available to all lot owners on a first-come, first-served basis. However, in June 2009 the HOA posted a visitor parking policy on its website. Under the policy, each lot owner received one visitor parking permit. Any vehicle not displaying a permit while parked in the spaces designated visitor parking would be towed.

In July 2009, the Plaintiffs filed a complaint in the circuit court seeking, among other things, a declaratory

judgment that the policy was invalid and permanent injunctive relief enjoining its enforcement. Thereafter, the HOA stipulated that it would no longer restrict each lot owner to one visitor permit, effectively restoring the status quo ante and reopening visitor parking to all lot owners on a first-come, first-served basis.

In December 2009, the HOA purportedly adopted an amendment to the Declaration ("the Amendment"). The Amendment added Section 1.16, which created the defined term "Reserved Common Area" and set forth its meaning as "a portion of the Common Area for which the Board of Directors of the [HOA] has granted a license to an Owner of a Lot in accordance with the terms of the Declaration." The Amendment also altered Section 2.3.18 to confer on the HOA

the right to designate portions of the Common Area as Reserved Common Area, which includes the right to designate two parking spaces within the Reserved Common Area for the exclusive use of the Owner of each [Ungaraged Lot] on a non-uniform and preferential basis; provided, however, that nothing herein shall require the [HOA] to ensure that the parking spaces are available for the use of any particular Owner of a Lot, nor shall the [HOA] be required to supervise or administer the use of the parking lots located in the Common Areas.

The Amendment further added Section 3.1.10, vesting in the HOA's board of directors the power "to grant non-uniform licenses in the Common Area to an Owner of [an Ungaraged Lot] by designating

portions of the Common Area as Reserved Common Area . . . includ[ing] the right to designate parking spaces for the exclusive use of the Owners of [Ungaraged Lots] on a non-uniform and preferential basis."

In June 2010, the Plaintiffs filed an amended complaint alleging that the unequal treatment resulting from the HOA's assignment of parking spaces only to Ungaraged Lots violated the Declaration. They also alleged that the individual members of the HOA's board of directors had breached fiduciary duties owed to them as members of the HOA, a non-stock corporation. The Plaintiffs sought only an award of compensatory damages for breach of contract and breach of fiduciary duties, and an award of costs, expenses, and attorneys' fees pursuant to Code § 55-515(A).³ The HOA filed an answer asserting, among other things, an affirmative defense that the Plaintiffs' claim was barred by the Amendment. The HOA subsequently reiterated its position in a plea in bar. In response, the Plaintiffs contended that the Amendment was invalid because it had been improperly adopted.

Following a bench trial, the circuit court determined that the Amendment was invalid on six grounds. First, it effected a

³ In contrast to the original complaint, the Plaintiffs did not seek declaratory or injunctive relief in the amended complaint. In addition, the claims against the individual board members for breach of fiduciary duties were subsequently nonsuited. Accordingly, the only claim before the circuit court at trial was for breach of contract and the only relief sought was an award of compensatory damages.

partition of the common area and therefore required written approval by two-thirds of the lot owners and their mortgagees. Second, the use of proxies in its adoption was not expressly authorized by the Declaration. Third, notice of the meeting at which it was considered had not been sent at least 15 days prior to the meeting, as required by the Declaration. Fourth, prior to its adoption, the HOA's president sent false information to the members. Fifth, its terms were internally inconsistent. Sixth, it effected a forfeiture or revocation of the recorded easement rights of the owners of Garaged Lots in derogation of their titles.

Having determined that the Amendment was invalid, the circuit court then ruled that the reservation of parking spaces in the common area for use solely by owners of Ungaraged Lots violated the Declaration by discriminating against Garaged Lot owners and giving them unequal access to the common area. Specifically, the court ruled that Section 3.1 of the Declaration gives all lot owners an equal right of use and enjoyment of the common area. Therefore, consistent with this Court's holding in Sully Station II Community Ass'n, Inc. v. Dye, 259 Va. 282, 289, 525 S.E.2d 555, 559 (2000), any assignment of parking spaces undertaken pursuant to Section 2.3.18 must benefit all lot owners equally without regard to the type of lot owned.

In considering the evidence of damages, the circuit court ruled that each lot owner held equitable title in the common area and therefore could testify as to its value. It likewise ruled that the HOA held legal title in the common area and its board members could testify as to its value as well. It also ruled that the HOA website was a publication of the HOA.

An entry on the website written by a board member indicated that the loss of assigned parking in the common area would decrease the value of Ungaraged Lots by \$50,000 to \$70,000. Because the Ungaraged Lots would be regarded as comparable properties in calculating the fair-market value of the Garaged Lots at resale, according to the website, the Garaged Lots would lose \$50,000 to \$70,000 in value also.

The circuit court ruled that the opinion expressed on the HOA's website was a party admission that loss of access to parking in the common area reduced a lot's value by \$25,000 to \$35,000 per space. Under Section 2.3.18 of the Declaration, the court continued, the HOA could assign a maximum of two spaces per lot provided the assignment benefited all lots equally, as required by Section 3.1. However, because the common area contained only 72 parking spaces, the HOA could properly assign, at most, one space per lot. Because the HOA chose to assign two spaces to each Ungaraged Lot instead of the one space to all lots equally, the HOA improperly deprived each Garaged Lot owner

of one space. Accordingly, the court ruled that Batt and Grom each were entitled to compensatory damages of \$25,000, the lower value of each parking space according to the website entry.

Because Martin had purchased his lot in 2006, after two parking spaces were reserved and assigned to each Ungaraged Lot, the circuit court ruled that the calculation of lost value did not apply to him. However, based on his testimony regarding the calculation of the square footage of his lot and his real property tax assessment, the court determined that he had paid \$37.50 per month in real property taxes on a parking space in the common area.⁴ Ruling that the assignment of parking spaces to Ungaraged Lots effected a forfeiture of Martin's right-of-use easement in the common area and, consequently, a loss of value equivalent to the apportioned tax assessment, the court awarded Martin compensatory damages of \$1762.50 - \$37.50 per month for each of the 47 months Martin had owned his lot.⁵

In addition, the circuit court awarded each Plaintiff compensatory damages for assessments paid to the HOA for maintenance of the common area. Grom, a former board member, testified that \$15 per month from the total monthly assessment

⁴ According to Martin's testimony, his calculation resulted in a monthly payment of \$35.70, not \$37.50. However, no party assigns error to the discrepancy and we adopt the circuit court's unchallenged determination.

⁵ The court ruled that any loss of value by Batt and Grom attributable to forfeiture of their easement rights was subsumed by the \$25,000 calculation of lost value.

levied by the HOA was spent on maintaining the common area. The court accordingly calculated that Martin was entitled to an additional award of \$705 - \$15 per month for 47 months--and Batt and Grom were each entitled to an additional award of \$2355.⁶

Finally, the circuit court ruled that the Plaintiffs were the prevailing parties within the meaning of Code § 55-515(A) and therefore were entitled to an award of costs and attorneys' fees. The Plaintiffs adduced evidence of \$191,445.19 in fees plus \$3267.50 in expert witness costs. The HOA objected that the Plaintiffs were not the prevailing party on the nonsuited claim for breach of fiduciary duties or the abandoned action for declaratory judgment and injunctive relief and therefore were not entitled to costs and fees arising from them. The Plaintiffs identified \$5767 in fees attributable to those claims, and the court awarded them \$188,840.69.

We awarded the HOA this appeal.

II. ANALYSIS

A. ASSIGNING PARKING SPACES IN THE COMMON AREA

The HOA first challenges the circuit court's interpretation of the Declaration and its conclusion that parking in the common

⁶ The court also awarded, in the alternative to the cumulative awards for loss of value and common area maintenance assessments, nominal damages of \$10 to each Plaintiff but this alternative award was not included in the final order. We therefore do not consider it. See Moreau v. Fuller, 276 Va. 127, 137, 661 S.E.2d 841, 847 (2008) (stating that courts speak only through their written orders).

area must be assigned to all lot owners equally if assigned at all. A declaration pursuant to the Act is "a contract entered into by all owners" of the lots in the subdivision it governs. Sully Station, 259 Va. at 284, 525 S.E.2d at 556 (internal quotation marks omitted). Accordingly, we review the circuit court's interpretation of the Declaration de novo. See Uniwest Constr., Inc. v. Amtech Elevator Servs., 280 Va. 428, 440, 699 S.E.2d 223, 229 (2010).

The HOA argues that nothing in the Declaration requires it to assign parking equally. Section 2.3.18 allows it "to designate a maximum of two parking spaces within the Common Area for the exclusive use of the Owner of each Lot" but this provision also expressly absolves it of any requirement "to ensure that the parking spaces are available for the use of any particular Owner of a Lot." Therefore, the HOA asserts that under this provision it could assign any particular lot owner one, two, or no parking spaces in the Common Area, while concomitantly assigning a different number of spaces to another lot owner. Accordingly, the HOA contends Sully Station is distinguishable because in that case the association's declaration expressly required any licensing of the use of the common area to be "on a uniform, non-preferential basis," 259 Va. at 285, 525 S.E.2d at 557, but there is no such requirement in the Declaration here. We disagree.

When a court interprets a contract, the words that the parties used are given their usual, ordinary, and popular meaning. Uniwest Constr., Inc., 280 Va. at 440, 699 S.E.2d at 229. Although the HOA argues that nothing in the Declaration requires that parking spaces in the common area be assigned equally, equality is inherent in the definition of a common area. A common area is defined as "[a]n area owned and used in common by the residents of a condominium, subdivision, or planned-unit development." Black's Law Dictionary 311 (9th ed. 2009) (emphasis added). "In common" means "[s]hared equally with others, undivided into separately owned parts." Id. at 833 (emphasis added). Accordingly, the HOA must assign parking spaces in the common area to all lot owners equally, if at all, unless the Declaration expressly provides otherwise. Nothing in the original Declaration does so, including its definition of "Common Area." Consequently, Sully Station controls the outcome on this issue.

The HOA argues that this interpretation renders meaningless its power under the Declaration to assign "a maximum of two" parking spaces in the common area because it contains only 72 spaces and there are 57 lots. We disagree. The phrase "a maximum of two" includes one and none, both of which are permissibly equal assignments of parking in the common area in its current, 72-space configuration. In addition, nothing in

the Declaration prohibits the HOA from "annexing" additional land as common area from which more parking spaces could be assigned. To the contrary, Section 10.6 of the Declaration expressly confers such annexation power.⁷ Therefore, our decision that all lot owners must be treated equally by any assignment of parking in the common area has no effect on the meaning of the phrase "a maximum of two."

The HOA likewise argues that this interpretation renders meaningless the language in Section 2.3.18 absolving it of the obligation "to ensure that the parking spaces are available for the use of any particular Owner of a Lot." We again disagree. The recited language merely discharges the HOA from a duty to enforce parking assignments. Rather, enforcement is the prerogative of the assignees. In short, the language means that if a vehicle is improperly parked in an assigned parking space, the HOA is not responsible for towing the vehicle away. Our decision does not shift that responsibility to the HOA.

Accordingly, the circuit court did not err in ruling the Declaration requires that parking spaces in the common area be assigned equally among all lot owners. We will affirm that portion of its judgment.

⁷ We consider the authority of the HOA to take such action rather than whether it is likely to do so.

B. THE VALIDITY OF THE AMENDMENT

The HOA next challenges the circuit court's determination that the Amendment is invalid. Specifically, it assigns error to the court's rulings that the Declaration does not authorize the use of proxies to enact amendments, that the Amendment effected a partition of the common area and therefore required written approval by two-thirds of the lot owners and their mortgagees, and that the Amendment effected a forfeiture or revocation of the recorded easement rights of the owners of Garaged Lots in derogation of their titles. However, these assignments of error contest only three of the six bases for the court's ruling.

It is well-settled that a party who challenges the ruling of a lower court must on appeal assign error to each articulated basis for that ruling. United Leasing Corp. v. Thrift Ins. Corp., 247 Va. 299, 307-08, 440 S.E.2d 902, 907 (1994) (failure to assign error to an independent ground supporting the circuit court's ruling "barred any appellate relief that might otherwise have been available" on the ground challenged by the appellant.); see also Parker-Smith v. Sto Corp., 262 Va. 432, 441, 551 S.E.2d 615, 620 (2001) ("Since the court had an independent basis for [its ruling] that is not the subject of an assignment of error, we cannot consider the arguments advanced by" the appellant.); Rash v. Hilb, Rogal & Hamilton Co., 251 Va.

281, 286, 467 S.E.2d 791, 795 (1996) ("[W]e cannot consider these arguments advanced by the [appellant] because there is an independent basis to support the [ruling below] on these issues and that basis has not been challenged on appeal."). Just as "[w]e cannot review the ruling of a lower court for error when the appellant does not bring within the record on appeal the [evidentiary] basis for that ruling," Prince Seating Corp. v. Rabideau, 275 Va. 468, 470, 659 S.E.2d 305, 307 (2008), we cannot review it when the appellant does not assign error to every legal basis given for it. "[O]therwise, 'an appellant could avoid the adverse effect of a separate and independent basis for the judgment by ignoring it and leaving it unchallenged.' " Johnson v. Commonwealth, 45 Va. App. 113, 116-17, 609 S.E.2d 58, 60 (2005) (quoting San Antonio Press v. Custom Bilt Machinery, 852 S.W.2d 64, 65 (Tex. App. 1993)).

However, the mere fact that the HOA has not assigned error to each basis for the circuit court's ruling does not end the inquiry. Rather, as the Court of Appeals has noted, we still must satisfy ourselves that the alternative holding is indeed one that (when properly applied to the facts of a given case) would legally constitute a freestanding basis in support of the [lower] court's decision. . . . But, in making that [evaluation], we do not examine the underlying merits of the alternative holding - for that is the very thing being waived by the appellant as a result of his failure to [assign error to it] on appeal.

Id. at 117, 609 S.E.2d at 60. Where, as here, an appellant's assignments of error leave multiple bases for the challenged ruling uncontested, our review is satisfied by a determination that any one of them provides a sufficient legal foundation for the ruling.

In this case, the circuit court determined that the meeting at which the Amendment was adopted was improper because the HOA provided inadequate notice under the Declaration. Without reviewing the correctness of that determination, id., we are satisfied that, if correct, it would render the Amendment invalid because a meeting of a corporation held upon inadequate notice is an improper meeting and the corporate acts undertaken therein are invalid as a matter of law. Noremac, Inc. v. Centre Hill Court, Inc., 164 Va. 151, 166-67, 178 S.E. 877, 881-82 (1935). Accordingly, this ground forms a separate and independent basis to affirm the circuit court's ruling that the Amendment was invalid and we will not reverse it.

C. DAMAGES

The HOA next challenges the circuit court's award of compensatory damages. "Factual findings of a trial court are entitled to the same weight as a jury verdict and will not be set aside unless they are plainly wrong or without evidence to support them." Riverside Owner, L.L.C. v. City of Richmond, 282 Va. 62, 75, 711 S.E.2d 533, 540 (2011). This Court "view[s] the

evidence and all reasonable inferences fairly deducible from it in the light most favorable to the prevailing party at trial," and "review[s] matters of law de novo." Bennett v. Sage Payment Solutions, Inc., 282 Va. 49, 54, 710 S.E.2d 736, 739 (2011) (quoting Syed v. ZH Technologies, Inc., 280 Va. 58, 68, 694 S.E.2d 625, 631 (2010)).

In a claim for breach of contract, proof of damages is an essential element and a plaintiff's failure to prove it requires that the action be dismissed. Collelo v. Geographic Servs., 283 Va. 56, ___, 727 S.E.2d 55, 62 (2012); Sunrise Continuing Care, LLC v. Wright, 277 Va. 148, 156, 671 S.E.2d 132, 136 (2009). Further, the plaintiff bears "the burden of proving with reasonable certainty the amount of damages and the cause from which they resulted; speculation and conjecture cannot form the basis of the recovery. Damages based on uncertainties, contingencies, or speculation cannot be recovered." Shepherd v. Davis, 265 Va. 108, 125, 574 S.E.2d 514, 524 (2003) (internal citations and quotation marks omitted). This burden requires the plaintiff "to furnish evidence of sufficient facts and circumstances to permit the fact-finder to make at least an intelligent and probable estimate of the damages sustained." Dillingham v. Hall, 235 Va. 1, 4, 365 S.E.2d 738, 739 (1988) (internal quotation marks omitted). "Proof with mathematical precision is not required, but there must be at least sufficient

evidence to permit an intelligent and probable estimate of the amount of damage." Id. at 3-4, 365 S.E.2d at 739 (emphasis and internal quotation marks omitted).

The circuit court found that the Plaintiffs had suffered compensatory damages arising from the parking space assignments. In doing so, it relied primarily on the calculation from the website entry that Ungaraged Lots would lose \$50,000 to \$70,000 if no parking spaces were assigned to their owners' use. It extrapolated that if Ungaraged Lots lost \$50,000 to \$70,000 when deprived of the assignment of two spaces (i.e., \$25,000 to \$35,000 per space), Garaged Units must lose the equivalent amount when deprived of the single space that their owners would have been assigned if the HOA had treated all lot owners equally. But this treats the assignment of parking spaces as a zero-sum game in which any increase in the value of Ungaraged Lots from assigning parking spaces necessarily reduces the value of Garaged Lots proportionally.

This perspective is refuted by the evidence in the record. The website entry and witness testimony, including that of the website entry's author, established that rather than decreasing the Garaged Lots' value, assigning two parking spaces to Ungaraged Lots actually increased the Garaged Lots' value because the assignment increased the value of the Ungaraged Lots and Ungaraged Lots were considered comparable units in

determining the value of Garaged Lots at resale. Accordingly, rather than increasing the value of some lots at the expense of others, as in a zero-sum game, the parking space assignment was in effect a rising tide lifting all ships.⁸

Other evidence adduced by the Plaintiffs at trial purporting to establish a diminution of the value of their lots was insufficient to meet their burden. At best, it established the replacement value of a parking space in the common area. But we have said that "[d]iminution in value of real property is not replacement value." Campbell County v. Royal, 283 Va. 4, 26, 720 S.E.2d 90, 101 (2012). Rather, "[t]he correct measure of damages . . . is undoubtedly the diminution in value of the property by reason of the change, or the difference in value before and after the change." Id. at 25, 720 S.E.2d at 101

⁸ The circuit court's view also exemplifies the fallacy of denying the antecedent in propositional logic. Denial of the antecedent occurs when reasoning that, "If P, then Q. Not P. Therefore, not Q." See Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Thinking 158 (3d ed. 1997). In this case, the proposition is that if the HOA assigns parking spaces ("P"), then the property value of the assignee lots increases ("Q"). The HOA did not assign parking spaces to the Garaged Lots ("not P"), therefore the property values of Garaged Lots did not increase ("not Q"). Accordingly, the proposition that any increase in the value of Ungaraged Lots attributable to the parking assignment necessitated a proportional decrease in the value of Garaged Lots is not a reasonable inference fairly deducible from the evidence.

(quoting Town of Galax v. Waugh, 143 Va. 213, 229, 129 S.E. 504, 509 (1925)).⁹

With respect to Batt and Grom, Grom testified that Garaged Lots originally cost \$6000 more than Ungaraged Lots. However, Batt testified that the higher price was attributable to the cost of additional materials associated with Garaged Lots compared to Ungaraged Lots, such as the concrete necessary for the driveway. Moreover, they have adduced no evidence of the value of their lots before the parking space assignment or the value of their lots after spaces were marked reserved and assigned to Ungaraged Lots in 1993 or 1994. Accordingly, any loss of value now cannot be attributed with reasonable certainty to the parking space assignment. Cf. Shepherd, 265 Va. at 125, 574 S.E.2d at 524 (The plaintiff must prove "with reasonable certainty the amount of damages and the cause from which they resulted." (emphasis added) (internal quotation marks omitted)).

Thus there is no evidence in the record supporting the award of compensatory damages for diminution of property value. That portion of the circuit court's judgment must be reversed.

The HOA also contends that the circuit court's award of other compensatory damages was improper. Specifically, the

⁹ While the holding in Campbell County arose from an inverse condemnation action, inverse condemnation actions proceed on a theory of breach of implied contract. See Richmeade, L.P. v. City of Richmond, 267 Va. 598, 602-03, 594 S.E.2d 606, 608-09 (2004).

court determined the HOA had deprived Martin of a parking space for which he had paid \$37.50 per month in real property taxes and awarded him \$1762.50 - 47 months of payments. It also found that the parking space assignment deprived the Plaintiffs of their use of the common area that they had paid to maintain as part of their monthly assessments. Grom, a former member of the HOA's board of directors, testified that \$15 of each month's assessment went to maintaining the common area. The court therefore awarded compensatory damages of \$2355 each to Batt and Grom and \$705 to Martin for such maintenance payments.

The HOA asserts the Plaintiffs may not recover these damages because they were not identified as damages sought in their discovery responses.¹⁰ The purpose of discovery is to

¹⁰ In its First Set of Interrogatories, the HOA propounded the following: "Interrogatory 18: Itemize with particularity all expenses and/or damages incurred by you as a result of the occurrences alleged in the Complaint. Include an itemization of all attorney's fees and costs you have allegedly incurred." The Plaintiffs responded:

Subject to and without waiving the foregoing objections, Plaintiffs state as follows:

Decreased property value related to deprivation of reserved parking spaces: \$70,000 per Plaintiff.

Attorneys' fees and costs: currently in excess of \$66,000, and increasing with additional fees incurred through the resolution of this matter.

Punitive damages in an amount to be determined by the Court.

The HOA argued to the circuit court that the Plaintiffs' interrogatory response limited their grounds for recovery in objections at trial, in supplemental briefing directed by the court, and in a motion to strike the Plaintiffs' evidence, and

narrow the issues being litigated, the HOA argues, so it was entitled to rely on the Plaintiffs' response.

We have said that "a trial court's decision to admit evidence that is not timely disclosed, rather than to impose the sanction of excluding it, will not be reversed unless the court's action amounts to an abuse of discretion." Rappold v. Indiana Lumbermens Mut. Ins. Co., 246 Va. 10, 15, 431 S.E.2d 302, 305 (1993). A court abuses its discretion "when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011).

The purpose of discovery is to narrow the issues being litigated. Little v. Cooke, 274 Va. 697, 717-18, 652 S.E.2d 129, 141 (2007) (citing Sheek v. Asia Badger, Inc., 235 F.3d 687, 693 (1st Cir. 2000)). However, such narrowing principally serves the purpose of avoiding surprise. See id. at 718, 652 S.E.2d at 141. Accordingly, we have held that permitting a plaintiff to raise a new claim at trial that was neither

it renews the argument on appeal in its third assignment of error.

disclosed in discovery nor pled in the complaint constituted an abuse of discretion because the defendant was prejudiced by the inability to prepare to defend against the new claim. Id.

With respect to the assessments, there was neither prejudice nor surprise. The amended complaint included an allegation that the Plaintiffs had paid assessments, partially for the purpose of maintaining the common area. The circuit court therefore did not abuse its discretion in permitting Grom's testimony. Conversely, the amended complaint did not include any allegation that the Plaintiffs had paid taxes on the common area. That issue therefore was outside the scope of both the pleadings and discovery. It was raised for first time at trial and the HOA promptly objected. Accordingly, we will affirm the circuit court's award of compensatory damages for the portion of the assessments attributable to maintenance of the common area but reverse its award to Martin for apportioned real property taxes.

D. ATTORNEYS' FEES

Finally, the HOA argues that Code § 55-515(A) does not allow the circuit court to award attorneys' fees to homeowners if they are the prevailing party in an action they bring against an association. Alternatively, the HOA argues that the evidence does not establish that the fees awarded arose from the claim on which the Plaintiffs were the prevailing party.

The circuit court's application of Code § 55-515(A) presents a question of statutory interpretation, which we review de novo. Eberhardt v. Fairfax County Emps. Ret. Sys. Bd. of Trs., 283 Va. 190, 194, 721 S.E.2d 524, 526 (2012).

In determining that the Plaintiffs in this case were entitled to an award of costs and attorneys' fees under the statute, the circuit court relied on our construction in White v. Boundary Ass'n, Inc., 271 Va. 50, 624 S.E.2d 5 (2006). The court noted that in that case, we determined that homeowners who sued an association seeking a declaratory judgment were the prevailing party under Code § 55-515(A) and thus were entitled to an award of costs and attorneys' fees. The HOA argues that the court's reliance on White is misplaced because we "did not undertake any analysis of the statute" in that case. We disagree.

Prior to July 1, 2012, Code § 55-515(A) provided that

[e]very lot owner, and all those entitled to occupy a lot shall comply with all lawful provisions of this chapter and all provisions of the declaration. Any lack of such compliance shall be grounds for an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the association, or by its executive organ or any managing agent on behalf of such association, or in any proper case, by one or more aggrieved lot owners on their own behalf or as a class action. The prevailing party shall be entitled to recover reasonable attorneys' fees and costs expended in the matter.

Former Code § 55-515(A) (2007 Repl. Vol.). The HOA contends that the first sentence of the statute requires lot owners and occupants to comply with the declaration, the second sentence allows certain parties to bring an action against lot owners and occupants to enforce such compliance, and the third sentence allows the prevailing party in such an action to recover its costs and fees. But in this case, the HOA argues, it is neither an owner nor occupant of a lot, and therefore the Plaintiffs' action to enforce its compliance with the Declaration is outside the scope of the statute.

The HOA's position creates a patent imbalance under which the question of whether a lot owner or occupant is entitled under the statute to an award of costs and fees in a suit to enforce a declaration turns as much on whether an association is the enforcer or alleged violator as on whether the lot owner or occupant prevails. Under the HOA's interpretation of the statute, when an association sues a non-compliant lot owner or occupant and wins, it is entitled to the damages and other legal and equitable relief it may seek and an award of costs and fees as well. However, where the aggrieved lot owner or occupant successfully undertakes a seemingly quixotic quest to force an association to comply with its own declaration, he must bear the expenses of litigation alone.

We implicitly rejected this inequity six years ago in White and we expressly reject it today. In White we held that Code § 55-515(A) allowed lot owners and occupants as well as associations to recover litigation expenses resulting from successful suits to enforce compliance with a declaration. 271 Va. at 57, 624 S.E.2d at 9-10. The General Assembly is presumed to be aware of our interpretation. Its failure to express a contrary intention by enacting appropriate legislation is not only acquiescence but approval.¹¹ Barson v. Commonwealth, 284 Va. 67, 74, 726 S.E.2d 292, 296 (2012). Accordingly, White controls and Code § 55-515(A) entitles the Plaintiffs to an award of costs and attorneys' fees.

Nevertheless, the statute establishes boundaries for the costs and fees which may be awarded. As we indicated in Ulloa v. QSP, Inc., 271 Va. 72, 83, 624 S.E.2d 43, 50 (2006), in an action encompassing several claims, the prevailing party is entitled to an award of costs and attorneys' fees only for those claims for which (a) there is a contractual or statutory basis for such an award and (b) the party has prevailed. Therefore, Code § 55-515(A) authorizes an award of costs and fees to the

¹¹ As noted above, the General Assembly amended the statute effective July 1, 2012. The amendment does not derogate our judgment in White. To the contrary, it applies only to actions against a lot owner for nonpayment of association assessments. 2012 Acts ch. 758. The fact that the legislature chose to amend the statute but declined to supersede White while doing so further attests that we correctly ascertained its intention.

Plaintiffs in this case only on claims that (a) were brought to enforce the Declaration and (b) they prevailed upon.

The claim for breach of fiduciary duties satisfies neither criterion. While the claim for declaratory and injunctive relief satisfies the first, it does not satisfy the second because it was abandoned by its omission from the amended complaint. However, the breach of contract claim satisfies both criteria and the Plaintiffs therefore are statutorily entitled to an award of costs and fees on it.

Still, the Plaintiffs bear the burden of establishing the amount of costs and fees arising from the breach of contract claim for which the statute entitles them to an award. Ulloa, 271 Va. at 83, 624 S.E.2d at 50. The HOA argues that the evidence does not support the circuit court's award of \$188,840.69 because the Plaintiffs failed to explain how the sum could arise solely from the single claim on which they prevailed.¹²

¹² The HOA also argues that the Plaintiffs' invoices and affidavit regarding attorneys' fees were not admitted into evidence. However, it did not object to their consideration by the circuit court at the attorneys' fees hearing. Rather, the record reflects only that the HOA objected to the Plaintiffs' attempt to question their expert witness using the HOA's invoices because they had not been admitted. In addition, the HOA acknowledged that the Plaintiffs were submitting their claim for attorneys' fees on affidavits, invited the circuit court to review certain items listed in the invoices, and its expert testified that he had reviewed the Plaintiffs' submissions in

As we noted in Ulloa, "[t]he amount of the fee award rests within the sound discretion of the trial court," 271 Va. at 82, 624 S.E.2d at 49, and we therefore will not reverse it absent an abuse of that discretion. Northern Va. Real Estate, Inc. v. Martins, 283 Va. 86, 117, 720 S.E.2d 121, 137 (2012). As noted above, a court abuses its discretion "when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." Landrum, 282 Va. at 352, 717 S.E.2d at 137.

We set forth the factors to be considered when determining an award of attorneys' fees in Chawla v. BurgerBusters, Inc., 255 Va. 616, 499 S.E.2d 829 (1998). They include, among other things, "the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate." Id. at 623, 499 S.E.2d at 833.

preparing his testimony. Accordingly, this argument has not been preserved for appeal. Rule 5:25.

Each of the parties argued these factors to the circuit court.¹³

We therefore are satisfied that the court considered the relevant factors without giving significant weight to any irrelevant improper factor.

In considering whether the circuit court nevertheless made a clear error of judgment, we note that the Plaintiffs' expert witness testified that the claims for declaratory and injunctive relief and for breach of contract were inseparable because they both involved the HOA's powers under the Declaration. The breach of contract claim largely subsumes the claim for a declaratory judgment because the circuit court was required to ascertain what the Declaration required in order to determine whether the HOA had breached it. Similarly, the HOA's expert witness testified that no entries in the Plaintiffs' invoices were associated with the claim for breach of fiduciary duties after the filing of the complaint. Finally, the Plaintiffs identified the entries on their invoices associated with the fiduciary duty claim, including the time spent on preliminary research, preparing the complaint, negotiating settlement, and preparing and filing the nonsuit of that claim. They excluded those entries, which amounted to \$5767, from the amount of attorneys' fees sought. We therefore are satisfied that the

¹³ The court also considered the effect of false evidence by the HOA in protracting the length of trial.

circuit court did not make a clear error of judgment in awarding \$188,840.69.

Accordingly, we find the circuit court did not err in ruling that Code § 55-515(A) entitled the Plaintiffs to an award of costs and attorneys' fees on the breach of contract claim. Further, it did not abuse its discretion in determining the amount of that award. We will affirm that portion of its judgment.

III. CONCLUSION

For the foregoing reasons, we will affirm the judgment in part, reverse it in part, and enter final judgment of \$2355 to Batt, \$2355 to Grom, and \$705 to Martin. We likewise enter final judgment for the Plaintiffs of \$188,840.69 in costs and attorneys' fees under Code § 55-515(A). We also will remand the case to the circuit court for a determination and award of reasonable costs and attorneys' fees incurred by the Plaintiffs subsequent to its entry of the judgment appealed from.

Affirmed in part and final judgment,
reversed in part and remanded.

RIVERVIEW HEIGHTS HOMEOWNERS'ASSOCIATION v. Rislov, 2009 WY

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2009 WY 55

RIVERVIEW HEIGHTS HOMEOWNERS' ASSOCIATION, &
RIVERVIEW HEIGHTS HOMEOWNERS, INC., a Wyoming
corporation, Appellants (Plaintiffs),

v.

CHRISTOPHER L. RISLOV, an individual, WYOMING
RENOVATIONS, INC., d/b/a FAIRGROUND HOMES, a
Wyoming corporation, Appellees (Defendants).

[No. S-08-0126](#)

Supreme Court of Wyoming. APRIL TERM, A.D. 2009.

April 21, 2009

Representing Appellants: Kelly A. Rudd, Baldwin, Crocker & Rudd, PC, Lander,
Wyoming.

Representing Appellees: Pamala M. Brondos and Peter C. Nicolaysen, Nicolaysen
& Wilking, PC, Casper, Wyoming. Argument by Mr. Nicolaysen.

Before VOIGT, C.J., and GOLDEN, HILL, KITE, and BURKE, JJ.

BURKE, Justice.

[¶ 1] The Riverview Heights Homeowners' Association filed suit against Christopher Rislov, seeking to enforce an amendment to the subdivision's restrictive covenants. Mr. Rislov contended that the amendment was invalid. The district court granted Mr. Rislov's motion for summary judgment, and the Association appealed. We affirm.

ISSUE

[¶ 2] The Association presents one issue: Did the district court err in ruling that the 2004 Amended Covenants are invalid as a matter of law?

FACTS

[¶ 3] Riverview Heights is a residential subdivision located northwest of Riverton, Wyoming. In 1977, the developer filed and recorded restrictive covenants for the subdivision. In 1979, the developer again filed and recorded restrictive covenants.^[1] The 1979 Covenants are nearly identical to the earlier ones, except for a provision for creating a homeowners' association, under which the Riverview Heights Homeowners' Association was formed. The two sets of restrictive covenants contain a provision, set forth in Paragraph 14 of each document,

establishing how the covenants may be amended:

The rights, duties, obligations and restrictions herein created are for the benefit of all of the land in said tract and they are and shall be irrevocable and perpetual until and unless revoked, obligated, modified or amended by instruments executed and acknowledged in the form prescribed for the execution of deeds by seventy-five (75) percent of the owners of the total acreage contained in this tract.

[¶ 4] In 2004, the Association filed and recorded an "Amendment to Restrictive Covenants on Use of Land in Riverview Heights Subdivision." The 2004 Amendment prohibited manufactured homes in the subdivision,^[2] and provided that all construction in the subdivision must be approved by the newly-created architectural control committee. The document was executed by the Association's officers, whose signatures were notarized. The document recited that at least 75% of the subdivision's landowners had approved of the amendment. Attached were thirty-four pages containing signatures of lot owners. Additional details about these signature pages will be reviewed in the discussion section.

[¶ 5] In 2007, Mr. Rislov purchased Lot 69 in the Riverview Heights Subdivision.^[3] He began preparing the lot for a manufactured home. The Association contacted Mr. Rislov to inform him that the 2004 Amendment to the covenants prohibited manufactured homes and required approval of an architectural control committee before development. Mr. Rislov disagreed. Litigation ensued.

[¶ 6] The Association and Mr. Rislov presented their dispute to the district court in cross-motions for summary judgment. The district court ruled that the amendment was invalid because it had not been executed and acknowledged as required by the 1977 and 1979 Covenants. It granted summary judgment in favor of Mr. Rislov, and the Association appealed.

STANDARD OF REVIEW

[¶ 7] We employ a familiar standard of review when considering a district court's summary judgment decision:

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. W.R.C.P. 56(c); [Metz Beverage Co. v. Wyoming Beverages, Inc., 2002 WY 21, ¶ 9, 39 P.3d 1051, 1055 \(Wyo. 2002\)](#).

"A genuine issue of material fact exists when a disputed fact, if it were proven, would establish or refute an essential element of a cause of action or a defense that the parties have asserted." *Id.* Because summary judgment involves a purely legal determination, we undertake *de novo* review of a trial court's summary judgment decision. [Glenn v. Union Pacific R.R. Co., 2008 WY 16, ¶ 6, 176 P.3d 640, 642 \(Wyo. 2008\)](#).

[Jacobs Ranch Coal Co. v. Thunder Basin Coal Co., LLC, 2008 WY 101, ¶ 8, 191 P.3d 125, 128-29 \(Wyo. 2008\)](#). We view the facts from the vantage point most favorable to the party opposing the motion, and give that party the benefit of all favorable inferences that may fairly be drawn from the record. [Brumbaugh v. Mikelson Land Co., 2008 WY 66, ¶ 11, 185 P.3d 695, 701 \(Wyo. 2008\)](#).

DISCUSSION

[¶ 8] Restrictive covenants

are contractual in nature and are interpreted according to principles of contract law. *Goglio v. Star Valley Ranch Ass'n*, 2002 WY 94, ¶ 18, 48 P.3d [1072,] 1079 [(Wyo. 2002)]. A court's goal is to determine and effectuate the intention of the parties, especially the grantor or declarant. *Stevens v. Elk Run Homeowners' Ass'n, Inc.*, 2004 WY 63, ¶ 13, 90 P.3d 1162, 1166 (Wyo. 2004). We first examine the language of the covenants and give the words their plain and ordinary meaning. *Seven Lakes Dev. Co., L.L.C. v. Maxson*, 2006 WY 136, ¶ 10, 144 P.3d 1239, 1245 (Wyo. 2006). We consider the whole document and not just one clause or paragraph. *Stevens*, ¶ 13, 90 P.3d at 1166.

Omohundro v. Sullivan, 2009 WY 38, ¶ 9, 202 P.3d 1077, 1081 (Wyo. 2009).

[¶ 9] In determining whether the 2004 Amendment is valid, we must interpret this language from Paragraph 14:

The rights, duties, obligations and restrictions herein created are for the benefit of all of the land in said tract and they are and shall be irrevocable and perpetual until and unless revoked, obligated, modified or amended by instruments executed and acknowledged in the form prescribed for the execution of deeds by seventy-five (75) percent of the owners of the total acreage contained in this tract.

We are mindful of our obligation to consider the documents in their entirety, but we have found no other pertinent or helpful provisions in the 1977 Covenants or the 1979 Covenants. We therefore narrow our focus to the provision quoted above.

[¶ 10] It is plain enough that Paragraph 14 requires that any instruments amending the covenants must be "executed and acknowledged in the form prescribed for the execution of deeds." The parties agree that the prescribed form for the execution of deeds is set forth in Wyo. Stat. Ann. § 34-1-113 (2008), which provides that "Execution of deeds, mortgages or other conveyances of lands, or any interest in lands, shall be acknowledged by the party or parties executing same, before any notarial officer."¹⁴¹ The parties disagree, however, about whose signatures must be notarized.

[¶ 11] The Association contends that the 2004 Amendment complied with Paragraph 14 because the Association's officers signed the document, and their signatures were notarized. On this basis, the Association contends that the 2004 Amendment is valid as a matter of law, and the district court should have granted the Association's motion for summary judgment. The Association further contends that Paragraph 14 is, at the very least, ambiguous. On this basis, the Association contends that the district court erred in granting summary judgment to Mr. Rislov.

[¶ 12] We are unconvinced by the Association's contentions, because we find them contrary to the plain language of Paragraph 14. In simplified form, the language provides that an amendment requires "instruments executed and acknowledged . . . by seventy-five (75) percent of the owners." This language is not ambiguous or subject to alternative interpretations. It requires execution and acknowledgement by the owners. Execution and acknowledgement by the Association's officers do not satisfy this requirement. Like the district court, we

find no other provisions in the restrictive covenants authorizing the Association's officers to act on behalf of the owners to amend the covenants.

[¶ 13] Because we do not accept the Association's main contentions, we also reject several of their supporting arguments. For example, they assert that the 2004 Amendment complied with the statutory requirements for execution and acknowledgement, as proven by the fact that the county clerk accepted it for filing. The clerk's filing of the document may suggest that the 2004 Amendment complied with Wyo. Stat. Ann. § 34-1-113. It does not prove that the 2004 Amendment complied with Paragraph 14 of the restrictive covenants.

[¶ 14] As another example, the Association asserts that its officers had inherent authority to impose the 2004 Amendment. They cite several cases from other jurisdictions suggesting that homeowners' associations possess some inherent authorities. However, not one of the cases includes the power to amend restrictive covenants among those inherent authorities. Typical is *Conestoga Pines Homeowners' Ass'n v. Black*, 689 P.2d 1176, 1178 (Colo. App. 1984), in which the court recognized a homeowners' association's authority to enforce restrictive covenants, but did not mention any authority to amend those covenants. We are more strongly persuaded by a case from our own jurisdiction, in which we quoted this commentary with approval:

Homeowners associations serve three primary functions: levying and collecting assessments; managing and maintaining common property for the benefit of residents; and enforcing covenants that govern developments. They derive authority to carry out these functions from several documents, including the declaration of covenants, conditions, and restrictions (CC&Rs), the association's bylaws and articles of incorporation, and the deeds to the property within a development.

Goglio v. Star Valley Ranch Ass'n, 2002 WY 94, ¶ 17, 48 P.3d 1072, 1078 (Wyo. 2002), quoting Casey J. Little, *Riss v. Angel: Washington Remodels the Framework for Interpreting Restrictive Covenants*, 73 Wash. L.Rev. 433, 437 (1998).

[¶ 15] The covenants under review in *Goglio* allowed the association to levy a special assessment upon an affirmative vote of two-thirds of its members. We observed that, "Implicit in the [covenant] language that requires approval of [two-thirds] of the members of the Association for the imposition of a special assessment *is the proposition that a special assessment cannot be levied without the requisite approval.*" *Goglio*, ¶ 25, 48 P.3d at 1081 (emphasis added). The covenants for Riverview Heights allow amendment to the covenants upon approval of 75% of the lot owners. Implicit is the proposition that the Association's officers, regardless of any inherent powers they might exercise, cannot amend the covenants without the requisite approval of 75% of the lot owners.

[¶ 16] As its next contention, the Association claims that Mr. Rislov is equitably estopped from challenging the validity of the 2004 Amendment. However, the cases cited by the Association do not apply here. The Association relies on *McCarthy v. Union Pacific Ry. Co.*, 131 P.2d 326, 332 (Wyo. 1942) for the general proposition that a grantee is estopped by the promises of his grantor where the grantee had notice of the promise. The Association contends that Mr. Rislov's grantor, the former owner of Lot 69, approved of the 2004 Amendment, and that Mr. Rislov had, at a minimum, constructive notice of that fact. However, in *McCarthy* there was no dispute that the grantor's promise was valid. The question was whether that valid promise was binding on the grantee. In the

present case, the 2004 Amendment was not approved by a sufficient number of lot owners. It never became binding on Mr. Rislov's grantor, whether or not the grantor approved it or "promised" to abide by it. It does not bind Mr. Rislov, whether or not he had notice of it.

[¶ 17] Similarly, the Association relies on *Bowers Welding and Hotshot, Inc. v. Bromley*, 699 P.2d 299 (Wyo. 1985), for the general rule that restrictive covenants with legal deficiencies may still be enforced in equity so long as a grantee has notice of the agreement. In *Bowers Welding*, however, the question was not whether the restrictive covenants were valid, but whether a mistake in the legal description rendered the covenants inapplicable to the particular lot in question. Again, the present case involves the underlying validity of the 2004 Amendment, not its applicability to Mr. Rislov's lot. Applying the cases cited by the Association to the question at issue here, we cannot conclude that Mr. Rislov is estopped in equity from challenging the validity of the 2004 Amendment.

[¶ 18] We turn finally to the Association's contention that the language of Paragraph 14 is ambiguous, in that it can reasonably be read to allow different ways of counting the owners' votes. It could allow one vote per owner, regardless of how many lots he or she owns. This, apparently, is the interpretation reached by the district court. However, the Association contends that it could also allow one vote per lot, so that an owner of three lots, for example, receives three votes.^[5] It is unnecessary to resolve this ambiguity, or even to decide whether an ambiguity exists, because the result is the same either way the votes are counted.

[¶ 19] There are 96 lots in the Riverview Heights Subdivision. The parties seem to agree that, at the time the 2004 Amendment was filed, there were 43 different owners of the 96 lots. Attached to the 2004 Amendment are signature pages purporting to reflect approval of the amendment. Several of the signature pages are not notarized. Signature pages that are not notarized are not properly executed and acknowledged, and we therefore agree with the district court that these signature pages are ineffective as approvals of the 2004 Amendment.

[¶ 20] Subtracting out the ineffective approvals, the remaining approvals represent 19 owners of 61 lots. Without deciding the point, we will treat all of these remaining approvals as valid.^[6] The valid approvals represent 19 of the total 43 owners, or 44%. They represent 61 of the total 96 lots, or 64%. Either way the votes are counted, they do not represent approval of the 2004 Amendment "by seventy-five (75) percent of the owners" of the Riverview Heights Subdivision.

CONCLUSION

[¶ 21] The 2004 Amendment to the restrictive covenants for the Riverview Heights Subdivision is invalid. We affirm the district court's decision granting summary judgment against the Association and in favor of Mr. Rislov.

[1] Despite some technical errors in the documents, the parties agree, and the district court ruled, that both the 1977 and the 1979 covenants apply to all of the property in the subdivision.

[2] The Association seems to take the position that the 1977 and 1979 covenants were meant to prohibit all types of manufactured homes, and the 2004 Amendment was merely a clarification of that prohibition. However, the case before us deals only with the Association's effort to enforce the 2004 Amendment. The question of whether the 1977 and 1979 covenants prohibit manufactured homes is not before us, and cannot be addressed in this decision.

[3] It is unclear if the lot is owned by Mr. Rislov or his company, Wyoming Renovations, Inc., doing business as Fairground Homes. The distinction does not affect our decision.

[4] The version of the statute in effect when the 2004 Amendment was filed also allowed for acknowledgement before certain court personnel or a county clerk, in addition to a notary. See 2008 Wyo. Sess. Laws ch. 20, § 2. Because the signatures at issue in this case were either acknowledged by a notary or not acknowledged at all, the change to the statute has no significance here.

[5] It has also been suggested the phrase "total acreage" in Paragraph 14 could lend itself to allowing one vote per acre. We reject that interpretation because the plain language of Paragraph 14 requires approval "by seventy-five (75) percent of *the owners* of the total acreage." (Emphasis added.)

[6] Mr. Rislov challenges the validity of the approvals of two additional owners. One of the signature pages includes the signature of only one of the two owners. One owner of several lots submitted an affidavit stating that she had approved of the amendment process, but not of the 2004 Amendment itself. Based on our calculations, however, it makes no difference if we treat these two owners' approvals as valid.



In the Missouri Court of Appeals Eastern District

DIVISION ONE

STERLING INVESTMENT GROUP, LLC,)	No. ED99341
)	
Plaintiff/Respondent,)	Appeal from the Circuit Court
)	of St. Louis County
v.)	
)	
BOARD OF MANAGERS OF THE)	Hon. Mary B. Schroeder
BRENTWOOD FOREST)	
CONDOMINIUM ASSOCIATION,)	
)	
Defendant/Appellant.)	FILED: May 21, 2013

The Board of Managers (Board) of the Brentwood Forest Condominium Association (Association) appeals the trial court's declaratory judgment in favor of unit-owner Sterling Investment Group (Sterling). We reverse and enter judgment in favor of the Board pursuant to Rule 84.14.

Background

The Board is the governing body of the Association, which comprises 1,425 condo units. Sterling owns 27 of those units. Generally, an amendment to the Association's bylaws requires a supermajority (75%) of the owners. Exceptionally, however, the bylaws allow the Board to pass amendments without a vote of the owners to comply with federal housing and lending regulations. Specifically, as pertinent here, the Federal Housing Association will insure a mortgage secured by a condo unit only if the

condo complex is at least 51% owner-occupied. 24 C.F.R. §234.26(i)(1)(iii). To satisfy this requirement, in December 2010, the Board invoked its compliance powers to amend the bylaws without a vote of owners. The amendment provided that, if the percentage of owner-occupied units dropped to 54% or less, then the Board would issue a warning letter informing owners that no new rentals would be approved until the percentage rebounded to 57% or better. The amendment exempted from this moratorium any units that were already rental units at the time of the Board's warning.

In March 2012, the Board determined that the percentage of owner-occupied units had dropped to 53%, but the Board declined to issue a warning letter in accordance with the 2010 amendment because it had since concluded that the moratorium was unfair to owners outside the established exemption. In June 2012, Sterling filed a petition for breach of fiduciary duty and injunctive and declaratory relief seeking enforcement of the 2010 amendment. The Board obliged by issuing a warning letter but subsequently passed a new amendment intended to replace the 2010 amendment. This new 2012 amendment was substantially similar to the 2010 version except that it: created a presumption that rentals to family members were owner-occupied; created mechanisms whereby moratorium-exempt rental units would become non-exempt upon sale, owner-occupancy, or after 90 days vacant; and required owner-lessors to notify the Association of any vacancies. Essentially, the 2012 amendment had the same purpose of regulatory compliance, but it rectified inequities in the 2010 version and improved oversight processes to reduce the risk of inadvertent non-compliance.

Following the Board's 2012 amendment, Sterling filed an amended petition seeking invalidation of the 2012 amendment and enforcement of the 2010 amendment.

Specifically, Sterling asserted that the Board lacked the authority under its compliance powers to pass the 2012 amendment without a vote of owners because the 2012 revision was merely administrative and not necessary to ensure regulatory compliance as was the original 2010 amendment. In response, the Board argued that its compliance powers necessarily extend to revisions of the amendment. In addition, the Board sought dismissal of the action for failure to join all owners as necessary parties.

The trial court took the case on the pleadings in October 2012 and entered judgment in favor of Sterling. The court found that the 2012 amendment was null and void and ordered the Board to comply with the 2010 amendment pursuant to its terms. The court also concluded that the other owners were not indispensable parties. The Board appeals those determinations.

Discussion

I. Joinder of Other Owners

First, the Board contends that the trial court erred by determining that the other owners weren't indispensable parties whose joinder was compulsory under Rules 52.04 and 87.04. This question is jurisdictional, and our review is guided by Murphy v. Carron, Vahey v. Vahey, 120 S.W.3d 288, 291 (Mo. App. E.D. 2003) (citing Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976)). We will affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy at 32.

Rule 87.04 states that, “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings.” In

determining which parties are required before the court, we consider the nature of relief requested and the interests to be adjudicated. Jones v. Jones, 285 S.W.3d 356, 360 (Mo. App. S.D. 2009). An “interest” demanding joinder is not merely consequential, remote, or conjectural, but rather a direct claim on the subject of the action such that the joined party will win or lose by operation of the judgment. Id.

In determining if parties should be joined, we examine whether they are necessary and indispensable under Rule 52.04. Paragraph (a) of the rule states the test for whether a party is necessary:

(a) A person shall be joined in the action if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant.

The absence of a necessary party is not fatal to jurisdiction; the remedy is joinder. Peasel v. Dunakey, 279 S.W.3d 543, 545 (Mo. App. E.D. 2009). However, if a necessary party cannot be joined, then the question becomes whether that party is indispensable such that a judgment in the party's absence is a nullity. Jones, 285 S.W.3d at 361. Paragraph (b) of the rule states the test for indispensability.

(b) If a person as described [in paragraph (a)] cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded as indispensable. The factors to be considered by the court include: (i) to what extent a judgment rendered in the person's absence might be prejudicial to that person or those already

parties; (ii) the extent to which by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (iii) whether a judgment rendered in the person's absence will be adequate; and (iv) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

"In determining if a party is indispensable, the preliminary question is whether the presence of such party is essential [*i.e.*, necessary] under Rule 52.04(a)." State ex rel. Twenty-Second Judicial Circuit v. Jones, 823 S.W.2d 471, 475 (Mo. 1992). "If the answer is in the negative, no further consideration need be given to the indispensability of that party." Id. Following this instruction, we must first determine whether the other owners are necessary as described in paragraph (a) of Rule 52.04, which, as relevant here, resembles Rule 87.04 in its focus on the claim or interest of, and impact of the judgment on, the absent party.¹

In support of its position that the other owners are necessary and indispensable (and conflating the two), the Board relies exclusively on Epstein v. Villa Dorado Condo. Ass'n, Inc., 316 S.W.3d 457 (Mo. App. E.D. 2010). There, two owners filed suit against their condo association to challenge a monetary assessment imposed on all owners to finance elevators serving only some. The plaintiffs purported to bring the action as representatives of a class of all owners not served by the elevators, and the trial court treated the matter as such, without any regard to the certification and notice requirements of Rule 52.08 governing class actions. For this, we held that the trial court erred by extending its judgment to all owners in the purported class without proper class certification. Id. at 461. Absent a valid class, we then noted that applying the judgment to all owners individually violated Rule 87.04 in that the absent owners were directly

¹ "Rule 87.04 ... essentially has the same import as Rule 52.04." Saladin v. Jennings, 111 S.W.3d 435, 445 fn. 3 (Mo. App. E.D. 2003).

affected and “had an obvious interest in any judicial declaration regarding the elevators.”

Id. While sound on its facts, Epstein does not mandate joinder here. In Epstein, it was undisputed that the absent owners were interested and affected by the subject matter of the suit in a direct and monetary way, but their inclusion was procedurally defective. Here, by contrast, applying the tests of Rules 87.04 and 52.04, we are not persuaded that all owners in the 1,425-unit complex were necessary, much less indispensable, to resolve Sterling’s complaint.

Although the Board diverts attention to the substance of the competing amendments, Sterling simply seeks interpretation and enforcement of the Association’s bylaws as a matter of proper procedure. If, as Sterling insists, the board lacked authority to pass the 2012 amendment, then the 2010 version remains in effect and the Board must abide by its provisions. If, conversely, the board voted within its powers, then the 2012 version controls and the Board must abide by *its* provisions. Either way, the trial court can grant relief in the absence of the other owners. Rule 52.04(a)(1). Disposition in their absence will not impair or impede their ability to protect their own interest in enforcing the bylaws (52.04(a)(2)(i)), nor will it leave Sterling or the Board subject to a risk of multiple or inconsistent obligations (52.04(a)(2)(ii)). We find support for this reasoning in Saladin v. Jennings, 111 S.W.3d 435 (Mo. App. E.D. 2003). There, several landowners sued the trustees of their subdivision claiming breach of the governing indenture and invalidity of an amendment therein. The defendant trustees sought dismissal of the petition for failure to join other landowners. The trial court denied the motion, and this court affirmed, explaining as follows.

[A]ny claimed interest of the other lot owners in this suit relates to maintenance and repair obligations under the Indenture and not to

ownership of the street. By the trial court's judgment declaring Defendants obligated under the Indenture to maintain and repair the street, the other lot owners have neither gained nor lost any right that existed prior to the judgment. In fact, the Indenture always vested the obligation of the street's maintenance and repair in Defendants. The trial court's judgment, therefore, benefited all the lot owners abutting [the street] and provided complete relief. Contrary to Defendants' contention, there is no risk of exposure to double, multiple, or otherwise inconsistent obligations; and therefore, the lot owners are not necessary or indispensable parties...

Id. at 440-441. Similarly here, any interest of the other owners relates to the Board's duty to comply with the bylaws. In this respect, they haven't gained or lost any right; they were always entitled to it. And the judgment benefits all owners and provides complete relief; the matter is resolved and there is no risk of inconsistent obligations.

We find additional support by implication in cases where individual owners sued their associations seeking a declaration interpreting or enforcing their bylaws, and the absence of other owners was never even questioned. See for example Mullin v. Silvercreek Condominium Owners' Ass'n, Inc., 195 S.W.3d 484 (Mo. App. S.D. 2006) (declaratory action challenging validity of rental restriction in bylaws), and Bitting v. Central Pointe Condominium Bd. of Managers, 970 S.W.2d 898 (Mo. App. E.D. 1998) (declaratory action challenging calculation of ownership percentages as stated in bylaws).

Applying the plain language of Rule 52.04(a) and informed by the foregoing authorities, we conclude that the other owners were not necessary parties to Sterling's action. Consequently, "no further consideration need be given to [their] indispensability." Jones, 823 S.W.2d at 475. The trial court did not err in denying the Board's motion to dismiss for failure to join the other owners. Point denied.

II. Validity of Amendments

For its second point, the Board contends that the trial court erred in enforcing the 2010 amendment and declaring the 2012 amendment invalid. The court took the matter

for judgment on the pleadings under Rule 55.27(b). Because a judgment on the pleadings presents a question of law, our review is *de novo*. State ex rel. Kansas City Symphony v. State, 311 S.W.3d 272, 274 (Mo. App. W.D. 2010).

The trial court concluded, as Sterling argues here, that the Association's bylaws only permitted the Board to pass the 2010 amendment, after which any further changes required a vote of owners. The Board asserts that its powers are broader. The source of the Board's authority under the bylaws, section 24.5, states as follows:

Compliance with FHA, V.A., FHLMC and FNMA Regulations: The Board by ninety percent (90%) majority vote shall have the power to make any amendments to Condominium documents (including the Declaration and By-Laws) to comply with all requirements of the Federal Housing Administration ("FHA"), the Veteran's [sic] Administration ("VA"), the Federal Home Loan Mortgage Corporation ("FHLMC") and the Federal National Mortgage Association ("FNMA") pertaining to the qualifications for and purchase of FNMA or conventional home loans and mortgages to be secured by Units in the Condominium. The Developer and all Unit Owners agree that, notwithstanding anything to the contrary contained herein, in the event the Condominium does not comply with such governmental agency requirements, the Developer, acting as the Board, and the Board after being elected by the Unit Owners, shall have the power (on behalf of the Association and each and every Unit Owner) to enter into any agreement with such governmental agencies or the mortgagees and/or to pass such amendments required by such entities as attorney in fact for the Unit Owners to Condominium documents to allow the Condominium to comply with such requirements. This includes making amendments to the Declaration and By-Laws of the Condominium to effectuate the purposes of this Section, so long as such amendment does not adversely affect the security interest of any mortgagee. The Board shall have discretion regarding the entering of such agreements or passing such amendments and may decline to so act if it feels the amendment or agreement would not be in the interest of the Association.

Corporate bylaws are construed according to general rules governing contracts. DCW Enterprises, Inc. v. Terre du Lac Ass'n, Inc., 953 S.W.2d 127, 130 (Mo. App. 1997). When there is uncertainty as to the meaning, the language must be interpreted in light of the context and subject matter. Id. Following these principles, we conclude that

the Board's authority under the foregoing paragraph is indeed broad enough to encompass the 2012 amendment. The provision confers upon the Board the power and *discretion* to pass *any amendments* and even to enter into any agreements, essentially for the purpose of maintaining the Association's good standing with the named agencies. Simply put, matters having federal lending implications are handled at the Board level. This interpretation is consistent with the above language and is also the only practical construction. The alternative, advocated by Sterling, ignores the clear intent of the provision and, moreover, is wholly unworkable in practice. It is inconceivable that, after the Board's initial attempt at satisfying federal lending regulations, any subsequent revisions to that end should require a supermajority of 1,425 unit owners. Rather, the above paragraph clearly and specifically removes regulatory compliance concerns from the scope of the owners' decision-making authority and instead vests in the Board all powers and discretion in such matters. The Board acted within its authority under the bylaws in enacting the 2012 amendment. The 2012 amendment is valid and supersedes the 2010 amendment. Point granted.²

Conclusion

Rule 84.14 permits an appellate court to give such judgment as the court ought to give. Hilton v. Davita, Inc., 302 S.W.3d 157, 159 (Mo. App. 2009). Unless justice requires otherwise, the court shall dispose finally of the case. Id. We need not remand but may render the judgment that should have been rendered by the trial court. Id. at 159-160. In particular, it is appropriate for the appellate court to render judgment where there is no dispute as to the facts but only a dispute as to their legal significance. Id. at 160.

² We do not reach the parties' alternative arguments regarding the validity of the 2010 amendment. However, to exhaust any doubt, we note that §448.2-117, cited in the trial court's judgment, is not applicable to the Association. §448.1-102.

Consistent with these principles and invoking this court's authority under Rule 84.14, we reverse and vacate the trial court's judgment and enter judgment in favor of the Board. The 2012 amendment shall be enforced in accordance with its terms. The parties shall pay their own attorney fees. Costs are assessed to Sterling. Any claims not expressly resolved herein are dismissed as moot.



Clifford H. Ahrens
Clifford H. Ahrens, Presiding Judge

Sherri B. Sullivan, J., concurs.
Glenn A. Norton, J., concurs.

FILED
Nov. 18, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

CLUB ENVY OF SPOKANE, LLC, a Washington limited liability company;)	No. 31913-0-III
DAVID LARGENT, a married man dealing in his separate property; RIDPATH PENTHOUSE, LLC, a Washington limited liability company; 515 SPOKANE PARTNERS, LLC, a Nevada limited liability company,)	PUBLISHED OPINION
Respondents,)	
v.)	
THE RIDPATH TOWER CONDOMINIUM ASSOCIATION, a Washington non-profit corporation; RIDPATH REVIVAL, LLC, a Washington limited liability company; FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Bank of Whitman,)	
Appellants.)	

BROWN, A.C.J. – Today, we examine a dispute stemming from the 2008 conversion of Spokane's Ridpath Hotel into condominiums. Ridpath Revival, LLC (Revival) appeals the trial court's summary judgment declaration granting relief to Club Envy of Spokane, LLC, David Largent, Ridpath Penthouse, LLC, and 515 Spokane

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Partners, LLC (collectively Club Envy). Club Envy asked the trial court to declare void a Second Amended and Restated Declaration of Covenants, Conditions, and Restrictions (CCRs). Club Envy argued RCW 64.34.264 and 64.34.348 prohibited certain acts embodied in the second amended declaration taken by the former officers and directors of The Ridpath Tower Condominium Association, and its president, Greg Jeffreys. Revival contends (1) Club Envy's action is barred by the statute of limitations, equitable estoppel, and laches; (2) genuine issues of material fact exist regarding whether the amended CCRs are void; (3) the court wrongly dismissed all claims in summary judgment; and (4) judicial misconduct. We affirm.

FACTS

On February 20, 2008, the Ridpath's owner, 515 Washvada Investments, LLC, created the Ridpath Tower Condominium. The tower became an 18-unit condominium complex and the Ridpath Tower Condominium Association was formed. The tower included common elements shared by the owners.

The first amended declaration of CCRs, recorded on June 12, 2008, divided Unit 18, spanning 12 floors, into Units 18 and 19. The second amended declaration, recorded on August 28, 2008, divided Unit 18 into Units 18, 20 and 21. It lowered each association member's voting rights from 5.263 percent to 4.762 percent and converted some common elements to private ownership. Both amendments were executed by Mr. Jeffreys. Mr. Jeffreys has since been convicted on a series of federal fraud charges unrelated to these transactions. Revival purchased Units 20 and 21, as well as Unit 3,

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in January 2013. During discussions to purchase, no discussion took place regarding the validity of the second amended declaration.

The majority of owners desired to develop the Ridpath tower into low-rent, micro-apartments. Revival, however, planned to develop rooftop Units 20 and 21 back into a luxury hotel. Club Envy sued for declaratory relief, requesting the court declare the second amended declaration void for lack of proper approval by the requisite percentage of condominium members and terminate Revival's interests in Units 20 and 21. Club Envy additionally asked the court to declare the use restriction in the first amended declaration does not prohibit rental of micro-apartments. Club Envy requested summary judgment on its request for declaratory relief. Revival filed a cross motion for summary judgment on the ground Club Envy's claims were barred as a matter of law by RCW 64.34.264(2)'s one-year statute of limitations.

During the summary judgment hearing, the trial judge commented she previously had "a lot of cases involving this sort of thing with the same gentleman, with Mr. Jeffreys, and they're not normal or typical. They're all just like huge messes involving a lot of people tragic a lot." Report of Proceedings (RP) at 65-66. The judge further stated, "Mr. Jeffreys . . . has shown a lot of creativity that takes all of these situations outside everything that a lot of us have seen before." RP at 71. The judge commented, "what if hypothetically, say, Mr. Jeffreys had some other things going on with this whole transaction that wouldn't pass muster and we kept looking at what went on with this whole deal." RP at 83.

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The court granted Club Envy's motion and denied Revival's motion. The court noted in its order, "There was some discussion at oral argument as to whether the granting of Plaintiffs' Motion for Summary Judgment would dispose of the case in total. The Court grants the motion as framed, and deems the matter resolved." Clerk's Papers (CP) at 607 n.1. Revival appealed.¹

ANALYSIS

A. Revival's Defenses

The issue is whether the trial court erred in denying Revival's request to summarily dismissing Club Envy's claims as time barred under RCW 64.34.264(2), and/or under principles of equitable estoppel or laches.

We review a grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Auto. United Trades Org. v. State*, 175 Wn.2d 537, 541, 286 P.3d 377 (2012). Summary judgment is proper when no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. CR 56(c); *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000). We construe facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003). Summary judgment is appropriate if reasonable persons could reach but one conclusion. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

¹ The Ridpath Tower Condominium Association and Federal Deposit Insurance Corporation were defendants below with Revival, but do not join Revival on appeal.

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Statute of Limitations. Whether a claim is time barred is a legal question we review de novo. *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995). A statute of limitations is designed to protect individuals and courts from stale claims. *Burns v. McClinton*, 135 Wn. App. 285, 293, 143 P.3d 630 (2006). A statutory period begins to run when the plaintiff's cause of action accrues. *Malnar v. Carlson*, 128 Wn.2d 521, 529, 910 P.2d 455 (1996).

The Washington Condominium Act (WCA), chapter 64.34 RCW, was enacted in 1989 and governs condominiums created after July 1, 1990. RCW 64.34.010. The WCA establishes the procedure by which condominium instruments may be amended and the procedure for challenging such amendments. RCW 64.34.264(2) provides, “No 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 is recorded.” (Emphasis added.) Thus, our question becomes whether all amendments must be challenged within one year or solely those adopted by the association under the WCA. In interpreting a statute, we first look to its plain language. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the plain language of the statute is unambiguous, our inquiry ends. *Id.* RCW 64.34.264(2)'s plain language states a challenge to an amendment “adopted by the association pursuant to this section” may not be brought more than one year after the amendment is recorded. RCW 64.34.264(2). Here, however, the parties contest whether a properly adopted amendment by the association exists under the WCA.

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America Condominium Association, Inc. v. IDC, Inc., 844 A.2d 117, 133 (R.I. 2004) is instructive. There, the Rhode Island Supreme Court analyzed a similar statute and held the one-year limitation did not apply. The statute stated, "No 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 is recorded." R.I. GEN. LAWS § 34-36.1-2.17(b) (1956) (emphasis added). The plaintiffs in *American Condominium* brought a suit challenging the voting procedure employed to extend development rights and, consequently, argued the amendments extending those rights were invalid. The court held, "[W]hen, as here, the amendment being challenged is determined to be void *ab initio*, the one-year statute of limitations does not apply to any subsequent action taken by an interested party . . . the hearing justice did not err in rejecting defendants' statute of limitations defense." *Am. Condo. Ass'n*, 844 A.2d at 133.

Washington courts have not specifically addressed this issue. But, in *Keller v. Sixty-01 Associates of Apartment Owners*, 127 Wn. App. 614, 621, 112 P.3d 544 (2005), the defendants raised a timeliness defense. In remanding the matter on another issue, Division One of this court noted, "the trial court must determine on remand whether the 1992 amendment was properly adopted. . . . If it was void, the Board's action in 1999 is inconsequential and this issue is moot." In other words, if the amendment was void from its inception because it was not "*adopted by the association*

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pursuant to this section" then RCW 64.34.264(2)'s time limitation does not apply.

(Emphasis added.)

Based on both *American Condominium Association* and *Keller*, and the plain meaning of RCW 64.34.264(2), Club Envy's challenge to the validity of the amendment as not being properly passed by the association pursuant to the WCA is not barred by RCW 64.34.264(2)'s one-year limitation.

Equitable Estoppel/Laches. The action is not barred by the doctrines of equitable estoppel and laches. A party asserting an equitable remedy has the burden to prove the requirements of that remedy. See *King County v. Taxpayers of King County*, 133 Wn.2d 584, 642, 949 P.2d 1260 (1997) (party asserting equitable defense of laches has burden of proof); *Teller v. APM Terminals Pac., Ltd.*, 134 Wn. App. 696, 712, 142 P.3d 179 (2006) (party asserting equitable estoppel must prove each of its elements by clear, cogent, and convincing evidence).

Revival argues Club Envy is estopped from challenging the second amended declaration. The elements of equitable estoppel are "(1) [a]n admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party from allowing the first party to contradict or repudiate such admission, statement, or act." *Finch v. Matthews*, 74 Wn.2d 161, 171 n.3, 443 P.2d 833 (1968). This doctrine is not favored and must be proved by clear, cogent, and convincing evidence. *Robinson v. City of Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318 (1992).

The parties focus on element two; the reliance element. Revival claims it relied on some of the condominium owners' silence. "Estoppel by silence does not arise without full knowledge of the facts and a duty to speak on the part of the person against whom it is claimed." *Codd v. Festchester Fire Ins. Co.*, 14 Wn.2d 600, 606, 128 P.2d 968 (1942). "Full knowledge of the facts is essential to create an estoppel by silence or acquiescence." *Id.* at 607(quoting *Blanck v. Pioneer Mining Co.*, 93 Wash. 26, 34, 259 P. 1077 (1916). "Mere silence, without positive acts, to effect an estoppel, must have operated as a fraud, must have been intended to mislead, and itself must have actually misled. The party keeping silent must have known or had reasonable grounds for believing that the other party would rely and act upon his silence." *Id.* The neighbors of a seller have no obligation to disclose facts to a prospective buyer.

Revival's founder, Arthur Coffey, declared he met with three condominium owners and they did not mention, "the Second Amended Declaration was not valid or that Units 20 or 21 were improperly created or subdivided." CP at 508. This is consistent with these owner's declarations that they were not aware of the amendment. Under the clear language of *Codd*, this is not enough to satisfy element two of an equitable estoppel claim. Moreover, no evidence in our record shows Revival relied on these conversations to confirm title and proceed with its purchase. Instead, the evidence on our record shows Revival relied on the title insurance company to provide title information. Revival dealt directly with Mr. Jeffreys not Club Envy. Assertions that association members were aware of the invalidity of the second amended declaration

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and chose to remain silent are, at best, speculative. Elements established by virtue of speculation or conjecture are insufficient to warrant estoppel. *Pub. Util. Dist. No. 1 of Douglas County v. Cooper*, 69 Wn.2d 909, 918, 421 P.2d 1002 (1966). Without a showing of all elements, Revival's estoppel argument fails.

Next, Revival argues the doctrine of laches prevents Club Envy from challenging the second amended declaration. Laches is an equitable defense involving, "(1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he [or she] has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; [and] (3) damage to defendant resulting from the unreasonable delay." *Citizens for Responsible Gov't v. Kitsap County*, 52 Wn. App. 236, 240, 758 P.2d 1009 (1988) (quoting *Buell v. City of Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972)).

Revival fails to show Club Envy was aware of its rights and sat on them for an "unreasonable" amount of time. *Citizens for Responsible Gov't*, 52 Wn. App. at 240. Mr. Coffey's testimony is that he met with various association members to discuss ownership before he purchased Units 20 and 21. Nothing indicates the association members were aware the second amended declaration was void or that it even existed. While Revival may be able to show damages, without the other elements of a laches defense, Revival's claim must fail. Accordingly, Revival cannot avail itself of a laches defense under the circumstances presented here.

B. Summary Judgment

The issue is whether the trial court erred in summarily declaring the second amended declaration void and dismissing all claims. Revival contends either reasonable minds could solely find in its favor, or genuine issues of material fact remain to preclude summary judgment.

“A condominium declaration is like a deed, the review of which is a mixed question of law and fact.” *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). The factual issue is the declarant’s intent that we discern from the face of the declaration; the declaration’s legal consequences are questions of law we review de novo. *Id.*

A condominium declaration is a document unilaterally creating a type of real property. *Bellevue Pac. Ctr. Condo. Owners Ass’n v. Bellevue Pac. Tower Condo. Ass’n*, 124 Wn. App. 178, 188,100 P.3d 832 (2004). A declaration can solely be amended by compliance with the WCA. *Id.* A condominium association board of directors may not amend a declaration, solely the unit owners may do so. RCW 64.34.264; RCW 64.34.308(2).

General amendments may be enacted solely by a vote or agreement of 67 percent of the votes allocated in the association, or any larger percentage the declaration specifies. RCW 64.34.264(1). Here, the original declaration states, to amend a declaration it must be approved by “at least ninety percent (90%) of all the

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Voting Interests.” CP at 58. And, “[a] certificate, signed and sworn to by two (2) officers of the Association, that the record Owners of the required number of Units (and the required number of first mortgagees, where applicable) have either voted for or consented in writing to any amendment.” CP at 58.

Additionally, RCW 64.34.264(4) expressly forbids amendments that “may create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or the uses to which any unit is restricted” without the vote of “the owner of each unit particularly affected.” Because the second amendment changed the voting interests of all the members it had to be approved by all the owners. Thus, the second amended declaration was not allowed under RCW 64.34.264(4).

Here, Club Envy submitted several declarations by condominium owners indicating they did not approve the change. The sole evidence to the contrary was an unsworn certificate attached to the second amendment by Mr. Jeffreys and another owner. This unsworn certificate alone is insufficient to meet the requirements of RCW 64.34.264(1); it is further insufficient to create a genuine issue of material fact where none exists. A party opposing summary judgment “may not rely merely upon allegations or self-serving statements, but must set forth specific facts showing that genuine issues of material fact exist.” *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp., Inc.*, 114 Wn. App. 151, 157, 52 P.3d 30 (2002).

The record shows the second amended declaration (which created more units, lowered each unit owner's voting rights, and converted some common elements to private ownership) was not passed by all members as statutorily required. Accordingly, the second amended declaration was void ab initio; the trial court properly granted Club Envy's motion for summary judgment, declaring the declaration as such.

Because the second amended declaration was void, the trial court properly dismissed Club Envy's other claims relating to application of second amended declaration's voting rights to terms in the first amended declaration. Club Envy acquiesces indicating "resolving the validity of the Second Amended Declaration created an entire resolution to the matter." Resp't Br. at 38.

C. Judicial Misconduct Allegation

The issue is whether the trial court's summary judgment order should be vacated based on judicial misconduct. Revival contends the judge should have recused herself because her prior knowledge of Mr. Jeffreys caused "actual or apparent unfairness and bias." Appellant's Br. at 2. This issue is raised for the first time on appeal. Because an appearance of fairness claim is not a "constitutional" claim pursuant to RAP 2.5(a)(3), we will generally not consider it for the first time on appeal. *State v. Morgensen*, 148 Wn. App. 81, 90-91, 197 P.3d 715 (2008).

In any event, to prevail on an appearance of fairness claim, Revival must present evidence of actual or potential bias. *State v. Post*, 118 Wn.2d 596, 618-19, 826 P.2d 172, 837 P.2d 599 (1992). The "critical concern in determining whether a proceeding

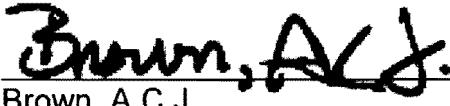
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satisfies the appearance of fairness doctrine is how it would appear to a reasonably prudent and disinterested person." *Chi., Milwaukee, St. Paul. & Pac. R.R. Co. v. Wash. State Human Rights Comm'n*, 87 Wn.2d 802, 810, 557 P.2d 307 (1976). We presume trial judges perform their functions regularly and properly, without prejudice or bias. *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945 (1993).

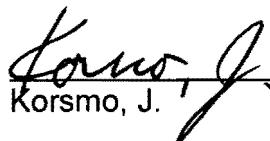
Here, the judge's comments noted in the facts section show the judge was familiar with Mr. Jeffreys, they do not show actual or potential bias against Revival. Indeed, many parties are repeatedly before the same judge, but that alone does not violate the appearance of fairness doctrine. See *State v. Leon*, 133 Wn. App. 810, 812, 138 P.3d 159 (2006) (frequency of appearance before a judge does not, without more, create an appearance of partiality that requires recusal from a matter).

Affirmed.

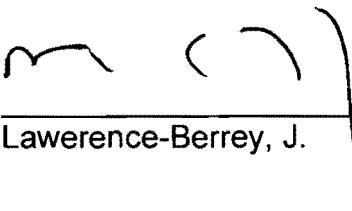


Brown, A.C.J.

WE CONCUR:



Korsmo, J.



Lawerence-Berrey, J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Belleville :
Bette Belleville :

v.

David Cutler Group and Malvern :
Hunt Homeowners Association :

Appeal of: Malvern Hunt :
Homeowners Association :

William Belleville :
Bette Belleville :

v.

David Cutler Group and Malvern :
Hunt Homeowners Association :

Appeal of: Malvern Hunt :
Homeowners Association :

William and Bette Belleville, h/w, :
Appellants :

v.

: No. 1512 C.D. 2014

: No. 2014 C.D. 2014

David Cutler Group, Inc. and Malvern :
Hunt Homeowners Association : No. 2081 C.D. 2014

: Argued: May 8, 2015

**BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ANNE E. COVEY, Judge**

OPINION BY JUDGE BROBSON

FILED: June 10, 2015

The Malvern Hunt Homeowners Association (Association) appeals from an order of the Court of Common Pleas of Chester County (trial court),

striking certain amendments from the Association’s Recorded Declaration. For the reasons stated below, we affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

A. The Dispute

The David Cutler Group (Cutler) was the developer of a planned community known as Malvern Hunt (the Development), which consists of 279 properties and was subdivided into three communities: The Reserve, The Chase, and The Ridings. The Reserve consists of 101 minimum-maintenance single-family lots, The Chase consists of 95 carriage homes, and The Ridings consists of 83 standard single-family units. Open spaces and amenities, including tennis courts and two playgrounds, are owned and maintained by the Association. William and Bette Belleville (the Bellevilles) own property in The Ridings.

Membership in the Association consists of the 196 lot owners of The Chase and The Reserve. The Bellevilles and the other 82 residents of The Ridings are excluded from membership in the Association.

Per the requirements for creating a planned community under the Uniform Planned Community Act¹ (UPCA), Cutler filed a Declaration with the Office of the Recorder of Deeds for Chester County (Chester County Recorder of Deeds) on March 20, 2001 (the Recorded Declaration).² The Recorded Declaration provided that only members of the Association (*i.e.*, owners in The

¹ 68 Pa. C.S. §§ 5101-5414.

² A planned community may be created only by recording a declaration executed in the same manner as a deed. Section 5201 of the UPCA, 68 Pa. C.S. § 5201.

Chase and The Reserve) received snow removal services for their sidewalks and driveways, grass-cutting services, weed treatments and mulching services. The owners in The Ridings received no services from the Association and were responsible for all aspects of their own property maintenance.

The Recorded Declaration also provided that “Single Family Lots [(The Ridings)] shall be exempt from all assessments, charges or liens” except for a \$1,000 contribution at the time of conveyance. (Recorded Declaration, art. IV, §10;³ Reproduced Record (R.R.) 895a.) Furthermore, the Recorded Declaration provided that, outside of the \$1,000 lump sum payment made at the time of conveyance, “[n]o other terms or provisions of Article IV [(pertaining to maintenance assessments)] shall apply” to The Ridings. (Recorded Declaration, art. XI;⁴ R.R. 910a.) The Recorded Declaration also prohibited the Association

³ Article IV, Section 10 of the Record Declaration states, in its entirety:

The following properties subject to this Declaration shall be exempt from the assessments, charges and liens created herein:
(a) all properties dedicated to and accepted by a government body, agency or authority, and devoted to public use; (b) all Common Open Space as defined in Article I, Section 1 hereof; (c) all Association Facilities as defined in Article I, Section 1 hereof. Notwithstanding any provisions herein, no land or improvements devoted to dwelling use shall be exempt from said assessments, charges or liens. Further, except as set forth in Article XI hereinbelow with regard to payment of an initial \$1,000 contribution, Single Family Lots shall be exempt from all assessments, charges or liens.

(R.R. 895a.)

⁴ Article XI provides, in pertinent part:

The Single Family Lots and Single Family Lot Owners shall be bound only by those provisions of this Declaration set forth hereinabove as follows . . . :

(Footnote continued on next page...)

from making amendments to the Recorded Declaration that impose any further monetary obligation on owners in The Ridings.⁵ (R.R. 907a.)

The Bellevilles purchased their home in August 2001, five months after the Recorded Declaration was recorded. The Bellevilles, however, did not receive a copy of the Recorded Declaration. Instead, Cutler provided the Bellevilles with a declaration that had not been recorded (Unrecorded Declaration), which contained different language than the Recorded Declaration. Specifically, the Unrecorded Declaration required residents of The Ridings to pay a one-time \$1,000 contribution to the Association *plus* an annual assessment of 20% of the uniform assessment paid by the owners of The Chase and The Reserve. (Unrecorded Declaration, art. XI; Ex. P-13 at 11, 29-30.) Cutler provided the Bellevilles with a summary of the Unrecorded Declaration (Summary), which provides, in pertinent part:

1. The open space and amenities within same as depicted on the approved subdivision plan for all of [the Development], which includes the carriage houses known

(continued...)

Article IV. Shall not apply. Rather, at the time of conveyance of each Single Family Lot from Developer to a Single Family Lot Owner a lump sum payment of ONE THOUSAND DOLLARS (\$1,000.00) shall be made in the same form and for the same purposes as set forth in Section 3, Article IV. No other terms or provision of Article IV shall apply.

(R.R. 909-10a.)

⁵ Recorded Declaration, art. X, § 1 (“Provided, however, that no amendment shall be permitted to any terms or provisions of this Declaration as affect solely the rights and provisions as apply to Single Family Lot Owners, as set forth in Article XI, hereinbelow, or which would in any manner impose any financial obligation upon such Single Family Lot Owners above and beyond those set forth herein.”).

as The Chase at Malvern Hunt, the minimum lot maintenance single family dwelling units known as The Reserve at Malvern Hunt and the standard single family lots known as The Ridings of Malvern Hunt is available for the use and enjoyment of the owners of lots and dwelling units in all three such areas.

...

3. The standard Single Family Lots [(The Ridings)] are intended to be owned and enjoyed without the Association providing any services with regard to snow removal, lawn mowing or any other type of lot maintenance. In short, the standard Single Family Lots are afforded the use and enjoyment of the Common Open Space, but the owners of these lots are not members of the [Association] never to be assessed for use and enjoyment of the open space or in any other matter impacted by the operation of the Association.

4. Each standard Single Family Lot [(The Ridings)] will have contributed \$1,000.00 toward the Association funds, as a one time only contribution upon settlement between the Developer and the initial buyer of each standard Single Family Lot. It shall be this sum, in concert with the percentage payment of the annual assessment as set forth hereinbelow, which will be the contribution towards use, enjoyment and maintenance of the Common Open Space, without any further financial obligation upon the standard Single Family Lots. Article XI provides that each Single Family Lot Owner shall pay a sum equal to twenty percent (20%) of the annual assessment as established by the Association and applicable to all other types of lot owners being those within The Chase at Malvern Hunt and The Reserve at Malvern Hunt, which annual sum shall be the sole financial obligation upon Single Family Lot [(The Ridings)] Owners with regard to the use, enjoyment and maintenance of the Common Open Space and Association Facilities, without any further financial obligation upon the standard Single Family Lots. Moreover, the Declaration, at Article X, Section 1,

expressly prohibits any future amendments to the Declaration that could affect the rights of the standard Single Family Lot Owners or impose any financial obligation above and beyond the initial \$1,000.00 contribution and the annual payment equal to twenty (20%) percent of the standard annual assessment as imposed by the Association on all other Lot Owners.

(R.R. 942-43a (emphasis in original).) In reliance on the Unrecorded Declaration provided to them, the Bellevilles paid the 20% annual assessment.

More than two years later, in October 2003, Cutler filed and recorded with the Chester County Recorder of Deeds a First Amendment to the Recorded Declaration (First Amendment) to “clarify” that property owners in The Ridings were to pay an annual 20% assessment.⁶ (R.R. 917a.) Notably, the First

⁶ The First Amendment provides, in pertinent part:

1. Article IV, Section 10, is amended by striking the concluding sentence thereof and replacing with the following language:

Further, except as set forth in Article XI hereinbelow with regard to payment of an initial ONE THOUSAND DOLLAR (\$1,000.00) contribution, and payment of not more than twenty (20%) percent of the annual assessment imposed on Lots within Village “C” (The Chase at Malvern Hunt) and Village “B” (The Reserve at Malvern Hunt) or twenty (20%) percent of the higher assessment if a differing assessment is, from time to time, imposed on Village “C” and Village “B”, Single Family Lots shall be exempt from all assessments, charges or liens.

2. Article XI is amended as to applicable provisions of Article IV. The language with regard to Article IV commencing at the bottom of page 29 of the Declaration is stricken and is to read as follows:

Article IV. Shall not apply. Rather, at the time of conveyance of each Single Family Lot from Developer to a Single Family Lot Owner a lump sum payment of ONE THOUSAND DOLLARS (\$1,000.00) shall be made in the same form and for

(Footnote continued on next page...)

Amendment also, for the first time, indicates that owners in The Chase and The Reserve may be charged differing annual assessments. The Recorded Declaration and Unrecorded Declaration both state, in Article IV, Section 3, that the annual assessment “shall be fixed at a uniform rate for all Lots.” (R.R. 891a; Ex. P-13 at 11.) The Bellevilles and other homeowners in the Development were not notified of the First Amendment or provided with a copy.

In 2006, the Association took control of the Development from Cutler in accordance with Article II, Section 2 of the Recorded Declaration. On August 15, 2007, the Association filed a Second Amendment to the Recorded

(continued...)

the same purposes as set forth in Section 3, Article IV. Each Single Family Lot Owner may further be assessed a sum equal to twenty (20%) percent of the annual assessment as established by the Association and applicable to all other types of Lot Owners (being those within The Chase at Malvern Hunt and The Reserve at Malvern Hunt), which annual sum shall be the sole financial obligation upon Single Family Lot Owners with regard to the use, enjoyment and maintenance of the Common Open Space and Association Facilities, without any further financial obligation upon the Single Family Lots. If the Association has levied a different annual assessment upon the Lots within The Chase at Malvern Hunt from The Reserve at Malvern Hunt, in that event, the twenty (20%) percent assessment upon the Single Family Lots shall be based upon the higher of the assessments upon The Chase at Malvern Hunt and The Reserve at Malvern Hunt. No other terms or provisions of Article IV shall apply.

(R.R. 918-19a.)

Declaration, allegedly to cure an ambiguity as it related to a budget shortfall (Second Amendment).⁷

On May 7, 2008, the Association recorded a Third Amendment to the Recorded Declaration, allegedly to cure an ambiguity regarding the collection of late fees, interests, costs, and attorney fees related to the non-payment of annual assessments (Third Amendment).⁸ In January 2008, the Association sent the

⁷ The Second Amendment is not at issue here.

⁸ The Third Amendment provides, in pertinent part:

1. Article IV, Section 10 is deleted and replaced in its entirety with the following:

Section 10. Exempt Property. The following properties subject to this Declaration shall be exempt from the assessments, charges and liens created herein: (a) all properties dedicated to and accepted by a government body, agency or authority, and devoted to public use; (b) all Common Open Space as defined in Article I, Section 1 hereof; (c) all Association Facilities as defined in Article I, Section 1 hereof. Notwithstanding any provisions herein, no land or improvements devoted to dwelling use shall be exempt from said assessments, charges or liens. Further, except as set forth in Article XI hereinbelow with regard to payment of an initial ONE THOUSAND DOLLAR (\$1,000.00) contribution, and payment of not more than twenty percent (20%) of the annual assessment imposed on Lots within Village "C" (The Chase at Malvern Hunt) and Village "B" (The Reserve at Malvern Hunt) or twenty percent (20%) of the higher assessment if a differing assessment is, from time to time, imposed on Village "C" and Village "B," Single Family Lots shall be exempt from all other special assessment, maintenance or open space assessments hereinafter imposed on the Lots. Provided, however, that the Single Family Lots shall not be exempt from any liens, charges, interest, late charges, costs or attorneys' fees otherwise imposed or authorized to be collected in accordance with applicable law or any other provisions of this Declaration

(Footnote continued on next page...)

Bellevilles an assessment notice that was calculated differently from all previous invoices. The 2008 assessment used a two-tiered format for owners in The Chase and The Reserve, and charged owners in The Ridings 20% of the higher amount. The Bellevilles disputed the calculation using the two-tiered system as unauthorized by the Declaration. The Bellevilles first learned of the amendments to the Recorded Declaration during the dispute, when the Association used the amendments to justify the higher assessment.

(continued...)

(including, without limitation, those relating to the non-payment of annual assessments).

2. Article IX is amended as to applicable provisions relating to Article IV, which is stricken and replaced with the following:

Article IV. Shall not apply, except as otherwise provided below or in Article IV of this Declaration. At the time of conveyance of each Single Family Lot from Developer to a Single Family Lot Owner a lump sum payment of ONE THOUSAND DOLLARS (\$1,000.00) shall be made in the same form and for the same purposes as set forth in Section 3, Article IV. Each Single Family Lot Owner may further be assessed a sum equal to twenty (20%) of the annual assessment as established by the Association and applicable to all other types of Lot Owners (being those within The Chase at Malvern Hunt and The Reserve at Malvern Hunt). If the Association has levied a different annual assessment upon the Lots within The Chase at Malvern Hunt from The Reserve at Malvern Hunt, in that event, the twenty (20%) percent assessment upon the Single Family Lots shall be based upon the higher of the assessments upon The Chase at Malvern Hunt and The Reserve at Malvern Hunt.

(R.R. 926a.)

B. Trial Court Proceedings

Unable to resolve their dispute with the Association, and believing that they had been wrongfully assessed under the terms of the Recorded Declaration, the Bellevilles filed a complaint on December 3, 2008, against Cutler and the Association, seeking declaratory judgment and compensatory and punitive damages. In Counts I through VI, the Bellevilles asked the trial court to “declare null and void” the First and Third Amendments. (R.R. 17-36a.) They argued that the First and Third Amendments were recorded without notice to *any* owner within the Development and without consent as required by Section 5219(d) of the UPCA, 68 Pa. C.S. § 5219(d), and in violation of the terms of Article X, Section 1 of the Recorded Declaration, which required 90-day advance written notice to all Owners of any amendments and prohibited any changes which “affect solely the rights and provisions as apply to Single Family Lot Owners [(The Ridings)] . . . or which would in any manner impose any financial obligation upon such Single Family Lot Owners above and beyond those set forth [in the Recorded Declaration].” (R.R. 907a.) In Count VII, the Bellevilles sought a refund from Cutler and the Association for the allegedly illegal annual assessments they collected from the Bellevilles. In Count VIII, the Bellevilles sought punitive damages from Cutler for “intentionally deceitful” conduct. (R.R. 37a.)

Cutler and the Association filed preliminary objections asserting, among other things, that the Bellevilles’ claim as to the First Amendment was time-barred under Section 5219(b) of the UPCA.⁹ On March 7, 2012, the trial

⁹ Section 5219(b) of the UPCA provides: “No action to challenge the validity of an amendment adopted by the association under this section may be brought more than one year after the amendment is recorded.” 68 Pa. C.S. § 5219(b).

court granted the preliminary objections in part, dismissing the Bellevilles' claims as to the First Amendment. Thereafter, the Bellevilles filed a motion to reconsider the March 7, 2012 order, which the trial court granted on April 30, 2012, vacating its March 7, 2012 order. The Association filed a motion to reconsider the April 30, 2012 order, which the trial court denied on May 24, 2012.

Prior to trial, Cutler filed a motion to dismiss the Bellevilles' cause of action for declaratory relief due to lack of jurisdiction for failure to join indispensable parties, namely the other 278 property owners in the Development. The trial court reserved its ruling until after the trial. A nonjury trial was held on October 16, 2012. On October 31, 2012, without ruling on the merits of the case, the trial court dismissed the Bellevilles' complaint in its entirety for failure to join indispensable parties. On appeal to this Court, the Bellevilles challenged only the trial court's dismissal of their causes of action seeking declaratory relief. By order dated January 3, 2014, we vacated the trial court's October 31, 2012 order, holding that the other 278 owners were not indispensable parties, and remanded the matter to the trial court for proceedings consistent with our opinion.¹⁰

On remand, the trial court, citing footnote 10 of this Court's opinion, considered only the declaratory judgment counts—*i.e.*, whether the First and Third Amendments were valid. In an opinion dated July 29, 2014, the trial court concluded that the First Amendment was not valid. It concluded that the Recorded Declaration was not ambiguous, and the First Amendment, therefore, could not be

¹⁰ *Belleville v. David Cutler Group, Inc.*, (Pa. Cmwlth., No. 284 C.D. 2013, filed January 3, 2014).

made as a technical correction under Section 5219(f) of the UPCA.¹¹ The trial court further concluded that the Association violated Section 5219(f) by failing to obtain an independent legal opinion, and that the First Amendment violated Section 5219(d) and it contradicted Article IV, Section 3 and Article X, Section 1 of the Recorded Declaration. The trial court likewise concluded that the Third Amendment was invalid because the Association failed to obtain an independent legal opinion in violation of Section 5219(f), the amendment violated Section 5219(d), and it contradicted Article IV, Section 10 and Article X, Section 1 of the Recorded Declaration. The trial court's order, therefore, declared the First

¹¹ 68 Pa. C.S. § 5219(f). At the time the First Amendment was filed, Section 5219(f) provided:

Technical corrections.—Except as otherwise provided in the declaration, if any amendment to the declaration is necessary in the judgment of the executive board to do any of the following:

(1) cure an ambiguity;

(2) correct or supplement any provision of the declaration, including the plats and plans, that is defective, missing or inconsistent with any other provision of the declaration or with this subparagraph;

(3) conform to the requirements of any agency or entity that has established national or regional standards with respect to loans secured by mortgages or deeds of trust or units in planned community or so-called “PUD” [(planned unit development)] projects, such as Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation;

the executive board may effect an appropriate corrective amendment without the approval of the unit owners or the holders of liens on the planned community, upon receipt of an opinion from independent legal counsel to the effect that the proposed amendment is permitted by the terms of this subsection.

and Third Amendments void and stricken and allowed any party to record a copy of the July 29, 2014 order with the Chester County Recorder of Deeds.

II. ISSUES ON APPEAL

On appeal¹² to this Court, the Association alleges various abuses of discretion and errors of law by the trial court: (1) the trial court erred in overruling the Association's preliminary objections because the Bellevilles' challenge to the First Amendment is time-barred; (2) the trial court erred in reconsidering its March 7, 2012, order because there were no legal grounds on which to reconsider it; (3) the trial court abused its discretion when it denied the Association's motion for reconsideration; (4) the trial court abused its discretion and/or erred as a matter of law when it denied the Association's motion for nonsuit at trial; (5) the trial court abused its discretion and/or erred as a matter of law when it failed to adopt the Association's proposed findings of fact and conclusions of law; (6) the trial court abused its discretion in making its findings of fact; and (7) the trial court's July 29, 2014 order contained the following errors of law: (a) Cutler and the Association followed proper procedure in amending the Recorded Declaration; (b) the Bellevilles' claims are barred by the one-year statute of limitations; (c) the Bellevilles' claims are barred by the doctrine of unclean hands; (d) the Bellevilles' claims are barred by the doctrine of laches; (e) the Bellevilles' claims are barred by the doctrine of equitable estoppel; (f) the Bellevilles' claims are barred by the doctrine of promissory estoppel; (g) the Bellevilles' claims are barred by an

¹² “Our standard of review in a declaratory judgment action is limited to determining whether the trial court’s findings are supported by substantial evidence, whether an error of law was committed or whether the trial court abused its discretion.” *Yost v. McKnight*, 865 A.2d 979, 982 n.6 (Pa. Cmwlth. 2005).

agreement at law; and (h) the trial court erred in allowing any party to record a copy of the July 29, 2014 order with the Chester County Recorder of Deeds. The Bellevilles filed a cross-appeal, in which they allege that the trial court committed an error of law when it concluded that they had waived their claims for damages and abused its discretion by failing to order the Association to pay part of the cost of recording the July 29, 2014 decision.

III. ANALYSIS

A. Association’s Appeal

The Association contends, multiple times throughout its brief, that the Bellevilles’ claims are time-barred by Section 5219(b) of the UPCA, which provides: “No action to challenge the validity of an amendment adopted by the association under this section may be brought more than one year after the amendment is recorded.” 68 Pa. C.S. § 5219(b). The Association argues that Section 5219(b) applies to all amendments, including those made under Section 5219(f) of the UPCA. When interpreting a statute, this court presumes that the General Assembly “does not intend a result that is absurd, impossible of execution or unreasonable.” Section 1922(1) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1922(1). Thus, the court may consider “the practical results of a peculiar interpretation” when construing a statute. *Unionville-Chadds Ford Sch. Dist. v. Rotteveel*, 487 A.2d 109, 112-13 (Pa. Cmwlth. 1985). Furthermore, “[i]t is well established that whenever a court construes one section of a statute, it must read that section not by itself, but with reference to, and in light of, the other sections.” *Commonwealth v. Mayhue*, 639 A.2d 421, 439 (Pa. 1994). We begin, therefore, by examining the whole of Section 5219 of the UPCA.

Section 5219 of the UPCA dictates how amendments to a declaration may be made. Section 5219(a)(1) of the UPCA establishes, as a baseline, that a declaration may only be amended when voted on or agreed to by at least 67% of the votes in an association, although it also allows for a larger or smaller percentage of votes under certain circumstances not applicable here. 68 Pa. C.S. § 5219(a)(1). The rest of Section 5219(a) of the UPCA identifies exceptions to the general rule that declarations may only be amended by vote or agreement as provided for in subsection (a)(1). For instance, subsection (a)(2) provides that unanimous consent may be required for some types of amendments, and subsection (a)(3) excludes certain types of amendments from the requirements of subsection (a)(1) all together. 68 Pa. C.S. § 5219(a)(2) and (3). One type of amendment excluded from the approval requirements of subsection (a)(1) are amendments made pursuant to Section 5219(f) of the UPCA, which allows “technical corrections” to be made by a declarant and recorded under certain circumstances without approval by the association. *See* 68 Pa. C.S. §§ 5219(a)(3)(ii)(A) and 5219(f).

Under the Association’s interpretation of Section 5219 of the UPCA, the executive board of the Association could unilaterally make any amendment it chooses—regardless of how large or material a change—with notice to or vote by the Association members, so long as the board declares the amendment to be a technical correction under Section 5219(f) of the UPCA. Furthermore, under the Association’s interpretation, pursuant to Section 5219(b) of the UPCA, Association members would have no form of recourse unless they somehow discover, without the benefit of any notice or vote, that an amendment has been recorded and bring an action within one year of the recording of that amendment. This is the exact

type of absurd result the General Assembly is presumed not to intend. Furthermore, it would frustrate the purpose of Section 5219(a), which is to ensure that a majority of association members are aware of and agree to material changes in the documents which govern the rights, responsibilities, obligations, and powers of the association, its members, and its board. Clearly, the time limitations set forth in Section 5219(b) apply to the non-technical amendments authorized by Section 5219(a)(1), because those amendments require a vote or agreement of the members of an association, such that some form of notice is implied. The Association's interpretation, however, which applies the time limitation to technical amendments under Section 5219(f), for which no vote, agreement, or notice are required, fails to take into account the entirety of Section 5219 and leads to an absurd result. For those reasons, the trial court did not err in concluding that the Bellevilles' claims were not time-barred by Section 5219(b) of the UPCA.¹³ See *Mayhue*, 639 A.2d at 439 (rejecting a plain meaning argument which failed to read the section with reference to, and in light of, other sections); *Commonwealth v. Horton*, 348 A.2d 728, 732 (Pa. 1975) (rejecting statutory interpretation which led to absurd result).

The Association argues that the trial court erred in granting the Bellevilles' motion for reconsideration of its March 7, 2012 order. Citing federal case law, the Association argues that the Bellevilles failed to establish one of three grounds for reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct an error of law or prevent a

¹³ We note that the Third Amendment was filed on April 17, 2008, and that the Bellevilles' complaint was filed on December 3, 2008, well within the one-year time period set forth in Section 5219(b) of the UPCA.

manifest injustice. Association's Br. at 37 (citing *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)). In fact, the Bellevilles' motion and the trial court's decision to grant reconsideration were based on the argument that the March 7, 2012 ruling, which held that the challenge to the First Amendment was time-barred by Section 5219(b) of the UPCA, was legally erroneous. The trial court agreed that the action was not time-barred, and, as our discussion above reveals, so do we.

Furthermore, the standard cited by the Association has not been adopted in Pennsylvania courts. A motion for reconsideration "is addressed to the sound discretion of the trial court." *Moore v. Moore*, 634 A.2d 163, 166 (Pa. 1993). We will not disturb the trial court's grant of reconsideration absent an abuse of discretion or error of law. *See Dahl v. AmeriQuest Mortg. Co.*, 954 A.2d 588, 593 (Pa. Super.) ("[T]he standard of review of a motion for reconsideration is limited to whether the trial court manifestly abused its discretion or committed an error of law."), *appeal denied*, 960 A.2d 840 (Pa. 2008). "An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." *Commonwealth v. Smith*, 673 A.2d 893, 895 (Pa. 1996). The Association has not alleged any unreasonableness, partiality, prejudice, bias or ill-will on the part of the trial court, and we perceive none. We, therefore, conclude that the trial court did not err as a matter of law or abuse its discretion in granting the Bellevilles' motion for reconsideration.

The Association also contends that the trial court erred in denying the Association's motion for reconsideration of the April 30, 2012 order because the

Bellevilles did not oppose the motion. As stated above, the grant or denial of a motion for reconsideration is within the sound discretion of the trial court. Here, the Association asked the trial court to reconsider its grant of reconsideration of its March 7, 2012 order, and the trial court denied the order before the Bellevilles' response was due. We perceive no abuse of discretion, as defined above, in the trial court's denial of the Association's motion prior to the filing of a response by the Bellevilles.

The Association next alleges that the trial court erred when it denied the Association's motion for nonsuit following the close of the Bellevilles' case-in-chief. The trial court may enter nonsuit only if it could not reasonably conclude that the elements of the cause of action have been established. *See Thomas v. City of Philadelphia*, 804 A.2d 97, 107 n.16 (Pa. Cmwlth.), *appeal denied*, 814 A.2d 679 (Pa. 2002), *cert. denied*, 538 U.S. 1057 (2003); Pa. R.C.P. No. 230.1(a)(1). Because we conclude that the amendments were invalid per our discussion below, the trial court did not err in refusing to grant the Association's motion for nonsuit.

Next the Association argues that the trial court abused its discretion and/or committed an error of law when it failed to adopt the Association's proposed findings of fact and conclusions of law. "The court may adopt a party's proposed findings and conclusions as it deems warranted or it may state its findings and conclusions in its own language." *Commonwealth ex rel. Bloomsburg State College by Nossen v. Porter*, 610 A.2d 516, 518 (Pa. Cmwlth. 1992) (citing Goodrich-Amram 2d § 1516:2 at 83), *appeal denied*, 627 A.2d 181 (Pa. 1993). Furthermore, "[t]he finder of fact is [the] sole judge of credibility and is free to believe all, part, or none of the evidence. This is true of a judge in a bench trial, as

well as a jury.” *In re Funds in Possession of Conemaugh Twp. Supervisors*, 753 A.2d 788, 790 (Pa. 2000). The trial court was not obligated to agree with or adopt either party’s proposed findings of fact or conclusions of law, and failure to do so does not constitute either an abuse of discretion or error of law.

The Association contends that the trial court abused its discretion in making its own findings of fact.

In a bench trial, the trial judge acts as fact-finder and has the authority to make credibility determinations and to resolve conflicts in evidence. Consequently, the trial judge’s findings made after a bench trial must be given the same weight and effect as a jury verdict and will not be disturbed on appeal unless they are not supported by competent evidence in the record.

Merrell v. Chartiers Valley Sch. Dist., 51 A.3d 286, 293 (Pa. Cmwlth. 2012) (internal citation omitted); see also *In re Funds in Possession of Conemaugh Twp. Supervisors*, 753 A.2d at 790 (“The finder of fact is [the] sole judge of credibility and is free to believe all, part, or none of the evidence.”). The Association does not argue that the trial court’s findings are unsupported by the evidence in the record, but instead argues that the trial court should have believed its evidence over the Bellevilles’ evidence or interpreted the evidence offered in another way. These arguments go to the credibility and weight of the evidence, issues within the sole province of the trial court as the fact finder, and we will not disturb them on appeal. See *Merrell*, 51 A.3d at 293; *In re Funds in Possession of Conemaugh Twp. Supervisors*, 753 A.2d at 790. Furthermore, we conclude that the trial court’s findings are supported by competent evidence in the record, and as such, the trial court did not abuse its discretion.

The Association’s main argument on the merits is that the Recorded Declaration was properly amended in accordance with Section 5219(f) of the

UPCA and that the trial court erred, therefore, in concluding the amendments were invalid. The Association argues that the First and Third Amendments were made to clarify an ambiguity and as such were technical corrections pursuant to Section 5219(f) of the UPCA. Because they were technical corrections under Section 5219(f), the Association argues, it was not required to notify residents of the Development or allow the members of the Association to vote on the amendments.

“A contract is ambiguous if it is reasonably susceptible to different interpretations and capable of being understood in more than one sense.” *Mayflower Square Condo. Ass’n v. KMALM, Inc.*, 724 A.2d 389, 394 (Pa. Cmwlth. 1999). Furthermore, any ambiguity will be construed against the drafter. *Clairton Slag, Inc. v. Dep’t of General Servs.*, 2 A.3d 765, 773 (Pa. Cmwlth. 2010), *appeal denied*, 30 A.3d 489 (Pa. 2011). Whether or not a contract is ambiguous is a question of law. *Id.*

The Association spends most of its time arguing that the Recorded Declaration was ambiguous because it was inconsistent with the Summary and Unrecorded Declaration given to homeowners in the Development. The trial court concluded, and we agree, that “the Association mudd[ies] the discussion of ambiguity by referring continually to ambiguity created by reading several documents together.” (Trial Ct. Op. at 6.) External inconsistencies cannot make the Recorded Declaration ambiguous; such ambiguity must be contained within the document itself. Furthermore, we note that the First Amendment did more than simply bring the Recorded Declaration into line with the Unrecorded Declaration and Summary by imposing a 20% assessment. It also, for the first time, indicated that owners in The Chase and The Reserve could be charged differing assessments.

The Association also refers to the following language contained in Section 10, Article IV of the Recorded Declaration as ambiguous:

Notwithstanding any provisions herein, no land or improvements devoted to dwelling use shall be exempt from said assessments, charges or liens. Further, except as set forth in Article XI hereinbelow with regard to payment of an initial \$1,000 contribution, Single Family Lots shall be exempt from all assessments, charges or liens.

(R.R. 895a.) We disagree. While this language may, at first blush and if read in isolation, appear ambiguous, it is clear from the rest of the Recorded Declaration, and specifically from the rest of Article IV, that Single Family Lots (*i.e.*, The Ridings) are exempt from all assessments, charges, or liens. Article IV, Section 1, which establishes the Association's right to levy annual and special assessments, speaks only in terms of "Lots" and "Owners." Both Lot and Owner are specially defined terms within the Recorded Declaration:

(g) "Lot" shall mean and refer to any plot of land intended and subdivided for fee simple conveyance for residential carriage house use or minimum lot maintenance single family home, all as shown upon the recorded subdivision plat of Malvern Hunt as Village-“C” and Village-“B” respectively. No Lot shall be severed from the covenants, restriction, easements and conditions herein contained.

(h) "Owner" shall mean and refer to the record owner, excluding the Developer, whether one or more persons or entities, of the fee simple title to any Lot but shall not mean or refer to any mortgagee or subsequent holder of a mortgage, unless and until such mortgagee or holder has acquired title pursuant to foreclosure or any proceeding in lieu of foreclosure.

(Article I, Section 1(g)-(h); R.R. 884a.)

Additionally, the definitions of “Single Family Lot” (*i.e.*, The Ridings) explicitly excludes “Single Family Lot” from inclusion in the definition of “Lot.” (Article I, Section 1(k) (“A Single Family Lot is separate and distinct from a “Lot” as defined in subparagraph (g) hereinabove.”); R.R. 885a.) “Single Family Lot Owner” is similarly excluded from inclusion in the definition of “Owner.” (Article I, Section 1(l) (“Such Single Family Lot Owner is separate and distinct from an “Owner” as defined in subparagraph (h) hereinabove.”); R.R. 885a.) Thus, it is clear that the establishment of annual and special assessments in Article IV was never intended to include The Ridings or homeowners in The Ridings, such as the Bellevilles. Such exclusion makes sense, given that owners in The Ridings are not members of the Association with a say in the assessments charged and do not receive any of the services, such as snow removal and lawn care, that those in The Chase and The Reserve receive. Furthermore, the First Amendment represents such a material change in terms that it cannot be considered technical in any sense of the word. Thus, because the Recorded Declaration was not ambiguous, the Association could not amend it under Section 5219(f) of the UPCA.

As for the Third Amendment, much of which is a repeat of the First Amendment, our reasoning above applies in equal measure. The Association argues that the Third Amendment was necessary to clarify that Single Family Lot Owners were required to pay late fees and other charges imposed for failure to pay the annual assessment on time, which was ambiguous after the First Amendment. Even if the First Amendment were valid, we perceive no such ambiguity. The First Amendment, in addition to imposing the 20% assessment, declared that Single Family Lots, with the exception of the 20% assessment, “shall be exempt

from all assessments, charges or liens,” and that “[n]o other terms or provisions of Article IV shall apply [to Single Family Lots].” (R.R. 918-19a.) Late fees and other liens, charges, interest, costs or attorney fees, are clearly other “assessments, charges and liens.” Furthermore, such fees and charges are imposed by Section 8 of Article IV (R.R. 894a), which under the explicit terms of the First Amendment, do not apply to Single Family Lots. (*See* R.R. 919a.) Thus, the First Amendment clearly exempted Single Family Lots from late fees and other associated charges. With no discernable ambiguity in the Recorded Declaration, or the Recorded Declaration as amended by the First Amendment, the Association was not permitted to record the Third Amendment as a technical correction under Section 5219(f) of the UPCA.

Additionally, the trial court concluded that even if such ambiguity existed, the First and Third Amendments were procedurally invalid because the Association failed to obtain an “opinion from independent legal counsel” that the amendment was permitted, as required under Section 5219(f) of the UPCA. The Association argues that Richard McBride, Esquire, counsel for Cutler, drafted the First Amendment and provided the requisite legal opinion. Similarly, for the Third Amendment, the Association argues that Sean O’Neill, Esquire, provided an independent legal opinion. Mr. O’Neill was a member of the firm Lentz, Cantor and Massey, which had been hired to represent the Association in the Belleville matter, and another member of the firm, Steve Sutton, Esquire, drafted the Third Amendment. The trial court concluded that “[a] single firm representing the Association, drafting the amendment and issuing the required opinion letter hardly results in the type of independent review contemplated by the [UPCA].” (Trial Ct. Op. 11.) We agree. “Independent legal counsel” is not defined by the UPCA, and

as such, we must give the words their ordinary meaning. *See* Section 1903(a) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1903(a) (“Words and phrases shall be construed according to rules of grammar and according to their common and approved usage.”). In the ordinary usage of the word independent, one would not consider an attorney and/or law firm already hired by a client to be independent, as they are clearly affiliated with and, to some extent, controlled by their client.¹⁴

The Association argues that the trial court should have concluded that “Section 5219(f) of the UPCA [was] satisfied, regardless of whether the Court believed the Association obtained guidance from an independent legal counsel.” (Association Br. at 58.) We cannot agree. Obtaining an independent legal opinion about a proposed “technical correction” under Section 5219(f) is clearly a requirement set forth by Section 5219(f) in order for an amendment made under that section to be valid. The Association offers no argument or legal reasoning for discounting this requirement, and we decline to do so.

Furthermore, we note, as the trial court did, that even if the amendments were procedurally valid, the First and Third Amendments would be substantively invalid because they violate other provisions of the Recorded Declaration. In particular, those amendments would violate Article IV, Section 3, which has never been amended and requires annual assessment to be “fixed at a uniform rate for all Lots,” (R.R. 891a), Article IV, Section 10, which exempts Single Family Lots from all assessments, charges or liens, (R.R. 895a), Article X,

¹⁴ Merriam Webster defines “independent” as “not subject to control by others” or “not affiliated with a larger controlling unit.” MERRIAM WEBSTER’S COLLEGiate DICTIONARY 633 (Frederick C. Mish et al. eds., 11th ed. 2003).

Section 1, which prohibits any amendment which “affect[s] solely the rights and provisions as apply to Single Family Lots Owners . . . or which would in any manner impose any financial obligation upon Single Family Lot Owners above and beyond those set forth herein,” (R.R. 907a), and Article XI, which provides that no other terms or provisions of Article IV apply to Single Family Lots, (R.R. 910a).

The Association then argues that the Bellevilles’ claims are barred by several legal doctrines. First, the Association again asserts that Section 5219(b) of the UPCA bars the Bellevilles’ claims. As we have already determined that the Bellevilles’ claims are not time-barred under Section 5219(b) above, we need not repeat our reasoning here.

Second, the Association asserts that the Bellevilles’ claims are barred by the doctrine of unclean hands. The doctrine of unclean hands allows a court to “deprive a party of equitable relief where, to the detriment of the other party, the party applying for such relief is guilty of bad conduct relating to the matter at issue. The doctrine of unclean hands requires that one seeking equity act fairly and without fraud or deceit as to the controversy in issue.” *Terraciano v. Dep’t of Transp., Bureau of Driver Licensing*, 753 A.2d 233, 237-38 (Pa. 2000) (internal citation omitted). The Association appears to be arguing that the Bellevilles were somehow guilty of bad conduct, fraud or deceit simply by virtue of the fact that they instituted this action after paying the assessment without complaint from 2001-2008. We agree with the trial court’s conclusion that the Bellevilles did not come to the trial court with unclean hands simply because they exercised their legal rights. *See id.* at 238 & n.11 (rejecting Department of Transportation’s argument that licensee had unclean hands because she accepted her statutory reprieve and then exercised her right to appeal her suspension).

Third, the Association asserts that the Bellevilles' claims are barred by the doctrine of laches. The doctrine of laches "bars relief when the complaining party is guilty of want of due diligence in failing to institute his action to another's prejudice." *Leedom v. Thomas*, 373 A.2d 1329, 1332 (Pa. 1977) (internal quotation marks omitted). As stated above in our statute of limitation discussion, the Bellevilles first had reason to learn of the amendments in 2008, after which they instituted this suit within the one year period allowed under the UPCA. As such we cannot conclude that the Bellevilles failed to exercise due diligence in bringing this action and, thus, the doctrine of laches does not apply.

Fourth, the Association contends that the Bellevilles' claims are barred by equitable estoppel. "[E]quitable estoppel recognizes that an informal promise implied by one's words, deeds or representations which leads another to rely justifiably thereon to his own injury or detriment, may be enforced in equity." *Novelty Knitting Mills, Inc. v. Siskind*, 457 A.2d 502, 503 (Pa. 1983). "The two essential elements of equitable estoppel are inducement and justifiable reliance on that inducement." *Id.*

The inducement may be words or conduct and the acts that are induced may be by commission or forbearance *provided that a change in condition results* causing disadvantage to the one induced. More important, the laws require that . . . The representation or conduct *must of itself* have been sufficient to warrant the action of the party claiming the estoppel.

Zitelli v. Dermatology Educ. & Research Found., 633 A.2d 134, 139 (Pa. 1993) (emphasis added) (citation omitted) (internal quotation marks omitted). The Association argues that it will be injured if the Bellevilles do not pay assessments, but it has identified no action it was induced to take or abstain from in reliance on any promise from the Bellevilles. In fact, the Association does not identify any

change in its behavior as a result of reliance upon the Bellevilles' payments, and indeed could not identify any such change as it provides no services directly or specifically to the Bellevilles—or any other member of The Ridings—and has no obligations to the Bellevilles independent from its obligations to residents of The Chase and The Reserve. Thus, the Association has failed to establish the necessary elements for equitable estoppel.

Fifth, the Association asserts that the Bellevilles' claims are barred by promissory estoppel. Promissory estoppel, like equitable estoppel, requires both inducement and detrimental reliance. *Matarazzo v. Millers Mut. Grp., Inc.*, 927 A.2d 689, 692 (Pa. Cmwlth. 2007) (“Under this theory, a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcing the promise.”). As discussed above, the Association identifies no action or forbearance it was induced to take by the Bellevilles and, as such, fails to establish the elements of promissory estoppel.

Sixth, the Association argues that under the decisional law of our courts, the Association has a right to assess property owners for the use or maintenance of the common facilities regardless of the language in the property owner's chain of title. The Association cites *Meadow Run and Mountain Lake Park Association v. Berkel*, 598 A.2d 1024 (Pa. Super. 1991), *appeal denied*, 610 A.2d 46 (Pa. 1992), *Spinnler Point Colony Association, Inc. v. Nash*, 689 A.2d 1026 (Pa. Cmwlth. 1997), and *Hess v. Barton Glen Club, Inc.*, 718 A.2d 908 (Pa. Cmwlth. 1998), *appeal denied*, 737 A.2d 745 (Pa. 1999), for the proposition that even if the power of a homeowners association to levy assessments for the use and maintenance of common areas is not mentioned in the

owners' chain of title, there is an implied agreement at law that homeowners must pay a portion of the cost to maintain such common areas. Each of these cases is easily distinguishable from the present case, however, because in each of them the owner's chain of title was *silent* about assessments paid for the maintenance of the common areas. *See Meadow Run*, 598 A.2d at 1027 (holding that "absent an express agreement prohibiting assessments . . . inherent in [the homeowners association's] authority is the ability to impose reasonable assessments on the property owners to fund the maintenance of [common] facilities"); *Spinnler Point*, 689 A.2d at 1028-29 (holding that owners were required to pay assessments despite fact that their chain of title made no reference to homeowners association); *Hess*, 718 A.2d at 912 ("When the owners of property in a residential development are permitted to use the common areas of a development, there is an implied agreement to accept a portion of the cost of maintaining those facilities. And, where a deed is silent on whether a homeowners' association has the authority to make such an assessment, the homeowners may be assessed their proportionate costs of common improvements.").

Here, the Bellevilles' chain of title was not silent as to assessment for maintenance of the common areas; instead, such assessment was *explicitly prohibited* by the terms of the Recorded Declaration. Thus, *Meadow Run*, *Spinnler Point*, and *Hess* are all inapplicable, and we decline to hold that an association can assess a property owner a maintenance fee when such assessment is prohibited by the terms of the declaration. *See also* Section 5302(a) of the UPCA, 68 Pa. C.S. § 5302(a) (providing that association may impose assessments for use and maintenance of common areas "subject to the provisions of the declaration").

Finally, the Association asserts that the trial court exceeded its authority in allowing any party to record its July 29, 2014 order because the Bellevilles did not request that relief. It is true that a trial court generally exceeds its authority if it grants relief outside of that requested. *See Williams Twp. Bd. of Supervisors v. Williams Twp. Emergency Co., Inc.*, 986 A.2d 914, 921 (Pa. Cmwlth. 2009) (“[W]hile a chancellor in equity may fashion a remedy that is narrower than the relief requested, he or she may not grant relief that exceeds the relief requested.”). The Bellevilles, however, twice requested “any further relief as is just and appropriate,” (R.R. 36a, 38a), a request we think broad enough to encompass the relief awarded by the trial court. Thus, the trial court did not err.

B. Bellevilles’ Appeal

On cross-appeal, the Bellevilles argue that the trial court committed an error of law when it concluded that they had waived their claims for damages. In our previous opinion, this court noted that the October 31, 2012 order “dismissed the entire Complaint, not just the counts for declaratory relief. However, [the Bellevilles’] appeal only concerns the trial court’s dismissal of their cause of action seeking declaratory relief.” *Belleville v. David Cutler Group, Inc.*, (Pa. Cmwlth., No. 284 C.D. 2013, filed January 3, 2014), slip op. at 8 n.10. Likewise, in footnote 15, this Court noted that “the only issue is whether the Amendments were valid.” *Id.* at 18 n.15. The trial court, interpreting this Court’s previous order in this case, concluded that the Bellevilles failed to appeal the portion of the trial court’s October 31, 2012 order dismissing their claims for damages and had, therefore, waived those claims. We disagree with the trial court’s interpretation of our previous order. Our January 3, 2014 order reinstated the Bellevilles’ claims for declaratory judgement. It necessarily follows that the

Bellevilles' thus retained the ability to pursue any relief available and requested based upon those claims. Our prior opinion did not foreclose the remedies available and sought by the Bellevilles, regardless of how they were characterized in the complaint.

Lastly, the Bellevilles argue that the trial court abused its discretion because it did not order the Association to pay part of the cost of recording the July 29, 2014 order. The Bellevilles cite no authority in support of this argument and also fail to point to any partiality, prejudice, bias, or ill-will that would constitute an abuse of discretion. *See Smith*, 673 A.2d at 895. We, therefore, decline to conclude that the trial court abused its discretion by failing to include such a provision in its July 29, 2014 order.¹⁵

For the reasons discussed above, the order of the trial court is hereby affirmed in part and reversed in part. The portion of the trial court's order finding waiver of the Bellevilles' request for relief in the nature of damages is hereby reversed, and this matter is remanded to the trial court with instruction to consider whether the Bellevilles are entitled to such relief. In all other respects, the order of the trial court is hereby affirmed.

P. KEVIN BROBSON, Judge

¹⁵ Whether the Bellevilles may recover the cost of recording the order as a taxable cost under Pennsylvania Rule of Appellate Procedure 2741 is not before us.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Belleville :
Bette Belleville :

v.

David Cutler Group and Malvern :
Hunt Homeowners Association :

Appeal of: Malvern Hunt :
Homeowners Association :

William Belleville :
Bette Belleville :

v.

David Cutler Group and Malvern :
Hunt Homeowners Association :

Appeal of: Malvern Hunt :
Homeowners Association :

William and Bette Belleville, h/w, :
Appellants :

v.

: No. 1512 C.D. 2014

: No. 2014 C.D. 2014

David Cutler Group, Inc. and Malvern :
Hunt Homeowners Association :

ORDER

AND NOW, this 10th day of June, 2015, the order of the Court of Common Pleas of Chester County (trial court) is hereby AFFIRMED in part and REVERSED in part. The portion of the trial court's order finding waiver of the Bellevilles' request for relief in the nature of damages is hereby REVERSED, and

this matter is REMANDED to the trial court with instruction to consider whether the Bellevilles are entitled to such relief. In all other respects, the order of the trial court is hereby AFFIRMED.

Jurisdiction relinquished.

P. KEVIN BROBSON, Judge

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by E-mail at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: <http://www.courts.state.nh.us/supreme>.

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
No. 2013-491

RICHARD HOLT & a.

v.

GARY KEER & a.

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Argued: May 15, 2014
Opinion Issued: January 13, 2015

Ducharme Law, P.L.L.C., of Portsmouth (Robert E. Ducharme on the brief and orally), for the petitioners.

Shaines & McEachern, PA, of Portsmouth (Paul McEachern on the brief and orally), for the respondents.

BASSETT, J. The petitioners, Gary and Katherine Keer, appeal an order of the Superior Court (McHugh, J.) denying their motion for enforcement of the trial court's previous orders and for a finding of contempt. The petitioners, the

owners of one of the four units in a condominium, filed the motion which alleged that the respondents, Richard Holt together with the owners of other units in the condominium, had unlawfully converted common area within the condominium to limited common area. We vacate and remand.

The following facts are taken from the record or are undisputed. This case involves a four-unit condominium located on Boston Avenue in Hampton, known as the Boston Four Condominium. The condominium was created in 1989 pursuant to a "Condominium Site Plan" and "Declaration of Condominium Ownership," both of which were recorded in the Rockingham County Registry of Deeds. The site plan depicts the four units and describes them as units "7, 7R, 9 & 9R Boston Avenue." Each unit is a free-standing residential building. The four units are arranged in a rectangle; units 7 and 9 are adjacent to one another bordering Boston Avenue, and units 7R and 9R are rear units located behind units 7 and 9 respectively. The condominium bylaws, recorded at the same time as the declaration, created the Boston Four Condominium Association to oversee the operations of the condominium property.

In addition to the residential buildings, the condominium also includes certain property around the four units that the declaration designates as either "common area" or "limited common area." Common area is property in which each unit owner has "an equal one-fourth (25%) undivided interest." The declaration provides that common area "[s]hall refer to all portions of the condominium other than the units." This includes a large portion of the outside property, walkways between units, as well as all utility lines serving the condominium. In contrast, limited common area consists of "the portion of the Common Area reserved for the exclusive use of . . . one or more, but less than all, of the units." Limited common area includes "doorsteps, porches, balconies, patios, and any other apparatus designed to serve a single unit, but located outside of the boundaries thereof . . ." In addition, as to units 7, 7R, and 9R, each has its own parking space which is designated as limited common area. Each parking space is 9 feet by 18 feet, with boundaries delineated on the site plan.

The Keers purchased unit 7 in 1996. At that time, Richard and Jeannine Holt, then husband and wife, owned unit 7R. In 1997, after Richard and Jeannie Holt were divorced, Richard Holt became the sole owner of unit 7R. Since 2006, Richard Holt and his current wife, Rosanna Holt, have jointly owned unit 7R. In 1998, Richard Holt, together with Patricia Duquette, purchased unit 9R.

In the mid-2000s, the unit owners had several disagreements relating to the operation of the condominium. The issues included allocation of costs relating to the units' connection to new sewer lines, the propriety of additions Richard Holt had made to units 7R and 9R, and use of the common area. A

further disagreement arose because Richard Holt and his tenants had been parking two vehicles, one behind the other, in unit 9R's designated parking space, which caused one of the vehicles to encroach onto the common area.

Pursuant to a clause in the declaration requiring the arbitration of disputes between and/or among unit owners, the parties submitted their dispute to a neutral arbitrator. The Keers and the owner of unit 9, Frederick Guthrie, alleged that Richard Holt and Duquette had committed at least eleven violations of the condominium documents. Richard Holt and Duquette asserted two cross-claims against the Keers and Guthrie. Although the arbitrator denied most of the relief requested by the Keers and Guthrie, he also issued an order prohibiting Richard Holt or his tenants from parking two vehicles in the parking space reserved for unit 9R. On the cross-claims relating to sewer connection costs, the arbitrator ordered the Keers and Guthrie to pay their share of the cost to connect their units to the sewer system.

In September 2008, Richard Holt filed a petition in superior court seeking an order confirming the arbitrator's decision. The Keers and Guthrie filed a separate action in superior court appealing the arbitrator's decision. In February 2009, the trial court consolidated the two actions, ruled that a hearing was unnecessary, and granted Richard Holt's petition to confirm the arbitrator's decision. The trial court also denied the Keers' and Guthrie's appeal, finding that it was, in essence, a disagreement with the arbitrator's factual findings, which was not a proper basis for appealing the decision.

Following a hearing regarding the enforcement of the arbitrator's decision, the trial court issued a final order in which it observed that "[t]he operation of the Boston Four Condominiums is in complete disarray," and that, given that the Keers and Guthrie disagreed with Richard Holt, who then had an ownership interest in two of the four units, "on any issue the vote is two to two." The court again confirmed the arbitrator's award and "required [all parties] to comply with its terms." The court stated that a failure to comply with the arbitrator's decision "may lead to contempt findings by the Court."

In June 2010, Guthrie sold unit 9 to Kathleen Barnicoat. In December 2010, responding to a motion brought by the Keers, the trial court ordered Richard Holt to formally mark the area around unit 9R's parking space, so that its boundaries would be clear. In April 2011, after the Keers filed a motion for contempt arguing that Richard Holt had marked unit 9R's parking space in excess of twenty feet, the court ordered Richard Holt to delineate the area of the parking space in accordance with the site plan so that it did not exceed eighteen feet.

In 2012, Richard Holt and Duquette sold unit 9R to John and Elaine Banacos. On August 28, 2012, the condominium association recorded an

amendment to the declaration and bylaws (2012 amendment). This amendment changed the designation of certain condominium property from common area to limited common area, to the benefit of units 7R and 9R, and to the detriment of the remaining units. The 2012 amendment inserted the following sentence into the section describing the property designated as limited common area:

The limited common areas contain the separate patio area behind and to the north of Unit 9R as “LCA Unit 9R”, the separate patio behind and [to] the north of Unit 7R as “LCA Unit 7R”, and; the walkway existing from the steps between units 9R and 7R extending from the steps to the north boundary as “LCA Units 9R and 7R.”

In response to the amendment, the Keers filed a “Motion to Bring Forward to Enforce the Court Order/Contempt” with the trial court. In the motion, the Keers alleged numerous violations of the arbitrator’s 2009 decision. The Keers also alleged that the 2012 amendment to the declaration infringed upon their equal undivided interest in the common area. Following a hearing, the trial court declined to rule on the issue stating that, with regard to the change in common area to limited common area, the hearing provided “very little information as to the specific areas in question” and, therefore, the court could not issue an order “with respect to what may be common area as opposed to limited common area without further evidence”

In April 2013, the condominium association recorded another amendment to the condominium instruments. This amendment inserted language into the declaration providing that written consent of three-fourths of the unit owners is sufficient to waive certain restrictive covenants. The amendment also inserted language into the bylaws that specifically allows condominium association meetings to take place if three-fourths of the unit owners attend.

In May 2013, the Keers filed a “Motion for Contempt/Enforce the Court Orders” with the trial court. Among other things, the Keers alleged that the 2012 amendment violated the terms of the Condominium Act, RSA ch. 356-B (2009) (Act). The Keers also alleged that both amendments to the declaration were not legally effective because they had not been signed by a majority of the owners. On May 31, 2013, the trial court denied the Keers’ motion.

On June 13, 2013, the condominium association recorded a document entitled “Ratification and Adoption of Prior Amendments to Declaration and Bylaws of the Boston Four Condominium” signed by all the unit owners except the Keers. That same day, the Keers filed a motion to reconsider the denial of their motion for contempt with the trial court. The Keers again asserted that the 2012 amendment violated the Condominium Act. On June 27, 2013, the

trial court denied the motion to reconsider, stating that “the Keer[s] continue to file motions challenging the court’s past decisions regarding the Condominium rules” and that it would not entertain any further motions on the issue. The Keers have appealed the trial court’s orders of May 31, 2013, and June 27, 2013.

On appeal, the Keers argue that, because the arbitrator’s 2009 decision requires unanimity of all unit owners in order to convert common area to limited common area, the remaining owners cannot amend the declaration to require less than unanimity. The Keers also argue that the 2012 amendment converting limited common area from common area violated the requirements of the Condominium Act and is therefore void. The respondents counter that the Keers failed to adequately preserve these issues for appeal. They also argue that the assignment of common area to limited common area was done in accordance with both the condominium instruments and the Condominium Act. We will first address the respondents’ preservation argument.

Supreme Court Rule 16(3)(b) states, in part, that a petitioner’s brief “shall make specific reference to the volume and page of the transcript where the issue [on appeal] was raised and where an objection was made, or to the pleading which raised the issue.” Sup. Ct. R. 16(3)(b). It further provides that “[f]ailure to comply with this requirement shall be cause for the court to disregard or strike the brief in whole or in part.” Id. This requirement reflects the general policy that “trial forums should have an opportunity to rule on issues and to correct errors before they are presented to the appellate court.” Camire v. Gunstock Area Comm’n, 166 N.H. 374, 377 (2014) (quotation omitted).

The respondents argue that the Keers’ brief fails to cite the specific pleading in which the issues on appeal were raised before the trial court and, therefore, that the Keers’ brief should be stricken. In response, the Keers filed a reply brief with a supplemental appendix that included the motion for contempt that the Keers had filed with the trial court. The respondents did not object to the supplemental filing.

More importantly, the record establishes that the issues raised on appeal were, in fact, before the trial court. Here, issues concerning the propriety of the amendments to the condominium instruments were raised in the Keers’ motion for contempt and again in their motion for reconsideration, and our acceptance order stated that these two orders were the only decisions at issue on appeal. Thus, we construe the respondents’ argument not as asserting that the issues were not raised in the trial court, but rather, that the Keers initially failed to cite references to these issues having been raised in the trial court. To strike the Keers’ brief under these circumstances would elevate form over substance. See State v. Burke, 153 N.H. 361, 362-63 (2006) (“Courts are least likely to dismiss an appeal . . . when briefing errors do not hamper the ability

to dispose of the appeal or otherwise interfere with their review.” (quotation omitted)). We decline to do so. Accordingly, we conclude that the issues are preserved for our review.

Turning to the merits, we are mindful that this case comes to us on appeal from the trial court’s denial of the Keers’ motion for contempt. “The contempt power is discretionary and the proper inquiry is not whether we would have found the respondent[s] in contempt, but whether the trial court unsustainably exercised its discretion in refusing to do so.” In the Matter of Giacomini & Giacomini, 150 N.H. 498, 500 (2004). “To show an unsustainable exercise of discretion, [the Keers] must demonstrate that the trial court’s ruling was clearly untenable or unreasonable to the prejudice of [their] case.” Lillie-Putz Trust v. Downeast Energy Corp., 160 N.H. 716, 723-24 (2010).

We read the trial court’s orders, which denied the Keers’ request for relief, as rejecting their argument that the 2012 amendment violated the Condominium Act. Resolution of this issue requires that we interpret the terms of the Condominium Act. “Statutory interpretation is a question of law that we review *de novo*.” EnergyNorth Natural Gas v. City of Concord, 164 N.H. 14, 16 (2012). “We are the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole.” *Id.* “In interpreting a statute, we first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning.” *Id.* “Furthermore, we interpret statutes in the context of the overall statutory scheme and not in isolation.” *Id.* “This enables us to better discern the legislature’s intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme.” Appeal of Local Gov’t Ctr., 165 N.H. 790, 804 (2014). Additionally, “[w]e construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.” *Id.*

The Condominium Act, RSA chapter 356-B, applies “to all condominiums and to all condominium projects” in New Hampshire. RSA 356-B:2, I. In order to create a condominium, certain “condominium instruments” must be recorded with the registry of deeds in the county where the condominium is located. RSA 356-B:7, :11. Condominium instruments include a declaration, which must describe or delineate all common area and limited common area, if any. RSA 356-B:16, I(e)-(f). RSA 356-B:3, II defines “common area” as “all portions of the condominium other than the units.” RSA 356-B:17 states, in relevant part, that a declaration may allocate each unit an equal undivided interest in the common area or a proportionate undivided interest based upon the size or value of the unit. RSA 356-B:17, I-II. In contrast, “limited common area” is defined in the Act as a “portion of the common area reserved for the exclusive use of those entitled to the use of one or more, but less than all, of the units.” RSA 356-B:3, XX. Notably, these statutory definitions of common

area and limited common area appear verbatim in the definition section of the Boston Four Condominium declaration.

RSA 356-B:19, I, sets forth the limited circumstances in which limited common areas may be assigned:

All assignments and reassignments of limited common areas shall be reflected by the condominium instruments. No limited common area shall be assigned or reassigned except in accordance with this chapter. No amendment to any condominium instrument shall alter any rights or obligations with respect to any limited common area without the consent of all unit owners adversely affected thereby as evidenced by their execution of such amendment, except to the extent that the condominium instruments expressly provided otherwise prior to the first assignment of that limited common area.

(Emphasis added.) Consequently, any assignment or reassignment of limited common area must both be expressly provided for in the condominium instruments, and comply with the terms of the Act. Id. In order to comply with RSA 356-B:19, I, an amendment to a condominium declaration cannot “alter any rights or obligations with respect to any limited common area” unless the unanimous consent of “all unit owners adversely affected” is obtained. Id.

In addition, the Act describes the limited circumstances under which an amendment to the declaration can convert common area to limited common area:

A common area not previously assigned as a limited common area shall be so assigned only pursuant to RSA 356-B:16, I(f), except that limited common areas may be created or expanded pursuant to an amendment to the condominium instruments consented to by 2/3 of the votes in the unit owners association, or such higher percentage as the condominium instruments may provide, and then thereafter assigned as therein provided. . . . The creation or expansion of limited common areas pursuant to this paragraph shall not alter the amount of undivided interest in the common areas allocated to any unit.

RSA 356-B:19, III.

As the first clause of RSA 356-B:19, III specifies, an area designated as common area that has not previously been assigned to any individual unit as limited common area may be assigned as limited common area “only” pursuant to RSA 356-B:16, I(f). RSA 356-B:16, I(f) states that a condominium declaration must contain “a description or delineation of all common areas . . .

which may subsequently be assigned as limited common areas, together with a statement that they may be so assigned” and “a description of the method whereby any such assignments shall be made in accordance with RSA 356-B:19” In this case, the Boston Four Condominium declaration does not specifically delineate any common area that may later be assigned as limited common area, nor does it contain any method by which common area could be assigned as limited common area.

The respondents argue that the 2012 amendment was lawfully made pursuant to the second clause of RSA 356-B:19, III, which states that limited common area “may be created or expanded” by an amendment to the condominium instruments “by 2/3 of the votes in the unit owners association, or such higher percentage as the condominium instruments may provide.” The respondents contend that, because an amendment of the Boston Four Condominium declaration requires consent of only three of the four unit owners, the second clause of RSA 356-B:19, III empowers three unit owners to amend the declaration to designate existing common area to be limited common area. We disagree.

“[W]e do not construe statutes in isolation; instead, we attempt to do so in harmony with the overall statutory scheme.” Soraghan v. Mt. Cranmore Ski Resort, Inc., 152 N.H. 399, 405 (2005). “When interpreting two statutes that deal with a similar subject matter, we construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes.” Id. Based upon the statute’s plain language, the purpose of RSA 356-B:19 is to provide protection for condominium unit owners, relating to their interest in common areas and limited common areas. Interpreting the two-thirds exception found in RSA 356-B:19, III to create a blanket exception for the assignment of limited common area would conflict with, and, essentially nullify, the other protections contained in RSA 356-B:19. See Weare Land Use Ass’n v. Town of Weare, 153 N.H. 510, 511-12 (2006) (“The legislature will not be presumed to pass an act leading to an absurd result and nullifying, to an appreciable extent, the purpose of the statute.”).

For example, interpreting the second clause of RSA 356-B:19, III as the respondents suggest creates a conflict with RSA 356-B:19, I. Converting common area to limited common area alters the rights and obligations of owners with respect to limited common area because new limited common area is created. See RSA 356-B:19, I. Contrary to the respondents’ assertion, the broad statutory language that an amendment may not “alter any rights or obligations with respect to any limited common area” encompasses any alteration in rights, and is not limited to circumstances in which rights to limited common area are eliminated. Thus, any amendment to the condominium documents that changes a unit owner’s rights to limited common area requires the unanimous consent of all “adversely affected” owners.

Because the Keers' right to use certain portions of the common area was extinguished by the assignment of those areas as limited common area, the 2012 amendment adversely affected the Keers, yet they did not consent to or execute the amendment as contemplated by RSA 356-B:19, I.

Additionally, we note that the respondents' interpretation of the second clause of RSA 356-B:19, III conflicts with the first clause of that same section. If a two-thirds majority were sufficient to reassign common area as limited common area, there would be no need for the declaration to identify, as required by the first clause of RSA 356-B:19, III, the specific common areas that could later be assigned as limited common area under RSA 356-B:16, I(f). Thus, the respondents' interpretation would, for all practical purposes, render the first clause of RSA 356-B:19, III meaningless. See Winnacunnet Coop. Sch. Dist. v. Town of Seabrook, 148 N.H. 519, 525-26 (2002) ("When construing a statute, we must give effect to all words in a statute and presume that the legislature did not enact superfluous or redundant words.").

Rather, we interpret RSA 356-B:19, III in harmony with RSA 356-B:19, I, which provides broad procedural protections for those owners adversely affected by an alteration of rights regarding limited common areas. However, as noted above, RSA 356-B:19, I also allows for situations in which the consent of adversely affected owners would not be required, so long as the condominium documents provided for this before assigning that limited common area. This exception is consonant with the first clause of RSA 356-B:19, III, which requires the condominium instruments to identify which common area not previously assigned as limited common area may be so assigned, and by what method.

The second clause of RSA 356-B:19, III allows limited common areas to be "created or expanded" pursuant to a two-thirds vote, or such higher percentage as provided in the condominium instruments. If, as discussed above, "created or expanded" limited common area were construed to include all assignment and reassignment of limited common areas, the second clause would directly conflict with RSA 356-B:19, I. Instead, we interpret the second clause of RSA 356-B:19, III to apply only when the creation or expansion of limited common area would not adversely affect unit owners under RSA 356-B:19, I. For instance, if a condominium association enters into an agreement to purchase additional land, it may choose to create new limited common area for particular unit owners. Because pre-existing common area and limited common area rights would remain unaffected, a unit owner not receiving additional limited common area would not be "adversely affected." Therefore, in the posited scenario, unanimous consent of all owners would not be required. This interpretation comports with the protective purpose of the statute, while, at the same time, it does not render other portions of RSA 356-B:19 a nullity. It is also consistent with the last sentence of RSA 356-B:19, III,

which specifically provides that creation of new limited common area cannot alter a unit owner's proportional percentage of common area.

Given our interpretation of paragraphs I and III of RSA 356-B:19, we hold that the 2012 amendment was unlawful. The 2012 amendment removed property previously designated as common area, and created limited common area in the "separate patio" areas behind units 9R and 7R, and in the walkway between units 9R and 7R. These assignments altered the owners' rights with respect to limited common area, and the Keers were adversely affected. See RSA 356-B:19, I. Because the assignment was made without the consent of the Keers, the 2012 amendment violated the Act. Given that we conclude that the 2012 amendment violated the terms of the Act, we need not address the Keers' argument that the 2012 amendment also violated the arbitrator's 2009 decision.

However, concluding that the 2012 amendment violated RSA 356-B:19 does not end our inquiry. We must also decide whether, in light of our ruling, the trial court's denial of the Keers' motion for contempt was an unsustainable exercise of discretion. To overturn the trial court's decision we must find that the Keers demonstrated that the trial court's ruling was "clearly untenable or unreasonable to the prejudice of [the Keers'] case." Lillie-Putz Trust, 160 N.H. at 723-24.

The Keers, representing themselves before the trial court, filed the motion for contempt arguing that the 2012 amendment violated their rights as unit owners. The motion also specifically alleges that the 2012 amendment violated RSA 356-B:19. In a one sentence order, the trial court denied the Keers' motion for contempt, noting that the change in unit ownership had shifted the balance of power in the condominium association. In their motion for reconsideration, the Keers again argued that the 2012 amendment violated RSA 356-B:19. In a summary order, the trial court denied the motion for reconsideration, stating that "the Keer[s] continue to file motions challenging the court's past decisions regarding the Condominium rules."

We conclude that the trial court either misconstrued the nature of the Keers' request, or that it simply failed to address their statutory claims. In fact, the Keers advanced several theories before the trial court, including an argument that the 2012 amendment violated the requirements of the Act with respect to assignment of limited common area. The basis for that argument was purely statutory and not predicated upon the terms of prior court orders regarding the condominium rules. Therefore, the trial court erred when it stated that the Keers were only challenging "the court's past decisions regarding the Condominium rules," and when it failed to address the Keers' statutory argument. Accordingly, we conclude that the trial court's decision is unsustainable. We, therefore, vacate the trial court's ruling on the Keers' motion for contempt and remand for consideration in light of our ruling. Cf. In

the Matter of Martel & Martel, 157 N.H. 53, 61 (2008) (vacating trial court's denial of a motion for contempt where trial court erred in a factual finding that formed the basis of contempt motion).

Finally, we note that, on appeal, the parties disagree as to the meaning and ramifications of the trial court's grant of the condominium association's motion to substitute parties. Given that we are remanding, we leave it to the trial court to determine, in the first instance, the effect of its own order.

Vacated and remanded.

DALIANIS, C.J., and HICKS, CONBOY, and LYNN, JJ., concurred.