The Honorable John C. Skinder

☐ EXPEDITE
☐ No hearing is set
☑ Hearing is set
Date: April 20, 2018
Time: 9:00 am
Judge/Calendar: John C Skinder

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

THERESA J. LOWE, a single woman; LOREN J. BOSSHARD and DONNA A. BOSSHARD, husband and wife; BURLEIGH M. CUBERT AND CAROLYN CUBERT, husband and wife,

Plaintiffs,

vs.

FOXHALL COMMUNITY ASSOCIATION, a nonprofit corporation,

Defendant.

NO. 17-2-00812-34

REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant's Motion for Summary Judgment is based on four independent bases, each of which requires dismissal: 1) the purported bylaw amendments conflict with the covenants governing the association and are therefore not enforceable; 2) the bylaws provide that they can be amended by a majority of those present, and the purported amendment passed only if proxies were also included; 3) the notice of the meeting was defective and misleading which violated the bylaws; and 4) the meeting during which the purported bylaws were adopted was improperly conducted.

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A. The Purported Amendment Conflicts with the Governing Covenants

As to the use of trails, the controlling covenants state that they are "for the benefit of and [be] used by the residents... ." Plaintiffs are attempting to change the language "for the benefit of residents" in the covenants to, "use by residents' families and friends only." But if a covenant is to be changed, it has to be changed by an amendment to the covenant, not a Bylaws amendment. Covenant amendments require the signatures of 80% of the members to an instrument that is then properly recorded.

Plaintiffs' response to the Motion for Summary Judgment, which incorporates the original response filed last year, does not contest the most important issue, which is that the bylaw amendment cannot conflict with the Covenants that govern the community. Nor does Plaintiffs' Response contest that the primary objective of interpreting a restrictive covenant is to determine the drafter's intent. Plaintiffs do not even address the Whisler Declaration that the drafter of the covenants and founder of the association, Virgil Adams, invited Mr. Whisler to board horses and allowed those boarders to use the horse trails in the community. Had "for the benefits of" in the covenants meant that only residents themselves could use the trails, Mr, Virgil would not have included this additional qualifying phrase.

Instead Plaintiffs' original reply relied heavily on RCW 64.38.020(6) which states that an association may regulate the use of common areas. But that entire statute is prefaced by, "[u]nless otherwise provided in the governing documents." Yes, the association can regulate common area use, but not where that regulation is in conflict with the covenants. And the Bylaws language they have tried to implement unquestionably conflicts with the existing covenants. There is nothing in that statute, or in the case law interpreting it, that provides that such regulation can negate the rights given in the covenants; they cannot.

Plaintiffs attempt to distinguish *Wilkinson v. Chiwawa Communities Ass'n.*, 180 Wash. 2d 241 (2014), by arguing that the ruling that rights to the use of property cannot be removed

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by majority vote only applies to restrictions to the use of the individually owned property, not to common areas. The ruling, however, is not so limited. A close reading of that case shows how very much it applies to this matter. The *Wilkinson v. Chiwawa* court found that the governing covenants included detailed provisions outlining what residents cannot do. The court concluded from this that had the drafters also wanted to prohibit other actions and property conditions, such as short term rentals, they would have done so. 180 Wn.2d at 251. Since they did not, the community could not remove that right by simple vote. The Court then went on to say that since the covenants actually imposed limits on the size of for rental signs, that was the only limit the drafters intended to put on rentals. The key to the holding was not that limits were imposed on the residents' use of property, but that the limits imposed were inconsistent with the covenants and could not therefore stand.

Here, the comparison is obvious. The covenant limitation put on the use of Foxhall trails that matters in this case is, "for the benefit of residents." If the drafters wanted to put additional limitations on trail uses, such as restricting that use to families and friends only, they would have. But the covenants do not place any such limits on those uses. Like *Wilkinson,* the association cannot place those limits by simple majority vote; members would have to amend the covenants

Plaintiffs have attempted to define "for the benefit of" to allow families and friends (which are clearly not residents), but to exclude business invitees. But there is nothing in the covenant that allows the distinction between those two groups. Under their reasoning, the association could even disallow owners who rent their property from using the trails since they would no longer be residents. The association could also restrict the use by family members and friends since neither are mentioned in the covenants as being allowed to use the trails. Such a result is in obvious contravention of the *Wilkinson v. Chiwawa* ruling.

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Plaintiffs are arguing that "for the benefit of" in the covenants does not allow business invitees of the resident, but it does allow families and friends, as set forth in the purported amendment. But what family members do the covenants allow? Those that live with the resident, grandparents, in laws, cousins, grandchildren or step children? What friends can use the trails, work friends, acquaintances, new friends? Is a friend who is also a business invitee precluded from using the trails? How about a family member who is also a business associate and is invited over to discuss business, can they use the trails? Does a boarder who is also a family member fit within the confines of "for the benefit of" a resident? These examples demonstrate not only the difficulty in enforcing this purported amendment, but more important, how plaintiff's interpretation of "for the benefit of" in the covenants simply makes no sense. There is nothing in the covenants that provides that a family member who also is a business associate can use the trails, but a boarder cannot.

Finally, Plaintiffs argue that Defendants' interpretation of the covenants could lead to ridiculous results such as allowing motorized vehicles on the trails. Of course, that argument is sheer speculation, and there is no factual development to support it that is either relevant or evidence-based. There is no history of the trails being used for motorized vehicles; there is a history of the trails being used for riding horses by both residents and boarders.

B. The Bylaws Can Only be Amended by the Votes of Those Present.

Plaintiffs argue that even though Article X of the Bylaws states that only those present can vote on a Bylaw amendment, "present" means, "present in person or by proxy." Plaintiffs completely ignore the three rules of statutory construction directly applicable to the interpretation of the bylaws cited in the opening brief, and instead refer to *Berg v. Hudesman* and Section 212 of the Restatement (second) of Contracts. However, neither that decision nor the Restatement support plaintiffs' opposition.

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Plaintiffs argue under *Berg* and the Restatement, that the term "present" must be considered in the context of corporate governance, the Homeowners Association Statute, and the Bylaws. They point out that quorum is defined in the bylaws by counting certain memberships to determine "the presence of a quorum." They somehow twist counting memberships to determine the "presence of a quorum" in one section of the bylaws to mean that "present" in Article 10 does not mean present in person. There is simply no logical connection between the two clauses. One is defining how to determine a quorum and one is setting forth who can vote for a bylaw amendment.

Plaintiffs also argue that the Homeowners' Association statute defines a quorum by counting those present in person or by proxy. However, that supports defendant's position, not plaintiffs'; if Article 10 of the bylaws governing their amendments wanted to include votes by proxy, it would have said so. It did not; instead is says that amendments have to be passed by a majority of those present.

Plaintiffs also point out that the bylaws state that a member can vote by proxy. That is a general provision. For example, Article IV of the bylaws addresses, among other things, electing directors. That bylaw does not require the votes to be in person, so they can be in person or by proxy as provided in Article V. However, since Article X specifically says that amendments are to be voted upon by a majority of those present, that requires that the voter be present at the meeting addressing the issue. This is the only provision in the bylaws that specifically says the vote is to be by those present.

The Homeowners' Association Act directs very specifically that how people vote on Bylaws amendments is to be spelled out in the Bylaws. RCW 64.38.030(5): "[t]he bylaws of the association shall provide for the method of amending the bylaws... ;" This is different from other provisions from those statutes that speak to how members vote generally. Foxhall Bylaws amendment votes are, in fact, addressed specifically, different from other Bylaws

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provisions about how members vote generally. Voting on Bylaws amendments is different from voting on whether to fund gravel for the trails. Such votes are different in quality and class and importance, and this difference is directly addressed by the statute, and, no doubt intentionally, by the Foxhall bylaws themselves. When the Foxhall bylaws say "present," they don't mean, "present in person or by proxy." Conversely, when the Bylaws say, generally, members vote "in person or by proxy," they don't mean, "in person only."

Plaintiffs fail to address the argument that courts should give deference to the Board's interpretation of its own documents. Bert Lewis, the current president, and president at the time of the Board's rejection of the purported amendment, states in his declaration how the Board interprets the bylaws; being present means there in person. There can be no doubt that the Board speaks for the association: "[e]xcept as provided in the association's governing documents or this chapter, the Board of Directors shall act in all instances on behalf of the association." RCW 64.38.025; and, "[t]he affairs of a [nonprofit]corporation shall be managed by a board of directors.," RCW 24.03.095. The only response to this argument is a declaration saying that "proxy votes have always been allowed in Foxhall." *See,* Eilts Decl., p.¶ 5. There are two main problems with this argument; (1), it does not address how the current board interprets its own governing documents; and (2), it is not true as to Bylaw amendment votes: none of the declarations claim that proxies were ever considered for bylaw amendments. Defendant is not saying proxy votes can never been used; it is saying they cannot be used for bylaw amendments only due to Article X requiring voters be present.

Even if there had been a past Bylaw amendment vote that had included proxies, for which there is no evidence, that does not mean that such an action binds all future Boards on related issues. Plaintiffs do not cite any authority for this argument.

Finally, Plaintiffs attempt to support their argument by relying on a 1997 survey on allowing **neighboring communities** to use the trails. (Lowe, Decl., Exh. C). Of course that

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survey has nothing to do with the issue here, whether paying guests of a resident should be prohibited from using the trails at all.

C. The Notice for the November 19, 2015 Meeting was Defective

The notice of the meeting was defective in two respects. The first thing it says is that the objective of the meeting was to amend the bylaws to adopt a rule for current and future Boards of Directors. Plaintiffs do not contest that in fact the proposed amendment had nothing whatsoever to do with that. Instead, plaintiffs rely on the fact that the notice went on to state that the proposed bylaw "clarifies" who can use the trails. It does no such thing; it doesn't clarify who can use them. As the Lowe declaration in opposition makes clear, it attempted to specifically exclude one family, the Johnstons, from having their boarders use the horse trails, even though both they and their predecessors, the Whislers, had done so since the community was founded. And, of course, the notice notably did not say that the meeting was about amending the covenants.

D. The Meeting During Which the Purported Bylaws Were Adopted Was Improperly Conducted.

Plaintiffs rely heavily on the November 19, 2015 minutes to refute the claims about the conduct of the meeting. However, even a review of those minutes alone demonstrates that the so called parliamentarian refused to allow a properly voiced and seconded amendment to the proposal. (Ex. D. to the Lewis declaration) Paragraph 4 of the minutes states that a motion was made and seconded to amend the proposed bylaw. Paragraph 5 makes it clear that no vote was allowed on the motion: "after a vigorous discussion, a Ruling was made by the Parliamentarian to continue the meeting by discussing the original, proposed Bylaw as written. . ." Despite the motion being made and seconded, she refused a vote on it.

While it is true that the bylaws do not require that the Roberts Rules of Order be used, here a vote was not even allowed on a motion made and seconded. The fact that the minutes

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were adopted has nothing to do with whether the process used was legitimate, it just means that the minutes reflected what happened. And here they reflected that Ms. Eilts would not even allow a vote on a motion that was made and seconded.[i]

The importance of this refusal to allow an amendment to the proposition on the floor cannot be overstated. It crystallizes the reason that Bylaws amendments can only be adopted by members who are present. The Parliamentarian was in a box of her own making: she could not allow a vote on an amendment because the proxies themselves were specific to the bylaw proposed. (*See* Exh. C to the Eilts' Decl.). If the amendment passed, the proxies would be invalid as they did not address an amended proposal. Those not present could not hear any discussion about how the proposal should be amended; it was the exact proposal, or nothing. So, at the meeting, the Parliamentarian could not allow an amendment; if she did, there were no proxies to vote on the amendment. And if the amendment from the floor passed, then there would be no proxies to vote on the amended proposal. Of course, the overwhelming majority of those actually there, who heard the discussion, voted against the proposal, 18-5, or by over 78%.[1]

There is a reason that the Homeowners' Association Act says that the call to meeting must include "...the **general nature** of any proposed amendment to the ...bylaws ... ." RCW 64.38.035. When the proposal comes before the members at a meeting, the members can then make adjustments to it, and vote on those adjustments. This is exactly why the Foxhall Bylaws specify that such votes can only be cast in person. Those who are there, in person, can hear discussions, vote on amendments to proposals, and fully understand all the issues. All of that is critically important to Bylaws amendment voting.

[1] For the argument addresses the claim that many present allowed their vote to proceed by their previously submitted proxies, see Defendants Response to Plaintiffs' Motion, p. 9.

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E. The Declaration of Richard Wadley Does Not Refute the Fact that the Same Insurance Coverage exists for Residents and Non Residents Using the Trails.

Plaintiffs submitted a Declaration of resident Richard Wadley, a State Farm employee, which attached an email he sent in 2015 about his opinion on the risks of allowing an unaccompanied non-resident to use the trails. His opinion on opposing the "liberalization" of the covenants is meaningless. All that statement means is that he is against it; it is for the Court to determine what the covenants means, using well accepted principles of contract interpretation.

Plaintiffs have also made much of a prior insurance company, Mutual of Enumclaw, not renewing its policy because of unaccompanied non-residents using the trails. Again, this has no relevance to the issue of coverage for any injuries on the trails. Indeed, what that evidence shows is that there was coverage for unaccompanied non-residents using the trails; Mutual of Enumclaw just did not want to issue a policy to Foxhall any longer. However, Foxhall found another carrier who was, Liberty Mutual. The coverage is the same for anyone using the trails.

DATED this 16th day of April, 2018.

BETTS, PATTERSON & MINES, P.S.

By _____
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CERTIFICATE OF SERVICE

I, Sally Phillips, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on April 16, 2018, I caused to be served upon counsel of record at the addresses and in the manner described below, the following document(s):

- **Reply in Support of Defendant's Motion for Summary Judgment; and**
- **Certificate of Service.**

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of April 2018.

Sally Phillips

Sally Phillips, Legal Assistant

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