No. 51898-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

THERESA J. LOWE; AND
LOREN J. BOSSHARD AND DONNA R. BOSSHARD,

Appellants,

v.

FOXHALL COMMUNITY ASSOCIATION,

Respondent.

APPELLANTS' BRIEF

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I. INTRODUCTION

This appeal involves the interpretation of a restrictive covenant recorded against the Foxhall community in Thurston County, Washington, as well as the interpretation of the proper procedures for noting and conducting a meeting of Foxhall's members for the purpose of amending its bylaws. The covenant in question mandates that the community's bridle trail system "shall be for the benefit of, and [shall] be used by, the residents in Foxhall," and all related maintenance and repair is to be paid for by Foxhall residents.[1] After years of experiencing problems with a resident allowing non-resident horse boarders to use the trails, on November 19, 2015, an overwhelming majority of Foxhall members voted in person or by proxy in favor of a Bylaw amendment that "clarified" that Foxhall residents could not conduct business activities on the community bridle trail system. Approximately six months later, however, the Foxhall Community Association's board of directors nullified this vote on the grounds that proxies could not be used to vote on a Bylaw amendment. This lawsuit ensued.

On April 20, 2018, after review of and argument on cross-motions for summary judgment, the trial court held that the November 19, 2015 Bylaws Amendment was void as a matter of law

[1] CP 35.

because it was contrary the restrictive covenant, since allowing commercial use of the trails was a "benefit" to any resident who commercially boarded horses. The trial court further held that the use of proxies was prohibited in a vote on the Bylaws amendment; the meeting notice for the November 19, 2015 meeting was defective; and the "parliamentarian" at the November 19, 2015 meeting violated the law by not allowing motions to amend the Bylaws proposal at the meeting.

The trial court's decision to grant summary judgment is contrary to the Foxhall restrictive covenants, Foxhall Bylaws, and applicable Washington law. Rather, summary judgment in favor of Appellants is warranted when the evidence and law are applied correctly.

II. ASSIGNMENT OF ERROR AND ISSUE

1. The trial court erred by granting summary judgment dismissal in favor of the Association on the grounds that the 2015 Bylaws Amendment conflicts with the Covenants.

   Issues Related to Assignment of Error No. 1:

   a. Did the trial court err when it determined that the 2015 Bylaws Amendment conflicts with the Covenants? Yes.

   b. Did the trial court err by granting summary judgment when there are material issues of fact regarding the intent of the Covenants? Yes.

2. The trial court erred by granting summary judgment dismissal in favor of the Association on the grounds that the process used to adopt the 2015 Bylaws Amendment violated the Bylaws

Issues Related to Assignment of Error No. 2:

a. Did the trial court err by finding that the Bylaws provision that states that the Bylaws can be amended "by a vote of the majority of the members of the corporation present at any meeting" means that the members had to be physically present, not present by proxy? Yes.

b. Did the trial court err by finding that the meeting notice for the November 19, 2015 meeting was misleading and incorrect? Yes.

c. Did the trial court err by finding that the vote on the November 19, 2015 Bylaws Amendment was void because the meeting's parliamentarian refused to allow consideration of one or more motions made at the meeting? Yes

III. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

A. Statement of the case.

1. The Foxhall Community

The Foxhall Community was platted as a 118-lot community in Thurston County starting in 1981.[2] The development was marketed as an equestrian-friendly residential community with several miles of horse-friendly trails owned and maintained by the Foxhall Community

[2] CP 360, 362-63, 365-67.

Association,[3] a Washington non-profit corporation and homeowner's association established by the developer of the Foxhall Community in 1981.[4]

The Foxhall Community is subject to the Foxhall Community Protective Covenants ("Covenants") recorded by the developer in 1981.[5] The Covenants mandate that all of the lots in the Foxhall Community "shall be used for residential purposes only."[6] The Covenants further declare that the equestrian trail system owned by the Association is for the benefit of Foxhall residents:

> [The Tracts containing the trail system and park] shall be for the benefit of, and [shall] be used by, the residents in Foxhall. . . and the maintenance thereof shall be the responsibility of the Foxhall Community Association and all repairs and maintenance thereof shall be provided for at the expense of the Foxhall Community Association and funded by assessments against all owners of lots in Foxhall . . ."[7]

2. A dispute arises regarding non-resident and commercial use of the bridle trails.

The use of the Foxhall bridle trails by nonresidents has been a longstanding concern in Foxhall Community. On November 15, 1997,

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[3] CP 353.

[4] CP 30-33.

[5] CP 35-41.

[6] CP 36.

[7] Cp 35.

for example, Association President Dennis Longnecker wrote a letter to a neighboring (non-member) property owner who was using the trails unaccompanied:

> The "Bridle Trails" in Foxhall (Tracts , H, I, J, and K) are for the benefit of, and to be used by Members of the Foxhall Community Association and their **accompanied** guests. . . . While this may seem the unneighborly thing to do, but due to the current (and future) developments around Foxhall, homeowner security, and insurance/liability concerns, we feel this is a essential step in protecting the investment of Foxhall Community Association members. **Please do not utilize these trails unless a bona fide member of the Foxhall Community Association accompanies you.** Simply having permission by a member – or on your way to visit them – is not considered a bona fide use.[8]

Four years later, the Foxhall Newsletter, *Foxhallian*, documented a survey Foxhall members that found 85% of members objected to non-resident use of the trails.[9] In confirmation of this opposition, signs posted at the direction of the Association's Boards of Directors over the years state that the trails are to be used by the residents only or accompanied guests. [10]

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[8] CP 415 (emphasis in original).

[9] CP 372-378.

[10] CP 354, 382, 413.

In 2003 Foxhall community members Gary and Judy Johnston started operating the Johnston Farm Arabians, Inc., a boarding/riding facility with approximately 18 horses.[11] In response to ongoing complaints, the Association's Board of Directors repeatedly advised the Johnstons that their non-resident boarders could not use Foxhall trails.[12] For example, on May 10, 2013, the Association sent the Johnstons a letter advising that their use of the trails for commercial purposes was not allowed:

> Dear Gary and Judy Johnston:
>
> The Foxhall Community Association (FSA) Board continues to receive reports that people who board their horses at your stable are riding the community horse trails without an accompanying resident. You are aware of this issue from discussions with Foxhall residents and earlier Boards, and from multiple signs posted on the trails for well over twenty years.
>
> . . .
>
> This requirement applies to all Foxhall Community Association parks and trails: they are owned in common by Foxhall property owners and are for the private use of the residents and accompanied guests only.

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[11] CP 115, 407. The prior owner of the property, Les Whisler, had also boarded horses for both Foxhall residents and non-residents. CP 59.

[12] CP 115.

> The Board suggests a simple way to resolve this violation, which would be for you or a Foxhall resident to accompany or ride with your boarders on the trail. You could even likely hire a resident to ride with your boarders.
>
> The Board anticipates that you will comply with the requirements.[13]

Nevertheless, the Johnstons continued to allow their unaccompanied non-resident boarders use the community trails.

3. The Foxhall Members vote to ban commercial use of the bridle trails.

The issue of nonresidents using the trails unaccompanied and for commercial purposes came to a head in 2015. On August 24, 2015, the Board learned that the Association's insurance company was not willing to continue to insure if non-resident boarders used the trails for commercial purposes.[14] Nevertheless, a majority of the Board of Directors adopted a resolution that allowed commercial boarders to use the trails when accompanied by a Foxhall resident.[15]

Concerned about the ramifications of the Board's resolution on members' liability exposure and its inconsistency with the Covenants and Foxhall Residents' wishes, a group of residents spearheaded the scheduling of a Special Meeting of Association members on

[13] CP 384.

[14] CP 111-12.

[15] CP 117.

November 19, 2015, to address the commercia use of the trails.[16] The Notice for the Special Meeting states that the Objective is to "Amend the Bylaws to adopt a clarifying rule for current and future Boards of Directors" and that the proposed bylaw amendment

> clarifies the governing documents that Foxhall Parks and Trails are for the exclusive use of residents, families and friends. Foxhall Association members' businesses may not extend their business activities onto Foxhall Parks and Trails.[17]

This notice is consistent with the language of the actual proposed Bylaw amendment:

> Article VI: POWERS AND DUTIES OF DIRECTORS. Sec. 9. Foxhall Parks and Trails are for the exclusive use of residents, families and friends. Nonresident visitors must be accompanied by a resident when using Foxhall Parks and Trails. Foxhall Association members' business may not extend their business activities onto Foxhall Parks and Trails. Members' business invitees, customers, or patrons, whether in trade or in barter, are prohibited from using Foxhall Parks and Trails, even when accompanied by a Foxhall member.[18]

A month before the November 19, 2015 meeting, the Chair of the Association's Architectural Control Committee, Rose Eilts, reached out to Dennis Adams, who was one of Foxhall developers, one of the Association's original directors, and a drafter of the Covenants and

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[16] CP 52. The meeting was originally scheduled for October 27, 2015, but was continued to November 19, 2015, due to a question regarding the timing of the notice. CP 52.

[17] CP 52.

[18] CP 387-88, 395.

asked for his feedback on non-resident use of the trails.[19] Mr. Adams confirmed that the intent of the Covenants' drafters was that only residents and accompanied guests could use the trails:

> When my Father, Virgil Adams and I wrote the covenant we wanted the intent to be that the residents could use the trails. We felt that it would be reasonable that a resident could invite a guest to ride the trails with them, but did not feel that the guests should be riding the trails alone.
>
> We felt that if the trails were opened up to others the liability was too great if someone got hurt. Security was also an issue. If you saw one of your neighbors on the trail with the guest it would not be a security issue. And finally, the residents are the ones paying the bill to maintain the trails, not others that might want to use the trails.
>
> . . . if it is the wish of the residents that the covenants be changed, the covenants state that can be done with the required number of signatures.[20]

At the time of the November 19, 2015 meeting, the Foxhall Community Association had 127 members.[21] Seventy-three members submitted proxy votes before the meeting, all of which were in favor of

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[19] CP 349-50.

[20] CP 351.

[21] CP 390-94.

the amendment.[22] Forty-two members were physically present at the meeting, 18 of whom voted against the amendment. Of the remaining 24 members, only five voted in person, as the remainder had already voted by proxy and were explicitly told that the proxy votes would be counted; accordingly, there was no reason for members who had voted in favor by proxy to void their proxy votes and vote again.[23]

The official vote tally of the November 19, 2015 meeting shows that the bylaw amendment passed by a vote of 78-18.[24] Accordingly, 63.9% of Association members voted for the Bylaws amendment, 14.8% voted against the amendment, and 21.3% did not vote.[25] Notably, had all 42 members in attendance voted in person, as opposed to with the use of proxies, the bylaw amendment would have still passed by a vote of 24-18.

The minutes of the November 19, 2016 Special Membership meeting were read to and adopted by the membership at the April 25, 2016 annual membership meeting.[26] No motions were made to modify

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[22] CP 396.

[23] CP 355. Comparing the meeting sign-in sheet with the official vote tally further reflects that 19 members who were physically present at the meeting chose to let their proxy votes stand as opposed to voting a second time in person at the meeting. CP 390-94.

[24] CP 388, 396.

[25] CP 355.

[26] CP 99, 103.

the minutes as written, and no objections were made by any members.[27]

4. The Board of Directors invalidates the Members' vote.

Despite the overwhelming vote for the November 19, 2015 Bylaws Amendment, shortly after the April 25, 2016 membership meeting a majority of the Board of Directors decided that the proxy votes in support of the November 19, 2015 Bylaws Amendment should not have been allowed and, therefore, the Amendment was void.[28] The Board based this reasoning on the language of the amendment provision of the Bylaws:

> The Bylaws may be amended at any time by a vote of a majority of the members of the corporation present at any meeting of the membership duly called for such purpose.[29]

Although the amendment provision makes no mention of an "in person" voting requirement, the Board nonetheless decided that "present" meant "present in person" and could not mean "present by proxy," even though Article V of the Bylaws, which governs membership

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[27] CP 99, 103

[28] CP 355 ¶ 17.

[2929] CP 50. Oddly, none of the parties below ever submitted to the trial court a copy of the Bylaws as they existed on November 19, 2015. Rather, the only full set of the Bylaws is the version amended as of March 7, 2017. CP 43-50. But documentation regarding the March 7, 2017 meeting that details the proposed amendments shows that the provision regarding Bylaws amendments was not changed. CP 398-401.

meetings, expressly stated that "A member may exercise his right to vote by proxy."[30] Other provisions of the Bylaws as they existed at the time of the meeting also state that members can vote by proxy.[31]

B. Procedural history.

Appellants Theresa J. Lowe and Loren J. and Donna A. Bosshard, along with fellow Foxhall community members Burleigh M. and Carolyn R. Cubert (collectively, "Lowe"), filed a Complaint for Declaratory and Injunctive Relief on February 22, 2017.[32] The Complaint sought a court determination that the November 19, 2015 Bylaw Amendment was valid and enforceable[33] and an injunction requiring the Board to enforce the November 19, 2015 Bylaw Amendment.[34]

On June 15, 2017, the Association filed a Motion for Summary Judgment seeking dismissal of Lowe's claims on the grounds that (1) the November 19, 2015 Bylaw conflicted with the Covenants' provision that the trails "shall be for the benefit of, and be used by, resident in Foxhall," (2) the Bylaws required that members be physically present in

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[30] CP 400. Notably, the Board itself was the one who circulated the proxy forms for the November 19, 2015 meeting. At the March 7, 2017 meeting, the Association added multiple questionable limitations on this right. CP 400, 46, which led to the March 7, 2017 version found at CP 43-50.

[31] CP 399.

[32] These parties will be collectively referred to as "Lowe" for ease of reference.

[33] CP 3.

[34] CP 4.

order to vote on a Bylaws amendment, (3) the meeting notice for the November 19, 2015 meeting was defective, and (4) there were procedural irregularities during the course of the November 19, 2015 meeting.[35] After Lowe responded and the Association replied, the judge recused herself due to a perceived conflict-of-interest. After a series of other delays, Defendants refiled their Motion for Summary Judgment on March 19, 2018.[36] On March 22, 2018, Lowe also filed a Motion for Summary Judgment of her claims.[37]

On April 20, 2018, the Honorable John C. Skinder granted the Association's summary-judgment motion and denied Lowe's summary-judgment motion, finding that were no material questions of fact that:

1. The November 19, 2015 Bylaws Amendment failed as a matter of law because the restrictions the Amendment sought to impose on the commercial use of bridle trails conflicted with the Covenants provision that the trails "shall be for the benefit of, and used by, the residents in Foxhall."

2. The process used to adopt the November 19, 2015 Bylaws Amendment violated the Bylaws because

    a) The Bylaws amendment provision that states Bylaws can be amended "by a vote of the majority of the members of the corporation present at any meeting" meant that the members had to be physically present, not present by proxy;

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[35] CP 9-25.

[36] CP 144.

[37] CP 163-182.

b) The meeting notice for the November 19, 2015 Bylaws Amendment was misleading and incorrect; and

c) The "parliamentarian" at the November 19, 2015 meeting refused to allow consideration of one or more motions at the meeting.[38]

IV. SUMMARY OF ARGUMENT

The November 19, 2015 Bylaws Amendment was fully consistent with the language and purpose of the Covenants. Moreover, the process followed at the meeting where the Amendment was adopted fully complied with the Bylaws and Washington law. And at a minimum, there are material disputed facts regarding these issues. Accordingly, the trial court's grant of summary judgment to the Association was unfounded.

V. ARGUMENT

A. Standard of review.

This Court reviews a trial court's order granting summary judgment *de novo*.[39] Accordingly, this Court engages in the same inquiry as the trial court.[40] Summary judgment is appropriate when, reviewing the evidence and all reasonable inferences from the

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[38] CP 429-30.

[39] *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

[40] *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014).

evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[41] "An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party."[42]

When seeking summary judgment, the initial burden is on the moving party to show there is no genuine issue of material fact.[43] Summary judgment should be granted where reasonable minds can reach only one conclusion based on the admissible facts in evidence.[44] But the Court cannot weigh evidence or assess witness credibility when considering a motion for summary judgment.[45]

B. The November 19, 2015 Bylaw Amendment is fully consistent with the Covenants.

1. Restrictive covenants are construed to support homeowners' reasonable expectations.

Restrictive covenants are interpreted according to a special set of rules in Washington. A covenant that runs with the land "has an indefinite life, subject to termination by conduct of the parties or a

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[41] CR 56(c); *Keck*, 184 Wn.2d at 370.

[42] *Keck*, 184 Wn.2d at 370.

[43] *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 169, 273 P.3d 965 (2012).

[44] *Smith v. Safeco Ins. Co.,* 150 Wn.2d 478, 78 P.3d 1274 (2003).

[45] *Barker v. Advanced Silicon Materials, LLC, (ASIMI)*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006).

change in circumstances which renders its purpose useless."[46] Enforcement of restrictive covenants protects the character of established residential neighborhoods.[47] As observed by this Court, such enforcement is increasingly important to preserve the expectations of property owners in the face of increased urban growth pressures. [48] Hence, "if more than one reasonable interpretation of the covenants is possible regarding an issue, [Washington courts] must favor that interpretation which avoids frustrating the reasonable expectations of those affected by the covenants' provisions."[49]

Accordingly, Washington courts have moved away from the position of strict construction historically adhered to when interpreting restrictive covenants.[50] Instead of viewing restrictive covenants as restraints on the free use of land, Washington courts now acknowledge that restrictive covenants "tend to enhance, not inhibit, the efficient use of land."[51] Consequently, Washington courts strive to interpret restrictive covenants in such a way that protects the homeowners' *collective* interests:

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[46] *Thayer v. Thompson*, 36 Wn. App. 794, 797, 677 P. 2d 787, *review denied*, 101 Wn. 2d 1016 (1984).

[47] *Hagemann v. Worth*, 56 Wn. App. 85, 88-89, 782 P. 2d 1072 (1989).

[48] *Mains Farm Homeowners Ass'n v. Worthington*, 64 Wn.App. 171, 179, 824 P.2d 495 (1992), *aff'd*, 121 Wn.2d 810; 854 P.2d 1072 (1993); *see also Thayer*, 36 Wn. App. at 797.

[49] *Green v. Normandy Park Riviera Section Community Club*, 137 Wn. App. 665, 151 P.3d 1038 (2007), *review denied*, 163 Wn.2d 1003, 180 P.3d 783 (2008).

[50] *Viking Properties Inv. v. Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005).

[51] *Id.*

> The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. The court's goal is to ascertain and give effect to those **purposes** intended by the covenants. . . . [and] The court will place "special emphasis on arriving at an interpretation that protects the homeowners' collective interests."[52]

The Washington Supreme Court has said this is especially true when the maker of the restrictive covenants – i.e. the developer – has departed the scene:

> [W]here construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among *homeowners* in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. **The court's goal is to ascertain and give effect to *those purposes intended by the covenant*.**[53]

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[52] *Riss v. Angel*, 131 Wn. 2d 612, 623, 934 P. 2d 669 (1997).

[53] *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997) (second emphasis added); *see also Lakes at Mercer Island Homeowners Ass'n. v. Witrak*, 61 Wn. App. 177, 180 (1991), *review denied*, 117 Wn.2d 1013, 816 P.2d 1224 (1991).

2. The November 2015 Bylaws Amendment was consistent with the restrictive covenants.

The Association argued, and the trial court agreed, that because the Covenants state that the trail system "shall be for the benefit of, and [shall] be used by, the residents in Foxhall. . .," [54] any use that "benefits" a resident must be allowed on the Foxhall trails. As a deduction from that reasoning, the Association argued, and the trial court agreed, that prohibiting a resident from using the trails for commercial purposes that financially benefitted that resident violates the Covenants. This holding is contrary to the Covenants and Washington law.

3. The holding in *Wilkinson* does not apply to this case.

The Association based its covenant-interpretation argument largely on the Washington Supreme Court's 2014 *Wilkinson v. Chiwawa Communities Ass'n*[55] decision. But *Wilkinson* is easily distinguishable. In *Wilkinson*, the Association sought to amend its restrictive covenants to add a provision prohibiting short-term rentals. The Association was able to obtain the required number the votes that its restrictive covenants stated was required for an amendment.[56] Nonetheless, the Washington Supreme Court reversed, finding that the new covenant went beyond the scope of the original covenants, which

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[54] CP 35.

[55] 180 Wn.2d 241, 327 P. 3d 614 (2014).

[56] *Id.* at 248.

imposed no restrictions on rentals, and therefore required unanimous approval to be valid:

> . . . when the general plan of development permits a majority to *change* the covenants but not create new ones, a simple majority cannot add new restrictive covenants that are inconsistent with the general plan of development or have no relation to existing covenants. *See Ebel v. Fairwood Park II Homeowners' Ass'n,* 136 Wash.App. 787, 793, 150 P.3d 1163 (2007); *Meresse v. Stelma,* 100 Wash.App. 857, 865–66, 999 P.2d 1267 (2000); *Lakeland Prop. Owners Ass'n v. Larson,* 121 Ill.App.3d 805, 459 N.E.2d 1164, 77 Ill.Dec. 68 (1984). This rule protects the reasonable, settled expectation of landowners by giving them the power to block "'new covenants which have no relation to existing ones'" and deprive them of their property rights. *Meresse,* 100 Wash.App. at 866, 999 P.2d 1267 (emphasis omitted) (quoting *Lakeland,* 77 Ill. Dec. 68, 459 N.E.2d at 1167, 1169). As the Court of Appeals observed, " '[t]he law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land.' " *Id.* (quoting *Boyles v. Hausmann,* 246 Neb. 181, 517 N.W.2d 610, 617 (1994)).[57]

The November 19, 2015 Bylaw Amendment is fully consistent with the Covenants' mandate that the trails "shall be for the benefit of, and [shall] be used by, the residents in Foxhall. . ." [58] First, the Covenants themselves state that the Foxhall lots "should be used for

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[57] *Id.* at 256.

[58] CP 35.

residential purposes only. . ."[59] Allowing residents to use the common trail system for their commercial enterprises is wholly inconsistent with this provision. Similarly, allowing such use would be wholly inconsistent with the Covenants' provision that horses can only be kept on Foxhall lots so long as they are not "kept, bred or maintained for any commercial purpose."[60]

Second, there is nothing in the Covenants that remotely suggests that owners' unaccompanied guests, invitees, or commercial customers are permitted on the common trails. Rather, the Covenants state the use of the trails is for the benefit of the residents as a whole, not an isolated few. Applying the well-known rule that contract terms are to be given their "ordinary, usual and popular meaning,"[61] the analysis would almost certainly require Foxhall to restrict non-residents from using the trails rather than requiring Foxhall to allow non-resident commercial boarders to use the trails, even though the vast majority of residents derive no benefit from such commercial use and suffer adverse consequences.

Third, Dennis Adams, one of the drafters of the Covenants, confirms that the trails were never intended that commercial use and that to allow such use would require an amendment of the

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[59] CP 36.

[60] CP 37. This particular requirement does not apply to the lots in Division II. *Id*.

[61] *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn.App. 706, 713, 334 P.3d 116 (2014).

Covenants.[62] As he notes, the residents as a whole are responsible for "paying the bill to maintain the trails,"[63] not commercial users.

Third, Washington's homeowners association statute explicitly authorizes Foxhall to "[r]egulate the use, maintenance, repair, and modification of common areas."[64] The statute does not require that once a use is allowed it must always be allowed. Rather, it provides that the Association may utilize its common areas as it sees fit for the benefit of the community at large.

In sum, there is conflict between the November 19, 2015 Bylaws Amendments and the Covenants. Rather, the Amendment protects the Foxhall residents' collective interests.[65]

4. If the Court were to adopt the interpretation urged by the Association, it would end with the absurd result that the Association could not prohibit any commercial or third-party use on Association common areas.

The position urged by the Association and adopted by the trial court leads to absurd results that are utterly at odds with a quiet, residential, large-lot community. For example, if Foxhall cannot prohibit non-resident commercial boarders from using its trails because a resident financially benefits from such use, Foxhall would have no justification to prohibit non-resident motorcyclists that paid to park on

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[62] CP 351.

[63] CP 351.

[64] RCW 64.38.020(6).

[65] *Riss*, 131 Wn.2d at 623.

a resident's property from using the trails. Nor could Foxhall prohibit any other commercial use of Foxhall's trails or park so long as a resident financially benefitted from such use. Such an absurd result is not supported by the Covenants or any Washington law.

C. The November 19. 2015 Special Membership Meeting and Vote complied with the Bylaws and Washington law.

1. The Bylaws and Washington law provide a right to vote by proxy.

As previously noted, 54 of the Foxhall Community Association members who voted in favor of the November 19, 2015 Bylaw Amendment voted by proxy and did not physically attend the special meeting.[66] Additionally, 19 members who physically attended the meeting did not vote at the meeting after they were told to rely on the proxies that they had previously submitted.[67] The trial court held that all of these proxies were void because the proxy-holders were not "present" at the meeting. The trial court's written decision offers no insight into how it came to the conclusion that "present" equated to physically present. And the transcript of the hearing hardly elucidates the holding any further; the trial court simply sided with the Association and asserted that he "could not do what maybe I want to do."[68] But the

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[66] CP 355

[67] CP 355.

[68] RP 26: 17-21.

decision makes no sense given that Washington's homeowners association statute *and* the Association's governing documents use the term "present" to include proxies. Finally, accepting the Association's conflicting definitions leads to absurd results.

a. The Bylaws expressly allow for voting by proxy.

At the time of the November 19, 2015 special meeting, the Foxhall Bylaws contained a clear and unambiguous grant of the right to use proxy votes. Specifically, Section 5 of Article V – which is the Article that governs *all* regular *and* special membership meetings – stated that "**A member may exercise his right to vote by proxy.**"[69]

Nevertheless, the trial court adopted the Association's argument that, because the amendment provision of the Bylaws does not mention proxies, members must be physically present in order to vote. But the Bylaws amendment provision doesn't mention "in person" either – rather, it merely states that the member must be "present":

> The Bylaws may be amended at any time by a vote of a majority of the members of the corporation present at any meeting of the membership duly called for such purpose.[70]

Similarly, the Bylaws' do not require physical, "in person" presence for the purpose of establishing a quorum:

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[69] CP 400 (emphasis added).

[70] CP 50.

> At all annual and special meetings of the members, ten percent of all of the members of the corporation shall constitute a quorum for the transaction of business. Each single membership shall be entitled to one vote and multiple memberships shall be entitled to one vote per lot owned and they shall be similarly counted to determine the **presence of a quorum.**[71]

In sum, the Bylaws don't require a member to be "present in person" any more than they require a member to be "present by proxy." Overall, the trial court's decision that proxies could not be used as part of the vote on the November 19, 2015 Bylaws Amendment is wholly contrary to the Bylaws.

b. The homeowners' association statute expressly allows for voting by proxy.

Washington's homeowners association statute[72] mandates that proxies are counted as "present" for the purpose of a quorum:

> Unless the governing documents specify a different percentage, a quorum is present throughout any meeting of the association if the owners to which thirty-four percent of the votes of the association are allocated are present in person or by proxy at the beginning of the meeting.[73]

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[71] CP 46.

[72] RCW ch. 64.38.

[73] RCW 64.38.040. It is uncontroverted that RCW 64.38.040 allows homeowners associations to determine what percentage of members "present" will constitute a quorum if the association chooses not to use the statutory default. But nothing in the provision gives authority to an association to decide whether members are considered present only if they are physically present. Instead, the statute states that whatever the percentage of owners specified, they are to be counted if they "…are

Hence, the statute makes it clear that being "present" at a homeowner's association meeting can be accomplished two ways: being physically present or by submitting a proxy.

While RCW 64.38.040 is the governing statute here, it is not the only example in which "present" is described as in person or by proxy. For example, Washington's law governing condominium associations also defines being "present" to include presence both in person and by proxy:

> Unless the bylaws specify a larger percentage, a quorum is present throughout any meeting of the association if the owners of units to which twenty-five percent of the votes of the association are allocated are present in person or by proxy at the beginning of the meeting.[74]

Likewise, the American Jurisprudence Legal Forms for § 64.38 on bylaws for Association of Owners repeatedly use the phrase "presence in person or by proxy" or similar language. Finally, the Washington Supreme Court has recognized that "present" did not equate to physical presence in a for-profit corporation context in *Wool Growers Service Corp. v. Ragan*:

> Galanena, apparently, did not attend this meeting. The minutes of the stockholders' meeting, reducing the number of trustees from four to three, which was held on

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present in person or by proxy at the beginning of the meeting." Thus, while the actual percentage is determined by the association, an association has no authority to change the counting method for finding a quorum.

[74] RCW 64.34.336.

the same day, recite that Galanena *was present by his power of attorney and proxy* to Ellis Ragan.[75]

In sum, the trial court's decision is contrary to Washington law.

c. The Association's interpretation leads to absurd results.

In interpreting a statute, a court must avoid "unlikely, absurd, or strained" results that would follow their interpretation.[76] Here, following the trial court's decision to its logical conclusion would create a situation where proxies would be used to establish a quorum present at a meeting where the bylaws were to be amended but would then be disregarded when it came time to vote. For example, it would be possible that 90% of members voted by proxy for a given outcome while ten percent opposed voted in person. The members present by proxy would be counted towards establishing the quorum, but their actual proxy could not be counted for the substantive vote. Rather, the 10% minority who showed up "in person" would nullify the will of the 90% majority, thereby allowing the clear minority to dictate the outcome.

This outcome is made more absurd by the facts here. Members who had previously submitted proxies also attended the membership meeting but did not to vote "in person" to ensure there was no double voting and because they had been assured that their proxy would

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[75] 18 Wn.2d 655, 677, 140 P.2d 512 (1943) (emphasis added).

[76] *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002).

count as it always had previously.[77] Had they voted in person the way they voted by proxy, the amendment would have passed because a majority of those attending in person supported it.[78] At the very least this court should recognize that the members who were physically at the meeting and supported the amendment should not be punished for trying to ensure a smooth counting process by allowing their proxies to stand.

Finally, barring the use of proxies upends public policy. Foxhall, like other neighborhoods, includes disabled people, people with work commitments, people who take vacations, people to take their children to sports/music/dance practice, people in the military, and people who would simply rather sign a proxy form versus attending a long association meeting.[79] Even assuming that a court could reasonably find that the word "present" in this context is ambiguous, such ambiguities are supposed to be decided in favor of the most "reasonable and just" interpretation.[80] It is hard to imagine that the more "reasonable and just" interpretation is the one that disregards

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[77] CP 355.

[78] *Id.*

[79] CP 355. Indeed, 53 of the members voted in favor the November 19, 2015 Bylaw Amendment could not or did not physically attend the special meeting.

[80] *See Berg v. Hudesman*, 115 Wn.2d 657, 672, 801 P.2d 222 (1990) (quoting *Fisher Properties, Inc. v. Arden–Mayfair, Inc.*, 106 Wn.2d 826, 837, 726 P.2d 8 (1986)).

the overwhelming majority of votes in order to affirm a Board of Directors that waited months to dispute the vote and which did so on transparently pre-textual grounds. Without requiring a more definite statement of intent to restrict bylaw amendments to those who can physically attend the meeting, the trial court's ruling nullifying the use of proxies disenfranchises a large majority of voters from voting on matters that often directly impact their property values and quality of life and allows room for further egregious behavior in the future.

2. The Notice for the November 19, 2015 Special Meeting was not ambiguous or misleading and complied with RCW 64.28.035(3).

The Washington homeowners association statute does not require that a meeting notice include a specific statement of every single provision of any proposed Bylaws amendment. Rather, it merely requires a statement of the "general nature" of the proposed amendment:

> The notice of any meeting shall state the time and place of the meeting and the business to be placed on the agenda by the board of directors for a vote by the owners, including the *general nature of any proposed amendment* to the articles of incorporation, bylaws...."[81]

Nothing in the Association's Bylaws requires anything more than what the RCW requires:

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[81] RCW 64.38.035(3).

> Notice of special meetings, stating the object thereof, shall be given by the secretary by mailing such notice to each member not less than fourteen (14) days… prior to the date on which such meeting is to be held.[82]

Neither of these notice requirements states that the amendment must be spelled out exactly as it is proposed.

The notice sent for the November 19, 2015 special membership meeting specifically states that there will be a vote on a bylaw that clarifies that the community trails may not be used for commercial purposes:

> **The proposed bylaw clarifies** the governing documents that Foxhall Parks and Trails are for the exclusive use of residents, families and friends. Foxhall Association members' businesses may not extend their business activities onto Foxhall Parks and Trails.[83]

This Notice is consistent with the language of the actual bylaw amendment:

> Article VI: POWERS AND DUTIES OF THE DIRECTORS. **Sec. 9,** Foxhall Park and Trails are for the exclusive use of residents, families and friends. Nonresident visitors must be accompanied by a resident when using Foxhall Parks and Trails. Foxhall Association members' businesses may not extend their business activities onto Foxhall Parks and Trails. Members' business invitees, customers, or patrons, whether in

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[82] CP 46.

[83] CP 52.

> trade or in barter, are prohibited from using Foxhall Parks and Trails, even when accompanied by a Foxhall member.[84]

Any reasonable person reviewing the proxy statement – which was drafted and proffered by the Association itself –would understand what they were voting on. While the stated "objective" of the meeting to "Amend the Bylaws to adopt a clarifying rule for current and future Boards of Directors" is not entirely clear as to the scope of the amendment, the notice goes on to explain in *precise* terms what the bylaw says. The statement is not vague as to the purpose of the bylaw - to the contrary, it clearly confirms that the trails may not be used in conjunction with a resident's business. Accordingly, the notice complied with the requirements of both the Bylaws and the statute, and the trial court was wrong to dismiss Lowe's claims based on improper notice.

3. The November 19, 2015 Special Meeting was conducted properly.

The trial court held that the November 19, 2015 Special Membership meeting was invalid because the chosen parliamentarian, Rose Eilts, did not allow consideration of amendments of the proposed Bylaw at the meeting. But there is no case law, statute, or Association

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[84] CP 387-88, 395.

governing document that requires specific procedures at membership meetings, either regular or special.

Moreover, allowing such amendments would have frustrated the vote of those who could not attend and, as allowed by the Bylaws and Homeowners Association statute, instead submitted proxies to ensure that they had a fair say in whether the clarifying bylaw was adopted. Hence, it was a reasonable decision to decline a vote to amend the proposed amendment as it was understood by all members when they sent in their proxies. Holding otherwise would allow an active minority to control the process and even alter the amendment to state something completely different, such as nullifying the entire proposed Bylaws amendment.

In the end, the vote on the Bylaws amendment was taken, and it passed by a wide margin. This is clearly recorded in the minutes of the November 19, 2015 Special Meeting, which were read and approved without amendment at the April 25, 2016 General Meeting of the Association. If procedural irregularities existed, they should have been objected to at that time.

In sum, there is no statute or rule that required the parliamentarian to entertain amendments to the proposed Bylaw at the November 19,

2015 Special Membership meeting. Accordingly, the trial court erred in dismissing Lowe's claims on this ground.

VI. CONCLUSION

The trial court's dismissal of Lowe's claims based on its finding that the Covenants prohibit interfering with a member's commercial use of the common trails for their personal financial benefit makes no practical sense and is not supported by the Covenants or Washington law. Similarly, the trial court's interpretation of the procedures required at the November 19, 2015 Special Membership Meeting conflicts with the language and purpose of the homeowners association statute as well as the Association's own Bylaws. Moreover, following the trial court's interpretation to its natural conclusion would lead to absurd results that were not could not have been the intention of the framers of the homeowners association statute or the Association's founders. Most importantly, such results undermine the Foxhall residents' collective interests. Accordingly, the Court should reverse the trial court's grant of summary judgment to the Association and remand this action to the trial court for entry of summary judgment in favor of Lowe.

Dated this 5th day of September 2018.

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