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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' REPLY BRIEF

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I. INTRODUCTION

Respondent Foxhall Community Association continues to misconstrue Washington law and Foxhall's own covenants and bylaws in order to defeat the November 19, 2015 bylaws amendment that was supported by an overwhelming majority of Foxhall residents. But the amendment is fully consistent with and supported by these governing documents and applicable law. Accordingly, the trial court's order granting summary judgment to the Association should be reversed.

II. ARGUMENT

A. The November 19, 2015 Bylaws Amendment is fully consistent with the Covenants.

The Association's continued insistence that *Wilkinson v. Chiwawa Communities Ass'n*[1] mandates allowing commercial use of the community trail system is unfounded. *Wilkinson* stands for two propositions: (1) if a covenant amendment imposes a new substantive restriction without express allowance in the governing agreement for adoption of new covenants by less than unanimous voting, a unanimous vote is necessary for valid adoption,[2] and (2) if the

[1] 180 Wn. 2d 241, 327 P. 3d 614 (2014).

[2] *Id.* at 256.

covenants being amended allow for amendment of existing restrictions by less than unanimous vote but are silent as to the adoption of new restrictions, a unanimous vote is necessary for valid adoption.[3] "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."[4]

The present matter does not involve a brand-new covenant that has no relation to the existing covenants. Rather, it involves a new Bylaw that interprets and confirms what is meant by the existing Foxhall covenant that mandates that the community's recreational trail system and park "shall be **for the benefit of,** and [shall] be **used by**, **the residents** in Foxhall. . ."[5] Hence, the covenants' express terms state that the trail system is for the **collective** benefit and use of all Foxhall **residents**. *There is no exception for non-resident business invitees of an individual Foxhall resident*—indeed, such an exception would be directly contrary to the covenants restricting Foxhall lots to "residential purposes only"[6] and allowing horses only if they are *not* "kept, bred, or

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[3] *Id.*

[4] *Id.* (quoting *Meresse v. Stelma,* 100 Wn. App. 857, 866, 999 P.2d 1267 (2000)).

[5] CP 35 (emphasis added).

[6] CP 36.

maintained for any commercial purpose."[7] *Nor is there an exception for a use that results in a pecuniary benefit to a single resident or small subset of residents*. Accordingly, the November 19, 2015 Bylaws amendment prohibiting commercial use of the trail system by nonresidents is completely consistent with the existing Foxhall covenants.

Overall, the Association appears to be implying that the right to ban a member's commercial use of the Foxhall community trail system has been abandoned or waived. But the Association never made this argument below, likely because it cannot its burden of proving the argument. First, the Association's reliance on Les Whisler's testimony is misplaced. Mr. Whisler testified that he was approached by the original developer to take boarders at some point after it was platted in 1981[8] "as it would make the development more desirable for equestrian families."[9] In other words, the developer wanted Mr. Whisler to board horses for Foxhall residents in order to encourage

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[7] CP 37. The Association argues that other commercial uses have been allowed over the years, but, even if true, at the time the covenants were recorded only residential use was allowed. Accordingly, "the benefit of" language could not have been intended to refer to the commercial benefit of individual lot owners.

[8] The Association repeatedly states that commercial use of the community trails has been going on for over 40 years. That is not true. By the time of the November 19, 2015 Bylaws amendment, the Foxhall community had existed for only 34 years.

[9] CP 59.

sales of lots within the new development.[10] And while Mr. Whisler testified in his declaration that the original developers never told him that non-resident boarders could not use the trail system or that they had to be accompanied,[11] Mr. Whisler does not deny the fact that—as was set forth in declarations and documents provided by Appellants Lowe and Bosshard (collectively "Lowe")—he was subsequently told by the Association that nonresident boarders could not use the trails unaccompanied and was aware of opposition. It is also very telling that he did *not* include the boarding business as part of his sale to Judy Johnston—indeed, he says it wasn't even discussed.[12]

Second, proving waiver or abandonment requires meeting a very high standard: A restrictive covenant must have been habitually and substantially violated so as to create an impression that it has been abandoned.[13] In considering whether a covenant has been abandoned, the court looks at the relative number of subdivision lots violating the covenant and the extent of the violations.[14] Lastly, to find

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[10] Notably, according to the developer's son who was directly involved in the development, the permission was granted in part to help curb the weed growth on the trails while the plat remained largely undeveloped. CP 143.

[11] CP 59.

[12] CP 59.

[13] *Sandy Point Improvement Co. v. Huber,* 26 Wn.App. 317, 319, 613 P.2d 160 (1980).

[14] *See, e.g., White v. Wilhelm,* 34 Wn.App. 763, 769–70, 665 P.2d 407 (1983) (citing Wash. State Bar Ass'n, Real Property Deskbook sec. 15.21 (1979))[2]; Sandy Point, 26

that a party has abandoned a restrictive covenant, the court must find the violations material to the covenant's overall purpose; minor violations are insufficient to show abandonment.[15]

Here, only one or two lots in the 118-lot Foxhall subdivision have allowed nonresident commercial boarders to use the community trail system. Accordingly, proving abandonment or waiver is a legal impossibility.

Finally, the Association dismisses the notion that the trial court's decision means that a Foxhall resident is free to allow renting out the trails to motocross bike users. But the logic is the same: the resident would be benefitting from being paid by nonresidents to use the trails. And even if motocross bikes were not allowed, how about horses—given the trial court's decision, what is to stop each lot owner from selling use of the trails to nonresident horse owners for a fee? The commercial use would "benefit" the lot owners who did so and, accordingly, could not be prohibited under the Association's view of the covenants and law. Obviously, the chaos and liability concerns arising

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Wn.App. at 319 (court considered four alleged covenant violations in a 1,000-lot subdivision).

[15] *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 342, 883 P. 2d 1383 (1994).

from 118 lot owners renting out the trails to unlimited numbers of horse enthusiasts would not be a benefit to anyone.

In sum, the notion that the covenants allow a solitary lot owner to allow nonresidential use of the community-trail system maintained by all community members so she—and only she--can financially benefit from the use runs completely contrary to the language of the covenants. The November 19, 2015 Bylaws amendment was an appropriate—and long overdue—clarification that this type of use was not allowed.

B. The November 19, 2015 special meeting was properly conducted.

1. The proxy votes for the November 19, 2015 special meeting were properly counted.

The Association argues that the Court should put blinders on and look solely at the language of the Foxhall Bylaws amendment provision when determining the meaning of "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.[16]

But contracts (and statutes) must be interpreted to give effect to all their provisions rather than adopting an interpretation that

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[16] CP 50.

renders some of the language meaningless or ineffective.[17] Here, the Foxhall Bylaws explicitly allow "a member [to] exercise his right to **vote by proxy**."[18] This voting provision applies to **all** regular and special meetings, including the one held on November 19, 2015 to vote on the Bylaws amendment at issue here. Simply put, there is nothing in the amendment provision or elsewhere in the Bylaws that excludes the amendment process from the requirement that proxies be allowed.[19]

Moreover, the Association's argument that the word "present" should be given its ordinary meaning supports Lowe's argument. As set forth in RCW 64.28.040, the Bylaws quorum provision, and multiple other authority cited in Lowe's opening brief, when the interpretation involves corporate and governance documents, the "plain and ordinary meaning" of "present" means "in person or by proxy."

Finally, the Association's argument that Bylaws amendments are so important that they should be made by fewer members–i.e. only those able to be physically present at the meeting–rather than as many members as possible through use of a detailed proxy process makes

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[17] *Hearst Commc'ns Inc. v. Seattle Times Co.*, 154 Wn.2d 493, at 503-04, 115 P.3d 262 (2005); *see also Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953).

[18] CP 400 (emphasis added).

[19] The Association incorrectly states that RCW 64.38.030(5) "explicitly treats bylaws amendments differently from other votes." Respondent's Brief at 19-20. That is simply not true. All that the provision does is require that the Bylaws have a process for amendment. RCW 64.38.030(5). For example, some associations allow the Board of Directors to amend Bylaws, while others require a super-majority of membership.

no sense. *Not* allowing proxy voting (or call-in attendance and voting, which would also be prohibited) would be a "distort[ion] of the decisionmaking process by putting a tremendous amount of power into the hands of a few."[20]

2. The Notice for the November 19, 2015 Special Meeting was clear and complied with RCW 64.28.035(3).

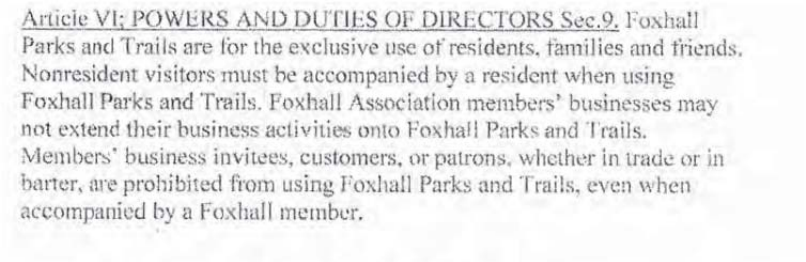
The Association's brief argument on the notice provision is puzzling. There is nothing inconsistent between the language of the Notice for the November 19, 2015 meeting and the Bylaw amendment that was passed. The one-page Notice stated the purpose of the meeting was a Bylaws amendment that would ban members' business activities on the Foxhall trail system and park:[21]

> **Objective:** Amend the Bylaws to adopt a clarifying rule for current and future Boards of Directors.
>
> **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.

[20] Respondent's Brief at 20.

[21] CP 52.

The November 19, 2015 Bylaw amendment does exactly that:[22]



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' businesses 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.

Moreover, even if the Notice had been less precise, Washington law 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...."[23]

The Association's argument also relies on "evidence" that is clearly disputed. For example, the Association cites to the Declaration of Jessica J. Bradley to support their contention that "the proponents of this amendment [mentioning only Rose Eilts] were actively asking members to submit proxy votes instead of actually attendance [sic] at the meeting."[24] But Rose Eilts testified, "I have never knocked on Jessica Bradley's door, never been in her house, never had a

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[22] CP 57.

[23] RCW 64.38.035(3).

[24] Respondent's Brief at 21 citing CP 70.

conversation with her."[25] Other testimony relied on by the Association regarding the proxy-collecting process was similarly disputed.[26] But this disputed testimony ultimately does not matter, as the November 19, 2015 Meeting Notice was very clear about the purpose of the meeting, as were the proxy forms themselves, [27] a fact conceded by the Association when it notes during a later argument that "many of the proxies themselves were specific to the bylaw proposed."[28] Anyone who actually read the Notice and proxy forms would not have been confused about the purpose of the proposed bylaw.

3. The November 19, 2015 meeting was properly conducted.

The Association acknowledges that "it is true that the Bylaws do not require that Robert's Rules of Order be used."[29] Yet its entire argument regarding the conduct of the November 19, 2015 special meeting is based on using these Rules that don't apply. It should be rejected on that ground alone.

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[25] CP 99.

[26] See, e.g. 114-21.

[27] CP 108-09.

[28] Respondent's brief at 23.

[29] Respondent's Brief at 23.

The Association's argument is also based in large part on the rather demeaning declaration submitted by Robert J. Armstrong.[30] But key statements in this declaration were refuted by other testimony[31] as well as the meeting minutes.[32] Moreover, even Robert's Rules of Order—on which he relies--says that any member who notices a breach of the rules the he wants remedied must immediately call attention to the fact and insist that the rules be enforced by raising a point of order. Yet, there is no indication in his declaration or the meeting minutes that he ever did so regarding the alleged failure to hear an amendment. Finally, contrary to his and the Association's apparently understanding, some types of motions are subject to a two-thirds vote requirement[33] under Roberts Rules of Order, including motions to prevent consideration of the question[34]--here the Bylaws amendment--and to suppress or limit debate.[35]

Overall, the November 19, 2015 vote on the Bylaws amendment was taken with proxies that were in response to a Notice that made

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[30] CP 60-62.

[31] CP 98-99.

[32] CP 120-21.

[33] There is no documentation anywhere indicating that this was in fact required by the parliamentarian.

[34] Robert's Rules of Order (Revised) § 23 (1971).

[35] *Id.* § 30.

clear the purpose of the meeting and the intent of the Bylaws amendment. As the Association concedes, the proxy forms themselves reflected this intent, which limited their use to just the November 19, 2015 meeting. The vote on the Bylaws respected these members' proxy votes, and the Bylaws amendment passed by a wide margin.[36] 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 Annual Meeting of the Association.[37]

III. CONCLUSION

The *Wilkinson* decision has no bearing on the November 19, 2015 Bylaws amendment, which is fully consistent with the Foxhall covenants and collective benefit of Foxhall residents. The November 19, 2015 special meeting and vote was also consistent with the Foxhall covenants as well as Washington law. 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.

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[36] CP 121.

[37] CP 103.

Dated this 5th day of November 2018.

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