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

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs' Motion for Summary Judgment should be denied and Defendant's granted. The purported bylaw amendment to completely exclude any business invitees, customers or patrons from using the trails under any circumstances conflicts with the Protective Covenants that provide that the trails "shall be for **the benefit of**, and be used by, the residents of Foxhall." It is therefore unenforceable. Further, the process used to adopt the bylaws in

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question was flawed in at least three respects: 1) 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.

II. FACTS

Defendants incorporate the facts section of its Motion for Summary Judgment and add the following.

Plaintiffs repeatedly refer in their motion to the trails being open to the public. They have never been open to the public. (Supp. Lewis Decl., ¶ 5). They have been open to those who board horses with a resident, primarily the Johnston family, though the restrictions plaintiffs seek to impose would prohibit any guest of any resident who boards a horse, even for a day, from using any of the trails at Foxhall even if accompanied by a resident. It should be noted that the Johnston boarding operation has existed in the same location since the inception of the defendant entity. (See Whisler and Johnston Declarations).

Plaintiffs also state in their motion that "profiteers" allow non-residents to use the Foxhall trails "in exchange for money." (Plaintiff's Motion, p. 2, ll. 9-10). There is no support in the record for this misrepresentation. The Johnston family has, and the Whisler family before them had, horse boarding operations and those who boarded their horses were allowed to use the Foxhall trails. There is no evidence that there was a charge for using the trails.

Plaintiffs also grossly misrepresent insurance coverage for any injuries sustained by a business invitee by arguing "[n]o insurance company has guaranteed Foxhall and/or the FCA that coverage exists for claims associated with the use of trails by nonresidents." There are also no "guarantees" of coverage for the use of trails by residents. In fact, the coverage is the same for both. (See Lewis Supp. Decl., ¶ 7, and Exh. 2, the insurance policy). The insurance policy

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does not distinguish between residents or others injured on Foxhall property. (*See* also the statement from the insurance broker to the Board president, Exh. 1to the Supp. Lewis Decl..)[1]

Plaintiffs make a number of other grandiose claims with no factual support. For example, Ms. Lowe states that she did not buy a home in Foxhall so "she could be in the center of commercial horseback riding enterprises." (Pls.' Motion, p. 2, ll. 18-19.) However, when she bought her home, the Whisler family had a boarding operation on the same property as the Johnston family. (See Whisler and Johnston Decls.) She also claims, without any support whatsoever, that the business use of the trails "exponentially increases the amount and frequency of horses on trails, which leads to a host of issues FCA was not organized to deal with." *Id.* at ll.19-21. Of course there is no indication what the host of problems are or how the one operation, the Johnston's, with 8 boarders can "exponentially" increase the use of the trails. She then argues that this case is about managing risks and preserving the character of the community by keeping disruptive businesses out of it." Again, this business has been at Foxhall since the inception of the community and is no evidence of additional risks in light of the insurance coverage. (Whisler Decl. and Lewis Supp. Decl.)

Plaintiffs cite to the *Eilts* lawsuit and to comments made by Judge Lanesse. That lawsuit, however, did not involve the November 2015 vote at issue in this case. Instead, it challenged a March 7, 2017 adoption of a by-law amendment. (See Eilts Complaint, Cause No. 17-2-02345-34). Further, the Court did not hear any argument on the merits, but denied the motion for an injunction for failure to meet the requirements of such a motion.

Plaintiffs also cite to an agreement with an adjacent property owner in 1984 and argue that it prohibits commercial business in the Foxhall community. (Pls.' Motion, p. 6.) However,

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[1] In response to the original motion for summary judgment, resident Eilts in a declaration pointed out that one insurance company, Mutual of Enumclaw, would not re-issue its policy if non-residents were allowed to use the trails. There was coverage under that policy, Mutual of Enumclaw just wanted off the risk. (See Exh. D. to Eilts June 29, 2017 Decl.). However, that is not the positon of the current carrier, Liberty Mutual.

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what the agreement says is that Olympia's property will not be used for commercial purposes; it does not say the Foxhall community can have no such activity. Furthermore, even if it applied to Foxhall, it has not been enforced for the past 44 years. There have been multiple businesses in the Foxhall community in addition to the boarding activity of the Whisler and Johnston families. These include two general equipment operations which include back hoe work, mowing, big tractor work, taking out trees, hauling rock or gravel in 10 yard dump truck and the like, another operated a child care center in her home, a mechanic who modified his garage to install a lift, and a doctor who performed physical exams all commercial pilots must have each year; he even built a large shop behind his home, the front half of it being his medical office. (Supp. Lewis Decl., ¶ 4). Indeed, although the Restrictive Covenants state that Foxhall is for residential use only, they also contemplate commercial use: "the Architectural Control Committee shall determine what trade, business, or use is undesirable or noxious, such determination shall be conclusive." (Exhibit 2 to Lewis June 12, 2017 Declaration, § II.F.)

Plaintiffs also claim, with no evidentiary support, that the boarders use of the trails increases the maintenance costs of those trails. Again, there is no evidence to support this claim. (See Lewis Supp. Decl., ¶ 6) Indeed, the Johnston's boarders contributed $500 to trail maintenance without even being asked to do so. (Supp. Lewis Decl., ¶ 6).

Plaintiffs also claim that allowing boarders to use the trails would "preclude law enforcement from being able to distinguish trespassers from paying customers." (P. 11, ll. 25-26). Again, there is no support for this speculative assertion or an explanation of the scenario which may cause a problem. Law enforcement would not be able to distinguish owners, from paying guests, from non-paying guests from trespassers. This is a non-issue.

Finally, Plaintiffs rely on alleged statements from the son of the founder of Foxhall, Dennis Adams. However, those statements are set forth in emails to two witnesses, Denise Solveson and Theresa Lowe and are attached to declarations from the two dated July 12, 2017.

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As such they are hearsay and cannot be considered by the Court (*Lynn v. Labor Ready Inc.* 136 Wn. App. 295 (2006) Furthermore, those statements fail to address the fact that the founder and his son specifically asked the Whisler family to start a boarding business and that those boarders routinely used the Foxhall trails until that property was sold to the Johnston family. (Whisler Decl.)

III, EVIDENCE RELIED UPON

This Opposition is based on the same evidence cited in Defendant's Motion for Summary Judgment and on the Supplemental Declaration of Bert Lewis.

IV. ISSUES PRESENTED

The issues to be decided are the same ones set forth in Defendant's Motion for Summary Judgment.

V. AUTHORITY AND ARGUMENT

Defendant adopts the authority and argument set forth in its Motion for Summary Judgment and adds the following:

A. The purported Amendment Conflicts with the Governing Covenants

Plaintiffs' cannot deny the black letter law in Washington a bylaw amendment cannot conflict with the Covenants that govern the community. *Wilkinson v. Chiwawa Community Assoc.*, 180 Wn. 2d 241 (2014)[2] In *Wilkinson*, the Supreme Court invalidated a bylaw amendment that sought to limit the ability of members to rent out their homes on a short term basis even though the covenants restricted the lots to single family residential uses only. As both parties agree, the key to determining whether such restrictions do conflict with the covenants is to determine the intent of the parties.

[2] Plaintiffs' prior counsel argued in response to Defendant's original motion that *Wilkinson* was not applicable because it only dealt with limitations on individual property, not on limitations on common areas. Current counsel wisely appears to have abandoned that argument by recognizing that "a bylaw should not impose a restriction that conflicts with restrictive covenants." (Plaintiffs' motion, p. 17, ll. 18-19).

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The issue then is what was intended by the language "for the benefit of" in the context of the statement in the covenants that the trails "shall be for the benefit of, and be used by, the residents of Foxhall." The founder of Foxhall, Virgil Adams, invited Mr. Whisler to board horses and allowed those boarders to use the horse trails in the community. Had "for the benefit of" in the covenants meant that only residents themselves could use the trails, Mr. Virgil would not have extended this invitation. The statements of his son, Dennis Adams, in the two emails attached to the Supplemental Declarations of Solveson and Lowe do nothing to change that fact for several reasons. First, those statements are blatant hearsay, and are therefore inadmissible (*Lynn v. Labor Ready Inc.*136 Wn. App. 295 (2006). Second, they do not change the fact that his father, the founder of the community, did in fact invite the Armstrong's predecessors, the Whisler family, to board horse and he allowed them to use the trails. Third, Virgil, Dennis' father, was the signatory of the covenants, not Dennis.

Plaintiffs argue that theirs is the reasonable interpretation of the covenant; that the trails are restricted to personal/social use of residents and accompanied guests. (Pls.' Motion, p. 15, ll. 13-14). But that also is not what the restriction says, it says it is for the benefit of and to be used by the residents. It says nothing about guests or social use. But the plaintiffs are correct that it is a reasonable interpretation because of the language "for the benefit of" which is also included in the covenants. But it is equally a reasonable interpretation that "for the benefit of" also means that paying boarders can also use the trails. After all, the word "benefit" has to be given some meaning. "Benefit" means to "be useful or profitable." Webster's Third Int'l Dictionary, 1986). It is just as useful or beneficial for the Johnston's to allow their boarders to use the trails as it is for other residents to allow their friends and social contacts to use them. This is especially so since the founder of the Foxhall, Virgil Adams, specifically invited the Johnston predecessors to board horses and allowed those boarders to use the trials. (Whisler Decl.)

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Plaintiffs argue that allowing paying boarders to use the trails does not benefit all owners. They point out a liability concern and a concern by Monica Wilder about boarders parking by her house instead of on the Johnston property. However, whether all owners benefit is not a relevant inquiry. Not all owners have horses or use the trails, but they still must allow others to do so. There can be many benefits of ownership that not all residents will enjoy. There is simply no authority for the proposition that the covenants must be interpreted in a way that all residents must benefit. Further, the complaint by Ms. Wilder about parking can be addressed by other means, such as requiring that guests park on the property of the resident. Such a bylaw amendment would not conflict with the covenants. She could also simply ask the Johnstons to have their boarders park on their property, or ask the Board to take that step. What she cannot do is restrict them from an activity allowed under the covenants because some of those boarders are not being polite. It is not a reason to take away rights provided for in the covenants and allowed since the founding of the community. Finally, there is no support whatsoever for a concern about increased liability exposure; there is no difference in the liability coverage between paying and non-paying guests using the trails. (See Lewis Supp. Decl. with attachments).

Plaintiffs also appear to argue that interpreting "for the benefit of" to allow boarders to use the trails would open the community to having to allow dirt bike racing. (Pls.' Motion, p. 15, ll. 20-23). This argument simply makes no sense; Foxhall was subdivided and sold as an equestrian friendly development was access to equestrian trails. (Whisler Decl.) Both the history of the development and the meaning of the phrase "for the benefit of" is consistent with boarders using the trails. There is no evidence that dirt bike racing is consistent with the restrictive covenants at issue.

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B. The November 2015 Amendment Failed Because It Did not Pass by a Vote of Those Present.

As pointed out in Defendant's Motion for Summary Judgment, Article X of the Bylaws states that they can be amended " by a vote of a majority of the members of the corporation **present** at any meeting of the membership called for such purposes." (Emphasis added). Defendant maintains that "present" means exactly what it says, the person voting must be there and cast his or her vote at the meeting. Plaintiffs argue that "present" means in person or by proxy, even though that is not what Article X says.

Plaintiffs argue that the term present is analogous to the RCWs which they claim treat the term "present" the same as voting in person or by proxy. This is not correct. The Homeowners' Association Act does state that a quorum includes those who are present in person or by proxy, but that has nothing to do with what the requirements of the bylaws are for amending them.. Indeed, that very Act, RCW 64.38.030(5) provides that HOAs can determine how to amend their bylaws. Here they do so by saying that members must be present to vote.

Thus, some provisions of the Homeowners' Association Act require that proxy votes be counted. These include establishing a quorum and removing a board member. Others do not, such as amending bylaws; the Act does not require proxies to be included for such amendments.

Plaintiffs also argue that Article V, Sec. 5 of the bylaws state that a member can vote in person or by proxy. That is accurate, unless otherwise stated, a member can vote by person or by proxy. However, here Article X specifically limits those who vote to those present. As pointed out in Defendant's Motion for Summary Judgment, the rules of statutory construction require that the word present be given meaning. Under Plaintiffs' interpretation of Article X, it has no meaning at all; if the word present were deleted from Article X the meaning of that

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Article would be the same. The only meaning it can be given is its plain at ordinary meaning, present means there, at the meeting.

Plaintiffs also rely on a March, 2017 bylaw amendment to support their argument. That change was made simply to reflect the requirements of the Homeowners' Association Act which does require votes of those present in person or by proxy to be considered; the language used in the amendment is the same as that in the statute. (Lewis Supp. Decl., ¶ 8) Indeed, that change supports Defendant's positon since Article X does not state that a vote can be in person present in person or by proxy. It simply says by a vote of those present.

Plaintiffs also argue that there were more than enough votes at the November 2015 meeting if the votes of those in attendance who allowed their vote to stand by proxy were included. However, there is no evidence as to why those present who did not cast a vote during the meeting failed to do so. Plaintiff just states with no foundation at all that they all decided to stand on their proxy vote. But that conclusion is not supported in the record. We don't even know if the same ones present were ones that signed proxies, and if so why they did not cast a ballot at the meeting. Further, voting by proxy is fundamentally different from voting in person; when voting by proxy a vote is given to another person to make. It is not voting at the meeting in person.

Finally, courts should give deference to the Board's interpretation of its own documents. *Couie v. Local Union No. 1849 Bhd. of Carpenters and Joiners of Am.*, 51 Wn.2d 108, 115, 316 P.2d 473 (1957). Bert Lewis, the current president, and president at the time of the Board's rejection of the purported amendment, states in his declaration how he interprets the bylaws; being present means there in person. (See Lewis June 12, 2017 Decl., ¶ 5)[3]

[3] Plaintiff Lowe also argues in her declaration that that the limited proxy forms on the Foxhall website appear to allow a limited proxy for bylaw amendment voting. She attached the form as Exhibit H. There is nothing in that form that indicates it can be used for a bylaw amendment.

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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 the fact 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 Johnston's, 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.

Defendants incorporate by reference their arguments set forth in their Motion for Summary judgment, pages 15-16.

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 state that a motion was made and seconded to amend the 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 were adopted has nothing to do with whether the process used was legitimate, it just means that

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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.

DATED this 9th day of April 2018.

BETTS, PATTERSON & MINES, P.S.

By _____
Steven Goldstein, WSBA #11042
Attorneys for Defendant

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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 9, 2018, I caused to be served upon counsel of record at the addresses and in the manner described below, the following document(s):

- **DEFENDANT'S RESPONSE TO PLAINTIFFS' 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 9th day of April 2018.

Sally Phillips, Legal Assistant

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