□ EXPEDITE
x Hearing is set
Date: July 14, 2017
Time: 9:00AM
Judge: Murphy
Calendar: Civil

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 R. CUBERT, husband and wife,

Plaintiffs,

vs.

FOXHALL COMMUNITY ASSOCIATION, a nonprofit corporation,

Defendant.

NO. 17-2-00812-34

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

## I. INTRODUCTION

This motion concerns whether a homeowners association's board of directors may overrule a vote of the association's members regarding the use of the association's common areas.

The common areas in question are the Foxhall Community Association's trails: the members voted to restrict use of the trails to members (homeowners and



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accompanied guests and invitees) and to prohibit use of Association common areas by commercial horse-boarding stables.

The Foxhall Board of Directors has attempted to overrule the Foxhall Members by an after-the fact revision of proxy voting rules and a torturous and unreasonable interpretation of the plain language of Foxhall's governing documents.

The plaintiffs are member homeowners within Foxhall who seek to enforce the vote of the members held at the November 19, 2015 Special Meeting of the Association. The Association seeks to prohibit enforcement.

In November of 2015, the Foxhall Community Association membership held a Special Meeting where it adopted a new bylaw limiting the use of the Association's trails and parks to members and their guests. This bylaw specifically excluded business invitees such as people boarding horses at commercial boarding stables within Foxhall.

At the April 25, 2016 General Meeting of the Foxhall Community Association, the minutes for the November Special Meeting were adopted and approved without amendment.

Thereafter, months after the original Special Meeting and in an attempt to avoid enforcement of the bylaw, the Board of Directors for the Defendant Foxhall



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Community Association (herein "Foxhall" or "Association") unilaterally adopted a definition of "present" which prohibited the use of proxy votes in amending its bylaws.

Additionally, the Board determined that the plain language in the Bylaws stating that the association common areas must be used "for the benefit of, and use by," residents implied that the Association lacked authority to govern the uses to which its trails could be put.

Contrary to the position of the Defendants, this is not the case. As such, the Court should deny the Defendant's Motion for Summary Judgment.

## II. EVIDENCE RELIED UPON

1. Declaration of Theresa Lowe
2. Declaration of Denise Solveson
3. Declaration of Rose Eilts

## III. STATEMENT OF FACTS

### A. History.

The Foxhall Community Association is governed by Protective Covenants filed by Virgil Adams in 1982. Although there is no dispute that one property has a history of allowing its non-resident commercial boarders to use the Foxhall trails,



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there is an ongoing dispute between various Boards for Foxhall and the owner of this property regarding that use.

Judy Johnson purchased her property in 2003. Since that time, several Boards of Directors have disputed her right to use the trails. Ms. Johnston at times even claimed that she would stop.[1] Even prior to Ms. Johnston's purchase of the property, Rose Eilts as the President of the Architectural Control Committee for Foxhall wrote to the Board in July of 2001 expressing her concern that the Board was allowing non-residents to use the trails of Foxhall.[2] Furthermore, at least since Ms. Eilts moved into the community in 1999, there have been a number of signs posted on the trails which made it clear that the trails were for residents and accompanied guests. [3]

**B. Adoption of Bylaw by Association Membership.**

In approximately August of 2015, a message from the insurance agent for Foxhall informed the Board of Foxhall that the insurance company issuing its policy considered use of the trails by non-residents commercially boarding horses at members' stables to be a "public use" of the trails. As such, the insurance company would not continue to cover Foxhall if Foxhall allowed these non-

[1] Decl. Lowe, p. 1-2.
[2] Decl. Eilts, p. 4.
[3] Id. at 4.



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residents onto its trails.[4] This was recorded in the minutes of the Board Meeting for August 24, 2015.

Additionally, between the Board meeting in August of 2015 and the Special Meeting in November of 2015, then-Board Secretary F. Paul Carlson was advocating for opening up the trails to use by even more non-residents. This plan included a "limited-use permit program for riders on Foxhall" where "[t]he non-resident user would pay $100 per year to FCA."[5]

With this warning as context, it cannot be legitimately argued that non-resident use of the trails increased the exposure to liability. However, that is precisely what the Defendant's Motion for Summary Judgment has claimed.

At this same meeting, the Board decided to adopt a rule specifically allowing non-residents commercially boarding horses to use the trails.[6] Because the Board did not appear to be taking this issue seriously, a number of residents within the community decided to call a special meeting of the Foxhall Community Association to pass a new Bylaw that clarified who was allowed to use the trails and parks of Foxhall. Notably, the Bylaw which the Association membership passed specifically excluded non-residents that commercially boarded their horses at Foxhall.

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[4] Decl. Eilts, Exhibit D, p. 2.
[5] Decl. Eilts, Exhibit B; Decl. Solveson, p. 3.
[6] Id., at p. 3.



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Because of the warning to the Association provided by its insurance agent, a group of people advocating for the new Bylaw lobbied their neighbors throughout the community and gathered voting proxies to improve the chances of passing this resolution. As the Board would not call a Special Meeting to vote on the proposed Bylaw, these members submitted written requests to the Foxhall to call a Special Meeting pursuant to the authority contained in RCW 64.38.035(1).

On November 19, 2015, the well attended Special Meeting (42 lots represented) was held and with the proxy ballots counted, this new Bylaw passed 78-18. Many of the members attending had submitted proxies and allowed them to stand.[7]

The minutes for this meeting memorializing the adoption of this new Bylaw were ultimately read aloud by Denise Solveson and adopted without amendment at the April 25, 2016 General Meeting of the Association.[8]

**C. Post-Adoption Nullification by the Board.**

Thereafter, the Board determined that it did not want to enforce the rule adopted by the Membership. However, instead of attempting to amend the Bylaws to change the rule, the Board came out with a pretextual reason why it could not enforce the Bylaw as adopted. The substance of their argument is contained in the

[7] Decl. Solveson, Exhibit A, p. 2.
[8] Decl. Eilts, Exhibit A, p. 2.



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Defendant's Motion for Summary Judgment. However, this reasoning was neither raised at the meeting adopting the Bylaw nor the ratification of the minutes of that meeting at the General Meeting of the Foxhall Community Association over five months later.

## IV. STATEMENT OF ISSUES

1. Whether the Bylaw adopted on November 19, 2015 is consistent with the governing documents of Foxhall?
2. Whether the Bylaw adopted on November 19, 2015 was passed consistent with the rules of procedure in the Foxhall governing documents and Washington law?

## V. AUTHORITY AND ARGUMENT

### 1. SUMMARY JUDGMENT STANDARD.

Summary judgment should be granted "where there is no genuine issue of material fact and … the moving party is entitled to judgment as a matter of law."[9] The purpose of summary judgment is to avoid useless litigation.[10] Material facts

[9] CR 56; *see also Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 253 (2002).

[10] *Currens v. Sleek*, 138 Wn.2d 858, 873 (1999); *see also Celotex Corp. v. Caltrett*, 477 U.S. 317, 323-27, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986); *Coggle v. Snow*, 56 Wn. App. 499, 507-08 (Div.1 1990) (courts strongly endorse summary judgment where appropriate in order to fulfill the purpose of the civil rules).



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are those "upon which the outcome of the litigation depends in whole or in part."[11]

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact.[12] Furthermore, the evidence and all reasonable inferences therefrom is considered in the light most favorable to the nonmoving party.[13]

**2. THE BYLAW ADOPTED ON NOVEMBER 19, 2015 DOES NOT CONFLICT WITH THE PROTECTIVE COVENANTS FOR FOXHALL.**

*A. The holding in Wilkinson is inapplicable to this case.*

There is a significant difference between the circumstances in *Wilkinson* and the facts of the current case that the Defendant fails to address. *Wilkinson* involved a homeowners association placing a new restriction on how lot owners could use their lots.[14] Specifically, owners of lots in this homeowners association were prohibited from renting their homes for short term or vacation rentals by a new rule adopted by a simple majority of the Association.[15] In the current matter, Foxhall is merely determining how common areas owned in fee by the Foxhall Community Association will be used. This is a significant and material distinction which the Defendant's motion has failed to address.

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[11] *Fraternal Order of Eagles*, at 252 n.126, quoting *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798 (2001).
[12] *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182, 187 (1989)
[13] *Id.*
[14] *Wilkinson v. Chiwawa*, 180 Wn.2d 241, 247 (2014)
[15] *Id.*



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In making its decision, the Supreme Court in Wilkinson based its holding on the principal that "the authority of a simple majority of homeowners to adopt new covenants or amend existing ones in order to place new restrictions on the use of private property is limited."[16] The Court goes on to note that "[t]he law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land."[17] However, this quote itself shows that it was restrictions on the lot owners' land, and not land owned by the association, that this case specifically addresses.

The Defendants appear to attempt to get around this distinction by implying that this restriction on non-resident use of the trails is a restriction on commercially boarding horses within Foxhall.[18] However, the Bylaw that was adopted is not a restriction on members use of their property to Board horses. Instead, the Bylaw merely prohibits non-residents commercial boarders from using the trails owned by the Foxhall Community Association to protect Foxhall members privacy, security, and to reduce liability exposure.

B. *Foxhall has the authority to regulate the use of its common areas under RCW 64.38.020(6).*

The Defendant's motion fails to address the statutory authority of Foxhall to

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[16] *Wilkinson,* at 256.
[17] *Id.*, quoting *Boyles v. Hausmann,* 246 Neb 181, 517 N.W.2d 610, 617 (1994).
[18] Defendant's Motion for Summary Judgment, p. 7.



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determine how its common areas are used. RCW 64.38.020(6) authorizes an association to "[r]egulate the use, maintenance, repair, and modification of common areas." If *Wilkinson* were to stand for the proposition that a homeowners association could not restrict how its common areas are used, it would have effectively overturned this statute. However, there is not a single mention of this statute in the *Wilkinson* opinion.

Had the Court in *Wilkinson* intended to address a homeowners association's regulation of the uses to which its common areas could be put in its opinion, it would have done so explicitly and it would have addressed the RCW allowing homeowners associations to "regulate [that] use."

*C. The language "for the benefit of, and be used by, the residents of Foxhall" does not require Foxhall to allow any and all uses on its common areas.*

The Defendant's motion specifically cites a protective covenant that states that "Tract A in Foxhall, Division I and Tracts H and I in Division I and Division II shall be for the benefit of, and be used by, the residents of Foxhall." They do so to imply that any use which "benefits" a resident must be allowed on the Foxhall trails. As a deduction from that reasoning, the Defendants urge the Court to hold that restricting the use of the trails to "residents and accompanied guests" would violate that Protective Covenant.



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The Defendants motion states that "language should be given its plain meaning."[19] They go on to note that "the language in the Restrictive Covenant that the trails are 'for the benefit of' the owners indicates by its plain language, that the owners can use the trails for their benefit." Under a plain language analysis, there is absolutely no doubt that the trails are intended to benefit the owners.

However, absent from any of these statements of purpose is any reference that owners' unaccompanied guests, invitees, or commercial boarders are even permitted on the common areas. Despite this, the Defendant urges the Court to find that this language not only allows unaccompanied guests, invitees, and commercial boarders to use the common areas, it requires Foxhall to allow this.

This clearly is an erroneous application of the rule that contract language should be given its plain meaning. There is nothing in the language of the Protective Covenant that clearly or even somewhat ambiguously requires Foxhall to allow non-residents onto its common areas. If you were to apply the rule in *Viking Bank* that contract terms are to be given their "ordinary, usual and popular meaning" in this case, 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.

[19] Defendant's Motion For Summary Judgment, p. 8, ln. 14.



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As the Protective Covenants are written, there is simply no rule that prohibits Foxhall from excluding commercial invitees from using its common areas. Furthermore, this interpretation is explicitly supported by the authorization in RCW 64.38.020(6) for Foxhall to "[r]egulate the use, maintenance, repair, and modification of common areas." The Defendant's motion is notably silent on this portion of the Homeowners Association Act.

RCW 64.38.020(6) doesn't state that once a use is allowed it must always be allowed. It provides that the Association may utilize its common areas as it sees fit for the benefit of the community. Contained within this grant of authority is the implied power of the association to turn its common areas to a new use. This authority is further supported by the Protective Covenants which allow the Association to "develop recreational facilities on said Tracts, at some future time."[20]

*D. If the Court were to adopt the interpretation urged by the Defendants, it would end with the absurd result that the Association could not prohibit any activity on Association common areas.*

If the Court were to adopt the position urged by the Defendants Motion for Summary Judgment, the results would be ridiculous. As an example, if Foxhall cannot prohibit non-resident commercial boarders from using its trails, Foxhall

[20] Decl. Lewis, Exhibit B, p. 3.



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would have no justification to prohibit non-resident motorcyclists that paid to park on a Member's property from using the trails—or any other use which members of Foxhall decided to allow their business invitees to undertake on Association owned common areas.

This would be the end-result of the Defendant's position on the interpretation of these covenants. As with statutory interpretation, courts attempt to determine the intent of the drafters of contracts and covenants: "[courts] presume the legislature does not intend absurd results and, where possible, interpret ambiguous language to avoid such absurdity."[21] In this case, the Court should presume that the drafters did not intend absurd results—and the Foxhall Community Association being unable to regulate the use of its common areas based on the strained interpretation of the phrase "for the benefit of, and use by, its residents" would be an absurd result.

### 3. THE ADOPTION OF THE NOVEMBER 2015 BYLAW AMENDMENT DID NOT VIOLATE ANY PROVISIONS OF THE GOVERNING DOCUMENTS.

Before discussing the legal questions, it should be noted that validity of the proxy votes was not challenged until many months after the vote even occurred. The vote occurred on November 19, 2015 and minutes were read to and adopted by

[21] *State v. Ervin*, 169 Wn.2d 815, 823–24, 239 P.3d 354, 358 (2010)



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the membership at the annual meeting on April 25, 2016.[22] No motions were made by anyone to modify the minutes as recorded and read at the meeting by Denise Solveson. The minutes from the November 19, 2015 Special Meeting are included as Exhibit A to the Declaration of Denise Solveson.

As such, more than five months after the November 19, 2015 meeting, the vote and bylaw amendment remained valid. It was only after the general meeting on April 25, 2016 that the Board for Foxhall began operating on a theory that the bylaw was invalid and it did so without further vote of the membership.

*A. Members were not required to be physically present to vote on a bylaw amendment.*

There is no doubt that a homeowners association has the authority to determine how its bylaws are amended. However, a homeowners association cannot manipulate the language of its bylaws to suppress votes. Unfortunately, this is precisely what the Board for Foxhall did when it decided to invalidate the proxy votes used at the November 19, 2015 meeting months after the minutes for that meeting had been approved.

i. Governing Documents: the Bylaws provide a right to vote by proxy.

Prior to the Amendments on March 7, 2017, the Bylaws for Foxhall had a clear and unambiguous grant of the right to use proxy votes. Specifically, Article

[22] Decl. Eilts, p. 3, Section 8.



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V, Section 5 of the Bylaws provided that "[a] member may exercise his right to vote by proxy."

The Defendant's motion goes through a number of rules of statutory construction without ever referencing perhaps the most important case under these circumstances, *Berg v. Hudesman.*

Washington's Supreme Court has adopted Section 212 of the Restatement (Second) of Contracts which provides in part that "[t]he interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter."[23] *Berg* states this particularly well in the following section:

> *Another issue involving interpretation which may be relevant in this case concerns the possibility that language used in the lease is technical or constitutes terms of art. If so, the general rule is that such language is to be given its technical meaning when used in a transaction within its technical field.*[24]

As such, the use of the term "present" cannot be interpreted within the Bylaws of Foxhall without considering how the term is used in corporate governance, the Homeowners Association Statute, and the Bylaws of Foxhall. Despite this, the Defendant urges the Court to a narrow dictionary definition of "present" which requires the physical presence of a Member.

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[23] *Berg v. Hudesman*, 115, Wn.2d 657, 667-668 (1990).
[24] *Id. (emphasis added)*



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The Bylaws for Foxhall, at Article V, Section 3, define a quorum as follows:

> *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****.*

It cannot be stressed enough that the Bylaws note the "presence of a quorum." Furthermore, the quorum provision does not reference physical preference for the purposes of determining whether a quorum is present. However, it does provide that the owners of multiple lots are counted multiple times as being present for the purposes of a quorum.

While the rules of contract construction can assist in certain circumstances, it is clear that in the *context* of the corporate governance of a homeowners association, unless otherwise specified, someone is "present" for all purposes through a proxy. As such, the Board of Foxhall's after-the-fact invalidation of the November 19, 2015 Bylaw was improper.

ii. Statutory Guidance.

Additionally, the statute which defines when a quorum is present for the purposes of a meeting of a homeowners' association provides that "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**



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**by proxy** at the beginning of the meeting."[25] This language is further mirrored in RCW 64.38.025(5) where the statute states that "[t]he owners by a majority vote of the voting power in the association present, in person or by proxy, and entitled to vote at any meeting of the owners at which a quorum is present, may remove any member of the board of directors with or without cause." (emphasis added). As these statutes clearly imply, members are present by either physical presence or through their proxy.

So, within both the Bylaws for Foxhall and within the statutes providing guidance on how quorums are counted, quorums are always referred to as being "present." Although the statutes do provide that homeowners' associations can make their own rules for modifying bylaws, that does not mean that Foxhall can arbitrarily define "presence" to suppress proxy votes in the amendment of its bylaws.

Any attempt to use a dictionary definition of "present" that does not take into account how "presence" or "present" is used within corporate governance is intellectually dishonest and inconsistent with how Washington law interprets contract language.

Nonetheless, this is precisely what the Defendants are urging the Court to

[25] RCW 64.38.040 (emphasis added).



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do. Instead of defining present how it is used in the context of corporate governance, they are insisting that this term means mere physical presence. However, defining this term to mean "physical presence" is inconsistent with the use of this term within the bylaws itself, the statutory scheme governing Foxhall, and its use generally in corporate governance.

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

As the Defendants noted, RCW 64.38.035(3) sets for the requirement that a notice of a meeting must include "the general nature of any proposed amendment to the articles of incorporation, bylaws, …" However, their conclusion that the Notice for the November 19, 2015 Special Meeting failed to meet this standard is inexplicable.

The Notice specifically states the following:

> **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.[26]

Furthermore, the language of the actual bylaw amendment is as follows:

> *Article VI; POWERS AND DUTIES OF THE 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*

[26] Lewis Decl., Exhibit D.



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> *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.*[27]

RCW 64.38.035(3) does not require a specific statement of every single provision of any proposed amendment. It merely requires a statement of the "general nature" of the proposed amendment.

*C. The Plaintiffs and advocates for the November 19, 2015 Bylaw did not intimidate or mislead anyone.*

The Defendant's motion makes a claim that the Plaintiffs and advocates for the November 19, 2015 Bylaw mislead, coerced, and otherwise intimidated members into signing proxy ballots. This is simply not true.

As an example, the Defendant claims that Plaintiff Lowe told member Longnecker that Foxhall was unable to get insurance because businesses were allowed to use the trails.[28] The Defendant then goes on to state that this was a lie. However, the meeting minutes from the August 24, 2015 meeting contain the following statement from the insurance agent for Foxhall:

> There is no exclusion in the policy, but the company wants off the risk now if boarding operation and operations allow non-residents to use trails. They consider this to be a public use. They are willing to stay on the account until February [2016] [if] only resident homeowners and their own guests are allowed onto the trails. We set this up that

[27] Declaration of Denise Solveson, Exhibit A, p. 1-2.
[28] Defendants Motion For Summary Judgment, pg 15, ln. 22-24.



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> way and that is the only way Mutual of Enumclaw will stay on the account. They want a written statement stating you agree to the terms and want it ASAP.[29]

However, rather than comply with this request, the Association adopted a rule to define "guest" to include "[a]n Association member inviting as guests non-members who board horses in Foxhall to ride with the member on the trails."[30] As such, Ms. Lowe was amply justified in her concern for the insurance covering the Foxhall trails. This statement from the insurance agent also gives more than sufficient evidence to base a statement that non-members riding on the trails increased liability to membership.

The Defendant implies that using the proxies previously executed for the original Special Meeting date of October 27, 2015 for the rescheduled meeting was somehow improper and unethical. However, these were proxy forms executed to pass the very same rule that was ultimately passed at the November 19, 2015 rescheduled Special Meeting. The advocates for the new Bylaw went around and asked for confirmation that they could continue to use these proxies at the rescheduled meeting date as a courtesy to members of the association and an attempt to act as legally and ethically as

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[29] Decl. Eilts, Exhibit D, p. 2.
[30] Id.



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possible. Attached as Exhibit C to the Declaration of Rose Eilts are examples of the proxy forms which were collected.

While there clearly are disagreements over the facts surrounding the level of increased liability with non-members riding on the trails, the Plaintiffs and other advocates for the November 19, 2015 meeting neither coerced, intimidated, mislead, or otherwise acted unethically in the gathering of proxy votes. Their opinions were based on solid evidence that the current insurance company considered the use of Foxhall trails by non-resident commercial boarders to be a significant increase in liability.

**D. THE NOVEMBER 19, 2015 WAS CONDUCTED PROPERLY.**

It should be noted again and emphasized that the meeting minutes for the November 19, 2015 Special Meeting were read and adopted 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. The Plaintiffs stand by the adopted minutes as the true and correct record of this event.

Nonetheless, it should also be noted that the meeting was conducted to attempt to conform to the notice of the special meeting and the restrictions thereto under RCW 64.38.035(3). As the Defendant has argued that passing



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the Bylaw would have violated RCW 64.38.035(3) requiring the notice to specify the general purpose of the meeting, the amendments which were offered to the proposed Bylaw would have clearly and unambiguously violated that requirement under the Defendant's interpretation.

Regardless, there is no requirement for following any particular set of rules for the meeting, but the Parliamentarian Rose Eilts attempted to use a "stripped down version of Roberts Rules of Order."[31] As such, the meeting was noticed to pass the proposed Bylaw that limited the use of trails to members and non-commercial guests. The vote was taken on the proposed Bylaw and it passed by a wide margin. This is clearly recorded in the approved minutes of the November 19, 2015 Special Meeting.

## VI. CONCLUSION

The Foxhall Community Association validly called, noticed and passed the subject Bylaw at a November 19, 2015 Special Meeting of the Association. The Bylaw merely addresses the persons who are allowed to use Foxhall's trails and parks and was passed under the statutory authority of every homeowners association to regulate the use of common areas that it owns. This rule is not a new restrictive covenant limiting the use of the Foxhall members' lots. Members

[31] Decl. Eilts, p. 3.



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are still allowed to do everything on their lot that they were allowed to do prior to the adoption of the Bylaw. As such, it clearly would not require an amendment to the Protective Covenants.

Furthermore, the Defendant's position that the language in the Protective Covenants require that Foxhall allow non-resident commercial boarders onto the common areas is completely without merit. It strains every rule of construction to find that the term "for the benefit of, and use by, the residents of Foxhall" requires such a result and would ultimately lead to the absurd result that Foxhall would be unable to prohibit any use on its common areas.

Additionally, months after the vote on the Bylaw amendment was taken and after the minutes for the Special Meeting were approved, the Board came up with a new theory that proxy votes are not allowed to amend Bylaws. However, the Board has again strained contract interpretation theory to arrive at this result. The fact is that the Bylaws specifically allow the use of proxy votes. Furthermore, proxy votes are counted for as present for the purposes of a quorum. Had drafters of the Protective Covenants wished to restrict proxy votes from amending the Bylaws, they would have done so explicitly and unambiguously. The current Board of Foxhall is merely using this argument as a pretext to not enforce the new Bylaw.



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As such, I would urge this Court to deny the Defendant's Motion for Summary Judgment.

Respectfully submitted this 3 day of July, 2017.

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