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Division II
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NO. 51898-8

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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,

Appellants,

v.

FOXHALL COMMUNITY ASSOCIATION,

Respondent.

BRIEF OF RESPONDENT FOXHALL COMMUNITY ASSOCIATION

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I. INTRODUCTION

This Court should affirm the trial court's order dismissing this case with prejudice. This lawsuit involved a narrow issue: whether the amendment to the Bylaws purportedly adopted on November 15, 2015 (hereafter "Bylaws Amendment") was valid and enforceable. The trial court concluded that the Bylaws Amendment was void for four reasons, all of which would have to be rejected by this Court for the order entering summary judgment to be reversed. Those reasons are (1) that the restrictions the Bylaws Amendment sought to impose on the use of common horse trails conflicted with the Protective Covenants providing that the trails "shall be for the benefit of, and be used by, the residents in Foxhall"; (2) that the vote to adopt the Bylaws Amendment was carried by proxy votes despite the Bylaws' provision that they can be amended only "by a vote of a majority of the members of the corporation ***present*** at any meeting"; (3) that the notice of the meeting called for the Bylaws Amendment was defective under the Bylaws because the purpose stated was incorrect and misleading; and (4) that motions made to change the Bylaws Amendment during the meeting were improperly excluded from consideration by the meeting's "parliamentarian," Rose Eilts. The Court need only agree with one of these rulings in order to affirm the trial court's order dismissing this case.

II. COUNTER-STATEMENT OF ISSUES

1. Did the trial court properly rule that the provisions in the Bylaws purportedly adopted on November 19, 2015 that restrict the use of community equestrian trails to only residents or their accompanied guests conflict with the applicable Protective Covenants, which provide that the trails "shall be for the benefit of, and be used by, the residents in Foxhall?"

2. Did the trial court properly rule that the process used to adopt the Bylaws amendments in November 2015 violated the Bylaws because the motion to amend only passed if proxies were included and Article X of the Bylaws provides that they can only be amended "by a vote of a majority of the members of the corporation ***present*** at any meeting"?

3. Did the trial court properly rule that the process used to adopt the Bylaw amendments in November 2015 violated the Bylaws because the notice of the November 2015 meeting was defective as the purpose stated was incorrect and misleading?

4. Did the trial court properly rule that the process used to adopt the Bylaw amendments in November 2015 violated the Bylaws because there were motions made during the meeting that the "parliamentarian" refused to allow to be considered?

III. STATEMENT OF THE CASE

A. Factual Background

Defendant Foxhall Community Association (the "Association) is a Washington non-profit corporation and a homeowners association for a tract of land in rural Thurston County. Its Articles of Incorporation were filed in 1981. (CP 30-33.) The property was subdivided and sold as an equestrian friendly development with access to several miles of equestrian trails. (CP 58-59.) Protective Covenants were filed by the developer, Virgil Adams, in 1982. (CP 35-41.) Those Covenants set aside certain tracts of the development, which encompassed the equestrian trails at issue, "for the benefit of, and be used by, the residents in Foxhall." (CP 35.)

Les Whisler was one of the early residents of the community. (CP 58.) He bought two five acre parcels in the community and built a house, stables and a riding arena for his family's use. (CP 58-59.) Virgil Adams, the developer, and his son Dennis, approached Mr. Whisler to consider taking on boarders as that would make the development more desirable for equestrian families. (CP 59.) Mr. Whisler thereafter started to board horses for both residents and non-residents on his property. (*Id.*) The non-resident boarders routinely used the Foxhall equestrian trails during the period Mr. Whisler owned the property. (*Id.*) Mr. Whisler was

never advised by the developer that non-residents could not use the trails or that they had to be accompanied by a resident. (CP 59.) And, in 2001, the Board of the Association explicitly approved the use of the Foxhall trails and parks by the Whislers' commercial boarding business. (CP 98.)

Mr. Whisler thereafter sold his property with the boarding facility to Gary and Judy Johnston, and the Johnstons continued to operate the boarding facility, with the boarders using the Foxhall equestrian trails. (*Id.*; CP 63-64.) They were still doing so when the summary judgment motion in this case was filed. (CP 64.) Thus, non-resident boarders had been using the equestrian trails in the community since the inception of this community in the early 1980s.

B. The 2015 Bylaws Amendment.

In 2015, some residents of the community sought to change the Bylaws to prohibit non-resident boarders from using the equestrian trails. They called a Special Meeting of the membership for November 19, 2015. (CP 52.) The notice stated that the Objective was to "Amend the Bylaws to adopt a clarifying rule for current and future Boards of Directors." (*Id.*) The meeting did no such thing. (CP 27.) Below that provision was a statement that 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 the

business activities onto Foxhall Parks and Trails." (CP 52.) However, the actual amendment proposed and voted on went much further than this description; it prohibited non-resident customers from using the trails even if accompanied by a resident:

> Foxhall Parks and Trails are for the exclusive use of the 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 Trails, even when accompanied by a member.

(CP 387-388.)

Forty two (42) out of one hundred twenty two (122) member households were present at the meeting on November 19, 2015. (CP 354, 390-394.) Seventy three (73) households submitted proxy forms. Of those, only three forms are in the record, and they all have different language. (CP 108-110.) In fact, one of them does not even contain the language of the proposed Bylaws Amendment. (CP 110.)

The meeting was initially called to order by Board member Denise Solveson. (CP 387.) Member Robert Armstrong called a point of order and asked that the president preside over the meeting as he was in attendance. (CP 60.). Solverson stated that she was presiding over the meeting because she was the board director in charge of the trails, and she

designated non-board member Rose Eilts as "parliamentarian" to preside over the meeting. (CP 60-61.)

During the meeting, member David Fleming made a motion to amend the proposed Bylaws Amendment, which was seconded. (CP 61.) However, Rose Eilts told Mr. Fleming to sit down and would not allow discussion or a vote on the motion. (*Id.*)

Another motion was made by member Dan Olson to refer the matter to a committee for review prior to a vote by the members; this motion was seconded by member Armstrong. (*Id.*) Another member then moved to amend Olson's motion to add that a professional mediator preside over the committee. (*Id.*) Eilts allowed this motion to go to vote, and 24 households voted in favor. (CP 62.) Nevertheless, "parliamentarian" Eilts announced that the vote failed because it required two thirds to pass (*id.*), but there is no such two thirds requirement in the Bylaws. (*See* CP 43-50.)

There was then a vote on the proposed Bylaws Amendment itself. The vote failed by a count of those present, 18 to 5, but passed if it included the 73 proxies collected by the proponents. (CP 396.) One member, Theresa Lowe, testified that that there were members "who were physically present at the meeting [but] chose to let their proxy votes stand as opposed to voting 'in-attendance.'" (CP 355.) Lowe further testified

that "[i]t was made clear at the meeting that proxy votes would count so there was no reason for people in attendance with proxies . . . to withdraw their proxies" (*id.*), but she did not identify who "made [this] clear." It is also impossible to glean from the record how many members were present and yet decided to rely on their proxy votes.[1]

The Board later rejected the Bylaws Amendment as void in several respects. (CP 27-28.) Five Foxhall members, Theresa Lowe, Loren and Donna Bosshard, and Burleigh and Carolyn Cubert (collectively referenced hereafter as "Lowe") sued the Association on February 22, 2017. (CP 1-4.) Their complaint seeks the enforcement of the 2015 Bylaws Amendment through claims for declaratory and injunctive relief. (CP 3-4.)

Both sides filed summary judgment motions. (CP 144-160, 163-

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[1] Lowe suggested in a declaration that there were nineteen such members, but this number was reached merely by "[c]omparing the meeting sign-in sheet with the official vote tally." (CP 355.) All this comparison establishes is that there were nineteen members present who did not submit an "in person" vote; it does ***not*** establish that they all submitted proxy votes, particularly where the proxy forms are not in the record.

182.) The trial court granted the Association's motion, denied Lowe's, and dismissed the case with prejudice. (CP 428-430.) Lowe now appeals.

IV. ARGUMENT

A. Standard of Review

This court reviews motions for summary judgment de novo. *Kave v. McIntosh Ridge Primary Rd. Ass'n*, 198 Wn. App. 812, 819, 394 P.3d 446 (2017) (citing *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014)). The court views the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Kave*, 198 Wn. App. at 819 (citing *Lakey v. Puget Sound Energy, Inc*., 176 Wn.2d 909, 922, 296 P.3d 860 (2013)). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Kave*, 198 Wn. App. at 819.

B. There Were No Genuine Disputes of Material Fact

As a preliminary matter, the Court should reject Lowe's assertion in their "Summary of Argument" that "there are material disputed facts regarding" the issues in this case (App. Br. at 14), because they fail to identify any such factual disparities that make a difference to the outcome of the issues at hand. Rather, Lowe's arguments concern the interpretation of the Protective Covenants, the Bylaws, and related statutes. The Court's

review, therefore, need only be based on the questions of law presented, not any material questions of fact.

C. The Trial Court Properly Ruled That the Bylaws Amendment Imposed New Restrictions on the Use of Common Property that Conflicted with the Protective Covenants Governing the Development.

Washington law does not permit a majority of homeowners in a residential development to force a new restriction on a minority's use of the property if the restriction is unrelated to or inconsistent with any existing covenant. *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 255, 327 P.3d 614 (2014). Here, the Protective Covenants governing Foxhall provide that the equestrian trails on Foxhall's common areas "shall be ***for the benefit of***, and be used by, the residents in Foxhall." (CP 35 (emphasis added).) Multiple residents in Foxhall have "benefited" over the years from allowing boarders of horses on their properties to use the trails as part of the boarding arrangement. The question presented by this case, therefore, was whether the 2015 Bylaws Amendment, which purported to prohibit this use, was a "new restriction on a minority of unsuspecting [Foxhall] homeowners unrelated to any existing covenant." *Wilkinson*, 180 Wn.2d at 255. If it was, then the amendment fails for lack of a unanimous vote by the members. *Id.*

In *Wilkinson*, the Supreme Court invalidated a new covenant,

which had been adopted by a mere majority of members, that prohibited short term vacation rentals. *Id.* at 257. The topic of short-term rentals was not otherwise addressed in the original covenants; in fact, the general plan of development allowed homeowners to rent their homes without any durational limitation. *Id*. Consequently, homeowners who took title under these covenants were not on notice that short-term rentals might be prohibited without their consent. *Id.* In striking the new covenant, the Court recognized the distinction between a ***change*** to existing covenants versus creating ***new*** covenants "that are inconsistent with the general plan of development or have no relation to existing covenants." *Id.* at 256. The former action can be taken by a simple majority of members, but the latter requires unanimous approval to be valid. *Id*. at 258. According to the Court, "[t]his 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." *Id.* at 256 (quotations omitted).

Here, the trial court agreed with the Association that the Bylaws Amendment was analogous to the invalid covenant in *Wilkinson*. It sought to impose new restrictions on the use of the Association trails that directly impacted a minority of the members, and the new restrictions were inconsistent with the Protective Covenants' provision that the equestrian

trails "shall be ***for the benefit of***, and be used by, the residents in Foxhall." (CP 35). After all, "benefit" means to "be useful or profitable," Webster's Third Int'1 Dictionary, 204 (1986), and one benefit to residents is that their boarders can use the trails.

Lowe rejects this interpretation of the Covenant and, by extension, the applicability of *Wilkinson* to the Bylaws Amendment. Interpretation of a restrictive covenant presents a question of law. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006). Courts apply the rules of contract interpretation when analyzing such covenants. *Id*. The primary objective on contract interpretation is determining the drafter's intent. *Harvis v. Garwall, Inc*., 137 Wn.2d 683, 696, 974 P.2d 836 (1999). Language should be given its plain meaning. *Viking Bank v. Firgrove Commons 3, LLC,* 183 Wn. App. 706, 713, 334 P.3d 116 (2014). In addition, courts consider the contract language, the subject matter and objective of the contract, the circumstances surrounding the making of the contract, subsequent conduct of the parties, and the reasonableness of the interpretations the parties advocate. *Martinez v. Kitsap Pub. Servs*., 94 Wn. App. 935, 943, 974 P.2d 1261 (1999).

It is important that the Covenant states ***both*** that the trails are "for the benefit of" residents ***and*** "for the use of" residents. Each part of the document should be given meaning, *Wash. Prof'l Real Estate LLC v.*

Young, 190 Wn. App. 541, 551, 360 P.3d 59 (2015), which means that whatever "benefit" means, it must be different than "use." Any use that benefits residents is permitted.

The conduct of the parties subsequent to the adoption of the Protective Covenants also demonstrates that the phrase "for the benefit of' was intended to allow members' guests, whether paying or not, to use the Foxhall trails. Past resident and longtime Board member and President Les Whisler was approached by the founders of Foxhall to start taking on boarders in order to make the development more attractive to equestrian families.[2] (CP 59.) There is no evidence that either the developer or anyone else told the Whislers that their boarders could not use the trails. (CP 59.) In fact, in 2001, the Board of the Association explicitly approved the use of the Foxhall trails and parks by the Whislers' commercial boarding business. (CP 98.)

Lowe argues that the Court should disregard these years of conduct by the parties because it is undermined by statements by the son of Foxhall's founder, Dennis Adams, regarding the intent of the Covenant.

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[2] Indeed, the record contains a hearsay email stating that the founder also asked Mr. Whisler to have his boarders use the trails to keep the weeds down. (CP 143.)

(App. Br. at 20-21.) However, those statements are set forth in a letter "obtained" from Mr. Adams in 2001 and attached to a declaration of Rose C. Eilts dated July 12, 2017. (CP 349-50, 351.) As such, it is hearsay and cannot be considered by the Court. *Lynn v. Labor Ready Inc*., 136 Wn. App. 295, 308–09, 151 P.3d 201 (2006), *as amended* (2007). Lowe also argues that past allowance of a particular use does not mean that the use must always be allowed because RCW 64.38.020(6) authorizes the Association to "[r]egulate the use, maintenance, repair, and modification of common areas." (App. Br. at 21.) What Lowe neglects to mention is that this entire statute is prefaced by the phrase "[u]nless otherwise provided in the governing documents". In other words, yes, the association can regulate common area use, but not where that regulation is in conflict with the covenants.

Lowe also argues that the Covenant contains an implied exclusion for ***commercial*** "benefits." (App. Br. at 19-20.) She relies on a general statement in the Covenants that Foxhall lots "shall be used for residential use only."[3] But Lowe ignores the fact that the Covenants clearly

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[3] Lowe also relies on another provision that she concedes does not apply to the entire property at Foxhall. (App. Br. at 20 n.60.) Indeed, it does not even apply to all of the common areas at issue. (*See* CP 35.)

contemplate some commercial use within that residential context: "the Architectural Control Committee shall determine what trade, business, or use is undesirable or noxious." (CP 36, 37.) Obviously, if no business were allowed at all within the community, there would be no need for the provision about the Architectural Control Committee governing such businesses. In actual practice, too, commercial activities are far from prohibited at Foxhall. There have been horse boarding businesses, an in-home child care center, a medical office, a mechanic's shop, and general equipment operations that have operated within Foxhall over the years. (*See* CP 184.) And, most important of all is the fact that it was the developer and founder of Foxhall who ***asked*** Mr. Whisler to board horses on his property and allowed those boarders to use the trails. Had "for the benefit of" in the covenants excluded any commercial "benefits," the developer would not have encouraged this use.

Lowe also argues that the phrase "for the benefit of . . . the residents in Foxhall" is restricted to benefits for residents "as a whole" rather than as individuals. (App. Br. at 20.) This argument is presumably based on the rule that court will "place 'special emphasis on arriving at an interpretation that protects the homeowners' collective interests," but Lowe does not identify the collective interest that she believes to be with regard to the Covenant at issue. Indeed, there is no "collective interest"

regarding the common trails that makes any sense. Residents may not benefit from non-resident boarders' use of the trails, but they do not benefit from any other residents' use of the trails either. There is really no use that can truly be said to be "for the benefit of residents" "as a whole." Thus, by Lowe's logic, ***all*** use of the trails would have to be prohibited.

Finally, Lowe argues that it would be an "absurd result" to interpret "for the benefit of" to allow boarders to use the trails because it would open the community to having to allow motorcycles on the trails. (App. Br. at 21-22.) This argument also makes no sense; Foxhall was subdivided and sold as an equestrian friendly development with access to equestrian trails. (CP 58-59.) Both the history of the development and the meaning of the phrase "for the benefit of" is consistent with horse boarders using the trails. By contrast, there is no evidence that motorcycle use on the trails is consistent with the development plan at issue.

D. The Adoption of the November 2015 Bylaws Amendment Violated Bylaw Provisions Governing the Procedures for Bylaws Amendments.

The trial court found three procedural flaws with the way that the Bylaws Amendment was adopted, any one of which requires invalidation of the Amendment and dismissal of the case.

1. The Amendment Passed Only Because of Proxy Votes, But the Bylaws Provide that Only Those Present Can Vote.

The Court should affirm the trial court's conclusion that the proxy votes used to pass the November 2015 amendments to the Bylaws were void. Article X of the Bylaws states explicitly that they can only be amended "by a vote of a majority of the members of the corporation ***present*** at any meeting of the membership duly called for such purposes." (CP 50 (emphasis added).) Lowe maintains that "present" in this context means present in person or by proxy. The Court should reject this argument, which strips Article X of the Bylaws of its plain meaning and undermines the special treatment of bylaws amendments in the law.

Language should be given it plain meaning. *Viking Bank*, 183 Wn. App. at 713. The meaning of Art. X is plain. The Bylaws amendment clause is placed within its own Article, highlighting its importance. The dictionary or plain language meaning of "present" is "being in one place and not elsewhere," "being within reach, sight, or call or within contemplated limits," "being in view or at hand," or "being before, beside, with, or in the same place as someone or something." Webster's Third Int'1 Dictionary, 1793 (1986); *see Nationwide Mut. Ins. Co. v. Hayles, Inc*., 136 Wn. App. 531, 537, 150 P.3d 589 (2007) (the ordinary meaning of a word is considered to be the dictionary definition of a word.).

Nowhere is it defined as including being somewhere when one is not actually there. There would be a different result, of course, if the Bylaws amendment provision said, "present in person or by proxy." This would mean that the drafters intended that the usual meaning of "present" was to be altered to include those not actually present but having given a proxy to another. There would also be a different result if the word "present" in either the governing statutes of the governing documents defined present to mean "in person or by proxy.' Of course, there are no such definitions.

Instead, Lowe cites first to the general provision in the Foxhall's Bylaws that "A member may exercise his right to vote by proxy." (CP 400 (Article V, section 5.) This is a general provision and applies to voting generally. There are any number of voting decisions addressed in the Bylaws that do not require voting members to be "present" and are therefore covered by this general rule. But this fact has no bearing on a provision that specifically requires voting members to be "present." *See Spokane Sch. Dist. No. 81 v. Spokane Educ. Ass'n*, 182 Wn. App. 291, 310, 331 P.3d 60 (2014) (the specific prevails over the general). Neither does the Bylaws' definition of a "quorum," which does not refer to "presence" or proxies at all. Instead of focusing on these irrelevant portions of the Bylaws, the Court should focus on giving meaning to Article X, which clearly governs and goes out of its way to require that

voting members be ***present*** to amend the Bylaws. Lowe's argument that this language should be ignored in favor of more general provisions violates the rule that the Court should give effect and meaning to each part of the document. *Wash. Prof'l Real Estate LLC*, 190 Wn. App. at 551.

It is true that the Homeowners' Association Act ("HAA") explicitly allows for proxy votes to be counted for purposes of reaching a "quorum." RCW 64.38.040. But the presence of a quorum does not prohibit an Association from imposing additional safeguards onto particular types of votes. Indeed, the HAA explicitly allows this by delegating the task of setting the "method of amending bylaws" to the Bylaws themselves. Specifically, RCW 64.38.030(5) states that "[u]nless provided for in the governing documents, the ***bylaws*** of the association shall provide for . . . [t]he method of amending the bylaws." (Emphasis added.) The legislature did not consider this approach to be "absurd," and neither should the Court.

Moreover, the fact that the HAA (and the Condominium Act) defines a quorum by counting those present in person or by proxy ultimately supports the Association's position, not Lowe's. It illustrates that even the legislature thought it necessary to specifically include the phrase "by proxy" in those definitions because proxies would not otherwise have been included in the meaning of the word "present."

Similarly, if Article X of the Bylaws here had wanted to include votes by proxy in its methods for amending the Bylaws, it would have said so as well. It did not.

Lowe's citation to a parenthetical paragraph in *Wool Growers Serv. Corp. v. Ragan*, 18 Wn.2d 655, 140 P.2d 512 (1943), a 1943 decision about a fraudulent conspiracy in the context of a mortgage foreclosure (raised for the first time on appeal) is similarly unpersuasive. In *Wool Growers*, the Court was not asked to define the word "present." Rather, the quote Lowe offers from the opinion is merely part of a lengthy statement of facts.

At the end of the day, Lowe is essentially arguing that because proxy votes are ***explicitly*** allowed in other contexts, they must also be ***implicitly*** allowed for Bylaws amendments in order to prevent an "absurd result." This argument rests on an apparent belief that votes for amend an association's bylaws should be just as easy as any other vote. But there are legitimate reasons to require more rigorous procedures for Bylaws amendments than other votes. Changing an association's governing documents is different in quality, class and importance from more mundane votes such as whether to fund gravel for the trails or who will serve as the next treasurer. This distinction is further supported by the HAA, which explicitly treats bylaws amendments differently from other

votes. RCW 64.38.030(5). Lowe touts the benefits of convenience provided by proxy voting, but it is critical that voters hear the reasons for and against such important decisions and have a meaningful opportunity to participate in any final language adopted. Proxy voting, by contrast, can distort the decisionmaking process by putting a tremendous amount of power into the hands of a few. The distortion is illustrated here by the manner in which the few tried to ram through this change through intimidation, providing misleading information, and disallowing a vote on a motion to amend the proposal. (*See* CP 65-72, 60-62.). The safeguards built into the Bylaws to prevent this situation are not "absurd."

2. The Notice for the November 2105 Meeting was Defective.

The Court should also affirm the trial court's ruling that the notice for the meeting to address the Bylaws was defective because it was misleading. The notice stated that the objective of the meeting was to "Amend the Bylaws to adopt a clarifying rule for current and future Boards of Directors." (CP 52.) Lowe concedes on appeal that this stated objective "is not entirely clear." (App. Br. at 30.) In reality, this description had nothing to do with the amendment being proposed, which was for restricting the use of the equestrian trails. (CP 27.) The notice did go on to provide a general description of the proposed bylaw, but one that

omitted a key provision: "Members' business invitees, customers, or patrons, whether in trade or in barter, are prohibited from using Foxhall Trails, even when accompanied by a member." (CP 387-88.) This absolute prohibition, which attempted to negate an over 40 year history of allowing such activity, was not mentioned anywhere in the notice. When viewed in conjunction with the completely erroneous objective stated, this omission made the notice extremely misleading and therefore defective.

This is particularly so as the proponents of this amendment were actively asking members to submit proxy votes instead of actually attendance at the meeting. (*See* CP 70.) The members who acquiesced to this strategy did not have the proper notice of what the meeting was about to make an informed decision about whether to delegate their vote to another person. The declarations submitted by the Association discuss other misconduct and disinformation spread by the proponents in their efforts to gain proxy votes as well. (CP 65-72.) In such a setting, compliance with the notice requirements of RCW 64.38.035(3) and the Bylaws is more critical than ever.

3. The November 19, 2015 Meeting Was Improperly Conducted.

The November 19, 2015 meeting was conducted by a non-board member, Rose Eilts, who had been appointed "parliamentarian." During

the meeting, a motion was made and seconded to amend the proposed bylaw change. A draft of the proposed amendment was circulated. Yet the so called parliamentarian, Ms. Eilts, did not allow a vote on the amendment and went back to discussing the original motion. (CP 61.) A motion was then made to refer the matter to a committee presided over by a professional mediator for review prior to a vote by the members. (*Id.*) The vote on this motion was 24 voted in favor out of no more than 42 members present, but "parliamentarian" Eilts nevertheless stated that the vote failed because it did not get the two thirds required to pass. There is no such two thirds requirement in the Bylaws. There was then a vote on the proposed Bylaw amendment, which passed only on the strength of proxy votes.

The complete failure to follow the Bylaws in the conduct of the meeting, the failure to allow a vote on a motion that was properly presented and seconded, and the refusal to recognize another vote on a motion to amend that did pass rendered the eventual vote on the original amendment flawed and voidable.

Lowe relies heavily on the November 19, 2015 meeting minutes to refute the claims about the conduct of the meeting. However, even a review of those minutes alone demonstrates that Ms. Eilts refused to allow a properly voiced and seconded amendment to the proposed Bylaws

Amendment. Paragraph 4 of the minutes states that a motion was made and seconded to amend the proposed bylaw. (CP 387.) Paragraph 5 makes it clear that no vote was allowed on the motion: "After a vigorous discussion a Ruling was made by Parliamentarian to continue the meeting by discussing the original, proposed Bylaw as written in the agenda . . ." (*Id.*) Thus, despite the motion being made and seconded, Ms. Eilts 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 properly made and seconded. Nor is Lowe's argument that the meeting minutes were adopted at the next member meeting persuasive or Relevant. Adoption of meeting minutes has nothing to do with whether the process used in the meeting was legitimate; it just means that the minutes reflected what happened. And here they reflected that Ms. Eilts would not even allow a vote on a motion that was made and seconded.

The importance of this refusal cannot be understated. It illustrates why an Association would want to limit decisions on Bylaws amendments only by members who are present. The Parliamentarian was in a box of her own making: she could not allow a vote on an amendment because many of the proxies themselves were specific to the bylaw proposed and would be invalid if the amendment passed. (See CP 108-109.) It was the

exact proposal, or nothing. Of course, the overwhelming majority of those actually there, who heard the discussion regarding proposed amendments, voted against the proposal, 18 to 5.

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

V. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's grant of summary judgment to the Association on any or all of the four bases presented.

RESPECTFULLY SUBMITTED this 5th day of October, 2018.

BETTS, PATTERSON & MINES, P.S.

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CERTIFICATE OF SERVICE

I, Karen Langridge, 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., One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on October 5, 2018, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Brief of Respondent Foxhall Community Association; and**
- **Certificate of Service.**

Counsel for Defendant Foxhall Community Association Robert D. Wilson-Hoss Hoss & Wilson-Hoss, LLP 236 W Birch St Shelton, WA 98584	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight ☑ ECF E-service
Counsel for Plaintiffs Cubert, Pro Se Carolyn R. Cubert Burleigh M. Cubert 4711 Foxtrail Dr NE Olympia, WA 98516	☑ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight ☐ E-mail

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☐ Facsimile
☐ Overnight
☑ ECF E-service

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

DATED this 5th day of October, 2018.

/s Karen Langridge
Karen Langridge

BETTS, PATTERSON & MINES, P.S.

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