

The Honorable John C. Skinder

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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,

NO. 17-2-00812-34
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Plaintiffs,

vs.

FOXHALL COMMUNITY ASSOCIATION,
a nonprofit corporation,

Defendant.

I. RELIEF REQUESTED

Defendant moves the Court for an order dismissing this case with prejudice.¹ This lawsuit involves a narrow issue: were the bylaws purportedly adopted on November 15, 2015

¹ This Motion was originally scheduled to be heard on July 14, 2017 before Judge Murphy. However, Judge Murphy recused herself as she knew one of the witnesses in the case. This Motion will therefore rely on the same declarations originally filed in the case, but a courtesy copy of those declarations will be provided with the Judge's copy of the Motions.

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SUMMARY JUDGMENT

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

1 valid and enforceable. The Board of the defendant homeowners' association rejected those
2 bylaws because :1) the restrictions the bylaws sought to impose on the use of the horse trails in
3 the community conflict with the Protective Covenants applicable to the defendant Association
4 which provide that the trails "shall be for the benefit of, and be used by, the residents in
5 Foxhall," and; 2) the process used to adopt them violated the Bylaws in at least three respects:
6 a) the motion to amend only passed if proxies were included and Article X of the bylaws
7 provides that Bylaws can be amended "by a vote of a majority of the members of the
8 corporation **present** at any meeting," b) the notice of the meeting during which the Bylaws
9 were purportedly adopted was defective because the purpose stated was incorrect and
10 misleading; and c) there were motions made during the meeting which the "parliamentarian,"
11 Rose Eilts,² refused to allow to be considered.

12 II. FACTS

13 Defendant Foxhall Community Association is a Washington Non-profit Corporation
14 and a Homeowners Association for a tract of land located in rural Thurston County. Its
15 Articles of Incorporation were filed in 1981. (Exhibit A to Lewis Decl. dated June 12, 2017)
16 The property was subdivided and sold as an equestrian friendly development with access to
17 several miles of equestrian trails. (Whisler Decl. ¶ 3 Dated April 28, 2017) Protective
18 Covenants were filed by the developer, Virgil Adams, in 1982. (Exhibit B to the Lewis Decl.)

19
20 Les Whisler, one of the early residents of the community, was a friend of the developer.
21 (Whisler Decl., ¶ 1). Mr. Whisler bought two five acre parcels in the community and built a
22 house, stables and a riding arena for his family's use. (Whisler Decl., ¶ 3). Virgil Adams, the
23 developer, and his son Dennis, approached Mr. Whisler to consider taking on boarders as that
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² Ms. Eilts has a separate lawsuit against the same defendant regrading amendments to the Bylaws that were properly adopted. See Cause No. 17-2-02345-34.

1 would make the development more desirable for equestrian families. (Whisler Decl. ¶ 5). Mr.
2 Whisler therefore started to board horses for both residents and non-residents. *Id.* The non-
3 resident boarders routinely used the Foxhall equestrian trails during the period Mr. Whisler
4 owned the property. *Id.* ¶ He sold the property with the boarding facility to the Mr. and Mrs.
5 Johnston in 2001. (Whisler Decl., ¶ 8). The Johnston family continues to operate the boarding
6 facility to this day, with the boarders using the Foxhall equestrian trails. (Johnston Decl. Dated
7 June 6, 2017, ¶ 4). Thus, since the inception of this community in the early 1980s, non-
8 resident boarders have used the equestrian trails in the community. (Whisler and Johnston
9 Decls.)
10

11 Mr. Whisler was never advised by either Virgil Adams or his son that non-residents
12 could not use the trails or that they had to be accompanied by a resident. (Whisler Decl., ¶ 5)
13 Nor were there any signs during this period prohibiting guests or boarders from using the trails
14 or otherwise requiring them to be accompanied by a resident. (Whisler Decl., ¶ 6).
15

16 **A. The 2015 Bylaw Amendment.**

17 In 2015, some residents of the community sought to change the By-laws to prohibit
18 non-residents from using the equestrian trails. They called a Special Meeting for November 19,
19 2015.³ (Exhibit D to the Lewis Decl.) The notice stated that the Objective was to “Amend the
20 Bylaws to adopt a clarifying rule for current and future Boards of Directors.” The meeting did
21 no such thing. (Lewis Decl. ¶ 7) Below that provision was a statement that the “proposed
22 bylaw clarifies the governing documents that Foxhall Parks and Trails are for the exclusive use
23 of residents, families and friends. Foxhall Association members businesses may not extend the
24

25 ³ There was an earlier meeting on October 27th, but the notification time of the meeting was questioned so a new meeting was scheduled. (See Notice of Meeting, Exhibit D to the Lewis Decl.)

1 business activities onto Foxhall Parks and Trails.” The actual amendment proposed and
2 purportedly passed went much further than the amendment description set forth in the notice;
3 the purported amendment adopted even prohibited non-resident customers from using the trails
4 even if accompanied by a resident:

5
6 Foxhall Parks and Trails are for the exclusive use of the residents,
7 families and friends. Nonresident visitors must be accompanied by
8 a resident when using Foxhall Parks and Trails. Foxhall Association
9 members’ businesses may not extend their business activities onto
10 Foxhall Parks and Trails. Members’ business invitees, customers, or
11 patrons, whether in trade or in barter, are prohibited from using Foxhall
12 Trails, even when accompanied by a member.

13 (Lewis Decl., Exhibit E).

14 At the beginning of the meeting, member Robert Armstrong called a point of order and
15 asked that the president preside over the meeting as he was in attendance. (Armstrong Decl.
16 dated June 5, 2017, ¶ 3). Board member Solverson stated that she was presiding over the
17 meeting because she was the board director in charge of the trails, and she designated non-
18 board member Rose Eilts as “parliamentarian” to preside over the meeting. (*Id.* at ¶ 4.)

19 During the meeting, member David Fleming made a motion to amend that was
20 seconded. Mr. Fleming then distributed a copy of his proposed amendment to those present.
21 (*Id.* at ¶ 5) However, Rose Eilts asked what was going on, and Mr. Fleming explained that
22 there should then be a discussion and a vote on the motion to amend. (*Id.*) Nevertheless, Ms.
23 Eilts told him to sit down and would not allow a vote on the amendment. (*Id.*)

24 A motion was then made by member Dan Olson to refer the matter to a committee for
25 review prior to a vote by the members which was seconded by member Armstrong. (*Id.* at 6.)
Another member then made a motion to amend Olson’s motion to add that a professional
mediator preside over the committee. Member Armstrong testified in favor of the committee
so, among other things, that all viewpoints from all impacted could be heard. (*Id.* at 6)..A vote

1 was taken on the amendment 24 voted in favor. (*Id.*) Nevertheless, “parliamentarian” Eilts
2 stated that the vote failed to get the required two thirds to pass, even though two thirds did vote
3 in favor of it (*Id.*), and there is no such two thirds requirement in the Bylaws. There was then a
4 vote on the proposed Bylaw amendment. The vote failed by a count of those present, 18 to 5,
5 but passed if it included the 73 proxies collected by the proponents. (Lewis Decl. ¶ 9 and
6 Exhibit E.).

7 The Board has rejected this purported amendment for several reasons. First and
8 foremost, it believes that such a limitation conflicts with the provision in the Restrictive
9 Covenants that the trails “shall be for **the benefit of**, and be used by, the residents of Foxhall.”
10 (emphasis added) Second, the Board believes that the process used for adopting the Bylaws
11 was flawed because it passed only if proxies were counted and the bylaws provide that only
12 those present can vote, the notice of the meeting was defective, and motions were made during
13 the meeting which were not allowed to be voted upon. Third, the language that was chosen for
14 the proposed Bylaws amendment interprets the covenant language to provide what the
15 proponents wanted, but it is both unclear and arbitrary. (Lewis Decl. ¶ 10).

16 III. ISSUES PRESENTED

17 1. Do the restrictions in the bylaws purportedly adopted on November 19, 2015 that
18 restrict the use of the community equestrian trails to only residents or their accompanied guests
19 conflict with the applicable Protective Covenants which provide that the trails “shall be for the
20 **benefit of**, and be used by, the residents in Foxhall?”

21 2. Did the process used to adopt the Bylaw amendments in November 2015 violate the
22 Bylaws because: a) the motion to amend only passed if proxies were included and Article X of
23 the bylaws provides that Bylaws can be amended “by a vote of a majority of the members of
24 the corporation **present** at any meeting,” b) the notice of the meeting during which the Bylaws
25 were purportedly adopted was defective as the purpose stated was incorrect and misleading

1 thus conflicting with the requirements of the Bylaws; c) there were motions made during the
2 meeting which the “parliamentarian,” Rose Eilts, refused to allow to be considered, and d) the
3 language of the purported amendment is both unclear and arbitrary.
4

5 **IV. EVIDENCE RELIED UPON**

6 This Motion is based on the Declarations of Board President Bert Lewis dated June 12,
7 2017 with attachments, Les Whisler dated April 28, 2017, Robert Armstrong dated June 5,
8 2017, Judy and Gary Johnston dated June 6, 2017, Dennis Longnecker dated May 7 2017,
9 Andrew Kolibas dated May 23, 2017, Cynthia Coble dated May 6, 2017 and Jessica Bradley
10 dated May 25, 2017, and on the records and files herein.

11 **V. AUTHORITY**

12 **A. Summary Judgment Standard**

13 Summary judgment is proper if papers on file show there is no genuine issue of material
14 fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A defendant
15 can move for summary judgment by setting out its version of the facts and allege that there is
16 no genuine issue as to the facts as set out. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*,
17 110 Wn.2d 912, 916, 757 P.2d 507 (1988). Alternatively, a party moving for summary
18 judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks
19 sufficient evidence to support its case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216,
20 225 n. 1, 770 P.2d 182 (1989).

21 In other words, the moving party bears the burden of producing evidence showing the
22 absence of an issue of material fact or challenging the sufficiency of the plaintiff’s evidence as
23 to a material issue. *Hash*, 110 Wn.2d at 915; *Young*, 112 Wn.2d at 225-26. If the moving party
24 carries its burden, the burden shifts to the nonmoving party to show that there is a genuine issue
25 remaining for trial. *Id.* A moving party is entitled to summary judgment when the non-moving

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1 party fails to make a sufficient showing on an essential element of its case in which it has the
2 burden of proof. *Young*, 112 Wn.2d at 216.

3 **B. The November 15, 2015 Purported Bylaw Amendment Imposes New**
4 **Restrictions on the Use of Common Property that Conflicts with the Protective Covenants**
5 **Governing the Development.**

6 The purported bylaw amendment that prohibits business members' guests from using
7 the Foxhall trails imposes new restrictions on the use of common property that conflicts with
8 the Restrictive Covenants governing the community and are therefore unenforceable.
9 *Wilkinson v. Chiwawa*, 180 Wn.2d 241 (2014) In *Wilkinson*, homeowners in a residential
10 community sought to invalidate a covenant adopted by a majority of the members of the
11 association prohibiting short term vacation rentals. The Association argued that the restrictions
12 should be upheld because they were consistent with the covenants that prohibited commercial
13 use of the property. The State Supreme Court disagreed and affirmed a summary judgment
14 striking the new restrictive covenant. The Court held that the new restriction was not consistent
15 with the original covenants, and was therefore unenforceable; the court explained that new
16 restrictions cannot be imposed on the use of the property by simply majority vote. *Id.* at 255.

17
18 Here, like *Wilkinson*, the purported bylaw amendment seeks to impose restrictions on
19 the use of the Association trails that are inconsistent with the covenants governing the
20 community. The Protective Covenants for the Defendant Association provide that the tracts on
21 which the equestrian trails are located "shall be **for the benefit of**, and be used by, the residents
22 in Foxhall." (Exh. B to Lewis Decl., p. 1, emphasis added). The covenants also include
23 contradictory provisions about business use by Foxhall residents. The Restrictive covenants
24 state on the one hand that lots "shall be used for residential purposes only," while at the same
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1 time stating that the “Architectural Control Committee shall determine what trade or business,
2 or use is undesirable or noxious.” *Id. at II A and II F*). Obviously, if no businesses were
3 allowed at all within the community, there would be no need for the provision about the
4 Architectural Control Committee governing such businesses. In any event, there is no record of
5 any attempt to prevent the Foxhall members from boarding horses for non-residents. Indeed, at
6 least some members have boarded horses for non-residents since the 1980s. (*See Whisler and*
7 *Johnston declarations*).⁴

9 Interpretation of a restrictive covenant presents a question of law. *Wimberly v.*
10 *Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006). Courts apply the rules of contract
11 interpretation when analyzing such covenants. *Id.* The primary objective on contract
12 interpretation is determining the drafter’s intent. *Harvis v. Garwall, Inc.*, 137 Wn.2d 683, 696,
13 974 P.2d 836 (1999). In doing so, courts consider the contract language, the subject matter and
14 objective of the contract, the circumstances surrounding the making of the contract, subsequent
15 conduct of the parties, and the reasonableness of the interpretations the parties advocate.
16 *Martinez v. Kitsap Pub. Servs.*, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999).

18 When interpreting any contract, language should be given its plain meaning. *Viking*
19 *Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d 116 (2014). Here, the
20 language in the Restrictive Covenant that the trails are “for the benefit of” the owners indicates
21 by its plain language, that the owners can use the trails for their benefit. One of those benefits
22 is that their boarders can use the trails. Further, each part of the document should be given
23 meaning. *Wash. Prof'l Real Estate LLC v. Young*, 190 Wn. App. 541, 551, 360 P.3d 59 (2015).

25 _____
⁴ The purported bylaw amendment in dispute did not seek to prohibit the boarding of horses, but instead tried to prohibit those boarders from using any of the trails.

1 Reading the clause “for the benefit of” to indicate that it only conveys the right to use the trails
2 to the owners themselves would make this language redundant, as the covenants already
3 provide that the trails are “for the use by” the residents.

4 The conduct of the parties subsequent to the adoption of the Protective Covenants also
5 demonstrates that the phrase “for the benefit of” was intended to allow members’ guests,
6 whether paying or not, to use the Foxhall trails. Past resident and longtime Board member and
7 President Les Whisler was approached by the founders of Foxhall to start taking on boarders in
8 order to make the development more attractive to equestrian families. (Whisler Decl. ¶5).
9 Indeed, Mr. Whisler started taking non-resident boarders within his first five years of living at
10 Foxhall, and neither the developer nor anyone else told him that the Boarders could not use the
11 trails. (*Id.*). Had the language in the Restrictive Covenants that the trails were “for the benefit
12 of, and be used by, the residents of Foxhall” meant that member guests could not use the trails,
13 the Whislens would not have been allowed to do so during the duration of his family living in
14 the community. In fact, the Johnston family, who bought the Whisler property with the
15 boarding facility, have continued to board horses for non-residents since they purchased the
16 property in 2003. (Johnston Decl., ¶ 2).

17 The Plaintiffs will argue that the amendment is consistent with the covenants because
18 “for the benefit of” the residents means that only members and their families and friends can
19 use the trails. However, that interpretation is erroneous not only for all the reasons stated
20 above, but also because it makes no sense. The covenants, for example, do not mention
21 friends; the covenant states that the trails are for residents. Under plaintiff’s interpretation,
22 friends of the residents could also be excluded. How can trails be “for the benefit of” residents
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1 if even family friends can be excluded by a simple vote. Further, resident is not defined. What
2 about a step child who is only visiting; is that step child a ‘resident’ and therefore allowed to
3 use the trails? How about grown children? Or a child that is away at college? The same
4 problem attaches to the purported amendment itself. It tries to exclude business invitees, but is
5 a friend who talks business a business invitee and therefore not allowed to use the trails? Can
6 any friend use the trails? How about friends of the children, friends of non-resident children, or
7 friends of friends? Similarly, the amendment says “visitors must be accompanied by
8 residents.” Is a visitor the same thing as a friend? Can a non-resident family member be the
9 one who accompanies a “friend?” The list of problems with interpreting “for the benefit of” in
10 the covenants so narrowly is endless.

11
12 **C. The Adoption of the November 2015 Bylaw Amendment Violated Bylaw**
13 **Provisions Governing Amendments**
14

15 1. The Bylaws Provide that Only Those Present Can Vote

16 Article X of the Bylaws states explicitly that they can be amended “by a vote of a
17 majority of the members of the corporation **present** at any meeting of the membership duly
18 called for such purposes.” (Lewis Decl., Exh. C, page 8 emphasis added).

19 Plaintiffs maintain that even though Article X of the Bylaws states that only those
20 present can vote on a Bylaw amendment, “present” means present in person or by proxy. They
21 base this argument on Article 5 of the Foxhall Bylaws which allows members to vote in person
22 or by proxy, and on the Homeowners’ Association Act which states that a quorum includes
23 those who are present in person or by proxy and that to remove a Board member the votes can
24 be in person or by proxy. However, a review of the Homeowners’ Association Act, RCW
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1 64.38; the Nonprofit Corporation Act, RCW 24.03; and the governing documents of the
2 association, in particular the Bylaws, demonstrates why members must actually be present to
3 vote on Bylaw amendments.

4 **i. Homeowners' Association Act.**

5 While the Homeowners' Association Act states that a quorum includes those who are
6 present in person or by proxy, and that to remove a Board member the votes can be in person or
7 by proxy, the specific language in that Act governing how an HOA can amend its bylaws;
8 RCW 64.38.030 states that "[u]nless provided for in the governing documents, the bylaws of
9 the association shall provide for:... (5) The method of amending the bylaws;" Thus, some of
10 the provisions of this Act are mandatory (establishing a quorum and removing a board
11 member), others are subject to the governing documents, such as how Bylaws are to be
12 amended. Under this Act, an HOA can determine how it amends its bylaws. There is no
13 specific requirement set forth in the statute, as there is for removing a Board member or for
14 establishing a quorum, that proxy votes be counted. Instead one looks to the Bylaws
15 themselves to see how they are to be amended. If the governing documents specify how the
16 Bylaws are to be amended, then the governing documents control. This statute makes it clear
17 that the method of amending the Bylaws is to be found in the Bylaws (unless it is somewhere
18 else in the governing documents). This is important because it separates out Bylaws
19 amendment voting from other voting and applies particular rules to Bylaws amendment voting
20 as opposed to any other sort of voting in general.
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1 **ii. Nonprofit Corporation Act**

2 The Nonprofit Corporation Act also provides that the Board can decide how to amend
3 its own Bylaws: RCW 24.03.070 provides that "[t]he power to alter, amend or repeal the
4 bylaws or adopt new bylaws shall be vested in the board of directors unless otherwise provided
5 in the articles of incorporation or the bylaws." This is contrasted with how Articles of
6 Corporation are amended: RCW 24.03.165, 170 provides that these can be amended by "the
7 votes members present at such meeting or represented by proxy are entitled to cast." There is
8 no companion statute that says that voting on amendments to Bylaws must allow proxy voting.
9 Thus, under both the Homeowners' Association Act and the Nonprofit Corporation Act, the
10 Bylaws control how they are amended there are no statutory requirements, and specifically to
11 requirements to include proxies.
12

13 **iii. Foxhall's Bylaws**

14 Art. V, Sec. 5, which provides that "A member may exercise his right to vote by proxy,"
15 is a general provision and applies to voting generally. Thus, unless stated otherwise, a vote
16 may be in person or by proxy. However, Art. X specifically provides that only those present
17 can vote on Bylaw amendments: "The Bylaws may be amended at any time by a vote of a
18 majority of the members of the corporation present at any meeting of the membership duly
19 called for such purposes."
20

21 **iv. Rules of Contract Construction Mandate That Only Those Actually**
22 **Present at a Meeting to Vote on Bylaw Amendments Can Vote**

23 Since it is clear under the controlling statutes that Foxhall's Bylaws control how they
24 are to be amended, the question is what does Article X mean when it says those "present" can
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1 vote on amendments? Basic principles of contract construction tell us that "present" means just
2 that, they must be there to vote:

- 3 • the specific prevails over the general. *Spokane Sch. Dist. No. 81 v. Spokane Educ.*
4 *Ass'n*, 182 Wn. App. 291, 310, 331 P.3d 60 (2014). Here, the Bylaws amendment
5 provision is more specific; it addresses one specific kind of voting as opposed to voting
6 in general;
- 7
8 • each part of a document is given meaning. *Wash. Prof'l Real Estate LLC v. Young*, 190
9 Wn. App. 541, 551, 360 P.3d 59 (2015). If members can vote in person or by proxy on
10 Bylaws amendments, then the provision in Art. X that that the majority vote of those
11 **present** can amend the Bylaws has no meaning and adds nothing to what is already
12 there.
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14 • Language should be given its plain meaning. *Viking Bank v. Firgrove Commons 3, LLC*,
15 183 Wn. App. 706, 713, 334 P.3d 116 (2014). The meaning of Art. X is plain. The
16 Bylaws amendment clause is placed within its own Article, highlighting its importance.
17 The dictionary or plain language meaning of "present" is, "in a particular place," "being
18 in view or at hand," "being, existing or occurring at this time or now," "being actually
19 here," "being with one or others or in the specified or understood place," "at the
20 particular place or event that is being referred to," or "being or existing in a specified
21 place." *See, e.g., Nationwide Mut. Ins. Co. v. Hayles, Inc.*, 136 Wn. App. 531, 537, 150
22 P.3d 589 (2007) (the ordinary meaning of a word is considered to be the dictionary
23 definition of a word.) Nowhere is it defined as including being somewhere when one is
24 not actually there. There would be a different result, of course, if the Bylaws
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1 amendment provision said, "present in person or by proxy." This would mean that the
2 drafters intended that the usual meaning of "present" was to be altered to include those
3 not actually present but having given a proxy to another. There would also be a
4 different result if the word "present" in either the governing statutes of the governing
5 documents defined present to mean "in person or by proxy." Of course there are no
6 such definitions.
7

8 **v. The Court Should Give Deference to the Board's Interpretation**
9 **of its Own Bylaws**

10 The Board maintains that Article X of the bylaws means exactly what it says, to vote on
11 the amendment requires that the member be present. (Lewis Decl. ¶ 5). The Court should
12 give deference to an organization's interpretation of its own governing documents unless it
13 is unreasonable or arbitrary. *Couie v. Local Union No. 1849 Bhd. of Carpenters and*
14 *Joiners of Am.*, 51 Wn.2d 108, 115, 316 P.2d 473 (1957). This is particularly so here in
15 light of the manner in which the few tried to ram through this change through intimidation,
16 providing misleading information, and disallowing a vote on a motion to amend the
17 proposal. (See section 2, *infra*). As the Board members well know, it is critical that voters
18 hear the reasons for and against such an important decision. To allow proxy votes puts a
19 tremendous amount of power into the hands of a few. This was particularly evident during
20 the November 19, 2015 vote when those present voted 18 to 5 against the amendment, yet it
21 passed if considering proxy votes because there were 73, and not one proxy vote that was
22 against.
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25 2. The Notice for the November 2105 Meeting was Defective.

1 RCW 64.38.035(3) sets forth the requirements of a notice to amend governing
2 documents:

3 The notice of any meeting shall state the time and place of the meeting
4 and the business to be placed on the agenda by the board of directors for
5 a vote by the owners, **including the general nature of any proposed**
6 **amendment to the articles of incorporation, bylaws, ” ” ” ” ”**
(emphasis added).

7 Here, the notice for the meeting to address the Bylaws was defective because it was
8 misleading. The notice stated that the objective of the meeting was to “Amend the Bylaws to
9 adopt a rule for current and future Boards of Directors.” The meeting had nothing to do with
10 such an amendment. (Lewis Decl., ¶¶ 7 & 8 and Exh. D). The only amendment considered
11 was to restrict the use of the equestrian trails. *Id.*

12 The notice did go on to provide a general description of the proposed bylaw, but one
13 that omitted a key provision. The Notice stated that the proposed bylaw clarifies the governing
14 documents that the parks and trails are for the exclusive use of residents, families and friends,
15 and that members’ businesses may not “extend their business activities onto Foxhall Parks and
16 Trails.” But this summary omitted the key restrictive language in the actual proposed
17 amendment that “Members’ business invitees, customers, or patrons, whether in trade or in
18 barter, are prohibited from using Foxhall Trails, even when accompanied by a member.” This
19 absolute prohibition, which attempted to negate an over 40 year history of allowing such
20 activity, was not mentioned anywhere in the notice. This omission, in conjunction with the
21 completely erroneous objective stated, made the notice extremely misleading and therefore
22 defective.
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1 This is particularly so as the purveyors of this amendment sought to pass it by proxies
2 and mislead members as to why they were seeking this restriction. For example, Plaintiff Lowe
3 told member Longnecker that Foxhall was unable to get insurance because businesses were
4 allowed to use the trails. (Longnecker Decl., ¶ 4). Foxhall has not had any trouble getting
5 liability insurance (Lewis Decl., ¶ 12). Another was warned of increased liability to
6 homeowners, even though there is no basis for such a claim. (Coble Decl., ¶ 3). Others felt
7 pressured into signing proxies. (Kolibas Decl., ¶ 4, Bradley Decl., Longnecker Decl., ¶ 5).
8 Plaintiff Lowe went so far as to tell one member that she had a proxy from a previous vote and
9 she could just use that again. (*Id at* ¶ 5). These actions demonstrate not just why the notice
10 was defective, but also why it was important for those voting to amend something as important
11 as the bylaws governing the community to actually attend the meeting and hear the arguments
12 for and against.
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15 c. The November 19, 2015 Meeting Was Improperly Conducted

16 The November 19, 2015 meeting was conducted by a non board member at the time,
17 Rose Eilts. She was appointed “parliamentarian” by those orchestrating the meeting. During
18 the meeting, a motion was made and seconded to amend the proposed bylaw. A draft of the
19 proposed amendment was circulated. Yet the so called parliamentarian, Ms. Eilts, did not
20 allow a vote on the amendment and went back to discussing the original motion. (Armstrong
21 Decl. ¶ 5) A motion was then made by member Dan Olson to refer the matter to a committee
22 for review prior to a vote by the members which was seconded by member Armstrong. *Id.* at 6.
23 Another member then made a motion to amend Olson’s motion to add that a professional
24 mediator preside over the committee. Member Armstrong testified in favor of the committee
25

1 so, among other things, that all viewpoints from all impacted could be heard. *Id. at 6.* A vote
2 was taken on the amendment 24 voted in favor. *Id.* Nevertheless, “parliamentarian” Eilts
3 stated that the vote failed to get the required two thirds to pass, even though two thirds did vote
4 in favor of it (*Id.*), and there is no such two thirds requirement in the Bylaws. There was then a
5 vote on the proposed Bylaw amendment. The vote failed by a count of those present, 18 to 5,
6 but passed when it included the 73 proxies collected by the proponents. (Lewis Decl. ¶ 9 and
7 Exhibit E.).
8


9 The complete failure to follow the bylaws in the conduct of the meeting, the failure to
10 allow a vote on a motion that were properly presented and seconded, and the refusal to
11 recognize another vote on a motion to amend that did pass rendered the eventual vote on the
12 original amendment flawed and voidable.
13

14 VI. CONCLUSION

15 For any or all of the reasons set forth above, the amendments purportedly adopted
16 during the November 19, 2015 meeting are unenforceable and Plaintiffs’ complaint should
17 therefore be dismissed with prejudice.
18

19 DATED this 16th day of March, 2018.

20 BETTS, PATTERSON & MINES, P.S.

21 By 
22 _____
23 Steven Goldstein, WSBA #11042
24 Shawna M. Lydon, WSBA #34238
25 Attorneys for Defendant