No. 1019831

SUPREME COURT
OF THE STATE OF WASHINGTON

DONALD COLEMAN and SUE WRIGHT, individuals, and THE HAWK HILL ASSOCIATION, a corporation.
APPELLANTS,
v.
DICK COOK, JOHN CRESS, MARIE EVANS, RAY GOFF, DAVE GULLO, RON HINES, JIM MURPHY, CASSIE SIEGAL, and SCOTT TOWSLEE, individuals, and THE VILLAGES OF GARRISON CREEK MASTER PROPERTY MANAGEMENT ASSOCIATION, a corporation.
RESPONDENTS.

INDIVIDUAL RESPONDENTS COOK, CRESS, EVANS, GOFF, GULLO, HINES, MURPHY, SIEGAL, AND TOWSLEE'S OPPOSITION TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Court Rules

I. INTRODUCTION

This appeal involves a planned community known as the Villages of Garrison Creek ("VGC") located in College Place, Walla Walla, Washington. VGC is comprised of multiple discrete "phases" or "villages" with 240 homes and approximately 400 residents. VGC is governed by the Master Property Management Association ("MPMA"), whose members are owners of VGC property. Petitioner Coleman resides within the Hawk Hill Association (also a Petitioner), which is a separate homeowners' association for VGC Phase 10, and is a gated residential community known as Hawk Hill.

Petitioners Coleman and Hawk Hill Association seek Supreme Court review of Division III of the Court of Appeals' unpublished May 12, 2023 Slip Opinion ("Decision") affirming summary judgment.[1] Specifically, Petitioners challenge Division

[1] Division III's unpublished Slip Opinion, as well as its April 13, 2023 Order Denying Motion for Reconsideration and Amending Opinion, are attached as appendices to the Petition for Review.

III's conclusion that amendments to VCG's Restated Declaration of Covenants, Conditions and Restrictions of the Villages of Garrison Creek ("CCRs") allowing certain discrete phases to exit VGC "are valid because they complied with the governing documents and the relevant statutes."[2] Slip Op. at 2. Notably, Petitioners repeatedly sought MPMA approval to allow the exit of Hawk Hill. Having been refused, these disgruntled Petitioners sued to invalidate the exit amendments that were approved by an overwhelming majority of the MPMA members.

Decision III's 33-page Decision meticulously addressed all issues presented in this appeal -- it is detailed, thorough and well-reasoned. But as an unpublished decision, it implicitly articulates no new rules of law, and the Decision may not be cited as binding precedent. GR 14.1, RCW 2.06.040. Rather, the

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Citations to Division III's Decision shall be to "Slip Op." followed by the page number.

[2] Division III reversed part of the trial court's summary judgment. Slip. Op. at 30-32. But this aspect of the Decision is not a subject of the Petition.

Decision is case-specific; it simply applied established law to the specific, unique CCRs and other governing documents, as well as the unique circumstances presented. This case-specific Decision does not warrant Supreme Court review. Petitioners failed to meet the standards set forth in RAP 13.4 and Petitioners' request for review should be denied.

II. IDENTITY OF RESPONDENTS

This Answer is submitted by Respondents Cook, Cress, Evans, Goff, Gullo, Hines, Murphy, Siegal, and Towslee ("Individual Respondents"), all of whom were, at one time or another, volunteer directors of the MPMA Board. Petitioners assert that each of these volunteers are individually liable for actions of the MPMA. Remarkably, Petitioners chose not to sue Douglas Botimer, who was one of the original developers of VGC, a CCR Declarant, on the MPMA Board from its inception, crafted the proposal to exit the discrete phases by CCR amendment, held veto power to stop the amendments and

ultimately voted in favor of the exit amendments, both as Board Director and as an MPMA member. CP 296-97, 728, 956-60.

The trial court summarily dismissed Petitioners' claims against the Individual Respondents (as well as the MPMA). CP 1825-29; VRP 59-60. However, Division III reversed this component of the summary judgment.

> It is apparent from the trial court's oral ruling, it decided only the question of whether the exit amendments are valid. Nothing in its ruling considered the question of whether the MPMA and the board members are liable for various allegations of mal feasance. Thus, we decline to rule on this issue.

Slip Op. at 31. Division III did nonetheless provide guidance regarding the level of proof that will be required from Petitioners if their claims are to survive a renewed motion for summary judgment on remand. *Id*. at 30-32. Petitioners do not challenge any aspect of Divisions III's decision in that regard.

Individual Respondents also join in the arguments the MPMA presents in its separately submitted Answer.

III. COUNTER STATEMENT OF FACTS

Division III presents a detailed statement of the facts on pages 2 through 11 of its Decision. But for a few specific, isolated statements (*see* Petition, Section II at 24), Petitioners do not seem to disagree with Division III's presentation of the facts. Accordingly, the Individual Respondents will not present detailed facts but will largely rely on Division III's recitation. An abridged statement is presented to facilitate evaluation of Petitioners' arguments.

A. The VGC Phases And The CCRs That Govern Them.

The VGC is a private planned community that was the vision of Doug Botimer and other developers. CP 1326. The VGC is comprised of eight discrete residential "phases" or "villages" with 240 homes and approximately 400 residents (Phases 1, 2, 5, 6, 7, 8, 10 and 14). The VGC community includes open spaces throughout the villages, providing parks and extensive walking trails as valuable amenities to the residential communities. CP 1326, 1332-33. Coleman resides in Hawk Hill

(Phase 10) and has formed a separate homeowners' association for the residents of Hawk Hill. CP 295

In addition to the private residential villages, VGC also included a nursing home (Phase 3), affordable housing units owned and operated by the Walla Walla Housing Authority (Phase 4), and undeveloped commercial property that is part of Phase 9 and owned by Myra Road Commercial, LLC. Though the VGC community was approved in 1996, Phase 14, planned for additional homes, is still owned by Botimer (through Phase Five Development, LLC), and remains undeveloped.

VGC is subject to the recorded Restated Declaration of Covenants, Conditions and Restrictions of the Villages of Garrison Creek, which created a framework for cohesive development, maintenance, and governance. CP 712. Consistent with the CCRs, VGC is managed by the MPMA, a volunteer homeowner's association. The purpose of the MPMA "is to own, develop, and maintain all common areas" within the VGC and "to administer, as necessary, the rules and regulations" that

pertain to the enforcement of the covenants, conditions, and restrictions that apply to the VGC and its residents. CP 712. The MPMA is also governed by Articles of Incorporation and Bylaws, which accord it broad powers in managing the affairs of the VGC. CP 725-26.

B. The Historical Practices Of The MPMA.

Though all the phases were subject to the CCRs, each phase was not necessarily subject to the same rules and regulations; some never participated in the MPMA. The CCRs expressly exempted Phase 3 (nursing home) from "any dues or assessments of operation of the Association for the maintenance of any areas used solely for the residents in the planned unit development, residential areas and commercial area, including park areas and greenbelts, etc." CP 742. Phase 3 also did not vote in the association. CP 1019.

The Housing Authority (Phase 4) made its own connections to water and sewer and was not transferred any

common areas. CP 522, 1132. Due to an early agreement, Phase 4 has never paid dues or assessments. CP 1132, 295.

Regarding commercial property, the CCRs expressly provide that the MPMA "shall have no control over the development of such land." CP 742. The CCRs also exempted the commercial property from dues and assessments other than contributions for maintenance of streets, water, sewer utilities, and walking paths. *Id.*

Botimer, who is a Declarant for the CCRs and has been on the MPMA Board from the beginning, confirmed that "[s]ince the inception of Association (MPMA), Phase III and Phase IV have been treated as if they are not part of the MPMA." CP1138. MPMA has never collected assessments from Phase 3 or Phase 4. CP 295. With regard the commercial property, assessments were originally collected only on parts of vacant commercial lands, with such assessments ceasing in 2012, when, notably, Petitioner Coleman was President of the MPMA Board. CP 295-296. The MPMA never collected assessment on other parts of

the vacant commercial lots of Myra Road Commercial as directed by the Declarants since the beginning of the MPMA in the late 1990s. CP 295-296.

C. The Exit Amendments.

Beginning in 2016, Petitioners sought approval for Hawk Hill (Phase 10) to exit the MPMA. CP 423, 872. Petitioners' request was never approved.

Botimer presented a plan to amend the CCRs and allow Phase 3, Phase 4, the Myra Commercial properties within Phase 9 and his own undeveloped Phase 14 property to exit from the MPMA. CP 956.

Following directions from Botimer, and with the assistance of legal counsel, the MPMA embarked to amend the CCRs to remove these discrete phases and to comport to historical practices. CP 207. Notice of the amendments was presented to the MPMA for consideration at the December 2017 annual meeting by providing ballots to each member that described each proposed exit. CP 224-26. At least 2/3 of the

MPMA members voted to approve each proposed exit amendment. 99 members attended the meeting and voted in person and 103 vote by proxy. CP 297, 524. With approval from its members, the MPMA Board proceeded to draft, approve, and record amendments to implement the MPMA memberships vote. CP 297-98.

Botimer voted in favor of the amendments, both as Board member and as an MPMA member. CP 296-97. Notably, Botimer, as an original Declarant to the CCRs held veto power over the proposal. The CCRs required the Declarant board members (Botimer) to vote in favor of any amendment. CP 744. Thus, had he any desire to stop the amendments, Botimer was fully empowered to do so.

This Petition challenges the exit amendments that were authorized by more than 2/3 of the VGC MPMA members.

IV. STANDARDS FOR REVIEW

Relevant to this Petition, RAP 13.4(b) provides that review will only be accepted if the decision of the Court of

Appeals conflicts with a decision of the Supreme Court or a published decision of the Court of Appeals, or if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Petitioners fail to meet their burden to demonstrate that review of Division III's unpublished decision warrants review.

V. ARGUMENT

A. Division III Correctly Concluded That The Exit Amendments Complied With Governing Documents And Relevant Statutes And Are Thus Valid.

Appropriately focusing on the language employed in VGC's CCRs and governing documents, Division III concluded that the "MPMA's governing documents permit phases to exit by amendment." (Slip Op. at 19; *see also* p. 20.) Central to the Court's analysis was ¶ 11 of the CCRs, which governs amendments, and confers broad authority, providing that "any owner may propose amendments to this Declaration to the Board of Directors of the Association" and amendments may be

approved by a 2/3 majority vote by the MPMA members. CP 744-45.

Though each case Petitioners cite also appropriately focused analysis upon the covenant language it reviewed, Petitioners nonetheless attempt to cherry pick select sentences from cited cases and apply them as bright line rules without considering distinguishing VGC CCR language and context.

Division III did not go rogue as Petitioners infer, nor did it "announce[] an unfettered power to change any covenant" by majority vote of association members. (Petition at 11.) To the contrary, Division III acknowledged and applied all the principles of law that Petitioners espouse, and it appropriately did so with consideration of the actual language of the VGC governing documents and the context presented by this case.

Petitioners do not like Division III's ultimate conclusions after it applied the relevant law. But they cannot credibly argue that Division III did not both acknowledge and follow the law. Certainly, the Petition presents no basis for Supreme Court

review of the unpublished decision, which articulated no novel legal principles and may not be cited as binding precedent. GR 14.1; *see also* RCW 2.06.040.

1. Division III's Decision does not conflict with *Wilkinson v. Chiwawa Community Ass'n.*

Petitioners' primary argument is that Division III's Decision conflicts with *Wilkinson v. Chiwawa Community Ass'n,* 180 Wn.2d 241, 327 P.3d 614 (2014). It does not.

In *Wilkinson*, subdivision homeowners voted by majority vote to amend their covenants to prohibit short-term home rentals. Prior to the amendment, the CCRs contained no prohibitions against renting any homes within the subdivision. The CCRs conferred owners the power "to **change** these protective covenants and covenants in whole or in part" by majority vote. *Id.* at 246 (emphasis added). Relevant to this appeal, *Wilkinson,* stated the following already established rules:

> When governing covenants authorize a majority of homeowners to ***create*** **new restrictions unrelated to existing ones**, majority rule prevails "provided that such power is exercised in a reasonable manner consistent with the

> general plan of development." However, when the general plan of development permits a majority **to *change* the covenants but not create new ones**, a simple majority cannot add new restrictive covenants that are inconsistent with the general plan of development or have no relation to existing covenants. This rule protects the reasonable, settled expectation of landowners by giving them the power to block "'new covenants which have no relation to existing ones'" and deprive them of their property rights. As the Court of Appeals observed, "'The law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land." (Italics in original, bolding added.)

Id. at 256 (citations omitted).

Applying the above rules, the *Wilkinson* Court ultimately concluded that the **newly imposed restriction** prohibiting short-term rentals was unrelated to the **existing restrictions**, which had no residential rental restrictions. Because the covenants only authorized owners to "change these protective covenants," and the adopted prohibition of short-term rentals was a wholly new, unrelated restriction, the Court, in that context, concluded that the Chiwawa Association could not impose the wholly new restriction by a simple majority vote. *Id.* at 255.

The circumstances presented here are vastly different from *Wilkinson*. Division III acknowledged and applied all the same rules enunciated in *Wilkinson*. It simply reached a different conclusion considering the significantly different circumstances and CCR language presented by this case.

To begin, the VGC CCR's do not limit the MPMA's authority to merely "change these protective covenants" as was the case in *Wilkinson*. The VGC CCRs provide that any homeowner may propose "an amendment" and that amendments may be approved by a 2/3 vote of the MPMA members. CP 744-45. There are no limitations on the type or nature of amendments that may be proposed and adopted by majority vote. The power to amend is broader and necessarily all-encompassing, as an amendment may be employed not only to change existing covenants, but also to delete from or add to the covenants. Division III correctly interpreted the VGC's governing documents when it concluded they provide that "any covenant can be amended," and, the MPMA was thus allowed to amend

the CCRs (by majority vote as authorized in CCR ¶ 11) to allow phases to exit. Slip Op. at 20.

Even if the MPMA did not have such broad authority, the MPMA did not add any new restrictive covenants. Petitioners repeat arguments from below – they summarily assert that the MPMA's majority vote to *remove* phases from VGC was "the functional equivalent of a wholly new restriction" because, they allege, the exits purportedly increased financial burdens on MPMA members and deprived a minority of homeowners of their property rights. Petition at 13-14. Thus, according to Petitioners, this "new restriction" required unanimous owner consent under *Wilkinson*.

But Division III addressed the argument, correctly noting "[t]his argument is unsupported by citation to authority or logic." Slip Op. at 20. The exited phases either never paid dues or had not paid dues for decades. Recall that the VGC CCRs conferred the MPMA "no control over the development" of commercial property. CP 742. The CCRs expressly exempted the nursing

home (Phase 3) from any dues or assessments of operation. *Id.* The Housing Authority, from the time it purchased the Phase 4 property, never paid dues. Moreover, the Housing Authority maintained its own walkways and held no common areas. CP 1132. Botimer confirmed in his declaration that, since its inception, Phase 3 and Phase 4 have been treated as if they were not part of the MPMA. CP 1388. Even Coleman himself acknowledged when he was the MPMA Board President that Phase 3 (nursing home), Phase 4 (Housing Authority) and the commercial development in Phase 9 were not considered part of VCG. CP 301, 295.

Division III considered these undisputed facts in its analysis of the issues, but they are not addressed in the Petition. Petitioners' bare unquantified and unsubstantiated assertions that the exit amendments somehow increased the remaining members' financial burdens or deprived minority owners of property rights, are wholly rebutted by the actual historical practices of the MPMA in the preceding decades. Division III

was correct that Petitioners' argument "is unsupported by citation to authority or logic."[3] Slip. Op. at 20.

Petitioners next argue that Division III's decision nonetheless conflicts with *Wilkinson,* specifically the requirement that the power to amend must be "exercised in a reasonable manner consistent with the general plan of the development." *Wilkinson, supra,* 180 Wn. 2d at 256." Petitioners again make their argument with bare unsubstantiated and unquantified assertions. Petitioners summarily allege that the exits amendments caused a "gross and radical transformation of

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[3] Petitioners also cite *Meresse v. Stelma*, 100 Wn. App. 857, 866, 999 P.2d 1267 (2000), to argue "a majority of homeowners may not impose unexpected burden on a minority of homeowners without their assent." Petition at 17. *Meresse* does not apply here. *Meresse* involved a 6-lot residential subdivision and a proposed amendment to change the location of a road that would have resulted in additional construction costs and imposed scenic easement restrictions. The court held the amendment went beyond the original intent of the covenant and presented an unexpected expansion of the subdivision owners' obligations to share in road maintenance. 100 Wn. App. at 863, 866. There was no such expansion of obligations here. To the contrary, the exit amendments revised the CCRs to conform with historical practices that occurred over decades.

the 'general plan of development,'" and were "to the detriment, financially and aesthetically, of the remaining members." Petition at p. 19.

But Division III did not ignore this legal principle; it acknowledged and addressed it, applying the same unrebutted facts that defeated Petitioners' first argument to also defeat this argument. The history of the development of VGC and the original CCRs established that the planned development was never treated as a single subdivision, but was comprised of discrete individual phases, some of which were subject to different rules and regulations. The lack of MPMA control over the nursing home and commercial development, and the fact that dues were not collected from the exiting phases for decades led to the irrefutable conclusion that the exit amendments changed nothing when considered in the context of the well-established historical practices.

Moreover, as Division III reasoned:

> Here, the presence of a nursing home, affordable

> government housing, commercial properties, and undeveloped residential land owned by Mr. Botimer is not integral to the complaining residential phase [Hawk Hill]. Quite the opposite, the general scheme or plan of the complaining residential phase is its gated community surrounded by scenic paths, a waterway, and green area. These integral aspects have not changed as a result of the exit amendments.[4]

Slip Op. at 22.

Division III's decision is consistent with *Wilkinson.*

2. Division III correctly concluded that the amendment procedure employed by the MPMA complied with the VGC governing documents and applicable Washington law.

Division III presented a painstakingly detailed analysis of each of Petitioners' individual arguments presented below regarding amendment procedure. Division III analyzed the specific language in CCR ¶ 11, which authorizes and sets forth the procedure for amendments, and interpreted the provision in the context of historical amendments revising and decreasing the

[4] The text quoted from page 22 of Division III's original opinion is modified to comport to the Order Denying Motion for Reconsideration and Amending Opinion at page 2.

formalities of the amendment process to determine intent, and, further, considered other relevant CCR provisions and the provisions of other governing documents. (*See* Slip Op. at 22-30.)

Petitioners essentially repeat arguments made below, without addressing Division III's specific analysis rejecting each argument.[5] Petitioners then parrot the general rule stated in *Ebel v. Fairwood Park II Homeowners' Ass'n*: "In order for an amendment to be valid, it must be adopted according to procedures set up in the covenants." 136 Wn. App. 787, 792, 150 P.3d 1163 (2007). Attempting to elevate their repeated arguments to meet the standards for Supreme Court review, Petitioners declare that Division III's decision "conflicts with

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[5] For example, Petitioners summarily assert: "No member … received notice of those exit resolutions before their adoption by vote on December 10, 17." Petition at 22. They assert only the 99 MPMA members that attended the meeting received the "actual notice" required by the CCRs. *Id*. Their argument ignores that the MPMA members received notice via the ballots distributed to all the members in advance of the meeting, of which 103 were submitted by proxy. CP 524.

Ebel by allowing covenants to be amended in violation of prescribed procedure." Petition at 21.

Once again, Petitioners fail to present any viable argument that Division III's Decision conflicts with any decision of this Court or any other Court of Appeals decision such that Supreme Court review and guidance is warranted. Petitioners instead argue facts and urge that the same law applied by Division III be applied to a different conclusion. Petitioners completely fail, however, to present any compelling reason for this Court to exercise its discretion to grant discretionary review.

B. Division III's Application Of The CR 56 Summary Judgment Standards Does Not Warrant Discretionary Review.

Petitioners moved for summary judgment not once, but twice, advocating each time that whether the VGC MPMA properly adopted the exit amendments may be decided as a matter of law. *See* CP 143-171, CP 550-51, 619-627. In the context of cross motions for summary judgment, the trial court agreed that the issue could be summarily resolved, as a matter of

law, but to Petitioners' chagrin, concluded that that the amendments were properly adopted and valid. Slip. Op. at 13-17.

It is thus astonishing that Petitioners now claim that the trial court failed, as required by CR 56, to view and draw inferences from the facts in favor of Petitioners as the "nonmoving party." For example, Petitioners object that Division III concluded that the presence of a nursing home, affordable government housing, and commercial properties is not integral to the complaining residential phase. Petition at 28-29, *citing* Slip Op. at 22. Though Petitioners advocated below that the court should summarily conclude the opposite as a matter of law, they now complain: "Whatever might be 'integral,' involves a question of fact or an inference." Petition at 29. Petitioners' argument lacks merit at best and is disingenuous at worst.

After strenuously advocating that the case may be resolved on summary judgment, Petitioners now assert that the trial

court's (and Division III's) decision to resolve the summary judgment constitutes error that warrants Supreme Court review. Petitioners should not be permitted to now complain about summary resolution of the case simply because the trial court (and Division III) rejected their advocated conclusion. Regardless, the Supreme Court is not a forum to reargue summary judgment motions. Petitioners fail to provide a basis to grant review.

Moreover, Petitioners isolate a few of Division III's statements and attempt to create a dispute. But they fail to demonstrate that any or all the stated facts collectively, even if genuinely in dispute, are material such that they would lead to a different outcome on summary judgment.

For example, Petitioners challenge Division III's statement at page 4 of the Slip Opinion: "Doug Botimer made an oral agreement with the Housing Authority [Phase IV] that it was not required to pay any assessments or common expenses." Petitioners attempt to manufacture dispute by presenting

Coleman's hearsay testimony that Botimer said he did not make such an agreement with the Housing Authority, and also Respondent Cook's testimony that he was unaware of the specifics of the agreement. Petition at 27.

This opposing "evidence" does not create a genuine dispute, much less a material dispute. First and foremost, Petitioners argument ignores Botimer's actual testimony: "Since the inception of the Association (MPMA) Phase III [nursing home] and Phase IV [Housing Authority] have been treated as if they are not part of the MPMA." CP 1388. Moreover, Petitioners ignore the corroborating evidence from the Housing Authority, which evidence drew no objection from Petitioners. By correspondence dated August 29, 2016, the Housing Authority confirmed the agreement:

> When the Housing Authority purchased the land, Mr. Botimer and Walla Walla Valley Development, LLC, made clear that since the Housing Authority was purchasing land for low income housing, and since there were no designated common areas within the land they were purchasing to be used by other Villages

> residents, the Housing Authority would not pay nor ever be required to pay any dues and assessments for common area in other parts of the development. This agreement has been followed for the last fifteen years. It was an oral agreement that has been consummated by performance by the parties.

CP 1132.

Finally, and perhaps most importantly, Petitioners ignore context and the point of Division III's statement:

> The Walla Walla Housing Authority was one of the first purchasers as part of Phase 4, and the Housing Authority made its own connections to sewer and water. Doug Botimer made an oral agreement with the Housing Authority that it was not to pay any assessments or common expenses. This agreement has always been recognized by the MPMA, in that it has never required Phase 4 to pay assessments or common expenses.

Slip. Op. at 4. Whether there was an "oral agreement" with Botimer is immaterial, though Petitioners present only hearsay to challenge this fact. What is material is the undisputed fact that the Housing Authority never paid dues or assessments and has never been treated as part of the MPMA. CP 1132, 1388. The originating circumstance that led to the undisputed reality that

the Housing Authority was never part of the MPMA is immaterial.

The other "challenged" factual statements highlighted by Petitioners present more of the same. Petitioners fail to demonstrate a "genuine" dispute to any of the highlighted statements and likewise fail to demonstrate that, even if genuinely disputed, they were material to the ultimate summary judgment decision.

Petitioners once again fail to present a compelling reason for this Court to exercise its discretion to grant review.

C. Division III's Correctly Concluded That The MPMA Directors Properly Voted By Proxy.

Petitioners next argue that the MPMA Directors illegally voted to approve the final amendments that were recorded to implement the resolutions that were overwhelmingly approved by the MPMA members. Petitioners decry: "The Court of Appeals announced a general rule that proxy voting by directors of nonprofit corporation is allowed." Petition at 34. They claim this Court should review this purported new rule as an issue of

substantial public interest. *Id.* at 35. Division III announced no new law and certainly, the unpublished decision presented no rule that is binding precedent. GR 14.1.

As recognized by Division III, Petitioners argument again relies upon the Washington Nonprofit Handbook, but they fail to cite any specific Washington statutes that disallowed the use of proxies by nonprofit board directors at the time the MPMA Directors casted their votes. Slip Op. at 27. Petitioners likewise fail to cite any authority that the quoted statements from the Handbook (or any other statement) have any regulatory or binding effect.

Division III correctly noted that, at the time the MPMA Directors approved the amendments, neither chapter 64.28 RCW, governing homeowners' associations, nor the Washington Nonprofit Corporation Act, chapter 24.03A RCW, contained any provisions prohibiting HOA directors from using proxies to count toward a quorum or to vote. Slip Op. at 28. The Legislature has since changed these statutes to prohibit such proxy voting,

but the legislative changes were not in effect and do not apply to the MPMA's actions. Division III correctly reasoned:

> Considering the changes in Washington law to now prohibit use of director proxies, we find that Washington law did not prohibit MPMA directors from voting by proxy at the December 2017 meeting when it approved the exit amendments.

Slip Op. at 28-29.

Petitioners assert that the subsequent legislative changes did nothing other than "express and codify the universal principal barring proxy use by directors." Petition at 33. But Petitioners cite no legal authority to support this proposition, nor do they cite any expression of legislative intent in the new legislation to confirm Petitioners' conclusory statement. Petitioners effectively argue for retroactive application of the subsequent legislative changes. Of course, in the absence of meeting specific criteria which are not argued or even discussed by Petitioners, the general rule is that a statute amendment applies prospectively, not retroactively. *In re F.D. Processing, Inc.,* 119 Wn.2d 452, 460, 832 P.2d 1303 (1992).

Division III correctly concluded that there was no statutory bar to proxy voting by directors at the time the MPMA amendments were approved. The subsequent legislative enactments served to confirm this correct conclusion. Review of Division III's Decision in this regard is unwarranted.

D. Division III's Decision Did Not Violate RCW 58.17.215.

RCW 58.17.215 provides in relevant part:

> If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, **and the application for alteration would result in the violation of a covenant**, the application shall contain an agreement signed by all parties subject to the covenants... (Emphasis added.)

Unanimous consent is only required if the amendments violate the CCRs. Division III concluded that the CCRs allowed amendment of the CCRS to exit phases. As such, RCW 58.17.215 is not implicated.

Contrary to Petitioners' assertion, no issue of substantial public interest regarding interpretation of RCW 58.17.215 is presented and review should be denied.

III. CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

I certify that this memorandum contains 4,991 words, in compliance with RAP 18.17(b)

Dated this 26th day of June, 2023.

Respectfully submitted,

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Signed with permission granted June 26, 2023

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this day, I caused the foregoing document to be served on the following party at the following address via the method indicated:

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June 26, 2023 - 3:54 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,983-1
Appellate Court Case Title:	Donald Coleman, et al. v. Dick Cook, et al.
Superior Court Case Number:	18-2-00404-8

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