No. 101983-1

SUPREME COURT OF THE STATE OF WASHINGTON

DONALD COLEMAN and SUE WRIGHT, individuals, and THE HAWK HILL ASSOCIATION, a corporation.

Petitioners,

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.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Court Rules

Other Authority

IDENTITY OF PETITIONERS

COME NOW Donald Coleman, and The Hawk Hill Association (not Sue Wright), and submit their petition for review of the Court of Appeals decision in this case.

The petitioners seek review and reversal of that part of the decision in this case by the Court of Appeals that affirms the trial court's summary judgment dismissing the petitioners' claims concerning the validity of certain changes in covenants. The petitioners do not seek review of that part of the decision of the Court of Appeals that remanded their case to the trial court for further litigation of certain claims of damages by the petitioners.

This petition for review should be accepted pursuant to RAP 13.4(b)(1), (2), and (4).

CITATION TO COURT OF APPEALS DECISION

The petitioners seek review of the decision of the Court of Appeals filed February 21, 2023, as an unpublished opinion.

The petitioners' timely motion for reconsideration was denied by the Court of Appeals on April 13, 2023. Copies of the Court of Appeals opinion and order denying the motion for reconsideration and amending the Court's opinion are found in the appendix.

ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals failed to follow controlling principles governing changes in covenants, rendering an erroneous decision that conflicts with decisions of the Supreme Court and Court of Appeals.

2. Whether the Court of Appeals failed to follow controlling principles governing application of CR 56,

rendering an erroneous decision that conflicts with decisions of the Supreme Court and Court of Appeals.

3. Whether the Court of Appeals failed to follow the established rule barring proxy voting by corporate directors, rendering an erroneous decision that involves an issue of substantial public interest that should be resolved by the Supreme Court.

4. Whether the Court of Appeals failed to follow the statute governing alteration of subdivisions, RCW 58.17.215, rendering an erroneous decision that involves an issue of substantial public interest that should be resolved by the Supreme Court.

STATEMENT OF THE CASE

This case arises from the defendant-respondents' failure and refusal to enforce certain running covenants (CCRs) within the planned unit development known as the Villages of Garrison Creek (VGC). By not enforcing certain covenants, the

defendants reduced collection of dues and assessments owed by certain property owners within the planned unit development, and thereby damaged the plaintiffs (petitioners) and others by increasing the financial burden they must carry to maintain the common areas of VGC.

After months of fruitless attempts to persuade the Master Property Management Association (MPMA) directors to follow the bylaws and CCRs concerning assessments to the nursing home (Phase III) and the Walla Walla Housing Authority (Phase IV), the petitioner Donald Coleman retained legal counsel and expressed his complaints to Cassie Siegal, then president of the MPMA, by letter of June 23, 2016. (CP 34-35) The MPMA directors continued in their failure to comply with the requirements of the CCRs. Thus, the instant litigation was commenced.

In an effort to avoid or defeat the plaintiffs' (petitioners') claims, the defendants (respondents) attempted to place the properties in question beyond reach with respect to covenant

enforcement. This effort took the form of radical changes to one governing document, the Restated Declaration of Covenants, Conditions, and Restrictions of The Villages of Garrison Creek (CCRs), that deleted the legal descriptions of the properties in question. The defendants attempted to shield themselves from the plaintiffs' complaint by removing the properties in question (the "de-annexed," or "exited" properties) from the coverage of the CCRs, and thereby terminating the VGC Master Property Management Association (MPMA) memberships of owners of the deleted properties.

By this litigation, the petitioners seek damages and restoration of the VGC as it was conceived, approved, established, and marketed to homeowners. The petitioners seek reversal of trial court decisions dismissing all their claims on the MPMA's motion for summary judgment. Also, the petitioners seek reversal of two orders denying their motions for partial summary judgment.

ARGUMENT

I. The Court of Appeals failed to follow controlling principles governing changes in covenants, rendering an erroneous decision that conflicts with decisions of the Supreme Court and Court of Appeals.

A. The Court of Appeals erroneously concluded that entire components (phases) of the VGC planned unit development could be removed therefrom by purported amendments to the CCRs based on a two-thirds majority vote.

The Court of Appeals decision announced an unfettered power to change any covenant by a vote of VGC members.

> Any covenant can be amended. Paragraph 11 [of the CCRs] provides the procedures for doing so. (Slip Opinion 20)
> Nevertheless, the covenants do not prohibit amendments that create a new covenant. (Slip Opinion 20)

These conclusions are contrary to dispositive authority and the MPMA governing documents.

The clear error of the Court of Appeals decision allowing termination of covenants and changes in the composition of the VGC is exposed by the holding and rationale of *Wilkinson v. Chiwawa Community Ass'n*, 180 Wn.2d 241, 327 P.3d 614

(2014). The Court of Appeals decision disregards and starkly conflicts with the principles found in *Wilkinson* that control the instant case.

(1) The Court of Appeals decision disregards limits on the creation of new covenants by majority vote.

As required by *Wilkinson*, 180 Wn.2d at 255, no homeowners' association may change covenants without unanimous consent of the homeowners where, as here, the change was not related to existing covenants, and those covenants did not permit a majority to create new restrictions:

> A majority of Chiwawa homeowners cannot force a new restriction on a minority of unsuspecting Chiwawa homeowners unrelated to any existing covenant.

This rule cannot be squared with the Court of Appeals decision here that allows creation of a new covenant unless the existing covenants "prohibit amendments that create a new covenant." (Slip Opinion 20) Under *Wilkinson*, *supra*, covenants must expressly allow changes to create a new covenant. The mere

absence of an express prohibition against creation of new covenants does not legally suffice to allow their creation.

With respect to the power to change existing covenants, the governing documents in *Wilkinson*, 180 Wn.2d at 256 provided:

> The Chiwawa general plan of development merely authorized a majority of owners "to change those protective restrictions and covenants in whole or in part."

In the instant case, the CCRs are more restrictive than those found in *Wilkinson*, *supra*. A wholesale change is not allowed. Rather, owners are permitted only to amend the existing declaration (CP 207). As in *Wilkinson*, *supra*, nothing allows the MPMA to create new covenants or restrictions.

By approving a change in covenants to allow the exit of substantial components (phases) of the VGC planned unit development, the Court of Appeals allowed a minority of homeowners to be deprived of their property rights. The total termination of all covenants burdening Phases III, IV, Myra

Road Commercial LLC, and Phase V Development LLC was a radical and gross change that was unrelated to any existing covenant. This change was the functional equivalent of a wholly new restriction, and essentially resulted in an entirely new set of CCRs.

As described by the petitioner Donald Coleman:

> The purported amendments to the CCRs recorded in September of 2018 cancelled the membership in the MPMA of Phase III, Phase IV, Myra Road Commercial LLC, and Phase V Development LLC -- violating the provisions in the governing documents providing that membership in the MPMA, once obtained, may not be terminated. Thus, Phase III, Phase IV, Myra Road Commercial LLC, and Phase V Development LLC have been absolved of any future obligation to contribute financial support to the MPMA as required by the CCRs. As a result, I (and all remaining members of the MPMA) will sustain economic damages caused by the removal of approximately 40% of the membership of the MPMA and consequent loss of income those former members would have generated. (CP 1372)

Thus, the requirement of *Wilkinson*, 180 Wn.2d at 255, that no new restriction unrelated to any existing covenant may be

imposed on a minority of unconsenting homeowners was disregarded by the Court of Appeals decision in this case.

That the change in the CCRs allowing removal of properties from the planned unit development and termination of membership in the MPMA was a radical departure from existing covenants is shown by a review of these provisions of the governing documents:

> The purposes for which this corporation is formed are as follows: (a) To manage the affairs of The Villages of Garrison Creek ("The Villages"), which *consists of approximately 95 acres of land which has or will be developed in phases, all of which property is made subject to [the CCRs], together with any amendments thereto* [emphasis supplied]. (Articles of Incorporation, Article IV(a); CP 725.)
>
> Membership in the Association, once obtained, will be terminated only by selling or disposing of an ownership interest covered under the Declaration (Articles of Incorporation, Article V; CP 726.)
>
> Each lot Owner or Contract Purchaser, as defined in the Declaration, shall automatically become a Member of the Master Property Management Association. (Bylaws, Article II.A.; CP 712.)
>
> General Plan: The Owner does hereby establish a general plan for the improvement and development

of The Villages, as legally described on Exhibit "A," attached hereto and incorporated herein by reference, and do hereby *establish covenants, conditions, reservations, and restrictions upon which and subject to which all lots and portions thereof as shown on the subdivision shall be improved, sold, conveyed or used* [emphasis supplied]. (CCRs 1; CP 198.)

Property Management Association: ... The benefits of membership in the Association are covenants running with the land, and membership in the Association will be terminated only by selling the ownership interest in the lot or unit which created membership rights. (CCRs 5; CP 199.)

Board of Directors: ... These restrictive covenants, the bylaws, and the rules and regulations of the Association shall be binding upon all owners and occupants and all persons claiming any interest in any residential property within the planned unit development. *The Board shall have the power and duty to enforce provisions of this Declaration, the articles of incorporation, the bylaws, and the rules and regulations of the Association as they may be lawfully amended from time to time for the benefit of the homeowners* [emphasis supplied]. (CCRs 5(c); CP 200-201.)

Nursing Home: ... It is recognized that the land within Phase 3 shall be responsible for and contribute to the expenses and maintenance of any common property, including streets, water and sewer utilities, and walking paths. (CCRs 7(b); CP 204-205.)

> *Commercial Property* [Myra Road Commercial, LLC]: ... It is recognized that any commercial land shall be responsible for and contribute to the expenses of maintenance of any common property, including streets, water and sewer utilities, and walking paths. (CCRs 7(c); CP 205.)

No one aware of these provisions could suspect that they could be rendered null by a majority vote to allow exit of certain phases. Indeed, the text of all of these provisions remained unchanged after the so-called exit amendments were purportedly adopted.

The holding and rationale of *Wilkinson*, *supra*, is buttressed by other decisions with which the Court of Appeals decision here conflicts. As stated in *Meresse v. Stelma,* 100 Wn. App. 857, 866, 999 P.2d 1267 (2000), a majority vote of homeowners may not impose unexpected burdens on a minority of homeowners without their assent. Yet, the defendants below did exactly that. By allowing exit of substantial components of the VGC planned unit development, the remaining homeowners were unreasonably and unexpectedly burdened.

Any assertion that the exits imposed no new burdens on the remaining homeowners should be rejected. In *Fawn Lake Maintenance Commission v. Abers*, 149 Wn. App. 318, 202 P.3d 1019 (2009), a homeowning couple attempted to halve their obligation to pay dues by creating one lot from two. This maneuver was correctly seen as increasing the dues obligation of other members:

> Because the dues covenants apply to the entire subdivision, modifying the covenants in a way that decreases the Aberses' dues would increase the burden on every other owner.

Plainly, and as noted by Donald Coleman, the removal of approximately 40% of the membership of the VGC planned unit development damages remaining members. (CP 1372)

> **(2) Assuming, *arguendo*, that new covenants could be created by majority vote, the removal of entire components of the VGC planned unit development disregards other requirements for changing CCRs.**

Assuming that exits of substantial components of the VGC planned unit development without the unanimous consent of the

remaining owners is permitted, the change to the covenants fails the alternative test of *Wilkinson*, 180 Wn.2d at 256:

> When the 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."

Here, the exit of Phase III, Phase IV, Myra Road Commercial LLC, and Phase V Planned Development LLC, as shown above, is a gross and radical transformation of the "general plan of development."

The change to the planned unit development presented by the exit amendments to the CCRs was unreasonable and inconsistent with the general plan of development. The change was unreasonable because it transformed the planned unit development as conceived, created, and marketed, all to the detriment, financially and aesthetically, of the remaining members. It was inconsistent with the general plan of development comprising 95 acres of land and 415 members, all of whom would contribute to the operations and maintenance of

the VGC. (CP 725) Thus, the Court of Appeals decision conflicts with either alternative test for validity of changes in covenants mandated by *Wilkinson*, 180 Wn.2d at 255, 256.

Moreover, there is no showing that the homeowners were benefitted in any way by the exit amendments. Deleting properties and members that were part of the VGC planned unit development is a change contrary to the CCRs, which require the directors to enforce (not amend) the CCRs "for the benefit of the homeowners." (CP 201).

B. The Court of Appeals erroneously concluded that the purported amendments to the CCRs allowing removal of entire components of the VGC planned unit development were adopted in accordance with lawful procedure.

Axiomatically, "courts do not owe deference to a homeowners' association's interpretation of its governing documents." *Bangerter v. Hat Island Cmty. Ass'n*, 199 Wn.2d 183, 193, 504 P.3d 813 (2022). Where, as here, the governing documents grant the MPMA board no discretion with respect to amending the CCRs, the limited deference to board decisions

allowed by *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997) has no place.

Here, the procedural requirements prescribed by the CCRs for their amendment are unequivocally constraining: "Any amendment which does not meet the specific criteria established herein shall be null and void." (CP 208) So is the law: "In order for an amendment to be valid, it must be adopted according to the procedures set up in the covenants...." *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 792, 150 P.3d 1163 (2007).

The Court of Appeals decision conflicts with *Ebel*, *supra*, by allowing covenants to be amended in violation of prescribed procedure. The amendments allowing the exit of Phase III, Phase IV, Myra Road Commercial LLC, and Phase V Development LLC were adopted contrary to the CCRs' requirement of actual notice to all members before a proposed amendment may be adopted. In concluding that the notice requirements for amending the CCRs were not violated, the Court of Appeals overlooked

crucial facts and misapprehended the CCRs' requirements for amendment.

The so-called exit resolutions were formulated on December 9, 2017, and presented only to the 99 members who attended the annual meeting on December 10, 2017, on that very day at that very meeting. No member (except certain recreant director members) received notice of those exit resolutions before their adoption by vote on December 10, 2017.

These facts show that this CCR amendment requirement was violated: "Actual notice must be given to each member before an amendment may be adopted" (CP 207). The amendment requirements may not be liberally interpreted: "Any amendment which does not meet the specific criteria established herein shall be null and void." (CP 208) Plainly, the exit resolutions as amendments to the CCRs are null and void because actual notice of them was not given to all members before their adoption on December 10, 2017.

The amendments allowing the exit of Phase III, Phase IV, Myra Road Commercial LLC, and Phase V Development LLC were formulated at a directors' meeting conducted in violation of the bylaws' requirement governing use of communications equipment. The Court of Appeals misapprehended the petitioners' position with respect to communications equipment. The petitioners do not contend that the MPMA bylaws require that telephone conference equipment be used by directors taking action at a meeting. Rather, the petitioners correctly showed that if communications equipment is used, the action taken must allow all persons participating in the meeting to hear each other at the same time. (CP 715)

As shown by the minutes of the directors' meeting of December 8, 2017, a telephone was used. The meeting remained open until December 9, 2017. Action was taken through the use of telephonic communications, but not with conference equipment. As confirmed by the deposition testimony of Richard

Cook, individual telephone calls, not a conference call, were used. (CP 1038)

The Court of Appeals misapprehended the governing documents and controlling statutory authority in overlooking the violation in the use of communications equipment by the directors at their meeting of December 8 and 9, 2017. The MPMA bylaws require that communications equipment may be used by directors at their meetings only if "all persons participating in the meeting can hear each other at the same time." (CP 188) RCW 24.03.120 specifies the same requirement. These congruent requirements control the use of communications equipment at board meetings. The defendant directors here violated them. Therefore, the exit resolutions were never properly approved by a lawful vote of the MPMA directors as required by the CCRs' amendment procedure. (CP 207)

II. The Court of Appeals failed to follow controlling principles governing application of CR 56, rendering an erroneous decision that conflicts with other decisions of the Supreme Court and Court of Appeals.

In its opinion, the Court of Appeals purported to describe the standard that must be met before summary judgment may be granted (Slip Opinion at 19):

> A trial court may grant summary judgment if the evidence, viewed in a light most favorable to the nonmoving party, establishes that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law.

The Court of Appeals cited *Wilkinson v. Chiwawa Community Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). Unlike the instant case, the parties in *Wilkinson* "largely agree[ ] on the material facts." *Wilkinson*, 180 Wn.2d at 249. Here, the parties do not agree on the material facts. Moreover, the Court of Appeals in the instant case failed to acknowledge and apply fundamental principles governing summary judgments.

Left out of the Court of Appeals one-sentence summary of CR 56 jurisprudence is a crucial requirement concerning inferences. Not only must the facts be viewed in a light most favorable to the nonmoving party. Also, a reviewing court must

view all "reasonable inferences from those facts in the light most favorable to the nonmoving party." *Fawn Lake Maintenance Commission v. Abers*, 149 Wn. App. 318, 323, 202 P.3d 1019 (2009). The Court of Appeals decision conflicts with *Fawn Lake*, *supra*, and the line of authority that it cites, *i.e.*, *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005) and *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Here, the Court of Appeals failed to recognize or follow the requirement that it view inferences in a light most favorable to the petitioners. More starkly, the Court of Appeals opinion shows that, in addition to misstating the governing standard of review for summary judgments, it failed to follow it with respect to facts actually of record.

The Court of Appeals opinion contains several factual statements that are material to its erroneous decision. These statements depart from authority governing the grant of summary judgment. In making these statements, the Court of

Appeals departed from the record entirely, or relied on disputed facts, or failed to draw inferences favorable to the petitioners:

1. On page 4 of the Slip Opinion the Court states:

> Doug Botimer made an oral agreement with the Housing Authority [Phase IV] that it was not required to pay any assessments or common expenses.

MPMA representative Richard Cook testified in his deposition pursuant to CR 30(b)(6) that he knew nothing about the nature of any agreement with Phase III, Phase IV, and Myra Road Commercial that purported to relieve them from paying dues and assessments. (CP 1022-1023) The plaintiff-petitioner Donald Coleman in his deposition testified that Doug Botimer, himself, said that he never made an agreement with the Walla Walla Housing Authority, relieving it of obligations imposed by the CCRs. (CP 1750) There is no basis in this summary judgment proceeding for the factual finding by the Court of Appeals to the contrary.

2. On page 9 of the Slip Opinion the Court states:

> The president also indicated that the exits were necessary to address a threatened lawsuit. Regarding the exit of Phase IX, the president explained that the action would provide clearer boundaries for VGC.

As stated by Donald Coleman, the "threatened lawsuit" was not a threat to the MPMA. Rather, the MPMA directors feared a lawsuit by Coleman or others for their own misbehavior. (CP 1371-1372) With respect to the question of "clearer boundaries," Phase IX was uninvolved. (The Court of Appeals attempts to correct this statement by amending its opinion.) Richard Cook's deposition testimony (CP 1012) exposes the "clearer boundaries" rationale as empty.

3. On page 22 of the Slip Opinion the Court states:

> Here, the presence of a nursing home, affordable government housing, and commercial properties is not integral to the complaining residential phase. Quite the opposite, the general scheme or plan of the complaining residential phase is its gated community surrounded to scenic paths, a

> waterway, and green areas. These integral aspects have not changed as a result of the exit amendments.

Whatever might be "integral," involves a question of fact or an inference. Moreover, allowing exiting phases to avoid paying their share for planned unit development maintenance as required by the governing documents destroys the financial integrity of the entire VGC development. There is no legal basis for the Court of Appeals' contrary factual finding.

4. On page 25 of the Slip Opinion the Court states:

> We conclude that the membership was adequately informed of the purpose of the exit amendments and was not required to approve the specific language eventually used.

Obviously, the Court has drawn an inference concerning adequate information that is adverse to the nonmoving parties here. As shown by the above remarks concerning a threatened lawsuit and clearer boundaries, the membership was misled, not informed.

5. On page 29 of the Slip Opinion the Court states:

> The members decided that the MPMA's proposal was for their benefit
>
> Nothing in the record specifically indicates why the membership voted on the amendments. To conclude that the vote of approval indicated that it was for the benefit of all homeowners is an improper inference that is unfavorable to the nonmoving party.

Essentially and contrary to CR 56, the Court of Appeals found facts and drew inferences unfavorable to the petitioners as exemplified by the foregoing excerpts from the opinion. Based on improper factual findings, the Court of Appeals drew erroneous conclusions and conflicted with established precedent.

III. The Court of Appeals failed to follow the established rule barring proxy voting by corporate directors, rendering an erroneous decision that involves an issue of substantial public interest that should be resolved by the Supreme Court.

The amendments allowing the exit of Phase III, Phase IV, Myra Road Commercial LLC, and Phase V Development LLC were formulated at a directors' meeting that was unlawful because some directors attended only by proxy. As stated in the Court of Appeals opinion, the appellants (petitioners) cited the 2018 edition of the Washington Nonprofit Handbook in support of their position that directors cannot appear by proxy. The appellants (petitioners) also cited the 2009 edition of the Washington Nonprofit Handbook in their reply brief, which states:

> Directors cannot appear by proxy or give their proxies to another director. Directors must be present to listen to the discussion, consider each resolution, and vote based on their judgment. (Washington Nonprofit Handbook, 2009 ed. at 28)

Plainly, proper governance of nonprofit corporations is a matter of great public interest. Yet, the Court of Appeals decision here completely disregards the import of the Secretary of State's analysis.

The MPMA is a homeowners' association in the form of a Washington nonprofit corporation. Thus, its directors are subject to RCW 64.38.024(1) which imports RCW 24.03.127. These statutes impose duties on directors, not their proxies. Those duties are nondelegable.

The prohibition of proxy use by directors receives other statutory support. Both RCW 24.03.085 and RCW 24.03.120 show proxies are not allowed to be used by directors. That RCW 24.03.085 specifically sets out elaborate rules for proxy voting by members of nonprofit corporations, but lacks any similar provision permitting proxy voting by directors, shows that directors may not vote by proxy. Similarly, RCW 24.03.120 bars proxy use by directors through its allowance of directors to attend their meetings electronically under strict limitations. If directors must meet strict limitations to attend meetings electronically, they may not participate through proxies. In concluding that proxies were not prohibited before

2021, the Court of Appeals misapprehends these statutory provisions.

The Court of Appeals conclusion that the 2018 and 2021 enactments explicitly barring proxies changed the law lacks authoritative support. Nothing has been shown that indicates the legislature did anything other than express and codify the universal principle barring proxy use by directors. The conclusion to the contrary is without legal authority. The conclusion to the contrary abrogates settled law recognizing the nondelegable duty of corporate directors.

The radical change in the law inferred by the Court of Appeals allowing proxy use by directors is contrary to logic and principles of statutory construction. An inference that the legislature intended to effect a change of any significance in the law is impermissible. *Schumacher v. Williams*, 107 Wn. App. 793, 801, 28 P.3d 793 (2001). Logic and legislative history more likely show that the statutory language barring proxy use

was intended to make the rule against proxy use by directors more explicit.

Disallowance of director proxies is a longstanding rule of general corporate law. *Greenberg v. Harrison*, 143 Conn. 519 (1956) citing 2 *Fletcher Corporations*, § 427 (Perm. Ed.); and 19 *C.J.S.* 96, § 750. That rule applied here shows that the defendants' purported amendments of the CCRs did "not meet the specific criteria established herein [and] shall be null and void." (CCRs, paragraph 11, *supra*) That recent statutes expressly prohibit use of proxies, does not show that use of proxies prior to the enactment of those recent statutes was allowed.

The Court of Appeals essentially changed the law of corporate governance concerning a director's nondelegable duties. This departure from established authority barring proxy voting was not limited to the instant case. The Court of Appeals announced a general rule that proxy voting by directors of nonprofit corporations is allowed. This new rule affects many

existing corporations as they have operated, at least prior to recent statutory changes explicitly barring proxy voting. This issue of public importance should be addressed and resolved by the Supreme Court.

IV. The Court of Appeals failed to follow the statute governing alteration of subdivisions, RCW 58.17.215, rendering an erroneous decision that involves an issue of substantial public interest that should be resolved by the Supreme Court.

The management of subdivisions involves issues of substantial public interest. Where, as here, the exit of certain phases from the VGC planned unit development resulted in violations of covenants imposed on the exiting properties and benefitting the remaining properties, all parties must consent. Here, they did not. The Court of Appeals decision erroneously allows a violation of a public statute. Necessarily, this involves an issue of substantial public interest that only the Supreme Court can resolve.

CONCLUSION

Based on the foregoing argument, review should be accepted in accordance with RAP 13.4(b)(1), (2), and (4).

Issues in conflict with other decisions by the Court of Appeals, and the Supreme Court, as well as matters of substantial public interest, should be resolved in the petitioners' favor. The trial court's summary judgment dismissing all of the petitioners' claims should be reversed. The trial court's denial of the plaintiffs' motions for partial summary judgment should be reversed.

This document contains 4,808 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 12th day of May, 2023.

Respectfully submitted,

Michael E. de Grasse,
WSBA No. 5593
Counsel for Petitioners

FILED
FEBRUARY 21, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

DONALD COLEMAN and SUE WRIGHT, individuals, and THE HAWK HILL ASSOCIATION, a corporation,	)	No. 38758-5-III
Appellants,	)	
v.	)	UNPUBLISHED OPINION
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.	)	

LAWRENCE-BERREY, J. — The Villages of Garrison Creek Master Property Management Association (MPMA) manages The Villages of Garrison Creek (VGC), a development comprised of residential and nonresidential "villages" or "phases." For several years, MPMA dealt with the conflicting interests between the residential and nonresidential phases. Eventually, the board submitted to the membership the question of

whether the covenants should be amended to allow various phases to exit VGC, that is, to no longer be part of VGC and its governing association. The membership overwhelmingly approved the exit amendments.

Two homeowners and the residential phase where they live brought this lawsuit against MPMA and its board members, primarily seeking to have the covenant amendments declared invalid. The trial court granted MPMA and its board members summary judgment and dismissed the lawsuit. We affirm in part.

We conclude (1) the exit amendments are valid because they complied with the governing documents and the relevant statutes, and (2) the trial court's summary judgment ruling did not consider plaintiffs' various claims for damages, so those claims are reinstated and remanded.

FACTS

VGC is a planned community made up of land located in College Place, Washington. VGC is known for its open spaces and extensive walking trails that follow a creek through well-maintained green spaces. VGC is comprised of different "villages" or "phases," with approximately 240 homes and 400 residents.

An overview of the phases is necessary to understand the dispute:

- Phases 1, 2, 5, 6, 7, 8, and 10 consist of residential properties;
- Phase 3 consists of a nursing home;
- Phase 4 consists of housing units owned and operated by Walla Walla Housing Authority;
- Phase 9 consists of residential lots owned by Pahlisch Homes, and undeveloped commercial property owned by Myra Road Commercial, LLC;
- Phase 10 is a gated residential community, more recently referred to as Hawk Hill Association; and
- Phase 14 consists of 14 acres of undeveloped residential lots, owned by Phase Five Development, LLC, which in turn is owned by Doug Botimer, one of the early developers of VGC.

VGC is managed by MPMA, a Washington nonprofit corporation. Lots within VGC are subject to the "Restated Declaration of Covenants, Conditions, and Restrictions of The Villages of Garrison Creek" (CCRs). Clerk's Papers (CP) at 734.

According to the CCRs, MPMA has no control over the operation or development of the land within Phase 3 or the commercial areas (such as the property owned by Myra Commercial, LLC). Also, Phase 3 and the commercial areas are required to contribute to the expenses and maintenance of any common property, including streets, water and

sewer utilities, and walking paths.[1] Phase 3 and the commercial areas are not responsible for any dues or assessments for the operation of MPMA, or for the maintenance of residential or commercial areas, or areas used exclusively by the residents, including park areas, green belts, etc.[2]

The Walla Walla Housing Authority was one of the first purchasers of VGC land. There are no common areas that were transferred 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 required to pay any assessments or common expenses. This agreement has always been recognized by MPMA, in that it has never required Phase 4 to pay assessments or common expenses.

MPMA governance

Phase Five Development, LLC, owned by Mr. Botimer, was the original incorporator or declarant that created MPMA. MPMA operates pursuant to its "Articles of Incorporation" and "Bylaws." Its purpose is to "own, develop, and maintain all common areas within the [VGC] and to administer, as necessary, the rules and regulations which pertain to enforcement of the [CCRs] which apply to [VGC] and its residents."

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[1] We hereafter refer to these charges as "common expenses."

[2] We hereafter refer to these charges as "assessments."

CP at 712. It is tasked with managing the affairs of VGC. To the extent authorized by the covenants, it has the power and duty to make and collect assessments and common expenses against members for the benefit of the homeowners.

MPMA is managed by a board consisting of seven directors. Mr. Botimer, effectively the declarant of MPMA, was entitled to appoint two directors and the other five directors are elected by MPMA members. Mr. Botimer had effective control over the board because the directors he appointed could not be removed without his consent, the board could not be enlarged without his consent, and a quorum could not be established without both declarant-appointed directors present. Mr. Botimer at all times relevant to this case was one of the two declarant-appointed directors.

Anyone who owns a lot within VGC is automatically a member of the MPMA. Each member is entitled to one vote for each lot or living unit owned. The nursing home (Phase 3) was formerly entitled to one vote. According to the covenants, "Membership in the [MPMA], once obtained, will be terminated only by selling or disposing of an ownership interest or property interest covered under the [CCRs]." CP at 726. The actual number of members is determined by the units developed or proposed to be developed at any given time.

Collection of assessments by MPMA

MPMA, since its inception, has never collected assessments or common expenses from Phase 3 or Phase 4. With respect to the commercial property owned by Myra Commercial, assessments were originally collected on only part of the lots, but this ceased in 2012.

Donald Coleman was president of MPMA from March 2011 to December 2014. During his tenure, MPMA did not take any action to collect assessments or common expenses beyond those that had been historically collected.

Amendment of CCRs

The procedures for amending the covenants are set forth in paragraph 11 of the CCRs:

> Amendments: Any owner may propose amendments to [the CCRs] to the Board of Directors of [MPMA]. The Board of Directors must approve such amendment by a majority vote before such amendment is proposed to the owners, and further provided that the two (2) members of the Board of Directors who are appointed by the Declarant/Owner must have voted in favor of the amendment before it may be submitted to the owners. If the Directors appointed by the Declarant/Owner approve the amendment, together with other Directors who in total represent a majority of the Board, then such amendment shall be presented to the members of [MPMA] for their consideration. The amendment may be submitted for consideration in written form or by the calling of a special meeting. Actual notice must be given to each member before an amendment may be adopted.
>
> [These CCRs] can be amended only by an affirmative vote of a majority of the Board of Directors, which majority includes both Board

> members who have been appointed by the Declarant/Owner and an affirmative vote of owners who hold at least two-thirds (2/3) of all votes in the [MPMA].
>
> Once an amendment has been properly adopted by the owners, it shall become effective when it is executed and certified on behalf of [MPMA], signed by the President thereof, and signed by at least two members of the Architectural Review Committee, and is then recorded with the Auditor of Walla Walla County, Washington. Any amendment which does not meet the criteria established herein shall be null and void.

CP at 744-45. As can be readily seen, Mr. Botimer had veto power over any proposed amendment because his appointed directors were required to vote in favor of any amendment before it could be voted on by MPMA membership.

Exiting phases

Since around 2016, Donald Coleman and Sue Wright have sought to exit Phase 10 from VGC. That year, Mr. Botimer told the board that he wanted to be removed as declarant and demanded that several phases be allowed to exit from MPMA and VGC. At the January 2017 board meeting, Mr. Botimer presented a plan to effect his resignation and the exiting of certain phases. He insisted that the MPMA was obligated to respond "yes" or "no" to his proposal to exit Phases 3, 4, 10, and 14 from VGC and MPMA. He suggested that Phase 9 be allowed to exit, but he was less insistent about that phase. If the vote failed, Mr. Botimer threatened to cease development of Phase 14 and continue to participate on the board unwillingly and unmotivated.

Regarding Phase 10, Mr. Botimer advised the board to agree to exit the phase because its residents' primary objective was to exit MPMA and take control of the common area maintenance and their own reserve fund. He advised the board that if it failed to negotiate in good faith, Phase 10 residents would "relentlessly continue to deluge" the board with charges of acting outside the authority of the governing documents. CP at 958. If the board agreed, Mr. Botimer advised that it should find the best attorney it could.

Exit resolutions and amendments

The board agreed to Mr. Botimer's proposal and hired an attorney to guide it "step by step through the process" for the resolutions, votes, and exits. CP at 1022. Over the course of 2017, the board discussed the exit of each phase.

On December 8, 2017, the board held a special meeting to vote on the exit resolutions for Phases 3, 4, 9, and 14.[3] Mr. Botimer gave the board signed written proxy

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[3] The board did not vote on an exit resolution for Phase 10. The board and Phase 10 residents had not been able to agree on the terms for how the exiting residents would pay for maintaining the roadway and walking trails the residents used. Donald Coleman and Sue Wright threatened to sue if the board continued to request funding for these items. Negotiations broke down.

MPMA submitted a question to its members, asking whether it should resume Phase 10 negotiations. Almost 75 percent of the membership responded, "yes." CP at 113. Apparently, later negotiations failed because the Phase 10 homeowners brought this suit.

instructions. He instructed the board to count the two declarant-appointed director votes toward quorum and in favor of the exit resolutions. The board did so, then held the meeting open to allow Mr. Botimer's attorney to review the resolutions. The next day, Mr. Botimer affirmed that both declarant-directors approved the resolutions. The board president contacted the remaining directors and confirmed that all seven voted in favor of the resolutions.

On December 10, 2017, MPMA conducted its annual member meeting. All but one director was present at the meeting. At that time, a total of 242 votes were authorized. Of the membership, 99 attended the meeting and voted in person, while 103 voted by proxy.

The meeting minutes indicate that each exit resolution was discussed individually. Regarding Phases 3 and 4, the board president explained that the phases had never paid assessments or common expenses, and that attempts to compel payment would likely fail due to the precedent established. The president also indicated that the exits were necessary to address a threatened lawsuit. Regarding the exit of Phase 9, the president explained that the action would provide clearer boundaries for VGC. Regarding the exit of Phase 14, the president explained that Mr. Botimer wanted to resign from his role as

declarant and a member of MPMA. Mr. Botimer spoke and urged MPMA members to support the exit resolutions.

The voting ballot included more specific information for each exit resolution. The ballot discussing the exit resolution for Phase 4 provided:

> **6) WALLA WALLA HOUSING AUTHORITY EXIT (Phase 4). Approve the *Resolution of the Owners of The Villages of Garrison Creek Master Property Management Association to Approve Exit of Walla Walla Housing Authority Property*** including an **Amendment to the Restated Declaration of Covenants, Conditions, and Restrictions of The Villages of Garrison Creek,** having the effect to remove **Walla Walla Housing Authority property** from the real property encumbered and governed by the Declaration and further directing the President of MPMA to **execute and record the Amendment** to the Restated Declaration of Covenants, Conditions and Restrictions of the Villages of Garrison Creek.
>
> _____Yes _____No

CP at 226. The ballots for the exit resolutions for Phases 3, 9, and 14 contained nearly identical language. MPMA members approved each of the four exit resolutions by more than the two-thirds vote required by the CCRs.

Eight months later, in September 2018, the amendment memorializing the exits of Phases 3, 4, and 9 was properly executed and then recorded by the Walla Walla County Auditor. The document indicated it was approved by a vote in accordance with the CCRs in December 2017.

Mr. Botimer negotiated a separate agreement and amendment for the exit of Phase 14, his undeveloped residential property. The amendment included (1) a road easement and maintenance agreement that specified shared common area expenses, (2) an open space and walking trail easement agreement allowing MPMA members to use trails in Phase 14, (3) a waiver of all declarant rights under the CCRs, Articles of Incorporation, and Bylaws, and (4) a written agreement that the development would adopt the same land use standards currently used by the MPMA.

Procedure

In May 2018, Donald Coleman and Sue Wright filed a derivative lawsuit on behalf of MPMA against past and current board members Dick Cook, John Cress, Marie Evans, Ray Goff, Dave Gullo, Ron Hines, Jim Murphy, Cassie Siegel, and Scott Towslee.[4] The complaint alleged that the individuals, all current or former directors, "are in breach of their fiduciary responsibilities and duty of loyalty" to MPMA and sought injunctive relief and monetary damages. CP at 5. The trial court later granted the current and former board members' motion for partial summary judgment and dismissed the derivative claims of MPMA.

[4] Curiously, Donald Coleman and Sue Wright did not name Mr. Botimer. He, more than any board member, set precedent on how assessments and common expenses would be collected, and he was the architect of the exit proposal.

In December 2019, Donald Coleman, Sue Wright, and Hawk Hill Association (collectively "Coleman") filed a third amended complaint, this time naming MPMA as a defendant, in addition to the current and former board members. Coleman complained that MPMA failed to enforce covenants requiring all phases to contribute to the common property maintenance fund. Coleman also alleged that MPMA illegally exited phases from membership to avoid liability for its failure to abide by the governing documents.

Coleman then moved for partial summary judgment, requesting the court hold the exit amendments void. Coleman argued that the exit amendments were illegal and not adopted in accordance with the CCR's amendment procedure. In an affidavit, Donald Coleman also claimed that MPMA had (1) refused to collect assessments from the exited phases, (2) conspired to favor a developer and illegally transferred funds, (3) conspired to cover up the board's conduct, (4) refused to maintain Phase 10 gates, (5) allocated maintenance expenses inequitably, (6) misused funds, (7) conducted meetings improperly, (8) conspired to deprive the Mr. Botimer of his power, (9) favored the owners of the exited phases, and (10) released the exited phases from land use standards. Mr. Coleman asserted that MPMA's malfeasance caused Phase 10 to incur past and future damages of over $6 million.

MPMA and the board members opposed Coleman's motion. The board members relied on the expert declaration of attorney Scott Miller to support their memorandum in opposition. Mr. Miller was retained to review Coleman's motion. He issued a declaration with his opinion of Coleman's claims. In his declaration, Mr. Miller testified that he is an attorney and arbitrator with experience in common interest community cases. He opined that the exit amendments were lawful and allowed under MPMA's governing documents. He opined that the board thoroughly debated and thoughtfully considered all actions taken, which were ultimately decided by a majority vote. He found no evidence to support Coleman's allegations that the motive for exiting properties was to avoid liability.

Coleman objected to Mr. Miller's declaration and moved to strike it. Coleman argued that Mr. Miller's declaration was a "collection of legal observations and opinions submitted as expert testimony" in violation of ER 702. CP at 531.

At the hearing, the trial court also denied Coleman's motion to strike Mr. Miller's declaration. After argument, the court denied Coleman's motion for partial summary judgment.

Coleman's second motion for partial summary judgment

Over one year later, Coleman brought a second motion for partial summary judgment against MPMA and the five board members who were on the board at the time

the exit amendments were recorded in 2018 (Cook, Cress, Evans, Murphy, and Towslee). Coleman again requested the court void the exit amendments. Coleman did not request partial summary judgment against the four board members who were not on the board at the time of the exit amendments (Goff, Gullo, Hines, and Siegal).

In his support affidavit, Donald Coleman argued that the exit amendments violated MPMA's governing documents. Mr. Coleman argued that the five board members attempted to shield themselves from liability by passing the exit amendments. Mr. Coleman made no claims about the conduct of the four board members who were not on the board in 2018.

Coleman's counsel also provided a declaration in support of the motion. The declaration included excerpts from the CR 30(b)(6) deposition of MPMA where board member Richard Cook testified on behalf of MPMA. Coleman's counsel questioned Mr. Cook about the procedure followed for the exit amendments. Mr. Cook testified on behalf of the MPMA, that

> "[Coleman's Counsel]: Going back to the minutes of the December 20, 2017 meeting, which is Exhibit 5, is there anything in Exhibit 5 that describes an amendment or a proposed amendment to the bylaws?
>
> [Mr. Cook]: It was my understanding that the resolutions would give permission to the board to finalize negotiations with Botimer. Those were between Botimer and his attorney and the association and our attorney. And so the actual amendments to the—to the covenants and the bylaws

> were—were approved and finally negotiated and approved in, I think, September of 2018.
>
> [Coleman's Counsel]: Did the membership have anything to do with that approval?
>
> [Mr. Cook]: It gave permission for that process to happen.
>
> [Coleman's Counsel]: Did the membership receive any actual notice of those amendments of September 2018?
>
> [Mr. Cook]: They received the concepts of what those negotiations were going to be about, and they allowed the board to make the final determination."

CP at 632-33. Coleman's counsel characterized this testimony as evidence the exit amendments did not occur when they were voted on by the membership in December 2017, but instead occurred in September 2018. Accordingly, Coleman's counsel argued that members did not receive actual notice of the amendments as required by the CCRs.

MPMA's cross motion for summary judgment

MPMA responded with a cross motion for summary judgment. The board members filed a joinder in the motion. MPMA argued that summary judgment should be granted in its favor because:

> a. The MPMA's proposal to allow the exit of certain parcels of land from VGC was overwhelmingly approved by the homeowners in conformity with the governing documents.
>
> b. The MPMA has authority to collect reserves and maintain the common elements of VGC under the governing documents and Washington law.
>
> c. Plaintiffs have come forward with no evidence that the MPMA acted fraudulently, dishonestly, or incompetently with respect to its management of VGC.

> d. The Hawk Hill Association is not a member of VGC and does not have standing as a plaintiff in this lawsuit.
>
> e. Plaintiffs have not pled a cause of action, which would allow them to remove the village of Hawk Hill from VGC.

CP at 1343.

MPMA's motion included the transcript from Mr. Coleman's deposition. Mr. Coleman testified that Hawk Hill assessed Phase 10 homeowners to pay to fix the gates after MPMA refused. He was shown a 2005 document, which stated that the "Phase 10 Gating System will be maintained by Phase 10 homeowners." CP at 757. He acknowledged seeing the document before but not knowing it to be true because he had not yet bought a home in VGC. He also stated that when he moved into the community and was elected to the board, he was told that Phase 10 residents maintained the gates.

MPMA's motion also included the transcript of MPMA's CR 30(b)(6) deposition, where Mr. Cook testified. When questioned about the exit amendments, Mr. Cook responded that MPMA's attorney drafted them and guided the board step by step through the process. When questioned about the Phase 10 gates, he testified that MPMA did not pay for the gates from the time they were installed around 2006 until around 2016. He testified that MPMA did provide some money for the gates in around 2016 at the request of Mr. Coleman. However, he also testified that Mr. Botimer told the board that the gates belonged to Phase 10.

The board members again filed Mr. Miller's declaration in support of their motion for summary judgment. Coleman responded with another motion to strike the declaration. The board members opposed the motion to strike and argued the court had already denied Coleman's first motion to strike and requested sanctions.

Summary judgment hearing

The trial court held a hearing on the parties' motions for summary judgment. At the hearing, Coleman's counsel opened by explaining:

> There is only one question that need be answered, and all the rest of the issues before this court will fall away. And the question is very simple: Did the members vote on the proposed amendments to the CCRs that were adopted by the board of directors in September 2018?

Rep. of Proc. (RP) at 6. The court agreed that the core issue was the validity of the exit amendments. Following argument on both motions, the court explained its decision and reasoning:

> The Court's review of the record shows that we have volunteers who were following the advice of counsel. The resolutions that were presented to the membership back in December of 2017 showed the members what they were voting on with enough detail for that to be sufficient. The Court believes that the plaintiffs' argument is too technical, that it is reading documents in a vacuum, and is not, therefore, taking into account the governing documents on the whole.
>
> For those reasons, the Court is going to deny the plaintiffs' motion for partial summary judgment, deny the motion to strike . . . and the Court is also going to grant the defendants' motion for final summary judgment in this matter, as well.

> The evidence shows the board acted within the scope of its power and authority. There's no evidence beyond speculation that the board acted for any improper motive. And again, these are volunteers who were attempting to assist the greater good of their community and were doing so relying on legal advice. The question of standing, this—I don't believe needs to be ruled upon, given the fact that the Court is granting the defendants' motion for final summary judgment.

RP at 59-60. Following the hearing the court entered an order in accordance with its oral ruling. Coleman timely appealed.

ANALYSIS[5]

Coleman contends the trial court erred in summarily dismissing its claims. We note there were two claims. One was whether the exit amendments are valid. The other was whether MPMA and the board members are liable for several allegations of malfeasance. We address the two claims separately.

A. EXIT AMENDMENTS

Coleman contends that the trial court erred by dismissing its claim that the exit amendments were invalid. We disagree.

We review a trial court's order on a motion for summary judgment de novo.

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[5] Initially, Coleman raises procedural arguments about whether the board members actually moved for summary judgment by joining and whether MPMA's summary judgment motion was proper, given its failure to file a separate motion pleading. We decline to address these unpreserved procedural claims. RAP 2.5(a).

Bangerter v. Hat Island Cmty. Ass'n, 14 Wn. App. 2d 718, 731, 472 P.3d 998 (2020), *aff'd in part*, 199 Wn.2d 183, 504 P.3d 813 (2022); *Wilkinson v. Chiwawa Cmtys. Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). A trial court may grant summary judgment if the evidence, viewed in a light most favorable to the nonmoving party, establishes that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Wilkinson*, 180 Wn.2d at 249. We may affirm the trial court on any grounds established by the pleadings and supported by the record. *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

1. MPMA's governing documents permit phases to exit by amendment

Coleman argues that the governing documents, when read together, do not allow MPMA to make amendments that exit phases. We disagree.

Interpretation of covenants is a question of law based on the rules of contract interpretation. *Bangerter*, 199 Wn.2d at 189. The court's primary objective is to determine the intent of the original parties that established the covenants. *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). In determining intent, language is given its ordinary and common meaning. *Id.* Ambiguity as to the intent of those establishing the covenants may be resolved by considering evidence of the surrounding circumstances.

Mountain Park Homeowners Ass'n, Inc. v. Tydings, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994).

Here, MPMA's Articles of Incorporation grant it broad powers, including "all powers as allowed by law." CP at 726. Coleman does not cite any law that prohibits MPMA from amending the covenants to allow phases to exit. Thus, we conclude that the governing documents allow MPMA to make such amendments to the CCRs.

Coleman argues that the covenants provide the sole method for how membership is terminated. Coleman points to paragraph 5 of the CCRs, which provides that any person who owns or purchases a lot within VGC automatically gains MPMA membership, and that membership "will be terminated only by selling the ownership interest in the lot or unit which created membership rights." CP at 736. However, Coleman's argument assumes that the membership covenant cannot be amended. Any covenant can be amended. And paragraph 11 provides the procedures for doing so.

Coleman next argues that allowing phases to exit results in an increased financial burden on members, which in effect creates a new covenant. This argument is unsupported by citation to authority or logic. Nevertheless, the covenants do not prohibit amendments that create a new covenant.

Coleman next argues that the exit amendments are void because they destroyed the general plan or scheme of VGC as it was intended and sold to residents. We disagree.

A homeowners' association may not amend its governing documents in a way that destroys the general scheme or plan of the development. *Lakemoor Cmty. Club, Inc. v. Swanson*, 24 Wn. App. 10, 600 P.2d 1022 (1979). In *Lakemoor*, a developer sold lots in a closed community with the representation that all lots would be used for residential purposes. *Id.* at 11. The community's covenants had a consent provision that reserved to the developer the right to alter, amend, or modify restrictions at his sole discretion. *Id.* at 14-15. The developer later conveyed lots within the community to a corporation and consented to portions being used for an access road and utilities. *Id.* at 12. Homeowners of the residential lots sued for a permanent injunction to stop the construction of the road, which the trial court granted. *Id.* On appeal, the court examined the consent provision. *Id.* at 14-15. The court held that the provision must be exercised in a reasonable manner that does not destroy the general scheme or plan of the development. *Id.* at 15 (quoting *Flamingo Ranch Ests., Inc. v. Sunshine Ranches Homeowners, Inc.*, 303 So. 2d 665, 666 (Fla. Dist. Ct. App. 1974)). The court ruled the provision did not allow the developer to destroy the integrity of the community as it was sold to residents because the residents were convinced they were buying homes in a self-contained residential community. *Id.* at

16-17. The court explained that it did not condone the developer trying to sidestep the covenants without giving minimal assurance that the new lots would be burdened by the existing covenants. *Id.* at 16.

Lakemoor is distinguishable. Here, the presence of a nursing home, affordable government housing, and commercial properties is not integral to the complaining residential phase. 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 areas. These integral aspects have not changed as a result of the exit amendments.

2. The amendment procedure did not violate the CCRs or Washington law

Coleman next argues that the board violated the CCRs' amendment procedure. Specifically, Coleman argues (a) the membership did not vote on the specific language of the amendments, (b) no homeowner proposed the amendments, (c) there was no quorum, (d) the board did not use proper communication equipment, (e) the board members used proxies, which are not permitted under Washington law, (f) MPMA violated RCW 58.17.215 by failing to obtain a written agreement from all VGC members allowing alteration of the subdivision, and (g) MPMA violated its duty to act in the best interest of its homeowners. We address each argument separately.

a. The membership was not required to vote on specific language

Coleman argues that MPMA membership did not vote on the specific language of the exit amendments. Coleman argues that members voted only on the concepts of the exit amendments at the December 2017 annual meeting, even though the actual amendment language was not decided and recorded until September 2018. We disagree that this approach violated the CCRs' amendment procedure.

The CCRs set out the procedures for amending covenants. In relevant part, they require that any amendment, properly approved by the board, "be presented to the members of [MPMA] for their consideration. The amendment may be submitted for consideration in written form or by the calling of a special meeting. Actual notice must be given to each member before an amendment may be adopted." CP at 744.

Coleman reads "actual notice" to require members to be provided the specific text of the amendments before they can be voted on and recorded. MPMA counters that the ballot language and presentation at the annual meeting was sufficient to provide the membership actual notice of the amendments.

Resolution of this issue turns on the definition of "actual notice," which is undefined in the CCRs. Without a definition of the phrase, our primary objective is to determine the intent of the original parties that established the covenants. *Riss*, 131

Wn.2d at 621. Language is given its ordinary and common meaning. *Id.* If the intent of those establishing the covenants is ambiguous, we may consider evidence of the surrounding circumstances. *Mountain Park*, 125 Wn.2d at 344.

MPMA argues that the intent of the original parties that established the covenants can be determined by comparing the original CCRs to the current, restated version, and by looking at the amendment provisions in MPMA's Articles of Incorporation and Bylaws.

MPMA's original CCRs, recorded in 1996, required an amendment to be submitted to the membership at least 60 days before the annual meeting. Notice of the annual meeting was required to include the text of any proposed amendment. It required an affirmative vote of 90 percent of the votes in MPMA and at least 90 percent of all owners for amendments affecting the right to levy dues and assessments or the manner of enforcement of the CCRs.

By contrast, MPMA's current, restated CCRs, recorded in 2002, have no such 60-day submission requirement for amendments. The restated CCRs also do not specify that the "text" of an amendment is required to be presented. This suggests that one of the purposes of the restated CCRs was to liberalize the procedure for amendments.

MPMA further points to its amended Articles of Incorporation, filed in 2003, and its amended Bylaws, filed in 2012, to evidence that the actual text of any amendment

need not be presented to the MPMA membership. Both the Articles of Incorporation and Bylaws specify that written notice of the proposed amendments "or *summary of changes* shall be given to each Member entitled to vote." CP at 720, 730 (emphasis added).

After considering the parties' arguments, the trial court found that:

> The resolutions that were presented to the membership back in December of 2017 showed the members what they were voting on with enough detail for that to be sufficient. The Court believes that the plaintiffs' argument is too technical, that it is reading the documents in a vacuum, and is not, therefore, taking into account the governing documents on the whole.

RP at 59. We agree with the trial court. The language of the ballots indicated to MPMA members the effect that voting "yes" on the exit resolutions would have. The ballot indicated that a "yes" vote would have the effect of (1) amending the CCRs, (2) removing the phase in question from the real property encumbered and governed by the CCRs, and (3) directing the board president to execute and record the amendment. We conclude that the membership was adequately informed of the purpose of the exit amendments and was not required to approve the specific language eventually used.

b. Amendment proposal

Coleman also argues there was no showing that a homeowner proposed the exit amendments. However, paragraph 11 of the CCRs explicitly provides that "[a]ny owner" may propose amendments. CP at 744. The record shows that Mr. Botimer proposed the

amendments to the board, and introduced and thoroughly discussed them at the board meeting in January 2017. Mr. Botimer is the owner of undeveloped residential lots within Phase 14, and therefore is an owner within the meaning of the CCRs. We conclude that the amendment was properly proposed.

c. Quorum

Coleman argues there was no quorum present at the board meeting on December 8, 2017, when the exit resolutions were voted on. We disagree.

Article IV, section F of MPMA's Bylaws provides:

> Quorum: A majority of Members of the Board shall constitute a quorum, provided that the Directors appointed by the Declarant are present. . . . The Board of Directors shall act by a majority vote of those present at its meeting where a quorum exists.

CP at 715.

Before the meeting, Mr. Botimer provided written proxy instructions to the board, instructing that he and his appointed declarant-director be counted toward a quorum. The instructions also indicated how the two declarant-director votes should be cast. Accordingly, the minutes of the December 8, 2017 meeting where the board approved the exit resolutions show that a quorum was established with all seven directors present in person, by proxy, or by telephone. The meeting was held open to allow Mr. Botimer's attorney to review the exit resolutions. A final vote was taken the next day. Three board

members met and confirmed their affirmation and the other four board members were contacted individually by telephone. All seven directors voted in the affirmative. Thus, a quorum of the board was present to approve the exit resolutions.

d. Telephonic communications equipment

Coleman next argues that MPMA failed to follow the bylaw regarding use of communications equipment. Coleman argues the bylaw requires that telephone conference equipment be used. We disagree.

Article IV, section H of MPMA's Bylaws provides:

> Action of Directors by Communications Equipment: Any action required or which may be taken at a meeting of Directors, or of a committee thereof, *may* be taken by means of a conference telephone call or similar communications equipment by means of which all persons participating in the meeting can hear each other at the same time.

CP at 715 (emphasis added). The bylaw does not require MPMA to use telephonic conferencing equipment, but instead allows such equipment to be used.

e. Director proxies

Coleman next argues that the board's use of proxies is not allowed under Washington law and general corporate law. Coleman cites to the "Washington Nonprofit Handbook" from 2018, but fails to cite to any specific Washington statute that disallows the use of proxies by a nonprofit board of directors.

At the time of the exit amendment votes in December 2017, chapter 64.38 RCW governed homeowners' associations (HOA). That chapter had no provisions prohibiting any HOA director from using proxies to vote. *See* former RCW 64.38.025 (2011) through former RCW 64.38.035 (2014).

On July 1, 2018, the "Washington Uniform Common Interest Ownership Act" (WUCIOA), chapter 64.90 RCW, went into effect. RCW 64.90.910. Under the WUCIOA, a HOA director may not vote by proxy. RCW 64.90.445(2)(m). That act and rule applies to all HOAs created after its effective date, but also allows HOAs created before the effective date to amend their CCRs to apply the act's provisions. RCW 64.90.095(1). Here, there is no evidence in the record that MPMA amended the CCRs to opt into WUCIOA; therefore, its provisions do not apply.

Separately, the former Washington Nonprofit Corporation Act, chapter 24.03 RCW, governed nonprofit corporations during the events at issue here. Under that version of the act, there was no prohibition on directors using proxies. *See* former RCW 24.03.120 (2004). The former Washington Nonprofit Corporation Act was repealed in 2021 and replaced with chapter 24.03A RCW. Under the new statute, a director *is* prohibited from using a proxy to count toward quorum or to vote. RCW 24.03A.565(5). Considering the changes in the 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 amendment resolutions at issue.

f. RCW 58.17.215 does not require written agreement of all members to alter the subdivision

Coleman argues, somewhat unclearly, that MPMA violated RCW 58.17.215. The only specific violation Coleman points to is a requirement in the statute that all alterations to a subdivision be approved by written agreement of all members. By its terms, that requirement applies only if the covenants do not allow the specific alteration. As mentioned previously, the covenants do allow phases to exit the subdivision. The requirement for written approval of all members therefore does not apply.

g. The members decided that MPMA's proposal was for their benefit

Directing our attention to paragraph 5(c) of the CCRs, Coleman argues that MPMA has a duty to act for the benefit of the homeowners. The provision imposes upon MPMA the "duty to enforce provisions of [the CCRs,] the articles of incorporation, the bylaws, and the rules and regulations of the Association . . . for the benefit of the homeowners." CP at 738. This duty is one of enforcement. It does not apply to proposing covenant amendments to be voted on by the membership. But even if it did,

the homeowners decided that the proposal was for their benefit, as reflected in the passage of the exit amendments by more than a two-thirds vote.[6]

3. Attorney Miller's declaration

Coleman argues the trial court erred by not striking attorney Miller's declaration because it contained inadmissible legal conclusions. The board members respond, in part, that this error was not prejudicial because there is no indication the trial court considered the declaration.

As noted previously, we review summary judgment orders de novo. Whether the trial court considered attorney Miller's declaration or not, we certainly did not. For the reasons expressed above, we conclude that the exit amendments were properly presented to the membership in accordance with the covenants and statutory law, were approved by the membership in accordance with the covenants, and are valid.

B. MPMA AND BOARD MEMBER LIABILITY

In his declaration, Mr. Coleman recounts his many complaints of MPMA and

[6] The record suggests that substantially all of the votes were cast by homeowners, rather than Mr. Botimer. At one board meeting, Mr. Botimer told the directors he would cast either 5 votes or 172 votes, the latter reflecting the number of his undeveloped lots. We note there were 173 homeowners who could vote in 2012. Thus, had Mr. Botimer cast 172 votes (instead of 5 votes), the 242 base votes shown in the ballot results would have been substantially higher.

board member malfeasance, including that they failed to enforce the covenants. As previously noted, paragraph 5(c) of the CCRs requires MPMA to enforce the covenants for the benefit of the homeowners.

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 MPMA and the board members are liable for Coleman's various allegations of malfeasance. We thus decline to rule on this issue. *See Grundy v. Thurston County*, 155 Wn.2d 1, 8, 117 P.3d 1089 (2005) (an appellate court may decline to consider an issue not ruled on by the trial court). Had the parties in their briefs to this court devoted greater attention to this issue, our decision might be different. *See LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 70-71, 331 P.3d 1147 (2014) (electing to review an issue not ruled on by the trial court because the parties thoroughly briefed and argued it to the lower appellate court).

It may be that MPMA acted for the benefit of the homeowners by *not* suing to force one or more phases to pay assessments and/or common expenses. We note that MPMA's president in 2018 stated his belief that a lawsuit to enforce such payments would be unsuccessful due to several years of MPMA's acquiescence. Also, for Coleman to recover assessments and common expenses not collected by MPMA from nonpaying

phases (likely limited to three years before filing suit), Coleman would need to establish that MPMA would have been successful in forcing nonpaying phases to pay. This could be difficult. Furthermore, Coleman cannot recover these types of damages *after* the nonpaying phases exited because the exit amendments were validly passed for the benefit of the homeowners. As for Coleman's other monetary claims, these may or may not present questions of fact.

C. LIABILITY STANDARD FOR INDIVIDUAL BOARD MEMBERS

In the interests of judicial economy, an appellate court may consider an issue that is likely to occur following remand if the parties have briefed and argued the issue in detail. *State ex rel. Haskell v. Spokane County Dist. Ct.*, 198 Wn.2d 1, 16, 491 P.3d 119 (2021). Here, the parties have briefed and argued in detail the question of what standard of liability to apply to the individual board members.

Unquestionably, Coleman's allegations against the board members concern their actions taken prior to 2018 within the scope of their role as directors of a nonprofit corporation. Thus, their standard of liability is governed by former RCW 24.03.127 (1986), which sets forth the duties and standards of liability for such directors.

CONCLUSION

We affirm the trial court's summary judgment ruling dismissing Coleman's claims concerning the exit amendments. The exit amendments are valid.

We remand and reinstate Coleman's malfeasance claims against MPMA and the board members, except to the extent those claims include damages for nonpaying phases after they exited.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Siddoway, C.J.

Staab, J.

FILED
APRIL 13, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

DONALD COLEMAN and SUE WRIGHT, individuals, and THE HAWK HILL ASSOCIATION, a corporation,	)	**No. 38758-5-III**
Appellants,	)	
v.	)	**ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION**
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.	)	

The court has considered appellant's motion for reconsideration of this court's opinion dated February 21, 2023, and is of the opinion the motion should be denied.

THEREFORE, IT IS ORDERED that the motion for reconsideration is hereby denied.

THE COURT HEREBY AMENDS the opinion as follows:

The last full sentence on page 8 that states, "On December 8, 2017, the board . . . Phases 3, 4, 9, and 14" shall be amended to read: "

> On December 8, 2017, the board held a special meeting to vote on the exit resolutions for Phases 3, 4, 14, and Myra Road Commercial, LLC property.

Within the last paragraph on page 9, the sentence that begins "Regarding the exit of Phase 9" shall be amended as follows:

> Regarding the exit of commercial property owned by Myra Road Commercial, LLC, the president explained that the action would provide clearer boundaries for VGC.

The first full sentence following the block quote on page 10 that begins "The ballots for" shall be amended as follows:

> The ballots for the exit resolutions for Phases 3, 14, and the Myra Road Commercial, LLC property contained nearly identical language.

The last full paragraph on page 10 that begins "Eight months later" shall be amended to read:

> Eight months later, in September 2018, the amendment memorializing the exits of Phases 3, 4, and Myra Road Commercial, LLC property was properly executed and then recorded by the Walla Walla County Auditor.

The second sentence in the first full paragraph on page 22 that begins "Here, the presence" shall be amended as follows:

> 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.

A footnote shall be added at the end of the last sentence of the first full paragraph on page 22 as follows:

> These integral aspects have not changed as a result of the exit amendments.[6]
>
> [6] The Phase 14 exit amendment specified the Phase agreed to share its open space and walking trails, share common area expenses, and adopt MPMA's land use standards.

PANEL: Judges Lawrence-Berrey, Siddoway, and Staab

FOR THE COURT:

George Fearing

GEORGE FEARING
CHIEF JUDGE

WASHINGTON NONPROFIT HANDBOOK:
How to Form and Maintain a Nonprofit Corporation in Washington State

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specifies the number. An amendment that decreases the number of directors cannot shorten the term of any current director. The articles or bylaws may provide that directors will be elected by the corporation's members or by the corporation's directors; in some circumstances, directors may be appointed.

The articles or bylaws specify the directors' terms of office. Terms can be for one year or several years. Nonprofit corporations typically choose terms of two or three years for their directors. Each director holds office until his or her successor has been selected and qualified. The term of the directors may be staggered by providing that only some portion of the board seats are up for election at the same time. Staggering the directors' terms can provide valuable continuity on the board.

If the corporation has a membership with voting rights, the articles or bylaws may require that directors be elected by a majority vote of the corporation's members. Alternatively, the articles or bylaws may provide for a more complex manner of electing directors known as "cumulative voting." Cumulative voting permits each member or director entitled to vote to add all of the votes to which he or she is entitled and apply them toward one candidate's election or distribute the votes among several candidates.

b. Action by the Board

To be a valid act of the corporation, the act must be approved by a majority of the directors at a board meeting in which a quorum is present. Unless the corporation's articles or bylaws state otherwise, a majority of the directors constitutes a quorum. A quorum may not be less than one-third of the total number of directors. The articles or bylaws may require a greater proportion of votes for certain acts by the board, such as the removal of a director or modification of the corporation's purpose.

A director may vote against (i.e., dissent) or not vote on (i.e., abstain) an action taken by the board. However, if the director is present at the meeting where the action is taken, it is assumed that the director consented to the action unless the director's dissent or abstention is recorded in the minutes or filed in writing with the Secretary of the corporation.

Directors cannot appear by proxy or give their proxies to another director. Directors must be present to listen to the discussion, consider each resolution, and vote based on their judgment.

c. Removing Directors and Vacancies on the Board

A corporation's articles or bylaws may contain a procedure for removing directors. If the articles or bylaws provide for the election of any directors by members, yet fail to specify a procedure for removal, the Act specifies the following:

- Any director elected by members may be removed by two-thirds of the votes cast by members having voting rights with regard to director elections, at a meeting where a quorum is present. Note that members may be represented in person or by proxy, if permitted by the bylaws (even though this option is not available to directors).

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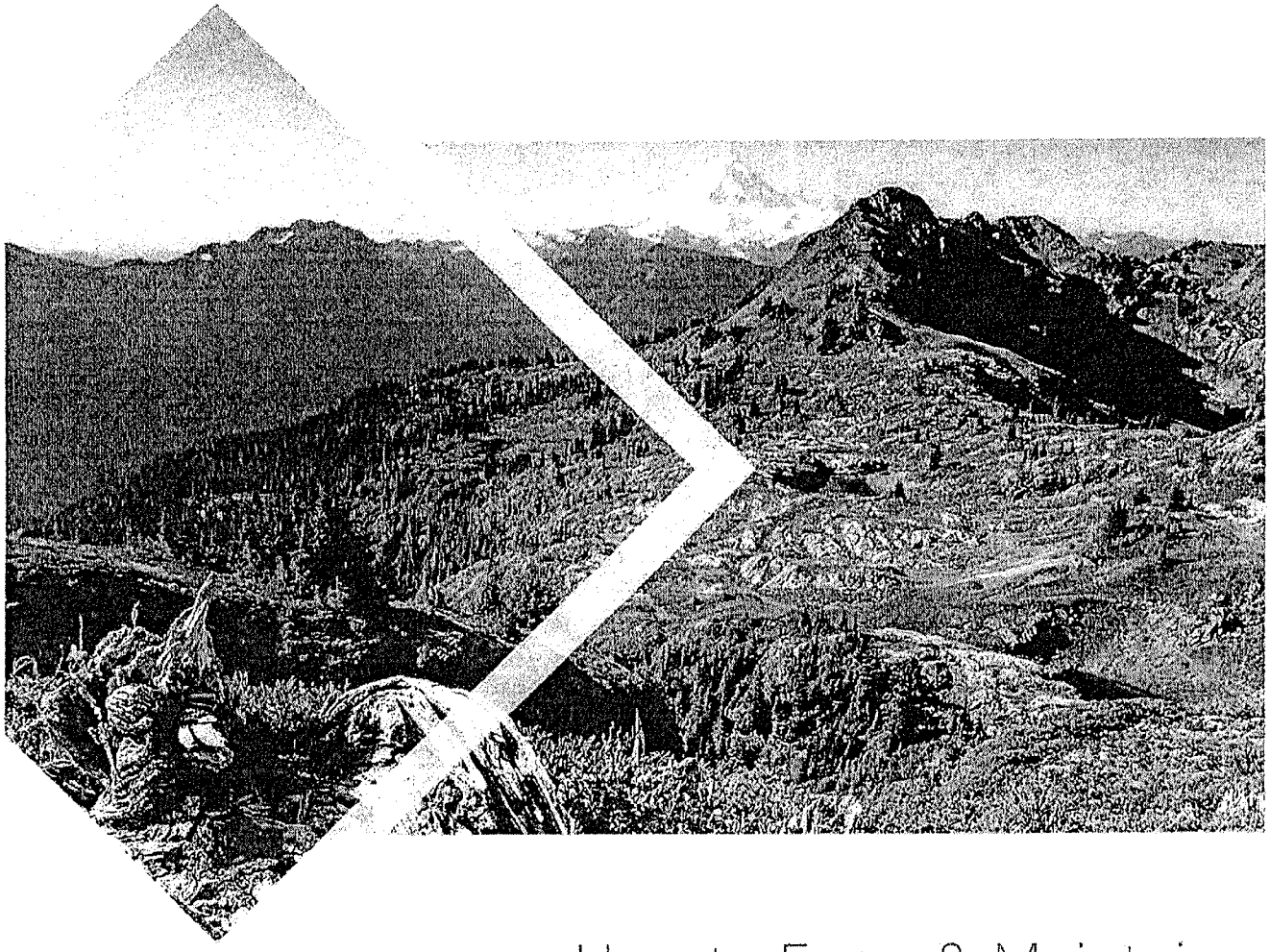

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- If a corporation has cumulative voting, a director may be removed if the number of votes cast for removal would have elected the director at an election.

MICHAEL E. DE GRASSE

May 12, 2023 - 11:05 AM

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