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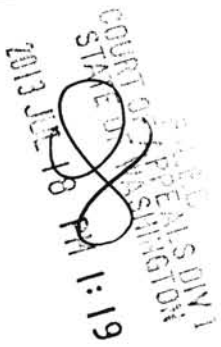
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

NO. 70329-3-I



SUDDEN VALLEY COMMUNITY ASSOCIATION,
a Washington homeowner's association,

Appellant,

v.

CURT CASEY, DAVE SCOTT, BARBARA VOLKOV,
Washington residents,

Respondents.

BRIEF OF APPELLANT
SUDDEN VALLEY COMMUNITY ASSOCIATION

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I. INTRODUCTION

An individual purchasing a home in Sudden Valley Community Association prior to 1995 had the assurance that his/her annual dues and assessments would increase if—and only if—the increase were proposed by the Board of Directors and subsequently approved by 60% of the members voting at a meeting of the members. Article III, Section 19 of the SVCA Bylaws establish this threshold.

But, Plaintiffs argue that the Legislature rendered this bylaw provision null and void in 1995 when it passed the Homeowners' Association Act (the "Act"), RCW 64.38. Plaintiffs contend that the Act mandates a specific process for a homeowners' association to impose assessments and that it overrides the process set forth in Article III, Section 19. The trial court agreed with the Plaintiffs, thereby eradicating the contractual expectations that members of SVCA have had since 1973.

The trial court's ruling, if upheld, has significant implications for SVCA and homeowners' associations throughout the State. Historically, SVCA has maintained an elevated threshold to increase assessments (i.e., 60% of the members voting at a

meeting). But, under the trial court ruling, the assessments established by the Board would be approved unless a majority of all members in SVCA (i.e., over half of 3,204 voting members) rejected the budget. What this means for SVCA is that any assessments proposed by the Board—no matter how unreasonable—would be approved because of the practical impossibility of getting 1,602 members to vote against a budget. In fact, it is rare for even half of the members to vote at a member meeting.

Plaintiffs' argument is premised on a misreading of the statute. Plaintiffs conflate two very different terms: "budget" and "assessments." The Act only talks about the process for ratifying a proposed "budget", but Plaintiffs maintain that the ratification of the proposed budget constitutes an automatic approval of "assessments." By misconstruing the statute in this fashion, Plaintiffs identify a "conflict" between the Act and Bylaws which does not exist. Worse yet, Plaintiffs' arguments lead to a disturbing result the Legislature never intended. It means that the Legislature—in an uncharacteristically obtuse manner and without any warning whatsoever—eliminated the contractual rights and

expectations of homeowners' association members throughout the state.

II. ASSIGNMENTS OF ERROR AND STANDARD OF REVIEW

Appellant assigns the following errors to the trial court's decision:

1. The trial court erred by denying SVCA's motion for summary judgment. *(The standard of review is de novo, and the appellate court performs the same inquiry as the trial court[1]).*

2. The trial court erred by granting Plaintiffs' motion for summary judgment. *(The standard of review is de novo, and the appellate court performs the same inquiry as the trial court[2]).*

3. The trial court erred by awarding Plaintiffs their attorneys' fees and costs and by denying SVCA's motion for attorneys' fees and costs. *(The standard of review is de novo, and the appellate court performs the same inquiry as the trial court[3]).*

III. STATEMENT OF THE CASE

A. General Background on Sudden Valley.

SVCA is a large homeowners' association in Whatcom County, Washington. It was incorporated in 1973 and is comprised of 3,204 lots (defined as also including residents of several condominium buildings located within the entire development) plus a variety of common amenities, including, among other things, a

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[1] *Smith v. Safeco Ins. Co.*, 150 Wash. 2d 478, 483, 78 P.3d 1274, 1276 (2003).
[2] Id.
[3] Id.

golf course, playground, marina, swimming pools, meeting facilities and fitness facility. CP 216-17, 254

SVCA is governed by an elected nine (9) member Board of Directors which is responsible for the affairs of the Association. The Board is elected by the members of the SVCA at the annual general meeting. Each lot in SVCA has one vote, so there are 3,204 possible votes at any meeting of the members. CP 216-17. Over the past 4 years, votes at member meetings have been cast in person or by mail-in ballot, by an average of only forty percent (40%) of the membership. CP 94, 97.

SVCA obtains its revenue from a variety of sources[4]; however, the majority of its annual revenue comes from "annual dues and assessments" levied on its members. CP 94. Since its incorporation in 1973, SVCA's Bylaws have provided that annual dues and assessments must be established by the Board of Directors and thereafter approved by the members. Article III, Section 19 of the Bylaws provides, in pertinent part, the following:

> Annual dues and assessments shall be established by the Board and approved by a vote of

[4] Such sources include greens fees from the golf course, building rent on leases to third parties, and marina fees.

> not less than sixty (60%) percent of the members present in person or by mail-in ballot at any annual or special meeting.

CP 217-18.

As a nonprofit corporation, SVCA holds an annual general meeting (AGM) of the members and, if needed, special general meetings (SGM). The AGM is held annually in the month of November. CP 234-35. Each year at the AGM, SVCA presents to the members a budget for ratification pursuant to RCW 64.38.025(3). The proposed budget contains the association's anticipated expenses and anticipated revenues from all sources, including annual dues and assessments.[5] If the Board proposes an increase in the annual dues and assessments for the following year, SVCA offers a separate measure for the membership to approve the proposed increase pursuant to Article III, Section 19 of the Bylaws. CP 95, 218.

Because of the elevated (i.e., 60%) approval threshold for annual dues and assessments (plus the failure of past Boards of Directors to adequately justify proposed increases to the

[5] Plaintiffs have repeatedly mischaracterized SVCA's budget process by claiming that SVCA excludes revenue from its budget. See, e.g., CP 60-61, 448, 472.

membership)[6], SVCA membership has frequently rejected proposed increases in the annual dues and assessments. In 2011, the Board decided to try a different approach in order to improve the likelihood that a proposed dues increase would pass. Rather than propose an amendment to Article III Section 19 to lower the approval threshold, the Board passed a motion that simply ignored the voting threshold and procedures set forth in Article III, Section 19 of the Bylaws. The rationale for the motion, and the motion itself, is stated in the August 22, 2011 meeting minutes:

> Our experience at our last several AGMs has been consistent. Each year our budget is approved but the dues proposal is defeated. Something like 50% of the members vote. Since approval of the dues under our Bylaws requires a super majority of 60% of those voting, 20% of the membership can and has blocked all dues increases, except one small one for the pools. To prevent this from happening at the coming AGM, I move:
>
> That at the AGM, the results of the vote on the regular budget for Operations, Road and Capital be increased in the Operations Budget to subsidize the cost of the pools and the Special Budget for Capital Repair, Replacement, Reserve Fund be determined in accordance with Washington State Law, RCW 64.38.025, which provides that the Budget, <u>including</u>

[6] The increase proposed at the 2012 AGM was passed by the membership, in part, due to the efforts of the Board to justify it.

> the Dues to support it is approved unless a majority of the membership rejects it.

(Emphasis added.) CP 119, 224. The Board passed this motion, notwithstanding the direct conflict with Article III, Section 19. At the 2011 AGM, the membership ratified the budget. CP 225. But, because the Board had also purported to combine the vote on the annual dues and assessments with the vote on the budget, the Board concluded that the proposed dues increase had passed, despite the overwhelming rejection by the members by a 2:1 margin[7]:

> Approved: 658
>
> Rejected: 1249

CP 225.

As soon as the newly elected Board members took office, the newly constituted board immediately rescinded the August 22, 2011 motion since it changed the manner of voting for annual dues and assessments, in violation of Article III, Section 19 of the Bylaws. CP 225. This newly constituted Board also confirmed that the increase in the annual dues and assessments had not been

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[7] According to RCW 64.38.025(3), 1605 votes were needed to reject.

validly approved by the membership because the measure had not been approved by a 60% majority of the ballots cast at the meeting. CP 226.

As explained above, the membership votes on the budget and any proposed increase in annual dues and assessments at the AGM which is held every year in the month of November. In those years when the Board submits a measure to increase annual dues and assessments, it includes the additional revenue from that increase in the proposed budget. However, if the membership ratifies the budget but rejects the measure to increase the annual dues and assessments, the projected revenue in the budget is overstated. CP 95. This happened in the following years: 2010, 2011, and 2012.[8] Id. To deal with this shortfall in revenue, the Board administratively adopted a "spending plan" in each of those years. Id. This was an orderly method for the Board to adjust expenditures so that total expenditures for the year did not exceed actual revenues. Plaintiffs assert that the Board's adoption of these

[8] No spending plan was required in 2013 because the measure to increase annual dues and assessments was approved by the membership. CP 226-27.

spending plans is—as well as the 60% requirement for approving annual dues and assessments—in violation of the Act.

IV. ARGUMENT

A. The Homeowners' Association Act Does Not Dictate the Process for Imposing Dues and Assessments.

The Act was enacted in 1995 for the stated purpose of "provid[ing] consistent laws regarding the formation and legal administration of homeowners' associations" ("HOAs"). RCW 64.38.005. This stated purpose, however, does not evince any specific legislative intent to invalidate longstanding, contractual homeowners' association methods for establishing assessments, or otherwise mandate a uniform *process* for homeowners' associations to impose assessments on their members. In fact, the Act says very little about assessments, and what it does say supports SVCA's position.

1. The Plain Language of the Act Supports SVCA's Position that the Budget Approval Process is Not Synonymous with the Process for Imposing Assessments.

Plaintiffs' argument relies almost exclusively on RCW 64.38.025(3). This section, by its very terms, deals with the

process for approving a *budget,* not the process for imposing assessments. It states the following:

> Within thirty days after adoption by the board of directors of any proposed regular or special budget of the association, the board shall set a date for a meeting of the owners to consider ratification of the budget not less than fourteen nor more than sixty days after mailing of the summary. **Unless at that meeting the owners of a majority of the votes in the association are allocated [sic] or any larger percentage specified in the governing documents reject the budget, in person or by proxy, the budget is ratified, whether or not a quorum is present**. In the event the proposed budget is rejected or the required notice is not given, the periodic budget last ratified by the owners shall be continued until such time as the owners ratify a subsequent budget proposed by the board of directors.

(Emphasis added). The term "assessments" is not even found in this section.

"Assessment" is defined in RCW 64.38.010(1) as "all sums chargeable to an owner by an association *in accordance with RCW 64.38.020*." (Emphasis added). RCW 64.38.020 provides, in pertinent part, the following:

> Unless otherwise provided in the governing documents, an association may:
>
> ***
>
> (2) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect

> assessments for common expenses from owners; [Emphasis added]
>
> ***
>
> (11) Impose and collect charges for late payments of assessments and, after notice and an opportunity to be heard by the board of directors or by the representative designated by the board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for violation of the bylaws, rules, and regulations of the association;

If Plaintiffs' interpretation is correct, the definition in RCW 64.38.010(1) would have read as follows: "all sums chargeable to an owner by an association *in accordance with RCW 64.38.025(3).*" (Emphasis added). The fact that the definition of assessment refers to a different section of the Act—which clearly and unambiguously addresses budgets as separate and apart from assessments—demonstrates that the legislature intended RCW 64.38.025(3) to apply only to the budget approval process, not to the imposition of assessments.

It bears great emphasis that the legislature distinguished assessments from budgets in RCW 64.38.020. This statute uses both terms. It is fundamental to statutory construction that where

the Legislature uses different terms, it intends a different meaning by each of those terms. In other words, each word used in a statute has its own separate meaning and the Legislature is presumed to have used no superfluous words.[9] Consistent with this principle, RCW 64.38.020 demonstrates that the Legislature distinguished between budgets and assessments not only by separately referencing each term but also by referencing the approval for each in different ways. It provides, in relevant part, as follows:

> Unless otherwise provided in the governing documents, an association may: . . .
>
> (2) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from owners.

(Emphasis added.) This sentence structure shows the Legislature distinguished between the process for (a) "adopting" budgets, and (b) "imposing" assessments. Accordingly, when the Legislature later discusses the budget approval process in RCW 64.38.025(3) the Legislature is referring only to budgets, and not assessments as

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[9] *State v. Roggenkamp*, 153 Wn.2d 614, 624-627 (2005). In this case, the Court held that the terms "reckless driving" and "in a reckless manner" were different and therefore had different meanings. *Id.*

those are separate and distinct terms in the Act. *Roggenkamp*, 153 Wn.2d 624-627.

2. Plaintiffs Fail to Read RCW 64.38.025(4) in Context and Thereby Misconstrue its Meaning.

Plaintiffs argue that the following language in RCW 64.38.025(4) supports their view that approval of a budget automatically constitutes approval of assessments:

> (4) As part of the summary of the budget provided to all owners, the board of directors shall disclose to the owners:
>
> (a) The current amount of regular assessments budgeted for contribution to the reserve account, the recommended contribution rate from the reserve study, and the funding plan upon which the recommended contribution rate is based;
>
> (b) If additional regular or special assessments are scheduled to be imposed, the date the assessments are due, the amount of the assessments per each owner per month or year, and the purpose of the assessments;
>
> (c) Based upon the most recent reserve study and other information, whether currently projected reserve account balances will be sufficient at the end of each year to meet the association's obligation for major maintenance, repair, or replacement of reserve components during the next thirty years;
>
> (d) If reserve account balances are not projected to be sufficient, what additional assessments may be necessary to ensure that sufficient reserve account

> funds will be available each year during the next thirty years, the approximate dates assessments may be due, and the amount of the assessments per owner per month or year;
>
> (e) The estimated amount recommended in the reserve account at the end of the current fiscal year based on the most recent reserve study, the projected reserve account cash balance at the end of the current fiscal year, and the percent funded at the date of the latest reserve study;
>
> (f) The estimated amount recommended in the reserve account based upon the most recent reserve study at the end of each of the next five budget years, the projected reserve account cash balance in each of those years, and the projected percent funded for each of those years; and
>
> (g) If the funding plan approved by the association is implemented, the projected reserve account cash balance in each of the next five budget years and the percent funded for each of those years.

Boiled down to its essence, Plaintiffs' argument is the following: (i) "funding plan" means "assessments", (ii) the funding plan must be included in the budget and therefore (iii) ratification of the budget automatically approves the revenue from assessments projected in the budget. This argument is in error for two reasons. First, it is a red herring because SVCA has always included proposed revenue from annual dues and assessments in its

budget. Second, this argument ignores the legislative history and purposes behind RCW 64.38.025(4).

The foregoing language was added to the Act in 2011—some 16 years after the Act was signed into law.[10] The purpose of this statutory amendment was to impose reserve study requirements—already an obligation of condominium associations—on homeowners' associations. Reserve studies are planning tools that enable a current or potential owner to understand whether an association has the necessary reserves to fund anticipated capital improvement projects.

Plaintiffs focus on the "summary of the budget" language as support for their position. But, they ignore crucial language that requires the summary of the budget to state the amount of assessments budgeted *for reserves* or *replacement of reserve components*.[11] (Emphasis added). The Bill Analysis for SHB 1309 confirms the purpose of the bill was to deal solely with reserve

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[10] SHB 1309.

[11] It is important to note that the "Summary of Budget" does not require the Board to provide a summary of operating expenses (e.g., salaries, ordinary maintenance, administration, etc.); it only requires the Board to provide a summary of capital projects and the association's plan to pay for such capital expenses.

components and reserve funds, and had nothing to do with the calculation or approval of the overall level of assessments:

Background:

Condominium Associations.

In 2008, the Legislature amended the Condominium Act and the Horizontal Property Regimes Act to require condominium associations to conduct an initial reserve study by a reserve study professional, updated annually with a visual site inspection every three years, unless doing so would impose an unreasonable hardship.

A reserve study identifies the major maintenance, repair, and replacement expenses that a condominium association will incur over time that are not practical to include in an annual budget. The purpose of a reserve study is to evaluate the expected cost of future repair and maintenance of common elements. A reserve study must include a variety of information such as a reserve component list and the balance of the association's reserve account. A condominium association is not required to conduct a reserve study if the cost of a study exceeds 10 percent of the annual budget.

Condominium associations are authorized and encouraged to establish reserve accounts independent of the annual operating budget, administered by the board of directors, to fund the maintenance, repair, and replacement of common elements. A reserve account consists of funds contributed by condominium owners, supplemental to the association's annual operating budget, to fund major maintenance, repair, and replacement of common elements that will be required within 30

years. Examples of common elements include a condominium's lobby, roof, parking lot, recreational areas, roads, and sidewalks. The purpose of the reserve account is to offset the financial burden of necessary future renovations that, in the absence of a reserve account, would require the condominium association to impose a special assessment upon the owners.

Homeowners' Associations.

A homeowners' association (HOA) is a legal entity with membership comprised of the owners of residential real property located within a development or other specified area. A HOA typically arises from restrictive covenants recorded by a developer against property in a subdivision. A HOA is managed by a board of directors who are elected by the members once the developer relinquishes control. In general, the purpose of a HOA is to manage and maintain a subdivision's common areas and structures, to review design, and to maintain architectural control.

Under the Homeowners' Association Act, the HOA may exercise powers necessary and proper for the governance and operating of the association, including: adopting and amending bylaws and rules; **adopting and amending budgets; imposing assessments on homeowners**; entering into contracts; acquiring and conveying property; maintaining and repairing the common areas; granting easements through the common areas; and imposing and collecting payments, fees, or charges for use and operation of the common areas.

HOAs are required to prepare annual financial statements and to provide homeowners with notice of and a ratification process for the annual budget.

HOAs are not required to conduct reserve studies or to maintain reserve accounts.

Summary of Bill:

The requirements of condominium associations concerning reserve components and summaries of annual budgets are amended. The reserve study and reserve account requirements related to condominium associations are adopted with respect to HOAs.

CP 182-83. (Emphasis added).

In short, RCW 64.38.025(4) does not assist Plaintiffs. The language they rely upon for interpretation of the word "budget" was not even part of the original Act they claim nullified the 60% majority requirement in Article III, Section 19 of the SVCA bylaws. Moreover, the "summary of the budget" is not even a document that is voted upon by the members; it is an ancillary, informational document that is intended to inform members and potential purchasers regarding the association's funding for capital projects.

Whereas a budget deals with the operational expenses for a single year, the "summary of the budget" as referred to deals solely with that portion of current expenses that are to be allocated to funding future financial projections that may stretch over many years. Thus, analyzing subsection (4) of RCW 64.38.025 is

completely unhelpful to interpreting RCW 64.38.025(3) because subsection (4) deals with something very different in purpose and scope than the single year budget to pay for the entirety of an association's annual operational expenses. Moreover, the phrase "regular assessments budgeted for contribution to the reserve account" uses the word "budgeted" only as a verb in the sense of "allocated." It has nothing all to do with the entirely separate concept of "budget" as a noun in the sense of a plan for revenues and expenses.

3. Plaintiffs' Analogy to the Condominium Act is Misplaced.

Plaintiffs argue that portions of the Washington Condominium Act (WCA) is "virtually identical" to the Act and that the court should look to the WCA for guidance. First, this inquiry into a separate statutory scheme is only appropriate if the Act is unclear or ambiguous[12], and neither party contends that it is. Thus,

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[12] "If the meaning of the language is ambiguous or unclear, this line of cases directs that examining the statute as a whole, or a statutory scheme as a whole, is then appropriate as part of the inquiry into what the Legislature intended. Thus, some of our cases indicate that consideration of a statutory scheme as a whole, or related statutes, is part of the inquiry into legislative intent only if a court determines that the plain meaning cannot be derived from the statutory provision at issue and ambiguity necessitates further inquiry.

such an inquiry is inappropriate. Second, even if the court found the Act ambiguous, the WCA would offer little guidance because it differs from the Act in several material respects.

The WCA was passed in 1989 and it only governs condominiums created prospectively (i.e., those created after July 1, 1990). It did not have retroactive effect on condominiums created before that date, except in those limited circumstances set forth in RCW 64.34.010. The sections of the WCA which Plaintiffs contend are "virtually identical" to the Act, namely RCW 64.34.308(3), (4) and RCW 64.34.360(1) are ***not*** applicable to those condominiums formed prior to July 1, 1990 ("Old Act Condominiums"). Those condominiums continue to be controlled by the Horizontal Property Regimes Act, RCW 64.32. Thus, the legislature did not make these sections apply retroactively to Old Act Condominiums. If it was so critical, as Plaintiffs contend, for assessments to be automatically approved by ratification of a budget, then it makes no sense at all that Old Act Condominiums

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State, Dept. of Ecology v. Campbell & Gwinn, L.L.C., 146 Wash. 2d 1, 10, 43 P.3d 4, 9 (2002) (citations omitted).

would be excluded from this requirement while pre-1990 homeowners' associations would not.

Additionally, RCW 64.34.360 contains a crucial difference from the Act. It expressly states that "[a]fter any assessment has been made by the association, assessments must be made against all units, ***based on a budget adopted by the association***. RCW 64.34.360 (Emphasis added). The Act contains no corresponding language. The legislature could have added this language to the Act in 2011 when it added a definition of "assessment" in RCW 64.38.010(1), but it did not. This difference is significant, and it confirms that for homeowners' associations, the budget is even further de-linked from the imposition of assessments than with condominiums governed by the WCA.

B. The Legislature Did Not Intend to Impose a Process for Approving Assessments that Would Supersede the Process Contained in an Association's Governing Documents.

The process for ratifying a budget under the Act is markedly different from the process for levying assessments under the SVCA's Bylaws. The key differences are as follows:

Under the Act:

- Members vote to "reject" (rather than "approve") the budget; and

- The minimum percentage of votes required to reject the budget (50%) is expressed as a percentage of the *total membership.*

- The votes of members who do not cast a ballot must be counted as votes to "approve" the budget.

- The vote of a member who is not in good standing, i.e., who is not current in the payment of annual dues and assessments to SVCA, must be counted as a vote to approve the budget.

Under the SVCA Bylaws:

- Members vote to "approve" (rather than "reject") annual dues and assessments; and

- The minimum percentage of votes required to approve annual dues and assessments (60%) is expressed as a percentage of the members *present at the meeting* (or voting by mail).

- Only members who are in good standing are entitled to vote.[13]

It is much easier to ratify the budget under the Act than it is to approve an increase in the annual dues and assessments under SVCA's Bylaws. An example demonstrates how this works in

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[13] Article III, Section 19.

practice. At present, SVCA has 3,204 lots and an equal number of possible votes. Assume that 50% of SVCA's total membership (i.e., 1602 members) votes at a given membership meeting. It would take only 961 votes to approve a dues increase under Article III, Section 19.[14] But, the budget would be automatically approved unless every member in attendance voted to reject the budget.

To make matters worse, RCW 64.38.025 offers an association the opportunity to make it virtually impossible to reject a budget. It states that the budget is approved unless rejected by the "owners of a majority of the votes in the association . . . *or any larger percentage specified in the governing documents.*" Thus, an association is free to say that 100% of the owners must reject the budget, or it is approved. In the case of SVCA, this would require all 3,204 voters to reject the budget.

If the Legislature wanted to give boards of directors this much power over the pocketbooks of the members and to override inconsistent provisions of governing documents, one would have expected the Legislature to have made its intent to overturn the owners' contractual expectations very clear. It did not do so, and

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[14] 60% x 1602 = 961.

there is no evidence or rule of statutory construction that would justify inferring such an intent.

1. The Legislature Did Not Expressly Indicate it Intended to Abrogate Contractual Expectations.

As explained above, the legislature distinguished between budgets and assessments. See RCW 64.38.020. This distinction is consistent with the common understanding that budgets are simply a planning tool. Black's Law Dictionary defines "budget" as "a statement of an organization's estimated revenues and expenses for a specified period." CP 79. Budgeted expenditures are non-binding on the Board. For example, no one would seriously contend that the Board must spend every dollar allocated in its budget to any particular line item. Nor would anyone contend that the Board lacks the authority to spend money on necessary but unbudgeted items (e.g., repairs) that were unanticipated.[15] In contrast to this flexible planning guide, a properly levied assessment is a fixed and binding financial obligation upon the members, enforceable by a lien foreclosure action.

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[15] In fact, the Board would have the inherent authority in mid-year to take money from a budgeted item and to spend it on an unbudgeted item without seeking membership approval.

Given the purpose of a budget (as a general planning tool for the expenditure of assessments levied pursuant to bylaws), it is not surprising that the Legislature entrusted boards with significant deference in this arena, providing that proposed budgets cannot be defeated by anything less than a majority of the total membership. This level of deference is consistent with the Act's recognition that the board has "primary authority to manage the affairs of the Association." RCW 64.38.010.

However, there is no reason to assume the Legislature intended to afford the same deference to board decisions regarding assessments, thereby overriding any bylaw provisions to the contrary. Certainly nothing in the Act compels this radical result. Under Plaintiffs' interpretation of the Act, a board-proposed increase in annual dues and assessments can only be defeated if a majority of the *total membership* attends the meeting in person or by proxy and votes to reject it. This is likely to occur only in the most extreme cases, and it marks a radical shift away from SVCA members'—and of the members of many other similarly situated homeowners' associations—settled expectations under their Bylaws. Indeed, a Sudden Valley property owner who purchased

prior to 1995 would be amazed to learn that the protection afforded from unreasonable dues increases was suddenly—and quite subtly—erased by the Legislature's passage of RCW 64.38.025(3).

The Washington Supreme Court has noted that the "bylaws of a homeowners' association are, in effect, a contract between the association and its members."[16] If the Legislature intended to abrogate a central feature of this contractual relationship (i.e., the process for imposing assessments) it would have said so in clear and unequivocal language, and presumably with a heightened level of notification that it was taking such action. The Legislature knows very well how to issue such an explicit notice. Consider, for instance, the language used by the Legislature to abrogate inconsistent provisions in a homeowners' association's governing documents regarding displaying the American flag (Emphasis added):

> **RCW 64.38.033**
> **Flag of the United States — Outdoor display — Governing documents.**
>
> (1) **The governing documents may not prohibit** the outdoor display of the flag of the United

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[16] *Rodruck v. Sand Point Maint. Comm.*, 48 Wn.2d 565 (1956).

States by an owner or resident on the owner's or resident's property if the flag is displayed in a manner consistent with federal flag display law, 4 U.S.C. Sec. 1 et seq. The governing documents may include reasonable rules and regulations, consistent with 4 U.S.C. Sec. 1 et seq., regarding the placement and manner of display of the flag of the United States.

(2) **The governing documents may not prohibit** the installation of a flagpole for the display of the flag of the United States. The governing documents may include reasonable rules and regulations regarding the location and the size of the flagpole.

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(4) **The provisions of this section shall be construed to apply retroactively to any governing documents in effect on June 10, 2004. Any provision in a governing document in effect on June 10, 2004, that is inconsistent with this section shall be void and unenforceable.**

To take another example, consider the explicit language used by the Legislature to abrogate provisions in governing documents preventing the display of political yard signs (Emphasis added):

RCW 64.38.034
Political yard signs — Governing documents.

(1) **The governing documents may not prohibit the outdoor display of political yard signs** by an owner or resident on the owner's or resident's property before any primary or general election. The

governing documents may include reasonable rules and regulations regarding the placement and manner of display of political yard signs.

(2) **This section applies retroactively to any governing documents in effect on July 24, 2005. Any provision in a governing document in effect on July 24, 2005, that is inconsistent with this section is void and unenforceable.**

The foregoing instructions are unambiguous and explicit. They affirm that the Legislature knows how to notify homeowners' associations that a statute will supersede any contrary provisions of their governing documents , and will do exactly that when such is their intent. Knowing this, it becomes clear that RCW 64.38.025(3) was *not* intended to override an association's methodology for approving assessments. The process for imposing assessments is left to the discretion of each homeowners' association.

2. The Legislative History of RCW 64.38 Does Not Demonstrate that the Legislature Was Concerned About the Process for Imposing Assessments.

House Bill Report HB 1471 explains the impetus for the Act as follows (Emphasis added):

> The bill is needed to deal with common complaints received from members of homeowners' associations. The bill provides a set of basic rules and procedures by which homeowners' associations must operate in order to protect individual association

> members. **The board of directors of some homeowners' associations currently do not provide members notice of their actions and imposition of assessments**. The board needs to be accountable to the members of the association and needs to make decisions based on the association's interest.

CP 81-84.

The House Bill Report shows that the Legislative intent behind the Act was to "protect individual association members." It did this by ensuring that members—and not just the directors—were entitled to advance notice of all board actions, including proposed budgets, as well as, and as separately specified, assessments, and were given the explicit authority to approve them. However, it makes no sense that the Legislature would have protected members by giving boards virtually unchecked authority to increase assessments regardless of what the bylaws have to say on the subject. This is a particularly absurd result with regard to SVCA where the Bylaw provisions regarding the imposition of assessments are far more protective of "individual association members" than the Act.[17]

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[17] This Court has already recognized the protective nature of Article III, Section 19 of SVCA's Bylaws. *See Ackerman v. Sudden Valley Community Association*,

Plaintiffs respond that the Legislature has kept the Board's authority in check by the fact that members can remove a director, with or without cause, upon a majority vote. See RCW 64.38.025(5). This argument misses the point. It is true that the ability to remove board members may offer some protection to members, albeit belatedly and by a rather blunt instrument. But, there is simply no evidence that the legislature considered this "protection" necessary or sufficient to offset the additional, virtually autocratic, power allegedly bestowed on the board. Further, Plaintiffs can point to nothing in the legislative history that supports their theory that the Legislature decided to intervene in the first place in controlling how an association imposes assessments.

3. The Legislature's Interest in Providing Consistent Laws Governing Homeowners' Associations Did Not Extend to Imposition of Assessments.

Plaintiffs assert that the Legislature's intention to provide consistent laws for administration of homeowners' associations means that the Legislature surely intended to deal with the manner

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89 Wn. App. 156, 164 n.12 (1997) ("As a check and balance, SVCA By-Laws require that annual dues and assessments be approved by a 60 percent majority vote of the membership.")

in which associations impose assessments. [18] But that argument goes too far. Legislative intent can certainly be used to resolve ambiguities in a statute, but it cannot be used to read something into the statute that is absent.

The legislature said nothing in RCW 64.38 about regulating the way in which associations impose assessments. In addition to its silence on that issue, the Legislature left many other "administrative" issues unregulated. RCW 64.38.030, for example, requires associations to address a number of administrative matters in their governing documents, but homeowners' associations are free to deal with them as they choose:

> (1) The number, qualifications, powers and duties, terms of office, and manner of electing and removing the board of directors and officers and filling vacancies;
>
> (2) Election by the board of directors of the officers of the association as the bylaws specify;
>
> (3) Which, if any, of its powers the board of directors or officers may delegate to other persons or to a managing agent;
>
> (4) Which of its officers may prepare, execute, certify, and record amendments to the governing documents on behalf of the association;

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[18] CP 471-72.

(5) The method of amending the bylaws; and

(6) Subject to the provisions of the governing documents, any other matters the association deems necessary and appropriate.

Other examples exist where the Legislature saw absolutely no need to regulate associations, to wit: the percentage of votes needed for a quorum[19], the method for levying of fines and appeal remedies, and the manner by which associations adopt rules and regulations, as well as fees, for use of common areas.

The same argument can be applied to condominiums. Obviously, the Legislature was concerned about consistent administration of condominiums, but the legislature saw no reason to compel Old Act Condominiums from following the budget and assessment process outlined in RCW 64.34.308. The point to be drawn from all of these examples is that while an examination of the Legislature's intent can be important for interpretation of an ambiguous statute, it cannot be used to add words and meaning whole cloth to the statute as Plaintiffs attempt to do.

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[19] RCW 64.38.040

4. Plaintiffs Create Ambiguity Where None Exists.

Plaintiffs urged the trial court to adopt their interpretation of RCW 64.38.025 because, otherwise, SVCA has no legal authority to impose assessments when the members reject a measure to increase them. This argument is spurious. First, it casts SVCA's bylaws as having some "loophole" that simply does not exist. And, it compounds the error by urging the court to adopt its interpretation of RCW 64.38.025(3) to fix this manufactured loophole.

Plaintiffs contend that the Bylaws are silent about what happens when the membership rejects a dues increase. This argument can be quickly disposed by the court. A plain reading of the Bylaws demonstrates that if the members reject an *increase* in the annual dues and assessments, the annual dues and assessments last approved by the members continue to operate. In other words, once an assessment level is approved by the members under Article III, Section 19, there is no need to have them re-authorized each year.

Plaintiffs go astray because they misconstrue a term that is used consistently in the bylaws: "*annual* dues and assessments." "Annual" is used to refer to the *type* of assessment imposed on its

members, as compared to "special assessments." See, e.g., Article III, Section 19(b). It does not, as Plaintiffs suggest, mean that the assessments must be re-authorized annually.

C. The Adoption of a Spending Plan Does Not Violate RCW 64.38 and is Not Subject to Member Approval.

Plaintiffs argue that the Board's adoption of a spending plan is, in essence, a revised budget which must be submitted to the membership for ratification. That argument seriously misapprehends the Board's authority and the purposes of RCW 64.38.025.

The Board adopted spending plans in years 2010, 2011, and 2012 to deal with the situation of an underfunded budget (i.e., the budget's projected revenues exceed the actual revenue because the measure to increase annual dues and assessments failed). An underfunded budget for any homeowners' association is not unusual. Projected revenue could be overstated in many ways. Property owners may default on their dues.[20] Revenues from the golf course, swimming pool, and/or fitness facility may be less than

[20] SVCA experienced an increase in defaults during the recession of the last few years. CP 94.

projected. [21] A commercial tenant (e.g., golf course restaurant operator) may abandon its lease, resulting in a loss of lease payments.[22] When such revenue shortfalls occur, the Board must determine which expenses need to be eliminated or adjusted. And yet, Plaintiffs apparently do not contend that the SVCA must amend its budget to account for these types of revenue shortfalls. Indeed, the Board simply adjusts expenditures throughout the year when revenues do not meet expectations.

The Board properly uses the budget document as a planning tool and a guide, which must remain flexible since projected revenues are an estimate, not a certainty. The Board routinely makes spending adjustments based on budget shortfalls without adopting an "amended budget," "spending plan" or similar planning document. But, beginning in 2010, the Board elected to adopt a "spending plan" shortly after the dues increase measure failed at the AGM. The Board felt that it should do this early in the year so that it could make principled, informed decisions—rather than ad hoc decisions—about how to spend its money for the balance of

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[21] CP 94.
[22] Id.

the year. This spending plan was nothing more than a formalized version of what the Board would need to do throughout the year if any other revenue stream were less than expected. Since the Board can make "informal" adjustments without member approval, it follows that the Board's more principled approach does not require member approval.

Aside from the practical problems resulting from Plaintiffs' argument[23], Plaintiffs fail to cite any legal authority holding that the spending plan adopted by the Board must be submitted to the membership for approval. The fact that the SVCA Board elected to deal with unanticipated revenue shortfalls in a more formal and organized fashion—by adopting a spending plan, rather than by making spending decisions on an ad hoc basis—does not trigger the approval process contained RCW 64.38.025(3). Further, the purposes of RCW 64.38.025(3) are not fulfilled by requiring that a spending plan be submitted to the membership for approval. The purpose of this statute is to ensure that association members receive notice of projected increases in their assessments.

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[23] This would require at least 60 days to call a special meeting (*see* Bylaws, Art. II, Section 2 at CP 234-35) and would cost around $10,000 for the election. CP 95.

However, the fact that the Board is adopting a spending plan means that the members already received notice of, and rejected, the proposed dues increase; thus, it is simply a matter of reducing expenditures. And, these decisions are solely within the Board's purview.[24]

D. Sudden Valley Should be Awarded Its Attorneys' Fees Pursuant to RCW 64.38.050.

The trial court awarded attorneys' fees to the Plaintiffs. That award of fees should be reversed, and SVCA should be awarded its fees incurred at the trial court and appellate court.

RCW 64.38.050 provides the following:

> **Violation — Remedy — Attorneys' fees.**
>
> Any violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or in equity. The court, in an appropriate case, may award reasonable attorneys' fees to the prevailing party.

An award of attorneys' fees to SVCA is appropriate for several reasons. First, Plaintiff's action has ignored clear language for the sake of fulfilling a particular goal. Plaintiffs chose to misinterpret the Act and to read language into the Act that is not

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[24] *See* Bylaws, Article III, Section 1 at CP 236; RCW 24.03.095.

present in order to accomplish their goal of making it easier to increase annual dues and assessments.

Second, one of the Plaintiffs, Curt Casey, was the President of the Board when the Board unanimously adopted its first spending plan. CP 465-66. Mr. Casey's response that, as president, he did not actually cast a vote to break a tie, is irrelevant. If the spending plan was, as he argues, so clearly a revised budget that was adopted in violation of RCW 64.38.025(3), he was duty bound to dissent from the adoption of the spending plan, or his silence would be presumed as assent. See RCW 24.03.113. He did not dissent, and it is presumed therefore that he agreed with that action which he now contends is an obvious violation of the Act.

V. CONCLUSION

Plaintiffs' interpretation of the Homeowners' Association Act violates core principles of statutory construction and would have significant adverse policy repercussions. It would result in a significant upheaval in the settled expectations of community association members across the state. Members in associations like SVCA that have higher thresholds for approving assessments,

immediately and without notice, would no longer have the expected protections afforded by their governing documents, some having done so over significant periods of time.

Plaintiffs' interpretation does not make sense given the Legislature's intent to protect association members. If the Legislature wanted to protect the financial interests of members, it is inexplicable that the Legislature would then do just the opposite by establishing such a dramatically low bar for approving assessments that the members could, statistically speaking, almost never reject them. And, if the Legislature intended to override higher thresholds, why didn't the Legislature clearly put associations on notice of this?

In short, Plaintiffs' interpretation of the Homeowners' Association Act must fail. The language of the Act and the legislative history fully support the notion that an association, such as SVCA, may establish different thresholds for approving assessments than the Legislature set for the rejection of budgets.

DATED this 17th day of July, 2013.

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