No. 45739-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HARTSTENE POINTE MAINTENANCE ASSOCIATION, Respondent,

v.

JOHN E. DIEHL, Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Statutes

Rules

Other Authorities

A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in granting the request of Hartstene Pointe Maintenance Association ("HPMA") for declaratory judgment that the governing documents do not grant owner-members a right to appeal decisions of the HPMA Board of Directors ("Board").

2. The trial court erred in granting HPMA's request for declaratory judgment that its Board has the right to exclude a Board member when it meets in closed sessions to discuss likely or pending litigation, when its majority believes that the member may be an adversary in litigation; and the court erred in denying Appellant's request for declaratory judgment that he as a Board member was entitled to disclosure of communications from the corporate attorney regarding the right of owners to appeal decisions of the HPMA Board.

3. The trial court erred in denying Appellant's request for declaratory judgment that HPMA's revised Hazard Tree Policy ("Policy") is invalid.

Issues Pertaining to Assignments of Error

Given that HPMA's Rules and Regulations ("Rules") state that owners who are adversely affected by a Board decision may receive a hearing by the Board when they request, did the trial court err in concluding that no Board decision is subject to such review? (Assignment of Error 1.)

May a minority of corporate directors be excluded from a meeting of the corporate board, even when they have no beneficial interest in a matter before the board, if the board

majority believes that the minority may potentially be adverse parties in litigation with the corporation? (Assignment of Error 2.)

When members of a corporate board of directors disagree about a matter of policy or an interpretation of law, does the majority have a right to use corporate funds to secure a legal opinion, but not to disclose this opinion to the minority? (Assignment of Error 2.)

Given that HPMA's Rules define "notice" as "notice given in person or notice given in writing by first class United States mail," does a policy that denies owner-members such notice when they may be adversely affected by an HPMA action conflict with HPMA's governing documents.? (Assignment of Error 3.)

Does HPMA's Policy set vague, over-inclusive standards for labeling trees as "imminent hazards," inconsistent with the county's Resource Ordinance? (Assignment of Error 3.)

Does HPMA's Policy grant powers to its manager inconsistent with HPMA's Rules and the county's Resource Ordinance? (Assignment of Error 3.)

Does HPMA's Policy impose unreasonable restrictions on an owner-member's appeal of the manager's decision to remove trees? (Assignment of Error 3.)

Given that HPMA's Covenants, Conditions, and Restrictions ("CC&Rs") provide that all owners have benefit of the Common Area on the same terms, may HPMA allow its manager to approve tree removal at his discretion when such removal might not be approved under the Rules if requested by an owner-member? (Assignment of Error 3.)

B. STATEMENT OF THE CASE

Appellant does not take issue with the trial court's findings, but only with its legal conclusions and order. The issues in this case pertain to the interpretation of HPMA's governing documents and the Homeowners Association Act (Ch. 64.38 RCW). HPMA's most basic governing documents are its Articles of Incorporation and CC&Rs. As authorized in RCW 64.38.020, and unless otherwise provided in the governing documents, the CC&Rs may be supplemented and explicated by its Rules and Bylaws.

This case grew out of a previous case. In 2009, HPMA's Board adopted a proposal to remove about 400 trees from a part of the Common Area. Diehl, both an owner and a Board director at the time, opposed the project, believing that such extensive removals would adversely affect the ambiance of a community that had a long commitment to "primitive" and "natural" management of vegetation in its "greenbelts," and mindful that mistakes made in removal of large trees can take, not just years, but generations to correct.

In *Diehl v. Hartstene Pointe Maintenance Association*, Mason County Superior Court granted a permanent injunction against the project as proposed. The matter was eventually resolved through a stipulated order requiring HPMA to replant trees to replace two that it removed in violation of the court's injunction., but allowing development of other management policies affecting its greenbelts. CP 225-229.

In September 2011, HPMA's Board voted 3-1 (two members absent, and Diehl dissenting) to adopt a n Interim Hazard Tree Policy, by which trees in the Common Area

might be selected for trimming or removal. CP 4, ¶ 7. Diehl, concerned that this new policy gave such latitude to decision makers as to permit piecemeal what had been proposed in 2009, complained of the action. While he saw little prospect that the Board would reverse its vote, Diehl was mindful that under HPMA's CC&Rs, "[n]o owner may sue to prevent or abate an actual or threatened violation of these covenants without [complaint and demand to the association of an actual or threatened violation of the covenants] and without having exhausted the remedies available within the Association." Ex. 5, Article X, § 3.[1]

HPMA's Rules provide a process for registering and hearing a complaint. "Any owner adversely affected by a decision of the Board of Directors may appeal to the Board of Directors for a hearing." Ex. 9, Article II, § 4. Accordingly, Diehl filed an appeal for a hearing. However, the Board's president, questioning whether Diehl was entitled to a hearing, sought an opinion from HPMA's attorney. CP 4.[2] When the president proposed to discuss the attorney's opinion in an executive meeting of the Board, he asked Diehl to recuse himself from this meeting. Diehl declined, maintaining that he was entitled to disclosure of the attorney's opinion on the question, and to participate in Board discussion of the issue of

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[1] HPMA has several sets of CC&Rs, applicable to divisions of Hartstene Pointe developed at different times. However, these different sets of CC&Rs are identical so far as they concern the provisions in controversy in this case. References here to the CC&Rs will be to those applicable to so-called "Island Houses," which are duplexes, each half of which is separately owned. These are the CC&Rs applicable to Diehl's residence.

[2] HPMA has not been consistent in its interpretation of the rule allowing appeal of Board decisions. When another Board director, Larry Wendt, appealed a Board decision not to fine an owner who cut down trees in the Common Area without a permit, the Board heard his appeal, and imposed a fine for the violation. See Exhibits 51 and 52.

whether owners were entitled to hearings when they were adversely affected by Board decisions. CP 5-6, ¶¶ 24-29, 102, and 211. The Board president then determined that the matter would not be considered in the proposed executive session. CP 5, ¶ 23. At the Board's next meeting the Board president presented Diehl with a written demand that he recuse himself, threatening legal action if he refused. CP 215. Diehl again declined, and the Board majority subsequently voted to file a complaint for declaratory judgment against him. Ex. 48. This complaint was filed November 30, 2011, and Diehl filed counterclaims with his answer on December 20, claiming that the adopted Policy was invalid, and that he, as a director without any beneficial interest in the matter, was entitled to disclosure of the HPMA attorney's opinion, and to a hearing under HPMA's governing documents regarding the validity of the Policy. CP 193-224 and 179-192.

Diehl filed a motion for summary judgment. The trial court invalidated the Interim Hazard Tree Policy in an order entered September 4, 2012. CP 87-88. HPMA subsequently amended its Policy, and Diehl amended his counterclaims to ask for a determination of invalidity regarding the revised Policy. CP 89-101. Following trial in June and July of 2013, the court concluded that the Board majority might properly have excluded Diehl from executive sessions dealing with issues where he might be an adversary. CP 3-15, particularly ¶ 8 at 10 and ¶ 11-12 at 12. It also concluded that owner-members are not entitled to appeal Board decisions under HPMA's governing documents, and that the revised Hazard Tree Policy was valid. CP 12, ¶ 14; CP 13, ¶ 18. Diehl has appealed on these issues.

C. SUMMARY OF ARGUMENT

While accepting the trial court's findings of fact, this appeal challenges its legal conclusions, contending that the court's conclusions lack substantive support in its findings of fact, and that it erred in its interpretation of HPMA's governing documents and the Homeowners' Association Act (Ch 64.38 RCW).

First, Diehl sought to exhaust his administrative remedies, as required by HPMA's CC&Rs, by following a procedure expressly provided in HPMA's Rules. Whatever may be said about the merits of allowing owner-members a hearing when they are adversely affected by a Board decision, the language of HPMA's Rules expressly provides for the kind of request for review Diehl attempted, notwithstanding the trial court's determination to the contrary.

Second, the court failed to point to any facts that disqualified Diehl from exercising his privileges and responsibilities as a member of the Board when the Board's adoption of its Hazard Tree Policy was being considered. In discussion of the preliminary question of whether owner-members have a right to appeal Board decisions, Diehl, who had no beneficial interest in the matter, had the same rights as other directors to have access to information paid for from corporate funds, and would have benefited by a recognition of the rights of owner-members only as much as other owner-members.

Third, the potential for owner-members being adversely affected by removal of trees near their property is undisputed, and so there is an undisputed need under HPMA's

governing documents to notify owners who might be adversely affected prior to undertaking such removals, unless the trees in question pose an imminent hazard. HPMA's Rules specify that notice is to be either by mail or personal service, not by the kind of posting provided in HPMA's Hazard Tree Policy, which does not provide for effective notification, but only for the possibility that owner-members may learn of actions adversely affecting them if they make continual inquiry, by frequently scrutinizing the HPMA website or the bulletin boards in the clubhouse or by calling the HPMA office. Whatever might be deemed reasonable notice if "notice" were not defined in the governing documents is scarcely relevant when "notice" is so defined.

Further, there are several other inconsistencies between HPMA's Hazard Tree Policy and its governing documents or between the Policy and applicable law. The Policy should be found invalid because (1) the Policy sets criteria for tree removal inconsistent with a county ordinance designed to protect critical areas and their buffers, some of which are found in the Common Area; (2) the Policy grants powers to the manager inconsistent with HPMA's Rules; (3) the Policy imposes unreasonable restrictions on an owner-member's appeal of a manager's decision to remove trees; and (4) the Policy is inconsistent with the CC&R's provision that all owner-members are entitled to have benefit of the Common Area on the same terms.

Writ large, this case raises questions about how corporate accountability may be achieved. As a matter of public policy, corporate boards should be discouraged from being

more closely aligned with the interests of dominant directors than with the interests of the organization they serve. It is not surprising that volunteer corporate directors of homeowners' associations fail to distinguish between the interests of the corporation and their personal interests. The problem of accountability can be exacerbated when a corporate attorney identifies the interest of the corporation with the preferences of the dominant directors. This court is asked to set some limits on the ability of a dominant faction on a corporate board to shut out minority views.

D. ARGUMENT

1. The trial court erred in denying Diehl any right to a hearing before the HPMA Board.

The trial court granted HPMA's request for declaratory judgment that HPMA's governing instruments do not grant owner-members a right to appeal decisions of the HPMA Board. CP 14, ¶ 2. Yet, HPMA's Rules, Article II, § 4, expressly state, "Any owner adversely affected by a decision of the Board of Directors may appeal to the Board of Directors for a hearing." Ex. 9. When such an appeal is made, the Board is required "to consider the appeal at its next scheduled meeting and make a final determination within 15 days after the hearing." *Id.*

HPMA argued that Article II, § 4, of the Rules does not mean what it says. In its complaint, notwithstanding the fact that the rule in question does not state any limitation on an owner-member's right to a hearing on Board decisions that he believes may adversely affect him, HPMA contended that this section "pertains only to decisions of the HPMA

Board relating to the enforcement of HPMA's Rules, and specifically, Notices of Violation." CP 200, ¶ 4.6. The trial court offered an even more restrictive interpretation, disallowing an appeal to the Board even when a Notice of Violation had been issued, if the Board had voted on the matter. CP 11, ¶ 5.

This court should consider the plain language of Article II, § 4. The Rule plainly states that owner-members have a right to a hearing on Board decisions adversely affecting them, without regard to whether such decisions accuse an owner-member of a violation.

Although a court's objective in interpreting restrictive covenants is to determine the intent of the parties, in determining intent, language is given its ordinary and common meaning. *Metzner v. Wojdyla*, 125 Wn.2d 445, 450, 886 P.2d 154 (1994); *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 815, 854 P.2d 1072 (1993); *Krein v. Smith*, 60 Wn. App. 809, 811, 807 P.2d 906, review denied, 117 Wn.2d 1002 (1991); cited in *Riss*, 131 Wn.2d at 621. Unambiguous language will be given its plain meaning. *Burton v. Douglas County*, 65 Wn.2d 619, 622, 399 P.2d 68 (1965). Ambiguity is not to be read into a contract that is otherwise clear. See *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992).

Moreover, there is supportive contextual evidence that Article II, § 4, should be construed as meaning what it says. Article II of the Rules is headed "INTERPRETATION, ADMINISTRATION AND ENFORCEMENT OF THESE RULES AND REGULATIONS," which is a broad description of its content, lending no support to HPMA's notion that appeals are

limited to Board decisions about alleged violations by owner-members. Article II, § 2 , of the Rules, repeating language found in the CC&Rs, suggests the broad scope of Article II, by providing that "[a]ny owner may complain of an actual or threatened violation of these Covenants to the Board of Directors, and request that the Association prevent or abate the same. . . ." Ex. 9. Because Article II, § 8, provides separately for owner-member appeals of alleged violations, it bolsters the conclusion that Article II, § 4, is **not** limited to appeals pertinent to alleged violations by owner-members. Ex. 9. In other words, on HPMA's interpretation, Article II, § 4, becomes redundant in light of Article II, § 8, which is contrary to principles of statutory and contractual interpretation. Thus, Article II, § 4, is properly construed as providing a specific procedure, i.e., a hearing, by which owner-members have an opportunity to be heard about any decision of the Board where they believe themselves adversely affected, when they believe that there is an actual or threatened violation of HPMA's CC&Rs, prior to seeking judicial relief.

This procedure is consistent with Article X, § 3, of the CC&Rs, which provides that no owner may sue to prevent or abate an actual or threatened violation without having complained to the Board (or the Architectural Control Committee if such a committee exists) and "without having exhausted the administrative remedies available to him within the Association." Ex. 5. Article II, § 4, of the Rules simply spells out how to handle such a complaint procedurally, and provides such an opportunity for an administrative remedy.

This rule is reasonable, and not simply because it offers owner-members a

procedure of due process, possibly a way to resolve a dispute without resort to litigation. It is also reasonable because it allows an administrative remedy to owner-members who may have received no notice of an impending decision before it was made, and so had no practical opportunity to be heard in advance of the decision.

In concluding that HPMA's owner-members have no right to appeal decisions made through a vote of the Board, the trial court cited no authority. Oddly, though agreeing that Article II, § 4, "must be given its clear meaning," it concluded that "[no] reasonable reading would permit an appeal of an action taken by the Board upon a motion and after a vote by the Board at a Board meeting." CP 11, ¶¶ 4-5. Not even HPMA has offered such a reading, since even HPMA agrees that owner-members are, under the rule, entitled to appeal Board decisions relating to alleged violations of HPMA's Rules.

HPMA may not have been required to include Article II, § 4, in its Rules to supplement and explicate its CC&Rs. But given that this provision is part of HPMA's governing documents, and the context in which it appears, the rule should be construed to mean what it says.

Diehl argued that he was adversely affected by the Board decision at issue and alleged that this decision was in violation of the Covenants. Neither HPMA nor the trial court in its findings disputed Diehl's claim to have been adversely affected or denied that he was expressing a concern about a policy potentially violative of HPMA's CC&Rs. Accordingly, Article II, § 4, provides that he should have been granted a hearing at the next

regular Board meeting following receipt of his appeal. HPMA's refusal to conduct a hearing was in violation of its own governing documents and in breach of its fiduciary duty under RCW 64.38.025(1). The trial court's ruling, denying all appeals of Board decisions, was contrary to the express language of the governing documents.

2. The trial court erred in allowing board majorities to exclude board minorities from closed meetings and to withhold material information from them.

The trial court granted declaratory judgment that the HPMA Board had the right to exclude Board member Diehl from closed meetings of the Board. CP 14, ¶ 1 and ¶ 3. The court found that when Diehl attempted to get a hearing on the Board's adoption of its Interim Hazard Tree Policy that the Board president, Todd Coward, had sought the opinion of HPMA counsel because he "did not see any basis for an appeal." CP 4, ¶ 11. Coward discussed the issue of whether owners had a right to appeal Board decisions with other Board members and HPMA counsel. CP 4, ¶ 12. Although Coward shared a copy of the legal opinion with all other Board members, he withheld it from Diehl because he believed the HPMA Board was in an adversarial position with Diehl. CP 5, ¶ 15. The trial court found no error in this, stating, "In Diehl's threatened /proposed litigation Diehl was wearing his "owner member" hat." CP 9, ¶ 61.

The trial court did not find that Diehl had a conflict of interest. It found that his refusal to recuse himself from two closed Board meetings did not represent any breach of his duties as a Board member. CP 10, ¶ 1. The trial court cited no authority in support of its

conclusion that Diehl might be excluded from closed meetings of the Board to consider whether owner-members might appeal Board decisions and whether the Interim Hazard Tree Policy was valid, or other matters of business before the Board. The trial court failed to recognize that a director on a homeowners' association board is entitled under the Homeowners' Association Act and the Nonprofit Corporation Act to all the rights and privileges of the office, including attending all board meetings and being informed of any advice provided to board members by corporate counsel paid with corporate funds, except where he has a conflict of interest regarding his fiduciary duties of loyalty and care, as defined by RCW 64.38.025(1) and RCW 24.03.127.

The law does not allow a dominant faction of a board of directors to shut out a minority, even a minority of one, on the ground that the minority is or may become adversarial to the board majority. While RCW 64.38.035(2) allows closed or "executive" sessions of a board of directors under specified circumstances, it does not authorize exclusion of any director from such a meeting.

Because, under RCW 64.38.025(1), directors of homeowners' associations have a fiduciary duty in performance of their work, they have a duty to disclose material facts to each other. See *Colonial Imports, Inc. v. Carlton N.W., Inc.*, 121 Wn.2d 726, 732, 853 P.2d 913 (1993), cited in *Kelsey Lane Homeowners Association v. Kelsey Lane Company, Inc.*, 125 Wn. App. 227, 242-243 (2005). Because by definition material information is such that it might be expected to induce action or forbearance, advice and

information of the corporate counsel is material.[3] In the present context, it was unchallenged that the corporate attorney's advice regarding the right of owner-members to appeal might have influenced action or forbearance by the directors. By denying material information to Diehl, the president violated his fiduciary duty, and HPMA deprived Diehl of information to which he was entitled as a director.

It is not clear what the trial court meant in stating that Diehl wore his "owner's cap" when he attempted to appeal the Board's adoption of its Interim Hazard Tree Policy. Metaphors aside, it is evident from Article II, § 4, of HPMA's Rules that **only** owner-members may appeal Board decisions. Ex. 9. So, it may be agreed that Diehl's appeal was undertaken in his capacity as an owner-member. However, it does not follow that he thereby forfeited his right to sit as a director in any review undertaken by the Board, or that he may be denied material information from corporate counsel regarding whether owner-members have a right to seek review of Board decisions. The presumption that all directors have equal rights as Board members is not rebutted by the circumstances of this case. Consequently, this court might reverse the trial court's ruling simply on the basis that its findings of fact do not support its conclusion of law. See *Landmark Dev., Inc. v. City of Roy* , 138 Wn.2d 561 , 573, 980 P.2d 1234 (1999).

It may also be observed that public policy considerations do not favor the trial

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[3] Information is material if it is "important . . . having influence or effect," such as "to influence party to whom made." Black's Law Dictionary, Rev. 4th ed. at 1128, citing *McGuire v. Gunn*, 133 Kan. 422, 300 P. 654, 656.

court's ruling. It will be generally agreed that accountability and transparency are ongoing problems with corporate governance at every level. In the instant case, both sides had threatened litigation, but neither had resorted to litigation at the point when Diehl was deprived of information about the advice of corporate counsel and when a closed meeting was cancelled because Diehl declined to recuse himself. The trial court's ruling does nothing to encourage cooperation, collaboration, and compromise. Instead of allowing the kind of dialogue that meetings of the whole Board might achieve, the ruling tends to encourage factions to stop talking with each other except through their lawyers. It is hard to see this as wise public policy.

However, it might be thought that there was an implicit rationale in the trial court's findings, and that Diehl's right to participate in Board meetings was somehow limited by a conflict of interest, an appearance of fairness, or by the attorney-client privilege. Each of these possibilities will now be examined.

(a) Diehl had no conflict of interest limiting his right as a director to disclosure of material information and to participation in closed meetings.

The dominant faction on HPMA's Board confused conscientious opposition by a minority with a conflict of interest. A minority of directors has the same right as the majority to benefit from whatever legal research and advice is obtained on behalf of the incorporated association. To imagine otherwise leads to the absurdity that a director might initially be part of a majority, but after learning corporate counsel's advice, have a change

of mind, and so no longer be allowed access to similar information.

Because it appears that no Washington appellate court has previously been asked whether a corporate board may exclude a member when it considers an issue where he is seen as "adversarial" even though not burdened by a conflict of interest, this may be a case of first impression. However there is case law from California, holding that a director, even one who might potentially be an adverse party, "is entitled to attend board meetings where the litigation may be discussed, perhaps with counsel. ... His position makes him potentially privy to privileged information about the litigation."[4] Case law in Washington has addressed a similar question posed with regard to members of the boards of municipal corporations.

Members of governing boards of municipal corporations, such as city councils, like members of the governing boards of homeowners' associations, have a fiduciary duty to their constituents. Like board members of homeowners' associations, who – under RCW 64.38.025(4) – may be removed by a majority vote of the voting power in the association at any meeting of the association at which a quorum is present, municipal officials may be recalled by a vote of their constituents.[5] In *Barry v. Johns*, 82 Wn. App. 865, 920 P.2d 222 (1996), the court rejected an effort to extend the concept of "beneficial interest" under Ch.

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[4] *Mills Land & Water Co. v. Golden West Refining Co.*, 186 Cal. App. 3d 116, 128, 230 Cal. Rptr. 461 (1986).

[5] However, while a director of a homeowners' association may be removed without cause, a public official can only be removed after filing of a petition stating with specificity substantial conduct clearly amounting to misfeasance, malfeasance, or violation of the oath of office. *Greco v. Parsons*, 105 Wn.2d 669, 671, 717 P.2d 1368 (1986).

42.23 RCW, the code of ethics for municipal officers, to prohibit participation by city councilmen, who also served as board members of a nonprofit corporation, in a decision by the city council to approve an agreement limiting board members' liability for decisions made in their capacity as board members. The court concluded that the councilmen whose actions were challenged had a right to participate in the decision because "the code seeks only to regulate municipal officers' financial interests in contracts, not the type of non-pecuniary interest involved here. . . ." *Barry*, 82 Wn. App. at 866. The court addressed the role of an elected representative in policy-making situations:

> [I]n a representative democracy, we elect our legislators precisely to carry out agendas and promote causes with full knowledge that 'their own personal predilections and preconceptions' will affect their decisions. . . . As long as these predilections do not lead them to line their pockets or otherwise abuse their offices, we leave the wisdom of their choices to the voters. If the voters do not like their representatives' agendas or voting decisions, they are free to vote them out of office.

Barry, 82 Wn. App. at 870, citing *Evergreen Sch. Dist. 114 v. Clark County Comm. on Sch. Dist. Org.*, 27 Wn. App. 826, 833, 621 P.2d 770 (1980). Similarly, an elected director of a homeowners' association should have no less freedom to pursue his or her legislative interests. Particularly, when the board of such an association meets in closed sessions, the majority should not be allowed to shut out a minority when the rights of all their constituents are being considered.

Both of the issues before the HPMA Board – whether owner-members had a right to appeal Board decisions adversely affecting them and whether the Interim Hazard Tree

Policy was in violation of the CC&Rs – were policy issues, not adjudication of the rights of any individual owner-member. It was not alleged by HPMA, nor found by the trial court, that Diehl had any beneficial interest at stake when he was denied disclosure of the corporate counsel's advice and denied admission to a proposed closed meeting of the Board to discuss such advice and the issue of whether owner-members have a right to ask for a review of Board decisions. Because he had no beneficial interest in the questions at issue, Diehl was entitled to the same rights of information and participation as any other HPMA director. He was only fulfilling his fiduciary responsibility to represent the interests of all owner-members to the best of his ability, loyal to their interests, not to any personal interest.

The trial court did not find that Diehl was disloyal to his association in advancing his views challenging the adopted Policy and claiming a right to a hearing under HPMA's Rules. If Diehl had prevailed before the Board, he would have 'benefited' only to the extent that every other owner-member would benefit from HPMA's recognition of certain rights and by adherence to HPMA's governing documents and its general plan of development. Each director in a homeowners' association may have his or her own view of matters before its board; however, it is unreasonable to suppose that only those on one side may hear the opinion of counsel and discuss the issue. Diehl was like the other Board members insofar as his views on issues before the Board were shaped by a variety of personal experiences. However, like other Board members, when he sat at a Board meeting, he wore his "director's cap," not an "owner's cap."

So, when directors have no beneficial interest at stake, their regular privileges, including the right to participate in all Board meetings and to receive all material information, should not be abridged. When a majority of directors denies material information to a minority, the majority is denying to the minority the opportunity to make that "reasonable inquiry" that is part of the fiduciary duty of a director under RCW 24.03.127.

(b) The appearance of fairness doctrine did not apply to Diehl's participation in closed Board meetings.

A distinction is often made between "legislative" and "adjudicatory" (or "administrative") actions. Actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative. *Durocher v. King County*, 80 Wn.2d 139, 152-53, 492 P.2d 547 (1972), citing 5 E. McQuillin, The Law of Municipal Corporations, 16.55 (3d.ed. 1969 rev. vol.) at 213. Adjudicatory matters are those in which a government's action affecting an individual is determined by facts peculiar to the individual case, whereas legislative decisions involve the adoption of a "broad, generally applicable rule of conduct on the basis of general public policy." *Saleeby v State Bar*, 39 Cal.3d 547, 560 (1985). It may be argued that when boards of homeowners' associations consider the rights and responsibilities of an individual, as determined by facts peculiar to the individual case, they perform a quasi-judicial action. It could then be argued that in such cases, board members might be excluded from participation if their previous involvement

jeopardized an appearance of fairness.

However, it should be remembered that Diehl's attempt to get reconsideration of a policy did not involve any quasi-judicial action, for the Board was **not** asked to consider the rights and responsibilities of an individual, as determined by the facts peculiar to the individual case. Instead, his appeal of the hazard tree policy was based on what he perceived to be a denial of rights of all owners, as protected by HPMA's governing documents.

Second, HPMA's Board excluded Diehl from discussion of a matter that he had not even addressed in his appeal, i.e., whether owner-members have a right to appeal Board decisions, which issue pertained to a broad, generally applicable rule or policy. Thus, the Board was to address a legislative matter, not an adjudicative issue. If the Board were to review a policy it had adopted, as Diehl requested through his appeal, it would be engaged in a continuing process essentially legislative in character. The appearance of fairness doctrine does not apply to legislative actions. See *Zehring v. City of Bellevue*, 99 Wn.2d 488, 494, 663 P.2d 823 (1983).

Third, even if it were determined that Diehl's expressed concerns about the Policy he was appealing somehow disqualified him from participation in Board review of the issue, then so might other Board members be similarly disqualified, for they, too, had expressed strong views on the issue. The result, absurdly, would be to disqualify all Board members.

Even if the Board's consideration of Diehl's request for a hearing on its Policy were construed as an adjudication of Diehl's individual rights as an owner-member, it would not

have been fair to allow only his opponents to determine the rights he claimed on behalf of all owner-members. Diehl and the majority of the Board had long had an adversarial relationship concerning removal of trees from the Common Area, and if it were supposed that resolution of this issue required an appearance of fairness in the procedures used to address the issue, then no such appearance could be preserved in procedures that allowed only Diehl's opponents to participate when the issues were addressed in executive session. Any meeting where only one perspective was allowed could not preserve an appearance of fairness. As the court ruled in *Smith v. Skagit County*, 75 Wn.2d 715, 743 (1969), when a planning commission went into executive session, inviting only advocates of certain zoning changes to attend and be heard, and deliberately excluding opponents of the proposed rezoning, "the hearing lost one of its most basic requisites - the appearance of elemental fairness, " invalidating the legislation that emerged.

(c) Attorney-client privilege did not justify the exclusion of Diehl from closed meetings of the Board.

Under RPC 1.13(a) a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. As such, lawyers representing an organization owe their independent judgment and loyalty to the organization, not to any of its constituents. HPMA's attorney misconstrued her proper loyalty by asserting, not simply that HPMA was her client, but that "the HPMA Board **majority** is properly identified as the 'highest authority' in the organization." CP 41, lines 1-2; emphasis added. To the contrary, the Board as a whole is the highest authority in

HPMA. Diehl did not lose the privileges or responsibilities he had as a director by reason of taking positions at odds with his fellow directors. HPMA was the client, not any faction within its Board.[6]

HPMA's attorney was obliged to offer her best advice to the organization, not to any faction within it. The different factions were entitled to make such use of her advice as they believed to be in the corporation's interest. It was as much in the interest of the association that such advice be disclosed to Diehl as to any other director. If the advice were cogent, it might have persuaded Diehl to abandon his interpretation, and so restored harmony on the corporate board. On the other hand, if the advice supported Diehl's interpretation or was equivocal, other Board members and ultimately the homeowners' association might have benefited if Diehl had been allowed to call attention to the absence of legal support for the position taken by HPMA's president. Consequently, it was not only an HPMA responsibility to disclose its attorney's advice to all its directors, but also in the interest of the homeowners' association to allow Diehl such access.

Of course, HPMA retained means of legitimately excluding Diehl or any dissident

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[6] Although HPMA attempted to invoke attorney-client privilege in withholding information from Diehl while he served as a director, it must be recalled that the information withheld was not in the context of discovery or examination of the attorney or client regarding communications between the two. As a director, Diehl was among the constituents of the corporate entity served by the corporate attorney, and so was a part of the client. The question of whether Diehl would have been entitled to introduce evidence of the corporate attorney's advice in the course of litigation did not arise, for such information was withheld from him, and was not the subject of any discovery requests by him.

faction from its meetings. He might have been removed from the Board by a majority vote of the voting power of the association. RCW 64.38.025(4). The dominant faction might have hired its own attorney, meeting privately with such counsel. Or, arguably, HPMA might have formed a special litigation committee to evaluate whether litigation was necessary and wise, and to oversee its details if litigation were chosen as the best course for the association.[7]

But HPMA has not contended and the trial court did not find that it did any of these things. Instead, counsel for HPMA, by conflating the interests of HPMA, her client, with the interests of the dominant faction of the Board, has an apparent conflict of interest under RPC 1.7(a), for the interests of HPMA may be distinct from the interests of a Board majority on a particular issue., and so for HPMA's counsel to represent both involves a concurrent conflict of interest, there being a significant risk that representation of the association would be materially limited by what its lawyer perceived as her responsibilities to the majority faction.

The HPMA attorney should have warned the Board that she could not represent

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[7] A California case suggests one avenue for excluding a minority: "If there is a concern that a dissident director might disclose confidential communications concerning the litigation, the corporation can form a litigation committee to discuss litigation matters in confidence without the presence of directors or shareholders who are adverse to the corporation's position." *La Jolla Cove Motel and Hotel Apartments, Inc. v. Superior Court of San Diego County*, 121 Cal. App. 4th 773, 17 Cal. Rptr. 3d 467 (2004). This case does not address the question of whether a litigation committee needs to be balanced, so that it is not merely a subterfuge by which a dominant faction excludes a minority faction from important business of the corporation.

both HPMA and a majority faction that had a significant dispute with a minority faction. Although RPC 1.7(b) contains provisions under which an attorney may represent both an organization and a faction within an organization, it requires the organization to consent in writing after consultation and full disclosure of the material facts. HPMA has not contended that it did so. The trial court did not find otherwise. A majority faction has no right to exclusive use of the corporate attorney, depriving a minority of material information.

3. The trial court erred in finding HPMA's Hazard Tree Policy to be valid.

The trial court did not accept any of Diehl's arguments for finding HPMA's Policy invalid, denying his request for declaratory judgment. CP 14, ¶ 4.[8] Yet, the trial court's findings of fact do not support its conclusion finding validity, and the court appears to have overlooked inconsistencies between the Policy and both HPMA's governing documents and the county's Resource Ordinance.

Like most homeowners' associations, HPMA has responsibility for a variety of structures and roads in its Common Area. Unlike most homeowners' associations, HPMA was formed with a special commitment to maintain the forested, natural character of its greenbelts. In a publication distributed to prospective buyers, developer Weyerhaeuser Properties described the general plan of development for the community:

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[8] Strictly, the trial court was asked to review two revised versions of the original Interim Hazard Tree Policy. However, this court is asked only to consider the most recent, and still current policy, adopted in December 2012.

> What is unspoiled will remain unspoiled; a tremendous accomplishment in an age of crowding and maximum land use. Approximately one-half of the total land is dedicated in perpetuity to green belts . . . This is not a place for manicured lawns, but one of natural environment . . . Hartstene Pointe is as primitive as ever and unchanged except for one thing. You can enjoy it in comfort and privacy. That part won't change. The developers have seen to that.

Ex. 56. As this publication, *Your Island Is Calling*, emphasizes, "Each circular lot is isolated, shielded and set in verdant forest. . . . No lot touches another. Between them are ample, wooded green belts dedicated forever as common ground to the whole property." *Id.*

Consistent with the developer's commitment that what was unspoiled would remain unspoiled, under Article VI of the CC&Rs, owner-members must obtain written permission before removing any vegetation, even on their own lots:

> No landscaping work, including the removal of natural trees, shrubs, brush and other ground cover, shall be undertaken on any Platted Residential Lot until the plans and specifications showing the nature and other details of the proposed work shall have been submitted to and approved in writing by the Board of Directors of the Association or by the aforementioned architectural control committee appointed by the Board.

Ex. 5. As the community grew, its Board developed numerous requirements, incorporated in HPMA's Rules, Article IV, § 7(f), to limit and guide tree removal, on both the Platted Residential Lots and the Common Area. Ex. 9. However, HPMA's adopted Policy, even as currently revised, runs contrary to HPMA's general plan of development as expressed in the Declarant's publication and its governing documents. More specifically, the Policy has these substantial flaws:

(a) The Policy fails to provide for the notice to which owner-members are entitled under its governing documents.

HPMA has not disputed that an owner-member is entitled to reasonable notice of actions, such as removal of trees in the vicinity of the property of an owner-member, which may be perceived by an owner-member as adversely affecting his or her property. HPMA's CC&Rs expressly provide that if the Board creates a committee called an "Architectural Control Committee" to interpret and administer the covenants, "the committee shall be responsible for seeing to it that lot owners who may be adversely affected by a committee decision are given **reasonable notice** thereof." Ex. 5, Article X, § 1; emphasis added. The Board assumed the responsibilities of the Architectural Control Committee in 2010, when it abolished this committee. The responsibility for notice thereby became incumbent upon the Board.

HPMA's Policy shifts HPMA's burden for notice onto owner-members to learn of pending removals of allegedly "non-imminent hazard" trees. The version of the Policy under appeal provides merely for posting the manager's recommendations in the clubhouse and on the website for 15 days, and for the HPMA office to respond to inquiries by owner-members when it receives them. Ex. 1, § 3(f).This imposes on owner-members the need to search the bulletin boards or website, where the postings may not be conspicuous, or to frequently call the office to ask about pending tree removals. Nonetheless, the trial court held that the posting requirement set forth in the December 2012 Hazard Tree Policy "constitutes reasonable notice." CP 12, ¶ 13.

How should notice be given? The definitions section of HPMA's Rules provides that "[n]otice may be notice given in person or notice given in writing by first class United States mail addressed to the lot owner at the address on file with the Association." Ex. 9. Thus, under HPMA's own Rules notice should be given in person or by first class mail.

Even if there were no relevant definition of "notice" in HPMA's Rules, case law establishes that notice must be reasonably calculated to apprise a party of the pendency of proceedings affecting him or his property, and must afford an opportunity to present his objections before a competent tribunal. *Fairwood Greens Homeowners v. Young*, 26 Wn. App. 758, 614 P.2d 219 (1980), citing *Watson v. Wn. Preferred Life Ins.*, 81 Wn.2d 403, 408, 502 P.2d 1016 (1972). It is fundamental that a notice to be meaningful must apprise the party to whom it is directed that his person or property is in jeopardy. *Ware v. Phillips*, 77 Wn.2d 879, 882, 468 P.2d 444 (1970).

The essence of procedural due process is notice and the right to be heard. *Watson v. Wn. Preferred Life Ins.*, 81 Wn.2d at 408. Therefore, because due process is at the heart of fair dealing in legal matters, the responsibility for reasonable notice becomes part of HPMA's fiduciary duty of care, good faith, and fair dealing under RCW 64.38.025(1) and RCW 24.03.127.

The trial court failed to recognize that posting proposed tree removals in the HPMA clubhouse and its website did not conform with either HPMA's own requirements for notice or the obligation under case law for meaningful notice that effectively apprises a party of

jeopardy to his person or property. Obviously, in a community where most property owners live elsewhere, a posting on a clubhouse bulletin board is not likely to be observed by most owner-members. Nor is there reason to suppose that most owner-members habitually look for postings on the website to learn of pending actions that may adversely affect them.

Further, even if owner-members somehow learned of a proposed action and submitted objections pursuant to § 3(i) of the current Policy, they might not receive notice of the Board's decision prior to removal of the trees at issue. Although § 3(i) requires the Board to "consider" such objections as it may receive at its next regularly scheduled meeting, the Policy does not require the Board to make a decision at this meeting or to notify objecting owner-members of its decision. Instead, under the current Policy, "[t]he Manager shall abate the hazard as promptly as possible . . . following the HPMA board's directive" (Ex. 1, § 3(k)), which means that even if the manager's decision were appealed, the Board's action on appeals might not be communicated to owner-members appealing, and the trees might be removed with no opportunity prior to removal for review of the Board decision pursuant to the Rules, Article II, § 4.

Of course, if the Policy dealt only with those trees posing imminent hazards, little or no notice would be adequate, for the overriding concern would be to eliminate the immediate peril, and no one disputes that the manager should be allowed to take "emergency" action in cases of truly immediate peril. However, the current Policy allows removal, without effective notice, of trees that experts may dispute as to whether they are

hazardous. The Policy allows HPMA's consultant to recommend removals that go far beyond emergency situations. If owner-members are not notified of such proposed tree removals, and are required instead to make continual inquiry – by frequently visiting the website or calling the HPMA office – to determine whether a proposed tree removal may adversely affect their property, they are not receiving that reasonable notice of such pending action to which they are entitled. The present policy allows HPMA to place a jumbled description of proposed and past tree removals, printed in a tiny font, pinned to the clubhouse bulletin board so that most of the trees designated for removal cannot even be seen without removing the pins, and without any indication of how soon comments must be received if they are to be considered. Thus, HPMA escapes scrutiny of its proposed tree removals, and avoids effective notice of its action.

Moreover, given that the posting required pertains only to the manager's tentative decision – not to the manager's final decision or the Board's decision if the manager's decision is appealed – there is no mechanism to ensure that owner-members have a meaningful opportunity to respond to whatever information is submitted to the manager before the manager reaches a final decision. Even if the consultant's recommendations are posted and somehow noticed by those affected, those adversely affected have no way of knowing what other information may be influencing the manager. In a similar case, failure to provide owners with "a meaningful opportunity to respond to the information submitted to the [decision makers] before [they] acted" was held unreasonable. See *Day v.*

Santorsola, 118 Wn. App. 746, 763 (2003).

So, owner-members are deprived of effective notice, and even when they manage to learn of a decision adversely affecting their property and object, they may be denied a meaningful opportunity to respond to information influencing the manager or the Board. As a community built upon the concept of leaving much of its natural environment, and particularly its greenbelts, intact, HPMA has never contended that it does not need to give notice to affected owner-members of proposed removal of trees that pose no imminent hazard. But what it calls "notice" in its hazard tree policy is ineffective and contrary to its own governing documents. This represents both a violation of the documents that form the fabric of HPMA's self-governance and neglect of the fiduciary duty its Board owes to its owner-members under RCW 64.38.025(1).

(b) The Policy sets vague, over-inclusive standards for labeling trees as "imminent hazards," inconsistent with the county's Resource ordinance.

The trial court, while not specifically addressing the criteria in the Hazard Tree Policy pertinent to labeling trees as "imminent hazards," concluded that the Policy was "not unreasonably vague." CP 12, ¶ 17. Here are the criteria definitional of imminent hazards in the current Policy (Ex. 1, § 2, emphasis added):

> An Imminent Hazard is a tree within a tree-length of a target (home, other structure, **driveway, parking area, roadway**) and exhibiting readily observable characteristics indicative of immediate structural failure, including **but not limited** to one or more of the following characteristics:
>
> a. Dead and leaning over or toward a target; clearly unstable or

in an advanced state of rot.

b. Leaning where lean is unnatural with uprooting (general standard approximately 50% or more root mass exposed), noticeable soil fissures, heaving of the root plate, or structural root fractures. (In these cases the soils are often soft over failed portion of root system, putting weight on the soft soils causes movement in the tree top when jumping up and down on roots.)

c. Tree uprooted or stem is broken, tree is hung up in another tree over target, and contact between trees is not stable (not likely to stay hung up for long).

d. Tree parts broken and hanging. Broken tree top or large hanging branch (2-inches diameter or larger) over target, and access under broken part cannot be restricted and target cannot be moved.

The ordinary understanding of an imminent hazard requires that (a) the threat is real, i.e., that it is probable that if the tree falls that it will cause significant damage upon a target; and (b) the threat is immediate, and not a guess about what might occur many months or years in the future. But HPMA's Policy allows removal of trees labeled as imminent hazards – without any notice to owner-members or opportunity for review by its Board – even where a tree showing signs of failure is only within reach of a driveway or roadway, without any evidence that the tree would cause damage to such a target in the event the tree fell, and without clear parameters of how imminent the risk of failure is.

Even if the specific criteria for "imminent hazard" were adequate, the above-quoted section undercuts these by stating that designation of imminently hazardous trees is "not limited" to any of the specified conditions. Thus, the "not limited" exception grants virtually unlimited discretion to the manager to remove trees he is willing to call "imminent hazards." Such discretion vitiates the commitment to preserve the natural, forested character of the

greenbelts, and denies, under cloak of the allegation of an "imminent hazard," any opportunity for owner-members to seek review before irreversible action is taken.

While the manager is required to comply with applicable law (Ex. 1, §§ 2(a) and 3(a)), the Policy gives no clue as to what law is applicable, and fails to ensure, by training or otherwise, that the manager is acquainted with applicable law, such as the Mason County Resource Ordinance. That ordinance, designed to protect "critical areas" designated under the State's Growth Management Act, prohibits removal of most trees from wetlands, landslide hazard areas, and fish and wildlife habitat conservation areas unless the trees are "danger trees," meaning trees with "a high probability of falling" and where there is "a residence or residential accessory structure within a tree length of the base of the trunk, or where the top of a bluff or steep slope is endangered."[9] Because the Policy allows removal of trees as "imminent hazards" not only if they might fall on a structure, but also on a road or driveway, the Policy allows removal of trees in, for example, landslide hazard areas where the ordinance requires retention to help guard against landslides.[10] By adopting a broader notion of what comprises a hazardous tree than is prescribed by the ordinance, the Policy is inconsistent with the ordinance.

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[9] See attached Appendix, showing the relevant sections of the Resource Ordinance.

[10] Although this appeal is based on a facial challenge to the Hazard Tree Policy, it may be noted that the conflict with local ordinance does not give rise to only a theoretical or remote possibility of violation of the law. Diehl pointed out that one or more trees near his house that were removed by the manager were within the buffer for a landslide hazard area. CP 78, lines 23-25. While agreeing that the trees were removed in violation of the Policy, the trial court did not specify its reasons for finding a violation. CP 10, ¶ 64.

Further, the broad characterization of possible "targets" makes nearly all trees in the greenbelts possible candidates for removal, given the density of development at the Pointe. See Ex. 15, map of Hartstene Pointe, showing housing density, including a multitude of streets and driveways.

Given that the manager may proceed to remove trees he calls "imminent hazards" with no opportunity for review by affected owner-members or their elected Board, evidence of violation of the county's ordinance may be destroyed by the act of removing such trees. Given that it is usually impractical after removal to establish the height of a tree and whether it is within a tree length of a structure, the Policy undercuts any opportunity for enforcement of a law intended to protect critical areas.

The Policy thereby allows not only excessive discretion to the manager in determining what trees to remove as "imminent hazards" – threatening the original intent to preserve the greenbelts in their natural, forested condition – but also sets criteria for removal that would **not** be deemed significant hazards to the ordinary understanding and that are inconsistent with the county ordinance.

(c) The Policy grants powers to HPMA's manager inconsistent with HPMA's Rules and the county's Resource Ordinance.

The trial court concluded that the Policy did not grant unreasonable discretion or overly broad powers to the HPMA manager. CP 12, ¶ 16. However, the court cited nothing in the Policy to justify such a conclusion, except to say that it has "considerable specificity" regarding the manager's duties, and that testimony by two managers – current and recent–

indicated that they did not feel confused or inadequately guided by the Policy. CP 8, ¶¶ 51-52.

Yet, while the Policy allows the manager to consider wildlife habitat, aesthetics, and cost-resource expenditures, it is only "to the extent practicable." Ex. 1, § 3(e).It fails to clarify what may be deemed practicable, and assigns no relative weight to these considerations. Nor is the manager required to take such considerations into account. The language of the Policy gives essentially unlimited discretion to the manager. One result is to fail to provide any reasonable standard for measuring whether the manager has erred in determining what vegetation to remove, or whether an owner-member has a valid basis to appeal the manager's decision.

In addition, a provision eliminating any "procedural requirements" for addressing imminent hazards seems to authorize the manager to take whatever action he pleases using whatever procedures he pleases. See Ex. 1, § 2(b). Although it is unclear whether this provision is meant literally, it is inconsistent with the stated procedural requirements in the Policy for removal of trees deemed imminent hazards.

More fundamentally, the delegation of authority to the manager found in the current Bylaws appears inconsistent with HPMA's Rules, which provide, with certain exceptions for minor work such as removal of dead vegetation, that "[a] property owner must apply to the HPMA to remove, trim, limb or plant vegetation in the common area." Ex. 9, Article IV, § 7(f)(1). The Rules make clear that authority to grant permission for removal of vegetation

lies with the Board of Directors: "CC&Rs governing the management of the forest found on common area fall under the direct authority and supervision of the Board of Directors." Preamble to Article IV, § 7. Further, the same article states specific criteria under which an application to the Board of Directors for removal of vegetation from the Common Area either **must** be approved (§ 7.f(2)) or **may** be approved (§7.f(3)). The latter section, while stating criteria that may justify the BOD in granting permits for removals, provides that "[t]he final determination of whether to grant a permit affecting the common area shall be in accord with the community interest in maintaining the forest and its habitat."

The attempt in the Policy and a recent amendment to the Bylaws to delegate authority to the manager in such a way that, except where an appeal is timely filed, the decision-making is left to the manager, not the Board, is inconsistent with these requirements. The manner in which Article VI, § 1(e), of the Bylaws delegates authority to the manager bypasses the requirement that the Board of Directors be the final arbiter on removal of vegetation. See Ex. 8. The nearly unbridled powers granted to the manager fail to ensure compliance with applicable law, and conflict with both the right of owner-members to appeal to the BOD and the duty of the BOD to be the final decision-maker.

(d) The Policy imposes unreasonable restrictions on an owner-member's appeal of the manager's decision to remove trees.

The actions of a homeowners' association, or its board of directors, must meet the test of reason. One element of the fiduciary duty of care and reasonable inquiry is independent verification of information supplied to the board "to obtain unbiased, objective

information." *Day*, 118 Wn. App. at 759. For example, when a homeowners' association was authorized to consider size, height and proximity when considering approval of building plans under a general consent to construction covenant, but made an inadequate investigation not based upon accurate information, the court determined that the association's decision to deny a permit for construction was unreasonable, arbitrary, and in violation of its covenants. *Riss v. Angel*, 131 Wn.2d 612, 638, 934 P.2d 669 (1997).

In *Riss*, the court also focused on misleading photos that gave a false impression of the height of a proposed house, showing inadequate verification by the decision-makers. *Riss*, 131 Wn.2d at 628. Thus, a homeowners' association is required, unlike a corporation seeking profit, to consider more than whether a practice or procedure is reasonable from a financial standpoint. Iit has a fiduciary duty of good faith, reasonable inquiry, and fair dealing when it addresses the concerns that owner-members bring to it.

No policy is reasonable that makes it difficult to appeal a tree removal decision before the trees are removed or that cuts in half the time allowed to secure expert opinion for a hearing on removal of trees unless the appellant uses an expert with credentials that HPMA does not impose on itself.

The trial court concluded that the Policy "does not limit an owner [appealing a manager's decision to remove trees] to any source of additional information, and is broad enough to enable any owner input." CP 12, ¶ 15. However, the problem is not that owner input is restricted; instead, it is that the Policy unreasonably limits the time allowed for all

but a single variety of expert report.

Although the Policy allows owner-members to submit comments (regarding trees proposed for removal that are not deemed imminent hazards) within 15 days of a posting on a clubhouse bulletin board, if owner-members seek an expert report, they have only 15 days to obtain it **unless** it is obtained from a "professionally qualified arborist," defined as a consulting arborist certified by the International Society of Arboriculture ("ISA"), in which case they are allowed 30 days. See Ex. 1, § 3(j). HPMA does not limit itself to consulting with ISA-certified arborists. HPMA's Policy only requires it to employ a forester with "urban experience" (Ex. 1, § 3(a)), whatever that is taken to mean.

However, even if HPMA required use of ISA-certified arborists in its own work, it would be arbitrary not to allow any expert except an ISA-certified forester 30 days to produce a report. Under the Policy, owner-members wishing to appeal the manager's recommendations would **not** be allowed to take 30 days to obtain a report from, for example, a Ph.D. in botany specializing in the problems of identification of hazardous trees (at least not unless they also paid an ISA-certified arborist to produce an additional report). Nor would owner-members be allowed more than 15 days in obtaining a report from a forest ecologist challenging the methodology of HPMA's arborist. In favoring only one type of expert, HPMA has imposed an unreasonable restriction on owner-members trying to challenge the work of HPMA's arborist.

(e) The Policy is inconsistent with the right of all owners to have benefit of the Common Area on the same terms.

The trial court did not directly address the question of whether HPMA's Policy is inconsistent with Article II, § 1(e), of the CC&Rs, which provides that all owners are entitled to "use, enjoy, and have the benefit of the Common Area **upon the same terms**."Ex. 5, emphasis added. HPMA, as successor to the Declarant, is bound by the Rules to the same extent as every other owner. See *Mountain Park Homeowners Ass'n v. Tydings*, 72 Wn. App. 139, 145, 864 P.2d 392 (1993), aff'd, 125 Wn.2d 337, 883 P.2d 1383 (1994). Accordingly, HPMA owes to its owner-members equal treatment of proposals for removal of vegetation from the Common Area.

Yet, HPMA's Policy creates a double standard, allowing the manager to weigh a variety of considerations, both stated and unstated, when no such latitude extends to requests for tree removal by owner-members. It is not simply that the manager is allowed to exercise his discretion in a manner denied to owner-members who apply to remove trees from the Common Area. Rather, it is that the manager is allowed a range of considerations not applicable under the Rules when an owner seeks permission to remove trees. For example, there is nothing in the Rules corresponding to the manager's discretion to consider "to the extent practicable," such matters as "wildlife habitat, aesthetics, and cost/resource expenditures." Ex. 1, § 3(e). Whatever these vague guidelines are taken to mean, they at least allow a range of discretion that goes beyond anything allowed to owner-members under the Rules when they seek tree removals from the Common Area. Compare Ex. 9,

Article IV, § 7(f).

Moreover, the Policy sets a different standard for identification of property lines than is applicable when individual owner-members apply to remove trees near their lots. Under the Policy, the manager is authorized to use his "best judgment" in determining whether trees are in the Common Area. See Ex. 1, "Step 1 SITE VISIT." In contrast, under the Rules an owner-member must have "properly identified his/her property line and [that] the targeted trees/brush are within said line" before he may get a permit for removal. Ex 9, Article IV, § 7.a.1. While this standard does not specifically require a survey, it puts the burden on the owner-member and leaves open the possibility that HPMA officials may require a survey for proper identification. Consequently, HPMA has a double standard, which violates the provision of the CC&Rs granting all members of the Association an equal right to use and enjoy the Common Area on the same terms.

D. CONCLUSION

In this case, the trial court failed to acknowledge Diehl's right to be heard regarding his appeal of its Interim Hazard Tree Policy, and also failed to grant him the same rights as other Board members in disclosure of communications from the corporate counsel and to participate in discussion of whether owner-members have certain rights.

The trial court failed to recognize that the Hazard Tree Policy deprives owner-members who may be adversely affected by HPMA action of the notice to which they are entitled under HPMA's governing documents. The trial court found no error in a Policy that

imposes unreasonable restrictions on owner-members, while granting vague powers to its manager inconsistent with responsibilities assigned to the Board under HPMA's Rules. Nor did the trial court see that the Policy is internally inconsistent, creating criteria for tree removal that may result in violations of the county's Resource Ordinance. Consequently, Appellant asks this court to reverse the trial court's order and remand the case to that court with instructions to reach legal conclusions and an order consistent with this court's conclusions. Diehl should be awarded costs both on appeal and for substantially prevailing in the matter before the lower court.

Dated: February 27, 2014 Submitted by: John E. Diehl

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APPENDIX: EXCERPTS FROM MASON COUNTY RESOURCE ORDINANCE RELATING TO DANGER TREES

Below are sections of the Mason County Resource Ordinance pertinent to the definition of "danger tree" and provision for removal of danger trees. The full ordinance is available online at http://www.co.mason.wa.us/code/Community_Dev/resource_ord_june_2009.pdf. The headings in boldface below are inserted for convenience and are **not** in the Resource Ordinance.

Definition of "danger tree"

Danger Tree: A tree with a high probability of falling due to a debilitating disease, a structural defect, a root mass more than 50% exposed, or having been exposed to wind throw within the past 10 years, and where there is a residence or residential accessory structure within a tree length of the base of the trunk, or where the top of a bluff or steep slope is endangered. Where not immediately apparent to the review authority, the danger tree determination shall be made after review of a report prepared by an arborist or forester.

Removal of danger trees within wetlands or their buffers

2. Activities Permitted without a Mason Environmental Permit

The following uses shall be allowed, in addition to those defined in General Exemptions (see Section 17.01.130), within a wetland or wetland buffer to the extent that they are not prohibited by the Shorelines Management ACT of 1971 (Chapter 90.58 RCW), Federal Water Pollution Control Act (Clean Water ACT), State Water Pollution Control Act (Chapter 90.48 RCW), State Hydraulic Code (RCW 75.20.100 - .140), Forest Practices Act (Chapter 76.09 RCW and Chapter 222-16 WAC) or any other applicable ordinance or law and provided they are conducted using best management practices, except where such activities result in the conversion of a regulated wetland or wetland buffer to a use to which it was not previously subjected and provided further that forest practices and conversions from forest land shall be governed by Chapter 76.09 RCW and its rules:

. . .

i. The felling of danger trees within buffers provided the following conditions are met:

(1) When it is demonstrated to the satisfaction of the Mason County Director of Community Development or his or her designee ("Department") that an imminent threat exists to public health or safety, or the safety of private or public property. Landowner shall provide to the Department a written statement describing tree location, danger it poses, and proposed mitigation.

(2) Should the imminent threat not be apparent to the Department (as danger trees are defined in Section 17.01.240), the Department may require the landowner submit a report from a professional forester or certified arborist.

(3) Before a danger tree may be felled or removed, with the exception of an emergency pursuant to Section 17.01.170, the landowner shall obtain written approval from the Department. This approval shall be processed promptly and may not be unreasonably withheld. If the Department fails to respond to a danger tree removal request within 10 business days, the landowner's request shall be conclusively allowed. . . .

Removal of danger trees within landslide hazard areas or their buffers

2. Land Clearing

a. Within this section, "Land Clearing" is defined as the cutting or harvesting of trees or the removing or cutting of vegetation so as to expose the soil and which is not otherwise exempt from this section.

b. Land Clearing in Landslide Hazard Areas or their buffers is permitted when it is consistent with the recommendation and plans contained in the Geotechnical Report and development approval.

c. If there is no Geotechnical Report for the site, land clearing is not permitted: however removal of danger trees, selected removal for viewing purposes of trees less than 6 inches dbh (diameter at breast height) and trimming or pruning of existing trees and vegetation is allowed with the qualifications cited herein. Danger trees shall be identified with the recommendation of a member of the Association of Consulting Foresters of America, an arborist certified by the International Society of Arboriculture, or with the recommendation of a person qualified to prepare a geotechnical report if removing trees for slope stabilization

purposes. Removal of trees less than 6 inches dbh shall be limited to less than 2 percent of the total number of trees of that size or larger in the hazard area. Removal of multiple trees in a concentrated area, i.e. within a distance of 25 feet of each other, shall be accompanied by replacement by deep rooting native shrubs or other vegetation that serve similar moisture and erosion protective functions to that provided by the removed trees. Trimming and pruning shall be accomplished in accordance with pruning standards of the International Society of Arboriculture, as published in "ANSI A300-95" or subsequent updated versions in order to minimize the potential for long term damage to the trees.

d. Removal of selected trees and ground cover is allowed without a permit for the purpose of surveying and geotechnical exploration activities that do not involve grading, provided that re-vegetation of the disturbed areas occurs immediately afterward.

e. Land clearing for which a permit has been obtained shall not be allowed during the wet season, i.e. from October 15 through May 1, unless special provisions for wet season erosion and landslide protection have been addressed in the Geotechnical Report and approved by the Director. . . .

Removal of danger trees within fish and wildlife habitat conservation areas or their buffers

F. ACTIVITIES WHICH DO NOT REQUIRE A MASON ENVIRONMENTAL PERMIT

The following uses shall be allowed, within a FWHCA or its buffer to the extent that they are not prohibited by any other applicable law or ordinance, provided they are conducted so as to minimize any impact on the values and functions of the FWHCA, and provided they are consistent with any county approved Resource Ordinance Special Study (such as a Habitat Management Plan or Geotechnical Report) or any state or Federally approved management plan for an endangered, threatened, or sensitive species.

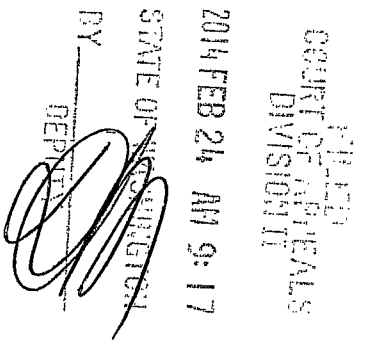
. . .

5. The felling of danger trees within buffers provided the following conditions are met:

a. When it is demonstrated to the satisfaction of the Mason County Director of Community Development or his or her designee ("Department") that an imminent threat exists to public health or safety, or the safety of private or public property. Landowner shall provide to the Department a written statement describing tree location, danger it poses, and proposed mitigation.

b. Should the imminent threat not be apparent to the Department (as danger trees are defined in Section 17.01.240), the Department may require the landowner submit a report from a professional forester or certified arborist.

c. Before a danger tree may be felled or removed, with the exception of an emergency pursuant to Section 17.01.170, the landowner shall obtain written approval from the Department. This approval shall be processed promptly and may not be unreasonably withheld. If the Department fails to respond to a danger tree removal request within 10 business days, the landowner's request shall be conclusively allowed. . . .



WASHINGTON STATE COURT OF APPEALS, DIVISION II

HARTSTENE POINTE MAINTENANCE ASSOCIATION, Respondent, v. JOHN E. DIEHL, Appellant.	NO. 45739-3-II DECLARATION OF SERVICE

I declare, under penalty of perjury under the laws of the State of Washington, that on February 24, 2014, I personally delivered, faxed, and/or electronically delivered a copy of BRIEF OF APPELLANT to the office of Kristin French, attorney for Hartstene Pointe Maintenance Association.

Dated: February 24, 2014

John E. Diehl

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