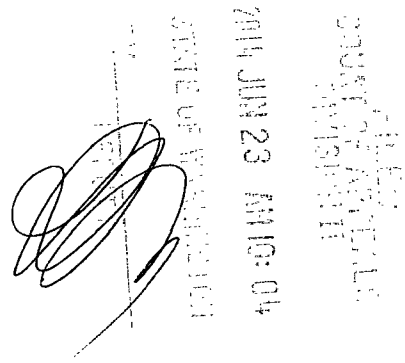
No. 45739-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON



HARTSTENE POINTE MAINTENANCE ASSOCIATION, Respondent,

v.

JOHN E. DIEHL, Appellant.

APPELLANT'S REPLY BRIEF

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The facts in this case, as found by the trial court, are undisputed. The issues are whether the trial court's conclusions follow from its findings related to (1) actions taken by Hartstene Pointe Maintenance Association ("HPMA") to block any possibility of an administrative remedy to resolve a dispute arising over the Board's adoption of a policy; (2) a corporate board's duties of disclosure, the responsibilities of counsel to a corporate board, and the proper procedure for handling disputes within a corporate board of directors; and (3) the validity of HPMA's Hazard Tree Policy. Where the relevant facts are undisputed, and the parties dispute only the legal effect of those facts, the standard of review is de novo. *Happy Bunch v. Grandview N.*, 142 Wn. App. 81 (2007).

Because the second of these issues may entail an issue of first impression, and carries statewide implications, Appellant respectfully requests this Court to publish its opinion, at least on this issue, for guidance to corporate boards throughout the state.

If this Court agrees with any one of Appellant's arguments against the validity of the Hazard Tree Policy, which are independent, then the policy must be deemed invalid. Of course, if this Court finds more than one basis for invalidity, then repairing the policy will require more than one change.

1. The trial court's conclusions are not to be affirmed by 'findings' that HPMA alleges the court might have made, but did not.

HPMA tries to turn to its advantage the fact that neither party has submitted a verbatim report of proceedings. On each of the three main issues on appeal, HPMA seems to rely mainly on its claim that testimony at trial, but not presented to this Court might show that the trial court had a basis to reach its legal conclusions. See Respondent's Response Brief ("RB") at 6, 17, and 21. Yet, unlike the circumstances in the cases cited by HPMA, here error is not assigned to any finding of fact. Consequently, review is limited to determining whether or not the conclusions of law properly follow from the findings of fact. *Happy Bunch v. Grandview N.*, 142 Wn. App. 81 (2007), citing *Fenton v. Contemporary Dev. Co.*, 12 Wn. App. 345, 347, 529 P.2d 883 (1974).

HPMA claims that evidence not in the record on review supports its position. Yet, matters not in the record will not be considered by the court on appeal. *State v. Likakur*, 26 Wn. App. 297, 301, 613 P.2d 156 (1980). If HPMA believed that testimony at trial supported its position, it could have supplemented the record with a transcript of such testimony. It did not.

But HPMA's more basic mistake is to argue that the trial court might have reached findings of fact that the court did not actually make. As HPMA

itself points out, when a verbatim record of proceedings is not presented for review, the appellate court "is limited to examining whether the conclusions follow from the findings." Respondent's Response Brief ("RB") at 6. The possibility that different or additional findings might have been warranted from the testimony is not relevant to the underlying question on review, viz., whether the trial court's conclusions of law follow from its findings of fact.

Any facts that HPMA claims the trial court might have found, but did not, are not among its findings. This Court has been presented the trial court's actual findings. These are not being challenged, and may be accepted as verities. But if the trial court's conclusions do not follow from its actual findings, then this error is ground for reversal.

HPMA is not explicit in stating what findings of fact it believes testimony at trial would have warranted. With respect to the issue of whether HPMA's governing documents allow owner-member appeals of board decisions, HPMA appears to argue that the court might have reached a finding of fact, based on testimony, that it was totally impracticable for the Board to allow such appeals. If the court had reached such a finding, then Appellant would have been compelled to challenge it (and to produce relevant testimony offered at trial). However, the trial court reached no such

finding, and such a hypothetical finding is of no help in showing that the trial court's conclusions follow from its findings of fact. HPMA begs the question underlying the issues on review when it either simply reiterates the trial court's findings and conclusions or alludes to purported evidence not in the record on review.

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

No one disputes that Article X, § 3 of HPMA's CC&Rs requires an owner-member to complain to its Board about any alleged violation of its CC&Rs prior to seeking a remedy through litigation. Ex. 5. Article II, § 4, of HPMA's Rules and Regulations provides a means by which such complaints may be heard: "Any owner adversely affected by a decision of the Board of Directors may appeal to the Board of Directors for a hearing." Ex. 9.

The trial court acknowledged the existence of this language, but inexplicably concluded that even though it "must be given its clear meaning . . . , [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. If the court agreed that the language in the Rules should be given its ordinary and common meaning – as held in *Metzner v. Wojdyla*, 125 Wn.2d 445, 450, 886 P.2d 154 (1994), among many others – then it makes

no sense to rule out virtually all appeals of Board decisions, particularly if these were from adversely affected owner-members who sought an administrative remedy, short of seeking judicial review. The trial court did not claim that a literal reading would lead to an absurdity, or that the phrasing of Article II, § 4, was ambiguous, and yet it did not follow the canon of construction that, except in such circumstances, the plain meaning of the language should determine intent.

The court also failed to follow the widely observed canon that courts should avoid interpreting a provision in a contract or law in a way that would render other provisions superfluous or unnecessary.[1] If the court is not understood as simply nullifying Article II, § 4, it at least renders it superfluous, since Article II, § 8, of the Rules provides separately for owner-member appeals by owners accused of violations, which HPMA sees as the only acceptable kind of appeal. See Ex. 9.

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[1] See Jacob Scott, "Codified Canons and the Common Law of Interpretation," GEORGETOWN LAW JOURNAL, Vol 98:341 at 368, reporting that ten states have even codified this canon of construction. In Washington, statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996))).

Although the trial court provided no rationale for its conclusion, HPMA rejects a literal reading of Article II, § 4, by referring to what it claims is the title of Article II. RB at 8. Actually, what HPMA asserts to be the title of Article II – "Procedure for Enforcement" – appears only in parentheses. The title is "INTERPRETATION, ADMINISTRATION AND ENFORCEMENT OF THESE RULES AND REGULATIONS," a title apparently taken from Article X of the CC&Rs, "INTERPRETATION, ADMINISTRATION AND ENFORCEMENT OF THESE COVENANTS." Compare Ex. 9 and Ex. 5. Yet, the latter contains § 3, which provides for complaints about violations of the covenants, and requires owner-members adversely affected to make such complaints before bringing suit "to prevent or abate an actual or threatened violation of these covenants." Ex. 5. Because Appellant's attempt to appeal was founded on his allegation that the Interim Hazard Tree Policy was in violation of the covenants, the heading of the section containing Article II, § 4, cannot be construed as prohibiting his appeal.

HPMA tries to cast the issue before the trial court as whether "Diehl, as an HPMA member, is entitled to full, formal 'appeal' proceedings before the HPMA Board following each and every policy/management action by the HPMA Board." RB at 4. HPMA misrepresents both the issue and the trial

court's conclusion. The issue was simply whether owner-members adversely affected by a decision of the Board of Directors may appeal to the Board of Directors for a hearing. HPMA inaccurately supplements the court's conclusion, inserting "formal appeal hearings," "general Board policy /management actions," "open meeting," and "with prior opportunity for membership comment to the Board." See RB at 7; compare CP 11, conclusion 5.

HPMA persistently refers to the appeals allowed by Article II as "formal" appeals, apparently in an attempt to connote a cumbersome process. But neither the HPMA Rules nor the trial court refers to the appeals allowed under HPMA Rules as "formal." Nor was there ever any dispute about how formal such appeals need to be, for HPMA's Board simply refused to entertain any appeal by Appellant.

HPMA points to the trial court's conclusion that owner-members sufficiently distressed by a Board decision may seek to recall Board members. RB at 10, referring to CP 11, conclusion 7. It was odd of the trial court to suggest that the availability of a procedure for removing Board members was a reason for concluding that owner-members have no right to appeal Board decisions adversely affecting them. It does not follow from the

fact that Board members may be recalled that the Rules do not provide, in Article II, § 4, for an administrative remedy less draconian than recall of Board members. This administrative remedy is expressly available under the Rules, if only the Board would allow its use.

Nothing precludes more than one remedy being provided in HPMA's governing documents. When Article X, § 3, of the CC&Rs calls for owner-members adversely affected by Board decisions "to exhaust the remedies available to them within the Association" before suing, it can scarcely be imagined that the intent was to refer to recall of Board members as an administrative remedy. Even when successful, a recall does not ensure a remedy to injury already done to owner-members. Further, given that recall of Board members requires a "majority vote of the voting power in the association present, in person or by proxy, and entitled to vote at any meeting of the owners in which a quorum is present" (under RCW 64.38.025(4)), this is not a remedy easily undertaken or likely to succeed if the injustice an owner-member suffers is inflicted on less than a majority of the ownership. Thus, recall is not usually a practical or desirable remedy for a particular grievance, and is used only as a last resort after a series of actions widely opposed in the community.

HPMA takes issue with a factual reference occurring in a footnote in Appellant's opening brief. RB at 11. Appellant referred to Ex. 51, a letter from owner-member Larry Wendt, appealing a Board decision not to fine another owner-member whom he accused of removing trees without a permit. Appellant's Brief at 4, fn. 2. This letter comprises Wendt's written appeal. The Board not only heard the appeal, but reversed its prior decision, agreeing to fine the owner-member about whom Wendt complained. Ex. 52. HPMA says that Wendt's appeal is "factually distinguishable" from Appellant's attempted appeal. Of course, it is. Wendt was appealing a decision not to fine an owner-member for removing trees without a permit. Appellant was appealing a decision creating a policy that he alleged conflicted with HPMA's CC&Rs and Rules, and even with the County's Resource Ordinance and with statutory requirements. Another difference was that the Board wanted to hear Wendt's appeal, but not Appellant's.

The significance of Wendt's appeal in this case is simply to show that the Board departed from its current interpretation of Article II, § 4, when it so desired. HPMA now proposes to "clarify" the trial court's opinion. RB at 12. It would allow appeals "only where an owner/member has been directly affected by adverse enforcement or regulatory action initiated by HPMA

against the particular owner/member." RB at 7. Of course, this restriction is not to be found in HPMA's governing documents. And if this reading were "readily apparent," HPMA should not have heard Wendt's appeal, for he was not directly affected by the Board's failure to fine another owner. Not surprisingly, if Article II, § 4, is interpreted to allow a more limited range of appeals than it literally allows, it will be unclear what range of appeals should be allowed.

The trial court recognized that Article X, § 3, of the CC&Rs allows any owner to complain of an actual or threatened violation of the Covenants to the ACC if there is one, or to the Board if there is not, and demand that HPMA prevent or abate the actual or threatened violation of the Covenants. CP 7, finding 34. It remains a mystery why the court did not interpret Article II, § 4, of the Rules as providing the means by which such complaints are to be heard by the Board.

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

HPMA asserts that the trial court's findings and conclusions "do not pertain in any way" to the issue above. RB at 17. Yet, the trial court concluded that if a Board member "has his owner-member hat on and is

acting in the capacity as an owner-member, and is involved in litigation or likely to be involved in litigation with the Board, and where that individual is also a Board member, that individual must absent himself from an executive Board meeting session called for the purpose of considering advice of legal counsel and discussing legal communications regarding the likely or pending litigation against HPMA." CP 11-12, conclusion 9. Appellant was in a minority, perhaps a minority of one, that the HPMA Board majority attempted to exclude from closed meetings, and from whom the Board president withheld material information. The trial court did not claim that the issues involved were sui generis. The restrictions it imposed on HPMA directors appear intended to restrict all corporate directors in similar circumstances. This court needs to decide whether such restrictions are lawful under HPMA's governing documents and this State's statutes and case law.

Oddly, the trial court seemed self-contradictory even in its ruling, for it also concluded that Appellant "did not breach any duties as a Board member by refusing to absent himself from the executive sessions attempted October 7, 2011, and October 14, 2011." CP 10, conclusion 1. Although Appellant subsequently absented himself, after the Board majority

determined to file suit against Appellant, the two occasions when he declined to remove himself from proposed executive meetings were when the announced purpose of the meeting was to hear and discuss advice from HPMA's counsel regarding the right of owner-members to appeal Board decisions. CP 5-6, findings 15-29. So, the trial court appears to have concluded both that Appellant had a duty to absent himself and that he did not have such a duty, at least regarding the only two closed meetings when he declined to remove himself.

Unquestionably, RCW 64.38.035 and HPMA's Bylaws (Ex. 8; Article V, § 7) allow directors of a homeowners' association to conduct closed meetings under certain circumstances. But there is nothing in either the statute or the HPMA Bylaws suggesting that a board of directors can exclude one or more of its directors from such meetings, particularly when such directors are not alleged to have a beneficial, or financial, interest in the topics under discussion. Neither the trial court nor HPMA has cited any authority in support of such an exclusion. Although HPMA has attempted to appeal to attorney-client privilege as a basis for such an exclusion when the majority of a board claims that one or more of its members may be an adversary in litigation, the Rules of Professional Conduct do not support

HPMA's position, and make plain that an attorney is obliged to back away from situations where the attorney is called upon to represent both a corporate client and a faction of a board representing one side in an internal legal dispute.

Directors are among the constituents of a corporate organizational client. RPC 1.13, comment 1. A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. RPC 1.13(a). Far from requiring a director in conflict with the majority on a corporate board to forfeit some of his ordinary rights as a director, the Rules of Professional Conduct require a lawyer representing an organization like HPMA to avoid a conflict of interest by refraining from representing both the organization and a faction of its board, when there is a dispute within the board. RPC 1.7(a)(2) provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest, which exists "if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person." A conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the

lawyer's other responsibilities or interests. RPC 1.8, comment 8.

Appellant, as one of seven directors of HPMA, was an equal member of HPMA's "highest authority," and so enjoyed the rights of other directors. A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization. RPC 1.7, note 34. Consequently, notwithstanding counsel's claim that she owed her loyalty to the majority on the HPMA Board of Directors (CP 41, lines 1-2), her client remained HPMA (and its "highest authority," its Board of Directors), not any faction within the Board, even if this faction happened to constitute a majority on a particular issue. Because the interests of an organization may be distinct from the interests of a majority of its directors on a particular issue, the representation of the organization was compromised when counsel decided to serve the desires of the majority faction.

Further, a lawyer may not withhold information from a client to serve the interests or convenience of another person. RPC 1.4, comment 7. Although information from HPMA's counsel was directly withheld from Appellant by HPMA's president (CP 4-5, findings 14-15), HPMA's counsel participated in this failure to disclose. Since the client was HPMA, counsel

should have ensured that all the constituents of HPMA's "highest authority," its Board of Directors, received the material information she provided her client.

HPMA and the trial court cite no authority for their view that directors may be excluded from executive meetings of a board of directors if they wear an owner-members 'hat.' Even though Appellant necessarily wore his owner-member's 'hat' when he availed himself of the right granted to owner-members to appeal Board decisions adversely affecting them, it does not follow that exercise of this right denied him the right to participate in the Board's consideration of his appeal. Moreover, the announced purpose of the October 2011 Board meetings that gave rise to this issue was not to consider Appellant's appeal of the Board's decision to adopt its Interim Hazard Tree Policy, but the general question of whether owner-members are entitled to appeal Board decisions. The implications of this question affected all owner-members, extending far beyond the particular decision Appellant was seeking to appeal. And yet, at least part of the trial court's conclusion was that the Board had a right to exclude a Board member and deny him access to the HPMA attorney's opinion on this question, thereby denying him access to material information to which he had as much right as any other

Board member.

Of course, directors do not literally wear hats that identify when they are acting or speaking for themselves and when they are fulfilling their fiduciary duty to represent the interests of the community. The 'hat' test invites subjective judgment and invidious discrimination against minorities on corporate boards. Appellant unquestionably had a strong interest in trying to prevent the unnecessary removal of trees from the Common Area. However, there is no reason why such an interest, not driven by any interest in personal gain, but by his concept of what was in the best interests of the community, should compel him to recuse himself from a closed meeting of the Board of which he was a part, especially because his opponents on the Board, who had previously engaged in litigation with him concerning an earlier attempt to remove trees from the Common Area, may also be inferred to have had strong interest in the matter, and no one suggests that they should have recused themselves.[2]

Although it may be inconvenient to have one or more members of a board of directors who are adversarial to the majority, unless they have a

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[2] The prior litigation dealt with a plan to thin trees in the Common Area greenbelts. Appellant obtained a permanent injunction against the plan, and the case was eventually settled through a stipulated agreement. See CP 225-229.

beneficial interest giving rise to a conflict of interest, no language in Chapter 64.38 RCW or Chapter 24.03 RCW allows the exclusion of directors holding such office from meetings of directors, whether open or closed, any more than they may be denied other rights associated with their responsibilities. Granted that there is case law from California supporting the concept that a minority may be excluded from meetings of a **litigation committee** formed by a board majority,[3] nothing of this sort was attempted in the present case. The majority faction on HPMA's Board had no right to deprive a minority of whatever material information the attorney imparted and of participation in evaluating the attorney's advice.

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

HPMA mainly relies on reiterating the trial court's findings and conclusions, which begs the question of whether the court's conclusion regarding the Hazard Tree Policy follows from its findings of fact. Lest Appellant's actual arguments be lost in HPMA's attempt to ignore most of them, this section will review the specific arguments together with whatever answer may be gleaned from HPMA's response brief.

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[3] See *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).

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

HPMA does not dispute that the Hazard Tree Policy calls for notice to owner-members of proposed tree removals. However, it asserts, without supporting evidence, that the definition of "notice" found in HPMA's Rules and Regulations was not intended to encompass notice given of removal of trees from the Common Area. The definition in question – "[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) – prescribes the method of notice whenever notice is required. It fully describes what counts as notice. Given that the Hazard Tree Policy specifies circumstances when notice is required, the definition from the Rules prescribes the allowable method for notice. No one has disputed that the Policy at issue fails to comply with the requirements for notice found in HPMA's Rules and Regulations.

The trial court nonetheless concluded that the Hazard Tree Policy gave reasonable notice. However, the court did not support its conclusion, either by a finding that the method of notice found in the Policy would be effective or by a conclusion that the definition of notice in the Rules was not applicable.

For its part, HPMA has never claimed that the notice provided by the Hazard Tree Policy is effective for all affected owner-members. Without contending that the notice required under HPMA's Rules is identical to notice required for constitutional due process, there is at least this resemblance: ". . .[W]hen notice is a person's due, process which is mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed 865 (1950). Unfortunately, HPMA chose a process of notifying affected owner-members of proposed removal of trees that would not have been adopted if its Board had been desirous of actually informing those affected.

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

HPMA does not directly dispute Appellant's argument that its Policy is inconsistent with Mason County's Resource Ordinance, and specifically with the provisions that limit removal of trees in critical areas such as landslide hazard areas. Instead, HPMA complains that Appellant has not presented the entire ordinance, a document of more than 100 pages, as an

exhibit in the record. RB at 21. However, Appellant argued even in his motion for summary judgment before the trial court that the Policy allowed tree removal contrary to the County's Resource Ordinance. CP 150, lines 8-14. Such concerns were repeated in Appellant/Defendant's trial brief. CP 56, lines 1-4; CP 69, lines 20-26; CP 70, lines 20-22. The local ordinance was not introduced in evidence at trial because it was cited, and readily available to the trial court. The relevant parts of the ordinance have been appended to Appellant's opening appeal brief, pursuant to RAP 10.4(c).

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

In response, HPMA only repeats the trial court's conclusions, and complains that the Resource Ordinance should have been introduced as evidence in the trial. HPMA ignores the question of whether its Hazard Tree Policy is consistent with its own governing documents, and specifically with its Rules and Regulations.

HPMA's Rules make clear that authority to grant permission for removal of vegetation rests only 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." Ex. 9, Preamble to Article IV, § 7. In addition, 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)).

On summary judgment, the trial court concluded that HPMA had not properly delegated authority to its manager. CP 87-88. Although HPMA subsequently amended its bylaws to delegate authority to its manager, it did not amend its Rules and Regulations to make these consistent with the delegation of authority to its manager. Thus, under the Rules, the Board remains the ultimate arbiter of tree removal issues, using criteria found in the Rules; but under the Policy, the manager is not bound by the same criteria, and is the ultimate arbiter if he deems a tree to be an imminent hazard or if no owner-manager takes notice of proposed tree removals quickly enough and fails to file a timely appeal of the manager's decision with the Board. This inconsistency alone should suffice to invalidate the Policy.

Moreover, the criteria the manager is directed to use for tree removal as stated in the Policy are not only different than those in the Rules, but also are vague in ways that allow the manager to make decisions inconsistent with criteria in the Rules. For example, while the Policy says that the manager may consider wildlife habitat, aesthetics, and cost-resource expenditures, he

is to consider such criteria 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.

Further, the Policy appears inconsistent with the Rules insofar as it eliminates any "procedural requirements" for addressing imminent hazards, seeming to authorize the manager to take whatever action he pleases using whatever procedures he pleases, so long as he calls the trees in question "imminent hazards." See Ex. 1, § 2(b). No authorization for such a waiver of procedural requirements is found in the Rules.

As for the question of the Policy's consistency with the Mason County Resource Ordinance, HPMA does not deny that the Resource Ordinance limits removal of trees from critical areas where the Hazard Tree Policy does not. The general statement that removals should be consistent with applicable law, without identification of how the Resource Ordinance is more restrictive than the Policy, or even any specific reference to the Resource Ordinance, is virtually an invitation to act in violation of the ordinance.

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

The trial court's decision and HPMA's response miss the fact that HPMA does not require use of ISA-certified arborists in its own work, but cuts in half the time an owner-member is allowed to secure expert testimony if the owner-member does not choose to hire an ISA-certified arborist in support of an appeal of the manager's recommendations. HPMA does not deny that there are other experts besides those certified as ISA arborists, who might usefully comment on proposed tree removals. But the Policy imposes an arbitrary restriction allowing greater time for only one category of experts. HPMA has no answer to the evident arbitrariness of this restriction.

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

HPMA has no response, except to repeat the conclusions of the trial court, to the argument that the Hazard Tree Policy creates a double standard by which proposals to remove trees are weighed by different standards, depending on whether the proposal comes from the HPMA Board, or one of its officers, or from its hired manager, as distinct from individual owner-members. HPMA has attempted to make itself an exception to the regulations that it imposes on all owner-members. HPMA's Policy not only gives greater latitude to the manager than allowed to owner-members insofar as criteria for tree removal are concerned, but also sets more lenient

standards for determination of property lines. Yet, under the CC&Rs all owners have benefit of the Common Area on the same terms. Ex. 5, Article II, § 1(e). HPMA offers no answer to the case law stating that a declarant is bound by the rules of a homeowners' association 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). As the successor to the declarant, HPMA may not exempt itself from rules affecting other owners. A policy granting the Board's agent special criteria unavailable to most owner-members for removal of trees is inconsistent with the equal treatment required by the CC&Rs.

5. Conclusion

Because the trial court's conclusions do not follow from its findings, Appellant asks this Court to reverse the trial court and remand the case to that court with instructions to reach legal conclusions and an order consistent with this Court's conclusions. Appellant should be awarded costs both on appeal and for substantially prevailing in the matter before the lower court.

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COURT OF APPEALS, DIVISION II
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HARTSTENE POINTE MAINTENANCE ASSOCIATION, Respondent, v. JOHN E. DIEHL, Appellant.	No. 45739-3-II DECLARATION OF SERVICE

I, John E. Diehl, hereby declare under penalty of perjury under the laws of the state of Washington that on June 20, 2014, I faxed and/or personally delivered a copy of Appellant's Reply Brief to Kristin French, attorney for Hartstene Pointe Maintenance Association.

6/20/14

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