SUPREME COURT NO. 98163-9

(Court of Appeals No. 51898-8-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THERESA J. LOWE, a single woman; LOREN J. BOSSHARD and DONNA A. BOSSHARD, husband and wife; BURLEIGH M. CUBERT and CAROLYN R. CUBERT, husband and wife,

Appellants/Petitioners,

v.

FOXHALL COMMUNITY ASSOCIATION,

Respondent.

ANSWERING BRIEF OF RESPONDENT FOXHALL COMMUNITY ASSOCIATION TO PETITION FOR REVIEW

Shawna M. Lydon, WSBA #34278
Luisa E. Taddeo, WSBA #48677
Betts Patterson & Mines
One Convention Place, Suite 1400
701 Pike Street
Seattle WA 98101-3927
Telephone: (206) 292-9988
Facsimile: (206) 343-7053
Attorneys for Respondent Foxhall Community Association

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I. INTRODUCTION

First, Lowe has failed to demonstrate that her petition for review meets the standards for review under RAP 13(b). The Court of Appeals' decision affirming summary judgment is entirely consistent with precedent and does not deviate from any previous decision made by the Supreme Court of Washington, or any decisions in Divisions I, II, or III of the Court of Appeals. In fact, there are multiple decisions from each Division and the Supreme Court of Washington that are in accord with the Court of Appeals in this case. There are zero decisions in opposition. Thus, the Petition for Review fails under RAP 13(b)(1) and RAP 13(b)(2).

Second, the Court of Appeals properly followed straightforward precedent in affirming summary judgment in favor of the Association based on the clear and plain language of the Association's Bylaws. Yet, the very narrow issue before this Court is whether it was proper to reject proxy votes to amend the Bylaws where the specific language of that governing document requires that they be amended only "by a vote of a majority of the members of the corporation ***present*** at any meeting." The clear language of the Bylaws requires a vote of majority of members ***present***. While other more general provisions of the Bylaws do allow votes to be made by proxy, the provision at issue goes out of its way to remove the option for a proxy vote when amending Bylaws. Additionally,

Washington law on contract interpretation requires that the provision be interpreted such that votes to amend Bylaws be made in person. Thus, the Court of Appeals appropriately affirmed the trial court's decision in dismissing Lowe's claims in this regard.

Lastly, Lowe's strained interpretation of the Bylaws to allow voting by proxy for Bylaw amendments conflicts with the plain language of the governing document, as well as the drafter's intent. Lowe fails to demonstrate how, in the face of well-settled case law, allowing an interpretation of the Bylaws that is inconsistent with the plain language of the document and the drafter's clear intent, is an issue of substantial public interest under RAP 13(b)(4).The Court should, therefore, deny the Petition for Review.

II. COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether this Court should accept review even though the Court of Appeals' decision follows precedent from all three Divisions of the Court of Appeals, is consistent with the Supreme Court's prior decisions on contract interpretation and RCW Chapter 64.38 governing Homeowners Associations, and is not of substantial public import.

2. Whether this Court should accept review of the issue regarding the Bylaw's requirement that amendments be made by an in-

person vote and not by proxy even though there are several additional grounds to uphold summary judgment not reached by the Court of Appeals.

III. COUNTER-STATEMENT OF THE CASE

A. Factual Background

Respondent Foxhall Community Association ("Association") is a Washington non-profit corporation and a homeowner's association for a tract of land in rural Thurston County, with its Articles of Incorporation filed in 1981. (CP 30-33.) The property was subdivided and sold as an equestrian- friendly development with access to several miles of equestrian trails. (CP 58-59.) The developer, Virgil Adams, filed Protective Covenants in 1982, which set aside certain tracts of the development (including the equestrian trails at issue), "for the benefit of, and be used by, the residents in Foxhall." (CP 35.)

One of the early residents of the community, Les Whisler, bought two five-acre parcels in the community and built a house, stables and a riding arena for his family's use. (CP 58-59.) Virgil Adams, the developer, and his son Dennis approached Mr. Whisler to consider taking on boarders as that would make the development more desirable for equestrian families. (CP 59.) Mr. Whisler thereafter started to board horses for both residents and non-residents on his property. (*Id*.) The non-

resident boarders routinely used the Foxhall equestrian trails during the period Mr. Whisler owned the property. (*Id*.) Mr. Whisler was never advised by the developer that non-residents could not use the trails or that they had to be accompanied by a resident. (CP 59.) And, in 2001, the Board of the Association explicitly approved the use of the Foxhall trails and parks by the Whislers' commercial boarding business. (CP 98.)

Mr. Whisler thereafter sold his property with the boarding facility to Gary and Judy Johnston, and the Johnstons continued to operate the boarding facility, with the boarders using the Foxhall equestrian trails. (*Id.*; CP 63-64.) They were still doing so when the summary judgment motion in this case was filed. (CP 64.) Thus, non-resident boarders had been using the equestrian trails in the community since the inception of this community in the early 1980s.

B. The 2015 Bylaws Amendment

In 2015, some residents of the community sought to change the Bylaws to prohibit non-resident boarders from using the equestrian trails. They called a Special Meeting of the membership for November 19, 2015. (CP 52.) The notice stated that the Objective was to "Amend the Bylaws to adopt a clarifying rule for current and future Boards of Directors." (*Id.*) The meeting did no such thing. (CP 27.) Below that provision was a statement that the "proposed bylaw clarifies the governing documents that

Foxhall Parks and Trails are for the exclusive use of residents, families and friends. Foxhall Association members businesses may not extend the business activities onto Foxhall Parks and Trails." (CP 52.) However, the actual amendment proposed and voted on went much further than this description; it prohibited non-resident customers from using the trails even if accompanied by a resident:

> Foxhall Parks and Trails are for the exclusive use of the residents, families and friends. Nonresident visitors must be accompanied by a resident when using Foxhall Parks and Trails. Foxhall Association members' businesses may not extend their business activities onto Foxhall Parks and Trails. Members' business invitees, customers, or patrons, whether in trade or in barter, are prohibited from using Foxhall Trails, even when accompanied by a member.

(CP 387-388.)

Forty-two (42) out of one hundred twenty-two (122) member households were physically present at the meeting on November 19, 2015. (CP 354, 390-394.) Seventy-three (73) households submitted proxy forms. Of those, only three forms are in the record, and they all have different language. (CP 108-110.) In fact, one of them does not even contain the language of the proposed Bylaws Amendment. (CP 110.)

The meeting was initially called to order by Board member Denise Solveson. (CP 387.) Member Robert Armstrong called a point of order and asked that the president preside over the meeting as he was in

attendance. (CP 60.) Solverson stated that she was presiding over the meeting because she was the board director in charge of the trails, and she designated non-board member Rose Eilts as "parliamentarian" to preside over the meeting. (CP 60-61.)

During the meeting, member David Fleming made a motion to amend the proposed Bylaws Amendment, which was seconded. (CP 61.) However, Rose Eilts told Mr. Fleming to sit down and would not allow discussion or a vote on the motion. (*Id*.)

Another motion was made by member Dan Olson to refer the matter to a committee for review prior to a vote by the members; this motion was seconded by member Armstrong. (*Id*.) Another member then moved to amend Olson's motion to add that a professional mediator preside over the committee. (*Id*.) Eilts allowed this motion to go to vote, and 24 households voted in favor. (CP 62.) Nevertheless, "parliamentarian" Eilts announced that the vote failed because it required two thirds to pass (*id.*), but there is no such two thirds requirement in the Bylaws. (*See* CP 43-50.)

There was then a vote on the proposed Bylaws Amendment itself. The vote failed by a count of those present, 18 to 5, but passed if it included the 73 proxies collected by the proponents. (CP 396.) One member, Theresa Lowe, testified that that there were members "who were

physically present at the meeting [but] chose to let their proxy votes stand as opposed to voting 'in-attendance.'" (CP 355.) Lowe further testified that "[i]t was made clear at the meeting that proxy votes would count so there was no reason for people in attendance with proxies . . . to withdraw their proxies" (*id.*), but she did not identify who "made [this] clear." It is also impossible to glean from the record how many members were present and yet decided to rely on their proxy votes.[1]

The Board later rejected the Bylaws Amendment as void in several respects. (CP 27-28.) Five Foxhall members, Theresa Lowe, Loren and Donna Bosshard, and Burleigh and Carolyn Cubert (collectively referenced hereafter as "Lowe") sued the Association on February 22, 2017. (CP 1-4.)

C. Procedural History

The complaint sought the enforcement of the 2015 Bylaws Amendment through claims for declaratory and injunctive relief. (CP 3-4.) Both sides filed summary judgment motions. (CP 144-160, 163-182.) The trial court granted the Association's motion, denied Lowe's motion, and dismissed the case with prejudice. (CP 428-430.) In granting the

[1] Lowe suggested in a declaration that there were nineteen such members, but this number was reached merely by "[c]omparing the meeting sign-in sheet with the official vote tally." (CP 355.) All this comparison establishes is that there were nineteen members present who did not submit an "in person" vote; it does ***not*** establish that they all submitted proxy votes, particularly where the proxy forms are not in the record.

Association's motion, the trial court found no genuine issues of material fact as to any of the following issues:

1. The Bylaws Amendment Imposed New Restrictions on the Use of Common Property that Conflicted with the Protective Covenants Governing the Development.
2. The Adoption of the November 2015 Bylaws Amendment Violated Bylaw Provisions in Allowing Proxy Votes, Where the Bylaws Provide that Only Those Present Can Vote.
3. The Adoption of the November 2015 Bylaws Amendment Violated Bylaw Provisions since the Notice for the Meeting was Defective.
4. The Adoption of the November 2015 Bylaws Amendment Violated Bylaw Provisions since the Meeting was Improperly Conducted.

Lowe appealed the trial court's decision to the Court of Appeals Division II, and the parties' oral arguments were heard.

On January 7, 2020, the Court of Appeals issued its Unpublished Opinion. In its opinion, the Court of Appeals held that the Foxhall Bylaws require in-person presence to vote on bylaw amendments and, thus, it did not consider the *three other arguments* presented on appeal since any one of those issues would have warranted an affirmation of the trial court's

dismissal of Lowe's complaint. Lowe now seeks review from this Court regarding the Court of Appeals' decision holding that the Foxhall Bylaws require all votes for bylaw amendments to be made in-person and not by proxy.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Lowe's Petition for Review Does Not Meet the Criteria Set Forth by the Rules Governing Acceptance of Review and Should be Denied

The Rules of Appellate Procedure ("RAP") allow a petition for review to be accepted by the Supreme Court ***only*** if one of the following criteria set forth in RAP 13(b) is met:

1) The decision of the Court of Appeals is in conflict with a decision of the Supreme Court;
2) The decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals;
3) A significant question of law under the Constitution of the State of Washington or of the United States is involved[2]; or
4) The petition involves an issue of substantial public interest that should be determined by the Supreme Court.

As set forth in more detail below, since none of the above criteria is met

[2] This factor need not be discussed as it is undisputed it does not apply here.

by Lowe, the Supreme Court must deny review.

1. The Court of Appeals' Decision is Not in Conflict with Any Supreme Court Case

Notably, in its petition for review, Lowe does not allege or cite to any Supreme Court decision that conflicts with the Court of Appeals' decision, because none exists. In fact, the only Supreme Court of Washington cases Lowe cites in her petition for review relating to contract and statute interpretation support the Association's position. (Pet. Rev. at 12-16).

a) It is Well-Established by the Supreme Court That the Only Reasonable Interpretation for Contract Terms is to Look at the Words Explicitly Written in a Contract

In interpreting contracts, the Court must look at the explicit language in the provision at issue. Lowe sites to *Hearst Communications, Inc. v. Seattle Times Co.* to support her position that the Court of Appeals' decision was contrary to Washington law because the court looked solely at the language of the amendment provision. In that case, the Supreme Court of Washington, however, held that when interpreting contracts, the intent of the drafter must be determined from the actual words used. *Hearst Communications, Inc. v. Seattle Times Co.,* 154 Wash.2d 493, 503-504, 115 P.3d 262 (2005). The Court in *Hearst* was unconvinced by the similar argument presented by Lowe here. *Id*. at 510. Specifically, the

Court held that the language of the agreements in that case was subject to only one reasonable interpretation – that is, the words explicitly written into the provisions at issue. *Id*. The Court additionally found it "unreasonable to suggest that the absence of any negotiation about the applicability of one clause to another, especially where the clauses do not reference each other, leads to the conclusion that they were intended to apply to each other." *Id.* at 509.

Here, Lowe makes the argument that the Court of Appeals should have looked to the other provisions in the Bylaws to interpret the plain language of the amendment provision at issue – despite the lack of any reference of the amendment provision to other provisions allowing a vote by proxy. Notably, Lowe makes no claim that the amendment provision somehow applies or references other provisions that allow voting by proxy, because the amendment provision clearly avoids such an application or reference. Thus, like in *Hearst Communications*, it is unreasonable to conclude that the amendment provision intended to mean something that was not explicitly included in that provision.[3]

[3] Other Supreme Court cases regarding contract interpretation relied upon by Petitioner similarly either support the Association's position or do not apply to this case. *See for e.g. Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953) (court held that there was no meeting of the minds and no contract between the parties where language in a purported "acceptance" of a counter-offer is ambiguous – that case did not involve an already existing contract, as here; further, it is important to note that Lowe makes no argument that the amendment provision is ambiguous; the only reference Lowe makes in

Lowe also relies on Supreme Court case law to attempt a re-draft of the amendment provision such that "present" is meant to mean "in person or by proxy" despite the explicit lack of the proxy language in the amendment provision. It is well-established law in Washington when discussing contract interpretation that the lack of an express term with the inclusion of other similar terms is evidence of drafter's intent. *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 255, 327 P.3d 614 (2014). Lowe does not dispute that other provisions of the Bylaws do specifically allow a vote by proxy (for e.g. the provisions on quorum and general provision relating to voting at membership meetings). If the drafters similarly intended to allow the Bylaws to be amended by a vote by proxy, this language would have been included in the amendment provision. But, since it is not, the language explicitly in the amendment provision is binding. It does not allow voting by proxy for Bylaw amendments and Lowe's arguments fail.

b) The Homeowner's Association Statute is Consistent with Supreme Court Decisions on Contract Interpretation

RCW Chapter 64.38 governs Washington's law on homeowner's associations (hereinafter referred to as the "HAA"). The HAA explicitly

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her petition for review that the word "present" in the amendment provision is ambiguous is in the section on public policy, but not in any other context).

treats bylaw amendments differently from other votes.[4] RCW 64.38.030(5).

Ultimately, Lowe argues that because proxy votes are ***explicitly*** allowed in other contexts, they must also be ***implicitly*** allowed for Bylaws amendments in order to prevent an "absurd result." This argument rests on an apparent belief that votes to amend an association's bylaws should be just as easy as any other vote. But there are legitimate reasons to require more rigorous procedures for Bylaws amendments than other votes. Changing an association's governing documents is different in quality, class and importance from more mundane votes such as whether to fund gravel for the trails or who will serve as the next treasurer.

Lowe claims that disallowing proxy voting causes "disenfranchising" among Foxhall residents who are unable to attend an association meeting due to work, illness, physical limitations, lack of access to childcare, or other family commitments. (Pet. Rev. at 10.) Lowe ignores, however, how critical it is that voters hear the reasons for and against important decisions, such as amendments to Bylaws, and have a

[4] RCW 64.38.030 illustrates this point as it defers to the governing documents when determining the method of amending an association's bylaws. Directly relevant is the language, "[u]nless provided for in the governing documents …" Thus, the HAA would apply only if the governing documents do not specify a different procedure. Here, the governing document (i.e. the amendment provision) *does* specify a different procedure, and therefore the language in the governing document controls.

meaningful opportunity to participate in any final language adopted. Proxy voting, by contrast, can distort the decision-making process by putting a tremendous amount of power into the hands of a few. The distortion is illustrated here by the way the few tried to ram through this change through intimidation, providing misleading information, and disallowing a vote on a motion to amend the proposal. (*See* CP 65-72, 60-62.). The safeguards built into the Bylaws to prevent this situation are not "absurd."

2. The Court of Appeals' Decision is Consistent with Precedent Across All Three Divisions of the Washington Courts

There is not a case in existence that contradicts the Court of Appeals' decision in this case. In fact, there are several cases throughout each Division of the Courts of Appeals that support the decision.

Article X of the Bylaws states explicitly that they can only be amended "by a vote of a majority of the members of the corporation ***present*** at any meeting of the membership duly called for such purposes." (CP 50 (emphasis added).) Lowe maintains that "present" in this context means present in person or by proxy. The Court should reject this argument, which strips Article X of the Bylaws of its plain meaning and undermines the special treatment of bylaws amendments in the law.

Language should be given it plain meaning. *Viking Bank v.*

Firgrove Commons 3, LLC, 183 Wn. App. 706, 713, 334 P.3d 116 (2014). The meaning of Article X is plain and unambiguous. The Bylaws amendment clause is placed within its own Article, highlighting its importance. The dictionary or plain language meaning of "present" is "being in one place and not elsewhere," "being within reach, sight, or call or within contemplated limits," "being in view or at hand," or "being before, beside, with, or in the same place as someone or something." Webster's Third Int'1 Dictionary, 1793 (1986); *see Nationwide Mut. Ins. Co. v. Hayles, Inc*., 136 Wn. App. 531, 537, 150 P.3d 589 (2007) (the ordinary meaning of a word is considered to be the dictionary definition of a word); *see also State Farm Fire and Casualty Company v. Peters*, 200 Wash. App. 1021, 2017 WL 3476787 (2017) (in reference to insurance contracts, court must enforce the contract as written if the language is clear and unambiguous).

Nowhere in Article X is "present" defined as including being somewhere when one is not actually there. Allowing such an interpretation would force the Court to include terms in the Bylaws that were not included in the amendment provision. There would be a different result, of course, if the Bylaws amendment provision said, "present in person or by proxy." This would mean that the drafters intended that the usual meaning of "present" was to be altered to include those not actually

present but having given a proxy to another. There would also be a different result if the word "present" in either the governing statutes of the governing documents defined present to mean "in person or by proxy." Of course, there are no such definitions. Further, as set forth above, all divisions of the Court of Appeals consistently hold that a court must enforce a contract as written, especially where, as here, the language is plain and unambiguous.

3. The Court of Appeals' Decision is Good Policy and Granting the Petition for Review Advocates Bad Policy

Lowe wrongly maintains that the Court of Appeals' reasoning bars the use of proxy voting. (Pet. Rev. at 17.) Lowe's argument fails because it is flawed and ignores the narrow issue, which is that the Bylaws ***here*** pertaining to amendments do not allow for proxy voting, otherwise, the drafters of those Bylaws would have included such language in the amendment provision. Lowe argues that not allowing proxy voting puts a tremendous amount of power into the hands of a few. First, this argument overlooks the board of director's fiduciary duties to the Association. Also, this argument overlooks the fact that proxy voting in this context would allow an individual to vote on an amendment without being present and participating in the discussion. This is concerning especially in this case where notice of the meeting was defective. Contrary to Lowe's argument,

if proxy voting would have been allowed in this context, it would have allowed votes in favor of an amendment where some voters were not provided notice, and would have the opposite effect of giving "tremendous power" to the parliamentarian of the meeting.

Additionally, Lowe makes the case that the Court of Appeals' decision is "troubling precedent" for any corporate association, nonprofit or otherwise. Lowe, however, discounts those organization's ability to ensure the language of their Bylaws accurately reflects their intent – whether that intent is to allow proxy voting on bylaw amendments or for other voting. Contrary to Lowe's arguments, allowing words in an organization's bylaws to mean something more than what they actually say would be concerning from a public policy perspective. Here, where the Court of Appeals correctly applied well-standing Washington law, the public interest is unaffected.

B. The Court Should Not Accept Review Because There are Additional Grounds to Grant Summary Judgment to the Association

There are additional grounds to affirm summary judgment for the Association. While the Court of Appeals did not reach these issues, the trial court nonetheless found summary dismissal in favor of the Association appropriate on three other grounds.

First, the trial court properly ruled that the Bylaws amendment imposed new restrictions on the use of common property that conflicted with the protective covenants governing the development. (CP 428-430.)

Second, the trial court properly decided that the adoption of the November 2015 Bylaws Amendment violated several bylaw provisions governing procedures for Bylaws amendments given the procedural flaws with the way that the Bylaws amendment was adopted, any one of which would have required invalidation of the Amendment. *Id.* Further discussion of these other grounds for upholding the trial court decision are fully set forth in the Respondent's briefing to the Court of Appeals.

V. CONCLUSION

For the foregoing reasons, this Court should deny review.

RESPECTFULLY SUBMITTED this 9th day of March, 2020.

BETTS, PATTERSON & MINES, P.S.

By /s Luisa E. Taddeo
Shawna M. Lydon, WSBA #34278
Luisa E. Taddeo, WSBA #48677
Betts Patterson & Mines
One Convention Place, Suite 1400
701 Pike Street
Seattle WA 98101-3927
Telephone: (206) 292-9988
Facsimile: (206) 343-7053
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Tatyana Stakhnyuk, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, P.S., One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on March 9, 2020, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Answering Brief of Respondent Foxhall Community Association; and**
- **Certificate of Service.**

Counsel for Defendant Foxhall Community Association Robert D. Wilson-Hoss Hoss & Wilson-Hoss, LLP 236 W Birch St Shelton, WA 98584	☐ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight ☑ ECF E-service
Counsel for Plaintiffs Cubert, Pro Se Carolyn R. Cubert Burleigh M. Cubert 4711 Foxtrail Dr NE Olympia, WA 98516	☑ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight ☐ E-mail

Counsel for Plaintiffs Lowe and Bosshard
Dianne K. Conway
Gordon Thomas Honeywell LLP
600 University St Ste 2100
Seattle, WA 98101-4185

☐ U.S. Mail
☐ Hand Delivery
☐ Facsimile
☐ Overnight
☑ ECF E-service

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of March, 2020.

/s Tatyana Stakhnyuk
Tatyana Stakhnyuk

BETTS, PATTERSON & MINES, P.S.

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- tstakhnyuk@bpmlaw.com

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