

No. 66514-6

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

GARY C. ROATS, Trustee for the real property LOT 128; GARY C. ROATS and PAMELA A. ROATS, husband and wife, owners of the real property LOT 129, SAN JUAN AVIATION ESTATES, on their own behalf and on behalf of a class of similarly situated individuals,

Plaintiffs/Appellants/Cross-Respondents,

v.

BLAKELY ISLAND MAINTENANCE COMMISSION, INC., a Washington non-profit corporation; ELLEN ROTH, ANNE MALMO, JIM FERGUS, DICK DEMERS, SCOTT BURKHARD, DEBORAH DAVEY, and GAIL LIGHT, in their capacity as Governors of the Board of the Blakely Island Maintenance Commission, Inc. and in their individual capacities,

Defendants/Respondents/Cross-Appellants.

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AMENDED OPENING BRIEF**

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I. INTRODUCTION

This case is about abuse of power by the Board of Directors ("Board") of the homeowners association of Blakely Island ("Blakely"), the Blakely Island Maintenance Commission ("BIMC"). The Board has wielded authority beyond that granted by its Articles of Incorporation ("Articles") and Bylaws. Specifically, the Board has embarked on financially risky commercial activities, including marina fuel sales which create serious risks of personal liability of Blakely's residents - *i.e.*, the members of BIMC. BIMC members Gary and Pam Roats (Appellants, or the "Roats") initiated this litigation to challenge the Board's unauthorized conduct and enjoin further abuses.

The Articles created a "maintenance" entity to preserve and sustain the island's roads, airstrip, and water facilities. They do not remotely authorize embarking on retail sales, marina operation or fuel sales—none of which are "maintenance" activities, none of which relate to the facilities enumerated in the Articles, and all of which entail financial and liability risks not contemplated in or permitted by the community's governing documents. To fund these operations—which have lost money—BIMC has levied assessments contrary to express limitations in the BIMC Bylaws, which forbid assessments for purposes beyond those stated in the Articles.

The Board initiated these unauthorized operations via a series of

private meetings without notice to the membership that led to borrowings and expenditures that were contrary to the expressed wishes of the membership but could not be readily reversed. The Board has also engaged in voting manipulation and misrepresentation of its governing documents as part of its campaign to operate a fuel dock, marina and store.

Blakely is a 4200-acre island that includes an air strip for residents' use, a lake (Horseshoe Lake) with a water supply system, roads and related facilities. A large area of Blakely is owned by the Crowley family. A trust formed by the Crowleys (Blakely Island Trust, or "BIT") owns the Blakely Island Marina ("Marina"). For decades BIT had an independent commercial operator running its Marina, store and marine fueling operation until financial losses led the operator to quit in 2005.

The issue in this case is not whether Blakely Island needs, or will have, a marina, a store, or a fuel dock. The issue is who operates these facilities, who is financially and legally responsible for the marina operations, and who will be financially and legally responsible for any liability arising out of the operations. As history demonstrates, there was no compelling need for BIMC to step in as operator. If there were such a compelling need, and Blakely's residents agreed, BIMC could have secured an appropriate amendment to its governing documents.

II. ASSIGNMENTS OF ERROR

The trial court issued three separate summary judgment rulings

that are the subject of this appeal.¹

1. The court erred in dismissing Claim 2, determining that the BIMC Board has authority to engage in operation of a marina, fuel dock and sales and retail store where Article III of the Articles provides:

The purposes of this corporation, hereinafter referred to as association, is to provide water, road and landing strip *maintenance* for the occupants and owners of San Juan Aviation and Yachting Estates, and to promulgate and enforce rules and regulations necessary to insure equal and proper use of *the same* [.]²

and where such operations entail significant financial and personal liability risks for BIMC's members (Blakely's residents) not contemplated by, or provided for in, any of the community's governing documents.

2. The court erred in dismissing Claim 2, determining that the Board has power to levy assessments for the cost of the foregoing operations where BIMC's Bylaws limit assessment authority to:

... the amount required to accomplish the *purposes set forth in Article III of the Articles of Incorporation (and no more)*...³

3. The court erred in dismissing Claim 1, determining the Blakely Island Covenants (BICs) were validly adopted without an affirmative vote of all residents where they purport to impose obligations on each lot.

4. The court erred in denying attorneys fees to the Roats under RCW 64.38.050 after ruling on summary judgment that the Roats had prevailed

¹ CP 814-817; CP 2145-2147; 2561-2565; 2556-2557; 2824-2825.

² CP 1041 (emphasis added).

³ Bylaws, Art. IV, Section 3(a) (emphasis added, parentheses in original). Relevant Bylaw excerpts, and excerpts of other key documents, are quoted in Appendix A.

on Claim 5, establishing 18 instances of Board meetings without required notice in violation of RCW 64.38.035, which violations facilitated the Board's taking over, and funding, marina, fuel sales and retail operations, including borrowing money to do so without member authorization.

5. The court erred in awarding fees against the Roats (claimed amount over \$215,000, final sum awarded \$13,797.42).

III. STATEMENT OF THE CASE

A. Factual Background

1. BIMC's Governing Documents.

Since 1988, Gary and Pam Roats have owned two lots in the residential subdivision of Blakely Island (the "San Juan Aviation Estates").⁴ The plat was recorded in 1955 and consisted of privately-owned residential lots, an airstrip, water system from Horseshoe Lake, and roads owned in common by the lot owners.⁵ At issue here is whether the BIMC acted outside the scope of its authority granted by its Articles, Bylaws, original covenants and (if valid) BICs.

a. The 1957 Covenants (the "DIR")

The Roats' deeds refer to "covenants, conditions and restrictions" recorded in 1957 (Recording No. 48675) (*see* Appendix E), as amended in

⁴ CP 1626-1627 at ¶ 3 and CP 3191 at ¶11.

⁵ CP 1627 at ¶ 4.

1970 (Recording No. 73091) (*see* Appendix F).⁶ These covenants, the Declaration and Imposition of Restrictions (“DIR”), were adopted by the property owners as part of a “general improvement plan for the benefit of all present and future owners” and provided that the San Juan Aviation Estates was designed “as a high-grade home and residence area . . .” with no commercial use except that the aircraft “runway and parking strip” and “yacht basin” could be “used for business purposes.”⁷

The 1957 DIR do not create, or mention, BIMC as such, but do provide that a “Board of Governors” would be elected to:

prescribe and secure the enforcement of reasonable police *regulations* to secure the safety, comfort, and convenience of the various tract owners and occupants.⁸

The DIR were amended multiple times and then expired in 1993.⁹

b. BIMC's 1961 Articles of Incorporation

BIMC was formed in 1961 as a nonprofit corporation under former RCW ch. 24.04 (now RCW ch. 24.03). Its Articles were adopted and recorded in 1961 and never amended.¹⁰ Relevant excerpts of the Articles are collected in Appendix A; the complete document is attached as Appendix B. Article III authorizes BIMC to provide “maintenance” for

⁶ CP 1568 – 1569 at ¶ 2 – 3; CP 1572-1573 at ¶¶ 2-3.

⁷ CP 1029-1030 and CP 1032 at ¶ 10.

⁸ CP 1032 § 9 (*italics added*).

⁹ DIR was amended on August 5, 1963, June 16, 1964, March 9, 1970, December 15, 1978, and December 30, 1983. *See* CP 1025 at ¶ 5; CP 1026 at ¶ 10; CP 1048-1067 and CP 1168-1283.

¹⁰ CP 1037-1046.

the occupants and owners of the San Juan Aviation Estates, as follows:

The purposes of this corporation, hereinafter referred to as association, is to provide water, road and landing strip *maintenance* for the occupants and owners of San Juan Aviation and Yachting Estates, and to promulgate and enforce rules and regulations necessary to insure equal and proper use of *the same*.¹¹

The Articles provide for BIMC to maintain the Blakely air strip. They do not mention maintenance (much less operation) of the Marina, which, until 2005, was perennially owned and operated by BIT.

The Articles can be amended only via formal notice, a two-thirds vote, and recording of the amendment.¹² The 1961 Articles were in effect at all times relevant to this appeal. As detailed below in Section IV.A.2, (a) no bylaw could lawfully expand BIMC's powers beyond the Articles and (b) the relevant bylaws (in effect in 2006 when BIMC's marina operations began) limit BIMC's assessment power to the purposes stated in Article III of the Articles.¹³ BIMC has ignored this limitation.

c. 1970 Amendment of the DIR

On March 9, 1970, the DIR were amended to provide that the "Board of Governors" would be "the same Board of Governors elected by the [BIMC]."¹⁴ The 1970 Amendment of the DIR stated that the "Board" had the power to perform specific functions, all of which are tied to the

¹¹ CP 1041 (emphasis added).

¹² RCW 24.03.160 - 180.

¹³ CP 1069-1077.

¹⁴ CP 1048 at § 9.A (see Appendix F for full amendment and Appendix A for quoted excerpts).

limitations in the Articles and to specific improvements *not* including the marina, store or gas dock.¹⁵ The scope of authority granted by the DIR did not exceed that granted by the 1961 Articles of Incorporation.

d. BIMC's Bylaws

The current Bylaws, in effect since at least 1987,¹⁶ are excerpted in Appendix A and attached as Appendix C. Article IV, Sec. 3(a) of the Bylaws limits the BIMC's authority to levy assessments to the purposes enumerated in Article III of the Articles of Incorporation:

... each member shall make a yearly contribution ... for maintenance and necessary capital improvements for the ensuing year in such amount as may be determined. ...[U]pon an estimate of the amount required to accomplish the *purposes set forth in Article III of the Articles of Incorporation (and no more)*...¹⁷

This limiting language was part of the Bylaws when BIMC began marina operations in 2006 and when it charged members assessments for such operations in 2008.¹⁸ The Bylaws include additional provisions that evidence a clear intent to limit Board power to maintaining property owned by BIMC and activities (and equipment) incident thereto *and* to subject BIMC's every action to Article IV, § 3 (just quoted above), which

¹⁵ Appendix A (1970 DIR Amendment Excerpts).

¹⁶ There is a possibility that in 1986 two competing versions of the Bylaws may have existed, one of which omitted the "and no more" language. *See* CP 1632 at ¶ 41; (1971 version) CP 1793-1800; (1975 version) CP 1802- 1816; (1978 version) CP 1818-1831; (1986 version) CP 1833-1841; (1987 version) CP 1843-1851; (1998 version) CP 1853-1865; (2004 version) CP 1867-1879. In any event, the 1971 Bylaws and every version of the Bylaws since 1987 expressly limited the Board's assessment authority to the purposes set forth in Article III of the Articles "(and no more)." Defendants have not contended that any other Bylaws applied in the period from 2005 to present. *See* CP 905-913.

¹⁷ CP 1069-1070 at Art. IV, Section 3(a) (emphasis added, parentheses in original).

¹⁸ CP 1025 at ¶ 6; CP 1069-1077.

limits assessment power to the purposes stated in the Articles:

ARTICLE II PURPOSE

The purpose of these by-laws is to provide for the administration, maintenance, improvement, and protection of the properties, easements, access agreements, water rights, and equipment *owned by the Association*. Further, the Association may promulgate and enforce *rules and regulations* which are consistent with the Blakely Island Covenants dated June 1, 1995 and as amended from time to time, covering the plat of the San Juan Aviation Estates (the "BIC"), and make further *rules and regulations* which the Association from time to time may deem necessary.

ARTICLE V BOARD OF GOVERNORS

Section 1 The Board of Governors shall have supervision, control and direction of the affairs of the Association; shall determine its policies or changes therein, *within the limits of the by-laws...*

Section 10 The Board of Governors is hereby authorized, *subject to Article IV, Section 3* of these by-laws, to enter into contracts for improvements and maintenance of *the Association properties* as may be deemed proper by the Board and to do all things necessary to accomplish the purposes of this Association.

ARTICLE VIII FEES AND CHARGES

Section 1 Before becoming a member each applicant shall pay his or her pro rata share of the annual amount determined as necessary for maintenance and capital improvements *in accordance with Article IV, Section 3*.

ARTICLE IX PROPERTY AND EQUIPMENT

Section 1 The *property and equipment owned and maintained by the Association* includes but is not limited to the Property Manager's residence, airport landing strip, taxi-way, tie-down area, buffer strip, tennis court, all roads (except private) as designated on the Plat; the Fire House and underlying land; all water lines and easements in connection therewith from Horseshoe Lake to the

Plat; including all pumps, tanks, water treatment system, buildings housing the equipment, easements for water lines both inside and outside the Plat, water rights to draw water from Horseshoe Lake, Parks at Driftwood Beach & South Runway, recycle center, and the 40' Beach access lot.¹⁹

The properties listed in Article IX, § 1 include every major piece of property then owned; they do not include the marina or related areas.

Any property acquisition, not to mention any new, risky enterprise requiring assessments, is subject to Article IV, § 3(a)²⁰—*i.e.*, is limited by the statements of purpose in Article III of the Articles.

e. Expiration of the DIR in 1993

The original term of the DIR was 20 years, subject to extension by written instrument, signed and acknowledged by the owners of at least two-thirds of the lots and effective only upon recording with the San Juan County Clerk.²¹ After being amended several times, the DIR expired without further extension on December 31, 1993.²² A valid enactment of new covenants would have required consent by every property owner, as BIMC's planning committee acknowledged in a letter from May 16, 1995:

It is imperative that new covenants be passed, since a lapse of the existing covenants would result in no rules and would require 100% approval of all owners of all lots in order to pass any new rules or covenants.²³

No such unanimous consent to any new covenants was ever

¹⁹ CP 1069; 1071; 1072; 1074; and 1076 (italics added).

²⁰ CP 1069-1070.

²¹ CP 1032-1033 at §§ 10 – 11.

²² CP 783 line 6-11 and CP 1026 at ¶¶ 10 & 11; 1169-1283; and 1285-1566.

²³ CP 1659.

obtained, though the Board has persisted in efforts to record a document purporting to be covenants enacted in 1995 (the "Blakely Island Covenants" or "BICs," excerpted in Appendix A and attached as Appendix D). The history of the failed efforts to extend the DIR and adopt the BICs are not material to the authority of BIMC to operate the marina, retail store and fuel dock since neither the BICs nor the original DIRs authorize such operations.²⁴

2. In 2006, BIMC's Board Begins Marina Operations and Persists in Spite of High Risks and Lack of Authority.

Since the 1960s and until 2006, Blakely Island's Marina, including the general store and fuel dock, was operated by private parties via arrangements with BIT (the Crowley trust).²⁵ BIMC had not considered operating the Marina before 2005.

From its formation in 1961 until 2005, BIMC acted as a classic homeowners association, maintaining the infrastructure of the subdivision—the roads, water supply, and the like—as provided in Article III of the Articles and as its covenants also provided. In 2005, the Marina owner and operator decided to cease operations.²⁶ Certain BIMC Board members began planning to have BIMC operate the Marina and retail store and did so.²⁷

²⁴ CP 1096-1097 at § 11.B.

²⁵ CP 1629 at ¶¶ 19 & 23; 3192 at ¶ 16.

²⁶ CP 1629 at ¶ 20.

²⁷ CP 1629 at ¶¶ 20-22; 3192 at ¶ 16.

At a July 2, 2005 annual meeting, a survey was circulated to gauge interest in the Marina and store.²⁸ Only 43 surveys were returned.²⁹ Only 54% of those who responded (23 BIMC members) indicated they “would be willing to pay a pro rata share of reasonable loss” to keep the Marina open—this was not a vote on who would operate it, but only an expression of willingness to lend some financial support.³⁰ There is no evidence of how many members attended the meeting³¹ and the memo with the compiled results concedes the “survey was not distributed to all BIMC members,” which “may have introduced a bias to the results.”³²

On September 5, 2005, a member meeting and a separate Board meeting were held. The Board reported that

[i]t is clear from the meeting that the community is *not interested in having BIMC be directly involved* in store operations, and they value continued access and operation of the facility.³³

The Board was considering several proposals for operation of the store (including marina and fueling operations), by third-party operators.³⁴ One third party proposed he would undertake "interim operation" in

²⁸ CP 925 (“Marc [Droppert] circulated a BIMC owner’s survey regarding the marina and store”); CP 929-932.

²⁹ CP 934.

³⁰ CP 934.

³¹ The reference in the minutes to a “quorum” is unreliable since the Board mistakenly believed that a quorum required only “55 votes.” See CP 1958 (“Various vote counts were discussed. 55 votes for quorum. 147 total votes. 74 votes to pass etc.”). In fact, the Bylaws require a majority for a quorum. CP 910 at Art. VII, § 7.

³² CP 934

³³ CP 937 (italics added). References to “store operations” generally include fuel sales and marina operating activities. See, e.g., CP 934 for references to “Gasoline (on the dock)” as a store service and CP 2772 for references to “Marina Proposals.”

³⁴ CP 937-938.

anticipation of BIMC taking a more *direct role* after it has been demonstrated that the facility can be operated profitably.³⁵

The Board noted:

this approach [BIMC's direct role] is not consistent with the community's preferences as indicated (sic) at the informational meeting earlier in the day....³⁶

At the September meeting, the Board decided six to one to "recommend" to the "Crowley family," a proposal whereby operations would be conducted by third-party Ken Parker.³⁷

But at a November 2, 2005, Board meeting an "outline" was presented for the "BIMC purchase of the marina" along with several other "options."³⁸ The "Board agreed that it is not recommending any of the options" and stated the "community must decide via the special meeting what option it wants to pursue."³⁹

The special member meeting was scheduled for November 26, 2005. On November 16, the Board sent a memo to the members outlining the proposal on which it sought a vote on November 26.⁴⁰ The Board said that only one of the earlier alternatives was still viable—a proposal by the marina owner, BIT, under which the "moorage" would be "commercialized." BIT would continue to own the moorage and would

³⁵ CP 937.

³⁶ CP 937.

³⁷ CP 941 at p. 1 at 2.

³⁸ CP 953 at 1.

³⁹ CP 953 at 1.

⁴⁰ CP 1661-1663.

lease the rest of the facility (the store, “fueling equipment . . . fuel dock/pier, barge ramp . . .”) to BIMC, which would be “responsible for use, operation and maintenance”⁴¹

Although it had recently recognized that the members did not want BIMC involved in such operations, the Board went on to recommend a version of this proposal. BIMC stated it would “operationalize” the BIT proposal in a way that would avoid (a) any potential BIMC liability in case of a fuel spill and (b) any BIMC financial responsibility for store inventory or losses by engaging a “turnkey” operator responsible for fuel operations.⁴² Specifically, the Board proposed:

. . . BIMC will form a subsidiary . . . , the Blakely Community Facility (“BCF”), which will be the designated lessee. This approach will **isolate BIMC’s other assets**, should there be an adverse event of any kind in the future (**e.g. a major fuel spill**).

* * *

The store facility will be leased out to an independent operator for seasonal operations, and they will operate it on the following basis:

* * *

They will operate it on a “turn key” basis (i.e., they will operate for their own account, including responsibility for **all store inventories, and for related profit and loss**) [and will] * * * be responsible for managing the fueling function [and will] * * * pay BIMC a percentage of gross revenue.

* * *

[Anticipated capital required] for BIMC to implement this proposal . . . is generally expected to be in the range of \$50,000-75,000

* * *

. . . the decision for the community to make at the Special Meeting will be whether to approve the BIT proposal, and provide the BIMC Board with authority to operationalize it From

⁴¹ CP 1661.

⁴² CP 1662.

discussions with BIT, if the BIMC community does not approve the proposal, they will likely proceed with their plans to **commercialize the moorage, and limit access to individuals who lease or purchase slips.**⁴³

At the November 26 special member meeting, the first motion was to reject this proposal.⁴⁴ It was defeated. The second motion was to provide BIMC very limited authority to negotiate further with BIT [references to “BIGS” are to Blakely Island General Store and include fuel sales]:

[The Board] is authorized to undertake and conclude negotiations to lease certain portions of the BIGS facility from the BIT . . . on terms consistent with . . . the November 16 mailing . . . , subject to the following clarifications . . . :

1. BIMC and its subsidiary will **not incur additional capital expenses** related to BIGS without first obtaining **further consent of the BIMC membership.**
2. BIMC and its subsidiary will not conduct retail operations of the store facility (other than sale of fuel products) in a manner which make it **accountable for related inventories**, or which place it at risk for the **profitability** of such operations.⁴⁵

This proposal was adopted.

On or about June 30, 2006, BIMC signed a lease to begin Marina operations and decided to fund the operations at Members’ expense without first obtaining “further consent of the BIMC membership,”

⁴³ CP 1662-1663 (bolding added).

⁴⁴ CP 1665.

⁴⁵ CP 1665-1666 (bolding added).

thereby violating the November 26, 2005, resolution.⁴⁶ On May 3, 2006, at a meeting held without notice,⁴⁷ the Board decided to borrow \$100,000 at 6% interest to fund Marina operations⁴⁸ (in further violation of the resolution and without member approval contrary to the Bylaws, Art. V, § 8). On May 10, 2006, BIMC organized a subsidiary to lease the Marina and participate in its operations.⁴⁹ BIMC proceeded with the personal loan of \$95,000 by individual members pursuant to the decision at the May 3, 2006, private Board meeting.⁵⁰ The borrowing created an obligation to repay the lenders.⁵¹ BIMC could do so only via member assessments, which (like the borrowing) had never been authorized even by a majority vote. Even if there had been a majority vote, it could not authorize assessments for non-Article III purposes.⁵²

Effective June 30, 2006, BIMC's wholly-owned subsidiary, BCF, entered into a lease of the Marina from BIT and began operations.⁵³ The lease activities included:

operation of facilities . . . including . . . vehicle and boat fueling systems . . . boat ramp, marina store⁵⁴

BCF also agreed to:

⁴⁶ CP 1685-1697 and CP 1719.

⁴⁷ CP 1952-1953 at ¶¶ 3-4.

⁴⁸ CP 1669.

⁴⁹ CP 1671-1683.

⁵⁰ CP 1668-1669; CP 1726.

⁵¹ CP 1669 and CP 1726.

⁵² CP 1041.

⁵³ CP 1685-1697.

⁵⁴ CP 1686 at ¶ 4.

indemnify . . . Lessor [BIT] from . . . damages . . . in connection with . . . activities . . . of Lessee . . . or any use . . . of the Leased Premises

I.e., BCF indemnified the marina owner against damages arising from a fuel spill or fire.⁵⁵ Through BCF, BIMC also took over the general store and sub-leased it to a third party.⁵⁶

3. BIMC Board Purports to Levy Assessments to Fund Marina Operations.

The Marina operations were not only risky, but also costly. The Board had long since abandoned its original, November 16 and 26, 2005, assurances that it would not assume inventory responsibility or other financial risks in connection with the store or liability risks in connection with fueling operations.⁵⁷ At the 2007 annual member meeting, the Board noted that it had already obtained \$95,000 in funding via personal member loans and that the notes were to be “paid off.”⁵⁸ There had been no “further consent of the BIMC Membership” for this financing as provided in the November 26, 2005 resolution.⁵⁹ The July 7, 2007 Meeting Minutes state that

[i]t was clarified that the notes are being paid off. We are not funding the marina; the community is repaying a debt.⁶⁰

These weasel words implicitly recognize that the Board had not been

⁵⁵ BCF also assumed other indemnity obligations. CP 1690 at ¶ 19.

⁵⁶ CP 1699-1716.

⁵⁷ CP 1661-1663 and CP 1665-1666.

⁵⁸ CP 1726.

⁵⁹ CP 1665-1666.

⁶⁰ CP 1726.

authorized to incur such costs to fund the marina, but had done so via an unauthorized borrowing that now had to be repaid, with the only funds for doing so coming from assessments (for purposes not authorized by the Articles, as the Bylaws required).

4. Members Oppose Risky Marina Fuel Operations.

By the summer of 2008, the leaking Marina fuel lines needed an expensive repair. The decision whether to decommission or repair the fuel lines was hotly debated at the July 5, 2008 annual membership meeting.⁶¹ At first, the members voted overwhelmingly to decommission the fuel lines, passing the motion by a voice vote.⁶² One hour later – *after several members in favor of decommissioning had left the meeting, reasonably expecting that the issue had been settled* – a second motion was made to reverse course and allocate \$120,000 to replace the fuel lines:

Believing the issue had been settled, several members, including some who had voted to decommission the fuel lines, left the meeting. About an hour after the first vote, the fuel line issue was brought up again.⁶³

After [the first] vote, some Members, including my wife, left the meeting during a recess. When the meeting reconvened, the Board decided to revote on the fuel line issue.⁶⁴

Even with manipulative revoting, the margin was so slim that three separate votes (a voice vote, a show of hands, and a standing vote) were

⁶¹ CP 1737.

⁶² CP 1737.

⁶³ CP 1962 at ¶¶ 4-6.

⁶⁴ CP 1630-1631 at ¶ 30.

needed for BIMC to eke out a 49 to 47 vote (i.e., turning on one vote).⁶⁵

The meeting minutes also reflect that Mr. Droppert (the former Board president and the attorney whose firm had formed the BCF to operate the Marina) advised that “he does not believe we would be liable for damages in a spill.”⁶⁶ This also had been his advice three years earlier in the November 16, 2005, Memorandum that served as the predicate for the November 26, 2005 vote (which also contained the clear prohibition against BIMC’s expending funds without further member approval).⁶⁷

The assurances of non-liability in 2005 and in 2008 were incorrect. Immediately following the July 5, 2008, meeting, because of concern about potential personal liability for fuel spills, including environmental damage, a BIMC Member not involved in this litigation, Sig Rogich, requested a formal legal opinion from Danielson Harrigan Leyh & Tollefson, LLP (“DHLT”) regarding the potential liability exposure.⁶⁸ On July 11, 2008, DHLT advised that BIMC Members could face:

significant liability for any leaks from the refueling lines . . . [and the State] would require reimbursement of cleanup costs for contamination resulting from the leaks, plus any damage to the natural marine habitat.⁶⁹

BCF, BIMC’s subsidiary for fuel, marina and store operations,

⁶⁵ CP 1737-1738.

⁶⁶ CP 1737.

⁶⁷ CP 1661-1663.

⁶⁸ CP 1742-1747.

⁶⁹ CP 1742.

sought a second opinion from Lane Powell,⁷⁰ which opined that damages and penalties could amount “to \$20,000 *per day* for negligent spills and \$100,000 for intentional or reckless spills”⁷¹ and added that individual members could potentially be liable for clean-up costs.

On August 4, 2008, the 5-member BCF committee promptly urged that fuel sales be stopped, writing:

In the event of a significant spill, however remote, the total cost could easily be in the hundreds of thousands of dollars and may well exceed \$1,000,000, which is the amount of environmental liability insurance that the BCF carries. ...

The BCF committee recommends that, given this potential, long term liability relative to the respective benefits, the sale of marine fuel be discontinued after the 2008 boating season. We acknowledge that this recommendation is counter to the vote at the annual meeting. ... We also considered other factors, such as the cost to replace the marine fuel lines (\$100,000+/-), the significant decline in 2008 in recreational boating ... the monitoring of the operator’s compliance and the long term viability of the store given the difficulty of both the Crowley’s and Ken Parker to earn a profit from store sales and marine fuel sales for the last several years.⁷²

In spite of the vote against fueling operations on July 5, 2008 (followed by three votes after members left), two unequivocal legal opinions⁷³ and the recommendation of its own responsible subsidiary, BCF, the Board forged ahead with its plan to repair the fuel lines (at a cost of about \$120,000)⁷⁴ and to continue Marina and fuel operations.⁷⁵ The

⁷⁰ CP 1749-1750.

⁷¹ CP 1750.

⁷² CP 1758-1759 (emphasis added).

⁷³ CP 1742-1747; 1749-1750.

⁷⁴ CP 274-275.

Board levied assessments for these expenses.⁷⁶ The assessments were for additional capital costs—of the type that were not to be incurred “without first obtaining the further consent of the BIMC Membership.”⁷⁷

Several homeowners, including the Roats, objected to further Marina operations and withheld from their 2008-2009 annual assessment the amount that related to the Marina.⁷⁸ The Roats withheld \$2,247.40 from the 2008-09 assessment in the mistaken belief that they might otherwise waive their right to object to the *ultra vires* operations.⁷⁹ The Roats paid the rest of their assessment and, since 2008-09, have paid the full amount of each annual assessment.⁸⁰

The Board threatened to file liens on the properties of objecting homeowners if they did not pay the Marina portion of their assessment.⁸¹ In early 2009, the Board prepared lien documents, warning the Roats and others that it would record liens for any unpaid assessments.⁸²

5. The Roats File this Lawsuit.

The Roats stepped up their efforts to enlighten the Board about its lack of authority to operate the Marina and to levy assessments for the operations. In a March 25, 2009 letter to the Board, DHLT outlined why

⁷⁵ CP 1737-1738.

⁷⁶ CP 887 at ¶ 21-22.

⁷⁷ CP 1665 at 1.

⁷⁸ CP 1631 at ¶ 35 and CP 1764.

⁷⁹ CP 3194 at ¶¶ 22-24.

⁸⁰ CP 3196-3197 at ¶ 33.

⁸¹ CP 1764.

⁸² CP 1766.

the Board's actions were without authority.⁸³ The Board did not reply.

On April 10, 2009, through other counsel,⁸⁴ the Roats filed this action in the belief that BIMC's Marina and other retail operations were unauthorized, expensive, entailed unacceptable financial risks and serious risks of personal liability of members.⁸⁵ Following negotiations between the Roats' litigation counsel and BIMC's counsel, the Roats deposited the withheld part of their 2008-09 assessment, \$2,247.40, into court when BIMC agreed that they would then "be considered current on their assessment" for that year.⁸⁶ The Roats withheld no further assessments.⁸⁷ BIMC did not file a lien against the Roats.⁸⁸ Others who had withheld assessments succumbed to the lien threat.

6. BIMC's Representation of Non-existent "Articles of Incorporation."

Several months after the Roats filed the action, in a January 7, 2010 Board Meeting, the BIMC Board attempted to address the questions about its authority to operate a Marina by stating:

Here is THE DECLARATION OF PURPOSE which appears in the *Articles of Incorporation* filed with the State of Washington (Filing # 156423, 1961). The purpose of the association is to provide water, road, and landing strip maintenance (*and such other services and maintenance as the association may hereafter decide*)

⁸³ CP 1768-1770.

⁸⁴ The Roats were represented in the litigation by Richard Roats, an Idaho lawyer, until DHLT associated as counsel in September 2009.

⁸⁵ CP 3188-3189 at ¶ 2; 3193 at ¶ 21.

⁸⁶ CP 279-280.

⁸⁷ CP 3196 at ¶ 33.

⁸⁸ CP 3194 ¶¶ 24-25.

for the property owners [occupant] of San Juan Aviation and Yachting Estates⁸⁹

In connection with this lawsuit, BIMC produced a document purporting to be the "Articles of Incorporation" referenced at the January 7, 2010 meeting.⁹⁰ This document was a concoction; it consisted of (a) "Articles of Association and Bylaws" containing the parenthetical "*(and such other services and maintenance as the association may hereafter decide)*" and (b) another document attached to the first--a poor copy of the actual first page of the *recorded Articles of Incorporation of BIMC*—those recorded on November 10, 1961, containing Article III.⁹¹ To make it appear that the entire document had been recorded in 1961, a poor copy of the first page of the actual 1961 Articles of Incorporation (which were in fact recorded with the Secretary of State at 9:12 a.m. on November 10, 1961⁹²) was attached to the "Articles of Association and Bylaws" which had never been recorded.⁹³

The language the Board quoted does not appear in the recorded Articles (Filing #156423).⁹⁴ But the Board represented to the membership that its source of authority was this manufactured document. The "Articles of Association and Bylaws" to which this page was attached are

⁸⁹ CP 1779 (italics added).

⁹⁰ CP 1079-1088.

⁹¹ CP 1080 and CP 1079 respectively.

⁹² CP 1079.

⁹³ CP 1080-1088.

⁹⁴ CP 1037-1046.

not the Bylaws that have been in effect since approximately 1987—those limit assessment authority to the purposes stated in Article III of the actual, recorded 1961 Articles of Incorporation. Nor were they part of the Articles filed in 1961—or ever. The document created a false appearance of authority.

The Articles attached hereto as Appendix B -- those originally filed with the secretary of state in 1961 – were the operative Articles of Incorporation at all times relevant to this appeal.⁹⁵ The Bylaws attached as Appendix C remain the operative Bylaws.⁹⁶ The 1987 version of the Bylaws contains the limiting assessment language that BIMC may charge assessments for “the purposes set forth in Article III of the Articles of Incorporation (and no more).”⁹⁷ This limiting language remains in the Bylaws and has been continuously in effect since 1987.

As explained below, even if the BICs (attached as Appendix D) had been validly adopted to replace the original DIRs, they also contain limited statements of purpose that exclude Marina and retail operations (*see* excerpts of BICs at Appendix A), as did the original DIRs.⁹⁸

⁹⁵ CP 1037-1046.

⁹⁶ CP 1069-1077 at 1070.

⁹⁷ CP 1843-1851 at 1845, Section 3(a).

⁹⁸ A second mystery document appeared in this case on April 22, 2010, when counsel for BIMC produced a letter dated September 13, 1961, to which “Articles of Association and Bylaws” were appended. CP 1608-1625. The cover letter erroneously refers to these draft bylaws as “Articles of Incorporation.” CP 1613 On November 10, 1961 – two months *after* the date of this letter – the *actual* Articles of Incorporation were recorded. Accordingly, this September 1961 document is not material to any issue on this appeal.

B. Procedural History

1. The Roats' Claims

On May 12, 2009, the Roats filed their first amended complaint, asserting causes of action for declaratory relief regarding the validity of the BICs (Claim 1), that BIMC was engaged in *ultra vires* actions (Claim 2), and violations of the open meeting law (RCW 64.38.035) because of meetings held without required notice (Claim 5).⁹⁹ The Roats also sought to quiet title to their property (mooted by the stipulated deposit into court) (Claim 3) and claimed that Board members had breached their duty of care (Claim 4).¹⁰⁰ Defendants asserted no counterclaims.¹⁰¹

2. The Court's Rulings

At issue on this appeal are the court's summary judgment rulings on Claims 1 (validity of BICs), 2 (*ultra vires*), and 5 (open meeting violations), and the rulings on each party's entitlement to attorneys' fees.¹⁰²

On October 28, 2009, the court dismissed Claim 1 (that the BICs were invalid) on summary judgment.¹⁰³ On May 7, 2010, cross motions for summary judgment on Claims 2 and 5—*ultra vires* and open meeting violations—were filed.¹⁰⁴ On July 15, 2010, the court dismissed the *ultra vires* claim and granted in part Plaintiffs' motion regarding violation of the

⁹⁹ CP 212-278.

¹⁰⁰ CP 212-278.

¹⁰¹ CP 289-300.

¹⁰² CP 814-817; CP 2145-2147; 2561-2565; 2556-2557; 2824-2825.

¹⁰³ CP 814-817.

¹⁰⁴ CP 855-883; CP 999-1023.

open meeting statute.¹⁰⁵ In September 2010, the parties moved for summary judgment concerning attorney fees and the improper Board meeting notice claim.¹⁰⁶ On October 13, 2010, in a letter to the parties, the Court denied attorney fees to Plaintiffs under RCW ch. 64.38 and stated that, "as the substantially prevailing party", Defendants' were entitled to fees "in an amount determined . . . after further proceedings."¹⁰⁷ Following Plaintiffs' motion for reconsideration,¹⁰⁸ in a letter ruling on November 12, 2010, the Court clarified that the basis for its fee award was the Bylaws, Art. VIII, § 9, which provides for fees "incurred" to "enforce" a "delinquent assessment"¹⁰⁹ (as opposed to broader "prevailing party" language). But the BIMC did not incur such fees; its insurer paid the costs of defending against the Roats' claims.

On November 29, 2010, the Court entered final judgment and ruled that Defendants, as the "substantially prevailing party," would recover their attorney fees and the Roats would not recover fees under RCW 64.38.050 for the open meeting violations.¹¹⁰ On June 24, 2011, a hearing was held on the amount of fees to be awarded.¹¹¹ BIMC claimed fees in

¹⁰⁵ CP 2145-2147.

¹⁰⁶ CP 2148-2157; CP 2208-2228.

¹⁰⁷ CP 2824-2825.

¹⁰⁸ CP 2446-2451.

¹⁰⁹ CP 2556-2557.

¹¹⁰ CP 2561-2565.

¹¹¹ RP dated June 24, 2011.

the amount of \$213,792.49.¹¹² On July 26, 2011, the Court awarded BIMC fees in the amount of \$13,797.42.¹¹³

Other issues were disposed of as follows: on May 14, 2009, the parties entered into the stipulation that the Roats would be “considered current on their assessments”;¹¹⁴ on June 17, 2009 the Court entered an Order granting the parties’ stipulation to dismiss Claim 3 (to quiet title);¹¹⁵ and on March 1, 2010, the Roats voluntarily dismissed Claim 4 (breach of duty of care) under an order that the dismissal was “without the award of attorneys [fees] or costs to any party.”¹¹⁶

IV. ARGUMENT

An order granting summary judgment is reviewed *de novo*.¹¹⁷ The court views the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party; summary judgment is proper only where “there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.”¹¹⁸

A. Dismissal of Claim 2 Was Error: The Governing Documents Give BIMC No Authority to Operate the Marina, Fuel Dock and Store or to Assess Members for such Operations.

Where, as here, a homeowners association’s articles of

¹¹² CP 3503-3517.

¹¹³ CP 3530-3531; and by Order of the Court on August 22, 2011, CP 3532-3535.

¹¹⁴ CP 279-280.

¹¹⁵ CP 303-304.

¹¹⁶ CP 852-854.

¹¹⁷ Go2Net, Inc. v. FreeYellow.com, Inc., 158 Wn.2d 247, 252, 143 P.3d 590 (2006) (citation omitted).

¹¹⁸ Stevens v. Brink’s Home Sec., Inc., 162 Wn.2d 42, 46-47, 169 P.3d 473 (2007).

incorporation, bylaws, covenants, and deeds reference one another, they are “correlated documents” that are to be construed together.¹¹⁹ There are two governing documents currently in effect: the 1961 Articles of Incorporation¹²⁰ and the current Bylaws.¹²¹ The original DIR have expired. The 1995 BICs were not validly adopted (*see* Section IV.B, below), but, even if they are in force, they do not remotely create authority for marina, fuel or other retail operations.¹²²

Both the Articles and Bylaws (and the BICs if they are effective) have been in effect since long before the Board began Marina or retail operations in 2006 and began levying assessments for those operations in 2008. None of the governing documents authorize Marina or retail operations or assessments in support of same.¹²³

1. The 1961 Articles of Incorporation Limit the BIMC’s Activities to Water, Road, and Landing Strip Maintenance.

BIMC is a creature of its charter, the Articles of Incorporation.

Article III states BIMC's purposes:

to provide water, road and landing strip maintenance ... and to promulgate and enforce rules and regulations necessary to insure equal and proper use of same.¹²⁴

¹¹⁹ Rodruck v. Sand Point Maintenance Commission, 48 Wash.2d 565, 577, 295 P.2d 714 (1956); *see also* Lake Limerick County Club v. Hunt Mfg. Homes, Inc., 120 Wash. App. 246, 84 P.3d 295 (2004) (articles/bylaws of homeowners’ association are binding covenants that run with land if properly referenced in original deed or agreement).

¹²⁰ CP 1037-1046.

¹²¹ CP 1069-1077.

¹²² CP 1090-1104.

¹²³ CP 1037-1046; 1069-1077; 1090-1104.

¹²⁴ CP 1041.

The Blakely Island *Maintenance* Commission was established for *maintenance* purposes. Article III lists three Blakely assets: water, roads and landing strip. It calls for BIMC to “maintain” them. It allows BIMC to adopt rules and regulations for “equal and proper use” of “same.” The assets do not include the marina, a fuel dock or a store. Those assets were not (and are not) owned by BIMC; they are owned by BIT, a creature of the Crowley family, which for decades arranged for them to be operated by a professional third party.¹²⁵

“Maintenance” of roads, water and landing strips may lead to “operating” vehicles or other facilities incident to maintenance activities, including fire prevention or extinguishment, grass-cutting, garbage collection, brush-clearing, maintenance sheds, vehicle engines and crews to perform these activities, water system operation, safety regulations at Horseshoe Lake (where swimming inevitably took place). But it simply is not rationally possible to translate “provide water, road and landing strip maintenance” and adopt regulations for “equal and proper use” of “same” to mean: take over the operation of the Marina owned by the Crowley trust; sell fuel; run the retail store; assume the financial risks of these money-losing operations; and create liability risks of all the members from fuel spills or fires.

¹²⁵ CP 1629, ¶ 19; CP 3192 ¶ 16.

The Articles' statement of purpose is *statutorily required* and cannot simply be ignored, as Defendants have done.¹²⁶ A corporation's "articles of incorporation are a contract, and govern, save as statute may otherwise provide, the rights of the parties."¹²⁷ BIMC has discretion in determining *how* to carry out those purposes, but does not have discretion to *expand* on them.¹²⁸ Actions not within the express statement of purpose are *ultra vires* and, under RCW 24.03.040, may be challenged and invalidated in an action by "a member or director against the corporation to enjoin the doing or continuation of unauthorized acts." The Roats' action is an RCW 24.03.040 proceeding.

The basic principle is explained in Shiflett v. John W. Kelly & Company, 16 Ga. App. 91, 93, 84 S.E. 606 (1915). There, the corporate entity was an offspring of the Farmers Life Confederation and organized as an insurance business. It then began operating as a "locker club," buying, selling, and distributing alcohol to its members. The Court held that such operations were "clearly ultra vires" and outside the purposes stated in its insurance business' charter:

¹²⁶ RCW 24.03.025(3) (articles must set forth "the purpose or purposes for which the corporation is organized").

¹²⁷ In re Olympic Nat'l Agencies, 74 Wn.2d 1, 7, 442 P.2d 246 (1968); Walden Inv. Group v. Pier 67, Inc., 29 Wn. App. 28, 31, 627 P.2d 129 (1981).

¹²⁸ See Fletcher Cycl. Corp. §3399 (2008-2009 Supp.) ("A corporation may exercise only those powers that are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant to the laws of the charter; acts beyond the scope of the power granted are ultra vires."); Hartstene Point Maintenance Assn., 95 Wn. App. 339, 344, 979 P.2d 854 (1999) ("The phrase '*ultra vires*' describes corporate transactions that are outside the purposes for which a corporation was formed and, thus, beyond the power granted the corporation by the Legislature.").

The buying, handling, and dispensing of intoxicating liquors was beyond the objects contemplated in its charter; such actions were not necessary or legitimate for the carrying into effect of any of the purposes of the charter. *Id.*, at 93.

The Court held that these actions were, therefore, *ultra vires* and void:

It was clearly *ultra vires* of its charter to organize, in connection with its insurance business, a 'locker club' and to contract for the buying, handling, and dispensing of intoxicating liquors. *Id.*, at 92.

If the BIMC members wish to operate the Marina, they have the power to do so by appropriate action. Instead, the BIMC Board has launched these operations without authority.

2. As Required by Law, the Bylaws Are Consistent with the 1961 Articles; they Do Not Authorize Marina Operations.

Bylaws of a corporation are subordinate to, and controlled by, limitations in the articles of incorporation. By statute, a corporation's bylaws must be consistent with the articles.¹²⁹ If there is any inconsistency, the articles control and the bylaws are void:

Bylaws, to be valid, must be consistent with the terms and spirit of the charter of the corporation... [a] bylaw which is not consistent with the charter but is in conflict with it and repugnant to it is void.

A bylaw can neither enlarge the rights and powers conferred by the charter nor restrict the duties and liabilities imposed by it. Where a bylaw attempts to do so, the charter will prevail...

A corporation cannot, by bylaw, change the character fixed upon it by charter in a fundamental respect, since bylaws must be

¹²⁹ RCW 24.03.025 ("whenever a provision of the articles of incorporation is inconsistent with a bylaw, the provision of the articles of incorporation shall be controlling."); RCW 24.03.035(12) ("Each corporation shall have power ... [t]o make and alter bylaws, not inconsistent with its articles of incorporation[.]"); RCW 24.03.070 ("The bylaws may contain any provisions . . . not inconsistent with law or the articles of incorporation.").

consistent with the nature, purposes and objects of the corporation.¹³⁰

Defendants argued below that Bylaw Articles II and III provides BIMC with a “far-reaching” and “wide-ranging” purpose.¹³¹ Nothing in either provision purports to (or could) broaden the BIMC’s powers and purposes beyond those stated in the Articles of Incorporation or covenants.

Article II of the Bylaws recites the “purpose *of the Bylaws*” – it purports neither to state nor to expand the purpose *of the association* (nor does it refer to marina operations):

The purpose of these by-laws is to provide for the administration, maintenance, improvement and protection of the properties, easements, access agreements, water rights, and equipment owned by the Association.¹³²

Article III of the Bylaws lists the various powers of the corporation necessary “to accomplish its purpose and to act in all things to this end[.]”¹³³ The listed powers are the means to the end – to accomplish the BIMC’s purpose as articulated in the Articles:

This corporation shall have the power [1] to buy, sell, mortgage or encumber real and personal property, [2] to receive and disburse money, [3] to enter into contracts, [in order] to accomplish its purpose and to act in all things to this end[.]¹³⁴

¹³⁰ Fletcher Cycl. Corp., §4190 (2001 Ed.). See also Howe v. Washington Land Yacht Harbor, Inc., 77 Wash. 2d 73, 87 459 P.2d 798 (1969); RCW 24.03.070 (“The bylaws may contain any provisions for the regulation and management of the affairs of a corporation *not inconsistent* with law or the articles of incorporation”) (emphasis added).

¹³¹ CP 868-869.

¹³² CP 905 (emphasis added).

¹³³ CP 905.

¹³⁴ CP 905 (emphasis added).

The Board's powers are similarly articulated in Bylaws, Article V, § 10:

The Board of Governors is hereby authorized, subject to Article IV, Section 3 of these by-laws, to enter into contracts for improvements and maintenance of the Association properties as may be deemed proper by the Board and to do all things necessary to accomplish the purposes of this Association[.]¹³⁵

Article IV, § 3(a) ties assessment authority to Article III of the Articles:

[assessments] shall be based upon an estimate of the amount required to accomplish the purposes set forth in Article III of the Articles of Incorporation (and no more).¹³⁶

An incorporated homeowners' association like the BIMC has some discretion in determining how to effectuate its authorized purposes, but it has no discretion to expand its purposes beyond those articulated in its governing documents, as held in Riss v. Angel, 131 Wn.2d 612, 621, 934 P.2d 669 (1997).

In Riss, the Supreme Court held that a homeowners association acted unreasonably when it imposed restrictions on a homeowner that were more burdensome than those allowed in the covenants. *Id.* at 621. The court analyzed the language of the covenants to determine their scope and explained that the court's primary objective was to give effect to the intent or purpose of the covenants' language. *Id.* "Historically, Washington courts have ... held that restrictive covenants... will not be extended to any use not clearly expressed..." *Id.* at 676. The court further

¹³⁵ CP 908 (emphasis added).

¹³⁶ CP 906.

recognized that

several courts have held that a... covenant cannot operate to place restrictions on a lot which are more burdensome than those imposed by the specific covenant. *Id.* at 677.

The BIMC Board's foray into Marina operations placed every lot owner at serious risk of financial losses and liability, a burden on each lot never hinted at in any governing document. The original DIRs, the BICs (if valid) and the Articles are consistent; none refers to or remotely authorizes the actions taken by the BIMC's board that are the subject of Claim 2.

3. The BICs Are Consistent with the Articles and Bylaws.

Even if the BICs had been validly adopted as a replacement for the expired DIRs, they are consistent with the Articles and Bylaws. The BICs provide that BIMC membership "runs with the land" – *i.e.*, if valid, the BICs are an encumbrance on each owner's title, meaning that successive owners automatically become members of BIMC:

All persons owning any lot, tract, or portion of the San Juan Aviation Estates, or any person who is a contract vendee or successor owner of such property, shall be members of the Blakely Island Maintenance Commission, Inc. No lot may be purchased or contracted to a purchaser, nor sold by any owner of any lot or lots, unless and until said purchaser shall be accepted for membership in the BIMC.¹³⁷

The BICs make membership in the BIMC mandatory for all

¹³⁷ CP 1094, ¶ 7.

owners of the San Juan Aviation Estates.¹³⁸ The BICs reinforce the Articles and Bylaws (and reflect the original limitations inherent in the DIRs) by narrowly and specifically stating what BIMC is authorized to do and by continuously incorporating the limitations of the Articles and Bylaws then in effect.

Appendix A sets forth key excerpts from the BICs demonstrating their specificity and their consistent reference to the existing Articles and Bylaws. A few examples are (“Powers and Duties”, § 11.B):

- (1) To prescribe... reasonable police regulations....

- (3) As approved by the BIMC members at the annual meeting, *maintain, repair and improve*, on behalf of the corporation, *roads, airports and airport facilities, water supply and all equipment, pipe lines, pumps, reservoirs, and easements in connection therewith.*
- (4) To maintain and administer fire protection....
- (5) To maintain and administer garbage disposal facilities.
- (6) To maintain and administer the water treatment plant.
- (7) To levy assessments for operating and maintenance expenses, and to collect such assessments upon owners of the properties contained in such plat *in accordance with the BIC and the BIMC Bylaws and Articles of Incorporation....*¹³⁹
- (8) To have the power, through the BIMC, after approval of its members, to incur indebtedness on behalf of the BIMC, to finance improvements and to maintain the same. The plat

¹³⁸ CP 1094, ¶ 7.

¹³⁹ CP 1096-1097, ¶ 11.B (emphasis added).

... shall be subject to the control and management of the BIMC in the manner described in this BIC, and *in accordance with the BIMC Articles of Incorporation and Bylaws* and the mandate and approval of its members.

The BICs are consistently and expressly limited to (a) the constraints imposed by the then operative Articles and Bylaws; (b) the facilities listed in the BICs, which are very specifically identified (water treatment plant, fire protection, garbage disposal, roads, airports and airport facilities, water supply and all equipment, pipe lines, pumps, reservoirs, and easements in connection *therewith*); (c) incurring indebtedness (§ 8) only to finance “said improvements” (specifically listed), “on behalf of BIMC” (*i.e.*, for its defined purposes); (d) “control and management” of the “property contained” in the “plat” but only “in the manner described in the BIC” and “*in accordance with the BIMC Articles of Incorporation and Bylaws*” (§ 8); (e) to acquire property but only to the extent “*reasonably necessary for BIMC use and benefit,*” -- *i.e.*, for the purposes previously listed and as set forth in the Articles and Bylaws (§ 9); (f) to execute legal documents but only “*to carry out the business interests of the BIMC,*” which limits any such authority to the specific powers otherwise accorded to BIMC (§ 10).

In § 7, the BICs expressly reiterate the limitations on the power “to levy assessments” to those “in accordance with the BIC and *the BIMC*”

*Bylaws and Articles of Incorporation...*¹⁴⁰ There is no discretionary grant of assessment power in this provision. It is even more expressly tied to the limitations in the Bylaws and Articles than some of the other provisions—control over the purse strings is carefully circumscribed by the original grant of power to BIMC.

Respondents argued below that the “clear intent” of BIC ¶¶ 8 and 10 is to authorize the BIMC Board “to enter into a lease, form a subsidiary and collect assessments” for the association’s benefit.¹⁴¹ The language is general; it does not even purport to create new BIMC authority, especially when read together with other very specific BIC provisions such as ¶ 7: “assessments for operating and maintenance expenses [can be levied only] in accordance with . . . the BIMC Bylaws and Articles of Incorporation.”¹⁴²

4. There Is No Statutory Basis for Expanded BIMC Authority

Applicable Washington statutes do not operate to expand BIMC’s authority beyond the Articles, Bylaws or covenants. RCW 64.38.020, relating to homeowners associations, enumerates default powers of such associations, subject to the proviso: “Unless otherwise provided in the governing documents” The default powers are inapplicable because the Articles limit BIMC’s authority. Similarly, RCW 24.03.035(20) (Non Profit Corporation Act) provides:

¹⁴⁰ CP 1097, at ¶ 11.B.7.

¹⁴¹ CP 870.

¹⁴² CP 1097, at ¶ 11.B.7.

[Corporations shall] have and exercise all powers necessary or convenient to effect any or all of the *purposes for which the corporation is organized*. (Italics added).

The Articles give BIMC “all of the power prescribed in R.C.W. 24.04.080, and, generally, to do all things necessary and proper to carry out the *purpose of its creation*”¹⁴³ In 1961, RCW 24.04.080 provided:

Corporations formed under this Chapter * * *

4. May purchase . . . real and personal property, as the *purposes of the corporation may require*. * * *
7. May enter into any lawful contracts . . . essential to the transaction of its affairs for the *purpose for which it was formed*. * * *
8. Generally, may do all things necessary or proper to carry out the *purpose of its creation*. (italics added).

In short, the Articles, the then-applicable homeowners statute as well as all other applicable statutes clearly limit the Board’s specific powers to those needed to implement the *purposes* for which the Articles specify the entity was created. Such statements of purpose are mandated by RCW 24.03.025(3) (the articles “shall set forth . . . [t]he purpose . . . for which the corporation is organized”). As explained above in Section IV.A.2, as required by law, the Bylaws are consistent with the Articles.¹⁴⁴

5. The BIMC Membership Never Validly Authorized Marina Operations

The BIMC argued that, even if the governing documents failed to

¹⁴³ CP 1042.

¹⁴⁴ See *supra*, FN 129.

provide the necessary authority, the homeowners approved/ratified the Board's action. However, where all homeowners would be affected by a deviation from the governing covenants, all must agree to be bound by the new terms, as stated in Meresse v. Stelma, 100 Wn.App. 857, 866 (2000):

The law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants.¹⁴⁵

Meresse involved a six-lot residential subdivision served by a single access road, in which each lot was subject to a restrictive covenant requiring equal payment for access road maintenance. *Id.* Under the relevant covenants, each owner agreed to:

Share on an equal basis the expense and responsibility for the maintenance, repairs and additional constructions on said existing road above-referenced. *Id.*, at 859.

By their terms, the covenants could be amended by majority vote.

Id. By a 5 to 1 vote, the owners amended the covenants to relocate the road, change its width, and create a scenic easement. *Id.* at 862. Plaintiff argued that the amendment required unanimous consent because road relocation was not contemplated by the original covenants:

At issue is whether [Defendants], as the owner[s] of a majority of the lots, can override the minority owner, Meresse, to impose a major change – relocating the access road – by calling it “road maintenance,” “construction,” or “repair,” which do not require unanimous approval. *Id.* at 864

¹⁴⁵ Meresse v. Stelma, 100 Wn.App. 857, 866 (2000) (citation omitted).

The court held that the relocation was an “unexpected expansion of the subdivision owners’ obligations to share in road maintenance.” *Id.* at 866. The covenant language does not place a purchaser or owner on notice that he or she might be burdened, without assent, by road relocation at the majority’s whim. *Id.* at 867. The effort to alter the purposes of the covenants by agreement of fewer than all homeowners was rejected.

Only where the proposed changes already fall within the express purposes of the association, can the governing documents authorize fewer than 100% of the members to adopt new covenants:

An express reservation of power authorizing less than 100 percent of property owners within a subdivision to adopt new restrictions respecting use of privately owned property is valid, *provided that such power is exercised in a reasonable manner consistent with the general plan of the development.*¹⁴⁶

Here, neither the original DIRs, nor the BICs, nor the Articles mention fueling operations, marina operation or retail operation with attendant financial and liability risks. Nothing forewarned buyers that a majority (much less a minority acting through manipulated voting) could subject a minority to the significant financial and liability risks of such commercial activities. The marina operations are outside of the stated BIMC charter “to provide water, road and landing strip maintenance.”¹⁴⁷

In any event, it is undisputed that a unanimous vote to adopt new

¹⁴⁶ *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn.App. 267, 273-74 (1994) (emphasis added).

¹⁴⁷ CP 1041, Art. III.

covenants authorizing Marina operations has never occurred. The vote of November 26, 2005, contained limitations on BIMC's authority that it promptly disregarded.¹⁴⁸ The 49 to 47 vote of July 5, 2008 essentially occurred without notice—*i.e.*, after the vote for which notice had been given was taken, new votes were taken of which the departing members had no notice.¹⁴⁹ This voting process was sheer manipulation by BIMC. The Board simply forged ahead, ignoring the recommendation of the subsidiary it had charged with the operations, ignoring the controlling, initial negative vote of July 5, and repeating its past practices of carrying out its plan through meetings conducted without notice to the members.

The BIMC Board employed a classic tactic of gaining momentum by proceeding with unauthorized actions adopted in secret meetings that were then presented as *faits accomplis*. After borrowing and committing funds without authority, the Board explained: “We are not funding the marina; the community is repaying a debt.”¹⁵⁰

6. BIMC's Misguided “*Fait Accompli*” Argument

The Board apparently believes its tactics are both appropriate and authorized. BIMC argued below that Art. V, § 6 of the Bylaws means the 5-member Board can do essentially whatever it wants and that each action, regardless of how far outside its authority, becomes an unassailable “*fait*

¹⁴⁸ CP 1629 at ¶ 22 and CP 1665-1666.

¹⁴⁹ CP 1630 at ¶ 30; CP 1962 at ¶¶ 4-6; and CP 1737-1738.

¹⁵⁰ CP 1726.

accompli” unless a vigilant (and fully informed) 15% or more of the membership lodges a written objection within 30 days:

All actions of the Board of Governors shall be final unless ... 15% of the members shall thereafter, and within 30 days from the issuance of said minutes, file written objections[.]¹⁵¹

In this action the Roats have asked for a declaration that the Board has no authority to operate the marina, store and fuel dock *in the future* and an injunction against its doing so, as contemplated by RCW 24.03.040(1).¹⁵² Art. V, § 6 has no possible bearing on that claim.¹⁵³

The provision also clearly pre-supposes Board action within its overall authority; it does not supplant more specific Bylaw provisions¹⁵⁴ that expressly reserve certain rights to the BIMC members.¹⁵⁵ As a matter of basic interpretation, Art. V, § 6 cannot eradicate the express limitations in other Bylaws. While an action otherwise permitted by the BIMC's governing documents may become final absent prompt objection, an *ultra vires* act cannot be similarly whitewashed, effectively nullifying the statutory right to challenge such unauthorized action.

¹⁵¹ CP 907, Art. V § 6.

¹⁵² CP 222-223; 226.

¹⁵³ CP 226 (requesting “[a]n order requiring Defendants to immediately cease its wrongful conduct as set forth above”).

¹⁵⁴ Gallo v. Dep't of Labor & Indus., 119 Wn. App. 49, 55, 81 P.3d 869 (2003) (under “*ejusdem generis*, a canon of statutory construction ... certain specific language ... control[s] more general terms...”); Meresse, 100 Wn.App. at 867, n. 10 (applying *ejusdem generis* to contract interpretation).

¹⁵⁵ See Bylaws, Art. V, § 8 (“The Board ... may not borrow money ... without the approval and consent of the members.”); Art. VIII, § 4 (“all Capital Assessments shall be subject to the approval of the members”); and Art. IV, § 3 (limiting assessments to the Article III purposes “and no more”).

In any event, the Bylaws are subordinate to the Articles and to the basic requirement that lots not be burdened with obligations beyond those of which notice is provided in the covenants. The non-objection provision does not create a boot strap for the Board to expand its powers beyond those granted by the governing documents.

B. Dismissal of Claim 1 Was Error: The BICs Are Invalid.

The BICs were proposed as a replacement for the DIR, which expired on December 31, 1993.¹⁵⁶ The BICs were not validly adopted by the entire BIMC membership, as shown in the May 6, 2010 Declaration of Gary Roats, ¶¶ 14-16.¹⁵⁷ The Roats' claim to this effect was dismissed on summary judgment based on the statute of limitations.¹⁵⁸ The basis for this ruling was an issue that arose in 2002.¹⁵⁹ BIMC advised the Roats that they would have to cut limbs from ornamental cherry trees along the perimeter of their property to allow a mobile home to pass that was being delivered to another site on the island.¹⁶⁰ The Roats were prompted to determine whether BIMC had the authority to require this. Gary Roats reached the conclusion that the BICs—which were cited as authority for this order—had not been validly adopted, and so advised BIMC. For unrelated reasons the mobile home was never delivered and the issue

¹⁵⁶ CP 1627 ¶¶ 9-10 and CP 783 lines 6-11.

¹⁵⁷ CP 1628.

¹⁵⁸ CP 814-817.

¹⁵⁹ CP 826 at ¶ 4.

¹⁶⁰ CP 826 at ¶ 5.

became moot before the Roats suffered any damage.¹⁶¹

As a matter of law, this episode did not give rise to a cause of action.¹⁶² Even if a member could have questioned the validity of the BICs without suffering actual damage at the time, the tree episode did not cause any such claim to accrue for the Roats. The BICs were void *ab initio*¹⁶³ if not validly enacted. The BICs provide that “[t]he parties to this instrument *are the owners of all the property* in San Juan Aviation Estates”¹⁶⁴; the BIMC Board admitted that adoption required unanimity,¹⁶⁵ which was not achieved. The BICs are invalid.

C. The Court Erred by Failing to Award the Roats Fees on Claim 5: The Board Used its Open Meetings Violations to Present Members with Purportedly Irreversible *Faits Accomplis*.

The trial court erred in not awarding the Roats' fees under RCW 64.38.050 for establishing numerous open meeting violations.¹⁶⁶ From 2004 to 2009, the Board met 28 times without providing any notice to members.¹⁶⁷ The Court agreed that, in doing so, the Board violated RCW

¹⁶¹ CP 827 at ¶ 7.

¹⁶² Neighbors & Friends v. Miller, 87 Wn. App. 361, 383, 940 P.2d 286 (1997) (“[b]efore a court may rule by declaratory judgment... [there must exist] an actual, present and existing dispute...”).

¹⁶³ See, e.g., Meresse, 100 Wn. App. at 867 (upholding trial court's decision that covenant was invalid because it did not receive “a total, 100% vote” of members); 1515-1519 Lakeview Blvd. Condo. Ass'n v. Apt. Sales Corp., 146 Wn.2d 194, 202-203, 43 P.3d 1233 (2002) (an enforceable covenant must contain five elements, including “a promise which is enforceable between the original parties”).

¹⁶⁴ CP 1090.

¹⁶⁵ CP 1659.

¹⁶⁶ CP 2563.

¹⁶⁷ CP 2156.

64.38.035.¹⁶⁸ All of these violations were deliberate and consequential. They are so consequential that BIMC and its counsel spent considerable time creating spreadsheets of meetings held without notice so that the Board could give notice of other meetings where the decisions previously made would be *ratified—and in their fee application BIMC’s counsel sought to charge the Roats’ with virtually the entire cost of preparing and presenting these ratification motions* (where the award was based on “enforcing” a “delinquent assessment”).¹⁶⁹

The Bylaws provide for regularly-scheduled Board meetings to be held immediately after the annual member meeting, “on the Saturday nearest July 4.”¹⁷⁰ Any other meeting is a “special meeting,” requiring at least 30 days’ written notice under both the Bylaws and by statute.¹⁷¹

BIMC violated the open meeting dictates of RCW 64.38.035(2):

[A]ll meetings of the board of directors shall be open for observation by all owners of record and their authorized agents...

No motion, or other action adopted, passed, or agreed to in closed session may become effective unless the board of directors, following the closed session, reconvenes in open meeting and votes in the open meeting on such motion, or other action which is reasonably identified.

¹⁶⁸ CP 2824-2825. The court found 18 violations, ruling that the claims related to the first 10 meetings identified by the Roats were untimely.

¹⁶⁹ CP 3249 lines 14 – 16 and CP 3163 line 23. The trial Court ultimately denied this and all similar elements of the fee request. CP 3530-3531.

¹⁷⁰ CP 1073 at Art. VII, § 4.

¹⁷¹ CP 1074 at Art. VII, § 6 (“Thirty (30) days’ notice by mail, computed from the time of mailing, shall be given all members or governors of any special meetings.”); RCW 24.03.120 (requiring notice of special meetings as provided by the bylaws).

BIMC argued below that the Board had “always made a telephone line available” for Member observation.¹⁷² But absent notice there is no opportunity to observe by phone or otherwise. Private, unannounced meetings were a pervasive technique employed by the BIMC Board to agree upon and take actions that would then be presented to the membership as done deals that could not be easily reversed. The \$95,000 borrowing was effected contrary to the specific limitations of the November 26, 2005 vote¹⁷³ and decided upon at the May 3, 2006 meeting without notice.¹⁷⁴ Then, at the 2007 annual meeting with notice, members were informed that an assessment was needed to retire the loan, but that “[w]e are not funding the marina; the community is repaying a debt.”¹⁷⁵

While the Court found the Roats' claims with respect to the first 10 meetings convened without notice untimely, those meetings are part of the overall pattern of creating momentum by secret meetings held to undertake unauthorized actions. The Court agreed the Board had violated the open meeting requirement 18 times between 2006 - 2009.¹⁷⁶ The Roats' lawsuit also led to recent changes in the Board's approach to secret meetings¹⁷⁷ and to the Board's convening meetings with notice to “ratify”

¹⁷² CP 880 lines 15-16.

¹⁷³ CP 1665.

¹⁷⁴ CP 2764. It is undisputed that this meeting occurred without proper notice. *See* CP 2561-2565, referencing CP 2156.

¹⁷⁵ CP 1726.

¹⁷⁶ CP 2824-2825 and CP 2561-2565.

¹⁷⁷ CP 2617 at ¶ 5.

its earlier actions—*i.e.*, the Roats’ lawsuit compelled the Board to give the members a voice on these matters.¹⁷⁸ The Roats should have been awarded their attorneys fees as the prevailing party on this issue under RCW 64.38.050.

D. The Trial Court Erred in Awarding Fees to the BIMC under the Bylaws.

While denying fees to the Roats for establishing persistent violations of the open meetings law, for which RCW 64.38.050 provides for prevailing party fees,¹⁷⁹ the trial court awarded fees to BIMC as the “prevailing party” in the Roats’ action under RCW 24.03.040 to establish that BIMC acted without authority. But no statute and no bylaw provides for fees for the “prevailing party” in an *ultra vires* dispute. Obviously, if this Court reverses the trial court on the merits, there will be no basis for any fee award in favor of BIMC. But there is no basis for such an award even if the trial court is affirmed on the merits of the *ultra vires* claim.

Initially, the trial court mistakenly adopted BIMC’s argument that it was entitled to fees as the “prevailing party,”¹⁸⁰ but ultimately (on a

¹⁷⁸ On August 12, 2010, the Board held a special meeting to approve/ratify all decisions made at the Board meetings held without proper notice. CP 2661. Many decisions purportedly ratified at this meeting related to the marina operations. CP 2672 (5/9/2009 decision to "authorize the BCF to grant a sublease to the newly formed Blakely Store LLC"); CP 2673 (5/7/2009 decision "to have the BCF related funding issues"); CP 12/17/2008 (12/17/2008 decision to "allocate \$30,000 for start up costs for fuel and other supplies related to the Marina store"); and CP 2679 (5/28/2006 decision to "approve the operating agreement for the newly-formed Blakely Community Facility (BCF)" and 5/3/2006 decision to "initiate the process to form the Blakely Community Facility LLC").

¹⁷⁹ CP 2561-2565; CP 2556-2557.

¹⁸⁰ CP 2824-2825.

motion for reconsideration) held that the award would be based only on a very narrow provision in the Bylaws (Art. VIII, § 9).¹⁸¹ That provision calls for members' assessment bills to include fees "incurred" by BIMC to "enforce" a "delinquent assessment."¹⁸² As the Court ultimately held, this case entails far more serious issues than a few thousand dollars in assessments—an issue that was in any event resolved when the funds were deposited into court under a May 14, 2009, stipulation that the Roats' were "considered current on their assessments."¹⁸³ It is not disputed that the Roats have paid every assessment since that date in full. This litigation had nothing to do with "enforcing" a "delinquent assessment" as referenced in Bylaw Art. VIII, § 9.¹⁸⁴

This provision is consistent with Bylaw Article IV, § 6, which provides for fees only if an "action" is brought to collect an assessment.¹⁸⁵ (Section 11.C(2)b of the BICs is to the same effect).¹⁸⁶ Reading the two Bylaws provisions together, BIMC can recover fees it incurs in pursuing an "action" to collect an assessment, which are then to be included in a bill to the member under Bylaws Article VIII, § 9.¹⁸⁷ BIMC has never brought an action. It did not file a counterclaim in this case to recover an

¹⁸¹ CP 2556-2557.

¹⁸² CP 2556; 2563.

¹⁸³ CP 280.

¹⁸⁴ CP 1075.

¹⁸⁵ CP 1071.

¹⁸⁶ CP 1098.

¹⁸⁷ CP 1075.

assessment.

BIMC's fees are also not recoverable to the extent they were paid by its insurer. The Bylaw provisions permit recovery only of fees "incurred" by BIMC. BIMC's counsel was hired and paid by its insurer.¹⁸⁸ Except for a small deductible, BIMC "incurred" no fees. The Bylaws are a contract with a narrow definition of entitlement to fees. If BIMC did not "incur" the fees it cannot collect them. This makes sense. BIMC bought insurance to cover its costs of defending claims. It planned to use BIMC emergency or contingency funds if it needed "to fund enforcement proceedings."¹⁸⁹ The purpose of the Bylaw provision for fees for enforcing delinquent assessments is to assure that BIMC is made whole. BIMC does not need to be made whole for litigation it did not fund and cannot collect fees from members for defending *ultra vires* claims.

The anti-subrogation rule provides an independent basis for reversal. The rule bars subrogation actions to recover fees from any person "for whose benefit the insurance was written" -- *i.e.*, those who pay for or are beneficiaries of the policy.¹⁹⁰ The Roats are protected because

¹⁸⁸ CP 2874 at ¶ 5; CP 3094-3096.

¹⁸⁹ CP 1099 § 11.C(2)f.

¹⁹⁰ General Ins. Co. of Am. v. Stoddard Wendle Ford Motors, 67 Wn.2d 973, 979 (1966) ("insurance company-having paid a loss to one insured-cannot, as subrogee, recover from another of the parties for whose benefit the insurance was written").

they provided funds used to buy the BIMC's insurance¹⁹¹ and because the coverage provides them protection.¹⁹² In Cascade Trailer Court v. Beeson,¹⁹³ the court held tenants were protected even though not a named insured because rent would normally provide funds for the coverage and a tenant had a possessory interest in the property covered by the policy. Here, premiums are BIMC expenses that are paid by the assessments the Roats have paid. Here, the “defense costs” incurred would have been paid by assessments had there been no insurance (and the claims against Board members were subject to indemnification by the members).¹⁹⁴ This is an easier case than Beeson. Here, the members’ assessments pay every dollar of BIMC’s premium expenses whereas a tenant’s rent only inferentially may be applied (but might not fully cover) all landlord costs, and the insurance covers defense costs members would otherwise have to pay.

BIMC has apparently been telling its insurer one thing and the trial court another. BIMC’s insurer paid the fees as “defense costs.” The insurer does not cover fees incurred for affirmative claims to “enforce” a “delinquent assessment.” It covers fees to defend “claims,” which are defined in BIMC’s insurance policy as those “reasonable and necessary

¹⁹¹ See, e.g., Cascade Trailer Court v. Beeson, 50 Wn. App. 678, 681-82, 749 P.2d 761 (1988); United Fire & Cas. Co. v. Bruggeman, 505 N.W.2d 87, 89 (Minn. App. 1993); Sutton v. Jondahl, 532 P.2d 478, 482 (Okla. App. 1975).

¹⁹² See Am. Nat'l Fire Ins. Co. v. Hughes, 658 N.W.2d 330, 2003 ND 43 (2003); Fireman's Ins. Co. of Newark v. Wheeler, 165 A.D.2d 141, 566 N.Y.S.2d 692 (1991).

¹⁹³ Cascade Trailer Court v. Beeson, 50 Wn. App. 678, 681-82, 749 P.2d 761 (1988)

¹⁹⁴ CP 1077, Art. XI, § 6.

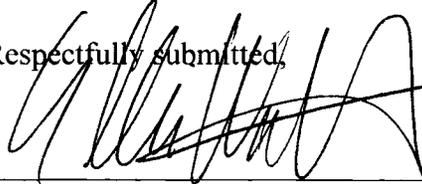
legal fees and expenses incurred... to defend the Insured against any claim.”¹⁹⁵ BIMC cannot charge members for its insurance premiums, avoid paying litigation costs as a result, and then collect those costs from a member on the diametrically opposite theory that they were incurred for an uncovered effort to “collect” a “delinquent assessment.”

V. CONCLUSION

The Roats respectfully request reversal and remand of the court's orders on summary judgment relating to Claims 1 and 2, reversal of the trial court's award of fees to Defendants, and that the trial court be directed to award reasonable attorney fees to the Roats on Claim 5.

DATED this 25th day of August, 2011.

Respectfully submitted,



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¹⁹⁵ CP 2369 at D.

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2011, I caused a true and correct copy of the foregoing to be delivered to the following counsel of record in the manner indicated below:

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Appendix A

APPENDIX A

Excerpts from Key BIMC Corporate Documents

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Articles of Incorporation,
dated November 10, 1961 (excerpts)¹

Article III

The purposes of this corporation, hereinafter referred to as association, is to provide water, road and landing strip *maintenance* for the occupants and owners of San Juan Aviation and Yachting Estates, and to promulgate and enforce rules and regulations necessary to insure equal and proper use of *the same*.

Article V

This corporation shall have all of the powers prescribed in R.C.W. 24.04.08, and, generally, to do all things necessary and proper to carry out the purpose of its creation, as any individual might do, all in accordance with the laws of the State of Washington.

By-Laws of the Blakely Island Maintenance Commission, Inc.
(excerpts)²

ARTICLE II **PURPOSE**

The purpose of these by-laws is to provide for the administration, maintenance, improvement, and protection of the properties, easements, access agreements, water rights, and equipment *owned by the Association*. Further, the Association may promulgate and enforce *rules and regulations* which are consistent with the Blakely Island Covenants dated

¹ Complete document attached as Appendix B.

² Complete document attached as Appendix C.

June 1, 1995 and as amended from time to time, covering the plat of the San Juan Aviation Estates (the "BIC"), and make further *rules and regulations* which the Association from time to time may deem necessary.

ARTICLE III POWERS

This corporation shall have the power [1] to buy, sell, mortgage or encumber real and personal property, [2] to receive and disburse money, [3] to enter into contracts, [in order] to accomplish its purpose and to act in all things to this end[.]

ARTICLE IV MEMBERSHIP

Section 3(a) . . . each member shall make a yearly contribution for maintenance and necessary capital improvements for the ensuing year in such amount as may be determined. . . . [U]pon an estimate of the amount required to accomplish the *purposes set forth in Article III of the Articles of Incorporation (and no more)*...

ARTICLE V BOARD OF GOVERNORS

Section 1 The Board of Governors shall have supervision, control and direction of the affairs of the Association; shall determine its policies or changes therein, *within the limits of the by-laws*...

Section 6 All actions of the Board of Governors shall be final unless . . . 15% of the members shall thereafter, and within 30 days from the issuance of said minutes, file written objections[.]

Section 8 The Board of Governors shall be the general business manager of the Association and shall have and exercise all powers and authority of every kind and nature not specifically denied or restricted, provided that it may not borrow money nor pledge or assign any of the

Association property or assets without the approval and consent of the members.

Section 10 The Board of Governors is hereby authorized, *subject to Article IV, Section 3* of these by-laws, to enter into contracts for improvements and maintenance of *the Association properties* as may be deemed proper by the Board and to do all things necessary to accomplish the purposes of this Association.

ARTICLE VII

Section 4 The annual meeting of the membership shall be held on the Saturday nearest July 4 each year at a designated location on Blakely Island.

Section 6 Thirty (30) days' notice by mail, computed from the time of mailing, shall be given all members or governors of any special meetings.

Section 7 A majority of the Board, or of the members, shall constitute a quorum for the transaction of all business. A majority vote of those present or represented by proxy and eligible to vote shall be required to pass any issue submitted to the members, including but not limited to election or removal of the Board of Governors, approval of Capital Assessments and Maintenance Assessments, and all other general business matters of the Association; provided, however, that a quorum must exist of those present or represented by proxy to pass any issue.

ARTICLE VIII FEES AND CHARGES

Section 1 Before becoming a member each applicant shall pay his or her pro rata share of the annual amount determined as necessary for maintenance and capital improvements *in accordance with Article IV, Section 3.*

Section 9 All assessments shall be paid to the Association at its office within 60 days after the mailing of notice of such assessment to the member and the amount of each assessment and the amount of any other delinquent assessments, together with all expenses, attorney's fees and costs reasonable incurred in enforcing same shall be paid by the member, and shall be a lien upon the lot or tract subject to said assessment....

ARTICLE IX PROPERTY AND EQUIPMENT

Section 1 The *property and equipment owned and maintained by the Association includes* but is not limited to the Property Manager's residence, airport landing strip, taxi-way, tie-down area, buffer strip, tennis court, all roads (except private) as designated on the Plat; the Fire House and underlying land; all water lines and easements in connection therewith from Horseshoe Lake to the Plat; including all pumps, tanks, water treatment system, buildings housing the equipment, easements for water lines both inside and outside the Plat, water rights to draw water from Horseshoe Lake, Parks at Driftwood Beach & South Runway, recycle center, and the 40' Beach access lot.

Blakely Island Covenants (BICs),
dated June 1, 1995 (excerpts)³

7. **Membership – Blakely Island Maintenance Commission**

All persons owning any lot, tract, or portion of the San Juan Aviation Estates, or any person who is a contract vendee or successor owner of such property, shall be members of the Blakely Island Maintenance Commission, Inc. No lot may be purchased or contracted to a purchaser, nor sold by any owner of any lot or lots, unless and until said purchaser shall be accepted for membership in the BIMC.

11. **Board of Governors**

B. **Powers and Duties – General....**

- (1) To prescribe... reasonable police regulations....
- (2) To administer and enforce building restrictions...
- (3) As approved by the BIMC members at the annual meeting, *maintain, repair and improve*, on behalf of the corporation, *roads, airports and airport facilities, water supply and all equipment, pipe lines, pumps, reservoirs, and easements in connection therewith.*
- (4) To maintain and administer fire protection...
- (5) To maintain and administer garbage disposal facilities.
- (6) To maintain and administer the water treatment plant.
- (7) To levy assessments for operating and maintenance expenses, and to collect such assessments upon owners of

³ Complete document attached as Appendix D.

the properties contained in such plat in accordance with the BIC and the BIMC Bylaws and Articles of Incorporation....

- (8) To have the power, *through the BIMC*, after approval of its members, to incur indebtedness *on behalf of the BIMC*, to finance said improvements and to maintain the same. The plat of San Juan Aviation Estates and the property contained therein shall be *subject to the control and management of the BIMC* in the manner described in this BIC, and in accordance with the BIMC Articles of Incorporation and Bylaws and the mandate and approval of its members.
- (9) *Through the BIMC*, after approval of its members, to acquire and own real or personal property, within, contiguous or adjacent to the plat of San Juan Aviation Estates, and to levy assessments against the owners of assessed lots or tracts for the payment of the acquisition price, taxes and costs of maintenance of the real or personal property; provided, however, that such property must be *reasonably necessary for BIMC use and benefit*.
- (10) On behalf of the BIMC, after approval of its members, to execute easements, licenses, conveyances and other legal documents *to carry out the business interests of the BIMC*.

C. General Enforcement Provisions and Penalties: The owners recognize that the provisions of the BIC must be followed by all owners in a timely and reasonable manner in order for there to be benefit to all owners for imposing these covenants. Therefore, the owners grant to the Board the following powers, in addition to those powers set forth in Paragraph 11B above. In the event that the Board of Governors determines that there is an existing violation of the terms of the BIC, the Board shall have the following powers and shall proceed accordingly.

- (2) b. Commencing litigation designed to secure compliance of the remedy. In the event litigation is commenced, the owner who is in violation shall be obligated to pay all costs of such litigation, including the payment of reasonable attorneys' fees.

- (2) f. In order to ensure that the Board has funds available to enforce the compliance of remedies or violations, the Board shall have the right to use any emergency or contingency funds available to the BIMC to fund enforcement proceedings.

**Declaration and Imposition of Restrictions (DIR),
dated August 24, 1957 (exerpts)⁴**

[Introductory paragraph] "San Juan Aviation Estates was ... designed ... as a high-grade home and residence area"

1. [with no commercial use except that the aircraft] (a)"runway and parking strip" and (e)"yacht basin" may be "used for business purposes."

9. They [the Board of Governors] shall also have the power to prescribe and secure the enforcement of reasonable police regulations to secure the safety, comfort, and convenience of the various tract owners and occupants.
10. The foregoing restrictions and conditions are established as part of a *general improvement plan for the benefit of all present and future owners...*"

⁴ Complete document attached as Appendix E.

**Amendment to Restrictions and Plat of the San Juan Aviation Estates,
1970 Amendment to the DIR (excerpts)⁵**

9. [T]he “Board of Governors” would be the same Board of Governors elected by the [BIMC].

B. Board of Governors – Powers and Duties:...

1. To prescribe and secure the enforcement of reasonable police regulations to secure the safety, comfort and convenience of the various tract owners and occupants.
2. To pass, administer and enforce building restrictions in accordance with Paragraph 4 of the Declaration and Imposition [sic] of Restrictions filed herein.
3. To acquire, maintain, repair and improve, on behalf of the corporation, roads, airport and airport facilities, water supply and all equipment, pipe lines, pumps, reservoirs and easements in connection therewith.
4. To supply and insure fire protection, and to buy, sell, use and own, through said corporation, necessary and proper equipment in connection therewith.
5. To maintain and administer garbage disposal facilities.
6. To levy and collect assessments upon any and all owners of the properties contained in such plat for the benefit of said owners, all *in accordance with the By-Laws and Articles of Incorporation* of said corporation.

⁵ Complete document attached as Appendix F.

7. To have the power, through said corporation, under prior approval of its members, to incur indebtedness on behalf of the corporation, to Finance *said improvements* and maintain the same, and said plat of San Juan Aviation Estates and the property contained therein shall be subject to the control and management of said corporation in the manner aforesaid, which corporation shall act *in accordance with its Articles of Incorporation and By-Laws* and the mandate and approval of its members, all as provided therein. The aforesaid plat or any portion thereof shall be subject to any lien asserted by said corporation for the rendition of its services and for the payment of its assessments.

8. Through said corporation, upon prior approval of its members, to acquire and own real or personal property, within, contiguous or adjacent to the plat of San Juan Aviation Estates, and to levy assessments against the owners thereof for the payment of the acquisition price, taxes and costs of maintenance of the real or personal property.

Appendix B



Washington

Secretary of State
SAM REED

CORPORATIONS DIVISION
James M. Dolliver Building
801 Capitol Way South • PO Box 40234
Olympia, WA 98504-0234
Tel: 360.725.0377
Fax: 360.864.8781
www.secstate.wa.gov/corps

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ROATS LAW OFFICE
RICHARD ROATS
PO BOX 9811
BOISE ID 83703

UNITED STATES OF AMERICA

The State of  Washington

Secretary of State

I, SAM REED, Secretary of State of the State of Washington and custodian of its seal,
hereby issue this

CERTIFICATE OF INCORPORATION

to

BLAKELY ISLAND MAINTENANCE COMMISSION, INC.

a/an WA Non-Profit Corporation. Charter documents are effective on the date indicated
below.

Date: 11/10/1961

UBI Number: 601-139-369



Given under my hand and the Seal of the State
of Washington at Olympia, the State Capital

Sam Reed, Secretary of State

UNITED STATES OF AMERICA

The State of  Washington

Secretary of State

I, Sam Reed, Secretary of State of the State of Washington and custodian of its seal,
hereby issue this

certificate that the attached is a true and correct copy of

ARTICLES OF INCORPORATION

of

BLAKELY ISLAND MAINTENANCE COMMISSION, INC.

as filed in this office on November 10, 1961.

Date: February 10, 2010



Given under my hand and the Seal of the State
of Washington at Olympia, the State Capital

Sam Reed

Sam Reed, Secretary of State

Filing No. 156423

Domestic

United States of America
State of Washington



I, VICTOR A. MEYERS, Secretary of State of the State of Washington, do hereby certify that

156423

ARTICLES OF INCORPORATION
OF THE

BLAKELY ISLAND MAINTENANCE COMMISSION, INC.

a Domestic Corporation, of Blakely Island, Washington, was, on
the 10th day of November, A. D. 19 61, at 9:12 o'clock A. M.,
filed for record in this office and now remains on file herein.

Filed at request of
Morgan, Brain & Meyer
1900 Alaska Building
618 Second Avenue
Seattle 4, Washington

NON PROFIT
Filing and recording fee \$ 25.00
License to June 30, 19 \$
Excess pages @ 25¢ \$

IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed hereto the Seal of the
State of Washington. Done at the Capitol, at
Olympia, this 10th day of November,
A. D. 19 61

Victor A. Meyers
VICTOR A. MEYERS, Secretary of State



Microfilmed, Roll No. 1041
Page 261-265

APPROVED
AS TO FORM AND FEE

NOV 10 1961

ARTICLES OF INCORPORATION
OF THE

VICTOR A. MEYERS
SECRETARY OF STATE
John Dumb
PRESIDENT SECRETARY OF STATE

BLAKELY ISLAND MAINTENANCE COMMISSION, INC.

ARTICLE I

This corporation is formed under R.C.W. Chapter 24.04 relating to non-profit corporations.

ARTICLE II

The name of this corporation shall be BLAKELY ISLAND MAINTENANCE COMMISSION, INC., and its principal place of business shall be Blakely Island, Washington. Its duration shall be perpetual.

ARTICLE III

The purposes of this corporation, hereinafter referred to as association, is to provide water, road and landing strip maintenance for the occupants and owners of San Juan Aviation and Yachting Estates, and to promulgate and enforce rules and regulations necessary to insure equal and proper use of the same.

ARTICLE IV

This association shall have and its business affairs shall be conducted by a Board of seven Trustees to be referred to in the By-Laws as Governors, and the names of the Trustees, who shall manage the affairs of the corporation as provided by R.C.W. 24.04.050 shall be as follows:

FLOYD O. JOHNSON

DON FITZPATRICK

DOC WHITE

B. B. BREER

E. E. MERGES

R. K. PEINOLA

JOHN HILL

ARTICLE V

This corporation shall have all of the powers prescribed in R.C.W. 24.04.080, and, generally, to do all things necessary and proper to carry out the purpose of its creation, as any individual might do, all in accordance with the laws of the State of Washington.

Roger A Baird
L. B. Chandler
George H. Campbell
James Wilson
B. Beebe
A. C. Hantley

Guests
Carl Freund
L. S. White
Herbert D. Reese
Ronald B. Montague
J. W. Fueduch
Allen D. Odell
Andrew Haurant
Harold L. Barton
Donald L. Wypatrick
David A. Strang
Robert L. Rankin
Robert E. Fisher
William D. Taylor
Thayer Hinson
Quentin Allumpe

UNITED STATES OF AMERICA

The State of Washington



Secretary of State

I, Sam Reed, Secretary of State of the State of Washington and custodian of its seal, hereby issue this

certificate that according to the records on file in this office, BLAKELY ISLAND MAINTENANCE COMMISSION, INC.

a Washington corporation, was incorporated on November 10, 1961 and is duly authorized to conduct affairs in the State of Washington; with a license expiration date of November 30, 2010; and I further certify that the following charter documents are on file in this office;

Filing:

ARTICLES OF INCORPORATION

Date Filed:

11/10/61

Date: January 28, 2010



Given under my hand and the Seal of the State of Washington at Olympia, the State Capital

Sam Reed

Sam Reed, Secretary of State

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UNITED STATES OF AMERICA

The State of Washington



Secretary of State

I, **SAM REED**, Secretary of State of the State of Washington and custodian of its seal, hereby issue this

CERTIFICATE OF INCORPORATION

to

BLAKELY ISLAND MAINTENANCE COMMISSION, INC.

a/an WA Non-Profit Corporation. Charter documents are effective on the date indicated below.

Date: 11/10/1961

UBI Number: 601-139-369

APPID: 1580273



Given under my hand and the Seal of the State of Washington at Olympia, the State Capital

Sam Reed, Secretary of State

045

UNITED STATES OF AMERICA

The State of Washington



Secretary of State

I, Sam Reed, Secretary of State of the State of Washington and custodian of its seal, hereby issue this

certificate that the attached is a true and correct copy of

ARTICLES OF INCORPORATION

of

BLAKELY ISLAND MAINTENANCE COMMISSION, INC.

as filed in this office on November 10, 1961.

Date: February 10, 2010



Given under my hand and the Seal of the State of Washington at Olympia, the State Capital

Sam Reed

Sam Reed, Secretary of State

Appendix C

BY-LAWS
of the
BLAKELY ISLAND MAINTENANCE COMMISSION, INC.

ARTICLE I **NAME**

The name of the Association shall be the Blakely Island Maintenance Commission, Inc. Its principal place of business shall be Blakely Island, Washington.

ARTICLE II **PURPOSE**

The purpose of these by-laws is to provide for the administration, maintenance, improvement, and protection of the properties, easements, access agreements, water rights, and equipment owned by the Association. Further, the Association may promulgate and enforce rules and regulations which are consistent with the Blakely Island Covenants dated June 1, 1995 and as amended from time to time, covering the plat of the San Juan Aviation Estates (the "BIC"), and make further rules and regulations which the Association from time to time may deem necessary.

ARTICLE III **POWERS**

This corporation shall have the power to buy, sell, mortgage or encumber real and personal property, to receive and disburse money, to enter into contracts, to accomplish its purpose and to act in all things to this end, as any individual might act, all in accordance with the laws of the State of Washington.

ARTICLE IV **MEMBERSHIP**

Section 1 Members of the Association shall consist only of incorporators and charter members, and such other individuals, marital communities, corporations, partnerships or associations (collectively "parties") as may be admitted to membership, and each member shall hold one share of the corporate stock. All parties owning any lot, part or portion thereof, or parties who are contract vendees of such property shall be members of this Association; and no lot may be purchased or contracted to a purchaser, nor sold by any owner of any lot or lots unless and until said purchaser shall be accepted for membership in the Association. All applicants for membership shall be approved or disapproved by the Association, acting reasonably and in accordance with these by-laws.

Section 2 Any prospective acquirer of an ownership interest in property within the plat of San Juan Aviation Estates ("the Plat") including but not limited to intent to acquire by purchase, contract to purchase, inheritance, gift, or foreclosure, shall file application with the Secretary of the Board of Governors of the Association in form prescribed by the Board, which application shall be approved or denied by the Board within 30 days of filing. Failure of the Board to act by notice mailed to applicant's stated address within that 30-day period shall constitute approval. On approval, one share of the corporate stock shall be transferred to the new owner as a member of the Association and stock held by the new member's predecessor in interest shall be retired and the preceding membership terminated. Absent such approval, no stock transfer shall be of any force or effect, or serve to grant or vest any right, title or interest or right of use of any of the Association's property, facilities, or utilities. Membership in the Association shall be in the name of one single family or one entity (as defined in the BIC). For voting purposes, each entity or member family shall designate one person as the "voting member" who shall cast all votes. Membership in the Association shall specifically be subject to the provisions of paragraph 15 of the BIC.

Section 3

- (a) There shall be no initiation fee or dues payable by any member, but each

BIMC 00037

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member shall make a yearly contribution to the Association for maintenance and necessary capital improvements for the ensuing year in such amount as may be determined by the membership at each annual meeting in accordance with the voting procedures set forth in Article VII hereof. Such determination shall be based upon an estimate of the amount required to accomplish the purposes set forth in Article III of the Articles of Incorporation (and no more) and any surplus shall be disposed of as provided in Section 8 of Article VIII hereof.

(b) "Maintenance Assessments" are charges to members for improvements to property, normal maintenance, repair and operation of existing property. Items which in the past have been considered Maintenance Assessments will continue to be considered Maintenance Assessments and may include but shall not be limited to repairs to the water distribution system, fire truck, mechanical equipment and runway lights. Voting will be by each member who shall be entitled to one vote.

(c) "Capital Assessments" are charges to members for improvements to property which are not maintenance assessments and refer primarily to acquisition of new property or assets of a capital nature with a useful life exceeding one year. If a question arises whether a charge is for a Maintenance Assessment or a Capital Assessment, the Board may refer to past practices and, if it wishes, refer the determination of the nature of the assessment to an independent certified public accountant whose decision shall be conclusive, if a determination can be made in accordance with generally accepted accounting principles. Capital Assessments may include but shall not be limited to Property Manager's residence, tennis court, water filtration plant, and fire fighting equipment.

Section 4 Each member shall file with the Secretary of the Association his or her post office address, and all notices of every kind required by the Association business shall have been properly delivered when mailed to such address. If any member shall fail to file such an address or to file change of address, such member will be deemed to have waived any notice required to be sent in the business of the Association.

Section 5 No member shall lease, rent, or permit subletting of any tract owned by such member in said San Juan Aviation Estates, or any portion thereof, to any party other than a member of the Association without the prior written approval and consent of the Board of Governors.

5.2.2 (7/98)

BIMC 00038

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Section 6 If any member shall fail to make any payment required of him hereunder or shall violate any of the terms of these by-laws, the BIC, or any rules and regulations adopted by the Board of Governors, the Board of Governors may pursue any remedies available at law or in equity, including without limitation the exercise of any rights, powers or remedies set forth in the BIC, and in addition may, after 30 days notice by mail to the address of said member appearing on the records, assess a fine in an amount determined by the Board, which if unpaid shall bear interest at the rate of twelve percent (12%) per annum, from the date assessed, and the Association, through its Board of Governors, may bring an action at law against the member personally obligated to pay the same and/or may institute an action to foreclose the lien against the lot or tract subject to the assessment, and there shall be added to the amount of such assessment all costs and expenses in connection with such suit, and also a reasonable sum as attorneys' fees, which sums shall be included in any judgment or decree entered in such suit.

ARTICLE V BOARD OF GOVERNORS

Section 1 The Board of Governors shall have supervision, control and direction of the affairs of the Association; shall determine its policies or changes therein, within the limits of the by-laws; shall have discretion in disbursement of its funds; shall adopt rules and regulations for the conduct of its business; and shall have all powers delegated to the Board of Governors pursuant to the BIC and all powers of the board of directors of a homeowners' association pursuant to RCW Chapter 64.36. The Board of Governors may, in the execution of any or all of the powers granted, appoint a Property Manager and other agents as it may consider necessary.

Section 2 There shall be seven (7) governors who shall be members of the Association. The governors shall be elected by the members for a three (3) year term, expiration of terms of office to be staggered so that the terms of no more than three Governors expire in any one year. Governors may not serve for more than three (3) consecutive years at any one time.

Section 3 The Board shall fill any vacancies that occur on the Board for any reason until the following annual meeting of the membership. At that time an election will be held to fill the unexpired term, if any.

Section 4 The Board shall hold a meeting immediately following the annual membership meeting on the same day, and scheduled meetings throughout the year.

Section 5 The President of the Association or any two members of the Board may call Special Board Meetings; such call to be deposited with the Secretary.

Section 6 All actions of the Board of Governors shall be final unless revoked or modified by the members as follows: a copy of the minutes of the meeting of the Board of Governors shall be promptly sent to each member and if 15% of the members shall thereafter, and within 30 days from the issuance of said minutes, file written objections to any such action of the Board of Governors, then the Secretary shall call a special meeting of the membership to consider such action. Such action of the Board of Governors is thereupon suspended pending action by the members to be taken at such meeting.

5.2.3 (7/98)

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Section 7 The Governors shall receive no compensation for their services, but may be repaid their actual expenses in transacting Association business.

Section 8 The Board of Governors shall be the general business manager of the Association and shall have and exercise all powers and authority of every kind and nature not specifically denied or restricted, provided that it may not borrow money nor pledge or assign any of the Association property or assets without the approval and consent of the members.

Section 9 The Board may remove a Governor from office only for good cause stated in written charges filed with the Secretary and after not less than 30 day's notice to the Governor being considered for removal.

Section 10 The Board of Governors is hereby authorized, subject to Article IV, Section 3 of these by-laws, to enter into contracts for improvements and maintenance of the Association properties as may be deemed proper by the Board and to do all things necessary to accomplish the purposes of this Association, and all members agree that in no event shall any member of the Board become liable to them or any of them for anything arising out of the transactions of the Board or any of its members or the performance or non-performance of any of their duties, save and except for embezzlement.

ARTICLE VI OFFICERS

Section 1 The officers of the Association shall be members of the Board of Governors and consist of a President, Vice-President, Secretary and Treasurer.

Section 2 The President shall preside at all meetings of the Governors and members, and shall have general charge of, and control of, the affairs of the Association, subject to the authority of the Board of Governors.

Section 3 The Vice-President shall perform such duties as may be assigned to him or her by the Board of Governors, and in case of the death, disability or absence of the President, he or she shall perform and be vested with the duties and powers of the President.

Section 4 The Secretary shall countersign all certificates of membership in the Association, shall keep a record of the minutes and proceedings of the meetings of the members and of the Board of Governors, and shall give notice as required by these by-laws of all meetings. The Secretary shall have custody of all books, records and papers of the Association.

Section 5 The Treasurer shall keep all accounts of all moneys and valuables in the name of and to the credit of the Association in such banks as the Board of Governors may designate. All checks for the payment of money shall be signed by the Treasurer or a Board member authorized by the Board.

Section 6 Any two offices may be held by one person.

5.2.4 (7/01)

BIMC 00040

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Section 7 All owners shall be elected by and hold office at the pleasure of the Board of Governors, until the next annual meeting of the Board of Governors and until his or her successor shall be elected and qualified, and may be removed at any time, with or without cause. Any vacancy in office shall be filled by the Board of Governors.

ARTICLE VII VOTING AND ELECTION PROCEDURES

Section 1 Each individual member, and each voting member designated by an entity or member family, shall have one vote for each lot or tract owned by that member and for which that member is currently paying a whole or one-half (1/2) assessment pursuant to these by-laws or the BIC; provided, however, that if any such assessment is in arrears as of the date of the vote, the right to vote for that parcel shall be suspended and void for that election and any future election until the assessment is paid in full.

Section 2 Authorized written or faxed proxies submitted by members unable to attend an annual or special meeting shall be recognized. Such proxies shall be presented to the Secretary prior to the meeting by another member or an adult member of the immediate family.

Section 3 The Board shall appoint a Nominating Committee of three to select members to be elected to the Board. Only one committee member may be a Board member and the Committee shall elect a non-Board member Chairman. The names of people selected by the Committee and agreeing to serve shall be submitted to the Board for approval. After approval by the Board, the names shall be submitted to the membership in writing at least forty-five (45) days prior to the annual meeting.

Section 4 The annual meeting of the membership shall be held on the Saturday nearest July 4 each year at a designated location on Blakely Island.

Section 5 At least thirty (30) days and not more than sixty (60) days prior to the annual meeting the President or Secretary shall forward to each member the following documents:

- (a) Meeting agenda and notice of the time and place of the meeting;
- (b) Preliminary financial statement for the fiscal year ended May 31;
- (c) Proposed operating and capital budget for the fiscal year beginning June 1st;
- (d) President's and other Board members' reports on significant matters dealt with during the past year and plans for the year just beginning;
- (e) Report of the Nominating Committee; and
- (f) Proposals from members involving amendments to the BIC, these by-laws or any rule or regulation adopted by the Board, or any other significant matters requiring consideration by the full membership. Such proposals must be submitted in writing to the Board not later than April 1st.

5.2.5 (7/98)

BIMC 00041

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Section 6 Thirty (30) days' notice by mail, computed from the time of mailing, shall be given all members or governors of any special meetings.

Section 7 A majority of the Board, or of the members, shall constitute a quorum for the transaction of all business. A majority vote of those present or represented by proxy and eligible to vote shall be required to pass any issue submitted to the members, including but not limited to election or removal of the Board of Governors, approval of Capital Assessments and Maintenance Assessments, and all other general business matters of the Association; provided, however, that a quorum must exist of those present or represented by proxy in order to pass any issue.

Section 8 Any issue that can be voted on in person by any member of the Association or member of the Board of Governors can also be voted on by mail. If the vote is to be conducted by mail, the President or Secretary shall mail all written material concerning the issue, including an appropriate ballot and a stamped return envelope, to each voting member at least thirty (30) days prior to the deadline for counting the votes. The Secretary shall keep all written ballots for at least two years after the date the voting is effective.

ARTICLE VIII FEES AND CHARGES

Section 1 Before becoming a member each applicant shall pay his or her pro rata share of the annual amount determined as necessary for maintenance and capital improvements in accordance with Article IV, Section 3.

Section 2 Payment of the foregoing charges shall entitle each member to full membership privileges, including the use of water, airport, and other facilities of the Association, for a period of one year, and in consideration of membership herein each member waives any right of action or claim of right of action individually or collectively which might result from denial of such member by the Association of the benefits of membership.

Section 3 The Board of Governors may fix higher rates for use of water for any member requiring greater service than an ordinary dwelling unit.

Section 4 The right is reserved by the Board of Governors to make additional assessments as may be necessary for payment of the obligations of the Association; provided, however, all Capital Assessments shall be subject to the approval of the members in accordance with the voting procedures set forth in Article VII hereof.

Section 5 All matters connected with the service rendered by this Association or the rates charged, and the status of properties and members, shall be first referred to the Board of Governors.

Section 6 The fiscal year of the Association shall be from June 1 of one year to May 31 of the following year.

Section 7 Any funds arising from the operation of the Association shall be considered surplus only after the payment of all obligations, expenses or construction, maintenance, repair, provision for depreciation and other costs or expenses, according to sound accounting practices. Books of the Association shall be kept under the supervision of a certified public accountant who shall prepare a financial report each year, to be presented at each annual meeting of the members.

5.2.6 (7/98)

BIMC 00042

1074

Section 8 Any surplus shall be disposed of in the following order: (a) hold as a reserve, to apply on the next year's expenses, such sum as the Board of Governors may fix; (b) divide pro rata among the members, in proportion to the assessments paid by the members, but the distribution shall never total more than charges actually paid.

Section 9 All assessments shall be paid to the Association at its office within 60 days after the mailing of notice of such assessment to the member and the amount of each assessment and the amount of any other delinquent assessments, together with all expenses, attorney's fees and costs reasonably incurred in enforcing same shall be paid by the member, and shall be a lien upon the lot or tract subject to said assessment and the stock appurtenant thereto, superior to any and all other liens created or permitted by the owner of such lot or tract and enforceable by foreclosure proceedings in the manner approved by law for the foreclosure of mortgages, deeds of trust or liens upon land.

Section 10 Assessment policy for Maintenance Assessments and Capital Assessments effective the fiscal year beginning June 1, 1984 and each year thereafter;

- (a) An improved lot will be subject to a full assessment. An improved lot is one that has a water service connection.
- (b) An unimproved lot will be subject to one-half of a full assessment. An unimproved lot is one that does not have a water service connection.
- (c) A lot under a contiguous lot agreement will be subject one-half a full assessment if unimproved and a full assessment if improved, plus \$1.00 for each year the lot has been under the contiguous lot agreement. Accumulated deferred assessments on a contiguous lot will be payable on change of ownership of the contiguous lot in accordance with the Plat restriction.
- (d) A single tract resulting from the combining of a primary improved lot and an unimproved contiguous lot at present under a contiguous lot agreement, will be subject to only one full assessment if the following conditions are met:
 - (i) The primary and contiguous lots are combined into a tract for only one household in accordance with the Plat restriction.
 - (ii) The total accumulated deferred assessments on the contiguous lot are paid in full.
- (e) Situations where there are more than one contiguous lot will be reviewed by the Board on a case-by-case basis.
- (f) There exist some contiguous lot agreements; those will continue to be treated as outlined in that agreement. (See Directors Manual for the form.)

5.2.8 (7/98)

Section 11 A building permit fee will be levied on new construction and on modifications to existing structures costing three thousand dollars or more, amounting to one quarter of one percent (.25%) of construction cost as indicated on the Building Permit issued by San Juan County. Payment is due at the time plans are approved by the Board of Governors. This fee, however, may be waived when, in the opinion of the Board of Governors, the construction will benefit a significant number of Association members. Members are required to obtain the permit prior to starting construction.

Section 12 Each member desiring water service shall, in addition to all other charges, fees and rates required herein, pay individually all costs of installing connections to his or her property and the same may be installed only in accordance with the requirements and orders of the Board of Governors.

Section 13 Irrigation water:

- (a) Irrigation water supply may be interrupted at any time at the sole discretion of the Board of Governors or its delegate.
- (b) From June 15 to September 15, members are limited to using irrigation water as outlined in the water use restrictions promulgated by the Board.

ARTICLE IX PROPERTY AND EQUIPMENT

Section 1 The property and equipment owned and maintained by the Association includes but is not limited to the Property Manager's residence, airport landing strip, taxi-way, tie-down area, buffer strip, tennis court, all roads (except private) as designated on the Plat; the Fire House and underlying land; all water lines and easements in connection therewith from Horseshoe Lake to the Plat; including all pumps, tanks, water treatment system, buildings housing the equipment, easements for water lines both inside and outside the Plat, water rights to draw water from Horseshoe Lake, Parks at Driftwood Beach & South Runway, recycle center, and the 40' Beach access lot.

Section 2 The membership shall be governed by, and the Board of Governors shall enforce, the procedures and regulations found in the BUFFER STRIP RULES approved July 6, 1991, and as amended from time to time. Said Buffer Strip Rules and Amendments shall be recorded in San Juan County, and become a part of these by-laws.

ARTICLE X RULES

The membership shall be governed by, and the Board of Governors shall enforce, the covenants and restrictions found in the Blakely Island Covenants dated June 1, 1995 and as amended from time to time. Such covenants and restrictions are to run with the land and become a part of these by-laws.

ARTICLE XI MISCELLANEOUS

Section 1 These by-laws may be amended, repealed or added to by the Board of Governors or the membership, subject to the right of the members by an affirmative vote of a majority at a regular meeting to approve or disapprove any amendment recommended by the Board of Governors. The President or Secretary of the Association may prepare, execute, certify and record any approved amendment to these by-laws, the Articles of Incorporation or any other governing documents of the Association.

5.29 (7/98)

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Section 2 The Association shall have a seal bearing the inscription "Blakely Island Maintenance Commission, Inc."

Section 3 Reference made in these by-laws to "members," "owners," "stockholders" shall refer to those who, in accordance with Article IV, Section 1, meet the requirements of being a member of this Association.

Section 4 A copy of these by-laws shall be made available to all members and the books and financial records of the Association shall be open to members at all reasonable times.

Section 5 Parliamentary rules. Roberts' Rules of Order (latest edition) shall govern the conduct of Association meetings when not in conflict with the BICs, the Articles of Incorporation, or these by-laws.

Section 6 The Association shall indemnify every officer of the Association, every member of the Board of Governors, and every member of an Association committee, and his or her heirs, executors and administrators against all expenses and liabilities, including attorneys' fees, reasonably incurred by or imposed in connection with any proceeding to which he or she may be a party or in which he or she may become involved by reason of holding or having held the position of Board member, officer, or member of an Association committee, or any settlement thereof, whether or not he or she holds such position at the time such expenses or liabilities are incurred, except to the extent such expenses and liabilities are covered by insurance and except in cases wherein such person is adjudged guilty of willful misfeasance in the performance of his or her duties; provided that, in the event of a settlement, the indemnification shall apply only when the Board approves such settlement and reimbursement as being for the best interests of the Association. Nothing contained herein shall be deemed to obligate the Association with respect to any duties or obligations assumed or liabilities incurred by him or her as a member of the Association.

Section 7 To the extent there are any differences between the terms of these by-laws and the BIC, or in the event there exists any ambiguity between the provisions of these by-laws and the BIC, the provisions of the BIC shall control and be determinative of any inconsistency.

5.2.10 (7/98)

Source: 2002 Blakely Island Owners Manual

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Appendix D

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BLAKELY ISLAND COVENANTS

(June 1, 1995)

WHEREAS, the parties to this instrument are the owners of all property in the San Juan Aviation Estates, a subdivision of a portion of Blakely Island in San Juan County, Washington; and

WHEREAS, the said San Juan Aviation Estates was designed, platted, and is maintained as a quality single-family residential community; and

WHEREAS, it is to the advantage of all present and future owners of lots and tracts in the San Juan Aviation Estates that the use, construction, occupancy and disposition of all lots and tracts, be subject to the restrictions and covenants set forth in the following paragraphs;

NOW, THEREFORE, in consideration of the benefits provided to each owner from the imposition of restrictive covenants set forth in the following paragraphs, each of the owners does join in and adopt these covenants and does specifically consent and agree that each and every lot and tract within the San Juan Aviation Estates in which he or she shall have any interest at law or in equity, shall be bound by these covenants and restrictions, which shall run with the land and be binding on all successors in interest and title. THE OWNERS AGREE AS FOLLOWS:

1. Effective Date and Revocation of Prior Restrictions

The effective date of the Blakely Island Covenants (hereinafter referred to as BIC) is July 1, 1995. The BIC supersedes any and all prior Imposition of Restrictions and amendments thereto, and all prior Imposition of Restrictions and amendments thereto are hereby revoked in their entirety as of the effective date of the BIC.

2. Enforcement, Term and Amendments

A. Enforcement. The restrictions and conditions contained in the BIC are established as a part of a general improvement plan for the benefit of all present and future owners of tracts or lots in the San Juan Aviation Estates; and as such, the same may be enforced by any owner of any tract or lot within such subdivision against any other tract or lot owner.

B. Term. The covenants, conditions, restrictions, and reservations of this BIC shall run with and bind the land subject to the BIC from the date the BIC is recorded for a period of twenty (20) years and six (6) months, or until December 31, 2015, whichever date is longer in duration; provided, however, that in the event the BIC has not been renewed, extended, or amended by December 31, 2015, then this BIC shall automatically be

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AT REQUEST OF RICHARDS E. LINDEN

SI STEPHENS, AUDITOR, SAN JUAN CO. WASH BY



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extended until such time as the BIC is renewed, extended, or amended; and further, provided, however, that this BIC may be amended from time to time as provided below.

- C. Amendments. The restrictions and conditions herein imposed may be amended, renewed, or extended in whole or in part, at any time or at once, by written instrument duly executed and acknowledged by the owners of not less than two-thirds (2/3) of all of the lots or tracts included within the recorded plat of the San Juan Aviation Estates at the time of the vote on the amendment. Any such approved amendment and the instrument effecting such amendment shall be placed on record with the County Clerk of San Juan County and shall be, from the date of such record, binding upon all of the tracts or lots in said San Juan Aviation Estates, and also on all of the owners of all of such tracts and lots. Any change in use of a lot or plat and any future addition to the San Juan Aviation Estates must comply with this paragraph, except those parcels referenced in paragraph 12(D).

3. Definitions

When referred to in the BIC, the following definitions shall apply:

- A. "BIMC Assessed Lot" shall mean and refer to all lots or parcels in the San Juan Aviation Estates that pay either a whole or one-half assessment imposed and levied by the Blakely Island Maintenance Commission.
- B. "BIMC" shall mean and refer to the Blakely Island Maintenance Commission, Inc., which is the corporation charged with the responsibility of providing maintenance and operation for the San Juan Aviation Estates.
- C. "Board" shall mean and refer to the Board of Governors of the Blakely Island Maintenance Commission, Inc.
- D. "Capital expenditures" are expenses for equipment or for improvements to property which are not maintenance costs and refer primarily to acquisition of new property or assets of a capital nature with a useful life exceeding one year.
- E. "Entity" shall refer to any trust, partnership, corporation, association, or joint venture which shall be subject to the provisions of paragraphs 5B and 5C, as well as the other provisions of the BIC, and shall include only one family. This definition shall not include reference to the BIMC.
- F. "Family" shall mean and refer to immediate family.

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- G. "Guest" is any person who is not a member of the BIMC.
- H. "Immediate family" shall refer to and include parents and lineal descendants of owners.
- I. "Lot" or "Tract" shall mean and refer to each separate plot of land recorded with the San Juan County Auditor.
- J. "Member" or "BIMC member" shall mean and refer to the individual or family who is a member of the BIMC.
- K. "Owner" shall mean and refer to the record title holder of one or more lot(s) or tract(s) in the San Juan Aviation Estates.
- L. "Single-family residence" shall mean and refer to a residence constructed, maintained, and occupied as a residence for one family and temporary guests.
- M. "Upper Island" shall mean and refer to all Blakely Island property containing easement rights conveyed by the Non-Exclusive Easement recorded under San Juan County Auditor File Number 83996.
- N. "Voting member" shall mean and refer to the designated member from the family or entity that has the voting rights for that family in the BIMC.

4. Commercial Tracts and Lots

The following lots, tracts, and/or improvements of the San Juan Aviation Estates may be used for business or commercial purposes, and are expressly excepted from the limited residential restrictions contained in Paragraph 5(A); provided, however, that nothing in this exception shall be deemed to permit multifamily residential use on any such commercial parcels. Except as specifically related to the restricted residential use of lots contained in Paragraph 5(A), commercial lots or tracts must otherwise adhere to the remaining provisions of Paragraph 5 and all other provisions of the BIC.

- A. Runway and owner airplane parking strip. (These parcels are subject to the provisions of paragraph 12(D).)
- B. The tract made up of the marina, store, dock, and its parking area.
- C. The tract consisting of lots 57, 58, 59, 77, 78, and 79 shall be used exclusively for construction and use as hangars for private airplanes or

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parking of vehicles or airplanes.

- D. Lots 143 through 155, inclusive, may be used for commercial or business purposes; provided, however, that Lot 143 will have a 15-foot buffer strip between it and Lot 142 in which no trees and vegetation shall be removed without consent of the owners of Lot 142. If any of these lot(s) is used for residential purposes, the use shall then conform to all other residential lots.
- E. Recycling Center subject to Buffer Strip Rules and Amendments.
- F. Water treatment plant and reservoirs.
- G. Tennis court and adjacent parking subject to Buffer Strip Rules and Amendments.
- H. Firehouse, post office, and BIMC shop.

5. Residential Lots

- A. Existing Residential Lots Except as provided for in paragraph 4 above, or unless specifically referenced in this paragraph, all lots shall be exclusively developed and used for one private single-family residence. The following are residential lots:

A, B, C, D, 1 through 6; 8 through 15; 17 through 49; 49A, 49B, 49C; 50, 51, 52, 52A, 53, 53A, 54, 54A, 55, 55A, 56, 60, 61, 61A, 62, 62A, 63, 63A, 64, 64A, 65, 66, 67, 68, 69, 69A, 70, 70A, 71, 71A, 72, 72A, 73, 74, 74A, 75, 75A, 76, 80 through 142; 156, 158, 160, 161, 162, 163, SP-1, SP-2, Meadow/Tidelands, 19/F10; North Point 1 through 5.

- B. No residence may be constructed, remodeled, altered, or used for any form or version of a multifamily residence. Nothing in this paragraph shall prevent the construction of a guest house or other detached building, such as a garage or a storage shed. No residence or guest house may be rented or leased without Board approval, except to a current BIMC member. No lot may be owned by more than one family or entity. If an entity other than a single family is the owner of any lot, the entity shall include only one family. Nothing in this paragraph shall prevent any owner from including, or transferring title to, other members of his or her immediate family as owners. No building or any part thereof erected on any of said residential lots or tracts, shall be used or occupied as a flat, apartment house, hotel, boarding or lodging house, hospital, sanitarium, store, market, service station, or any other business, commercial, or manufacturing purpose that

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adversely compromises the residential character of the plat or that is offensive to adjacent neighbors. No residence shall be owned, used, or maintained as a corporate retreat, time-share, or any similar use which is inconsistent with the specific intent that the use of each residence shall be exclusively for the purpose of housing one single family who are the owners of the lot. No trailer house, camper trailers, or temporary structures shall be erected, kept, or occupied upon any lot or tract. Recreational tents may be erected on an occasional overnight basis, but shall not remain erected for more than a seven (7) day period without prior written approval by the Board of Governors.

- C. Lots owned by more than one family at the time of adoption of the BIC may continue to be owned and jointly used as a single-family residence by the existing owners. The remaining provisions of paragraph 5 shall apply.

6. Additions to San Juan Aviation Estates

There shall be no additions of lots or amendment to the plat of the San Juan Aviation Estates, except as may be provided for in an amendment to the BIC pursuant to the provisions of paragraph 2(C).

7. Membership - Blakely Island Maintenance Commission

All persons owning any lot, tract, or portion of the San Juan Aviation Estates, or any person who is a contract vendee or successor owner of such property, shall be members of the Blakely Island Maintenance Commission, Inc. No lot may be purchased or contracted to a purchaser, nor sold by any owner of any lot or lots, unless and until said purchaser shall be accepted for membership in the BIMC. All applicants for membership shall be approved or disapproved by said corporation, acting reasonably and in accordance with the BIMC Bylaws. Membership in the BIMC shall be in the name of one single family or one entity. For voting purposes, each entity or member family shall designate one person as the "voting member" who shall cast all votes. Membership in the BIMC shall specifically be subject to the provisions of paragraph 15.

8. Construction and Improvements to Property

- A. No building upon any tract or lot, including those properties excepted from the residential area and as designated in paragraph 4 hereof, shall be constructed or remodeled until and unless the provisions of BIMC building restrictions and regulations have been met to the satisfaction of the Board and until the owner has received a letter from the Board determining compliance with such restrictions and regulations, and until the general plan

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thereof shall have been approved by the Board of Governors. All dwelling houses and all other buildings shall conform in all respects to the applicable building, sanitary, plumbing, and electrical codes of San Juan County and the State of Washington.

- B. The Board of Governors shall require each owner who requests approval to build or construct any residence or other structure, including but not limited to a garage, guest house, workshop, or storage facility, to submit to the Board detailed plans of the intended construction, including documentation demonstrating the maximum height and maximum width (including all overhangs, gutters, etc.); proposed setbacks; exact location of adjoining or neighboring residences; a description of the likely impact of the construction on the adjoining or neighboring property and views; and the percentage of coverage of structures on the subject lot. Prior to approval of the requested construction, the Board of Governors shall consider each of the above aspects of the requested construction and shall make or establish whatever adjustments or conditions to the construction request as they shall deem to be reasonable and appropriate to preserve and protect the use, views, and property values of properties adjacent to the subject property. Any approval of the requested construction shall be conditioned upon compliance with the adjustments or conditions imposed by the Board of Governors. Any requirement for conditions or adjustments imposed by the Board of Governors which is different from or at variance with BIMC building codes/restrictions shall be subject to an immediate appeal to owners pursuant to the voting procedures in paragraph 12.
- C. As of January 1996, all new roofs or reroofs constructed on any dwelling or other structure in the San Juan Aviation Estates shall be fire-rated in accordance with the San Juan County Building Code and the class of fire rating shall be the highest fire-resistant rating that is reasonable for the subject residence without requiring significant structural changes.

9. Completion of Construction

No construction on any tract or lot shall be left incomplete in the course of construction and, once construction has been commenced, it shall be expeditiously carried to exterior completion in accordance with the approved plans and specifications. The exterior construction shall proceed without interruption and be completed within eighteen (18) months from the date the original permit for construction is issued by San Juan County. The construction schedule will be adjusted to include additional days for those which have been documented to be stalled for reasons beyond the control of the owner. In the event of strikes, unavailability of materials, fire, acts of God, or other similar causes which are

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entirely beyond the control of the owner, the Board shall have the right to extend the completion date for a single six (6) month period upon a showing of good cause by the property owner. Shortage of funds with which to complete any construction shall not be recognized as good cause or a cause beyond the control of the owner.

10. Rubbish and Debris -- Unsafe Conditions

No rubbish, trash, debris, unsightly or offensive materials or items shall be allowed or permitted to accumulate on any lot or tract, nor shall such items be allowed to remain exposed to public view. No condition which creates a hazard or is unsafe to the public or adjoining property owners shall be permitted to exist or accumulate on any tract or lot. The Board shall have the power to determine and identify any such items that they, in their discretion, shall determine to be precluded by this paragraph.

11. Board of Governors

A. Election -- Term

(1) The Board of Governors shall consist of seven (7) members and shall be the same Board of Governors elected by the Blakely Island Maintenance Commission, a corporation authorized and existing under the laws of the State of Washington, and shall be elected from the owners of the lots or tracts of said San Juan Aviation Estates by an election to be held on said subdivision on a Saturday nearest in time to the Fourth of July of each year at a time and place designated to the BIMC members in writing by the Board of Governors at least thirty (30) days in advance of said Saturday. The election of the Board of Governors shall be as provided for in paragraph 12.

(2) The term of office of each Board member shall be for three (3) years.

B. Powers and Duties -- General. The Board of Governors shall have power to determine and pass upon the matters delegated to them in the BIC. In addition, they shall have the following powers with reference to the said San Juan Aviation Estates:

(1) To prescribe for BIMC member approval and then secure the enforcement of reasonable police regulations to secure the safety, comfort, and convenience of the various lot or tract owners and occupants.

- (2) To administer and enforce building restrictions in accordance with paragraph 8 and 9 of the BIC.
- (3) As approved by the BIMC members at the annual meeting, maintain, repair and improve, on behalf of the corporation, roads, airports and airport facilities, water supply and all equipment, pipe lines, pumps, reservoirs, and easements in connection therewith.
- (4) To maintain and administer fire protection, and to buy, sell, use and own, through said corporation, necessary and proper equipment in connection therewith.
- (5) To maintain and administer garbage disposal facilities.
- (6) To maintain and administer the water treatment plant.
- (7) To levy assessments for operating and maintenance expenses, and to collect such assessments upon owners of the properties contained in such plat in accordance with the BIC and the BIMC Bylaws and Articles of Incorporation. The San Juan Aviation Estates plat, or any assessed lot or tract thereof, shall be subject to any liens assessed by the BIMC.
- (8) To have the power, through the BIMC, after approval of its members, to incur indebtedness on behalf of the BIMC, to finance said improvements and to maintain the same. The plat of San Juan Aviation Estates and the property contained therein shall be subject to the control and management of the BIMC in the manner described in this BIC, and in accordance with the BIMC Articles of Incorporation and Bylaws and the mandate and approval of its members.
- (9) Through the BIMC, after approval of its members, to acquire and own real or personal property, within, contiguous or adjacent to the plat of San Juan Aviation Estates, and to levy assessments against the owners of assessed lots or tracts for the payment of the acquisition price, taxes and costs of maintenance of the real or personal property; provided, however, that such property must be reasonably necessary for BIMC use and benefit.
- (10) On behalf of the BIMC, after approval of its members, to execute easements, licenses, conveyances and other legal documents to carry out the business interests of the BIMC.

C. General Enforcement Provisions and Penalties. The owners recognize that the provisions of the BIC must be followed by all owners in a timely and reasonable manner in order for there to be benefit to all owners for imposing these covenants. Therefore, the owners grant to the Board the following powers, in addition to those powers set forth in Paragraph 11B above. In the event that the Board of Governors determines that there is an existing violation of the terms of the BIC, the Board shall have the following powers and shall proceed accordingly:

- (1) To notify the owner of the violation and request the owner to remedy the violation within a stated and reasonable period of time; the owner shall within a reasonable time either remedy the condition or contact the Board with any explanation or extenuating circumstance which is believed to affect the subject matter of the Board's notice.
- (2) In the event the owner fails to comply with the request identified in paragraph 11(C)(1), above, and if the Board has not granted an extension of time for such compliance, the Board shall provide written notice to the owner, by Certified Mail with Return Receipt Requested, of a formal demand to remedy the violation by a stated reasonable deadline and describing in detail the action to be taken by the Board if the violation is not remedied by the stated deadline. The options which shall be available to the Board to remedy the violation in the event of the failure of the owner to remedy the violation shall include the following:
 - a. Imposing a reasonable monetary daily penalty for failure to comply with the notice. The amount of the reasonable daily penalty shall be determined by the Board, taking into consideration the seriousness of the violation and the urgency for compliance; and shall not be punitive in nature; and/or
 - b. Commencing litigation designed to secure compliance of the remedy. In the event litigation is commenced, the owner who is in violation shall be obligated to pay all costs of such litigation, including the payment of reasonable attorneys' fees.
 - c. If approved and provided for by court order, to complete the work necessary to obtain compliance of the remedy, either by using the service of employed personnel or outside contractors. In any event, the owner shall be charged the reasonable value of the cost of remedying the violation and

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the owner shall be charged with interest on the unpaid balance at the rate of 12 percent (12%).

- d. In the event the owner fails to pay the costs, penalties or charges as referenced in sections 11(C)(2)(a), (b), (c) above, the Board shall have the right to file a lien on the owner's property to secure payment of the obligation;
- e. In the event the lien referenced in the immediately preceding paragraph section 11(C)(2)(d) is not paid and satisfied within six (6) months, the Board shall consider foreclosure on the lien to satisfy the obligation.
- f. In order to ensure that the Board has funds available to enforce the compliance of remedies or violations, the Board shall have the right to use any emergency or contingency funds available to the BIMC to fund enforcement proceedings.
- g. The Board shall at all times have the ability to determine that an extreme and emergency circumstance exists which requires the immediate correction of a violation in order to maintain reasonable safety for persons on the plat. In such circumstances, the Board may identify such emergency, attempt to notify the owner by telephone, and may correct the violation or condition without further notice at the owner's expense.

D. Hold Harmless and Indemnity. In consideration of the Board of Governors' service on behalf of the owners, the owners hereby hold the Board of Governors harmless for any and all liabilities they might incur while serving in their capacity as a Board member. Further, the owners agree to indemnify any Board member who shall become liable for any damages as a result of his or her service as a member of the Board of Governors. This agreement to hold harmless and indemnify the Board of Governors shall include the cost of reasonable attorneys' fees incurred by the Board member, but shall not include any agreement or obligation to hold harmless, indemnify, or pay attorneys' fees for any Board member for any illegal act, intentional wrongdoing, malicious act, or for libel and slander, if in fact such determination is made by a trier of fact.

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12. Voting and Election Procedures

- A. Except as provided for in paragraph 2(C), each voting member shall have one vote in the corporation for each lot or tract owned by the BIMC member that is currently paying a whole or one-half (1/2) assessment in the San Juan Aviation Estates, PROVIDED, HOWEVER, that if any assessment to the San Juan Aviation Estates is in arrears as of the date of the vote, the right to vote for that parcel shall be suspended and void for that election and any future election until the assessment is paid in full.
- B. If any lot(s) or tract(s) is held jointly by two or more persons or entities, and if BIMC assessments are being paid on said lot(s) or tract(s), the owners of the lot(s) or tract(s) shall be entitled to a single vote and in the event of such joint ownership, the joint owners shall designate one person as the "voting member."
- C. A majority vote of those present or by proxy and eligible to vote pursuant to paragraph 12(A) above shall be required to pass any issue and these procedures shall apply to, but shall not be limited to, election or removal of the Board of Governors, capital assessments, maintenance assessments, and all other general business matters requiring voting by mail or at any meeting of the BIMC; provided, however, that a quorum must exist of those present in order to pass any issue.
- D. The parcels and property designated and used for runway and owner airplane parking strips, described in paragraph 4(A), shall not be changed from its existing airplane use, except by a written instrument duly executed and acknowledged by the owners of not less than eighty percent (80%) of all BIMC lots or tracts within the San Juan Aviation Estates which are recorded with the County Auditor at the time of the vote. Any other change in use of a lot or plat and any future addition to the San Juan Aviation Estates must comply with paragraph 2(C).
- E. Any issue that can be voted on in-person can also be voted on by mail. If the vote is to be conducted by mail, the Board or BIMC member shall mail all written material concerning the issue, including an appropriate ballot and a stamped return envelope, to each voting member at least thirty (30) days prior to the deadline for counting the votes. The Secretary of the Board shall keep all written ballots for at least two years.

13. Assessments

The assessments provided for in subsection 11(B)(7) hereof, together with such

interest thereon and costs of collection as are hereafter provided, shall be a charge upon the land and shall be a continuing lien, running with the land, upon the lot or lots against which such assessment is made.

If any assessment or installment thereof authorized to be levied pursuant to this section is not paid within thirty (30) days after the last day of the calendar month in which notice of collection thereof is mailed to the owner by the corporation, it shall bear interest at the rate of twelve percent (12%) per annum, from the date thereof, and the corporation, through its Board of Governors, may bring an action at law against the owner personally obligated to pay the same and/or may institute an action to foreclose the lien against the property subject to assessment, and there shall be added to the amount of such assessment all costs and expenses in connection with such suit, and also a reasonable sum as attorneys' fees, which sums shall be included in any judgment or decree entered in such suit.

14. Right of First Refusal

- A. If any owner of any tract within the San Juan Aviation Estates shall propose to sell such tract, whether improved or unimproved, the owner shall, before selling or agreeing to sell the same to any third person, offer the same in writing over his or her signature to the Blakely Island Maintenance Commission, at the price and terms for which he or she is willing to sell; and such offer shall remain open for acceptance and consummation of sale and purchase for a period of thirty (30) days following the date of offer, during which period, if the offer be accepted, such proposed seller shall be obligated to complete the sale upon the acceptance of his or her offer. If the offer be not accepted within such thirty (30) day period, such proposed seller shall be at liberty to sell to a third person. The exercise of the right of first refusal by the BIMC shall, at all times, be subject to the provisions of paragraph 15 and shall only be exercised if the parcel is reasonably necessary for the business of the BIMC.
- B. Any property owner may apply to the Board of Governors for a waiver of paragraph 14(A) at any time. Such a waiver shall not exceed a period of three years for each application. The Board shall respond in a timely manner but must approve or disapprove such a waiver within ninety (90) days of receiving the application. Any disapproval of a waiver application must be accompanied by an explanation of a reasonable basis for the applicant's parcel to have a potential specific benefit to the BIMC. Should the applicant receive an acceptable offer from a purchaser within the 90-day response period and prior to the Board approving such a waiver, paragraph 14(A) will take precedence and the waiver will be denied.

15. Discrimination

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Discrimination shall not be allowed in the San Juan Aviation Estates. Any business established upon any lot or tract herein, or hereafter authorized to be used for business purposes, shall be required to furnish its services, upon receipt of appropriate fees or charges, to all persons regardless of race, color, creed, gender, disability, sexual preference, or place of residence or ownership on Blakely Island. Membership in the BIMC and all BIMC business shall be subject to the intent and requirements of this paragraph.

16. Upper Island Easement

The BIMC, the members thereof, and every record title holder of any lot or lots in the San Juan Aviation Estates has an easement for use of certain portions of the upper island pursuant to the Non-Exclusive Easement dated November 10, 1973, and Exhibit 1 thereto (The Corrective Deed), recorded under San Juan County Auditor's File Number 83956. Guests of BIMC members are not permitted or authorized to use the upper island easement area without being accompanied by a member.

The owners and BIMC members recognize that the provisions of this easement grant to the BIMC the power to cancel the easement to any of its individual BIMC members should a material violation of the restrictions contained therein occur as a result of the act or acts of any individual BIMC member or members. Therefore, the owners and BIMC members grant to the Board of Governors the following powers, in addition to those set forth in paragraph 11 above.

In the event the Board of Governors determines that there is an existing violation of the terms of the Non-Exclusive Easement or the BIMC Upper Island Rules, the Board shall have the following powers:

- A. Notify the owner or BIMC member of the violation and request the owner or BIMC member to remedy the violation within a stated and reasonable period of time.
- B. Restrict the owner or BIMC member from a portion or all of the upper island for a specified period of time not to exceed twelve (12) months.
- C. To indefinitely suspend the easement privileges granted to any of its individual owners or BIMC members should a material, repeated, and flagrant violation of the restrictions occur. Any such indefinite suspension shall automatically be subject to an appeal to the BIMC members at the next annual BIMC meeting. A majority vote of those attending the meeting and eligible to vote pursuant to the provisions of paragraph 12 shall be

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required to reverse, alter, or change the terms of the indefinite suspension ordered by the Board of Governors.

17. Consolidation of Lots

Adjacent lots may be joined or consolidated together to establish fewer residential lots after obtaining approval of the Board. No consolidation shall be allowed of two or more lots where there already exists a residence on each lot after the effective date of the BIC, unless one of the residences is designated as a guest house. Once the appropriate deeds and legal descriptions of the revised property lines of the consolidated lots are secured and recorded, the property owner shall then be subject to assessments and voting rights consistent with the revised number of lots which exist after the consolidation. Any attempt to thereafter separate or divide the lots must comply with the provisions provided for any other additions to the plat.

18. Pets and Animals

Except for household pets, no animals, including horses, rabbits, or other farm animals, shall be kept or maintained upon any of said tracts or lots in said San Juan Aviation Estates.

19. Variance

Variance from the exact provisions hereof may be granted by a majority of the Board of Governors in instances where, in their opinion, a particular hardship or good cause may exist, provided that no such variance shall be granted unless approved in writing over the signatures of adjacent lot owner/owners impacted by the variance and owners of at least one-half (1/2) of the tracts or lots lying, or any part or parts of which lie within three hundred (300) feet from and parallel to each of the boundary lines of the tract or lot for which a variance is desired. If variance is granted, the same shall be reduced in writing in exact detail, shall carry the signatures of approval of the required minimum of lot owners within the prescribed distance and the approval over their signatures of the majority of the Board of Governors, and shall be filed and recorded with the County Clerk of San Juan County, Washington. If a variance is granted, it is the owner's responsibility to ensure that it is recorded with the County Clerk.

20. Inconsistent Provisions

To the extent that there are any differences between the terms of the BIC and the BIMC Articles and/or Bylaws of BIMC, or in the event there exists any ambiguity between the provisions of the BIMC Articles and/or Bylaws and the BIC, the

provisions of the BIC shall control and be determinative of any inconsistency.

21. No Waiver

In the event one or more of the provisions or requirements imposed by the BIC are not followed, whether through an act of omission or commission, this shall not be a waiver of any other provision of the BIC, and further shall not be a waiver of the future application of such provision to all property contained within the San Juan Aviation Estates.

22. Severability

In the event one or more terms or provisions of the BIC is determined to be void or unenforceable, such determination shall have no effect whatsoever on the remaining terms and provisions of the BIC, which shall remain in full force and effect.

DATED this first day of June, 1995.



MICHAEL F. BRUSTKERN
President - BIMC Board of Governors

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Appendix E

...the property of said decedent, the said decedent and
the said estate shall have the right, title and interest
in and to the same, together with the right of said estate
to receive the same, and the right of said estate to sue
for the same, and to defend the same, and to do all such
things as may be necessary to carry out the purposes of
this will.

...the said estate shall have the right, title and interest
in and to the same, together with the right of said estate
to receive the same, and the right of said estate to sue
for the same, and to defend the same, and to do all such
things as may be necessary to carry out the purposes of
this will.

...the said estate shall have the right, title and interest
in and to the same, together with the right of said estate
to receive the same, and the right of said estate to sue
for the same, and to defend the same, and to do all such
things as may be necessary to carry out the purposes of
this will.

...the said estate shall have the right, title and interest
in and to the same, together with the right of said estate
to receive the same, and the right of said estate to sue
for the same, and to defend the same, and to do all such
things as may be necessary to carry out the purposes of
this will.

1. These trusts shall terminate on the date of said decedent's
death, and the property of said trusts shall be paid to the
estate of said decedent.

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ARTICLE 10. THE COVENANTS.

and shall be subject to the right at the discretion of the Board of Directors to alter or amend the same in whole or in part, and the same shall be subject to the right of the Board of Directors to alter or amend the same in whole or in part, and the same shall be subject to the right of the Board of Directors to alter or amend the same in whole or in part.

may be used for business purposes, and shall be expressly prohibited for the operation of any business, and shall be subject to the right of the Board of Directors to alter or amend the same in whole or in part.

2. With the exception of the use of the same for residential purposes, no tract or lot shall on the part of any subdivision which is used or occupied otherwise than for the use and use of one private domestic single family residence as a dwelling house, with guest house if desired, and with usual and building's appurtenances to the use of a single family dwelling house, or building, or any part thereof located on any of said tracts, shall be used or occupied for a hotel, apartment house, hotel, boarding or lodging house, institution, school, business, office, market, warehouse, or any other business, and used for manufacturing purposes of any kind or nature. No trailer coach shall be kept or used on any lot or tract.

3. No building on any tract or lot shall be built, erected, or in course of construction, and no structure or construction shall be carried to completion in the ordinary course of building and all other construction prohibited by the Board of Directors, or any other authority, and no act or deed in violation of the covenants herein contained shall be the act of the builder. Structures or loads which are complementary buildings shall not be recognized as a cause beyond the control of the owner.

4. No building upon any tract or lot, other than those excepted portions of the plat and designated in paragraph 1 hereof, shall be constructed or maintained which shall violate the general plan thereof shall have been approved by the Board of Governors, hereinafter provided for and created. All existing houses and other buildings shall conform in all respects to the applicable building, sanitary, plumbing and structural codes of the State of Washington, except for temporary permits which shall be granted by a majority of said Board of Governors.

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CITY OF ...

BE IT REMEMBERED that on this ... day of ... 19... before me, the undersigned a Notary Public in and for said County and State, personally appeared ... and ... known to me to be the ... and ... and ... the ... and ...

In presence of ... and ...

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BE IT REMEMBERED that on this ... day of ... 19... before me, the undersigned a Notary Public in and for said County and State, personally appeared ... and ... known to me to be the ... and ... and ... the ... and ...

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Appendix F

part 10
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DECLARATION TO RESTRICTIONS AND DEED OF THE SAN JUAN AVIATION ESTATES

PURSUANT to the provisions of Paragraph 1 of the Declaration and imposition of Restrictions heretofore filed and relating to the plat of the San Juan Aviation Estates, a subdivision of Blakely Island in San Juan County, Washington, the undersigned owners of not less than two-thirds of all the lots of said plat hereby amend Paragraph 9 of the Declaration and imposition of the Restrictions thereof in its entirety as follows:

9. A. Board of Governors - Election - Term: The Board of Governors shall consist of (17) members and shall be the same Board of Governors created by the Blakely Island Maintenance Commission, a corporation authorized and existing under the laws of the State of Washington, and shall be elected from the owners of tracts of said San Juan Aviation Estates by an election to be held in the club house in said subdivision at 5:00 p.m. on a Saturday nearest in time to the fourth of July of each year. The election of the Board of Governors shall be accomplished by one vote for each owner of a tract or tracts of said San Juan Aviation Estates, rather than one vote for each tract or lot included in said plat. Each owner shall have one vote in the corporation regardless of the number of lots owned or being purchased by said person. For the purpose of these restrictions, the term "owner" shall mean the record owner, whether one or more persons or entities, of the fee simple title to any lot within the plat; provided, a contract purchaser, if his contract be in good standing, shall have the right to vote in lieu of the record owner, but if his contract shall not be in good standing, his right so to vote shall be abated and the record owner shall be entitled to vote as "owner" of said lot. If any lot or lots are held jointly by two or more persons, the several owners of such interest shall be entitled to one vote and in the event of such joint ownership, the said joint owners shall designate one member as "Member". The term of office of each Governor shall be for three (3) years; provided, that the initial Board shall be elected at a special election to be held on the 15th day of November, 1957, and the terms of office of the initial Board shall be, as to two (2) of said members until the next following regular election only, as to an additional two (2) of said members until the second regular election following such special election, and as to the remaining three (3) of such members until the third regular election following such special election. The initial Board shall determine between themselves by lot the durations of their respective terms under the foregoing formula; and vacancies occurring under such formula shall be filled in rotation at the following regular elections.

B. Board of Governors - Powers and Duties: The Board of Governors shall have power to determine and pass upon those matters hereinbefore specified for delegation to them. In addition, they shall have the following powers with reference to the said San Juan Aviation Estates:

1. To prescribe and secure the enforcement of reasonable police regulations to secure the safety, comfort and convenience of the various tract owners and occupants.
2. To pass, administer and enforce building restrictions in accordance with Paragraph 4 of the Declaration and imposition of Restrictions filed herein.
3. To acquire, maintain, repair and improve, on behalf of the corporation, roads, airport and airport facilities, water supply and all equipment, pipe lines, pumps, reservoirs and easements in connection therewith.
4. To supply and insure fire protection, and to buy, sell, use and own, through said corporation, necessary and proper equipment in connection therewith.
5. To maintain and administer garbage disposal facilities.

Record for record # 11,448 MAR 9 1970

at request of Blakely Island Maintenance Commission
Page One of C. Bergman Andover, San Juan Co., Wash.
M. J. Leibel, Mgr.

1048

6. To levy and collect assessments upon any and all owners of the properties contained in such plat for the benefit of said owners, all in accordance with the By-laws and Articles of Incorporation of said corporation.

7. To have the power, through said corporation, under prior approval of its members, to incur indebtedness on behalf of the corporation, to finance said improvements and maintain the same, and said plat of San Juan Aviation Estates and the property contained therein shall be subject to the control and management of said corporation in the manner aforesaid, which corporation shall act in accordance with its Articles of Incorporation and By-laws and the mandate and approval of its members, all as provided therein. The aforesaid plat or any portion thereof shall be subject to any lien asserted by said corporation for the rendition of its services and for the payment of its assessments.

8. Through said corporation, upon prior approval of its members, to acquire and own real or personal property, within, contiguous or adjacent to the plat of San Juan Aviation Estates, and to levy assessments against the owners thereof for the payment of the acquisition price, taxes and costs of maintenance of the real or personal property.

Nothing herein provided shall be construed so as to lessen any of the restrictions already imposed relative to the subject property contained in the plat of the San Juan Aviation and Landing Estates or any adjacent or abutting property which shall hereafter become subject to the said plat restrictions.

C. Assessments - Enforcement: The assessments provided for in subsection A hereof, together with such interest thereon and costs of collection as are hereafter provided, shall be a charge upon the land and shall be a continuing lien, running with the land, upon the lot or lots against which such assessment is made.

If any assessment or installment thereof authorized to be levied pursuant to this section is not paid within 30 days after the first day of the calendar month in which notice of collection thereof is mailed to the owner by the corporation, it shall bear interest at the rate of 12% per annum, from the due date thereof, and the corporation, through its Board of Governors may bring an action at law against the owner personally obligated to pay the same and/or may institute an action to foreclose the lien against the property subject to assessment, and there shall be added to the amount of such assessment all costs and expenses in connection with such suit, and also a reasonable sum as attorney fees, which sums shall be included in any judgment or decree entered in such suit.

8. Membership - Blakely Island Maintenance Commission: All persons owning any lot, part or a portion of said San Juan Aviation Estates, or persons who are contract vendors of such property, shall be members of the Blakely Island Maintenance Commission, Inc., and no lot may be purchased or contracted to a purchaser, nor sold by any owner of any lot or lots unless and until he shall be accepted for membership by said corporation, and applicants for membership may be approved or disapproved by said corporation, acting in accordance with its By-laws.

IN WITNESS WHEREOF, we have signed this Amendment to the Restrictions and Plat of the San Juan Aviation Estates this 15th day of August, 1969.

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STATE OF WASHINGTON
 COUNTY OF THURSTON

On this 1st day of November, 1969, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared

Richard F. Ludeman & Gladys I. Ludeman

to me known to be the individuals described in and who executed the foregoing instrument, and acknowledged to me that they signed and sealed the said instrument as their free and voluntary act and deed for the uses and purposes therein contained.

WITNESS my hand and seal hereunto affixed the day and year in this certificate above written.

J. P. ...
 Notary Public in and for the State of Washington, residing at ...

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Appendix G



American National Fire Insurance Company as subrogee of United Crane & Excavation, Plaintiff and Appellant v. Gary Hughes, Defendant and Appellee

No. 20020207

SUPREME COURT OF NORTH DAKOTA

2003 ND 43; 658 N.W.2d 330; 2003 N.D. LEXIS 55

March 26, 2003, Filed

PRIOR HISTORY: [***1] Appeal from the District Court of Grand Forks County, Northeast Central Judicial District, the Honorable Debbie Gordon Kleven, Judge.

DISPOSITION: AFFIRMED.

COUNSEL: Brian T. Suth (argued), Ellison, Nielsen, Knibbs, Zehe & Antas, P.C., Chicago, IL, and Eric G. Olsen (appeared), Jeffries, Olson & Flom, PA, Moorhead, MN, for plaintiff and appellant.

Steven L. Marquart, Cahill & Marquart, Moorhead, MN, for defendant and appellee.

JUDGES: Opinion of the Court by Kapsner, Justice. Carol Ronning Kapsner, Dale V. Sandstrom, William A. Neumann, Mary Muehlen Maring, Gerald W. VandeWalle, C.J.

OPINION BY: Carol Ronning Kapsner

OPINION

[**332] Kapsner, Justice.

[*P1] American National Fire Insurance Company, as subrogee of United Crane & Excavation, appeals from a summary judgment dismissing its subrogation action against Gary Hughes. We hold American National is not entitled to subrogation from Hughes because for purposes

of subrogation he was not a third party but an implied co-insured under American National's insurance policy [***2] with United Crane. We affirm.

I

[*P2] United Crane was a closely held corporation engaged in demolition work, bridge construction, and installation of underground water and sewer lines. Hughes' parents owned all the stock of United Crane, and he was an employee and officer of United Crane, acting as its director and vice president. American National insured United Crane under a "BUSINESSPRO" mono line property policy that designated United Crane as the insured and provided coverage for physical damage to its scheduled vehicles and equipment. The policy did not provide liability coverage for the scheduled property and did not explicitly designate United Crane's owners, officers, or employees as insureds.

[*P3] During nonbusiness hours on Saturday, January 13, 2001, Hughes was using United Crane's tools at its shop to do mechanical work on his personal snowmobile. Hughes' snowmobile was not used for United Crane's business and was not listed as scheduled property under American National's policy with United Crane. Hughes was using a shop vac to remove gasoline from his snowmobile's gas tank when a spark ignited the gasoline and caused a fire that damaged vehicles and equipment [***3] insured under American National's policy with United Crane. American National paid United Crane more than \$ 250,000 for damage to property

covered under the policy.

[*P4] American National thereafter brought this subrogation action against Hughes, alleging his negligence caused the damage to United Crane's property. The trial court granted Hughes summary judgment dismissal of American National's subrogation action against him, concluding he was an additional insured under American National's policy with United Crane. American National appealed.

II

[*P5] We review this appeal in the posture of summary judgment, which is a procedure for resolving a controversy on the merits without a trial if the evidence establishes there are no genuine issues of material fact, or inferences to be drawn from undisputed facts, and if the evidence shows a party is entitled to judgment as a matter of law. *Bender v. Aviko USA L.L.C.*, 2002 ND 13, P4, 638 N.W.2d 545. If the law is such that resolution of any factual disputes will not alter the result, the disputed facts are not material and summary judgment is appropriate. *Richmond* [***333] v. *Nodland*, 552 N.W.2d 586, 588 (N.D. 1996). [***4]

III

[*P6] American National argues the trial court erred in deciding Hughes was an additional insured under its insurance policy with United Crane, because Hughes was not acting within the scope of his employment for United Crane when the fire occurred. American National argues there is a factual dispute about whether Hughes was acting within the scope of his employment when the fire occurred. American National argues the court erred in relying on a factually distinguishable out-of-state case, see *Fireman's Ins. Co. v. Wheeler*, 165 A.D.2d 141, 566 N.Y.S.2d 692 (N.Y. App. Div. 1991), while ignoring established North Dakota law on respondeat superior. See *Zimprich v. Broekel*, 519 N.W.2d 588 (N.D. 1994). American National argues the rule precluding subrogation from landlord-tenant cases is not applicable to this case, and asserts equitable principles support its subrogation claim against Hughes.

[*P7] Under the doctrine of respondeat superior, an employer is vicariously liable for the negligence of its employees while the employees are acting within the scope of their employment. *Nelson v. Gillette*, 1997 ND 205, P 10, 571 N.W.2d 332; [***5] *Zimprich*, 519

N.W.2d at 590-91. The underlying rationale for the doctrine is the employer's right to control its employee's conduct, and the employer's vicarious liability extends only to an employee's acts done on the employer's behalf and within the scope of the employee's employment. *Zimprich*, at 591. In *Zimprich*, at 589, a Kenworth tractor owner leased his tractor to a common carrier, who provided loads for the owner to transport. This Court concluded the owner was performing his independent contractual duty to repair his tractor when a fire occurred, and the owner was not an employee of the common carrier acting within the scope of employment. *Id.* at 592-93. We further concluded the common carrier was not vicariously liable for the tractor owner's negligence because the common carrier was not exercising control over the owner's work. *Id.* at 593-94. However, *Zimprich* did not involve a subrogation claim and does not necessarily control whether American National is entitled to subrogation from Hughes.

[*P8] Subrogation is an equitable remedy which provides for an adjustment between parties to secure the ultimate [***6] discharge of a debt by the person who, in equity and good conscience, ought to pay for it. *St. Paul Fire & Marine Ins. Co. v. Amerada Hess Corp.*, 275 N.W.2d 304, 308 (N.D. 1979); *State Farm Mut. Auto. Ins. Co. v. Wee*, 196 N.W.2d 54, 59-60 (N.D. 1971). Generally, when an insurer pays its insured for a loss, the insurer is subrogated to the insured's right of action against any third party responsible for the loss. *Continental Ins. Co. v. Bottomly*, 250 Mont. 66, 817 P.2d 1162, 1164 (Mont. 1991); *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832, 836 (Neb. 1984); *Pennsylvania Gen. Ins. v. Austin Powder*, 68 N.Y.2d 465, 502 N.E.2d 982, 985, 510 N.Y.S.2d 67 (N.Y. 1986); *Wheeler*, 566 N.Y.S.2d at 693. See generally 6A Appleman, *Insurance Law and Practice* § 4051 (1972); 16 Lee R. Russ and Thomas F. Segalla, *Couch on Insurance* §§ 222:5 and 223:1 (3rd ed. 2000). However, an insurer is not entitled to subrogation from its own insured for a claim arising from the very risk for which the insured was covered. *Bottomly*, at 1164; *Reeder*, at 836; *Austin Powder*, at 985; *Wheeler* [***7] , at 693. See *Uren v. Dakota Dust-Tex, Inc.*, 2002 ND 81, PP 6, 13, 643 N.W.2d 678; *Community Credit Union v. Homelvig*, 487 N.W.2d 602, 603, 605 [***334] (N.D. 1992). See generally 6A Appleman, at P 4055; 16 *Couch*, at §§ 224:1 and 224:3. An insurer is not entitled to subrogation from entities named as insureds in the insurance policy, or entities deemed to be additional insureds under the policy. See

2003 ND 43, *P8; 658 N.W.2d 330, **334;
2003 N.D. LEXIS 55, ***7

Bottomly, at 1164; *Reeder*, at 836; *Wheeler*, at 693; *Uren*, 2002 ND 81 at P 6; *Homelvig*, at 603. See generally 6A Appleman, at § 4055; 16 Couch, at § 224:12. An entity not named as an insured in an insurance policy is considered an additional insured when, under the circumstances, the insurer is attempting to recover from the insured on the risk the insurer had agreed to take upon payment of premiums. See *Bottomly*, at 1164; *Reeder*, at 836; *Wheeler*, at 693; *Uren*, 2002 ND 81 at P 6; *Homelvig*, at 603. See generally 6A Appleman, at § 4055. The rule precluding an insurer's subrogation claim against a co-insured generally applies absent fraud or design by the co-insured. See *Sherwood Med. Co. v. B.P.S. Guard Servs., Inc.*, 882 S.W.2d 160, 162 (Mo. Ct. App. 1994); [***8] *State Farm Fire & Cas. Co. v. Sentry Indem. Co.*, 316 So. 2d 185, 188 (La. Ct. App. 1975). See generally 16 Couch, at § 224:10.

[*P9] In *Homelvig*, 487 N.W.2d at 605, this Court held that absent an express agreement to the contrary, a tenant was an implied co-insured under the insurer's policy with the landlord, and the insurer was not entitled to subrogation from the tenant. See also *Uren*, 2002 ND 81, P 13, 643 N.W.2d 678 (holding *Homelvig* applies where lease contains no express agreement indicating tenant should not be considered an implied co-insured under landlord's property insurance policy). In *Homelvig*, at 603-04 (quoting 6A Appleman, at § 4055), this Court said the primary rationale for concluding a landlord and tenant were co-insureds was their "insurable interests in the property, and the commercial realities under which lessors insure leased premises and pass on the premium cost in rent." See also *Uren*, 2002 ND 81 at P 27.

[*P10] Other courts have rejected subrogation claims in cases involving other relationships between the insured and a third party. See *Bottomly*, 817 P.2d at 1165; [***9] *Reeder*, 348 N.W.2d at 837; *Wheeler*, 566 N.Y.S.2d at 693. In *Bottomly*, at 1163-65, the court held a named insured's brother and nephew were additional insureds under a policy insuring a seasonal cabin used for recreational purposes by the insured's family. In *Reeder*, at 835-37, the court held the named insured's brother and niece were additional insureds while temporarily occupying the insured's house as a guest during construction of the brother's new house. In *Bottomly*, at 1165, and *Reeder*, at 836, the courts concluded the relationship between the named insured and a third-party tortfeasor was such that allowing subrogation would permit the insurer to sue its insured on the very risk the

insurer had agreed to take upon payment of premiums.

[*P11] In *Wheeler*, 566 N.Y.S.2d at 693-95, the Appellate Division of the New York Supreme Court rejected an insurer's subrogation claim against the president and principal shareholder of the named insured, a closely held corporation that had incurred a fire loss and submitted a claim under a comprehensive business insurance policy. In *Wheeler*, 566 N.Y.S.2d at 693, the president and [***10] principal shareholder was an additional insured under the property portion of the insurance policy for up to \$ 2,500 for fire loss for his personal effects at the insured premises, and he was a named insured on the automobile liability part of the policy. The comprehensive general liability part of the policy extended coverage as an additional insured to any corporate executive officer acting within the scope of that person's duties for injury to a person or to property not owned by the [***335] corporation. *Id.* The insurer paid the closely held corporation's claim for a fire loss, and the corporation, through its president, executed a receipt subrogating the insurer to the corporation's right to recover from any third party and requiring the corporation to cooperate with the insurer. *Id.* The insurer then brought a subrogation action against the corporation's president and principal shareholder, alleging his negligence caused the fire. *Id.*

[*P12] The court held equitable principles and public policy precluded the insurer from obtaining subrogation from the president and principal shareholder of the insured. *Wheeler*, 566 N.Y.S.2d at 693. The court explained [***11] it would be inequitable to permit an insurer to pass the incidence of loss from itself to its own insured and avoid the coverage which its insured had purchased. *Id.* at 693-94. The court said the insurer was presumed to know the closely held corporation's relationship with its president and principal shareholder, and having agreed to insure a business enterprise in corporate form, the insurer was charged with knowledge that the insured entity could act only through its officers and employees. *Id.* at 694. The court said "if subrogation against a corporate insured is ever to be barred under the doctrine that an insurer completely assumes the risk of a fire loss due to the negligence of the insured, at the very least the risk assumed must extend to the negligence of a corporate officer." *Id.* (emphasis in original).

[*P13] The court also explained that subrogation was precluded by the public policy for averting potential

conflicts of interest. *Wheeler*, 566 N.Y.S.2d at 694-95. The court recognized the insurance policy required the insured to subrogate any claim for loss the insured might have against another person, to submit to examination under oath, [***12] to furnish a sworn statement of loss, and to do what was necessary to secure the insurer's right to recovery by subrogation. *Id.* The court said the corporation acted through its president, who was required to disclose the circumstances of the loss to the insurer, and if the president failed to provide necessary information to the insurer, the corporation would forfeit its rights under the policy. *Id.* at 695. The court said:

Defendant, as the principal officer of the named insured corporation and with which he presumably is fully united in economic interest, has been placed in the dilemma of having to furnish the necessary information and to fully cooperate in plaintiff's efforts to recover the loss from him personally or forfeit his corporation's policy right to indemnity for the loss. We conclude that the compromise of the integrity of the insurer's relationship with its insured and the potential conflict of interest inherent in this dilemma forced upon defendant by plaintiff require denial of plaintiff's right of subrogation here.

Id.

[*P14] The relationship between United Crane and Hughes is not identical to the relationship between the corporation [***13] and its president and principal shareholder in *Wheeler*. Moreover, the *Wheeler* decision does not state whether the alleged negligence by the corporation's president and principal shareholder occurred within the scope of his employment, and there is a dearth of authority regarding the effect of corporate acts within or outside the scope of employment on a claim for subrogation. We conclude, however, the rationale of *Wheeler* precludes subrogation in a case where United Crane permitted Hughes and its corporate officers and owners to use its shop for work on their snowmobiles.

[**336] [*P15] American National's policy designated United Crane as the insured and did not name Hughes, or any other individuals associated with United

Crane, as additional insureds. American National's policy included a "CONTRACTOR'S EQUIPMENT SCHEDULED COVERAGE FORM," which provided coverage for "loss' to Covered Property from any of the Covered Causes of Loss." The policy defined "Covered Causes of Loss" to mean "Risks of Direct Physical 'Loss' to the Covered Property except those causes of 'loss' listed in the Exclusions." The policy excluded coverage for losses caused by governmental action, nuclear [***14] hazard, and war and military action. The policy also explicitly excluded coverage for losses resulting from dishonest acts by United Crane's employees or authorized representatives whether or not the acts occurred during the hours of employment. However, the policy did not exclude coverage for losses resulting from acts outside the scope of employment of an officer, owner, or employee of United Crane.

[*P16] A corporation is an artificial entity which can act only through its agents. *United Accounts, Inc. v. Teladvantage, Inc.*, 499 N.W.2d 115, 117 n.1 (N.D. 1993); *Dewey v. Lutz*, 462 N.W.2d 435, 443 (N.D. 1990). See *Wheeler*, 566 N.Y.S.2d at 694. Although Hughes did not own any stock in United Crane, American National agreed to insure United Crane in its corporate form and is charged with knowledge that United Crane could act only through its officers and employees. See *Wheeler*, at 694. Hughes was the vice president of United Crane. He supervised his own crew of workers for United Crane, and he hired and fired the members of his crew. Hughes' brother was president of United Crane, and his parents owned all of the outstanding [***15] stock in the closely held corporation. Although Hughes may not have been explicitly acting within the scope of his employment with United Crane when the fire occurred, American National does not dispute that Hughes, his brother, and his father all worked on their snowmobiles at United Crane's shop. American National also does not dispute that Hughes worked on his snowmobile at United Crane's shop during business hours the week before the fire. According to Hughes, he also stored his snowmobile at United Crane's shop.

[*P17] Hughes' alleged negligence may not have been within the scope of his employment, and for purposes of summary judgment, we assume, without deciding, that he was acting outside the scope of his employment. However, the resolution of that factual issue will not alter the result in this case, because United Crane undisputedly permitted its corporate owners and officers

2003 ND 43, *P17; 658 N.W.2d 330, **336;
2003 N.D. LEXIS 55, ***15

to use its shop to work on their snowmobiles during business and nonbusiness hours. American National insured United Crane for property damage to scheduled vehicles and equipment, which included a risk of loss for negligence by United Crane's corporate officers and employees. Under these circumstances [***16] and in the absence of a claim of fraud or a provision specifically excluding coverage for acts by officers or employees outside the scope of their employment, the relationship between United Crane and Hughes is such that allowing subrogation against Hughes for his alleged negligence would permit American National to sue its insured for the very risk that American National insured and for which it received premiums. We conclude that result would be inequitable.

[*P18] We also conclude the public policy for averting potential conflicts of interest applies to this case. See *Wheeler*, 566 N.Y.S.2d at 694-95. American National's insurance policy required United Crane to [**337] transfer to American National the right to recover damages from another to the extent of American National's payments to United Crane. The policy required United Crane to do everything necessary to secure American National's rights and precluded United Crane from doing anything to impair those rights. The policy required United Crane to submit to examination under oath about any matter relating to a claim and to cooperate in the investigation and the settlement of a claim. Under American National's [***17] policy, coverage was void

in the case of misrepresentation of a material fact on a claim. Hughes was placed in the dilemma of furnishing necessary information and fully cooperating with American National's efforts to recover the loss from him personally, or forfeit United Crane's right to coverage for the loss. *Wheeler*, 566 N.Y.S.2d at 695. We agree with the public policy rationale in *Wheeler* that it would compromise the integrity of American National's relationship with United Crane and create a potential conflict of interest to allow American National's subrogation claim against Hughes.

IV

[*P19] We conclude the undisputed material facts in this case establish Hughes was, for purposes of the subrogation claim, an implied co-insured under American National's policy with United Crane, and American National is precluded from obtaining subrogation from Hughes. We affirm the summary judgment.

[*P20] Carol Ronning Kapsner

Dale V. Sandstrom

William A. Neumann

Mary Muehlen Maring

Gerald W. VandeWalle, C.J.



Fireman's Insurance Company of Newark, New Jersey, Respondent, v. Donald G. Wheeler, Appellant

No. 61800

Supreme Court of New York, Appellate Division, Third Department

165 A.D.2d 141; 566 N.Y.S.2d 692; 1991 N.Y. App. Div. LEXIS 2200

January 14, 1991, Argued

February 21, 1991

PRIOR HISTORY: [***1] Appeal from an order of the Supreme Court (F. Warren Travers, J.), entered January 8, 1990 in Rensselaer County, which denied a motion by defendant for summary judgment dismissing the complaint for failure to state a cause of action.

Fireman's Ins. Co. of Newark v Wheeler, 145 Misc 2d 847.

DISPOSITION: Order reversed, on the law, with costs, motion granted, summary judgment awarded to defendant and complaint dismissed.

COUNSEL: *Donohue, Sabo, Varley & Armstrong, P. C.* (Fred J. Hutchison of counsel), for appellant.

Bouck, Holloway, Kiernan & Casey (Mary Ann D. Allen and David J. Pollock of counsel), for respondent.

JUDGES: Levine, J. Weiss, J. P., Mikoll, Mercure and Harvey, JJ., concur.

OPINION BY: LEVINE

OPINION

[*142] OPINION OF THE COURT

[**693] Defendant is the president of Wheeler Brothers Brass Founders, Inc., a closely held corporation which has been owned and operated as a brass foundry in

the City of Troy, Rensselaer County, by several generations of defendant's family. At the pertinent time involved in this case, the corporation employed seven people. A fire occurred at the premises of the foundry on July 30, 1987. The corporation submitted a proof [***2] of loss to plaintiff, its insurer, under the fire insurance coverage provided in a comprehensive business insurance policy issued by plaintiff. The property portion of the policy covering, *inter alia*, fire loss provided that the insured could apply "up to \$ 2,500 to cover direct loss * * * to personal effects while located on * * * the designated premises, belonging to * * * officers, directors, partners or employees". Defendant was specifically included as a named insured in the automobile liability portion of the policy. Also, the comprehensive general liability portion of the policy extended coverage as an additional insured to "any executive officer" of the corporation, while acting within the scope of that person's duties, for injury to person or to property not owned by the corporation.

[*143] Plaintiff settled and paid the corporation's fire loss claim for some \$ 210,000 in November 1987. In accordance with its obligations as the named insured under the policy, the corporation executed a "SUBROGATION RECEIPT" subrogating plaintiff to all of its rights to recover for the loss "against any person or corporation" and agreeing "to cooperate fully" with plaintiff in [***3] the prosecution of such a claim. Defendant signed the instrument on behalf of the corporation. Plaintiff then commenced this action against defendant, alleging that the fire was caused by the

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1991 N.Y. App. Div. LEXIS 2200, ***3

negligent acts of defendant. After issue was joined, defendant moved for summary judgment dismissing the complaint, essentially on the ground that defendant, as an officer of the primary insured corporation, was also an insured under the policy and, therefore, subrogation by plaintiff against him was barred as a matter of law. Defendant appeals from the denial of his motion (145 Misc 2d 847).

[1] There should be a reversal. In our view, the equitable principles and public policy considerations underlying the denial of any right of subrogation by an insurer against an additional insured under its policy, as set forth in *Pennsylvania Gen. Ins. Co. v Austin Powder Co.* (68 NY2d 465), apply here sufficiently to bar plaintiff's claim. The Court of Appeals in *Pennsylvania Gen. Ins. Co.* characterized an insurer's attempt to recoup its payment to a primary insured from a person who is an additional insured under the same policy as an "unseemly result [which] would not be consistent [***4] with the equitable principles that govern subrogation claims" (*supra*, at 471). Subrogation by an insurer, the court noted, has traditionally applied to claims against "third parties" whose active wrongdoing caused the loss for which the insurer was required to indemnify its insured. The court pointed out, however, that "[a] third party, by definition, is one to whom the insurer owes no duty under the insurance policy through which its loss was incurred" (*supra*, at 471 [emphasis supplied]). Permitting recovery against an insured is inequitable because it "would permit an insurer, in effect, to pass the incidence of the loss * * * from itself to its own insured and thus avoid the coverage which its insured purchased" (*supra*, at 471, quoting *Home Ins. Co. v Pinski Bros.*, 160 Mont 219, 226, 500 P2d 945, 949).

Another court described the same inequity, in a fire loss subrogation claim, as follows: "An overwhelming percentage of all insurable losses sustained because of fire can be directly traced to some act or acts of negligence. Were it not for the [*144] errant human element, the hazards insured against would be greatly diminished. It [**694] [***5] is in full appreciation of these conditions that the property owner seeks insurance, and it is after painstaking analysis of them that the insurer fixes his premiums and issues the policies. It is in recognition of this practice that the law requires the insurer to assume the risk of the negligence of the insured and permits recovery by an insured whose negligence proximately caused the loss" (*Federal Ins. Co. v*

Tamiami Trail Tours, 117 F2d 794, 796 [emphasis supplied]; see also, *Builders & Mfrs. Mut. Cas. Co. v Preferred Auto. Ins. Co.*, 118 F2d 118). Moreover, several authorities have concluded that the foregoing principle barring an insurer's subrogation against an insured may apply in claims against persons not named in the policy, because the relationship between the person and the insured makes it reasonable to infer that the insured paid the insurer to completely assume the risk of loss by the acts of that person. As stated in a major text on insurance law: "A person not named in an insurance policy is considered an insured for purposes of preventing subrogation when, under the circumstances, the insurer seeking subrogation is attempting, in effect, to recover [***6] from the insured on the risk the insurer had agreed to take upon payment of the premium" (6A Appleman, Insurance Law and Practice § 4055, at 77 [1990 Supp]). Thus, subrogation against the brother of a homeowner/insured was denied for a fire loss caused by the brother while a guest at the insured premises, the court stating: "It may be presumed that the insured bought this policy so that he would not have to look to his guest for payment in the event of damage caused by the negligent act of the guest. We are persuaded that the relationship which existed between the brothers in this case was such that * * * a right of subrogation * * * should not lie as a matter of law" (*Reeder v Reeder*, 217 Neb 120, 129, 348 NW2d 832, 837; see, *Cascade Trailer Ct. v Beeson*, 50 Wash App 678, 749 P2d 761).

In our view, the equities clearly favor defendant here. Defendant was an additional insured under the policy for up to \$ 2,500 as to any fire loss of his personal effects at the insured premises. He was a named insured on the automobile liability coverage of the policy and would have been an insured had he somehow caused a fire at other premises while acting within the scope of his [***7] duties with the corporation. Thus, defendant can hardly be characterized as a "third party * * * to whom [plaintiff] owe[d] no duty under the insurance [*145] policy through which its loss was incurred" (*Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 471, *supra*).

More importantly, plaintiff must be presumed to have known at the time the policy was issued of the nature of defendant's relationship to the insured, i.e., president and principal shareholder of a closely held corporation. Had defendant operated the foundry as a single proprietorship or partnership, undoubtedly he

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would have been a named insured against whom the subrogation claim made here would not lie. Having agreed to insure the business enterprise here in a corporate form, plaintiff certainly is charged with awareness that the entity it insured could only act through its officers and employees. If subrogation against a corporate insured is ever to be barred under the doctrine that an insurer completely assumes the risk of a fire loss due to the negligence of the insured, at the very least the risk assumed must extend to the negligence of a corporate officer of the insured, thus [***8] barring plaintiff's claim in the instant case.

[2] The alternative equitable and public policy rationale for the denial of subrogation against an insured cited in *Pennsylvania Gen. Ins. Co.* is also applicable here, namely, "the public interest in assuring integrity of insurers' relations with their insureds and in averting even the potential for conflict of interest in these situations" (*supra*, at 472). The insurance policy imposed the obligation on the insured, on a fire loss claim, to "submit to examination under oath" and to furnish a sworn statement of loss setting forth, *inter alia*, the "cause of loss". And as already noted, the policy required the [**695] named corporate insured to subrogate any claim for the loss it might have against another person and to do whatever else was necessary to secure plaintiff's right of recovery. Again, because the insured here is a closely held corporation essentially operated by defendant, it was

defendant upon whom devolved the corporate insured's duties of full disclosure to plaintiff of the circumstances giving rise to the loss and of cooperation with respect to any subrogated right of recovery on behalf of plaintiff. [***9] Intentional suppression or distortion of material facts by defendant as a corporate officer in dealing with plaintiff could have resulted in the forfeiture of the corporation's rights under the policy (*see, Seawide Fish Mkt. v New York Prop. Ins. Underwriting Assn.*, 111 AD2d 137, 138; *Kantor Silk Mills v Century Ins. Co.*, 223 App Div 387, 388, *affd* 253 NY 584).

Thus, defendant, as the principal officer of the named [*146] insured corporation and with which he presumably is fully united in economic interest, has been placed in the dilemma of having to furnish the necessary information and to fully cooperate in plaintiff's efforts to recover the loss from him personally or forfeit his corporation's policy right to indemnity for the loss. We conclude that the compromise of the integrity of the insurer's relationship with its insured and the potential conflict of interest inherent in this dilemma forced upon defendant by plaintiff require denial of plaintiff's right of subrogation here (*see, Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, *supra*; *Chrysler Leasing Corp. v Public Adm'r, N. Y. County*, 85 AD2d 410, 414; *see also, Weinreb v Weinreb*, 140 AD2d [***10] 226).



LEXSEE 16 GA.APP. 91



Cited

As of: May 13, 2010

SHIFLETT v. JOHN W. KELLY & COMPANY.

5794.

COURT OF APPEALS OF GEORGIA*16 Ga. App. 91; 84 S.E. 606; 1915 Ga. App. LEXIS 504***March 18, 1915, Decided**

PRIOR HISTORY: [***1] Complaint; from city court of Floyd county--Judge Reece. May 26, 1914.

DISPOSITION: Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant member filed an appeal to challenge a judgment from the City Court of Floyd County (Georgia), which directed a verdict in favor of plaintiff seller. The seller had filed an action against the member of a club to recover on an open account for liquors that were allegedly sold to the member.

OVERVIEW: The member, who conducted business under the trade name of a club, denied individual liability, alleging that he was a member and treasurer and steward of the club, which was a "locker" club, and that after ordering the liquors, he received them at the club through a person in charge of the club premises. He claimed that the club was associated with a confederation, which was a mutual benefit association, and that under the confederation's charter, the club could maintain "locker clubs" in connection therewith. On appeal from the judgment for the seller, the court found:

(1) under its charter and under Ga. Civ. Code § 2503, the confederation was a fraternal insurance society, and hence, the buying and handling of intoxicating liquors were beyond the objects contemplated in the charter; (2) as such, it was ultra vires of the charter to organize, in connection with its insurance business, a "locker" club and to contract for the buying and handling of liquors to its members; (3) the confederation could not delegate an authority which it did not itself have; and (4) hence, the member could be held liable on the club's contract, as a general promisor or partner.

OUTCOME: The court affirmed the city court's judgment.

LexisNexis(R) Headnotes

Business & Corporate Law > Corporations > Formation > Corporate Existence, Powers & Purpose > Powers > Ultra Vires Doctrine
Business & Corporate Law > Foreign Businesses > General Overview
Public Contracts Law > Bids & Formation > Offer &

16 Ga. App. 91, *; 84 S.E. 606, **;
1915 Ga. App. LEXIS 504, ***1

Acceptance > Acceptances & Awards

[HN1] The charter of a corporation is a contract between the State of Georgia and the shareholders, and between the shareholders themselves. The State contracts to permit the exercise of the powers granted in the charter, and not to impair the obligation of any contract made in pursuance thereof. The shareholders engage not to exceed the powers conferred upon them by law, and each stockholder, by accepting the charter, agrees with the others not to divert the assets of the corporation to a purpose foreign to the objects of the organization. As to this matter, the law makes no distinction between public and private corporations. Corporations are granted no rights and are clothed with no powers except those which are expressly conferred by law or by their charter, or which arise therefrom by necessary implication. If a contract by a corporation is usual and necessary for the business of the corporation, it is not ultra vires. Where it is unusual and not necessary, it is ultra vires. A corporation is a mere creature of the law, with no authority whatever outside of the powers given it by its charter and enumerated therein, and such powers as are necessarily incidental to the execution of those expressly granted. The stockholders in a corporation cannot substitute their will for the legislative or judicial grant of power.

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Causes of Action > General Overview

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Rights of Partners > General Overview

[HN2] As to third persons, all the members of a partnership are liable, not only to the extent of their interest in a partnership property, but also to the whole extent of their separate property. Ga. Civ. Code § 3156. A person who assumes to act as agent for a non-existing or for a legally incompetent or irresponsible principal, renders himself personally liable to the person with whom he deals, unless it is expressly understood, either that the agent shall not be held, and the contractee, with knowledge of the facts, extends credit to the supposed principal, or that the agent's liability shall be limited to a fund held by him for the purpose of his agency. Unincorporated associations, clubs, and committees, are generally held to be such irresponsible principals that

persons attempting to contract for them as agents render themselves personally liable. One who assumes to act as agent impliedly warrants his authority; but if there is no principal, then the agent cannot have authority, and therefore, he shall be held liable for the breach of his implied warranty.

Civil Procedure > Pretrial Judgments > Nonsuits > General Overview

Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials

Evidence > Procedural Considerations > Weight & Sufficiency

[HN3] An exception to the refusal to grant a nonsuit will not be considered where a verdict for a plaintiff is complained of in a motion for a new trial as not supported by the evidence. In such a case, an appellate court will review the sufficiency of the evidence as a whole, in the light of the verdict given or directed, and will not merely consider the sufficiency of a plaintiff's case to withstand the motion for a nonsuit at the particular stage at which the nonsuit was made.

SYLLABUS

An exception to the refusal to grant a nonsuit will not be considered, where a verdict for the plaintiff is complained of in a motion for a new trial as not supported by the evidence.

An ultra vires act of a corporation is one in excess of its charter power. Corporations are granted no rights and clothed with no powers except those which are expressly conferred by law or by their charters, or which arise therefrom by necessary implication.

A corporation doing business under a charter as a fraternal insurance society has no power to operate a "locker club," or to contract for the purchase of intoxicating liquors.

While a corporation can amend its constitution and by-laws, it can not so amend them as to make an altogether new and different kind of society. So, where a corporation is granted a charter as a fraternal beneficiary association, it has no power to change itself into a "locker club," and to contract for the buying, handling, and dispensing of intoxicating liquors to its members.

Under the foregoing rulings, such a "locker club,"

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having no valid charter, is not [***2] a corporation, and consequently any one of its individual members can be held liable for liquors purchased and received by the club.

The plaintiff in error, being a member of the "locker club," and its treasurer and steward, and having himself ordered the liquors--the subject-matter of this suit--which were received at the club, was liable for the purchase-price of the liquors; especially when he filed no plea of non-joinder, naming others who should be sued.

The evidence demanded the verdict directed, and the court did not err in refusing to grant the motion for a new trial.

COUNSEL: McHenry & Porter, for plaintiff in error.

Lipscomb & Willingham, Nathan Harris, contra.

JUDGES: Broyles, J.

OPINION BY: BROYLES

OPINION

[*92] [**606] BROYLES, J. John W. Kelly & Co., a Tennessee corporation, brought suit in the city court of Floyd county against C. H. Shiflett, doing business under the trade name of the "Cosmopolitan Club," on an open account for liquors, amounting to \$ 390 and interest. The defendant, Shiflett, in his answer, substantially admitted the correctness of the account, but denied individual liability. He failed, however, to plead misjoinder or non-joinder of parties. [***3] Upon the trial he testified that he was a member of the club in question; that it was a "locker club;" that he was its treasurer and steward; that the liquors included in the account sued on were ordered by him, and that he received them at the club through his man in charge of the club premises. He claimed that this "Cosmopolitan Club" was an offspring of the Farmers Life Confederation, a mutual benefit association, which was given a charter by the judge of the superior court of Fulton county; and that under this charter the "Confederation" had a right to establish and maintain "locker clubs" in connection therewith. This Farmers Life Confederation, under its charter, and under section 2503 of the Civil Code, [**607] is a fraternal insurance society, and was expressly so recognized by the Supreme Court of this State in *Worthy v. Farmers Life Confederation*, 139 Ga. 81 (76 S.E. 856). It was clearly

ultra vires of its charter to organize, in connection with its insurance business, a "locker club," and to contract for the buying, [*93] handling, and dispensing of intoxicating liquors to its members. In *Savannah Ice Co. v. Canal-Louisiana Bank &c. Co.*, 12 [***4] Ga. App. 818 (79 S.E. 45), this court held as follows: "(1) [HN1] The charter of a corporation is a contract between the State and the shareholders, and between the shareholders themselves. The State contracts to permit the exercise of the powers granted in the charter, and not to impair the obligation of any contract made in pursuance thereof. The shareholders engage not to exceed the powers conferred upon them by law, and each stockholder, by accepting the charter, agrees with the others not to divert the assets of the corporation to a purpose foreign to the objects of the organization. As to this matter, the law makes no distinction between public and private corporations. (2) Corporations are granted no rights and clothed with no powers except those which are expressly conferred by law or the charter, or which arise therefrom by necessary implication."

In deciding whether a certain contract by a corporation is ultra vires the rule is, that, if the contract is usual and necessary for the business of the corporation, it is not ultra vires; and where it is unusual and not necessary, it is ultra vires. A corporation is a mere creature of the law, with no authority whatever outside of [***5] the powers given it by its charter and enumerated therein, and such powers as are necessarily incidental to the execution of those expressly granted. *Dublin Fertilizer Works v. Carter*, 6 Ga. App. 835 (65 S.E. 1082). The stockholders in a corporation can not substitute their will for the legislative or judicial grant of power. It is clear to us that the contracting of a debt for intoxicating liquors was ultra vires of the charter of the Farmers Life Confederation. It follows that this corporation could not delegate an authority which it did not itself have. The buying, handling, and dispensing of intoxicating liquors was beyond the objects contemplated in its charter; such actions were not necessary or legitimate for the carrying into effect of any of the purposes of the charter; and, under this view, any of the individual members of the locker club could have been held liable on its contracts as general promisors or partners. *Thurmond v. Cedar Spring Baptist Church*, 110 Ga. 816 (36 S.E. 221); *Wilkins v. Wardens etc.*, 52 Ga. 351. [HN2] As to third persons, all the members of a partnership are liable, not only to the extent of their interest in the partnership [***6] property, but also to the

16 Ga. App. 91, *93; 84 S.E. 606, **607;
1915 Ga. App. LEXIS 504, ***6

whole extent of their separate property. Civil Code, [*94] § 3156. "A person who assumes to act as agent for a non-existing or legally incompetent or irresponsible principal renders himself personally liable to the person with whom he deals, unless it is expressly understood either that the agent shall not be held, and the contractee with knowledge of the facts extends credit to the supposed principal, or that the agent's liability shall be limited to a fund held by him for the purpose of his agency." 31 Cyc. 1548, 1549. "Unincorporated associations, clubs, and committees, are generally held to be such irresponsible principals that persons attempting to contract for them as agents render themselves personally liable." *Comfort v. Graham*, 87 Iowa, 295 (54 N. W. 242); *Thistle v. Jones*, 45 Misc. 215 (92 N. Y. Supp. 113). One who assumes to act as agent impliedly warrants his authority; but if there is no principal, then the agent can not have authority, and therefore he should be held liable for the breach of his implied warranty. *Bartholomae v. Kaufman*, 16 N. Y. Weekly Dig. 127.

[HN3] An exception to the refusal to grant a nonsuit will not be considered [***7] where a verdict for the plaintiff is complained of in a motion for a new trial as not supported by the evidence. In such a case this court will review the sufficiency of the evidence as a whole, in the light of the verdict given or directed, and will not merely consider the sufficiency of the plaintiff's case to withstand the motion for a nonsuit at the particular stage at which the nonsuit was made. *Atlantic Coast Line R. Co. v. Blalock*, 8 Ga. App. 44 (2), 47 (68 S.E. 743).

The plaintiff in error being practically in charge of this so-called "Cosmopolitan Club," and having testified during the trial that he was treasurer and steward of the club, and that he ordered all the liquors in the account sued on, and that they were received at the club by his agent or employee, he was clearly liable for the same; and, the evidence demanding a verdict against him, it was not error for the court to direct the verdict.

Judgment affirmed.



SUTTON et al., Appellees, v. John JONDAHL et al., Appellants

No. 46662

Court of Appeals of Oklahoma, Division Two

1975 OK CIV APP 2; 532 P.2d 478; 1975 Okla. Civ. App. LEXIS 105

January 21, 1975

PRIOR HISTORY: [**1] Appeal from District Court, Kay County; Leslie D. Page, Trial Judge. Action by insurance company as subrogee against its insureds' tenant for fire damage to rental property allegedly due to tenant's negligence. Jury awarded damages to plaintiff. Defendant appeals.

DISPOSITION: Reversed and remanded.

COUNSEL: John W. Raley, Jr., Northcutt, Northcutt, Ellifrit, Raley & Gardner, Ponca City, for Appellees.

Lana Jeanne Tyree, Benefield, Shelton & Johnson, Oklahoma City, for Appellant John Jondahl.

JUDGES: Brightmire, J. wrote the opinion. Neptune, P.J., and Bacon, J., concur.

OPINION BY: BRIGHTMIRE

OPINION

[*479] Landlords' fire insurance carrier sued a tenant and his 10-year-old son (in the name of the property owners) to recover a \$2,382.57 fire loss. A jury returned a verdict favoring the insurance company against only the father. From a judgment on the verdict the father appeals claiming it resulted from some fatal judicial mistakes -- two instructional and one evidentiary. We agree and reverse for a new trial.

The pertinent background and operative facts include

these. Once upon a time the elder Jondahl rented from the Suttons a home for his family in Ponca City, Oklahoma. For Christmas [**2] 1968 he gave an inexpensive chemistry set to his 10-year-old son -- a co-defendant -- who performed experiments for about a year without mishap.

Then, on January 11, 1970, the budding scientist took an electric popcorn popper to his bedroom and while using it to heat some chemicals a flame suddenly flared upward igniting nearby curtains causing damage to the house in the amount of \$2,382.57.

Central Mutual Insurance Company which covered subject premises with fire insurance, paid the loss, and then, as subrogee, brought this suit against John Jondahl and his boy, alleging, in substance, that the father contributed to the cause of the fire by breaching a duty to prohibit his son from carrying on unsupervised chemical experiments in the bedroom.

[*480] Later, at the request of defendants, the court required Central to substitute itself for the Suttons since it paid the full loss and therefore the landlords were not real parties in interest.

Defendant first says the trial court committed an error of a fundamental nature by telling the jury in Instruction No. 9 -- ". . . Unless the Defendants prove to your satisfaction that they, or either of them, was not negligent, you should [**3] find in favor of Plaintiffs in the sum of \$2,382.57." This instruction, he argues, cast upon defendants the burden of proving their innocence --

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an especially egregious error when considered in light of the fact the jury was never advised that plaintiff had the burden of proving negligence on the part of each defendant. We agree. No other instruction mentions anything about who has the burden of proof in the case. The first one -- given at the beginning of the trial -- informed the jurors in a general way about their duties and certain elementary features of the proceedings irrelevant to the problem here.

The second instruction -- given along with ten others at the close of the evidence -- stated simply: "This is a civil action prosecuted by Central Mutual Insurance Company against John Jondahl and John Jondahl III. The Plaintiff alleges that a fire which occurred at 1713 Cedar Lane, Ponca City, Oklahoma, on January 11, 1970, was the result of the negligence of the Defendants. More specifically the Plaintiff alleges that John, III, improperly conducted his chemistry experiment and that his father failed to exercise proper supervision. Plaintiff alleges that the negligence of both [**4] Defendants caused a fire resulting in damage in the amount of \$2,382.57. The Defendants have filed separate answers in which they deny negligence on their part."

Instruction No. 3 defined "ordinary care," suggested what "negligence imports," defined "actionable negligence" as consisting of three elements (duty, its breach, injury to the party suing "proximately" caused by the breach), repeated that negligence must be "the proximate cause of the injury and damage," and explained what proximate cause is.

The fourth charge discussed the meaning of the phrase "preponderance of the evidence."

Number five told the jury that if they found defendants "guilty of negligence, the fact that the owners of the property have been reimbursed by insurance for the resulting damages does not relieve the Defendants of their negligence." The impropriety of this instruction will become manifest later on.

The sixth instruction stated a separate standard of care for minors, while the seventh informed the jury that "a parent must exercise reasonable control and supervision over his minor child."

Charge number eight explained that the "original Plaintiffs," the Suttons, owned the property in question [**5] and that when the fire occurred it was occupied by

the Jondahls who as tenants had a duty not to negligently injure the property.

The ninth instruction begins as a "finding" one and before it ends takes on the character of *res ipsa loquitur*. In substance it advised that if the fire damage was caused by things solely under the control of "either" defendant, and such fire damage would not have occurred but for negligence on the part of "either" defendant, then a "presumption of negligence on the part of [both] Defendants has been established. Unless the Defendants prove to your satisfaction that they, or either of them, were not negligent, you should find in favor of the Plaintiffs in the sum of \$2,382.57."

The remaining three advise that the father alone can be found guilty, that the amount of damages is agreed to, and that it will take the concurrence of at least five jurors to return a verdict.

The assailed ninth instruction, we think, is fundamentally wrong and misleading in a way that even a consideration of instructions as a whole fails to cure. Its form [**481] and substance has the effect of making a "presumption of negligence" under the doctrine of *res ipsa loquitur* [**6] -- and a preliminarily conclusive one at that -- in that without placing any burden on plaintiff of proving anything it told the jury that if they found two predicatorial facts then the law presumes defendants were negligent on the basis of which plaintiff "should" have a verdict "unless the Defendants prove to your satisfaction that they, or either of them, was not negligent." ¹

1 The jury, incidentally, filed to follow this instruction in that they did not find the younger Jondahl negligent, yet returned a verdict for plaintiff against the older defendant.

In the first place the law does not do the presuming or inferring in connection with subject rule of evidence. All it does is permit the jury to infer or presume negligence from the mere happening of the accident under certain circumstances. *Lawton Coca-Cola Bottling Co. v. Shaughnessy*, 202 Okl. 610, 216 P.2d 579 (1950). Except for unusual circumstances the jury has discretion as to whether or not to make the inference. A jury's rejection of the [**7] inference can be due either to a failure of plaintiff to convincingly prove the premises or to persuade the jury that negligence is more probably the cause of the damage than otherwise. Or the jury may decline to make the inference if defendants are found to

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have proved by a fair preponderance of the evidence that they were not negligent.

Worth mentioning is a discussion of an instructional defect similar to the one we have here in *St. John's Hospital & School of Nursing v. Chapman, Okl., 434 P.2d 160 (1967)*. There, failure to confide inference-making rights in the jury was recognized but, unlike here, other instructions given were held sufficient to dispel the fallacious implication of prima facie conclusiveness of the permissive *res ipsa loquitur* inference.

We hold here the instructions improperly directed the jury to return a verdict for plaintiff unless it found defendants had borne the burden of proving themselves blameless or of presenting proof otherwise sufficient to exonerate themselves from a legal presumption of negligence. Failure of the trial court on its own motion to properly instruct the jury with regard to the fundamental issues and applicable law involved in the [**8] case is ground for a new trial. *McKee v. Neilson, Okl., 444 P.2d 194 (1968)*; *City of Altus v. Martin, 185 Okl. 446, 94 P.2d 1 (1939)*. The foregoing fundamental error, we think, was prejudicial to defendant and therefore warrants a new trial.

Defendant's remaining propositions we dispose of because the case is being remanded for further proceedings. One is that a *res ipsa loquitur* instruction was inappropriate because plaintiffs alleged only specific allegations of negligence. The same contention was rejected and the controversial subject laid to rest not long ago in *Creswell v. Temple Milling Co., Okl., 499 P.2d 421 (1972)*. Said the court: "The doctrine [of *res ipsa loquitur*] is a rule of evidence and not a rule of pleading . . . (The) allegation of specific acts of negligence only does not preclude reliance on the doctrine . . ."

Defendant's other proposition is that the verdict is not supported by evidence and is contrary to law. The argument is that the evidence fails to establish negligence on the part of the defending father pitched as it was on a failure to properly perform his duty to supervise his son whom the jury found innocent of negligence. While evidence bearing [**9] on the breach of such duty was indeed scarce we cannot say there was an absence. What we do say, however, is that there is no evidence to establish Central Mutual Insurance Company has been actionably damaged by such breach. The reason is that under the circumstances thus far disclosed by the record

here, the insurance company has no subrogational rights against the tenant of its policyholder.

The principle of subrogation was begotten of a union between equity and her [*482] beloved — the natural justice of placing the burden of bearing a loss where it *ought to be*. Being so sired this child of justice is without the form of a rigid rule of law. On the contrary it is a fluid concept depending upon the particular facts and circumstances of a given case for its applicability. To some facts subrogation will adhere — to others it will not. *Home Owners' Loan Corp. v. Parker, 181 Okl. 234, 73 P.2d 170 (1937)*.

Under the facts and circumstances in this record the subrogation should not be available to the insurance carrier because the law considers the tenant as a co-insured of the landlord absent an express agreement between them to the contrary, comparable to the permissive-user [**10] feature of automobile insurance. This principle is derived from a recognition of a relational reality, namely, that both landlord and tenant have an insurable interest in the rented premises — the former owns the fee and the latter has a possessory interest. Here the landlords (Suttons) purchased the fire insurance from Central Mutual Insurance Company to protect such interests in the property against loss from fire. This is not uncommon. And as a matter of sound business practice the premium paid had to be considered in establishing the rent rate on the rental unit. Such premium was chargeable against the rent as an overhead or operating expense. And of course it follows then that the tenant actually paid the premium as part of the monthly rental.

The landlords of course could have held out for an agreement that the tenant would furnish fire insurance on the premises. But they did not. They elected to themselves purchase the coverage. To suggest the fire insurance does not extend to the insurable interest of an occupying tenant is to ignore the realities of urban apartment and single-family dwelling renting. Prospective tenants ordinarily rely upon the owner of the dwelling [**11] to provide fire protection for the realty (as distinguished from personal property) absent an express agreement otherwise. Certainly it would not likely occur to a reasonably prudent tenant that the premises were without fire insurance protection or if there was such protection it did not inure to his benefit and that he would need to take out another fire policy to

1975 OK CIV APP 2; 532 P.2d 478, *482;
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protect himself from any loss during his occupancy. Perhaps this comes about because the companies themselves have accepted coverage of a tenant as a natural thing. Otherwise their insurance salesmen would have long ago made such need a matter of common knowledge by promoting the sale to tenants of a second fire insurance policy to cover the real estate.

Basic equity and fundamental justice upon which the equitable doctrine of subrogation is established requires that when fire insurance is provided for a dwelling it protects the insurable interests of all joint owners including the possessory interests of a tenant absent an express agreement by the latter to the contrary. The company affording such coverage should not be allowed to shift a fire loss to an occupying tenant even if the latter negligently caused it. *New [**12] Hampshire Ins. Co. v. Ballard Wade, Inc., 17 Utah 2d 86, 404 P.2d 674 (1965)*. A parallel effect was reached in *Hardware Mut. Ins. Co.*

v. Dunwoody, 194 F.2d 666 (9th Cir. 1952). For to conclude otherwise is to shift the insurable risk assumed by the insurance company from it to the tenant -- a party occupying a substantially different position from that of a fire-causing third party not in privity with the insured landlord.

Failure of either the pleadings or the evidence to show the landlords' insurance carrier possesses a right of subrogation against the Jondahls furnishes another reason why it was fundamental error to instruct the jury that they should return a verdict for the insurance company unless "defendants prove . . . they . . . [were] not negligent."

The judgment below is therefore reversed and the cause remanded for a new trial.

NEPTUNE, P.J., and BACON, J., concur.



United Fire & Casualty Company, Appellant, v. Jerry Bruggeman and Carla Bruggeman, d/b/a Junction Gifts and Craft Supply, Respondents, AND Employers Mutual Casualty Co., Plaintiff, v. Jerry Bruggeman and Carla Bruggeman, d/b/a Junction Gifts and Craft Supply, Respondents.

C3-93-333

COURT OF APPEALS OF MINNESOTA

505 N.W.2d 87; 1993 Minn. App. LEXIS 884

August 31, 1993, Filed

SUBSEQUENT HISTORY: Petition for Review Filed September 17, 1993. Petition for Review Denied October 19, 1993, Reported at: 1993 Minn. LEXIS 721.

PRIOR HISTORY: [**1] Appeal from District Court, Sherburne County; District Court File No. C9-91-1629. Hon. Robert B. Danforth, Judge.

DISPOSITION: Affirmed.

COUNSEL: For United Fire & Casualty Company, Appellant: Gordon H. Hansmeier, Michael C. Rajkowski, Donohue Rajkowski Ltd., St. Cloud, MN.

For Jerry Bruggeman and Carla Bruggeman, d/b/a Junction Gifts and Craft Supply, Respondents: Lee F. Haskell, Thomas F. Ascher, Cosgrove, Flynn, Gaskins & O'Connor, Minneapolis, MN.

JUDGES: Considered and decided by Forsberg, Presiding Judge, Huspeni, Judge, and Schultz, Judge. *

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

OPINION BY: THOMAS G. FORSBERG

OPINION

[*88] OPINION

FORSBERG, Judge

A landlord's insurer brought a subrogation action against negligent tenants who caused fire damages. The trial court determined the tenants were co-insureds under the policy and therefore not amenable to suit. We affirm.

FACTS

Respondents Jerry and Carla Bruggeman rented space from the Jedneak Brothers Properties in July 1990. There was no written lease or [**2] contract between the parties, and no independent arrangement for provision of insurance coverage was discussed. On August 6, 1990, a fire destroyed the property. The Jedneak Brothers were paid \$ 81,275 by their insurer, appellant United Fire & Casualty Company (United).

United claimed the fire was negligently caused by the Bruggemans, and commenced this subrogation action. Trial was bifurcated, with a jury determining negligence and damages, and the court determining the legal issue of whether a subrogation action may be maintained. The jury found the Bruggemans were negligent and assigned damages in the amount of \$ 37,775. Despite these factual findings prerequisite to a subrogation action, the trial

court denied recovery by finding the Bruggemans were co-insureds under the fire policy. United's motion for a new trial was denied, and judgment was entered. United appeals, claiming the trial court erred in finding the Bruggemans were co-insureds.

ISSUE

Did the trial court err in finding the tenants co-insureds under their landlord's fire insurance policy, and therefore not amenable to a subrogation action?

ANALYSIS

United claims the trial court erred in determining the Bruggemans [**3] were co-insureds under its policy covering the Jedneak Brothers' property. This is a case of first impression in Minnesota, but the issue has been considered extensively by a number of other jurisdictions, where there is a clear split in the holdings. We believe the greater wisdom is in the majority position.

The first and leading case to state the majority position is *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975). As in this case, a [*89] jury found a tenant had negligently caused a fire. Likewise, as here, there was no expressed agreement between landlord and tenant covering provision of fire insurance. The *Sutton* court determined subrogation was not available to the landlord's insurer. *Id.* at 482.

The *Sutton* court recognized the landlord and the tenant were co-insureds because each had an insurable interest in the property—the landlord a fee interest and the tenant a possessory interest. In *Sutton*, as here, the party with the fee interest purchased fire insurance,

and as a matter of sound business practice the premium paid had to be considered in establishing the rent rate on the rental unit. Such premium [**4] was chargeable against the rent as an overhead or operating expense. And of course it follows then that the tenant actually paid the premium as part of the monthly rental.

Id. This sharing of proprietary interests and the expenses associated with protecting them gives rise to the co-insured relationship.

We believe this is the most efficient way to allocate

insurance costs. This is especially true when considering the reality of today's multi-unit rental market. If, as United contends, each tenant is responsible for all damages arising from its negligence in causing a fire and if each tenant was therefore responsible for its own fire insurance, the same property would be insured many times over. While this may provide insurance companies a welcome windfall, it would be contrary to economic logic and common sense.

The minority position on the subject is well illustrated by the case of *Neubauer v. Hostetter*, 485 N.W.2d 87 (Ia. 1992). The *Neubauer* court took a close look at the authority on this question and allowed the subrogation action because "it satisfies equitable concerns by placing the burden of the loss where it ought to be—on the [**5] negligent party." *Id.* at 89 (quoting *Fire Ins. Exch. v. Geekie*, 534 N.E.2d 1061, 1062 (Ill. App. 1989)).

This minority position disregards the majority position's reasoning that a co-insured relationship is established because the tenant indirectly pays the insurance premiums. When payment of rent is understood to include insurance premiums, as we believe it does, the minority position fails because insurance is purchased to hold the insured harmless from its negligence. The parties' status as co-insureds renders nugatory the issue of the relative negligence of the separate interest holders.

Also, we are not convinced by the minority position's concern that establishing the co-insured relationship for purposes of subrogation interferes with an insurer's ability to limit its risk.

The insurer has a right to choose whom it will insure and it did not choose to insure the lessees, and under [*Sutton*] the lessee could have sued the insurer for loss due to damage to the realty, e.g. loss of use if policy provides such coverage. Cases following *Sutton*, however, have at least impliedly restricted the co-insurance relationship [**6] to one limited solely to the purpose of prohibiting subrogation.

Id., 485 N.W.2d at 89 (quoting 6A J. Appleman, *Insurance Law and Practice* § 4055, at 94 n.86.01 (1991 Supp.)).

The insurer knows the risk it is undertaking when

insuring a rental property. It insures the building for the use for which it is intended. While it may not have control over who the individual tenants are, it can increase its premiums to reflect increased risks presented by changing tenant use. Likewise, it can require the landlord to undertake any number of safety and structural precautions. We believe the landlord is the party in the best position to assume such responsibilities, and we reject the minority position on this issue.

Finally, we find no problem with limiting the co-insured relationship to the subrogation context. Landlord and tenant have separate insurable risks for loss of use in the event of a fire. The landlord's risk is directly related to the insured structure, that is, loss of rents. The tenant's loss of use involves the activity carried on within the structure. The tenant's loss arises from the use, not the structure. The shared insurable interests [**7] between landlord and tenant are limited to the structure, which is the subject of the fire policy. Risks [*90] such as loss of

use are therefore properly dealt with in separate insurance contracts.

United also claims several evidentiary errors led to an insufficient award of damages. Since we affirm the trial court's dismissal of the subrogation action, we need not reach this issue.

DECISION

The Bruggemans were co-insureds under the Jedneak Brothers' fire insurance policy, and therefore are not subject to subrogation by United. The judgment of the trial court is affirmed.

Affirmed.

Thomas G. Forsberg

August 25, 1993

Appendix H

Fletcher Encyclopedia of the Law of Corporations
Current through February 2011 Update

William Meade Fletcher

Chapter

40. ULTRA VIRES

I. GENERAL CONSIDERATIONS

A. DEFINITION

§ 3399. Use of the term "ultra vires"

West's Key Number Digest

West's Key Number Digest, Corporations ↪385

There is possibly no term in the whole law used as loosely and with so little regard to its strict meaning as the term "ultra vires." Unfortunately, this expression has often been used by the courts and by writers on corporation law as meaning several different things, and this has resulted in much confusion. Therefore, when the expression is used in the decision of a court, in order to interpret the decision correctly, it is necessary to ascertain the sense in which it is used by construing it with reference to the facts of the particular case. A corporation may exercise only those powers that are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant to the laws or charter; acts beyond the scope of the power granted are ultra vires.[1] An ultra vires act or contract, as the term is used in this chapter and according to the strict construction of the term, is one not within the express or implied powers of the corporation as fixed by its charter, the statutes, or the common law.[2] Contracts that are ultra vires are wholly void and not merely voidable;[2.50] the corporation is under a perpetual disability to make them.[3] The term ultra vires includes not only contracts entirely without the scope and purpose of the charter privileges and not pertaining to the objects for which the corporation was chartered, but also contracts beyond the limitations of the powers conferred by the charter although within the purposes contemplated by the articles of incorporation.[4]

Today, statutory provisions exist that have abolished or severely limited the doctrine of ultra vires.[5]

[FN1]

Alaska

Asinuk Corp. v. Lower Yukon School District, 214 P3d 259 (Alaska 2009).

California

Sammis v. Stafford, 48 Cal App 4th 1935, 56 Cal Rptr 2d 589 (1996).

Mississippi

Keene v. Brookhaven Academy, Inc., 28 So 3d 1285 (Miss 2010). For an expanded analysis of this case, see , 28-4 Fletcher Corp Law Adviser Article V.

North Carolina

Springer Eubank Co. v. Four County Elec. Membership Corp., 543 SE2d 197 (NC App 2001).

South Carolina

Seabrook Island Property Owners Ass'n v. Pelzer, 292 SC 343, 356 SE2d 411 (SC App 1987).

Virginia

Princess Anne Hills Civic League, Inc. v. Susan Constant Real Estate Trust, 243 Va 53, 413 SE2d 599 (1992) (not complying with statutory provisions not ultra vires).

Washington

Hartstene Pointe Maintenance Ass'n v. Diehl, 95 Wash App 339, 979 P2d 854 (1999).

Wyoming

Jewish Community Association of Casper v. Community First National Bank, 6 P3d 1264 (Wyo 2000).

[FN2]

United States

Federal Deposit Ins. Corp. v. Benson, 867 F Supp 512 (SD Tex 1994) (applying Texas law); American Fidelity Fire Ins. Co. v. Construcciones Werl, Inc., 407 F Supp 164 (D VI); Blue River Co. v. Summit County Development Corp., 207 F Supp 283, citing this treatise; Halpern v. Pennsylvania R. Co., 189 F Supp 494, citing this treatise.

Alaska

Asinuk Corp. v. Lower Yukon School District, 214 P3d 259 (Alaska 2009).

Alabama

Alabama City, G.&A.R. Co. v. Kyle, 202 Ala 552, 81 So 54; Buck Creek Lumber Co. v. Nelson, 188 Ala 243, 66 So 476.

California

In its true sense the phrase ultra vires describes action which is beyond the purpose or power of the corporation. McDermott v. Bear Film Co., 219 Cal App 2d 60733 Cal Rptr 486, citing this treatise.

Connecticut

Isaiah 61:1, Inc. v. City of Bridgeport, 851 A2d 277 (Conn 2004) (nonprofit corporation's provision of housing to inmates not ultra vires).

Florida

Knowles v. Magic City Grocery, 144 Fla 78, 197 So 843; Orlando Orange Groves Co. v. Hale, 107 Fla 304, 144 So 674; Randall v. Mickle, 103 Fla 1229, 138 So 14, 141 So 317.

Georgia

Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co., 12 Ga App 818, 79 SE 45.

Illinois

People v. Wiersema State Bank, 361 Ill 75, 197 NE 537; O'Connell v. Chicago Park Dist., 305 Ill App 294, 27 NE2d 603; Bradbury v. Waukegan & W. Mining & Smelting Co., 113 Ill App 600.

Iowa

State v. Corning State Sav. Bank, 136 Iowa 79, 113 NW 500.

Kentucky

Wilson v. Louisville Trust Co., 242 Ky 432, 46 SW2d 767.

Maryland

Pennsylvania R. Co. v. Minis, 120 Md 461, 87 A 1062; Greenbelt Homes, Inc. v. Nyman Realty, Inc., 48 Md App 42, 426 A2d 867, quoting this treatise.

Bad judgment in making a contract for an extended period and at a price proving disadvantageous, does not make a contract ultra vires. Eastern Rolling Mill Co. v. Michlovitz, 157 Md 51, 145 A 378.

Minnesota

Onvoy, Inc. v. Shal, LLC, 669 NW2d 344 (Minn 2003), citing this treatise.

Articles of incorporation, together with statutes applicable at the time of incorporation, constitute a contract between the stockholders, and acts in excess of powers thereby conferred are ultra vires. West Duluth Land Co. v. Northwestern Textile Co., 176 Minn 588, 224 NW 245.

Mississippi

Keene v. Brookhaven Academy, Inc., 28 So 3d 1285 (Miss 2010). For an expanded analysis of this case, see 28-4 Fletcher Corp Law Adviser Article V.

Missouri

St. Charles County v. A Joint Board or Commission, 184 SW3d 161 (Mo App 2006); McWilliams v. Central States Life Ins. Co., 137 SW2d 641 (Mo App); State v. Cook, 234 Mo App 898, 136 SW2d 142; Bolin v. Sovereign Camp, W.O.W., 112 SW2d 582 (Mo App).

Nebraska

Fremont Nat. Bank v. Ferguson & Co., 127 Neb 307, 255 NW 39; Jeffrey Lake Dev., Inc. v. Central Nebraska Public Power & Irrigation Dist., 5 Neb App 974, 568 NW2d 585 (1997).

Nevada

Shoen v. SAC Holding Corp., 137 P3d 1171 (Nev 2006).

New Jersey

Helfman v. American Light & Traction Co., 121 NJ Eq 1, 187 A 540; Foster v. Washington Nat. Ins. Co., 118 NJL 228, 192 A 59.

New Mexico

Jennings v. Ruidoso Racing Ass'n, 79 NM 144, 441 P2d 42, citing this treatise.

North Carolina

Brinson v. Mill Supply Co., Inc., 219 NC 498, 14 SE2d 505; Lee v. Wake County, 598 SE2d 427 (NC App 2004).

North Dakota

Tourtlot v. Whithed, 9 ND 407, 84 NW 8.

Ohio

Murrell v. Elder-Beerman Stores Corp., 16 Ohio Misc 1, 239 NE2d 248.

Oklahoma

Schultz v. Morgan Sash & Door Co., 344 P2d 253 (Okla); State v. Benevolent Investment & Relief Ass'n, 107 Okla 228, 232 P 35; Crowder State Bank v. Aetna Powder Co., 41 Okla 394, 138 P 392.

Ultra vires acts of corporations are not necessarily unlawful or such as a corporation cannot perform, but are merely acts which are not within powers conferred upon the corporation by acts of its creation. Alfalfa Elec. Cooperative, Inc. v. First Nat. Bank & Trust Co. of Oklahoma City, 525 P2d 644 (Okla).

Pennsylvania

Beaver Dam Outdoors Club v. Hazleton City Authority, 944 A2d 97 (Pa Cmwlth 2008) (allegedly ultra vires act of unincorporated organization); Mitchell's Bar & Restaurant, Inc. v. Allegheny County, 924 A2d 730 (Pa Comwlth 2007) (ultra vires ordinance); Rising Sun Entertainment, Inc. v. Commonwealth, 829 A2d 1214 (Pa Commw 2003) (ultra vires act).

Texas

Religious Films, Inc. v. Potts, 197 SW2d 592 (Tex Civ App); Malone v. Republic Nat. Bank & Trust Co., 70 SW2d 809 (Tex Civ App); Desdemona State Bank & Trust Co. v. Streeby, 250 SW 286 (Tex Civ App).

Under Texas law, ultra vires acts are acts beyond the scope of the powers of a corporation as designated by its charter or the laws of the state of incorporation. Federal Deposit Ins. Corp. v. Benson, 867 F Supp 512 (SD Tex 1994).

Washington

Twisp Mining & Smelting Co. v. Chelan Min. Co., 16 Wash 2d 264, 133 P2d 300.

[FN2.50]

Missouri

St. Charles County v. A Joint Board or Commission, 184 SW3d 161 (Mo App 2006).

[FN3]

Tennessee

Denver Area Meat Cutters and Employers Pension Plan ex rel Clayton Homes, Inc. v. Clayton, 120 SW3d 841 (Tenn App 2003) (void acts are those that the corporation has no authority to undertake).

Vermont

Vermont Dept. of Public Service v. Massachusetts Municipal Wholesale Elec. Co., 151 Vt 73, 558 A2d

215 (1988).

Virginia

Princess Anne Hills Civic League, Inc. v. Susan Constant Real Estate Trust, 243 Va 53, 413 SE2d 599 (1992) (not complying with statutory provisions not ultra vires).

[FN4]

Illinois

People v. Bank of Peoria, 295 Ill App 543, 15 NE2d 333.

Kentucky

American Southern Nat. Bank v. Smith, 170 Ky 512, 186 SW 482.

Corporate charter, see ch 42; articles of incorporation, see §§ 135 et seq.

[FN5] Statutory provisions limiting doctrine of ultra vires, see §§ 3439 et seq.

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Chapter

50. BYLAWS

V. GENERAL REQUISITES OF VALIDITY OF BYLAWS

§ 4190. Consonance with charter

West's Key Number Digest

West's Key Number Digest, Corporations ↪53, 54, 57

To be valid, bylaws must be consistent with the terms and spirit of the charter of the corporation—the word charter being used here in its broadest sense without regard to whether the statutory right to be a corporation is obtained by special act or under general statutes.[1] A bylaw that is not consistent with the charter but is in conflict with and repugnant to it is void.[2]

A bylaw can neither enlarge the rights and powers conferred by the charter nor restrict the duties and liabilities imposed by it. Where a bylaw attempts to do so, the charter will prevail,[3] even though the bylaw may be in accord with statutory law.[4] Where bylaws conflict with the articles of incorporation, the articles of incorporation control and the bylaws in conflict are void.[5] Furthermore, as a general rule, when the applicable statute commands that a provision governing shareholder rights be set out in the certificate of incorporation but the provision is not so set out, a bylaw purporting to regulate shareholder rights is void.[6] It seems, however, that bylaws may explain the corporate powers or purposes.[7] The silence of the charter on a particular subject may imply a limitation concerning such subject that cannot be violated by inconsistent bylaws.[8]

A bylaw prohibiting acts that are within the powers conferred, expressly or impliedly, by a corporation's charter affects the authority of its officers but does not render their acts in violation of the bylaw *ultra vires*. [9] Bylaws of a corporation are not enforced by avoiding contracts made in violation of them.[10]

A corporation cannot, by bylaw, fundamentally change the character fixed upon it by charter,[11] since bylaws must be consistent with the nature, purposes and objects of the corporation.[12]

Whether a bylaw is in conflict with and repugnant to the charter is a question of law for the court.[13] The rules requiring originally adopted bylaws to be in consonance with the corporation's charter apply equally to amendments and new bylaws.[14]

[FNI]

Delaware

Centaur Partners v. National Intergroup, Inc., 582 A2d 923 (Del 1990); *Kurz v. Holbrook*, 989 A2d 140 (Del Ch 2010); *Paolino v. Mace Security International, Inc.*, 985 A2d 392 (Del Ch 2009).

Missouri

Boatmen's First Nat. Bank of West Plains v. Southern Missouri Dist. Council of the Assemblies of God, 806 SW2d 706 (Mo App 1991).

[FN2]

United States

Bullard v. National Eagle Bank, 18 Wall 589, 21 L Ed 923; *First Nat. Bank of South Bend v. Lanier*, 11 Wall 369, 20 L Ed 172; *Peck v. Elliott*, 79 F 10, revg *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 F 957; *Associated Grocers of Alabama v. Willingham*, 77 F Supp 990, citing this treatise.

Alabama

Supreme Commandery Knights of Golden Rule v. Ainsworth, 71 Ala 436.

Arkansas

Ray Townsend Farms, Inc. v. Smith, 91 Ark App 22, 207 SW3d 557 (2005), citing this treatise.

California

People's Home Sav. Bank v. Superior Court City & County of San Francisco, 104 Cal 649, 38 P 452; *Brewster v. Hartley*, 37 Cal 15; *Olincy v. Merle Norman Cosmetics, Inc.*, 200 Cal App 2d 260, 19 Cal Rptr 387 (bylaws must be consistent with charter).

Delaware

Centaur Partners v. National Intergroup, Inc., 582 A2d 923 (Del 1990) (corporate charter requiring 80% to amend bylaws); *Kurz v. Holbrook*, 989 A2d 140 (Del Ch 2010); *Paolino v. Mace Security International, Inc.*, 985 A2d 392 (Del Ch 2009); *Prickett v. American Steel & Pump Corp.*, 253 A2d 86 (Del Ch); *Essential Enterprises Corp. v. Automatic Steel Products, Inc.*, 159 A2d 288 (Del Ch); *Brooks v. State*, 26 Del 1, 79 A 790; *Gow v. Consolidated Coppermines Corp.*, 19 Del Ch 172, 165 A 136.

A bylaw in conflict with the certificate of incorporation is a nullity. *Burr v. Burr Corp.*, 291 A2d 409 (Del Ch).

Illinois

King v. International Bldg., Loan & Investment Union, 170 Ill 135, 48 NE 677; *People v. Chicago Live Stock Exchange*, 170 Ill 556, 570, 48 NE 1062; *Durkee v. People*, 155 Ill 354, 40 NE 626.

Indiana

Presbyterian Mut. Assur. Fund v. Allen, 106 Ind 593, 7 NE 317; *McCallister v. Shannondale Coop. Tel. Co.*, 47 Ind App 517, 94 NE 910; *State v. Anderson*, 31 Ind App 34, 67 NE 207.

Maryland

Mutual Fire Ins. Co. v. Farquhar, 86 Md 668, 39 A 527.

Massachusetts

Supreme Council v. Perry, 140 Mass 580, 5 NE 634.

Michigan

Detroit Osteopathic Hospital v. Johnson, 290 Mich 283, 287 NW 466 (bylaws of nonprofit hospital organization).

Bylaw of nonprofit hospital corporation, adopted by incorporators, which gave power to amend, add to, or repeal bylaws to board of trustees, and which did not violate any statutory provision at time of its adoption or contravene articles of association, bound those who affiliated with corporation subsequent to its organization unless it transgressed public policy. Detroit Osteopathic Hospital v. Johnson, 290 Mich 283, 287 NW 466.

Minnesota

Lafayette Club v. Wright, 199 Minn 356, 271 NW 702 (failure of bylaw to comply with charter provisions); Kolff v. St. Paul Fuel Exchange, 48 Minn 215, 50 NW 1036; Bergman v. St. Paul Mut. Bldg. Ass'n, 29 Minn 275, 13 NW 120.

Mississippi

Dixie Elec. Power Ass'n v. Hosey, 208 So 2d 751 (Miss).

Missouri

Kahn v. Bank of St. Joseph, 70 Mo 262, 269; Boatmen's First Nat. Bank of West Plains v. Southern Missouri Dist. Council of the Assemblies of God, 806 SW2d 706 (Mo App 1991); Missouri State Teachers Ass'n v. St. Louis Suburban Teachers Ass'n, 622 SW2d 745 (Mo App 1981); State v. Seehorn, 227 Mo App 666, 55 SW2d 714; Kretzer v. Cole Bros. Lightning Rod Co., 193 Mo App 99, 181 SW 1066; O'Brien v. Cummings, 13 Mo App 197.

Nevada

State v. Curtis, 9 Nev 325.

New Hampshire

Great Falls Mut. Fire Ins. Co. v. Harvey, 45 NH 292.

New Jersey

In re United Towns Building & Loan Ass'n, 79 NJL 31, 74 A 310; State v. Overton, 24 NJL 435; Taylor v. Griswold, 14 NJL 222; Kearney v. Andrews, 10 NJ Eq 70.

New York

Conklin v. Second Nat. Bank of Oswego, 45 NY 655; Christal v. Petry, 275 AD 550, 90 NYS2d 620; Parish v. New York Produce Exchange, 60 AD 11, 69 NYS 764; Lasker v. Moreida, 38 Misc 2d 348, 238 NYS2d 16; National League Commission Merchants of United States v. Hornung, 72 Misc 181, 129 NYS 437; Stein v. Marks, 44 Misc 140, 89 NYS 921.

Though special statute creating corporation authorizes it to enact bylaws not contrary to provisions of incorporating act, corporation cannot, by enactment of bylaws, extend its purposes beyond those laid down in statute. Buffalo Ass'n of Fire Underwriters v. Noxsel-Dimick Co., 235 AD 92, 256 NYS 263, affd 260 NY 678, 184 NE 142.

North Carolina

Duffy v. Fidelity Mut. Life Ins. Co., 143 NC 697, 55 SE 1047, s.c. 142 NC 103, 55 SE 79.

Ohio

Nicholson v. Franklin Brewing Co., 82 Ohio St 94, 91 NE 991.

Oregon

State v. Ostrander, 212 Or 177, 318 P2d 284, quoting this treatise; Griffith v. Klamath Water Ass'n, 68 Or 402, 137 P 226; Sabre Farms, Inc. v. Jordan, 78 Or App 323, 717 P2d 156.

Pennsylvania

Pelzer v. Lewis, 440 Pa 58, 269 A2d 902 (bylaw of religious nonprofit corporation requiring two-thirds vote invalid as inconsistent with its charter); In re German General Beneficial Ass'n of Philadelphia, 30 Pa 155.

Rhode Island

Ireland v. Globe Milling & Reduction Co., 19 RI 180, 32 A 921.

South Carolina

Hancock v. National Council Junior Order United American Mechanics, 180 SC 518, 186 SE 538; St. Luke's Church v. Mathews, 4 Desaus Eq 578.

Tennessee

State v. Vanderbilt University, 129 Tenn 279, 164 SW 1151; Bailey v. Master Plumbers, 103 Tenn 99, 52 SW 853; Dwyer v. Progressive Building & Loan Ass'n, 20 Tenn App 16, 94 SW2d 725; Martin v. Nashville Bldg. Ass'n, 2 Cold 418; Herring v. Ruskin Co-op. Ass'n (Tenn Ch App), 52 SW 327.

Texas

Tempel v. Dodge, 89 Tex 69, 32 SW 514, 33 SW 222.

Washington

Howe v. Washington Land Yacht Harbor, Inc., 77 Wash 2d 73, 459 P2d 798 (bylaws of nonprofit corporation void as violative of statute and articles of incorporation).

[FN3]

United States

A bylaw may regulate the exercise of a corporate power, but it cannot enlarge or alter the powers conferred by the charter or by statute. Peck v. Elliott, 79 F 10, revg Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co., 72 F 957.

Alabama

Kelly v. Mobile Building & Loan Ass'n, 64 Ala 501.

Where articles of incorporation provided that management and control of corporation was in board of directors, bylaw provision granting management authority to president was void. Roach v. Bynum, 403 So 2d 187 (Ala).

It is not competent for the stockholders, by the adoption of bylaws ... to enlarge or extend the powers of the corporation beyond the scope authorized by its charter and the general laws. *Steiner v. Steiner Land & Lumber Co.*, 120 Ala 128, 26 So 494.

It has been held that a corporation organized for the purpose of a purely private business may adopt a bylaw at the time of its organization limiting the duration of its corporate existence. *Merchants' & Planters' Line v. Waganer*, 71 Ala 581.

Arkansas

Ray Townsend Farms, Inc. v. Smith, 91 Ark App 22, 207 SW3d 557 (2005), citing this treatise.

California

Brewster v. Hartley, 37 Cal 15.

Since a corporation only has those powers conferred upon it by its charter, and its powers cannot be added to or diminished by the consent of the shareholders, it necessarily follows that the powers of a corporation cannot be affected by its bylaws; that additional power cannot be conferred by a bylaw is clear, for to hold otherwise would allow a corporation to assume any powers it might see fit to exercise. *Brewster v. Hartley*, 37 Cal 15.

Delaware

Centaur Partners v. National Intergroup, Inc., 582 A2d 923 (Del 1990).

Indiana

State v. Anderson, 31 Ind App 34, 67 NE 207.

The articles of association of a corporation cannot be modified by bylaws as to any matters which the statute requires to be stated in the articles. *State v. Anderson*, 31 Ind App 34, 67 NE 207.

Maryland

Andrews v. Union Mut. Fire Ins. Co., 37 Me 256.

Massachusetts

Traders' & Mechanics' Ins. Co. v. Brown, 142 Mass 403, 8 NE 134; *Assessors of Boston v. World Wide Broadcasting Foundation of Massachusetts*, 317 Mass 598, 59 NE2d 188.

Michigan

Anderson v. Conductors' Protective Assur. Co., 266 Mich 471, 254 NW 171 (cooperative and mutual protective associations of railway conductors and engineers).

Missouri

Boatmen's First Nat. Bank of West Plains v. Southern Missouri Dist. Council of the Assemblies of God, 806 SW2d 706 (Mo App 1991).

New Hampshire

Union Mut. Fire Ins. Co. v. Keyser, 32 NH 313.

New Jersey

Mutual Ben. Life Ins. Co. v. Utter, 34 NJL 489.

New York

Parish v. New York Produce Exchange, 60 AD 11, 69 NYS 764.

Tennessee

Dwyer v. Progressive Building & Loan Ass'n, 20 Tenn App 16, 94 SW2d 725.

Texas

A corporation cannot by a bylaw vest the management of its business in an executive committee, when the charter or enabling act vests the management in the board of directors. Tempel v. Dodge, 89 Tex 68, 32 SW 514, 33 SW 222.

Canada

A bylaw which is repugnant to the powers of the corporation as prescribed by the legislative act of incorporation is void. Murphy v. Moncton Hospital, 35 DLR (Can) 327.

England

Guinness v. Land Corp. of Ireland, 22 Ch Div (Eng) 349.

[FN4]

Ohio

Where the charter of a benefit corporation limits the class of persons who may be named as beneficiaries to the member's family, the class cannot be enlarged by a bylaw to include heirs, even though the bylaw follows the statute under which the corporation was incorporated. Wegener v. Wegener, 101 Ohio St 22, 126 NE 892.

[FN5]

Arkansas

Ray Townsend Farms, Inc. v. Smith, 91 Ark App 22, 207 SW3d 557 (2005), citing this treatise.

Colorado

Harding v. Heritage Health Products Co., 98 P3d 945 (Colo App 2004); Paulek v. Isgar, 38 Colo App 29, 551 P2d 213, citing this treatise.

Illinois

Manufacturers' Exhibition Bldg. Co. v. Landay, 219 Ill 168, 76 NE 146.

Missouri

Boatmen's First Nat. Bank of West Plains v. Southern Missouri Dist. Council of the Assemblies of God, 806 SW2d 706 (Mo App 1991).

Nevada

Nevada Classified School Employees Ass'n v. Quaglia, 177 P3d 509 (Nev 2008).

New York

Nesbeda v. Edna McConnell Clark Foundation, 266 AD2d 72, 698 NYS2d 627 (1999).

Oregon

Sabre Farms, Inc. v. Jordan, 78 Or App 323, 717 P2d 156.

[FN6]

Alabama

Roach v. Bynum, 403 So 2d 187 (Ala) (and citations therein).

Arkansas

Ray Townsend Farms, Inc. v. Smith, 91 Ark App 22, 207 SW3d 557 (2005), citing this treatise.

[FN7]

New York

Corporation of Yaddo v. City of Saratoga Springs, 216 AD 1, 214 NYS 523.

[FN8]

Michigan

A bylaw prescribing a religious qualification for membership in a society, the articles of association of which are silent on the subject, cannot be sustained. People v. Young Men's Father Matthew T.A.B. Society, 41 Mich 67, 1 NW 931.

New York

Where the certificate of incorporation names directors to serve for the first year, and neither the charter nor the bylaws provides for their removal, an after-adopted bylaw providing for their removal is invalid as inconsistent with and an unauthorized limitation upon the charter. In re Automotive Manufacturers' Ass'n, 120 Misc 405, 199 NYS 313.

[FN9] Doctrine of ultra vires generally, see ch 40.

[FN10]

Alabama

Kelly v. Mobile Building & Loan Ass'n, 64 Ala 501.

Maryland

Tome v. Parkersburg Branch R. Co., 39 Md 36.

North Carolina

First Nat. Bank of Washington v. Eureka Lumber Co., 123 NC 24, 31 SE 348.

[FN11]

Georgia

Shiflett v. John W. Kelly & Co., 16 Ga App 91, 84 SE 606.

Montana

A corporation chartered as a stock company cannot be converted into one of a mutual character by a bylaw. *Canyon Creek Irr. Dist. v. Martin*, 52 Mont 335, 159 P 418.

[FN12]

Alabama

Steiner v. Steiner Land & Lumber Co., 120 Ala 128, 26 So 494; *Supreme Commandery Knights of Golden Rule v. Ainsworth*, 71 Ala 436.

California

Brewster v. Hartley, 37 Cal 15.

Illinois

People v. Chicago Live Stock Exchange, 170 Ill 556, 570, 48 NE 1062; *People v. Board of Trade of Chicago*, 45 Ill 112, 118.

Iowa

Van Atten v. Modern Brotherhood of America, 131 Iowa 232, 108 NW 313.

Maine

Andrews v. Union Mut. Fire Ins. Co., 37 Me 256.

Massachusetts

Traders' & Mechanics' Ins. Co. v. Brown, 142 Mass 403, 8 NE 134.

Michigan

A bylaw of a mutual insurance corporation, membership in which is limited to members of a specified lodge who are in good standing, which attempts to make void the policy of a member if delinquent in payment of dues to the lodge, is void for conflicting with the charter where the lodge does not deprive a member of good standing for mere delinquency in payment of dues. *Howe v. Patrons' Mut. Fire Ins. Co. of Michigan*, 216 Mich 560, 185 NW 864.

Minnesota

Where there is nothing in the articles of incorporation which suggests power in the corporation to control, regulate or interfere with its stockholders in the conduct of their separate, individual businesses, bylaws which assume to do this are beyond the scope of the corporate purposes and are void. *Kolff v. St. Paul Fuel Exchange*, 48 Minn 215, 50 NW 1036.

New Jersey

Mutual Benefit Life Ins. Co. v. Utter, 34 NJL 489; *Taylor v. Griswold*, 14 NJL 222.

New York

National League Commission Merchants of United States v. Hornung, 72 Misc 181, 129 NYS 437; *Stein v. Marks*, 44 Misc 140, 89 NYS 921; *Monroe Dairy Ass'n v. Webb*, 40 AD 49, 57 NYS 572 (bylaw of association, incorporated under manufacturing statute, imposing penalty on stockholder failing to furnish milk to association).

Oregon

A mutual corporation may amend its bylaws, or enact others not inconsistent with its purpose as an organization. *McConnell v. Owyhee Ditch Co.*, 132 Or 128, 283 P 755.

South Carolina

Palmetto Lodge No. 5, I.O.O.F. v. Hubbell, 2 Strob L 457, 49 Am Dec 604.

Texas

When the directors of a corporation are given the right to enact bylaws for the government of the concern, this is not to be construed as an unlimited power to make fundamental or radical changes in the conduct of the affairs of the corporation, but only such as will be in harmony with the powers they are supposed to exercise and the purposes sought to be accomplished. *Clark v. Brown*, 108 SW 421 (Tex Civ App).

Utah

Summit Range & Livestock Co. v. Rees, 1 Utah 2d 195, 265 P2d 381.

[FN13]

Idaho

Twin Lakes Village Property Ass'n, Inc. v. Crowley, 124 Idaho 132, 857 P2d 611 (1993).

New Jersey

Compton v. Van Volkenburgh, 34 NJL 134; *Morris & E.R. Co. v. Ayres*, 29 NJL 393, 395; *State v. Overton*, 24 NJL 435.

[FN14]

Nevada

Nevada Classified School Employees Ass'n v. Quaglia, 177 P3d 509 (Nev 2008).

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