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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____

DEPUTY

No. 47651-7-II

THE COURT OF APPEALS, DIVISION II

State of Washington

NORTH OAKES CONDOMINIUM ASSOCIATION,

PLAINTIFF

Vs.

HEATHER RANKOS AND GEORGE RANKOS,

DEFENDANTS

APPELLANT'S OPENING BRIEF

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Statutes Applicable:

RCW 64.34.308(8):

(8) Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a two-thirds vote of the voting power in the association present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the board of directors with or without cause, other than a member appointed by the declarant. The declarant may not remove any member of the board of directors elected by the unit owners. Prior to the termination of the period of declarant control, the unit owners, other than the declarant, may remove by a two-thirds vote, any director elected by the unit owners.

ASSIGNMENTS OF ERROR

The Superior Court erred in determining that there was adequate notice of a vote to remove directors of the condominium association's board.

The Superior Court erred in determining that the votes of five owners in an eight-unit condominium met the statutory two-thirds vote needed to remove a condominium association board member.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Is a vote to remove a condominium association's board members valid if there no notice to owners of the intent to vote on removing a director?
2. Is a condominium association's board member removed if only five owners vote to remove out of eight condominiums owned in total; does that meet the statutory 2/3 vote requirement?

STATEMENT OF THE CASE

STANDARD OF REVIEW

This is an appeal of a ruling by the trial court granting summary judgment. Such decisions are reviewed de novo. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

Summary judgment is appropriate only where "the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Jones, supra*, 146 Wn.2d at 300-01; CR 56(c).

IMPORTANT FACTS

What happened in this case is not genuinely disputed. What's disputed is the legal significance of what happened.

The case centers on an eight unit condominium. CP 96. The central question is whether board members can be properly removed by the affirmative vote of five unit owners.

A secondary question is whether a vote to remove a board member can properly be entertained at an annual owner's meeting, if there is no advance notice that disgruntled owners intend to vote on removal of a board member.

All of this is a question of statutory construction, and the applicable statutes are, frankly, not well-written. There are ten published cases and one unpublished case addressing aspects of the applicable statute, which is RCW 64.34.308(8). None of the cases addresses the questions presented here, and that's probably not unexpected as board members probably aren't often removed, and when that does happen, it almost certainly is accompanied by lots of notice and overwhelming approval. Moreover, it's understandably unlikely that board members who are the target of removal would appeal removal.

As is acknowledged by all sides, Jeff Graham and John Graham and Heather Rankos were elected to the board of the North Oakes Condominium Association in early 2014. CP 97 – 99.

The board manages an eight unit condominium in Tacoma's North End. CP 96.

At the time of his election, Mr. Graham controlled four units. One was owned by Barbara Webster, one by Sally Christensen, and one owned by George and Heather Rankos, and one owned by James and Judith Betournay.¹ When Jeff and John Graham were elected to the board, the Betournay Unit didn't vote, and consequently, the two Grahams were elected by a 4-3 vote; Ms. Rankos election to the board wasn't opposed. CP 97 – 99.

Once elected, the Grahams set about collecting unpaid dues from all the owners, and authorized the filing of a lawsuit to collect such unpaid dues. CP 99 (lines 13 – 16).

In August of 2015, one of the units previously controlled by Jeff Graham was foreclosed on by its mortgagor and at the Trustee's sale, Heather and George Rankos bought the unit, so they then owned two units. CP 101 (lines 3 – 6). Jeff Graham only controlled three.

The Rankos then crafted an alliance to alter the balance of voting power, and enlisted the support of the Betournays by offering to forgive dues they owed in exchange for a vote in favor of ousting the Grahams from board

¹ Technically, all but the Betournay unit was owned by an LLC. Each LLC was wholly owned by the parties identified here as owners for clarity. The Betournay unit was never transferred to an LLC.

membership. CP 100 -101. As a consequence, votes in favor of removing the Grahams were taken, and during the summer of 2014, those votes were 5-3 for removal because Mr. Graham continuing to own three units. CP 101.

RCW 64.34.308(8) plainly requires that a member of the board is removed by a 2/3 vote of the membership, and no one (even the Superior Court) thought that the statutory 2/3 requirement was met by a 5-3 vote.

On January 24, 2015, a vote was held again on the issue of removing Jeff and John Graham from the board. That vote was 5 in favor, *two* against. See Court order dated 4/17/2015; CP 170. (Technically, it was five in favor, no votes against. See n. 3 *infra*.)

A complete review of the clerk's papers will not really advise the court of why the vote changed from 5-3 to 5-2. However, the reason – which certainly no one disputes – is that on January 9, 2015, US Bank conducted a Trustee's sale respecting one of the three units controlled by Jeff Graham, bid in its debt, and US Bank became the owner of one of the three units formerly controlled by Jeff Graham (after the

Rankos bought their second unit).² US Bank didn't participate in any votes and at the January 24, 2015 meeting of owners, Jeff Graham could vote no more than two votes against removal. That's why the vote changed from 5-3 to 5-2 in favor of removal. (Again, see n. 3 *infra*. Technically, it was 5-0 for removal.)

The defendants characterize the situation in late January as follows:

1 There are eight units, but there are seven active "votes" because 1913-C is bank owned.
2
3 because 1913-C reverted to the lender at auction in January. Five votes are: George Rankos,
4 Heather Rankos, Sally Webster, Barbara Christensen and James Betournay. Five of seven is a
5 clear majority.
6
7 *Under the North Oakes Manor Condominium Association Declaration and RCW 6A 34 326*

CP 120. See also CP. 249-50.

The Superior Court ruled that this January 24, 2015 vote with five votes in favor of removal, met the statutory removal criteria.³ This timely appeal followed.

² Appellants advise the court of this because, while there is probably an absence of evidence to support the court's decision in the record, no purpose would be served by having everyone go back and recreate the record. Appellant concedes that by January 24, 2015 Jeff Graham owned only two units, and voting in favor of removal were a) two units owned by the Rankos, b) one unit owned by Sally Christenson, c) one unit owned by Barbara Webster, and d) one unit owned by the Betournays.

³ The minutes of the meeting are at CP 246-255. The votes in favor of removal are recorded. CP 249-50. Mr. Graham left before the vote, and his votes against

Also, at issue was the question of notice because the undisputed evidence was that the only agenda and notice ever circulated contained no notice that a vote on board membership would be entertained at the January, 24, 2015 owners meeting. CP 183-84.

LAW AND ARGUMENT

The trial court erred in determining that Jeff and John Graham were removed from the board of the Association in January of 2015 because there was no notice given to owners that such a vote was on the meeting agenda.

RCW 64.34.332 requires specifically that any proposal to remove a director be set forth in the annual meeting notice provided in advance to all the owners. Here, that wasn't done. CP 183-84.

It's not entirely clear what Jeff Graham might have done had notice been given, but at the least, he could have solicited a proxy from the bank or otherwise sought the bank's vote against removal.

Given his efforts to collect unpaid dues, it's doubtful that he could have persuaded other owners to support him,

weren't recorded (or cast) because a vote for removal was not on the meeting agenda. CP 184.

but that's not entirely out of the question. In all events, there is a failure to give the notice required by the statute and accordingly any vote to remove board members on January 24, 2015 was void.

The trial court erred in determining that 5 votes out of 8 met the statutory requirement for removing a member of the board of the Association.

The applicable statute is RCW 64.34.308(8), which provides as follows:

(8) Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a two-thirds vote of the voting power in the association present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the board of directors with or without cause, other than a member appointed by the declarant. The declarant may not remove any member of the board of directors elected by the unit owners. Prior to the termination of the period of declarant control, the unit owners, other than the declarant, may remove by a two-thirds vote, any director elected by the unit owners.

What's clear about the statute is that removal requires "a two-thirds vote of the voting power in the association." Very plainly, this is a super-majority provision, and like other statutory mandates involving super-majorities, it's designed to generally protect the status quo – it makes it harder, not easier to remove a board member.

There are very good reasons for that. Board members are often called upon to take positions that might be opposed by large groups – even by majorities of the membership. Board members have duties and responsibilities to the entire membership. See RCW 64.34.308(1). That means often standing up for minority members, sometimes even standing up for a minority of one when the majority wants to unreasonably impact an owner’s interest.

The removal statute requires require a supermajority of two-thirds “of the voting power in the association,” and it seems plain enough that the “voting power in the association” is the total of units owned, except that units owned by the Association are not entitled to vote. See RCW 64.34.340(4).

The super-majority of two-thirds pertains also, however, to those “present and entitled to vote at any meeting.” That’s the critical language.

The Superior Court agreed with defendants that an owner – like US Bank – who doesn’t show up at a meeting isn’t “present and entitled to vote” and so the two-thirds super-majority applies only to seven votes; it held that five out of seven met the two thirds requirement.

Certainly one way to read the statute is that removal happens when two thirds of those who show up at a meeting, by proxy or otherwise, vote to remove. But, an alternative reading is that the removal statute imposes a **requirement** that two-thirds of the entire voting power attend; that is, **be present** at the meeting, and vote for removal.

When a statute is ambiguous, courts resort to principles of statutory construction, legislative history, and relevant case law to assist in interpretation. *Yousoufian v. King County Executive*, 152 Wash.2d 421, 434, 98 P.3d 463 (2004) (citing *State v. Watson*, 146 Wash.2d 947, 955, 51 P.3d 66 (2002)). A statute is ambiguous if it can reasonably be interpreted more than one way. *Yousoufian*, 152 Wash.2d at 434, 98 P.3d 463 (quoting *Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd. for King County*, 127 Wash.2d 759, 771, 903 P.2d 953 (1995)).

Dictionary.com defines “present” (in part) as an adjective meaning: “being with one or others or in the specified or understood place: to be present at the wedding.”

Cambridge dictionaries online defines present (in part) as:

present *adjective* [not gradable] (PLACE)

 in a particular place:

The mayor was present during the entire meeting.

Generally speaking, an owner need not be “present” to vote. That’s so because RCW 64.34.340 allows for voting by proxy as a general rule. So, it’s typically possible for an owner to simply give authority to vote to another by handing over a proxy.

However, removing a sitting board member is an important activity. The most reasonable and plausible explanation for the requirement that ouster requires a supermajority of those “present and entitled to vote,” is to carve out a special rule – applicable to removal of directors – which varies the general rule allowing voting by proxy; a vote to remove board members requires an owner to be “present.”

A general rule of statutory construction is that specific rules are taken to be an exception to general rules. *In re North River Logging Co.*, 130 P.2d 64, 15 Wn.2d 204(1942), (citing to *In re Steelman*, 219 N.C. 306, 13 S.E.2d 544 (1941)). See also *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wash.2d 275, 309, 197 P.3d 1153 (2008) (“It is a fundamental rule

that where the general statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute.”)

Applying that rule to this case, *generally*, votes can be cast by proxy, but when there’s a vote to remove a board member, those interested in removal must actually be “present and entitled to vote.”

Functionally, what that means is that, instead of just having two-thirds of those who show up at a meeting approve removal, an owner trying to oust the board must actually get two-thirds of the owners to attend in person and vote to remove a board member. And, if the board member is truly bad, that shouldn’t be hard, but it isn’t likely to happen easy unless the board member is truly failing to fulfill his or her duties.

A second principle of statutory construction is that statutes are interpreted to give effect to all of the language and to render no portion meaningless or superfluous.

Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. P'ship, 156 Wash.2d 696, 699, 131 P.3d 905 (2006). Here, the Superior Court’s interpretation essentially reads out of

the statute the words “of the voting power in the association,” because according to the trial court’s analysis, it’s simply two-thirds of those who show up at a meeting, whether by proxy or otherwise, who count.

The “voting power in the association” here is plainly eight. But, the Superior Court determined that only two-thirds of *seven* votes was needed to remove board members.

Most importantly, a rule of statutory construction is that the court will not interpret statutes in a manner resulting in unlikely, absurd, or strained consequences." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash.2d 224, 239, 59 P.3d 655 (2002). A reading that produces absurd results must be avoided because " 'it will not be presumed that the legislature intended absurd results.' " *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003) (quoting *State v. Delgado*, 148 Wash.2d 723, 733, 63 P.3d 792 (2003) (Madsen, J., dissenting)).

As a general rule, and in the absence of bylaws specifying a larger percentage, a quorum is present at any meeting of the association if twenty-five percent of the owners show up. RCW 64.34.336. Thus, under the Superior

Court's analysis, all it would take to oust Jeff and John Graham would be two votes. Three members present would more than meet the quorum requirement, and then two out of three casting a vote to remove would meet the two-thirds requirement. And, yet, it seems unlikely that the legislature would put in a super-majority provision at all if, in an eight-unit condominium, only *two* votes are actually needed to oust a sitting board member.

It is pretty clearly absurd to interpret a super-majority provision in a way that allows fewer people to oust the board than voted to install the board.⁴

The trial court's interpretation puts the burden on a board member resisting removal to gather up more than a third of the owners to vote against removal at the meeting. In short, an ambiguous vote – such as the bank's absence – lowers the supermajority threshold. It means that owners who don't show up, are in fact voting to remove a board member. That seems like an irrational interpretation given the purpose of having a super-majority provision in the first place.

CONCLUSION

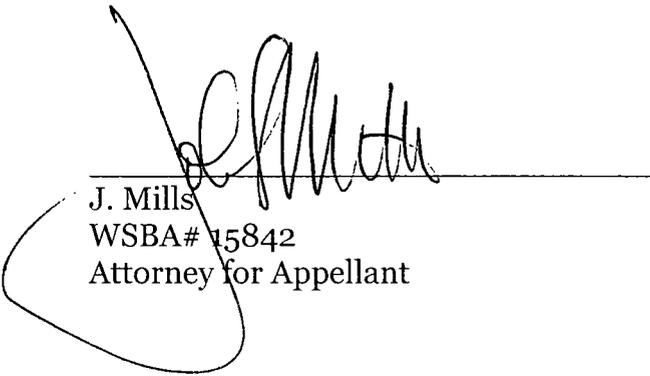
Because there was no notice to owners, as required by RCW 64.34.332, no valid vote to remove the board was had on January 24, 2015, and the Superior Court erred in finding that Jeff and John Graham were validly removed that day.

RCW 64.34.308(8) requires that a vote to remove be by “two-thirds of the voting power in the association present and entitled to vote.” That could be read to mean only two-thirds of those who show up can remove a board member, or it could mean that removal requires that two-thirds of the owners actually show up and be present and entitled to vote at the meeting where removal is proposed. Virtually all the rules of statutory construction support the latter interpretation and accordingly in an association with eight members, removal requires that at least six owners show up and vote to remove board members. Because only five voted for removal on January 24, 2015, the court erred in ruling that the requisite vote for removal was had.

⁴ And, if a vote can be had without notice to the owners which only requires 2/3 of a quorum, then plainly the “super-majority” is no real protection at all.

Accordingly, the ruling of the Superior Court should
reversed and the case remanded with instructions to grant
Mr. Graham's motion for summary judgment.

DATED this 29th day of September, 2015.

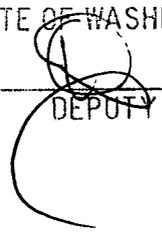


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STATE OF WASHINGTON

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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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7 NORTH OAKES MANOR,
8 Condominium Association,
Plaintiff,

9 Vs.

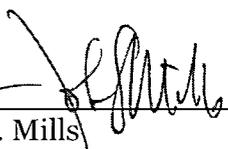
10 George and Heather Rankos,
11 Defendants.

NO. 47651-7-II

DECLARATION OF SERVICE OF
OPENING BRIEF

12
13
14 The undersigned declares under penalty of perjury of the State of Washington that I
15 delivered today a true copy of the plaintiff's opening brief along with a copy of this
16 declaration by 1) email to counsel for defendants, Ms. Powell and 2) by personal delivery to
17 her regular business address on Dock Street in Tacoma.
18

19 DATED this 30th day of September, 2015.

20
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25 *Service Declaration*
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