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RCW 64.34.308

Board of directors and officers.

...

(3) Within thirty days after adoption of any proposed budget for the condominium, the board of directors shall provide a summary of the budget to all the unit owners and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than fourteen nor more than sixty days after mailing of the summary. Unless at that meeting the owners of units to which a majority of the votes in the association are allocated or any larger percentage specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. In the event the proposed budget is rejected or the required

notice is not given, the periodic budget last ratified by the unit owners shall be continued until such time as the unit owners ratify a subsequent budget proposed by the board of directors.

...

(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.

[2011 c 189 § 2; 1992 c 220 § 15; 1989 c 43 § 3-103.]

Notice was insufficient to meet the statutory requirements.

At page 7 of North Oakes Manor Condominium Association's brief, it's asserted that: "But the policy of that statute [as to notice] appears fulfilled since the owners of seven of the eight condominium units were present, in person or by proxy, and voted at the January 24, 2015, meeting."

Actually, that's inaccurate. If, as is asserted by the Association, all that's required to remove a sitting board member is *2/3 of those who attend a meeting*, then notice to all the owners is critical. No one will ever know how the bank, which owned the eighth unit, might have voted January 24th, but at least in theory, had the bank been notified, attended, and voted against removal, the vote would have been 5 favoring removal, and 3 against – not sufficient to meet the 2/3 requirement.

The Association asserts, at page 6 that the Graham faction had notice of a vote to remove January 24th because at *prior* meetings efforts to remove them were made. True that efforts were made to remove the Grahams at prior meetings. But, that doesn't excuse notice of a removal effort

at the annual meeting. Indeed, the absence of notice about a removal vote would suggest that the effort to remove had been abandoned.

It's true that John Graham was the secretary; the Association argues at page 6 that he "failed in that responsibility [to provide notice of a removal vote]." As to that, the parties seeking removal would be the ones responsible for notifying everyone of that proposed action. And, there is no showing that John Graham was ever even asked to give notice of that proposed activity.

Frankly, what the evidence shows is that, by that January, both "the Rankos" faction and the "Graham faction" were asserting that they were the board. (This action was filed January 23rd, one day before the annual meeting.) Understandably, the "Rankos faction" didn't feel obligated to give notice of removal since they believed removal had *already* occurred.

Finally, as to notice, the Association asserts that the court should not consider issues of notice since that was not raised in the motion for summary judgment.

As to that, the entire procedure below is irregular. The Grahams (believing they were the board) filed a motion

and declaration for summary judgment on 3/20/2015. No cross motion for summary judgment was filed. There was a response filed by the Rankos faction on 4/6/2015, and a Reply filed 4/9/2015, but never any cross motion for affirmative relief.

Technically, what was before the court for decision on 4/17/2015 was the Graham motion for summary judgment which could have been denied or granted. But, what the court did was effectively grant a summary judgment in favor of “the Rankos” faction. That happened without actually giving “the Graham” faction fair time to respond because “the Rankos faction” never filed a motion for summary judgment.

It is not *improper* for the court to grant a summary judgment to either side when the facts and law are undisputed even if one side has not filed a motion seeking affirmative relief. See Impecoven v. Dep’t. of Revenue, 120 Wn.2d 357, 365, 841 P.2d 752 (1992); and Rubenser v. Felice, 58 Wn.2d. 862, 866, 365 P.2d 320 (1961).

Still, when the procedure is abbreviated by the trial court, some leniency in the timing of responding material needs to be granted. That concern is the subject of Justice

Wiggins' dissent in In re Estate of Toland, 180 Wn.2d 836, 854-55, 329 P.3d 878, (Wash. 2014) ("I disagree with the majority opinion because it grants summary judgment to a nonmoving party. Paul Toland, the party against whom the majority enters summary judgment, did not receive notice that the court was considering summary judgment against him. This absence of notice deprived him of the opportunity to demonstrate triable issues. Without knowing what facts would have existed if Paul had had the opportunity to respond, the majority enters summary judgment. The Washington State Court Rules do not authorize courts to grant summary judgment to nonmoving parties. The rules permit summary judgment if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." CR 56(c) (emphasis added).") The grant of a summary judgment in favor of non-moving parties is what happened in this case, and in that circumstance the courts ought to consider any pertinent material even if filed as a reconsideration.

See also RAP 1.2 "These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined

on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).” Deadlines in the nature of statutes of limitation and times for appeal are necessarily arbitrary, but for reasons of policy, strictly enforced. All other timeframes generally are subject to waiver and should be waived as required to allow for cases to be decided on their merits.

Ultimately, the cases cited by the Association at page 8-9 of its brief support the proposition that an appellate court *may* decline to address issues not raised below. No law *requires* the appellate court to reject issues that were raised late in the proceedings, particularly where the beneficiary of the decision below hasn’t followed the rules for setting up a summary judgment.

There are no reported decisions describing what exactly is required to remove a sitting member of the board of a condominium. The public at large would be well served by having some authoritative decision on the question of required notice, and no purpose is served by ignoring issues of notice that were brought to the trial court’s attention prior to a final decision.

Five votes is insufficient to remove a sitting member of the North Oakes Condominium Association board.

The Association asserts at page 4-5 that “present and entitled to vote” includes members present by proxy; the Association references RCW 64.34.336(1), which specifically identifies a quorum as being (absent a larger percentage called out in the bylaws) twenty-five percent of those “present in person or by proxy.” By analogy, the Association asserts that, since a quorum is calculated including proxies, then a vote to remove should allow for proxies.

But, the fact that RCW 64.34.336(1) expressly allows presence “by proxy” to calculate quorums, suggests that the absence of the words “by proxy” in the statute on removal of directors means something different.

More fundamentally, and whether voting is allowed by proxy or not, if all that’s needed is to remove a director is 2/3 of those who show up at the meeting “in person or by proxy,”

then the words “of the voting power in the association present” are rendered superfluous.¹

The Association’s argument is that the statute really means only this:

(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~~ [those] 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.

However, a well-settled principle of statutory construction is that “each word of a statute is to be accorded meaning.” State ex rel. Schillberg v. Barnett, 79 Wash.2d 578, 584, 488 P.2d

¹ The whole discussion of proxy voting is pertinent only to making sense of the phrase “present and entitled to vote.” If, what’s required is 2/3 of the voting power, then why doesn’t the statute read: “by a two-thirds vote of the voting power in the association ~~present and~~ entitled to vote at any meeting of the unit owners”? If, on the other hand, as the Association asserts, the statute only requires a 2/3 vote of those who decide to show up at the meeting, why doesn’t the statute say: “by a two-thirds vote of ~~the voting power in the association present and~~ [those] entitled to vote at any meeting of the unit owners”? It seems that the only way to assign meaning to *all* the words is to view the word “present” as not being a modifier of “total voting power,” but instead as indicating that the voters have to actually be present; that is it implies that proxy voting isn’t allowed, and there might be good reasons to insist on that. Be that as it may, the core dispute here is whether removal requires the vote of 2/3 of the *total voting power*, or 2/3 of those who *actually show up* at the meeting. Looked at differently, the dispute is about what to do about an *abstention* – someone that doesn’t show up at all? Is that counted as a vote to remove, or a vote to retain?

255 (1971). " '[T]he drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.' " In re Recall of Pearsall-Stipek, 141 Wash.2d 756, 767, 10 P.3d 1034 (2000) (quoting Greenwood v. Dep't of Motor Vehicles, 13 Wash.App. 624, 628, 536 P.2d 644 (1975)). "[W]e may not delete language from an unambiguous statute: "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." ' " State v. J.P., 149 Wash.2d 444, 450, 69 P.3d 318 (2003) (quoting Davis v. Dep't of Licensing, 137 Wash.2d 957, 963, 977 P.2d 554 (1999) (quoting Whatcom County v. City of Bellingham, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996))). If the appellate court assigns some meaning to the words "voting power in the association," then what's required to remove a director is something more than 2/3 of those who show up at a meeting.

At page 5, the Association references RCW 64.34.103 – the removal provision in the Nonprofit Corporation Act. That statute allows removal by a two-thirds vote of members "represented in person or by proxy at a meeting of members at which a quorum is present." Had the legislature used that

same language in the Condominium Act, obviously the appellant's interpretation would be just wrong. But, the language in the Condominium Act is *different* from the language in the Nonprofit Corporations Act; that difference in language implies a different meaning was intended. State v. Roth, 479 P.2d 55, 78 Wn.2d 711 (Wash. 1971) ("Where different language is used in the same connection in different parts of a statute, it is presumed that a different meaning was intended. 82 C.J.S. Statutes § 348 (1953).")

At page 5, the Association makes the rather remarkable claim that "it is inconceivable that bylaws would set a quorum as high as two-thirds." Not explained is why that's "inconceivable." It seems perfectly conceivable that some condominiums, particularly small ones, might set quorums as high as 3/4 of the membership.

Finally, at page 6 the Association argues that RCW 64.34.308(3) shows that the legislature "knew full well" how to specify a requirement for percentage of voting power allocated among the units. The statute cited is the provision which presumptively confirms a budget unless "a majority of votes in the association" reject the budget.

It's not quite clear what connection the Association is trying to draw. The statute on presumptive budget allocation doesn't specify whether one can reject the budget by proxy or whether one must come to the meeting "in person" to reject a budget. In that sense, it's as ambiguous as the statute on removal of directors.

Appellants agree that the legislature knows how to specify a percentage of the voting power. As to rejecting the budget, that percentage is 50%. As to removing a director, the percentage is 2/3. No one doubts that the legislature understands and knows how to specify the percentage of "voting power" needed to accomplish a task. What happened here, however, is that the trial court allowed 5 votes to remove a director when the law requires 2/3 "of the voting power" before a director is removed. Because there are 8 units in the condominium, 2/3 of "the voting power" is 6.²

According to the Superior Court, what's needed to remove a director is not 2/3 of the "voting power," but rather 2/3 of those who show up at the meeting to vote.

By that analysis, the rule on budget rejection for the North Oakes Condominium Association would allow a

² Technically, it's 5.33333, but it is more than 5.

rejection of the budget by only 3 members if just 4 showed at the annual meeting. By the Superior Court's analysis, it wouldn't take a majority of votes "*in the Association*" to reject a budget, but only a majority of the owners who show up at the hearing.

If this case were about rejecting a budget, appellants believe that, to give meaning to every word in the statute on budget rejection, a budget is approved *unless* 5 of the members vote affirmatively to reject it (a majority). According to the Superior Court's analysis and that of the Appellees, it doesn't take 5 votes to reject a budget; it takes only a majority of a quorum, and that would mean only 2 *members voting to reject* at a meeting if only three members show up, because three members exceeds the 25% quorum requirement, and according to the Superior Court's analysis all that's needed to act would be a majority of those who show up at a meeting with a quorum.

Appellants don't think a budget can be rejected by a vote of two members of the Association, nor do Appellants think that the number of votes required to reject a budget is somehow a variable number dependent on how many members happen to arrive at the annual meeting. Instead,

Appellants believe that at the North Oakes Condominium a budget is approved unless 5 members affirmatively vote to reject the budget (a majority). That's so irrespective of how many owners arrive at the annual meeting. Five are need to reject a budget because five is a majority of the "voting power" which is eight.

Just so, the statute on removal of directors calls for 2/3 of the "voting power" to vote remove. To the Appellants, 2/3 of the voting power is 6³ – that being 2/3 of eight *total* members. The number doesn't change depending on how many owners attend a meeting, because it's not 2/3 of the owners who attend, it's 2/3 of the "voting power in the Association."

Conclusion:

Because of the odd procedural posture of the case before the Superior Court and the expedited ruling essentially granting a summary judgment to a non-moving party, delay in presenting argument about the notice required to remove a director should be excused and that issue should be addressed.

³ Technically, it's 5.3333, but it is more than 5 votes.

Of course, that's all irrelevant if the court concludes, as it should, that removal of a board member requires more than five votes. Just as the number of votes needed to reject a budget is a majority of "the voting power" – meaning 5, and just as the number to reject a budget doesn't change depending on how many members show up at a meeting, so too, the number of votes needed to remove a director doesn't vary depending on how many show up at the meeting. In all cases, to remove a director requires the vote of 2/3 – more than five, and in the case of the North Oakes Condominium Association, that's six votes.

The trial court erred in interpreting the statute in a manner that allowed for a removal by only five votes, and accordingly the decision of the trial court should be reversed with instructions to grant Appellant's motion for summary judgment.

DATED this 15th day of December, 2015.



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