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STATE OF WASHINGTON

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BY RONALD R. CARPENTER

NO. 81873-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SANDRA LAKE, INDIVIDUALLY
Plaintiff/Appellant

v.

WOODCREEK HOMEOWNERS ASSOCIATION,
a Washington Homeowners Association;
GLEN R. CLAUSING, a single man
Defendants/Respondents

SUPPLEMENTAL BRIEF

OF

GLEN R. CLAUSING, PETITIONER
RAP 13.7(d)

Attorneys for Petitioner:

Charles E. Watts, WSBA #02331
Oseran, Hahn, Spring, Straight & Watts, P.S.
10900 NE Fourth Street #850
Bellevue, WA 98004
425-455-3900
425-455-9201 - fax

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A. INTRODUCTION

There is no support for the Court of Appeals' decision in the case under review that only "*like kind*" properties, (an apartment with another apartment, a common area with a another common area, or a limited common area with a another limited common area), can be combined and that the combining of a common area, limited common area and an apartment is prohibited as a matter of law. The Court of Appeals' prohibition on combining common area and an apartment is not supported by the HPRA (RCW Ch. 64.32), is not supported by the Woodcreek Condominium Declaration, which specifically allows such combining, and is not supported by cases from other jurisdictions that have disallowed combining only when the statute or the Declaration at issue did not expressly provide for it.

The issues the Court of Appeals raises in its decision on review her that deserve special attention by the Supreme Court are:

1. The Horizontal Property Regimes Act (RCW Ch. 64.32) *requires* all condominium Declarations to contain provisions authorizing the combining of common area, limited common area, and apartments, and *requires* all condominium Declarations set forth the procedures for doing so. While the statute *requires* that the Declaration authorize

combining and contain a procedure to do so, it leaves to the developer to set forth in the Declaration those procedures. (Argument B-1 below);

2. The Woodcreek Condominium Declaration specifically provides for and authorizes the combining of common area, apartments, and limited common areas (Argument B-1 below);

3. The decision of the Court of Appeals under review fails to account for the fact that when other jurisdictions have prohibited a “combining” it was only when neither the statute nor the Declaration at issue provide for it, and fails to recognize that legislatures and the Uniform Condominium Act (RCW Ch. 64.34) have reversed those decisions and expressly allow combining of common area, apartments, and limited areas. The clear legislative trend in Washington and elsewhere is to allow combining and the decision of the Court of Appeals in this case goes against that trend unnecessarily and without legal or factual justification (Argument B-2);

4. The decision of the Court of Appeals under review relies heavily for support on its earlier decision in *Bogomolov vs. Lake Villas*,¹ without considering the fundamental differences between the condominium Declaration at issue in *Bogomolov* and the condominium Declaration of Woodcreek at issue here. The Court of Appeals failed to

¹ 131 Wn. App 353, 127 P.3d 762 (2006)

acknowledge the “apples and oranges” differences between the two Declarations, and therefore, failed to acknowledge that *Bogomolov* does not provide any support for an interpretation of the Woodcreek condominium Declaration with respect to the issue of “combining.” (Argument B-3.)

B. ARGUMENT

1. The Court of Appeals in this case did not enforce the Woodcreek Declaration or the Horizontal Property Regimes Act (HPRA) as written. Both the HPRA and the Woodcreek Declaration provide for and authorize combining of common area, limited common areas and apartments.

The Washington Court of Appeals (Div. II) in *Gold Creek North Limited Partnership v. Gold Creek Umbrella Association*² described the purpose and legal effect of a condominium Declaration this way:

“Declarations are the operative documents for condominiums and in some states are referred to as ‘master deed[s]’. [citations omitted] In other words, they spell out the true extent of the purchased interest. Woodside Vill. Condo. Ass’n, Inc. v. Jahren, 806 So.2d 452, 456 (Fla.2002) (QUOTING Pepe v. Whispering Sands Condo. Ass’n, Inc. 351 So.2nd 755, 757 (Fla.Dist.Ct.App, 1077)). Declarations not only prescribe the governance structure of the development, but they also serve to give notice to individual buyers of the significant terms of any encumbrances, easements,

² 143 Wash. App. 191, 177 P.3d 201 (2008)

liens, and matters of title affecting the condominium development. See generally 4 Frederic White, Thompson on Real Property Condominiums & Cooperatives §36.09(j), at 258 (2nd Thomas ed.2004)”³ [Bold emphasis added.]

Both the Washington condominium statutes, the HPRA and the Condominium Act have always permitted the combining of a common area, limited common area and apartments. When the Washington State legislature enacted the first condominium law, the HPRA, under which Woodcreek was formed, it included RCW 64.32.090(10) that *requires* every condominium declaration contain

“A provision authorizing and establishing procedures for the subdividing and/or combining of any apartment or apartments, common areas and facilities or limited common areas and facilities . . .”

When the Washington State legislature in 1989 enacted the newer Condominium Act, RCW 64.34, instead of requiring that a condominium declaration contain procedures for subdividing and combining, the legislature put such procedures in the statute itself. RCW 64.34.228(3) provides:

“Unless otherwise provided in the declaration, the owners of units to which at least sixty-seven percent of the votes are allocated, including the owner to which the limited common element will be assigned or incorporated must agree to reallocate a common element as a limited common element or to

³ *Gold Creek North Limited Partnership vs. Gold Creek Umbrella Ass'n.* at 203

incorporate a common element or limited common element into an existing unit.” [Emphasis added]

Neither statute limits combining to “like kind properties.” Neither statute provides that if properties are combined the declared values change. Woodcreek’s Declaration (paragraph 12) provides for the combining of common area, limited common area and apartments, it does not limit combining to “like kind properties” and very importantly, Woodcreek’s Declaration provides that in the case of combining the declared values of apartment units do not change.

The HPRA does not prohibit a developer from including in a Declaration provisions like those contained in paragraph 4 of the Woodcreek Declaration, the paragraph that provides for and describes bonus rooms. To the contrary, RCW 64.32.090(12), which sets forth what a Declaration of a condominium created under the HPRA must contain, states the Declaration may contain:

“(12) Any further details in connection with the property which the person executing the declaration may deem desirable to set forth consistent with this chapter; . . .”

The property interest every grantee (including Sandra Lake and Glen Clausing) acquired in Woodcreek when they purchased their respective apartment units was subject to the “*significant terms*” and

“*matters of title*” of the Woodcreek Declaration, as written, including its paragraph 4 [CP 386] that provides:

“At the option of the *purchaser* the floor plans for Types L and M⁴ Units will include an additional area to be situated directly above the car garage area which is incorporated within the basic structure of the apartment unit. The bonus room will consist of one of four alternate floor plans and will increase the square footage of said units by approximately 416 square feet.” [1976 Dec. par 4. as amended in 1977 / CP 386 & 376]

RCW 64.32.120(1) requires that every deed to every Woodcreek apartment must reference Woodcreek’s Declaration. RCW 64.32.120(1) provides:

“Deeds or other conveyances of apartments shall include the following:

(1) A description of the land as provided in RCW 64.32.090, or the post office address of the property, including in either case the date of recording of the declaration and the volume and page or county auditor’s recording number of the recorded declaration;” [Underscore added]

Because the declaration had to be (and was) recorded before the first apartment unit was conveyed, and because all deeds of conveyance (from the very first to and including the most recent) reference the Declaration, all purchasers of a Woodcreek apartment, including Sandra Lake, by accepting their deeds of conveyance agreed, by operation of law,

⁴ [by amendment changed to Types J, K, L & M - CP 376]

to be bound by the terms of Woodcreek's Declaration. Further, as a matter of law by accepting the deeds they also are required to strictly comply with its terms. RCW 64.32.060 provides:

"Each apartment owner shall comply strictly . . . with the covenants, conditions and restrictions set forth in the declaration or in the deed to his apartment."

In accordance with Paragraph 4 of the Declaration 100% of the Woodcreek apartment owners by accepting their deeds agreed that their fellow purchasers of type J, K, L, and M units have an option for a bonus room to be added to their unit. Further, by operation of law they agreed to those provisions of the Declaration that provide that if a bonus room is added it (1) will be situated directly above the garage, (2) will be part of the basic structure of the apartment unit, and (3) will increase the size of the apartment by approximately 416 square feet. Like all 43 bonus rooms now in place at Woodcreek, Glen Clausing's bonus room for his J type unit is directly above his garage, is part of the basic structure of his apartment unit, and it increases the size of his apartment by approximately 416 square feet just as the declarations allow.⁵

Sandra Lake maintains (and Division I in this case held) that Glen Clausing's bonus room could not be built unless Woodcreek's Declaration

⁵ Lake also has a bonus room. Her bonus room is above her garage, part of the basic structure of her apartment, and increases the size of her apartment by approximately 416 square feet. [CP 201, 203, 858]

was amended and that such an amendment requires unanimous approval.⁶ This argument is specious because Woodcreek's Declaration already contains provisions for bonus rooms for J, K, L & M type units. Since the declaration already has provisions for bonus rooms, no amendment to the Declaration is needed for Glen Clausing's bonus room.

The plain meaning and common sense reading of the Declaration is that Woodcreek's common area can be combined with an apartment and/or common area can be created (improved) for purposes of building a bonus room as it is absolutely impossible to build a bonus room as described in the Declaration without doing so. The recorded survey maps and plans for Woodcreek include a floor plan/construction diagram of a bonus room that depicts walls, roof, beams, and other structural components. Though RCW 64.32.010(6)(b) lists airspace, beams, supports, windows, plumbing and electrical wiring as components of the "common area" the first sentence of 64.32.010 provides the statutory definitions are not literal but are only used "*unless the context otherwise requires.*" Further, RCW 64.32.010(6)(b) specifically states the components listed in the statute are common area "*unless otherwise provided in the declaration.*"

⁶ *Lake vs. Woodcreek at 1225, 1230*

The provisions of the Declaration should not be construed in a way that renders portions of it superfluous or renders its provisions meaningless. It is incongruous to claim that the Declaration, as written, should be interpreted to mean that a bonus room can be built “above the car garage,” (which paragraph 4 of the Declaration also defines as part of the apartment unit) and “incorporated within the basic structure of the apartment unit” *as long one does not invade airspace, or have walls, or a roof, or support beams, etc.* What is reasonable to conclude is that: (1) By accepting their deeds 100% of the grantees of a Woodcreek apartment, by operation of law, agreed to be bound by the Declaration; (2) Bonus rooms by their vary nature and as described in the Declaration result in common area being combined with an apartment and/or create (improve) common area; (3) Therefore, it follows that 100% of the Woodcreek homeowners agreed that it is permissible to combine a common area with an apartment and/or to create a common area by building an optional bonus room.

The Declaration has been so interpreted by the Woodcreek Board of Directors and all past and current owners of Woodcreek apartments since 1978 when the Board of Directors approved the first bonus room. The only exception being Sandra Lake’s objection to the bonus room

added to Glen Clausing's unit set forth in her suit filed 15 months after that bonus room was built.

2. The decision by the Court of Appeals and its analysis of the issue of combining a common area and an apartment are inconsistent with those of other courts that have analyzed and decided the same issue.

Cases from other jurisdictions have held that a common area, limited common area, and an apartment can be combined when the condominium Declaration and governing statutes so provide. They have held that this cannot be done if the condominium Declaration or governing statutes are silent on the issue. All cases from other jurisdictions that have decided the issue have done so by enforcing the condominium Declaration and the statute *as written*. When courts in other jurisdictions have not allowed a common area, limited common area and an apartment to be combined because the statute *as written* did not contain a provision that permits combining similar to RCW 64.32.090(10) or RCW 64.34.228(3), state legislatures have amended their statutes.

Examples of cases from other jurisdictions that have held combining/convertng is allowed and combining/convertng does not change declared values when "*unlike*" properties (a common area with an apartment, or limited common area with an apartment) are combined

include *Newport Condominium Ass'n, Inc. v. Concord-Wisconsin, Inc.*, 556 N.W. 2d 775, 778 (Ws. Ct. App. 1996), *Lake Barrington Shore Condominium Ten Homeowners Ass'n v. May*, 553 N.E. 2d 814, 196 Ill. App. 3d 280 (1980), and *Ochs v. L'Enfant Trust*, 504 A.2d 1110 (D.C. Cir. 1986). In all these cases, the decisions turned upon the language of the governing statutes and provisions of the condominium Declaration.

Examples of cases that resulted in state legislatures amending their condominium statutes after a court found invalid a combining (or conversion of one type of property to another) because the governing statute was silent on the issue include: *Grimes v. Moreland*, 41 Ohio Misc. 69, 322 N.E.2d 699 (1974), *Kaplan v. Boudreau*, 410 Mass. 435, 573 N.E.2d 495 (1991); and *Makeever v. Lyle*, 125 Ariz. 384, 609 P.2d 1084 (1980). These cases are discussed in greater detail below.

In *Grimes v. Moreland*, 41 Ohio Misc. 69, 322 N.E.2d 699 (1974), the Declaration of the condominium was amended by less than a unanimous vote to permit owners to use the common area to install fencing and air conditioning compressors. The amendment to the Declaration was challenged as a combining of common area with an apartment and/or converting common area into a limited common area. The Ohio Court of Appeals invalidated the amendment to the Declaration after stating:

“Unfortunately, neither the declaration, by-laws or statutes of Ohio expressly provide for a means of converting common area into limited common area or unit owner’s property. . . . Therefore, the erection of fences and installation of compressors without unanimously approval amendments to the declaration is improper.⁷”

In 1978, the Ohio State legislature amended Ohio’s condominium statutes. The new statute, Title 53, Chapter 11, Sections .04(E) and .031(A) permits the Board of Directors of a Condominium to adjust boundaries between units, to relocate limited common elements and to relocate and reallocate common areas upon an application submitted by the owners of units adjoining the units affected. The statute does not require unanimous consent or even a simple majority vote of the owners. The amended Ohio statutes cited above are in the Appendix.

In *Kaplan v. Boudreau*, 410 Mass. 435, 573 N.E.2d 495 (1991), the court held invalid a newly adopted condominium bylaw that had the effect of allowing the owner of one unit to have the exclusive use of a common area. The basis for the decision was that there was no provision for such conversion or combining in the Declaration or the statutes on which the Declaration was based. After the *Kaplan* decision, the Massachusetts legislature amended its condominium statute to expressly provide:

“ . . . the designation or allocation by the organization of unit owners of limited common

⁷ *Grimes v. Moreland, supra, at p. 74.*

areas and facilities, or a withdrawal of a portion of the common area and facilities, all as provided for in this subsection, **shall not be deemed to affect or alter the undivided interest of any unit owner**” [Emphasis added.] Mass. Gen. Laws ch. 183(A, § 5(b)(1)(1988). [Statute is in the appendix.]

In *Makeever v. Lyle*, 125 Ariz. 384, 609 P.2d 1084 (1980), the combining of a common area and an apartment was held invalid. The court acknowledged Arizona law at the time lacked “extensive statutory provision specifying the uses which may be made of general common elements and the manner or means by which the owners may govern or control such uses.” The fact there was no authority in the statute was significant to the Arizona Court’s decision. The Arizona law regarding condominiums since that decision has been completely rewritten, and the statutes in effect when *Makeever* was decided were repealed. Arizona’s “new” condominium law is based on the Uniform Condominium Act, the same uniform act Washington adopted (RCW 64.34) to replace the HPRA. The new Arizona condominium law (a copy is in the appendix) provides that common area, limited common area and/or apartments can be combined upon less than unanimous consent of all owners.

3. **The analysis by the Court of Appeals of the issue of combining a common area with an apartment in this case was inconsistent with the analysis it employed in its *Bogomolov* decision.**

The cases from other jurisdictions discussed in this brief were all cited in the briefs filed in *Bogomolov v. Lake Villas*. Judge Applewick, who wrote the concurring opinion in this case and the majority opinion in the *Bogomolov* decision, did not cite those cases as precedent or controlling. Rather, as these other cases had done, he looked to the Declaration at issue in *Bogomolov* in deciding whether new dock slips could be built at the Lake Villas Condominiums. *Bogomolov* did not hold nor does it stand for the proposition that combining and converting properties, like-kind or otherwise, is *per se* improper. Rather, Judge Applewick based his decision in *Bogomolov* on the specific unique provisions of the Lake Villas' Condominium declaration.

As set forth in the Glen Clausing and Woodcreek briefs and their Petitions for Discretionary Review, Lake Villas' Declaration at issue in *Bogomolov* is markedly different than Woodcreek's Declaration in the following respects:

1. Lake Villa's Declaration defines the docks where proposed boats were to be built as common areas and the dock slips themselves as limited common areas. Woodcreek's Declaration defines bonus rooms as "part of" and "incorporated within the basic structure" of the apartments;

2. Lake Villa's Declaration assigns a declared value to the boat slips and a declared value to parking slips. Lake Villas Declaration

then provides that the declared value of an apartment is the sum of the declared values for the apartment itself, any dock assigned to it, and any parking space assigned to it. Hence when a dock space is added to a Lake Villas apartment, the declared value of the apartment is increased by the declared value of the assigned dock. Woodcreek's Declaration assigns no value to a bonus room. Hence when a bonus room is added to a Woodcreek apartment, the declared value of the apartment does not change;

3. Lake Villas Declaration (paragraph 27) provides that the common areas, limited common areas, and apartments at Lake Villas cannot be partitioned or combined without 100% affirmative vote of the Lake Villas apartment owners. Woodcreek's Declaration, paragraph 12, provides that common areas, limited common areas, and apartments at Woodcreek can be partitioned or combined with a 51% affirmative vote of the Woodcreek homeowners; and

4. The Woodcreek Declaration specifically allows the addition of a bonus room onto a unit that incorporates a portion of the common area structure and the air space of the unit to which it is added.

One of the cases cited in *Bogomolov, Newport Condominium Association v. Concord-Wisconsin, Inc.*, 556 N.W. 2d 775, 778 (Ws. Ct. App. 1996) deserves careful consideration. That decision and its analysis

are based on the statute and the Declaration *as written* and the decision makes it clear the court clearly understood the difference between “declared value” and “fair market value.” In *Newport*, the Declaration was amended by less than unanimous vote to reclassify a common area veranda as a limited common area for the use exclusively by one unit. At page 583 of the opinion, the Wisconsin Court of Appeals held:

“Statutes relating to the same subject matter are to be construed together and harmonized. [citations omitted] The cardinal rule in interpreting statutes is that the purpose of the whole act is to be sought and is favored over a construction which will defeat the manifest object of the act. [citations omitted]

“With these principles in mind, we conclude that §§ 703.09 and 703.13, STATS., are clear and unambiguous. Section 703.13(4) states that the percentage interest a condominium owner possesses in a common element ‘may not be changed without the written consent of all units owners . . .’

“The Tomeras contend that the Restated Declaration is invalid because it changed the common element status of the veranda to a limited common element, thereby restricting their use and reducing their interest in the common elements. The Tomeras have confused the concepts of percentage ownership with the value of their unit.”

Before Glen Clausing built his bonus room, Sandra Lake had a 0.801 interest in the common areas of Woodcreek based on the declared value of her unit, \$56,786, divided by the declared value of Woodcreek, \$7,065,000. [CP 203, 380, 393] She had one vote on homeowner matters,

was responsible for 0.801 of the common area assessments and entitled to 0.801 of the sale proceeds if Woodcreek as a whole was sold or otherwise liquidated. After Glen Clausing built his bonus room, Sandra Lake still has a 0.801 interest in the common areas, one vote, is responsible for 0.801 of common area assessments and entitled to receive 0.801 of the sale proceeds if Woodcreek as a whole is sold or liquidated. All that has changed is that Woodcreek has lost the use of a small amount of the airspace that was above the garage of Glen Clausing's unit.⁸

The developer of Woodcreek deemed it desirable to set forth in the Woodcreek Declaration an option for a bonus room by all purchasers J, K, L and M type units. In the Declaration the developer described the optional bonus rooms and included a plan/construction diagram. The developer did not include in Woodcreek's Declaration (and he was not required to do so) a declared value for the bonus room. Instead, the developer declared the same value for apartments of the same type with and without bonus rooms. These differences distinguish the analysis and outcome in *Bogomolov* from that here. *Bogomolov* must be limited to its unique facts and cannot be controlling as to an interpretation and enforcement of the dramatically different Woodcreek condominium Declaration.

⁸ Sandra Lake's deposition testimony is that she has sustained no economic damages as a result of Glen Clausing's bonus room being built. [CP 839, 845]

The developer of Woodcreek, as required by the HPRA, set forth in the Woodcreek Declaration the formula and the procedures for subdividing and combining. As set forth in paragraph 12 of Woodcreek's Declaration the developer decided that subdividing and combining could be done upon the affirmative vote of 51% of the owners, and the developer further set forth in paragraph 12 that in the case of combining, the declared values of the apartments do not change. 100% of the Woodcreek apartment owners, by operation of law when they accepted their deeds, agreed to be bound by these provisions of the Declaration. By a vote of 91 to 4, an affirmative vote of over 60% of all homeowners entitled to vote, the homeowners approved the following resolution that specifically approved all bonus rooms including Glen Clausung's:

"The Homeowners hereby ratify and approve the Board's past approvals of all owner-added bonus rooms built to date and its past approvals of any owner modifications that may have involved or permitted a combining of apartment unit or units with common areas or facilities or limited common area or facilities as provided for in paragraph 12 of the Declarations." [CP 130]

C. CONCLUSION

The Woodcreek Declaration should be interpreted *as written* by the developer and enforced consistently with how all Woodcreek Board of Directors, all Woodcreek Apartment owners (other than Sandra Lake), and the King County Superior Court in this case have interpreted it over the

last 40 years. The HPRA upon which the Woodcreek Declaration is based should be enforced *as written*. Neither should be interpreted such that part of their provisions are rendered meaningless or are superfluous and no words, such as “*like kind*” should be added. When the issue of combining an common area and an apartment is analyzed based on (1) the Declaration and HPRA *as written*, (2) the legal effect of the Declaration on all those that acquire a property interest at Woodcreek; (3) the difference between “declared value” and “fair market value;” and (4) the “before and after” declared values (as was done in *Newport Condominium Association vs. Concord-Wisconsin* and in *Bogomolov*⁹) the inescapable conclusions are that: (1) at Woodcreek a bonus room addition is permitted under the Declaration, (2) a bonus room addition at Woodcreek does not run afoul of the HPRA, and (3) adding a bonus room has no effect on the declared values/declared percentages.

⁹ In *Bogomolov*, Div.1 of the Court of Appeals employed a “before and after” analysis to determine if at Lake Villas the assignment of a new dock slip, which had a declared value in that condominium’s Declaration, to an apartment changed the apartment’s declared value.

“Appellants assert that the values and percentages required by RCW 64.32.050(1), set forth in Schedule A of the Declaration, have not changed . . . [*Bogomolov* at 366]

“Section 7 of the Declaration provides that ‘[t]he total percentage of any apartment will be the combined percentages of the apartment and the open parking spaces and dock spaces assigned to it, if any.’” *Bogomolov* page 369.

“The exclusive use of the boat slips would increase the overall value of units to which they were assigned [by the values assigned to boat slips in the declaration] and would necessarily change the percentages of ownership of the owners of Lake Villas condominium in the common areas. The court did not err in so ruling.” *Bogomolov* at 370-71.

Reliance on *Bogomolov* to interpret and enforce the Declarations at Woodcreek is comparing apples and oranges. The Woodcreek Declaration and the HPRA permit “combining” of common area and apartments and limited common areas. The Declaration in *Bogomolov* did not. *Bogomolov* is not precedent for the appeals court’s decision interpreting the Woodcreek condominium Declaration. The better authority is found in *McLendon v. Snowblaze Recreational*, 84 Wn. App. 283, 929 P.2d 1140 (Div. III 1997).

The trial court in this case properly granted summary judgment dismissing the Lake complaint. The decision of the Court of Appeals reversing the trial court should be reversed itself and the case remanded confirming entry of summary judgment of dismissal of the Lake complaint by the Superior Court.

Dated this 4th day of February 2009.

OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.

by 

Charles E. Watts, WSBA 02331
Attorney for Respondent/Petitioner Clausing

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CERTIFICATE OF SERVICE

BY RONALD R. CARPENTER

I hereby certify that I arranged to have copies of ~~Glen Clausinger~~^{CLERK}
Supplemental Brief filed with the Supreme Court of Washington by ABC
Legal Messenger Service, and served on the following attorneys for
parties by depositing the same in the U.S. Mail, postage pre-paid on
February 4th, 2009.

Marianne K. Jones
Jones Law Group
11819 NE 34th St.
Bellevue, WA 98005

Christopher I. Brain
Tousley Brain Stephens, PLLC
1700 7th Ave. Ste 2200
Seattle, WA 98101

Scott M. Barbara
Johnson Andrews & Skinner, P.S.
200 West Thomas, Ste 500
Seattle, WA 98119

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

Signed this 4th day of February, 2009.


Lynn Salvatori

C

Arizona Revised Statutes Annotated Currentness

Title 33. Property

☐ Chapter 9. Condominiums (Refs & Annos)

☐ Article 2. Creation, Alteration and Termination of Condominiums

→ § 33-1218. Limited common elements

A. Except for the limited common elements described in § 33-1212, paragraphs 2 and 4, other than porches, balconies, patios and entryways, the declaration shall specify to which unit or units each limited common element is allocated. The allocation shall not be altered without the consent of the unit owners whose units are affected.

B. Except as the declaration otherwise provides, a limited common element may be reallocated by an amendment to the declaration. The amendment shall be executed by the unit owners between or among whose units the reallocation is made, shall state the manner in which the limited common elements are to be reallocated and, before recording the amendment, shall be submitted to the board of directors. Unless the board of directors determines within thirty days that the proposed amendment is unreasonable, which determination shall be in writing and specifically state the reasons for disapproval, the association shall execute its approval and record the amendment.

C. A common element not previously allocated as a limited common element shall not be so allocated except pursuant to provisions in the declaration. The allocations shall be made by amendments to the declaration.

CREDIT(S)

Added by Laws 1985, Ch. 192, § 3, eff. Jan. 1, 1986.

HISTORICAL AND STATUTORY NOTES

For provisions of Laws 1985, Ch. 192 regarding interpretation of act, short title, and effective date, see Historical and Statutory Notes preceding § 33-1201.

Uniform Law:

This section is similar to § 2-108 of the Uniform Condominium Act. See 7, Pt. II Uniform Laws Annotated, Master Edition or ULA Database on Westlaw.

LIBRARY REFERENCES

Condominium ↔ 6.1 to 12.
Westlaw Topic No. 89A.
C.J.S. Estates §§ 198, 211 to 219, 221, 230.

C

Arizona Revised Statutes Annotated Currentness

Title 33. Property

▣ Chapter 9. Condominiums (Refs & Annos)

▣ Article 2. Creation, Alteration and Termination of Condominiums

→ § 33-1222. Relocation of boundaries between adjoining units

If the declaration expressly permits, the boundaries between or among adjoining units may be relocated by an amendment to the declaration. The owners of the units shall prepare an amendment to the declaration, including the plat, that identifies the units involved, specifies the altered boundaries of the units and their dimensions and includes the units' identifying numbers. If the owners of the adjoining units have specified a reallocation between their units of the allocated interests, the amendment shall state the proposed reallocation in a reasonable manner. The amendment shall be executed by the owners of those units, shall contain words of conveyance between or among them and, before recording the amendment, shall be submitted to the board of directors. Unless the board of directors determines within thirty days that the proposed amendment is unreasonable, which determination shall be in writing and specifically state the reasons for disapproval, the association shall execute its approval and record the amendment.

CREDIT(S)

Added by Laws 1985, Ch. 192, § 3, eff. Jan. 1, 1986.

HISTORICAL AND STATUTORY NOTES

For provisions of Laws 1985, Ch. 192 regarding interpretation of act, short title, and effective date, see Historical and Statutory Notes preceding § 33-1201.

Uniform Law:

This section is similar to § 2-112 of the Uniform Condominium Act. See 7, Pt. II Uniform Laws Annotated, Master Edition or ULA Database on Westlaw.

LIBRARY REFERENCES

Condominium ↪ 3.
Westlaw Topic No. 89A.
C.J.S. Estates §§ 197 to 203, 244.

RESEARCH REFERENCES

Treatises and Practice Aids

11A Arizona Practice A.R.S. § 33-1227, Amendment Of Declaration.



Effective:[See Text Amendments]

~~Massachusetts General Laws Annotated Currentness~~

Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)

▣ Title I. Title to Real Property (Ch. 183-189)

▣ Chapter 183A. Condominiums (Refs & Annos)

→ § 5. Interest in common areas or facilities; percentage; division

(a) Each unit owner shall be entitled to an undivided interest in the common areas and facilities in the percentage set forth in the master deed. Such percentage shall be in the approximate relation that the fair value of the unit on the date of the master deed bears to the then aggregate fair value of all the units.

(b)(1) The percentage of the undivided interest of each unit owner in the common areas and facilities as expressed in the master deed shall not be altered without the consent of all unit owners whose percentage of the undivided interest is materially affected, expressed in an amendment to the master deed duly recorded; provided, however, that the acceptance and recording of the unit deed shall constitute consent by the grantee to the addition of subsequent units or land or both to the condominium and consent to the reduction of the undivided interest of the unit owner if the master deed at the time of the recording of the unit deed provided for the addition of units or land and made possible an accurate determination of the alteration of each unit's undivided interest that would result therefrom. The percentage of the undivided interest in the common areas and facilities shall not be separated from the unit to which it appertains, and shall be deemed to be conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument. The granting of an easement by the organization of unit owners, or the designation or allocation by the organization of unit owners of limited common areas and facilities, or the withdrawal of a portion of the common areas and facilities, all as provided for in this subsection, shall not be deemed to affect or alter the undivided interest of any unit owner.

(2) The organization of unit owners, acting by and through its governing body, shall have the power and authority, as attorney in fact on behalf of all unit owners from time to time owning units in the condominium, except as provided in this subsection, to:

(i) Grant, modify and amend easements through, over and under the common areas and facilities, and to accept easements benefiting the condominium, and portions thereof, and its unit owners, including, without limitation, easements for public or private utility purposes, as the governing body of the organization shall deem appropriate; provided, however, that the consent of at least 51 per cent of the number of all mortgagees holding first mortgages on units within the condominium who have requested to be notified thereof, as provided in subsection (5) of section 4 is first obtained; and provided, further, that at the time of creation of such easement and at the time of modification or amendment of any such easement, such easement and any such modification or amendment shall not be inconsistent with the peaceful and lawful use and enjoyment of the common condominium

property by the owners thereof. Such grant, modification, amendment, or acceptance shall be effective on the thirtieth day following the recording, within the chain of title of the master deed, of an instrument duly executed by the governing body of the organization of unit owners setting forth the grant, modification, amendment or acceptance with specificity, and reciting compliance with the requirements of this subsection.

(ii) Grant to or designate for any unit owner the right to use, whether exclusively or in common with other unit owners, any limited common area and facility, whether or not provided for in the master deed, upon such terms as deemed appropriate by the governing body of the organization of unit owners; provided, however, that consent has been obtained from (a) all owners and first mortgagees of units shown on the recorded condominium plans as immediately adjoining the limited common area or facility so designated and (b) 51 per cent of the number of all mortgagees holding first mortgages on units within the condominium who have given notice of their desire to be notified thereof as provided in subsection (5) of section 4. In such case as the limited common area or facility shall directly and substantially impede access to any unit, the consent of the unit owner of such unit and its first mortgagee, if such mortgagee has requested notice as aforesaid, shall also be required. Such grant or designation, and the acceptance thereof, shall be effective 30 days following the recording, within the chain of title of the master deed or of the declaration of trust or by-laws, of an instrument duly executed by the governing body of the organization of unit owners and the grantee or designee and his mortgagees, which instrument shall accurately designate, depict and describe the area affected and the rights granted and designated, and shall recite compliance with the requirements of this subsection. Such grant or designation shall be considered an appurtenance to the subject unit and shall be deemed to be conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument.

(iii) Extend, revive or grant rights to develop the condominium, including the right to add additional units or land to the condominium; provided, however, that the rights to add additional units are set forth in or specifically authorized by the master deed, and, notwithstanding any provision in section 19 to the contrary, withdraw any portion of the common area of the condominium upon which, at the time of said withdrawal, no unit has been added to the condominium in accordance with the master deed; and provided further, that said withdrawal is not specifically prohibited by the master deed. Any action taken pursuant to this subparagraph shall be taken upon such terms and conditions as the organization of unit owners may deem appropriate, including the method or formula by which the percentage interest of each unit is to be set in accordance with subsection (a) of section 5, or in accordance with another method which the organization of unit owners reasonably determines is fair and equitable under the circumstances, following such extension, revival, grant, addition or withdrawal if not specified in the master deed; provided further, that the consent thereto, including the terms and conditions thereof, of not less than 75 per cent of owners of units within the condominium, or such lower percentage, if any, as the master deed may provide, and 51 per cent of the number of all mortgagees holding first mortgages on units within the condominium who have given notice of their desire to be notified thereof as provided in subsection (5) of section 4 is obtained for such extension, revival, grant, addition or withdrawal. Any action taken pursuant to this subparagraph may be taken even if the time period for adding land, units or common facilities, or for withdrawal has expired. The withdrawal of common areas pursuant to this subparagraph shall not be deemed to affect the percentage interest of each unit. Such extension, revival, grant, addition or withdrawal shall be effective 30 days after the recording, within the chain of title of the master deed or of the declaration of trust or by-laws, of an instrument duly executed by the organization of unit owners setting forth accurately the extension, revival, grant, addition or withdrawal, and reciting compliance with the requirements of this subsection; and

(iv) Sell, convey, lease or mortgage any rights or interest created as a result of exercise of rights established under subparagraph (iii); provided, however, that any proceeds obtained by the organization of unit owners as a result of such sale, conveyance, lease, or mortgage may be paid by the organization of unit owners for common expenses of the condominium, and otherwise shall be distributed in accordance with subparagraph (iii) of subsection (a) of section (6), or in accordance with another method which the organization of unit owners reasonably determines is fair and equitable under the circumstances. The provisions of paragraph (2) shall not affect the rights reserved by the declarant in the master deed except to the extent such rights have expired.

Any consent required by this subsection shall be deemed to be given if, upon written notice by certified and first class mail, provided by the governing body of the organization of unit owners of a proposed action hereunder, to the unit owner or mortgagee whose consent is required, such unit owner or mortgagee fails to object within 60 days of the date of mailing of such notice. The consent of each mortgagee, to the extent required hereunder, shall be counted separately as to each unit upon which such mortgagee holds a mortgage, based upon one vote for each unit. In no event may a consent required of a mortgagee under this subsection be withheld unless the interests of the mortgagee would be materially impaired by the action proposed. In the event of any conflict between the provisions of this subsection and of the master deed, trust or by-laws or other governing documents of the condominium, this subsection shall control. Any third party interested in title to said condominium or condominium unit or units may conclusively rely upon the recitation of compliance contained within any instrument recorded pursuant to this subsection.

(c) The common areas and facilities shall remain undivided and no unit owner or any other person shall bring any action for partition or division of any part thereof, except as provided in sections seventeen, eighteen and nineteen. The use of limited common areas and facilities may be designated by the organization of unit owners in the same manner as set forth herein relative to the granting of easements; provided, however, that such designation shall take the form of an amendment to the master deed, executed by said organization and the unit owner or owners to whom the designation is made, upon the written consent of the owner or owners of the unit or units directly abutting the limited common area and facility or whose unit or units are directly affected thereby and upon the payment by the unit owner to whom the designation is being granted of the reasonable costs of the preparation, execution and the recordation thereof. Said amendment shall be recorded in the appropriate registry of deeds or land registration office in the names of the parties and the condominium. Nothing contained herein shall be construed to require the consent of one hundred percent of the beneficial interest and the mortgagees to the granting of an easement by the organization of unit owners, or the designation or allocation of limited common areas and facilities. Except as expressly provided herein, the provisions hereof may not be varied by agreement and rights conferred hereby may not be waived. In the event of a conflict between this section and the master deed, or declaration of trust, or bylaws of any condominium submitted to the provisions of this chapter, the language hereof shall control. Any covenant or provision to the contrary shall be null and void.

(d) Each unit owner may use the common areas and facilities in accordance with their intended purposes without being deemed thereby to be hindering or encroaching upon the lawful rights of the other unit owners.

(e) The necessary work of maintenance, repair and replacement of the common areas and facilities shall be carried out as provided in the by-laws.

(f) Unless the by-laws otherwise provide, whenever the common areas and facilities shall require emergency works of repair, replacement or maintenance, any unit owner may undertake the same at his expense and recover his reasonable costs as a common expense.

(g) No work which would jeopardize the soundness or safety of the building shall be done in a unit or in the common areas and facilities unless in every such case the unanimous consent of all unit owners is first obtained.

CREDIT(S)

Added by St.1963, c. 493, § 1. Amended by St.1987, c. 87; St.1994, c. 365, §§ 2, 3; St.1998, c. 242, § 5.

HISTORICAL AND STATUTORY NOTES

2003 Main Volume

St.1987, c. 87, approved May 29, 1987, in par. (b), in the first sentence, inserted "whose percentage of the undivided interest is affected".

St.1994, c. 365, § 2, approved Jan. 13, 1995, and by § 5 made effective Jan. 1, 1996, rewrote subsec. (b), which prior thereto read:

"The percentage of the undivided interest of each unit owner in the common areas and facilities as expressed in the master deed shall not be altered without the consent of all unit owners whose percentage of the undivided interest is affected, expressed in an amended master deed duly recorded. The percentage of the undivided interest in the common areas and facilities shall not be separated from the unit to which it appertains, and shall be deemed to be conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument."

Section 3 of St.1994, c. 365, in subsec. (c), inserted the second to sixth sentences.

St.1998, c. 242, § 5, an emergency act, approved Aug. 7, 1998, rewrote subsec. (b), which prior thereto read:

"(b) The percentage of the undivided interest of each unit owner in the common areas and facilities as expressed in the master deed shall not be altered without the consent of all unit owners whose percentage of the undivided interest is affected, expressed in an amended master deed duly recorded. The organization of unit owners shall have the power, as attorney in fact on behalf of all unit owners and their successors in title, to grant, modify or amend easements through or over the common areas and facilities and to accept easements benefiting the condominium or any portion thereof, including, without limitation, easements for public or private utility purposes, including cable television; provided, however, that at the time of creation of such easement and at the time of the modification or amendment of any such easement, such easement and any such modification and amendment shall not be inconsistent with the peaceful and lawful use and enjoyment of the condominium property by the owners thereof. Said organization shall further have the power to grant to any unit owner an easement for the exclusive use of any limited common area and facility, or a portion thereof. The actions of the organization of unit owners in granting such easements shall not require the joinder of any unit owner, except for an easement for the use of a limited common area and facility; such easement shall only be granted upon the written consent of the owner or owners of the unit or units directly abutting the limited common area and facility or whose unit or units

5311.04**Statutes and Session Law****TITLE [53] LIII REAL PROPERTY****CHAPTER 5311: CONDOMINIUM PROPERTY****5311.04 Common areas and facilities.****5311.04 Common areas and facilities.**

(A) The common elements of a condominium property are owned by the unit owners as tenants in common, and the ownership shall remain undivided. No action for partition of any part of the common elements may be commenced, except as provided in section 5311.14 of the Revised Code, and no unit owner otherwise may waive or release any rights in the common elements.

(B) The declaration shall set forth the undivided interest in the common elements appurtenant to each unit.

(1) For units in condominium properties other than expandable condominium properties, the undivided interest in the common elements shall be computed in the proportion that the fair market value of the unit bears to the aggregate fair market value of all units on the date that the declaration is originally filed for record, shall be based on the size or par value of the unit, or shall be computed on an equal basis.

(2) Except as provided in division(D) of this section, the interest in the common elements appurtenant to units in expandable condominium properties may be computed in any proportion or on any basis that is the same for units submitted by the declaration as originally filed and those submitted later by the addition of additional property and that uniformly reallocates undivided interests of units previously submitted when additional property is submitted.

(C) If a par value is assigned to any unit, a par value shall be assigned to every unit. Substantially identical units shall be assigned the same par value, but units located at substantially different heights above the ground or having substantially different views, amenities, or other characteristics that might result in differences in fair market value may be considered substantially identical. If par value is stated in terms of dollars, it need not reflect or relate in any way to the sale price or fair market value of any unit, and no opinion, appraisal, or market transaction at a different figure affects the par value of any unit.

(D) The declaration for an expandable condominium property shall not allocate interest in the common elements on the basis of par value, unless the declaration as originally filed does either of the following:

(1) Requires that all units created on any additional property that is added to the condominium property be substantially identical to the units created on the condominium property previously submitted;

(2) Describes the types of units that may be created on any additional property and states the par value that will be assigned to every unit that is created.

(E) Except as provided in sections 5311.031 to 5311.033 and 5311.051 of the Revised Code, the undivided interest in the common elements of each unit as expressed in the original declaration shall not be altered except by an amendment to the declaration unanimously approved by all unit owners affected. The

▷ Court of Common Pleas of Ohio, Franklin County.

GRIMES et al.
v.
MORELAND et al.
No. 72 CV-08-2487.

June 26, 1974.

Action was brought in which key issue was whether unit owners' placement of fences and air conditioner compressors on condominium common areas was a 'use' of property requiring owner's association board approval and compliance with provisions of declaration, amended by 75% vote of unit owners, or was a taking of common area property affecting percentage of undivided interest of other unit owners requiring unanimous approval of an amended declaration. The Common Pleas Court, Franklin County, Petree, J., held, on basis of findings, conclusions and recommendations by Paddock, Referee, that unanimous approval was required, that purported lease of an area of condominium blacktop was a nullity but that lease agreement had been ratified and that attorney fees could not be awarded to any party.

Judgment accordingly.

West Headnotes

[1] Condominium 89A ↪ 11

89A Condominium

89Ak6 Common Elements; Management and Control

89Ak11 k. Improvements and Alterations. Most Cited Cases

(Formerly 154k11, 154k1)

Unit owners' placement of fences and compressors on condominium common areas constituted a "taking of property subject to undivided interest" of all unit owners within statute providing that undivided percentage of interest in the common areas

and facilities of a condominium owned by individual unit owners, as expressed in the condominium declaration, shall not be altered except by an amendment to the declaration unanimously approved by all unit owners affected. R.C. § 5311.04(C).

[2] Condominium 89A ↪ 12

89A Condominium

89Ak6 Common Elements; Management and Control

89Ak12 k. Assessment for Expenses. Most Cited Cases

(Formerly 154k11, 154k1)

Rights to condominium common areas may not be waived, released or partitioned by civil suit through action of any unit owner acting alone. R.C. § 5311.04.

[3] Condominium 89A ↪ 10

89A Condominium

89Ak6 Common Elements; Management and Control

89Ak10 k. Use of Premises. Most Cited Cases

(Formerly 154k11, 154k1)

Unit owners' association's purported lease of an area of condominium blacktop was a nullity where lease form was never attested to or acknowledged and where leasing of such area was not an act authorized by association board; but, since association had received benefit of the monthly rental of the blacktop for four and one-half years, lease agreement had been ratified. R.C. § 5301.01.

[4] Costs 102 ↪ 194.25

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.25 k. In General. Most Cited

(Formerly 102k194.24, 102k172)

In action in which key issue was whether unanimous approval of owners of condominium units was required before fences and air conditioner compressors could be placed on condominium common areas, attorney fees could not be awarded to any party. R.C. § 5311.01 et seq.

****700 Syllabus by the Court**

1. *69 The undivided percentage of interest in the common areas and facilities of a condominium owned by individual unit owners, as expressed in the condominium declaration, shall not be altered except by an amendment to the declaration unanimously approved by all unit owners affected.

2. The erection of fences by condominium unit owners, which enclose a portion of the common area adjacent to the unit owners' property, and their installation of air-conditioner compressors in the common area, purportedly authorized by approval of an amendment to the condominium declaration by a vote of less than all unit owners, constitute a taking of property which is the subject of the undivided interest of all unit owners.

Robins, Preston & Beckett Co., L. P. A., and John F. Gugle, Columbus, for plaintiffs.
Tidwell & Lunsford and Alan Lunsford, Columbus, for defendants.

PADDOCK, Referee.

Pursuant to Rule 53, the referee makes the following findings of fact, conclusions of law, and recommendation based on the pleadings, stipulations, exhibits, view of the premises, and arguments of counsel.

***70 FINDINGS OF FACT**

1. The Broad-Brunson Place Condominium is a 17-unit residential building on a parcel of land in Columbus, Ohio, bounded by East Broad Street, Brunson Avenue, Long Street and Monypenny Avenue. The building and land were submitted as con-

dominium property by the execution and filing of a declaration, pursuant to R.C. Chapter 5311, in September 1963. The declaration contained all the proper information required by R.C. Section 5311.05, including the By-Laws of the Unit Owners' Association.

2. The By-Laws of the Unit Owners' Association were amended in November of 1971 by a vote of more than 75% of the voting power of the Unit owners, as required by R.C. 5311.05(B)(9) and the By-Laws. The particular portions of the Amended By-Laws relevant to this litigation are:

Article VIII-Administrative Rules and Regulations, Section 1. The board of **701 managers may adopt administrative rules and regulations governing the use and operation of condominium property not in conflict with the declaration or these By-Laws and amendments thereto by a vote of a majority of the members of the board. Such Administrative Rules and Regulations shall be recorded with the secretary-treasurer and shall be sent to each unit owner by registered mail prior to the effective date of their application.

Section 2. Such Rules and Regulations may be amended from time to time by a majority vote of the members of the board of managers or by a vote of at least seventy-five percent (75) of the voting power of the Unit Owners' Association at the annual meeting or at a special meeting of the same.

Article IX-Use Of Unit and Compliance With By-Laws, Section 1. Each unit shall be used and occupied only as a private dwelling by the owner or his tenant. Each unit or any part thereof shall not be used for any other purpose. Each owner or any other occupant of the unit shall respect the comfort and peace of mind of his neighbors, as well as other occupants of the condominium. Each owner shall not do, or permit to be done, or keep in the *71 unit, anything which will increase the rate of fire insurance for the condominium, or do or suffer to be done any act or thing which shall be a nuisance, annoyance, inconvenience, or damage to the unit or

any occupants of the condominium.

Article X-Unit Ownership.

Section 1. Ownership of a unit includes the right to exclusive possession, use and enjoyment of the surfaces of all its perimeter walls, floors and ceilings, and of all supporting walls, fixtures, and other parts of the building within its boundaries, as well as the garage space assigned to the unit, including the right to paint, tile, wax, paper, or otherwise finish, refinish or decorate the same.

3. The schedule of units, filed as part of the original declaration, states as follows:

'All are contained within the boundaries of the condominium and not specifically designated as part of a unit is common area. All utilities located within any unit but not serving that specific unit alone are common facilities. All utilities outside the limits of any units are common facilities.'

4. The original declaration was amended in September of 1971, 'to permit fencing and other items on common ground for the purpose of inclosing portions of common area to be used as patio.'

'It is hereby declared that all requests for such fencing shall be submitted in writing along with the plans as to design, uniformity and control, to the board of managers, and their approval with written consent must be given by the board of managers in each case.

'It is further declared that any gates, a part of such fencing, shall be kept unlocked. Unit Owners may beautify their area by planting of flowers and shrubbery without submitting written plans.'

This amendment to the declaration was approved by 75% of the unit owners. The signatures of the owners of 14 units appear on the amendment as filed with the County Recorder, the signatures of 5 unit owners (numbers 3, 4, 8, 9, and 15) do not.

5. On February 10, 1972, the Rules and Regulations

*72 of the condominium were adopted, which contained the following provision:

8-CONSTRUCTION

'No unit owner may erect, or cause to be erected, any structure, fence, or other item, or in any way change or alter the now existing contour of the outside of the property without written consent of the board of managers. Plans, as to design, uniformity and control, have to be submitted to the board of managers in writing.**702 Locked enclosures prohibited. An exception to this rule may be: unit owners may beautify their area by planting of flowers and shrubbery without submitting written plans.'

6. Since the date of the last amendment to the declaration and the adoption of the Rules and Regulations pertaining to fences, defendant Jerry Glick has built a redwood fence, roughly 6 feet high, enclosing a rectangular area on the east side of the condominium at the rear area of his unit. Mr. Glick obtained written permission for his fence. Defendants Stephan Ely, Randall Jester and Lyle Smith have applied to the board for permission to build similar fences, and have received conditional approval pending the outcome of this case.

7. Plaintiffs H. Coleman and Mary Grimes and several of the defendants have placed air conditioner compressors on the common area east of the condominium. Mr. and Mrs. Grimes' compressor is a green metal device, roughly 2 feet wide, 3 feet long and 2 feet high. Other compressors are of similar size. Defendant Smith's is a larger heavy duty model. The compressors were installed at various times. No section of the declaration, bylaws or rules and regulations deals directly with the matter of air conditioner compressors.

8. On the 27th of August, 1969, plaintiff H. Coleman Grimes, as secretary-treasurer of the association, signed a lease form with the appropriate blanks filled in, purporting to lease an area of the condominium blacktop to Diversified Janitorial

Service for a 5-year period, at a rent of \$20 per month. The form was never attested to or acknowledged pursuant to R.C. 5301.01. There is no indication that the association authorized this transaction. The lease, *73 with a 5-year option clause, expires on August 31, 1974. The lease has been ratified by almost 4 1/2 years of rent collection by the association.

9. The controversy regarding Edna Moreland doing business as a real estate broker from her unit is now moot.

10. There is no evidence that any party suffered damages as a result of the actions of another party.

CONCLUSIONS OF LAW

1. The key issue in this case is whether placing fences and air conditioner compressors on condominium common areas is a 'use' of the property requiring association board approval and compliance with the provisions of the declaration, amended by a 75% vote of the unit owners, or is a taking of common area property affecting the percentage of undivided interest of the other unit owners requiring unanimous approval of an amended Declaration. This is a case of first impression in Ohio and perhaps even in the United States.

[1][2] Based on the language of R.C. Chapter 5311, it is the conclusion of the referee that placing fences and compressors on condominium common areas constitutes a taking of property and an ouster of co-tenants from common areas subject to all owners' undivided interest such as to require unanimous approval of an amendment to the declaration. This conclusion is based largely on R.C. 5311.04, 'Ownership of common areas and facilities.' Subsection (A) states that ownership of common areas shall remain undivided. Six-foot-high redwood fences, even if unlocked do divide the common area into identifiable zones adjacent to particular units with an implied desire for privacy which would deter, if not stop, other unit owners

from strolling, dog walking, or toddler exercising in the fenced off area. The rights to the common areas may not be waived, released or partitioned by civil suit through the action of any unit owner acting alone. Subsection (D) provides that the common **703 areas be used for their intended purposes without hinderance or encroachment of other unit owners lawful rights. Again, fences and compressors do stop others from walking, etc., on the ground they enclose or occupy.

Subsections (B) and (C) pose a problem for determining*74 the manner in which condominiums can allow immovable objects such as fences, compressors, and brick barbecues to be placed on common areas for use by or benefit to less than all of unit owners. R.C. 5311.04(C) allows change in the percentage of interest in the common areas only by unanimous amendment of the declaration. Fencing-in of one area for almost exclusive use of one unit owner will not alter the percentage interest of the other unit owners (each will still have his approximately 6% interest) but it will mean that each unit owner will have 6% of the smaller remaining common area. Unfortunately, neither the declaration, by-laws or statutes of Ohio expressly provide for a means of converting common area into limited common area or unit owner's property. As erecting fixed objects on common areas does constitute a taking of property the subject of the undivided interest of all unit owners, it is proper to require unanimous approval of such a change. To do otherwise would allow unit owners in control of 76% of the voting power to take common area from those with 24% of the voting power through amendment of the declaration.

Therefore, the erection of fences and installation of compressors without unanimously approval amendments to the declaration is improper.

[3] 2. The purported lease of blacktop to Diversified Janitorial Services is a legal nullity as the document was executed without proper statutory formalities and was not an act authorized by the Board.

RECOMMENDATIONS

1. Both the fences and the compressors are on common areas in violation of R.C. 5311.04. The referee considered the two forms of taking common area to be indistinguishable and not susceptible to a de minimus treatment. However, as each unit owner in good faith relied on the then apparent propriety of the 75% approved amendment to the declaration in creating their fences, and as lack of air conditioning in Columbus summers can severely reduce the comfort of any habitation, the unit owners will have 90 days from the date of final judgment of this Court *75 to remove all air conditioner compressors and fences. Planted shrubs and flowers may remain.

2. As the association has received the benefit of the monthly rental of the blacktop to Diversified Janitorial Services, for 4 1/2 years, the lease agreement has been ratified. The association may still remedy the problem by not renewing the lease when it expires August 31, 1974.

[4] 3. As there is no statutory provision in R.C. Chapter 5311 for an award of attorney's fees, each side must pay their own counsel.

4. Therefore, the referee recommends that judgment be entered for plaintiffs and against the defendants on the issue of removal of fences and for defendants against plaintiffs on the issue of damages and attorney fees, and, on defendants' counterclaim, for defendants against plaintiffs on the issue of removal of air conditioner compressors and for plaintiffs against defendants on the issue issue of damages and fees.

JUDGMENT

PETREE, Judge.

This matter having come on for hearing on the pleadings, stipulations of counsel, **704 exhibits and view of the premises, upon the evidence adduced it is accordingly, ordered, adjudged and decreed that judgment be entered for plaintiffs and against defendants on the issue of removal of

fences, and for defendants against plaintiffs on the issue of damages an attorney's fees, and, on defendants' counter-claim, judgment in favor of defendants against plaintiffs on the issue of removal of air-conditioner compressors, and for plaintiffs against defendants on the issue of damages and fees.

It is therefore, ordered that all fences and all air-conditioner compressors be removed from the common area within ninety (90) days from this date.

Judgment accordingly.

Ohio Com.Pl. 1974.
Grimes v. Moreland
41 Ohio Misc. 69, 322 N.E.2d 699, 70 O.O.2d 134

END OF DOCUMENT

Supreme Judicial Court of Massachusetts, Norfolk.
Leonard W. KAPLAN,
v.
James L. BOUDREAUX, et al., Trustees,^{FN1} et al.^{FN2}

FN1. Donna Carnevale, Andrew Melcer, Abby Simon, Edward Hoard, William Hyland, and Henry Wellins, trustees of 90 Park Street Condominium Trust.

FN2. Michelle A. McGraw. McGraw is coowner, together with James L. Boudreaux, of unit eleven of the condominium.

Argued April 3, 1991.
Decided June 18, 1991.

Owner of condominium unit brought suit challenging validity of amendment to condominium bylaws, which allowed owners of one unit to have exclusive use of area of common property. The Superior Court, Norfolk County, Roger J. Donahue, J., declared that amendment was valid and granted summary judgment to defendants. Plaintiff appealed. The Supreme Judicial Court, Abrams, J., held that: (1) term "interest," as used in statute providing that percentage of individual unit owner's undivided interest in common areas of condominium may not be altered without consent of all other unit owners whose percentages are affected, is broad enough to include interests which are less than ownership or fee simple interests, and (2) amendment to bylaws was invalid, as reducing plaintiff's percentage interest in common property without his consent.

Reversed and remanded.

West Headnotes

[1] Condominium 89A ↪ 6.1

89A Condominium
89Ak6 Common Elements; Management and Control

89Ak6.1 k. In General. Most Cited Cases
(Formerly 89Ak6)

Term "interest," as used in statute providing that percentage of individual unit owner's undivided interest in common areas of condominium may not be altered without consent of all other unit owners whose percentages are affected, is broad enough to include interests which are less than ownership or fee simple interests. M.G.L.A. c. 183A, § 5(b).

[2] Condominium 89A ↪ 7

89A Condominium
89Ak6 Common Elements; Management and Control

89Ak7 k. Constitution and Bylaws. Most Cited Cases

Amendment to condominium bylaws, which allowed unit owners to use common area outside their unit free of use restrictions that applied to all other unit owners, and which assigned common area for unit owners' exclusive use, affected percentage of other unit owners' undivided interest in common areas and, accordingly, required unanimous consent of all unit owners. M.G.L.A. c. 183A, § 5(b).

**496*436 Roger S. Davis, Boston, for plaintiff.
Robert J. Baum (Edward R. Wiest with him), Boston, for defendants.

Before LIACOS, C.J., and ABRAMS, NOLAN, LYNCH and GREANEY, JJ.

ABRAMS, Justice.
Leonard W. Kaplan, the owner of one unit of 90 Park Street Condominium (condominium), filed a complaint in Superior Court alleging that an amendment to the condominium by-laws, which allowed the owners of one unit to have the exclusive use of an area of common property, reduced his percentage interest in the common property. He

contends that the amendment is invalid because it was adopted in contravention of the terms of the master deed, the condominium trust, and G.L. c. 183A, § 5 (1988 ed.). A judge in the Superior Court declared the amendment valid and granted summary judgment to the defendants. The plaintiff appealed,^{FN3} and we transferred the case on our own motion. We reverse.

FN3. The plaintiff's complaint consists of three counts. Count I requests both preliminary and permanent injunctions preventing Boudreaux and McGraw from transferring unit eleven of the condominium; count II requests a declaration that the by-law amendment is invalid; and count III requests damages pursuant to G.L. c. 93A (1988 ed). The judge dismissed counts I and III and declared the amendment to be valid. In his appellate brief, the plaintiff does not argue the issues of an injunction or damages pursuant to c. 93A. Therefore, those issues are deemed waived. Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

The essential facts of the case are undisputed. The plaintiff owns one of the nineteen units in 90 Park Street, a condominium development located at the intersection of Park and Vernon Streets in Brookline. James L. Boudreaux, a trustee of the 90 Park Street Condominium Trust, owns unit eleven of the condominium development, together with Michelle A. McGraw. Unit eleven is located in one corner of the building, occupying part of the first and second floors. Outside the exterior entrance of unit eleven is an area containing a walkway which extends from unit eleven to Park Street. The walkway, containing an area of approximately 640 square feet, provides access to unit eleven only. The condominium *437 master deed includes the land and walkways as common areas, and provides that the use of the common areas is subject **497 to the by-laws of the condominium trust. Section 5.19 of the by-laws prohibits occupants from using outdoor com-

mon areas for any purpose other than ingress and egress along paved paths.^{FN4}

FN4. Section 5.19 of the by-laws states: "No occupant, whether Unit Owner, guest or tenant, or member of a Unit Owner's, guest's or tenant's household, shall use or cause to be used the outdoor common areas for any activity other than ingress or egress along paved paths. All other activities are prohibited, including but not restricted to barbecuing or cooking, sun bathing, loitering, participating in games or other recreation, and allowing household pets to defecate without cleaning up promptly. Areas subject to specific easements, such as balconies, entryways and patios, are exempt from these restrictions provided that they are not used in a manner that interferes with the [privileges] and comfort of any other occupant of the Condominium."

Boudreaux and McGraw wished to landscape part of the walkway leading from Park Street to unit eleven. They sought to have the by-laws amended to allow them to do so. The trustees proposed and then executed an amendment to the by-laws on June 15, 1988, and recorded the amendment at the Norfolk County registry of deeds on June 27, 1988. Unit owners purportedly representing 77.38% of the voting interest of the trust signed the amendment. The by-law amendment exempts the "outside, private entry-way/patio leading from Park Street into Unit 11" from the use restrictions set out in § 5.19 of the by-laws. It also assigns this area "for the exclusive use of Unit # 11."^{FN5} The plaintiff contests the validity of this amendment. He alleges that the adoption of the amendment violated the terms of the master deed, the condominium trust, and G.L. c. 183A, § 5, because all the owners of condominium units did not consent to the adoption *438 of the by-law. The plaintiff filed suit against the trustees of the condominium seeking a declaration that the by-law amendment was invalid and damages and attorney's fees pursuant to G.L. c. 93A (1988 ed.).

The judge allowed the defendants' motion for summary judgment. The plaintiff seeks review of the judge's decision on the validity of the by-law amendment and further consideration of the issue of attorney's fees.

FN5. "5.19(a) with respect to the restrictions mentioned in Section 5.19 concerning common area, it is herein declared that the outside, private entry-way/patio leading from Park Street into Unit # 11 shall be exempted from any such restrictions limiting activities other than ingress or egress by the owners of Unit # 11. This outside, private entry-way/patio having the sole and only purpose of providing entry access directly into Unit # 11 from Park Street shall hereforth be assigned for the exclusive use of Unit # 11 without regard to the restrictions as mentioned in Section 5.19."

1. *Regulatory framework.* The Legislature established governing rules for condominium ownership in Massachusetts in G.L. c. 183A (1988 ed.), which essentially is an enabling statute. *Barclay v. DeVeau*, 384 Mass. 676, 682, 429 N.E.2d 323 (1981). A condominium unit owner is entitled to the exclusive ownership and possession of his unit, G.L. c. 183A, § 4, and to an undivided interest in the common areas in the same proportion as the value of his unit compared to the aggregate value of all the units. G.L. c. 183A, § 5. Section 5 (b) provides that the percentage of undivided interest in the common areas held by each unit owner cannot be altered without the consent of all unit owners whose percentage is affected, and that any such alteration can be achieved only by amendment to the master deed.

In order to establish a condominium, the owner must record a master deed. G.L. c. 183A, § 2. The master deed of 90 Park Street Condominium contains a provision similar to that in § 5: "No instrument of amendment which alters the percentage of the undivided interest in and to the Common Areas and Facilities to which any unit is entitled shall be

of any force or effect unless the same has been approved by all Unit Owners and said instrument is recorded as an Amended Master Deed."

The statute also requires that the master deed contain the name of the trust or association which will manage and regulate the condominium, and a statement that the trust has established by-laws. G.L. c. 183A, § 8(i). The by-laws must provide **498 for a method of adopting and amending rules governing the use of common areas. G.L. c. 183A, § 11(d). The by-laws governing 90 Park Street are contained within *439 the 90 Park Street Condominium Trust instrument. The trust instrument outlines procedures for amendment. The trustees may amend the trust with the written consent of the owners entitled to 75% of the beneficial interest in the trust. However, pursuant to § 8.1 of the by-laws, "[n]o such amendment ... which purports to alter or in any manner or to any extent modify or affect the percentage of the Beneficial Interest of any Unit Owner so as to be different from the percentage of Beneficial Interest of such Unit Owner in the Common Areas ... set forth in Section 4.1 and the Master Deed shall be valid or effective without the consent of all the Unit Owners." Thus the trust instrument, the master deed, and the statute all contemplate the possibility of changes in the rules that apply to the unit owners. However, all three prohibit any alteration which changes a unit owner's percentage interest in the common areas without the consent of all the unit owners.^{FN6}

FN6. The statute specifies that consent must be obtained from all unit owners "whose percentage of the undivided interest is affected." G.L. c. 183A, § 5(b). The defendants argue that the amendment does not change any owner's percentage interest, but do not argue further that, even if it did, the plaintiff would not qualify as an owner whose interest is affected. We assume, without deciding, that, if the amendment changed the percentage interest of unit eleven, then the plaintiff's interest

would be affected.

[1] 2. *Validity of by-law 5.19(a)*. The issue before us is whether the amendment to the by-laws which granted the owners of unit eleven exclusive and unrestricted use of the walkway leading to that unit constitutes an alteration in the percentage interest of the owners, or whether it is a permissible regulation of the use of common areas. We begin by determining whether the rights granted to the owner of unit eleven constitute an "interest" in the common area, or whether, as the defendants argue, only the conveyance of an "ownership" interest would alter the unit owner's percentage interest.

Neither c. 183A nor the condominium documents define an "interest" in the common areas. We turn, therefore, to other legal authorities. Such sources provide some insight *440 into the meaning of this term; however, "[a]s applied to property, the chief use of the word 'interest' seems to be to designate some right attached to property which either cannot, or need not, be defined with precision." 31 C.J.S. Estates § 1(b), at 10 (1964). Some commentators have used the phrase in an extremely broad sense, to include all "rights, privileges, powers and immunities with regard to specific land ... which exist only in a particular person." Restatement of Property § 5 comment d (1936). Such a broad understanding of the phrase is not universal, however. Many courts, for example, specifically have stated that a license is not an interest in land. E.g., *Chelsea Yacht Club v. Mystic River Bridge Auth.*, 330 Mass. 566, 568, 116 N.E.2d 153 (1953); *Chase v. Aetna Rubber Co.*, 321 Mass. 721, 724, 75 N.E.2d 637 (1947); *Baseball Publishing Co. v. Bruton*, 302 Mass. 54, 55, 18 N.E.2d 362 (1938); *Booker v. Cherokee Water Dist.*, 651 P.2d 452, 453 (Colo.Ct.App.1982); *Waterville Estates Ass'n v. Campton*, 122 N.H. 506, 508-509, 446 A.2d 1167 (1982). See G. Korngold, *Private Land Use Arrangements* § 7.01 (1990); J.W. Bruce & J.W. Ely, *Easements and Licenses in Land* par. 1.03[1] (1988 & Supp.1991). It is clear, however, that " 'complete property' in (or 'full ownership' of) [land] may be

divided into smaller segments or 'interests.' " R.A. Cunningham, W.B. Stoebeck, & D.A. Whitman, *Property* § 1.2, at 6 (1984). Restatement of Property, *supra* at § 5 comment e. Thus, while the authorities do not furnish one precise definition which can be easily applied to the statute and documents at issue, they do support an understanding of each unit owner's "interest" in the common areas as composed of a number of smaller interests. Clearly, a transfer of the sum total of a unit owner's interests in a portion of the common area to another unit owner would affect percentage interest in the common area of both owners. It **499 is not necessary, however, to transfer the sum of one owner's interests in a portion of land in order to change the comparative interests held by each. Transfer of an interest that is smaller than an "ownership" interest would suffice to alter the percentage interest held by each.

*441 The common law thus recognizes interests in land which are less than an "ownership" interest. There is no indication that in c. 183A, § 5, the Legislature intended to be more restrictive, and to use the term "interest" to mean only "ownership interest" or "fee simple interest." Absent any such indication, we may not narrow the applicability of the statute. See *Commercial Wharf East Condominium Ass'n v. Waterfront Parking Corp.*, 407 Mass. 123, 129, 552 N.E.2d 66 (1990) (recognizing non-ownership rights in condominium property); *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 782, 407 N.E.2d 297 (1980). The language of the master deed and the trust instrument tracks the language of c. 183A. We see no indication that the parties intended the term "interest" to have a different meaning in the trust and the master deed than it has in the statute. We conclude that the common law, the condominium statute, and the condominium documents are all properly interpreted as recognizing interests in land which are less than an ownership interest. We therefore reject the defendants' argument that only the transfer of an "ownership" interest in a common area could alter a unit owner's percentage interest and thus would require the un-

animous consent of the unit owners.

[2] We still must consider, however, whether the particular changes in use restrictions contained in this by-law amendment were sufficient to affect the percentage interest in the common property held by the plaintiff. The defendants contend that the amendment simply constitutes an alteration in allowable uses of common areas, which does not require unanimous consent of all unit owners. Essentially, their argument is that the use restriction in the amendment did not create or transfer any interest in the common property.

The amendment contained two elements: first, the owners of unit eleven are allowed to use the common area outside their unit free of the use restrictions which apply to all other unit owners and all other areas. Second, the area outside unit eleven is assigned for the exclusive use of unit eleven. Thus, all other unit owners are excluded from any further use of that portion of the common area.

*442 None of the common law categories of rights in land describes precisely the rights granted by the amendment, perhaps because condominiums are essentially creatures of statute. However, because the Massachusetts condominium statute does not address the issue before us, we look to the common law as a means of analyzing the nature of the rights created by the by-law. See *Commercial Wharf East Condominium Ass'n, supra* (referring to common law of easements to determine nature of an interest in common areas retained by the developer). See also G.L. c. 183A, § 3 (a condominium unit and associated interest in common areas constitutes real estate); *Beaconsfield Towne House Condominium Trust v. Zussman*, 401 Mass. 480, 484, 517 N.E.2d 816 (1988) (claim under G.L. c. 183A, § 5, constitutes an action concerning an interest in land).

The rights granted by the amendment contain some characteristics of an easement or a lease, which are interests in land, and some characteristics of a license, which is not an interest in land. See *Baseball Publishing Co., supra*, 302 Mass. at 55, 58, 18

N.E.2d 362. The rights are revokable, because unit owners holding 75% of the interest in the condominium association can change the amendment. Revocability is a primary characteristic of a license, but is not characteristic of an easement. See J.W. Bruce & J.W. Ely, *Easements and Licenses in Land, supra* at par. 1.03[1]. The rights are not personal, but are granted to the owners of unit eleven. Both leases and licenses are typically personal in nature, see G. Korngold, *Private Land Use Arrangements, supra* at §§ 7.02, 7.03; H. Stavisky & R.A. Greeley, *Landlord and Tenant Law* § 171 (1977); most easements **500 are not. The amendment grants exclusive use of the area. Exclusive use is not characteristic of a license, but is a primary characteristic of a lease. See *Commercial Wharf East Condominium Ass'n, supra*, 407 Mass. at 134, 552 N.E.2d 66. We need not pin a label on the rights granted by this by-law in order to determine that the by-law contains critical characteristics of the common law categories which are interests in land. We conclude that the by-law properly is treated as transferring an interest in land.

*443 We attribute particular significance, as have other courts, to the fact that the by-law granted *exclusive* use of a common area. The other unit owners thus lost all right to use part of the common property, and one unit owner gained the right to use it *exclusively*. The combination of the other unit owners' loss of right to use the property and one owner's gain of an *exclusive* right to use the property is qualitatively different from generalized use regulations. "There is a distinct difference between ... cases, in which ... use, control, and/or ownership of the common areas is taken from some or all of the unit owners and cases in which some reasonable restrictions or regulation of the common areas is imposed on all owners." *Jarvis v. Stage Neck Owners Ass'n*, 464 A.2d 952, 956 (Me.1983). See *Directors of By the Sea Council of Co-Owners, Inc. v. Sondock*, 644 S.W.2d 774, 781 (Tex.Ct.App.1982). The grant of exclusive use to one unit owner of a common area is sufficient to change the relative interest of the unit owners in

that common area. *Penney v. Apartment Owners of Hale Kaanapali*, 70 Haw. 469, 776 P.2d 393, 395 (1989). See *Makeever v. Lyle*, 125 Ariz. 384, 609 P.2d 1084 (Ct.App.1980); *Stuewe v. Lauletta*, 93 Ill.App.3d 1029, 49 Ill.Dec. 494, 418 N.E.2d 138 (1981); *Grimes v. Moreland*, 41 Ohio Misc. 69, 322 N.E.2d 699 (1974).

The master deed, the condominium trust instrument, and G.L. c. 183A, § 5, all require the unanimous consent of the unit owners for any change in the owners' percentage interest in the common areas.^{FN7} The by-laws amendment at issue was *444 adopted without the unanimous consent of the unit owners. The amendment therefore violated G.L. c. 183A, § 5(b), and the terms of the master deed and the condominium trust instrument. Under the master deed and the trust instrument, the amendment is invalid and has no effect.

FN7. The grant of exclusive use to one unit owner is similar to the creation of a "limited" common area. A limited common area is available for the use of one or more, but not all, unit owners. 1 P.J. Rohan & M.A. Reskin, *Condominium Law and Practice* § 6.01[5] (1987). The Massachusetts condominium enabling statute is silent on the subject of limited common areas. However, this court has recognized that common areas may exist which, in fact, are used by only some of the unit owners, and that an association may assess maintenance fees to only those owners who use these areas. *Tosney v. Chelmsford Village Condominium Ass'n*, 397 Mass. 683, 687, 493 N.E.2d 488 (1986). The exact requirements for creation of a "limited" common area have not been set out. We do note, however, that many State statutes addressing the establishment of "limited" common areas require consent of all unit owners. See, e.g., N.J.Stat. Ann. § 46:8A-2(f) (1989 ed.); 1 P.J. Rohan & M.A. Reskin, *supra*.

The judgment for the defendants on the issue of the validity of the amendment is reversed, and on remand a declaration should be entered that the amendment is invalid.

So ordered.

Mass., 1991.
Kaplan v. Boudreaux
410 Mass. 435, 573 N.E.2d 495

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▷ Appellate Court of Illinois, Second District.
LAKE BARRINGTON SHORE CONDOMINIUM
TEN HOMEOWNERS ASSOCIATION, Plaintiff-
Appellant,

v.

Lawrence MAY, Defendant-Appellee.
No. 2-89-0595.

April 17, 1990.

Condominium association brought action against condominium owner and sought mandatory injunction requiring owner to dismantle deck. The Circuit Court, Lake County, John G. Radosevich, J., entered judgment in favor of owner. Association appealed. The Appellate Court, McLaren, J., held that association failed to establish that deck was impermissible encroachment on common elements.

Affirmed.

West Headnotes

[1] Covenants 108 ↪ 49

108 Covenants

108II Construction and Operation

108II(C) Covenants as to Use of Real Property

108k49 k. Nature and Operation in General. Most Cited Cases

Paramount rule for interpretation of covenants is to expound them so as to give effect to the actual intent of the parties as determined from the whole document construed in connection with the circumstances surrounding its execution; rule of strict construction in favor of free use of property will not be applied to defeat obvious purpose of restriction, even if not precisely expressed.

[2] Injunction 212 ↪ 50

212 Injunction

212II Subjects of Protection and Relief
212II(B) Matters Relating to Property
212k45 Trespass or Other Injury to Real Property

212k50 k. Encroachments by Buildings or Other Structures. Most Cited Cases

Certain encroachments on the common elements were permissible pursuant to condominium documents, and condominium association failed to establish that deck was impermissible encroachment; therefore, condominium association was not entitled to mandatory injunction requiring condominium owner to dismantle deck.

****814 *281 ***107** Mark L. Dressel, Morgan, Lanoff, Denniston & *****108** Madigan, Ltd., Chicago, Ronald T. Slewitzke, Morgan, Lanoff, Denniston & ****815** Madigan, Ltd., Denis J. McKeown, Waukegan, for Lake Barrington Shores Condo.

Justice McLAREN delivered the opinion of the court: Plaintiff, Lake Barrington Shores Condominium Ten Homeowners Association (Association), filed suit against defendant, Lawrence May, alleging that defendant, a condominium owner and Association member, had violated the terms of the condominium declaration and the Association's bylaws and regulations by erecting a deck to the rear of his condominium. The Association sought a mandatory injunction requiring defendant to dismantle the deck. The trial court entered judgment in favor of defendant. Plaintiff appeals the judgment, contending that the trial court erred in finding (1) that the Association's decision not to grant defendant a variance for his deck because the deck would encroach on common elements was an absurdity and (2) that the Association could not deny defendant a variance in light of its acquiescence in prior violations.

Defendant purchased his condominium in 1985. At that time, there was a 10-foot by 10-foot concrete patio at the rear of the unit. In July 1986, defendant removed the patio and began construction of a

10-foot by 18-foot wooden deck. The Association's property manager advised defendant that there was no approved architectural variance for the deck and that he should cease construction until he received approval for the project. Defendant submitted a plan to the Association's architectural committee, and they recommended the plan for approval. The board of directors, however, rejected the plan based on its policy of denying any variance which would encroach on the common elements of the development. The board advised defendant that it would approve a variance for a deck which was no larger than the 10-foot by 10-foot patio. Defendant went forward, however, and completed the deck despite the lack of approval. The Association brought suit seeking a mandatory injunction requiring defendant to remove the deck. Following a bench trial, the court ruled in favor of *282 defendant and denied the request for a mandatory injunction. Plaintiff appeals.

Plaintiff contends that defendant was an Association member and was bound by the restrictions contained in the declaration, the bylaws and the regulations and that defendant violated the restrictions by altering his patio without written approval. Plaintiff relies on various sections of the declaration, bylaws and regulations.

Article 5, paragraph 4, of the declaration states:

"The use of the Common Elements and the rights of the Unit Owners with respect thereto shall be subject to and governed by the provisions of the Act [the Condominium Property Act (Ill.Rev.Stat.1983, ch. 30, par. 301*et seq.*)], this Declaration and the By-Laws and rules and regulations of the Board of Directors of the Association."

Article 5, paragraph 6 states:

"No alterations of any Common Elements or any additions or improvements thereto shall be made by any Unit Owner without the prior written approval of the Board."

Article 5, paragraph 8D, states:

"A Unit Owner shall not * * * change the appearance of any * * * balcony, deck or patio, in any manner contrary to such rules and regulations as may be established by the Association."

Article 5, section 2, of the bylaws states:

"The use, maintenance and operation of the Common Elements shall not be obstructed, damaged or unreasonably interfered with by any Unit Owner."

The board regulations state:

"The Condo X Board will not approve any variance that encroaches on common elements."

Common elements are defined as all of the property except the units. Patios, decks and balconies are included within the description of common elements; however, they are designated as limited common elements and are reserved for the exclusive use of the unit owner whose property adjoins that patio, deck or balcony. The board rejected defendant's request for a **816 ***109 variance because the proposed deck would encroach on common elements.

The trial court found that the board's reason for denying defendant's variance was an absurdity because a deck is by definition a part of the common elements and, therefore, cannot encroach on itself.

[1] The paramount rule for the interpretation of covenants is to expound them so as to give effect to the actual intent of the parties *283 as determined from the whole document construed in connection with the circumstances surrounding its execution. (*Amoco Realty Co. v. Montalbano* (1985), 133 Ill.App.3d 327, 331, 88 Ill.Dec. 369, 478 N.E.2d 860.) The rule of strict construction in favor of the free use of property will not be applied to defeat the obvious purpose of a restriction, even if not precisely expressed. *Amoco*, 133 Ill.App.3d at 331, 88 Ill.Dec. 369, 478 N.E.2d 860.

The restrictions in the declarations, bylaws and reg-

ulations exist for the purpose of maintaining architectural and aesthetic standards and preserving the common elements for the use and enjoyment of all of the homeowners. Plaintiff contends that the Association's intention in promulgating its policy against encroachments into common elements was to "disapprove encroachments onto the common elements that extended beyond the parameters of the limited common elements."

Even assuming that this is a proper statement of the Association's intention, the Association has failed to establish an impermissible encroachment. As noted above, the limited common elements are a subset of the common elements; they are those portions of the common elements, including patios and decks, that are reserved for the exclusive use of the unit owner whose property adjoins such elements. In effect, every limited common element is an encroachment on the common elements because it is reserved for the exclusive use of an individual. The declaration clearly contemplates the existence of patios, decks and balconies, however, and, therefore, contemplates that each unit owner will have some portion of the common elements reserved for his exclusive use, in effect, a permissible encroachment.

The Association's position, that defendant's deck is an impermissible encroachment, is premised on a belief that the 10-foot by 10-foot patio which existed when defendant moved into his unit defines that portion of the common elements which is reserved for defendant's exclusive use. However, plaintiff has failed to present any evidence tending to establish this beyond the existence of the patio itself. Plaintiff presented no document or plat which indicates that the area reserved for defendant's use was in any way limited to a certain size or to the parameters of the patio which existed when the development was constructed. Having failed to establish the size of the portion of the common elements which was reserved for defendant's exclusive use, plaintiff has, consequently, failed to establish that defendant's deck exceeded that size.

Plaintiff contends that "[u]nder the court's rationale, the Defendant or any unit owner could build a deck of any dimension(s) without Board approval thereby usurping the common elements for *284 their private use." We disagree. Unit owners are still required to submit plans and obtain approval before altering the common elements. The architectural committee makes rulings and suggestions concerning whether additions and improvements are architecturally acceptable and consistent with the other unit owners' uses and interests. If suggested changes do not meet architectural and aesthetic standards, or will interfere with the other owners' use and enjoyment of the property, the committee and the board may disapprove the variance. In this case, defendant's deck was architecturally indistinguishable from the other decks in the development; there were many decks which were larger than defendant's deck; and there was no evidence that defendant's deck interfered with other unit owners' interests. Further, if the Association wishes to establish a limitation on the size of decks, this can be accomplished through an amendment of the condominium documents.

****817 ***110** [2] The relief sought in this case is a mandatory injunction requiring defendant to remove his deck. The remedy of mandatory injunction is generally invoked by the courts to compel a landowner to remove an encroachment. (See *Ariola v. Nigro* (1959), 16 Ill.2d 46, 51, 156 N.E.2d 536; *Calhoon v. Communications Systems Construction, Inc.* (1986), 140 Ill.App.3d 1012, 1016-17, 95 Ill.Dec. 71, 489 N.E.2d 23.) In this case, certain encroachments on the common elements are permissible pursuant to the condominium documents, and plaintiff has failed to establish that the deck at issue constitutes an impermissible encroachment. Under these circumstances, plaintiff has failed to establish its right to a mandatory injunction.

The judgment of the circuit court of Lake County is affirmed.

Affirmed.

553 N.E.2d 814
196 Ill.App.3d 280, 553 N.E.2d 814, 143 Ill.Dec. 107
(Cite as: 196 Ill.App.3d 280, 553 N.E.2d 814, 143 Ill.Dec. 107)

Page 4

UNVERZAGT, P.J., and WOODWARD, J., con-
cur.

Ill.App. 2 Dist.,1990.

Lake Barrington Shore Condominium Ten
Homeowners Ass'n v. May

196 Ill.App.3d 280, 553 N.E.2d 814, 143 Ill.Dec. 107

END OF DOCUMENT

Westlaw.

609 P.2d 1084
125 Ariz. 384, 609 P.2d 1084, 13 A.L.R.4th 591
(Cite as: 125 Ariz. 384, 609 P.2d 1084)

*No Stat.
no Dec
no By Law*

*Statute
Amended.*

▷

Court of Appeals of Arizona, Division 1, Department C.

Harrison A. MAKEEVER and Ruby K. Makeever;
Richard S. Schuman and Jean C. Schuman, Appellants,

v.

Dr. William H. LYLE and Mrs. William H. Lyle,
Appellees.

No. 1 CA-CIV 4111.

March 4, 1980.
Rehearing Denied April 7, 1980.
Review Denied April 22, 1980.

Condominium owners brought an action seeking to enjoin another owner from proceeding with the construction of basement and second floor additions. The Superior Court of Yuma County, No. C-38766, Douglas W. Keddie, J., refused the injunction, and plaintiffs appealed. The Court of Appeals, Haire, J., held that: (1) nothing contained in the statute setting forth powers conferred on the council of condominium co-owners conferred upon a majority of the council the right to convert a portion of the general common elements to the exclusive use and control of an individual apartment owner; (2) the land and space which were to be occupied by the proposed additions were part of the general common elements; and (3) nothing in the condominium bylaws gave authority to the council of co-owners to authorize the construction and taking involved.

Reversed and remanded.

West Headnotes

[1] Condominium 89A ↪10

89A Condominium

89Ak6 Common Elements; Management and Control

89Ak10 k. Use of Premises. Most Cited

Cases

Nothing contained in statute setting forth powers conferred on council of condominium co-owners confers upon majority of the council of co-owners the right to convert a portion of the general common elements to the exclusive use and control, and thereby to the private ownership, of an individual apartment owner. A.R.S. § 33-561, subd. A.

[2] Condominium 89A ↪10

89A Condominium

89Ak6 Common Elements; Management and Control

89Ak10 k. Use of Premises. Most Cited Cases
Land and space which were to be occupied by condominium owner's proposed basement and second floor additions were part of the general common elements owned in common by all the apartment owners, and contemplated use was not a use in common with other owners. A.R.S. § 33-553.

[3] Condominium 89A ↪7

89A Condominium

89Ak6 Common Elements; Management and Control

89Ak7 k. Constitution and Bylaws. Most Cited Cases

General provision in condominium bylaws which delineated responsibilities of council of co-owners and stated that "decisions and resolutions of the Council shall require the approval of a majority of a quorum of owners" did not constitute an unlimited grant of power to the council of co-owners to consider any question which might conceivably be presented to the council, but merely allowed the approval by a majority vote of questions which council had been given authority to decide. A.R.S. § 33-561, subd. A.

[4] Condominium 89A ↪10

89A Condominium

89Ak6 Common Elements; Management and Control

89Ak10 k. Use of Premises. Most Cited Cases Council of condominium co-owners must have broad powers in determining and managing common uses of general common elements, and such determinations will be upheld if they are not arbitrary and capricious, bearing no reasonable relationship to the fundamental condominium concept.

[5] Condominium 89A ↪ 10

89A Condominium

89Ak6 Common Elements; Management and Control

89Ak10 k. Use of Premises. Most Cited Cases Power of council of condominium co-owners to convert common general elements to the exclusive and private use and control of one of the individual owners constitutes a taking of the other remaining individual owners' property which must be clearly given by statutes, declaration of submission or bylaws before its existence will be recognized. A.R.S. § 33-551 et seq.

[6] Condominium 89A ↪ 10

89A Condominium

89Ak6 Common Elements; Management and Control

89Ak10 k. Use of Premises. Most Cited Cases Nothing in condominium bylaws gave authority to council of co-owners to, by a majority vote or otherwise, authorize taking of part of the general common elements for the construction of basement and second floor additions by individual apartment owner.

*385 **1085 Bryne, Bradshaw, Ellsworth, Benesch & Thode by Thomas A. Thode, Yuma, for appellants.

Thaddeus G. Baker, P.C. by Thaddeus G. Baker, Yuma, for appellees.

OPINION

HAIRE, Judge.

The issues raised on this appeal require a consideration of the rights acquired by a condominium apartment owner in the "general common elements" when a parcel of real property has been submitted to a horizontal property regime pursuant to A.R.S. ss 33-551 et seq.

Each of the appellants own an apartment unit in the Laguna West Horizontal Property Regime, a condominium development consisting of 16 separate units located in Yuma, Arizona. Laguna West is not a vertical development, rather all the apartments *386 **1086 are built at ground level in blocks of four adjacent to the Yuma Golf and Country Club. Within each block each apartment shares at least one common wall with a neighboring apartment. Only four of the apartments have two stories and each of the apartments has its own two-car carport immediately adjacent to its entrance. Surrounding the apartments is an unfenced area, and the units share a common bathhouse and swimming pool.

The circumstances giving rise to this litigation commenced in December 1976 when the appellees, Dr. and Mrs. William H. Lyle, decided to purchase apartment unit 12. This was a single-story apartment, and Dr. Lyle wanted to construct a second story consisting of two bedrooms, a bath and a den, and also add a basement workshop immediately underneath his carport. He subsequently consummated the purchase of unit 12, and after receiving the approval of ten of the 16 unit owners, started construction.[FN1]

FN1. Initially, and apparently before he consummated the purchase, Dr. Lyle obtained the approval of 14 of the owners, subject to final approval of plans and specifications by the board of directors. Thereafter, due to conflicting opinions concerning the legality of the proposed construction, the board of directors failed to give their approval.

Appellants then commenced an action in Yuma County Superior Court seeking declaratory relief and also seeking to enjoin Dr. Lyle from proceeding with the construction. Essentially, appellants contended that Dr. Lyle's contemplated construction of the second floor and basement workshop would constitute a wrongful appropriation or taking for his sole and exclusive use and control of cubic space belonging in common to all the apartment owners, and that such a taking could not be accomplished without the unanimous consent of all the unit owners. On the other hand, it was Dr. Lyle's contention that since there was no specific provision in the Laguna West bylaws governing the contemplated construction, the only approval necessary was by a majority of the owners.

The trial judge adopted Dr. Lyle's position, refused to enjoin the contemplated construction, and awarded Dr. Lyle judgment for attorney's fees against appellants. For the reasons set forth herein, we reverse.

The Arizona statutes governing and authorizing horizontal property regimes (condominiums) were first enacted in 1962. See A.R.S. ss 33-551 through 561. In general these statutes authorize an owner to submit a parcel of real property to a horizontal property regime by filing a declaration of submission, which must contain certain declarations. See A.R.S. ss 33-552 and 33-553. The general concept involves a scheme of real property ownership whereby an owner individually owns a horizontal layer of "cubic content space" [FN2] which is subject to his exclusive control, A.R.S. s 33-553(3), together with an undivided fractional or percentage interest held in common with other unit owners in the "general common elements". Among other things, the general common elements include the land, the foundations, floors, the exterior walls of each apartment, ceilings and roofs, and in general all that portion of the property other than that which is subject to the exclusive ownership and control of an individual apartment owner. A.R.S. s 33-551(6). The fractional interest of the apartment owner in

the general common elements is appurtenant to each apartment, A.R.S. s 33-558, and the ownership of each individual apartment and the appurtenant interest in the general common elements is "vested as . . . any separate parcel of real property is or may be under the laws of this state . . ." subject to certain limitations on alienation and partition set forth in the statutes. A.R.S. s 33-557.

FN2. E. g., the cubic content space of his apartment, carport or garage, or any other area subject to his exclusive control.

Although some states have enacted extensive statutory provisions specifying the uses which may be made of the general common elements and the manner or means by which the owners may govern or control *387 **1087 such uses, [FN3] the sole Arizona statutory provision of this nature is found in A.R.S. s 33-561 A:

FN3. See, e. g., Fla.Stat.Ann. ss 718.103, 718.107, 718.108, 718.110, 718.113 and 718.123.

"A. The council of co-owners [FN4] shall be required to make provisions for maintenance of common elements, limited common elements where applicable, assessment of expenses, payment of losses, division of profits, disposition of hazard insurance proceeds and similar matters and shall be required to adopt bylaws, rules and regulations." (Footnote added).

FN4. The "council of co-owners" is a reference to all the owners of the condominium units. See A.R.S. s 33-551(5).

While there was some question presented in the trial court as to whether valid bylaws had ever been adopted for Laguna West as required by A.R.S. s 33-561 A, the trial judge found that the bylaws were adopted in compliance with the statute. That finding has not been challenged on appeal. [FN5]

FN5. The full title of the bylaws is

"Declaration of Restrictions and Bylaws and Rules and Regulations of Laguna West", recorded in Docket 546, commencing at Page 392, Records of Yuma County, Arizona.

Counsel for appellees cite Hidden Harbour Estates v. Norman, 309 So.2d 180, 181-182 (Fla.App. 1975) for the following:

"It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization."(Emphasis added).

[1] We agree with this concept. See generally 31 C.J.S. Estates s 150 (1979). However, even in "a little democratic sub society", there must be some basic sources from which the principles governing the democratic sub society are derived. Here the sources arise from the statutes (A.R.S. ss 33-551 through 33-561), the Declaration of Submission of Laguna West to a Horizontal Property Regime [FN6] and the above referred-to bylaws. We have previously quoted herein the only Arizona statutory provision directly setting forth powers conferred on the council of co-owners. See A.R.S. s 33-561. Without repeating the specific language of that statute, it requires that the council of co-owners arrange for the maintenance of the common elements, the assessment of expenses relating thereto, the disposition of hazard insurance proceeds, "and similar matters". Nothing contained in the statute can be remotely interpreted as conferring upon a majority of the council of co-owners the right to convert a portion of the general common elements to the exclusive use and control, and thereby to the private

ownership, of an individual apartment owner.

FN6. The declaration of submission is recorded in Docket 546, commencing at Pages 381 and 633, Records of Yuma County, Arizona.

[2] Examining next the declaration of submission of the property to the horizontal property regime concept, we note that the declaration does not contain any provision directly bearing on the question before this Court, although it does, as required by A.R.S. s 33-553 provide the descriptions and means for determining the "cubic content space" of the property which is owned by the apartment owner individually, and that portion of the property which is owned in common, the "general common elements". Although the declaration of submission presents some ambiguity as to the proper classification of the cubic content space of the carports,[FN7] there can be no question*388 **1088 but that the land and space which were to be occupied by Dr. Lyle's proposed basement and second floor addition were part of the general common elements owned in common by all the apartment owners.

FN7. The provisions of the declaration of submission were ambiguous as to whether the cubic content space of the carport was part of the space owned individually by each apartment owner, as opposed to being a part of the general common elements owned in common. The trial court properly resolved this ambiguity, finding that the carport cubic content space was not part of the general common elements.

Before considering the provisions of the bylaws, which constitute the third possible source of powers to be exercised by the council of co-owners, it is important to note that the use by Dr. Lyle of the contemplated second floor and basement was not a use in common with the other owners of Laguna West. Rather, by the very nature of the contemplated construction, the use necessarily would be in

the nature of a taking of that portion of the general common elements and converting it to the exclusive use and control of Dr. Lyle as an individual owner. The trial court, apparently recognizing that by reason of the proposed construction, a portion of the general common elements would be converted to Dr. Lyle's individual ownership, directed in its judgment that the declaration of submission be amended to reflect an additional amount of cubic content space for unit 12, belonging to Dr. Lyle.

[3] As previously indicated, appellees and the trial judge have recognized that there is no specific bylaw provision which would authorize appellees to do this. Rather, they rely upon a general provision in the bylaws, Article III, Section 1, as follows:

"Section 1. Council Responsibilities. The owners of units will constitute the Council of owners (hereinafter referred to as 'Council') and shall have the responsibility of administering the property, approving the annual budget, delegating such duties as it elects to agents designated for such purpose, establishing and collecting monthly assessments, maintaining fire and other hazard and liability insurance on the entire property, disbursement of fire and other hazard insurance and other proceeds for repair or reconstruction of any portion of the property. Except as otherwise provided, decisions and resolutions of the Council shall require the approval of a majority of a quorum of owners."(Emphasis added).

Appellees interpret the emphasized portion of Article III, Section 1 as constituting an unlimited grant of power to the council of co-owners to consider any question which might conceivably be presented to the council, and then to decide that question by majority vote, except as otherwise specifically required in the bylaws. We disagree. In our opinion the correct interpretation of the emphasized portion of Article III, Section 1, is that it does not constitute a grant of power expanding the area of questions which might be decided, but rather merely allows the approval by a majority vote of questions which are properly before the council, i. e., ques-

tions which the council has been given the authority to decide.[FN8]

FN8. Article II, Section 1, deals with the voting rights of owners, and provides in part: "The vote of a 'majority of owners' of a duly constituted quorum as required by Section 3 of this Article shall decide any question brought before such meeting."When considered in context it is clear that this provision, likewise, was not intended as an all-inclusive grant of authority to the council of co-owners.

[4][5] This brings us to the heart of the issue presented here. In the absence of specific authorization in the statutes, declaration of submission or bylaws, may a condominium owner be deprived of his interest in a substantial portion of the general common elements without his consent? We hold that he may not. This is not the type of power which may be inferred. It is recognized that the council of co-owners must have broad powers in determining and managing the common uses of the general common elements, and such determinations will be upheld if they are not arbitrary and capricious, bearing no reasonable relationship to the fundamental condominium concept. *Ritchey v. Villa Nueva Condominium Assoc.*, 81 Cal.App.3d 688, 146 Cal.Rptr. 695 (1978); *Hidden Harbour Estates v. Norman*, supra; *Ryan v. Baptiste*, 565 S.W.2d 196 (Mo.App.1978). However, in our opinion *389 **1089 the power of the council of co-owners to actually convert the common general elements to the exclusive and private use and control of one of the individual owners constitutes a taking of the other remaining individual owners' property which must be clearly given by the statutes, declaration of submission or bylaws before its existence will be recognized. See, e. g., *Grimes v. Moreland*, 41 Ohio Misc. 69, 322 N.E.2d 699 (1974). In our opinion it is a great step from a delegation of the right to manage one's interest in the general common elements for common purposes to a grant of the right to dispose of that property interest completely for the

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(Cite as: 125 Ariz. 384, 609 P.2d 1084)

sole, exclusive and private use of another.

[6] Referring again to the bylaws in question, we note several instances in which minor intrusions into the general common elements have been authorized without the necessity of acquiring unanimous consent. Thus, in Article VII, Section 3 of the bylaws, the owner is given the right to attach fixtures to the interior service of bearing walls (part of the general common elements) so long as he does not interfere with or damage the structural integrity of the building. Article VII, Section 4, subsection (j) prohibits exterior antennae without prior written approval of a majority of the owners. Likewise, Article VII, Section 4, subsection (k) allows exterior clotheslines only if erected or maintained in such a manner as to be "non-visible" to the other owners. However, we find nothing in these provisions which would either directly, or by negative implication, give authority to the council of co-owners to, by majority vote or otherwise, authorize the construction and taking involved here.

In summary, we hold that the trial court erred when it denied the injunctive relief sought by appellants. Accordingly, the judgments entered by the trial court denying injunctive relief and awarding attorney's fees against appellant are reversed. The matter is remanded for further proceedings not inconsistent with this opinion.

CONTRERAS, P. J., and EUBANK, J., concur.
Ariz.App., 1980.
Makeever v. Lyle
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Court of Appeals of Wisconsin.
 NEWPORT CONDOMINIUM ASSOCIATION,
 INC., a nonstock, not for profit corporation,
 Plaintiff-Respondent,
 v.
 CONCORD-WISCONSIN, INC., a Wisconsin cor-
 poration, Defendant-Respondent.
 Michelle TOMERA and Craig Tomera, Defendants-
 Third Party Plaintiffs-Appellants,
 v.
 THOMAS C. RICCI, LTD. PROFIT SHARING
 PLAN, f/k/a Thomas C. Ricci Pension and Trust,
 Thomas C. Ricci and Phyllis J. Ricci, Third Party
 Defendants-Respondents.
 No. 95-0869.

Submitted on Briefs Aug. 12, 1996.
 Opinion Released Oct. 23, 1996.
 Opinion Filed Oct. 23, 1996.

Owners of individual condominium unit sought de-
 clarations of interest that amendment to condomini-
 um declaration that reclassified veranda area from
 common area to limited common area appurtenant
 only to another unit was invalid. On competing mo-
 tions for summary judgment, the Circuit Court,
 Walworth County, John R. Race, J., held that re-
 stated declaration and reallocation of use of ver-
 anda were valid. Individual unit owners appealed.
 The Court of Appeals, Anderson, P.J., held that: (1)
 reallocation of veranda to limited common element
 did not reduce individual unit owners' percentage of
 ownership interest in veranda; (2) condominium as-
 sociation could amend declaration without indi-
 vidual unit owners' agreement; and (3) individual
 unit owners' remedy was with owners of unit whose
 value was increased by reallocation of veranda.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ↪842(1)

30 Appeal and Error
 30XVI Review
 30XVI(A) Scope, Standards, and Extent, in
 General
 30k838 Questions Considered
 30k842 Review Dependent on Whether
 Questions Are of Law or of Fact
 30k842(1) k. In General. Most
 Cited Cases

Appeal and Error 30 ↪842(8)

30 Appeal and Error
 30XVI Review
 30XVI(A) Scope, Standards, and Extent, in
 General
 30k838 Questions Considered
 30k842 Review Dependent on Whether
 Questions Are of Law or of Fact
 30k842(8) k. Review Where Evid-
 ence Consists of Documents. Most Cited Cases
 Application of statute and interpretation of unam-
 biguous written agreement involve questions of law
 which are independently reviewed on appeal.

[2] Statutes 361 ↪181(1)

361 Statutes
 361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k180 Intention of Legislature
 361k181 In General
 361k181(1) k. In General. Most
 Cited Cases

Statutes 361 ↪188

361 Statutes
 361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k187 Meaning of Language
 361k188 k. In General. Most Cited

Statutes 361 ↪190

361 Statutes

- 361VI Construction and Operation
- 361VI(A) General Rules of Construction
- 361k187 Meaning of Language
- 361k190 k. Existence of Ambiguity.

Most Cited Cases

In construing a statute, appellate court is to give effect to intent of legislature and to ascertain legislative intent; court first looks to language of statute and if it is not ambiguous, then court is not permitted to use interpretation and construction techniques because words of statute must be given their obvious and ordinary meaning.

[3] Statutes 361 ↪206

361 Statutes

- 361VI Construction and Operation
- 361VI(A) General Rules of Construction
- 361k204 Statute as a Whole, and Intrinsic

Aids to Construction

361k206 k. Giving Effect to Entire Statute. Most Cited Cases

Statutes 361 ↪208

361 Statutes

- 361VI Construction and Operation
- 361VI(A) General Rules of Construction
- 361k204 Statute as a Whole, and Intrinsic

Aids to Construction

361k208 k. Context and Related Clauses. Most Cited Cases
Entire section of a statute and related sections are to be considered in its construction or interpretation, and Court of Appeals does not read statutes out of context.

[4] Statutes 361 ↪223.2(.5)

361 Statutes

- 361VI Construction and Operation
- 361VI(A) General Rules of Construction
- 361k223 Construction with Reference to

Other Statutes

361k223.2 Statutes Relating to the

Same Subject Matter in General

361k223.2(.5) k. In General. Most

Cited Cases

Statutes relating to same subject matter are to be construed together and harmonized.

[5] Statutes 361 ↪184

361 Statutes

- 361VI Construction and Operation
- 361VI(A) General Rules of Construction
- 361k180 Intention of Legislature
- 361k184 k. Policy and Purpose of Act.

Most Cited Cases

Cardinal rule in interpreting statutes is that purpose of whole act is to be sought and is favored over construction that would defeat manifest object of the act.

[6] Condominium 89A ↪2

89A Condominium

89Ak2 k. Constitutional and Statutory Provisions. Most Cited Cases

Condominium Ownership Act provisions concerning change in percentage interest possessed in common element and amendment of declaration are clear and unambiguous. W.S.A. 703.09, 703.13.

[7] Condominium 89A ↪3

89A Condominium

89Ak3 k. Creation; Declarations. Most Cited Cases

Condominium Owners Association was permitted under Condominium Ownership Act, to amend entire declaration in plat without specific owners agreement where restated declaration was adopted by greater than three-fourths vote, unless amendments altered percentage of ownership interest in any of the owners' common elements. W.S.A. 703.09, 703.13.

[8] Condominium 89A ↪3

89A Condominium

89Ak3 k. Creation; Declarations. Most Cited

Cases

In changing veranda from common element to limited common element, condominium's restated declaration did not reduce owner's percentage of ownership interest in veranda, but merely reduced value of individual unit; owners still had same percentage in all common elements but lost unlimited use of veranda, and if sale of entire building occurred owners would still receive same percentage of proceeds. W.S.A. 703.09, 703.13.

[9] Condominium 89A ↪17

89A Condominium

89Ak17 k. Actions. Most Cited Cases

Remedy for condominium owners who lost value in their condominium by reallocation of veranda from common element to limited common element was with owner of unit that increased in value based on the reallocation, under statute providing for compensation if amendment to declaration increases value of one unit owner's interest and reduces another's, rather than suing condominium association, challenging the reallocation. W.S.A. 703.09(3)(a).

****776 *579** On behalf of the defendants-third party plaintiffs-appellants, the cause was submitted on the brief of Lisle W. Blackburn of Godfrey, Neshek, Worth & Leibsle, S.C. of Elkhorn.

On behalf of the defendant-respondent, the cause was submitted on the briefs of William Swindal, of Hinshaw & Culbertson of Chicago. ****777** On behalf of plaintiff-respondent, the cause was submitted on the briefs of Nicholas J. Loniello of Loniello, Johnson & Simonini.

Before ANDERSON, P.J., and BROWN and SNYDER, JJ.

ANDERSON, Presiding Judge.

Michelle and Craig Tomera (the Tomeras) appeal from a summary judgment in favor of Newport Condominium Association, Inc. (Association). The Tomeras argue that the adoption of a Restated Declaration and Plat (Restated Declaration), which re-

defined the veranda as a limited *580 common element appurtenant to Concord-Wisconsin, Inc.'s (Concord) unit, without the consent of all owners was improper. The Tomeras also question the validity of an amendment adopted by the Association in 1980. We conclude that the reallocation of the veranda from a common element to a limited common element within the Restated Declaration was proper under § 703.09(2), STATS., and that any reduction in condominium value suffered by the Tomeras is recoverable under § 703.09(3)(a). Accordingly, we affirm the trial court.^{FN1}

FN1. Due to our decision regarding the Restated Declaration, we find it unnecessary to address the validity of the 1980 amendment. *City of Waukesha v. Town Bd.*, 198 Wis.2d 592, 601, 543 N.W.2d 515, 518 (Ct.App.1995) (if a decision on one point disposes of an appeal, this court need not decide other issues raised).

The Association is an association of owners of Newport Condominium located on Lake Geneva.^{FN2} The condominium consists of seven units and was established by an original declaration and plat in 1978.^{FN3} The Tomeras have owned Unit 3N since July 1980. The remaining units are owned or controlled by Concord-Wisconsin, Inc. (Unit 1RL); Thomas C. Ricci Ltd. Profit Sharing Plan (Units 2S, 2N, 3S and 3C); and Phyllis J. Ricci (Unit 2C), who together control over seventy-five percent of all of the voting rights or interest in the common elements of the Association.

FN2. Newport Condominium has since been renamed Stone Manor Condominium.

FN3. The property at issue in this appeal was the subject of a federal lawsuit in which Judge Reynolds of the United States District Court for the Eastern District of Wisconsin held that the property was an expandable condominium with the seven declared units possessing 100% of the undivided percentage interests in the com-

mon elements of the condominium.

*581 The lawsuit was originally commenced by the Association against Concord in November 1992. The Association sought a declaration of interest that the second amendment, which attempted to reclassify a grassed area of the exterior grounds, referred to as the "veranda," from a common area to a limited common area appurtenant only to Unit 1RL, was invalid. However, in November 1993, Concord and Ricci reached a settlement whereby Ricci agreed to the amendment of the condominium declaration and directed the Association to dismiss the complaint. Consequently, the Tomeras intervened and adopted the Association's complaint as part of their cross-claim, counterclaim and third-party complaint.

In 1994, the owners of the condominium, except the intervening defendants and Phyllis Ricci, adopted a Restated Declaration by greater than three-fourths vote. This decision included defining the veranda as a limited common element appurtenant to Unit 1RL. Additionally, a part of the roof was classified as a limited common element, as well as a part of the basement and various other areas on the condominium grounds. Also in 1994, the board of directors adopted resolutions relating to the Restated Declaration. The Tomeras objected to and refused to consent to the Restated Declaration and the board's resolutions.

Competing motions for summary judgment were made in order to determine the validity of the Restated Declaration. The trial court issued a final judgment, concluding: "I hold the Restated Declaration to be valid, the reallocation of the use of the veranda to be within the Board's powers to restate with a three-fourths vote. It follows then that other common areas reallocated were done so validly. Tomeras' remedy lies in § 703.09(3)(a)." The Tomeras appeal.

*582 The Tomeras argue that the trial court erred by granting Concord's motion for summary**778 judgment. We review summary judgment decisions

using the same methodology as the trial court. *M & I First Nat'l Bank v. Episcopal Homes Management, Inc.*, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct.App.1995); § 802.08(2), STATS. We observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See *M & I First Nat'l Bank*, 195 Wis.2d at 496-97, 536 N.W.2d at 182; see also § 802.08(2). Because no dispute exists among the material facts here, issues of law are all that remain.

[1][2] The Tomeras contend that the reallocation of the veranda as a limited common element by less than all of the unit owners constituted a change in their percentage ownership in the common element and was improper. This argument requires us to construe provisions within Wisconsin's Condominium Ownership Act, codified in ch. 703, STATS., and then apply the facts of this case to them.^{FN4} The "application of a statute and interpretation of an unambiguous written agreement involve questions of law, which we independently review." *Aluminum Indus. v. Camelot Trails Condominium Corp.*, 194 Wis.2d 574, 581, 535 N.W.2d 74, 77 (Ct.App.1995). In construing a statute, we are to give effect to the intent of the legislature. *Castle Corp. v. DOR*, 142 Wis.2d 716, 720, 419 N.W.2d 709, 710 (Ct.App.1987). To ascertain legislative intent, we first look to the language of the statute. If it *583 is not ambiguous, then we are not permitted to use interpretation and construction techniques because the words of the statute must be given their obvious and ordinary meaning. See *Town of Seymour v. City of Eau Claire*, 112 Wis.2d 313, 319, 332 N.W.2d 821, 823-24 (Ct.App.1983).

FN4. Because we conclude that statutes within ch. 703, STATS., adequately govern the issue, we need not consider the case law from foreign jurisdictions.

[3][4][5] We note some additional tenets of statutory construction which are relevant to this case. The entire section of a statute and related sections are to be considered in its construction or interpret-

ation; we do not read statutes out of context. See *State v. Barnes*, 127 Wis.2d 34, 37, 377 N.W.2d 624, 625 (Ct.App.1985). Statutes relating to the same subject matter are to be construed together and harmonized. *State v. Burkman*, 96 Wis.2d 630, 642, 292 N.W.2d 641, 647 (1980). The cardinal rule in interpreting statutes is that the purpose of the whole act is to be sought and is favored over a construction which will defeat the manifest object of the act. *Milwaukee County v. DILHR*, 80 Wis.2d 445, 453, 259 N.W.2d 118, 122 (1977).

[6][7] With these principles in mind, we conclude that §§ 703.09 and 703.13, STATS., are clear and unambiguous. Section 703.13(4) states that the percentage interest a condominium owner possesses in a common element "may not be changed without the written consent of all unit owners...." In contrast, § 703.09(2) provides that an association may amend its declaration with "the written consent of at least two-thirds of the unit owners...." These statutes clearly permit the Association to amend the entire declaration and plat without the Tomeras' agreement, unless the amendments alter the percentage of ownership interest in any of the owners' common elements.

*584 The Association's declaration allocated the percentage of ownership interest in common elements based on the square footage of the condominium unit owned. Essentially this establishes three means of changing an owner's interest in the common elements. First, if additional units were added, then any percentage share in the common elements would decrease accordingly. Second, if the total square footage of an owner's condominium changed, then that owner's percentage of total living space would change, thereby altering the percentage of ownership in the common elements. The difference would either be added to or subtracted from another unit owner's interest, or in the case where a change in the total living space of all the condominiums occurred, the percentage interest of all the owners would be reallocated. Third, if the Association elected to allocate the percentage in the

common elements by assigning each condominium an equal share, **779 each unit would own one-seventh of the common elements or 14.29%.

The Tomeras contend that the Restated Declaration is invalid because it changed the common element status of the veranda to a limited common element, thereby restricting their use and reducing their interest in the common elements. The Tomeras have confused the concepts of percentage ownership with the value of their unit.

[8] By changing the veranda from a common element to a limited common element, the Restated Declaration did not reduce the Tomeras' percentage of ownership interest in the veranda. The amendments merely reduced the *value* of the Tomeras' individual unit, while increasing the value of Unit 1RL. The Tomeras still own 10.61% of all the common elements, but they have lost their unlimited use of the veranda. If a sale of *585 the entire building occurred, then the Tomeras would still receive 10.61% of the proceeds. If, however, the Tomeras sold their individual unit, then presumably it would bring a lower price because of the reduced use of the veranda.^{FN5}

FN5. Obviously, the sale price of Unit 1RL would likely increase in value based on its unlimited access to and use of the veranda.

[9] The legislature has provided a remedy for the Tomeras' loss of value in their condominium under § 703.09(3)(a), STATS. Section 703.09(3)(a) provides:

If an amendment to a condominium declaration has the effect of reducing the value of any unit owner's interest in any common element, including any limited common element, and increases the value ... of any other unit owner's interest in the common element or limited common element, then the ... other unit owner shall compensate the unit owner the value of whose interest is reduced in the amount of the reduction in value, either in cash or by other consideration acceptable to the unit owner.

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Because the reallocation of the veranda's use reduced the Tomeras' condominium value, while increasing Unit 1RL's value, the Tomeras' remedy lies with the owners of Unit 1RL.

We conclude that the reallocation of the veranda from a common element to a limited common element by the Restated Declaration was proper under § 703.09(2), STATS. We further conclude that the reduction in condominium value suffered by the Tomeras is recoverable under § 703.09(3)(a), STATS.

Judgment affirmed.

Wis.App., 1996.
Newport Condominium Ass'n, Inc. v. Concord-
Wisconsin, Inc.
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C

District of Columbia Court of Appeals.
Laurance J. OCHS, Appellant,
v.
L'ENFANT TRUST and West End Condominium
Association, Appellees.
No. 84-1540.

Argued Oct. 9, 1985.
Decided Jan. 31, 1986.

Condominium owner brought action to invalidate condominium association's grant of conservation easement for commonly owned facade of building and association counterclaimed for unit owner's share of assessment to defray costs of easement. The Superior Court, Tim Murphy, J., granted summary judgment for association on issue of validity of easement and held unit owner liable for assessment and attorney fees and unit owner appealed. The Court of Appeals, Pair, Senior Judge, held that: (1) the condominium association board of directors had authority to grant easement; (2) unit owner was liable for share of cost of financing conveyance of easement; and (3) trial court abused its discretion in awarding association \$10,000 in attorney fees.

Reversed in part and remanded.

West Headnotes

[1] Condominium 89A ↪8

89A Condominium
89Ak6 Common Elements; Management and Control
89Ak8 k. Condominium Associations. Most Cited Cases
D.C.Code 1981, § 45-1848(b) vested authority in condominium association board of directors to grant conservation easement for commonly owned facade of building without approval by unit owners when no restriction on such authority was specified in association's condominium instruments.

[2] Constitutional Law 92 ↪4073

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4073 k. Housing in General. Most Cited Cases
(Formerly 92k278(1.3), 92k278(1.2))

Condominium association's execution of conservation easement for commonly owned facade of building did not deprive unit owner of vested property interest in violation of due process clause of Fifth Amendment in that only government action complained of was city council's promulgation of statute authorizing such easements. U.S.C.A. Const.Amend. 5; D.C.Code 1981, § 45-1848(b).

[3] Condominium 89A ↪12

89A Condominium
89Ak6 Common Elements; Management and Control
89Ak12 k. Assessment for Expenses. Most Cited Cases
Condominium association board of directors could lawfully assess unit owner for his share of cost of financing conveyance of conservation easement to commonly owned facade of building where condominium bylaws authorized special assessments for purpose of defraying cost of nonrecurring contingencies.

[4] Condominium 89A ↪12

89A Condominium
89Ak6 Common Elements; Management and Control
89Ak12 k. Assessment for Expenses. Most Cited Cases
Condominium association board of directors had authority under association bylaws to assess cost of conservation easement disproportionately among

unit owners where one owner was not United States federal income taxpayer and could not reap charitable deduction benefits of easement. D.C.Code 1981, §§ 45-1848(b), 45-1852(b).

[5] Condominium 89A ↪17

89A Condominium

89Ak17 k. Actions. Most Cited Cases

Trial court erred in awarding attorney fees related to condominium association's defense of unit owner's claim that association invalidly granted conservation easement to building's commonly owned facade, though claim was determined by summary judgment for association, in that association bylaws only allotted attorney fees upon unit owner default; attorney fees related to association's counterclaim to collect special assessment to help finance conveyance of conservation easement were proper.

*1111 Laurance J. Ochs, Washington, D.C., pro se. Benny L. Kass, Washington, D.C., for appellees. Laurie Farnham Hurvitz, Washington, D.C., also entered an appearance.

Before PRYOR, Chief Judge, NEWMAN, Associate Judge, and PAIR, Senior Judge.

PAIR, Senior Judge:

Appellant Laurance J. Ochs is an owner in fee simple of a unit in the West End Condominium on 21st Street, Northwest, and a member of its owner association, appellee West End Condominium Association (hereinafter the "Association"). Brought into question in this appeal are separate orders of the Superior Court which together validated the Association's grant of a conservation easement to appellee L'Enfant Trust (hereinafter the "Trust"), upheld the Association's special assessment to appellant for use in financing the easement, and awarded the Association attorney fees in connection with the litigation in the amount of \$10,000.

As grounds for reversal, appellant principally maintains that (1) the grant of the conservation easement was not in accordance with law and the condomini-

um documents; (2) the Association's allocation of the easement assessment to less than all of its members was improper; and (3) the trial court erroneously included in its award of attorney fees the costs and legal expenses incurred by the Association in defending his suit to have the easement grant declared void. We agree only with appellant's last contention and, accordingly, remand this case to the trial court for further proceedings on this issue.

I

The Association is comprised of the owners of 34 units in the West End Condominium, a "horizontal property regime" recognized as such under the District of Columbia Condominium Act of 1976, D.C. Code § 45-1801 *et seq.* (1981). In late 1981, the Association was approached by the Trust, a non-profit foundation, regarding the possibility of the Association donating to it a "conservation easement" in the facade of the condominium building. The proposed easement was designed primarily to help *1112 preserve the historic nature of the neighborhood, which is known to some as the DuPont Circle Historic District. The easement would constitute an encumbrance on the property and would grant to the Trust the right to review and approve any Association decision affecting the exterior of the building, whether structural or cosmetic in nature. The condominium owners would be directly affected by the conveyance of the easement, particularly insofar as it encumbered their individual, undivided percentage interests in the building's facade, which is designated a "common element" in the condominium instruments.

The events which precipitated the granting of the conservation easement to the Trust were as follows. In May 1982, the President of the Association's Board of Directors, Mr. Gordon Binder, circulated a memorandum to all condominium owners notifying them of the Association's upcoming "special" mid-year meeting. The memorandum placed on the meeting's agenda a discussion of the

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proposed conservation easement and explained its purpose and ramifications. It was noted that the easement "would convey an ownership interest" in the property to the Trust and would be financed by the Association through a special assessment on unit owners. The owners were told, however, that they "should realize ... a charitable deduction on their income taxes" as a result of the conveyance. The owners were informed further that the grant would require an amendment to the condominium declaration and by-laws, which itself would require approval by two-thirds of the Association members. For this reason, a proposed by-laws amendment was attached to the memorandum.

The special mid-year meeting was held in June 1982 and, according to its recorded minutes, the proposed conservation easement was discussed at length. A representative of the Trust attended the meeting and explained that "[b]ecause the easement donation [would be] granted in perpetuity, it constitutes an encumbrance and ... it qualifies as a charitable donation worth by some estimates 10% of the market value of the property." It was clarified that the Association would have to comply with the condominium instruments in granting the easement, including the requirement that two-thirds of the owners assent to the conveyance. Ultimately, on motion, a vote was taken to grant the easement and to amend the by-laws to implement the donation. Although the motion was defeated, a related motion to authorize the Association's Board of Directors to pursue the subject more thoroughly was unanimously approved. Thereafter, the Board filed a preliminary application with the Trust to ascertain whether it would accept the conservation easement, commissioned an appraiser, and obtained a letter ruling from the Internal Revenue Service that the Trust qualified as a tax exempt organization.

On September 20, 1982, the Association's Board of Directors met and discussed, among other things, the proposed easement. At the meeting, Binder presented to the Board a progress report which included a tentative timetable for approval and con-

veyance of the easement to the Trust. Mr. Dale Kenney, the Secretary of the Association, reported that the appraiser had valued the condominium building at nearly 3.5 million dollars and had valued the easement donation at slightly over \$265,000, or approximately 8% of the building's appraised value. But no further action regarding the easement was taken at the Board's September meeting.

A few days later, Binder received the formal appraisal on the values of the property and the proposed conservation easement. It was estimated that the property had a pre-easement value of \$3,315,810, which would be reduced to \$3,050,545 in the event the easement was conveyed. In detailed findings, the appraiser represented that the "easement directly preserves the facade of the subject property, thus insuring the architectural integrity inherent to the building, and complementing and preserving*1113 the historic significance of the neighborhood environment." The appraiser enumerated, however, those factors contributing to the adverse impact the easement could have on the building's value, including the following: slightly greater insurance premiums; additional legal expenses over the years; possible lender resistance in a future sale or refinancing resulting possibly in more expensive financing; increased costs of eventual repairs to the facade; loss of the potential for future "higher and better use of the land"; restrictions on exterior alteration or modification; inconvenience of facade inspections; possible delays in obtaining approval for desired repairs; and the possibility of a lien being placed on the property for restoration of the facade..

On October 1, 1982, the Association's Board of Directors circulated a detailed memorandum to all unit owners on the proposed conservation easement, the purpose of which was to poll the Association for a final vote on whether it should donate the easement to the Trust. The owners were asked "to vote, as a package, on amending the Declaration and the By-laws and on levying a special assess-

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ment of \$17,263 to pay the required contribution to the Trust and the other costs of this transaction. All three must be approved to effect the donation." Attached to the memorandum were copies of the letter from the Internal Revenue Service respecting the Trust's qualification as a tax-exempt organization, the appraiser's report, a "letter and accompanying materials" which the owners were to submit to their mortgagees, proposed amendments to the Condominium Declaration and By-laws authorizing a special assessment of \$17,263, a "schedule of Estimated Special Assessments" to be used by each owner in estimating his or her individual assessment, a ballot to be used by the owners in casting their votes (which was to be returned no later than October 25, 1982), and a draft "Conservation Easement Deed of Gift."

By its memorandum, the Board informed the unit owners that if the Association voted to grant the easement, the special assessment would be due no later than December 7, 1982. The owners were advised further that "[t]he Board makes no representations how the [Internal Revenue Service] would rule [on the charitable deduction] if it reviewed the situation of individual taxpayers"; and "that because the owner of units 102 and 106 is not subject to U.S. tax laws, the Board, upon advice of counsel, recommends assessing 'around' him. His increment is apportioned among the other 32 units in proportion to each unit's share of the building." The easement package was mailed to non-resident unit owners and was slid under the doors of the unit owners who lived in the building.

At a meeting of the Board of Directors on October 25, 1982, it was reported that an insufficient number of ballots had been received to adopt the special assessment and the amendments to the condominium instruments by a two-thirds vote. The minutes of that meeting indicate that the Board decided it would contact those unit members who had yet to submit a ballot. The minutes further reveal that the Board, upon receipt of a letter from the Department of the Interior respecting the eligibility of the build-

ing for historic treatment, "would submit a formal application to the L'Enfant Trust and send the letter regarding the assessment to the owners."

On November 3, 1982, Kenny, in his capacity as the Association's secretary, informed Binder by memorandum that as of November 2, he had received more than two-thirds affirmative votes from the unit owners for donating the facade easement to the Trust. By a memorandum dated November 5, Binder relayed this information to all unit owners. Binder advised them that the Board would proceed with the donation and that "[t]he same vote authorizing the easement levied a special assessment on Association members per the attached schedule," the payment of *1114 which was due no later than December 7. The unit owners were also informed that if payment was not forthcoming by December 7, a late fee of \$50 would be charged for the first week in arrears, and a fee of \$75 for each succeeding week until payment was received by the Association.

On November 10, 1982, appellant informed Binder by letter that he objected to the granting of the easement, and the related assessment, on the ground that it was "illegal and without a rational basis to support a deduction for federal income tax purposes." This conclusion was based on several factors, to wit: the appraisal was "internally inconsistent"; "Article 17 of the Condominium Declaration expressly prohibits the abandonment of the common elements unless the condominium regime is terminated"; since each unit owner has an individual interest in the common elements, each unit owner must assent to the proposed easement conveyance; and finally, the Condominium By-laws had been violated by the Board's mail-ballot procedure. And, on these grounds, appellant declared to Binder that he would "never" agree to the proposed easement and threatened a lawsuit if the easement was conveyed to the Trust.

During succeeding weeks, appellant and the Board exchanged correspondence concerning the proposed easement which culminated in a Board meeting on

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December 8, which was attended by appellant and other interested unit owners. After extensive discussion among those present, the Board of Directors on motion voted to proceed with the easement donation. On December 16, 1982, the "Unit Owners of the West End Condominium" granted a "Conservation Easement Deed of Gift" to the Trust thereby restricting the Association's control over the building's facade.

II

On January 13, 1983, appellant filed in the Superior Court a "Complaint to Quiet Title and Damages for Trespass" on the basis of the Association's conveyance of the conservation easement to the Trust. Appellant prayed for, *inter alia*, a declaration that the Trust had "no estate, right, title, lien or interest in or to said real property or any part thereof," an order enjoining the Trust and the Association from interfering with his possession, use and enjoyment of the property, compensatory damages of \$10,000, and punitive damages in the sum of \$30,000. The Trust and the Association filed a timely answer in which they denied appellant's allegations, and which they amended to include a counterclaim against appellant for the special assessment that had been levied against him (\$707.27), late fees (\$725 through February 16 and \$75 per week thereafter in which the assessment remained unpaid), interest on the judgment, costs, and reasonable attorney fees. Shortly thereafter, appellant filed an answer to the counterclaim alleging that the counterclaim was predicated "on illegal acts undertaken by [the Association] contrary to the West End Condominium's Declaration and By-laws." More specifically, the answer alleged that the Association was without authority to levy the special assessment and, in any event, did not do so according to his percentage interest in the condominium, for he was being required to pay partially for a non-assessed unit owner's contribution.

On March 11, appellant moved for partial summary judgment on his claim that the conservation ease-

ment should be declared void. The Association and the Trust then filed their own motion for partial summary judgment, urging that they were entitled to judgment as a matter of law on the claims contained in appellant's complaint, but reserving their counterclaim related to the special assessment. They also filed a terse opposition to appellant's motion for partial summary judgment. On July 6, 1983, the trial court entered an order which, on the authority of D.C. Code § 45-1848(b) (1981), *infra*, denied appellant's motion for partial summary judgment, granted the Association's and the Trust's motion for partial summary judgment, and accordingly, dismissed*1115 appellant's complaint with prejudice. By its order, the court deferred consideration of the Association's counterclaim against appellant for his failure to pay the special assessment.

On January 26, 1984, a non-jury trial was held on the Association's counterclaim which resulted in a judgment for the Association in the amount claimed for the special assessment, \$707.27, plus a \$50 late fee, interest at the compounded rate of 10% per annum from December 8, 1982 until paid, and costs. The court indicated that an award of attorney fees to the Association was appropriate and, consequently, agreed to consider further submissions by the parties on this subject. By an order dated April 16, 1984, the trial court awarded the Association \$10,000 in attorney fees on the basis of "the length of time invested in the suit, the character of the action, and the actual fees attendant to the condominium association itself." Appellant subsequently filed a motion to amend the order to include findings of fact and conclusions of law. The motion was granted and, on October 29, 1984, the trial court filed a comprehensive order. The court confirmed its earlier award of \$10,000 as fees reasonably incurred by the Association in defending itself in the initial suit brought by appellant and in pursuing its counterclaim for the special assessment and late fees. The court observed:

The entire proceeding arises out of the alleged default by Mr. Ochs. The two issues raised by the

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pleadings and decided by the court—the validity of the easement and the validity of the special assessment—are inextricably linked. Establishing the validity of the easement was a prerequisite to recovery of the special assessment by the Association.

Appellant then appealed this judgment, as well as the trial court's earlier judgments which summarily disposed of his claim against the Association and the Trust, and which held him liable for the Association's special assessment and attendant late fees.

III

A. Appellant's first four contentions pertain to the trial court's grant of summary judgment to appellees on his initial claim which, as we have noted, sought a declaration that the conservation easement grant was invalid, as well as related compensatory and punitive damages. Specifically, appellant contends that (1) D.C. Code § 45-1848(b) (1981), *infra*, upon which the trial court based its decision, is subordinate to, or should be read together with the common law rules of tenancies in common which preclude the type of encumbrance here conveyed; (2) the Condominium Declaration and By-laws, and *id.* §§ 45-1821(f) and 45-1838(e), prohibited the Association from encumbering his undivided percentage interest in the building's facade, a common element; (3) the execution of the conservation easement deed deprived him of a vested property interest in violation of the due process clause of the Fifth Amendment; and (4) the Board of Directors obtained the necessary unit owner votes by procedures violative of the condominium instruments and *id.* § 45-1845(d).

It is settled now that summary judgment is proper only where the pleadings, depositions, and other papers on file reveal that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Super Ct.Civ.R. 56(c); *Burt v. First American Bank*, 490 A.2d 182, 185 (D.C.1985) (citations omitted). On review of a grant of summary judgment, it is, of

course, this court's obligation to conduct an independent review of the record and to apply the same standard. *Id.* at 184-85 (citations omitted); *Milton Properties, Inc. v. Newby*, 456 A.2d 349, 354 (D.C.1983). In our view, the trial court here correctly determined that on appellant's claim there was no genuine issue as to any material fact and that appellees were entitled to judgment as a matter of law.

In so holding, the court properly applied D.C.Code § 45-1848(b), which reads:

*1116 Except to the extent prohibited by the condominium instruments, and subject to any restrictions and limitations specified therein, the executive organ of the unit owners' association, if any, and if not, then the unit owners' association itself, shall have the irrevocable power as attorney-in-fact on behalf of all unit owners and their successors in title to grant easements through the common elements and accept easements benefiting the condominium or any part thereof. [Emphasis added.]

Because there was no factual dispute regarding the nature of the easement, the trial court was entitled to decide, as a matter of law, whether it was properly granted by the Board to the Trust pursuant to § 45-1848(b).

[1] Unmistakably, in the planning stages the Board was working under the assumption that two-thirds of the unit owners would have to assent to the conveyance of the conservation easement to the Trust. Indeed, if the Board had thought otherwise, it would not have circulated the initial ballot respecting the proposed easement to all unit owners. But in our view, this assumption was erroneous. Section 45-1848(b) vested authority in the Board to grant the conservation easement in question without approval by the unit owners. As the "executive organ" of the Association,^{FNI} the Board was empowered "to grant easements through the common elements," as it did here by conveying the "Conservation Easement Deed of Gift" in the building's facade to the Trust.

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FN1. In Paragraph 4.1 of the Condominium Declaration (as amended), and in By-laws Article IV, 4.1, the Board of Directors is defined as the "Executive Organ" of the Association within the meaning of the Condominium Act.

Given this statutory authority, the only question is whether such authority was prohibited by, or subject to any restrictions and limitations specified in the Association's condominium instruments. *Id.* § 45-1848(b). We have closely examined these instruments (the Condominium Declaration and By-laws) and have found nothing which would in any way prohibit or restrict the Board's power to act as attorney-in-fact on behalf of the unit owners to grant an easement in the facade of the condominium building. Consequently, on the basis of the unambiguous import of § 45-1848(b), we hold that the Superior Court did not err in rejecting appellant's challenge to the conveyance of the conservation easement to the Trust.

[2] Appellant's related claims concerning the validity of the easement conveyance are without merit.^{FN2} Appellant maintains that execution of the easement deed deprived him of a vested property interest in violation of the due process clause of the Fifth Amendment. This argument must fail as it takes " 'significant government involvement' in order for the challenged action to fall within the ambit of the constitutional protection." *Bryant v. Jefferson Federal Savings and Loan Association*, 166 U.S.App.D.C. 178, 180, 509 F.2d 511, 513 (1974) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); *1117*Reitman v. Mulkey*, 387 U.S. 369, 380, 87 S.Ct. 1627, 1633, 18 L.Ed.2d 830 (1967)). Since the only government action complained of here is the City Council's promulgation of § 45-1848(b), we hold that appellant's constitutional claim is insufficient as a matter of law.^{FN3} *Cf. Bryant, supra*, 166 U.S.App.D.C. at 180-81, 509 F.2d at 513-15; *Bichel Optical Laboratories, Inc. v. Marquette National Bank of Minneapolis*, 487

F.2d 906, 907 (8th Cir.1973); *Adams v. Southern California First National Bank*, 492 F.2d 324, 330-31 (9th Cir.1973), *cert. denied*, 419 U.S. 1006, 95 S.Ct. 325, 42 L.Ed.2d 282 (1974).

FN2. Two of these claims may be dismissed with little discussion. First, we need not decide whether the common law rules of tenancies in common would preclude the action taken by the Board of Directors in the case at bar, for the District of Columbia City Council has passed specific legislation, *i.e.*, § 45-1848(b), permitting the action here challenged—the Board's granting of an easement through a common element.

Secondly, nothing in the Condominium Declaration or By-laws, or for that matter the statutory authority cited by appellant, D.C. Code §§ 45-1821(f) and 45-1838(e) (1981), would divest the Board of such authority. Sections 45-1821(f) and 45-1838(e) of the Condominium Act preclude certain action which would affect unit owners' interests in condominium common elements. However, even if read to proscribe the easement grant to the Trust, those sections, by their terms, are subordinate to conflicting provisions of the Condominium Act. And section 45-1848(b) necessarily permits the infringement of unit owners' interests in common elements, as it empowers the executive organs of unit owner associations to grant easements through condominium common elements.

FN3. Indeed, § 45-1848(b) is subject to the restrictions and limitations specified in condominium instruments. Thus, its application can be avoided altogether if a condominium association so decides.

And finally, as we have already intimated, since the

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Board of Directors had statutory authority under § 45-1848(b) to grant the conservation easement without unit owner approval, it is of no significance that an insufficient number of owners' votes may have been properly cast.^{FN4} Consequently, for the aforesaid reasons, the trial court properly granted the Association and the Trust summary judgment on appellant's claim.

FN4. By this statement, we are not suggesting that this may have been the case, only that this issue need not be reached. And, for this reason, appellant's reliance on § 45-1845(d) does not help him. In any event, appellant's position draws little sympathy for, as the records bears out, two-thirds of the unit owners did eventually approve the easement conveyance.

B. Appellant next challenges the trial court's ruling that he was liable for the Board's special assessment levied against him for use in financing the conveyance of the conservation easement. Appellant contends that "[t]he special assessment levied by the Board of Directors was not levied against each unit owner in proportion to the share interest of each unit owner as required by the By-laws and D.C. Code § 45-1852 (1981), and was not an assessment authorized under the By-laws or the D.C. Condominium Act."^{FN5}

FN5. The special assessment was worded in part as follows:

For the sole complete purpose of executing a conservation easement as defined in ... the Internal Revenue Code ... the West End Condominium Unit Owners Association authorizes a special assessment of \$17,263 for defraying and meeting all costs incurred for such act... All unit owners will be assessed in proportion to their ownership percentage in the Condominium, except that the unit owner of units 102 and 106 will not be assessed any amount for such assessment

and such assessment is waived for that unit owner, with the increment that would otherwise be due from units 102 and 106 being apportioned among the remaining unit owners in proportion to their percentage interest in the building.

[3] We have no doubt that the Board could lawfully assess appellant for his share of the cost of financing the conveyance of the conservation easement. Article VI, 6.1(C) of the By-laws provides that "[a] Unit Owner shall be personally liable for all lawful assessments, or installments thereof, levied against his Condominium Unit..."^{FN6} A unit owner may be *specialy assessed* under By-laws Article VI, 6.1(E), which provides in pertinent part as follows:

FN6. Paragraph 21 of the Condominium Declaration also contains such a provision.

Special Assessments. In addition to the assessments authorized above, the Board of Directors may levy a special assessment for the purpose of defraying the cost of any unexpected repair or *other nonrecurring contingency*, or to meet any deficiencies occurring from time to time... Any such special assessments shall be assessed in the manner set forth in Paragraph D of this Section 6.1 ... with respect to additional assessments payable to the reserve fund for capital improvement, replacements and major repairs. [Emphasis added.]

It is fair to say that the assessment for the conservation easement was for the purpose of defraying the cost of a "nonrecurring contingency," *i.e.*, the easement in perpetuity to the Trust.

*1118 [4] Appellant nevertheless complains that he has been wrongfully burdened with a portion of another's share of the special assessment. We cannot agree. It is true that the Board of Directors did not assess the owner of two units in the building because, as a non-United States federal income taxpayer, he could not reap the charitable deduction benefits of the easement. But the authority for assessing around this individual is contained in D.C. Code § 45-1852(b), applied by the trial court,

which reads:

(b) To the extent that the condominium instruments expressly so provide, any other common expenses benefiting less than all of the condominium units ... shall be specially assessed against the condominium unit or units involved, in accordance with such reasonable provisions as the condominium instruments may make for such cases.

Appellant suggests that the condominium instruments do not "expressly so provide," and points to By-laws Article VI, 6.1(E), which provides that special assessments "shall be assessed in the manner set forth in Paragraph D of this Section 6.1." The applicable portion of Section 6.1(D) states that an assessment shall be levied against the unit owners "in proportion to the respective Par Value of their Units."

[5] By-laws Article VI, 6.6, however, would appear to satisfy § 45-1852(b)'s requirement that the condominium instruments expressly allow for disproportionate assessment since it provides in part that:

Whenever in the judgment of the Board of Directors the Common Elements shall require additions, alterations or improvements costing in excess of \$5,000 during any period of 12 consecutive months, and the making of such additions, alterations or improvements shall have been approved by the Unit Owners of apartment units to which a majority of the votes in the Association appertain, the Board of Directors shall proceed with such additions, alterations and improvements and shall assess all Unit Owners for the cost thereof as a Common Expense.... Notwithstanding the foregoing, if, in the opinion of not less than 80% of the members of the Board of Directors, such additions, alterations or improvements are exclusively or substantially exclusively for the benefit of the Unit Owner or Unit Owners requesting the same, such requesting Unit Owner or Unit Owners shall be assessed therefor, in such proportion as they jointly approve, if more than one Unit Owner, or, if they are unable to agree thereon, in such proportions as may be determined

by the Board of Directors.

In our opinion, this by-law, though admittedly ambiguous, vested discretion in the Association's Board of Directors to assess around the non-United States taxpayer-unit owner, who would be unable to take advantage of the charitable deduction concomitant with conveyance of the conservation easement.

C. Appellant urges finally that the trial court abused its discretion in awarding the Association \$10,000 in attorney fees. He submits in this regard that while the Association may have been entitled to attorney fees in connection with its counterclaim-related to the special assessment-it was not entitled to an award for fees incurred in defending his initial challenge to the grant of the easement. The trial court thought otherwise, ruling that appellant was liable for the Association's fees for the related causes on the ground that appellant's claim and the Association's counterclaim were "inextricably linked," and saying further that "[t]he parties should not simply pay their own costs. Plaintiff put the Association to extraordinary expense on a novel issue because he did not accept the will of the majority of the Association members."

Article XI, 11.1 of the Condominium By-laws provides:

A default by the Unit Owner shall entitle the Association acting through the Board of Directors ... to the following relief: ...

*1119 C. *Costs and Attorney's Fees.* In any proceeding arising out of any alleged default by a Unit Owner, the prevailing party shall be entitled to recover the costs of the proceeding, and such reasonable attorney's fees as may be determined by the court.

As expressed in this article, the proceeding must arise out of an "alleged default" by a unit owner. Therefore, there is support for the Association's position that it is entitled to reasonable attorney fees

in connection with the adjudication of its counterclaim, a proceeding which stemmed from appellant's default in paying the special assessment.

It is our view, however, that the Association is not entitled to reimbursement from appellant under Article XI, 11.1(C), for the fees it incurred in defending his challenge to the conveyance of the conservation easement. While the two causes-appellant's claim and the Association's counterclaim-are undoubtedly related, we cannot say that the initial proceeding arose from any default by appellant. See *Cohan v. Riverside Park Place Condominium Association, Inc.*, 123 Mich.App. 743, 333 N.W.2d 574, 577 (1983). Rather, this proceeding arose from appellant's challenge to specific action taken by the Association through its Board of Directors. See *id.* Consequently, Article XI, 11.1(C) cannot be relied on for the relief the Association sought and was granted-an award for attorney fees based upon the entire litigation.^{FN7}

FN7. Of course, if appellant had sued the Association in bad faith, or had otherwise maintained an unfounded action, it would have been within the trial court's discretion to award attorney fees on that basis. E.g., *Zapata v. Zapata*, 499 A.2d 905, 910 (D.C.1985). However, nothing in the record before us convinces us that this action was so conceived or maintained.

Apart from this, we are required to follow "the so-called American rule, which makes each litigant in a civil action, irrespective of the outcome of the case, shoulder the burden of paying his own lawyer." *Rachal v. Rachal*, 489 A.2d 476, 480 (D.C.1985) (Reilly, J., concurring) (citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), and *In re Antioch University*, 482 A.2d 133 (D.C.1984)); see *Zapata v. Zapata*, *supra* note 7, 499 A.2d at 910. Accordingly, we hold that the court erred in awarding attorney fees related to the Association's defense of appellant's claim.^{FN8} On remand, the trial court shall determine reasonable

attorney fees in relation solely to the prosecution of the Association's counterclaim.^{FN9}

FN8. Quite some time after oral argument in this case, this court granted the Association's motion for leave to file a post-argument supplemental brief on the attorney fees issue. We have considered its supplemental brief, and authority cited therein, e.g., *Erickson Enterprises, Inc. v. Louis Wohl & Sons, Inc.*, 422 So.2d 1085 (Fla.App.1982), as well as appellant's post-argument supplemental reply brief, in reaching our decision.

FN9. We note finally that the result reached here on the attorney fees issue could have been avoided by the Association had it more providently worded the pertinent provision of the condominium instruments.

Reversed in part and remanded for further proceedings consistent with this opinion.

D.C., 1986.
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