IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR WHATCOM COUNTY

SCOTT HILLIUS, et al., Plaintiffs, v. 18 PARADISE LLP et al., Defendants,	No. 20-2-00701-37 PLAINTIFFS REPLY ON MOTION FOR PARTIAL SUMMARY JUDGMENT Judge Robert E. Olson January 22, 2021

I. INTRODUCTION

The Sixth and Seventh Amendments are clearly invalid and void on three separate grounds: violation of the strict notice and ratification requirements of RCW 64.90.525; constituting unreasonable and legally impermissible changes to CCRs and violating the conditions precedent set out in the PRD agreement binding the Declarant. The Amendments are also legally suspect for improper/unauthorized execution and recording. Plaintiffs need only establish that at least one of the four legal defects apply to the Amendments in dispute.

II. DISCUSSION

A. The Amendments Violate RCW Chapter 64.90.

In 2018, the Legislature enacted the Common Interest Ownership Act, RCW Chapter 64.90. Although most of the Act does not apply to preexisting developments, Defendants admit that RCW 64.90.525 supersedes existing provisions of the governing documents of all plat communities. Response at 8. RCW 64.90.525 imposes homeowner notice and ratification requirements for budgets and special assessments.

Defendants admit their failure to comply with RCW 64.90.525, but claim that it is impossible for them to comply with the law: "Because it has no functioning Board and is an association in name only, the Homestead *sic* had no method to impose Maintenance Fees other than by following the Master Declaration." *Id.* Defendants say

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that they can comply with RCW 64.90.525 by creating an "Advisory Board" hand-picked by Defendants to approve the 2021 budget and put it before the membership for a vote, but that is not the procedure set forth in the statute. RCW 64.90.525(1). Whether or not Defendants can comply with the Act in the future, their actions in 2019 and 2020 were illegal, and all fees received pursuant to the Seventh Amendment were invalidly collected.

Defendants' violation with the Sixth Amendment is even more egregious. RCW 64.90.525(3) provides that any special assessment is "effective only if the board follows the procedures for ratification of a budget described in subsection (1) of this section and the unit owners do not reject the proposed assessment." Even assuming that the Sixth Amendment itself were valid, the August 2019 special assessment is invalid because it was simply imposed on the members. The Court must declare the special assessment void and order a refund to the members.

B. The Amendments Are Void Under the Special Rule for Amendments to Restrictive Covenants.

Washington law has a specific rule for amendments to restrictive covenants by less than the unanimous consent of affected owners: such amendments must be done in "a reasonable manner consistent with the general plan of the development." *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 248, 255-56, 327 P.3d 614 (2014). Washington courts have repeatedly considered whether amendments to restrictive covenants comply with this rule and have invalidated amendments on several occasions. The leading case is *Wilkinson*, in which the Supreme Court invalidated an amendment to leasing provisions that barred short term rentals. *Id.* at 248-50. In *Fillmore LLP v. Unit Owners Association of Centre Pointe Condominium*, 183 Wn.App. 328, 333 P.3d 498 (2014), the court invalidated a similar amendment to leasing provisions. In *Meresse v. Stelma*, 100 Wn.App. 857, 999 P.2d 1267 (2000), the court invalidated an amendment to an easement. Other cases have found amendments valid. In *Ebel v. Fairwood Park II Homeowners' Association*, 136 Wn.App. 787, 150 P.3d 1163 (2007), for example, the court found valid an amendment to form a homeowners' association. In *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates*, 76 Wn.App. 267, 883 P.2d 1387 1994), the court held valid an amendment to restrictions on use of a shared dock. Most of those cases were decided on summary judgment.

The point is that the law in this regard is fully developed, and Plaintiffs are not seeking arcane or exceptional relief. In interpreting the covenants, the courts "place special emphasis on arriving at an interpretation of restrictive covenants that protects the homeowners' collective interests." *Wilkinson*, 180 Wn.2d at 249-50. The purpose of

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this rule is to "protect the reasonable, settled expectation of landowners" from "unlimited and unexpected restrictions on the use of their land." *Id.* The job of the Court is to protect the homeowners, not the Declarant.

Defendants' only argument is that "development plan for the Homestead Resort relies on the Golf Club's owner to maintain, operate, and manage the subdivision's infrastructure, including critical stormwater systems, for the development as a whole." Response at 2. That simply is not true. Nothing in the Declaration requires Homestead owners to pay for stormwater systems or anything on the golf course. The maintenance fees are only for the Common Open Space, which is defined in the Declaration and includes less than 9 acres of grass and trees.

> The term "Common Open Space" as used herein **does not and shall not include the golf course**, clubhouse, R.V. storage and maintenance areas. It includes only the property described on Exhibit B and any phased amendments thereto.

Exhibit 1 at ¶ 1.3.3. Pursuant to the Declaration, Homestead homeowners are not responsible for the maintenance of the bioswales, ditches, or ponds. The Declaration never even mentions the so-called "residential infrastructure." Absurdity of defendants' claim is evident from their own documents. Exhibit A to the O'Bryan Declaration is a Profit and Loss for the entire operation. It lists payroll expenses for the entire operation in 2019 of $464,812.42. Exhibit D purports to allocate expenses to just the Common Open Space maintenance work in 2019. It lists total payroll for the maintenance work in 2019 as $211,783.92. In other words, Defendants claim to have spent almost as much maintaining 9 acres of common areas as they did operating a 140 acre 18-hole golf course.

The plan for Homestead never required the homeowners to pay for maintenance of the golf course or anything other than its own common areas. The Declarant was required to maintain the common areas with maintenance fees because the Declaration provides that "All costs and expenses of maintenance of and improvements to the Common Open Space shall be paid by the Declarant, its heirs, successors and assigns." Exhibit 1 at ¶ 3.3. If the costs exceeded the amount of the fees, the Declarant's only right was to increase the fee 5% the following year. Exhibit 1 at ¶ 3.5(f). If those permitted increases were inadequate then the Declarant was responsible for the cost.

The Sixth Amendment contradicts this plan by allowing the declarant to impose special assessments. A special assessment would be an end run around the limit of annual increases to 5% and would drastically change the nature of the relationship. It would allow the Declarant to make the homeowners pay for anything the Declarant dreamed up. The Sixth Amendment violates the rule for amendments and should be declared void.

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The Seventh Amendment also plainly violates the plan for the development. The Declaration sets forth a clear and specific procedure for increases in the maintenance fee. Pursuant to section 3.5(e) of the Declaration, the fee may be increased one year at a time and then only by notice during the preceding December. Exhibit 1 at ¶ 3.5(e). Pursuant to this provision, Homestead homeowners could know with certainty that there would be no increase in the fee for any year if they did not receive a notice during the preceding December. Homestead owners have relied on the absence of such notices for almost 30 years. The Seventh Amendment, however, purports to eliminate that requirement and allow 18 Paradise to retroactively increase the fee by 5% every year back to 1993 even though no December notice was given. Incredibly, the Seventh Amendment left in place the requirement for a December notice. The Seventh Amendment rips the rug from under Homestead owners and changes the rules decades after the fact. It is precisely the kind of thing that *Wilkinson* prohibits.

In their reply the Defendants appear to argue necessity. This raises important accounting issues. O'Bryan presents the Courts with new financial statements which completely contradict prior documents and comingle homeowner maintenance fees with golf course operations. Defendant accountant's recent attempts to allocate are admittedly an "artificial distinction." More surprisingly, Defendants expended large amounts of Homestead revenues on another golf course owned by the owner of 18 Paradise, in Birch Bay. O'Bryan Declaration at Exhibit A, page 4 ("Investment in Sea Links $65,679.33"); Exhibit A, page 5 ("North America CC Canada Payable $295,576.47"). Documents produced by MJ Management confirm that it spent at least $201,647.21 on the Sea Links golf course. Andersson Declaration, Exhibits 1 and 2. Defendants claim that the golf course subsidized Homestead common area maintenance, while in fact Homestead owners subsidized the owner's other golf course. Andersson Declaration Exhibit 3.

C. <u>The Amendments Are Unlawful Under the PRD Agreement</u>.

Defendants say that it is unclear whether a City ordinance was in effect when the Master Declaration was recorded on June 24, 1992, but Ordinance No. 905 as passed by Lynden on January 21, 1992 was attached as Exhibit 1 to the Davis Declaration in support of class action certification, and we know that the current ordinance referenced by the Defendants is essentially the same. In any event, Plaintiffs' argument was not made under the ordinance. It was made under the July 20, 1992 agreement between the City and the Declarant to create the PRD. The PRD Agreement binds the successor Declarant and provides:

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> The covenants, conditions and restrictions submitted to the City and herein referred to will be placed in force upon the property covered by this plan and will not be altered or amended without the consent of the City.

Exhibit 13 at ¶17. It is undisputed that Defendants did not seek or obtain the City's consent. A condition precedent to amendment did not occur, and the amendments are invalid.

D. Improper/unauthorized Execution and Recording.

Defendants say that the signature identifies O'Bryan as the person who signed the documents, but the signature on the Sixth Amendment states that "the Declarant has caused this Amendment to be executed on the date entered above, by its President," and O'Bryan was not the president of 18 Paradise. Exhibit 5 at page 2. In a recent related matter, O'Bryan demonstrated propensity to falsely, and without any authority, sign and record documents affecting interests in land. Declaration of Ron Saran.

The last time the parties were before the Court, 18 Paradise stated that it was unable to admit or deny whether it had authorized MJ Management to execute and record the Sixth and Seventh Amendment. Now it says in its Joinder that it delegated to MJ Management "all of the declarant's rights to set and collect maintenance fees collectible from Homestead homeowners, use those fees to manage the common open space, and amend Homestead's covenants, conditions and restrictions." Joinder at 1-2. 18 Paradise has admitted that it is liable for everything that MJ Management did under the Agreement.

It is all but impossible to escape the conclusion that this delegation was concocted long after the fact. However, because this is summary judgment, Plaintiffs acknowledge that the Court may accept the Defendants' declarations at face value no matter how false they appear.

III. CONCLUSION

The Court should grant summary judgment. The Sixth and Seventh Amendments are clearly invalid for the reasons presented above. This would be true even if 18 Paradise had executed them itself.

DATED this 19th day of January 2021

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