CAI Law Reporter - September 2019 (Plain Text Version)

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Recent Cases in Community Association Law

Law Reporter **provides a brief review of key court decisions throughout the U.S. each month. These reviews give the reader an idea of the types of legal issues community associations face and how the courts rule on them. Case reviews are illustrations only and should not be applied to other situations. For further information, full court rulings can usually be found online by copying the case citation into your web browser. In addition, the College of Community Association Lawyers prepares a case law update annually. Summaries of these cases along with their references, case numbers, dates, and other data are available online.**

Owner Pays Enormous Price for Challenging Association Assessments

Black **v.** ***Whitestone Estates Condominium Homeowners' Association*****, No. S-16986, 7400 (Alaska Aug. 16, 2019)**

Assessments: The Supreme Court of Alaska held that declaration language regarding how payments were applied overrode any payment directives given by an owner to the association, and the owner was liable for all the association's huge legal bills since the owner engaged in bad faith litigation.

Whitestone Estates Condominium Homeowners' Association (association) governed a 10-unit condominium in Eagle River, Alaska. The condominium units were lots containing detached homes. Units 1 and 2 were accessed by a short private drive; units 3 through 10 were served by a longer private drive. The association charged each unit a $100 monthly assessment for driveway maintenance, most of which covered the cost of snow removal.

In 2002, Craig Black and Camille Brill purchased unit 1. In 2004, Black, an attorney, challenged charging equal assessments to all units. He proposed that each unit owner should pay the percentage of the annual snow removal expenses that corresponded to the portion of the drive that served the owner's unit. The owners voted to reject Black's proposal. Nonetheless, Black and Brill began paying less than the full assessment, paying only what their share would have been under Black's proposed formula.

In February 2014, Black notified the association of his intent to end his assessment protest. He enclosed checks for $3,800, stating that the payments were to cover the amounts that had been assessed since Jan. 2010. At the annual meeting in March 2014, the treasurer stated that all owners were paid through December 2013 or beyond. The owners voted to disregard Black's directive and instead apply the payments to Black's oldest debts first. Neither Black nor Brill objected at the meeting or afterwards.

From then on, Black sent monthly $100 checks to the association with instructions that the payments be applied to unit 1's current assessments. The association initially cashed the checks but later started returning them to Black.

In March 2016, the association sued Black and Brill, seeking $4,714 in unpaid assessments and fees, interest plus attorney's fees. The association also sought a determination of whether the owners of units 1 and 2 were obligated to pay assessments to cover the costs of maintaining the longer drive. Black asserted that he was current in paying assessments for the past three years and the association's claims for amounts before that time were barred by the statute of limitations.

Black also complained that the association was obligated to refund to the owners any operating funds left over at the end of the year rather than transferring the amount to reserves. The Alaska Common Interest Ownership Act (act) provides that, unless otherwise stated in the declaration, any surplus funds remaining after all common expenses have been paid must be given to the unit owners or credited to them to reduce future common expense assessments.

The association did not have a separate bank account for reserves. The trial court determined that any funds remaining at the end of the year were reserve funds, even though they were in a commingled account, and Black was not entitled to any refund or distribution.

The trial court resolved all issues in the association's favor. It concluded that Black had bullied everyone with his position as a lawyer, but there was no substance to Black's legal arguments. The trial court held that Black's payment directives were not binding on the association because they could not override the mandate in the declaration of condominium (declaration) that payments were to be applied to the oldest debts first. The trial court awarded the association $11,518 for unpaid assessments, late fees, and interest plus $125,533 in attorney’s fees and costs. Black and Brill appealed.

The declaration provided that any payments received by the association may be applied first to interest, late charges, collection costs, fines, and fees, and then to the oldest balance due from the owner for assessments. Black argued the use of the term "may" meant the payment instructions were permissive, not mandatory. The appeals court disagreed, finding the use of the word "any" indicated that the instructions applied to all payments made to the association, even those accompanied by payment directives from an owner.

In addition, the parties' own conduct supported this interpretation. Black himself said the association's policy was to always apply payments to the oldest debts first, and other owners also testified to this effect. The appeals court concluded that the declaration granted the association the authority to disregard Black's instructions and apply the payment to the oldest debts. As such, Black's debts were not beyond the statute of limitations.

The declaration obligated the association to establish a reserve fund to meet unforeseen expenditures or to acquire additional equipment or services. Neither the declaration nor the act defined surplus funds or reserve funds. The appeals court determined that any funds set aside for such purposes were reserve funds, regardless of whether they were in a segregated account.

All witnesses testified that the extra funds in the association's account were to pay for future road maintenance and repair, which supported the conclusion that any excess funds in the association's account were reserve funds. The declaration specified that payments to the reserve fund were not refundable.

Black argued that the attorney’s fees awarded to the association were unreasonable because they were far higher than the assessment amount in controversy. Not only did the declaration state that the prevailing party was entitled to recover its actual attorney’s fees incurred, but the trial court found that Black's litigious conduct was the cause of the high legal fees. Black rejected two pretrial settlement offers. The trial court stated that Black seemed intent on litigating the case, regardless of any offer on the table, and seemed to enjoy raising every possible argument, no matter how unworthy of litigation. The trial court determined that Black engaged in nonstop vexatious and bad faith litigation.

The appeals court found that the trial court's characterization of Black's behavior was supported by the evidence and the trial record. As such, the trial court did not abuse its discretion in deciding to award the association the full amount of its attorney’s fees incurred.

Accordingly, the trial court's judgment was affirmed.

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Absent Any Elections, Original Board Continued to Serve Years After Terms Were Supposed to Expire

***Channel View East Condominium Association, Inc.* v. *Ferguson*, No. 344149 (Mich. Ct. App. July 2, 2019)**

Association Operations: The Court of Appeals of Michigan held that the original association board of directors appointed by the developer continued to serve as the board because elections had never been held, even though annual elections should have begun more than a decade earlier.

Channel View East Condominium Association, Inc. (association) governed a condominium community in Chippewa County, Mich. Gregory Ferguson owned a lot in the community.

The initial members of the association's board of directors (board) were elected by the developer in 2001 in accordance with the association's articles of incorporation. The articles of incorporation stated that, after the first board was elected, directors would be elected in accordance with the association's bylaws.

The bylaws provided for the first meeting of association members to take place no later than 120 days after 75% of the lots were conveyed to owners other than the developer. The first meeting should have occurred no later than July 2003, but no such meeting was ever called or took place.

Ferguson started construction of a house on his lot in 2003. In September 2005, the association informed Ferguson that he was in violation of the condominium governing documents by not completing construction within 12 months. The association scheduled a hearing on the violation, but Ferguson did not attend. At the hearing, the board found Ferguson to be in violation and began imposing monthly fines until the violation was remedied.

By October 2016, Ferguson's home still was not completed. The association filed suit against Ferguson, seeking to foreclose its lien for fines and interest. By August 2017, the association claimed Ferguson owed $137,800 in fines and interest. Ferguson argued that the association could not sue him since there was no properly elected board to authorize the action. The trial court agreed with Ferguson and dismissed the case. The association appealed.

The appeals court determined that the central question was whether the association had a board at the time the lawsuit was filed in 2016. The trial court ruled that the initial board’s terms had expired at the July 2003 deadline for holding a member election. However, the bylaws stated that a board elected in accordance with the bylaws provisions shall serve until the earlier of the next annual association meeting or such time as the board has been replaced in accordance with the bylaws.

The appeals court found nothing in the condominium documents stating that the board's powers would be divested in the event member meetings or elections did not occur. It was undisputed that there had never been an annual meeting and that the board was never replaced by any other means. Since the board was to serve until one of those two conditions occurred, and neither had taken place, the appeals court held that the initial directors continued to serve on the board. It is generally recognized that directors continue to hold over past the end of their stated terms and continue to conduct the association’s business in the absence of a demand for elections.

However, the appeals court cautioned that its ruling should not be read as giving boards the liberty to freely ignore the association’s bylaws. Ferguson or any other association member could initiate a legal proceeding to compel an election, and the association could be liable for that person's legal fees. Since no association member had yet taken such action, the initial directors continued to hold over in office in the absence of any elections.

Accordingly, the trial court's judgment was reversed, and the case was remanded for further proceedings.

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Unit Owner's Joint and Several Liability for Unpaid Assessments Includes Liability for Debts Incurred by Multiple Previous Owners

***Coastal Creek Condominium Association, Inc.* v. *FLA Trust Services LLC*, 275 So. 3d 836 (Fla. Ct. App. July 16, 2019)**

State and Local Legislation and Regulations: The Court of Appeal of Florida interpreted the Florida Condominium Act to require that the current unit owner was jointly and severally liable with the previous unit owner for all unpaid assessments for the unit, not just those that came due during their respective ownership periods.

Coastal Creek Condominium Association, Inc. (association) governed a condominium in Duval County, Fla. Tracy Langley and Todd Levraea (original owners) owned a unit in the condominium. Their mortgage company foreclosed on the unit, and Homes HQ, LLC (Homes HQ) purchased the unit at the foreclosure sale in June 2016.

In July 2016, Homes HQ transferred the unit to FLA Trust Services LLC (FLA). In December 2016, the association filed suit against FLA to foreclose its lien, asserting that FLA was liable for all assessments and related expenses that had come due since August 2015. FLA admitted that it owed assessments to the association but denied that it was responsible for the full amount claimed by the association.

FLA asserted that, under the Florida Condominium Act (act), the present unit owner shared joint and several liability with only the previous owner. Thus, FLA argued that it was responsible only for assessments that came due after Homes HQ acquired the unit in June 2016. The trial court agreed and entered judgment in FLA's favor. The association appealed.

The act provides that a unit owner "is liable for all assessments which come due while he or she is the unit owner. Additionally, a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title."

The appeals court stated that FLA's reliance on the singular word "the" before "previous owner" is misplaced. The appeals court emphasized that the phrase "the previous owner" referred to the person with whom the present owner had joint and several liability, not to the period of ownership for which the present owner is liable. This latter period was the crux of the dispute. The question was whether FLA's joint and several liability with Homes HQ contained *all* of Homes HQ's liability for assessments, including Homes HQ's joint and several liability with the previous owners.

The appeals court stated that, if the state legislature intended to limit the present owner's liability to unpaid assessments that came due during the previous owner's ownership, it could have referred to the period of ownership rather than the previous owner's liability. In addition, this one sentence in the act cannot be read in isolation from the rest of the act. Rather, the entire act must be considered to give effect to all its parts to achieve a consistent whole and avoid an interpretation that rendered a part of the act meaningless.

The act specifically provides that the term "previous owner" does not include an association that acquires title through foreclosure or by deed in lieu of foreclosure. A present unit owner's liability is limited to any unpaid assessments that accrued before the association acquired title to the delinquent property. The appeals court pointed out that this scheme of skipping over the association's ownership emphasized that the act intended for the present owner to be liable for unpaid assessments that came due during the original owner's ownership but not during the association's ownership.

The appeals court determined that all the act's provisions, when read together, unambiguously showed that FLA was jointly and severally liable with Homes HQ for unpaid assessments that came due during the ownership of both Homes HQ and the original owners.

Accordingly, the trial court's judgment was reversed.

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Developer Could Not Grant Rights through Subdivision to Access Property Outside the Subdivision

***Cook* v. *Nissimov*, No. 14-18-00055-CV (Tex. Ct. App. July 16, 2019)**

Developmental Rights: The Court of Appeals of Texas held that a generic exceptions clause in lot deeds was insufficient to reserve the right for the developer to grant access through the gated subdivision to property outside of the subdivision.

In 2009, Charles Cook entered into an agreement with Ralph McKnight regarding a 130-acre parcel in Grimes County, Texas, that Cook intended to subdivide and develop as the Tierra Buena North Subdivision (Tierra Buena). McKnight owned a nonexclusive right to a 60-foot easement (access easement) that could be used to access Tierra Buena.

McKnight gave Cook and his assigns the nonexclusive right to use the access easement (the easement agreement). The easement agreement noted that Cook owned a 450-acre parcel abutting Tierra Buena. It indicated that, if Cook decided to subdivide the 450-acre parcel and to use the access easement for access to such parcel, then Cook must impose the minimum deed restrictions for Tierra Buena.

Cook subdivided Tierra Buena and developed it as a gated subdivision. Brian Blalock and Ronen and Natalia Nissimov (collectively, the Tierra Buena owners) bought lots in Tierra Buena. Their deeds conveyed to them the lot along with rights of ingress and egress over the access easement described in the easement agreement. The deeds contained an exceptions clause, which excepted from the conveyance the easements reflected on the recorded plat and all validly existing easements and rights-of-way, whether of record or not.

After Cook sold all of the Tierra Buena lots, he subdivided and sold unplatted lots in the 450-acre parcel (the northern lots). The deeds to the northern lot purchasers also purported to grant them access rights over the access easement.

Grimes County first sued Cook because he was selling unplatted lots in violation of Texas law. Then, the Tierra Buena owners intervened in the case, alleging that Cook had no right to grant access rights through the private, gated Tierra Buena subdivision for property outside of the subdivision. The northern lot purchasers also were joined in the case.

Cook responded that he had reserved the right to use the access agreement in the Tierra Buena owners' deeds by excepting easements from the conveyance. The Tierra Buena owners argued that excepting the access easement from the deeds did not reserve the right to grant access to the access easement. They asserted that, in order for Cook to be able to grant rights in the access easement to others outside of the subdivision, he had to expressly reserve such right in the deeds.

The trial court agreed that Cook had not reserved any right to use the private road within the gated community. It granted summary judgment (judgment without a trial based on undisputed facts) in the Tierra Buena owners' favor. Cook and the northern lot purchasers appealed.

A warranty deed conveys all of the owner's interest in the property at the time of conveyance unless there are reservations or exceptions that reduce the property interest conveyed. The appeals court noted that, although the words "exception" and "reservation" are often used interchangeably, they have different meanings. A reservation is the creation of a new right in favor of the property seller/grantor. An exception operates to exclude some existing interest from the property conveyance.

An owner who wishes to reserve a right or easement from the conveyance must make such reservation by clear language. There is a presumption that a property seller has no intention of reserving a property interest in a narrow strip of land adjoining the land being conveyed when it ceases to be of use to him, unless such property interest is clearly reserved.

Since the Tierra Buena deeds did not contain an express reservation of the access easement, the appeals court applied the presumption noted above to conclude that Cook had unambiguously conveyed all of this interest in the Tierra Buena lots, including use of the access easement.

Accordingly, the trial court's judgment in the Tierra Buena owners' favor was affirmed.

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Owners Lose Out on Purchase by Miscalculating Deadline for Exercising Right of First Refusal

***Filatov* v. *Turnage*, No. 18CA1200 (Colo. Ct. App. Aug. 1, 2019)**

Contracts: The Court of Appeals of Colorado held that strict compliance with a declaration's terms for exercising a right of first refusal was required to exercise the right.

Anna Filatov entered into a contract to purchase a condominium unit in Vail, Colo. The purchase was subject to right of first refusal established by the declaration of condominium (declaration).

The declaration required any unit owner who received a bona fide offer to purchase the owner's unit to give written notice and a copy of the offer to the condominium association's board of managers (board). The declaration then required the board to advise the owners of other units in the same building of the offer, in accordance with the association's bylaws. The right of first refusal gave the owners in the same building the right to purchase the unit on the same terms and conditions as the offer. To exercise the right, an owner needed

to notify the seller in writing and make a matching earnest money deposit during the 20-day period immediately following the delivery of the notice and copy of the offer.

On November 7, 2016, the unit sellers notified the board that they had accepted Filatov's offer to purchase the unit. The next day, the board advised the other unit owners in the building of the offer and their right of first refusal. The letter stated that November 8, 2016 was the first day of the 20-day period in which an owner could exercise the right of first refusal. It further stated that any owner wishing to exercise the right must do so by November 27, 2016.

On Friday, November 25, 2016, Mark and Natalie Turnage notified the association of their intent to exercise the right of first refusal. On Saturday morning, the sellers' agent informed the Turnages that they had to pay the earnest money to Land Title Guarantee Corporation (title company). On Monday, the Turnages deposited the required amount with the title company.

Filatov sued the Turnages and the sellers. The association was not brought into the lawsuit. Filatov asserted that, because the Turnages deposited the earnest money after the deadline, their attempt to exercise the right of first refusal was ineffective. The trial court found that the deadline did not expire until November 28 because it was a commonly accepted principle that, in calculations of time, the first day of a fixed period is excluded but the last day is included. Filatov appealed.

While the parties agreed that the terms of the right of first refusal stated in the declaration were unambiguous, they disagreed on how they should be interpreted. Specifically, they disagreed about when the 20-day period began to run—the date of the sellers' notice to the board or the date the board notified the other owners?

The appeals court held that the sellers' notice to the board triggered the beginning of the 20-day period. The appeals court noted the distinction between the terms "notice" and "advise" in the declaration. The seller was required to provide *notice* to the board, and then the board was to *advise* the owners. The declaration tied the 20-day clock to delivery of the *notice*. The appeals court held that the declaration unambiguously established that the right of first refusal began immediately following delivery of the sellers' notice to the board.

The Turnages argued that the date of notice to the association should not start the clock as a matter of principle because the association might not promptly advise the owners of their rights or might not even notify the owners of the pending sale at all. They argued that allowing the association's behavior to impede or possibly eliminate the right of first refusal altogether was contrary to the declaration's intent to give existing unit owners an opportunity to purchase a unit for sale, which is equal to that of third parties. The appeals court disagreed, stating that the owners were free to amend the declaration if they were dissatisfied with the existing right of first refusal mechanism.

The Turnages also asserted that strict compliance with the declaration's 20-day period deprived them of their right to have the same opportunity to purchase the unit as Filatov. Filatov's contract rolled deadlines falling on a weekend or a holiday over to the next business day. The Turnages argued this same rule should apply to their earnest money deposit. When they were told of the requirement to deposit the funds with the title company, it was not possible to make the deposit until the next business day on Monday, November 28. The appeals court was not persuaded, stating that strict compliance with the terms of the right of first refusal was incumbent on the party desiring to exercise the right.

Accordingly, the trial court's judgment was reversed, and the case was remanded with instructions for the trial court to enter judgment in Filatov's favor.

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Owner Had to Pursue Derivative Action to Challenge Assessments Levied by Association

***Steele* v. *Diamond Farm Homes Corporation*, 464 Md. 364 (Md. Ct. App. Jun. 26, 2019)**

Assessments: The Court of Appeals of Maryland held that an owner could not challenge association assessment increases as unauthorized without first pursuing a derivative action challenging the board's authority, and the owner waited too long to challenge the increases.

Diamond Farm Homes Corporation (association) governed the Diamond Farm community in Gaithersburg, Md. Diane Steele owned a home in the community.

Recorded in 1969, the declaration of covenants, conditions, and restrictions for Diamond Farm (declaration) stated a maximum annual association assessment of $150, but the annual assessment could be increased above the maximum by a vote of owners holding two-thirds of the total association votes at a meeting called for that purpose. Minutes of the 2003 meeting reflected that more than two-thirds of the owners voted to increase the annual assessment to $720.

The annual assessment also was raised in 2007, 2011, and 2014. A vote on the 2007 increase received a majority of the votes but not the requisite two-thirds. Assessment notices for the 2011 and 2014 increases did not state whether a vote had been taken.

In 2016, a former member of the association's board of directors discovered that the assessment increases for 2007, 2011 and 2014 had not been properly approved, and he wrote a letter to all owners informing them of such. When Steele received this letter, she calculated that she had paid $1,400 more than required based on the declaration's stated maximum. Steele stopped making payments to the association to offset her overpayment.

In 2017, the association sued Steele in small claims court, seeking $1,257 in unpaid assessments plus interest and attorney’s fees. The trial court determined that the association failed to prove that Steele owed the amount requested, and it awarded judgment in Steele's favor. The association appealed to the trial court.

The association argued that it could not survive with funding capped at the declaration's stated annual maximum. Even at the then-current annual assessment rate of $960, the association was still operating at a loss and underfunding its reserves for capital expenses. Steele admitted that she received notices informing her of assessment increases in 2007, 2011, and 2014 but did not take action until she received the 2016 letter, even though she could have requested documentation regarding votes on the increases at any time.

The trial court determined that, if Steele wanted to challenge the association's authority to charge assessments, she had to pursue the procedures outlined in the Maryland General Corporation Law (act). The act states that a corporation's action is not invalid or unenforceable solely because the corporation lacked the power or capacity to take the action. Since Steele failed to follow the act's procedures, the trial court held that she was precluded from asserting a lack of authority defense against the association.

The trial court also found that Steele's continued payment of increased assessments for years constituted acquiescence or ratification of the increases. It also determined that Steele's delay of nine years (since the 2007 increase) before complaining about assessments unreasonably prejudiced the association, so she was precluded from complaining about the assessment rates based on an equitable estoppel theory.

The trial court ruled in the association's favor and awarded it $4,200 in attorney’s fees. Although the association sought $26,589 in attorney’s fees, the trial court concluded that the uppermost range of permissible fees would be three times the assessment amount involved. Steele appealed.

The act's procedures apply to ultra vires acts by the corporation, which are actions that exceed the express or implied powers of the corporation. The appeals court found that the declaration operated as a key governing document outlining the association's powers and capacity. In addition, the association's articles of incorporation expressly referred to the declaration as a source of the association's power.

As such, the declaration served as a document subject to the ultra vires rule. This meant that Steele had to first pursue a derivative action (suit by a corporation member to enforce the corporation's rights) before challenging the association's authority in its case against her.

The appeals court also determined that equitable estoppel prevented Steele from challenging the assessment rates after such a lengthy delay. The association relied upon the owners' payment of increased assessments in order to maintain safe and sanitary conditions and budget accordingly. If the assessments were capped at the maximum stated in the declaration, the association would have to greatly reduce services, such as a garbage pickup, and delay common area repairs, such as fixing sidewalk trip hazards.

The appeals court further upheld the attorney’s fee award to the association because the trial court provided a thoughtful analysis of the reasonableness of the fees involved. Accordingly, the trial court's judgment was affirmed.

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Members Can Call a Special Meeting to Oust Board—Without President's Participation

***U.S. Bank National Association* v. *Bellevue Park Homeowners Association*, No. 77368-2-I (Wash. Ct. App. July 1, 2019)**

Association Operations: The Court of Appeals of Washington held that association members could call a special meeting under corporate law, and nonparticipation by the president did not invalidate the meeting.

Bellevue Park Homeowners Association (association) governed a 79-unit condominium in Bellevue, Wash. The association's articles of incorporation provided for a five-person board of directors (board), and the board elected the association's officers.

By December 2016, the association had serious organizational problems. There was no president or vice president, and there were only four directors—Abolfazl Hosseinzadeh, Xiao Cai, Martin Yamamoto, and Adrian Teague. Yamamoto, the treasurer, had resigned effective Jan. 3, 2017. The association's management company also had provided notice that it was terminating the management contract effective Jan. 7, 2017. In addition, the association was involved in a lawsuit with a roofing contractor. Hosseinzadeh was also involved in litigation with the association.

In December 2016, Teague sent a letter to all association members asking them to sign a petition to hold a special meeting for the purpose of removing Cai and Hosseinzadeh from the board. He later sent out an amended petition form that said the purpose of the meeting was to replace the entire board. A request signed by 51% of the owners was required for a member-demanded special meeting. Petitions were signed by 63.5% of the members.

Hosseinzadeh and Cai called a board meeting for Jan. 7. Also in attendance was Zheng Tang. Hosseinzadeh and Cai voted to appoint Tang to the board. The three of them then elected officers (with Hosseinzadeh as president), voted to hire a new accountant, and appointed Cai as liaison for the law firm they intended to use in litigation.

On Jan. 13, Teague and other members sent all members notice of a special meeting to take place on Jan. 31. The meeting agenda accompanying the notice included the removal of all current board members and nomination and election of new board members. At the meeting, 78% of the members attended in person or by proxy, 69% voted to remove the current board, and 67% voted to elect Teague, Marlene Newman, Mark Middlesworth, Jeni Gonzalez, and Dave Jensen (collectively, the new board) to the board. The new board met the following day to elect officers, including selecting Teague as president.

The association had bank accounts with U.S. Bank National Association (U.S. Bank), and the bank received conflicting instructions for release of the association's funds. On Feb. 1, 2017, Hosseinzadeh sent U.S. Bank an email with a copy of association's corporate registration on file with the Washington Secretary of State that identified Hosseinzadeh, Cai, and Tang as the board. On Feb. 2, Gonzalez contacted U.S. Bank to gain access to the association's accounts and to restrict access from Hosseinzadeh.

As a result, U.S. Bank put a hold on the association's accounts and filed an interpleader lawsuit (an equitable proceeding to determine the rights of rival claimants to property held by a third party having no interest in the property). U.S. Bank asked the trial court to determine the rights of Hosseinzadeh and Teague and to discharge it from all liability in connection with the association's funds. Teague filed a response on behalf of the association and filed a cross-claim against Hosseinzadeh.

The trial court granted summary judgment (judgment without a trial based on undisputed fact) in the association's favor. It determined that the Jan. 7 board meeting was invalid and ineffective to elect Tang to the board. The trial court found that the Jan. 31 special meeting was properly called and was effective to remove the prior board and to elect the new board. It held that the actions taken by Hosseinzadeh, Cai, and Tang on and after Jan. 7 were invalid and that the new board was the only one with the authority to act after Jan. 31.

Hosseinzadeh appealed, asserting that the bylaws allowed only the president to call a special meeting. The bylaws stated that it was the duty of the president to call a special meeting of the association when so directed by a majority of the board or upon the written request of owners having 51% or more of the votes. However, the bylaws did not prohibit the members from calling a special meeting or state that the bylaws provision was the exclusive method for calling a special meeting.

The appeals court held that the bylaws had to be read in conjunction with the Washington Nonprofit Corporation Act (act), which allowed special meetings of the members to be called by that number or proportion of members established in the bylaws. In the absence of a provision fixing the number or proportion of members entitled to call a meeting, the act provided that a special meeting may be called by members having one-twentieth of the votes entitled to be cast at the meeting.

Since the bylaws did not fix the number of members entitled to call a special meeting, the appeals court held that members having one-twentieth of the votes in the association could call a special meeting. It also determined that the Jan. 31 meeting was valid because the number of members who responded in writing to Teague's request comfortably satisfied the required number.

Hosseinzadeh further complained that the special meeting was fundamentally unfair because there was no president to preside over it, and the bylaws required that the president preside over all association meetings. The appeals court noted that the bylaws required only a quorum be present for a valid meeting to take place. While the president had the duty to preside at the meeting, there was no provision that made the meeting or action taken at the meeting invalid if a president did not preside over it.

Accordingly, the trial court's judgment was affirmed.

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Owners Forced to Pay Assessments to Voluntary Association

***Welker* v. *Mount Dallas Association*, No. 78031-0-I (Wash. Ct. App. July 8, 2019)**

Association Operations: The Court of Appeals of Washington held that owners with easement rights in an access road could be required to pay assessments to a voluntary association created to maintain the road.

In 1964, Mount Dallas Road was established by an easement as a private road on San Juan Island, Wash. Later, six separate easements were granted over portions of the road to provide access to 84 properties. The six easements were of varying lengths, but they all terminated at the point where Mount Dallas Road intersected with a public road, so the seven easements overlapped in areas or were "stacked." In addition, each easement identified a different number of owners with use rights under that easement. None of the easements discussed maintenance or repair of the road.

In 1989, a group of the owners formed Mount Dallas Association (association) to assume responsibility for the road. All owners of properties served by the road were eligible for membership in the association, but membership was voluntary. Between 1989 and 2015, the association raised more than $500,000 in voluntary contributions to pay for road maintenance.

However, in April 2015, following a Washington court opinion involving a road easement, the association notified all owners that it would be billing them for their fair share of road maintenance costs. The association explained that, under Washington law, all owners having easement rights in a private road must pay an equitable share of the road maintenance costs, even though a maintenance agreement does not exist. The association stated that each owner's share would be based on the length of the road the owner used. In other words, those owners who traveled farther along the road to reach their properties would have to pay more.

Abigail and Clare Welker (the Welkers) owned two lots on the road. In June 2015, they sued the association and all other owners, seeking a declaration that the association had no authority to establish or enforce a road maintenance agreement or assess road maintenance costs. They also asked the court to establish an equitable method of allocating road maintenance costs.

Two cost allocation methods were proposed, referred to as the actual use method and the legal method. Under the actual use method, the owners would pay for the portion of the road they actually used. Under the legal method, the owners would pay for the portion of the road that they had the legal right to use. The Welkers argued that the legal method was a more equitable solution, while the association advocated for the actual use method.

The trial court found the actual use method to be a fairer approach. The trial court determined that a majority of the owners had assigned their rights to manage the road to the association, so it ruled that the association was the proper entity to maintain the road until otherwise modified by a majority of the owners. The trial court held that all owners had an obligation to share in the costs of routine general maintenance of the road, periodic resurfacing, and administrative costs. It also stated that the association could charge each owner an annual reserve fund contribution, and all assessments for road maintenance costs had to be approved by a majority vote of the owners. However, only those owners who were current in payment of association assessments could vote.

Finally, the trial court ruled that the owners of undeveloped lots should be responsible for only 25% of the assessment charged to developed lots because the data presented showed that most of the road repair needs were caused by wear and tear due to use, but some repairs were needed due to degradation attributable solely to environmental factors unrelated to use (sun, wind, water, oxidation, etc.). The Welkers appealed.

The appeals court found that both cost allocation methodologies impermissibly shifted costs from one easement to another and treated the road as a single easement. It held that only those owners with rights in a particular easement were obligated to share in the costs of maintaining the portion of the road covered by that easement.

The appeals court stated that the total square footage of the seven easements should be added together to determine their combined area. Then, using the area of an individual easement as the numerator and the combined area as the denominator would yield the percentage of the total maintenance costs attributable to each easement.

The appeals court instructed the trial court to determine whether the costs for each easement should be divided equally among the easement holders (the legal method) or whether some equitable adjustment should be made based on nonuse by undeveloped lots. The appeals court agreed that it might be appropriate for undeveloped lots not to contribute to wear and tear maintenance costs, but substantial evidence did not support the 25%-75% allocation imposed by the trial court.

The appeals court also determined that owners could be required to pay a reserve contribution for future resurfacing costs to ensure that all owners participated in the joint maintenance obligation. Further, the appeals court found it was not unreasonable to limit the voting rights of owners who were delinquent to the association.

Accordingly, the trial court's cost allocation was reversed, and the case was remanded for further proceedings.

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