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IN THE

Supreme Court of Virginia

RECORD NO. 150456

STEVEN F. TVARDEK, JR., *et al.*,

Appellants,

v.

POWHATAN VILLAGE
HOMEOWNERS ASSOCIATION, INC.,

Appellee.

REPLY BRIEF OF APPELLANTS

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Introduction[1]

The Powhatan Village Homeowner's Association ("HOA") contends that the word "effective" in Virginia Code § 55-515.1(E) means something different than the word "effective" in § 55-515.1(F) . (Br. 3-4). And even if the meaning is the same, the HOA contends that its certification on the 2008 Amendment was close enough to comply with the requirements of § 55-519.1(F) . (Br. 4-5). Beyond that, the HOA advances a myriad of policy-based rationales, reminescent of a legislative debate, contending that the Tvardeks' suit be barred. The former arguments should be rejected because they contradict the plain language of the statute. The latter arguments may be appropriate for consideration by the General Assembly, but are beyond the scope of this Court's judicial function. *See Barr v. Town & Country Properties, Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) ("Courts are not permitted to rewrite statutes. This is a legislative function."); *accord*, *Women's Healthcare Assocs. v. Mucci*, 64 Va. App. 420, 432, 768 S.E.2d 720, 726 (2015).

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[1] All citations herein to the Brief of Appellee will be designated with the abbreviation "Br." and will be followed by the page number(s) on which the referenced material appears.Citations to the Joint Appendix are labeled "JA" followed by the page number.

Before turning to argument, it should be noted that the HOA brief does not contain a statement of facts and thus concedes that there are no other facts necessary to correct or amplify the basic facts set forth in the Tvardeks' brief.[2] It is further noteworthy that the parties are agreed that the applicable standard of review relates to the plain language of the statute:

> When the language of a statute is unambiguous, we are bound by the plain meaning of that language. Furthermore, we must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity. If a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute.

Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007) (citations omitted). *See* Br. at 1; Appellants' Brief at 15, 17).

I. The Definition of "Effective" in § 55-515.1(F) Applies to the Limitations Provision in Subsection § 55-515.1 (E).

The HOA argues that the term "effective" in Subsection (E) means that the amendment "takes 'effect' *upon recordation,*" in part because "[n]othing in Subsection (E) specifically refers to the *definition* of "effective'" in Subsection F." Br. at 3 (emphasis added). This argument, premised as it is upon the term "effective" in Subsection (E) having a meaning

[2] Supreme Court Rule 5:28 (c).

independent of the definition in Subsection (F), is inherently flawed as a matter of statutory interpretation.

A.

First, the HOA, in effect, contends that the Subsections (E) and (F) should be considered in hermetically sealed vacuums. This Court has made it clear, however, that:

> "[S]tatutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogenous system, or a single and complete statutory arrangement." Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957) (quoting 50 Am. Jur., Statutes, § 349).

Blake v. Commonwealth, 288 Va. 375, 383, 764 S.E.2d 105, 108 (Va. 2014) (emphasis added). The provisions must therefore be considered together in light of the overall purposes of § 55-515.1 and the Virginia Property Owners' Association Act.

Second, there is no ambiguity in the statutory language that would justify formulation of an extraneous definition beyond the "definition" that is clearly stated in Subsection (F). As this Court has said, when "provisions are unambiguous. . . .the language is to be given its ordinary meaning and

intent"[3] which generally means the self-evident definitions of words.[4] The term "effective" commonly means "producing a decided, decisive, or desired effect."[5] This is fully consistent with the limitations period in (E) "taking effect" when the definitional criteria in Subsection (F) are met (which, of course, was not the case here).

Third, by inviting the Court to construe the word "effective" to mean "recordation," the HOA not only would have this Court call an "apple" an "orange," but take the Court into an area well beyond its judicial function. *See Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944) ("Courts are not permitted to rewrite statutes"); *Office of the AG v. State Corp. Comm'n*, 288 Va. 183, 191-192, 762 S.E.2d 774, 780 (Va. 2014) ("We likewise decline to substitute the word 'completed' for the word 'entire' when interpreting the meaning of the phrase 'entire facility' in

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[3] *See Level 3 Communs. of Va. v. State Corp. Comm'n*, 268 Va. 471, 477, 604 S.E.2d 71, 74 (Va. 2004).

[4] *See Sauder v. Ferguson*, 2015 Va. LEXIS, 771 S.E.2d 664 (Va. 2015) ("We will apply the ordinary meaning of the word 'may' in construing a statute unless a contrary legislative intention plainly appears."); *BASF Corp. v. State Corp. Comm'n*, 2015 Va. LEXIS 49, 770 S.E.2d 458, 473 (Va. 2015) ("A layperson can identify the plain meaning of a transmission line. . . .").

[5] See Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/effective (last viewed August 6, 2015).

Subsection (A)(6)."), *citing Appalachian Power*, 284 Va. 695, 706, 733 S.E.2d 250, 256 (2012) ('Rules of statutory construction prohibit adding language to or deleting language from a statute.'").

Finally, and most importantly, the General Assembly knew the difference between the words "effective" and "recordation" in the context of other statutes governing amendments to declarations of restrictive covenants. The limitations provision for amendments to Condominium Declarations expressly use the word "recordation" *instead* of "effective." *See* Code § 55-79.71(C) (Challenges must be brought within "one year after the amendment is *recorded*."). This Court has expressly credited the corresponding provisions of the Condominium Act as being relevant in determining the meaning of provisions of the Property Owners' Association Act.[6] And the Court has repeatedly emphasized in multiple decisions over the years, including those interpreting the Property Owner's Association Act, that "[w]e look to the plain meaning of the statutory language, and *presume that the legislature chose, with care, the words it used when it enacted the relevant statute*." *Zinone v. Lee's Crossing Homeowners Association*, 282 Va. 330, 337, 714 S.E.2d 922 (2011); *see also*, *Seabolt v.*

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[6] *See* Appellants' Opening Brief at pp. 21-24; *Zinone v. Lee's Crossing Homeowners Association*, *supra*, 282 Va. at 336, 714 S.E.2d at 925.

County of Albemarle, 283 Va. 717, 720, 724 S.E.2d 715, 720 (Va. 2012); *Addison v. Jurgelsky*, 281 Va. 205, 208, 704 S.E.2d 402, 404 (2011).

B.

The HOA concedes in its Brief that Subsection (F) contains a "definition" of the term "effective," namely:

> . . .[The amendment of the declaration] shall become *effective* when a copy of the amendment is recorded *together with* a certification. . . that the requisite majority of the lot owners signed the amendment or ratifications thereof.

§ 55-515.1 (F) (emphasis added). If, as the HOA contends, that definition does not apply to Subsection (E), what then is its purpose or application? The answer to this question is essential to a well-founded interpretation of the statute.

Apart from Subsections (E) and (F), the term "effective" is not used elsewhere in the Virginia Property Owners Association Act in any sense germane to amendments to homeowner association declarations.[7] Thus, assuming for purposes of argument that the "definition" in Subsection (F)

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[7] The term "effective" is found in §§ 55-510.1 (board meetings), 55-510.2 (communications with members) and 55-515.2:1 (predicates for judicial action).

does not apply to Subsection (E), its only application must therefore be within Subsection (F). But considering the language of Subsection (F) alone, there is no application for the definition. Needless to say, a "definition" cannot define itself. And absent application to Subsection (E) (as the HOA contends), the definition of "effective" in (F) is surplusage, devoid of effect or meaning. Thus, the HOA's position violates the longstanding interpretive principle that statutory provisions will not be rendered meaningless. *See CVAS 2, LLC v. City of Fredericksburg*, 289 Va. 100, 766 S.E.2d 912 (2015) (Invoking judiciary's repeated admonition against making any portion of a statute meaningless or surplusage); *Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 405, 468 S.E.2d 905, 909 (Va. 1996) ("Every part of a statute is presumed to have some effect and no part will be treated as meaningless unless absolutely necessary.")

In addition to application of the above standards, the linkage between the use of the term "effective" in Subsections (E) and (F) is more than evident from the legislative summary for Chapter 805 of the 1999 Acts of Assembly which described it as follows:

> The bill also provides (i) that an action to challenge the validity of an amendment may not be brought more than one year after

> the amendment is *effective* <u>*and*</u> *(ii)* ***when*** *an amendment is effective.*[8]

In other words, the General Assembly specifically identified the term "effective" in both Subsections and intended for Subsection (F) to define "**when** an amendment is effective," and thus the limitations periods begins to run under Subsection (E) only when "the amendment is effective." The reasonable, harmonious interpretation of the plain language of the enitre statute, and the legislative intent, shows that the "definition" in Subsection (F) applies to Subsection (E) and that the prerequisites of Subsection (F) must be satisfied for the Amendment to become effective and for the limitations period in Subsection (E) to commence.

C.

Acceding instead to the HOA's "close enough" rationale, the Circuit Court departed from applying this Court's standards of statutory interpretation. *See* JA 227 (Lines 10-11); 247 (Lines 7-18); 248 (Line 5). Its ruling below, however, was not without doubt: "I can't say I'm hundred percent confident of [the ruling]. I think it's a close case. . . ." JA 247-248. The doubt most likely arose from the compelling fact that the proper

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[8] *See* Virginia General Assembly Legislative Information Service, SB 999 Property owners' associations; amendment of declaration, http://leg1.state.va.us/cgi-bin/legp504.exe?991+sum+SB999S (last viewed July 8, 2015).

certification for the amendment to take effect was missing. *See* JA 245 (Lines 2-13). A proper application of this Court's standards, as set forth in Subparts A. and B. above, would have avoided the error, resulting in the overruling of the Special Plea, and the granting of the Tvardeks' Motion for Partial Summary Judgment (JA 130) which was scheduled for hearing the same day, but preempted by the court's ruling on the Special Plea. *See* JA 145; Brief in Support of Motion, Record, Volume 2, pp. 256-66. Since the issues presented by the Motion for Partial Summary Judgment are the same as those presented by the Special Plea (JA 135-140; 141), this Court should summarily dispose of the case in the Tvardeks' favor and remand for an award of attorneys fees and costs.

II. The Material Statutory Predicates Contained in Code § 55-515.1 (F) Have Not Been Satisfied For the Amendment to Be "Effective".

The HOA also contends that its certification in the 2008 Amendment complies with the requirements of Subsection F. The argument is flawed for two reasons.

First, to be effective, Subsection (F) requires that two-thirds of lot owners execute the amendment or ratifications thereof. This is an important requirement established by the General Assembly to protect the rights of

private property owners.[9] Although the HOA makes vague references to "evidence," and aberrant notions of "ratification,"[10] there is absolutely *nothing* in the record or in the HOA's certification to evidence that two-thirds of the lot owners actually executed the amendment or ratifications thereof, as explicitly required by the statute.

As for the certification, the HOA has admitted that Exhibit "C" to the Complaint ¶26 (JA 105) is a true and correct copy of the recorded 2008 Amendment. Answer ¶26, JA125. That document evidences conclusively that the substantive and very particular requirements set forth in Subsection (F) for the Amendment were <u>not</u> met by the HOA for it to be effective. The certification is materially defective and makes no mention

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[9] See Appellants' Opening Brief, pp. 25-30.

[10] The HOA defines "ratification" as "[a]ny documents signed by owners confirming that they voted in favor of the amendment. . . ." Br. at 5. However, a "ratification" is not merely a signed proxy for a vote, but a confirmation "*of a previous act* done either by himself or by another. . . ." Black's Law Dictionary, p. 1261 (6th Ed. 1990) (emphasis added). Except for the Tvardeks' allegations in their Complaint that two-thirds of the lot owners did <u>not</u> execute the amendment or ratifications thereof, there is no "evidence" in the record establishing that lot owners executed the amendment or "ratifications" thereof.

whatsoever that the requisite majority of lot owners *signed* the Amendment or ratifications thereof.[11]

III. The Plain Meaning of the Statute Does Not Result in a Manifest Absurdity.

The HOA's arguments faulting the contingent limitations period set forth in Subsection (E) lack perspective, and are based on the underlying premise that the General Assembly must have enacted a statute for an HOA-ruled world. Relying on policy-driven arguments, and suggesting that the General Assembly did not mean what it said, the HOA posits a parade of horribles that are highly remote, or will never occur or for which there is or will be an adequate legislative remedy.

The Virginia Property Owners' Association Act was enacted in 1989.[12] Prior to that time, there was no statute of limitations period for homeowners in subdivisions with restrictive covenants subject to association assessments. To this day, in residential subdivisions not subject to association assessments, there is no limitations period to challenge the validity of amendments to subdivision declarations and covenants. The same is true for lot owners in business parks and

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[11] It need hardly be said that voting is materially different from two-thirds of lot owners *executing* the amendment or a document ratifying it.

[12] 1989 Acts of Assembly, Chapter 679.

commercial developments. Moreover, as pointed out in the *Hening* case cited in the Tvardeks' principal brief,[13] in such subdivisions, all lot owners are required to *sign* amendments for them to be valid (unless a lesser number is specified in the covenants), with no statute of limitations. In other words, at common law, neither homeowners or homeowners associations have any inherent right to a statute of limitations on challenges to amendments to declarations of restrictive covenants. Thus, the limitations period granted under § 55-515.1 of the Virginia Property Owners' Association Act, which applies only to subdivisions with restrictive covenants subjecting lot owners to association assessments, is there by legislative grace, and only modifies --- without eliminating --- the long-established elements of Virginia common law tradition as to such subdivisions.

The General Assembly's imposition of conditions for amendment of declarations in such subdivisions is eminently reasonable. It places a time frame in which the effectiveness of the amendment can be challenged, but

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[13] *See Hening v. Maynard*, 227 Va. 113, 117, 313 S.E.2d 379, 381 (1984) ("In the absence of an agreement to the contrary, existing restrictions cannot be amended or terminated unless all parties affected by the restrictions, or their successors, agree to the amendment or termination.") *citing Duvall v. Ford Leasing*, 220 Va. 36, 44, 255 S.E.2d 470, 474-75 (1979). *See* Appellants' Opening Brief p. 26.

that time frame is made contingent upon the HOA's satisfaction of the relatively simple, but explicit, conditions set forth in Subsection (F).[14] These requirements balance the interests of those owning, as well as buying and selling, real property. For owners, an amendment must have the signatures of the requisite majority of lot owners, and recordation of the amendments with the requisite certification as to signatures. For buyers and sellers, it provides a limitations period for challenge, but subject to proper certification of signatures and recordation. Compliance or non-compliance with these requirements are readily ascertainable on the face of the recorded document and provide a basis for buyers and buyers' counsel to inquire as to the validity of restrictions imposed by amendments.

The General Assembly has balanced important private property rights of owners who purchased property based on certain expectations, and the right of lot owners to make changes to restrictions by permitting amendments and a limitations period, but subject to HOA certification that the requirements have in fact been met. If they are not properly certified,

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[14] The requirements for the limitations bar to commence are very simple: (1) a copy of the amendment must be recorded, (2) the recorded amendment must contain a certification, and (3) the certification must (a) be signed by the principal officer of the association or by such other officer or officers as the declaration may specify, and (b) specify that the requisite majority of the lot owners signed the amendment or ratifications thereof. *See* definition of "effective" in Va. Code § 55-515.1(F).

owners are protected by the tolling of the limitations period. If the prerequisites are properly certified on the face of the amendment, the amendment is effective and any challenge is barred after the one year period has passed. Cf. *Conner v. Hendrix*, 194 Va. 17, 26, 72 S.E.2d 259, 265 (1952) ("There is a conclusive presumption that all property not embraced within the description of a deed is excluded from it."); *Miller v. Commonwealth*, 172 Va. 639, 651, 2 S.E.2d 343, 348 (1939) ("A conclusive presumption of law is generally defined as an inference which must be drawn from proof of a given fact or facts, which no evidence, however strong, no argument, or consideration, will be permitted to overcome. . . .").[15]

The potential shortcomings identified by the HOA in the limitations provision of § 55-515.1 are policy driven arguments that belong in the legislative arena. The General Assembly's completely rational process for amendment of declarations under the Virginia Property Owners' Association Act, enacted for the protection of private property rights, should not be disturbed simply because the HOA may have "better ideas"

[15] Black's Law Dictionary defines a "conclusive presumption" as "one in which proof of basic fact renders the existence of the presumed fact conclusive and irrebuttable." Black's Law Dictionary, p. 1186 (6th Ed.).

than those actually reflected in the statute. The remedy is to enforce the statute as written and relegate the HOA to the legislature.

CONCLUSION

The 2008 Amendment was never "effective" within the meaning of the statute and there was no bar to the Tvardeks' suit. The Circuit Court failed to apply this Court's standards for statutory interpretation and accepted an HOA certification that clearly failed to meet the requirements of the statute. This Court should therefore reverse the ruling below and either reinstate this action and remand it to the trial Court for further proceedings on the Tvardeks' Motion for Partial Summary Judgment, or summarily dispose of the case and remand for an award of the Appellants' attorneys fees and costs.

Dated: August 11, 2015.

Respectfully submitted,

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CERTIFICATE

Pursuant to Rules 5:26(h) and 32(a)(3)(i) of the Rules of the Virginia Supreme Court, counsel for the Appellants Steven F. Tvardek Jr. and Marta P. Tvardek certifies that on August 11, 2015, the undersigned counsel:

1. Complied with the requirements of Rules 26 and 32 of the Rules of the Supreme Court of Virginia with regard to the filing and service of the Reply Brief of the Appellants; and
2. Caused an electronic version, in Portable Document Format (PDF), of the Reply Brief of Appellants signed by counsel of record for the Appellants to be filed with Clerk of this Court by electronic transmission in accordance with the VACES Guidelines and User's Manual using the Virginia Appellate Courts eBriefs System; and
3. Caused to be served on opposing counsel copies thereof by email transmission to said counsel's email address at dorans@wolriv.com and to counsel for amicus curiae at sjc@waldoandlyle.com, jeb@waldoandlyle.com, and sfranck@ghfhlaw.com; and

4. Caused to be filed in the Office of the Clerk of this Court ten (10) printed copies of the Reply Brief of Appellants; and

5. Caused to be served on opposing counsel and counsel for *amici curiae* a printed copy of said Reply Brief of Appellants by mailing a true copy of the said Reply Brief, postage pre-paid, by first class mail as follows: (a) to Appellee's counsel, Barry Dorans, Esquire, Wolcott Rivers Gates, 301 Bendix Road, Suite 500, Virginia Beach, Virginia 23452, and (b) to counsel for *amicus curiae* at (i) Stephen J. Clarke, Esquire, Joshua E. Baker, Esquire, Waldo & Lyle, P. C., 301 West Freemason Street, Norfolk, Virginia 23510, and (ii) Sheldon M. Franck, Esquire, Geddy, Harris, Franck & Hickman, LLP, 1177 Jamestown Road, Williamsburg, Virginia 23185.

By:____/s/ James J. Knicely_____
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