In The

# Supreme Court of Virginia

**RECORD NO. 160606**

**KENNETH M. SHEPHERD, *et al.*,**

***Appellants*,**

**v.**

**RACHELLE CONDE, *et al.*,**

***Appellees.***

## BRIEF OF APPELLEES

**William D. Ashwell (VSB No. 83131)**
**MARK B. WILLIAMS & ASSOCIATES, PLC**
**27 Culpeper Street**
**Warrenton, Virginia 20186**
**(540) 347-6595 (Telephone)**
**(540) 349-8579 (Facsimile)**
**wdashwell@mbwalaw.com**

***Counsel for Appellees***

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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## PRESERVATION OF ASSIGNMENTS OF ERROR

The Appellants (hereafter referred to as "Shepard Parties") failed to preserve the issues raised in the assignments of error before the Court pursuant to Rule 5:25 of the Supreme Court of Virginia. "Rule 5:25, governing appeals to this Court, provides, in part: 'Error will not be sustained to any ruling of the trial court . . . unless the objection was stated with reasonable certainty at the time of the ruling.'" *Weidman v. Babcock*, 241 Va. 40, 44 (1991). "The main purpose of requiring timely specific objections is to afford the trial court an opportunity to *rule intelligently* on the issues presented, thus avoiding unnecessary appeals and reversals." *Id*. (Emphasis added) (*See also*, *Reid v. Baumgardner*, 217 Va. 769, 773 (1977)).

The record in the instant case is devoid of any showing the trial court was given the opportunity to rule intelligently as to the Shepard Parties purported assignments of error raised in this appeal at the time of the ruling.[1] Further, the record does not include any references or indications

[1] The Shepard Parties argue in the Brief of Shepard Parties that their proffered Final Order tendered to the trial court included exceptions sufficient to comply with Rule 5:25. Brief of Shepard Parties at 7. However, the Final Order entered by the trial court and made part of the record in the instant appeal fails to establish any proof the trial court ruled intelligently as to the Shepard Parties objections. Without such proof, the Shepard parties failed to comply with the clear language of Rule 5:25.

to exceptions to comport with Rule 5:25. Joint Appendix at 437. While the Shepard Parties attempted to supplement the record on appeal to cure this missing component of their appeal, their attempt was rejected by this Court. Certificate of Appeal dated September 16, 2016. Additionally, the Shepard Parties failed to file any post-trial motions seeking to have the trial court correct the purported errors raised in the instant appeal. As the Shepard Parties failed to comply with Rule 5:25, this Court should dismiss the instant appeal and affirm the judgment of the trial court.

## NATURE OF THE CASE & MATERIAL PROCEEDINGS BELOW

On June 13, 2014, the Appellees, Norman and Rachelle Conde (hereafter referred to as "the Condes") filed a Declaratory Judgment action (Case No. CL14-289) in the Fauquier County Circuit Court. (Joint App. at 1.) The Condes sought a declaratory judgment related to declarations and restrictive covenants to the Saddle Ridge community of Fauquier County, Virginia. (Joint App. at 1; ¶ 44-45). Named Defendants in the suit were the five remaining home owners in Saddle Ridge; Kenneth M. Shepard, Patricia E. Shepard, David W. Emerick, Sr., Sandra E. Emerick, Cheryl A. Kinsey, George P. Kinsey III, Anita L. Rau, Morton D. Rau, Elizabeth M. Schlenker, John S. Schlenker, Jr., and the Saddle Ridge Farms Home

Owners Association, an unincorporated entity (hereafter "Shepard Parties"). (Id. at 1.)

The Condes' Declaratory Judgment sought relief from the trial court declaring the Saddle Ridge Farms Declaration of Protective Covenants and Restriction, recorded with the subdivision plat dated August 22, 1988 (hereafter the "Declaration"), failed to create a homeowner's association entitled to the protections, powers and authority of the Property Owner's Association Act pursuant to the Code of Virginia, § 55-508, *et seq*., as amended (hereafter "VPOAA"). (Id. at ¶ 45.) Further, the Condes sought declaratory relief from the trial court finding that the Architectural Control Committee (hereafter "ACC"), created by the initial Declaration, has no powers under the VPOAA. (Id.) Finally, the Condes sought declaratory relief from the trial court finding that the Amended Covenants recorded by the Condes and with the Saddle Ridge Home Owner's Association as a party, were invalid. (Id.)

The Shepard Parties filed a Demurrer and Plea in Bar on August 14, 2014. (Joint App. at 34.) Further, the Shepard Parties filed an Amended Counter-claim on August 27, 2014, seeking in essence, opposing declaratory relief to that requested by the Condes' in their Declaratory Judgment. (Joint App.at 70.) The Shepard Parties then further amended

their counterclaim seeking to include facts and argument related to the Saddle Ridge Home Owner's Association's adoption and recording of a Second Amended Restatement of Saddle Ridge Farms Declaration of Protective Covenants and Restrictions. (Joint App. at 166.) Following the Appellant's Amended Counterclaim, the Condes also amended their Declaratory Judgment action to include the Second Amended Covenants recorded by the Saddle Ridge Home Owner's Association. (Joint App. at 171.)

A final hearing was held on October 19, 2015, related to the parties' competing Declaratory Judgment actions. At the hearing, all exhibits and facts were stipulated to by the parties. (Joint App. at 198; Joint App. at 275-405). The parties presented argument to the court as to their positions on the Declaration's intent, what entities and associations were properly created, and were given an opportunity to brief final issues before the trial court rendered judgment. (Joint App. at 405; 425).

The trial court issued a detailed letter opinion on November 6, 2015, finding that: 1) Saddle Ridge Farms Home Owner's Association is limited in its power to perform all of the functions for which it was created; 2) the Saddle Ridge Farms Home Owner's Association has no powers under the VPOAA; 3) the Architectural Control Committee has no powers under the

VPOAA; 4) the First and Second Amended Covenants are invalid as they apply to the Condes or their property. (Joint App. at 430). The Condes were tasked with drafting the Final Order for entry. (Id.)

The Condes, after drafting the Final Order as requested by the trial court, offered the Final Order for appropriate endorsement to opposing counsel. After some delay, counsel for the Shepard Parties informed counsel for the Condes they would be tendering their own version of the requested Final Order to the trial court. On January 19, 2016, a hearing was held on entry of the Final Order. No argument took place at the hearing on entry of the Final Order, and no transcript exists of any arguments purported to have taken place. Ultimately, the trial court entered the Final Order drafted by the Condes. The Shepard Parties made no written objections to the entry of the Final Order. The purported Final Order offered by the Shepard Parties is not part of the record on appeal. The Shepard Parties noted their appeal on February 22, 2016, and submitted their Petition of Appeal on April 19, 2016. (Joint App. at 438.)

## STATEMENT OF FACTS

Saddle Ridge Farms (hereafter "Saddle Ridge") is a subdivision community in Fauquier County, which consists of six residential lots and was created on September 9, 1988, with recordation of the Saddle Ridge

Farms Declaration of Protective Covenants and Restriction, recorded with the subdivision plat dated August 22, 1988. (Joint App. at 275). The Condes purchased their property within Saddle Ridge Farms in October of 2011. (Joint App. at 382). Access to all residential lots within Saddle Ridge is available via a single roadway. (Joint App. at 326).

Initial Declaration of Protective Covenants and Restriction

The original Declaration created an Architectural Control Committee (hereafter "ACC"), making all lot owners at Saddle Ridge members and empowering the ACC to regulate covenants upon the sale from the initial developer to all private lot owners at Saddle Ridge. (Joint App. at 275; ¶ 1-2.) The Declaration did not create an expressed Home Owner's Association, failed to designate any common areas, mandated no special duty to the ACC, and failed to express any requirement owners at Saddle Ridge were to pay any dues or special assessments. (Id. *passim*).

The only financial obligation outlined in the Declaration is that the lot owners "agree to pay their pro-rata share of road maintenance, if a lot owner does not pay his pro-rata assessment, a lien shall be placed upon the land for the cost of the same…" (Id. at ¶ 22.) Despite outlining the possibility of pro-rata shares of road maintenance costs, the Declaration failed to expressly state who would make the monetary assessment, how

the assessment would be calculated, when it would be assessed, and how fee collection would be enforced. (Id.)

Appellant's Amendments to Protective Covenants and Restrictions

On February 25, 2014, the Shepard Parties recorded an Amendment and Restatement of Saddle Ridge Farms Declaration of Protective Covenants and Restrictions.[2] (Joint App. at 275.) Then, on October 15, 2014, the Shepard Parties put to record the Second Amendment and Restatement of Saddle Ridge Farms Declaration and Protective Covenants and Restrictions (hereafter "Second Declaration"). (Joint App. at 299.)

The Second Amendment incorrectly states that Saddle Ridge Farms Home Owners Association was established pursuant to the recordation of the Initial Declaration. (Id. at ¶ 2.) Further, the Second Declaration erroneously states that the lot owners have the ability to amend the Declaration by two-thirds vote. (Id.) Moreover, the Second Amendment outlines the ACC's ability to assess payments, when payments are to be made, and consequences for failure to make required payments to the Saddle Ridge HOA or ACC. (Id. at ¶ 21-34.) The Second Declaration fails to designate who is required to complete any road repair and how costs

[2] The Appellant's Second Amendment to the Declaration of Protective Covenants and Restrictions negates the need for a detailed discussion as to the First Amendment, however this amendment can be found in the record as Joint App. at 275.

shall be assessed. (Id. at ¶ 24). The Second Declaration purports to avail itself to the powers encompassed in the VPOAA and declares all lot owners in Saddle Ridge are bound by the Second Declaration. (Id. at ¶ 25; ¶ 26). Finally, the Second Declaration permits the ACC to modify provisions of the covenants to alleviate hardship with a simple majority vote. (Id. at ¶ 34).

## STANDARD OF REVIEW

The issues presented in this appeal involve mixed questions of law and fact as to the trial court's interpretation of initial and Second Amended Declarations of Covenants and Restriction and the Virginia Property Owner's Association Act pursuant to the Code of Virginia, 1950, § 55-508, *et seq*., as amended. Therefore, this Court gives "deference to the trial court's factual findings and view the facts in the light most favorable to the prevailing part[y,] but [the Court] review[s] the trial court's application of the law to those facts *de novo*." *Tuttle v. Webb*, 284 Va. 319, 324 (2012)

As the prevailing party at trial, Mr. and Mrs. Conde are entitled to have the evidence viewed in the light most favorable to them, with all conflicts and inferences resolved in their favor. *Caplan v. Bogard*, 264 Va. 219, 225 (2002).

Further, "[the Court is] guided by well-established principles that restrictive covenants are not favored and must be strictly construed." *Mid-State Equipment Co. v. Bell*, 217 Va. 133, 140 (1976).

## AUTHORITIES AND ARGUMENT

The trial court correctly ruled and should be affirmed on appeal in holding: 1) the Saddle Ridge Homeowners Association is not subject to the provisions of the Virginia Property Owner's Association Act; 2) the ACC is similarly not subject to the provisions of the Virginia Property Owner's Association Act and the powers therein contained; 3) a unanimous vote is required to amend the provisions of the initial Declaration or to expand the powers therein contained; and 4) the Declaration is not binding on all lot owners.

The Shepard Parties, in their opening brief, urge this Court to overturn itself from the decision rendered in Dogwood II, stating "a review of relevant code provisions [referring to § 55-508, *et seq*.] in the VPOAA contradict the holdings in *Dogwood I* and *II*, and do not articulate the standards set forth in those cases." This is, however, not the case, despite the Shepard Parties' attempt to persuade this Court to take an expansive view of the applicable statutes, authority, and their application.

I. The initial Declaration did not create an HOA subject to the provisions of the Virginia Property Owner's Association Act.

A. The Code of Virginia § 55-508, *et seq.*, as amended, outlines association's requirements to qualify under the Virginia Property Owner Association Act.

The VPOAA defines a property owners' association as "an incorporated or unincorporated entity upon which responsibilities are imposed and to which authority is granted in the declaration." Code of Virginia, 1950, § 55-509, as amended. The Act further outlines a "Declaration" is defined in the Act as "any instrument, however denominated, recorded among the land records of the county or city in which the development or any part thereof is located, that either (i) imposes on the association maintenance or operational responsibilities for the common area or (ii) creates the authority in the association to impose on lots . . . any mandatory payment of money in connection with the provision of maintenance and/or services for the benefit of . . . the common area." Code § 55-509.

The Court correctly interpreted the requirements outlined in the Act on multiple occasions, most recently in *Dogwood Valley Citizens Ass'n v.*

*Shifflett*, 275 Va. 197 (2008)[3] (hereafter "*Dogwood II*"). The Court further outlined in *Lake Arrowhead*, "[r]eading these two definitions together [referring to § 55-508 and 55-509], it is clear that in order to qualify under the VPOAA, an association must possess both the power to collect a fixed assessment or to make variable assessments and a corresponding duty to maintain the common area." *Anderson v. Lake Arrowhead Civic Ass'n*, 253 Va. 264, 271-272 (1997). Further, the Court has highlighted on multiple occasions, "[w]e are guided by well-established principles that restrictive covenants are not favored and must be strictly construed." *Id*. at 269-270. (See also, *Mid-State Equipment Co. v. Bell*, 217 Va. 133, 140 (1976)). "Substantial doubt or ambiguity is to be resolved against the restrictions and in favor of the free use of property." *Id*. (See also, *Friedberg v. Riverpoint Bldg. Comm.*, 218 Va. 659, 665 (1977)).

B. <u>The Court in *Dogwood II* included the statutory analysis quoted by the Shepard Parties in their opening brief and the Court did not erroneously disregard the statutory language.</u>

In *Dogwood II*, the Court broke down the analysis echoed by the Shepard Parties in their opening brief. The *Dogwood II* Court began its discussion of the issues:

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[3] See also, *David Anderson, et al., v. Lake Arrowhead Civic Association, Inc.*, 253 Va. 264 (1997), *Dogwood Valley Citizens Association, Inc., et al. v. William A. Winkelman*, 267 Va. 7 (2004) (hereafter "*Dogwood I*").

> The VPOAA defines a property owners' association as "an incorporated or unincorporated entity upon which responsibilities are imposed and to which authority is granted in the declaration." Code § 55-509. "Declaration" is defined in the VPOAA as
>
> > any instrument, however denominated, recorded among the land records of the county or city in which the development or any part thereof is located, that *either* (i) imposes on the association maintenance or operational responsibilities for the common area *or* (ii) creates the authority in the association to impose on lots . . . any mandatory payment of money in connection with the provision of maintenance and/or services for the benefit of . . . the common area. Code § 55-509. *Dogwood II* at 202. (Emphasis added).

Further, the *Dogwood II* Court echoed the same provisions the Shepard Parties quote in their opening brief, concluding with:

> The VPOAA applies to "developments subject to a declaration." Code § 55-508(A). A "[d]evelopment" is defined by the VPOAA as
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> > real property . . . subject to a declaration which contains both lots . . . and common areas with respect to which any person, by virtue of ownership of a lot . . . is obligated to pay assessments provided for in a declaration. Code § 55-509. *Dogwood II* at 203.

Based on the Court's analysis, the Shepard Parties maintain "a declaration must either impose operation or maintenance responsibilities on an association, or provide an association with the authority (but not

necessarily the duty) to undertake those functions." It is alleged this Court's analysis is an express failure to interpret the "express verbiage" in the statute. However, the quoted language reiterates the Court did analyze the operative language in § 55-508 in the disjunctive – and thereby the Shepard Parties' argument that the Court failed to correctly apply the statutory language is without merit upon review of the trial Court's ultimate analysis – taking into consideration the facts and circumstances of the Dogwood case.

C. The initial Saddle Ridge Farms Declaration of Protective Covenants and Restriction fail to qualify as a "declaration" under the Act.

Duty to Collect Fixed or Variable Costs

The initial Saddle Ridge Declaration fails to qualify as a "declaration" pursuant to the Virginia Property Owner's Association Act. A "Declaration" is defined in the VPOAA as any instrument, however denominated, recorded among the land records of the county or city in which the development or any part thereof is located, that *either* (i) imposes on the association maintenance or operational responsibilities for the common area *or* (ii) creates the authority in the association to impose on lots . . . any mandatory payment of money in connection with the provision of maintenance and/or services for

the benefit of . . . the common area. Code § 55-509 (Emphasis added). An association "must possess both the power to collect a fixed assessment or to make variable assessments and a corresponding duty to maintain the common area." *Lake Arrowhead*, 253 Va. 264, 271-272.

In the initial Declaration at issue, the ACC is the only entity created and vested with any specific powers. Joint App. at 275; ¶ 1-2. Despite the creation of this ACC committee, the Declaration fails to outline an ability to collect a fixed or variable assessment. In fact, the only mention of a financial obligation upon the lot owners at Saddle Ridge appears in clause 22, which states the lot owners "agree to pay their *pro-rata* share of road maintenance." Id. at ¶ 22. Further, the Declaration states if a lot owner fails to pay their *pro-rata* share, then "a lien shall be placed upon the land for the cost of the same." *Id*.

While the Shepard Parties place great weight in the Declaration's creation of a duty to provide road maintenance and include language related to the division of said costs and lien enforcement, the unlimited and unspecified particulars of how the ACC would implement such alleged powers renders much of the operative language in the Declaration

meaningless and against the expressed requirements for inclusion under the VPOAA.[4]

Nowhere in the Declaration does the document appoint who would make such *pro-rata* cost assessment. Despite the Shepard Parties' position that "[a] common sense reading of the Declaration as a whole would lead to the obvious conclusion that the ACC – empowered to enforce the Declaration under its terms – had the right to assert the lien," this very position reinforces the ambiguity which abounds the Declaration. Further, the Declaration does not outline who has the power and in what form a lien would be placed on a lot owner's property for failure to contribute their *pro-rata* share of costs. The ACC, most importantly, despite being created in the Declaration, is not tasked with making the "pro-rata" assessment or attaching a lien on the delinquent lot owner property, despite the Shepard Parties' contention. The Declaration is silent as to who, how, or when any *pro-rata* assessment would take place and who would enforce the same.

The Shepard Parties urge the Court to overlook the patent ambiguities that abound the initial Declarations to read a valid set of covenants which fall under the purview of the VPOAA. In holding the initial

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[4] "Substantial doubt or ambiguity is to be resolved against the restrictions and in favor of the free use of property." *David Anderson, et al., v. Lake Arrowhead Civic Association*, *Inc.*, 253 Va. 264 (1997)

Declaration failed to qualify, the trial court focused on a point the Shepard Parties seem to refuse to accept – the "pro-rata" assessments argued to vest power in the ACC include no provisions for realistic enforceability or provide a formula for any reasonable calculation. The covenants clearly fail to provide for a fixed assessment, which the Shepard Parties do not allege. While the term "variable assessment" is not defined in § 55-509 or elsewhere in the code, a properly drafted covenant would certainly include a basis for the calculation of said assessment and the criteria for which such calculation is made. The "pro-rata" assessments contained in paragraph 27 include no supporting information or definition which would provide the clarity required for the ACC to impose the alleged powers the Shepard Parties maintain it has been vested.

The Shepard Parties point the Court, as they did with the trial court, back and forth between provisions attempting to establish a clear and obvious ability to enforce fixed or variable assessments. But this strategy flies in the face of the basic premise that follows restrictive covenants – "a restrictive covenant of 'substantial doubt or ambiguity' must be interpreted 'in favor of the free use of property and against restrictions.'" *Scott v. Walker*, 274 Va. 209 (2007) (quoting *Schwarzschild v. Welborne*, 186 Va. 1052 (1947)).

Duty to Maintain a Common Area

Common area is defined in the code as "property within a development which is owned, leased or required by the declaration to be maintained or operated by a property owners' association for the use of its members and designated as common area in the declaration." § 55-509. Nowhere in the Saddle Ridge initial Declaration does an association carry a duty to maintain a common area – or to the road shared by the lot owners, as argued by the Shepard Parties. *See* Joint App. at 275. The requirement that an association has a duty to maintain a common area "must be expressly stated in a recorded instrument in the land records of the jurisdiction where some portion of the development is located." *Dogwood*, 267 Va. 7 at 14. "This duty must be *expressly* stated in the recorded documents and may not be inferred or implied." *Id*. (Emphasis added).

In the instant case, the initial Declaration itself creates no specific duty that any entity or the ACC maintain the easement on which the road exists. Further, there are no common areas owned or leased by the ACC and outlined in the initial Declaration. In fact, the initial Declaration in Clause 21 dictates that the road shall be private until such time lot owners "subsequently desire the addition of such private street into the secondary

system of state highways…" - something the Shepard Parties do not address to the court in their opening brief. Joint App. at 275; ¶ 21. The common area the Shepard Parties purport qualify Saddle Ridge under the VPOAA may be altered and made into a public thoroughfare upon agreement of the lot owners. The ability of the lot owners to change the nature of the maintenance of said road reaffirms the Condes' position that the roadway is not a common area, even by implication, as required by the VPOAA. On the face of the initial Declaration, and contrary to the requirements of the VPOAA, no duty to maintain a common area exists.

This lack of common area designation in the declaration is fatal to the Shepard Parties' position throughout their opening brief. Throughout § 55-508, *et seq*., it is clear common areas are required to prevail a HOA to the powers of the VPOAA. In § 55-509, a development must "contain both lots…and common areas…" No such common areas exist in the Saddle Ridge Declaration nor in reality – thereby is Saddle Ridge not a development for the purposes of § 55-508.

Further, a valid declaration must "(i) [impose] on the association maintenance or operation responsibilities for the common area." § 55-509. No such common area exists in which an association is vested with powers related to maintenance or operation of a common area as defined in the

Code. Thereby, one of the disjunctive qualifications for a valid declaration is not established by the Shepard Parties based on a clear reading of the statute.

## II. The Second Amended Declaration recorded by the Shepard Parties attempt to impose new obligations on the lot owners and create new powers missing from the initial Declaration.

Surprisingly, the Shepard Parties recorded a First Amended Saddle Ridge Farms Declaration of Protective Covenants and Restriction, which failed to address the many and diverse issues relating to the failure to grant express powers of an entity to collect a fixes or variable assessment. Joint App. at 284. Not until the Second Amended Saddle Ridge Declaration of Protective Covenants and Restriction did the Shepard Parties attempt to address the failures of the initial Declaration related to the ability to collect any sort of fixed or variable assessment. Joint App. at 299. The Shepard Parties' attempt to cure the failures of the initial Declaration were unsuccessful.

In the Second Amended Declaration, the Shepard Parties attempted to impose on each lot owner the requirement that they "shall pay to the Association all Assessments and other charges as determined by the Committee and as assessed by the Association pursuant to the provisions of the Declaration." Joint App. at 299; ¶ 22. This new power outlined in the

Second Amended Declaration suddenly provided a newly created association with powers, as well as the ACC, which did not exist in the initial Declaration.

Further, the Second Amended Declaration maintains a "Saddle Ridge Home Owner's Association was established pursuant to the recordation of the Initial Declaration." *Id*. This claim is unsupported by any language in the initial Declaration creating such an entity. The ACC was the only entity mentioned or created in the initial Declaration. The Second Amended Declaration language referencing an HOA being created in the initial Declaration is insufficient to cure the initial Declaration's deficiencies.

III. <u>The trial court correctly ruled a unanimous vote is required to modify the Declaration.</u>

The Court may "enforce restrictive covenants where the intention of the parties is clear." *Scott v. Walker*, 274 Va. 209, 212 (2007). Further, restrictive covenants related to an imposition on the alienability of land use "are not favored and must be strictly construed." *Anderson*, 253 Va. 264, 269 (1997). Any ambiguity must be resolved against the restrictive covenants. *Id*. at 269-270. "Generally, a restrictive covenant cannot be modified or terminated except by agreement of all the parties entitled to enforce the covenant. However, the covenant may provide for a mechanism by which the parties, or some number of them, may modify or

terminate the restriction." *Barris v. Keswick Homes*, *L.L.C.*, 268 Va. 67, 71 (2004) (*See also*, *Hening v. Maynard*, 227 Va. 113, 117 (1984); *Minner v. City of Lynchburg*, 204 Va. 180, 188-90 (1963)).

The trial court correctly found that unanimous consent is required to amend the initial covenants and Declaration. First, a glaring, and indeed fatal, omission from the Shepard Parties' argument is any reference to the language in the initial Declaration related to future amendments to the Declaration outside of paragraph 27. See Joint App. at 275. The only language related to amendments to the Declaration read, "[t]he declarant hereunder, or its designee, reserves the right to modify any of the provisions of these covenants to alleviate hardship." Joint App. at 275; ¶ 24. No explanation or definition of what constitutes "hardship" exists in the document. *Id*. No reference to the procedures necessary to effect change exist within the clause, or any related clause, which vests the declarant with the ability to change the terms of the Declaration. *Id*. Consistent with *Barris v. Keswick Homes*, *L.L.C.*, the language in the initial Declaration fails to designate a mechanism by which the lot owners may modify the covenants and restrictions contained in the Declaration.

Further, the Shepard Parties assert the initial Declaration provides for a two-thirds vote for further modification of the restrictions contained in the

Declaration. Brief of Appellants at 9. However, it is clear from the face of the initial Declaration that the two-thirds vote pertains to the restrictive covenants running with the land for successive periods of twenty-five (25) years. Clause 27 reads:

> (27) These Covenants are to run with the land and shall be binding on all parties and all persons claiming under them and must be in full force and effect for a period of not less than twenty-five (25) years from the date of recordation and shall automatically be extended for successive twenty-five (25) year periods. Changes cannot be made unless passed by a vote of two-thirds of the then record owners of the lots in the subdivision. Joint App. at 275; ¶ 27.

Clear from the language in the document, the two-thirds vote requirement makes no mention of the powers in Clause 24. Also from a clear reading of the document the two-thirds vote may modify the renewal periods of the restrictive covenants by the designated majority of the lot owners. As the two-thirds vote is clearly inapplicable to the Shepard Parties' position that Clause 27 provides a designated avenue to modify the restrictions therein contained in the Declaration, a unanimous vote would be required to effectuate change as to the restrictive covenants terms consistent with *Barris v. Keswick Homes*, *L.L.C.* Therefore, the trial court was correct in finding a unanimous vote would be required to change the restrictions contained in the initial Declaration.

## IV. The Amended Declarations are not binding on all lot owners and the new powers therein contained are unenforceable under the VPOAA.

Contrary to the well-defined principles of strict construction and clear intent of the parties applicable in an analysis of restrictive covenants, the Shepard Parties make the extraordinary argument of inferring a vast amount of powers and mechanisms of modification in the initial Declaration that are simply not present. And in doing so, the Shepard Parties attempt to legitimize the substantive changes made in the First and Second Amended Declarations and bind all lot owners at Saddle Ridge to the erroneous covenant amendments.

The Appellant's argument fails for the same reason held by this Court in *Dogwood Valley Citizens Ass'n v. Shifflett*, 275 Va. 197 (2008). In *Dogwood*, the purported home owner's association, known as DVCA, attempted to cure defects in their initial declaration by amending the same. *Id.* at 202. Specifically, the DVCA filed Articles of Incorporation and Bylaws in the land records because said documents created a requisite duty to maintain the roads and common areas of the developments. *Id*. This, in part, was done due to this Court finding the DVCA previously failed to qualify under the VPOAA. *Id*.

Specifically, the Court, in rejecting DVCA's attempt to create and impose new duties binding and enforceable against the property owner's by the filing of an amended declaration, held:

> DVCA's interpretation of "declaration" would allow a property owners' association to acquire the right to issue special assessments under the VPOAA merely by filing in the appropriate land records a document, regardless of its nature, stating that the association has the authority to assess property owners for maintenance of common areas and the responsibility to maintain those areas. Such a change in existing duties and responsibilities of an association and its members could occur without any notice to or concurrence by the property owners. Yet the VPOAA considers a declaration a document that can be changed only if the lot owners have notice and agree to the change, see Code § 55-515.1, a condition consistent with the method of altering restrictive covenants applicable to real property. *Id.* at 203-204.

The same analysis may be applied in the instant case, as the Shepard Parties' maintain the First and Second Amended Declarations create new powers, obligations, assessment abilities, and in fact a new Home Owner's Association not created in the initial Declaration. Specifically, the Second Amended Declaration now provides the ACC with the power to assess payments and define when payments shall be made for a lot owner's pro-rata road maintenance responsibility. Joint App. at 299; ¶ 21. No such power is defined for the ACC in the initial Declaration. Further, the Second Amended Declaration provided that the newly created Saddle Ridge HOA and the ACC may assess costs to lot owners. *Id*. at

¶ 22-23. No such power exists in the initial Declaration. Further, the Amended Declaration charges the lot-owners with the responsibility of fixing damage to the road, and, if the lot owner does not make said repairs, repairs will be carried out by the HOA and costs assessed. *Id*. at ¶ 24. Nowhere in this new obligation created in the Second Amended Declaration does the document state who must repair the purported damages, nor is there an expressed responsibility that the Saddle Ridge HOA or the ACC provide such repairs. *Id*.

Clause 25 of the Second Amended Declaration declares the ACC may avail itself to the provisions and powers of the VPOAA. *Id*. at ¶ 25. Further, Clause 26 attempts to bind all lot owners in Saddle Ridge to the provisions of the Second Amended Declaration. *Id*. at ¶ 26. The Declarations fail to identify how all lot owners are bound by said Declaration without unanimous consent.

Further, completely new powers appear that are absent from the initial Declaration exercisable by the Saddle Ridge HOA and ACC. Such powers appear in Clauses 27-33 of the Second Amended Declaration, including the ability to collect attorney's fees, force foreclosures of delinquent lot owner's property, and conduct due process proceedings pursuant to the language applicable in the Code of Virginia, 1950, § 55-

508, *et seq.*, as amended. *Id*. at ¶ 27-33. Finally, the Second Amended Declaration attempts to solidify the ability to make changes to the restrictive covenants with a majority vote. *Id*. at ¶ 34.

By and through the recordation of the Second Amended Declaration, the Shepard Parties attempted to cure the defects in the initial Declaration which contravenes the Courts correct holding in *Dogwood*. 275 Va. 197 (2008). The VPOAA outlines the requirements allowing a "declaration" to qualify under the provisions of the act. Clear from the face of Saddle Ridge's initial Declaration, the Declaration fails to incorporate the appropriate duties which would avail any Saddle Ridge entity to the powers of the VPOAA. As in *Dogwood II*, the Shepard Parties attempt to amend the Declaration as a cure to the failed initial Declaration, while simultaneously granting itself new powers and abilities. As the initial Declaration failed to qualify under the VPOAA, the attempted Amendments by the Shepard Parties are without merit and cannot be binding on all lot owners at Saddle Ridge.

V. <u>The Court correctly outlined and analyzed the clear statutory language in § 55-509 in defining the criteria of a valid declaration in *Dogwood I* and *II*.</u>

Clear in the Shepard Parties opening brief is a position that the Court was incorrect in its analysis and holding of *Dogwood I* and *II*. The Court,

however, correctly outlined and analyzed the necessary criteria for the qualification of a declaration under the VPOAA, and in particular § 55-509. The Shepard Parties urge, in their opening brief, that their broad and inclusive reading of the statute should be adopted by this Court, and further, that this Court, not less than two times [and again, reiterating the basis behind the Court's analysis in *Dogwood I* and *II* in *Zinone v. Lee's Crossing Homeowners*, *Ass'n*, 282 Va. 330 (2011)] misapplied the statutory language of § 55-509. Such a position is unsupported by a clear reading of the Court's previous analysis in *Lake Arrowhead*, *Dogwood I*, and *Dogwood II* – read in conjunction with the statutory language itself.

Further, the Shepard Parties urge that the Court retreat from its previous holding in *Dogwood I* and *II* is against public policy as it penalizes those who have relied on the Court's interpretation to craft appropriate covenants, by-laws, and other necessary documentation relations to an HOA. The Court's holding in *Dogwood I* and *II* was not made in error – merely the Shepard Parties are urging the Court to overturn itself as the only method of validating the defective declaration at issue. In encouraging the Court to accept an incorrect and overbroad interpretation both of § 55-508, *et seq.*, and the Saddle Ridge Farms Declaration of Protective Covenants and Restriction, the Shepard Parties are advocating for judicial

approval of clearly defective convents. To accept the Shepard Parties' position, the Court would be encouraging a surge of similar litigation and appeals to seek the same treatment – a judicial reaffirmation of defective covenants despite the clear statutory language and the Court's correct case law authority.

## CONCLUSION

The Court should affirm the trial court as to all assignments of error put forth by the Shepard Parties. First, the Shepard Parties failed to preserve any purported assignments of error. Second, the trial court correctly ruled the initial Declaration did not create an association subject to the provisions of the VPOAA. Third, the Appellant's Amended Declaration is not binding on all lot owners in Saddle Ridge Farms. Finally, the Appellant's Amended Declaration fails to remedy the drafting failures of the initial Declaration and the initial Declaration's inapplicability under the VPOAA.

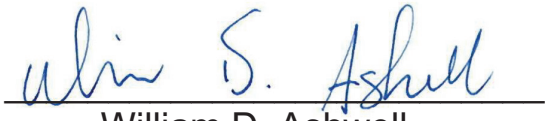
William D. Ashwell, Esq. (VSB No. 83131)
MARK B. WILLIAMS ASSOCIATES, PLC
27 Culpeper Street
Warrenton, Virginia 20186
Telephone: (540) 347-6595
Facsimile: (540) 349-8579
wdashwell@mbwalaw.com
*Counsel for Appellees*

## CERTIFICATE OF SERVICE

I hereby certify that this Brief of Appellees is within the word limit set out by the Rules of the Supreme Court of Virginia, Rule 5:26(h). This Brief of Appellees is 6,171 words.

I hereby certify that on this 21st day of November, 2016, 10 copies of this Brief of Appellees were hand-filed with the Clerk of the Supreme Court of Virginia, and an electronic copy of the same was filed, via VACES. On this same day, an electronic copy of the same was served, via email, upon the following persons:

Robert J. Cunningham, Jr. (VSB No. 27547)
Mariam W. Tadros (VSB No. 75502)
Jasmine G. Chalashtori (VSB No. 90615)
1900 Gallows Road, Suite 700
Tysons Corner, VA 22182
Tel: (703) 790-1911
Facsimile: (703) 847-0463
rcunningham@reesbroome.com
mtadros@reesbroome.com
jchalashtori@reesbrooe.com
*Counsel for Appellants/Shepherd Parties*



William D. Ashwell