In The

Supreme Court of Virginia

RECORD NO. 160606

KENNETH M. SHEPHERD, *et al.*,

***Appellants*,**

v.

RACHELLE CONDE, *et al.*,

Appellees.

BRIEF OF APPELLANTS

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SCV: Submitted on 10-26-2016 15:30:18 EDT for filing on 10-26-2016

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Norman and Rachelle Conde (Plaintiffs in the trial court, appellees in the case at bar, and collectively referred to as the "Condes"), own a single family residence in the Saddle Ridge community in Fauquier County, Virginia, which was established by the recordation of a Declaration of Protective Covenants and Restrictions among the land records of Fauquier County (the "Declaration") in 1988. Joint App. at 1, 275. Kenneth M. Shepherd, Patricia E. Shepherd, David W. Emerick, Sandra E. Emerick, George P. Kinsey, III, Cheryl A. Kinsey, Morton D. Rau, Anita L. Rau, John S. Schlenker, Jr., and Elizabeth M. Schlenker own, as respective married couples, the remaining five homes in the community (Respondents in the trial court, appellants in the case at bar, and collectively referred to as the "Shepherd Parties"). Together, the Condes and the Shepherd Parties comprise the Saddle Ridge Homeowners Association (the "Association"), an unincorporated association.

The Saddle Ridge community contains six residential lots, accessed by a single private paved right of way for the benefit of all lot owners. Joint App. at 313. The Condes acquired their property by deed dated October 3, 2011, which contained the typical verbiage that the Condes were acquiring the property "subject to the conditions, restrictions, easements and rights of

way found in the Deeds forming the chain of title." Joint App. at 382-83. The previously recorded Declaration was contained in the chain of title to the Condes' property.

The Declaration created an unincorporated association (the "Association") comprising the lot owners and established a committee to oversee enforcement of the Declaration. Joint App. at 275-83. In the Declaration, the Architectural Control Committee (the "ACC") is designated as the executive organ of the Association, with the powers and responsibilities set forth in the Declaration, to include enforcing the terms of the Declaration. *Id.* Specifically, paragraphs 1-2 of the Declaration provide, "In order to insure that the intent and purpose of these Covenants and Restrictions are complied with, an [ACC] is hereby established which shall have full authority in enforcing same. Each lot owner shall automatically be a member of the [ACC]…." Joint App. at 275-76. In addition, the Declaration at paragraph 22 provides that each of the lot owners "agree to pay their pro-rata share of road maintenance, [and] if a lot owner does not pay his pro-rate [sic] assessment, a lien shall be placed upon the land for the cost of the same…." Joint App. at 280-81.

In April 2014, after providing notice to all lot owners (to include the Condes), the Shepherd Parties adopted and recorded the Amendment and

Restatement of Saddle Ridge Farms Declaration of Protective Covenants and Restrictions in Deed Book 1457, Page 1069-1083 among the land records of Fauquier County ("First Amended Declaration") by a 83% majority vote (5 out of 6 lots). Joint App. at 127-41. Thereafter, in October 2014 and again after notice to all lot owners,[1] the Shepherd Parties adopted (again by 83% majority vote, or 5 out of 6 lots) and recorded the Second Amendment and Restatement of Saddle Ridge Farms Declaration of Protective Covenants and Restrictions in Deed Book 1470, Page 144-163 among the land records of Fauquier County ("Second Amended Declaration" collectively referred to as the "Amended Declarations"). Joint App. at 143-63. The Amended Declarations were executed by the lot owners who approved those amendments.

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[1] Although the Condes allege in their Answer and Grounds of Defense to the Shepherd Parties' Counterclaim and First Amended Counterclaim that they did not receive notice of the meetings giving rise to the First Amended Declaration and Second Declaration (the "Amended Declarations"), the Shepherd Parties provided notice to the Condes of the proposed change of the Amended Declaration via certified mail, electronic mail and hand delivery. Joint App. at 395-401. Despite providing the Condes with legal notice, the Condes failed to attend the meetings where the remaining lot owners voted upon and approved the amendments to the Declaration and the Amended Declaration. Whether or not they received notice or attended is immaterial as the Condes' vote against the amendments would not have overcome the remaining five votes, nor does the Condes' failure to attend the meetings invalidate any actions taken at those meetings.

On June 13, 2014, the Condes filed a Petition for Declaratory Judgment in the Circuit Court for Fauquier County, Case No. CL14-289 against the remaining lot owners seeking a declaration that the Association is not a proper party to the Declaration or the First Amended Declaration because the Association was purportedly not named in the Declaration. Joint App. at 1-33. The Condes also asserted that the Association did not meet the requirements of a homeowners association subject to the Virginia Property Owners Association Act, § 55-508 *et seq.* (the "POAA"), citing the legal authority in *Dogwood Valley Citizens Ass'n, Inc., et al. v. Winkelman*, 267 Va. 7, 590 S.E.2d 358 (2004) and *Anderson v. Lake Arrowhead Civic Ass'n, Inc.*, 253 Va. 264 (1997). *Id.* Lastly, the Condes sought a declaration that: (1) the Association is not a validly incorporated organization, (2) the ACC has no power under the POAA; (3) the First Amended Declaration is invalid; and (4) that the Condes are entitled to return of any assessments they paid during their ownership of their property. *Id.*

The Shepherd Parties filed a Counterclaim for Declaratory Judgment, which was amended twice by leave of court. Joint App. at 34-163. In the Second Amended Counterclaim, the Shepherd Parties sought a declaration that the initial Saddle Ridge Declaration and Amended Declarations are binding on all lot owners in the Saddle Ridge Community and that as a

common interest community, the Property Owners Association Act (the "POAA") applies to the Association and all owners of lots within the Association. Joint App. at 112-14. The Shepherd Parties also asserted that the reference in the First Amended Declaration that the Association is a "non-stock corporation" was a scrivener's error, and that the Association is, and always has been, an unincorporated association. Joint App. at 114.[2] The Condes filed their Answer to the Second Amended Counterclaim, but asserted no affirmative defenses. Joint App. at 166-68.

Trial in this matter was held on October 19, 2015 on stipulated facts and exhibits, as the issues presented were issues of law. Subsequently, the trial court issued a letter opinion dated November 6, 2015 holding that the Association has no powers under the POAA; the ACC (authorized by the Declaration) has no powers under the POAA; and the First Amended Declaration and Second Amended Declaration are invalid so far as they apply to the Condes or their property.[3] Joint App. at 430-33.

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[2] In addition to filing the Second Amended Counterclaim, the Shepherd Parties also filed a Demurrer and a Plea in Bar, which were denied by the trial court. (Record Nos. 267-70, 277-79).

[3] The trial court reached its conclusion regarding the invalidity of the First Amended and Second Amended Declarations presumably on the ground that the trial court found that in order to amend the Declaration, such amendment required unanimous consent of the lot owners, rather than the 2/3 majority otherwise required by the Declaration.

The trial court also ruled that the Association "may be a valid [corporation], but it is limited in its power to perform all the functions for which it was created."[4] Joint App. at 433. Further, the trial court ruled in its final order that the "Saddle Ridge Farms Homeowners Association was not created by the Initial Covenants and has no powers under the [POAA]", while also ruling that "All of the parties' properties are subject to the Initial Declaration." Joint App. at 436. Finally, in its final order, the trial court declined to rule on the issue of return of assessments paid by the Condes. *Id*.

In its letter opinion, the trial court gave substantial deference to *Dogwood Valley Citizens Ass'n, Inc. v. Winkleman*, 267 Va. 7, 590 S.E.2d 358 (2004) and *Dogwood Valley Citizens Ass'n, Inc., et al. v. Shifflet*, 275 Va.197, 654 S.E.2d 894 (2008) (informally referred to herein as "*Dogwood I* and *Dogwood II*"), while at the same time referencing Va. Code Ann. § 55-509, in ultimately ruling in its letter opinion that there were no common areas in the community that required maintenance by the Association, no dues or special assessments set forth in the Declaration, and no "specific

[4] No party contended that the Association was ever a corporation – because it was not.

duty" in the Declaration requiring the Association to maintain or operate the road. Joint App. at 431-32.

The final order in the trial court was entered on January 22, 2016 following submittal of competing final orders to the court by the parties.[5] In the final order (the Condes' version), the trial court struck through the verbiage sought to be included by the Condes that the Association "has no powers under the Initial Declaration," thereby implying that the Association does have powers under the Declaration. Joint App. at 436. However, nothing in the final order or the trial court's letter opinion expressly declares this, except in paragraph 1 of the trial court's "Conclusions" in the letter opinion, which states that "Saddle Ridge Farms HO-Assoc. **may** be a valid corp.[6], but it is limited in its power to perform all the functions for which it was created." Joint App. at 433 (emphasis added).

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[5] The final order was entered in chambers, and the trial court dispensed with counsel's signatures under Rule 1:13, Rules of the Supreme Court of Virginia. The Shepherd Parties' proposed final order contained their objections to the trial court's rulings, which the trial court reviewed and considered (in addition to the extensive legal arguments presented in briefs and in oral argument to the trial court) before entering the Condes' order as modified by the trial court.

[6] As indicated above, the Saddle Ridge Farms Homeowners Association is not, nor was it ever, a corporation. Rather, it is an unincorporated association which is recognized as a valid legal entity under Virginia law.

The Shepherd Parties timely noted their appeal and filed a transcript of the proceedings below.

STATEMENT OF FACTS

The Condes own real property located within the Saddle Ridge community. Joint App. at 1. The Condes purchased their property in June, 2011, twenty-three years after the recordation of the original Declaration. Joint App. at 382.

The Association is identified as the "ACC" in the Declaration, the First Amended Declaration and the Second Amended Declaration. Joint App. at 275-76, 286-301. The lot owners of the six lots within the community share a common paved road, which is maintained by the lot owners. Joint App. at 109-10, 280-81, 290-91, 305-06. The Declaration, First Amended Declaration and Second Amended Declaration task the Association with maintaining the road and provide the Association with the ability to pay for road maintenance through imposition of assessments. *Id.*; Joint App. at 110-11.

Specifically, paragraph 21 of the Declaration, paragraph 19 of the First Amended Declaration and paragraph 20 of the Second Amended Declaration provide that there is a private street that is required to be maintained by the lot owners. Joint App. at 280, 290, 305. In fact, the

governing documents make clear that neither the Virginia Department of Transportation nor Fauquier County have any obligation to maintain the road, leaving the Association with that responsibility. *Id.*

Further, paragraph 22 of the Declaration, paragraph 21 of the First Amended Declaration and paragraph 21 of the Second Amended Declaration provide that, "Until such time the road becomes state maintained, <u>all lot owners agree to pay their pro-rata share of road maintenance</u>. If a lot owner does not pay his pro-rata assessment, a lien shall be placed upon the land for the cost of same…" Joint App. at 280-81, 291, 305-06. (emphasis added). The Association, through the ACC, has been maintaining the road and imposing assessments as necessary for road maintenance since the recordation of the Declaration in 1988. Joint App. at 343-45, 391-92.

<u>Amending the Declaration and the First Amended Declaration</u>

The Declaration expressly provides that it can be modified by a two-thirds vote of the record lot owners:

> 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 not less than twenty-five years from date of recordation and shall automatically be extended for successive twenty-five year periods. <u>Changes</u>

> 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 291, 310 (emphasis added).

Following formal notice to all lot owners, the Declaration was first amended in April 2014 by the filing of the First Amended Declaration, following notice and 83% (5/6) vote of the lot owners. Joint App. at 284-98. The First Amended Declaration was subsequently amended, again, in October 11, 2014. Joint App. at 299-319. The Second Amended Declaration was recorded on October 15, 2014, after notice to all lot owners of the proposed amendment (including the Condes) and confirmation of the approval of 83% of the lot owners subject to the Declaration as evidenced by their execution of the Second Amendment. Joint App. at 299, 395-96.

The Virginia Supreme Court currently requires that an association falling within the purview of the POAA be tasked with common area maintenance and given the power to impose assessments for such maintenance. *Anderson*, 253 Va. at 271-72, 483 S.E.2d at 213. Even though the Declaration, First Amended Declaration and Second Amended Declaration provide that there is a private street that the Association has authority to maintain and to impose assessments for such maintenance, the Condes claimed - and the trial court agreed - that the Declaration did

not establish a homeowners association under the POAA because it did not impose an "affirmative duty" to maintain the common roadway, Joint App. at 202, (as asserted by the Condes and in accordance with the legal principles espoused in *Dogwood I and II*), and the Declaration did not include a provision "for assessing or calculating dues or liens." Joint App. at 432.

Based upon this misreading of the Declaration, the First Amended Declaration and the Second Amended Declaration, coupled with the holdings in *Dogwood I* and *II* and their progeny, the trial court found that the Association and the ACC could not avail themselves of the powers granted under the POAA pursuant to Va. Code Ann. §§ 55-508 *et seq.* nor could the Association assess and collect annual or other periodic dues as authorized by the POAA. Joint App. at 433. The trial court also found that the Declaration as amended did not govern the Condes because the Amended Declarations were not adopted by a 100% vote, even though the governing documents only require a 2/3 vote for amendment to the Declaration. Joint App. 291, 310; *Id.*

ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the Association has no powers under the POA even though the Declaration and Declaration as amended provide the power to impose assessments for road maintenance and impose a duty to perform such maintenance. Joint App. at 430-37.

2. The trial court erred in holding that the Declaration did not create an association under Virginia law. Joint App. at 430-37.

3. The trial court erred in finding that a 100% majority is required in order to amend the Declaration of the Association. Joint App. at 430-37.

4. The trial court erred when it failed to rule on the Appellants' Request for a Declaratory Judgment that "the [Declaration is] binding on all lot owners in the Saddle Ridge Community." Joint App. at 430-37.

SUMMARY OF THE CASE

This is a case involving pure issues of law regarding the interpretation and legal efficacy of the Declaration, and whether the homeowners' association created by that Declaration has powers under the purview of the POAA. Among the issues here are the legal doctrines espoused in *Dogwood I* and *II* and their progeny, which require review and clarification, as *Dogwood I* and *II* miss the mark when reviewing and analyzing the relevant provisions of the POAA which enactment predates the *Dogwood* cases. In any case, the Shepherd Parties assert here that the Declaration, on its own merit, is within the purview of and subject to the POAA.

Finally, this case presents this Court with the opportunity to decide whether or not a declaration may be amended to satisfy the requirements of the POAA to bring that declaration squarely within the purview of the POAA, and whether such amendment is reasonable under prevailing law.

AUTHORITIES AND ARGUMENT

I. Standard of Review

"As to purely factual determinations made by a trial court, an appellate court will not disturb those findings unless they are plainly wrong or without evidence to support them. An appellate court reviews a trial court's interpretation of covenants and other written documents *de novo*." *Perel v. Brannan*, 267 Va. 691, 697, 594 S.E.2d 899, 903 (2004). The appellate court accords the prevailing party all reasonable inferences deducible from the evidence. *Little v. Cooke*, 274 Va. 697, 703, 652 S.E.2d 129,133 (2007).

II. The amendments to the Declaration are valid and enforceable as to the Condes (Assignment of Error No. 3).

A declaration of covenants, conditions, and restrictions is the contract between the association and the lot owners. *Dye v. Sully Station II Community Ass'n*, 47 Va. Cir. 188 (1998); *see also Manchester Oaks Homeowners Ass'n v. Batt*, 284 Va. 409, 412, 732 S.E.2d 690, 697 (2012) ("A declaration pursuant to the Act 'is a contract entered into by all owners'

of the lots in the subdivision it governs.”). The Virginia Supreme Court has held that while, “Generally, a restrictive covenant cannot be modified or terminated except by agreement of all the parties entitled to enforce the covenant…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, LLC*, 268 Va. 67, 597 S.E.2d 54 (2004) (emphasis added).

Paragraph 27 of the Declaration provided the lot owners with the authority to: (1) amend the Declaration and (2) record amendments to the Declaration that subject both the Association and the lot owners to the POAA. As indicated above, paragraph 27 of the Declaration provides that:

> 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 not less than twenty-five years from date of recordation and shall automatically be extended for successive twenty-five 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. 291, 310 (emphasis added).

The language in paragraph 27 is consistent with Virginia law. In interpreting the Declaration, the Court cannot disregard the terms of paragraph 27. This is because, “Contract language will not be treated as meaningless where it can be given a reasonable meaning. Parties are not

presumed to have included a provision of no effect." *Ross v. Craw*, 231 Va. 206, 214, 343 S.E.2d 312, 316-17 (1986). The amendment provision in paragraph 27 is wholly consistent with the principles recognizing the freedom of parties to negotiate the terms of their own contracts.

In its letter opinion, the trial court discussed this provision, taking issue with the notion that this provision did not specify what "changes" could be made to the Declaration, if any:

> Paragraph 27 of the Original Declaration requires 2/3 of the vote of the record owners to effect change. But the next question becomes what changes can be made? This potentially extraordinary power is placed at the end of paragraph (27) dealing with renewal periods, almost as an afterthought. It is not clear if the "changes" are simply limited to what is contained in paragraph (27) or if changes can be made to all the Covenants. There is no limitation or express grant as to what can be changed.

Joint App. at 432.

A plain reading of the entirety of paragraph 27 of the Declaration leads to the irrefutable conclusion that the "changes" contemplated by this provision are changes to the entirety of the Saddle Ridge Farms Declaration of Protective Covenants and Restrictions. "When contract terms are clear and unambiguous, we must construe those terms according to their plain meaning." *Bentley Funding Group, L.L.C. v. SK&R Group, L.L.C.*, 269 Va. 315, 329 (2005) (quoting *Lansdowne Dev. Co., L.L.C. v.*

Xerox Realty Corp., 257 Va. 392, 400, 514 S.E.2d 157, 161 (1999) (A court may not "add to the terms of the contracts of parties by construction, in order to meet the [circumstances] of a particular case." *Id.* (quoting *C.S. Luck & Sons, Inc. v. Boatwright*, 157 Va. 490, 497, 162 S.E. 53, 55 (1932)). "Words that the parties used are normally given their usual, ordinary, and popular meaning. No word or clause in the contract will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly." *City of Chesapeake*, 271 Va. 574, 578, 628 S.E.2d 539, 541 (2006) (quoting *D.C. McClain, Inc. v. Arlington County*, 249 Va. 131, 135-36, 452 S.E.2d 659, 662 (1995)). Finally, the Supreme Court has emphasized that:

> It is the function of the court to construe the contract made by the parties, not . . . to alter the contract they have made so as to conform it to the court's notion of the contract they should have made in view of the subject matter and the surrounding facts and circumstances. . . . The court . . . is not at liberty . . . to put a construction on the words the parties have used which they do not properly bear. It is the court's duty to declare what the instrument itself says it says.

Ames v. Am. Nat'l Bank, 163 Va. 1, 38, 176 S.E.204, 216 (1934).

The trial court's concerns in its observations that there were no "limitations" as to what can be changed or modified in the Declaration as provided for in paragraph 27 are of no moment, as the law protects against improper or unreasonable changes or modifications, whatever they may be.

In examining amendments to restrictive covenants in particular, amendments are valid unless they are found to be unreasonable. *See Goodwin v. Hunter's Lodge Civic Ass'n*, 31 Va. Cir. 356 (Spotsylvania County 1993) ("[I]n modern times such covenants, along with zoning laws and other public land use regulations, are an accepted part of community life. Their purpose, especially when imposed on defined developments for the benefit and advantage of the landowners within the development, is said to be lawful and laudable. If the restrictions are reasonable, they will be upheld and enforced according to their purposes and design."); *see also Perel*, 267 Va. at 699, 594 S.E.2d at 904 ("Where a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree specific performance of it, as it is for a court of law to give damages for a breach of it."); *see also Unit Owners Ass'n. v. Gillman*, 223 Va. 752, 768, 292 S.E.2d 378, 387 (1982) ("Amendments to condominium restrictions, rules, and regulations should be measured by a standard of reasonableness, and that courts should refuse to enforce regulations that are found to be unreasonable.").

Thus, absent a finding that the First Amended Declaration or the Second Amended Declaration are unreasonable under these legal standards, the trial court was required to find that the First Amended

Declaration and Second Amended Declaration were duly adopted and that the Second Amended Declaration is operative and fully enforceable. [7]

The Condes, who were provided with a resale disclosure package prior to the purchase of their lot (Joint App. 348-69) and notice of the special meetings regarding the proposed amendments (Joint App. at 395), did not assert that any portion of the First Amended Declaration or the Second Amended Declaration were unreasonable, nor have they contended that bringing the Association within the purview of the POAA is, itself, unreasonable. The Condes' apparent inability to identify a single offending provision in the amendments or to cite any authority to suggest that the nature of the amendments to the Declaration in any way unfairly or unreasonably impacts their fundamental rights precluded the trial court from finding that the otherwise validly adopted amendments to the Declaration were ineffective as to the Condes.

Finally, the Trial Court's reliance on the breadth of other provisions in the Declaration that relate to amendments is a red herring as those provisions have no impact on the interpretation of paragraph 27. For instance, the trial court relied upon section 24 of the Declaration which

[7] The trial court made no such finding in the present case, nor did the Condes make any such assertion in the trial court.

provides, “The declarant hereunder, or its designee, reserves the right to modify any of the provisions of these covenants to alleviate hardship.” Joint App. at 281. This provision has no relation to paragraph 27, and clearly contemplates modifications to the covenants by the declarant while under declarant control. The trial court also relied on paragraph 26, which states, “Conditions as set forth in paragraph 21 cannot be changed without approval of the Fauquier County Board of Supervisors.” *Id.* Paragraph 21, in turn, provides that the “private street in this subdivision will not be paved or maintained with funds of Fauquier County or funds administered by the Virginia Department of Transportation…” Joint App. at 280. Thus, paragraph 26, likewise, has no bearing on the enforceability or breadth of paragraph 27 but is solely relating to the Association’s duty to maintain the road, which cannot be changed without the approval of the Fauquier County Board of Supervisors.

The trial court erred in finding that the Condes were required to concur with the proposed amendments to the Declaration, and provided no authority for this proposition, other than its incorrect interpretation of paragraph 27 of the Declaration.

III. <u>The trial court erred in finding that the Association and lot owners in the Saddle Ridge Farm Community are not subject to the POAA (Assignment of Error No. 1).</u>

Under current legal authority from this Court (which has been questioned by the Shepherd Parties in this appeal), qualification as a property owners' association under the POAA requires that a declaration affirmatively impose on an association both the power to assess fees for roads and common facilities maintenance and the duty to perform such maintenance. *Dogwood II*, 275 Va. at 200, 654 S.E.2d at 895. "The responsibility for maintenance of common areas and roads must be "imposed" on the association. . ." *Id.* at 204, 897. However, a review of relevant code provisions in the POAA contradict the holdings in *Dogwood* I and II, and do not articulate the standards set forth in those cases. A review of these statutes leads to the conclusion that a declaration must merely authorize an association to maintain common elements and collect assessments – not impose such obligations – in order for an association and its declaration to be subject to the POAA.

Va. Code Ann. § 55-508(A) of the POAA provides, in part:

> This chapter shall apply to <u>developments subject to a declaration, as defined herein</u>, initially recorded after January 1, 1959, associations incorporated or otherwise organized after

> such date, and all subdivisions created under the former Subdivided Land Sales Act (§§ 55-336 *et seq*.). . . .

(emphasis added).

Pursuant to Va. Code Ann. § 55-509,

> [A] "Development" means real property located within this Commonwealth <u>subject to a declaration</u> which contains both lots, at least some of which are residential or are occupied for recreational purposes, and common areas with respect to which any person, by virtue of ownership of a lot, is a member of an association and is obligated to pay assessments <u>provided for in a declaration</u>."
>
> (emphasis added).

A Property Owners Association is defined by Va. Code Ann. § 55-509 as, "[A]n incorporated or unincorporated entity upon which responsibilities are imposed and <u>to which authority is granted in the declaration</u>." (emphasis added).

Finally, a Declaration is defined by Va. Code Ann. § 55-509 as:

> [A]ny instrument, however denominated, recorded among the land records of the county or city in which the development or any part thereof is located, that <u>either</u> (i) imposes on the association maintenance or operational responsibilities for the common area <u>or</u> (ii) creates the authority in the association to impose on lots, or on the owners or occupants of such lots, or on any other entity any mandatory payment of money in connection with the provision of maintenance and/or services for the benefit of some or all of the lots, the owners or occupants of the lots, or the common area.
>
> (emphasis added).

Contrary to *Dogwood I* and *II*, the definition of "declaration" under the POAA imposes an "either/or" test: a declaration must either impose operational or maintenance responsibilities on an association, <u>or</u> provide an association with the authority (but not necessarily the duty) to undertake those functions. *Dogwood I* and *II* erroneously disregard the express verbiage in the statute and require review and clarification.

"When interpreting statutes, courts 'ascertain and give effect to the intention of the legislature.'" *Boynton v. Kilgore*, 271 Va. 220, 227 (2006) (quoting *Chase v. DaimlerChrysler Corp*., 266 Va. 544, 547, 587 S.E.2d 521, 522 (2003)). That intent is usually self-evident from the words used in the statute. *Id*. "Consequently, courts apply the plain language of a statute unless the terms are ambiguous, or applying the plain language would lead to an absurd result. *Id*. (quoting *Tiller v. Commonwealth*, 193 Va. 418, 420, 69 S.E.2d 441, 442 (1952) and *Cummings v. Fulghum*, 261 Va. 73, 77, 540 S.E.2d 494, 496 (2001)) (internal quotations and citations omitted); *see Crown Cent. Petroleum Corp. v. Hill*, 254 Va. 88, 91, 488 S.E.2d 345, 346 (1997) ("[W]e do not rely on rules of statutory construction . . . unless a literal application would produce a meaningless or absurd result.").

While admitting that the definitions "common area" and "association" in § 509(A) are seemingly inconsistent with the definition of "declaration"

under the POAA, it is clear that Va. Code Ann. § 508 voices the overall intent of the POAA to apply to communities subject to a declaration, "as defined [therein]".[8]

The Shepherd Parties respectfully maintain that this Court's holdings in *Dogwood I* and *II* and their progeny (requiring a declaration to impose the affirmative duty to maintain common elements and impose and collect assessments in order to be within the purview of the POAA) are in derogation of the overall intent and express verbiage of the POAA as a whole. Accordingly, if a declaration either imposes the duty to maintain common elements on an association, <u>or</u> gives the association the authority to maintain the common elements, that association and the community are within the purview of the POAA, notwithstanding the holdings in *Dogwood I and II* and their progeny.

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[8] "Common area" is defined 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"; "association" is defined as "an incorporated or unincorporated entity upon which responsibilities are imposed and to which authority is granted in the declaration." Va. Code Ann. § 55-509(A).

(A) The Association is subject to the POAA because it has the right and duty to maintain the road, the authority to impose assessments on all lot owners, and the duty to impose a lien for non-compliance with the obligation to pay assessments.

There can be no question that, pursuant to Va. Code Ann. § 55-509, the road in the Saddle Ridge community is a common area for the benefit for all of the residents in the community. There is also no question that it has been and will continue to be maintained for the benefit of those same residents. In the initial Declaration, it states that "In order to insure that the intent and purpose of these Covenants and Restrictions are complied with, an [ACC] is established which shall have full authority in enforcing same." Joint App. at 9-12 (emphasis added).

Following a litany of some 20 mandatory obligations imposed upon the lot owners in the community, the Declaration further states: ". . .[A]ll 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, which lien shall be inferior only to taxes

and deeds of trust." Joint App. at 16-17 (emphasis added)[9]. Even if the *Dogwood* doctrines are valid and apply, this directory language does impose the affirmative duty on the Association to collect dues and enforce non-payment of those dues in the manner prescribed by the Declaration.

The trial court's holding to the contrary is erroneous. In finding the Association did not meet the standards set forth in the *Dogwood* cases, the trial court held, "The Original Declaration did not expressly state who would make the monthly assessment, how it would be calculated, when it could be assessed, who would place the assessment on the property or how it would be enforced." This is error. Nothing in the Declaration or statute requires that assessments be regular and periodic; the amendments to the Declaration in fact authorize monthly assessments and identify who may enforce the collection of the assessments; and in the circumstances here (where the paved roadway will by necessity and character only require

[9] The trial court had difficulty with this provision, observing that the Declaration did not state who was entitled to assert a lien. 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. In fact, no other person or individual in the Saddle Ridge community would have the power to record a lien, given the power to impose assessments is given solely to the ACC under the Declaration, which was empowered to enforce the Declaration as a whole.

sporadic and unpredictable repairs), charges for maintenance would correspond to the timing and necessity of such repairs.

In *Dogwood I* this Court held:

> We applied Code §§ 55-508 and -509, and we held that: 'reading these two definitions together, it is clear that in order to qualify under the [Property Owners' Association Act] an association must possess both the power to collect a fixed assessment <u>or to make variable assessments</u> and a corresponding duty to maintain the common area. In addition, these conditions must be expressly stated in a recorded instrument in the land records of the jurisdiction where some portion of the development is located.'

267 Va. at 13, 590 S.E.2d at 361 (emphasis added).

Nowhere in Virginia law has any court defined the term "variable assessments", and the Shepherd Parties assert that this case presents the perfect opportunity to do so. The trial court had difficulty in its observations regarding the lack of specificity in the Declaration regarding the amounts of assessments for road maintenance. *See* Joint App. at 431. The Shepherd Parties maintain here that the common paved roadway in the Saddle Ridge community, by its nature, will have sporadic and variable maintenance costs, and thereby satisfy the as yet undefined "variable assessment" requirement in *Dogwood I.*

Further, the Declaration provides that the ACC is charged with imposing the lien for unpaid assessments. The Declaration states, "In order

to insure that the intent and purpose of these Covenants and Restrictions are complied with, an Architectural Control Committee…is hereby established which shall have full authority in enforcing same." Joint App. at 43-44. Additionally, the Declaration states, "Each lot owner shall automatically be a member of the [ACC] and have one vote for each lot owned…" *Id.*

Moreover, the Declaration sets the assessment amount as the pro-rata share of the costs required for maintaining the road, and mandates a remedy in the event of non-compliance. Paragraph 23 of the Declaration states:

> Until such time the road becomes state maintained, all 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 <u>shall be placed</u> upon the land for the cost of same, which lien shall be inferior only to taxes and deeds of trust.
>
> Joint App. at 48-49.

Reading these provisions together, it is clear that among the purposes for which the ACC was created was to "insure" that all lot owners pay for the maintenance of a private street and record a lien against their lot for their failure to do so.

The Association has, in fact, maintained the common roadway in the Saddle Ridge community. *See* Joint App. at 326 (photographs of the road),

345-47 (check paid by the Association to Asphalt Pave Masters), 343-44 (the Association's Statement of Account, which demonstrates that the Association has imposed assessments and used those assessments to pay road maintenance), 389-90 (May 17, 2013 Meeting Minutes discussing recommended road maintenance work to address cracks and prevent extensive future repairs).

The trial court's overly burdensome requirement that the Declaration list the amount and timing of the assessments for the costs of the common road maintenance is nowhere to be found in case law or statutes, nor would it make logical sense given that the fiscal needs for maintenance of an association for this particular neighborhood (that has only one common element – a paved road) will indeed vary in both cost and the timing of maintenance over time.

Given that there is a common road that the Association has maintained under the authority conferred by the Declaration, that the Association has the authority to impose assessments and <u>the duty</u> to assert a lien for non-compliance, and that the Association has, in fact, undertaken that obligation in accordance with the governing documents, the trial court erred in finding that the Declaration did not create a homeowners association subject to the POAA.

IV. <u>An unincorporated association was established at the time of execution and recordation of the Declaration (Assignment of Error No. 2).</u>

The trial court's assertion that "The original Declaration did not specifically create a homeowners association but did create a body known as the [ACC]" is erroneous. Va. Code Ann. § 55-509 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." This statutory definition is also consistent with Virginia law generally. An unincorporated association is "a voluntary group of persons joined together by mutual consent for the purpose of promoting some stated objective…." *Carroll County High Sch. Band Boosters v. Webb*, 13 Va. Cir. 127, 128 (Washington County 1988); *see Yonce v. Miners Mem'l Hosp. Ass'n*, 161 F. Supp. 178, 186 (W.D. Va. 1958) ("[A]n association suggests an organized group made up of persons who become members of the association voluntarily, but subject to certain rules or by-laws; the members are customarily subject to discipline for violations or non-compliance with the rules of the association.").

The Declaration created an unincorporated association as there was a group of homeowners, joined together for the purpose of setting guidelines for the community by virtue of their ownership of lots subject to

the Declaration, and the Declaration provided for the maintenance of common areas and collections of dues for such maintenance. The unincorporated association came into existence at the very moment the Declarant executed and recorded the Declaration; there is no requirement that an unincorporated association take any additional steps to establish itself as an association. Like it or not, the Condes became members of this association the moment they accepted their deed of conveyance, and with that membership, the right of the Association to enforce the Declaration, and the right of the Association to amend the Declaration by 2/3 vote, as it has done here twice. The trial court's holding to the contrary is erroneous as a matter of law.

V. The trial court failed to rule on the Shepherd Parties' request for a Declaratory Judgment that "the Association is binding on all lot owners in the Saddle Ridge Community" (Assignment of Error No. 4).

In the Second Amended Counterclaim, the Shepherd Parties requested that the Court issue a declaratory judgment that "the [Declaration is] binding on all lot owners in the Saddle Ridge Community." Even if the trial court found that neither the Declaration, the First Amended Declaration nor the Second Amended Declaration are subject the Association to the POAA, the ACC would still be vested with all of the powers contained in the operative covenants and the Condes would remain subject to those

operative covenants since the Declaration and amendments thereto are recorded in the chain of title of the Condes' lot.

The powers and duties afforded by the Declaration, Amended Declaration and Second Amended Declaration to both the ACC and the lot owners are not void or ineffective simply because the Association may not be subject to the POAA. *See* Va. Code Ann. § 55-508(A) ("The granting of rights in [the POAA] shall not be construed to imply that such rights did not exist with respect to any development created in the Commonwealth before July 1, 1989."). The operative covenants remain valid and enforceable.

This is consistent with Virginia law, which recognized the validity of an association of homeowners, even prior to enactment of the POAA. In *Bauer v. Harn*, which was decided before the Virginia General Assembly enacted the POAA in 1989, the Virginia Supreme Court held that because the relationship between an association and its members is contractual in nature, the association's authority to exercise broad powers was only limited by "the contractual obligations embodied in the restrictive covenants." 223 Va. 31, 36, 286 S.E.2d 192, 194 (1982); *see also Kean v. Section I*, 31 Va. Cir. 331 (Accomack County 1993) ("Restrictive covenants limit the use of property, restrictive or protective, in order to maintain or enhance property in the whole development by controlling its nature and

use.”). Additionally, in *Gillman*, the Virginia Supreme Court, again, acknowledged the enforceability of restrictive covenants, particularly because the owners purchasing a lot within an association are aware, prior to purchase, that they will be subject to restrictive covenants:

> Restrictions found in the declaration… are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land, and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right.

223 Va. at 767, n.1, 292 S.E.2d at 386, n.1 (emphasis added).

Moreover, the Condes were on notice of the restrictions and obligations contained within the Declaration because the Declaration was within their chain of title. *See Providence Forge Fishing & Hunting Club v. Gill*, 117 Va. 557, 85 S.E. 464 (1915) (holding that a party is charged with constructive notice of the contents of all documents appearing in his chain of title). In *Goodwin*, the court explained the significance of restrictive covenants:

> Each lot acquires an equitable right to see that everyone else in the subdivision complies with the covenants, and by the same token, each lot is burdened by them. Once the restrictions have attached, they cannot be altered or terminated except by agreement of all parties whose property is affected by them

> unless the restrictive covenants themselves provide for a different means of alteration or termination.

31 Va. Cir. at 358 (emphasis added).

The Declaration and the obligations therein ran with the land and are not void simply because the Condes did not wish to abide by them. Thus, even if the Association is not subject to the POAA, there is no basis by which to find that the lot owners (to include the Condes) are not subject to the Declaration or the Declaration as amended, and that the ACC and the lot owners have all of the powers and responsibilities set forth in those governing documents. The Condes were on actual and legal notice that their lot was subject to Declaration and its provisions when they purchased their lot. There is no basis for them to claim that they are no longer subject to the Declaration in the event that this Court finds that the Association does not fall within the purview of the POAA.

VI. If this Court holds that *Dogwood I* and *II* govern the issues in this matter, and holds that the Declaration was properly amended, the Second Amended Declaration satisfies the requirements of the *Dogwood* cases.

As argued above, the Shepherd Parties assert that the Declaration was properly amended. If this Court holds that the legal requirements in *Dogwood I* and *II* survive this appeal (that a declaration imposes upon an association the duty to maintain common elements and to impose and

collect assessments to be within the purview of the POAA), then the Second Amended Declaration satisfies those requirements, and the Association is subject to and within the purview of the POAA.

The Second Amended Declaration (1) identifies the common elements that require maintenance and (2) requires the Committee empowered to enforce the Amended Declaration to impose periodic assessments to fund such maintenance obligations. Joint App. 299-319. These requirements having been met in the Second Amended Declaration, the Association and lot owners in the Saddle Ridge Community are therefore subject to the POAA.

If this Court rules that the Second Amended Declaration does not satisfy the *Dogwood* principles, the Association would further amend the Declaration consistent with this Court's rulings in accordance with the amendment procedure in the Declaration, which further amendment would be binding on the Condes.

CONCLUSION

The trial court erred by ruling that the Saddle Ridge Declaration – the initial Declaration and as amended - is not within the purview of the POAA, and further erred in holding that amendment of the Declaration requires unanimous consent. The trial court further erred in failing to grant the

declaratory relief sought by the Shepherd Parties, instead declining to rule on issues presented to it, and otherwise rendering rulings that were unclear. Finally, the Shepherd Parties maintain that *Dogwood I* and *II* require review and clarification, as these cases and their progeny are in conflict with the provisions of the POAA cited herein. For these reasons and for reasons to be presented at oral argument, the Shepherd Parties request the following relief:

a. That the trial court be reversed in its holding that amendment of the Saddle Ridge Declaration requires unanimous consent;
b. That the trial court's holding that the Declaration – both initial and as amended – are not within the purview of the POAA be reversed;
c. That the trial court's holding and ruling that the Saddle Ridge Farms Homeowner's Association "may be" a valid corporation be reversed, as the Association is and always has been an unincorporated association under Virginia law;
d. That the trial court's ruling that the Saddle Ridge Farms Declaration of Covenants and Restrictions does not qualify as a "declaration" pursuant to Va. Code Ann. § 55-509 be reversed,

and that this Court hold that the Declaration is a declaration as defined in this code section;

e. That this Court review and clarify as necessary its holdings in *Dogwood I* and *II* consistent with the arguments herein;

f. That this Court confirm, in clear and unequivocal terms, that the Saddle Ridge Declaration – initial and/or as amended – is binding on all lot owners in the Saddle Ridge community; and

g. For any further relief as may be required in this matter.

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CERTIFICATE OF SERVICE

1. The names of the appellants are Kenneth M. Shepherd, Patricia E. Shepherd, 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 Saddle Ridge Farms Homeowners Association.

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5. Electronic copies of the Brief of Appellants and Appendix were filed, via VACES, and ten paper copies of the Brief of Appellants and three paper copies of the Appendix were hand-filed with the Clerk of this Court. On this same day, an electronic copy of the Brief of Appellants was served, via email, and electronic copies on CD of the Brief of Appellants and Appendix were served, via UPS Ground Transportation, upon counsel for The Condes on October 26, 2016.

6. This brief is shorter than 50 pages, in compliance with Rule 5:26, Virginia Supreme Court Rules, exclusive of the cover page, table of contents, table of authorities, and certificate.

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