IN THE

Supreme Court of Virginia

RECORD NO. 181037

SANJAY SAINANI, *et al.*,

Appellants,

v.

BELMONT GLEN HOMEOWNERS ASSOCIATION, INC.,

Appellee.

OPENING BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW[1]

This case arises from the attempted enforcement of disputed homeowner association rules brought under a purported declaration of restrictive covenants that was never voted on or approved by lot owners. The purported declaration was recorded in the Loudoun County, Virginia, land records as part of the 2014 merger of Belmont Glen Homeowners Association, Inc. into Belmont Glen Village Homeowners Association. The merger designated the latter entity as the "surviving association" and renamed it with the Belmont Glen Homeowners Association, Inc. name (the "Merged Association"). Prior to the merger, the original Belmont Glen Homeowners Association, Inc., and the Belmont Glen Village Homeowners Association, were adjacent subdivisions governed by separate, and different, declarations of restrictive covenants. The plaintiff/appellee entity in this case is the Merged Association.

The Merged Association filed suit on September 9, 2015, in the General District Court of Loudoun County against defendants/appellants SanJay and Sona

[1] The parties have filed herewith a Joint Appendix pursuant to Supreme Court Rule 5:32, which includes consecutively numbered materials designated by the parties. All citations to documents in the Joint Appendix are designated with the abbreviation "JA" followed by the page number(s) of the Joint Appendix where it appears. Citations to documents in the Record but not in the Joint Appendix are designated with the abbreviation "R." followed by the page number(s) of the Record where it appears.

Sainani (together, the "Sainanis") seeking to recover alleged unpaid charges arising from the Sainanis' alleged violations of the Merged Association's rules. JA1, 3. After the Sainanis' attorney failed to file grounds of defense, the General District Court granted the Merged Association's summary judgment motion. JA1, 408-409; R.27-29. The Sainanis appealed the judgment to the Circuit Court, *pro se*. JA32.

With new counsel, the Sainanis filed counterclaims against the Merged Association on March 4, 2016 (JA35), and an Answer and Grounds of Defense on July 18, 2016. JA56. Counts I and II of the Sainanis' counterclaims were dismissed by the trial court on September 27, 2016. JA61. Following discovery, both parties moved for and were granted leave to amend their respective pleadings, namely the Merged Association's Amended Bill of Particulars on April 7, 2017 (JA71, 89), and the Sainanis' Amended Counterclaim on April 24, 2017. JA105, 133.

The case was tried in a two-day trial starting on May 24, 2017. After the close of the Merged Association's case, the Sainanis moved to strike (JA391) which the court denied. JA 409-10. After the close of the Sainanis' case-in-chief, the Circuit Court granted the Merged Association's motion to strike and dismissed the Sainanis' counterclaims. JA496, 517. Following final argument, the Court ruled from the bench, awarding judgment to the Merged Association on the claims made in its Amended Bill of Particulars and an injunction against the Sainanis.

JA556-61, 176-79. After briefing, and a June 6, 2017, argument on the Merged Association's request for attorneys' fees, the Circuit Court issued an opinion letter on the attorneys' fees issue (JA1190-92), and entered a Final Order dated July 19, 2017, enjoining the Sainanis from violating the Merged Association's governing documents and awarding the Merged Association a monetary judgment of $884.17, in addition to $39,148.25 in costs and attorneys' fees ("July 19, 2017 Order") JA152-55. In addition to objections made at trial, counsel to the Sainanis filed written objections to the trial court's rulings. JA146, 149.

The Sainanis noted their appeal on August 17, 2017. R.1244. This Court dismissed the Sainanis' appeal on February 2, 2018, without prejudice, finding that the July 19, 2017, Order was not a final, appealable order. JA170. The Circuit Court entered a revised Final Order on May 11, 2018 ("Final Order") (JA171), from which the Sainanis, by counsel, timely noted appeal on June 1, 2018. JA189.

STATEMENT OF FACTS

I. Facts Relating To The Parties And The Proposed Plan Of Corporate Merger Of Belmont Glen HOA Into Belmont Glen Village HOA

In 2010, the Sainanis acquired their improved lot at 42453 Moreland Point Court, Ashburn, Virginia, within the original Belmont Glen subdivision. JA410. At that time, the property was subject to the original Belmont Glen Homeowners Association, Inc. ("BGHOA") declaration of restrictive covenants recorded August 20, 2002, in Loudoun County Deed Book 2242 at Page 2250 ("Original

Declaration"). JA635. Years later, Belmont Glen *Village* Homeowners Association ("BGVHOA"), a declarant-controlled association governing the adjacent, less-developed subdivision called Belmont Glen Village, entered into discussion with BGHOA (then homeowner-controlled) regarding a potential merger. JA225-26.

In 2014, officials of the two associations proposed a formal plan of corporate merger ("Plan of Merger") providing for, among other things, (1) the merger of BGHOA into BGVHOA, as survivor; (2) the renaming of the Merged Association with the BGHOA corporate name; (3) the "deemed" termination of the Original Declaration; and (4) the adoption and recordation by the Merged Association's "New Board" of an amended BGVHOA declaration that would ostensibly apply to both subdivisions, subject to certain BGVHOA Declarant rights set forth in the Plan of Merger. JA682, 686-87.

In furtherance of the proposed merger, the BGHOA Board of Directors delivered a Notice of Special Meeting to its members calling for a meeting to consider a "[p]roposed Merger with Belmont Glen Village Homeowners Association." JA255-57, 676. The Notice stated that the purpose of the meeting was "to discuss and vote on the proposed Plan of Merger by and between [BGHOA and BGVHOA]." JA676. The Notice package included the following documents, including (a) the proposed Plan of Merger, JA680; (b) a special meeting proxy form with instructions, JA678-79; and (c) a proposed "draft"

(marked as such) of an amended declaration of restrictive covenants to govern the merged associations ("April 2014 Draft Declaration"). JA690.

The Special Meeting was held on April 30, 2014, with one hundred twelve (112) of the possible one hundred twenty-nine (129) votes cast to approve the Plan of Merger. JA 258, 752. Significantly, the minutes of the Special Meeting revealed that eighty percent (80%) of the votes cast were based on the Special Meeting Proxy form delivered to the members by the BGHOA Board. *Id.* The Special Meeting Proxy prepared by BGHOA, on which the vote on the plan of merger depended, stated the question for vote as follows:

> 1. *Whether the Proposed Plan of Merger Merging Belmont Glen* ***Village*** *Homeowners Association, Inc.* ***into*** *Belmont Glen* ***Village*** *Homeowners Association Should Be Approved and Adopted And the Association Board of Directors and Association Officers be authorized to Execute the Plan of Merger, and Articles of Merger, the Amended and Restated Declaration of Covenants, Conditions and Restrictions and all other instruments as contemplated or required by the Plan of Merger (Please Check One ☐ to Indicate Vote*)
>
> **Yes/Approve** ☐
>
> **No/Disapprove** ☐

JA678-79 (emphasis in text added). The proxy was defective on its face. The question presented was the merger of BG**V**HOA into BG**V**HOA, a non-sequitur. *Id*. The other ostensible party to the merger, BGHOA, was not identified or mentioned anywhere in the proxy. *Id*.

The question presented for vote in the proxy, as shown above, was limited to approval of the Plan of Merger and authorization of the directors/officers to execute the Amended and Restated Declaration of Covenants, Conditions and Restrictions and all other instruments as contemplated or required by the Plan of Merger. *Id*. Neither the proxy, nor the Notice, solicited, or purported to constitute, a homeowner vote to approve the April 2014 Draft Declaration as an amendment to the BGHOA Original Declaration. JA676-79. The latter omission is particularly noteworthy because, as set forth in detail in the next sub-section, such a vote is required to amend the Original Declaration. JA667. Instead, Paragraph Seven of the approved Plan of Merger called for the Merged Association's "New Board," without any mention of the BGHOA homeowners, to adopt and record "an amendment to the Belmont Glen Declaration . . . which substitutes the Belmont Glen Village Declaration as the Declaration for Belmont Glen . . . and as otherwise to be amended to reflect the concepts set forth in this Plan." JA686-87.

The subsequently written minutes of the April 30 special meeting described the action taken at the meeting as a "[v]ote on merger of Belmont Glen/Moreland Estates and Belmont Glen Village (BGV)," and declared summarily that "the vote to merge Moreland Estates/Belmont Glen and Belmont Glen Village is officially passed." JA258, 752. Nothing in the minutes described the vote as including a vote to approve the proposed draft of the amended declaration. JA752. Witnesses

who attended the special meeting testified that no other documents were presented to members attending the meeting. JA256-57, 381-82. The community manager, who attended the meeting, testified that the only documents presented at the meeting were the proxies. JA275-76, 380-82. Except for the proxies and Plan of Merger, the minutes also do not identify any other document being presented at the Special Meeting for approval, adoption, or recording of the draft amended declaration. JA752. The Sainanis did not attend or cast a vote at the Special Meeting, by proxy or otherwise. JA388.

A few months after the special meeting, the boards of BGHOA and BGVHOA submitted Articles of Merger to the State Corporation Commission ("SCC") with exhibits. JA872-89. The SCC issued a Certificate of Merger and Restatement on August 4, 2014, accepting the BGVHOA's restated articles of incorporation and renaming BGVHOA with the BGHOA name. JA889. As previously indicated, the new merged entity is referred to in this brief as the "Merged Association."

II. Facts Relating To Proposed Amended Declaration And The Purported Amended And Restated Declarations Recorded In The Land Records

A. The Flawed Procedure Purporting to Approve the Amended Declarations. The text of the April 2014 Notice of Special Meeting sent to homeowners suggested that the vote on the Plan of Merger, in effect, was

vicariously sufficient for all purposes in merging the governance and covenants for the two subdivisions:

> **Briefly, if the Plan is approved**, the Surviving Association will be named Belmont Glen HOA; however, the Articles of Incorporation and Bylaws for the Surviving Association will [sic] the BGVHOA documents (as amended). **In addition, all Belmont Glen HOA Members will be subject to the Amended and Restated Declaration of Covenants, Conditions and Restrictions *because the Plan provides that the Declaration of Protective Covenants will be terminated and replaced by the Amended and Restated Declaration of Covenants, Conditions and Restrictions***.

JA676 (emphasis added). As indicated above, the minutes for the April 30 meeting referenced only approval of the Plan of Merger, not of the draft amended declaration. JA752. The Plan of Merger stated, in part, that the Original Declaration would be "deemed" without more to be terminated (JA682), and that the Belmont Glen and Belmont Glen Village subdivisions would be subject to a single amended and restated BGVHOA declaration to be *adopted as an amendment to the Belmont Glen Declaration by the "New Board" of the Merged Association*. JA686-87. No mention was made in the Plan of Merger of any homeowner approval of the draft amended declaration. JA680-89.

The presumption that approval of the Plan of Merger was all that was necessary to approve the April 2014 Draft Declaration is in stark contrast to Section 13.01 of the then-governing BGHOA Original Declaration. Section 13.01

sets forth explicit requirements for an amendment to be effective, as highlighted in pertinent part below:

> 13.01 General Amendments. Subject to Section 13.03 and Section 14.08 and the other limitations set forth in this Declaration, ***this*** *Declaration may be amended by an instrument approved by not less than seventy-five percent (75%) of the Members voting at a meeting of the Members. The amendment instrument shall be recorded among the Land Records for the jurisdiction in which this Declaration is recorded.* Unless a 'later date is specified in any such instrument, *any amendment to this Declaration shall become effective on the date of recording*; provided, however, that no amendment shall be effective unless it is executed by at least one Class A member, should there be any Class A members.

JA667 (emphasis added). Notwithstanding the explicit requirements and procedure for amendment, as previously indicated, the Special Meeting Notice, Proxy, and Minutes did not contain any reference to any homeowner vote to approve the April 2014 Draft Declaration as an "instrument" to amend the Original Declaration. JA676-79. And the authorization set forth in the Plan of Merger was for the Board of Directors of the Merged Association to "adopt" an amendment to the Original Declaration. JA686-87. Significantly, the Merged Association did not proffer for admission any copy of the April 2014 Draft Declaration sent to homeowners in April 2014 that was ever recorded, as required by Section 13.01 of the Original Declaration for it to be effective. JA667.

B. The Later Recordings of Unapproved, Materially Changed

Declarations. Alyssa Knight, the then-President and Director of BGHOA (and later a declarant-appointed Director of the Merged Association), testified at trial that after the April 30, 2014, meeting, two sets of amended declaration documents were recorded in the Loudoun County land records. JA228-32, 251, 754, 812. One was undated, signed and recorded by the Merged Association on July 31, 2014 (the "July 2014 Declaration") (JA754), *before* the Merged Association came into legal existence.[2] A second amended declaration --- pre-dated to July 23, 2014, but containing the same pre-merger notarized signatures found on the July 2014 Declaration --- was recorded on August 5, 2014 (the "August 2014 Declaration") (JA812), the day after the SCC issued the Certificate of Merger and Restatement. The August 2014 Declaration also contained a "NOTE" explaining that it was being recorded "to attach Exhibit C [water quality standards] and to correct the current name of the Homeowners Association in Section 5 on Page 3." *Id*; JA230-32, 276-278.

Ms. Knight's testimony confirmed that the terms of both the July 2014 Declaration and the August 2014 Declaration differed materially from the terms of the April 2014 Draft Declaration document that was provided to BGHOA Members with Special Meeting proxy. JA265-78. The July and August 2014

[2] The SCC Certificate of Merger and Restatement was issued and effective on August 4, 2014. JA889.

Declarations contained the following different provisions from the April 2014 Draft Declaration presented to members with the Notice of Special Meeting, to wit:

(1) changes to recitals, JA265-67;

(2) changes to definitions of terms, JA268-69);

(3) changes to Article VII, by adding a whole new Section 6 for Pool Facilities and Pool Facilities Assessments, (JA270-273);

(4) the addition of wholly new content in Article XIII involving the BGVHOA swimming pool not previously shown in the April 2014 Draft Declaration, JA273-75; and

(5) the addition of previously unattached exhibits and correction of the name of one of the merging entities from BGVHOA to BGHOA. JA230-31, 276-77.

Compare the April 2014 Draft Declaration (JA690), *with* the recorded July 2014 Declaration (JA754), and the recorded August 2014 Declaration (JA812). BGHOA President Alyssa Knight admitted that the changes made in the July 2014 Declaration and in the August 2014 Declaration were inserted by attorneys, without approval or vote at any BGHOA board meeting. JA269, 272, 274. She also admitted that neither the July 2014 Declaration nor the August 2014 Declaration were sent to the homeowners or presented for a homeowner vote prior to their recordation. JA264-78.

C. The Contradictions Between Ms. Knight's March 16, 2016, Notarized Certification and Her Sworn Trial Testimony. On March 16, 2016, Ms. Knight, as the former BGHOA President, and the other principal officers of the Merged Association and its predecessor entities, executed and recorded in the Loudoun County land records a purportedly curative certification for the August 2014 Declaration.[3] The previously recorded August 2014 Declaration was attached as an exhibit to the certification. JA232-34, 890. In the certification, Ms. Knight specifically averred that "the requisite number of lot owner members of BGHA signed ratifications approving [the July 2014 Amended Declaration and the August 2014 Amended Declaration]." JA890. In direct contradiction of her certifications, she testified at trial, under oath, (1) that the July and the August 2014 Declarations contained content that was ***never*** voted on by the BGHOA Members (or by the BGHOA Board at any meeting) at any time, and (2) that at the time the homeowners signed their proxies for approval of the Plan of Merger, they had not

[3] That March 2016 certification was intended to remedy the lack of a valid certification of the purported amendment's adoption and signed ratification by homeowners as required by Virginia Code § 55-515.1(F) and this Court's decision in *Tvardek v. Powhatan Vill. Homeowners Ass'n*, 291 Va. 269 (2016). JA232-33. The July 2014 and August 2014 Declarations both did not contain any § 55-515.1(F) certification; in each of their Answers and Grounds of Defense in July 2016, and as amended in May 2017 in response to the Merged Association's Amended Bill of Particulars, the Sainanis denied that they were subject to the Declarations and contended that they were not effective. JA56, 59, 91, 98.

been provided with the full content of the July and August Amended Declarations which differed substantively from the content of the April 2014 Draft Declaration. JA264-78.

III. Facts Relating to The Seasonal Decoration Guidelines and Enforcement

A. The 2014 Seasonal Holiday Decoration Guideline. After the BGHOA Vote on the Plan of Merger, but **prior** to the SCC's issuance of the Certificate of Merger and Restatement (JA889), and **prior** to the full execution and recordation of the July 2014 and August 2014 Declarations by the BGHOA (JA754, 812, 1027-29), the Merged Association's Board of Directors purported to adopt on July 30, 2014,[4] a Handbook and Architectural Design Guidelines dated August 1, 2014, for use by its Architectural Review Board ("ARB"). JA280-83, 384-85, 1027-29.[5] The 2014 Handbook and Architectural Guidelines included a

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[4] Section 13.01 of the Original Declaration required that an amendment be recorded for it to be effective. Ms. Knight justified the pre-mature adoption of the 2014 Guideline on grounds that "[w]e were under the impression that since we had voted on it, that it was effective, and that it was waiting to be formally recorded." JA283.

[5] The role of the ARB under the August 2014 Declaration was to "regulate the external design and appearance of the Property and the external design, appearance and location of the improvements thereon so as to preserve and enhance property values and to maintain harmonious relationship among structures and the natural vegetation and topography." It required written application and ARB approval for construction, improvements and alteration of structures on lots. Art. VIIII, Sec. 6; Art. IX, Sec. 4 & 5. JA837, 840-41.

policy relating to the display of "SEASONAL HOLIDAY DECORATIONS" ("2014 Guideline"). JA993-94. The 2014 Guideline's overall stated purpose was "(1) to promote harmony in the community; (2) avoid discourteous and unsafe conditions affecting property values; [and] (3) to avoid religious issues in the community. JA993. *But see* JA238-40 (esthetics; religious limitations).

Under the 2014 Guideline, owners were **not** required to apply to the ARB for holiday decorations that "are not permanently attached to the exterior of the home and are displayed only during the proper holiday time frame." JA993. The 2014 Guideline limited the display of holiday decorations to a total of ten (10) days for "all Federal Holidays, Religious Holidays and Valentine's Day," thirty-eight (38) days for Halloween (October 1 to November 7), thirty (30) or more days for Thanksgiving (1st Saturday in November to December 15), sixty (60) days for "Winter Holidays" (4th Saturday in November to January 31), and fifteen (15) days for the Fourth of July (July 1 to July 15). JA994. Additionally, homeowners could apply to the ARB to install decorations for "none (sic) nationally recognized holidays" to be displayed for no more than eleven (11) days. *Id.* Ms. Knight explained it as follows: "So we decided just to put the four major holidays that people typically decorate for with lighting. And then we allowed for people to pick two others at their discretion and just let us know." JA240. Finally, the 2014

Guideline stated that, "[a]s a courtesy to your neighbors, decorative lighting must be turned off by midnight each evening." *Id*. The Sainanis were charged with violating these Guidelines by notices of violation on September 2, 2014, October 14, 2014, and December 16, 2014 . JA1038-39, 1043.

B. The 2015 Seasonal Decoration Guidelines. The 2014 Guideline was subsequently revised in October 2015 ("2015 Guideline") just after the Merged Association brought its suit against the Sainanis. S*ee* JA241-43, 1000. The 2015 Guideline, titled "SEASONAL DECORATIONS," identified its purpose as the avoidance of the "prolonged display of lights and decorations outside the respective holiday." JA1019-20. "Seasonal Decorations" were defined to be "those tasteful special objects and lighting that are consistent with the holidays and decorations." *Id*. The time frames permitted for display remained nearly the same, except that the Hindu festival of Diwali was added, permitting decorations for up to fifteen (15) days, under a schedule prescribed each year by the ARB. The previous policy in the 2014 Guideline permitting holiday decorations for a total of ten days for "all Federal Holidays, Religious Holidays and Valentine's Day" was abandoned. *Id*. Instead, the 2015 Guideline allowed application for permission to decorate for other holidays or celebrations for up to fourteen (14) days each. *Id*. The Sainanis were charged with violating the 2015 Guideline by notices of violation on October 16, 2015, December 4, 2015, and January 21, 2016. JA1044-

45, 1047. *(*The 2014 and 2015 seasonal decoration guidelines are hereafter referred to together as the "Seasonal Guidelines.")

C. The August 2014 Declaration's Restrictive Covenant on Lighting and its Implementation in the Handbook and Architectural Guidelines. The only restrictive covenant in the August 2014 Declaration with reference to exterior lighting is found in Article IX, Section 3, Paragraph C:

> Lighting. No exterior lighting on a Lot shall be directed outside the boundaries of the Lot. Exterior lighting which results in an adverse visual impact to Lots, whether by location, wattage or other features, is prohibited. The ARB shall have the right to determine whether or not exterior lighting results in an adverse visual impact, which decision may be appealed to the Board.

JA839. To implement this restriction, the Handbook and Architectural Guidelines included a section labeled EXTERIOR LIGHTING. JA986, 1012. This EXTERIOR LIGHTING Guideline regulated the alteration, replacement, and/or addition of lighting and fixtures in accordance with style and scale, proscribing additional lighting that produced an "adverse visual impact" on neighbors "due to location, wattage or other features." *Id*. Neither the Lighting restrictive covenant, nor the related EXTERIOR LIGHTING Guideline mentioned temporary seasonal lighting. None of the Merged Association's enforcement actions were conducted under the EXTERIOR LIGHTING Guideline. JA1038-40, 1042-45, 1047-50. Neither of the Seasonal Guidelines contains any language similar to that contained in the Lighting restrictive covenant, and the requirement of "adverse visual impact"

is entirely absent. JA993-94, 1019-20. Never was there any finding of adverse visual impact by the ARB or the Board of Directors in any communication to the Sainanis from the Merged Association. JA1038-40, 1042-45, 1047-50.

D. The Sainanis' Practices In Celebrating Religious Festivals. The Sainanis are Hindus by religion and belong to the Sindhi-Sikh community. Sustained burning of an oil lamp inside and display of lights during their Hindu, Sindhi and Sikh religious festivals plays a significant role in the practice of their religion.[6] JA414-16. Throughout their homeownership in the Belmont Glen subdivision, the Sainanis have celebrated their religious festivals by temporarily displaying a single string of small, multi-colored, lights around the front door and along their backyard deck railing. JA300.[7] As part of their devotion to a specific deity's birthday or religious festival, the Sainanis temporarily displayed these lights for periods corresponding with the respective festival and then removed them. JA412-16. Mr. Sainani testified that numerous exterior lights were displayed by homeowners at various other seasons throughout the year,

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[6] Though not part of the Record, this Court can take judicial notice that in 2013, the General Assembly of Virginia passed Joint Resolutions recognizing April 14, 2013 and in succeeding years as the Hindu/Sikh holiday of Vaisakhi (S.J. Res. 260, February 15, 2013), and the last Saturday of October as Diwali Day. (H.J.R. Res. 550, March 19, 2013; S.J.R. Res. 384, March 15, 2013).

[7] A photo taken by Frank Voight, the ARB Chair, confirming the Sainanis' limited display of lights, was introduced into evidence. JA306-07; R.1748-50.

including candlelights, bright 10 watt bulbs outlining houses, and laser shows. JA417. Mr. Sainani also explained that as a result of the Merged Association's enforcement, he had been harassed and threatened, and made the subject of name calling because of his religion. JA433-35. He further testified that he had suffered from anxiety attacks and sought medical treatment because of the numerous HOA communications from the Merged Association and interactions at Board of Directors meetings, to the point that he was unable to attend those meetings, and given the threats, even unable to open the Merged Association's letters. JA435-36.

E. The Merged Association's Enforcement Action. Shortly after the Merged Association purportedly adopted the 2014 Guideline, it charged the Sainanis with violating the 2014 Guideline. JA1038-39. After a November 2014 hearing, the ARB found the Sainanis to be in violation of the 2014 Guideline for displaying "unapproved holiday lights" and charged the Sainanis ten dollars per day for ninety days. JA1042. A similar enforcement action occurred under the revised 2015 Guideline. JA1044-45. After a hearing on January 13, 2016, the ARB found the Sainanis to be in violation of the 2015 Guideline and levied ten dollar per day penalties for up to ninety days and suspended the Sainanis' voting and common area privileges. JA1049. At trial, the Merged Association contended that the January 15, 2016, common area sanctions were put in abeyance when the Merged Association received a February 17, 2016, letter from the Sainanis'

counsel contesting yet another noticed violation. JA366-70, 1051. No written evidence of any moratorium on the suspension of privileges was proffered. The undisputed record shows that the Sainanis were deprived of voting and common area privileges for at least a month (from January 15 to February 17, 2016), if not longer. JA366-70.

ASSIGNMENTS OF ERROR

I. In awarding judgment and an injunction against the Sainanis, the trial court erred by finding that the August 2014 Declaration was effective and enforceable against the Sainanis [Trial Tr. JA215-217, 527-46; Sainanis' Objections to Final Order & Other Decisions At Trial, JA146-48; June 6, 2017 Atty Fee Tr. JA596-97, 619-20; Sainanis' Suppl. Objections to Final Order, JA149-51].

II. In awarding judgment and an injunction against the Homeowners, the trial court erred by finding that the Seasonal Guidelines were reasonable and enforceable. [Trial Tr. JA393-394, 406-407, 531-32, 545-46; Sainanis' Objections to Final Order Etc., JA146-48; Atty Fee Tr.; JA596-97, 619-20; Sainanis' Suppl. Objections to Final Order, JA149-51].

III. The trial court erred in sustaining the Association's motion to strike the Sainanis' counterclaims because the Sainanis presented sufficient evidence to sustain their causes of action. [Trial Tr. JA507-516, 521; Sainanis' Objections to Final Order Etc., JA146-48; Sainanis' Suppl. Objections to Final Order, JA149-51].

IV. Assuming the trial court was correct in entering judgment against the Sainanis, the trial court erred in awarding the Merged Association $39,148.25 in costs and attorneys' fees because most of those expenses were not paid for by the Merged Association. [Atty Fee Tr. JA619-20; Resp. to Request for Atty Fees, JA1175-83; Sainanis' Suppl. Objections to Final Order, JA149-151].

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THE AUGUST 2014 DECLARATION TO BE EFFECTIVE AND ENFORCEABLE AGAINST THE SAINANIS.

A. Standard of Review.

The question of whether a recorded declaration of restrictive covenants constitutes a valid contract that is effective and enforceable against a landowner is a question of law reviewed *de novo* on appeal. *Beeren & Barry Invs., v. AHC, Inc.*, 277 Va. 32, 37 (2009); *White v. Boundary Ass'n*, 271 Va. 50, 56-57 (2006); *Sonomo Dev. Inc. v. Miller*, 258 Va. 163, 168-69 (1999). In reviewing restrictive covenants, the court applies the principle of strict construction in recognition that at common law, unless otherwise changed by statute, homeowner property rights will not be presumed forfeited without imputed consent as reflected in the specific language of the applicable declaration. *Shepherd v. Conde*, 293 Va. 274, 281 (2017); *Tvardek v. Powhatan Vill. Homeowners Ass'n,* 291 Va. 269, 174-75 (2016); *Fein v. Payandeh*, 284 Va. 599, 606 (2012); *Anderson v. Lake Arrowhead Civic Ass'n*, 253 Va. 264, 269-70 (1997). The trial court's interpretation of the declaration is reviewed *de novo*. *Shepherd*, 293 Va. at 281; *Barris v. Keswick Homes, L.L.C.*, 268 Va. 67, 71 (2004).

B. The August 2014 Declaration was not effective or enforceable because it was not approved by the requisite vote of the BGHOA homeowners, as required by Section 13.01 of the Original Declaration.

1. The April 30, 2014, homeowner vote did not meet the requirements for approval of an amendment to the Original Declaration.

The trial court determined that the August 2014 Declaration was properly approved and therefore effective and enforceable against the Sainanis, JA556; JA172. This determination was erroneous for several reasons.

First, the recorded August 2014 Declaration was not approved by a requisite vote at a meeting of BGHOA Members. Section 13.01 of the Original Declaration required a seventy-five percent member vote approving an "instrument" amending the Original Declaration. However, the homeowners did not vote to approve the proposed amended declaration. The only question set forth in the proxy for a vote to approve a document was approval and adoption of the proposed Plan of Merger. JA678. Even that vote was problematic because on its face, the stated vote was whether to approve the merger of BG**V**HOA into BG**V**HOA. *Id*. That misnomer further compounded the question as to what BG**V**HOA documents the directors and officers were ostensibly authorized to execute. Importantly, BGHOA was not identified in the question presented, or otherwise mentioned anywhere in the proxy. *Id*.

Even if the law were to blind itself to the proxy's entity mis-identification, it cannot, and should not, indulge the fiction that the proxy constituted a vote under Section 13.01 of the Original Declaration to approve the proposed April 2014 Draft

Declaration. The question presented was patently whether to approve or disapprove the plan of merger, **not** an "instrument" terminating or amending the Original Declaration, nor was it ever described as such. *See* Original Declaration, Section 13.01, JA 667; Notice of Special Meeting, JA676; Minutes of April 30, 2014, Special Meeting, JA752-53; Plan of Merger, JA682, 686-87. Likewise, the question as to whether the board of directors or officers should execute documents did not constitute a vote to approve an "instrument" amending the Original Declaration.

The Notice described the meeting's special purpose to "discuss and vote on the proposed Plan of Merger by and between" BGHOA and BGVHOA. JA676. It went on to explain to lot owners that a vote to approve the Plan of Merger would result in their lots being made subject to the proposed amended declaration, a sort of vicarious approval effecting the termination and amendment of the Original Declaration, with no provision for the required direct, specific homeowners' vote to do so. JA667. The terms of the Plan of Merger were consistent with this explanation. The Plan provided that upon merger, the Original Declaration would be deemed terminated. JA682. It also stated that the "New Board" of the Merged Association (consisting of officers and directors from each entity) would be required to "adopt an amendment to the Belmont Glen Declaration to be prepared and recorded which substitutes the Belmont Glen Village Declaration as the

Declaration for Belmont Glen. . . ." JA686-87 (emphasis added). The minutes from the April 30, 2014, Special Meeting further confirm BGHOA's "merger inclusive" position. The minutes make no mention of a vote to approve the proposed amended declaration and refer only to a vote on the merger of BGHOA and BGVHOA. JA752-53. Finally, the text of both the July 2014 and August 2014 Declarations declared that BGHOA and BGVHOA "merged pursuant to a *Plan of Merger*, duly adopted and approved by BGHA members, the Association Board of Directors and the Declarant, which took effect on June 4, 2014, terminating the Declaration of Protective Covenants and subjecting the Belmont Glen Properties to this Declaration". JA762, 820, 902 (emphasis added). In other words, BGHOA assumed, wrongly, that a vote to approve the Plan of Merger constituted a vote for amendment and termination of the Original Declaration. Notably, nowhere is there any mention of any approval *of the amended declaration* by BGHOA homeowners.

Vicarious action is no valid substitute for the explicitly granted contract rights under Section 13.01 of the Original Declaration and affirmed by Section 55-515.1 of the Virginia Property Owners Association Act ("POA Act"), requiring a formal vote of members to approve an "instrument" amending the Original

Declaration.[8] It was error, therefore, for the Court below to accept the artifice of corporate merger to terminate and amend the Original Declaration and subject property to additional restrictions without the required direct and specifically identified vote of homeowners.

Finally, even assuming for purposes of argument that the proxy might conceivably be counted as a vote for the merger, and that the vote taken on the Plan of Merger subsumed within it a vote to approve the April 2014 Draft Declaration, the April 2014 Draft Declaration was never effective and could not be enforced against the Sainanis because it was **never** recorded in land records, as required by Section 13.01 of the Original Declaration.

2. *The July 2014 and August 2014 Declarations, also failed to meet the requirements of Section 13.01 for homeowner approval of an "instrument" amending the Original Declaration.*

The subsequently drafted and recorded July and August 2014 Declarations, with their materially different provisions from the April 2014 Draft Declaration, likewise were not voted on by homeowners. No vote ever occurred to approve those "instruments" as amendments to the Original Declaration. Alyssa Knight, the then-President of BGHOA, testified at trial that numerous *unapproved* changes were made to the recorded July and August 2014 Declarations *beyond* the text of

[8] The 2017 amendments to Section 55-515.1(D) & (F) do not apply to any amendment to declarations occurring before July 1, 2017. *See* Chapter 374, 2017 Acts of Assembly.

the April 2014 Draft Declaration. JA265-78; *see* text on pp. 10-11, *supra*. A plain comparison of the changes identified by Ms. Knight in her testimony (JA265-78), with the text of the April 2014 Draft Declaration (JA 690), and the text of the two recorded Declarations (JA 754, 812), confirms the material differences. The changes cannot be considered as correctable errors without homeowner approval because the Merged Association did not proffer any testimony showing that the changes qualified for correction under Virginia Code § 55-515.2. Ms. Knight confirmed that such changes were not even submitted to, or approved by, any vote of the BGHOA Board of Directors. JA269, 272, 274-75, 278.

Thus, even if the April 30, 2014, vote on the Plan of Merger was deemed to be a valid homeowner vote approving the April 2014 Draft Declaration, it is nevertheless clear that the actual "instruments" recorded *after* the April 30, 2014, Special Meeting contained further amendments drafted *ex parte*, and inserted independently and in disregard of the Original Declaration's amendment procedure. It follows that no BGHOA homeowner vote occurred with regard to the July and August 2014 Declarations, in breach of the requirements of Section 13.01 of the Original Declaration. The Sainanis cannot, therefore, be penalized under a regime of rules promulgated in the dark without the requisite homeowner vote. The August 2014 Declaration thus should not have been held to be effective and enforceable against the Sainanis.

3. The Sainanis could not be subjected to the August 2014 Declaration solely by means of the corporate Plan of Merger.

The Association argued alternatively at trial that the terms of the Plan of Merger provided a mechanism through which the Sainanis could be subjected to the August 2014 Declaration. *See* JA552-54. The Notice of Special Meeting and proxy for the Plan of Merger unquestionably provided for a vote only on a corporate merger. JA676-79. It is conceivable that the Merged Association could argue that the Plan of Merger itself was the "instrument" approved by BGHOA members to amend the Original Declaration. However, the Original Declaration is clear that any such "instrument" must not only be voted on, but **must** also be recorded among the land records. JA667. No evidence was presented by the Merged Association showing that the Plan of Merger was ever recorded as required by Section 13.01 of the Original Declaration to be effective. Therefore, the Plan of Merger itself could not be deemed to be a qualifying "instrument" to amend the Original Declaration. Additionally, the Plan of Merger is obviously a corporate document. Like the articles of incorporation and bylaws rejected as restrictive covenants in *Dogwood Valley Citizens Ass'n v. Shifflett*, 275 Va. 197, 203 (2008), a plan of merger is not "an instrument[] that subject[s] real property to certain burdens and benefits that pass as part of the property rights in the conveyance of the property." *See also*, *Shepherd v. Conde*, 293 Va. 274, 282 (2017); Va. Code § 55-509 (definition of "declaration"). Therefore, based on the

Shifflett case, the Plan of Merger itself, whether or not recorded, cannot be used as a vehicle to circumvent the explicit requirements of Section 13.01 of the Original Declaration and of Section 55-515.1 of the POA Act to subject landowners to a new set of restrictive covenants. Section 13.01 requires a distinct, direct vote by homeowners approving an "instrument" amending the declaration.

Finally, as previously stated, even if the April 30, 2014, vote on the Plan of Merger could be construed as a vote on an instrument terminating and amending the Original Declaration, that vote nevertheless could not have been effective for enforcement purposes because the Merged Association has never alleged, or proffered in evidence, a recorded copy of the April 2014 Draft Declaration. It was the unapproved July 2014 and August 2014 Declarations that were recorded, and they were materially changed from the draft delivered to owners in the April Special Meeting package. Accordingly, the trial court erred by determining that the August 2014 Declaration was effective and enforceable against the Sainanis.

C. The trial court's acceptance of the effectiveness of the 2014 Draft Declaration, and of its enforcement against the Sainanis, abrogates the long-established principle of strict construction of restrictive covenants.

The trial court loosely accepted the terms of respective declarations without "strictly construing" the requirements of BGHOA's Original Declaration. In doing so, it departed from the higher level of scrutiny this Court has uniformly applied in cases involving restrictive covenants. No doubt, restrictive covenants covered by

the POA Act may be modified by less than all property owners in a subdivision. *Shepherd v. Conde*, 293 Va. 274, 287 (citing *Barris v, Keswick Homes, L.L.C.,* 268 Va. 67, 71 (2004); *see also* Va. Code § 55-515.1(D). Likewise, amendments will be enforced where the parties' intentions are clear, the restrictions are reasonable, and the proper procedures are followed in adopting the amendment. *Shepherd*, 293 Va. at 288-89. However, this Court has repeatedly made clear that "restrictive covenants are disfavored and [must be] 'construed most strictly against the grantor and persons seeking to enforce them.'" *Id.* at 281 (*quoting Fein v. Payandeh*, 284 Va. 599, 606 (2012).

Here, the trial court chose to ignore at the proxy's omission of a vote approving the April 2014 Draft Declaration, in effect, deeming the vote approving the plan of merger to include approval of the proposed amended declaration. Indeed, though urged to do so, the trial court did not engage in any careful scrutiny of the Original Declaration's amendment requirements, or even seek to rationalize or apply them. Likewise, despite the testimony and evidence, the trial court discounted the material *ex parte* changes made to the July and August 2014 Declaration documents with no homeowner or Board of Directors vote.

Common law property rights, except where explicitly relaxed by statute, require a more thorough and searching inquiry of restrictive covenants, and even more so of the process by which they are amended. Indeed, in this instance, the

statute is as exacting as the Original Declaration. Section 55-515.1(F) of the POA Act requires agreement of a requisite majority of homeowners and signed ratifications evidencing that agreement. The failure of the trial court to apply a higher level of scrutiny as to whether the requirements of the Original Declaration had been met, or whether the alleged Seasonal Guidelines were enacted not to exceed the boundaries of the express restrictive covenants, inexorably led to its erroneous judgment that the August 2014 Declaration (and Seasonal Guidelines) were effective and enforceable against the Sainanis. Under any measure of reasonable scrutiny, the process followed by BGHOA regarding the purported amendment of the declaration was irreparably flawed as a matter of law at numerous junctures. There was no *bona fide* approval of the April 2014 Draft Declaration, or of the recorded July and August 2014 Declarations. JA265-78. Therefore, they are ineffective and cannot be enforced against the Sainanis. Accordingly, the judgment upholding that enforcement should be reversed.

II. THE TRIAL COURT ERRED IN DETERMINING THAT THE SEASONAL GUIDELINES WERE ENFORCEABLE AND REASONABLE.

A. Standard of Review

The trial court determined in its Final Order that the Merged Association's Seasonal Guidelines were enforceable and reasonable under the August 2014 Declaration. JA171-72, 556, 558-59. Assuming, without conceding, that the latter

Declaration was effective, such determinations involve questions of law under the August 2014 Declaration and § 55-513 of the POA Act as to whether the Merged Association exceeded its authority under the declaration and applicable law to promulgate and apply its rules limiting seasonal decorations. *White v. Boundary Ass'n,* 271 Va. 50, 55-57 (2006). The party seeking to enforce a restrictive covenant has the burden "to demonstrate that [the covenants] are applicable to the acts of which he complains." *Friedberg v. Riverpoint Bldg. Comm.*, 218 Va. 659, 665 (1977). In addition, whether the rule adopted by the Merged Association and its application was reasonable presents a question of mixed law and fact. The Court reviews issues of law *de novo,* giving deference to the trial court's factual findings; the review of the trial court's application of law to the facts is also *de novo*. *Nielson Co. (US) v. Cnty. Bd. of Arlington Cnty.*, 289 Va. 79, 87 (2015); *Manchester Oaks Homeowners Ass'n v. Batt*, 284 Va. 409, 419-20 (2012); *Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co.*, 270 Va. 566, 573-74 (2005).

B. The trial court erred in its interpretation and application of the overbroad Seasonal Guidelines, in light of the absence of any restriction pertaining to temporary seasonal lighting contained in the August 2014 Declaration.

As previously stated, a declaration of restrictive covenants is a contract between the property owners' association and lot owners and must be enforced according to the plain meaning of the text and the intentions of the parties. *White v.*

Boundary Ass'n. 271 Va. 50, 55 (2006). The general rule with respect to the interpretation and enforcement of restrictive covenants is guided by the following principle:

> [t]he burden is on him who would enforce such covenants to establish that the activity objected to is within their terms. They are to be construed most strictly against the grantor and persons seeking to enforce them, and substantial doubt or ambiguity is to be resolved in favor of the free use of property and against restrictions.

Scott v. Walker, 274 Va. 209, 212-13 (2007). Importantly, the rights existing under declarations and the POA Act, along with the stringent legal doctrines favoring the free use of property, "trump future attempts to modify such rights by corporate boards vested with the express power to make administrative decisions for those they represent." *Bennett v. Loudoun Valley Home Owners' Ass'n*, 73 Va. Cir. 466, 467 (Va. Cir. Ct. 2007) (citing *Sully Station II Cmty. Ass'n v. Dye*, 259 Va. 282 (2000)). To that end, to the extent association action exceeds the boundaries of specific restrictive covenants, property owners' associations are "not at liberty to adopt arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life" of the various owners in the community. *Unit Owners Ass'n of Buildamerica-I v. Gillman*, 223 Va. 752, 767 (1982).

In order to determine whether a rule adopted by a property owners' association is enforceable, a court must determine (1) whether the declaration provided the association with authority to adopt the rule (*Id*. at 767-69; *Sully*

Station II Cmty. Ass'n v. Dye, 259 Va. at 284, 289; *Manchester Oaks Homeowners Ass'n v. Batt*, 284 Va. 409, 419-21 (2012)), and (2) whether the rule (if properly adopted) and its application were reasonable. *Cornwell v. Main St. Vill. Homeowners Assoc.*, 42 Va. Cir. 48, 51 (Va. Cir. Ct. 1997).

1. *The Seasonal Guidelines exceeded the authority ostensibly granted to the Merged Association by the August 2014 Declaration.*

The authority for any rule restricting lot owners must in the first instance be derived from a specific restrictive covenant found in the applicable declaration. *Sully Station II Cmty. Ass'n*, 259 Va. at 289; *White v. Boundary Ass'n*, 271 Va. 50, 55 (2006); *New Bethel L.L.C. v. Howell*, 93 Va. Cir. 86, 94-95 (Va. Cir. Ct. 2016). As detailed above, the trial court determined that the August 2014 Declaration was effective and enforceable against the Sainanis.[9] That holding necessarily includes a finding that the Seasonal Guidelines were adopted within the authority granted to the Merged Association in that document. *Friedberg v. Riverpoint Bldg. Comm.*, 218 Va. 659, 665 (1977).

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[9] The trial court's ruling from the bench was that "there was authority in the declaration filed in August of 2014." JA172, 176, 556. As reported in the trial transcript, the court also ruled that "I don't find that the declaration **is ineffective or ultra vires** based on the statue and the case law and the evidence that I reviewed." JA 556. Inexplicably, the transcript attached to the Final Order reported the same ruling as: "I don't find that the declaration **is in effect (inaudible)** based on the statue and the case law and the evidence that I reviewed." JA176. The contemporaneous trial transcription, which tracks the text of the Final Order, would appear to be more accurate. *Compare* text at JA176, *with* JA172.

The Seasonal Guidelines enforced against the Sainanis were contained in a sub-section of the 2014 and 2015 Architectural Design Guidelines Handbooks. JA994-95, 1019-20. The Handbooks are part of the Merged Association's guidelines for exterior changes to lots in the community. JA974, 1000. According to the Seasonal Guidelines, an architectural change application is not necessary as long as decorations (1) are not permanently attached to the exterior of the home, and (2) are displayed only during the Association-designated time frame. JA993-94, 1019-20. The issue is whether the August 2014 Declaration provided the Merged Association with the substantive authority to impose restrictions on temporary holiday lighting.

Article IX of the August 2014 Declaration established restrictive covenants that apply to all of the lots within the community and provided the Merged Association with authority to adopt rules and regulations derived from the express covenants. JA838. Importantly, there are no covenants that expressly prohibit or otherwise restrict an owner's or a specific group of owners' ability to display holiday lighting. Therefore, the Merged Association must have some other basis in the August 2014 Declaration for establishing the Seasonal Guidelines.

Article IX, Sections 4 and 5 of the August 2014 Declaration prohibits owners from modifying or altering any lot, structure, or any portion thereof without the prior approval of the ARB. JA840. These types of changes clearly

imply a sense of permanence, which is further supported by the subparagraphs of Section 4 and 5. *Id.* However, the string of small, multi-colored lights that the Sainanis displayed around their front door and backyard deck during religious festivals (*see* note 7, *supra*) are, by their very nature, temporary and upon removal leave no discernable change or alteration to the lot, structure or any portion thereof.

The only other restrictive covenant in Article IX that was invoked by the Merged Association in support of its authority to adopt the Seasonal Guidelines (*see* JA292), was Section 3(C), which regulates exterior lighting on lots. JA839. That Section prohibits exterior lighting "which results in an adverse visual impact to adjacent Lots, whether by location, wattage, or other features." *Id.* Importantly the Seasonal Guidelines do not regulate location, wattage, or other features of holiday lights and decorations. JA993-94, 1019-20. Instead, they only restrict the timing of when such lights and decorations can be installed and do not require a determination as to "adverse visual impact." *Id*. Accordingly, the Seasonal Guidelines are also outside the scope of the Merged Association's authority to regulate lighting pursuant to Article IX, Section 3(C) of the August 2014 Declaration.

The ARB's Architectural Handbook and Guidelines did contain a separate sub-section titled "EXTERIOR LIGHTING." JA1012. The provisions of that regulation are directly related to the Article IX, Section 3(C) Lighting covenant

contained in the August 2014 Declaration. However, there is no comparable linkage in the language of the Seasonal Guidelines to Article IX, Section C or to any other specific restrictive covenant in the August 2014 Declaration. *Compare* the Seasonal Guideline provisions (JA993-94, 1019-20), *with* the restrictive covenants set forth in the August 2014 Declaration (JA838-42). The August 2014 Declaration is simply devoid of a restrictive covenant expressly prohibiting or restricting lot owners from displaying temporary seasonal decorations, including temporary holiday lighting. Moreover, the "EXTERIOR LIGHTING" guideline requires an "adverse visual impact." The Seasonal Guidelines do not. Even if the exterior lighting restrictions provided authority for regulation of the Sainanis' temporary lighting, the Merged Association in fact did not enforce the "EXTERIOR LIGHTING" Guideline against the Sainanis. Rather, its enforcement was based on the Seasonal Guidelines alone. JA993-94, 1019-20.

The stated bases for the 2014 Seasonal Guideline were considerations of "promotion of harmony in the community," "discourtesy and safety for property values," "religious issues," and later in the 2015 Guideline, the avoidance of "prolonged display" of holiday lights and decorations. JA993, 1019. None of the foregoing purposes are mentioned in the Lighting covenant or in **any** other restrictive covenant in the August 2014 Declaration. *See generally*, *Scott v. Walker*, 274 Va. 209 (2007).

Based on the foregoing, it is clear that the EXTERIOR LIGHTING Guideline is completely faithful to the underlying Lighting restriction in Article IX, Section 3(C), as well as the overall functions and duties of the ARB in Article VIII, Section 5 of the August 2014 Declaration as gatekeeper for the design of permanent structures, and changes, replacements and additions thereto. JA837, 840-41. On the other hand, the Seasonal Guidelines are not based on any restrictive covenant and far exceed the permitted restrictions in the Article IX, Section 3(C) Lighting covenant. Accordingly, taking into consideration (1) the interpretative principle of strict construction against the party seeking enforcement of restrictions; (2) the very limited and narrow context of the Article IX, Section C Lighting restrictive covenant; (3) the ARB's prime responsibility for *permanent* as opposed to *temporary* design matters (as shown in the August 2014 and earlier Declarations); (4) the Merged Association's "EXTERIOR LIGHTING" Guideline, which was not applied in this case, though correctly mirrored from the Article IX, Section 3(C) Lighting covenant; (5) the total absence of any express restrictive covenant restricting seasonal decorations or temporary holiday lighting; and (6) the total absence of any requirement or standard or finding of an "adverse visual impact" in the Seasonal Guidelines, it follows that the restrictions imposed by the Seasonal Guidelines exceeded the authority granted under the August 2014 Declaration to the Merged Association and its ARB. The trial court thus erred in

ruling that the Seasonal Guidelines were effective and enforceable against the Sainanis. *See Arthur v. Surrey at Manchester Lakes*, 32 Va. Cir. 270, 272 (Va. Cir. Ct. 1993).

2. The Seasonal Guidelines are not reasonable.

Even if, for purposes of argument, the August 2014 Declaration was deemed to provide authority to adopt the Seasonal Guidelines, they are still unenforceable because the guidelines' content and application were otherwise unreasonable, arbitrary and capricious. The *Gillman* case advises that an association cannot act unreasonably by "promulgating arbitrary and capricious rules . . . bearing no relation to the health, happiness and enjoyment of life" of the various owners in the community. *Unit Owners Ass'n of Buildamerica- I* v. *Gillman*, 223 Va. 272, 767-69 (1982). Moreover, in *Gillman*, this Court also acknowledged that the powers of a community association are limited by general law, including Virginia Code Section 1-13.17 (now Section 1-248), which provides that "[w]hen . . . any . . . number of persons, are authorized to make . . . bylaws, rules, regulations . . . it shall be understood that the same must not be inconsistent with the Constitution and laws of the United States or of this State." *Id*. at 763.

In this case, the text of the August 2014 Declaration identified the preservation and promotion of community values, health, safety, and welfare of the

owners as inherent purposes of the Merged Association.[10] While the owners' common interest in these purposes requires them to give up limited degrees of freedom based only on *expressly stated* restrictive covenants, the Court in *Gillman* made clear that broadly phrased purposes contained in a declaration do not permit an association to impose arbitrary or capricious rules.

Justifying its regulatory authority initially based on the "promotion of harmony in the community," "discourtesy and safety for property values," "religious issues," and subsequently on the avoidance of "prolonged display," the Merged Association carved out selective religious holidays and assigned certain time periods totaling more than one hundred fifty (150) days for celebration of those holidays. Apart from the fact that the foregoing purposes are not at all recognized in any restrictive covenant, the overreach of the Seasonal Guidelines even became obvious to the trial court. In granting the injunction against the Sainanis, the court advised Merged Association counsel "to keep in mind that the way the guidelines are written, a seasonal display of lights can commence from October 1 through January 31. . . . *[A]ny color light* can be up from October 1 through January 31st." JA 560-61 (emphasis added). The court's reservation arose

[10] *See* July 2014 Declaration and August 2014 Declaration, Recitals G. and H. (preservation of community values) JA762, 820; Article VII, Section 2 (assessments to be used to promote recreation, safety, health and welfare of residents and owners) JA774,832; *cf. Gillman*, 223 Va. at 767.

from the trial testimony of ARB Chair Frank Voigt, who made weekly inspections of residences (JA296) and contended he had the ability to make the necessary distinctions among holiday decorations and lighting:

> Q Aren't Halloween lights part of the Halloween decoration?
>
> A Not typically in terms of strings around the deck or around the front door where they are red, blue, green, et cereta. Halloween lights are typically other colors purple, maybe green, dark blue, whatever the case may be, but it is not the same thing.
>
> Q Is that spelled out anywhere?
>
> A No, it's not.

JA324-25. Implicitly, therefore, the trial court recognized the arbitrary, capricious, and unreasonable nature of enforcing the Seasonal Guidelines. Her advice to counsel emasculated the distinctions drawn among holidays, in effect, collapsing the distinctions to allow temporary lighting of whatever type during one grand period extending from October 1 through January 31, wholly without regard to "adverse visual impact." JA560-61.

Even if the Seasonal Guidelines were deemed permitted by the August 2014 Declaration's lighting restrictions based on "adverse visual impact," the ARB-crafted Seasonal Guidelines are arbitrary on their face because they assume that <u>any and all</u> temporary lighting from February 1 through September 30 (other than lighting for July 4th) *ipso facto* has an "adverse visual impact." JA 839, 986, 993-

94, 1012, 1019-20 . Inversely, the same temporary lighting from October 1 through January 31 would on its face be conclusively presumed to have no "adverse visual impact." *Id*. Few, if any, regulations could be based on more arbitrary, capricious or unreasonable assumptions of fact. The special ARB application process is equally flawed because it rests on the same unreasonable foundation of arbitrary assumptions and allows for the imposition of standardless, impermissible predilections.

Finally, counsel for the Merged Association contended that the ARB could regulate temporary seasonal lighting under the August 2014 Declaration's description of the ARB's duties to regulate "the external design, appearance and location of the *improvements* thereon so as to preserve and enhance property values. . ." JA338-39, 402-04, 837. But a description of ARB duties does not constitute a restrictive covenant. Moreover, the improvements described are in the context of permanent changes to existing structures. Likewise, the establishment of procedures for obtaining approval of changes or improvements to property do not grant the power to legislate substantively as to what is, or what is not permitted lighting when a specific covenant establishes the applicable limitations and standards. In sum, the Seasonal Guidelines are on their face arbitrary and capricious in restricting the owners' choices in decorating their properties to celebrate holidays and religious festivals, and are inherently tainted with

standardless, discriminatory discretion and application. *See Unit Owners Ass'n of Buildamerica v. Gillman*, 223 Va. 752, 770 (1982). As such, the trial court erred in finding the Seasonal Guidelines to be reasonable and enforceable.

III. THE TRIAL COURT ERRED IN SUSTAINING THE MERGED ASSOCIATION'S MOTION TO STRIKE THE SAINANIS' COUNTERCLAIMS BECAUSE THE SAINANIS PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THEIR CAUSES OF ACTION.

A. Standard of Review

At the close of the Sainanis' case, the trial court granted the Association's motion to strike the Sainanis' counterclaims. On appeal, the standard of review is the same applied by a trial court in its consideration of a motion to strike the evidence. *Claycomb v. Didawick*, 256 Va. 332, 335 (1998); *see Kiddell v. Labowitz*, 284 Va. 611, 629 (2012). That standard requires the Court "to accept as true all the evidence favorable to the [Sainanis] as well as any reasonable inference a jury might draw therefrom which would sustain the [Sainanis'] cause of action." *Claycomb*, 256 Va. at 335. Additionally, the Court "is not to judge the weight and credibility of the evidence, and may not reject any inference from the evidence favorable to the [Sainanis] unless it would defy logic and common sense." *Id.*

B. Discussion

The Sainanis brought three counterclaims against the Merged Association related to its enforcement of the Seasonal Guidelines. It is respectfully submitted

that all three causes of action were erroneously dismissed on the Merged Association's motion to strike.

1. Count I – Permanent Injunction. Pursuant to the applicable declaration, and Sections 55-513 and 55-515 of the POA Act, the Sainanis asked the trial court to enjoin the Merged Association from enforcing the Seasonal Guidelines so as to deny the Sainanis loss of use and enjoyment of their property and the common area/facilities, and their rights to be free from unreasonable rules and regulations under the applicable declarations. JA106-07, 112-13. At the close of the Sainanis' case, the trial court struck their injunction claim because it found no evidence of irreparable harm, focusing only on the Sainanis' alleged lack of access to the common area. *See* JA518-19.[11] To strike on this ground, the trial court had to make a factual determination that the Sainanis had not been denied access to the common area/facilities resulting from the Merged Association's enforcement of the Seasonal Guidelines; however, whether the Sainanis had been denied access to the common area/facilities was disputed. JA366-370, 423-24.[12]

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[11] The parties agreed to allow the Sainanis to put on evidence in their case during cross-examination of the Merged Association's witnesses. JA250. There was no additional testimony from either party after the Sainanis rested their case. *See* JA521.

[12] In fact, the January 15, 2016 hearing results show that the Merged Association did suspend the Sainanis' voting privileges and access to the common area pool. JA1049; *see* text at pp. 18-19, *supra*.

Moreover, the fact that suspension is even a possible sanction for violating the Seasonal Guidelines is itself evidence of irreparable harm since it is clear that a "violation of a real property interest is deemed 'irreparable and the owner protected in the enjoyment of his property whether such be sentimental or pecuniary.'" *Norfolk S. Ry. Co. v. E.A. Breeden, Inc.*, 287 Va. 456, 464-65 (2014) (quoting *Levisa Coal Co. v. Consolidations Coal Co.*, 276 Va. 44, 62 (2008)). As explained above, the enforceability of the Seasonal Guidelines was challenged because the August 2014 Declaration did not apply to the Sainanis and the Seasonal Guidelines were not authorized and were unreasonable. Significantly, these issues, which required findings of fact, were simply not ripe for determination on a motion to strike because the evidence was required to be viewed in the light most favorable to the non-moving party. *Claycomb*, 256 Va. at 336. Accordingly, the trial court erred in striking the Sainanis' claim for injunctive relief.

2. Count II - Breach of Contract. The Sainanis' second counterclaim sought an award of damages arising from the Merged Association's enforcement of the Seasonal Guidelines under the applicable amended declaration and/or the Original Declaration. JA106-07, 114-15. In order to prove either of the claims made under this count, the Sainanis were obligated to prove a breach of a declaration and resulting damages suffered by the Sainanis caused by the Merged

Association's breach. *See Manchester Oaks Homeowners Ass'n v. Batt*, 284 Va. 409, 423 (2012). The trial court struck the Sainanis' claim for breach of the declaration because it determined that the Merged Association had the authority to adopt the Seasonal Guidelines and the actions taken by the Merged Association were not arbitrary or capricious. JA519-20. Again, the trial court failed to view the evidence in the light most favorable to the Sainanis. To grant a motion to strike, the trial court had to make factual determinations as to which declaration applied, and whether it was enforceable, and also as to whether the Seasonal Guidelines were authorized and reasonable. The facts underlying those issues were in dispute and simply not ripe for decision on a motion to strike. The trial court, therefore, erred in striking the second count of the amended counterclaim.

3. Count III – Violation of the POA Act. Similarly, the trial court struck the Sainanis' third counterclaim relating to the Merged Association's violation of the POA Act after determining that the Sainanis had provided insufficient evidence relating to damages. JA520. Section 55-515 of the POA Act creates a cause of action for any violation of the applicable declaration. Va. Code §55-515(A). The Sainanis' claim under § 55-515 arose from the Merged Association's attempt to enforce the Seasonal Guidelines, which (i) were outside the scope of its authority under either the Original Declaration or the alleged August 2014 Declaration and (ii) were otherwise unreasonable. JA106-07, 114-15. Like the other two claims,

the trial court erred by granting the motion to strike without recognizing legitimate, disputed issues of material fact, and without viewing, as required by law, the evidence in the light most favorable to the Sainanis. The trial court took particular exception to the Sainanis' evidence supporting its claim for damages. However, the Sainanis were "required only to furnish evidence of sufficient facts to permit the trier of fact to make an intelligent and probable estimate of the damages sustained." *Estate of Taylor v. Flair Prop. Assocs.*, 248 Va. 410, 414 (1994). During its case-in-chief, the Sainanis presented evidence that they paid monthly assessments to the Merged Association and that the assessments were used, in part, to pay for expenses related to the Merged Association's common area facilities. JA421-23. Importantly, whether the Merged Association had suspended the Sainanis' privilege of using the common area facilities, including the pool, for violating the Seasonal Guidelines was a disputed issue. JA423-34.[13] This and other evidence was more than sufficient to overcome a motion to strike. *See Manchester Oaks Homeowners Ass'n v. Batt*, 284 Va. 409, 423-27 (2012) (awarding damages for an owner's inability to use common area). The trial court thus erred in striking the third count.

[13] The evidence also showed that the ninety-day assessment against the Sainanis in 2014 for the period November 16, 2014, to January 31, 2015 was for a time when the display of holiday lighting was *permitted* under the 2014 Guideline. JA321-25, 385-87, 393-94.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING COSTS AND ATTORNEYS' FEES TO THE MERGED ASSOCIATION WITHOUT REGARD TO WHO ACTUALLY PAID THE FEES.

A. Standard of Review

The award of attorneys' fees by a trial court is reviewed for abuse of discretion. *Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245, 252 (2017); *Robinson-Huntley v. George Wash. Carver Mut. Homes Ass'n,* 287 Va. 425, 432 (2014). In making an award of attorneys' fees, a trial court can abuse its discretion in multiple ways, including by failing to consider a "relevant factor that should have been given significant weight"; or by considering "an irrelevant or improper factor [and giving it] significant weight"; or by "commit[ting] a clear error of judgment." *Commonwealth ex rel. Fair Hous. Bd. v. Windsor Plaza Condo. Ass'n*, 289 Va. 34, 66 (2014). In addition, if the trial court bases its decision on an erroneous legal conclusion, its judgment may also be reversed. *Id*. Finally, since the award was made pursuant to a contract imposing obligations on the owners of real property, the disputed provisions must be "strictly construed." *Anderson v. Lake Arrowhead Civic Ass'n*, 253 Va. 264, 269-70 (1997)

B. Discussion

A prevailing litigant can recover attorneys' fees against the loser where there is a contractual or statutory provision authorizing such recovery, but only to the extent permitted by such contract or statute. *See Coady v. Strategic Res., Inc.*, 258

Va. 12, 15-16 (1999); *Advanced Marine Enters v. PRC, Inc.*, 256 Va. 106, 125-26 (1998). Here, the Merged Association was awarded attorneys' fees pursuant to (1) Article XV, Section 2 of the August 2014 Declaration, JA851, and (2) Section 55-515 of the POA Act. JA185-87. Importantly, the trial court determined that the Sainanis were responsible for **all** costs and expenses related to the Merged Association's enforcement action without regard to who actually paid for them. JA186. This determination was erroneous because the specific language of both the August 2014 Declaration and § 55-515 only permits the Merged Association to recover costs and attorneys' fees that it **actually** incurs and/or expends in its enforcement action against the Sainanis.

1. *The August 2014 Declaration authorizes the Merged Association to recover only those fees it actually pays for in any enforcement action.*

Assuming for purposes of argument that the August 2014 Declaration applies to this dispute, the contract at issue is one imposing obligations on the owners of real property and must therefore be "strictly construed." In other words, the declaration's provisions providing for recovery of attorneys' fees and costs are no exception to the common law rule of strict interpretation.

Article XV, Section 2 of the August 2014 Declaration entitles the Merged Association to "recover any costs, including without limitation attorneys' fees, **incurred** in connection with an enforcement action." JA851 (emphasis added). This Court has previously defined a cost to be incurred "when one has paid it or

become legally obligated to pay it." *State Farm Mut. Auto. Ins. v. Bowers*, 255 Va. 581, 586 (1998). Accordingly, applying the strict terms of the August 2014 Declaration, the Merged Association may only recover fees it actually paid for as a result of this enforcement action.

The requirement that the Merged Association recover only those fees for which it was the actual payer is further supported by the terms of Article XV, Section 3 of the August 2014 Declaration. This Section states that costs arising out of an enforcement action "may be **paid** out of the . . . [a]ssessment funds collected by the Association. **Such costs** shall be subject to recovery from any Owner(s) determined or found to be in violation . . . ." JA851 (emphasis added). This wording is consistent with the interpretation that the Merged Association may recover only costs related to enforcement actions that are actually **paid** by the Association. *See Wright v. Everett*, 197 Va. 608, 615 (1956) ("As a general rule, damages for breach of contracts are limited to the pecuniary loss sustained."); *Bowers*, 255 Va. at 586 (discouraging windfall damages). The declaration does not subsume third parties not in privity or give them rights as non-privity "third party beneficiaries" or include non-party, non-privity subrogates.

The bulk of the invoices supporting the attorneys' fee award were paid for **not** by the Merged Association, but by its insurer, which the court presumed to be subrogated. JA186, 1055ff, 1115ff. In fact, the evidence showed that of the

$46,919.14 requested by the Association, only $7,403.12 was actually paid by the Merged Association. Notably, the Association's insurance policy was never admitted into evidence. Its terms could not possibly have been the basis of the trial court's decision. The trial court thus abused its discretion by failing to distinguish between the costs actually paid by the Merged Association and those paid for by its insurer.

2. *Section 55-515 authorizes **a prevailing party** to recover only costs and fees that it actually **expends** in an enforcement action.*

Section 55-515(A) of the POA Act entitles only a **prevailing party** in an action seeking compliance with an association's declaration to recover reasonable attorneys' fees and costs expended in the action. *White v. Boundary Ass'n*, 271 Va. 50, 57; Va. Code § 55-515(A). The plain language of the Code does not authorize an award to a subrogated insurer. Moreover, Section 55-515(A) states that the prevailing party is limited to recover only those costs "**expended** in the matter." Va. Code § 55-515(A) (emphasis added). As its legal invoices make clear, the Merged Association only "expended" $7,403.12 of its assessment funds for costs and attorneys' fees. The purpose of the cost recovery provisions in the declaration and the applicable statute is to make an association whole only for monies it has expended in enforcement actions, not to provide the association with a windfall or reimburse it for the market risk its insurer assumes and is compensated for by the premiums paid over time by an association from assessments levied on all of its

members (including the Sainanis). The Merged Association's recovery must be limited to no more than the amount it actually expended in the enforcement action. Accordingly, the trial court erred by awarding the Merged Association costs and attorneys' fees without regard to who actually paid for those expenses.

CONCLUSION

For the reasons set forth above, the trial court erred in its judgment. The Sainanis respectfully request this Court to reverse the trial court's judgment, reinstate the Sainanis' counterclaims, and remand the case for further proceedings in accordance with the Court's decision, including without limitation granting the Sainani's their costs and attorneys' fees.

Respectfully Submitted,

/s/ James J. Knicely

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CERTIFICATE

Pursuant to Rules 5:26(h) and 32(a)(3)(i) of the Rules of the Virginia Supreme Court, the undersigned counsel for the Appellants SanJay Sainani and Sona Sainani hereby certifies that on January 28, 2019 the undersigned counsel:

1. Complied with the requirements of Rules 5:6, 5:26 and 32 of the Rules of the Supreme Court of Virginia with regard to the filing and service of the Opening Brief of the Appellants and the Joint Appendix, including without limitation the pagination requirements and preparation in an authorized proportionally spaced typeface of at least 14 point font.

2. Caused an electronic version, in Portable Document Format (PDF), of the Opening Brief of Appellants signed by counsel of record for the Appellants and of the Joint Appendix 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 Marla J. Diaz, Esquire, 3190 Fairview Park Drive, Suite 800, Falls Church, Virginia| 22042 an electronic copy thereof by email transmission to said counsel's email address at mdiaz@wtplaw.com; and

4. Caused to be filed in the Office of the Clerk of this Court three (3) printed copies of the Opening Brief of Appellants, along with three (3) printed copies of the Joint Appendix.

/s/ James J. Knicely

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