STATE OF MICHIGAN
IN THE COURT OF APPEALS
(On Appeal from the Gogebic County Circuit Court)

SUNNYSIDE RESORT CONDOMINIUM ASSOCIATION, INC., A Michigan Nonprofit Corporation,

Plaintiff/Counter-Defendant/Appellant,

vs.

NEIL J. BECKMAN, an Individual, BECKMAN HOLDINGS, INC., a Michigan Corporation, and MEINKE CONSTRUCTION, INC., A Michigan Corporation,

Defendants/Counter-Plaintiffs/ Third-Party Plaintiffs/Appellees,

vs.

THOMAS BROWN, JANE BROWN, CLAIRE JAROS, RANDY SWONGER, and PAUL BUSCH,

Third-Party Defendants/Appellants.

COA Docket No. 341116

32nd Cir Ct No. 16-000203-AV

98th Dist Ct No. G-12-864-GC

AMICUS CURIAE BRIEF OF THE COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF APPELLANT

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INTEREST OF THE AMICI CURIAE

Community Associations Institute ("CAI") is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 39,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 69 million homeowners who live in more than 380,000 community associations in the United States.

Community associations are non-profit corporations whose sole source of income is the collection of assessments paid by its members. Without assessments, an association is not able to provide the essential services required for the administration of its community. Further, the administration of a condominium association is dictated by the terms of the condominium's governing documents, including its master deed and condominium bylaws. A board of directors does not have the authority to simply not impose assessments required to be paid by the condominium bylaws. MCL 559.169 requires all units to pay their allocated share of assessments and does not permit a board of directors to arbitrarily not assess units for certain time periods. The Michigan Condominium Act, MCL 559.109(1) requires the total percentage of value to be one hundred (100%) percent which is intended to be based on a full allocation expenses for maintenance. Permitting certain units to not pay assessments would create a deficiency, or a gap, in the association's annual budget as assessments are commonly based on each unit's percentage of value, as is true in this case. Further, permitting a board of directors to deviate from the

allocation methodology required by the condominium bylaws undermines the entire community's ability to rely upon the written and recorded governing documents.

STATEMENT OF JURISDICTION

Amicus Curiae Community Associations Institute ("CAI") concurs in the Statement of Jurisdiction referenced by the Appellant at Page 1 of Appellant's Brief.

As it relates to Amicus Curiae, pursuant MCR 7.212(H), on October 18, 2018, this Court granted CAI's Motion for Leave to File an Amicus Curiae Brief. This Brief is being timely filed within twenty-one (21) days of the date of the Order granting CAI's Motion.

STANDARD OF REVIEW

Amicus Curiae CAI concurs in the Standard of Review referenced by the Appellant at Page 26 of Appellant's Brief.

STATEMENT OF QUESTIONS INVOLVED

QUESTION NO. 1

Did the Trial Court err by not permitting the Association to pursue assessments against Units 11 and 13 for the years 2006 through 2012 where the Association had successfully demonstrated that its interpretation of the Condominium Bylaws was correct and required that assessments be allocated in proportion to each Unit's percentage of value?

Plaintiff/Appellant says "Yes"

Amicus Curiae says "Yes"

Defendants/Appellees said "No"

Trial Court answered "No"

QUESTION NO. 2

Did the Trial Court err by not permitting the Association to recover reasonable attorneys' fees where the Association successfully demonstrated that its interpretation of the Condominium Bylaws was correct and that the Defendants' refusal to pay assessments based on each Unit's percentage of value constituted a breach of the Condominium Bylaws?

Plaintiff/Appellant says "Yes"

Amicus Curiae says "Yes"

Defendants/Appellees said "No"

Trial Court answered "No"

STATEMENT OF FACTS

The Community Associations Institute ("CAI") became involved in this matter involving Sunnyside Resort Condominium ("Sunnyside" or the "Condominium") because it represents both the significance of the written and recorded condominium documents to the proper administration of a condominium and the adverse consequences faced by a condominium association when the written condominium documents are not followed, especially in regard to the collection of assessments. In this case certain units were improperly excused from having to pay assessments for several years contrary to the express mandatory language of the condominium bylaws. After a change in control of the board of directors, the association later sought to collect those assessments. At trial, the association successfully demonstrated to the Trial Court that its interpretation of the operative bylaws' language was correct and that the written contract required the assessments to be paid; yet the association was still denied the opportunity to recover past due assessments and denied the recovery of attorneys' fees warranted by both statute and contract.

It is CAI's position that the Trial Court erred in not permitting the association to recover all assessments required to be paid under the condominium bylaws. The co-owners of units in common interest communities are entitled to rely upon the written, recorded, documents that form the very basis for the existence of their communities. These contractual documents provide and define the rights, responsibilities, duties, and obligations of co-owners and developers alike. A community association that seeks to require compliance with such documents is enforcing the right of all common interest communities to rely upon the obligations contained in their governing documents and should not be punished for doing so.

A. The Master Deed and Relevant Condominium Document Excerpts

The Master Deed for Sunnyside Resort Condominium ("Sunnyside Resort") was recorded on August 3, 2004, in Liber 427, Page 200, Gogebic County Records (Appendix A; Master Deed; Plaintiff's Tr Ex 1). The Developer under the Master Deed is "Robert Delich and Lisa Delich, husband and wife." (Appendix A, Master Deed, p 1 & Art III.k)) ("'Developer' means Robert Delich and Lisa Delich, husband wife, who have executed this Master Deed, and shall include their heirs, successors, and assigns."). None of the Defendants, not Neil J. Beckman, Beckman Holdings, Inc., nor Meinke Construction, Inc., is a "Developer" under the Master Deed.

There is no serious question that the Master Deed binds all those with an interest in the Condominium. The "Dedication" contained in the Master Deed expressly states that all persons who acquire an interest in the Condominium are bound by the Master Deed and Condominium Bylaws:

> All of the provisions, covenants, conditions, restrictions and obligations set forth in this Master Deed (including Exhibits A and B hereto) shall run with the real property included in the Condominium Project and shall be a burden on, and a benefit to, the Developer, its successors and assigns, and all persons acquiring or owning an interest in the Condominium Project, or in the real property hereby dedicated to the Condominium Project, and their grantees, successors, assigns, heirs, and personal representatives. (Appendix A, Master Deed, Art I).

In part, the underlying dispute relates to the definition of a "Unit," and whether Units 11 and 13 are "Units" under the Master Deed. Under the Master Deed, a "Condominium Unit" or "Unit" is defined as "that portion of the Condominium Project designed and intended for separate ownership and use, as described on Exhibit B hereto." (Appendix A, Master Deed, Art III.j)). Article IV of the Master Deed states that "[t]he improvements contained in the Condominium Project, including the number, boundaries, dimensions, and area of each unit, are set forth completely in the Condominium Subdivision Plan attached hereto as Exhibit B." (Appendix A,

Master Deed, Art IV). Article IV further states that "[e]ach Unit in the Condominium Project contains individual sites to be used for residential purposes, and each unit has been designed and intended for separate ownership and use." (Appendix A, Master Deed, Art IV). Page 3 of the Condominium Subdivision Plan attached as Exhibit B to the Master Deed depicts the location and approximate size of the Units of the Condominium, including the location and approximate size of Unit 11 and Unit 13. (Appendix A, Master Deed, Ex B, p 3). There are no buildings or structures depicted on the Subdivision Plan in the location of Units 11 or 13, nor are there any architectural drawings depicting any such buildings. Accordingly, under the definition of a "Unit" and according to the Subdivision Plan, the purchaser of Units 11 and 13 purchased the space designated on the Subdivision Plan for the location of that Unit, and under the Sunnyside Resort Master Deed the definition of the "Unit" does not require a dwelling, structure, or other building.

Article VI of the Master Deed describes each Unit's percentage of value. The percentages of value for Units 11 and 13 are both 5.8334%. Pursuant to Article VI, "[t]hese percentages of value shall be determinative of the proportionate share of each unit in the common expenses and proceeds of administration . . . ." (Appendix A, Master Deed, Art VI). There is no language in Article VI which would suggest that the percentage of value for Units 11 and 13 would be different or altered depending on whether a dwelling or structure had been built within the Unit.

With respect to administration, pursuant to Article I, Section 1 of the Sunnyside Resort Condominium Bylaws, Plaintiff Sunnyside Resort Condominium Association (the "Association") is "responsible for the management, maintenance, operation and administration of the common elements, easements and, generally, the affairs of the Condominium in accordance with the Master Deed, these Bylaws, the Articles of Incorporation, Bylaws, Rules and Regulations of the Association, and the laws of the State of Michigan." (Appendix A, Master Deed, Ex A, Art I, Sec

1). As with the Declaration contained in the master Deed, under Article I, Section 2 of the Condominium Bylaws, "[a]ll present and future co-owners . . . shall be subject to and comply with the provisions of the [Michigan Condominium] Act, the Master Deed, these Condominium Bylaws, the Articles of Incorporation, Bylaws, Rules and Regulations of the Association . . . ." (Appendix A, Master Deed, Ex A, Art I, Sec 2). Under Article II, Section 1 of the Condominium Bylaws each co-owner is a member of the Association during the term of ownership. (Appendix A, Master Deed, Ex A, Art II, Sec 1).

With respect to assessments, Article II, Section 2(b) of the Condominium Bylaws authorizes the Association to "levy and collect assessments against and from the members of the Association and to use the proceeds therefrom for the purposes of the Association, and to enforce assessments through lines [sic] and foreclosure proceedings where appropriate . . . ." (Appendix A, Master Deed, Ex A, Art II, Sec 2(b)).

Article V, Section 4 of the Condominium Bylaws describes Regular Monthly Assessments. Section 4 requires the Board of Directors to establish an annual budget and further states:

> The budget also shall allocate and assess all such common charges against ***all members*** in accordance with the percentage of value allocated to each unit by the Master Deed, without increase or decrease for the existence of any rights to the use of limited common elements appurtenant thereto. . . . The Board shall advise each member in writing of the amount of common charges payable by him and shall furnish copies of each annual budget on which such common charges are based to all members, although failure to deliver a copy of the budget to each member shall not affect any member's liability for any existing or future assessments. . . . (Appendix A, Master Deed, Ex A, Art V, Sec 4).

Under Article V, Section 6 of the Condominium Bylaws, "[e]ach member, whether one or more persons, shall be and shall remain personally obligated for the payment of all assessments levied with regard to his unit during the time that he is the owner thereof, and no member may exempt himself from liability for his contribution toward the expenses of administration by waiver

of the use or enjoyment of any of the common elements or by the abandonment of his unit. . . . Unpaid assessments shall constitute a lien upon the unit prior to all other liens except tax liens and sums unpaid on a first mortgage of record." (Appendix A, Master Deed, Ex A, Art V, Sec 6).

As is contained in many condominium bylaws, the Sunnyside Condominium Bylaws contain a provision which provides certain benefits to the Developer with respect to the payment of assessments. Article V, Section 7 of the Condominium Bylaws describes the obligation of the Developer as to "Complete" and "incomplete" Units and states:

> Section 7. Obligations of the Developer.
>
> (a) The Developer shall be responsible for payment of the full monthly Association maintenance assessment, and all special assessments, for all completed units owned by it and shall also maintain, at its own expense, any incomplete units owned by it. "Completed unit" shall mean a unit with respect to which a certificate of occupancy has been issued by the local public authority. An "incomplete unit" shall mean any unit that is not a Completed unit.
>
> (b) In addition to maintaining any incomplete units owned by it, the Developer shall be charged a portion of the established monthly Association assessment for each incomplete unit established in the Master Deed, whether constructed or not. Such portion shall be determined by the officers of the Association based upon the level of common expenses incurred in respect of such incomplete nits [sic], and it may be altered on a month-to-month basis. Each incomplete unit must, at a minimum, bear its pro rata portion of the cost of all accounting and legal fees, public liability and casualty insurance, road maintenance (including snow removal), utility maintenance, if any, grounds maintenance (including landscaping), real estate taxes in the year of the establishment of the Condominium, and the reserve for the repair and replacement of major common elements. Such pro rata portion of such costs shall be allocated to the incomplete units in accordance with the percentage of value allocated to each unit by the Master [Deed], without increase or decrease for the existence of any rights to the use of limited common elements appurtenant thereto. (Appendix A, Master Deed, Ex A, Art V, Sec 7).

Accordingly, under Article V, Section 7 of the Bylaws, the Developer has the right to pay a form of reduced assessment for an undeveloped Unit, but at no time could the Developer avoid

paying assessments altogether, and at all times the Developer was required to pay at a minimum each Unit's "pro rata portion of the cost" of numerous common services.

With respect to collecting unpaid assessments, Article V, Section 6 of the Condominium Bylaws states, in part, that "[t]he expenses incurred in collection of unpaid assessments, including interest, costs, reasonable attorney's fees (not limited to statutory fees) and advances for taxes or other liens paid by the Association to protect its lien, ***shall be chargeable*** to the member in default and shall be secured by the lien on his unit." (Appendix A, Master Deed, Ex A, Art V, Sec 6) (emphasis added). Similarly, Article XII, Section 1.(b) provides for the Association to recover its attorneys' fees if successful:

> (b) In any proceeding arising because of an alleged default by any member, the Association, if successful, shall be entitled to recover the costs of the proceeding and such reasonable attorneys' fees, (not limited to statutory fees) as may be determined by the Court, but in no event shall any member be entitled to recover such attorneys' fees. (Appendix A, Master Deed, Ex A, Art XII, Sec 1.(b)).

In the event of a failure by the Association to pursue a particular remedy, Article VII, Section 2 of the Bylaws states that "[t]he failure of the Association to enforce any right, provision, covenant or condition which may be granted by the Act, the Master Deed, these Bylaws, the Articles of Incorporation, Bylaws or Rules and Regulations of the Association, shall not constitute a waiver of the right of the Association to enforce such right, provision, covenant or condition in the future." (Appendix A, Master Deed, Ex A, Art VII, Sec 2). Accordingly, in the event of a failure of a Board of Directors to exercise a right or pursue a particular remedy, the Sunnyside Condominium Bylaws specifically protects the Association's right to exercise that right or pursue that remedy at a later date.

The above-provisions constitute the sections of the Bylaws at issue in this matter. Further, these provisions are contained in the original Condominium Documents and have existed since the

Condominium's creation in 2004. At no time have there been any amendments to the Master Deed or Bylaw recorded with the Gogebic County Register of Deeds which would alter or change the rights and responsibilities set forth in the Master Deed and Bylaws.

B. The Developer and Administration of the Condominium

With respect to the administration of the Condominium, Developer Robert Delich served as Association President for at least 2005 and 2006. (Appellant Br p 9). According to the Appellees' Brief, Robert Delich "was involved with Sunnyside Resort Condominium Association until 2010." (Appellee Br pp 10-11). The Defendants acquired Units 11 and 13 from the Developer pursuant to a warranty deed dated May 3, 2006. (Appellant Br p 9). Shortly after Defendants' acquisition of Units 11 and 13, Defendant Neil Beckman was elected to the Board of Directors. Defendant Neil Beckman then served as a director of the Association from at least August 6, 2006, through April 2, 2011. (Appellant Br p 9 & Appellee Br p 11). The Developer's involvement in the Association and Mr. Beckman's tenure as a director coincided with the Association's excusing Units 11 and 13 from having to pay any assessments. As stated in Appellees' Brief, for the entire time that the Board of Directors was controlled by the Developer and Neil Beckman:

> It was the unanimous[1] decision of the Officers/Board of Directors for the years 2004 through 2012 that no fees or assessments would be levied against an "incomplete unit." (Appellee Br p 12).

[1] There appears to be conflicting testimony regarding the alleged "unanimous" decision not to impose assessments on Units 11 and 13. According to Appellants' Brief, Tom Brown, a director from at least March 30, 2008, testified that "the Board never agreed not to charge units 11 and 13 and that arguments ensued as to whether the President should be allocating Units 11 and 13 their percentage share of the total assessment amount." (Appellant Br p 10). In its April 29, 2015, Opinion and Order, the District Court found that the Board of Directors had voted not to assess Units 11 and 13. (Appendix B; 4/29/15 Trial Opinion p 4) ("[F]or every year from 2006 until 2012 . . . the board of directors voted to assess no fee against units 11 and 13."). For the reasons set forth in more detail below, whether the decision was made by a single officer, a vote of the Board of Directors, or the entire Board of Directors, the Association had no authority to not impose

This "unanimous decision" is the reflection of the Developer's determination as to what he believed to be the proper amount that certain Units should be assessed and the Developer's belief that he had the right to make such a determination. For example, at Page 6 of the Appellees' Brief, Appellees describe the Developer's position on assessments:

> As the Developer, he set the initial assessments. Robert Delich testified that no condominium fees or assessments would be levied against an "incomplete unit" until a structure was built thereon and a certificate of occupancy issued, at which time, the assessment would be in accordance with the percentage of value allocated to the said unit by the Master Deed. (Appellee Br p 6).[2]

Appellees also assert that "[a]s the Developer Robert Delich had the legal authority to unilaterally revise the condominium project and declare amendments to the condominium documents." (Appellees' Br p 6). As described in Appellees' Brief, and as it relates to Units 11 and 13, the Developer implemented his belief that incomplete units should not pay assessments by including in the Developer's terms of sale with Defendants "a specific covenant with the Developer that Beckman/Meinke would not be responsible for or required to pay any condominium fees or assessments for said 'incomplete units' until such time as a residential structure [was] built and a certificate of occupancy issued." (Appellee Br p 9).

This "specific covenant" was not included in the original May 3, 2006, Master Deed, but on May 9, 2010, a "CORRECTION Warranty Deed" for Units 11 and 13 was recorded which

assessments on Units 11 and 13. Accordingly, whether the Board of Directors approved the assessments, or not, is immaterial to the outcome of the portion of the Appeal to which this Amicus Brief relates.

[2] The immediate next sentence in Appellees' Brief is the assertion that "The Developer made full disclosure of this Amendment to each prospective purchaser." (Appellees' Br p 6). There was, however, no recorded amendment in the record which would alter or change the means of allocating assessments from what is contained in the Condominium Bylaws.

added language relating to the Developer's covenant to Defendants regarding the payment of assessments:

> Pursuant to the agreement of the developer and the buyers, no condominium fees or assessments will be charged on these units [11 and 13] until the units are constructed and have occupancy permits issued. (Appellant's Br p 13 quoting Trial Ex 7).

In their Brief, Appellees acknowledge that they are not "Developers" within the meaning of the Michigan Condominium Act nor do they claim to be "Developers." (Appellees' Br p 1) ("The crutch [sic] of this case is whether a non-developer owner of a vacant lot 'incomplete unit' is required to pay condominium fees or assessments."). Further, Appellees acknowledge that no amendment has ever been recorded which would have altered the method of allocating assessments under the Master Deed and Bylaws. (Appellees' Br p 6) ("Attorney Clark did not feel a formal amendment was necessary given the minimal amount of the change.").

On December 11, 2012, once the Board of Directors was no longer controlled by the Developer or Mr. Beckman, the Association filed the instant lawsuit seeking the recovery for assessments for the time period between January 1, 2006, and September 30, 2012. In accordance with Article V, Section 6 and Article XII, Section 1.(b) of the Condominium Bylaws, the Association also sought recovery of its attorneys' fees.

In its Notice of Trial and Issues for Trial, the District Court identified the triable issues as follows:

> 1. Are all Units subject to the determinative percentage values as set forth in Article VI (B) of the Master Deed, even if they are not built upon, such that each Unit owner is responsible for that percentage of condominium expenses?
>
> 2. Whether a non developer owner of a vacant lot is required to pay condominium fees or assessments?
>
> 3. How is a developer defined and can there be only one developer? (Appendix C; 4/29/15 Trial Opinion, p 2)

In its decision, the District Court ruled, in its entirety, as follows:

> The facts are a classic example of the difference between De Facto and De Jury. [sic] The corporation did not feel units 11 and 13 should be assessed from 2004-2012 therefore they were not billed for those years. The assessment for those years by a later board is not valid. It appears, from the master deed, all units should have been assessed and the assessment from 2012 and thereafter is valid.
>
> It is hereby ordered and adjudged that defendants are liable for the assessment from spring 2012 to date. Plaintiff is to prepare a judgment to that effect with a computation of what the defendant's liability should be.

(Appendix C; 12/30/14 Ruling, p 4). In its April 29, 2015, Trial Opinion,[3] the District Court found as follows:

- "The apportionment of fees in the Master Plan assessed vacant units and units on similarly sized parcels with completed structures at the same rate . . . ." (Appendix B; 4/29/15 Trial Opinion, p 3).

- "From the time that the corporate defendants purchased units 11 and 13 in 2006 until Sunnyside seated a new board of directors in the Spring of 2011 association fees were not assessed on these vacant lot units. . . ." (Appendix B; 4/29/15 Trial Opinion, p 3).

- "[F]or every year from 2006 until 2012 . . . the board of directors voted to assess no fee against units 11 and 13." (Appendix B; 4/29/15 Trial Opinion, p 4).

- "At the spring, 2012 board of directors meeting, fees were assessed against units 11 and 13, for the first time. The new board then sought to collect fees back to 2006 from defendants, even though the prior boards had not assessed them." (Appendix B; 4/29/15 Trial Opinion, p 4).

Ultimately the Trial Court ruled that the Association was not permitted to impose assessments for the years that the Board of Directors was controlled by the Developer or Neil Beckman, on the basis that the Board of Directors had made the decision not to impose such assessments in those years, notwithstanding that the Bylaws required such assessments to be made.

[3] The Trial Opinion appears to have been signed on September 29, 2015, but bears a "4/29/15" date on the first page.

Further, the Trial Court did not consider the Association's request for attorneys' fees, even though the Association's interpretation of the Bylaws was deemed to be correct.

After an unsuccessful appeal to Circuit Court, the Association filed an Application for Leave to Appeal to this Court which was granted, and this appeal followed.

ARGUMENT

A. THE COURT ERRED IN DENYING PLAINTIFF ASSOCIATION THE RIGHT TO PURSUE PAST-DUE ASSESSMENTS FOR THE TIME PERIOD BETWEEN 2006 AND 2012.

1. The Trial Court Correctly Held that the Master Deed and Bylaws Require Payment of Assessments for All Units.

As a preliminary matter, the Trial Court correctly held that the Master Deed and Condominium Bylaws require the payment of assessments for all Units, whether complete or incomplete. In its April 29, 2015, Trial Opinion the District Court expressly found that "[t]he apportionment of fees in the Master Plan assessed vacant units and units on similarly sized parcels with completed structures ***at the same rate*** . . . ." (Appendix B; 4/29/15 Trial Opinion, p. 3) (emphasis added). The Appellees did not file a cross-appeal and did not challenge this determination though a significant portion of the Appellees' Brief seeks to undermine this ruling. On this issue, however, the District Court decision was unquestionably correct and should be upheld.

a. The Master Deed and Bylaws Dictate Administration of the Condominium

The rights and responsibilities of the developer and co-owners regarding the administration of a condominium project are dictated by the contents of the master deed and bylaws. The right of each owner to rely upon the recorded condominium documents is the foundation on which the common interest community concept itself is based. Section 53 of the Michigan Condominium Act (the "Act") expressly states:

> Sec. 53. The administration of a condominium project shall be governed by bylaws recorded as part of the master deed, or as provided in the master deed. An amendment to the bylaws of any condominium project shall not eliminate the mandatory provisions required in Section 54. An amendment shall be inoperative until recorded. MCL 559.153.

This proposition was recently reaffirmed by a panel of this Court in *Tuscany Grove Ass'n v Peraino*, 311 Mich App 389, 393; 875 NW2d 234 (2015), wherein the Court stated:

> Pursuant to the Condominium Act, the administration of a condominium project is governed by the condominium bylaws. MCL 559.153. Bylaws are attached to the master deed and, along with the other condominium documents***, the bylaws dictate the rights and obligations of a co-owner in the condominium***. (emphasis added).

Further, the Act and its implementing administrative rules expressly require that all parties having an interest in the condominium project comply with the master deed and bylaws. Section 65 of the Act states that "[e]ach Unit co-owner, tenant, or nonco-owner occupant shall comply with the master deed, bylaws, and rules and regulations of the condominium project and this act." MCL 559.165. See also Mich Admin Code, R 559.510 ("The Bylaws shall provide, in accordance with Section 65 of the act, that all present and future co-owners, tenants, and any other persons or occupants using the facilities of the project in any manner are subject to, and shall comply with, the act, the master deed and bylaws, and the articles of association, and rules and regulations adopted by the association of co-owners."). This language is contained in the Dedication of the Sunnyside Resort Master Deed and Article I, Section 2 of its Bylaws.

Accordingly, under Michigan case-law and statutory law, and the Condominium's own governing documents, any question regarding the parties' rights within a Condominium are to be made by reference to the written and recorded Master Deed and Bylaws, and not the unstated or unrecorded intentions of the Developer or another Co-owner.

b. The Act Requires that Assessments be Allocated in Proportion to the Percentages of Value or as May Otherwise Be Contained in the Master Deed.

Further, the Act requires that the Master Deed and Bylaws describe, in detail, the manner in which assessments are to be allocated among units. Section 69 of the Act requires that regular monthly assessments be assessed either in proportion to the percentages of value assigned to each

unit or as may otherwise be expressly set forth in the master deed. Section 69 states in relevant part:

> . . .
> 3) The amount of all common expenses not specially assessed under subsections (1) and (2) shall be assessed against the condominium units ***in proportion to the percentages of value or other provisions as may be contained in the master deed for apportionment of expenses of administration.***
>
> (4) A co-owner shall not be exempt from contributing as provided in this act by nonuse or waiver of the use of any of the common elements or by abandonment of his or her condominium unit. (MCL 559.169(3) & (4)) (emphasis added).

The requirement that the bylaws describe, in detail, the means of assessments is also required by Administrative Rule. Rule 513 states that "[t]he bylaws shall set forth detailed information concerning assessments. The method by which assessments are to be made shall be included and shall provide that the board of directors of the association shall establish an annual budget." Mich Admin Code, R 559.513. Requiring the means to allocate assessments to be contained in the condominium documents protects all owners, as it prevents an owner, or group of owners, or even a developer, from allocating assessments or costs to other co-owners in a manner which contradicts the method set forth in the bylaws and it prevents an owner, or group of owners, from excusing themselves from having to pay assessments when otherwise required.

Accordingly, with respect to the question of how to allocate assessments, the written and recorded Sunnyside Resort Master Deed and Bylaws control, and under Michigan law are required to provide, in detail, the means by which such assessments are to be allocated.

c. The Master Deed and Bylaws Clearly and Unambiguously Require Payment of Assessments by All Units Not Owned by the Developer to be Paid in Proportion to Their Percentage of Value.

As set forth above, the amount that a co-owner is obligated to pay in assessments must be determined by reference to the master deed and bylaws. In this case, the Sunnyside Resort Bylaws

clearly and unambiguously require that except for incomplete units owned by the Developer, all units pay assessments in proportion to their percentage of value. With respect to the interpretation of condominium documents,

> Condominium bylaws are interpreted according to the rules governing the interpretation of a contract. Accordingly, this Court begins by examining the language of the bylaws. Words are interpreted according to their plain and ordinary meaning. Further, this Court avoids interpretations that would render any part of the document surplusage or nugatory, and instead this Court gives effect to every word, phrase, and clause. Ultimately, we enforce clear and unambiguous language as written.

Tuscany Grove Ass'n, 311 Mich App at 393 (citations omitted). The Michigan Supreme Court "has said in numerous decisions that a contract must be construed, if possible, to effectuate the intent of the parties. In the instant case such intent must be determined from the provisions of the written instrument." *McCastle v Scanlon*, 337 Mich 122, 128; 59 NW2d 114 (1953). See also *Mahnick v Bell Co*, 256 Mich App 154, 158-59; 662 NW2d 830 (2003) (citations omitted) ("Under the common law, the main goal in the interpretation of contracts is to honor the intent of the parties. The court must look for the intent of the parties in the words used in the contract itself. When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties, or to consider extrinsic testimony to determine the parties' intent."); *Davis v LaFontaine Motors, Inc*, 271 Mich App 68, 74; 719 NW2d 890 (2006) ("Courts must discern the parties' intent from the words used in the contract and must enforce an unambiguous contract according to its plain terms."); *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 57; 698 NW2d 900 (2005) ("When the contract is unambiguous, the parties' intent is gleaned from the actual language used."); *Zantel Mktg Agency v Whitesell Corp*, 265 Mich App 559, 569; 696 NW2d 735 (2005) ("Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written

agreement."); *Burkhardt v Bailey*, 260 Mich App 636, 656-57; 680 NW2d 453 (2004) ("But when the language of a document is clear and unambiguous, interpretation is limited to the actual words used, . . . and parol evidence is inadmissible to prove a different intent . . . ."). Moreover, Michigan courts reject any effort to rewrite a contract based on the parties' supposed intent:

> [t]his approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstances, such as a contract in violation of law or public policy. [*Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003).]

Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership, 295 Mich App 99, 126; 812 NW2d 799 (2011).

Under the principles described above, Article V, Section 4 of the Bylaws unambiguously requires that "all members" must pay assessments in accordance with the percentage of value allocated to their unit. Article V, Section 4 of the Condominium Bylaws states:

> The budget also ***shall*** allocate and assess all such common charges against ***all members*** in accordance with the percentage of value allocated to each unit by the Master Deed, without increase or decrease for the existence of any rights to the use of limited common elements appurtenant thereto. . . . (Appendix A; Master Deed, Ex A, Art V, Sec 4).

The use of the term "shall" establishes that the assessment of common charges against members in accordance with a unit's percentage of value is mandatory and not permissive. *NL Ventures VI Farmington, LLC v City of Livonia*, 314 Mich App 222, 230; 886 NW2d 772 (2015) ("Thus, the presumption is that 'shall' is mandatory.").

Further, there is no question that Units 11 and 13 exist, and that they existed for the entire time period between 2006 and 2012. The existence of a "Unit" does not depend on its construction or development. The Master Deed defines a "Condominium Unit" or "Unit" as "that portion of the Condominium Project designed and intended for separate ownership and use, as described on

Exhibit B hereto." (Appendix A; Master Deed, Art III.j)). Article IV of the Master Deed further states that "[t]he improvements contained in the Condominium Project, including the number, boundaries, dimensions, and area of each unit, are set forth completely in the Condominium Subdivision Plan attached hereto as Exhibit B." (Appendix A; Master Deed, Art IV). Page 3 of the Condominium Subdivision Plan attached as Exhibit B to the Master Deed depicts the location and approximate size of the Units of the Condominium, including the location and approximate size of Unit 11 and Unit 13. (Appendix A; Master Deed, Ex B, p 3). There are no buildings or structures depicted on the Subdivision Plan in the location of Units 11 or 13, nor are there any architectural drawings depicting any such buildings. Nothing in the Master Deed's definition of a "Unit" requires that a dwelling be constructed for the Unit to exist.

Moreover, Michigan statutory law's definition of condominium units also does not require the construction of a dwelling on a unit for the unit to exist. A "unit" in a condominium is created upon the recording of the Master Deed. See MCL 559.172(1) ("A condominium project for any property shall be established upon the recording of a master deed that complies with this act."); MCL 559.104(3) ("'Condominium unit' means that portion of the condominium project designed and intended for separate ownership and use, as described in the master deed… ."). Once established, undeveloped units are just air space in a condominium. See MCL 559.166(2) ("A complete condominium subdivision plan shall including all of the following: …(i) The vertical boundaries for each unit comprised of enclosed air space"); Patrick E. Mears and C. Kim Shierk, *Workouts, Receiverships, and Foreclosures on Michigan Residential Condominium Projects: A Road Map for Mortgage Lenders*, 36 Mich Real Prop Rev 177, 179 (2009) ("When the condominium unit is located within a structure, unit ownership boundaries are defined as the air space within unit walls as depicted on the condominium subdivision plan.").

Lastly, this issue was considered and addressed by the California Court of Appeals in *Bear Creek Master Ass'n v Edwards*, 130 Cal App 4th 1470, 1483; 31 Cal Rptr 3d 337 (2005) (Appendix D). In *Bear Creek*, the purchaser of eight (8) vacant units had refused to pay assessments on the grounds that no structures had yet been built on the units. The court rejected this argument for the same reasons being argued here, namely that the units existed as "space" within the condominium as described in the applicable condominium plan. As explained by the California Court of Appeals:

> Edwards owned eight units in CCV Phase IV. Edwards therefore owed a duty under both the Davis–Stirling Act and the Bear Creek CC & R's to pay those assessments, ***regardless of the absence of an actual condominium structure or building. The definition of a "condominium" as a unit of "space," which space may consist of air, water or earth, in no wise requires an actual structure or building***; rather, it requires a specific description in a particular kind of qualifying recorded instrument. Such an instrument (condominium plan) exists here. As a matter of law, based upon statutory construction, interpretation of the written CC & R's, and undisputed facts, the Trust owed a duty to pay assessments to Bear Creek for each of the eight condominium units it owned.

Bear Creek Master Ass'n, 130 Cal App 4th at 1483.

Accordingly, under the Master Deed, pursuant to Michigan law, and as similarly held by the California Court of Appeals in *Bear Creek*, upon the recording of the Master Deed and the creation of the Units within the Condominium, the respective co-owner of each Unit became obligated to pay assessments in accordance with their Unit's percentage of value.

d. Article V, Section 7 of the Condominium Bylaws Does Not Apply to the Association's Effort to Collect Assessments from Non-Developer Co-owners.

In their Brief, Appellees raise several arguments in an effort to distract from the central question of how assessments are to be allocated under the governing documents. Each of these arguments fail as they do not apply to the issues in this appeal.

Defendants attempt to rely upon Article V, Section 7 of the Bylaws to claim that the Bylaws do not require the co-owner of a vacant unit to pay full assessments. This position is misplaced because the Defendants are not the "Developer" and, therefore, Article V, Section 7 does not apply to the Association's effort to collect unpaid assessments from the non-Developer Co-owners.[4]

Article V, Section 7 of the Condominium Bylaws describes the obligations of the Developer for assessments as to "Complete" and "incomplete" units and states:

> Section 7. Obligations of the Developer.
>
> (a) The Developer shall be responsible for payment of the full monthly Association maintenance assessment, and all special assessments, for all completed units owned by it and shall also maintain, at its own expense, any incomplete units owned by it. "Completed unit" shall mean a unit with respect to which a certificate of occupancy has been issued by the local public authority. An "incomplete unit" shall mean any unit that is not a Completed unit.
>
> (b) In addition to maintaining any incomplete units owned by it, the Developer shall be charged a portion of the established monthly Association assessment for each incomplete unit established in the Master Deed, whether constructed or not. Such portion shall be determined by the officers of the Association based upon the level of common expenses incurred in respect of such incomplete nits [sic], and it may be altered on a month-to-month basis. Each incomplete unit must, at a minimum, bear its pro rata portion of the cost of all accounting and legal fees, public liability and casualty insurance, road maintenance (including snow removal), utility maintenance, if any, grounds maintenance (including landscaping), real estate taxes in the year of the establishment of the Condominium, and the reserve for the repair and replacement of major common elements. Such

[4] Further, even assuming Article V, Section 7 applied, it could not have been used to excuse the payment of assessments altogether. As is expressly required by Article V, Section 7, even for a "vacant" Unit, "[e]ach incomplete unit must, ***at a minimum***, bear its pro rata portion of the cost of all accounting and legal fees, public liability and casualty insurance, road maintenance (including snow removal), utility maintenance, if any, grounds maintenance (including landscaping), real estate taxes in the year of the establishment of the Condominium, and the reserve for the repair and replacement of major common elements." The Developer's decision to not allocate assessments to any "vacant" Units contradicts even the Developer's right to a reduced allocation of assessments permitted by Article V, Section 7. Because the Defendants do not possess the rights of the Developer, however, this analysis is not required because Article V, Section 7 does not apply in this case.

> pro rata portion of such costs shall be allocated to the incomplete units in accordance with the percentage of value allocated to each unit by the Master [Deed], without increase or decrease for the existence of any rights to the use of limited common elements appurtenant thereto. (Appendix A; Master Deed, Ex A, Art V, Sec 7).

Article V, Section 7, by its express terms applies only to the Developer. It does not purport to apply to any Co-owner other than the Developer. Accordingly, any effort by the Defendants to rely upon Article V, Section 7 is misplaced.

The Defendants also claim that it would be unfair to impose assessments against Units 11 and 13 where no structures had yet been constructed on the Units. As a preliminary matter, MCL 559.169(3) would have permitted the drafter of the Bylaws to allocate assessments in a manner different than by percentage of value,[5] but except for Units owned by the Developer, the drafter chose not to do so. Further, both the Condominium Bylaws and the Act prohibit a Co-owner from using their non-use of a Unit, or the non-use of the Common Elements, as an excuse for non-payment of assessments. Specifically, Article V, Section 6 of the Condominium Bylaws states:

> Each member, whether one or more persons, shall be and shall remain personally obligated for the payment of all assessments levied with regard to his unit during the time that he is the other thereof, and ***no member may exempt himself from liability for his contribution toward the expenses of administration by waiver of the use or enjoyment of any of the common elements or by the abandonment of his unit***. . . . (Appendix A; Master Deed, Ex A, Art V, Sec 6) (emphasis added).

[5] Significantly, permitting any Unit to pay an assessment which deviates from the required percentage would disrupt the entire structure of allocating assessments for all Units under the Bylaws. If a single unit, or a group of units, is excused from paying assessments under a methodology which uses a percentage of value to determine the correct allocation of assessments, then all other unit owners' share of assessments must necessarily be *increased* in order to make up the difference. Accordingly, permitting one unit or a group of units to not pay assessments improperly increases all other units' proportionate share. In other words, once one unit is permitted to avoid paying assessments, all other units are adversely affected and no unit's allocation of assessments would comply with the method required to be used under the Bylaws.

Similarly, with respect to the payment of assessments, Section 69(4) of the Act states that "[a] co-owner shall not be exempt from contributing as provided in this act by nonuse or waiver of the use of any of the common elements or by abandonment of his or her condominium unit." MCL 559.169(4). A co-owner may not use the perceived benefits or value of his or her Unit (or perceived lack thereof), as a means to pay assessments which differ from the assessments required to be paid under the Master Deed and Bylaws. MCL 559.169(4); see also MCL 559.139 ("A co-owner may not assert in an answer, or set off to a complaint brought by the association for non-payment of assessments the fact that the association of co-owners or its agents have not provided the services or management to a co-owner."); *Newport W Condo Ass'n v Veniar*, 134 Mich App 1, 11, 350 NW2d 818 (1984) ("Simply stated, the Condominium Act does not provide a co-owner with the self-help remedy of withholding part or all of his assessed fees.").

In addition, the Defendants appear to claim, without support, that the Developer amended the Bylaws to excuse Units 11 and 13 from paying assessments until such time as a dwelling was constructed on the Units. There is, however, no recorded amendment which would excuse Units 11 and 13 from the payment of assessments. Under the Act, any amendment must be recorded to be effective. Section 73(1) of the Act states that "[a] master deed and an amendment to the master deed shall be recorded" MCL 559.173(1). Further, Section 91(1) of the Act states that "[a]n amendment to the master deed or other recorded condominium document ***shall not be effective until the amendment is recorded***." MCL 559.191(1) (emphasis added). See also Mich Admin Code, R 559.501(3)("An amendment to, or a change in, the condominium bylaws shall be effective upon recordation and the master deed or bylaws shall so state."). Accordingly, any claim by the Defendants that the Developer amended the Bylaws to excuse Units 11 and 13 from paying assessments must be rejected.

Significantly, the Appellees' arguments in this case demonstrate the reason for CAI's involvement. As is stated in their own Brief, the Defendants' underlying position is that their decision to excuse their own Units from paying assessments is justified because the Developer permitted it and they controlled the Board of Directors. However, each Co-owner within Sunnyside Resort is entitled to rely upon the means of allocating assessments contained in the written, recorded, Master Deed and Bylaws. No co-owner in any common interest community should be required to live in a community where the Developer or Board of Directors controls by fiat or rule[6] which contradicts the written contract.

2. The Trial Court Erred in Concluding that the Association Could Not Pursue Unpaid Assessments for 2006 through 2012.

Under Michigan law, the Developer and all Co-owners must comply with the Condominium Bylaws. Under the Condominium Bylaws, all assessments for non-Developer owned Units are to be allocated to each Unit in proportion to their percentage of value. There is no discretion for the Association to deviate from these principles and the Association itself is obligated to follow the means of assessment dictated by the Condominium Bylaws. As set forth above, the Trial Court correctly found that the Master Deed and Bylaws obligated all Units to pay full assessments. The Trial Court erred, however, when it refused to permit the Association, in 2012, to pursue unpaid assessments that the Association had not assessed for the time period between 2006 and 2012. Simply put, the Board of Directors of the Association did not have the

[6] This Court has ruled in other cases that a homeowners' association lacks authority to adopt a rule which contradicts the recorded restrictions under the guise of "interpreting" or "implementing" such restriction. See *Conlin v Upton*, 313 Mich App 243, 265; 881 NW2d 511 (2015) ("The Association could not, however, expand that restriction or impose a new burden on the lot owners with less than unanimous consent under the guise of interpreting the restriction."). This case is governed by the same principle—the written and recorded documents control and the Board of Directors lacks the authority to act in a manner which contradicts these documents.

authority to not impose assessments for Units 11 and 13 between 2006 and 2012, and it was proper for the Association to seek to recover those unpaid assessments not barred by the applicable statute of limitations. [7]

a. The Association Did Not Have Authority to Not Impose Assessments for Units 11 and 13 for the Years 2006 Through 2012.

Since the Master Deed and Bylaws mandated that all Units be allocated assessments in proportion to their percentage of value, the Association did not have authority to not impose assessments for Units 11 and 13.

In *Tuscany Grove Ass'n*, the Court of Appeals recently considered a condominium association's efforts to pursue a lawsuit in violation of a provision of the bylaws which required co-owner approval prior to the filing of the lawsuit. In rejecting the association's arguments that approval was not required, this Court held that not only was the provision enforceable, but "[b]y virtue of this provision, the board of directors ***was without authority*** to hire an attorney or incur any other expenses related to litigation against defendant aimed at the enforcement of fencing restrictions." *Tuscany Grove Ass'n*, 311 Mich App at 394 (emphasis added).

Similarly, in this case, since the Condominium Bylaws required that all Units be assessed in proportion to their percentage of value, the Association, acting through its Board of Directors and officers, lacked the authority to allocate assessments differently than that required to be allocated by the Master Deed and Bylaws.

[7] Though not at issue before the lower court, the applicable statute of limitations for recovery of assessments should be the ten (10) year statute of limitations for a breach of covenant. See MCL 600.5807(5) ("The period of limitations is 10 years for an action founded on a covenant in a deed or mortgage of real estate."); *Lakes of the N Ass'n v TWIGA Ltd. P'ship*, 241 Mich App 91, 100; 614 NW2d 682 (2000) (indicating that covenants to pay association assessments are restrictive covenants and private deed restrictions).

b. The Association Has the Authority to Pursue Unpaid Assessments As Required to be Allocated Under the Bylaws.

In 2012 the Association determined, through a newly seated Board of Directors, that the prior determination of the Association to not allocate assessments to Units 11 and 13 was in error (and had been in error), and pursued the Co-owners of Units 11 and 13 for unpaid assessments. The Trial Court found that the Association's interpretation of the Bylaws was correct, and that assessments must be allocated against Units 11 and 13 even if the Units were vacant. There is no basis, however, for the Trial Court to have concluded that the Association could not correct its prior error and impose assessments in a manner that complies with the Condominium Bylaws for the years 2006 through 2012.

As an initial matter, the Act itself permits co-owners to force the association to comply with its governing documents by lawsuit. Section 107 of the Act provides that "[a] co-owner may maintain an action against the association of co-owners and its officers and directors to compel these persons to enforce the terms and conditions of the condominium documents." MCL 559.207. Accordingly, one potential alternative would have been for a co-owner to have commenced a lawsuit and required the Association to allocate assessments correctly. In this case, however, that step should have been unnecessary as the Association itself sought to take corrective action when a Board of Directors assumed control without a conflict of interest in the matter.

As is stated by the Appellees, the Developer did not wish to impose assessments against units on which no buildings had been constructed and the Defendants continued this practice upon Neil Beckman being elected to the Board of Directors. In fact, Appellees claim to have been expressly promised by the Developer that they would not have to pay assessments so long as they did not construct a building on their Unit, even though the Bylaws required that such assessments be imposed. Immediately upon Defendants purchasing their Units, Defendant Neil Beckman

sought and obtained a position on the Board of Directors then used this position to continue the Developer's practice of not imposing assessments against their Units. A direct conflict of interest then existed between the interest of other Co-owners who owned Units on which buildings had been constructed and the interests of Defendants and Neil Beckman, who served on the Board of Directors.

Issues involving the self-interest of the Developer and the potential for self-dealing of members of the Board of Directors are not new, and their potential for harm to the community, especially when involving the payment (or non-payment) of assessments, is well-described by the California Court of Appeals in *Raven's Cove Townhomes, Inc v Knuppe Dev Co,* 114 Cal App 3d 783, 799; 171 Cal Rptr 334 (Ct App 1981):

> Of particular significance is the conflict of interest presented where, as here, the owner of the Developer and his wife and major co-owner, are also directors of the Association in its infancy, along with the Developer's employees. We note that the duty of undivided loyalty (see Scott, The Fiduciary Principle, 37 Cal L Rev 539) applies when the board of directors of the Association considers maintenance and repair contracts, the operating budget, creation of reserve and operating accounts, etc. Thus, a developer and his agents and employees who also serve as directors of an association, like the instant one, may not make decisions for the Association that benefit their own interests at the expense of the association and its members. . . . In most jurisdictions, the developer is a fiduciary acting on behalf of unknown persons who will purchase and become members of the association (Florida Condominiums Developer Abuses and Securities Law Implications, 25 U Fla L Rev 350, 355).
>
> We also find persuasive the following comment on the specific problem here presented. "(I)ndividuals on the board are held to a high standard of conduct, the breach of which may subject each or all of them to individual liability.... Where a developer or sponsor totally dominates the association, or where the methods of control by the membership are weak or nonexistent, 'closer judicial scrutiny may be felt appropriate,' and the principles of fiduciary duty established with business corporations 'may exist for holding those exercising actual control over the group's affairs to a duty not to use their power in such a way as to harm unnecessarily a substantial interest of a dominated faction.' " (12 Wake Forest L Rev 915, 923.) We are indebted for our approach to these problems to the thoughtful and insightful discussion of the specific issues in the Wake Forest Law Review cited above, which aptly continues at page 976: "The subject of fiscal responsibilities, e.g., 'lowballing' failure to pay assessments on unsold units, the failure to enforce the

> obligation to pay, is one of the areas of great developer exposure." The article also points to the necessity for . . . good management with adequate books, records and minutes (see also Self-Dealing by Developers of Condominium Project As Affecting Contracts or Leases With Condominium Association, 73 ALR3d 613).

114 Cal App 3d 783, 799; 171 Cal Rptr 334 (Ct App 1981) (Appendix E).

Raven's Cove describes circumstances where the court felt the need for closer judicial scrutiny was warranted and where there was a potential for harm to a "dominated faction." The *Raven's Cove* court felt this to be especially true where, as here, the issue dealt with the "fiscal responsibilities" of the Board of Directors and the "failure to enforce the obligation to pay . . . ." The court in *Raven's Cove* was considering the issues before it, in part, to determine whether to impose personal liability on a director for a breach of fiduciary duty in one pf these circumstances. In other words, *Raven's Cove* considered circumstances where the director uses his or her position to unduly benefit themselves to the detriment of the community.

The irony in the present case is that it is the Defendants' very position that because they controlled the Board of Directors and because they were in a position to be able to excuse themselves from having to pay assessments that their decision is now insulated from review. For the Trial Court to find that the Bylaws required assessments to be paid but to then refuse to allow the Association to pursue those assessments describes the very circumstances that concerned the court in *Raven's Cove*. CAI submits this Brief in large part to encourage this Court to permit the Association to pursue assessments that should have been paid for those years where the beneficiary of the improper allocation of assessments served as a director of the Association. Whether Neil Beckman should also have been liable for a breach of fiduciary duty for his role in avoiding assessments is a separate issue being addressed by the Appellants. However, where, as here, the Association's interpretation of the Bylaws is demonstrated to be correct, and the Association

merely seeks to recover assessments that must have been paid under the Bylaws but were not, it is error for the Trial Court to have refused the Association the right to recover such assessments.

Defendants contend that the Trial Court "properly gave deference" to the Association's pre-2012 decision to not pursue assessments from Units 11 and 13. (Appellees' Brief p 19). This appears to be an effort to claim that the decision to not pursue assessments was merely an exercise of the "business judgment rule." Such an argument misconstrues both the business judgment rule and the authority of the Association. Since the Association did not have the authority to not impose assessments for Units 11 and 13, the business judgment rule does not apply. Though an unpublished decision, this concept was recently clarified by the Michigan Court of Appeals in *MJ Dev Co, Inc v Inn at Bay Harbor, Ass'n*, unpublished per curiam opinion of the Court of Appeals, issued February 23, 2017, (Docket No. 330496), 2017 WL 726591, at *2 (Mich Ct App Feb 23, 2017)[8] (Appendix F) ("In this case, plaintiff alleges that defendant Association breached the bylaws by acting outside its authority when it added a fireplace to the facility that cost over $10,000 without getting approval via a special assessment. If true, the business judgment rule would not shield defendant Association."). Numerous out of state decisions have similarly stated that an association that acts without authority is not protected by the business judgment rule, and that such acts would be *ultra vires*. See *Matanuska Elec Ass'n v Waterman*, 87 P3d 820, 824 (Alaska 2004) (Appendix G) ("MEA's reliance on the business judgment rule is misplaced because a plain reading of the bylaws, and Janacek's undisputed compliance with the correction report requirements of Section 11(g), leave no discretion to the Board to refuse to seat Janacek."); *Fisher*

[8] *MJ Dev Co, Inc* is an unpublished decision. However, it is being cited here because it addresses circumstances dealing with the business judgment rule's application to a community association's authority to act in a manner not permitted by the community's bylaws. No published decision was located on this particular issue.

v Shipyard Vill of Co-owners, Inc, 415 SC 256, 270-272; 781 SE2d 903 (2016) (Appendix H) ("A corporation's actions taken within the scope of the powers granted it are considered *intra vires* acts, acts beyond the scope of its powers, however, are *ultra vires* acts. . . . The business judgment rule applies to *intra vires* acts of the corporation, but not to *ultra vires* acts. In other words, while the business judgment rule protects a corporation's exercise of its best judgment when deciding between viable options in a given business-related situation, the business judgment rule is not a cloak that protects a corporation from a violation of its own bylaws.") (citation omitted).

Defendants also contend that they were assured by the Developer that they would not have to pay assessments, and rely on their 2010 warranty deed. However, any covenant contained in the warranty deed between the Developer and the Defendants regarding assessments would not bind the Association; instead, it would serve as a covenant by the Developer to the Defendants that in the event the Defendants were obligated to pay assessments the Developer would indemnify the Defendants the amount required to be paid. See 20 Am Jur 2d Covenants, Etc § 87 (Appendix I) ("A covenant against encumbrances is a contract of indemnity. It is an agreement to indemnify the purchaser from any loss to the value of the property due to an encumbrance's existence. Its object is to indemnify a purchaser for any encumbrance on the property which must be satisfied or removed, at least where the encumbrance is a charge or lien against the land which can be extinguished by payment."). Any covenant contained in the 2010 warranty deed does not apply to the Association's responsibility to impose assessments under the Master Deed and Bylaws, and cannot be used to bind other Co-owners not a party to the Developer's agreement; such Co-owners are entitled to rely on the written, and recorded, Master Deed and Bylaws.

The Association did not have authority to not impose assessments against Units 11 and 13. In fact, to excuse the Defendants from having to pay assessments for the years 2006 through 2012

would reward the very type of fiscal abuse at issue in *Raven's Cove*. Because the Association lacked such authority, the business judgment rule did not provide the Board of Directors with the "discretion" to not impose such assessments and the Trial Court could not rely upon any such "discretion" to excuse the Association's decision. Any promise by the Developer to the Defendants that they would not have to pay assessments only serves as a promise by the Developer to the Defendants to indemnify the Defendants if assessments were required to be paid, it cannot serve as a basis to bind the Association. Accordingly, the Trial Court erred when it refused to impose assessments for the years 2006 through 2012 against Units 11 and 13.

B. THE COURT ERRED IN REFUSING TO PERMIT PLAINTIFF ASSOCIATION TO RECOVER REASONABLE ATTORNEYS' FEES.

As stated above the Trial Court found that the Association's interpretation of the Bylaws was correct and that all Units are to be assessed in proportion to their percentage of value. Under Michigan law, where a proceeding is necessitated by the default of the co-owner, the association is entitled to its attorneys' fees so long as the association's condominium documents provide for recovery. Section 106 of the Act states:

> A default by a co-owner shall entitle the association of co-owners to the following relief:
>
> (a) Failure to comply with any of the terms or provisions of the condominium documents, shall be grounds for relief, which may include without limitations, an action to recover sums due for damages, injunctive relief, foreclosure of lien if default in payment of assessment, or any combination thereof.
>
> (b) In a proceeding arising because of an alleged default by a co-owner, the association of co-owners or the co-owner, if successful, ***shall recover the costs of the proceeding and reasonable attorney fees, as determined by the court, to the extent the condominium documents expressly so provide***.
> . . .

MCL 559.206(a) & (b). The Condominium Act makes an award of attorneys' fees mandatory if required by the Sunnyside Resort Condominium Documents. In this case, the Bylaws require an

award of attorneys' fees if the Association is successful under Article XII, Section 1.(b) of the Bylaws:

> (b) In any proceeding arising because of an alleged default by any member, the Association, if successful, shall be entitled to recover the costs of the proceeding and such reasonable attorneys' fees, (not limited to statutory fees) as may be determined by the Court, but in no event shall any member be entitled to recover such attorneys' fees. (BL, Art. XII, Section 1.(b)).

In *Windemere Commons I Association v O'Brien*, 269 Mich App 681, 683-684; 713 NW2d 814 (2006), a panel of this Court held that under MCL 559.206(b) it was an abuse of discretion for a trial court to deny a prevailing condominium association's requests for costs and attorneys' fees, stating:

> As a general rule, an award of attorney fees as an element of costs or damages is prohibited unless it is expressly authorized by statute or court rule. *Rafferty v Markovitz*, 461 Mich 265, 270, 602 NW2d 367 (1999). MCL 559.206(b) states that a condominium association, if successful in an action arising out of the alleged default of a co-owner, shall recover the costs and reasonable attorney fees associated with the action, "as determined by the court, to the extent the condominium documents expressly so provide." Article XIX, § 2 of plaintiff's condominium bylaws provides for an award of costs and reasonable attorney fees to the association if the association is successful in an action arising out of the alleged default of a co-owner.
> . . .
> In this case, the trial court denied plaintiff's request for costs and fees, but gave no explanation for its decision to do so. However, plaintiff prevailed in its action against defendants, and therefore, pursuant to MCL 559.206(b) and the association bylaws, it was entitled to costs and reasonable attorney fees. We reverse that portion of the trial court's order denying plaintiff's request for costs and fees, and remand this case for a determination of the costs and fees to which plaintiff is entitled.

In the present case, the Association was successful in its proceeding. The Association successfully established that, contrary to the position of the Defendants, the Condominium Documents required the allocation of assessments in proportion to percentage of value. This point the Defendants, who did not file a cross-appeal, still challenge. The proceeding filed by the Association was necessitated by the non-paying Co-owner who refused to pay such assessments.

Under *Windemere Commons I Association*, it was error for the Trial Court to refuse the Association the right to recover its reasonable attorneys' fees.

RELIEF REQUESTED

WHEREFORE, Amicus Curiae respectfully requests that:

A. The Court reverse the lower courts' determinations that the Association was not entitled to pursue assessments for years 2006-2012;

B. The Court remand the matter to the Trial Court for a determination of the amount of assessments due for years 2006-2012 under the correct allocation of assessments;

C. The Court remand the matter to the Trial Court for a determination of the reasonable amount of attorneys' fees incurred by the Association; and

D. The Court grant such further and additional relief as may be lawful and proper.

Respectfully submitted,

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