IN THE

COURT OF APPEALS OF VIRGINIA

RECORD NO. 0222-22-4

TELEGRAPH SQUARE II, A CONDOMINIUM UNIT OWNERS ASSOCIATION,

Appellant.

V.

7205 TELEGRAPH SQUARE, LLC,

Appellee.

BRIEF OF *AMICUS CURIAE* WASHINGTON METROPOLITAN CHAPTER COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE

The Washington Metropolitan Chapter Community Associations Institute ("WMCCAI") is a 501(c)(6) organization situated in Falls Church, Virginia, and the largest chapter of the Community Associations Institute ("CAI"), 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.

Founded in 1973, WMCCAI is the largest of CAI's 63 US and international chapters, with more than 3,000 members who reside or do business in Virginia. Nearly two million Virginia residents live and/or own in nearly 8,700 common interest community associations, which includes commercial condominiums as well as residential homeowner and condominium unit owner associations. See VA_FactsFigures_Info.pdf (caionline.org) (2018 figures). WMCCAI provides education, advocacy and resources for these common interest communities.

WMCCAI has a substantial interest in fostering best practices and ensuring association boards of directors are able to administer and manage their associations through compliance with and enforcement of the recorded documents (i.e., condominium instruments for condominium unit owners'

associations), adherence to relevant statutes (i.e., the Virginia Condominium Act, Va. Code § 55.1-1900, *et seq*.), and to exercise their best business judgment without fear of losing their liability protection. WMCCAI believes maintaining consistent and uniform application of the tenets of community association laws is critical to avoid creating an unpredictable environment, which would have a chilling effect for volunteers, and the industry, overall.

WMCCAI respectfully submits this brief as an Amicus Curiae in support of Appellant, Telegraph Square II, a Condominium Unit Owners Association, pursuant to Virginia Supreme Court Rule 5A:23.

STATEMENT OF THE CASE

Amicus concurs with the Nature of the Case and Material Proceedings set forth in the Brief for Appellant ("Appellant Brief"). Specifically, WMCCAI has a material interest in this matter involving Telegraph Square II, a Condominium Unit Owners Association ("Association") because the case represents both the significance of the recorded condominium instruments to the proper administration of a condominium and the adverse consequences faced by a condominium unit owners association when the recorded condominium instruments are not followed by unit owners. In this case, Appellee, 7205 Telegraph Square, LLC ("Unit Owner"), declined paying assessments to the Association for several years contrary to the express

mandatory language of the Association's bylaws.

It is WMCCAI's position that the Trial Court erred in not permitting the Association to recover all assessments required to be paid under the Association's bylaws, and in failing to acknowledge the authority established in the condominium instruments to lawfully regulate parking through the designation of Reserved Common Elements. The owners of units in condominium unit owners' associations are entitled to rely upon the recorded instruments that form the very basis for the existence of their condominiums. A condominium unit owners association that seeks to enforce compliance with such instruments is exercising the right of all common interest communities to justifiably rely upon the obligations expressly set forth in their respective governing documents, and this court should uphold their ability to do so.

ASSIGNMENTS OF ERROR

Amicus concurs with the Assignments of Error set forth in the Appellant Brief, and is intent to specifically address that:

1. The Trial Court erred in ruling that Plaintiff was (i) improperly assessed fees for the use, maintenance, and repair of Phase I common elements and (ii) entitled to attorneys' fees as a prevailing party in this action.

Preserved at R. 927-931, 939-940, 980-984, 1009-1011, and 1155-1166.

2. The Trial Court erred in finding that the Board's 2015 parking action: (i) "impermissibly converted" Phase 1 common elements into limited common elements, not reserved common elements; and (ii) violated Fairfax County's zoning ordinance.

Preserved at Record (R.) 924-927, 931-933, 977-980, and 997-1008.

STATEMENT OF FACTS

Amicus concurs with the Statement of Facts set forth in the Appellant Brief. For the Court's convenience, we summarize the relevant facts as follows:

This case involves a dispute between the Association, a Virginia commercial condominium unit owners' association, and the Unit Owner regarding parking and the allocation of common expenses. Both the Association and the Unit Owner are subject to the Virginia Condominium Act, Va. Code, Section 55.1-1900, *et seq*. ("Condominium Act") and the recorded Declaration and Bylaws (*see,* Appellant's Brief*,* Exhibit 1), referred to as the "Condominium Instruments." (R. 1690-1764.)

The Telegraph Square II, A Condominium ("Condominium") was developed in phases, with Phases II-V being added to the Condominium following negotiations with Phase I owners, and the amendment of the Association's Condominium Instruments to provide express assessment

obligations for Phases II-V to contribute towards Phase I common expenses. (R. 1779.)

In 1997, the Association's Board of Directors ("Board") reallocated the Association's maintenance costs in what they believed to be a more equitable manner such that the Association maintained the asphalt in all phases as a common expense, and unit owners in Phases II-IV no longer paid Phase I building maintenance expenses. (R. 1217:14-1220:7, 1578:7-1579:3.) The Board did not amend the Condominium Instruments when it made these changes.

In 2015, the Board was advised by its attorney that their 1997 reallocation was not consistent with the Condominium Instruments and was advised to amend the Condominium Instruments to authorize reallocation of maintenance responsibilities and assessments, or to allocate assessments as required by the Condominium Instruments. (R. 1217:1-1221:17, 1578:7-1579:3, 1818-1819, 2081-2091.) In addition, the Board was advised of its authority to designate the Phase I common element parking spaces as Reserved Common Elements for the exclusive use of Phase I unit owners. (R. 1818, 1968-2080, 1824.) In October 2015, the Board took action to designate the parking spaces in Phase I for the exclusive use of the unit owners in Phase I, in accordance with the Condominium Instruments and

upon the advice of legal counsel. (Id.) The Unit Owner was a member of the Board when the decision was made but did not take part in making the decision. (R. 1818.)

In 2019, the Unit Owner sued the Association in the Circuit Court, claiming that the Association: a) improperly assigned Phase I common element parking spaces, thereby diminishing the Owner's interest in that portion of the common elements; b) improperly assessed the Unit Owner for its proportionate share of the common expenses for Phase I; and c) improperly assessed the Unit Owner for the Association's legal fees relating to the dispute between the Association and the Unit Owner. (R. 173-339.) In separate litigation, the Association sued the Unit Owner for nearly $100,000 in assessments which had not been paid in over four years. In addition, the Association also filed liens against the delinquent units owned by the Unit Owner.

On January 14, 2022, the Trial Court issued its Final Order, which found for the Unit Owner on all counts and awarded the Unit Owner nearly $500,000.00 in damages, reduced the Unit Owner's assessment obligation by over $50,000.00, ordered a credit to the Owner for overcharged assessments of over $6,000.00, and awarded over $320,000.00 in legal fees. (R. 1076-1079, 1115-1122.) The Trial Court also held that the parking

scheme violated the Condominium Instruments and Fairfax County zoning ordinance and ordered that parking restrictions on the common element parking in Phase I be lifted. (R. 1076-1126.)

STANDARD OF REVIEW

Amicus concurs with the Standard of Review set forth in the Appellant Brief. Specifically, that a decision rendered following a bench trial shall be upheld unless "it appears from the evidence to be plainly wrong or without evidence to support it." *Suntrust Bank v. Farrar*, 277 Va. 546, 554 (2009) (reversing circuit court's judgment where plaintiffs "failed to meet their burden of proof on the issue of damages", and "'where only one reasonable inference can be drawn from [the] circumstances, the question becomes one of law to be determined by the court.'") *Bratton v. Selective Ins. Co. of Am.*, 290 Va. 314, 328 (2015) (citation omitted). "Questions of law are reviewed de novo." *MCR Fed., LLC v. JB&A, Inc.*, 294 Va. 446, 457 (2017) (citation omitted).

INTRODUCTION AND SUMMARY OF ARGUMENT

The case under consideration by this Court is one of substantial import for condominiums subject to the Condominium Act and the ability of condominium boards of directors to govern and manage their unit owners' association based upon their best business judgment, and in full accordance

with their respective association's condominium instruments and the Condominium Act. After careful review of the record in this case, it is WMCCAI's belief that the Trial Court was in error in its findings and failed to consider the applicable provisions of the Condominium Act and the plain language of the Condominium Instruments in its ruling.

WMCCAI wishes to highlight for the Court's consideration the conflict created by the decision of the Trial Court and the unintended consequence the decision will have if it is affirmed regarding a community association's ability to collect assessments and maintain its financial well-being, to recruit and maintain volunteers for their respective board of directors, and to rely upon and enforce its condominium instruments.

Virginia condominium unit owners' associations rely on unit owners to pay assessments, which serve as the primary source of income for associations. 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 instruments, including its declaration and condominium bylaws. A board of directors does not have the authority to avoid imposing assessments required to be paid by unit owners under the condominium bylaws. Permitting certain units to not pay assessments would create a

shortfall in the association's annual budget that would be shouldered by the rest of the unit owners. Further, forcing 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 condominium instruments.

In addition, the issues presented in this appeal are of great importance to WMCCAI and its members because the case affects how courts will apply the business judgment rule, a bulwark of protection for the Association's directors and officers against retrospective assertions of personal liability.

I. The Trial Court Erred in Permitting the Plaintiff to Unilaterally Withhold Payment of Assessments in Derogation of its Obligations to the Association

In Virginia, the condominium form of real estate ownership was created by the Horizontal Property Act in the 1970's which has since been superseded by the Condominium Act in 1974, which remains the bedrock upon which all Virginia condominiums are created and administered. Under this form of ownership, individuals hold a separate interest in their respective condominium units while also holding an undivided interest in the condominium's common elements as tenants in common with the remaining unit owners. While a unit owner's undivided common element interest may vary based on several factors from one condominium development to another, one tenet holds true for every condominium project in Virginia: unit

owners are responsible for a proportionate share of the payment of expenses related to the management and maintenance of the condominium project. This obligation is expressly set forth in Section 55.1-1964 of the Act as well as the condominium instruments[1] of each condominium in Virginia.

These expenses are paid by a condominium's respective unit owner's association (which is collectively comprised of all the unit owners) for services related to the maintenance, replacement and repair of common infrastructure, the payment of insurance premiums, trash collection, snow and ice removal, etc. These services provide a benefit to the unit owners, both individually and as a collective.

Whether meritorious or not, at times unit owners may express dissatisfaction with the services provided by their association or disagree with actions taken by their association's board of directors. Often, these disputes arise from an owner's desire to perform an impermissible act or from an owner's alleged breach of a restrictive covenant. Unfortunately, a common but legally unsupported reaction to such a dispute is the decision by the unit owner to withhold the payment of assessments the unit owner is obligated to pay to the association.

[1] As such term is defined in Section 55.1-1900 of the Virginia Condominium Act to include a condominium's declaration, bylaws and other pertinent documents.

A. Plaintiff's Statutory Remedies Do Not Include the Right to Withhold the Payment of Assessments

At times unit owners may have legally valid concerns, and aggrieved unit owners are provided numerous express statutory remedies to resolve their disputes under the Act. Such remedies are set forth in Section 55.1-1939 of the Act and include (i) the right to cast a vote on any matter requiring a vote by the unit owners' association membership in proportion to the unit owner's ownership interest; (ii) the right to have notice of any meeting of the executive board, to make a record of such meetings by audio or visual means, and to participate in such meeting; and (iii) the right to serve on the executive board if duly elected and a member in good standing of the unit owners' association. In addition, an aggrieved unit owner is expressly entitled by statute to pursue an action against a unit owners association to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity in accordance with Section 55.1-1915 of the Act.

Noticeably absent from this list of statutorily authorized remedies is the ability to withhold the payment of an aggrieved unit owner's proportionate share of assessments to a condominium unit owners association. As a matter of policy, if the Virginia legislature intended for an aggrieved condominium unit owner to have the power to withhold the payment of

assessments, such power certainly would have been included in the Statement of Unit Owner Rights codified under the Act in 2015[2] or elsewhere within the Act, similar to the rights provided tenants in Section 55.1-1244 of the Virginia Landlord Tenant Act (Va. Code, Section 55.1-1200, *et seq.*).

The decision of the Trial Court in this matter presents and creates substantial hardship for every condominium unit owners' association in Virginia, and countless others across the country. At the heart of this issue is a condominium unit owner's responsibility to adhere to the terms of a condominium's covenants. While the facts of the underlying case involve an aggrieved unit owner's unilateral decision to obviate its obligation to pay assessments, an argument could be made that the decision below permits a unit owner to obviate any obligation under a recorded condominium covenant simply because the unit owner disagrees with the association's actions.

The Trial Court's ruling is tantamount to providing every unit owner carte blanche authority to withhold payment of assessments to their respective associations for any and all perceived grievances with their unit owner associations' activities, whether justified or not, until such matter can be resolved by a court. Under this decision, if a unit owner unilaterally

[2] Formerly Section 55-79.72:3 of the Virginia Condominium Act, now Section 55.1-1939.

determines to withhold payment of assessments, an inequitable burden is placed on the remaining unit owners to pay for any budgetary shortfall in the deliverance of services to the condominium (which are still provided and enjoyed by the withholding unit owner). If a large enough group of unit owners unilaterally determine to withhold payment of their assessments, the condominium's services cannot be provided and its financial obligations may not be met, resulting in potentially catastrophic infrastructure maintenance concerns and lasting financial repercussions for a condominium's service providers and creditors.

While not binding authority on this Court, the Indiana Circuit Court of Appeals held in *Feather Trace Homeowners Ass'n v. Luster*, 132 N.E.3d 500 (Ind. App. 2019) that permitting members of a homeowner's association to unilaterally withhold the payment of assessments would make an association's underlying problems worse and would "quickly empty the HOA's coffers when Luster's neighbors learn that they, too, need not pay their annual fees. If that were to occur, it would quickly become impossible for the HOA to correct the very serious problems in the neighborhood." The Indiana Circuit Court of Appeals further held that "Luster has other legal remedies aside from abrogation of his responsibility to pay the annual fees—and these remedies would actually have a chance of bettering the situation for

the residents. For example, he can mount a campaign to oust the current board members; he can participate with board meetings or strive to become a board member to influence the HOA's decision-making process; he can seek injunctive relief against the HOA; he can seek a receivership for the HOA; or he can sue board members for a breach of fiduciary duty." *Id*.

These same remedies are available to the Unit Owner, and members of condominium unit owners' associations throughout Virginia and are the appropriate means for addressing an owner's grievance with their respective common interest community association.

B. Plaintiff's Contractual Remedies Do Not Include the Right to Withhold the Payment of Assessments

While it is clear that a unit owner's power to withhold the payment of assessments is not statutorily authorized by Virginia law, this Court has recognized a contractual right to set-off among parties in certain instances. First, where such right is contractually provided, and second, where a breach of contract was caused by bad faith or a willful departure from the contract.

The Virginia Supreme Court has consistently held that a condominium's governing documents are contractual in nature. "The power exercised by the Association is contractual in nature and is the creature of the condominium documents to which all unit owners subjected themselves in purchasing their units. It is a power exercised in accordance with the

private consensus of the unit owners." *Unit Owners Association of BuildAmerica-1 v. Gillman*, 223 Va. 752, 766 (1982).

At trial, it was undisputed that the Association had the authority to impose and collect assessments from the Unit Owner. Such authority was expressly set forth in the Bylaws for the condominium. It does not appear from the record that the Unit Owner argued that there was any express authority under the Bylaws to withhold its payment of assessments.

This Court has also held that "[w]hen the meaning of language in a contract is clear and unambiguous, as it is here, the contract needs no interpretation, and "the intention of the parties must be determined from what they actually say and not from what it may be supposed they intended to say." *Sully Station II Community Ass'n, Inc. v. Dye*, 259 Va. 282, 284, 525 S.E.2d 555 (2000) (citing *Carter v. Carter*, 202 Va. 892, 896, 121 S.E.2d 482, 485 (1961)).

As the Court stated in *High Knob, Inc. v. Allen*, 205 Va. 503, 507, 138 S.E.2d 49 (1964), "While courts cannot make contracts for the parties, neither will they permit parties to be released from the obligations which they have assumed if this can be ascertained with reasonable certainty from language used, in the light of all the surrounding circumstances. This is especially true where there has been partial performance." The Frederick

County Circuit Court held that, “[t]his principle also applies to restrictive covenants, and courts will not permit parties to be released from obligations which they have legally assumed simply because in retrospect they may be perceived as unfair.” *Lake Holiday Country Club, Inc. v. Love* 52 Va. Cir. 471 (2000).

Here, the Unit Owner seeks to be released from its contractually required covenant to pay assessments, despite the Association’s, at a minimum, partial performance. Assuming arguendo that the Unit Owner’s underlying dispute over the parking regime is valid, the Unit Owner still enjoyed other services and benefits provided by the Association.

The Frederick County Circuit Court further held that, “[p]eople enter contracts like the original contract to purchase the lot in this case to receive some perceived benefit, and although the benefit received may be slight, or in retrospect regretted, that is not a legal reason to vitiate the obligation between the parties.” Irrespective of the validity of the Unit Owner’s claims related to parking, the fact that the Unit Owner enjoyed other benefits from the Association does not excuse Unit Owner’s contractual obligation to pay assessments to the Association.

The Frederick County Circuit Court ultimately held that “[T]he burden was on the Defendant lot owner to prove that the restrictive covenants

obligating him to pay the assessments have been terminated or amended or that their provisions had been waived by the parties, which he did not prove." Absent the termination, amendment or waiver of the Associations' covenant to pay assessments, here, the Plaintiff was required to pay assessments to the Association and failed to do so. The record does not show that the covenant to pay assessments was terminated, amended or waived. Thus, the Unit Owner's appropriate remedy in this case was to pay the assessments owed and seek recovery of excess funds paid in a subsequent lawsuit against the Association.

Finally, the Virginia Supreme Court has held that a party "is entitled to recover the balance due on a contract as an offset in the absence of evidence that the breach of the contract was caused by bad faith or a willful departure from the contract." *Nichols Const. Corp. V. Virginia Machine Tool Col.*, LLC, 276 Va. 81 (2008) (citing *Kirk Reid Co. v. Fine*, 205 Va. at 789–90, 139 S.E.2d at 837). The record does not support a finding that the Association's Board of Directors conducted itself with bad faith or willfully departed from the Association's obligations under the Condominium Instruments.

II. The Trial Court Erred in Declaring the Board's 2015 Designation of Phase I Parking as Reserved Common Elements as Void.

The Trial Court declared the Board-adopted parking regime void as exceeding the Board's authority, specifically because the regime (i) violated the zoning ordinance and (ii) impermissibly converted common elements into limited common elements. As *Amicus*, WMCCAI specifically argues that the court erred in determining (ii) above; i.e., that the Board impermissibly converted common elements into limited common elements.[3]

A. The Clear Terms of the Condominium Instruments Establish Authority for the Association's Board of Directors to Reserve Common Element Parking Spaces to the Exclusive Use of Less Than All of the Unit Owners.

Condominiums are creatures of statute that may be created only by recording condominium instruments in accordance with Section 55.1-1907 of the Condominium Act. As discussed, above, the condominium instruments, which include the declaration and bylaws, are contractual in nature and define the powers of a condominium unit owners association. *Unit Owners Ass'n of Buildamerica-1 v. Gillman*, 223 Va. 752, 766 (1982).

[3] WMCCAI supports the Association's arguments in favor of the Association's assignment of errors to (i) above about a local zoning ordinance; and, for brevity's sake, WMCCAI sees no reason to further supplement those arguments.

Although covenants may be disfavored, it is critical that condominium unit owners' associations be able to enforce the terms of their condominium instruments to which all unit owners agreed and subjected themselves when purchasing their units. The words included in the condominium instruments are the words to which unit owners and their association must rely upon to conduct their roles in administration and governance of the condominium – confidence must be had in the words used precisely for their definiteness. Condominium instruments must be "construed as written without adding terms that were not included by the parties...No word or clause in the contract will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly." *Fairfax Cnty Redevelopment & Housing Authority v. Shadowood Condominium Association et al*, 83 Va. Cir. 33 (Va. Cir. Ct. 2011) (quoting *PMA Capital Ins. Co. v. US Airways, Inc.*, 271 Va. 352, 358 (2006)). When the terms of a restrictive covenant are clear and unambiguous, the language used will be taken in its ordinary signification, and the plain meaning will be ascribed to it.'" *Barris v. Keswick Homes, LLC*, 268 Va. 67 (2004) (quoting *Marriott Corp. v. Combined Properties, L.P.*, 239 Va. 506, 512 (1990)).

Unlike a property owners' association in which the association entity owns the interest in common area subject to the owners' easement of enjoyment, a condominium unit owners' association does not actually own anything. Instead, it is the *unit owners* who own an undivided interest in the common elements. However, "the authority to control the use of the common elements is vested in the Association by the condominium documents." *Gillman*, 223 Va. at 766; *see also* Section 55.1-1956.B of the Act (providing that the executive board of a unit owners' association "has the irrevocable power as attorney-in-fact on behalf of all the unit owners and their successors in title with respect to the common elements"). It would give any board great pause to exercise any authority if it cannot rely on the express authority it has in its association's condominium instruments.

Here, the clear authority of the Board to exercise its control over the common elements needed to be upheld. It was not. Section 3.1 of the Association Bylaws establishes general Board authority, on behalf of the Association, "to do all such acts and things as are not by the Condominium Act or the condominium instruments to be exercised and done by the Association." (R. 1713.) With regard to the common element parking spaces located in Phase I of the Condominium, Section 5.11 of the Bylaws provides that parking spaces are available on a "first come, first served" basis, "*except as the Board may otherwise determine.*" (emphasis added). (§ 5.11, R.

1732-1733.) Moreover, Section 3.1(p) of the Bylaws provides that the Board, *in its sole discretion*, may "designate certain common elements as Reserved Common Elements and impose such restrictions and conditions on the use thereof *as the Board of Directors deems appropriate*." (emphasis added). (R. 1713.) Section 1.3(h) of the Bylaws defines *Reserved Common Element* as a "common element in which the Board of Directors has granted a revocable license for exclusive use *by less than all of the unit owners*." (R. 1708.) So, it is clear from the Bylaws that the ***Board*** retains substantial authority to control use of the common elements on behalf of the Association, including licensing parking spaces to less than all the unit owners.

In reliance on the terms of the Bylaws, the Board decided in October, 2015, to designate the common element parking spaces in Phase I of the Condominium for the exclusive use of the owners of units in Phase I. The authority exercised by the Board to restrict use of common elements to less than all unit owners, particularly with regard to parking, should be upheld because the condominium instruments established express authority in the Board to restrict use of common elements to less than all of the unit owners.

B. Case Law in Other Jurisdictions Support the Board's Actions in Establishing the Phase I Parking Regime.

The ability of a board of directors of a condominium unit owners association to reserve common element parking spaces to less than all the

unit owners has been supported throughout the country where such authority is established in the condominium instruments. *See Juno By the Sea North Condominium Ass'n v. Manfredonia*, 397 So.2d 297 (Fla. Dist. Ct. App. 1980); *Allera v. Huntington Woods Condo Trust*, 167 N.E.3d 894 (Mass. App. 2021); *Lee-Davis v. Dauphin Surf Club Ass'n, Inc.*, 581 So.2d 1110 (Ala. Civ. App. 1991) (holding that unit owners "cannot block the leasing of the mineral interests in the limited common elements and the common elements of the condominiums" because the "Association retains *title* to the undivided interests in the common elements" and has authority to implement reasonable regulations with respect to the common elements).

This Court should not go against the majority of United States jurisdictions that have upheld the authority of boards of directors to regulate common elements consistent with its recorded governing documents. It is a foundation of community association governance that each owner has a right to rely upon the recorded condominium instruments, and similarly for the boards of directors to rely upon and exercise authorities established therein.

Governance through a representative democracy of volunteer leaders elected by their peers is also foundational to community associations. Ignoring the fact that the Unit Owner held almost a quarter of the voting interest in the Condominium, any unit owner that is displeased with an action

of the Board has a right to vote and oust current Board members – and take action to "correct" any perceived wrongs.

WMCCAI believes it is critical that Virginia common interest communities be permitted to rely upon and govern in accordance with the directives established in each community's recorded covenants and the decisions of each community's elected leaders. With clear support from jurisdictions across the country and the express language in the condominium instruments described above, WMCCI urges this Court to determine that the Board had authority to restrict use of certain portions of the common elements to less than all of the unit owners by designating them as Reserved Common Elements, not limited common elements.

C. Because the Parking Regime was Implemented Within the Board's Scope of Authority, the Business Judgment Rule Precludes the Court from Replacing Its Judgment for That of the Board.

The Trial Court recognized that the *business judgment rule* is available to and shields the Board except to the extent that the Board decision involves (i) fraud, (ii) bad faith, (iii) breach of trust, (iv) gross mismanagement, or (v) *ultra vires* acts. *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 857 (1958). The Trial Court's conclusion that the *business judgment rule* did not apply in this case is based on its determination that the Board's decision with respect to parking was *ultra vires* – that the decision violated the zoning ordinance

and exceeded authority established in the condominium instruments and the Act. There was no finding that the Board's decision involved fraud, bad faith, breach of trust, or gross mismanagement.

It follows that, absent an *ultra vires* act, the court must apply the *business judgment rule* and not replace its judgment (i.e., whether the parking regime and any conditions or lack thereof are "fair" or "appropriate") for that of the Board. The Bylaws do ***not*** require that such reservation be expressly revocable, as a Reserved Common Element by its very nature is revocable. *See Colony Council Bd. Of Directors v. Hightower Enterprises*, 228 Va. 197, 200 (1984) (holding "[t]he bylaws make no such statement. Had this been the intention of the parties it should have been spelled out in plain language"). The Bylaws also do not require that the designation be conditioned on anything, as Section 3.1(p) of the Bylaws clearly reflects that restrictions and conditions are only necessary if deemed appropriate by the Board.

Further, the trial court could not rewrite the Bylaws to require that said reservation must be revocable or conditional. *See Va. Electric & Power Co. v. Northern Va. Regional Park Authority*, 270 Va. 309, 316 (2005) (holding "where an agreement is complete on its face, is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the

instrument itself”); *see also Amos v. Coffee*, 228 Va. 88, 92 (1984) (holding that “courts are bound to say that the parties intended what the written instrument plainly declares”).

The condominium instruments establish clear and express authority for the Board to restrict common element parking spaces to the exclusive use of less than all of the unit owners. The Board’s exercise of that authority is subject to the *business judgment rule* which restricts the scope of the Court’s review to the decision. *See Gottlieb*, 199 Va. at 857 – 58 (holding that “the action of the corporation is conclusive, if it is in accordance with the law and the powers conferred upon the corporation. When there is evidence tending to support the conclusion, the courts will not interfere with the merits of the decision”). Because the Trial Court did not determine that the Board’s regulatory authority was exercised through fraud, bad faith, breach of trust, or gross mismanagement, the Trial Court erred in declaring the parking regime void when it also erroneously determined that the Board’s designation of reserved common elements was *ultra vires* despite the Board’s plain authority to do so established in the condominium instruments.

III. The Trial Court Erred in Declaring the Board's Special Assessment for Attorneys’ Fees and Costs Incurred in this Case Could Not Be Assessed Against the Unit Owner.

The Trial Court declared that special assessments levied by the Board to pay for attorneys’ fees and costs incurred by the Association could not be

enforced against the Unit Owner because the Unit Owner "did not benefit from the defense of this suit and therefore should not be improperly specially assessed for it." Trial Transcript at Lines 3 – 6. As *Amicus*, WMCCAI argues that the court erred in its decision because such a conclusion is inconsistent with the condominium instruments.

The Trial Court's decision relies entirely on Section 5.1(c)(2) of the Bylaws, which provides in pertinent part that

> "[a]ny other common expenses paid or incurred for the benefit of less than all of the condominium units shall also be paid specially assessed against the condominium unit or units involved to the extent each is thereby benefitted."

However, the Trial Court ignores the other portions of this subsection which are critical in interpreting how the subsection should be applied. As explained by Virginia Supreme Court, "[a] basic canon of construction requires that 'words grouped in a list should be given related meaning.' . . . 'When . . . any words – are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar.'" *Sainani v. Belmont Glen Homeowners Ass'n*, 297 Va. 714 (2019) (citations omitted).

In reading Section 5.1(c)(2) of the Bylaws, as a whole, the more specific types of common expenses identified, as opposed to the "catch-all" provision relied upon by the Trial Court, contemplate the provision of services

or maintenance that are intended to benefit specific units (i.e., utility services, cleaning and painting garage doors). Legal expenses, on the other hand, are intended to benefit *all* of the unit owners. Accordingly, legal expenses have nothing in common with the type of common expenses enumerated in Section 5.1(c)(2) of the Bylaws and therefore may be assessed to *all* unit owners.

This conclusion is consistent with other provisions of the condominium instruments and the Act. Section 3.1(k) of the Bylaws provides the Board with the authority to "pay the cost of all authorized services rendered to the [Association] and not billed to unit owners of individual units or otherwise provided for in Sections 5.1 and 5.3 of these Bylaws." Legal services are rendered to the *Association*, not billed to owners of individual units. Relatedly, Section 55.1-1958.D of the Act provides that any judgment for money against a unit owners' association is a lien against each unit in proportion to the liability of each unit owner for common expenses established in accordance with the Act. Practically, this means that any unit owner who obtains a money judgment against their own association is themselves jointly and severally liable for their proportionate share of the judgment along with the rest of the unit owners.

Requiring boards of directors of condominium unit owners' associations to determine what types of common expenses benefit all or less than all of the unit owners would create an incredible obligation that would be subject to challenge and different interpretations. If an attorney drafts a demand letter on behalf of the association, must that negligible cost be specially assessed against the other unit owners? If a unit owner refuses to utilize a trash service provided by the association, must that unit owner's share of the expense be allocated among his neighbors? If a unit owner does not use the pool, may the unit owner insist that her assessments be discounted? The examples are endless and would result in an environment where unit owners could conceivably "opt-in" and "opt-out" of every service the association provides to its residents.

As legal fees and costs incurred in this list are for the benefit of *all* the unit owners, as opposed to being a cost incurred to benefit a specific unit, the Unit Owner should be responsible for paying its proportionate share of any special assessment levied to cover the expenses of this case. The Trial Court accordingly erred.

CONCLUSION

The arguments raised in this Brief are critical not only to this case, but to condominiums across Virginia – and possibly throughout the country. As

described further above, WMCCAI, as *Amicus* in support of the Association, believes strongly that the Trial Court erred in several respects, specifically that (i) the Unit Owner was allowed to withhold assessments owed to the Association without authority, (ii) the Board's reserved common element parking scheme was *ultra vires* and void, and (iii) the Board could not assess the Unit Owner for the attorneys' fees and costs incurred by the Association in defending this case. Accordingly, this Court should reverse the decision of the Trial Court and remand the case for further proceedings consistent with its decision.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 3rd day of June, 2022, I caused the foregoing brief to be filed using the Court's electronic case filing system, and caused a copy of the foregoing to be served on the following counsel via electronic mail:

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Further, Pursuant to Rule 5A:4(d), this Brief complies with the applicable word count limit of Rule 5A:19(a) of the Rules of the Virginia Court of Appeals because it contains 7,058 words, not including the excluded material listed in Rule 5A:20(h).

/s/ Andrew J. Terrell