IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-179

Filed 5 December 2023

Mecklenburg County, No. 20CVS2194

DAVID BAYNE ALEXANDER, et al., Petitioners.

v.

JEFFREY M. BURKEY, et al., Respondents.

v.

DIANE K. BECKER and THOMAS H. BECKER, Co-trustees of the Diane K. Becker Revocable Living Trust dated December 19, 2006, et al., Third Party Respondents.

v.

THE COURTYARDS OF HUNTERSVILLE CONDOMINIUM ASSOCIATION, INC., Third Party Respondent.

Appeal by third party respondent from judgment entered 13 October 2022 by Judge J. Thomas Davis in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 September 2023.

Law Firm Carolinas, by Harmony Taylor, for third party respondent.

Alexander Ricks, PLLC, by Roy H. Michaux, Jr., for petitioners.

Frances M. Clairmont and Joe L. Dominguez, pro se petitioners.

Ward and Smith, P.A., by Alexander C. Dale. Brief of Amicus Curiae for third party defendant.

DILLON, Judge.

This dispute concerns two issues: (1) whether a certain residential condominium had the authority to enact an amendment to its declaration to require its association to take on the responsibility to maintain certain common elements and, (2) if so, whether the amendment adopted in this case with the approval by a supermajority of the unit owners was validly enacted. The trial court declared the amendment invalid. We reverse and remand for further proceedings.

I. Background

This appeal is the second in this matter. The first, *Alexander v. Becker*, 280 N.C. App. 131, 866 S.E.2d 525 (2021) (hereinafter "*Alexander I*"), involved a dispute between the Courtyards of Huntersville (the "Community") and its unit owners, which belong to a unit owner's association (the "Association"). The Community is composed of fifty-one (51) residential units, each of which is a free-standing, single-family dwelling structure. However, the Community is legally a condominium, established under a Declaration of Condominium (the "Declaration"), which mirrors the North Carolina Condominium Act (the "Act").

The dispute in *Alexander I* concerned whether the Association bore the responsibility to maintain and insure the exterior structure (roofs, outer walls, and gutters) of each unit or whether this responsibility lay with each unit owner. This answer directly affects the economic obligations of each unit owner as the units vary

in size: if the responsibility to maintain and insure the exterior belongs to the Association, the costs would be split equally among the unit owners.

We held in *Alexander I* that the Association had the duty under the Declaration "to maintain insurance for" the outer walls, roofs, and gutters against certain perils, but that each individual unit owner was responsible for the maintenance and repair of these outer structures on his/her unit.

Thereafter, the Association recorded an amendment to the Declaration at Book 37237, Pages 511-518 of the Mecklenburg County Register of Deeds. The Amendment was approved by the unit owners holding at least sixty-seven percent (67%) of all votes entitled to be cast.

The Amendment purported to amend the Declaration to provide that the Association would now be responsible to maintain the structural limited common elements. Specifically, it purported to amend Article III, Section 2(c) of the Declaration to provide that the Association would be responsible to maintain:

> (3) all portions of the Limited Common Elements beginning at the upper boundary of the Unit described in Article V, Section 2(a)(1) and proceeding upward and outward through and including the outermost surface of the shingles on the roof of the structure. To avoid any ambiguity, this shall include all elements between the unit boundary and the outermost surface of the building exteriors, including the exterior surface;
>
> (4) all portions of the Limited Common Elements beginning at the vertical boundaries of the Unit described in Article V, Section 2(a)(3) and proceeding outward through and including the outermost surface of the building exterior. To

> avoid any ambiguity, this shall include all elements between the unit boundary and the outermost surface of the building exteriors, including the exterior surface; and
>
> (5) all portions of the gutters, downspouts and associated hardware serving each residential building.

The Amendment also purported to give the Association the power to allocate funds and maintain reserves to cover the costs associated with maintaining and repairing the aforementioned limited common elements.

Subsequently, Petitioners moved the trial court for a judgment concluding that the Amendment was invalid and unenforceable.

On 13 October 2022, the trial court entered its final judgment, holding that the Amendment could not be approved without *unanimous* approval of the unit owners and, therefore, was invalid:

> [T]he Amendment to the extent it allocates to the Association the obligation to repair and maintain those limited elements… (including but not limited to the roof, exterior walls, and gutters), and to the extent it allows the costs of the same to be assessed to the Unit owners by the Association, exceeds the powers granted the Association by NCGS Chapter 47C, and is contrary to the mandatory provisions of NCGS Chapter 47C. In addition, assuming arguendo that the Association had authority to pass the Amendment, it fails in that it was not adopted by the required unanimous vote of the Unit owners.

The Community appealed.

II. Analysis

The Community argues that the trial court improperly interpreted the

statutory framework of the Act and that contrary to the trial court's judgment, (1) the Association does possess the authority under the Act to maintain limited common elements and assess unit owners for the cost, and that (2) the Amendment is valid and enforceable because a supermajority vote, rather than a unanimous vote, was sufficient to pass the Amendment under both the Act and the Declaration.

Because both issues in this appeal concern statutory interpretation, we conduct a *de novo* review. *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 730, 843 S.E.2d 206, 210 (2020).

A. The Association's Authority under the Act

We must first consider whether the Association had the authority under the Act to maintain limited common elements and assess unit owners for the cost.

First, the Community argues that the trial court improperly treated the Amendment as unauthorized under N.C. Gen. Stat. § 47C-3-102(10), which reads:

> (a) Unless the declaration expressly provides to the contrary, the association, even if unincorporated, may do all of the following:
>
> (10) Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements other than limited common elements described in subsections 47C-2-102(2) and (4) and for services provided to unit owners.

N.C. Gen. Stat. § 47C-3-102(a)(10) (2021).

The Courtyard correctly argues that this statute does not prevent an association from providing for *the repair and maintenance* of limited common

elements. Indeed, the Act expressly allows a condominium association to assess fees associated with the repair and maintenance of limited common elements:

> (1) Any common expense associated with the maintenance, repair, or replacement of a limited common element must be assessed against the units to which that limited common element is assigned, equally, or in any other proportion that the declaration provides[.]

N.C. Gen. Stat. § 47C-3-115(c)(1) (2021).

We further note an official comment to § 47C-3-107, which governs the assessment of fees for the upkeep of common elements, and states the following:

> *The Act permits the declaration to separate maintenance responsibility from ownership.* This is commonly done in practice. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. *See* Section 1-103(16). As a result, under subsection (a), *unless the declaration requires that unit owners are responsible for the upkeep of such limited common elements*, the association will be responsible for their maintenance.

N.C. Gen. Stat. § 47C-3-107 cmt. 1 (2021) (emphasis added).

Likewise, an official comment to § 47C-3-108, which governs limited common elements generally, also reflects the above concept:

> Like all other common elements, limited common elements are owned in common by all unit owners. The use of a limited common element, however, is reserved to less than all of the unit owners. *Unless the declaration provides otherwise*, the association is responsible for the upkeep of a limited common element and the cost of such upkeep is

> assessed against all the units.

N.C. Gen. Stat. § 47C-2-108 cmt. 1 (2021) (emphasis added).

Thus, because the Declaration did "provide otherwise" than the default treatment of repair and maintenance costs provided for in the Act, we conclude the Association here did have authority under the Act to maintain limited common elements and assess unit owners for the cost.

B. Unanimous Consent

Next, the Community argues that the trial court erred by concluding that the Amendment was invalid and unenforceable because it was passed by a mere supermajority instead of with unanimous consent of all unit owners.

According to § 47C-2-117(d) of the Act:

> Except to the extent expressly permitted or required by other provisions of this Chapter, no amendment shall create or increase special declarant rights, increase the number of units, or change the boundaries of any unit, the allocated interest of a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.

N.C. Gen. Stat. § 47C-2-117(d) (2021).

Here, the Community argues that the trial court erroneously concluded that the Amendment changed the allocated interests of units. The Act defines the "allocated interest of the unit" as the "undivided interests in the common elements, the common expense liability, and votes in the association allocated to each unit." N.C. Gen. Stat. § 47C-1-103(2) (2021).

We conclude nothing in the Amendment altered the voting interests allocated to each unit. Specifically, the Amendment did not purport to change the "undivided interests in the common elements", which the Declaration defines as the following:

> "Common Elements Interest" shall mean and refer to the undivided interest in the Common Elements allocated to each unit… the total of which shall equal one (1) since the undivided interest in the Common Elements is stated as fractions. The Common Elements Interest has been calculated based on a par value for each Unit type that is set forth on Exhibit C, which par values have been assigned on the basis of various factors, including average fair market value, replacement costs, relative size, and simplicity, and shall be used to allocate the division of proceeds, if any, resulting from any casualty loss or eminent domain proceedings, and to determine each Unit's share of Common Expenses.

Each unit continues to hold an undivided 1/51 interest, which results in a total of one full undivided interest in the common elements. Because the Amendment did not alter the 1/51 interest allocated to each unit, it did not affect the unit owners' "undivided interests in the common elements".

We last consider whether the Amendment changed the "common expense liability". Here, although the Amendment increased the Association's common expenses, it did not change any unit owner's relative share of the common expenses. As the Community notes in its brief, "if a unit owner was responsible for 5% of the common expenses before the Amendment, they remained responsible for the exact same 5% of the common expenses *after* the Amendment."

Therefore, we conclude that the Amendment did not change the relative

common expense liability of any unit. As a result, we conclude that the trial court erred when it held that the Amendment was invalid on the basis that it purported to alter the allocated interests of the units. Because the Amendment did not alter the interests allocated to each unit, unanimous consent was not required for the Amendment to be valid and enforceable.

III. Conclusion

We conclude that the Community did possess the authority under the Act to maintain limited common elements and assess unit owners for the cost. We also conclude the Amendment was valid validly enacted, notwithstanding that it was passed without unanimous consent. Therefore, we reverse the trial court's judgment concluding that the Amendment was invalid and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges ARROWOOD and GORE concur.

Report per Rule 30(e).