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STATE OF NEW MEXICO
THIRTEENTH JUDICIAL DISTRICT
COUNTY OF VALENCIA

SOCORRO ELECTRIC COOPERATIVE, INC.,
Plaintiff,
v.
CHARLENE WEST, et al.,
Defendants,
And

No. D1314-CV-2010-0849
Judge: Mitchell

CHARLES WAGNER, individually and
on behalf of those similarly situated, et al.,
Cross Claim Plaintiff,

v.

SOCORRO ELECTRIC COOPERATIVE, INC.,
et al.,
Cross Claim Defendants.

NOTICE OF ADDITIONAL CITATIONS

PLEASE TAKE NOTICE of the additional citations as part of the previously filed brief addressing matters related to the Court's authority and appropriate remedy.

Respectfully submitted this 5th day of November 2012.

*_"Electronically Filed" /s/ Stephen K. Kortemeier_*
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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the last date above, a true and correct copy of the foregoing was e-mailed as follows:

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__/s/ Shiloh Pallante__

HN19 **Ultra vires [***37]** .

> (a) Except as provided in subsection (b) of this section, the validity of corporate **[**354]** action may not be challenged on the ground that the corporation lacks or lacked power to act.
>
> (b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the attorney general, a director or by a member or members in a derivative proceeding.
>
> (c) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee or agent of the corporation. The proceeding may be brought by a director, the corporation, directly, derivatively, or through a receiver, a trustee or other legal representative, or in the case of a public benefit corporation, by the attorney general.

Wyo. Stat. Ann. § 17-19-304 (LexisNexis 2005). Since the exception in subsection (b) is plainly not applicable as this is not an action to enjoin any corporate act, Appellants' claims are clearly barred under subsection (a) of the statute. Zimmer and Crittenden have completed their service as general manager:

> HN20 When **[***38]** an ultra vires contract has been fully performed on both sides, neither party can maintain an action to set aside the transaction or to recover what has been parted with. In other words, neither a court of law nor a court of equity will interfere to deprive either the corporation or the other party of money or other property acquired under the contract. The reason for the rule, which is well settled, is that the attempted contract, being void, is disregarded, and in its place a quasi-contractual obligation to do justice is enforced. Ultra vires will not justify the reopening of a completely executed transaction. Stated differently, if an ultra vires contract is fully executed on both sides, it cannot be attacked or set aside either by the corporation or by the other party to the contract, and the fact that the contract is ultra vires cannot be collaterally urged by a third person not a party to the contract.

7A Fletcher Cyclopedia Corporations § 3497 (1997).

[*P24] Appellants did not cite or discuss Wyo. Stat. Ann. § 17-19-304 in their argument on this issue. The egregiousness of this failure is compounded by the fact that Appellants were **[***39]** obviously aware of the statute because they cite it in support of an argument on another issue. Appellants' argument is not only not cogent, it is frivolous, and we can only conclude that the claim was pursued in bad faith. The summary judgment is affirmed.

Fraud, negligent misrepresentation and conflict of interest claims against Cox and Cox, Ohman & Brandstetter

[*P25] Cox was elected to the Board in June of 1994. The Association had a policy of reimbursing directors for expenses incurred while in the performance of their duties. The policy was encompassed within the Association's accounting procedures. Cox used the resources of his law firm in performing his duties as a director. He sought reimbursement for the expenses incurred by his law firm. In a letter dated March 28, 1995, to the then general manager of the Association, Joseph Iwanski, Cox referenced an agreement for reimbursement:

> This will confirm our understanding as to the reimbursement to be paid to this office

> and myself for Director costs and expenses incurred hereafter. We understand that such Director costs and expenses will be reimbursed or paid to us by the Association as follows:
>
> 1. **[***40]** $ .10 per page for photocopy cost (regular is $ .20 per page);
>
> 2. $ 1.00 per page for facsimiles sent;
>
> 3. Actual postage costs above the regular postal rate for first class letters;
>
> 4. Actual cost for long distant telephone charges plus 15% to cover bookkeeping, regular service and system maintenance/replacement costs;
>
> 5. Milage [sic] at the going rate allowed by the IRS for SVRA business travel other that [sic] to the ranch;
>
> **[**355]** 6. Airfare, if any, at cost.
>
> If the above does not meet with your and the Associations [sic] understanding and approval, please advise immediately. Otherwise, we will hereafter rely on the foregoing.

The Association paid all invoices submitted by Cox and his firm for expense reimbursement.

[*P26] Appellants demanded that the Association seek repayment of the monies paid to Cox and his law firm and when the Board refused, they filed this action. Appellants alleged that Cox had engaged in a conflict of interest transaction without obtaining prior authorization of the Association in violation of Wyoming statute and the Association bylaws. Appellants alleged that the Board's failure to obtain repayment breached its fiduciary duties to **[***41]** the Association and its members. In separate claims against Cox, Appellants alleged that he engaged in fraud and/or negligent misrepresentation when he represented to the Board that Zimmer had settled the claim against him for overpayment of salary with a prior Board. The district court granted Cox's motion for summary judgment finding that since "Cox was not doing business with the Association when he was incurring the expenses [rather] he was acting in furtherance of the Association's business in his capacity as a director," there was no conflict of interest transaction. The court also granted summary judgment on the fraud and negligent misrepresentation claims since the finding that Cox's billings were appropriate precluded them.

[*P27] We can quickly dispense with the fraud and negligent misrepresentation claims. Initially, however, we note that the district court erred in its reasoning for granting summary judgment. Appellants' claims for fraud and misrepresentation had nothing to do with Cox's expense billings; rather, they concerned statements made by Cox to the Board with regard to Zimmer's claims for overtime. Nevertheless, after reviewing the record, we conclude **[***42]** that summary judgment was appropriate. As was the case with the claim of fraud against Zimmer, the record does not contain any evidence to support a claim of fraud against Cox. Appellants offer only unsupported allegations regarding Cox's motivations for his statements to the Board. In order to prove negligent misrepresentation, Appellants would have to show that "one who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Richey v. Patrick*, 904 P.2d 798, 802 (Wyo. 1995), (quoting

Restatement, Second, Torts § 552(1) (1977)). We can locate no evidence in the record to support an allegation that Cox failed "to exercise reasonable care or competence in obtaining or communicating the information" regarding Zimmer's overtime claim to the Board. Again, Appellants offer nothing **[***43]** but allegations in support of their claims. The district court's summary judgment is affirmed.

[*P28] Appellants contend that the reimbursement of expenses to Cox and the law firm constituted a conflict of interest transaction that required specific board approval. They argue that there are material facts in dispute regarding whether there was an agreement between Cox and the Board for reimbursement of expenses and whether such was sufficient to satisfy the requirement of Board approval that should have precluded summary judgment.

[*P29] We begin with the language of the statute governing director conflicts of interest under the Wyoming Nonprofit Corporation Act:

> *HN21* **Director conflict of interest.**
>
> (a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable if the transaction was fair at the time it was entered into or is approved as provided in subsection (b) or (c) of this section.
>
> **[**356]** (b) A transaction in which a director of a public benefit or religious corporation has a conflict of interest may be approved:
>
> (i) **[***44]** In advance by the vote of the board of directors or a committee of the board if:
>
> (A) The material facts of the transaction and the director's interest are disclosed or known to the board or committee of the board; and
>
> (B) The directors approving the transaction in good faith reasonably believe that the transaction is fair to the corporation; or
>
> (ii) Before or after it is consummated by obtaining approval of the:
>
> (A) Attorney general; or
>
> (B) District court in an action in which the attorney general is joined as a party.
>
> (c) A transaction in which a director of a mutual benefit corporation has a conflict of interest may be approved if:
>
> (i) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board and the board or committee of the board authorized, approved or ratified the transaction; or
>
> (ii) The material facts of the transaction and the director's interest were disclosed or known to the members and they authorized, approved or ratified the transaction.
>
> (d) For purposes of this section, a director of the corporation has an indirect interest in a transaction if:

> (i) Another entity in which **[***45]** the director has a material interest or in which the director is a general partner is a party to the transaction; or
>
> (ii) Another entity of which the director is a director, officer or trustee is a party to the transaction.
>
> (e) For purposes of subsections (b) and (c) of this section a conflict of interest transaction is authorized, approved or ratified, if it receives the affirmative vote of a majority of the directors on the board or on the committee, who have no direct or indirect interest in the transaction, but a transaction shall not be authorized, approved or ratified under this section by a single director. If a majority of the directors on the board who have no direct or indirect interest in the transaction vote to authorize, approve or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under paragraph (b)(i) or (c)(i) or this section if the transaction is otherwise approved as provided in subsection (b) or (c) of this section.
>
> (f) For purposes of paragraph (c)(ii) of this section, **[***46]** a conflict of interest transaction is authorized, approved or ratified by the members if it receives a majority of the votes entitled to be counted under this subsection. Votes cast by or voted under the control of a director who has a direct or indirect interest in the transaction, and votes cast by or voted under the control of an entity described in paragraph (d)(i) of this section, shall not be counted in a vote of members to determine whether to authorize, approve or ratify a conflict of interest transaction under paragraph (c)(ii) of this section. The vote of these members, however, is counted in determining whether the transaction is approved under other sections of this act. A majority of the voting power, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.
>
> (g) The articles, bylaws or a resolution of the board may impose additional requirements on conflict of interest transactions.

[357]** Wyo. Stat. Ann. § 17-19-831 (LexisNexis 2005). HN22"We endeavor to interpret statutes in accordance with the Legislature's intent. **[***47]** We begin by making an "' inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection.'" [citation omitted] We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe together all parts of the statute in pari materia." *In re Estate of Novakovich*, 2004 WY 158, P13, 101 P. 3d 931, 934 (Wyo. 2004) (quoting *Wyodak Resources Development Corporation v. State Board of Equalization*, 2001 WY 92, P7, 32 P. 3d 1056, [1058] (Wyo. 2001) and *Exxon Corporation v. Board of County Commissioners*, 987 P.2d 158, 161-62 (Wyo. 1999)).

[*P30] This statute prevents a corporate director of a nonprofit corporation from engaging in activity with the corporation in which the director has a direct or indirect interest unless certain specific procedures are followed by the governing board. The purpose of the statute, obviously, is to protect the corporation from potential unfair dealing by providing for review of conflict of interest transactions by disinterested board or committee members. The Association's bylaws echo the statutory purpose:

> No **[***48]** member of the Board of Directors or Officers or member of any

> committee of the Association shall directly or indirectly benefit financially from or possess an interest in any contract or transaction relating to the property, facilities, or operation of the Association, or the furnishing of supplies, equipment or services to the Association unless specifically authorized by the Board of Directors.

The threshold question then is whether the statute or bylaw is even applicable to this situation. The district court concluded that it was not since Cox was not doing business with the Association; rather, Cox was incurring the expenses while furthering the Association's business in his capacity as a director. We agree.

[*P31] The phrase "conflict of interest transaction" is defined by the statute as "a transaction with the corporation in which a director of the corporation has a direct or indirect interest." What constitutes a "transaction" is not defined by the statute or elsewhere in the Wyoming Nonprofit Corporation Act. As previously noted, Wyoming's Nonprofit Corporation Act is based on the Revised Model Nonprofit Corporation Act. While that Model Act and its official comments **[***49]** are silent on what comprises a "transaction," the drafters "decided to track the [Model Business Corporation Act] in form and substance wherever appropriate[.]" Revised Model Nonprofit Corporation Act, Introduction at xx (1988). The substantively similar conflict of interest provision found in the Model Business Corporation Act provides some guidance. In the Introductory Comments to that Act a definition of what constitutes a "transaction" for conflict of interest analysis is found:

> The subchapter is applicable only when there is a "transaction" by or with the corporation. For purposes of subchapter F, HN23 "transaction" generally connotes negotiations or a consensual bilateral arrangement between the corporation and another party or parties that concern their respective and differing economic rights or interests - not simply a unilateral action by the corporation but rather a "deal."

2 Model Business Corporation Act Annotated § 8.60, at 8-373 (3rd ed. 1998). The official comment to the Model Act goes on to state:

> To constitute a director's conflicting interest transaction, there must first be a transaction by the corporation, its subsidiary, or controlled entity **[***50]** in which the director has a financial interest. As discussed earlier, the safe harbor provisions provided by subchapter F have no application to circumstances in which there is no "transaction" by the corporation, however apparent the director's conflicting interest. Other strictures of law prohibit a director from seizing corporate opportunities for himself and from competing against the corporation of which he is a director; subchapter F has no application to such situations. Moreover, a director might personally benefit if the corporation takes no action, as where the corporation decides not to make a bid. Subchapter F has no application to such instances. The limited **[**358]** thrust of the subchapter is to establish procedures which, if followed, immunize a corporate transaction and the interested director against the common law doctrine of voidability grounded on the director's conflicting interest.

Id. § 8.60, at 8-382-83 (1997 Supplement). The Model Act's definition of "transaction" is consistent with the plain meaning of the word:

> **1**. The act or an instance of conducting business or other dealings. **2**. Something performed or carried out; a business agreement **[***51]** or exchange. **3**. Any activity involving two or more persons. **4**. *Civil law*. An agreement that is intended by the parties to prevent or end a dispute and in which they make reciprocal concessions.

Black's Law Dictionary 1503 (7th ed. 1999).

[*P32] There is no "transaction," as that term is used in the statute, in this case. The reimbursement of a director's expenses incurred while in the performance of his or her duties is not the type of corporate action the statute was designed to cover. There were no "negotiations or a consensual bilateral arrangement between the corporation and another party." There is no "deal" or act or agreement here. The Board made a decision to reimburse directors for the expenses they incurred while in the performance of their duties. That is a policy choice. Indeed, Appellants do not challenge the Board's authority to reimburse director expenses. Appellant Mueller acknowledged in his deposition that the Association had a long-standing practice of reimbursement and that Cox would be entitled to reimbursement for any reasonable expenses. Appellants' complaint is apparently predicated on the Board's decision to reimburse Cox and his **[***52]** law firm for overhead on telephone expenses. Appellants fail to articulate why that action would render the reimbursements to Cox and the law firm a conflict of interest transaction under the statute. The Board's decision was a policy choice within its discretion and authority, one that, as already noted, we will not disturb absent a showing of bad faith. Appellants have sought to expand the reach of Wyo. Stat. Ann. § 17-19-831 far beyond the scope of its plain language and the purpose behind the statute. The summary judgment on this claim is affirmed.

Declaratory judgment claim against the Association

[*P33] On June 24, 1995, the Association's annual election of directors was held. On the ballot was a proposed amendment to the bylaws to increase the number of directors from five to seven. The Association bylaws provided that membership was appurtenant to the subdivision lots, with each lot entitled to one vote. At the time of the election, there were 2,027 lots, or votes, in the Association. The bylaws contained the following provisions relevant to amendments to change the number of directors:

> **Article VIII**
>
> **Directors**
>
> **[***53] Section 2. Number and Qualifications of Directors**. The Board of Directors shall consist of the number of Directors named in the Articles of Incorporation (5) until changed by amendment of the Articles, or by amendment to this Section 2 of these By-laws, fixing or changing such number, adopted by a majority of the voting power; but in no event shall there be less than three (3) Directors. All Directors shall be voting members in good standing of the Association.
>
> ***
>
> **Article XI**
>
> **Amendments**
>
> **Section 1. Powers of Members**. The By-laws of this Association may be adopted, amended, or repealed at a meeting duly called for said purpose by an affirmative vote of at least two thirds (2/3) majority of the voting powers of those present or by proxy. The presence in person or by proxy of fifty percent (50) of all members authorized to vote shall constitute a quorum for the purpose of amending or repealing the By-laws. Any proposed amendment or repeal as provided above shall be submitted in writing to each **[**359]** member of the Association thirty (30) days in advance of said meeting.
>
> **Section 2. Powers of Directors**. Subject to the right of the members to adopt, amend or **[***54]** repeal these By-laws, as provided in [the Powers of Members section above], at any special or regular meeting, the Board of Directors may adopt, amend, or repeal any of these By-laws other than a By-law or amendment thereof changing the authorized number of Directors.

There were 1,042 votes present in person or by proxy at the election meeting. No official statement or record of the vote was released but the contemporaneous notes of director Cox reflected 753 votes in favor and 126 opposed to the amendment. The amendment went into effect in 1996 and a seven-member board has served every year since.

[*P34] Appellants filed a declaratory judgment action seeking to set aside the amendment to the bylaws. The district court granted summary judgment, determining that since a quorum was present and the amendment received two-thirds of the votes present at the meeting, the amendment was effective under Article XI, Section 1, of the bylaws.

[*P35] HN24 Bylaws are contractual in nature. *Skane v. Star Valley Ranch Association*, 826 P.2d 266, 271 (Wyo. 1992). Unsurprisingly, bylaws are interpreted according to the principles applicable to the interpretation of **[***55]** contracts. *Bloom v. National Collegiate Athletic Association*, 93 P.3d 621, 625 (Colo. App. 2004); *Singh v. Singh*, 114 Cal. App. 4th 1264, 1293-94, 9 Cal. Rptr. 3d 4 (Cal. App. 2004); *Dawkins v. Walker*, 794 So. 2d 333, 339 (Ala. 2001). Our standard for interpreting contracts is well-established and straightforward:

> HN25 In contract litigation, when the terms of the agreement are unambiguous, the interpretation is a question of law.... *Examination Management Services, Inc. v. Kirschbaum*, 927 P.2d 686, 689 (Wyo. 1996); *Union Pacific Resources Co. v. Texaco, Inc.*, 882 P.2d 212, 218-19 (Wyo. 1994). Whether a contract is ambiguous is a question of law for the reviewing court. *Prudential Preferred Properties v. J and J Ventures, Inc.*, 859 P.2d 1267, 1271 (Wyo. 1993). We review questions of law de novo without affording deference to the decision of the district court. *Hermreck v. United Parcel Services, Inc.*, 938 P.2d 863, 866 (Wyo. 1997); *Griess v. Office of the Atty. Gen., Div. of Criminal Investigation*, 932 P.2d 734, 736 (Wyo. 1997).
>
> HN26 According **[***56]** to our established standards for interpretation of contracts, the words used in the contract are afforded the plain meaning that a reasonable person would give them. *Doctors' Co. v. Insurance Corp. of America*, 864 P.2d 1018, 1023 (Wyo. 1993). When the provisions in the contract are clear and unambiguous, the court looks only to the "four corners" of the document in arriving at the intent of the parties. *Union Pacific Resources Co.*, 882 P.2d at 220; *Prudential Preferred Properties*, 859 P.2d at 1271. In the absence of any ambiguity, the contract will be enforced according to its terms because no construction is appropriate. *Sinclair Oil Corp. v. Republic Ins. Co.*, 929 P.2d 535, 539 (Wyo. 1996); *Prudential Preferred Properties*, 859 P.2d at 1271.

Roney v. B.B.C. Corporation, 2004 WY 113, P10, 98 P. 3d 196, 200 (Wyo. 2004) (quoting *Amoco Prod. Co. v. EM Nominee Partnership Co.*, 2 P. 3d 534, 540 (Wyo. 2000) and *Double Eagle Petroleum & Min. Corp. v. Questar Exploration & Prod. Co.*, 2003 WY 139, P7, 78 P. 3d 679, [681] (Wyo. 2003)).

[*P36] **[***57]** The parties advance two alternative interpretations of the Association's bylaws. Appellants interpret the phrase "voting power" in Article VIII, Section 2, to require a different approval procedure for amendments concerning the number of directors than that set out in the general provision for amending bylaws in Article XI, Section 1. They point out that the phrase is defined in Wyoming's Nonprofit Corporation Act to mean "the total number of votes entitled to be cast for the election of directors at the time the determination of voting power is made[.]" Wyo. Stat. Ann. § 17-19-140(a)(xxxvi) (LexisNexis 2005). Appellants read Article VIII, Section 2, to require a majority vote of all eligible voters in the Association to amend the bylaw and change the number of directors. Accordingly, they **[**360]** conclude that 1,014 votes out of the 2,027 total were necessary to pass the amendment and since it received only 753 votes, it failed.

[*P37] The Association argues, and the district court agreed, that an amendment to change the number of directors needs, if a quorum is present, two-thirds of the majority of the votes

present at the election meeting as set forth **[***58]** in Article XI, Section 1, of the bylaws. The Association interprets the phrase "voting power" appearing in Article VIII, Section 2, to refer to the total number of votes entitled to be cast in an election of directors at the time of voting. After noting that Wyo. Stat. Ann. § 17-19-707(b) [7] grants nonprofit corporations broad discretion in defining in their bylaws the members entitled to vote, the Association concludes that Article XI, Section 1, defines those members who are entitled to vote as those who are present in person or by proxy at the election. Accordingly, the Association concludes that the amendment was passed pursuant to the bylaws as more than two-thirds of the votes present were in favor.

FOOTNOTES

[7] The statute provides:

> HN27 **§ 17-19-707. Record date; determining members entitled to notice and vote.**
>
> ....
>
> (b) The bylaws of a corporation may fix or provide the manner of fixing a date as the record date for determining the members entitled to vote at a members' meeting. If the bylaws do not fix or provide for fixing a record date, the board may fix a future date as the record date. If no record date is fixed, members on the date of the meeting who are otherwise eligible to vote are entitled to vote at the meeting.

[*59]** **[*P38]** We agree with the Association. HN28 The Model Business Corporation Act further defines "voting power" to mean "... the current power to vote in the election of directors. Application of this definition turns on whether the relevant shares carry the power to vote in the election of directors ***as of the time for voting on the relevant transaction***." 1 Model Business Corporation Act Annotated § 1.40 at 1-87 (emphasis added) (3rd ed. 1998 2000/01/02 Supplement). The Association is given the discretion by statute to determine "the members entitled to vote at a members' meeting." Article XI, Section 1, unambiguously states that the "voting power" consists of those members "present or by proxy." Members who do not appear or provide a proxy are not eligible to vote in the Association's elections to amend bylaws. Appellants' interpretation circumvents the bylaw requirements for voter eligibility by giving a vote - which will always be a "no" vote - to every lot owner who fails to appear at the meeting. Appellants' position would make it virtually impossible to amend the bylaw, and it effectively deprives the members who complied with bylaw requirements and appeared at the **[***60]** meeting in person or by proxy of their vote. We agree with the district court that the Association's interpretation of the bylaws is the correct one.

[*P39] In granting summary judgment, the district court declined to consider an affidavit proffered by Appellants from a member of the Association who claimed to have been present during the vote and count. Sara Kittleson averred that the results of the election were posted on a chalkboard and showed that the amendment only received 653 votes. Attached to the affidavit was a handwritten note made at the time by Kittleson reflecting what was written on the chalkboard. Since 653 votes do not constitute a two-thirds majority of the votes present, Appellants contend that this was evidence that the amendment did not pass. The district court rejected the proffered affidavit concluding that it was hearsay and unreliable. Appellants contend that the district court's conclusion was in error.

[*P40] HN29 The determination of admissibility of evidence is vested in the district court's

discretion. *Armstrong v. Hrabal*, 2004 WY 39, P10, 87 P. 3d 1226, 1230 (Wyo. 2004). After a movant has adequately supported a motion for summary **[***61]** judgment, the opposing party must come forward with competent evidence admissible at trial showing that there are genuine issues of material fact. *Jones v. Schabron*, 2005 WY 65, P9, 113 P. 3d 34, 37 (Wyo. 2005).

[*P41] *HN30*Hearsay, of course, "is a statement, other than one made by the declarant while testifying at the trial or hearing, **[**361]** offered in evidence to prove the truth of the matter asserted." W.R.E. 801(c) (LexisNexis 2005). A "statement" is "an oral or written assertion or ... nonverbal conduct of a person, if it is intended by him as an assertion." W.R.E. 801(a). Appellants assert that Kittleson's affidavit was not hearsay. It was "what she saw." Appellants do not support their argument with any analysis or citation to legal authority. We conclude that the district court was correct and that Kittleson's affidavit is hearsay. Kittleson's affidavit (and attached note) describes a writing produced by another person, and it is being offered for the truth of the matter asserted therein (i. e., that there were, in fact, a certain number of votes). There is no evidence that Kittleson has any personal knowledge of the facts set forth on the chalkboard. *HN31*It is basic **[***62]** evidence law that "any writing, other than one made by a witness during the witness's testimony in court, is hearsay if offered to prove the truth of what is written." David F. Binder, Hearsay Handbook § 1: 4 (4th ed. 2001); *see*, e. g., *Odegard v. Odegard*, 2003 WY 67, P14-15, 69 P. 3d 917, 922-23 (Wyo. 2003) (letter is hearsay); *Canyon View Ranch v. Basin Electric Power Corporation*, 628 P.2d 530, 537 (Wyo. 1981) (facts in magazine article without any evidence to establish their truth or credibility are hearsay); and *City of Cheyenne v. Frangos*, 487 P.2d 804, 807 (Wyo. 1971) (newspaper article is hearsay). Given that Appellants have not made an argument that any of the exceptions to the hearsay rule apply, or otherwise present us a cogent argument, we need not consider this claim any further.

[*P42] Finally, Appellants contend that the amendment is void because of the Association's failure to maintain a record of the vote in its minutes or permanent records and to record the amendment in the bylaws. The Association's bylaws state that:

> **Section 3. Record of Amendments**. Whenever an amendment or new By-law is adopted, **[***63]** it shall be placed in the book of By-laws in the appropriate place. If any By-law is repealed, the fact of repeal, with the date of the meeting at which the repeal was enacted or written assent was filed, shall be stated in said book.

By-Laws of Star Valley Ranch Association, Article XI, Section 3. The copy of the bylaws we have in the record contains a footnote in Article VIII, Section 2, that governs the number of directors indicating that the bylaw was amended on June 24, 1995. That date, of course, is when the subject disputed election was held. Appellants do not mention this fact in their brief. Without a cogent argument as to why this reference is not sufficient notice of the amendment under the Association's bylaws, we will not consider the matter further.

[*P43] Appellants' argument that the Association's failure to maintain a record of the election renders the amendment void is predicated on Wyo. Stat. Ann. § 17-19-1601(a) (LexisNexis 2005), which provides:

> *HN32*A corporation shall keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or directors without **[***64]** a meeting, and a record of all actions taken by committees of the board of directors as authorized by W.S. 17-19-825(d).

Appellants contend that the failure of a corporation to maintain proper records as mandated by statute "affects the validity of the action" taken. There is no dispute that there is no official record of the vote on the amendment in the Association's records. However, Appellants fail to cite any legal authority for the proposition that such failure automatically renders the action

invalid. There is authority that suggests this is not so. *See Swain v. Wiley College*, 74 S.W. 3d 143, 147 (Tex. App. 2002) ("The failure of a corporation to record the actions of its directors in corporate minutes, as required by its bylaws and the Texas Non Profit Corporation Act, does not render the action invalid."); and *Wimbledon Townhouse Condominium I, Association, Inc. v. Wolfson*, 510 So. 2d 1106, 1108-09 (Fla. App. 4 Dist. 1987) ("Failure of the board of directors of a corporation to record their action will not affect the validity of the acts done by them.") (quoting *Redstone v. Redstone Lumber & Supply Co.*, 101 Fla. 226, 133 So. 882, 883-84 (Fla. 1931)). **[***65]** HN33 When a corporation's minutes do not fully reflect an action **[**362]** taken by a corporation, parol evidence may be admissible to establish what transpired:

> Where the minutes contain a record of action taken, it will be presumed, prima facie, that the record covers the entire action. This is not conclusive, however, and parol evidence may be introduced to show what was in fact done. If the minutes appear on their face or are shown to be incomplete or incorrect or otherwise fail to show what actually transpired, parol evidence is admissible to supply the omission and to aid, correct and supplement them, or to aid in ascertaining the true meaning of indefinite or ambiguous records. Thus, where the corporate minutes are incomplete but are sufficient to show that the shareholders and directors present at a meeting did enter into an agreement, the courts may resort to evidence of extrinsic facts and circumstances to determine the full intent of the agreement if any ambiguity arises.

5A Fletcher Cyclopedia Corporations § 2198 at 178-80 (2004). Here, there is evidence that the amendment passed on a vote of 753 to 126 in director Cox's contemporaneous, handwritten notes. Once again, Appellants **[***66]** fail to provide any legal analysis or cite any authority for their argument. Therefore, we decline to consider their claim. The district court's summary judgment on the declaratory judgment is affirmed.

Attorney Fees

[*P44] In the event that the trial court's summary judgment was affirmed in their favor, Cox and the Association request that we remand to the district court for the determination of attorney fees, costs, and expenses pursuant to Wyo. Stat. Ann. § 17-19-630(d) (LexisNexis 2005) relating to derivative suits:

> HN34 On termination of the proceeding the court may require the complainants to pay any defendant's reasonable expenses, including counsel fees, incurred in defending the suit if it finds that the proceeding was commenced frivolously or in bad faith.

Appellants' argument has been characterized by the failure to provide evidence in support of their allegations and by the repeated presentation of contentions that are not cogent or supported by citation to any relevant legal authority. We specifically have found that Appellants' claim that the employments of Zimmer and Crittenden were ultra vires was frivolous **[***67]** and brought in bad faith considering their failure to cite the relevant statutory provision. Accordingly, we will require Appellants to pay all of the defendants' reasonable expenses, including counsel fees incurred in defending that particular claim. [8] While tempted to award fees and costs for the other derivative claims brought by Appellants, we decline to do so after careful consideration of the matter. We remand this matter to the district court for a determination of those fees and costs.

FOOTNOTES

[8] Since we are imposing these fees and costs under the derivative statute, any costs or fees incurred by the defendants in defending the declaratory judgment action are not recoverable.

CONCLUSION

[*P45] The district court's summary judgments on Appellants' derivative and declaratory judgment claims are affirmed. The cases are remanded to the district court for a determination of costs and fees owed to defendants by Appellants for their frivolous and bad faith claims in their derivative action.

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*250 Va. 565, *; 463 S.E.2d 652, **;*
*1995 Va. LEXIS 125, ****

LAKE MONTICELLO OWNERS' ASSOCIATION v. JARED L. LAKE

Record No. 950256

SUPREME COURT OF VIRGINIA

250 Va. 565; 463 S.E.2d 652; 1995 Va. LEXIS 125

November 3, 1995, Decided

PRIOR HISTORY: [*1]** FROM THE CIRCUIT COURT OF FLUVANNA COUNTY. F. Ward Harkrader, Jr., Judge.

DISPOSITION: Affirmed in part, reversed in part, and final judgment.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff homeowner appealed from the judgment of the Circuit Court of Fluvanna County (Virginia) that determined that proposals pursuant to bylaw § 4.08 to amend certain bylaws, rules, regulations, and policies of the homeowner association were invalid because the bylaws violated Va. Code Ann. § 55-513.

OVERVIEW: Plaintiff homeowner and some other members of defendant homeowner association filed proposals to amend certain association bylaws, rules, regulations, and policies pursuant to § 4.08 of the association's bylaws, which gave members the right to make proposals appropriate for member action for inclusion in the proxy statement and notice for an annual meeting. The association contended that the proposals were invalid. The owner filed a motion for declaratory judgment that the proposals were valid. The trial court invalidated the amendment provisions because they conflicted with Va. Code Ann. § 55-513. On appeal the court concluded that the trial court erred in holding that § 55-513 invalidated bylaws §§ 4.08(c)(1), (6) and in excluding the proposals from the proxy statement because the alleged policies bound the future conduct of association members, provided penalties for their violation, and therefore were valid as proposed amendments to a rule or regulation within the meaning of Va. Code Ann. § 55-513. The court therefore reversed that portion of the trial court's judgment that found bylaws §§ 4.08(c)(1), (6) invalid and entered a declaratory judgment in favor of the owner.

OUTCOME: The court concluded that the trial court erred in holding that certain bylaws of defendant homeowner association were invalid and in excluding plaintiff homeowner's proposals from the association's proxy statement. The court reversed that part of the trial court's judgment that found certain bylaws invalid and entered a declaratory judgment in favor of the homeowner consistent with this opinion.

CORE TERMS: bylaw, lake, amend, board of directors, property owners', declaration, repeal, proxy statement, lot owner, nonstock, judgment rule, common areas, inclusion, proxy, green fees, invalidated, assigned, binding, manual, golf, card, incorporation, proposed amendments, security force, annual meeting, declaratory judgment, business decisions, good faith, disqualifying, residential

LEXISNEXIS(R) HEADNOTES

Real Property Law > Common Interest Communities > Condominium & Cooperative Abuse Relief Act
Real Property Law > Common Interest Communities > Condominiums > General Overview
Real Property Law > Common Interest Communities > Timeshares

HN1 Pursuant to Va. Code Ann. §§ 55-508(B)(i), (ii), (iii), the Property Owners' Association Act, Va. Code Ann. §§ 55-508 to -516.2, does not apply to the provisions of documents of, operations of any association governing, or relationship of a member to any association governing condominiums created pursuant to the Condominium Act, Va. Code Ann. § 55-79.39 et seq., cooperatives created pursuant to the Virginia Real Estate Cooperative Act, Va. Code Ann. § 55-424 et seq., time-shares created pursuant to the Virginia Real Estate Time-Share Act, Va. Code Ann. § 55-360 et seq., or membership campgrounds created pursuant to the Virginia Membership Camping Act, Va. Code Ann. § 59.1-311 et seq.

Real Property Law > Common Interest Communities > Homeowners Associations

HN2 The Property Owners' Association Act, Va. Code Ann. §§ 55-508 to -516.2 does not apply to any nonstock, nonprofit, taxable corporation with nonmandatory membership which, as its primary function, makes available golf, ski, and other recreational facilities both to its members and the general public.

Real Property Law > Common Interest Communities > Homeowners Associations

HN3 See Va. Code Ann. § 55-513(A).

Business & Corporate Law > Corporations > Governing Documents & Procedures > Articles of Incorporation & Bylaws > Interpretation of Bylaws
Real Property Law > Common Interest Communities > Homeowners Associations

HN4 If apparently conflicting statutes can be harmonized and effect given to both of them, they will be so construed. This rule is equally applicable when there could be a conflict between a statute and corporate bylaws, and the bylaws may be construed to avoid that conflict.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Articles of Incorporation & Bylaws > General Overview
Real Property Law > Common Interest Communities > Homeowners Associations

HN5 If a policy of a governing body is binding upon the future conduct of its members, it is treated as a rule or regulation.

HEADNOTES

Real Property -- Property Owners' Association Act -- Corporations -- Residential Communities -- Boards of Directors -- Bylaws -- Amendments -- Proxies

A large residential community has its own private utilities, roads, security force, and common recreation amenities. Control of these facilities is vested in defendant property owners' association, a nonstock corporation subject to the provisions of the Property Owners' Association Act. The corporate declaration provides that the body shall operate and maintain the common facilities and subject each lot owner, as a member of the association, to the articles and by-laws, including payment of charges and levys made by the association. Each lot owner has voting rights in the election and removal of directors and in the amendment, alteration, or repeal of the bylaws. Property owners, as members of the association, have the right to repeal or amend any rule or regulation adopted by the board of directors if that rule or regulation has been adopted with respect to use of the common areas or such other areas of

responsibility assigned to the association by the declaration. Plaintiff lot owner and some other members of the association were dissatisfied with a number of the bylaws, regulations, and policies adopted by the board of directors of the association and contained in the association policy manual. A section of the bylaws gives members the right to make proposals for member action to be included in the proxy statement and notice of annual meeting, and the members filed a number of proposals for amendments to be made at the next annual meeting of members. The board ruled that the proposals did not qualify for inclusion on the proxy ballot and refused to include them in the material distributed in connection with the meeting. The plaintiff filed a motion for declaratory judgment seeking a construction of the provisions of Code § 55-513 and § 4.08 of the bylaws and a declaration that the proposals were proper for inclusion in the association's proxy statement. The trial court invalidated certain provisions of the bylaws as overly broad, arbitrary and in violation of Code § 55-513. It also ruled that the plaintiffs were entitled to have their proposed amendments included in the proxy statement for appropriate action at the next association members' meeting. The association appeals.

1. When there is a conflict between a statute and corporate bylaws, the bylaws may be construed to avoid that conflict.

2. In the context of this case, imprecise bylaw phrases can be construed to limit the board's disqualification power over proposals to those proposals which relate to matters within the exclusive control of the board.

3. Therefore, the trial court erred in holding that Code § 55-513 invalidated certain sections of the association's bylaws.

4. Under the "business judgment rule," a corporate director ordinarily has no individual liability for business decisions made in accordance with his good faith judgment of the best interests of the corporation.

5. A necessary predicate for the application of the rule is that the decision must be a *business* judgment and not a decision, such as the one in this case, which construes and applies a statute and a corporate bylaw.

6. Therefore, the association's contention that the presumption set forth in the business judgment rule should be applied when deciding whether the association properly construed its bylaws in disqualifying the proposals must be rejected.

7. With the exception of one proposal that seeks to amend a section of the bylaws, the proposals made by the plaintiff all seek to amend rules and regulations of the association which either restrict the future conduct of members and their invitees in the exercise of their rights in the community or subject their conduct to the control of the association's employees or agents.

8. The proposals either deal with the members' use of parts of the common areas or the association's responsibilities in enforcing the declaration-imposed obligations on each member. Code § 55-513 authorizes members to suggest such proposals.

9. If a policy of a governing body is binding upon the future conduct of its members, it is treated as a rule or regulation and because the policies bind the future conduct of the association members and provide penalties for their violation, each proposal at issue here seeks to amend a rule or regulation within the meaning of Code § 55-513.

10. Given the language of Code § 55-513 and the fact that the association members must submit to these rules, regulations, and policies as long as they own homes in the community, the proposals, if enacted by majority vote, would merely impose limitations upon the board's powers authorized by the code section and would not impermissibly "sterilize" the board.

11. The board of directors erred in excluding the proposals from the proxy statement.

SYLLABUS

The trial court correctly found that the board of directors of a nonstock corporation subject to the Property Owners' Association Act improperly excluded certain proposals by lot owners from a proxy statement, but the court erred in finding certain bylaw provisions invalid. A declaratory judgment is granted in favor of the plaintiff homeowner.

JUDGES: Present: Carrico, C.J., Compton, Stephenson, Lacy, Hassell, Koontz, JJ., and Whiting, Senior Justice. OPINION BY SENIOR JUSTICE HENRY H. WHITING.

OPINION BY: HENRY H. WHITING

OPINION

[*567] [653]** OPINION BY SENIOR JUSTICE HENRY H. WHITING

This appeal involves the validity, construction, and application of bylaw provisions of a nonstock corporation that is subject to the Property Owners' Association Act.

Lake Monticello, a large residential community in Fluvanna County, is an essentially self-controlled community with its own private utilities, roads, security force, and common amenities, including a lake, golf course, **[**654]** swimming pool, and tennis courts. Access to the community is controlled by private security officers at the main gate and by magnetic cards at other gates.

Control of these facilities is vested in Lake Monticello Owners' Association (LMOA), a nonstock corporation that is subject to the provisions of the Property Owners' Association Act, Code §§ 55-508 to -516.2. By its very terms, this Act has restricted and limited application.

HN1 The Act does not apply **[***2]**

> to the (i) provisions of documents of, (ii) operations of any association governing, or (iii) relationship of a member to any association governing condominiums created pursuant to the Condominium Act ([Code] § 55-79.39 et seq.), cooperatives created pursuant to the Virginia Real Estate Cooperative Act ([Code] § 55-424 et seq.), time-shares created pursuant to the Virginia Real Estate Time-Share Act ([Code] § 55-360 et seq.), or membership campgrounds created pursuant to the Virginia Membership Camping Act ([Code] § 59.1-311 et seq.).

[*568] Code § 55-508(B). Additionally, HN2 this Act does not apply "to any nonstock, nonprofit, taxable corporation with nonmandatory membership which, as its primary function, makes available golf, ski, and other recreational facilities both to its members and the general public." Id.

LMOA's corporate purpose is set out in the various documents that create and regulate LMOA and the community it controls. The declaration provides that LMOA "shall operate and maintain the club, lake, roads, parks, and other recreational facilities." The declaration also subjects each lot owner, as a member of LMOA, to LMOA's "Articles [of Incorporation] **[***3]** and By-laws, including the payment of such charges and levys as may properly be made by the Association."

The articles of incorporation charge LMOA with responsibility for the "common welfare and safety of the residents of Lake Monticello." The bylaws charge LMOA to "provide for the necessary operation, administration, and government of Lake Monticello . . . and . . . to provide machinery for the interpretation, application, administration and enforcement of certain restrictions and covenants affecting all lots." LMOA's published "policy manual" contains its rules, regulations, and policies and states that "LMOA Rules and Regulations are defined in LMOA Documents (Covenants and Restrictions, Articles of Incorporation, By-Laws, Policies, Rules and Regulations). "Pursuant to LMOA's articles of incorporation and bylaws, each lot owner is a member of LMOA with voting rights in the election and removal of directors and in the amendment, alteration, or repeal of its bylaws.

Additionally, the Property Owners' Association Act vests in a majority of LMOA members, as members of a property owners' association, the right to "repeal or amend any rule or regulation adopted by the board of directors" **[***4]** if such rule or regulation has been adopted by the board "with respect to use of the common areas [or] such other areas of responsibility assigned to the association by the declaration." Code § 55-513(A). [1] There is no similar statutory right given to shareholders, under the Virginia Stock **[*569]** Corporation Act, Code §§ 13.1-601 to -800, or to members, under the Virginia Nonstock Corporation Act, Code §§ 13.1-801 to -980. See Code §§ 13.1-624, -662, -823, and -846.

FOOTNOTES

1 *HN3*Code § 55-513(A) provides in pertinent part:

> The board of directors of the association shall have the power to establish, adopt, and enforce rules and regulations with respect to use of the common areas and with respect to such other areas of responsibility assigned to the association by the declaration . . . . A majority of votes cast, in person or by proxy, at a meeting convened in accordance with the provisions of the association's bylaws and called for that purpose, shall repeal or amend any rule or regulation adopted by the board of directors.

[*5]** Jared L. Lake and some other members in LMOA were dissatisfied with a number of the bylaws, rules, regulations, and policies adopted by LMOA's board of directors and contained in LMOA's policy manual. Section 4.08 of the bylaws gives LMOA members the right to make proposals "appropriate for member action" for inclusion in the proxy statement and notice for an annual meeting. **[**655]** Acting pursuant to this bylaw provision, Lake and those other property owners filed a number of proposals to amend certain of LMOA's bylaws, rules, regulations, and policies at the next annual meeting of LMOA members.

A summary of the proposed amendments pertinent to this appeal follows:

> 1. Repeal of a requirement that a lot owner's invitee obtain a guest card or pass before entering the subdivision, even though they possess one of the lot owner's magnetic cards.
>
> 2. Imposition of a limitation on the boards' discretion in fixing annual green fees by exempting property owners who do not play golf from payment of such fees, and by specifying the minimum green fees to be fixed by the board.
>
> 3. Repeal of a provision for LMOA's compliance committee's assessment of

"penalties, including the **[***6]** assessing of charges and similar sanctions," by transferring that function to the courts.

4. Repeal of a provision authorizing the appointment of members of LMOA's security force as special policemen under the provisions of Code § 15.1-144.

5. Amendment of provisions restricting access by prospective purchasers of properties in Lake Monticello by providing for a two-hour pass to be issued by the guards at the main gate.

Bylaw § 4.08(c)(1) and (6), respectively, provide that a member proposal "may be disqualified" from inclusion in LMOA's proxy statement and notice of meeting if "it is not a proper subject for action by members" or if "it deals with a matter relating to the ordinary business operations of the Association." Relying **[*570]** on these bylaw provisions and on other bylaw provisions which LMOA has since waived, the board ruled that the proposals "did not qualify for inclusion on the LMOA proxy/ballot" and refused to include them in the proxy.

Lake filed this action as a motion for declaratory judgment seeking a construction of the provisions of Code § 55-513 and § 4.08 of the bylaws and a declaration that the proposals were proper for inclusion in LMOA's **[***7]** proxy statement. [2] Following an ore tenus hearing, the trial court invalidated the provisions of § 4.08(c)(1) and (6) because they were "overly broad, arbitrary and in violation of [Code] § 55-513." Thereafter, the court ruled that the association members were entitled to have these proposed amendments included in the proxy statement for appropriate action at the next LMOA members' meeting. We granted LMOA an appeal. [3]

FOOTNOTES

2 LMOA stipulated that Lake was a proper party to bring the action.

3 Lake filed no reply brief and thus did not make an oral argument. Rule 5:33.

LMOA contends that the trial court erred in invalidating § 4.08(c)(1) and (6) of the bylaws. Specifically LMOA argues that those provision are not inconsistent with Code § 55-513. We agree.

[1-2] A settled rule of statutory construction is that HN4"if apparently conflicting statutes can be harmonized and effect given to both of them, they will be so construed." Albemarle County v. Marshall, 215 Va. 756, 761, 214 S.E.2d 146, 150 (1975); **[***8]** Blue v. Virginia State Bar, 222 Va. 357, 359, 282 S.E.2d 6, 8 (1981). We think that this rule is equally applicable when there could be a conflict between a statute and corporate bylaws, and the bylaws may be construed to avoid that conflict. Thus, in the context of this case, we construe the imprecise bylaw phrases "proper subject for action by members" and "relating to the ordinary business operations of the Association" to limit the board's disqualification right to those proposals which relate to matters within the exclusive control of the board.

[3] Accordingly, we conclude that the trial court erred in holding that Code § 55-513 invalidated § 4.08(c)(1) and (6) of LMOA's bylaws. Since we find that these subsections are valid, we must now decide whether the proposals were properly disqualified by the board.

[*571] LMOA contends that we need not inquire into the correctness of LMOA's decision since Lake failed to introduce any evidence showing that LMOA's board of directors acted **[**656]** in bad faith in making its decision. This, according to LMOA, is a prerequisite for judicial review of LMOA's construction of its rule because a corporate board's decision is subject to a presumption of correctness **[***9]** under the "business judgment rule."

[4] Under this rule, a corporate director ordinarily has no individual liability for business decisions made "in accordance with his good faith judgment of the best interests of the corporation." Code § 13.1-870(A); see Izadpanah v. The Boeing Joint Venture, 243 Va. 81, 83, 412 S.E.2d 708, 709 (1992) (transfer of corporate assets); Giannotti v. Hamway, 239 Va. 14, 24, 387 S.E.2d 725, 731 (1990) (payment of compensation to corporate officers and directors). And in an action to review the directors' business decision, the decision itself is also entitled to the same presumption. Gottlieb v. Economy Stores, 199 Va. 848, 857, 102 S.E.2d 345, 352 (1958) (expulsion of member of nonstock grocers' cooperative marketing corporation for misleading advertising reflecting upon integrity of corporation); Penn v. Pemberton & Penn, 189 Va. 649, 661, 53 S.E.2d 823, 829 (1949) (continuance of corporate existence).

[5] As the name implies, a necessary predicate for the application of the business judgment rule is that the directors' decision be that of a business judgment and not a decision, such as that in this case, which construes and applies a statute **[***10]** and a corporate bylaw. In the latter instance, a trial court reviews the decision just as it would review a similar decision by any other party. See Gottlieb, 199 Va. at 857-58, 102 S.E.2d at 352-53 (even under business judgment rule, action of corporation must be in accordance with law and corporate powers); cf. Bank of Giles County v. Mason, 199 Va. 176, 181-82, 98 S.E.2d 905, 908 (1957) (court determines whether shareholder's exercise of common-law right to inspect corporate documents is made in good faith after corporation rejects request).

[7] Therefore, we reject LMOA's contention that the presumption set forth in the business judgment rule should be applied when deciding whether LMOA properly construed its bylaws in disqualifying the proposals. This brings us to a consideration of the correctness of LMOA's construction of § 4.08(c)(1) and (6) in disqualifying these proposals. In deciding this issue, we are not **[*572]** concerned with the advisability or wisdom of the proposals, but only with whether Code § 55-315 and § 4.08 of the bylaws give Lake the right to submit these proposals to a vote of his fellow members of LMOA.

LMOA asserts a number of contentions in support of its **[***11]** argument that its board correctly rejected these proposals. For the reasons which follow, we find no merit in any of these contentions.

First, LMOA asserts that the members' right to amend LMOA's bylaws is "confined to matters such as conduct of meetings, elections of directors and officers, duties of officers and committees and other matters of internal concern" and does not include "any mundane detail relating to the day-to-day activities of the Association" or "the making of corporate policy and management decisions (such as, whether the security guards are deputized or setting green fees for the golf course.)" In this case, however, we are not dealing with bylaw amendments of an ordinary corporation; rather, we are faced with specific statutory rights allowing LMOA members to amend or repeal LMOA's rules and regulations "with respect to use of the common areas and with respect to such other areas of responsibility assigned to the association by the declaration." Code § 55-513(A).

[7-8] With the exception of the third proposal herein that seeks to amend § 10.03 of the bylaws, the remaining proposals all seek to amend rules and regulations of LMOA. These rules and regulations either **[***12]** restrict the future conduct of members and their invitees in the exercise of their rights in the community (guest cards or passes, green fees, and display of their homes for future sale) or subject their conduct to the control of LMOA's employees or agents (appointment of LMOA's security officers as special policemen). As such, the proposals either deal with the members' use of parts of the common area or LMOA's responsibilities in enforcing the declaration-imposed obligations upon each member to comply with LMOA's articles and bylaw provisions or suffer the **[**657]** penalties imposed by LMOA. [4] Accordingly, we think that Code § 55-513 authorizes members to suggest these proposals.

FOOTNOTES

4 To the extent that LMOA's duly adopted rules and regulations expressly so provide, Code § 55-513(B) gives LMOA's board of directors the right to assess charges against members for violation of LMOA's rules and regulations. Since the part of LMOA's policy manual that is in the record contains a schedule of charges and penalties for violations of LMOA's rules and regulations, we assume that LMOA's rules and regulations provide for imposition of such charges and penalties.

[*13]** **[*573]** [9] LMOA next argues that some of the proposals seek to amend its statements of policy, not its rules and regulations. HN5 However, if a policy of a governing body is binding upon the future conduct of its members, it is treated as a rule or regulation. See Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 422, 86 L. Ed. 1563, 62 S. Ct. 1194 (1942) (order promulgating policy announcement, accompanied by statement that administrative agency would "follow" order is regulation within meaning of federal statute); cf. Pacific Gas & Electric Co. v. Federal Power Comm'n, 164 U.S. App. D.C. 371, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A general statement of policy . . . does not establish a 'binding norm.' . . . A policy statement announces the agency's tentative intentions for the future"). Because these alleged policies bind the future conduct of LMOA's members and provide penalties for their violation, we conclude that each proposal at issue here seeks to amend a rule or regulation within the meaning of Code § 55-513.

Nevertheless, citing Kaplan v. Block, 183 Va. 327, 332, 31 S.E.2d 893, 895 (1944), LMOA contends that such proposals cannot divest the board of its duty of management and control by creating a "sterilized board **[***14]** of directors." Importantly, Kaplan is inapposite because it involved a stock corporation, not a nonstock corporation that is subject to the Property Owners' Association Act. Moreover, in contrast to Kaplan, the present proposals do not create a "sterilized board" in which every action of the board has to be approved by the members. Id. at 335, 31 S.E.2d at 896.

[10-11] Given the language of Code § 55-513 and the fact that LMOA members must submit to these rules, regulations, and binding policies as long as they own homes in Lake Monticello, we think the proposals, if enacted by majority vote, would merely impose limitations upon the board's powers authorized by this code section. Accordingly, we conclude that the board of directors erred in excluding these proposals from the proxy statement. Although we will reverse that part of the trial court's judgment finding bylaw § 4.08(c)(1) and (6) invalid, we will enter a declaratory judgment in favor of Lake consistent with this opinion.

Affirmed in part,

reversed in part,

and final judgment.

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*381 N.J. Super. 148, *; 885 A.2d 35, **;*
*2005 N.J. Super. LEXIS 318, ****

MICHEVE, L.L.C., PLAINTIFF-RESPONDENT, v. WYNDHAM PLACE AT FREEHOLD CONDOMINIUM ASSOCIATION, DEFENDANT-APPELLANT.

DOCKET NO. A-1014-04T2

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

381 N.J. Super. 148; 885 A.2d 35; 2005 N.J. Super. LEXIS 318

October 11, 2005, Argued
November 3, 2005, Decided

SUBSEQUENT HISTORY: [*1]** Approved for Publication November 3, 2005.
Certification denied by Micheve, LLC v. Wyndham Place at Freehold Condo. Ass'n, 186 N.J. 256, 893 A.2d 723, 2006 N.J. LEXIS 361 (N.J., Feb. 15, 2006)

PRIOR HISTORY: On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Special Civil Part, Docket No. DC-12868-03.
Micheve, L.L.C. v. Wyndham Place at Freehold Condo. Assoc., 370 N.J. Super. 524, 851 A.2d 743, 2004 N.J. Super. LEXIS 247 (App.Div., 2004)

CASE SUMMARY:

PROCEDURAL POSTURE: The Superior Court of New Jersey, Law Division, Monmouth County, Special Civil Part, granted summary judgment to plaintiff homeowner, concluding that defendant condominium association (association) could not assess a non-refundable capital contribution against the homeowner when he acquired title to his home, as such violated the Condominium Act, N.J. Stat. Ann. § 46:8B-1 et seq. The association appealed.

OVERVIEW: The question presented by the appeal was whether a condominium association could impose a non-refundable capital contribution fee whenever there was a transfer of title to a condominium unit. The appeals court concluded that such an imposition violated the provisions of the Condominium Act, N.J. Stat. Ann. § 46:8B-1 to -38, which required the common expenses for maintenance of a condominium's common elements to be charged to all unit owners. Further, the association failed to show that the assessment was justified by any extra expenses it incurred upon a transfer of title to a unit. Rather, it was undisputed that the money from the assessment was used solely to pay common expenses for the maintenance, repair, and replacement of the common elements from which all unit owners benefited. Second, while the association sought to justify the special assessment upon new purchasers as an exercise of its board's business judgment, because the assessment violated the Condominium Act and the association's own master deed and by-laws, the business judgment rule, which governed judicial review of decisions within the scope of a condominium association's discretionary authority, did not apply.

OUTCOME: The judgment was affirmed.

CORE TERMS: unit owners, condominium, deed, condominium unit, capital contribution, by-laws, Condominium Act, non-refundable, purchaser, processing, undivided interests, prior owner, parking fee, discriminatory, replacement, nonresident, invalid, repair, judgment rule, maintenance fees, special assessment, proportionately, common-elements, proportionate, undisputed, rental, bylaws, owed, acquisition

LEXISNEXIS(R) HEADNOTES

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations

HN1 N.J. Stat. Ann. § 46:8B-17 requires a condominium association's common expenses to be charged to unit owners according to the percentage of their respective undivided interests in the common elements.

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations

HN2 See N.J. Stat. Ann. § 46:8B-17.

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations

HN3 See N.J. Stat. Ann. § 46:8B-3(e).

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations

HN4 Under the Condominium Act, a plaintiff is only proportionately liable for his share of the common expenses, pursuant to N.J. Stat. Ann. § 46:8B-3e, determined on the basis of that plaintiff's proportionate undivided interest in the common elements. N.J. Stat. Ann. § 46:8B-9(g).

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations

HN5 To determine whether a condominium association has properly exercised its managerial powers under the business judgment rule, a court must consider: (1) whether the associations' actions were authorized by statute or by its own by-laws or master deed; and if so, (2) whether the action is fraudulent, self-dealing or unconscionable.

COUNSEL: *Kenneth W. Biedzynski* argued the cause for appellant (*Goldzweig, Farrell & Green,* attorneys; *Mr. Biedzynski,* of counsel and on the brief).

Virginia Kilcoyne argued the cause for respondent (*Bruce H. Dexter,* attorney; *Ms. Kilcoyne,* on the brief).

JUDGES: Before Judges SKILLMAN, PAYNE and LEVY. The opinion of the court was delivered by SKILLMAN, P.J.A.D.

OPINION BY: SKILLMAN

OPINION

[*150] [36]** The opinion of the court was delivered by

SKILLMAN, P.J.A.D.

The question presented by this appeal is whether a condominium association may impose a non-refundable capital contribution fee whenever there is a transfer of title to a condominium unit. We conclude that such an imposition violates the provisions of the Condominium Act, *N.J.S.A.* 46:8B-1 to -38, which require the common expenses for maintenance of a

condominium's common elements to be charged to all unit owners.

Defendant is a condominium association subject to the provisions of the Condominium Act. Those provisions include[HN1] *N.J.S.A.* 46:8B-17 **[***2]** , which requires a condominium association's "common expenses" to be "charged to unit owners according to the percentage of their respective undivided interests in the common elements."

In April 2002, defendant's Board of Directors adopted a resolution which provides that "[u]pon acquisition of title to a unit, the unit owner shall pay to the Association a one time non-refundable working capital contribution of $ 750." The same resolution also requires payment of "a one time processing fee of $ 125.00" upon acquisition of title to any condominium unit.

In March 2003, plaintiff acquired title to one of the units within defendant's condominium complex by a sheriff's deed. In **[**37]** June 2003, plaintiff resold the unit to a third party. At closing, defendant required plaintiff to pay various charges, including both the $ 750 non-refundable working capital contribution and the $ 125 processing fee established by the April 2002 resolution.

Plaintiff subsequently brought this action seeking recovery of the $ 750 capital contribution. [1] Plaintiff brought the case before **[*151]** the trial court by motion for summary judgment. The court concluded that the $ 750 capital contribution, assessed only on new **[***3]** purchasers of condominium units, violated the Condominium Act and defendant's master deed and by-laws. Accordingly, the court entered judgment requiring defendant to refund this assessment to plaintiff.

FOOTNOTES

1 The complaint also challenged various other fees defendant charged plaintiff at the closing, including the balance of the maintenance fees owed by the unit's prior owner. During the pendency of this action, we decided in another action between the same parties that a purchaser of a condominium unit at a foreclosure sale is not liable for association fees owed by the prior owner. *Micheve, L.L.C. v. Wyndham Place at Freehold Condo. Ass'n*, 370 N.J. Super. 524, 528-33, 851 A.2d 743 (App.Div.2004). Based on that decision, defendant conceded it was liable for repayment of the prior owner's maintenance fees that plaintiff had paid at closing. Plaintiff has abandoned the other claims set forth in its complaint.

N.J.S.A. 46:8B-17 provides in pertinent part:

> [HN2]The common expenses **[***4]** shall be charged to unit owners according to the percentage of their respective undivided interests in the common elements as set forth in the master deed and amendments thereto, or in such other proportions as may be provided in the master deed or by-laws.

Defendant's master deed and by-laws mirror this statutory standard for allocation of common expenses among all owners of condominium units. Section B(2) of the master deed states that "the percentage of interest of each dwelling unit appertaining to the common expenses . . . shall be as set forth in [the by-laws]," and the by-laws state that the common expenses shall be assessed "among the Unit Owners according to their respective interest[s] in the Common Elements." The by-laws also require any special assessment for capital expenses to be imposed on this same basis.

The Condominium Act contains an expansive definition of "common expenses":

> [HN3]"Common expenses" means expenses for which the unit owners are

> proportionately liable, including but not limited to:
>
> (i) all expenses of administration, maintenance, repair and replacement of the common elements;
>
> (ii) expenses agreed upon as common by all unit owners; and
>
> (iii) **[***5]** expenses declared common by provisions of this act or by the master deed or by the bylaws.
>
> [*N.J.S.A.* 46:8B-3(e).]

Notwithstanding the provisions of the Condominium Act and defendant's master deed and by-laws that require the common **[*152]** expenses of a condominium association to be paid by all unit owners according to their percentage interests in the common elements, defendant's Board of Directors adopted a resolution that imposed a special $ 750 assessment solely upon new purchasers of condominium units. Defendant does not allege that the proceeds from this assessment are used for any purpose other than the payment of common expenses incurred for the maintenance, repair and replacement of the condominium association's common elements. In fact, the only description of the use of those proceeds in the record is set forth in **[**38]** the certification of defendant's financial manager, which states: "[I]n order to maintain a certain standard of care throughout the Association certain fees must be assessed to new unit owners." Thus, it is undisputed that the non-refundable $ 750 capital contribution that new purchasers of condominium units are required to pay is **[***6]** used simply as an additional source of funds for defendant's common expenses.

Such an imposition upon only one class of condominium unit owners violates *N.J.S.A.* 46:8B-17 and other provisions of the Condominium Act that require common expenses to be charged to all unit owners based on their proportionate individual interests in the common elements. The capital contribution fee defendant imposes upon a transfer of title to a condominium unit is similar to the higher parking fee a condominium association imposed upon nonresident unit owners for use of the condominium garage, which the Court invalidated in *Thanasoulis v. Winston Towers 200 Ass'n*, 110 N.J. 650, 542 A.2d 900 (1988). In concluding that this discriminatory parking fee was invalid, the Court stated:

> [T]he Association is prohibited by the Act from discriminating against plaintiff because he is a nonresident owner. HN4 Under the Act, plaintiff is only *proportionately liable* for his share of the common expenses, *N.J.S.A.* 46:8B-3e, determined on the basis of plaintiff's proportionate undivided interest in the common elements. *N.J.S.A.* 46:8B-9(g) **[***7]** . Another vice of the parking fee regulation is that the higher fees paid by nonresident owners necessarily reduce the common-elements charge apportioned among all owners. In effect, defendant has required plaintiff, through his tenant, to contribute three times more money to the common-expense fund for parking privileges than do other unit owners who do not rent their units. The result is that plaintiff is compelled to bear a disproportionate share of the common expenses.
>
> **[*153]** [*Id.* at 661, 542 A.2d 900.]

Similarly, in *Chin v. COVENTRY Square Condo. Ass'n*, 270 N.J. Super. 323, 637 A.2d 197 (App.Div.1994), we held that the portion of a $ 375 rental fee charged by a condominium association each time a condominium owner rented a unit that exceeded the cost of reviewing

lease documents and inspecting common elements was invalid. We concluded that, as in *Thanasoulis,* this portion of the fee constituted "a discriminatory revenue-raising device assessed only against a discrete class of unit owners," *id.* at 329, 637 A.2d 197, and that it "necessarily reduce[d] the common-elements charge paid by all owners at the expense of the owner-landlords." *Id.* at 330, 637 A.2d 197 **[***8]** Accordingly, we remanded to the trial court to determine what portion of the fee was justified by the condominium association's expenses that were "legitimately related to the rental transaction." *Ibid.*

The $ 750 non-refundable capital contribution that defendant assesses upon the transfer of title to a condominium unit constitutes the same type of discriminatory imposition of common expenses upon one class of unit owners that was declared invalid in *Thanasoulis* and *Chin*. Defendant has not undertaken to show that this assessment is justified by any extra expenses it incurs upon a transfer of title to a unit. [2] Rather, it is undisputed that the **[**39]** money derived from this assessment is used solely to pay common expenses for the maintenance, repair and replacement of the common elements from which all unit owners benefit. Therefore, this assessment violates the Condominium Act as well as defendant's own master deed and by-laws.

FOOTNOTES

2 Such expenses appear to be covered by the $ 125 processing fee that defendant imposed in the same April 2002 resolution that imposed the $ 750 capital contribution. Plaintiff does not challenge the part of the resolution that imposed this processing fee. *See Chin*, *supra*, 270 N.J. Super. at 328, 637 A.2d 197.

[*9]** Defendant seeks to justify this special assessment upon new purchasers as an exercise of its Board's "business judgment." HN5 To determine whether a condominium association has properly **[*154]** exercised its managerial powers under the "business judgment rule," a court must consider "(1) whether the Associations' actions were authorized by statute or by its own by-laws or master deed, and if so, (2) whether the action is fraudulent, self-dealing or unconscionable." *Owners of the Manor Homes of Whittingham v. Whittingham Homeowners Ass'n, Inc.*, 367 N.J. Super. 314, 322, 842 A.2d 853 (App.Div.2004). As previously discussed, the $ 750 assessment upon transfer of title to a condominium unit violates the Condominium Act and defendant's own master deed and bylaws. Therefore, the business judgment rule, which governs judicial review of decisions within the scope of a condominium association's discretionary authority, has no applicability to this case. *See Verna v. Links at Valleybrook Neighborhood Ass'n, Inc.*, 371 N.J. Super. 77, 93, 852 A.2d 202 (App.Div.2004).

Affirmed.

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*87 P.3d 820, *; 2004 Alas. LEXIS 40, ***

MATANUSKA ELECTRIC ASSOCIATION, INC., Appellant, v. ROWLAND SCOTT WATERMAN, Appellee.

Supreme Court No. S-10828, No. 5790

SUPREME COURT OF ALASKA

87 P.3d 820; 2004 Alas. LEXIS 40

March 26, 2004, Decided

PRIOR HISTORY: [1]** Appeal from the Superior Court of the State of Alaska, Third Judicial District, Palmer, Beverly W. Cutler, Judge. Superior Court No. 3PA-01-00548 CI.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant corporation challenged a decision from the Superior Court of the State of Alaska, Third Judicial District, which granted appellee member's motion for summary judgment in an action seeking to compel the corporation to seat a candidate on its board of directors.

OVERVIEW: The corporation refused to seat a successful candidate on its board of directors because of an alleged campaign disclosure violation. Thereafter, a member filed suit against the corporation, which sought to compel the corporation to seat the candidate. After denying a motion for a temporary restraining order, the trial court granted the member's motion for summary judgment. Thereafter, the corporation sought review. In affirming, the court determined that the business judgment rule did not apply to the case. The corporation's interpretation of its bylaws was not binding on the court. According to the bylaws, a candidate who had a disclosure violation was given 30 days to cure the violation. The refusal to seat a candidate was only permitted when a violation was not cured. The evidence showed that the candidate had filed a corrected report within 30 days of being notified of the problem. As such, there was no discretion to disqualify the candidate based on the violations.

OUTCOME: The judgment of the superior court was affirmed.

CORE TERMS: candidate, bylaw, disclosure, seat, campaign, correction, seated, summary judgment, board member, election, notified, cooperative, executive session, post-election, pre-election, disclose, managed, information required, plain language, advertising, correctly, corrected, winning, notice, cure, voted, judgment rule, disclosure statements, annual meeting, good faith

LEXISNEXIS(R) HEADNOTES

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 An appellate court reviews a superior court's grant of summary judgment de novo. Under that standard, the appellate court determines whether any genuine issue of

material fact exists and whether the movant is entitled to judgment on the law applicable to the established facts. The appellate court views the facts in the light most favorable to the non-movant, drawing all factual inferences in favor of the non-movant.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Articles of Incorporation & Bylaws > Interpretation of Bylaws
Contracts Law > Contract Interpretation > General Overview
HN2 A board's interpretation of a corporate bylaw is not necessarily conclusive. The rules of contract interpretation apply to the interpretation of by-laws and include avoiding interpretations that create conflict among provisions.

COUNSEL: Kyle W. Parker and David J. Mayberry, Patton Boggs LLP, Anchorage, for Appellant.

Peter J. Maassen, Ingaldson Maassen, P.C., Anchorage, for Appellee.

JUDGES: Before: Bryner, Chief Justice, Matthews, Fabe, and Carpeneti, Justices. [Eastaugh, Justice, not participating.]

OPINION BY: FABE

OPINION

[*820] FABE, Justice.

I. INTRODUCTION

Rowland Waterman sued Matanuska Electric Association, Inc. (MEA) after the Board of Directors refused to seat a successful candidate for the Board of Directors because of alleged campaign disclosure violations. The superior court granted Waterman's motion for summary judgment, concluding that under the MEA bylaws the MEA Board was not permitted to refuse to seat a successful board candidate. MEA appeals the superior court's judgment. Because the superior court correctly interpreted the MEA bylaws, we affirm its ruling. **[**2]**

II. FACTS AND PROCEEDINGS

A. Factual History

Matanuska Electric Association, Inc. (MEA) is a public utility cooperative that is managed by a seven-person board of directors. In the spring of 2001 three Board seats came up for election. Two incumbent directors, Rose Marie DePriest and Linda Shattuck, sought reelection, while there was no incumbent for the third seat. Michael Janecek and Mae Tischer both ran for the open seat. Janecek received 119 votes more than Tischer in the election. DePriest and Shattuck were both reelected to the Board.

On April 9, 2001, the Board met to certify the election results and to seat the winning candidates. At this meeting, one participant expressed concern about Janecek's campaign disclosures, suggesting that Janecek's advertising cost more than his disclosure statements revealed. At the same meeting, Stephen Ellis, MEA's counsel, questioned Janecek about the contents of his disclosure report as well as his contributions and expenditures. The meeting was then continued to April 30 so that the campaign disclosures of all of the winning candidates could **[*821]** be reviewed. None of the successful candidates were seated at the April 9 meeting.

[3]** There are four campaign-finance reports described in the "Election 2001 Candidate's Handbook": a pre-election report which must be filed ten to twenty days prior to the April annual meeting; a post-election report which covers the period after the filing of the pre-election report and must be filed within twenty days after the April annual meeting; a year-end report for all of 2001; and a correction report. The correction report is described in the handbook as an opportunity for a candidate to provide any information that is missing:

If a candidate fails to fully disclose the information required by MEA, he will be notified by the Board of Directors of the actions needed to fully comply-- for example, to correct any erroneous campaign finance report. The candidate will be asked to file a **Correction Report**. The Board will specify the period this report should cover. The **Correction Report** must be filed within 30 days after the candidate receives notice of the Board's request for the report.

On April 26 Janecek filed two reports: a timely post-election report and a correction of his pre-election report. In his correction report, Janecek disclosed a $ 6,400 invoice for a **[**4]** mailing performed by North Mail. His post-election report also included advertising expenses with the *Frontiersman* newspaper.

The MEA Board meeting resumed on April 30, 2001. Apparently Ellis had conducted an investigation of the candidates in the interim although the April 9 meeting transcript makes no mention of any request for such an investigation. Ellis asked that the Board go into executive session to consider the findings of his investigation. Directors Lester and Cottle objected to going into executive session, but Ellis responded that he expected the findings to be made public after the executive session. There is no record of what occurred in the executive session.

When the regular session resumed, the Board adopted the findings of fact set forth in Ellis's investigation report. Ellis then orally summarized the contents of his report, describing his findings for each candidate. Ellis found several irregularities for DePriest and Shattuck, but he described each of these as "minor," "in good faith," and "correctable." No objection was raised to seating these two successful candidates on the Board, and subsequent to Ellis's review, each was sworn in.

Ellis then summarized **[**5]** his findings about Janecek. He identified a failure to disclose $ 1,935 in ads placed by Janecek in the *Frontiersman* and described this as a violation that could "not be cured or corrected." Ellis concluded that there were "aggravating factors" making Janecek's explanation for the omission not "credible." Ellis also identified a mailing expense of $ 6,400 that was not disclosed when it was accrued. Ellis described Janecek's other violations as minor and correctable.

After Ellis completed his report, Board President William Folsom opened the floor for discussion. Although one board member asked whether Janecek or his attorney would have an opportunity to respond to Ellis's findings, Folsom maintained that Ellis's report was based on Janecek's disclosures. Immediately thereafter, a motion was made that Janecek be found in violation of the MEA bylaws and thus not be seated on the Board. Before the vote, Janecek repeatedly requested to be heard, only to be told by Folsom that the Board was not hearing "anything further from the public." The Board then voted 5-2 not to seat Janecek. By a 5-2 vote, Tischer, Janecek's opponent, was seated in Janecek's stead. Before Tischer was seated, **[**6]** Ellis pointed out Tischer's own disclosure irregularity but described it as in "good faith."

During the meeting, Directors Lester and Cottle made clear their dissatisfaction with the actions of the Board. Lester criticized the Board's action on the basis that all three candidates had violated the bylaws which, according to Lester, should have prevented them all from being seated.

B. Procedural History

In May 2001 Rowland Waterman, an MEA member who had voted for Janecek, filed suit

[*822] against MEA alleging violations of the bylaws, the Open Meetings Act, and the Alaska Constitution and seeking to compel the Board to seat Janecek. Waterman also sought a temporary restraining order (TRO).

Superior Court Judge Peter A. Michalski was temporarily assigned the case during Superior Court Judge Beverly W. Cutler's absence. After a hearing, Judge Michalski denied Waterman's request for a TRO.

Following discovery, both sides filed motions for summary judgment on Waterman's various claims. On February 7, 2002, Judge Cutler heard oral arguments on the summary judgment motions. Judge Cutler granted Waterman's motion for summary judgment on two grounds, concluding that the Board had violated **[**7]** section 11 of its bylaws when it refused to seat Janecek, and that MEA was estopped from enforcing its campaign disclosure regulations against Janecek because Janecek relied on MEA's disclosure forms and fully completed them. Judge Cutler also found that Waterman was a public interest litigant and awarded him full reasonable attorney's fees of $ 100,000.

Final judgment was entered on September 10, 2002, and the Board seated Janecek at its next regularly scheduled Board meeting on March 11, 2002. MEA appeals the superior court's decision to grant summary judgment in Waterman's favor.

III. STANDARD OF REVIEW

*HN1*We review a superior court's grant of summary judgment de novo. [1] Under that standard, we determine whether any genuine issue of material fact exists and whether the movant "is entitled to judgment on the law applicable to the established facts." [2] We view the facts in the light most favorable to the non-movant, drawing all factual inferences in favor of the non-movant. [3]

FOOTNOTES

1 *Martinez v. Ha*, 12 P.3d 1159, 1161 (Alaska 2000).

2 *Id.*; *Geolar, Inc. v. Gilbert/Commonwealth Inc. of Michigan*, 874 P.2d 937, 941 n.8 (Alaska 1994). **[**8]**

3 *Martinez*, 12 P.3d at 1162.

IV. DISCUSSION

A. The Superior Court Correctly Concluded That the Board Had Violated Its Bylaws by Refusing To Seat Janecek.

MEA argues that the superior court erred when it substituted its judgment for that of the Board and overturned the Board's decision not to seat Janecek. It contends that the business judgment rule applies and protects the Board's reasonable decision. Judge Cutler rejected MEA's claim that the Board's actions were reasonable and relied instead on the plain language of the bylaws. The trial court concluded that "the board had no discretion not to seat [Janecek]."

1. The relevant bylaws

Section 11 of the MEA bylaws is entitled "Campaign Disclosure," with section 11(g) and (i) controlling the treatment of candidates' campaign disclosure violations. Section 11(g) requires the Board to give candidates an opportunity to correct disclosure violations, while section 11(i)

allows the Board to refuse to seat a candidate who does not make the corrective disclosure required by section 11(g). The relevant **[**9]** sections provide:

The following provisions of this bylaw apply to Board candidates who campaign for a seat on the Board of Directors. The Board shall adopt policies and prescribe such forms for the implementation of this section as the Board shall deem necessary.

. . . .

(g) Any candidate who fails to fully disclose the information required to be filed with the Association as stated in sections (a), (b), (c), (d) and (e) above shall be notified in writing by the Board of the actions needed to fully comply and shall be given thirty (30) days from the receipt of notice to make the disclosure or file the appropriate report.

. . . .

[*823] (i) A candidate who is found by the Board to be in violation of this section shall not be seated by the Board of Directors, and if seated shall be immediately removed from the Board by the Board if the candidate or Board members fails to make the disclosure required in (g) above, as provided by Article IV, Section 3.

2. Bylaw interpretation

MEA argues that the Board was simply doing its job by addressing violations of the campaign disclosure regulations. MEA relies on the managerial power granted to the Board by statute [4] and its own bylaws, **[**10]** [5] as well as the authority granted in the bylaws to regulate campaign disclosures [6] and to adopt policies for the implementation of MEA's campaign disclosure bylaws. [7] MEA further argues that Waterman's interpretation of the bylaws "would effectively render MEA's campaign disclosure rules a nullity." MEA contends that there are certain serious campaign disclosure violations that cannot be cured with the filing of a post-election correction report [8] and that it is the Board's duty to distinguish such violations from those that are less serious.

FOOTNOTES

4 "The business of a cooperative shall be managed by a board of not less than five directors, each of whom shall be a member of the cooperative or of another cooperative which is a member of it." AS 10.25.140.

5 "The business and affairs of the Association shall be managed by a board of seven (7) members which shall exercise all of the power of the Association except such as are by law, the Articles of Incorporation or these Bylaws, conferred upon or reserved to the members." MEA Bylaws Art. IV, § 1.

6 MEA Bylaws Art. IV, § 11(i). **[**11]**

7 "The Board shall adopt policies and prescribe such forms for the implementation of this section as the Board shall deem necessary." MEA Bylaws Art. IV, § 11.

8 MEA describes Janecek's violations as "uncurable." While it might make sense to permit only pre-election "cures," the MEA bylaws do not contain this requirement. Judge Cutler found that Janecek fully filled out all of the forms. The Campaign Disclosure Statements provided by MEA only ask for various types of contributions. The court concluded that there was no space on the forms to indicate advertising that was hired out by the candidate and not yet billed by the advertiser since it is not a "contribution." We need not resolve the question whether the forms estopped MEA from enforcing the additional disclosure

requirements.

In *Afognak Native Corp. v. Olsen*, we recognized that HN2 a board's interpretation of a corporate bylaw is not necessarily conclusive. [9] The rules of contract interpretation apply to the interpretation of by-laws [10] and include avoiding interpretations that create conflict among provisions. [11]

FOOTNOTES

[9] 648 P.2d 991, 992 (Alaska 1982). **[**12]**

[10] *Storrs v. Lutheran Hosps. & Homes Soc'y of America, Inc.*, 609 P.2d 24, 30 (Alaska 1980); *see also McMillan v. Anchorage Community Hosp.*, 646 P.2d 857, 862 (Alaska 1982).

[11] *Storrs*, 609 P.2d at 30.

MEA's position ignores the plain language of the bylaws. Section 11(i) states that "a candidate . . . in violation of [§ 11] shall not be seated . . . if the candidate . . . fails to make the disclosure required in (g)." (Emphasis added.) Section 11(g) provides that "any candidate who fails to fully disclose the information required to be filed . . . shall be notified in writing by the Board of the actions needed to fully comply and shall be given thirty days from receipt of notice to make the disclosure or file the appropriate report." (Emphasis added.) Taken together, these sections create a system whereby a candidate is to be notified of any disclosure violations and given thirty days to cure the violation. If, and only if, a candidate fails to provide such a cure is the Board permitted to refuse to seat that candidate. This **[**13]** procedure parallels the procedure described in article IV, section 3(e), [12] which permits the Board to remove a board member when there is a violation that has not been corrected under section 11(g). Having been verbally **[*824]** notified at the April 9 Board meeting of concerns regarding his campaign disclosures, Janecek filed a correction report within thirty days. Janecek thus made a curative disclosure and satisfied all of the requirements of section 11(g).

FOOTNOTES

[12] Article IV, section 3(e) of the MEA Bylaws states:

Upon establishment of the fact that a board member is holding the office in violation of any of the foregoing provisions or in violation of Article IV, Sections 11 (a), (b), (c), (d), (e) and not corrected under Section 11(g), the Board shall remove such board member from office.

The plain language of the bylaws prevents the Board from using its discretion to determine whether a candidate should be disqualified due to campaign disclosure violations. And the bylaws are based on solid policy. As Waterman notes, **[**14]** unfettered Board discretion to decide when a campaign disclosure violation merits refusing to seat a successful candidate would permit the Board to "refuse to seat a winning slate of reform candidates" or to choose not to seat its challengers. In *Grimm v. Wagoner*, we considered whether financial disclosure violations required a state senate candidate to forfeit an election. [13] We reasoned that minor errors in disclosure did not interfere with the public's ability to judge the candidates; [14] we instead emphasized the harm of "thwarting voter intent" by depriving voters of the representatives they elect. [15] The same concern arises here when a board is authorized to overcome the will of the members by selectively seating candidates. Rather, pursuant to section 5 of the bylaws, entitled "Removal of Board Member by Members," it is the members who "bring

charges for cause" and who vote on the "question of the removal of such board member."

FOOTNOTES

13 77 P.3d 423 (Alaska 2003).

14 *Id.* at 432.

15 *Id.*

[15]** MEA's reliance on the business judgment rule is misplaced because a plain reading of the bylaws, and Janecek's undisputed compliance with the correction report requirements of section 11(g), leave no discretion to the Board to refuse to seat Janecek. Therefore, we affirm the superior court's grant of summary judgment in favor of Waterman.

V. CONCLUSION

Because the superior court correctly concluded that the Board violated its own bylaws by refusing to seat Janecek, we AFFIRM the superior court's determinations.

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