In The

Appellate Court of Maryland

Nos. 1107 & 1675
September Term 2023

KEVIN TRACY, ET AL.,

Appellants,

v.

107 TERRAPIN LANE, LLC, ET AL.,

Appellees.

THE COVE CREEK CLUB, INC.,

Appellant,

v.

107 TERRAPIN LANE, LLC,

Appellee.

Appeal from the Circuit Court for Queen Anne's County, Maryland
Circuit Court No. C-17-CV-23-000033 (Honorable Lynn Knight, J.)

BRIEF OF AMICUS CURIAE

ERICA L. LITOVITZ (# 1312180166)
JOHN J. MATTEO (# 9212220002)
JACKSON & CAMPBELL, P.C.
2300 N Street, NW, Suite 300
Washington, D.C. 20037
Telephone: (202) 457-1643
Email: elitovitz@jackscamp.com
Email: jmatteo@jackscam.com
Counsel for Community Associations Institute

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

INTEREST OF CAI AS AMICUS CURIAE

Community Associations Institute ("CAI") is an international organization dedicated to providing information, education, resources, and advocacy for community association leaders, members, and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 43,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 74.1 million homeowners who live in more than 355,000 community associations in the United States. Approximately 7,100 community associations are located in Maryland serving 1,062,000 homeowners.[1] CAI is representing not only itself, but also its tens of thousands of members on the important issue of associations being able to modify their governing documents in order to control and regulate the operations of their communities, including the control and regulation of short-term rentals.

INTRODUCTION

One of the issues facing community associations is the ability to adapt to an ever-changing world while preserving the underlying purpose and function of the community. In an effort to strike that balance, community associations are governed

[1] See https://foundation.caionline.org/publications/factbook/statistical-review/.

by declarations that can be amended to reflect the changing needs of the community as it grows and evolves.

The Maryland Homeowners Association Act (the "Act") defines the term "declaration" as:

> an instrument, however denominated, recorded among the land records of the county in which the property of the declarant is located, that creates the authority for a homeowners association to impose on lots, or on the owners or occupants of lots, or on another homeowners association, condominium, or cooperative housing corporation any mandatory fee in connection with the provision of services or otherwise for the benefit of some or all of the lots, the owners or occupants of lots, or the common areas.

Md. Code, Real Prop. § 11B-101(d)(1).

The Act contemplates that associations will need to amend their declarations from time to time and provides a process for doing so. See Md. Code, Real Prop. § 11B-101(d)(2); Md. Code, Real Prop. § 11B-116. The possibility of amending declarations is also contemplated by the language of declarations themselves. Indeed, declarants almost always provide for the possibility of amendments and set forth the process for accomplishing them. The declaration at issue in this case is no different, *i.e.*, it expressly contemplates the possibility of amendments and spells out the requirements therefor.

In this case, the appellant homeowners' association, The Cove Creek Club, Inc. ("Appellant" or the "Association") was formed in 1979 by recording a

Declaration of Covenants, Conditions, and Restrictions (the "Declaration") among the land records of Queen Anne's County, Maryland. In the decades since its formation, the needs of the community and the Association have changed. Accordingly, the Association has, from time to time, amended its Declaration pursuant to the provisions of the Act and the Declaration.

Most recently, the Association amended its Declaration to prohibit short-term rentals. Appellee, 107 Terrapin Lane, LLC ("Appellee" or "Terrapin") filed suit, claiming, *inter alia*, that it had purchased its unit in reliance on the fact that the Declaration did not, at the time of purchase, prohibit short-term rentals. In its Complaint, Terrapin acknowledged that the Declaration contained a blanket provision authorizing amendments, which provision is discussed below in more detail. However, Terrapin argued that because the Declaration did not *specifically* spell out the possibility of an amendment that would prohibit short-term rentals, the Association was barred from amending the Declaration in such a manner. The Circuit Court for Queen Anne's County agreed with Terrapin, and the Association appealed. The industry-wide consequences of the Circuit Court's Opinion not only in connection with the issue of short-term rentals, but for any other issue relating to the ability of associations to regulate their operation in accordance with their governing documents, prompted CAI to file this *amicus curiae* brief. For the reasons

set forth below, CAI believes that the Circuit Court erred and that its decision should be reversed.

ARGUMENT

I. The Circuit Court's Opinion Is Inconsistent with the Provisions of the Act and the Declaration.

As set forth above, the Act expressly contemplates the possibility that associations will need to amend their declarations from time to time. See Md. Code, Real Prop. § 11B-101(d)(2). In fact, the Act sets forth the process and procedure for effectuating such an amendment. More specifically, the Act provides that "[n]otwithstanding the provisions of a governing document, a homeowners association may amend the governing document by the affirmative vote of lot owners in good standing having at least 60% of the votes in the development, *or by a lower percentage* if required in the governing document." Md. Code, Real Prop. § 11B-116(c) (emphasis added).[2]

The right of an association to amend its declaration cannot be varied by agreement or waived by the association. See Md. Code, Real Prop. § 11B-103 ("Except as expressly provided in this title, the provisions of this title may not be varied by agreement, and rights conferred by this title may not be waived."). This Court has found that "[p]rior to the enactment of RP §11B-116, if a declaration did

[2] The declaration is considered one of the governing documents of a homeowners' association. See Md. Code, Real Prop. § 11B-116(a)(2).

not address how it could be amended, 'the right to amend by less than 100% of the [o]wners & mortgagees . . . [would] not be implied.'" Logan, Trustee Under Harold A. Logan Trust Agreement Dated April 30, 2007 v. Dietz, 258 Md. App. 629, 684 (2023) (quoting Cynthia Hitt Kent, Governing Document Issues, in Developing and Managing Condominium and Homeowners' Associations 51, 61 (Nat'l Bus. Inst. July 2007)). Since the enactment of § 11B-116, there is no question that an amendment to an association's declaration requires at most sixty percent (60%) of the lot owners to vote in its favor.

The Declaration itself requires the vote of owners having more than two-thirds of the votes in the association. See App. 285 (Dec. § 7.1). However, in light of the express language of Md. Code, Real Prop. § 11B-116, no amendment to the declaration requires a vote of owners having more than sixty percent (60%) of the votes in the association. Regardless of whether the Court looks to the amendment threshold in the Act (60%) or the Declaration (66.6%), there is no situation in which an amendment would require the vote of *all* of the lot owners – or even all of the affected lot owners.[3]

[3] While additional requirements must be satisfied to amend governing documents containing provisions requiring action on the part of the holder of a mortgage or deed of trust, see Md. Code, Real Prop. § 11B-116(d), the Circuit Court has held that the Association's governing documents do not require lender consent for amendments (see App. 222). Accordingly, the more stringent requirements imposed on amendments that require lender consent are inapplicable in the instant case.

Like the Act, the Declaration expressly contemplates the possibility of amendments thereto. Specifically, the Declaration provides that it "may be amended only upon the assent of a two-thirds of all Membership votes eligible to be cast . . . ." See App. 285 (Decl. § 7.1). It goes on to provide that no such amendment will be effective until the instrument evidencing the amendment is recorded among the land records; however, it provides no limitations as to which of its provisions is eligible for amendment.

Notwithstanding the foregoing, when deciding this case, the Circuit Court read a new restriction into the amendment procedure authorized by the Act and Declaration. Specifically, the Circuit Court has determined that declarations can only be amended to the extent the original declaration expressly contemplated that very type of amendment. In other words, no provision of the declaration can be amended unless the declaration specifically states that the provision in question is subject to amendment. No such restriction exists in the Act or in the Declaration. Nevertheless, according to the Circuit Court's opinion, neither the provisions of the Act (which broadly permit amendments to the declaration provided the requisite votes are obtained) nor the Declaration itself (which contains a blanket provision authorizing amendment) is sufficient to allow for amendments to individual provisions. This decision frustrates the intent of the Maryland General Assembly in passing the Act,

the developer in drafting the Declaration and the vast majority of the owners who voted to approve the amendment.

II. Declarations Are More Difficult to Amend than Bylaws Because Amendments to Declarations, Unlike Amendments to Bylaws, Can Restrict Owners' Property Rights.

The creation of a homeowners' association involves two legal documents: a declaration and bylaws. See Hyatt, Condominium and Homeowner Association Practice: Community Association Law § 1.06(e) (3d ed. 2000). "Generally, fundamental provisions dealing with the ownership and property rights are in the declaration; the bylaws typically contain governance and operational provisions, and function in the same capacity as corporate bylaws." Id. "Because the Declaration defines property rights, and the Bylaws do not, it is logical that amending the Declaration would be more difficult." Kiekel v. Four Colonies Homes Ass'n, 38 Kan.App.2d 102, 108 (2007) (citing 4 Thompson on Real Property § 36.06(a), pp. 240-41 (2d ed. 2004)).

The fact that the Act makes it more difficult to amend the declaration than the bylaws, and that the Association chose to require an even greater vote than the Act, demonstrates the understanding – of both the Maryland General Assembly and the Association – that amendments to the Declaration could have sweeping consequences on a community association and, as such, should be difficult to accomplish. In this case, the Association satisfied the stringent requirements for

amendments imposed by the Act and the Declaration. Indeed, the members of the Association voted overwhelmingly in favor of amending the Declaration to restrict short-term rentals. See App. 142. The amendment was thought necessary to prevent all of the problems inherent in short-term rentals (noise, parking issues, damage to common elements, etc.) which destroy the residential nature of the community and make some homes more like commercial hotels. In short, use of some homes for short-term rentals destroys the fabric of the neighborhood – which the restrictive covenants are imposed to ensure. To ignore the two-thirds vote of the members that was duly noticed and conducted in strict compliance with the provisions of the Association's governing documents would not only frustrate the determination of the Association, but also nullify the clear intent of the statute. This would bring complete uncertainty to all future decisions of the thousands of homeowner associations with respect to every decision to amend their Declarations and would clearly thwart the intent of the legislature.

In Kiekel, the court found that based upon the declaration and bylaws filed of record, the plaintiffs knew their property rights could be further restricted by an amendment to the declaration but did not have notice that their property rights could be further restricted by an amendment to the bylaws. See Kiekel v. Four Colonies Homes Ass'n, 38 Kan.App.2d 102, 109-110 (2007) ("In this case, however, it is clear that the Declaration intended any property use restrictions, including restrictions on

renting, to be achieved through an amendment to the Declaration. Because Four Colonies failed to properly amend the Declaration, the bylaw amendment imposing rental restrictions is void and unenforceable."). Thus, the court found that the association could not circumvent the intent of the declaration, *i.e.*, the enabling document, by simply amending the bylaws. See id. In this case, however, the Association made no such attempt to circumvent the strict requirements for amending the Declaration. Instead of trying to avoid that process and taking the easier route of amending the bylaws, the Association jumped through the difficult hoops required to amend the Declaration and followed that process to the letter. Like the plaintiffs in Kiekel, Terrapin was on notice of the fact that its property rights could be affected by amendments to the Declaration. The case differs from Kiekel only insofar as the Association in the instant case took the necessary procedural steps to validly effect such a change in accordance with the statute and its governing documents.

III. The Circuit Court's Opinion Is Inconsistent with Recent Case Law.

Not only is the Circuit Court's conclusion inconsistent with the plain language of the Act and the Declaration, it is also contravened by recent case law addressing this precise issue. See, e.g., Pandharipande v. FSD Corp., 679 S.W.3d 610 (2023).[4]

[4] Because there is no Maryland law addressing this issue, the parties have relied on case law from other jurisdictions to support their arguments. Tennessee is the latest state to rule on this issue, with the court in that state finding that amendment

The Pandharipande court found that "a party is free to purchase property subject to restrictive covenants that allow future amendments, and such amendments generally are permissible unless they are arbitrary and capricious." Id. at 629 (citing Hughes v. New Life Dev. Corp., 387 S.W.3d 453, 475 (Tenn. 2012)). "Thus, '[w]hen a purchaser buys into' a community governed by a restrictive covenant that permits future amendments, 'the purchaser buys not only subject to the express covenants in the declaration, but also subject to the amendment provisions of the declaration.'" Id. (quoting Hughes, 387 S.W.3d at 476).

The Pandharipande court examined a treatise that was based on a 1938 decision by a Missouri Court. See Pandharipande, 679 S.W.3d at 630 (citing Van Deusen v. Ruth, 125 S.W.2d 1 (Mo. 1938)). The Van Deusen case did not, in fact, support the proposition that amendments can only impose less stringent restrictions. See id. The Pandharipande court found Van Deusen was inapposite because the language in the restrictive covenant in that case was distinguishable from the language in the covenant in Pandharipande. See id. at 630. The restrictive covenant

---

provisions in declarations create a broad right to make amendments. See generally id. at 629. In addition, Pandharipande follows the same line of reasoning set forth in a District of Columbia case, Burgess v. Pelkey, 738 A.2d 783 (D.C. 1999). Burgess involved an association that amended its bylaws to require ninety percent owner occupancy, which effectively prohibited a shareholder from continuing to sublet his unit. Id. The D.C. Court of Appeals found that the amendment was not a retroactive change to the bylaws in violation of the proprietary lease and was, instead, a valid amendment. Id.

at issue in Van Deusen stated that "'[a]ll or any of the foregoing provisions or restrictions may be modified, amended, released or extinguished . . . .'" Id. (quoting Van Deusen v. Ruth, S.W.2d at 2). The Van Deusen court interpreted that language to mean that the parties intended to allow *existing* restrictions to be alleviated or extinguished. Id. The covenant in Van Deusen, however, provided that subsequent amendments could impose additional restrictions and obligations. See id. Thus, the court found that the plaintiff "cannot 'be heard to complain when, as anticipated by the recorded declaration of covenants, the homeowners' association amends the declaration' in a manner that further restricts use of his property." Id. (quoting Hughes v. New Life Dev. Corp., 387 S.W.3d 453, 476 (Tenn. 2012)).

The language of the Declaration at issue in this case more closely resembles that at issue in Pandharipande than the covenant described in Van Heusen. Here, like in Pandharipande, the Declaration contains no language purporting to limit amendments to make existing restrictions less harsh. Therefore, this Court should find that the Declaration put Terrapin on notice of the possibility of greater restrictions being imposed for the same reason that the Pandharipande court allowed such an amendment.

IV. Restrictions in a Declaration Are Presumed Valid Unless They Violate a Public Policy or Fundamental Constitutional Right.

In the context of community associations, courts have found a "sound basis for treating restrictions in the originating documents as being 'clothed with a very

strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed.'" Noble v. Murphy, 612 N.E.2d 266, 270 (Mass. 1993) (quoting Hidden Harbour Estates, Inc. v. Basso, 393 So.2d 637, 639-40 (Fla. Dist. Ct. App. 1981)). Ownership in a community association is founded on the principle that each homeowner, in exchange for the benefits of the association, "must give up a certain degree of freedom of choice . . . ." Hidden Harbour Estates, Inc. v. Norman, 309 So.2d 180, 182 (Fla. Dist. Ct. App. 1975).

In this case, when Terrapin bought into the Association, it knew, from the plain language in the Declaration, that the governing rules, such as the ability to operate short-term rentals, can be changed by a super majority. There is nothing in the Declaration or otherwise that purports to make short-term rentals a fundamental right not subject to amendment. Likewise, Appellee has not argued that short-term rentals are a fundamental right, nor is there any support in the record for that proposition.

V. The Circuit Court's Opinion Fails to Recognize the Changing Landscape as It Relates to Short-Term Rentals.

The Association first adopted its Declaration in 1979. Airbnb, the most popular short-term rental platform, was not formed until nearly thirty years later – in 2007. Its older but less popular counterpart, VRBO, was born in 1995 – sixteen years after the Declaration was adopted. The concept of short-term rentals was essentially non-existent when the Declaration was adopted, and, in 1979, the

declarant could not possibly have predicted the burgeoning of such web-based platforms. Thus, the declarant could not have known that short-term rentals would then explode in popularity and wreak havoc on otherwise peaceful, residential community associations. Had the declarant been clairvoyant, it may well have included a restriction on short-term rentals in the original Declaration. Since that was not an option, the declarant did the next best thing – it acknowledged that it did not know what needs the association might have during the course of its perpetual existence and thus provided a mechanism for the Association to amend the Declaration as the community evolved.

The advent of Airbnb is not the only technology-driven change that has necessitated amendments to associations' governing documents. Another example is videoconferencing. Many community associations were created before technologies like Zoom, WebEx, or Microsoft Teams existed. As such, their bylaws did not allow for meetings to be held by videoconference. However, as those platforms were developed and grew more popular and widespread, countless associations realized they could govern more effectively by allowing their boards and members to meet remotely. Thus, associations began amending their bylaws to allow for remote meetings – a concept that was not, and could not have been, contemplated by the original governing documents. This trend towards remote

community association meetings accelerated greatly during the unanticipated COVID-19 pandemic.

The advent of short-term rentals is no different. Older associations did not include restrictions on short-term rentals in their declarations because they did not contemplate the existence of such arrangements. Times have changed, and in order to stay relevant, community associations must be permitted to change with them.

The affirmation of the Circuit Court's decision would have negative consequences that extend well beyond the realm of short-term rentals. By precluding associations from amending their declarations pursuant to the documents' general amendment provisions, the Circuit Court's decision will render associations unable to address a host of unforeseen issues that arise in the future. As the needs of community associations continue to evolve, this limitation will make it increasingly difficult for associations to adapt to changing times and effectively govern their communities.

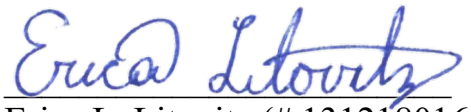
Finally, the Circuit Court's decision is problematic insofar as it invites litigation regarding the validity of past amendments to declarations. If the Circuit Court's decision is affirmed, Maryland courts will be swamped with lawsuits challenging the validity of amendments to governing documents.

CONCLUSION

The lower court's decision is incorrect. It ignores the clear intent of the legislature and the fact that the Association fully complied with the Act and its governing documents. To allow the decision to stand and ignore existing law would create a serious uncertainty in Maryland with respect to the governance of community associations, all with no support in the law.

Wherefore, for the reasons set forth above, Amicus Curiae, the Community Associations Institute, respectfully requests that this honorable Court reverse the decision of the Circuit Court for Queen Anne's County.

Respectfully submitted,



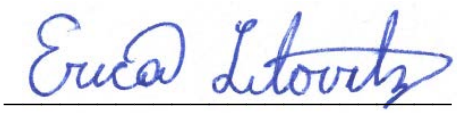
Erica L. Litovitz (# 1312180166)
John J. Matteo (# 9212220002)
JACKSON & CAMPBELL, P.C.
2300 N Street, NW, Suite 300
Washington, D.C. 20037
Telephone: (202) 457-1643
Email: elitovitz@jackscamp.com
Email: jmatteo@jackscamp.com
Counsel for Community Associations Institute

CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3,382 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing and type size requirements stated in Rule 8-112. Specifically, this brief is composed in Times New Roman font, at 14 type size.

Respectfully submitted,



Erica L. Litovitz (# 1312180166)
John J. Matteo (# 9212220002)
JACKSON & CAMPBELL, P.C.
2300 N Street, NW, Suite 300
Washington, D.C. 20037
Telephone: (202) 457-1643
Email: elitovitz@jackscamp.com
Email: jmatteo@jackscamp.com
Counsel for Community Associations Institute

STATUTES AND RULES RELIED UPON

MD Code, Real Property, § 11B-101
§ 11B-101. Definitions

(a) In this title the following words have the meanings indicated, unless the context requires otherwise.

(b) "Common areas" means property which is owned or leased by a homeowners association.

(c) "Declarant" means any person who subjects property to a declaration.

(d)(1) "Declaration" means an instrument, however denominated, recorded among the land records of the county in which the property of the declarant is located, that creates the authority for a homeowners association to impose on lots, or on the owners or occupants of lots, or on another homeowners association, condominium, or cooperative housing corporation any mandatory fee in connection with the provision of services or otherwise for the benefit of some or all of the lots, the owners or occupants of lots, or the common areas.

(2) "Declaration" includes any amendment or supplement to the instruments described in paragraph (1) of this subsection.

(3) "Declaration" does not include a private right-of-way or similar agreement unless it requires a mandatory fee payable annually or at more frequent intervals.

(e) "Depository" or "homeowners association depository" means the document file created by the clerk of the court of each county and the City of Baltimore where a homeowners association may periodically deposit information as required by this title.

(f)(1) "Development" means property subject to a declaration.

(2) "Development" includes property comprising a condominium or cooperative housing corporation to the extent that the property is part of a development.

(3) "Development" does not include a cooperative housing corporation or a condominium.

(g) "Electronic transmission" means any form of communication, not directly involving the physical transmission of paper, that creates a record that:

(1) May be retained, retrieved, and reviewed by a recipient of the communication; and

(2) May be reproduced directly in paper form by a recipient through an automated process.

(h) "Governing body" means the homeowners association, board of directors, or other entity established to govern the development.

(i)(1) "Homeowners association" means a person having the authority to enforce the provisions of a declaration.

(2) "Homeowners association" includes an incorporated or unincorporated association.

(j)(1) "Lot" means any plot or parcel of land on which a dwelling is located or will be located within a development.

(2) "Lot" includes a unit within a condominium or cooperative housing corporation if the condominium or cooperative housing corporation is part of a development.

(k) "Primary development" means a development such that the purchaser of a lot will pay fees directly to its homeowners association.

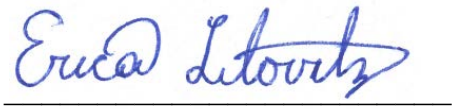
(l) "Recorded covenants and restrictions" means any instrument of writing which is recorded in the land records of the jurisdiction within which a lot is located, and which instrument governs or otherwise legally restricts the use of such lot.

(m) "Related development" means a development such that the purchaser of a lot will pay fees to the homeowners association of such development through the homeowners association of a primary development or another development.

(n) "Unaffiliated declarant" means a person who is not affiliated with the vendor of a lot but who has subjected such property to a declaration required to be disclosed by this title.

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2024, a copy of the *Brief of Amicus Curiae* was served via the Court's electronic filing system on all counsel of record.



Erica L. Litovitz