

No. A22-0288

**STATE OF MINNESOTA
IN SUPREME COURT**

City Bella Commercial, L.L.C., et. al.,

Respondents,

vs.

City Bella on Lyndale,

Appellant.

**BRIEF OF AMICUS CURIAE
COMMUNITY ASSOCIATIONS INSTITUTE**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTRODUCTION AND STATEMENT OF INTEREST OF *AMICUS CURIAE*.....1

ANALYSIS.....2

 I. MCIOA’S SEVERANCE PROVISION IS UNAMBIGUOUS AND
 CONTROLS IN ALL MATTERS INVOLVING THE SEVERANCE OF
 REAL PROPERTY FROM A CIC.....2

 A. The Relevant Statutory Provisions.....2

 B. Relevant Canons of Statutory Construction.....6

 C. Any Attempt by a CIC to Sever Real Property Must Comply with
 MCIOA’s Severance Provision.....11

 II. PUBLIC POLICY REQUIRES THAT THE AMENDMENT PROVISION
 NOT BE ALLOWED TO BE USED TO CIRCUMVENT THE MORE
 STRINGENT REQUIREMENTS IN THE SEVERANCE PROVISION.....15

CONCLUSION.....17

CERTIFICATE OF BRIEF LENGTH.....19

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>City of Chicago, Illinois v. Fulton</i> , 141 S. Ct. 585 (2021).....	9
<i>ILHC of Eagan, LLC v. Cnty. of Dakota</i> , 693 N.W.2d 412 (Minn. 2005).....	6
<i>Marks v. Comm'r of Revenue</i> , 875 N.W.2d 321 (Minn. 2016).....	6
<i>Nielsen v. 2003 Honda Accord</i> , 845 N.W.2d 754 (Minn. 2013).....	7
<i>State v. Thompson</i> , 950 N.W.2d 65 (Minn. 2020).....	9
<i>United States v. Goodner Bros. Aircraft</i> , 966 F.2d 380 (8th Cir. 1992).....	10
<i>Van Asperen v. Darling Olds, Inc.</i> , 254 Minn. 62, 93 N.W.2d 690 (1958).....	6
<i>Yates v. United States</i> , 574 U.S. 528 (2015).....	9
STATUTES AND RULES	
Minn. Stat. § 515B.1-103.....	3
Minn. Stat. § 515B.1-104.....	3, 16
Minn. Stat. § 515B.2-101.....	2
Minn. Stat. § 515B.2-105.....	3
Minn. Stat. § 515B.2-118.....	<i>passim</i>
Minn. Stat. § 515B.2-124.....	<i>passim</i>
Minn. Stat. § 515B.3-112.....	3
Minn. Stat. § 645.26.....	7

INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

Community Associations Institute (“CAI”) respectfully submits this brief as *Amicus Curiae* in support of Appellant City Bella on Lyndale (the “Cooperative”) to assist the Court in interpreting and applying certain sections of the Minnesota Common Interest Ownership Act (“MCIOA”): Minn. Stat. §§ 515B.2-118, 515B.2-124.¹

CAI is a national non-profit organization founded in 1973 and is a voice and information resource for common interest communities (“CICs”) and community association governance, operations, and management in Minnesota and, more broadly, the entire United States. CAI’s work is supported by membership fees, event registration fees, donations, and volunteers. CAI serves its members through educational programs, industry publications, and legislative action. CAI’s Legislative Action Committee represents the interests of CAI’s members with legislative, regulatory, and *amicus curiae* advocacy in matters affecting CICs. CAI’s Minnesota Chapter has a vested interest in ensuring proper interpretation and application of MCIOA for the thousands of CICs and community associations across the state.

Amicus Curiae CAI submits this brief to assist the Court in determining whether a claimed severance of real property from a CIC is void as a matter of law when its only purported corroboration is an amendment to a declaration prepared and recorded pursuant

¹ This brief was authored by Smith Jadin Johnson, PLLC in its capacity as attorneys for *amicus curiae*, CAI. Neither Appellant Cooperative nor its counsel participated in the drafting of this brief in any way, in whole or in part. Appellant made no monetary contribution toward the preparation or submission of this brief. No person or entity other than *amicus curiae* CAI, its members, or its counsel made a monetary contribution intended to fund its preparation, contents, or submission.

to Minn. Stat. § 515B.2-118 (MCIOA’s “Amendment Provision”), which did not purport to sever property and undisputedly failed to comply with the more explicit statutory provisions codified in Minn. Stat. § 515B.2-124 (MCIOA’s “Severance Provision”). CAI’s participation will help the Court consider broader perspectives of this decision’s potential widespread impact beyond the narrow consideration of the specific facts in this case.

As discussed more fully below, CAI respectfully submits that the Severance Provision is unambiguous and controls over the more general Amendment Provision in all matters involving the severance of real property from a CIC. CAI further submits that as both a matter of law and sound public policy, parties should not be allowed to rely on the statute of limitations in the Amendment Provision to evade the Severance Provision’s specific – and far more stringent – requirements for severing property from a CIC.

ANALYSIS

I. MCIOA’S SEVERANCE PROVISION IS UNAMBIGUOUS AND CONTROLS IN ALL MATTERS INVOLVING THE SEVERANCE OF REAL PROPERTY FROM A CIC.

A. The Relevant Statutory Provisions.

MCIOA governs the creation of CICs, which include cooperatives, in Minnesota. Under MCIOA, a CIC is created by recording a declaration of covenants, conditions, and restrictions (a “Declaration”). Minn. Stat. § 515B.2-101. MCIOA requires a cooperative’s Declaration to include certain specific information, including but not limited to “a legally sufficient description of the real estate included in the common interest community,” “a statement as to whether the unit owners' interests in all units and their allocated interests are real estate or personal property,” and “an allocation to each unit of the allocated

interests.” Minn. Stat. § 515B.2-105(a)(4), (7), and (8). Further, once a CIC is created, a declarant (a person or persons who reserves special declarant rights in the Declaration) “may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of [MCIOA] or the declaration.” Minn. Stat. § 515B.1-104; Minn. Stat. § 515B.1-103(15)(i).

MCIOA generally permits CICs to amend their Declaration “by vote or written consent of unit owners of units to which at least 67 percent of the votes in the association are allocated, or any greater or other requirement” specified in the Declaration. Minn. Stat. § 515B.2-118(a). However, MCIOA also states that certain significant amendments require the unanimous written consent of the unit owners. Minn. Stat. §515B.2-118(a)(3). All such amendments are subject to a two-year statute of limitations, after which time their validity cannot be challenged. Minn. Stat. § 515B.2-118(b).

MCIOA also permits CICs to sever property from the community upon approval of a written severance agreement. *See* Minn. Stat. § 515B.2-124(a).² MCIOA specifies that such a severance agreement must be executed by “at least 67 percent of the votes in the association,” as long as a majority of the owners in the property to be severed from the CIC and in the property remaining in the CIC both approve it. Minn. Stat. § 515B.2-124(a)(1).

² For clarity and simplicity, *Amicus Curiae* CAI focuses its argument on MCIOA’s Severance Provision. However, there is also an additional section of MCIOA that governs conveyance of common elements. *See* Minn. Stat. § 515B.3-112. This conveyance provision contains specific requirements restricting how a CIC may convey common elements and also voids non-compliant attempts. Minn. Stat. § 515B.3-112(d). The conveyance provision applies to this case, in addition to the Severance Provision, and both provisions support the conclusions advocated herein.

In a cooperative, a severance agreement must also be approved by “all holders of mortgages or contracts for deed on the entire real estate constituting the cooperative.” Minn. Stat. § 515B.2-124(a)(3).

A written severance agreement must include certain statutorily proscribed information. Among other things, it must “specify a severance date by which the severance of the common interest community shall be accomplished, after which the severance agreement is *void*.” Minn. Stat. § 515B.2-124(c) (emphasis added). A severance agreement must also be recorded with the county recorder’s office where the CIC is located. Minn. Stat. § 515B.2-124(e). Recording of the written severance agreement constitutes notice to all persons interested in acquiring property that the CIC is being severed and that the interested person would be acquiring the property subject to the terms in the severance agreement. *Id.* Further, a written severance agreement must allocate the CIC’s assets and liabilities between the remaining CIC and any new CIC formed from the severed property. Minn. Stat. § 515B.2-124(d)(4).

A written severance agreement must also approve a proposed amendment to the Declaration that: (i) legally describes the real estate constituting the remaining CIC and the real estate being severed, (ii) restates the number of units in the remaining CIC, (iii) reallocates the interests of the unit owners in the remaining CIC among the remaining units in accordance with the allocation formula set forth in the Declaration, and (iv) recites any easements to which the severed portion of the CIC remains subject. Minn. Stat. § 515B.2-124(d)(1). It must also authorize the association operating the remaining CIC to execute and record the amended Declaration and other governing documents on behalf of the unit

owners and all other persons holding an interest in the remaining CIC and to take other actions necessary to accomplish the severance of the CIC. Minn. Stat. § 515B.2-124(d)(3). Finally, MCIOA provides that if the amendment to the Declaration of the remaining CIC is not recorded on or before the severance date, then “the severance agreement and the amendment to the declaration are *void as of the day after the severance date.*” Minn. Stat. § 515B.2-124(f) (emphasis added).

The Severance Provision unequivocally states that “a part of a common interest community...may be severed from the common interest community, *subject to the requirements of this section.*” Minn. Stat. § 515B.2-124(a) (emphasis added). In other words, the Severance Provision in Minn. Stat. § 515B.2-124 – and not the Amendment Provision in Minn. Stat. § 515B.2-118 – controls any attempt to remove real property from a CIC.

Unlike an amendment to a Declaration under Minn. Stat. § 515B.2-118, the severance of property from a CIC under Minn. Stat. § 515B.2-124 is not subject to any statute of limitations. This is undoubtedly because severing property from a CIC not only affects the rights and responsibilities of the CIC but of all unit owners and mortgagees therein. The severance of real property from a CIC carries enormous operational impact, such as: (1) reduced operating income for the CIC commensurate with the properties being severed; (2) increased assessments for unit owners because the operating and maintenance expenses for the remaining CIC are spread among fewer units; and (3) reduced property values for the units within the remaining CIC because of lost access and use rights to certain real property and amenities located thereon. In light of these impacts, MCIOA rightly

subjects the severance of properties to more stringent approval requirements. Because the provisions explicitly void non-compliant attempts as a matter of law, MCIOA requires strict compliance.

CAI respectfully submits that Minn. Stat. § 515B.2-124 is unambiguous and that Minnesota courts are bound to apply it – rather than Minn. Stat. § 515B.2-118 – to cases involving the purported severance of real property from a CIC. As more fully explained below, the relevant canons of statutory interpretation also favor applying the Severance Provision here.

B. Relevant Canons of Statutory Construction.

“The touchstone for statutory interpretation is the plain meaning of a statute's language.” *ILHC of Eagan, LLC v. Cnty. of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005). The rules of statutory construction are only applied if the statute is ambiguous. *Id.* “A statute is ambiguous if, as applied to the facts of the case, it is susceptible to more than one reasonable interpretation.” *Marks v. Comm'r of Revenue*, 875 N.W.2d 321, 324 (Minn. 2016). Generally, statutory construction rules require this Court to read a specific provision in context with the statute's other provisions in order to interpret the meaning of the provision(s) in question. *ILHC of Eagan, LLC*, 693 N.W.2d at 419. Further, the Court should presume that the legislature “understood the effect of its words and intended the entire statute to be effective and certain.” *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 74, 93 N.W.2d 690, 698 (1958). Statutes should also be read and construed as a whole, and the Court must interpret each section in consideration of the surrounding sections to prevent conflicting interpretations. *See id.*

Each of these canons of statutory interpretation direct the Court to apply the more specific requirements in the Severance Provision over the more general requirements in the Amendment Provision in matters involving the severance of real property from a CIC.

1. The Severance Provision, as a Provision That Controls a Specific Process, Prevails over the Amendment Provision.

If a general statutory provision conflicts with a special provision in the same statute, this Court interprets the two provisions to give effect to both provisions whenever possible. *Nielsen v. 2003 Honda Accord*, 845 N.W.2d 754, 756 (Minn. 2013) (citing Minn. Stat. § 645.26, subd. 1 (2012)). “But if the conflict between two statutes is irreconcilable, the special provision prevails and will be interpreted as an exception to the general provision, unless the general provision was enacted at a later session and it is the manifest intent of the Legislature that the general provision prevail.” *Id.*

The Amendment Provision was included in the original drafting of MCIOA, whereas the Severance Provision was adopted and added to MCIOA five years later in 1999. *See* Minn. Stat. § 515B.2-118(b) (1994); Minn. Stat. § 515B.2-124 (1999). Therefore, if there is ambiguity as to which provision should apply, this canon favors the Severance Provision as the more specific provision because the more general Amendment Provision was already part of the statute when the more specific Severance Provision was added.

As discussed above, the Severance Provision governs the specific process of severance, which requires CICs to comply with several steps prior to a Declaration amendment. While the Severance Provision requires a Declaration amendment as one of

the steps of severance, it is only one step in the process, and it is meant to be one of the final steps, with the prerequisite that a CIC has complied with all the steps leading up to that point. The Amendment Provision more properly applies to Declaration amendments generally, which can accomplish many other, less technical, revisions to a Declaration.

The Severance Provision requires CICs to strictly comply with its requirements, renders non-compliant attempts to sever real property from a CIC void as a matter of law, and applies to the underlying severance process itself. Any challenge to a claimed severance therefore concerns compliance with all aspects of that process, not just a Declaration amendment. A lone Declaration amendment, without any additional documentation, cannot retroactively validate a non-compliant severance attempt—especially if such a Declaration amendment does not purport to evidence or confirm severance.

In other words, the Amendment Provision's statute of limitations can only apply in the context of this case if – and only if – the prerequisite requirements of the severance statute had been met first, and the validity of the Declaration amendment itself was the only issue. The Amendment Provision cannot be applied in a way that would effectively confirm severance, a process for which MCIOA requires strict compliance, by way of an unrelated, belated, and non-compliant Declaration amendment.

Severance, as a specific course of action, must therefore be governed by MCIOA's Severance Provision.

2. The Canon Against Surplusage Disfavors Application of the Amendment Provision Because It Renders the Severance Provision Inconsequential.

The rule against surplusage generally provides that the Court should avoid interpretations that would make a word or phrase superfluous, invalid, or inconsequential. *State v. Thompson*, 950 N.W.2d 65, 69 (Minn. 2020). “The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.” *City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 591 (2021) (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality opinion; internal quotation marks and brackets omitted)).

Here, application of the Amendment Provision would place a two-year statute of limitations where none was intended. The Severance Provision does not provide a time limitation for litigating disputes regarding the purported severance of real property from a CIC. Nor does the Severance Provision expressly point to the Amendment Provision as applicable—both of which the Minnesota Legislature easily could have done if it had so intended. Indeed, if the Court were to adopt Respondents’ argument and uphold the district court’s ruling, then the Amendment Provision’s two-year statute of limitations would operate as a loophole, rendering the Severance Provision essentially insignificant because real property could be severed from a CIC (whether intentionally or accidentally) without complying with the Severance Provision’s stringent requirements simply by recording a non-compliant Declaration amendment and waiting two years.

The Minnesota Legislature did not include a statute of limitations in the Severance Provision. To apply the Amendment Provision to the facts of this case would be to impose a plainly unintended limitation that would render the Severance Provision immaterial.

3. The Severance Attempt Was *Void Ab Initio* Pursuant to the Severance Provision, and the Statute of Limitations Argument Is Inapposite.

A statute, like MCIOA's Severance Provision, that renders an attempt void for non-compliance means the attempt is *void ab initio* or without "force or effect of law." See *United States v. Goodner Bros. Aircraft*, 966 F.2d 380, 384 (8th Cir. 1992).

A CIC's severance attempt is *void ab initio* without a written and recorded severance agreement. See Minn. Stat. § 515B.2-124. Failure to comply with these requirements is fatal. Without the proper documentation at the outset of the severance attempt—namely, the written severance agreement—the attempt is *void ab initio*, and any steps taken without a written severance agreement are void as a matter of law. Further, because the severance agreement is the document that provides approval for a Declaration amendment that would memorialize the severance, the severance agreement (with all its own requirements) is a condition precedent to any such Declaration amendment. A Declaration amendment, on its own, therefore cannot validate a severance because the lack of required preceding documentation renders the severance *void ab initio*, and the Declaration amendment is therefore ineffective as it relates to the attempted severance as a matter of law. Accordingly, a statute of limitations argument pursuant to MCIOA's Amendment Provision is misplaced and unavailing.

The various canons of statutory interpretation therefore confirm that the Severance Provision should prevail here whether or not its application is unambiguous. MCIOA's Severance Provision allows real property to be severed from a CIC if – and only if – certain conditions are met and documented. As explained more fully below, the Severance Provision governs in this case because there was an attempt to remove real property from the Cooperative.

C. Any Attempt by a CIC to Sever Real Property Must Comply with MCIOA's Severance Provision.

As detailed above, severance of real property from a CIC involves a specific, multi-step process under MCIOA. When a CIC attempts severance by transferring real property via warranty deed (or any other means of legally transferring ownership of real property), and in that transfer intends that the property is no longer subject to the CIC's Declaration, the CIC is bound by MCIOA's Severance Provision.

As applied to the facts of this case, the purported severance of real property from the Cooperative is void as a matter of law because: (1) the Severance Provision requires preparing and recording a written severance agreement; (2) the Cooperative undisputedly never prepared or recorded a written severance agreement; and (3) the Cooperative inarguably never prepared or recorded a Severance-Provision-compliant amendment to the Declaration.

Where there is no documentation to support any attempt by the CIC to meet the obligations set forth in MCIOA's Severance Provision, the requirements, such as the recording of a severance agreement in the county records, cannot have been met. MCIOA

does not provide that a later document can cure these deficiencies. In fact, MCIOA's Severance Provision renders any non-compliant attempt void. *See* Minn. Stat. § 515B.2-124(c) and (f). A Declaration amendment alone does not – and cannot – satisfy the requirements of the Severance Provision and therefore cannot confirm severance without the other required documentation.

1. Without a Recorded Severance Agreement, There Can Be No Declaration Amendment Confirming Severance.

Where, as here, there is no severance agreement, none of the specific terms required to be covered in the severance agreement can be satisfied. There would be no execution showing approval of the requisite percentage of owners and mortgagees. There would be no written agreement recorded in the county property records to provide notice to persons interested in purchasing property within the CIC.

Further, with no severance agreement, there is also no severance date by which the severance was meant to be accomplished. The severance date designates the date by which all the requirements must be met and the date by which the corresponding Declaration amendment would need to be recorded—both instances that would otherwise render the attempt void if not completed. Minn. Stat. § 515B.2-124(c) and (f). MCIOA's requirement to specify a severance date indicates that severance attempts have time limitations and cannot be held open indefinitely.³ The lack of a recorded severance agreement and the lack

³ The time limitation specified by a severance date relates to a specific attempt to sever real property, restricts the attempt to a confined time period, and requires strict compliance. This time limitation is different from and antecedent to any application of the Amendment Provision's statute of limitations here.

of a specified severance date each, on their own, render a severance attempt void. To be clear, with no specified severance date and no recorded severance agreement, any related attempt to sever real property from a CIC is void, and any speculation as to a possible severance date where none was specified is inappropriate. CAI therefore submits the following as an illustration of why any speculation here would be ineffective.

MCIOA explicitly states that failure to record a Declaration amendment on or before the severance date renders both the severance agreement and Declaration amendment void as of the day after the severance date. Minn. Stat. § 515B.2-124(f). When a CIC attempts severance, logically, the legal transfer of ownership of the real property would be one of the last steps taken in the severance process, after all the prerequisite requirements—namely, both a compliant severance agreement and Declaration amendment—have been fully satisfied and properly documented by recording *both* documents in the county records, as mandated by MCIOA’s Severance Provision. The date of legal transfer of property would therefore be the last possible “severance date” by which the corresponding Declaration amendment would need to be recorded without rendering the attempt automatically void (assuming, *arguendo*, that the severance date could be inferred despite the Severance Provision unequivocally requiring that the date be specified in the severance agreement). Accordingly, a singular, unrelated Declaration amendment recorded *more than two years after* a warranty deed cannot logically be substituted for a severance agreement and Declaration amendment that would have needed to be recorded prior to any transfer of real property.

Therefore, if no severance agreement (and no Declaration amendment) is recorded

at the time real property is transferred from a CIC, the severance attempt is void as a matter of law.

2. A CIC's Contention That a Severance Attempt Is Void Is Not a Challenge to the Validity of an Unrelated Declaration Amendment.

Without a recorded severance agreement to first approve a Declaration amendment memorializing the severance, a severance attempt is void as a matter of law, and any allegedly related Declaration amendment is ineffective as to any references concerning the previously voided severance attempt. Accordingly, when a CIC contends that a severance attempt was void, the CIC asserts that the severance attempt did not meet the requirements of MCIOA's Severance Provision (only one portion of which relates to a Declaration amendment). Under the circumstances here, a CIC does not challenge the validity of the amendment; the CIC instead challenges the amendment's claimed operative effect, which was asserted more than a decade after the amendment was recorded. Because there are several provisions, including the recording of a severance agreement, that must be met prior to reaching the step of recording a Declaration amendment, if those prerequisite steps have not been completed, a CIC's concern is not with a Declaration amendment, even if one was recorded, but rather whether the attempt was void prior to any Declaration amendment as a matter of law.

A CIC under the described circumstances therefore does not dispute the Declaration amendment but rather the attempted severance's compliance with the statutory requirements. The use of a Declaration amendment here—and the Amendment Provision's statute of limitations—to supplant a lack of required documentation is therefore erroneous

and ineffective. Any attempted retroactive attribution of severance to an unrelated Declaration amendment recorded years after the transfer of real property must fail.

Based on the foregoing, the Severance Provision unambiguously applies to the facts of this case, but even if the Court concludes that application of the two provisions is ambiguous, canons of statutory interpretation also require application of the Severance Provision here.

II. PUBLIC POLICY REQUIRES THAT THE AMENDMENT PROVISION NOT BE ALLOWED TO BE USED TO CIRCUMVENT THE MORE STRINGENT REQUIREMENTS IN THE SEVERANCE PROVISION.

Severance affects the rights and responsibilities of both a CIC as a whole and its individual homeowners. As such, its potential impact is rightfully restricted by MCIOA through a specific set of requirements that must be followed to achieve that consequential result, one of which is a requisite percentage of approval of both homeowners and mortgagees. Based on the stringent terms of the Severance Provision, public policy disfavors confirming severance due to passage of time or because the parties acted as if severance was accomplished. This Court should not allow the Amendment Provision—simply because a Declaration amendment exists—to be used as a shield to excuse non-compliance with the Severance Provision. MCIOA’s Severance Provision was implemented specifically for the purpose of regulating and constraining severance, and public policy demands that this Court reassert the Severance Provision’s dominance over the Amendment Provision as to severance attempts.

CICs are governed by Boards of Directors (“Boards”), which are primarily comprised of homeowners who live in their respective communities. These homeowners

are lay people and typically serve terms of one to three years. Turnover on these positions varies, but Boards can and do turnover entirely in any given year. Continuity and CIC history can consequently be difficult to maintain.

The potential problem here is then that these lay people would be expected to check the property's records with the county each year, as a matter of course, to make sure there have been no documents recorded that may result in an accidental or attempted, but unapproved, severance. Moreover, even if Boards followed through with such a requirement, it would be extremely difficult for lay people to understand that an amendment intended severance if, as here, a different legal description was the only indicator. In other words, it would not help if a new Board checked a Declaration amendment like the amendment in this case—they would have no way of knowing or discovering that this document supposedly solidified or documented a severance based on the legal description alone.

Further, this potential need to check property records annually would be a burden on Boards (who are made up entirely of volunteers) in every single association of the thousands across Minnesota, as well as the county recorders' offices who will likely have to answer these questions and provide copies of the documents on a regular basis.

Finally, MCIOA prohibits declarants from evading the limitations of MCIOA once a Declaration has been recorded. Minn. Stat. § 515B.1-104. This is the case even – or especially – when a CIC is under declarant control, as was the case here. A CIC's dispute over whether a severance attempt properly complied with the Severance Provision (where the severance was attempted while the CIC was still under declarant control) should not be

barred by an unrelated statute of limitations. Allowing an unrelated, non-compliant Declaration amendment to be disingenuously shoehorned as evidence of severance (a contention that was made much later than two years after the amendment) and then using a two-year statute of limitations to preclude a legal challenge to an issue completely unrelated to said amendment, would be tantamount to allowing a declarant to evade MCIOA's specific limitations in its Severance Provision.

CICs are important organizations in Minnesota, and they can be challenging enough for their volunteer Boards to operate without the potential added duty of checking property records annually and attempting to interpret whether an amendment might implicate severance even when not explicitly stated. Public policy therefore urges that the Amendment Provision cannot be permitted to be used as a means to bypass the Severance Provision's requirements.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* CAI respectfully requests that this Court reverse the judgment of the court of appeals and declare the attempted severance void as required by Minn. Stat. § 515B.2-124.

Respectfully Submitted,

Dated: April 3, 2023

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CERTIFICATE OF DOCUMENT LENGTH

The undersigned counsel for *Amicus Curiae* Community Associations Institute certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01 in that it is printed in 13-point proportionally spaced typeface, and the length of this brief is 4461 words. This document was prepared using Microsoft Word365.

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