COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	~~DATE FILED~~ December 6, 2024 5:59 PM FILING ID: 19D279394FD2A CASE NUMBER: 2024SC648
Court of Appeals Division III Opinion by Schultz, J. Jones, J. concurring, and Johnson, J. dissenting Case No. 2022CA0913 District Court, Summit County, Colorado Ret. Hon. Mark D. Thompson Case No. 2020CV30124	
Petitioners - Appellees: Katheryn Marrone, Billy Joe North, Marilyn North, Gail M. O'Malley Revocable Trust, and Parkside Townhomes 1 v. **Respondent - Appellant:** Holly Crystal.	▲ COURT USE ONLY ▲ Case Number: 2024SC648
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BRIEF OF AMICUS CURIAE
COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF PETITIONERS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 53(g).

☑ It contains 3,114 words (does not exceed 3,150 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 53.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32 and C.A.R. 53.

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Amicus Curiae Community Associations Institute ("CAI") submits the following Brief in support of the Petitioners.

I. INTRODUCTION AND STATEMENT OF INTEREST

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 2.72 million Coloradans live in 1,058,730 units within 11,299 community associations[1].

The key issues raised in this case concern the ability of community associations to amend their governing documents, to clarify easement boundaries, and the attendant implications for community associations. Thus, CAI is uniquely suited to advise this Court as *amicus curiae* under C.A.R. 29, concerning both the critical functions served by community associations and the adverse effect that

[1] 2023 HOA Information & Resource Center Report (§ 4.3), Colorado Department of Regulatory Agencies, Division of Real Estate: https://dre.colorado.gov/hoa-center

affirming the Court of Appeals' Opinion would have on community associations. If left in-tact, the Court of Appeals' Opinion will severely hamper the ability of community associations to update their documents to: (1) correct drafting errors; (2) comply with current law and important public policies; (3) resolve technical issues created by careless developers, (4) memorialize implicit and equitable property rights, and (5) clarify the meaning of provisions susceptible to misinterpretation.

Declarations and plats are prepared by developers to ensure a continued and consistent plan and scheme of development. Easements identified and/or described in a declaration or plat (or both), are designed to ensure that the collective interests of the community and homeowners as a whole are served. This includes rights of both homeowners and an association to have reasonable access to their individually owned properties and to common areas for general use and enjoyment, and to carry out their respective maintenance and repair responsibilities.

CAI respectfully submits this brief as *amicus curae* to highlight for this Court's consideration the importance of maintaining and ensuring reasonable access to property, but without imposing unnecessary and undue financial or legal burdens on the association.

The consequences of the Court of Appeals' decision are of significant concern to CAI and its members. The greatest impact falls upon the citizens of Colorado who live in common interest communities. This is because the ruling of the Court of Appeals effectively precludes the Association from performing routine maintenance functions, and also precludes similarly situated homeowners in other communities from accessing portions of their property. The ruling may also discourage homeowners from seeking to clarify and correct older documents, which is contrary to public policies that encourage clarity and full disclosure. Finally, the Association's easement rights to access rear yards over the homeowner's objection does not deprive or interfere with any use rights of that homeowner.

II. POSITION OF THE COMMUNITY ASSOCIATIONS INSTITUTE

CAI's concern and interest in this case arises from the Court of Appeals' determination that the Association and certain homeowners do not have reasonable access to property in the community based on an extremely narrow interpretation of the Plat, particularly when the historical use the property and provisions of the Declaration, as amended, disclose the intended scope of the easements and the purposes for which the easements were established. The Court of Appeals' decision focused solely upon the limited information contained on the Plat and in

the unartfully drafted original Declaration. By failing to construe the governing documents as a whole, and by ignoring the plainly stated intentions of the developer to grant access, the Court of Appeals' Opinion has profound, adverse implications for community associations and homeowners.

If the Court of Appeals' Opinion stands, the Association will be left with a legal duty to maintain and repair, but without legal access, to perform those responsibilities, which could, in turn, lead to blight, fire hazards, and nuisances for other nearby communities. It also denigrates the owners' understanding and expectations, when the property was purchased in reliance on historical interpretation of the governing documents and the ongoing reliance upon long-standing rights of access.

Worse, if the Court of Appeals' Opinion stands, it may chill efforts of other communities to correct ambiguities, drafting errors and critical omissions by a developer or declarant. The right to amend governing documents is an important provision of CCIOA. Here, however, the majority's decision suggests that homeowners seeking to clarify their documents risk having an appellate court treat their vote as evidence they were "not confident" in their easement rights. Opinion ¶ 48.

For these reasons, CAI respectfully urges this Court to grant certiorari.

III. STATEMENT OF THE CASE

CAI adopts and incorporates the Petitioners Statement of the Case.

IV. ARGUMENT

A. Introduction.

Acceptance of the Court of Appeals' Opinion and reasoning will be detrimental to thousands of Coloradans living in common interest communities and will undermine the ability of community associations to effectively self-govern. Affirmance of the Court of Appeals' Opinion would substantially impair protected property rights, inhibit the ability of community associations from carrying out their obligations, encourage frivolous litigation, and harm property owners and community associations throughout Colorado.

B. The 2020 Declaration Amendment was Valid and Appropriate to Allow the Association to Perform Basic Functions.

One of the primary issues that precipitated the adoption of CCIOA was concern over unclear documents from the 1970s and 1980s, such as the Declaration at issue here. As such, key portions of CCIOA were made applicable to pre-existing communities formed before 1992, including the right to amend documents with the vote of 67% or more of the homeowners – even if the declaration purported to require a higher percentage. *See* C.R.S. §§ 38-33.3-117(1.5)(d), -217(1). The majority's conclusion that any one homeowner can now invalidate such a vote by

arguing that a taking occurred is directly contrary to the legislative intent. Indeed, CAI is troubled by the majority's suggestion that an unlawful taking occurs merely because an association's vendors might walk across a townhome owner's side yard while performing building maintenance. Opinion ¶¶ 49-50. Even the government is allowed to pass regulations affecting real property rights, so long as the regulations do not go "too far" or impose a "very high" level of interference with the owner's use of land. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of La Plata*, 38 P.3d 59, 65 (Colo. 2001). The majority's holding could hamstring community associations across Colorado and leave them unable to perform their basic functions. This radical new takings theory is certainly not a basis to upend a proper vote passed by the Parkside I residents.

Here, 75% of the homeowners at Parkside I exercised their statutory and contractual right to amend the Declaration to clarify the undefined term "common area" and establish the boundaries of the Declaration's easement. This vote provided record notice to current and future residents of how the property had been treated for the previous thirty years. CCIOA empowers association members to take such action, which serves the important public policy of providing notice to homeowners. The majority, however, took this vote as evidence that the homeowners were "not confident" in their easement rights. Opinion ¶ 48. If this

opinion stands, it may frustrate public policy and chill other communities' efforts to clarify historic documents. Rather than correcting mistakes in prior recordings, associations may now become fearful that an appellate court might misconstrue their efforts years later. This is not what the legislature intended when it gave homeowners a statutory process to amend their documents.

It is well settled that community associations in Colorado (1) have implied powers to perform their basic functions and (2) have the right to amend their governing documents to codify implied rights and/or duties. *Evergreen Highlands Ass'n v. West*, 73 P.3d 1 (Colo. 2003).

The soundness of this Court's reasoning in *Evergreen Highlands* is premised on the underlying principles that community associations have broad amendment powers. In *Evergreen*, the Court reasoned that to promote efficient governance, it is necessary that homeowners associations have the implied powers, even in the absence of express authority in the declaration.

In this instance, the Association has provided maintenance on the townhomes and other improvements for decades in reliance upon the continued use of the side yards adjacent to Lots 104A and 104D, and pursuant to the Association's implicit access to the property.

The purpose of the 2020 Declaration amendment was to preserve the status quo – i.e., to memorialize historical access and use rights as originally intended by the developer, and as acknowledged and exercised by members of the community since the original creation/formation of the community. The method by which the 2020 Declaration Amendment was approved was valid under the terms of the governing documents and Colorado law. Moreover, it is undisputed that each owner who purchased a lot in the community purchased the property subject to the terms and conditions of the recorded Declaration, which includes the right to amend the Declaration.

Notwithstanding the fact that the 2020 Amendment was properly approved, if the Court of Appeals' Opinion stands, doing so would deprive the Association of existing rights necessary to perform basic functions – i.e., the right of access to perform maintenance and/or repairs on the townhomes and other improvements that the Association is obligated to maintain.

CAI submits that the Declaration and CCIOA should reasonably and logically be construed to permit the 2020 Amendment to effectuate the purposes for which the Association was formed. To permit individual lot owners to unilaterally deny the Association access to the side yards necessary to perform basic maintenance on the townhomes, in the absence of a clear expression

otherwise in the governing documents, would destroy the Association's right to rely on restrictive covenants and practices which have traditionally been recognized and upheld in Colorado.

C. Interpretation of the Declaration and Plat for Parkside Townhomes 1 Requires the Consideration of Extrinsic Evidence.

CCIOA is patterned after the Uniform Common Interest Ownership Act ("UCIOA"). CAI was directly involved in legislative efforts to adopt CCIOA.

CCIOA contains a comprehensive legislative declaration underlying the framework for the creation, operation and management of common interest communities. C.R.S. § 38-33.3-102. The legislative declaration emphasizes the need for statewide uniformity and effective and efficient governance:

> "The general assembly hereby finds, determines and declares, as follows: (a) That is in the best interests of the state and its citizens to establish a clear, comprehensive, and uniform framework for the creation and operation of common interest communities…; (d) That it is the policy of this state to promote effective and efficient property management through defined operational requirements that preserve flexibility for such a homeowners associations… ."

Id. [Emphasis supplied.]

The creation/formation of common interest communities is dependent upon the level of knowledge, experience and foresight of developers, who bring the community into existence by drafting and recording the community's declaration and plats. Not surprisingly, mistakes and/or drafting errors occasionally occur,

resulting in provisions that are susceptible to misinterpretation or misunderstanding. The General Assembly rightly did not expect perfection of developers, nor did it expect that every circumstance or nuance would be thoroughly memorialized in an association's governing documents. For that reason, the General Assembly adopted an intentionally broad definition of "Declaration" to provide a mechanism to interpret or correct potential oversights, brevity, ignorance, or simple mistakes of developers. C.R.S. § 38-33.3-103(13) provides that:

> "'Declaration' means <u>any recorded instruments</u> however denominated, that create a common interest community, <u>including any amendments to those instruments and also including, but not limited to, plats and maps</u>."

[Emphasis added].

Governing documents are routinely amended to correct errors and memorialize historic, implied rights contained therein. In this instance, the original Declaration and Plat for Parkside Townhomes 1, when viewed in isolation, did not contain sufficient detail to appropriately ascertain the exact boundaries of the access easements. The Association and its members, over several decades, were entitled to reasonably, practically, and fairly review and construe the governing documents together to appropriately discern the original intent of the drafters.

Construction of the declaration requires that the Court " 'follow the dictates of plain English' to construe the document as a whole." *Vista Ridge Master*

Homeowners Ass'n, Inc. v. Arcadia Holdings at Vista Ridge, LLC, 300 P.3d 1004, 1007 (Colo. Ct. App. 2013); *see also Double D Manor, Inc. v. Evergreen Meadows Homeowners' Ass'n*, 773 P.2d 1046, 1048 (Colo.1989). If a declaration is clear on its face, it should be enforced as written. *Id.*

Here, neither the original Declaration nor the Plat independently provide clear or unambiguous indication of the Common Area boundaries, nor the boundaries of easements. Extrinsic evidence was developed at trial and relied upon by the District Court to clarify the ambiguities and property interpret the easements. *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229 (Colo. 1998).

The goal in construing a declaration is to ascertain the intention of the parties to it, which controls over merely technical rules of construction and is gathered from the entire language used, considered in connection with the subject matter. See generally, Boyack "Common Interest Community Covenants and the Freedom of Contract Myth", 22 J.L. & *Pol'y* 767 (2014). *See also Dunn v. Dunn*, 3 Colo. 510 (1877); *American Holidays, Inc. v. Foxtail Owners Ass'n*, 821 P.2d 577 (Wyo. 1991) (when interpreting declaration covenants, courts seek to discern intent of the parties including that of grantor); *Pulte Home Corp. v. Countryside Comty. Ass'n*, 382 P.3d 821, 826 (Colo. 2016) (covenants are construed as a whole and courts seek to harmonize and give effect to all provisions so that none will be

rendered meaningless.); and *Wilson v. Goldman*, 699 P.2d 420 (Colo. App. 1985) (protective covenants must be construed as a whole and interpreted in view of their underlying purposes.).

The District Court properly considered the totality of the governing documents to determine that the Common Area and express easements existed on all land within the community outside the residential building footprints. The Court of Appeals erred in limiting the scope of its review to discrete portions of the Plat containing ambiguous lines and arrows. By narrowly relying upon only the Plat, the Court of Appeals determined the pictographic representations on the Plat were the only boundaries of both the Common Area and any express or implied easements. App. Opinion, ¶34. This was a reversible error.

The Plat alone for Parkside Townhomes 1 is ambiguous and necessarily required a contemporaneous review of the Declaration to determine the developer's intent as to the location and boundaries of the common areas, as well as the location and boundaries of the access and utility easements. The Court of Appeals disregarded the Declaration in attempting to ascertain the developer's intent. The Opinion goes so far as to indicate that the Plat contains "clear notations" and "clear intent," despite the absence of a specific legal description describing the boundaries of such easements and Common Area. This analysis is contrary to established

Colorado law. *See Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993); *City of Lakewood v. Armstrong*, 2017 COA 159, ¶¶ 10-11; *Lobato v. Taylor*, 71 P.3d 938 (Colo. 2002).

The Court of Appeals' reasoning and failure to fully inform its reading of the Plat has led to an unacceptable and illogical result. *In re J.N.H.*, 209 P.3d 1221, 1223 (Colo. App. 2009); *Bryant v. Cmty. Choice Credit Union*, 160 P.3d 266, 274 (Colo. App. 2007); *DA Mountain Rentals, LLC v. Lodge at Lionshead Phase III Condo. Ass'n Inc.*, 409 P.3d 564 (Colo. App. 2016) ("We do not, however, adopt any interpretation that leads to an absurd conclusion or is at odds with the legislative scheme").

D. Implied Easements Exist on The Side and Rear Yards of Lot 104A.

"An implied easement of necessity for access to land arises when the owner of a tract of land conveys part of that tract to another, leaving either the part conveyed or the part retained without access except over the other part." *Wagner v. Fairlamb*, 151 Colo. 481, 486, 379 P.2d 165, 168 (1963), cert. denied, 375 U.S. 879, 84 S.Ct. 149, 11 L.Ed.2d 110 (1963). This predicament is for those owners of Lots 104B and 104C, who are left without access to their backyards, and for the Association, which is now effectively prohibited from complying with its maintenance and repair obligations. In these circumstances, an easement must be

implied because "the law assumes that no person intends to render property conveyed inaccessible for the purpose for which it was granted [or retained]." *Id*. at 487, 379 P.2d at 168-69.

The Court of Appeals erred in failing to consider whether a prescriptive easement existed. *Lobato*, 71 P.3d at 954. Instead, the Court of Appeals summarily disposed of the prescriptive easement argument based upon its strained interpretation that the prior use was permissive.

E. Colorado's Statutory Scheme Supports Reasonable Easements for Access to Lots and Common Areas.

The comments to UCIOA, upon which CCIOA is based, are helpful and informative in construing the governing documents, and supports the District Court's finding that access easements exist on the common areas (i.e., side yards) immediately surrounding and/or adjacent to the townhomes. UCIOA, § 2-116, Comment 3 states, in part:

> "This section also grants unit owners in a planned community an easement for access, support, and enjoyment in the common elements [common areas] because unit owners hold a beneficial, but no fee, interest in the common elements."

In other words, regardless of fee ownership of the property surrounding the townhomes, homeowners have a beneficial/equitable interest in these areas necessary for the reasonable use and enjoyment of their homes.

V. CONCLUSION

Declarations, plats, and other instruments creating and establishing common interest communities frequently lack the legal precision or level of detail to function as standalone documents. Acceptance of the Court of Appeals' reasoning will serve no purpose but to ensure that any unintentional oversights are, in effect, fatal to the community. That outcome will serve to contravene the General Assembly's public policy considerations and will impair the rights of property owners and communities.

CAI advocated for the passage of CCIOA in 1991 because the Act conferred important rights in Colorado and established a uniform legal framework for its operation and a process for fixing errors in older documents. CAI respectfully urges this Court to accept the Petition for *certiorari* review, to reverse the Court of Appeals' Opinion, and to remand to the Court of Appeals with directions to remand to the District Court to fulfill the District Court's order and judgments.

Respectfully submitted this 6th day of December, 2024.

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Community Associations Institute

Printed copy with original signatures on file in accordance with C.A.R. 30

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2024, a true and correct copy of the foregoing will be served via CCEF on the following:

All Counsel of Record.

/s/ Heather Shaughnessy

Heather Shaughnessy, paralegal