

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ISLAND

ROBERT WILBUR and DUSTIN
FREDERICK,

Plaintiffs,

v.

ADMIRAL'S COVE BEACH CLUB, a
Washington non-profit corporation; and JEAN
SALLS, MARIA CHAMBERLAIN, KAREN
SHAAK, ROBERT PEETZ, ELSA PALMER,
ED DELAHANTY AND DAN JONES,
individuals,

Defendants.

NO. 13-2-00741-4

LEGAL MEMORANDUM IN
SUPPORT OF PROPOSED ORDER
SUBMITTED BY DEFENDANTS
ADMIRAL'S COVE BEACH CLUB,
JEAN SALLS, MARIA
CHAMBERLAIN, KAREN SHAAK,
ROBERT PEETZ, AND DAN JONES

I. INTRODUCTION AND RELIEF REQUESTED

Defendants Admiral's Cove Beach Club ("ACBC"), Jean Salls, Maria Chamberlain, Karen Shaak, Robert Peetz, and Dan Jones (collectively, "defendants") submit this Legal Memorandum in support of their Proposed Order regarding the Court's November 27, 2013 ruling. Defendants request that the Court order that ACBC proceed with its long-standing voting procedures for the upcoming election for ACBC's Board of Directors. Defendants are submitting this Memorandum

1 because plaintiffs have threatened to go to Court if their version of the voting process is not
2 implemented immediately.

3 ACBC has been using substantially the same voting procedure for over thirty years. This
4 voting procedure uses anonymous, unsigned, mail-in ballots. When plaintiff Frederick was
5 President of ACBC's Board of Directors he oversaw elections conducted under this procedure.
6 Both plaintiffs have voted under this procedure many times.

7 Despite ACBC's use of this procedure for over thirty years, and plaintiffs' prior willingness
8 to vote under this procedure, plaintiffs now seek to change how ACBC conducts its election and
9 voting methodology. Plaintiffs assert that because the Bylaws do not expressly state how elections
10 are to be conducted, the standard voting procedure used for over thirty years should be abandoned
11 in favor of a procedure set forth in Robert's Rules of Order. However, consistent use of the same
12 procedure for over 30 years has made ACBC's standard voting procedure a part of this
13 community's system of governance. Not only has this procedure been adopted by the Club as the
14 standard method for mail-in balloting, but plaintiffs' failure to assert these arguments in
15 conjunction with any prior election or vote precludes them from asserting this argument now. For
16 the reasons set forth herein, defendants request that the Court include in its Order that ACBC
17 proceed with its standard voting procedure for upcoming election of Board of Directors.

18 **II. STATEMENT OF FACTS**

19 For as long as defendants have been ACBC members, ACBC has been conducting all mail-
20 in balloting using substantially the same process. (*See* ¶ 3 of Declaration of Jean Salls ("Salls
21 Decl.")). Whether the ballot is for an election of directors, a vote on a special assessment, or a vote
22 regarding other Club matters, the voting has always followed the same standard procedure. (*Id.* at
23 ¶ 4.) Under ACBC's standard procedure, every member in "good standing" is sent a ballot, a
24 return envelope, and generally an information packet relevant to the vote. (*Id.*) Members then
25

1 return the completed ballots using the return envelope. (*Id.*) Neither the ballot nor the return
2 envelope has a place for a signature and no return address is required on the return envelope. (*Id.*)
3 ACBC's standard procedure, including whether or not a member even voted, is completely
4 anonymous. (*Id.*) ACBC has used this method as its standard voting procedure for over 30 years.
5 (*Id.*)

6 Defendant Salls has been an ACBC member since 1995 and is the longest-tenured member
7 of the defendants. (*Id.* at ¶ 5.) Since 1995 to the present day, no other voting process has ever
8 been used for votes requiring mail-in ballots. (*Id.*) Additionally, defendants are not aware of any
9 prior complaints about the absolute anonymity of the voting process prior to plaintiffs' complaints
10 in this action. (*Id.*) Defendants are submitting this Memorandum because plaintiffs have
11 threatened to go to Court if their version of the voting process is not implemented immediately.
12 (*See* e-mail from plaintiffs' counsel to defendants' counsel, attached to the Declaration of Vasudev
13 N. Addanki as **Exh. A.**)

14 Plaintiff Wilbur has been an ACBC member since 2006; plaintiff Frederick has been a
15 member since 2007. (Salls Decl. at ¶ 6.) During that entire time, the community has voted using
16 the standard ACBC voting procedure. (*Id.*) In fact, from 2008 to 2012, Mr. Frederick was on the
17 Board. (*Id.*) From 2010 to 2012, Mr. Frederick was Board President. (*Id.*) During his tenure on
18 the Board, Mr. Frederick oversaw several votes using the standard ACBC procedure described
19 above. (*Id.*) Mr. Frederick never departed from the standard voting procedure. (*Id.*) The only
20 recent modification to the voting procedure was to add the corporate seal to each ballot to prevent
21 photocopying of each ballot. (*Id.*) As Mr. Frederick oversaw elections using this procedure and
22 declined to implement the Robert's Rules procedures when he was given the chance. (*Id.*)
23
24
25

1 **IV. EVIDENCE RELIED UPON**

2 Defendants' Memorandum is based on all records and pleadings previously filed in the
3 Court record as well as the declarations of Vasudev N. Addanki and Jean Salls and any exhibits
4 attached thereto.

5 **V. AUTHORITY AND ARGUMENT**

6 **A. ACBC's Course of Dealing and Course of Performance Establish that its Long-Time**
7 **Voting Procedures Are Standard Under the Bylaws and Not Subject to Displacement**

8 When interpreting an organization's bylaws Washington courts apply general principles of
9 contract law. *Davenport v. Elliot Bay Plywood Machs. Co.*, 30 Wn.App. 152, 154 632 P.2d 76
10 (1981). Course of dealing is relevant to interpreting a contract and determining the contract's
11 terms. *Puget Sound Financial, L.L.C. v. Unisearch, Inc.*, 146 Wn.2d 428, 434, 47 P.3d 940 (2002).
12 Notably, "[a]mbiguity is not required before evidence of . . . course of dealing can be used to
13 ascertain the terms of a contract." *Id.* (citing Restatement (Second) of Contracts §§ 222 cmt. b, 223
14 cmt b). Additionally, "[t]he interpretation which the parties to a contract have placed on it, by their
15 performance of it, is entitled to great, if not controlling, weight." *Fancher v. Landreth*, 51 Wn.2d
16 297, 301, 317 P.2d 1066 (1957). The application of these principles to an organization's bylaws
17 was noted in *Davenport* in which the Court of Appeals stated that the Court's interpretation of the
18 bylaws was consistent with the prior interpretations and actions of the corporation's shareholders.
19 *Davenport*, 30 Wn.App. at 155 n.2 (citing *Fancher*, 51 Wn.2d 297).

20 In *Puget Sound*, the Washington Supreme Court adopted the Restatement (Second) of
21 Contracts § 223 which states:
22
23
24
25

1 (1) A course of dealing is a sequence of previous conduct between the parties to an
2 agreement which is fairly to be regarded as establishing a common basis of
3 understanding for interpreting their expressions and other conduct.

4 (2) Unless otherwise agreed, a course of dealing between the parties gives meaning
5 to or supplements or qualifies their agreement.

6 Restatement (Second) of Contracts § 223. Comment b to section 223, which was cited in *Puget*
7 *Sound*, elaborates on the restatement and states:

8 Course of dealing may become part of an agreement either by explicit provision or
9 by tacit recognition, or it may guide the court in supplying an omitted term. Like
10 usage of trade, it may determine the meaning of language or it may annex an agreed
11 but unstated term. There is no requirement that an agreement be ambiguous before
12 evidence of a course of dealing can be shown, nor is it required that the course of
13 dealing be consistent with the meaning the agreement would have apart from the
14 course of dealing.

15 *Id.* at cmt. b. In *Puget Sound*, the court found that through the parties' course of dealing under an
16 oral contract, liability limitations had been added to the contract. *Puget Sound*, 146 Wn.2d at 435-
17 38. Because the liability limitation language had been included in each of 48 invoices sent to
18 plaintiff and plaintiff never opposed the language, the language became part of the contract. *Id.*
19 The Supreme Court in *Puget Sound* also used the course of dealing and plaintiff's failure to object
20 to the liability limitation clauses in determining that the clauses were enforceable. *Id.*

21 In contrast to course of dealing, "a 'course of performance' refers to '[a] sequence of
22 previous performance by either party after an agreement has been entered into, when a contract
23 involves repeated occasions for performance.'" *Spradlin Rock Products, Inc. v. Public Utility Dist.*
24 *No. 1 of Grays Harbor County*, 164 Wn.App. 641, 661, 266 P.3d 229 (2011) (quoting Blacks Law
25 Dictionary 405 (9th Ed. 2009)) (citing RCW 62A.2-208, UCC § 1-303). In *Spradlin*, the court
applied the general principles in *Puget Sound* to a course of performance analysis. The *Spradlin*

1 court further stated that “any course of performance accepted or acquiesced in without objection
2 shall be relevant to determine the meaning of the agreement.” *Id.* Course of Performance is
3 defined under the Washington UCC as:

4 (a) A “course of performance” is a sequence of conduct between the parties to a
5 particular transaction that exists if:

6 (1) The agreement of the parties with respect to the transaction involves
7 repeated occasions for performance by a party; and

8 (2) The other party, with knowledge of the nature of the performance and
9 opportunity for objection to it, accepts the performance or acquiesces in it
without objection.

10 RCW 62A.1-303(a). In *Spradlin*, the course of performance was used to clarify the meaning of
11 the parties’ oral agreement.

12 In addressing the application of course of dealing to a written contract, the Court in
13 *Badgett v. Security State Bank*, 116 Wn.2d 563, 572-73, 807 P.2d 356 (1991) cited the course of
14 dealings provision from the UCC and stated that “the express terms of an agreement and an
15 applicable course of dealing ‘shall be construed wherever reasonable as consistent with each other.’
16 However, when such construction is unreasonable, express terms control.” *Id.* at 573. However,
17 the revised UCC provision cited by *Badgett* states:

18 A course of performance or course of dealing between the parties or usage of trade
19 in the vocation or trade in which they are engaged or of which they are or should be
20 aware is relevant in ascertaining the meaning of the parties’ agreement, may give
21 particular meaning to specific terms of the agreement, and may supplement or
qualify the terms of the agreement.

22 RCW 62A.1-303.

23 Here, ACBC has been using the same standard voting procedure for over 30 years.

24 While the Bylaws do not contain express language detailing the process for voting by mail ballot,
25

1 the Club’s course of dealing under prior iterations of the Bylaws and course of performance
2 under the current Bylaws have solidified ACBC’s standard voting procedure as the proper
3 manner to conduct a vote by mail ballot. As noted in the Bylaws, Robert’s Rules of Order only
4 apply when not inconsistent with the Articles of Incorporation, the Bylaws, applicable State Law,
5 and/or any special rules of order the Club may adopt. As the Bylaws have consistently been
6 interpreted as providing for voting under the standard ACBC procedure, turning to Robert’s
7 Rules would be inconsistent with the Club’s historic interpretation of its Bylaws. *Fancher*, 51
8 Wn.2d at 301 (“The interpretation which the parties to a contract have placed on it, by their
9 performance of it, is entitled to great, if not controlling, weight.”).

11 Further, ACBC’s standard voting procedure is a rule of order used by the club for over
12 thirty years. While it is unknown if this standard voting procedure was formally adopted as a
13 special rule of order as contemplated under Article XV, Sec. 1 of the Bylaws, it is apparent that
14 ACBC’s course of dealing and course of performance have proceeded as if its standard voting
15 procedure was a special rule of order governing any vote by mail ballot. As such, turning to
16 Robert’s Rules to change the voting procedure would be in conflict with a rule of order adopted
17 by the club through its course of dealing and course of performance. Because ACBC has been
18 using the same standard voting procedure for over thirty years, its standard voting procedure is
19 part of this community’s Bylaws and rules of order by way of ACBC’s course of dealing and
20 performance. Therefore, changing ACBC’s standard voting procedure to the procedures set forth
21 in Robert’s Rules is not supported by the Bylaws.
22
23
24
25

1 **B. Equitable Reasons to Prevent Plaintiffs from Arguing for a Change in the Voting**
2 **Procedure**

3 The doctrines of Equitable Estoppel, Laches, and Waiver preclude plaintiffs from arguing
4 for an election under any procedure other than what the club has used for over thirty years.

5 **1. Equitable Estoppel**

6 The law governing equitable estoppel was set forth in *Nickell v. Southview Homeowners*
7 *Ass'n*, 167 Wn.App. 42, 271 P.3d 973 (2012), which states:

8 The doctrine of equitable estoppel rests on the principle that a person “shall not be
9 permitted to deny what he has once solemnly acknowledged.” *Arnold v. Melani*, 75
10 Wash.2d 143, 147, 449 P.2d 800 (1968). “ [W]here a person, by his acts or
11 representations, causes another to change his position or to refrain from performing
12 a necessary act to such person's detriment or prejudice, the person who performs
13 such acts or makes such representations is precluded from asserting the conduct or
14 forbearance of the other party to his own advantage.’ ” *In re Marriage of Barber*,
15 106 Wash.App. 390, 396, 23 P.3d 1106 (2001) (quoting *Hartman v. Smith*, 100
16 Wash.2d 766, 769, 674 P.2d 176 (1984)). Before we can apply estoppel in pais or
17 equitable estoppel, three things must occur:

- 18 (1) an admission, statement, or act inconsistent with the claim afterwards asserted;
19 (2) action by the other party on the faith of such admission, statement, or act; and
20 (3) injury to such other party resulting from allowing the first party to contradict or
21 repudiate such admission, statement, or act.

22 *Thomas v. Harlan*, 27 Wash.2d 512, 518, 178 P.2d 965 (1947); *see also Dorward v.*
23 *ILWU–PMA Pension Plan*, 75 Wash.2d 478, 484, 452 P.2d 258 (1969). Courts
24 disfavor equitable estoppel; thus, the reviewing court requires the aggrieved party to
25 prove every element with clear, cogent, and convincing evidence, and also to show
detrimental reliance. *Barber*, 106 Wash.App. at 396, 23 P.3d 1106.

Id. at 53.

While courts generally disfavor equitable estoppel, this case presents a classic example of
a situation in which the doctrine of equitable estoppel must be applied. Here, Mr. Frederick

1 oversaw elections and voted in elections under the exact procedure plaintiffs now seek to
2 displace. In addition, Mr. Wilbur voted in numerous elections under the exact procedure
3 plaintiffs now seek to displace. Therefore, plaintiffs have acted inconsistent with their current
4 position regarding the election procedure.

5 When planning to conduct the current election under the procedures used for the past
6 thirty years, defendants were relying and acting on prior interpretations of the Bylaws and prior
7 Boards' use of the standard ACBC voting procedure. The Board was also relying on the
8 members' acceptance and consistent use of ACBC's standard voting procedure when going
9 forward with the current election. Mr. Frederick's interpretation of ACBC's Bylaws and rules of
10 order during his presidency directly added to the Club's precedent regarding interpretation of
11 ACBC's Bylaws. As defendants relied on that precedent when sending the ballots for the current
12 election, defendants relied on the actions of Mr. Frederick. Therefore, defendants have met the
13 second requirement for equitable estoppel.
14
15

16 Finally, if ACBC was required to change its voting procedure, it would incur monetary
17 damages of more than \$2,000 to mail a second ballot. In addition, ACBC would be harmed in
18 that members are expecting the election to be completely anonymous. Therefore, plaintiffs
19 should be equitably estopped from arguing for a change in ACBC's voting procedure.
20

21 **2. Laches**

22 The standard for laches was set forth in *In re Anderson*, 134 Wn.App. 111, 138 P.3d 1118
23 (2006), in which the court stated:

24 Laches is an equitable remedy that applies when a party: (1) had knowledge of facts
25 constituting a cause of action or a reasonable opportunity to discover these facts; (2)

1 there was an unreasonable delay in commencing the action; and (3) the delay caused
2 damage to the other party. *See, e.g., In re Marriage of Barber*, 106 Wash.App. 390,
3 397, 23 P.3d 1106 (2001). Damages are an essential element of the defense of
4 laches, and a party cannot prove damages by asserting he must do now what he has
5 been legally obligated to do for years. *In re Marriage of Capetillo*, 85 Wash.App.
6 311, 318, 932 P.2d 691 (1997). Additionally, delay is only deemed unreasonable if
7 it occurs “ ‘under circumstances permitting diligence.’ ” *Hunter*, 52 Wash.App. at
8 270, 758 P.2d 1019 (quoting *Retail Clerks Health & Welfare Trust Funds v.*
9 *Shopland Supermarket, Inc.*, 96 Wash.2d 939, 949, 640 P.2d 1051 (1982)).

10 *Id.* at 118.

11 Here, plaintiffs had knowledge of ACBC’s voting procedure for as long as they have been
12 members of ACBC. They also had knowledge that the Bylaws contained language referencing
13 Robert’s Rules or had a reasonable opportunity to discover that fact for as long as they have been
14 members of ACBC. Therefore, the first prong of laches has been met. As the community has been
15 using the standard ACBC voting procedure for over thirty years and plaintiffs have lived in the
16 community for approximately seven years, they unreasonably delayed in asserting their argument
17 that ACBC should change its voting procedure. Consequently, the second prong of the laches
18 analysis is also met. Finally, to change the voting procedure now after years of a completely
19 anonymous voting process would harm the community based on the fact that members are
20 expecting to vote consistent with the manner they have always voted. In addition, to change the
21 voting procedure after ballots have already been sent out would cost the community monetary
22 damages in mailing new ballots. Consequently, laches applies to prevent plaintiffs from arguing
23 for a change in ACBC’s voting procedure.
24
25

1 DATED this 29th day of December, 2013.

2 BETTS, PATTERSON & MINES, P.S.

3
4 By 
5 Joseph D. Hampton, WSBA #15297
6 Vasudev N. Addanki, WSBA #41055
7 Attorneys for Defendants

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
LEGAL MEMORANDUM IN SUPPORT OF
PROPOSED ORDER

664808.3/122913 2101/77180073

- 13 -

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

1 **CERTIFICATE OF SERVICE**

2 I, Valerie D. Marsh, declare as follows:

3 1) I am a citizen of the United States and a resident of the State of Washington. I am
4 over the age of 18 years and not a party to the within entitled cause. I am employed by the law
5 firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400,
6 701 Pike Street, Seattle, Washington 98101-3927.

7 2) By the end of the business day on December 30, 2013, I caused to be served upon
8 counsel of record at the addresses and in the manner described below, the following documents:

- 9 • **Legal Memorandum In Support Of Proposed Order; and**
- 10 • **Certificate of Service.**

11 ***Counsel for Plaintiffs:***

12 Christon C. Skinner
13 Law Offices of Christon C. Skinner, P.S.
14 791 SE Barrington Drive
Oak Harbor, WA 98277-3278

- U.S. Mail
- Hand Delivery
- Telefax
- UPS
- E-mail

15 ***Counsel for Defendants Palmer and Delahanty:***

16 Christopher J. Nye
17 Reed McClure
Two Union Square
601 Union Street, Suite 4901
18 Seattle, WA 98101-3920

- U.S. Mail
- Hand Delivery
- Telefax
- UPS
- E-mail

19 I declare under penalty of perjury under the laws of the State of Washington that the
20 foregoing is true and correct.

21 DATED this 30th day of December, 2013.

23 
24 _____
Valerie D. Marsh

*** TX REPORT ***

TRANSMISSION OK

TX/RX NO 0501
RECIPIENT ADDRESS 13602405530
DESTINATION ID
ST. TIME 12/30 08:24
TIME USE 01'33
PAGES SENT 6
RESULT OK

FAX COVER SHEET
FOR FILING IN THE ISLAND COUNTY SUPERIOR COURT
OF THE STATE OF WASHINGTON (per OR 17)

ONLY FOR DOCUMENTS TO BE FILED IN THE COURT FILE-FEE REQUIRED
ISLAND COUNTY CLERK (360) 679-7359

Fax Number (360) 240-5530

Date: 12/30/13 For filing in the Cause Number: 13-2-00741-4

Case Caption Wilbur, et al. vs Admiral's Cove Beach Club, et al.

Firm Name (if any): Betts Patterson & Mines Fax Contact: Diane Marsh

Phone Number (206) 268-8746 Fax Number (206) 343-7053

Address: One Convention Place, Suite 1400, 701 Pike Street, Seattle WA 98101-3927

PAGE LIMIT: To send single transmissions exceeding ten (10) pages during regular business hours (8:00 am to 4:30 pm Monday through Friday), you must have permission from the Clerk's Office. Please call in advance. **All faxes must be limited to 40 pages unless special arrangements have been made.** We do not count the Fax Cover Sheet towards this limit. Fax filing is available 24 hours a day, 7 days a week.

I called Island County for approval on fax exceeding ten (10) pages.

FILING FEE: Documents requiring filing fees MAY NOT be faxed. These include, but are not limited to original petitions or complaints, jury demands, writs, notices of appeal, petition to modify child support & notices of relocation. Orders for presentation, ex-parte, may be faxed as long as the presentation fee is sent along with the filing fee.

FAX FEE PAYMENT NOTICE: Pay your fax fee by sending a check or money order immediately for your "fax fee," which is \$5.00 for the first page and \$1.00 for each page thereafter.

Today, I am mailing my check/money order for a total of \$ 9, payable to Island County Clerk, PO Box 5000, Coupeville, WA 98239-5000. This represents the Fax fee for 5 page(s) of the accompanying 1 document(s), along with the \$30.00 presentation fee (if applicable).

Name of Documents sent & # of pages:

ADDANKI DECLARATION RE LEGAL MEMORANDUM