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

9 ROBOERT WILBUR and DUSTIN
10 FREDERICK,

11 Plaintiffs,

12 v.

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

19 Defendants.

Case No.: 13-2-00741-4

INTERVENOR SUSAN CORLISS'
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT,
MOTION TO DISSOLVE TEMPORARY
RESTRAINING ORDER, AND MOTION
PURSUANT TO RULE 56(f) FOR MORE
TIME TO CONDUCT DISCOVERY

20 SUE CORLISS,

21 Intervenor,

22 v.

23 DUSTIN FREDRICK, ROBERT WILBUR,
24 ADMIRAL'S COVE BEACH CLUB, a
25 Washington non-profit corporation, and its
26 BOARD OF DIRECTORS.

27 Defendants.

28
I. SUMMARY

Plaintiff requests a summary judgment ruling and a sweeping "Mandatory Injunction." This Motion goes far beyond anything requested of this Court before.

1 A single property owner in the 600-Member Admiral's Cove development is
2 asking this Court to force the Admiral's Cove Beach Club to complete extensive,
3 expensive repairs to its dilapidated, uncovered, outdoor swimming pool. This pool is
4 only open on a very small number of days each year, and is only used regularly by a
5 small number of the Cove's 600 Members. Inspection and architectural planning
6 disclose that these repairs to the pool and related facilities will cost at least
7 \$650,000.

8 As to this cost, Mr. Wilbur asks the Court for a Mandatory Injunction
9 ordering the Club to impose large financial assessments against all 600 Members.
10 The Members have not approved these assessments, and many of them simply
11 cannot afford them. The requested Order would usurp and override the Bylaws of
12 the Club in numerous respects. Most importantly, the Bylaws establish a
13 democratic process to govern Club policy, particularly regarding budgeting,
14 financing, and assessments against Members. If the requested Order is granted, all
15 600 Members will be disenfranchised from one of the most important principals of
16 Club operations – democratic Member decision-making related to dues and
17 assessments.

18 The requested Order would also violate RCW 7.24.110, which provides that in
19 a Declaratory Judgment action: “[N]o declaration shall prejudice the rights of
20 persons not parties to the proceeding.” Here, approximately 600 property
21 owners on Whidbey Island, who are not parties to this proceeding, would be directly
22 financially prejudiced by the Order requested.

23 12 Club Members submit declarations to this Court stating their opposition
24 to the request for forced pool repairs and forced assessments against the
25 Membership. In totality, these Declarations provide the Court with a more
26 complete picture of the dynamics related to the pool issue than has been presented
27 before. These are the Declarations of Intervenor Corliss, and King, Shaak, Peetz,
28 Chamberlain, Johnson, Salls, Harrison, Portin, Bauer, Nichols, and Deegan.

1 In a well informed and carefully vetted process, in May 2013 Club Members
2 voted to close their pool. Under the plain terms of the Articles of Incorporation, the
3 Club had every right to “dispose of” or sell or eliminate this pool. Although the
4 Court, on Motion, was convinced to grant a TRO restraining that vote, the
5 Intervenor respectfully submits that the Court was not provided with complete
6 information regarding facts on the ground. Accordingly, pursuant to RCW 7.40.180
7 the Intervenor now requests that the Court dissolve the TRO. This will return
8 management of Club budgeting, financing, and decision-making to where it belongs:
9 the democratically-controlled and Member-managed Admiral’s Cove Beach Club.

10 The main legal defect with Mr. Wilbur’s case is that he offers no legal support
11 for the claimed property right in the perpetual operation and repair of a swimming
12 pool. There simply is no doctrine of property law that requires the perpetual
13 operation of specific facilities, such as a pool, within a community-organized
14 development. If individual lot-owners had such rights, this would overturn the
15 entire legal edifice supporting the existence of community developments. For
16 example, the law governing Condominiums, and Homeowner’s Associations, would
17 be largely wiped off the books. See RCW 64.34.005 *et seq.*

18 In support of the remarkable assertion that he possesses an individual
19 property right to force the Cove development to repair and operate the pool, Mr.
20 Wilbur cites to no supporting case law or statutes whatsoever. No principal of
21 property law is discussed or referred to. None is cited, because none is believed to
22 exist. Moreover -- despite Mr. Wilbur’s repeated suggestions to the contrary --
23 neither the Restrictive Covenants nor the Articles of Incorporation say anything
24 whatsoever about a swimming pool. Because they nowhere mention a pool, under
25 property law concepts these documents cannot establish an enforceable property
right in a pool.

26 The Articles of Incorporation do make clear, however, that the Club has the
27 right: “To sell, convey, mortgage, pledge, lease, exchange, transfer **and otherwise**

1 **dispose of all or any part of the property and assets.”** See Articles, Corliss
2 Decl., Ex. F, Article V, ¶ 5 (emphasis added). This provision alone, unambiguous,
3 and standard in such Articles in modern times, placed Mr. Wilbur on notice that the
4 Club could, at its discretion, “dispose of” the pool. This is what the Club tried to do,
5 and what it has every right to do under its own formation documents.

6 Unlike on the TRO, Mr. Wilbur is now requesting a “Mandatory Injunction,”
7 one that will force the Club and its Members to engage in many affirmative acts and
8 which will cost many Members a lot of time *and money*. Yet because of their
9 nature – forcing people who are not parties to engage in affirmative acts and pay
10 money – Mandatory Injunctions are highly disfavored. Stanley v. University of S.
11 Cal., 13 F.3d 1313, 1320 (9th Cir. 1994). Such Injunctions should be “denied unless
12 the facts and law clearly favor the moving party.” Stanley, 13 F.3d at 1320; see also
13 Park Village Apartment Tenants Ass’n v. Mortimer Howard Trust, 636 F.3d 1150,
14 1160 (9th Cir. 2011). This is in keeping with Washington’s statutory rule that a
15 final Declaratory Judgment, such as the one sought here, cannot bind people who
16 are not parties to the case. RCW 7.24.110.

17 Here, the legal basis for Mr. Wilbur’s claimed property right is nonexistent,
18 and approximately 600 individual Club Members will be directly impacted by the
19 requested Order. A Mandatory Injunction is not appropriate, and the Court should
20 now dissolve the TRO previously entered in this case.

21 **II. FACTS SUPPORTING THE OPPOSITION**

22 As noted above, in support of this Opposition, 12 Members of the Admiral’s
23 Cove Beach Club have submitted Declarations opposing Mr. Wilbur’s request.
24 These Declarations cover a range of issues, but taken together they provide the
25 Court with a more complete picture of the events giving rise to the present dispute
26 than has been presented before. As one example, the Declaration of Cathie
27 Harrison provides a complete timeline and description of the detailed work
28 conducted by Cove Members to study the pool issues and make recommendations to

1 the Members preceding the vote to close the pool in May, 2013.

2 The following facts are derived from the Corliss Declaration, which serves as
3 an overview of sorts for the factual issues at play in this case. Ms. Corliss is a
4 property owner in the Admiral's Cove development. By virtue of her property
5 ownership, she is a Member in good standing of the Admiral's Cove Beach Club (the
6 "Club,") which is named as the defendant in this lawsuit. She has voting rights as a
7 Member of the Club, and may be subject to annual dues and special assessments
8 imposed by the Club pursuant to its Bylaws and Articles of Incorporation. The Club
9 exists to serve the interest of its Members, including Ms. Corliss. Indeed, as an
10 individual property owner and Member within the Cove, she has the exact same
11 standing as does Mr. Wilbur in this case.

12 **A. THE CLUB AND ITS OPERATIONS**

13 The Club includes approximately 600 active Members, all of whom own lots
14 within the Cove development. Pursuant to the Bylaws and Articles of Incorporation
15 of the Club, Members all have voting rights to elect Club officers and to set Club
16 policy, particularly when it comes to dues and assessments against Members.

17 The Club Bylaws govern Club activities. Under the Bylaws, the Club cannot
18 impose special assessments against lot owners/Members without a majority vote of
19 those Members, either at a live Member's meeting or by mail ballot. Corliss Decl.,
20 Ex. A, Bylaws, Article 14, Sec. 3. Also, the Club may not significantly increase the
21 annual dues imposed on Members without a majority vote of the Members. Id.,
22 Bylaws, Article 8, Sec. 7. In this way, the approximately 600 property owners in the
23 Cove have the right, through a democratic process, to set fiscal policy for
24 themselves. The Club is managed by the Members, through the Bylaws. A true
25 and correct copy of the Club Bylaws is attached as Exhibit A to the Corliss
26 Declaration.

27 The Cove property consists of hundreds of private, Member-owned lots, as
28 well as large property lots owned by the non-profit Admiral's Cove Beach Club. A lot

1 map showing the lot configuration in the Cove development is attached as Exhibit B
2 to the Corliss Declaration. Members have rights for access and use of the Club-
3 owned property. The most significant piece of Club owned property is the large
4 waterfront area owned by the club with beach access at Admiralty Bay and another
5 area with waterfront access to the Lake. This beach area is available for all
6 Members to use and enjoy. Corliss Decl., ¶ 5.

7 **B. MR WILBUR’S LAWSUIT TO FORCE THE CLUB TO KEEP THE**
8 **POOL OPEN FOR HIS BENEFIT**

9 This suit, however, primarily concerns an uncovered outdoor swimming pool
10 which is located on one parcel of property owned by the Club. Many Club members,
11 such as Ms. Corliss and others who have submitted Declarations, have no interest
12 in using this old, dilapidated, outdoor pool facility. While the plaintiff has
13 repeatedly asserted that this pool is the “primary asset and recreational facility” of
14 the Club, this is far from the truth. In fact, the primary asset of the Club is the
15 large waterfront area which provides waterfront and beach access to all Club
16 members who live in the Cove. This asset is far more valuable, far more popular
17 among members, and far more regularly used, than is the dilapidated pool. In fact,
18 the pool is almost never open, remains locked and inaccessible for the vast majority
19 of the year, and is used by only a small percentage of Cove residents. Corliss Decl.,
20 ¶ 6.

21 In this case, a single member of the Club, Mr. Wilbur, is suing to force all
22 Club Members to spend hundreds of thousands of dollars to keep this pool open.
23 This is against the wishes of the majority of Club Members, who voted pursuant to
24 the Bylaws to close the pool. If successful, Mr. Wilbur’s suit will result in large
25 assessments being imposed upon all 600 Members, including Ms. Corliss and the
26 other Declarants, against their will and without Member approval for such
27 assessments, which is required by the Bylaws. Corliss Decl., ¶ 7.
28

1 **C. THE DELAPIDATED, OUTDATED POOL**

2 The uncovered, outdoor pool was built in the 1960s. It has never been
3 refurbished. It is in a dramatic state of disrepair. As a result, it can only be used
4 during a very small portion of the year. According to the approved Board of
5 Director’s meeting minutes from September 20, 2014, this year the pool was open on
6 only approximately 20 days. On days when the pool is not open -- which is the vast
7 majority of the entire year -- the pool area is fenced, locked, and inaccessible to
8 Members. The pool facility is almost always in this locked and inaccessible
9 condition. Therefore, the vast majority of the time, the “pool” actually consists of a
10 fenced, locked, unusable and worthless area within the Cove. Corliss Decl., ¶ 8.

11 Many Members, including Ms. Corliss and other of the Declarants, never use
12 the pool. In a June, 2012 Long Range Planning Survey, 49.3% of Members disclosed
13 that they never use the pool, with another 37.7% reporting that they only used it
14 “occasionally” in the summer, meaning less than once weekly. Relevant portions of
15 this survey are attached as Exhibit C to the Corliss declaration. Only a very small
16 minority of Members reported using the pool on a regular basis. Corliss Decl., ¶ 9.

17 A recent inspection and architectural review of the pool facility disclosed
18 widespread problems with the pool, and recommended that it be very significantly
19 rebuilt, with all major systems replaced. After inspection, the remaining useful life
20 of the existing swimming pool was identified as “0 years.” The review concluded:
21 “Most of the pool components are outdated/aged with no major renovations of the
22 pool since construction in the law 1960’s.” Major required repairs include
23 “swallowing” the deep end of the pool “due to hydrostatic issues” and installing new
24 drains, re-plastering the pool which will also include removing and replacing all the
25 tile and coping, removing and replacing the entire concrete deck, and replacing all
26 underground piping. The pool heater, a major component, was found to be
27 dysfunctional and requires replacement. The pool pump, another major component,
28 was found to be not functioning and requires replacement. A series of repairs major

1 and minor were recommended, both to the pool and to its related facilities such as
2 the dilapidated shower facility. The estimated cost of these repairs to pool facilities
3 was \$650,000. True and accurate copies of portion of these evaluations are attached
4 as Exhibit D to the Corliss Declaration. Corliss Decl., ¶ 10.

5 **D. THE MEMBER VOTE, PURSUANT TO THE BYLAWS, TO CLOSE**
6 **THE POOL**

7 In support of his injunction requests, Mr. Wilbur has repeatedly argued that
8 the vote of the Members in May 2013 to decommission the pool was somehow in
9 violation of an October 2012 Motion which created a Pool Committee to study pool
10 issues. He suggests that the Member vote in May 2013 somehow violated or
11 usurped the scope of work of the Pool Committee. This is entirely false. In fact, Mr.
12 Wilbur was a member of the Pool Committee, but he decided to stop attending
13 Committee meetings and he took himself out of the process early on, for unknown
14 reasons. See Harrison Decl. at 2-3. Despite Mr. Wilbur's inattention, however, the
15 Pool Committee engaged in a rigorous process of review and analysis over many
16 months to develop options and plans for the pool. Harrison Decl. at 3-11. This was
17 detailed-oriented work. It involved the assistance of architects and pool consultants
18 to inspect and examine the pool and related facilities and report and make specific
19 recommendations. Multiple Members worked on this Committee and met and
20 communicated regularly. Further details of this process are contained in the
21 Harrison Declaration.

22 Through this detailed process, the Pool Committee eventually identified two
23 primary options for the pool, either a major repair job which would cost
24 approximately \$650,000, or a decommissioning of the pool which would cost
25 approximately \$200,000. Given the advanced state of disrepair of the pool, and its
26 estimated useful life of "zero years," these were in fact the only realistic options. As
27 noted, the Harrison Declaration and the details contained therein prove that the
28 options presented to the Members in the May, 2013 ballot were well vetted, well

1 supported, **and were the only realistic options for moving forward.** So the
2 ballot to Members was meticulously prepared, after a thorough and complete
3 Member-run process. The Pool Committee work fed directly into the formation of
4 the ballot distributed to Members. Corliss Decl., ¶ 13.

5 As the Court will recall, in May of 2013, pursuant to Club Bylaws this ballot
6 was circulated to Club Members to determine the future of our pool. Two options
7 were provided for Members to vote on: (1) a special assessment of \$200,000 to
8 decommission/remove the pool, or (2) a special assessment of \$650,000 to repair the
9 pool and bring it up to standards. With their ballot, each Member also received a
10 two page “Frequently Asked Questions” document. This document explained in
11 detail the various options and issues related to the pool vote. A true and correct
12 copy of this Frequently Asked Questions document is attached as Exhibit E to the
13 Corliss Declaration. Among other things, this document discussed the estimates for
14 repair or removal of the pool, the various financing options, and ADA compliance.
15 Corliss Decl., ¶¶ 14-15.

16 Prior to the vote, in addition to the detailed work of the Pool Committee, the
17 pool issue had been debated and discussed within the Cove community for many
18 years. Any Club Member such as Mr. Wilbur with an interest in the pool had ample
19 time and opportunity, before the vote, to be fully advised about every part of the
20 pool dispute. Indeed, Mr. Wilbur had an opportunity to participate as a member of
21 the Pool Committee, but chose to abandon that involvement. Club Members voted
22 with their eyes wide open. Corliss Decl., ¶ 16.

23 The result of the vote was 166 Members in favor of closing the pool, 153 in
24 favor of an assessment to keep the pool open. So a majority of the 319 voting
25 Members chose to close the pool. Ms. Corliss and other Declarants voted with the
26 majority to close the pool. Corliss Decl., ¶ 17.

27 **E. THE OBVIOUS FLAWS IN MR. WILBUR’S ARGUMENTS**

28 Mr. Wilbur is now seeking to overturn the majority will of Club Members and

1 force the Club to keep the pool open. This will result in the imposition of very large
2 special assessments against each Club Member, without consent as required by the
3 Bylaws. These assessments will have a significant financial impact on Ms. Corliss
4 and other similarly situated Members who are on fixed incomes and who have
5 limited assets. Many members, who do not use the pool, will not be able to afford
6 these assessments. This will impose a severe financial burden for many people, as
7 discussed in the accompanying Declarations. The Declarants oppose the imposition
8 of these assessments against them. Corliss Decl., ¶ 18.

9 In this Motion, Mr. Wilbur seeks to end this case now, without a trial, and
10 requests a Permanent Injunction. The wide-ranging injunction he seeks goes well
11 beyond anything that has been requested in this case before. Mr. Wilbur now asks
12 the Court to “affirmatively require and direct” the Club to conduct significant
13 repairs to the pool. Motion for Summary Judgment at 2. He asks the Court to
14 order the Club to “implement an annual budget that provides for sufficient funds,
15 from dues and assessments,” to effectuate these repairs and maintenance. Id. In
16 other words, Mr. Wilbur is asking the Court to take over Club affairs as it regards
17 the repair, maintenance, budgeting, and assessments against Members related to
18 the pool. He does this without even estimating in his Motion how much this will
19 cost the 600 Club Members who would be subject to this Order. Corliss Decl., ¶ 20.

20 The Injunction requested would violate the Club Bylaws in numerous
21 respects. It would eliminate Club control over its own facilities and property. It
22 would eliminate the entitlement of all Club Members to vote on budgetary and
23 assessment issues, an entitlement enshrined in the Bylaws. It would overturn the
24 vote of Club Members, pursuant to the Bylaws, regarding the disposition of the pool.
25 And it would impose large financial assessments against all 600 Club Members,
26 who will have no say in the matter or ability to vote. Corliss Decl., ¶ 21.

27 Mr. Wilbur has argued in this case that he has some sort of vested
28 enforceable property right to force the entire Cove organization, which includes 600

1 Members, to continue to own, operate and maintain a swimming pool that was
2 present on the date that he purchased his property. To support this proposition, he
3 refers repeatedly, but vaguely, to the formation documents of the Club, arguing that
4 within these documents can somewhere be found an enforceable property right,
5 running to him, in the continued existence of the pool. In this regard, he makes
6 unsupported statements such as: “ACBC was formed for the principal purpose of
7 providing and operating recreational facilities, which specifically included the
8 community pool.” See Wilbur Declaration, ¶ 3. However, he usually provides no
9 citation or exhibit to support these conclusory statements. In fact, there is no
10 evidence to support the proposition that the primary purpose of the Club was for the
11 operation of a swimming pool. Nor is there any evidence to support Mr. Wilbur’s
12 argument that he acquired some enforceable property right related to the pool.
13 Corliss Decl., ¶¶ 22-23.

14 **F. CLUB FORMATION AND PROPERTY DOCUMENTS**

15 In 1969, when the Cove development was organized and the Club was
16 constituted, there were two primary formation documents. These documents were
17 recorded. These were the Articles of Incorporation of the Admiral’s Cove Beach
18 Club, and the Restrictive Covenants Running With Land of the preexisting
19 Admirals Cove Inc. These documents provide the starting point for determining the
20 purposes and powers, and the obligations and rights, of the property
21 owners/Members within the Cove, and of the Club itself. A true and accurate copy
22 of the Articles of Incorporation and the Restrictive Covenants are attached as
23 Exhibit F and to the Corliss Declaration. Corliss Decl., ¶ 24.

24 Despite Mr. Wilbur’s repeated suggestions to the contrary, neither of these
25 documents makes any mention whatsoever of a swimming pool. The pool is not
26 referenced or mentioned either in the Articles of Incorporation or the Restrictive
27 Covenants. Therefore, Wilbur’s repeated assertion that these formation documents
28 somehow vest in him an individual property right to a swimming pool is without

1 any support in the documents themselves. A reasonable land owner, reviewing
2 these formation documents, would have no basis to conclude that they are gaining
3 an enforceable property right to the continued operation of a swimming pool. By
4 their plain terms, these documents simply do not establish any such entitlement.
5 Corliss Decl., ¶ 25.

6 On the other hand, the Articles of Incorporation specifically provide that the
7 Club can, at its discretion, transfer, sell, convey, close, or otherwise dispose of or
8 amend its assets and holdings. Article V, Paragraph 4 of the Articles states, among
9 the power of the Club, to: “Purchase, take, receive, lease, take by gift, devise or
10 bequest, or otherwise acquire, own, hold, approve, use and otherwise deal in and
11 with real or personal property or any interest therein wherever situated.” Corliss
12 Decl., Ex. F at 2 (Article V, ¶ 4). Paragraph 5 of this Article further grants to Club
13 the power: “To sell, convey, mortgage, pledge, lease, exchange, transfer and
14 otherwise dispose of all or any part of the property and assets.” Id.

15 A purchaser such as Mr. Wilbur was on notice, through these preexisting
16 formation documents, that the Club had the power to both acquire, and to “transfer
17 and otherwise dispose of all or any part of the property and assets” of the Club. By
18 the clear and unambiguous meaning of these words, the Club has the right and the
19 power to dispose of the swimming pool. This right was clearly announced in plain
20 language in the formation documents themselves, which were recorded at the time
21 Mr. Wilbur purchased his property. This clear statement of Club powers stands in
22 stark contrast to Mr. Wilbur’s argument that this same document somehow compels
23 the continued operation of the pool, forever. His reading is not supported by any
24 language in the documents. Yet the opposite reading – that the Club is empowered
25 to dispose of the pool if it chooses to – is supported by clear and unambiguous
26 language. Corliss Decl., ¶ 28.

27 In support of his Injunction requests, Mr. Wilbur repeatedly, but vaguely,
28 argues that “deeds” associated with Cove property somehow conveyed to him

1 specifically a property right in the perpetual operation of a swimming pool. Wilbur
2 repeatedly references “original deeds” of the land, whatever those are. See Wilbur
3 Decl., ¶ 7. However, none of these “original deeds” are submitted as exhibits to this
4 Motion. Moreover, there is no assertion, or evidentiary support, that any “original
5 deed” **applicable to Mr. Wilbur’s lot** has language referring to a swimming pool.
6 No evidence is presented regarding what the “original deeds” are, when they were
7 conveyed, or to whom they were conveyed. Nor is evidence showing whether such
8 “original deeds” mentioning a pool exist for all lots within the Cove, or some limited
9 number of lots, or a single lot, or Mr. Wilbur’s lot. Certainly, Mr. Wilbur’s
10 unsupported assertion about “original deeds” is not sufficient to show as a matter of
11 law that he, personally, on his lot, has some right to enforce the continued existence
12 of a swimming pool. And unless he can show the existence of a Deed on his own lot
13 specifically conveying an interest in a pool to him, Mr. Wilbur cannot claim a
14 property right. Corliss Decl., ¶ 29. Mr. Wilbur’s own property deed, conveying to
15 him his property in the Cove, nowhere mentions a swimming pool. A true and
16 accurate copy of Wilbur’s recorded Deed is attached as Exhibit H to the Corliss
17 Declaration.

18 Mr. Wilbur also repeated argues that the Club Bylaws somehow convey to
19 him an individual property right to the forever operation of a swimming pool. In
20 this regard, it is worth noting that the Bylaws, which are an internal governing
21 document, are subject to change, modification, and revision by a simple majority
22 vote of Club Members. Corliss Decl., Ex. A, Bylaws, Article 16. Any resulting, new
23 versions of the Bylaws “shall supercede any and all previous versions.” *Id.* There is
24 no logic to the proposition that someone can acquire a permanent property right by
25 reference to internal Bylaws. Such Bylaws change over time, yet by Mr. Wilbur’s
26 logic they could never change, at least in reference to the pool he prefers. Under the
27 Bylaws, a majority of Members could, by a simple vote, remove any reference to a
28 swimming pool from. Under these circumstances, the Bylaws cannot vest in any

1 single Member an absolute enforceable property right of the kind asserted by Mr.
2 Wilbur. Nor is any case law or statute cited for the proposition that such Bylaws
3 form the basis for enforceable property rights among individual members. Corliss
4 Decl., ¶ 31.

5 **G. MR. FREDRICK'S QUESTIONABLE CONDUCT AS A BOARD**
6 **MEMBER**

7 Many Members were surprised to learn that the Club has decided not to
8 oppose Mr. Wilbur's request for a Permanent Injunction mandating expensive
9 repairs to the pool, for his benefit. It is worth noting that the former co-plaintiff in
10 this case, Dustin Frederick, is now a member of the Club Board. As a former
11 plaintiff in this litigation, Mr. Frederick, as a fiduciary for all Club Members, would
12 have been expected to recuse himself from all Board action and consideration of pool
13 issues. However, he has not done so. In fact, Mr. Frederick apparently has used his
14 Board position to aggressively push for the agenda that he previously pursued in
15 this litigation. He may be privy to private Board discussions, in Executive Session,
16 about the pool. It is also reasonable to assume that he shares the information he
17 learns through Board deliberations with his former co-plaintiff, Mr. Wilbur. Corliss
18 Decl., ¶ 32.

19 **H. RECENT CLUB ACTIVITY TO ADDRESS THE POOL ISSUE**

20 The Club Membership took recent steps, pursuant to the Bylaws, to study
21 and move forward on alternative plans for the use of the underutilized property
22 where the pool is currently located. This is in keeping with the Articles of
23 Incorporation of the Club, which clearly allow the Club to "dispose of" the pool and
24 to develop and acquire other property and facilities. Corliss Decl., ¶ 33. At an
25 Annual Meeting of the Club on October 25, 2014, pursuant to the Bylaws a Member
26 Motion was passed creating a Member Committee called "Alternate Visions." This
27 Committee has been formed to "evaluate an alternative recreational use for the
28 property on which the current pool is located so that it will become an asset that is a

1 year-round indoor facility. The ad hoc committee will compare the costs and
2 benefits of an indoor recreational and conference facility to the costs of operating
3 and refurbishing the pool[.]” Corliss Decl., ¶ 34; See also Deegan Declaration, ¶ 6.
4 Through this Committee, Club Membership intends to move forward to evaluate
5 alternate uses for the pool area. This may include “how revenue generated from an
6 indoor recreational facility could potentially be used to fund a pool on an alternative
7 site.” Id.

8 Through this work, Club Membership may develop plans and proposals for
9 the pool area – which is now simply wasted space for the vast majority of every year
10 and is only used by a small fraction of Club members – into a year round facility
11 that could benefit all Club members and that could generate revenue for the Club.

12 III. ARGUMENT

13 This is a summary judgment motion, and as such it cannot be granted if
14 there is any genuine issue of material fact for trial. Moreover, as discussed above,
15 Mr. Wilbur seeks Summary Judgment on his Declaratory Judgment request.
16 However, the law is clear: A final Declaratory ruling cannot impose obligations on
17 people who are not parties. RCW 7.24.110. Here, the Injunction requested would
18 require the Cove to “**approve and implement**” a budget “that provides for
19 sufficient funds, **from dues and assessments**, to maintain the swimming pool and
20 other community assets.” Motion at 2. Therefore, the request relief would subject
21 all 600 Cove Members to liability for these “dues and assessments.” This is
improper under Washington law.

22 Also, Mr. Wilbur is requesting Summary Judgment on a Mandatory
23 Injunction. Such Mandatory Injunctions are highly disfavored. Stanley v.
24 University of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994). Such Injunctions should
25 be “denied unless the facts and law clearly favor the moving party.” Stanley, 13
26 F.3d at 1320; see also Park Village Apartment Tenants Ass’n v. Mortimer Howard
27 Trust, 636 F.3d 1150, 1160 (9th Cir. 2011).

1
2 **A. MR. WILBUR FAILS TO PROVE THE EXISTENCE OF A CLEAR**
3 **LEGAL RIGHT**

4 As discussed above, Mr. Wilbur offers no legal support whatsoever for the
5 proposition that he somehow acquired an enforceable individual property right in
6 the perpetual operation of the swimming pool. No legal underpinning for that
7 assertion is known to exist. Without a clear statement of the legal principal
8 involved, and a showing that there is no material issue of fact pursuant to that
9 principal, Summary Judgment simply cannot be granted. Moreover, as noted
10 above, the legal concept proposed would violate basic tenants of well-established
11 property law. These include the enumerated powers of condominiums, homeowner’s
12 associations, and other community organizations related to real property.

13 Mr. Wilbur’s factual assertions fail from the same basic lack of support. Mr.
14 Wilbur nowhere specifies the specific chain of property conveyance where he,
15 himself, on his lot, acquired an individual property right to enforce the continued
16 operation of the swimming pool. From what specific document did he, and he
17 specifically, derive this right? In what specific transaction did he, and he
18 specifically, acquire this right? The undersigned respectfully submits that the
19 reason Mr. Wilbur’s factual assertions – regarding “original deeds” and the Articles
20 of Incorporation, for example – are so vague is because he is unable to demonstrate
21 a clear chain of Title which vested in him specifically an enforceable property right
22 in the pool.

23 It is noteworthy that, unlike in condominium developments, here there is no
24 joint ownership of “common areas” relating to the pool. Rather, the “community”
25 lots, including the lot where the pool is located, are wholly and individually owned,
26 in fee, by the Admiral’s Cove Beach Club itself. See Exhibit B. Mr. Wilbur has no
27 individual, or shared, ownership interest in the land upon which the pool sits.

28 As discussed above, the Articles of Incorporation and the Restrictive

1 Covenants were recorded on the Cove property when Mr. Wilbur purchased his lots.
2 Neither one of these makes any mention whatsoever of a pool. They simply cannot
3 form the basis for an individual, enforceable, specific property right running to Mr.
4 Wilbur's lot regarding the pool. Moreover, despite Mr. Wilbur's repeated, but
5 vague, assertions regarding "original deeds," there is no showing that an "original
6 deed" **on Mr. Wilbur's lot** says anything about a swimming pool. There is no
7 evidence of how many such "original deeds" exist, what lots they were recorded on,
8 what exactly they say, and how many lots they apply to. Without showing, at the
9 very least, that some "original deed" applicable **to his specific lot** includes
10 language discussing a swimming pool, this argument simply misses the mark.
11 Moreover, there is no legal basis to conclude that an "original deed," from some
12 long-ago moment in time, somehow fed into Mr. Wilbur's purchase and conveyed **to**
13 **him specifically** any right whatsoever. No citation for that proposition is
14 provided.

15 Again, the specific transaction, and property document, from which Mr.
16 Wilbur claims to have derived an enforceable ownership interest in the pool is
17 unclear. This is particularly glaring because Mr. Wilbur's own deed, conveying his
18 lot to him, makes no mention of a swimming pool. Exhibit H. Such are "material
19 issues of fact," and it is Mr. Wilbur's burden to prove that such material issues don't
20 exist. He has not met that burden.

21 While they make no mention whatsoever of a pool, the Articles of
22 Incorporation do clearly convey to the Club the power to sell, transfer, or otherwise
23 "dispose of" its property and its assets. This clear, unambiguous language puts
24 every purchaser (such as Mr. Wilbur) on notice that the Club can, at its election,
25 dispose of the pool or any other element of its property or facilities. Unambiguous
26 language in property documents is given its plain meaning. See Niemann v.
27 Vaughn Community Church, 154 Wn.2d 365, 374 (2005). There is nothing
28 ambiguous about the enumerated power to "dispose of" Club assets.

1 Club decisions on such issues are in turn governed by the Bylaws, through
2 which the Members exercise democratic control over Club finances and operations.
3 The Members exercised that franchise when they studied, for six months, issues
4 related to the pool. They met and communicated regularly, received expert
5 analysis, and developed a set of options based on that analysis. The Club then held
6 a Member vote **on the only two viable options**: repair, or elimination. A
7 majority of Club Members voted to eliminate the pool, and to approve the \$200,000
8 assessment to cover that expense. Mr. Wilbur now sues to overturn that vote, and
9 he acquired a TRO to prevent its implementation. That TRO should be lifted
10 pursuant to RCW 7.40.180.

11 Mr. Wilbur's argument that the Bylaws somehow convey to him an
12 enforceable property right is specious. Those Bylaws are subject to change by a
13 simple majority vote of the Members. There is no principal of property law, and
14 none is cited, where a set of managing Bylaws is held to convey, to every property
15 owner, an absolute right to preserve the Bylaws as they existed on the date of
16 purchase. That concept flies in the face of the law governing member-managed
17 property developments, starting with Washington's Condominium Act, RCW
18 64.34.005 *et seq.* Moreover, the same Bylaws require a majority vote of the
19 Members before any assessment or significant dues increase. Yet Mr. Wilbur is
20 asking this Court to compel very large assessments against all 600 Members,
21 without their consent and against their wishes as expressed by their prior vote. It
22 is not fair to embrace the Bylaws, on the one hand, and seek to override and usurp
23 them, on the other.

23 **C. THE COURT SHOULD DISSOLVE THE PRESENT INJUNCTION**

24 A trial court upon considering whether to grant or deny an injunction may
25 weigh as equitable factors: (a) the nature of the interest claimed, (b) the relative
26 adequacy of an injunction in comparison with other remedies, (c) the delay, if any,
27 in bringing suit, (d) the misconduct of the plaintiff if any, (e) the relative hardship
28

1 likely to result to the defendant if an injunction is granted and to the plaintiff if it is
2 denied, (f) the interest of third persons and of the public, and (g) the practicability of
3 framing and enforcing the order or judgment. Steele v. Queen City Broadcasting
4 Co., 54 Wash.2d 402, 341 P.2d 499 (1959); 4 Restatement of Torts § 936 (1939).

5 Here, as discussed above Mr. Wilbur has failed in his obligation to prove his
6 clear entitlement to the property interest he claims. Moreover, the weighing of
7 hardships, and the interests of third persons, weigh extremely heavily against the
8 continuation of an injunction. Obviously, the Court's TRO has thrown the Club's
9 operations into disarray, and has resulted in continued conflict and struggle over an
10 issue the Club worked hard to resolve through democratic means. Mr. Wilbur's
11 individual litigation has already had a negative effect on the entire Cove
12 community. It has also apparently thrown the Club's Board into some disarray. As
13 seen in the Club's responsive filing, the Board cannot even agree on a position,
14 telling the Court that it can "take no position" on the Motion.

15 To compound matters, Mr. Wilbur now asks for a permanent, Mandatory
16 Injunction which would impose on all 600 Members the obligation to pay significant
17 assessments for major repairs to the pool. This is a financial hardship that many
18 members of the community, who are on fixed incomes with limited assets, cannot
19 afford to bear. See, e.g., Declarations of Nichols and Bauer, filed herewith. The
20 countervailing interest – Mr. Wilbur's desire to use an uncovered, outdoor
21 swimming pool at his pleasure on rare occasions when Northwest weather permits –
22 pales in comparison to the burdens faced by the entire Cove Membership if the
23 Injunction is continued.

24 Ms. Corliss, as Intervenor, has joined this case to try and protect the
25 "interests of third parties," and to alert the Court to the hardships caused by the
26 Injunction. This is especially important because the Cove's Board has decided it
27 cannot or will not take a position on the current Motion. The majority of Cove
28 Members who voted to close the pool deserve a voice in this case.

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IV. CONCLUSION

The requested Permanent Mandatory Injunction will have a major financial impact on all 600 Members of the Cove Community. These Members studied carefully and decided the difficult issue of “what to do with our pool?” through an approved democratic process. While some may disagree with the decision, this was the majority will of the Members as expressed through their Bylaws. A single Member now seeks to usurp that process and impose his preferred outcome on all 600 Members. He does so without showing any clear entitlement to the property right he claims.

This Court should deny the present Motion for Summary Judgment, and should dissolve the existing TRO. This will allow the Cove and its Membership to move forward to implement democratic decisions previously made regarding the pool.¹

Respectfully Submitted,



Jay Carlson, WSBA 30411
Attorney for Intervenor Susan Corliss

¹ In the alternative, this Court should delay consideration of the present Motion to allow more time for discovery, pursuant to CR 56(f). Intervenor and her counsel are new to this case. We requested from plaintiff’s counsel an agreement for a two week continuance in this hearing to better prepare for and brief the Summary Judgment issues, but that was denied. Additional time will allow for discovery regarding the numerous assertions from Mr. Wilbur regarding his claimed property right to the pool. It is believed that there has been very little discovery to date.