No. 73725-2-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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SUSAN CORLISS,

Appellant,

vs.

ADMIRAL'S COVE BEACH CLUB, ROBERT WILBUR, et al,

Respondents.

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# OPENING BRIEF OF APPELLANT SUSAN CORLISS

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## I. INTRODUCTION

Appellant Susan Corliss, Intervenor below, hereby appeals the trial court's ruling of May 18, 2015 granting in part and denying in part plaintiff Robert Wilbur's motion for summary judgment. CP 14-19. Specifically, Ms. Corliss appeals paragraphs 1-9 of the trial court's Order, in which the Court granted in part plaintiff Robert Wilbur's request for a declaratory judgment. CP 16-19.

This case concerns a dilapidated, nearly-half-century-old, uncovered outdoor swimming pool located within a property development on Whidbey Island. The 600 member development is known as the Admiral's Cove Beach Club (the "Club"). This broken down, outdoor pool is only open on a small number of days each year. It is used regularly by only a small minority of Club Members. Moreover, expert analysis has disclosed that the pool has no remaining useful life left, and that it will cost at least $650,000 to effectuate needed repairs.

Accordingly, in May, 2013, after a well informed and carefully vetted process, the Members of the Club voted to close and decommission this pool. Under the plain terms of the Club's Articles of Incorporation, the Club Members and their Board had every right to eliminate or "dispose of" the pool. However, one Club Member, plaintiff Robert Wilbur, filed a lawsuit against the Club. He sought a permanent injunction to invalidate the vote of the Club membership to get rid of the pool. He also asked the trial court to compel each of the 600 Members of the Club to pay an expensive special

assessment to repair the pool. See generally, Plaintiff's Motions for Summary Judgment, CP 743-757; CP 302-317. His requested order, if granted, would have violated the most basic democratic processes of the Club regarding financial decision making. These democratic processes are encoded in the Club's Articles of Incorporation and Bylaws.

The trial court declined to impose a mandatory injunction forcing all Club Members, against their wishes, to pay to repair the pool. The court also declined to impose an injunction of any kind. CP 18-19. However, the court did invalidate the prior vote of the membership to get rid of the pool. The court further ruled that the documents governing the Club somehow created a contractual right, enforceable by Mr. Wilbur, in the perpetual maintenance and operation of the swimming pool. CP 17-18. It is this part of the trial court's ruling that is challenged on appeal.

Below, Mr. Wilbur offered no legal support for his claimed property right in the perpetual operation and repair of the swimming pool. There simply is no doctrine of property law that requires the perpetual operation of specific facilities, such as a pool, within a community-organized development. If individual lot-owners had such rights, this would overturn the entire legal edifice supporting the existence of community developments and democratic decision making within those developments.

Moreover, neither the Restrictive Covenants nor the Articles of Incorporation of the Club say anything whatsoever about a swimming pool. Because they nowhere mention a pool, these documents cannot establish any

enforceable right in the perpetual operation of a pool. And while the Club Bylaws have certain provisions touching on the pool, these provisions are operational only, and are limited to the "Committees" portion of the bylaws. These provisions merely concern operational procedures such as committee work to manage the pool. They nowhere guarantee or require or compel the perpetual presence of a swimming pool. Nor can they be reasonably construed to do so.

The Articles of Incorporation of the Club do make clear, however, that the Club has the right "[t]o sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of the property and assets." See Corliss Declaration, CP 496-577, Exhibit F, Article V, ¶ 5, CP 546. The power of the Club to "dispose of" of "all or any part of" its assets could not be stated more clearly and unambigously. This provision alone, unambiguous, placed Mr. Wilbur on clear notice that the Club could, at its discretion, "dispose of" the pool.

The formation documents are unambiguous that the Club can "dispose of" the pool. This unambiguous language overrides any attempt to construe vague Bylaw provisions regarding pool committees as somehow compelling the perpetual presence of the pool. The Club voted democratically to get rid of its pool, and it had every right to do so under its own formation documents. The trial court's ruling to the contrary was error.

## II. ASSIGNMENTS OF ERROR

1. Where the governing documents of the Admiral's Cove Beach Club unambiguously provide that the Club Board may "dispose of all or any part of the property and assets" of the Club, was it error for the trial court to rule that the Club Board may not dispose of the dilapidated swimming pool owned by the Club? (Order, CP 14-19, ¶ 1-9).

2. Where, after a detailed evaluation by the Club Board regarding the swimming pool, the Club membership followed their own bylaws and procedures and voted to dispose of the swimming pool, was it error for the trial court to rule that the Club membership had no right to vote to dispose of the swimming pool? (Order, CP 14-19, ¶¶ 1-9).

3. Where the governing documents of the Admiral's Cove Beach Club do not specifically state that the Club shall maintain and operate a swimming pool, was it error for the trial court to rule that these documents created an enforceable right for the perpetual maintenance and operation of a swimming pool? (Order, CP 14-19, ¶¶ 1-9).

4. Was it error for the trial court to grant Robert Wilbur's Motion for Summary Judgment and deny Intervenor Susan Corliss' Cross-Motion for Summary Judgment?

Because the trial court ruled on these issues on cross-motions for summary judgment, the Appellate Court reviews these issues *de novo*, applying the summary judgment standard in the same manner as did the trial court.

## III. STATEMENT OF THE CASE

Ms. Susan Corliss is a property owner in the Admiral's Cove development and was the Intervenor below. By virtue of her property ownership, Ms. Corliss is a Member in good standing of the Admiral's Cove Beach Club (the "Club"), the putative defendant in this lawsuit. After Intervention, Ms. Corliss, along with 10 other Club members, submitted declarations in support of her motion for summary judgment and in opposition to plaintiff Wilbur's motion for summary judgment. The statement of the case is based primarily on these submissions. See generally the Declarations of Susan Corliss, Michael King, Karen Shaak, Robert Peetz, Delwin Johnson, Cathie Harrison, Bradley Portin, Charles Bauer, Barbara Nichols, John Deegan, and Jean Salls, located at CP 70-83, and CP 420-577. These declarations are cited with specificity below.

### A. THE CLUB AND ITS OPERATIONS

The Admiral's Cove Beach Club is a waterfront property development on Whidbey Island. The Club includes approximately 600 active Members, all of whom own lots within the Club development. The Club property consists of hundreds of private, Member-owned lots, as well as large property lots owned by the non-profit Admiral's Cove Beach Club. A lot map showing the lot configuration in the Club development is attached as Exhibit B to the Corliss Declaration. See Corliss Declaration, ¶ 5, CP 497, and Ex. B, CP 523.

Members have rights for access and use of the Club-owned property. The most significant piece of Club owned property is the large waterfront beach area owned by the club with beach access at Admiralty Bay, and another area with waterfront access to the Lake. This beautiful recreational beach area is available for all Members to use and enjoy. Corliss Decl., ¶ 5 CP 495.

Below, Mr. Wilbur repeatedly asserted that the swimming pool was the only or the primary recreational asset of the Club. This is not true. In fact, the most valuable and popular recreational asset of the Club is the beautiful waterfront beach area which is owned by the Club and available for use by members. The Club also maintains a covered, open air barbeque and party area, an administration building, a basketball court, a volleyball court, a children's jungle gym playground, an outdoor fire-pit and picnic area, and other facilities. See Shaak Declaration, CP 70-83, ¶ 11, CP 73. It was simply wrong to assert below that the swimming pool was the sole and defining "purpose" for which ACBC was formed, or that the swimming pool is the only – or even the primary – asset of the Club.

Pursuant to the Bylaws and Articles of Incorporation of the Club, Members all have voting rights to elect Club officers and to set Club policy, particularly when it comes to dues and assessments against Members. Corliss Decl., Ex. A (Club Bylaws), CP 507-521. For example, under the Bylaws at issue in this litigation, the Club cannot impose special assessments against lot owners/Members without a majority vote of those Members,

either at a live Member's meeting or by mail ballot. Corliss Decl., Ex. A, Bylaws, Article 14, Sec. 3, CP 520. Also, the Club may not significantly increase the annual dues imposed on Members without a majority vote of the Members. Id., Bylaws, Article 8, Sec. 7, CP 514. In this way, the approximately 600 property owners in the Cove have the right, through a democratic process, to set fiscal policy for themselves. The Club is managed by the Members, through the Bylaws.

**B. CLUB FORMATION AND PROPERTY DOCUMENTS**

In 1969, when the Club development was organized and the Club was constituted, there were two primary formation documents. These documents were recorded. These were the Articles of Incorporation of the Admiral's Cove Beach Club, and the Restrictive Covenants Running With Land of the preexisting Admirals Cove Inc. These documents provide the starting point for determining the purposes and powers, and the obligations and rights, of the property owners/Members within the Club, and of the Club itself through its Board. A true and accurate copy of the Articles of Incorporation and the Restrictive Covenants are attached as Exhibit F and G to the Corliss Decl., CP 542-571; see also Corliss Decl., ¶¶ 24-25, CP 502-03.

The key issue on this appeal is whether these formation documents somehow compel the perpetual maintenance and operation of a swimming pool, overriding the vote of Club membership to get rid of the pool. As to the Articles of Incorporation and the Restrictive Covenants, neither of these documents makes any mention whatsoever of a swimming pool. Therefore,

Wilbur's repeated assertion below that these formation documents somehow vested in him an individual property right to a forever swimming pool is without any support in the documents themselves. A reasonable land owner, reviewing these formation documents, would have no basis to conclude that they are gaining an enforceable property right to the perpetual presence of a swimming pool. By their plain terms, these documents simply do not establish any such entitlement. Corliss Decl., ¶ 24-25, CP 502-03.

On the other hand, the Articles of Incorporation specifically provide that the Club can, at its discretion, transfer, sell, convey, close, or otherwise dispose of or amend its assets and holdings. Article V, Paragraph 4 of the Articles states that, among the power of the Club, is the power to: "Purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, approve, use and otherwise deal in and with real or personal property or any interest therein wherever situated." Corliss Decl., Ex. F at 2, Bylaws, Article V, ¶ 4, CP 544. Paragraph 5 of this Article further grants to Club the power: "To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of the property and assets." Id.

A purchaser such as Mr. Wilbur was on notice, through these formation documents, that the Club had the power to "acquire," "deal in and with," and "transfer and otherwise dispose of all or any part of the property and assets" of the Club. By the clear and unambiguous meaning of these words, the Club had the right and the power to dispose of the swimming pool. This right was clearly announced in plain language in the formation

documents themselves, which were recorded at the time Mr. Wilbur purchased his property. This clear statement of Club powers stands in stark contrast to Mr. Wilbur's argument that these same documents somehow compel the continued operation of the pool, forever. His reading is not supported by any language in the documents. Yet the opposite reading – that the Club is empowered to dispose of the pool if it chooses to – is supported by clear and unambiguous language. Corliss Decl., ¶¶ 26-27, CP 503-504.

Mr. Wilbur also argued below that the Club Bylaws somehow convey to him an individual property right to the forever operation of a swimming pool. In this regard, it is worth noting that the Bylaws, which are an internal governing document, are subject to change, modification, and revision by a simple majority vote of Club Members. Corliss Decl., Ex. A, Bylaws, Article 16, CP 521. Any resulting, new versions of the Bylaws "shall supercede any and all previous versions." Id. There is no logic to the proposition that someone can acquire a permanent property right solely by reference to internal operating Bylaws. Nor did Wilbur cite to any case law or statute for the proposition that such Bylaws form the basis for enforceable property rights among individual members. Corliss Decl., ¶ 31, CP 504-05.

**C. THE DELAPIDATED, OUTDATED POOL**

This suit primarily concerns the uncovered outdoor swimming pool which is located on one parcel of property owned by the Club. Many Club members, such as Ms. Corliss and others who have submitted Declarations, have no interest in using this old, dilapidated, outdoor pool facility. While

the plaintiff repeatedly asserted below that this pool is the "primary asset and recreational facility" of the Club, that is far from the truth. In fact, the primary asset of the Club is the large waterfront area which provides waterfront and beach access to all Club members who live in the Cove. This asset is far more valuable, far more popular among members, and far more regularly used, than is the dilapidated pool. In fact, the pool is almost never open, remains locked and inaccessible for the vast majority of the year, and is used by only a small percentage of Cove residents. Corliss Decl., ¶ 6, CP 497-98; Shaak Decl., ¶ 11, CP 73.

The uncovered, outdoor pool was built in the 1960s. It has never been refurbished. It is in a dramatic state of disrepair. As a result, it can only be used during a very small portion of the year. According to the approved Board of Director's meeting minutes from September 20, 2014, in 2014 the pool was open on only approximately 20 days. On days when the pool is not open -- which is the vast majority of the entire year -- the pool area is fenced, locked, and is inaccessible to Members. The pool facility is almost always in this locked and inaccessible condition. Therefore, the vast majority of the time, the "pool" actually consists of a fenced, locked, unusable and worthless area within the Club. Corliss Decl., ¶ 8, CP 498.

Many Members, including Ms. Corliss and other of the Declarants, never use the pool. In a June, 2012 Long Range Planning Survey, 49.3% of Members disclosed that they never use the pool, with another 37.7% reporting that they only used it "occasionally" in the summer, meaning less

than once weekly. Relevant portions of this survey are attached as Exhibit C to the Corliss declaration. Only a very small minority of Members reported using the pool on a regular basis. Corliss Decl., ¶ 9, CP 498-99, Ex. C, CP 524-26.

A 2013 inspection and architectural review of the pool facility disclosed widespread problems with the pool, and concluded that it had to be very significantly rebuilt, with all major systems replaced. After inspection, the remaining useful life of the existing swimming pool was identified as "0 years." Corliss Decl., Ex D at 13/45 and 28/45, CP 530, CP 538. The review concluded: "Most of the pool components are outdated/aged with no major renovations of the pool since construction in the law 1960's." Id. Major required repairs include "swallowing" the deep end of the pool "due to hydrostatic issues" and installing new drains, re-plastering the pool which will also include removing and replacing all the tile and coping, removing and replacing the entire concrete deck, and replacing all underground piping. The pool heater, a major component, was found to be dysfunctional and requires replacement. The pool pump, another major component, was found to be not functioning and requires replacement. A series of repairs major and minor were recommended, both to the pool and to its related facilities such as the dilapidated shower facility. The estimated cost of these repairs to pool facilities was $650,000. True and accurate copies of portion of these evaluations are attached as Exhibit D to the Corliss Declaration. Corliss Decl., Ex D, CP 527-538, and ¶ 10, CP 499.

### D. THE MEMBER VOTE, PURSUANT TO THE BYLAWS, TO CLOSE THE POOL

In support of his injunction requests below, Mr. Wilbur repeatedly argued that the vote of the Members in May 2013 to decommission the pool was somehow in violation of an October 2012 motion which tasked the Club's Pool Committee and Long Range Planning Committee to study pool issues. The motion directed these committees to evaluate the status of the dilapidated pool in terms of needed repairs, to work with the Club Board to develop alternatives based on that study, and to develop an appropriate ballot whereby the Club membership could choose between available options. See Wilbur Decl., ¶¶ 15-16, CP 292. He suggested that the Member vote in May 2013 somehow violated or usurped the scope of work of this working committee.

In fact, Mr. Wilbur was a member of this working pool committee, but he decided to stop attending committee meetings and he took himself out of the process early on, for unknown reasons. See Harrison Decl. at 2-3, CP 468-69. Despite Mr. Wilbur's inattention, however, this committee engaged in a rigorous process of review and analysis over many months to develop options and plans for the pool. This work is discussed in detail in the Harrison Declaration, CP 469-77. This was detailed-oriented work. It involved the assistance of architects and pool consultants to inspect and examine the pool and related facilities and report and make specific recommendations. Multiple Members worked on this evaluation and they

met and communicated regularly. Further details of this process are contained in the Harrison Declaration.

Through this detailed process, the committee eventually identified two primary options for the pool: either a major repair job which would cost approximately $650,000, or a decommissioning of the pool which would cost approximately $200,000. Given the advanced state of disrepair of the pool, and its remaining useful life of "0 years," these were in fact the only realistic options. As noted, the Harrison Declaration and the details contained therein prove that the options presented to the Members in the May, 2013 ballot were well vetted, well supported, and were the only realistic options for moving forward. So the ballot to Members was meticulously thought out, after a thorough and complete Member-run process. The working committee work fed directly to the Club Board and into the formation of the ballot distributed to Members. Corliss Decl., ¶ 13, CP 500; see also Corliss Decl., Ex. D, CP 528-38.

In May of 2013, pursuant to Club Bylaws, this ballot was circulated to Club Members to determine the future of the pool. Two options were provided for Members to vote on: (1) a special assessment of $200,000 to decommission/remove the pool, or (2) a special assessment of $650,000 to repair the pool and bring it up to standards. With their ballot, each Member also received a two page "Frequently Asked Questions" document. This document explained in detail the various options and issues related to the pool vote. A true and correct copy of this Frequently Asked Questions

document is attached as Exhibit E to the Corliss Declaration. CP 540. Among other things, this document discussed the estimates for repair or removal of the pool, the various financing options, and ADA compliance. Corliss Decl., ¶¶ 14-15, CP 500.

Prior to the vote, in addition to the detailed work of Pool Committee and Long Range Planning Committee Members studying the pool issue, the pool issue had been debated and discussed within the Club community for many years. Any Club Member such as Mr. Wilbur with an interest in the pool had ample time and opportunity, before the vote, to be fully advised about every part of the pool dispute. Indeed, Mr. Wilbur had an opportunity to participate as a member of the working committee, but chose to abandon that involvement. Club Members voted with their eyes wide open in regards to the pool. Corliss Decl., ¶ 16, CP 500-01.

The result of the vote was 166 Members in favor of closing the pool, 153 in favor of an assessment to keep the pool open. So a majority of the 319 voting Members chose to close the pool. Ms. Corliss and other Declarants voted with the majority to close the pool. Corliss Decl., ¶ 17, CP 501.

### E. MR. FREDRICK'S QUESTIONABLE CONDUCT AS A BOARD MEMBER

During the summary judgment proceedings below, many Members were surprised to learn that the Club has decided not to oppose Mr. Wilbur's request for a Permanent Injunction mandating expensive repairs to the pool, for his benefit. In this regard, it is worth noting that the former co-plaintiff in this case, Dustin Frederick, is now a member of the Club Board. As a former

plaintiff in this litigation, Mr. Frederick, as a fiduciary for all Club Members, might have been expected to recuse himself from all Board action and consideration of pool issues. However, he has not done so. In fact, Mr. Frederick apparently has used his Board position to aggressively push for the agenda that he previously pursued in this litigation. Corliss Decl., ¶ 32, CP 505. It remains to be seen how the current Club Board, as defendants in this case, will choose to argue in response to this appeal.

**F. MORE RECENT CLUB ACTIVITY TO ADDRESS THE POOL ISSUE**

The Club Membership took additional recent steps, pursuant to the Bylaws, to study and move forward on alternative plans for the use of the underutilized property where the pool is currently located. This is in keeping with the Articles of Incorporation of the Club, which clearly allow the Club to "dispose of" the pool and to develop and acquire other property and facilities. Corliss Decl., ¶ 33, CP 505. At an Annual Meeting of the Club on October 25, 2014, pursuant to the Bylaws a Member Motion was passed creating a Member Committee called "Alternate Visions." This Committee has been formed to "evaluate an alternative recreational use for the property on which the current pool is located so that it will become an asset that is a year-round indoor facility. The ad hoc committee will compare the costs and benefits of an indoor recreational and conference facility to the costs of operating and refurbishing the pool[.]" Corliss Decl., ¶ 34, CP 505-06; see also Deegan Declaration, CP 420-26, ¶ 6, CP 423-24. Through this Committee, Club Membership intends to move forward to evaluate alternate uses for the pool

area. This may include "how revenue generated from an indoor recreational facility could potentially be used to fund a pool on an alternative site." Id.

Through this work, Club Membership may develop plans and proposals for the pool area – which is now simply wasted space for the vast majority of every year and is only used by a small fraction of Club members – into a year round facility that could benefit all Club members and that could generate revenue for the Club. Corliss Decl., ¶¶ 33-35, CP 504-06.

## IV. ARGUMENT

This trial court's ruling came on a summary judgment motion, and as such it should not have been granted if there was any genuine issue of material fact for trial. The trial court's determination that the Club cannot remove the pool, based upon the language in its governing documents, should be reversed for several reasons.

First, the trial court issued an improper declaratory judgment. The appealed ruling has had and will continue to have a direct impact on all Club Members. Here, the court's ruling will require all Club members to pay to maintain and operate a swimming pool, one they previously voted to get rid of. While the long term plan for and the costs associated with this cannot be known, the estimates provided by the detailed study of the study in 2013 demonstrate that this will be very costly to the entire Club community. The pool simply has no remaining useful life, yet it cannot be repaired without the expenditure of hundreds of thousands of dollars. These facts are undisputed. And pursuant to the Club's structure, the ongoing future costs of

the declaratory ruling will have to be borne by the Club membership as a whole.

However, the law is clear: A final declaratory ruling cannot impose obligations on people who are not parties. RCW 7.24.110. "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration[.]" "[N]o declaration shall prejudice the rights of persons not parties to the proceeding." The vast majority of the people affected by the ruling -- the approximately 600 Club Members -- were not parties. They have had no opportunity to test or litigate the legal theories put forward by the plaintiff. Yet the granted declaratory judgment will have a direct financial impact on them all. The ruling also disenfranchised the majority of Club Members who voted to dispose of the swimming pool, invalidating their democratic decision to get rid of the pool. Because the declaratory judgment affected all Members' interests, it is invalid on its face because the Members were not parties.

Second, as the record demonstrates, the prior vote of the Club Membership to decommission the pool was entirely valid. The ad hoc pool committee and the Club Board studied the issue carefully, using experts to conduct detailed inspections and to provide detailed repair estimates. These experts concluded that the pool had "no useful life" remaining ("Remaining Life: 0 years," Corliss Decl., Ex. D at 13/45 and 28/45, CP 530, 538), and that needed repairs would cost a minimum of $650,000. These facts are

uncontested. With this information in hand, the Pool Committee did exactly what the 2012 motion called upon it to do: it presented the only available options to the membership for a decision. That is worth repeating: after the committee study, the only two viable options were: (1) decommission the pool, or (2) repair the pool. That decision was presented to the membership with detailed information. The membership made an informed vote, and that vote was valid. There is no legal reason to conclude that it was not.

Third, it was erroneous for the trial court to conclude that the governing documents of the Club somehow compel the perpetual operation of the pool. The Articles of Incorporation and Restrictive Covenants make no mention of a pool whatsoever. The Articles do make clear, however, that the Club has the unfettered right to "dispose of" "any" of its assets, which is exactly what the Club sought to do. That specific grant of authority, within documents recorded at the time Mr. Wilbur purchased his property, could not be more clear. Wilbur's reliance on vague, procedural and non-specific provisions in the Bylaws regarding committees cannot supersede this specific and unambiguous grant of authority to "dispose of" assets such as the pool. Unambiguous language in property documents is given its plain meaning. See Niemann v. Vaughn Community Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005). There is nothing ambiguous about the enumerated power to "dispose of" Club assets.

It is noteworthy that, unlike in condominium developments, here there is no joint ownership of the "common areas" relating to the pool.

Rather, the "community" lots, including the lot where the pool is located, are wholly and individually owned, in fee, by the Admiral's Cove Beach Club itself. See Corliss Decl., Ex. B, CP 523. Mr. Wilbur has no individual, or shared, ownership interest in the land upon which the pool sits.

Mr. Wilbur's argument that the Bylaws somehow convey to him an enforceable property right is specious. The Bylaws are subject to change by a simple majority vote of the Members. There is no principal of property law, and none is cited, where a set of procedural Bylaws is held to convey, to every property owner, an absolute right to preserve the property as it existed on their date of purchase. That concept flies in the face of the law governing member-managed property developments, starting with Washington's Condominium Act, RCW 64.34.005 *et seq*.

## V. CONCLUSION

The vote of Club Members in May 2013 was entirely proper and valid. These Members studied carefully, then 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 own Bylaws. A single Member has now usurped that process and sought to impose his preferred outcome on all 600 Members.

This Court should reverse the order below granting summary judgment and a declaratory judgment to Mr. Wilbur. It should further grant Ms. Corliss' cross-motion for summary judgment, which the trial court denied as moot. In that motion, Ms. Corliss merely sought to enforce the 2013 vote

of the Club membership to decommission the swimming pool. CP 266-87. This will allow the Club and its membership to move forward and implement their previous, democratically-made decision regarding the pool.

Respectfully submitted,

/s/_____

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## DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

That on January 25, 2016, I served the attached Opening Brief of Appellant, to the parties to this action via email (pursuant to previous agreement):

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DATED at Seattle, Washington this 25th day of January, 2016.

/s/_____
Jay Carlson, WSBA 30411

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Accordingly, in May, 2013, after a well informed and carefully vetted process, the Members of the Club voted to close and decommission this pool. Under the plain terms of the Club's Articles of Incorporation, the Club Members and their Board had every right to eliminate or "dispose of" the pool. However, one Club Member, plaintiff Robert Wilbur, filed a lawsuit against the Club. He sought a permanent injunction to invalidate the vote of the Club membership to get rid of the pool. He also asked the trial court to compel each of the 600 Members of the Club to pay an expensive special

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enforceable right in the perpetual operation of a pool. And while the Club Bylaws have certain provisions touching on the pool, these provisions are operational only, and are limited to the "Committees" portion of the bylaws. These provisions merely concern operational procedures such as committee work to manage the pool. They nowhere guarantee or require or compel the perpetual presence of a swimming pool. Nor can they be reasonably construed to do so.

The Articles of Incorporation of the Club do make clear, however, that the Club has the right "[t]o sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of the property and assets." See Corliss Declaration, CP 496-577, Exhibit F, Article V, ¶ 5, CP 546. The power of the Club to "dispose of" of "all or any part of" its assets could not be stated more clearly and unambigously. This provision alone, unambiguous, placed Mr. Wilbur on clear notice that the Club could, at its discretion, "dispose of" the pool.

The formation documents are unambiguous that the Club can "dispose of" the pool. This unambiguous language overrides any attempt to construe vague Bylaw provisions regarding pool committees as somehow compelling the perpetual presence of the pool. The Club voted democratically to get rid of its pool, and it had every right to do so under its own formation documents. The trial court's ruling to the contrary was error.

## II. ASSIGNMENTS OF ERROR

1. Where the governing documents of the Admiral's Cove Beach Club unambiguously provide that the Club Board may "dispose of all or any part of the property and assets" of the Club, was it error for the trial court to rule that the Club Board may not dispose of the dilapidated swimming pool owned by the Club? (Order, CP 14-19, ¶ 1-9).

2. Where, after a detailed evaluation by the Club Board regarding the swimming pool, the Club membership followed their own bylaws and procedures and voted to dispose of the swimming pool, was it error for the trial court to rule that the Club membership had no right to vote to dispose of the swimming pool? (Order, CP 14-19, ¶¶ 1-9).

3. Where the governing documents of the Admiral's Cove Beach Club do not specifically state that the Club shall maintain and operate a swimming pool, was it error for the trial court to rule that these documents created an enforceable right for the perpetual maintenance and operation of a swimming pool? (Order, CP 14-19, ¶¶ 1-9).

4. Was it error for the trial court to grant Robert Wilbur's Motion for Summary Judgment and deny Intervenor Susan Corliss' Cross-Motion for Summary Judgment?

Because the trial court ruled on these issues on cross-motions for summary judgment, the Appellate Court reviews these issues *de novo*, applying the summary judgment standard in the same manner as did the trial court.

## III. STATEMENT OF THE CASE

Ms. Susan Corliss is a property owner in the Admiral's Cove development and was the Intervenor below. By virtue of her property ownership, Ms. Corliss is a Member in good standing of the Admiral's Cove Beach Club (the "Club"), the putative defendant in this lawsuit. After Intervention, Ms. Corliss, along with 10 other Club members, submitted declarations in support of her motion for summary judgment and in opposition to plaintiff Wilbur's motion for summary judgment. The statement of the case is based primarily on these submissions. See generally the Declarations of Susan Corliss, Michael King, Karen Shaak, Robert Peetz, Delwin Johnson, Cathie Harrison, Bradley Portin, Charles Bauer, Barbara Nichols, John Deegan, and Jean Salls, located at CP 70-83, and CP 420-577. These declarations are cited with specificity below.

### A. THE CLUB AND ITS OPERATIONS

The Admiral's Cove Beach Club is a waterfront property development on Whidbey Island. The Club includes approximately 600 active Members, all of whom own lots within the Club development. The Club property consists of hundreds of private, Member-owned lots, as well as large property lots owned by the non-profit Admiral's Cove Beach Club. A lot map showing the lot configuration in the Club development is attached as Exhibit B to the Corliss Declaration. See Corliss Declaration, ¶ 5, CP 497, and Ex. B, CP 523.

Members have rights for access and use of the Club-owned property. The most significant piece of Club owned property is the large waterfront beach area owned by the club with beach access at Admiralty Bay, and another area with waterfront access to the Lake. This beautiful recreational beach area is available for all Members to use and enjoy. Corliss Decl., ¶ 5 CP 495.

Below, Mr. Wilbur repeatedly asserted that the swimming pool was the only or the primary recreational asset of the Club. This is not true. In fact, the most valuable and popular recreational asset of the Club is the beautiful waterfront beach area which is owned by the Club and available for use by members. The Club also maintains a covered, open air barbeque and party area, an administration building, a basketball court, a volleyball court, a children's jungle gym playground, an outdoor fire-pit and picnic area, and other facilities. See Shaak Declaration, CP 70-83, ¶ 11, CP 73. It was simply wrong to assert below that the swimming pool was the sole and defining "purpose" for which ACBC was formed, or that the swimming pool is the only – or even the primary – asset of the Club.

Pursuant to the Bylaws and Articles of Incorporation of the Club, Members all have voting rights to elect Club officers and to set Club policy, particularly when it comes to dues and assessments against Members. Corliss Decl., Ex. A (Club Bylaws), CP 507-521. For example, under the Bylaws at issue in this litigation, the Club cannot impose special assessments against lot owners/Members without a majority vote of those Members,

either at a live Member's meeting or by mail ballot. Corliss Decl., Ex. A, Bylaws, Article 14, Sec. 3, CP 520. Also, the Club may not significantly increase the annual dues imposed on Members without a majority vote of the Members. Id., Bylaws, Article 8, Sec. 7, CP 514. In this way, the approximately 600 property owners in the Cove have the right, through a democratic process, to set fiscal policy for themselves. The Club is managed by the Members, through the Bylaws.

**B. CLUB FORMATION AND PROPERTY DOCUMENTS**

In 1969, when the Club development was organized and the Club was constituted, there were two primary formation documents. These documents were recorded. These were the Articles of Incorporation of the Admiral's Cove Beach Club, and the Restrictive Covenants Running With Land of the preexisting Admirals Cove Inc. These documents provide the starting point for determining the purposes and powers, and the obligations and rights, of the property owners/Members within the Club, and of the Club itself through its Board. A true and accurate copy of the Articles of Incorporation and the Restrictive Covenants are attached as Exhibit F and G to the Corliss Decl., CP 542-571; see also Corliss Decl., ¶¶ 24-25, CP 502-03.

The key issue on this appeal is whether these formation documents somehow compel the perpetual maintenance and operation of a swimming pool, overriding the vote of Club membership to get rid of the pool. As to the Articles of Incorporation and the Restrictive Covenants, neither of these documents makes any mention whatsoever of a swimming pool. Therefore,

Wilbur's repeated assertion below that these formation documents somehow vested in him an individual property right to a forever swimming pool is without any support in the documents themselves. A reasonable land owner, reviewing these formation documents, would have no basis to conclude that they are gaining an enforceable property right to the perpetual presence of a swimming pool. By their plain terms, these documents simply do not establish any such entitlement. Corliss Decl., ¶ 24-25, CP 502-03.

On the other hand, the Articles of Incorporation specifically provide that the Club can, at its discretion, transfer, sell, convey, close, or otherwise dispose of or amend its assets and holdings. Article V, Paragraph 4 of the Articles states that, among the power of the Club, is the power to: "Purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, approve, use and otherwise deal in and with real or personal property or any interest therein wherever situated." Corliss Decl., Ex. F at 2, Bylaws, Article V, ¶ 4, CP 544. Paragraph 5 of this Article further grants to Club the power: "To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of the property and assets." Id.

A purchaser such as Mr. Wilbur was on notice, through these formation documents, that the Club had the power to "acquire," "deal in and with," and "transfer and otherwise dispose of all or any part of the property and assets" of the Club. By the clear and unambiguous meaning of these words, the Club had the right and the power to dispose of the swimming pool. This right was clearly announced in plain language in the formation

documents themselves, which were recorded at the time Mr. Wilbur purchased his property. This clear statement of Club powers stands in stark contrast to Mr. Wilbur's argument that these same documents somehow compel the continued operation of the pool, forever. His reading is not supported by any language in the documents. Yet the opposite reading – that the Club is empowered to dispose of the pool if it chooses to – is supported by clear and unambiguous language. Corliss Decl., ¶¶ 26-27, CP 503-504.

Mr. Wilbur also argued below that the Club Bylaws somehow convey to him an individual property right to the forever operation of a swimming pool. In this regard, it is worth noting that the Bylaws, which are an internal governing document, are subject to change, modification, and revision by a simple majority vote of Club Members. Corliss Decl., Ex. A, Bylaws, Article 16, CP 521. Any resulting, new versions of the Bylaws "shall supercede any and all previous versions." Id. There is no logic to the proposition that someone can acquire a permanent property right solely by reference to internal operating Bylaws. Nor did Wilbur cite to any case law or statute for the proposition that such Bylaws form the basis for enforceable property rights among individual members. Corliss Decl., ¶ 31, CP 504-05.

**C. THE DELAPIDATED, OUTDATED POOL**

This suit primarily concerns the uncovered outdoor swimming pool which is located on one parcel of property owned by the Club. Many Club members, such as Ms. Corliss and others who have submitted Declarations, have no interest in using this old, dilapidated, outdoor pool facility. While

the plaintiff repeatedly asserted below that this pool is the "primary asset and recreational facility" of the Club, that is far from the truth. In fact, the primary asset of the Club is the large waterfront area which provides waterfront and beach access to all Club members who live in the Cove. This asset is far more valuable, far more popular among members, and far more regularly used, than is the dilapidated pool. In fact, the pool is almost never open, remains locked and inaccessible for the vast majority of the year, and is used by only a small percentage of Cove residents. Corliss Decl., ¶ 6, CP 497-98; Shaak Decl., ¶ 11, CP 73.

The uncovered, outdoor pool was built in the 1960s. It has never been refurbished. It is in a dramatic state of disrepair. As a result, it can only be used during a very small portion of the year. According to the approved Board of Director's meeting minutes from September 20, 2014, in 2014 the pool was open on only approximately 20 days. On days when the pool is not open -- which is the vast majority of the entire year -- the pool area is fenced, locked, and is inaccessible to Members. The pool facility is almost always in this locked and inaccessible condition. Therefore, the vast majority of the time, the "pool" actually consists of a fenced, locked, unusable and worthless area within the Club. Corliss Decl., ¶ 8, CP 498.

Many Members, including Ms. Corliss and other of the Declarants, never use the pool. In a June, 2012 Long Range Planning Survey, 49.3% of Members disclosed that they never use the pool, with another 37.7% reporting that they only used it "occasionally" in the summer, meaning less

than once weekly. Relevant portions of this survey are attached as Exhibit C to the Corliss declaration. Only a very small minority of Members reported using the pool on a regular basis. Corliss Decl., ¶ 9, CP 498-99, Ex. C, CP 524-26.

A 2013 inspection and architectural review of the pool facility disclosed widespread problems with the pool, and concluded that it had to be very significantly rebuilt, with all major systems replaced. After inspection, the remaining useful life of the existing swimming pool was identified as "0 years." Corliss Decl., Ex D at 13/45 and 28/45, CP 530, CP 538. The review concluded: "Most of the pool components are outdated/aged with no major renovations of the pool since construction in the law 1960's." Id. Major required repairs include "swallowing" the deep end of the pool "due to hydrostatic issues" and installing new drains, re-plastering the pool which will also include removing and replacing all the tile and coping, removing and replacing the entire concrete deck, and replacing all underground piping. The pool heater, a major component, was found to be dysfunctional and requires replacement. The pool pump, another major component, was found to be not functioning and requires replacement. A series of repairs major and minor were recommended, both to the pool and to its related facilities such as the dilapidated shower facility. The estimated cost of these repairs to pool facilities was $650,000. True and accurate copies of portion of these evaluations are attached as Exhibit D to the Corliss Declaration. Corliss Decl., Ex D, CP 527-538, and ¶ 10, CP 499.

### D. THE MEMBER VOTE, PURSUANT TO THE BYLAWS, TO CLOSE THE POOL

In support of his injunction requests below, Mr. Wilbur repeatedly argued that the vote of the Members in May 2013 to decommission the pool was somehow in violation of an October 2012 motion which tasked the Club's Pool Committee and Long Range Planning Committee to study pool issues. The motion directed these committees to evaluate the status of the dilapidated pool in terms of needed repairs, to work with the Club Board to develop alternatives based on that study, and to develop an appropriate ballot whereby the Club membership could choose between available options. See Wilbur Decl., ¶¶ 15-16, CP 292. He suggested that the Member vote in May 2013 somehow violated or usurped the scope of work of this working committee.

In fact, Mr. Wilbur was a member of this working pool committee, but he decided to stop attending committee meetings and he took himself out of the process early on, for unknown reasons. See Harrison Decl. at 2-3, CP 468-69. Despite Mr. Wilbur's inattention, however, this committee engaged in a rigorous process of review and analysis over many months to develop options and plans for the pool. This work is discussed in detail in the Harrison Declaration, CP 469-77. This was detailed-oriented work. It involved the assistance of architects and pool consultants to inspect and examine the pool and related facilities and report and make specific recommendations. Multiple Members worked on this evaluation and they

met and communicated regularly. Further details of this process are contained in the Harrison Declaration.

Through this detailed process, the committee eventually identified two primary options for the pool: either a major repair job which would cost approximately $650,000, or a decommissioning of the pool which would cost approximately $200,000. Given the advanced state of disrepair of the pool, and its remaining useful life of "0 years," these were in fact the only realistic options. As noted, the Harrison Declaration and the details contained therein prove that the options presented to the Members in the May, 2013 ballot were well vetted, well supported, and were the only realistic options for moving forward. So the ballot to Members was meticulously thought out, after a thorough and complete Member-run process. The working committee work fed directly to the Club Board and into the formation of the ballot distributed to Members. Corliss Decl., ¶ 13, CP 500; see also Corliss Decl., Ex. D, CP 528-38.

In May of 2013, pursuant to Club Bylaws, this ballot was circulated to Club Members to determine the future of the pool. Two options were provided for Members to vote on: (1) a special assessment of $200,000 to decommission/remove the pool, or (2) a special assessment of $650,000 to repair the pool and bring it up to standards. With their ballot, each Member also received a two page "Frequently Asked Questions" document. This document explained in detail the various options and issues related to the pool vote. A true and correct copy of this Frequently Asked Questions

document is attached as Exhibit E to the Corliss Declaration. CP 540. Among other things, this document discussed the estimates for repair or removal of the pool, the various financing options, and ADA compliance. Corliss Decl., ¶¶ 14-15, CP 500.

Prior to the vote, in addition to the detailed work of Pool Committee and Long Range Planning Committee Members studying the pool issue, the pool issue had been debated and discussed within the Club community for many years. Any Club Member such as Mr. Wilbur with an interest in the pool had ample time and opportunity, before the vote, to be fully advised about every part of the pool dispute. Indeed, Mr. Wilbur had an opportunity to participate as a member of the working committee, but chose to abandon that involvement. Club Members voted with their eyes wide open in regards to the pool. Corliss Decl., ¶ 16, CP 500-01.

The result of the vote was 166 Members in favor of closing the pool, 153 in favor of an assessment to keep the pool open. So a majority of the 319 voting Members chose to close the pool. Ms. Corliss and other Declarants voted with the majority to close the pool. Corliss Decl., ¶ 17, CP 501.

### E. MR. FREDRICK'S QUESTIONABLE CONDUCT AS A BOARD MEMBER

During the summary judgment proceedings below, many Members were surprised to learn that the Club has decided not to oppose Mr. Wilbur's request for a Permanent Injunction mandating expensive repairs to the pool, for his benefit. In this regard, it is worth noting that the former co-plaintiff in this case, Dustin Frederick, is now a member of the Club Board. As a former

plaintiff in this litigation, Mr. Frederick, as a fiduciary for all Club Members, might have been expected to recuse himself from all Board action and consideration of pool issues. However, he has not done so. In fact, Mr. Frederick apparently has used his Board position to aggressively push for the agenda that he previously pursued in this litigation. Corliss Decl., ¶ 32, CP 505. It remains to be seen how the current Club Board, as defendants in this case, will choose to argue in response to this appeal.

**F. MORE RECENT CLUB ACTIVITY TO ADDRESS THE POOL ISSUE**

The Club Membership took additional recent steps, pursuant to the Bylaws, to study and move forward on alternative plans for the use of the underutilized property where the pool is currently located. This is in keeping with the Articles of Incorporation of the Club, which clearly allow the Club to "dispose of" the pool and to develop and acquire other property and facilities. Corliss Decl., ¶ 33, CP 505. At an Annual Meeting of the Club on October 25, 2014, pursuant to the Bylaws a Member Motion was passed creating a Member Committee called "Alternate Visions." This Committee has been formed to "evaluate an alternative recreational use for the property on which the current pool is located so that it will become an asset that is a year-round indoor facility. The ad hoc committee will compare the costs and benefits of an indoor recreational and conference facility to the costs of operating and refurbishing the pool[.]" Corliss Decl., ¶ 34, CP 505-06; see also Deegan Declaration, CP 420-26, ¶ 6, CP 423-24. Through this Committee, Club Membership intends to move forward to evaluate alternate uses for the pool

area. This may include "how revenue generated from an indoor recreational facility could potentially be used to fund a pool on an alternative site." Id.

Through this work, Club Membership may develop plans and proposals for the pool area – which is now simply wasted space for the vast majority of every year and is only used by a small fraction of Club members – into a year round facility that could benefit all Club members and that could generate revenue for the Club. Corliss Decl., ¶¶ 33-35, CP 504-06.

## IV. ARGUMENT

This trial court's ruling came on a summary judgment motion, and as such it should not have been granted if there was any genuine issue of material fact for trial. The trial court's determination that the Club cannot remove the pool, based upon the language in its governing documents, should be reversed for several reasons.

First, the trial court issued an improper declaratory judgment. The appealed ruling has had and will continue to have a direct impact on all Club Members. Here, the court's ruling will require all Club members to pay to maintain and operate a swimming pool, one they previously voted to get rid of. While the long term plan for and the costs associated with this cannot be known, the estimates provided by the detailed study of the study in 2013 demonstrate that this will be very costly to the entire Club community. The pool simply has no remaining useful life, yet it cannot be repaired without the expenditure of hundreds of thousands of dollars. These facts are undisputed. And pursuant to the Club's structure, the ongoing future costs of

the declaratory ruling will have to be borne by the Club membership as a whole.

However, the law is clear: A final declaratory ruling cannot impose obligations on people who are not parties. RCW 7.24.110. "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration[.]" "[N]o declaration shall prejudice the rights of persons not parties to the proceeding." The vast majority of the people affected by the ruling -- the approximately 600 Club Members -- were not parties. They have had no opportunity to test or litigate the legal theories put forward by the plaintiff. Yet the granted declaratory judgment will have a direct financial impact on them all. The ruling also disenfranchised the majority of Club Members who voted to dispose of the swimming pool, invalidating their democratic decision to get rid of the pool. Because the declaratory judgment affected all Members' interests, it is invalid on its face because the Members were not parties.

Second, as the record demonstrates, the prior vote of the Club Membership to decommission the pool was entirely valid. The ad hoc pool committee and the Club Board studied the issue carefully, using experts to conduct detailed inspections and to provide detailed repair estimates. These experts concluded that the pool had "no useful life" remaining ("Remaining Life: 0 years," Corliss Decl., Ex. D at 13/45 and 28/45, CP 530, 538), and that needed repairs would cost a minimum of $650,000. These facts are

uncontested. With this information in hand, the Pool Committee did exactly what the 2012 motion called upon it to do: it presented the only available options to the membership for a decision. That is worth repeating: after the committee study, the only two viable options were: (1) decommission the pool, or (2) repair the pool. That decision was presented to the membership with detailed information. The membership made an informed vote, and that vote was valid. There is no legal reason to conclude that it was not.

Third, it was erroneous for the trial court to conclude that the governing documents of the Club somehow compel the perpetual operation of the pool. The Articles of Incorporation and Restrictive Covenants make no mention of a pool whatsoever. The Articles do make clear, however, that the Club has the unfettered right to "dispose of" "any" of its assets, which is exactly what the Club sought to do. That specific grant of authority, within documents recorded at the time Mr. Wilbur purchased his property, could not be more clear. Wilbur's reliance on vague, procedural and non-specific provisions in the Bylaws regarding committees cannot supersede this specific and unambiguous grant of authority to "dispose of" assets such as the pool. Unambiguous language in property documents is given its plain meaning. See Niemann v. Vaughn Community Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005). There is nothing ambiguous about the enumerated power to "dispose of" Club assets.

It is noteworthy that, unlike in condominium developments, here there is no joint ownership of the "common areas" relating to the pool.

Rather, the "community" lots, including the lot where the pool is located, are wholly and individually owned, in fee, by the Admiral's Cove Beach Club itself. See Corliss Decl., Ex. B, CP 523. Mr. Wilbur has no individual, or shared, ownership interest in the land upon which the pool sits.

Mr. Wilbur's argument that the Bylaws somehow convey to him an enforceable property right is specious. The Bylaws are subject to change by a simple majority vote of the Members. There is no principal of property law, and none is cited, where a set of procedural Bylaws is held to convey, to every property owner, an absolute right to preserve the property as it existed on their date of purchase. That concept flies in the face of the law governing member-managed property developments, starting with Washington's Condominium Act, RCW 64.34.005 *et seq*.

## V. CONCLUSION

The vote of Club Members in May 2013 was entirely proper and valid. These Members studied carefully, then 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 own Bylaws. A single Member has now usurped that process and sought to impose his preferred outcome on all 600 Members.

This Court should reverse the order below granting summary judgment and a declaratory judgment to Mr. Wilbur. It should further grant Ms. Corliss' cross-motion for summary judgment, which the trial court denied as moot. In that motion, Ms. Corliss merely sought to enforce the 2013 vote

of the Club membership to decommission the swimming pool. CP 266-87. This will allow the Club and its membership to move forward and implement their previous, democratically-made decision regarding the pool.

Respectfully submitted,

/s/_____

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## DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

That on January 25, 2016, I served the attached Opening Brief of Appellant, to the parties to this action via email (pursuant to previous agreement):

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/s/_____
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