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

ROBERT WILBUR and DUSTIN
FREDERICK,

Plaintiffs,

NO. 13-2-00741-4

vs.

PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

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

Defendants.

I. RELIEF REQUESTED

The Plaintiff, Robert Wilbur, requests the entry of summary judgment in his favor as follows:

- A. Granting a permanent injunction which enjoins and restrains the Defendant, Admiral's Cove Beach Club, and its board of directors, from taking any action, including the employment of third parties, contractors or subcontractors, to demolish, decommission, remove, damage, destroy, fill in, or otherwise render inoperative, the Admiral's Cove Beach Club swimming pool complex and all related facilities.

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B. Granting a permanent injunction which enjoins and restrains the Defendant, Admiral's Cove Beach Club, and its board of directors, from imposing or levying or attempting to enforce or collect an assessment of any type against any lot within the plat of Admiral's Cove, the purpose of which is to pay for any part of the costs of decommissioning, deactivating, demolishing, or in any manner filling, grading, removing, destroying or otherwise rendering unusable, the swimming pool and related facilities owned by the Admiral's Cove Beach Club, except as allowed under paragraph A of this Order.

C. Granting a permanent injunction which affirmatively requires and directs the Defendant, Admiral's Cove Beach Club, and its board of directors, to properly operate and maintain the Admiral's Cove Beach Club swimming pool and facilities, by:

1. meeting any and all local, state or federal standards that may be applicable and which are required for the swimming pool to be functional and fully operational, including all usual and customary maintenance tasks and practices necessary to keep the swimming pool in good operating condition and reasonably safe and clean; and
2. ensuring all actions which should be taken in accordance with the ACBC Bylaws are appropriately facilitated, and
3. completing any and all maintenance and repairs required or recommended by federal, state, or local law; and
4. approving and implementing an annual budget that provides for sufficient funds, from dues and assessments, to maintain the swimming pool and other community assets, including the accumulation of reserves for repairs and maintenance.

1 D. Granting a permanent injunction which enjoins and restrains the
2 Defendant, Admiral's Cove Beach Club, and its board of directors, from
3 attempting to take any action that is contrary to or inconsistent with the
4 terms of the Motion to save the pool unanimously approved by the
5 members of Admiral's Cove Beach Club at the October 27, 2012 annual
6 meeting of the membership.
7

8 E. Granting the Plaintiff's request for declaratory judgment by making the
9 following determinations:

- 10 1. That the Plaintiff, as an ACBC member, has a clear expectation and
11 legal right to the continued operation, and proper and adequate
12 maintenance and repair and upgrade of the ACBC swimming pool
13 and pool facilities.
14
15 2. That the Plaintiff has a well-grounded fear of invasion of that right,
16 and will be actually and substantially injured if the Defendant, ACBC
17 through its Board of Directors, takes any action to decommission or
18 de-activate the ACBC swimming pool or imposes or attempts to
19 enforces any special assessment intended to fund the
20 decommissioning, removal or de-activation of the swimming pool.
21
22 3. That the Plaintiff would be actually and substantially injured if the
23 Board was allowed to proceed with these actions.
24
25 4. That the Plaintiff has no adequate remedy at law.
26
27 5. That the Plaintiff and other owners of property within the Plat of
28 Admiral's Cove Beach have a vested and contractual ownership
29 interest and right to require the Defendant, ACBC to continue
30 operating the swimming pool and community facilities that cannot be
31 changed and the pool cannot be removed in contravention of the
32 deeds.

1 6. Declaring that so long as the Association's "purposes" remain the
2 same as those stated in the Articles of Incorporation, the Board of
3 Directors of ACBC is without authority to decommission, remove or
4 fail to maintain the swimming pool and related facilities. And further,
5 reaffirming that no action can be taken to change the Association's
6 purpose without a two – thirds vote of the membership as provided in
7 Article V. ¶1 of the Articles of Incorporation. The Defendant, ACBC's
8 previously elected board, improperly attempted to eliminate or
9 decommission the swimming pool when it relied upon an improperly
10 prepared ballot and a membership vote approved by only a slim,
11 simple majority of the members. The court should enter declaratory
12 relief expressly providing that such a procedure is improper and
13 contrary to the ACBC Articles and Bylaws.

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16 7. Declaring, as a matter of law, that the special assessment submitted
17 and approved by the members to decommission the pool, which
18 assessment vote was imposed by the defendant ACBC Board on or
19 about August 14, 2013, was invalid for, at minimum, the following two
20 reasons:

21 7.1 The Board's action was contrary to the October 27, 2012
22 Motion and resulting resolution of the members and,

23 7.2 The Board's action was contrary to the vested property
24 interest described in certain owner's deeds and was also contrary
25 to the provisions of the Association's Bylaws and Articles of
26 Incorporation.
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29 II. PERTINENT FACTS

30 The Plat of Admiral's Cove, Divisions 1 through 7, is located in Island County,
31 Washington. The owners of parcels of property within this plat are entitled, by virtue of
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1 that ownership, to an "Active" membership in the non-profit corporation known as
2 Admiral's Cove Beach Club ("ACBC"). The original grant of deed for many parcels of
3 property within the Admiral's Cove Plat conveyed both the real estate and, in addition,
4 "one family membership in Admiral's Cove Beach Club, Inc. (sic), a Washington
5 nonprofit corporation, which will own and maintain certain beach rights, recreational
6 areas, swimming pool and other tracts, as shown on plat of Admirals Cove... .
7

8 Plaintiff is a member of ACBC. The association was formed in 1969 "[t]o
9 construct, install, maintain and/or operate athletic and recreational facilities of all types
10 and kinds for benefit of the members." ACBC is governed by a board of directors who
11 are elected by and serve at the pleasure of the membership. ACBC is not a
12 Homeowner's Association because it permits non-owners to be members of the
13 corporation pursuant to an "Associate Membership."
14

15 Article V of ACBC's Articles of Incorporation describes the corporation's general
16 purposes, including the purpose "[t]o construct, install, maintain and/or operate athletic
17 and recreational facilities of all types and kinds for benefit of the members."
18

19 Article II of ACBC's Bylaws states that the object of the "Club" shall be to:
20 "[p]rovide and operate recreational facilities for the benefit of the members;" and
21 to "[p]rocure, maintain, operate and protect the recreational (and associated
22 safety) concerns of the members of the community of Admiral's Cove, subject to
the approval of the members of the club."
23

24 Although Article II of the Bylaws refers, generally, to the members' ability to
25 "approve" procurement, operation, maintenance and protection of the recreational
26 concerns, this general approval does not permit the membership to alter the
27 Corporation's objects and purposes by a simple majority vote of the members. Any
28 action of that nature requires a full two-thirds majority vote of the members at a
29 meeting of the members called for that purpose.
30

31 The primary asset and recreational facility of ACBC is a competition sized
32 swimming pool located in a common area within the Plat of Admiral's Cove, located on

1 Whidbey Island in Island County, Washington. The Plaintiff and other persons who
2 own property within the plat purchased their properties, in part, because they would be
3 entitled to have access to the swimming pool and related facilities as an incident of
4 owning property within the plat. When making the decision to purchase their property
5 within the plat of Admiral's Cove, the Plaintiff and other owners of property within the
6 plat, relied upon the fact that as a property owner within the plat, they would have the
7 right to have access to a community owned swimming pool and related facilities, and
8 that this right was being conveyed as part of the ownership rights to the lot or lots and
9 inherent as an element of ownership. The Plaintiff and other property owners paid a
10 price for their property that reflected the benefits of membership in the Admiral's Cove
11 Beach Club.
12

13 The Plaintiff brought suit in this case against ACBC as an entity and the ACBC
14 board of directors who were in office in September of 2013. At the time the action was
15 commenced, the defendant board members were identified in the initial complaint as
16 Defendants Jean Salls, Marilyn Chamberlain, Karen Shaak, Robert Peetz, Elsa
17 Palmer, Ed Delahanty and Dan Jones. This board attempted to decommission and
18 demolish the swimming pool without proper authority and without the required
19 approval of the members of ACBC. The defendant board members attempted to
20 impose a special assessment for the demolition or decommissioning of the swimming
21 pool is contrary to the stated purposes of ACBC and in contravention of the Plaintiff's
22 right to have access to the swimming pool and related facilities. In addition, the
23 defendant board members created a deceptive and misleading ballot for submission to
24 the general membership in connection with the swimming pool "assessment." The
25 board of directors then in office, individually or as a majority of the members on the
26 board, failed to abide by and adhere to the express provisions of a motion that was
27 unanimously passed by the members at their annual membership meeting conducted
28 in 2012.
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1 At this annual meeting of the members of ACBC, a motion was made and
2 unanimously approved by the membership that required the Board to meet and confer
3 with the "Pool Operations and Maintenance" and "Long Range Planning" committees
4 to investigate various funding alternatives for paying the costs of renovating and/or
5 repairing the swimming pool. In addition, the members directed the board to work with
6 these committee members to develop a ballot to be submitted to the members for the
7 purpose of voting on a special membership assessment.
8

9 The former defendant Board members failed and refused to abide by the
10 membership's direction as memorialized by the motion. The existence and operation
11 of the ACBC swimming pool is a material element of the value and desirability of the
12 parcels of property owned by the Plaintiffs and other property owners within the Plat of
13 Admiral's Cove. Since the swimming pool and related facility represent the primary
14 and most valuable recreational facility owned by ACBC, any decision of the
15 association's board of directors that operates to decommission the swimming pool
16 without a corresponding, definitive plan to repair or renovate it, improperly violates the
17 purpose and object of the ACBC.
18

19 The Plaintiffs and other property owners within the Plat of Admiral's Cove have
20 a property interest and expectation in the continued existence of the swimming pool.
21 The Plaintiffs and other property owners owning property within the plat reasonably
22 relied upon the swimming pool's continued existence and operation as part of the
23 consideration received when they purchased their respective parcels.
24

25 On December 30, 2013, this court granted the Plaintiff's motion for the entry of
26 a temporary injunction which, provided, among other things, that the defendant board
27 of directors was precluded from taking any action directed toward the removal or
28 decommissioning of the swimming pool. The defendant board was also enjoined from
29 making any effort to collect or impose assessments against the association members
30 or their property for the purpose of decommissioning or removing the swimming pool.
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1 In its oral ruling, the court made several, dispositive statements that should be
2 considered as part of the record for this motion. For example, the court, in its oral
3 ruling concluded the following:

4 So it seems obvious that the Bylaws of the association clearly presupposed the
5 existence of the pool, and any action taken that would decommission the pool
6 would be contrary to the Bylaws.

7 It's also important to note that the deeds of beach club members contain
8 specific language granting them memberships in the beach club and further
9 provides that the beach club, quote, "will own and maintain certain beach
10 rights, recreational areas, swimming pool" -- underscore the words swimming
11 pool -- "and other tracts." Unquote. So the property owners have a property
12 right in this connection.

13 It also seems obvious that the plaintiffs in this case, as members of the
14 association, have a clear legal right to the continued operation and
15 maintenance of the pool, a well-grounded fear of the immediate invasion of that
16 right based on the Board's decision to follow the unauthorized vote to
17 decommission the pool and impose a special assessment to do so, and they
18 would be actually and substantially injured if the Board was allowed to proceed
19 with these actions. Clearly, they have no adequate remedy at law in this
20 connection either. So, again, by agreement, the restraint against the
21 decommissioning of the pool is granted.

22 Since the date of the entry of the court's order granting the Plaintiff's motion for
23 a temporary injunction, a new board of directors was elected at an annual meeting of
24 the membership. The new board replaced several of the members who were named
25 as individual defendants in this lawsuit and who voted to decommission the swimming
26 pool and assess members for the costs associated.

27 Among those new board members is former Plaintiff, Dustin Frederick. Mr.
28 Frederick dismissed his complaint against the named defendants and is no longer a
29 party to this proceeding. The remaining plaintiff is association member Robert Wilbur.

30 By agreement, the individual board members who were originally named as
31 defendants in this case have been dismissed from the lawsuit. The only remaining
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1 defendant in this case now is the entity known as Admiral's Cove Beach Club, a non-
2 profit corporation.

3 III. LAW AND DISCUSSION

4 **Summary Judgment.** Summary judgment is appropriate where "the pleadings,
5 depositions, answers to interrogatories, and admissions on file, together with the
6 affidavits, if any, show that there is no genuine issue as to any material fact and that
7 the moving party is entitled to a judgment as a matter of law." CR 56(c); *Sanders v.*
8 *City of Seattle*, 160 Wn.2d 198, 207, 156 P.3d 874 (2007). "The rationale underlying
9 summary procedures is to eliminate trials where only questions of law remain to be
10 determined." *Brown v. Fire Prot. Dist.*, 100 Wn.2d 188, 203, 668 P.2d 571 (1983).
11 "One of the important functions of the summary judgment procedure is the avoidance
12 of long and expensive litigation productive of nothing." *Padron v. Goodyear Tire*, 34
13 Wn. App. 473, 475, 662 P.2d 67 (1983). "Conclusory allegations, speculative
14 statements or argumentative assertions that unresolved factual matters remain are not
15 sufficient to preclude an order of summary judgment." *Turngren v. King County*, 33
16 Wn. App. 78, 84, 649 P.2d 153 (1982). Instead, the non-moving party must put forth
17 specific disputed facts that are material to the legal issue before the court.
18

19
20 Summary judgment is appropriate here because it is undisputed that one of the
21 primary purposes for which the Admiral's Cove Beach Club association was formed
22 was the maintenance of recreational facilities, including, the swimming pool which is
23 the subject of this action. Absent a two-thirds vote by the association members to
24 change the association's purposes, the actions of the Board of Directors of ACBC
25 must remain consistent with the Association's stated purpose. No disputes of fact
26 exist with regard to this particular argument.
27

28 **Declaratory Judgment.** Under the Uniform Declaratory Judgments Act, RCW
29 Ch. 7.24, courts of record are authorized to "declare rights, status and other legal
30 relations". RCW 7.24.010; *Williams v. Poulsbo Rural Tel. Ass'n*, 87 Wn. 2d 636, 643,
31 555 P.2d 1173 (1976). Accordingly, a person whose rights are affected may obtain a
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1 declaration of rights thereunder. RCW 7.24.020; see also *State ex rel. Lvon v. Board*
2 *of Cy. Comm'rs*, 31 Wn. 2d 366, 373, 196 P.2d 997 (1948).

3 Previously in Washington it was held that a lack of an adequate remedy at law
4 is a prerequisite to the right to a declaratory judgment, see *Watson v. Washington*
5 *Preferred Life Ins. Co.*, 81 Wn. 2d 401, 502 P.2d 1016 (1972); however, existence of
6 an alternative remedy no longer precludes judgment for declaratory relief in
7 appropriate cases, *Ronken v. Commissioners*, 89 Wn. 2d 304, 572 P.2d 1 (1977), see
8 also CR 57: "The existence of another adequate remedy does not preclude
9 a judgment for declaratory relief in cases where it is appropriate." Declaratory relief is
10 considered appropriate when judgment will serve useful purpose in clarifying and
11 settling legal relations in issue, and when it will terminate and afford relief from
12 uncertainty, insecurity, and controversy giving rise to proceeding. *Guerra v. Sutton*,
13 783 F.2d 1371 (C.A.9, Wash, 1986).

14
15 In applying the Uniform Declaratory Judgments Act, Washington courts have
16 maintained that, absent issues of major public importance, a justiciable controversy
17 must exist before a court's jurisdiction may be invoked under the act. *DiNino v. State*,
18 102 Wn. 2d 327, 330, 684 P.2d 1297 (1984). For purposes of declaratory relief, a
19 justiciable controversy warranting declaratory relief is:
20

- 21 (1) ... an actual, present and existing dispute, or the mature seeds of one, as
22 distinguished from a possible, dormant, hypothetical, speculative, or moot
23 disagreement, (2) between parties having genuine and opposing interests,
24 (3) which involves interests that must be direct and substantial, rather than
25 potential, theoretical, abstract or academic, and (4) a judicial determination
26 of which will be final and conclusive. *Diversified Indus. Dev. Corp. v. Ripley*,
27 82 Wn. 2d 81, 815, 514 P.2d 137 (1973).

28 While it has commonly been indicated that the burden of proof, in
29 a declaratory relief action, is on the Plaintiff to produce evidence in support
30 of judgment, *Taylor v. State*, 291 Wn. 2d 638, 188 P. 2d 671 (1948), it has also been
31 noted that in declaratory judgment cases the question of has the burden of proof is
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1 governed not by the formal position of parties but by the nature of the relief
2 sought, *Seattle Audubon Soc. V. Lyons*, 871 F.Supp. 1291, affirmed 80 F.3d 1401
3 (W.D. Wash 1994). Regardless, the evidentiary standard is a preponderance of the
4 evidence, *Ohio Cas. Ins. Co. V. Nelson*, 49 Wn. 2d 748, 306 P. 2d 201 (1957),
5 although granting of declaratory relief is discretionary with the trial court, *Ronkin v.*
6 *County Commissioners*, 89 Wn. 2d at 310, and thus the court may, after full
7 consideration of the merits, exercise its discretion to refuse to grant declaratory relief
8 because the state of the record is inadequate to support the extent of the relief
9 sought. *U.S. v. State of Wash.*, 759 F. 2d 1353, *certiorari denied* 106 S.Ct. 407, 474
10 U.S. 994, 88 L.Ed.2d 358 (C.A. Wash. 1985).

12 It is also important to note a declaratory judgment action is not the same or
13 similar to a summary judgment action. In a declaratory judgment action a trial court
14 may decide only those issues of fact which are necessary or incidental to the
15 declaration of legal relations sought by the parties. *Progressive Casualty Ins. v.*
16 *Cameron*, 45 Wn. App. 272, 724 P.2d 1096 (1986) and the court does not view facts in
17 a light favorable to the nonmoving party but rather decides those facts necessary in
18 support of the requested judgment and relief.

20 If proceeding under a request for declaratory relief, the appropriate standard of
21 review, on appeal, is whether the trial court abused its discretion in declining to
22 grant declaratory relief. In declaratory judgment actions, appellate review may ensue
23 in two situations. First, under the Uniform Declaratory Judgments Act, trial courts have
24 discretion to determine whether to entertain a declaratory judgment action.
25 Accordingly, an appellate court may be called upon to determine whether the trial,
26 court erroneously exercised its discretion either to consider or refuse to consider such
27 an action. Second, in cases in which a court decides the declaratory judgment action
28 on its merits, an appellate court may be called upon to determine the propriety of the
29 lower court's grant or denial of declaratory relief. *Nollette v. Christianson*, 115 Wn.2d
30 594, 599, 800 P.2d 359 (1990).

1 When a Court issues a declaratory judgment, it has also been found proper, if
2 appropriate in such situation, for the trial court to retain jurisdiction and issue, together
3 with its declaratory judgment, appropriate relief or a coercive remedy of injunction as a
4 convenient and appropriate method for settling the issues presented. *Ronken v.*
5 *County Commissioners*, 89 Wn. at 309. That continuing jurisdiction is important in the
6 case at bar because of the fluid and ongoing nature of the Board of Directors actions
7 and activities relative to the swimming pool and related facilities.
8

9 Plaintiff is entitled to a declaratory judgment as part of the claim for relief in this
10 case if (1) Plaintiff and Defendant have existing and genuine rights or interests; (2)
11 these rights or interests [are] direct and substantial; (3) the determination will be a final
12 judgment that extinguishes the dispute identified; and (4) the proceeding [is] genuinely
13 adversarial in character." *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 186
14 (2007); see also RCW 7.24.010. Inherent in these requirements is a standing
15 requirement. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411 (2001).
16 The purpose of these requirements is to ensure that the court enters a final decision
17 on an actual dispute between opposing parties with a genuine stake in the court's
18 decision. *Id.* The court's determination of the corporation's purpose and the
19 corresponding role and function of the ACBC swimming pool and related facilities as
20 part of that corporate purpose will guide the parties in this dispute and any future
21 decisions made concerning the retention, maintenance and operation of the swimming
22 pool.
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25 In addition, the evidence unequivocally supports the Plaintiff's contention that
26 the formerly elected ACBC board of directors, took action that was different than or
27 contrary to the express intentions of the members expressed in the form of the
28 approved motion that was made and seconded at the 2012 annual membership
29 meeting. The former board's actions were contrary to the authority vested in them and
30 a declaration from this court concerning the manner in which the board has acted in
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1 furtherance of the members' express desires is necessary to resolve the dispute
2 between the Plaintiff, other association members and the Defendant, ACBC.

3 There is a present and actual controversy between Plaintiff and Defendant
4 ACBC regarding whether ACBC and its board have a legal right to decommission or
5 remove the swimming pool and use a special assessment of the membership to fund
6 that action. There is also an actual controversy about whether the Defendant and the
7 formerly constituted board of directors complied with the purpose, meaning and intent
8 of the membership's unanimous decision and resolution submitted and approved at
9 the 2012 membership meeting. The court should determine and "declare" that The
10 Admiral's Cove Beach Club community pool cannot be demolished or
11 decommissioned by an action of the Board of Directors that is not predicated by a two
12 thirds vote of the members to change the purposes of the association as provided in
13 the Articles of Incorporation.

14
15 **Permanent Injunction.** A permanent injunction precluding any such action
16 should be ordered as part of the relief requested in this motion.

17
18 In order to preserve the integrity of the Association's organizational purposes,
19 the court should not only permanently enjoin the Board of Directors from taking
20 affirmative action to decommission the swimming pool and related facilities, but also
21 provide affirmative injunctive relief by ordering the Board, in conjunction with the two
22 pool committees specified in and consistent with the October 2012 Motion, to
23 immediately determine an appropriate funding mechanism for renovation, rehabilitation
24 and ongoing maintenance and repair of the swimming pool, such as a membership
25 dues increase and/or assessment. The Board should also be directed to use all legal
26 means to enforce collection of dues and assessments as it is obligated to do,
27 consistent with Article V of the Articles of Incorporation.

28
29 If the pool is demolished, the injury to Plaintiff and other association members
30 will be irreparable and cannot be compensated by post hoc money damages. "Courts
31 have generally found remedies to be inadequate in three circumstances: (1) the injury
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1 complained of by its nature cannot be compensated by money damages, (2) the
2 damages cannot be ascertained with any degree of certainty, and (3) the remedy at
3 law would not be efficient because the injury is of a continuing nature." *Kucera*, 140
4 Wn.2d at 210. Here, all three circumstances are present. First, a loss of the ability to
5 recommission or reconstruct the swimming pool in the future because of
6 environmental and shoreline restrictions by its very nature cannot be compensated by
7 money damages. Second, the loss of the value to each individual lot owner of the fair
8 market value of their property due to Defendant's potential activity and prior activities
9 to decommission or demolish the swimming pool, cannot be ascertained with any
10 degree of certainty. Third, the injury is or will be continuing because if the swimming
11 pool is ever demolished or decommissioned in the future, the swimming pool and
12 related facilities may never be replaced because of environmental regulations and
13 permitting restrictions that are now in place that did not exist at the time the pool was
14 originally constructed and ACBC was formed.
15

16 IV. CONCLUSION

17
18 The facts upon which Plaintiff Robert Wilbur relies are undisputed. The purpose
19 and essential function of ACBC is the maintenance and operation of a recreational
20 facility that includes a swimming pool. Many of the persons who acquired property
21 within the plat did so with the express understanding that they were receiving not only
22 an interest in a parcel of real estate, but also the right to membership in an
23 organization that operated a unique swimming pool and related facilities. So long as
24 the association's stated purpose remains the same as originally declared, any effort by
25 an elected Board of defendant ACBC to decommission or remove or fail to maintain
26 the swimming pool, including the failure to raise adequate funds for maintenance and
27 repair, violates the property rights and expectations of the association's members and
28 could deprive them of the value of their property without proper authority. The court
29 should enjoin any activity that is contrary to this stated purpose and declare as a
30 matter of law that the Board is obligated to both refrain from decommissioning or
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1 destroying the swimming pool but also to raising sufficient funds through dues and
2 assessments to properly maintain the swimming pool and related facilities so that its
3 value is not lost through neglect or inaction.

4 Dated this 19th day of September, 2014.
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7 Law Office of Christon C. Skinner, P.S.
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11 _____
12 CHRISTON C. SKINNER/ #9515
13 Attorney for Plaintiff
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