

The Order of the Court is stated below:

Dated: October 13, 2020
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/s/ MARVIN D BAGLEY
District Court Judge



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IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR KANE COUNTY, STATE OF UTAH	
<p>ARTHUR W. COCKS and JULIE L. COCKS, Trustees of the Cocks Family Trust, dated August 11, 2006, Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>SWAIN’S CREEK PINES LOT OWNERS’ ASSOCIATION BOARD, Defendants.</p>	<p>MEMORANDUM DECISION CONSTITUTING, FINDINGS OF FACT AND CONCLUSIONS OF LAW</p> <p>Civil No. 170600114 Judge: Marvin D. Bagley</p>

Trial was held in this case the 24th, 27th, and 28th of January, 2020. Thereafter the Court allowed the parties until the 28th day of February, 2020, to submit in writing, their proposed analysis, findings of fact and conclusions of law. Oral arguments were held August 20, 2020. The Court having considered the evidence presented at trial, the proposed analysis, findings and conclusions submitted by counsel, and having considered the arguments presented, now enters the following memorandum decision constituting findings of fact and conclusions of law.

PROCEDURAL BACKGROUND

Plaintiffs Arthur W. Cocks and Julie L Cocks, as trustees of the Cocks Family Trust dated August 11, 2006, initiated this matter by filing a verified complaint on the 10th day of

November, 2017. The Complaint set forth five causes of action: declaratory judgment, selective enforcement, breach of covenant of good faith and fair dealing, taking without just compensation, and prejudgment relief.

On or about the 29th day of November, 2017, Plaintiffs filed a motion to amend, together with their first amended verified complaint, with the same causes of action. The amended verified complaint was filed, as a matter of course in accordance with Rule 15, Utah Rules of Civil Procedure, as the original complaint had not yet been served. The first amended complaint was served thereafter on or about the 6th day of February, 2018. Defendants submitted an objection on the 23rd day of March, 2018. Plaintiffs' second amended complaint asserted the same causes of action but was amended to include Swains Creek Pines Homeowners' Association, but not its board of directors. The second amended complaint included the individual members of the board in their official capacity as board members.

Defendants answered the second amended complaint. On the 9th day of April, 2018, Defendants filed a second motion to dismiss, or in the alternative, motion to extend time for answering. On the 20th day of April, 2018, Plaintiffs objected, with a supporting memorandum and affidavit. On the 14th day of May, 2018, Defendants replied. The second motion to dismiss was heard on or about the 31st day of May, 2018. On the 3rd day of August, 2018, this Court entered its order denying the motion in part and granting it in part. Defendants' motion was granted as to the second and fourth causes of action and denied as to the remainder. Defendants were allowed to supplement their answer within fourteen days of entry of the Court's order. However, no additional supplemental answer was filed. Defendants' second amended answer

responded by denying the general allegations and causes of action, and asserted affirmative defenses. Defendants' 24th affirmative defense asserted that Plaintiffs' second amended complaint was barred by the Business Judgment Rule.

The parties went through discovery making initial disclosures and took the depositions of various witnesses. On or about the 3rd day of April, 2019, Defendants filed a motion for summary judgment as to the third cause of action, breach of implied covenant of good faith and fair dealing. On or about the 19th day of April, 2019, Plaintiffs objected and provided supporting memorandum and affidavit. Defendants replied on the 30th day of April, 2019, also filing a motion for overlength brief. On the 3rd day of May, 2019. The overlength brief was allowed and the reply brief was filed on April 30th, 2019.

On the 21st day of June, 2019, Defendants filed two motions for summary judgment; one based upon Bell Canyon v McLelland and the other based upon the doctrine of plain language. On the 23rd of July, 2019, Plaintiffs responded to each motion with supporting memorandum and affidavit. On the 12th day of August, 2019, Defendants replied. Regarding the third cause of action, this Court ruled that Plaintiffs had failed to demonstrate a genuine issue of material fact as to the damage element of a good faith and fair dealing claim and, therefore, the claim was dismissed. Regarding Bell Canyon, the Court ruled that the Plaintiffs in the case, Arthur W. Cocks and Julie L. Cocks, Trustees, may address their own rights and not those for other property owners within the subdivision. As a practical matter, such other owners were not precluded by this order from bringing a separate cause of action or from subsequently benefitting from any potential favorable ruling by the Plaintiffs in this case. Regarding the motion for

summary judgment on the doctrine of plain language of the CC&Rs, the Court found a genuine issue of material fact existed as to the association's prior dealings, Plaintiffs' entitlement to rely on that past course of dealing, and whether the association should be estopped from strict enforcement. The Court denied Plaintiffs' motion.

This matter was set for trial on January 24th through the 29th, 2020, with a pretrial conference scheduled for the 9th day of January, 2020. On the 25th day of November, 2019, there was filed a notice of failed mediation. On the 2nd day of December, 2019, the Court received Defendants' pretrial disclosures of witnesses and exhibits. Plaintiffs filed their pretrial disclosures as provided by Rule 26, Utah Rules of Civil Procedure. On the 5th day of December, 2019, Defendants filed a motion in limine. On the 11th day of December, 2019, Defendants filed a motion for summary judgment regarding director liability. On the 23rd day of December, 2019, Plaintiffs filed objections to Defendants' motion in limine with supporting memorandum and affidavit. A reply was filed on the 30th day of December, 2019. On the 31st of December, 2019, Plaintiffs filed an objection with supporting memorandum and affidavit to Defendants' motion for summary judgment on director liability. A reply memorandum was filed on the 7th day of January, 2020.

At the pretrial conference, Plaintiffs stipulated to a release of Defendants individually, not including the association. On the 21st day of January, 2020, three days before trial, Defendants submitted a trial brief. The matter was tried on January 24th, 27th and 28th, 2020. At the time of trial, evidence was received, and the parties were granted until the 28th of February, 2020, to submit their analysis, findings of fact and conclusions of law.

ANALYSIS

This matter involves the Swains Creek Pines Unit Number 3 Subdivision situated in the County of Kane, State of Utah, on Cedar Mountain. At issue are the ownership interests of Plaintiffs, ARTHUR W. COCKS and JULIE L. COCKS, Trustees of the Cocks Family Trust, dated August 11, 2006. The Trust owns lots 526 and 527, Swains Creek Pines subdivision, according to the official plat thereof, recorded in the office of the Kane County Recorder. Plaintiffs received their ownership interest by warranty deed, on or about the 16th day of July, 2014. At that time, their lots constituted undisturbed mountain forest land. They subsequently began using their lots for the use of an RV. The interest conveyed by the warranty deed was subject to the conditions, covenants, reservations and restrictions (hereafter "CC&Rs") of the subdivision known as Swains Creek Pines Unit Number 3, filed May 17th, 1977, book 55, at pages 809-815 of the official records.

Within, and as part of the CC&Rs, are Articles of Incorporation of the Swains Creek Pines Lot Owners Association, a non-profit corporation. In the Articles, the developers, the Christiansen family, retained control of enforcement of the CC&Rs until 1998. Thereafter, a board of directors would be established by the association to manage the association and enforce the CC&Rs. It is clear from the evidence there has developed a close knit community among the members of the association. Many property owners in the association spend substantial time and effort on projects; including, cleaning trails, stocking fish ponds, building additional amenities within the subdivision; including clean up and restoration. The community members work cooperatively to comply with the mandate that the properties are to be used to preserve and

enhance their pastoral, scenic beauty from unsightly neglect or abuse. The evidence is clear there has been a focused community effort from the beginning. It is also clear recent use of RVs has raised concern within the association; and has brought to the forefront, the question of interpretation of the CC&Rs. One relevant provision of the CC&Rs reads as follows:

1. RESIDENTIAL USE. Each and all of said lots are for single family residential purposes only and are not subject to further subdivision or partition by sale; said lots to be **used, build upon, improved and held in such a way as to preserve and enhance their pastoral, scenic beauty as mountain cabin residential recreational sites free from unsightly neglect and abuse.** No building or structure intended for or adapted to business purposes. And no apartment house, double house, lodging house, rooming house, hospital, sanatorium or doctor's office or other multiple family dwelling shall be erected, placed or permitted or maintained on such premises or on any part thereof. **No improvement or structure whatever, other than a first-class private dwelling house, patio walls, swimming pool, and customary outbuildings, garage, carport, servants quarters, or guesthouse may be erected, placed or maintained on any lot in such premises.** (Emphasis added)

Embedded within the CC&Rs after paragraph 19, are the Articles of Incorporation of Swains Creek Pines Lot Owners Association, a non-profit corporation. The Articles were amended on the 13th of November, 1990. This changed paragraph 1, Article 3, to say for “the protection of the recreational and scenic values essential to the proper enjoyment of such subdivision lot of each owner,” to “the services desirable and necessary to the health, safety and wellbeing of such lot owners enhancement and preservation of the recreational and scenic values essential to the proper enjoyment of the subdivision lots by such owners.”

Sometime after Plaintiffs’ purchased their property, a controversy arose among some lot owners. The controversy was between those who used, and/or supported use of, some lots in the subdivision for RVs and trailers; and those who used their lots, or supported the use of all lots,

for cabins only. Each group demanded the board of the homeowners association take action. The demands resulted in a proposed RV resolution dated October 24, 2015; with a revision of it on the 14th day of December, 2015. It appears that, notwithstanding the designation in the proposed resolution of RV and trailer use as nonconforming, the proposed resolution provided for RV and trailer use to continue, so long as the use met certain conditions. However, the proposed RV Resolution was presented to the membership for a vote and was rejected by a super majority. Seventy two percent of the ballots cast were against adoption of the resolution. The Chairperson of the Board had previously informed members that only a simple majority was needed to pass or reject the Resolution; despite the fact that the Utah Code required a vote of 67% of the membership to amend the CC&Rs.

Following the vote by the membership to reject the proposed resolution, the board (without a membership vote) enacted a different resolution on the 1st day of October, 2016. The resolution enacted by the board provided the association would not currently pursue enforcement action against members, whose lots were, at that time, being used for RVs. Under the board's resolution, RV use was allowed, until such time as the lots were sold to someone other than immediate family members. Such lots were designated as non conforming. Exhibit "A" to the Resolution identified those lots and owners. A relevant portion of the resolution reads as follows:

NOW THEREFORE, BE IT RESOLVED that, pursuant to Utah Code Section 57-8a-213, the Association will not pursue enforcement action as it relates to the placement² of RVs on the prior nonconforming lots until such time:

- (1) the CCRs are amended to state otherwise; or
- (2) a prior nonconforming lot is sold, whereupon the "prior nonconforming lot" designated will be removed with regard to the specific lot and the placement of RVs with regard to that lot will no longer be allowed and any existing RVs must

be immediately removed. A lot is considered sold when one or more of the following occur:

- (a) the voluntary or involuntary conveyance, sale or transfer of a lot to an unrelated third party;
- (b) the granting of a life estate in the lot; or
- (c) if the lot is owned by a liability company, corporation, partnership, or other business entity, the sale or transfer of more than 75% of the business entity share, stock, membership interest or partnership interest in a 12 month period.

A lot is not considered sold when there is a transfer to an heir under a will, a beneficiary under a trust or other testamentary transfer. A transfer made during the lifetime of a lot owner to a spouse, child or other next of kin is also not considered a sale. For this purpose, next of kin shall mean the lot owner's closest living relation.

² This resolution not to enforce relates only to the placement of RVs on the prior nonconforming lots. This resolution in no way affects the Association's ability to enforce or pursue any other rules, regulations or remedies set forth in the governing documents of the Association as it relates to the prior nonconforming lot or future placements.

The resolution did not provide "change of use," as the limitation on enforcement. Thus, under the terms of the resolution adopted by the board, Plaintiffs are prohibited from selling their property for RV use, to an unrelated third party. Plaintiffs, thus assert they are damaged. They believe their property to be more valuable as a lot that allows RV use; than as a cabin lot only. They believe there is a demand for RV lot use, that makes their lots more valuable. Plaintiffs assert that if change of use, rather than sale to an unrelated third party, had been the standard incorporated into the resolution, the value of their lots would not be diminished; and they would not have been harmed.

In addition to the CC&Rs and the Articles of Incorporation, as amended, the Swains Creek Pines Lot Owners Association also implemented written guidelines, rules and regulations.

Included in the written guidelines, rules and regulations is rule 16. Rule 16 contains a definition of “structures” that are used and kept in the subdivision. The definition includes “trailers.” Use of the word “trailers” conveys the association’s knowledge, support, and approval of RV use in the subdivision. Rule 16 states the following:

STRUCTURES: All lots are to be used, built upon and held in such a way as to preserve and enhance their pastoral scenic beauty as mountain cabin residential recreational sites free from unsightly neglect or abuse. All structures, including cabins, **trailers**, garages, sheds, decks, stairs, shelters, etc. shall be kept in safe and good repair. Owners of properties shall be held liable for repair or removal of defective, neglected or unsightly structures. All structures are to be constructed according to the county and state building regulations and are to be maintained accordingly. **ALL structures, buildings, add-ons, and remodels, regardless of whether a building permit is required, must be approved by the SCPLOA architectural committee before the start of the project. Contact the SCPLOA manager or go to [www. swainscreekpines.com](http://www.swainscreekpines.com) for forms and instructions.**

All new cabins or homes shall have a floor area of at least 400 square feet. Decks and walkways shall not be considered to be part of the minimum floor requirement. Leftover materials and scrap must be hauled out of the area, and the contractors and owners will be responsible for site cleanups. There will be no dumping of construction materials or cleanup debris in the dumpsters, onto the forest service lands, or on private property. Violators will be subject to a \$1,000 fine.

Metal roll-off containers do not fit the criteria for a first-class dwelling, customary outbuilding or any other structure as specified in the CC&Rs and are no longer permitted within the Swains Creek Pines. (Emphasis added)

Plaintiffs presented testimony of members of the homeowners association who have used their lots for RV’s since the 1970s. They consistently testified they used their lots for long periods of time, interacting with other association members, without ever being told or confronted by board members that they could not make such use of their property. In many

instances, they had specifically been told by realtors, contractors, association members and board members, that RV use was allowed. In contrast, Defendants presented testimony from other members of the homeowners association who were insistent they had been told by everyone concerned that all lots in unit 3 were limited to cabin development. They understood cabin development to be stick built structures from the ground up, placed on a foundation. Some witnesses called by the Defendants were past members of the board of the association, who testified that no action had ever been taken by the association, or by the reversionary owner to enforce the CC&Rs against any RV user.

The testimony at trial established RV use has historically been allowed; but there has been a recent proliferation of such use. The recent increase in use is what brought the issue to light and caused association members to take sides. The recent increase caused association members to pressure board members to interpret the CC&Rs in the manner each side advocated.

The present case was filed by Plaintiffs seeking declaratory judgment to challenge the interpretation of the CC&Rs made by the board in adopting its October 1, 2016 resolution. The board's position as expressed by the testimony of its Chairperson, JENELLE PEARCE was: "upon the comments that were received on the authority of the people that spoke to me [her] they did not want to make their neighbors leave and we [the board] could not offer them a permanent solution."

The evidence presented at trial established that the majority of cabin owners did not want permanent RVs in the subdivision, but they also did not want to make their neighbors who had been using RVs to be required to stop their use. The chairperson of the board testified the

resolution was intended to be a compromise. The compromise was to allow continued RV use until a triggering event. The triggering event was the sale of property to a non-family third party. Plaintiffs contend the effect of the board's decision causes them damage. They assert that because the triggering event is a sale to a non-related party, rather than a change of use, the value of their property is diminished. Under the resolution, Plaintiffs can only sell their property, for RV use, to a family member. Under a change of use standard, Plaintiffs would be able to sell their property, for RV use, not only to family members, but also to third parties.

The Court was persuaded by the evidence at trial that: subdivision lots, in which RV use is permitted, are, at least in Plaintiffs' case, more valuable than lots restricted to cabin use only.

Defendant challenges Plaintiffs claim for declaratory judgment. Defendant claims its CC&Rs are unambiguous and preclude RV use on Plaintiff's property. Under Utah law, restrictive covenants that are unambiguous constitute contracts, which the Court should interpret according to their plain language. See View Condo, Owners Association v. MSICO, LLC, 2005 UT 291 paragraph 21, 127 P. 3d 697. In interpreting the plain language, this Court is required to look for a reading that harmonizes the provisions, and avoids rendering a provision meaningless. Peterson Simpson v HIHC Help Services Inc., LLC, 2009 UT 7, paragraphs 28, 210 P. 3d 263. In addition, the ordinary and usual meaning of words should be applied. The ordinary meaning "is best determined through standard, non legal dictionaries." S. Ridge Homeowners Ass'n, 2010 UT App 23, paragraph 1 (quoting Marburton v Virginia Beach Fed. Sav. & Loan Ass'n, 899 P. 2d 782 (Utah Ct. App. 1995)).

Defendant contends the language of the CC&Rs is clear and prohibits RV use in the subdivision. This Court disagrees. This Court finds nothing in the CC&Rs that expressly prohibits RV use. At most, the language is ambiguous as to whether RV use is prohibited. Particularly when the language is juxtaposed against the way the association has interpreted and applied the CC&Rs through the years; and also when juxtaposed against the language in Rule 16 which includes “trailers” as a permitted “structure.”

Use of the word “cabin” in paragraph 1 of the CC&Rs does not expressly exclude RVs or trailers. Neither does use of the words “first-class dwelling house.” The words “RV” or “trailer” are not even used as a term in paragraph 1. Of specific significance, such words were not included in the sentence which prohibits what can “be erected, placed or permitted or maintained” in the subdivision. In contrast, Rule 16 specifically includes the word, “trailers” when addressing what may be “used, built upon and held” in the subdivision. Rule 16 is a rule enacted by the association in furtherance of the CC&Rs. It makes no sense to interpret the CC&Rs as prohibiting RV and trailer use, when the rules enacted in furtherance of the CC&Rs specifically allows such use.

In addition, it was clear from the testimony of THEODORE LONG, based on his understanding of the positions taken by the reversionary owner and first members of the board, that the original developers, who adopted the CC&Rs, intended to exclude the placement of mobile homes. However, that same understanding did not apply to the use of trailers or RVs. Trailers and RVs are different from mobile homes. Trailer and RV use is of a temporary use in the nature of camping. Trailers and RVs come and go. For the most part they are removed at the

end of each summer season. In contrast, mobile homes are an attachment to the property. Cabins and RVs, in general, are for temporary and sporadic camping. Mobile homes are in the nature of a permanent dwelling. Theodore Long conceded he took no action to exclude RVs from the subdivision when he was a member of the board.

There was a consistent theme among witnesses who had been members of the board, or members of a committee created by the board. For the most part they testified the association took no action to prevent the use of lots for RV purposes. This Court finds this lack of enforcement action by the association to be consistent with the interpretation that the CC&Rs allow RV use. Likewise, the Court finds the lack of enforcement action by the association to be consistent with the interpretation that the CC&Rs do not preclude RV use.

At a minimum, the association's lack of enforcement of the CC&Rs in the manner the association now advocates, supports a finding the CC&Rs were ambiguous. The CC&Rs were applied inconsistently by the association as to whether they prohibited or allowed RV use. Such inconsistency, at a minimum, supports the Court's finding of ambiguity.

In addition, by attempting to further define, through its resolution, that "cabin" meant a stick built structure with a foundation and "recreational vehicle" meant a motor vehicle; the board of the association implicitly acknowledged, the wording of the CC&Rs were ambiguous and needed clarification.

Defendant further argues that if the Court finds the terms of the CC&Rs ambiguous it should only consider the meaning intended by the parties at the time they entered into the agreement; relying upon Uinta Basin Med. Ctr. v Hardy, 205 UT App 92 paragraph 12, 110 P. 3d

168. Defendant rightly asserts that a Court may consider extrinsic evidence to determine a party's intention, only where there is ambiguity. Ambiguity exists only where the language of the contract is reasonably capable of being understood in more than one sense (citing to Peterson & Simpson v HIC Health Sevr. Inc., 2009 UT 54, paragraph 13, 217 P. 3d 716, 720 (quoting Encore Utah, LLC v Floor Aims Kramer, LLC, 2009 UT 7, paragraph 28, 2010 P. 3d 263)). In this case the very nature of an ambiguous term is met.

From the evidence presented at trial, it was clear owners who purchased lots in Phase 3, and wanted to use their lots for RV purposes, were told by sellers of those lots, and by the realtors facilitating the sales, that RV use was allowed. In contrast, owners who purchased lots in Phase 3 for cabin use, and who were opposed to RVs being used in the subdivision, were told by sellers of those lots, and by the realtors facilitating those sales, that RV use was prohibited. Buyers on both sides of the issue were told what they wanted to hear.

Similarly, lot owners who wanted to make small modifications to their lots, to facilitate their RV use, were told by contractors, who regularly worked in the subdivision, RV use was allowed. Lot owners who wanted to build cabins, and who were opposed to RV use, were told by contractors who regularly worked in the subdivision, RV use was prohibited. Just like Sellers and realtors, contractors who were familiar with the subdivision, and worked regularly in the subdivision, told lot owners what they wanted to hear.

Similarly, a lot owner who wanted to use his or her lot for RV use could find a board member of the association willing to tell the owner that RV use was an allowable use. A lot

owner who opposed RV use in the subdivision could find a board member willing to tell him or her, RV use was prohibited.

The Court finds from the evidence presented, the association, as an organization, was fully aware that sellers, realtors, contractors and board members were telling prospective buyers and lot owners what they wanted to hear; regarding whether the CC&Rs allowed or prohibited RV use in Phase 3 of the subdivision. Based on this knowledge, the Court finds that the position adopted by the association, as demonstrated by the actions of its board members, was that the CC&Rs allowed RV use on lots owned by lot owners who supported RV use. Similarly this Court finds that the position, adopted by the association, as demonstrated by the actions of its board members, was that the CC&Rs prohibited RV use on lots owned by lot owners opposed to RV use.

The evidence at trial demonstrated that a reasonable person could support his or her claim for one position or the other. The evidence clearly showed that RV use was historically allowed. The attempt made by the board of the association in the October 1, 2016 resolution, to interpret the CC&Rs as prohibiting RV use, is based on a recent board decision. That decision, by the board, was made after plaintiffs purchased their property; and after RV use in the subdivision began to increase.

Attorney, Keith Christiansen, who drafted the original CC&Rs, testified at trial. Although he is a capable attorney in his own right, he did not persuade this Court, the original owner intended the wording of the CC&Rs to exclude trailer or RV use. The language in paragraph 1 of the CC&Rs appears to have, as its purpose, the exclusion of businesses for the purpose of

preserving and enhancing the pastoral, scenic beauty of the property. Indeed, the subdivision is a mountain subdivision. The interpretation that a lot owner is not even allowed to camp on his or her own property, put up a tent, or use a trailer, is inconsistent with general ownership of mountain property in Utah. The Court finds such interpretation contrary to, and not in harmony with mountain land use generally. It is also inconsistent with the stated purpose of preserving or enhancing the pastoral, scenic beauty of mountain property. The Court finds attorney Keith Christensen's testimony unpersuasive.

Plaintiffs assert that Defendant, by its actions, has waived, any right it may have had to enforce the CC&Rs, in the manner it now advocates. Defendant responds that waiver requires the intentional relinquishment of a known right. Defendant argues that, to constitute a waiver of its right to interpret the CC&Rs the way it now advocates, it would have had to intentionally chosen not to enforce the position it took by enacting the October 1, 2016 resolution. The problem with Defendant's argument is that it comes too late. Plaintiffs were entitled to rely upon the interpretation of the CC&Rs the association adopted prior to the adoption of the October 1, 2016 resolution. From the time they acquired their property, plaintiffs have been allowed to use their property for RV use. Similarly Plaintiffs could have, at any time since they purchased their property, sold their property, for RV use, to someone outside their immediate family. Under Defendant's new interpretation of the CC&Rs, Defendants are taking those rights away from Plaintiffs.

The testimony of each side makes clear there was deliberate interaction between cabin owners and RV owners for many years. The evidence was clear that cabin owners, board

members and the association as a whole, had no intention of restricting their RV neighbors from using their property for RV use. These interactions involved cleanup and improvement functions and even assisting neighbors when needed. With one exception of a trailer owner in unit 1a, who was an actual nonconforming user; the majority of the cabin owners, while serving on the board, never interpreted or enforced the CC&Rs in a manner to evict RV owners. The association cannot now change horses in mid stream to deprive Plaintiffs of the full use of their property.

Defendant relies upon the “Business Judgment Rule” in Utah Code Annotated, Section 58-8a-213 as authority for the restrictions it placed on Plaintiffs and their property by enacting the October 1, 2016 resolution. Section 57-8a-213 states:

- (1)(a) The board shall use its reasonable judgment to determine whether to exercise the association's powers to impose sanctions or pursue legal action for a violation of the governing documents, including:
 - (i) whether to compromise a claim made by or against the board or the association; and
 - (ii) whether to pursue a claim for an unpaid assessment.
- (b) The association may not be required to take enforcement action if the board determines, after fair review and acting in good faith and without conflict of interest, that under the particular circumstances:
 - (i) the association's legal position does not justify taking any or further enforcement action;
 - (ii) the covenant, restriction, or rule in the governing documents is likely to be construed as inconsistent with current law;
 - (iii)(A) a technical violation has or may have occurred; and
(B) the violation is not material as to a reasonable person or does not justify expending the association's resources; or
 - (iv) it is not in the association's best interests to pursue an enforcement action, based upon hardship, expense, or other reasonable criteria.
- (2) Subject to Subsection (3), if the board decides under Subsection (1)(b) to forego enforcement, the association is not prevented from later taking enforcement action.
- (3) The board may not be arbitrary, capricious, or against public policy in taking or not taking enforcement action.

(4) This section does not govern whether the association's action in enforcing a provision of the governing documents constitutes a waiver or modification of that provision. (Emphasis added)

This Court finds the "Business Judgment Rule" does provide the association with the authority it claims for *prospective* application of the board's interpretation of the CC&R's. However, it does not provide the authority to adversely affect the rights Plaintiffs have enjoyed (with the association's tacit approval) since they purchased their property. The CC&Rs, as written, and as interpreted by the association through the years, do not unambiguously give notice to members that use of RVs constitutes a violation of such governing documents. Indeed, the association, acting through its previous boards, took the position that RV use was not a violation of the governing documents. Such interpretation was communicated to members. Plaintiffs rights were established under that interpretation of the governing documents.

The board's change of position, as memorialized in the October 1, 2016 resolution (as related to Plaintiffs) constitutes a change to the governing documents. In enacting the resolution, the board was not using its best judgment to determine whether to pursue enforcement of a violation of the governing documents. Rather the board used its judgment to change its interpretation of what constitutes a violation of the governing documents. The Court has no problem with that decision prospectively. However, Plaintiffs rights under the association's prior interpretation of its governing documents are entitled to protection. The board's action going forward is a reasonable exercise of business judgment. Adversely impacting Plaintiffs' rights by reversing its prior position, is arbitrary, capricious and against public policy; as it relates to Plaintiffs.

The October 1, 2016 resolution can be recorded in some manner to give notice to future interest holders of the association's interpretation of its governing documents, i.e. the CC&Rs. Such action will clear up ambiguities, and place current and future lot owners, board members, realtors and contractors on notice of the association's interpretation of its governing documents..

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The factual statements contained in this memorandum decision constitute this Court's findings of fact. Based on those findings, this Court concludes Plaintiffs are entitled to a judgment allowing Plaintiffs to continue to use their property in the subdivision for RV purposes; until such time as there is a change of use of their property. Counsel for Plaintiffs is requested to prepare, and submit, for signing, a proposed implementing judgment.

End of document. The Court's signature and the filing information appear in the upper right-hand corner on the first page of this instrument.