IN THE UTAH COURT OF APPEALS

ARTHUR W. COCKS and JULIE L. COCKS, Trustees of the Cocks Family Trust, dated August 11, 2006, Appellees, v. SWAIN'S CREEK PINES LOT OWNERS' ASSOCIATION, Appellant.	Case No. 20200961-CA

BRIEF OF APPELLEES

Appeal from Judgment and Decree entered November 20th, 2020, and Memorandum, constituting Findings of Fact and Conclusions of Law dated October 13th, 2020, from the Sixth Judicial District Court in and for Kane County, State of Utah, before the Honorable Marvin D. Bagley.

BRUCE C. JENKINS (5972)
KIMBALL A. FORBES (12511)
KATHRYN LUSTY (10269)
JENKINS BAGLEY SPERRY, PLLC
285 West Tabernacle, Suite 300
St. George, UT 84770
(435) 696-8200
bcj@jenkinsbagley.com
kaf@jenkinsbagley.com
kl@jenkinsbagley.com
Attorneys for Appellant

J. BRYAN JACKSON, P.C. (4488)
THE LAW OFFICE @ 456
456 West 200 North
P.O. Box 519
Cedar City, Utah 84721-0519
(435) 586-8450
bryan@lawoffice456.com
Attorney for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

IN THE UTAH COURT OF APPEALS

ARTHUR W. COCKS and JULIE L. COCKS, Trustees of the Cocks Family Trust, dated August 11, 2006, Appellees, v. SWAIN'S CREEK PINES LOT OWNERS' ASSOCIATION, Appellant.	Appellate No. 20200961-CA

I
INTRODUCTION

This matter concerns Appellees' use and ownership of two lots purchased in Swains Creek Pines Subdivision in Kane County, Utah. Their use included the placement of a recreational vehicle (hereafter "RV"). The Board of Directors (hereafter "Board") of the Swains Creek Pine Lot Owners Association (hereafter "Association") commenced proceedings to change the meaning of the long established Covenants, Conditions and Restrictions (hereafter "CC&Rs") to prohibit the use of RVs and trailers. After a three day trial in January, 2020, the trial court filed its memorandum decision on the 13th of October, 2020. On November 20th, 2020, it entered Judgment and Decree for case number 170600114, concluding that the Appellees could use their property for RV purposes and that the CC&Rs did not prohibit such use. The action taken by the Board was found not to be justified under the Business Judgment Rule and that the Association's right to enforce as it applied to the Appellees was abandoned or waived. This Court should affirm the Judgment and Decree of the trial court.

II
STATEMENT OF ISSUES

A.

Was the trial court correct in finding that the CC&Rs in the Swains Creek Pine Subdivision do not prohibit RV or trailer use on Appellees' property?

STANDARD OF REVIEW

In reviewing a trial court's evaluation of a declaration, which presents a legal question, the Court of Appeals applies a correction standard. See View Condo Homeowners Ass'n v MSICO, L.L.C., 2005 UT 91, paragraph 17, 127 P. 3d 697. See McNeil Eng'g & Land Surveying, L.L.C. v Benchmark, 2011 UT App 423, paragraph 7, 268 P. 3d 854. The determination of whether a contract is facially ambiguous is a question of law, which the Court of Appeals reviews for correctness. Daines v Vincent, 2008 UT 51, paragraph 25, 190 P. 3d 1269. However, this Court resolves questions of factual ambiguity [arising from] a contract according to the parties' intent, which is a question of fact. Id.

Preservation

This issue was preserved at R. 1949-1953, 2089-2091, 2429-1, 2433-35, 2610-617.

B.

Was the trial court correct to consider extrinsic evidence interpreting the meaning of the CC&Rs and were the findings made by the trial court sufficient?

STANDARD OF REVIEW

Restrictive covenants are contracts that should be enforced consistently with the intention of the parties. See Swenson v Erickson, 2006 UT App 34, paragraph 10. If they are susceptible to two or more reasonable interpretations, the intention of the parties is controlling. Id

When faced with ambiguity in a written contract, courts do not interpret the provision to comport with what they think is most sensible or is most likely what one of the parties "really" meant or is what leads to the fairest result. Rather, they recognize the need to consider extrinsic evidence in an effort to resolve the ambiguity. If the extrinsic evidence is not conclusive, then the last resort in contract interpretation is to construe the provision *against* the drafter. Fire Insurance Exchange v Oltmanns, 2012 Ut App 230, paragraph 7; see also Wilburn v Interstate Electric, 748 P.2d 582, 584-85 (Ut Ct. App. 1988) Any uncertainty with respect to construction of a contract should be resolved against the party who drafted the agreement. Park Enters. Inc. v New Cent. Realty Inc., 652 P. 2d 918, 920 (Utah 1982); see also JENCO v Perkins, 2016 UT App 140, paragraph 14. In actions tried upon the facts without a jury, the findings of fact shall not be set aside unless clearly erroneous, and due regard given to the trial court assessing the credibility of the witnesses. Hale v Big H Construction, Inc., 2012 UT App 283, paragraph 9. It is clearly erroneous "only if the finding is without adequate evidentiary support or induced by an erroneous view of the law." Id. See also State v Walker, 743 P. 2d 191, 193 (Utah 1987). This Court will not disturb a finding unless it is against the clear weight of the

evidence, or if it otherwise reaches a definite and firm conviction that a mistake has been made. Id.

Preservation

This issue was preserved at R. 1969-97, 2344-53.

C.

Was the trial court correct in finding that the Association's attempt to redefine the meaning of its governing documents was arbitrary and capricious?

STANDARD OF REVIEW

It is arbitrary and capricious to apply a different rule of law in a future case with similar facts. Salt Lake Citizens Congress v Mountain States Telephone & Telegraph Co., 846 P. 2d 1245 (Utah 1992). Whether the administrative agency's decision is illegal [arbitrary and capricious] depends on a proper interpretation and application of the law. In that regard, this Court accords no deference to the administrative agency [association]. Viel v Provo City, 2009 UT App 122, paragraph 9, 10 P. 3d 947; see also Specht v Big Water Town, 2017 UT App 75, paragraph 22. The Court of Appeals reviews the trial court's findings of fact for clear error. Fort Pierce v Shakespeare, 2016 UT 28, 379 P. 3d 1216. This Court will set aside a district court's factual findings as clearly erroneous only if it is "against the clear weight of the evidence, or if [the Court] otherwise reaches a definite and firm conviction that a mistake has been made." See Brown v State, 2013 UT 42, paragraph 37, 308 P. 3d 486.

Preservation

This issue was preserved at R. 1830-31, 1955-57, 2444-2450.

D.

Do the trial court's factual findings correctly reflect the pattern of use within the subdivision, establishing there was no intention to exclude RV use and has the Appellant sufficiently marshaled the evidence to challenge those factual findings?

STANDARD OF REVIEW

In challenging a factual finding one must first marshal all record evidence that supports the challenged finding. This requirement applies when a party challenges a court's or an agency's factual findings, regardless of the standard of review at issue. Neilson Supply, Inc. v Fradan Mfg Corp., 2002 UT 94, paragraph 21, 54 P. 3d 1177. To dispute factual findings, "an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court's decision". Id.

Appellant must marshal the evidence that forms the basis for the trial court's ruling. United Park City Mines Co. v Stichting Mayflower Mountain Fonds., 2006 UT 35, paragraphs 37-38, 140 P. 3d 1200. The appellate court affirms the accuracy of the agency's or trial court's factual findings in the absence of marshaling. Martinez v Paymaster Plus, 2007 UT 42. A decision is arbitrary and capricious if not supported by substantial evidence in the record. LJ Mascaro, Inc. v Herriman City, 2018 UT App 127, paragraph 20, 420 P. 3d 4. Substantial evidence is that quantum and quality of relevant evidence that is adequate to persuade a reasonable mind, and on review "we [Court of Appeals] consider all the evidence in the record, both favorable and contrary, with the aim of determining whether a reasonable mind could reach the same conclusion on the

land use authority. Checketts v Providence City, 2018 UT App 48, paragraph 18, 420 P.3d 71. In doing so we [Court of Appeals] do not weigh or substitute our judgment for that of the [trial court]. LJ Mascaro, Inc., 2018 UT App 127, paragraph 20, 420 P. 3d 4; see also JP Furlough Co. v Board of Oil, Gas and Mining, 2018 UT 22, paragraph 25, 424 P. 3d 858.

Preservation

This issue was preserved at R. 2471-2512, 2545-2623.

E.

Did the trial court correctly find that the Board's right to exclude RVs and trailers was waived?

STANDARD OF REVIEW

The standard of review for waiver and abandonment involves the intentional relinquishment of a known right. See Soter's Inc. v Desert Fed. Sav. & Loan Ass'n, 857 P.2d 935, 942 (Utah 1993). For contractual waiver there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it. This issue presents a mixed question of law and fact: whether the trial court applied the proper standard of waiver presents a legal question which is reviewed for correctness, but the actions or events allegedly supporting waiver are factual in nature and should be reviewed as factual determinations, to which deference is given. See Chandler v Blue Cross Blue Shield, 833 P.2d 356, 360 (Utah 1992).

Preservation

This issue was preserved at R. 1954-56, 2217-22, 2271-2318 and 2610-2618.

III
STATEMENT OF THE CASE

A. Judgment, Decree and Ruling. On the 5th of November, 2020, the Honorable Marvin Bagley issued a judgment and decree in civil number 170600114 (R. at 1922-3), and ordered, adjusted and decreed that Arthur and Julie Cocks, Trustees and Appellees, could continue to use an RV on their property, lots 526 and 527 of the Swains Creek Pines Subdivision, until such time as there was a change of use. It was further ordered that the most recent resolution of the Board, dated October 1st, 2016, could be recorded to give notice to interest holders of the Association of its prospective application. A true and correct photocopy of the Judgment and Decree is set forth in Appellees' Addendum, Exhibit 1, and the same is incorporated herein by this reference.

The Judgment and Decree was the result of the trial court's memorandum decision constituting findings of fact and conclusions of law, filed the 13th day of October, 2020 (R. at 1876-94), which summarized the procedural background culminating in three day bench trial in January, 2020, and included its analysis for decision. A true and correct photocopy of the Memorandum is set forth in Appellees' Addendum, Exhibit 2.

Appellees purchased their two mountain lots in the Swains Creek Pines Subdivision by warranty deed on or about the 16th day of July, 2014. The lots were subject to conditions, covenants and restrictions (the "CC&Rs") of Swains Creek Pines Unit Number 3, filed May 17th, 1977, recorded in the official records of Kane County. A true and correct photocopy of the CC&Rs is attached to Appellees' Addendum, Exhibit 3.

The CC&Rs included articles of incorporation of the Swains Creek Pines Lot Owners Association, a non-profit corporation. It found that the Christensen family, the developers of the subdivision, retained control of enforcement of the CC&Rs until 1998. Thereafter, enforcement and management was administered by an elected Board of Directors.

It was noted that the subdivision reflected a close-knit community with members of the Association spending substantial time and effort preserving the pastoral, scenic beauty and maintenance and repair of lots and amenities within the subdivision, as a focused community effort but the recent increase in the use of RVs within the subdivision raised concern and the Board's desire to change the established meaning of the CC&Rs, in particular, paragraph one, which reads as follows:

> 1. RESIDENTIAL USE. Each and all of said lots are for *single-family residential purposes* and are not subject to further subdivision or partition by sale; said lots are to be **used, built 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 a 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, permitted or maintained on such premises or on any part thereof. **No improvements or structures 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 in any lot in such premises**. (Emphasis added by way of italics and bold as found in original) (R. at 236)

The trial court found this language, interpreted by the Board to exclude RVs and trailers, to be ambiguous. It concluded that the evidence presented at trial, testimony as well as supporting documentation, supported the established precedent favoring RV and

trailer use within this mountain property subdivision. The trial court noted that general membership voted and rejected the actions taken by the Board to exclude RVs or amend the CC&Rs. It also took exception to the Board's action after the membership's rejection to propose a resolution of non-enforcement, classifying RV lot owners as nonconforming members of the Association and limiting future use at sale to someone other than immediate family members.

The trial court found that the Board's action after this protracted effort was arbitrary and capricious in failing to consider as an alternative to change of ownership "a change of use" for qualifying enforcement, noting at trial that the action adversely impacted the Appellees' rights of ownership (R. at 2463).

The court found that the action did not meet the requirements for proper notice. Notwithstanding, it did find that the Business Judgment Rule by this final resolution provided the Association with authority to claim prospective application for future RV use so long as the same did not adversely impact the rights of members that enjoyed (with the Association's tacit approval) the use for which they purchased their property.

The district court ruled that the Board's change of position as memorialized in the October 1st, 2016 resolution constituted a change to the governing documents and that the Board was not using its best judgment to pursue enforcement of the governing documents. Rather, the Board used its judgment to change the CC&Rs which constituted a violation of the same.

The trial court's ruling did not specifically address abandonment or waive of the anti-waiver provision imbedded in the CC&Rs. However, the trial court's decision

confirms such waiver of enforcement as against the Appellees by determining the Board's action to be improper. (R. at 1892-93)

B. Appellate Jurisdiction. The Utah Supreme Court has original jurisdiction, Utah Code Annotated, Section 78A-3-102(j). However, by subsection (4), the matter was transferred to the Court of Appeals consistent with Rule 42(a), Utah Rules of Appellate Procedure, on January 5th, 2021. The Utah Court of Appeals has jurisdiction pursuant to Utah Code Annotated, Section 78-4-103(2)(j).

C. Procedural History of the Case. The court's findings provide procedural background, including the following:

Arthur W. Cocks and Julie L. Cocks, trustees of the Cocks Family Trust dated August 11, 2006, Appellees, filed a verified complaint on the 13th day of November, 2017. After amendment and pretrial determination the initial causes of action were reduced to an action for declaratory judgment and a defense invoking the Business Judgment Rule. (R. at 1876-79)

Upon Appellant's motion for summary judgment on the doctrine of plain language of the CC&Rs, the court found that a genuine issue of material fact existed reflected in the Association's prior dealings, which entitled Appellees to rely upon course of dealing, and consider whether the Association should be estopped from enforcement. On or about August 10th, 2019, it entered an order (R. at 1327-32). As part of its conclusion, it reserved for trial issues concerning the plain language of the CC&Rs and the Association's past course of dealing (R. at 1332).

The matter was set for trial for January 24th through the 29th, 2020. On the 11th day of December, 2019, Appellant filed a motion for summary judgment, regarding director liability. At the pretrial conference, Appellees stipulated to a release of Board members individually but not dismissing the Association. The bench trial was held at the time and dates specified. The trial court judge, after evidence was concluded, the attorneys submitted their own analysis, findings of fact and conclusions of law. He listened to oral argument and issued his decision, constituting findings of fact and conclusions of law, on the 13th of October, 2020. On November 20th, 2020, he filed an amended version of the judgment and decree prepared by Appellees' counsel, edited by Appellant's counsel, both versions appearing in the record at 1922-25. A notice of appeal was timely filed on November 16th, 2020.

D. Statement of Facts. A summary of the pleadings and testimony:

1. Appellees are the owners of two lots within the mountain subdivision of Swains Creek Pines, in Kane County, State of Utah, described as follows, to wit:

> All of Lots 526 and 527, SWAINS CREEK PINES, UNIT 3, according to the Official Plat thereof, on file in the Office of the Recorder of Kane County, State of Utah.
> TOGETHER WITH all improvements and appurtenances thereunto belonging, and SUBJECT TO easements, rights of way, restrictions, and reservations of record and those enforceable in law and equity. (R. 213-14)

By purchase, they became members of Swains Creek Pines Lot Owners Association, who is the Appellant, but the case concerns the action taken by its Board.

2. Appellees purchased subject to the declarations of establishment of protective conditions, covenants, reservations and restrictions affecting the subdivided lots known

as Swains Creek Pines, Unit Number 3, situated in the County of Kane, State of Utah, dated May 17th, 1977, in the record of the Kane County Recorder. (R. at 234-420)

3. After purchasing, Appellees received approval allowing them to make improvements to their lots for RV use. (R. at 2200)

4. The CC&Rs reference "mountain cabin residential recreational site" in paragraph one under RESIDENTIAL USE which appears on its face to be a restriction of business purposes and does not expressly forbid the lot use of RVs or trailers. (R. at 236)

5. In addition to the language found in the CC&Rs, there is no restriction prohibiting trailers or RVs that rises in the history of development as enforced within the subdivision, no restriction having been interpreted to apply based upon the course of dealing between individual lot owners and the Association for forty years until the Board's change in policy direction commenced in 2015.

6. In November, 2015, the Board departed from the established interpretation of the CC&Rs, now prohibiting trailers and RVs. The chairman of the Board announced that the CC&Rs refer to a "mountain cabin dwelling" and this would be further addressed through a proposed RV Rule. (R. at 218-19)

7. On October 3rd, 2015, the Board called for a special meeting, to be held on October 24th, 2015, to review a resolution for a new RV rule. This notice did not comply with the 30 day requirement for special meetings as provided in the bylaws, Article IV, Directors, 5.03 for the Association. (R. at 219-20)

8. At the meeting held on the 24th of October, 2015, notwithstanding most members attending the meeting, including Appellees, opposed such action, the Board

adopted Rule 19 which effectively changed the meaning of the language found in the CC&Rs to define an RV or trailer as a motor vehicle and a dwelling house as a building or structure with foundation and not an RV or trailer with wheels. (R. at 220) A true and correct photocopy of the same is set forth in Appellees' Addendum, Exhibit 4. This was done to exclude RV use.

9. This was a course of action inconsistent with the established written guidelines of the Association, in particular Rule 16, which classified trailers as a permissible structure, that in pertinent part reads as follows:

> All lots are to be used, built upon and held in such a way as to preserve and enhance the 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.** (R. at 220-21) (Emphasis as in memorandum)

10. After contention by members, on the 18th of November, 2015, the Board announced that it would change the language of Rule 19 to make it clear to not apply to RVs and trailers established prior to its the enactment and a special meeting was scheduled on the 14th of December, 2015, once again failing to meet the 30 day notice requirement of the bylaws. (R.at 221)

11. On the 7th day of December, 2015, the Appellees provided the Association with sufficient signatures to call for a membership vote on Rule 19 and for a lot owners association membership vote to adopt the Kane County ordinance to apply to the subdivision. These two petitions should have stayed further action by the Board. Notwithstanding the mandate of Utah Code Annotated, Section 57-8a-217, the Board

went forward with its special meeting, passed a revised RV resolution and tabled the request for a vote on the Kane County RV ordinance. (R. at 222) A true and correct copy of the revised RV resolution is set forth in Appelleees' Addendum, Exhibit 5.

12. In March, 2016, there was mailed to lot owners a ballot for a special meeting and election on April 9th, 2016, for the adoption of the revised Rule 19. The vote in April resulted in 72% of the votes tallied overturning it. From May to September, 2016, the Board and the Appellees worked together to amend the CC&Rs which went to vote and failed to pass. (R. at 224)

13. On the 1st day of October, 2016, the Board, rather than concede to the two votes by the membership rejecting the Board's actions, adopted a resolution declaring the waiver of enforcement for existing nonconforming RV lot owners. This imposed future use restrictions upon RV lots at the time of sale. (R. at 225)

14. The revision of the resolution declared that the Board elected to not enforce the violation of the placement of RVs on nonconforming lots but did not address whether there was a waiver. Rather, it qualified this assertion of non-enforcement to be effective until such time that the lot was sold to a non-related third party. (R. at 226) A true and correct photocopy of the October 1st, 2016, resolution is included in Appellees' Addendum, Exhibit 6.

15. At trial, the testimony received included the following, summarized with excerpt pages referred to herein attached at Appellees' Addendum, Exhibit 7, incorporated herein:

(a) KEITH CHRISTENSEN. The son of the developer, an attorney, identified that as he was going to college he managed development. (R. at 1962) He was part of the initial governing Board of the lot owners association with his mother and father and testified that the CC&Rs for Unit 3 excluded trailers and RVs. He stated that this was a big deal to them as they had trouble with trailers in unit 1, testifying as follows:

> A. Well, we've got language about—we got more careful about what people could do. For example, if they were to build, they had to submit plans, building plans in paragraph number 12. Plans and specifications for any structure must be submitted to the revisionary owner and blah, blah, blah. You can read that. But the approval needed to be obtained. That's on page 8—the handwritten number 810. (R. at 1970)

Concerning paragraph 1 of the CC&Rs, Mr. Christensen testified.

> Q. Okay. Did you assist in the drafting of this document?
> A. I was involved with it. I wasn't the lawyer that did it. But I read it, and reviewed it, and talked with the lawyers about it.
> …
> Q. And what was that understanding?
> A. It was clear to my father, my mother and I that, as I said before, the provision to allow trailers in Unit 1 was a mistake. So we used the word "cabin, cabins and building" as I understood it then and now. It was clearly intended that only cabins be permitted in this unit. (R. at 1972)

Concerning the phrase "first-class dwelling house," testified:

> Q. Did you have an understanding of what that meant?
> A. Yes.
> Q. And what was that?
> A. It was it would have to be a cabin, a stick-built, framed building such as a cabin is. It could be a log cabin. It could be a structurally stick built, but it had to be a cabin under roof. It couldn't be a trailer. (R. at 1973)

On cross examination, Mr. Christensen stated:

> Q. Alright. So I'm going with you here. If that was your intention, if you wanted to restrict RVs and restrict trailers such as you are restricting no

> commercial restrictions that's set forth…why wouldn't you just state no RVs, no trailers?
> A. Well, if you look at number one, the language in Unit Number 1, it has express language that allows trailers defined as the document defines it, 30 feet or longer, and good exterior [inaudible].
> Q. That's in the other document?
> A. That's correct. Now you're asking me why we didn't name trailers? Well, we didn't authorize trailers in Unit 2 or 3, or the other projects. But we restricted the use of the property, and we believed that we had done it properly. We believed we were restricting the use of the land as expressly worded in this document in Unit Number 3. You can do certain things on the land, that's it. (R. at 1978-79)

To the question of what is a house he testified:

> A. I didn't then, and don't now, believe a house is a trailer when you use the word "mountain cabin." A cabin is a cabin. A trailer is a trailer. A duck is a duck, and a horse is a horse. You can say this property is restricted for the use of horses, okay? That doesn't mean you can have a pig farm on it because we didn't restrict it to pigs. That's how I would read this. So I'm telling you it was our intent at the time. (R. at 1981)

When asked if he ever removed anyone for bringing in a trailer, Mr. Christensen responded:

> Q. Did you ever do that?
> A. Didn't have to while I was there.
> Q. So the answer is no, you didn't ever do that?
> A. I did not, no.
> Q. Was that ever done by any lot owner?
> A. Not while I was there. (R. at 1997)

(b) DAN THESIEN, an owner in Unit 3, reported that his realtor told him that trailers were not allowed. (R. at 2002) After reading the CC&Rs he concluded that RVs were not allowed. He became a member of the Board and believed the final resolution was a fair compromise. (R. at 2015) Mr. Thesien acknowledged that he purchased the lot from one who used it as an RV lot. (R. at 2027)

(c) DINAH HOOD, a lot owner in Unit 3, purchased her lot in 2012 and a second lot in 2014. She testified that she read the CC&Rs and they clearly stated that the property is to have a first-class single family dwelling on the property. (R. at 2034) She recalled that there was discussion before the trial about RV use and characterized RV users as follows:

> Q. Okay. When you purchased in Swains Creek was it important to you to buy a in a project that did not allow RVs, or was that not important to you?
> A. That was important to us.
> Q. And why was that?
> A. Property values, riff-raff kind of ownership, a lot of reasons like that. (R. at 2035)

She testified that a first-class dwelling needed to have a foundation:

> Q. Okay. You made a statement as to it was important to you that you buy into a place that didn't have trailers. Is that right?
> A. Yes, sir.
> Q. And I think that you explained that by saying because of property values and riff-raff.
> A. Yes, sir.
> Q. What did you mean by that?
> A. Well, people that have homes normally take care of them, upgrade them, and clean them up, you know? Keep them clean, keep them nice, and then the property values can go up. But if you have someone that has say an RV, they are only there temporarily, and they don't take care of their property, then the property value can go down. So we were looking for a place that we were hoping that the property values, of course, would go up, and people have pride of ownership.
> Q. And there's how many trailers up there? Do you know?
> A. I have absolutely no idea.
> Q. Is there a lot of trailers up there?
> A. Sir, I have no idea.
> Q. Okay. Has there been any riff-raff up in that subdivision?
> A. Oh, yes, sir. There's been plenty.
> Q. What is it that you mean by riff-raff?
> A. People that only come up there on the weekends do not pay attention to the laws of the subdivision and ride their ATVs flying down the road. Do not take care, you know, do not observe the speed limit, partying all night,

> and doing donuts in the middle of the road where they are tearing up the roads so that the Association pays money to have to be treated to keep the dust down. People that just take their ATV and run through the forest where there's no roads, people that just do not abide by the CC&Rs, the governing rules that protect everybody.
> Q. And are you associating those individuals that use ATVs that way as being RV owners?
> A. A majority of them are.
> Q. There's no cabin owners that have ATVs?
> A. Oh, yeah, there's cabin owners. Yes, sir. There's cabin owners that have ATVs, but they abide by the laws of Swains Creek, by the CC&Rs. They abide by the rules. (R. at 2042)

(d) PAMELA SZEMAMZKI owns three lots in Swains Creek Pines Unit Number 3, purchased in 1993, whose realtor informed her that the lots could only be used for residential buildings and trailers were only allowed during construction. She claims that structures under the CC&Rs had to be solid, something that didn't have wheels. (R. at 2052) She stated that she wouldn't have purchased the property had there been RVs around them. (R. at 2057) She recalled that her realtor told her that owners were allowed to have a cabin or permanent structure, nothing that could be rolled away. (R. at 2059)

(e) TODD CALL owns two lots in Swains Creek Pines Unit 3, owned for more than 15 years as an RV property. He made improvements and received authorization from the Association to allow for use of his RV. (R. at 2067) He testified about being allowed to have his RV as follows:

> Q. Let me ask you a question this way. Had anybody from the Association, at the time you bought it or afterward, from the time that you owned this property had anybody approached you from the Association saying that you could not have your RV there?
> A. The first time we ever heard anything about it was 2015 and 2016, and that's when everything hit the fan and all of a sudden RVs weren't allowed. (R. at 2069)

Call testified that he paid around $450 in dues for two lots for 15 years. He stated that he has been involved in Association activities, a lot of dinners and whatnot and his family goes out and helps clean up. He indicated that he has a great neighborhood with elderly people who need help. He takes his tractor and chainsaws and dump trailers to help. (R. at 2071) He understood from reading the CC&Rs that he couldn't build a rental but never understood them to keep him from having an RV. (R. at 2073) He stated that there are RVs all over the mountainside in that subdivision. (R. at 2074) He testified that they bring up a new trailer every year and have done so for the last 16 years. (R. at 2079)

(f) SANDRA CALL, wife of Todd Call, stated that Swains Creek was where they wanted to make their second home. They are involved in the cleanup projects in the subdivision but she felt like things were going in the wrong direction. They purchased the property with the RV on it and said that was the way they should be able to sell it. (R. at 2095)

(g) PATRICIA MARTIN purchased her lot in 1993 and told their realtor that they wanted to buy a place that they could take their RV. The Martins have owned fifth-wheels and a motor home and received approval to put in a septic tank and make improvements to their lot for RV use. They have been involved in Association activities and attended the annual meetings. She has never heard it discussed that RVs could no longer be used in the subdivision. No one has ever approached her about it. (R. at 2105) Concerning an RV compared to a cabin, she stated:

> Q. …did it occur to you to build a cabin at the time you bought the property?

> A. We just didn't want a cabin. We wanted to be able to go and do other things. Because of the people I know that in the past that have had properties, recreational cabins and stuff like that, they spend all their time going to the cabin. … I didn't want to be tied to another house. It's hard enough to take care of one house, much less two. (R. at 2108)

She further stated:

> Q. Okay. So is it fair to say that you can do whatever you want on the property unless it specifically says you can't in the CC&Rs?
> A. Yeah, because they detail what you can and can't do with your lot. And they don't say you can't use your RV on your lot. …
> Q. And that's an opinion you formed on your own?
> A. Yes, and we were told by numerous boards since we bought our property up there that Swains Creek allowed the use of RVs on our lots.
> Q. Can you tell me the name of the board members who—
> A. Al Hoffmeister, Bob Runckle, I think—
> Q. And they specifically said you can use an RV on your lot?
> A. Ken Kromer.
> Q. Each one of those specifically said you can use an RV on your lot?
> A. Yes.
> Q. And do you know if they said that to any other lot owner?
> A. I have no idea what they said to other lot owners.
> Q. And are you certain those people were board members?
> A. Yes. …
> Q. How did you know that they were board members?
> A. Because of documents, and also because they told me they were board members. We met All Hoffmeister when we very first looked at the property because he and his wife Shirley owned the property right behind the lot we were looking at. And they came out to meet us and wanted to know what we were up to. And we told them what we were doing, and that what we wanted to buy the lot for. And Al said that we were correct in assuming that we could put our RV up there because he was on the board. And he assured us that there would be no problem. (R. at 2118-19)

(h) HOLLY HUNTER purchased her lot in 1977 from a member of the Christensen family. She paid Association dues from the time that they started collecting.

She started by putting a tent up for a number of years and then in the summer of 1996

brought up a 1965 Nomad trailer which she had fixed up. (R. at 2162) When asked whether she could put in a trailer, she stated:

> A. Whenever they started, I don't know exactly the date they started that phase of trying to get the, say you couldn't have a trailer up there, you had to build.
> Q. Would you say that you used the property for a tent from 1977 to 1996?
> A. Pretty much. And I also had a van. I slept in the back of a van, too.
> Q. I see.
> A. I just used it for camping. …
> Q. Do you keep your property up?
> A. Oh yes. It's very nice. (R. at 2164-65)

She further stated:

> Q. Is this piece of property pretty important to you?
> A. Oh, it's my life. It has actually been my saving grace for many, many years.
> Q. To be able to go up there and use the property?
> A. Correct.
> Q. Has any neighbors or any other members of the association ever told you that you needed to stop using your property for—
> A. Well, I've been called trailer trash, yeah. I've heard people say, you know, I don't want to live by all those trailers. I don't want to, you know, but most of the people up there right around me have been very, very good to me. Dean Cortrin, that lived across the street, I left my battery. I left my key on, one time. And he had to come jump me. He's helped me with water. All different kinds of things. You know, they've all been very good to me up there. I've been a single woman going up there alone a lot for many years, and everybody's treated me very well. (R. at 2168-69)

About having a trailer on the property, purchasing it from a member of the Christensen family, she stated:

> Q. Was it Mark Jacobs [son-in-law in the Christensen family] that told you that you could have a trailer on the property?
> A. Yes, it was Mark Jacobs. I told him what I would, I wanted to use the property for. And before I signed the papers, I said it again, "I can use this for camping and if I ever get a trailer?" He says, "Yes, you may." (R. at 2174)

(i) JERRY HARRISON put an RV on his lot and attempted to sell it but was told by his agent that he would have to lower the price because he could not advertise it as an RV lot after the Board passed the RV resolution. (R. at 2187)

(j) ARTHUR COCKS, an Appellee, investigated before purchase and understood that RVs were okay in Swains Creek Pines when he read the CC&Rs. (R. at 2194) Going through the subdivision, he noticed a lot of trailers. His research found Rule 16 of the Association included trailers with other structures and spoke with a friend who owned a cabin there since the late 70s confirming RV use. (R. at 2198) About putting in an RV he stated:

> Q. And did you discuss with them whether you could put a trailer in it?
> A. I did. My friend has other friends on the mountain, and he explained that they had been there for approximately 25 years at that time, and the first 10 years they used their property, and they're in unit three, with a trailer prior to building their cabin.
> Q. And didn't have any problem with the association in doing it?
> A. No, they had no problem. (R. at 2198)

Cocks testified that after purchasing the property he went through the architectural committee, filled out the form and submitted it for improvements for RV use which was approved. (R. at 2200) He understood the first-class dwelling house to include RVs. He explained challenging the proposed resolutions by the Board. He expressed concern about the final resolution:

> A. It's a cloud hanging over our head. They've now defined us, newly defined us as nonconforming. And the new board in 2016, which was just a few months later, could take action against us.
> Q. And essentially that's why you were saying this is an eviction notice?
> A. The language in the September meeting minutes I believe in my heart is what their true intention was. And this affirmed it. But now they have made

themselves, they've given themselves the authority to take action against what the consider nonconforming RV lots.
Q. Based upon what they've designated as their recitals in the document, now they made resolutions, right?
A. Yes. …
Q. … It says, "RVs and trailers are defined as a motor vehicle or trailer equipped with living space and amenities found in a home …
A. It could, yes.
Q. And then it defines what a dwelling house is, right?
A. Yes.
Q. And a dwelling house at this point is defined as being a structure. But then specifically says an RV or trailer is not a dwelling house, right?
A. That's what it says.
Q. So this is the first time that you've seen something that says your trailer is not considered to be a dwelling house?
A. Yes. (R. at 2217-19)

(k) JANETTE KATHLEEN COX bought a lot in Swains Creek Pines Unit 3 in 1979 and has a cabin. She stated that Cocks told her that he intended to build a cabin. (R. at 2319) She understands the recreational use provision includes a cabin and not RVs and claims to have spoken to one of the developers, Darryl Christensen. She was told that RVs were not allowed and that they did not want to live in a community which allowed essentially year-round trailers. (R. at 2321) They built their cabin in 1992 and utilized a trailer when building the cabin. (R. at 2323) She saw trailers after they purchased their property and complained at board meetings. She stated the Association did nothing about her complaints. (R. at 2325)

(l) CHERYL CASE was a member of the Board but does not own property in Unit 3. However, she bought property in Swains Creek in 1983. She served on the Board at various times for more than 16 years. (R. at 2339) She testified that during the time she served as secretary there were instances where applications were approved for the

construction of septic tanks and driveways for use in conjunction with RVs but offered no explanation as to why they would be approved when RVs were not allowed in Unit 3. (R. 2345) She confirmed Al Hoffmeister was a board member. (R. at 2349) She was aware that the Martins had an RV but wasn't aware of any action taken by the Association to keep them from using their lot as an RV lot. (R. at 2350) Concerning use, she stated:

> Q. So if I'm understanding correctly, what you're saying is from the association's perspective you can own the property, right?
> A. People are allowed to purchase property, correct.
> Q. Pay the association dues, correct?
> A. People join into the association and would be obligated to pay dues.
> Q. But you can't camp on it?
> A. I don't believe unit three allows camping. Not that I'm aware of.
> Q. You can't put—
> A. But I could review the CC&Rs again to be sure.
> Q. So you can't camp on it and you can't put a trailer on it?
> A. Not to my knowledge.
> Q. The only way—
> A. Unless you're building, if you're building a cabin, you can put your trailer on there while you're building.
> Q. So the only way you get to use your property is if you're building a cabin?
> A. For unit three. (R. at 2367)

(m) DAVID PUGH owns a lot in Unit 3. He specifically asked the realtor to narrow their search to areas that did not allow RVs. After reading the CC&Rs he understood them to mean cabins and not RVs. (R. at 2382)

(n) CHRISTOPHER DAHLIN is a real estate appraiser in southern Utah. He stated that he was familiar with the Swains Creek Pines project and did appraisals in Swains Creek. He testified that his license covers real estate and trailers without wheels. He is not licensed to appraise anything with wheels. (R. at 2427) As to relevancy of Mr. Dahlin's opinion testimony, the Court commented as follows:

> THE COURT: Here's my analysis, the interpretation of paragraph one is a legal interpretation, that is for the Judge to decide. If he's going to tell me how to interpret it, then I have to sustain the objection. You lawyers are trained and so you can make legal arguments, but he's not been to law school, so he can't make legal arguments. … if the reason you have him on the stand is to tell me how to interpret that language, I have to sustain the objection because that's my job. You're taking my job away from me. (R. at 2429)

(o) JOHN DAVID RICHARDS III is an attorney whose practice is devoted to condominium, planned community, and association representation. He is one of three in Utah belonging to the Community Associations Institute and familiar with the Utah Community Association Act. He testified that while working with many boards, the use of first-class dwelling house included mountain cabins but not RVs. (R. at 2451) When asked about the Business Judgment Rule, he stated:

> A. That's consistent with my understanding with the business judgment rule. It's consistent with how I've seen it interpreted in various states where I've lectured and taught and in part of my experience with different organizations at the community association institute and my own practice, but the first thing I did notice when I read that in preparation of today was I noticed that was a lot of the same language right out of the statute we've been talking about, Section 213. (R. at 2452)

In that regard, the court asked the witness as follows:

> THE COURT: I guess I have a couple of questions. Does the Business Judgment Rule allow a board to by resolution change restrictions in the CC&Rs?
> THE WITNESS: So, Your Honor, my opinion, very firm on that, a resolution can interpret, clarify, and procedurally improve upon what's already there. It cannot change what's in the CC&Rs.
> THE COURT. And CC&Rs are a contract?
> THE WITNESS: Correct.
> …
> THE COURT: If there's a need to be clear, isn't that an indication that it's not clear?

> THE WITNESS: I'm not so sure that it means that it's legally unclear, I think it might mean that the owners, lay people, might not know what is permitted or not permitted. The board can step in and as long as they can legally and lawfully interpret what the CC&Rs and bylaws mean, I think it's legally clear with the authority, but it might, because they, just because a board has to jump in and interpret the governing documents, it certainly isn't an indication, the home owners might have some confusion, but it doesn't necessarily mean that the law is confused on the issue. (R. at 2460-62)

The court asked the witness about phasing out the nonconforming use by sale to change of use and the witness stated:

> THE WITNESS: The, that is sometimes a decision of boards. Usually, to, when we get into a situation where there's been a determination of the board that there's a violation, there's been violations occurring, and we, if this is our baseline compliance with the CC&Rs and we deem that the behavior of certain compliance has fallen below our standard, if we implement, my experience has been if the board adopts an enforcement policy that says, "When there's a change of use, we'll eventually get back to where we want to be on our baseline and (inaudible)," that could take decades upon decades, and so could a sale, I acknowledge that, but it can take so long that the purpose of the board, which is to maintain integrity of the covenants, property values, quality of life, livability, that becomes frustrated if you wait for a change of use. So usually what I've seen in the industry is a sale is the trigger to come back into what we deem compliance. The other remedy takes too long. (R. at 2463)

(p) GINA CHAPMAN served on a committee for Swains Creek Pines and on the Board. The committee dealt with RVs and were unable to pass an amendment in 2013. The board asked her to survey to make changes they'd like to see from the Association.

When asked her opinion on residential use, she stated:

> A. In my opinion, yes, I thought I knew what it meant, but as a board, what we did is we actually investigated different terminology and did research to determine what, you know, what's considered a cabin and a single-family dwelling, and we did a lot of discussion about could it be something other than this, and we determined, no, there's no RV. (R. as 2482)

The witness was asked:

> Q. Why did you have to come up with a solution if the RVs, if the CC&Rs are so clear to exclude RVs, why not just enforce the CC&Rs? Why go to the trouble, apparently extensive trouble, of passing a resolution that attempts to try to define the CC&Rs?
> A. Well, as I mentioned earlier, we exhausted our avenues of trying to resolve the issue, and it—
> Q. Hold on. Isn't one of those avenues just to enforce the CC&Rs?
> A. In my opinion, I was being neighborly and compassionate of people that had RVs—
> Q. But wouldn't—
> A. –as well as being compassionate to the cabin owners.
> Q. So one of the things that you didn't do as a board was to enforce the CC&Rs the way they're written?
> A. We did not.
> …
> Q. What you did with passing Rule 19, and I'm talking about the October rule of 2015, the RV resolution, was essentially to define RVs as being something other than a cabin or a dwelling?
> A. What I recall, the reason why we were passing Rule 19 is so that we could send letters to the realtors and construction people on the mountain to help us, assist us with stopping proliferation of RVs in the development.
> Q. And 33 RV lots in a 300, 400, or 700 lot subdivision is a proliferation of RVs?
> A. Over the years, 2010 to 2015, adding 24 to the membership appeared to be a continuing trend towards proliferation, in my opinion.
> Q. So what is the harm of having an RV on a lot?
> A. My role as a board member was to enforce the governing documents.
> Q. Which you didn't do because what you did is you chose to amend the governing documents? (R. at 2504)

(a) ALLEN ZELLHOEFER owns property in Swains Creek who testified that he talked with Cocks about improvements he was making. Cocks told him that he was going to build a cabin, (R. at 2528) He never told Cocks he could not put an RV on his property. (R. at 2534) He served on the board for 10 years but never took action to remove RVs in Unit 3. (R. at 2536)

(r) THEODORE JAMES LONG once owned property and served on one of the first boards of the homeowners association who testified as follows:

> Q. You mentioned, you use the term mobile home, wasn't that the concern back in that day bringing in a mobile home?
> MR. JENKINS: Objection, foundation.
> MR. JACKSON: That's the question that, that's the term that he used, Your Honor.
> THE WITNESS: A stick-built on a foundation is the term I used.
> MR. JACKSON: No, when you made reference to a mobile home.
> BY MR. JACKSON:
> Q. The concern that the Christensens had was allowing mobile homes to be brought up there?
> A. That was their concern, yes.
> Q. In conjunction with that, we're talking about mobile homes back in the 1970s?
> A. Yeah, I think.
> Q. I think your comment also was that it really didn't address RVs.
> A. It did not.
> Q. So RVs that we're talking about now, that's different than the mobile home problem that they were trying to stop back—
> A. When they mentioned trailer in the CC&Rs, they were referring to mobile homes, not RVs.
> Q. Which the mobile home basically was something that they were going up there, trying to set it up, take the wheels off, set it down on foundation, and having that in the subdivision?
> A. That's the way I interpret a mobile home, yeah.
> Q. But the whole idea, I mean, there weren't really any RVs back in the 1970s, were there?
> A. No, there wasn't. They weren't that popular.
> Q. I mean, we're talking about first generation Winnebagos.
> A. Right.
> Q. So the whole RV issue was not one that was even contemplated at the time, was it?
> A, I guess not, no. (R. at 2551-53)

(s) JANELLE KRAFT PEARCE owns property in Swains Creek and served on the board at various times from 2010 to 2017. She stated:

> A. Based on the number of votes that were cast and the comments and concerns that I received as chairman of the board, the majority of people

> that spoke to me did not want to make their neighbors leave. They didn't want permanent RVs in the area, but they did not want to make their neighbors have to pack up and leave their property. That resolution was the compromise between all parties to try to satisfy everyone, and it did. (R. at 2575)

IV
SUMMARY OF ARGUMENT

A.

The trial court correctly found that the CC&Rs in the Swains Creek Pines Subdivision, Unit 3, did not prohibit RV use on Appellees' property. The case comes down to interpretation of "mountain cabin residential recreational sites" and "a first-class private dwelling house" contained in the RESIDENTIAL USE paragraph of the CC&Rs. These clauses only become ambiguous by interpreting them as prohibiting use of RVs or trailers; otherwise, they are unambiguous if construed to allow such use. The court's assessment was not done summarily but it gave Appellant the benefit of the doubt by finding ambiguity. Notwithstanding, it was careful to consider the matter at trial, to not wrongfully deprive Appellees of the use and enjoyment of their property.

B.

The trial court was correct to find the CC&Rs ambiguous and extrinsic evidence supports its interpretation. The trial court's consideration of extrinsic evidence is not limited to the parol evidence testimony of those involved in drafting the CC&Rs. It may consider the directives of the Association. Neither party was involved in negotiating the CC&Rs but the Association is the party whose predecessor drafted them. Appellant cannot use parol evidence to add additional terms. The testimony of LONG was

persuasive in asserting that the developer's concern was to prohibit placement of mobile homes, not RVs or trailers. The court was not persuaded by the testimony of CHRISTENSEN.

C.

The trial court's ruling was appropriate concerning the Business Judgment Rule and efforts of the Association to redefine the meaning were arbitrary, capricious and against public policy. The Board cannot justify changing the CC&Rs by claiming to have given the matter fair review, acting in good faith, without conflict of interest, when such action effectively deprived a property owner of a permissible use. The court determined the action of the Board was arbitrary and capricious, failing to consider change of use as an alternative to change of ownership. However, the trial court allowed the resolution prospectively.

D.

The trial court's findings of fact are supported by the evidence and Appellant has failed to sufficiently marshal the evidence. The Appellant attempts to challenge the trial court's factual findings, asserting that they are not supported by the clear weight of the evidence, without marshalling the evidence. Appellant scrutinized the trial court for failing to give more weight to the uncontroverted testimony of its expert. However, the court did not abuse its discretion in giving such testimony the weight it received in light of the testimony presented. When one fails to marshal the evidence the reviewing court has no choice but to affirm the trial court's decision. The evidence is substantial

supporting the court's findings and the matter should be viewed in the light most favorable to its decision.

E.

The evidence supports waiver and abandonment regarding enforcement to exclude RVs and trailers. The issue of waiver presupposes an interpretation of the CC&Rs that prohibits RV and trailer use. Nevertheless, the evidence at trial supports waiver even when considered in the context of an anti-waiver provision. The issue is a mixed issue of law and fact and the trial court's decision was correct and its factual determination was not clearly erroneous.

V
ARGUMENT

A.
The trial Court correctly found that the CC&Rs in the Swains Creek Pines Subdivision, Unit 3, did not Prohibit RV or Trailer use on Appellees' Property.

This is a matter commenced in 2017 where Appellees challenged an action of a Board of a lot owners association to interfere with their right to use their property by improving it for a recreational vehicle as established and acknowledged as being an acceptable use in the Subdivision for 40 years. The challenge first arose a few months after their purchase and was never before contemplated as being inconsistent with the CC&Rs. Representations and testimony aside, no Board or member of the Association ever initiated proceedings against a member in Unit 3 for RV use. The Association collected dues, granted permits and each party acknowledged that past RV use was acceptable. In fact, this was a close-knit community. The trial court did not make this

decision summarily although many attempts were made to have it do so. The evidence presented at trial more than sufficiently substantiated its ruling. Examining the document itself in the context for which it was construed, there is no question that the court's interpretation was correct. It is understood that a contract is a question of law that this Court reviews for correctness, giving no deference to the ruling of the trial court. See McNeil Eng'g & Land Surveying, L.L.C. v Benchmark, 2011 UT App 423, paragraph 7, 268 P.3d 854; see also View Condo Homeowners Ass'n v MSICO, L.L.C., 2005 UT 91, paragraph 17, 127 P.3d 697. This Court makes a determination as to whether a contract is facially ambiguous. See Daines v Vincent, 2008 UT 51, paragraph 25, 190 P.3d 1269.

In this case, there is called into question the use of two phrases within the first paragraph of the CC&Rs. The first is "mountain cabin residential recreational sites" and the second is "a first-class private dwelling house." The context of these two phrases is found under RESIDENTIAL USE which declares that lots within the subdivision are to be for single-family residential purposes only. They cannot be partitioned further by sale. Rather, they are to be used and improved to preserve and enhance their pastoral, scenic beauty. Beauty is then qualified as meaning "mountain cabin residential recreational sites" free from unsightly neglect and abuse. The Appellant contends that the use of cabin in this phrase means cabin use exclusive of all other uses. This tortures the meaning of the phrase when considered in its entirety and also when considered in the context of the paragraph for which it was being used. Such meaning would exclude all other uses of the remaining portion of the provision including to preserve and enhance the site free from unsightly neglect and abuse. Requiring that a lot owner build a cabin compels

improvement or disturbance as a way of deviating from that concept. The Court should look to an interpretation for a reading that harmonizes the provisions and avoids rendering any part thereof meaningless. See Peterson & Simpson v IHC Hospital Servs., Inc., 2009 UT 54, paragraphs 13-19; see also Encom Utah, L.L.C. v Fluor Ames Kramer, L.L.C., 2009 UT 7, paragraph 28, 210 P.3d 263. The same applies when reading in context the second clause found within the same paragraph. The paragraph itself addresses residential use while excluding structures for business purposes after qualifying the same, and ends by stating "no improvement whatsoever, other than *a first-class private dwelling house*, patio walls, swimming pool, and customary outbuildings, garage, carports, servants quarters, or guesthouse may be erected, placed or maintained on any lot in such premises." In this case, it is particularly significant that "first-class dwelling house" is not defined in the CC&Rs, bylaws or other governing documents. The use of the phrase in context in this case does not attempt to exclude RVs or trailers from structures such as patios, carports, or guesthouses, servants quarters, garage or customary outbuildings. A swimming pool is used in the context of a structure appropriate for use but for some unknown reason Appellant's contention excludes RVs. However, the only exclusion found in this paragraph pertains to buildings and structures intended for or adapted to business purposes. Recreational vehicles, RVs and trailers are not found in the express wording of the CC&Rs. The exclusion argued by Appellant defies intended meaning within the paragraph when read in its entirety, focusing attention on two single words, "house" and" cabin," to assert the drafters intended to restrict the use of RVs and trailers.

Using that interpretation even if that was the intended meaning, neither the CC&Rs nor the governing documents set forth the duties and responsibilities of the revisionary owner or Association to enforce. The CC&Rs make no provision for eviction or to assess a penalty upon RV or trailer users. The more compelling interpretation is to treat both "cabin" and "house" as qualifying a structure used not excluding trailers and RVs. That is as reasonable of an interpretation as that purported to be the plain meaning asserted by the Appellant. The Court will find ambiguity where the language of the contract "is reasonably capable of being understood in more than one sense." Cent. Fla. v Parkwest, 2002 UT 3d, paragraph 12.

In this case, the Appellees' interpretation is reasonable and gives effect to all provisions of that portion of the CC&Rs while rendering no part superfluous, useless or inexplicable. It further reflects the course of dealing of the parties where the CC&Rs as implemented, allowed for RV and trailer use. This is an interpretation which gives clearer understanding to the meaning of the full paragraph and accounts for what is otherwise a missing term or facial deficiency by Appellant's contention. See UDAK Properties v Canyon Creek, 2021 UT App 16, paragraph 15, 482 P.3d 841. Such consideration is consistent with that which the trial court reached in its conclusion. What is clear is that the court was reviewing this matter in the context of the parties' property rights and the intrusive action taken by the Board. In a real sense this is not unlike actions recognized as entities exercise the right of eminent domain which is typically construed to insure that no person is wrongfully deprived of the use and enjoyment of property. See KFJ Ranch Marion Energy, Inc. v J Ranch Partnership, 2001 UT 50 paragraph 2, footnote 2; see also

Bertagnoli v Baker, 215 P.2d 626, 627-28 (Utah 1950). The trial court in this case, given the Appellant's contention of plain meaning, found that the CC&Rs were ambiguous.

B.
The trial court was correct to find the CC&Rs Ambiguous and extrinsic Evidence supports its Interpretation.

In the event that a trial court is not able to resolve controversy of the plain meaning to a contract, it is appropriate for it to consider extrinsic evidence. When a contract term is ambiguous, a district court may consider extrinsic evidence. Brady v Park, 2019 UT 16, paragraph 9. When ambiguity does exist, the intent of the parties is a question of fact. See Plateau Mining Co. v Utah Div. of State Lands & Forestry, 2008 P.2d 720, 725 (Utah 1990). A district court makes a determination of the parties' intent after considering extrinsic evidence, this is a factual determination to which this Court grants deference. Watkins v Ford, 2013 UT 31, paragraph 19, 304 P.3d 841.

The trial court's consideration of extrinsic evidence was not limited to the testimony of the witnesses at trial. Rather, an understanding was found in the directives implemented by the Association in its written guidelines, rules and regulations which included swimming pools in its definition of structures, summarized within the permissible structures recognized. This directive also included "trailers." The trial court noted, "use of the word 'trailers' conveys the Association's knowledge, support and approval of RV use in the subdivision." (R. at 1884) The language found within Rule 16 is consistent with that found in the CC&Rs pertaining to residential use including the phrase "mountain cabin residential recreational sites free from unsightly neglect or abuse." Id. The Rule states that all structures, including cabins, **trailers,** garages, sheds,

decks, stairs, shelters, etc. shall be kept in safe and good repair. This was extrinsic evidence that supported Appellees' contention that using their lot for RV purposes was in fact a permitted use. Otherwise, there would be no need to recognize trailers directly after stating that all lots were 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. It is true that the use of extrinsic evidence is to determine the intent of the parties. However, the judicial fiction ends there. Neither the Appellees nor the Appellant were parties to the creation of this particular contract. The Association is a party to the contract by reason of administering the responsibilities acquired from the revisionary owner. Appellees accepted the CC&Rs without the right to disregard or change in their purchase of property years after the CC&Rs had been created. Neither party was in a position to negotiate the terms of the CC&Rs. For all intents and purposes, the CC&Rs are a contract of adhesion. The attempt by Appellant to introduce testimony of the developers' intention is in and of itself an acknowledgment that those phrases contained within the CC&Rs are ambiguous. In this case, they conceded they could not rely upon the first principle of construction. "[U]nambiguous restrictive covenants," including CC&Rs, "should be enforced as written." Swenson v Erickson, 2000 UT 16, paragraph 11, 998 P.2d 807.

Appellant argues that extrinsic evidence considered by the trial court was appropriate but then attempts to discredit the court's use of the same except for its own submitted testimony as to intent or expertise. The Appellant's resort to such testimony concedes that the CC&Rs were ambiguous. However, testimony of people, parol

evidence, associated with the developer is not the only recognized means of clarification. It violates the Parol Evidence Rule to extend the meaning of an integrated contract. The Parol Evidence Rule operates "to exclude [extrinsic] evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an integrated contract. DCH Holdings, L.L.C. v Nielsen, 2009 UT App 268. It is considered in this case only because of the ambiguity of the relevant phrases but is not conclusive in the trial court's consideration. The exclusion of RVs and trailers and enforcement of prohibition of the same is an essential term in the CC&Rs, also missing, unless to allow for such RV use to preserve and enhance the pastoral, scenic beauty free from unsightly neglect or abuse is considered the understanding.

The trial court may consider the history or course of dealing and interaction with members of the Association as well as the impact that it had upon realtors, contractors, other Association members and Board members in conjunction with the phrasing or lack thereof that RV use was allowed. In conjunction therewith the trial court stated as follows:

> 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." (R. at 1887)

The trial court was particularly persuaded by the testimony of THEODORE LONG, who testified that his understanding of the position taken by the revisionary

owner and the first members of the Board, the original developers, who adopted the CC&Rs, intended to exclude the placement of *mobile homes*. Id.

The trial court went on to reason that this 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 [sic] [trailers] and RVs, in general, are for temporary and sporadic camping. Mobile homes are in the nature of a permanent dwelling. Long conceded he took no action to exclude RVs from the subdivision when he was a member of the board. (R. at 1887-88)

The fact that the trial court discounted the testimony of Keith Christensen was a fair and appropriate exercise of the court's discretion. Christensen did not draft the CC&Rs. He testified at trial that he was not with the law firm where the CC&Rs were drawn up at Thorpe Whitingham's guidance. (R. at 1974) Christensen was not then a lawyer; rather, he was one of several involved in the development but the developer was a separate entity. This was a distinction overlooked by the court in referring to Mr. Christensen's testimony as follows:

> Attorney, Keith Christiansen [sic], 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. (R. at 1890-91)

The Appellant argues that since creation of the Association rules apply to different units, this somehow justified a distinction in the definition of structures within Rule 16. This is suggesting that the language used within the rule applies to all units but is interpreted differently from one unit to the next as if that assumption alone was not enough to constitute ambiguity. Appellees contend that the interpretation most reasonable under the circumstances is that which is consistent with an interpretation finding the CC&Rs unambiguous when construed to include trailers and RVs.

Appellant cites to Saleh v Farmer's Ins. Exch., 2006 UT 20, paragraph 17, 133 P.3d 428, to assert the position that words and phrases do not qualify as ambiguous simply because one party seeks to endow them with a different interpretation according to his or her own interest. However, this assertion is taken out of context. The full rendering is more informative contrary to that which Appellant suggests. Therein, the Supreme Court states:

> Our cases that have required us to test for the presence of contract ambiguity have, not surprisingly avoided an etymologically-based test of plausibility. Rather, we have been content to permit plausibility to speak for itself. For example, we stated that the proffered alternative interpretation "must be plausible and reasonable in light of the language used (citation omitted)," and that to merit consideration as an interpretation that creates an ambiguity, the alternative rendition "must be based upon the usual and natural meaning of the language used and may not be the result of a forced or strained construction."

See Saleh, 2006 UT, paragraph 17; see also Sav & Loan v Aetna Cas. & Sur. Co., 817 P.2d 341, 367 (UT Ct. App. 1991) The final option would be to construe the provision against the drafter which would be the Appellant. See Fire Insurance Exch. v Ottomanns, 2012 Ut. Ct. App. Paragraph 7; see also Wilburn v Interstate Electric, 748 P.2d 582, 584-85 (Ut. Ct. App 1988)

C.

The trial Court's Ruling was Appropriate concerning the Business Judgment Rule and the Efforts of the Association to redefine the meaning were Arbitrary, Capricious and against Public Policy.

The court's ruling considered the action of the Board in the context of the Business Judgment Rule, codified in Utah Code Annotated, Section 57-8a-213, a copy of the same is set forth in Appellees' Addendum, Exhibit 8, incorporated herein by this reference. Appellate suggests that the trial court's decision did not apply appropriate deference to the Association's judgment, that it was acting in good faith with no conflict of interest. It flies in the face of reason to assume that a board would be justified curtailing lawful use by adopting a procedure where after fair review and acting in good faith and without conflict to change effectively depriving a property owner of permissible use. This Court determines whether the action taken by the trial court was arbitrary and capricious. It is arbitrary and capricious if a different rule of law applies in a case concerning the same facts. See Salt Lake Citizens Congress v Mountain States Telephone & Telegraph Co., 846 P.2d 1245 (Utah 1992). This Court accords no deference to the trial court in interpretation and application of the law. See Viel v Provo City, 2009 UT App 122, paragraph 9, 10 P.3d 947; see also Specht v Big Water Town, 2017 UT App 75,

paragraph 22. It reviews the trial court's findings of fact for clear error. See also Fort Pierce v Shakespeare, 2016 UT 28, 379 P.3d 1216.

The Supreme Court has stated that it will set aside a district court's factual findings as clearly erroneous only of it is "against the clear weight of the evidence." Brown v State, 2013 UT 42, paragraph 37, 308 P.3d 486. Exercise of the Business Judgment Rule does not justify changing the CC&Rs. This is made clear by Appellant's expert witness responding to the court's question stating that members of the Association have no power by use of the Business Judgment Rule to change or modify the CC&Rs. In this case, the trial court has not acted arbitrarily or capriciously. It found from the evidence at trial that the language set forth in the revised resolution of October 1st, 2016, was arbitrary and capricious but determined that the Business Judgment Rule provided the Association with authority for prospective application. However, this did not provide the authority to adversely affect the rights Appellees enjoyed (with the Association's tacit approval). The trial court asserted that the CC&Rs, as written, and as interpreted by the Association, do not retroactively give notice to members that use of RVs constituted a violation of its governing documents. The court pointed out that the present position taken by the Board constituted a change and the Board was not using its best judgment to determine whether to pursue enforcement of violation. The trial court was acting within its discretion to qualify the Board's last resolution accordingly.

D.

The trial Court's Findings of Fact are supported by the Evidence and Appellant has failed to sufficiently Marshal the Evidence.

The Appellant contends that the weight of the evidence does not support a finding of lack of enforcement. Appellant scrutinizes the trial court for failing to properly weigh the testimony of Mr. Richards as such testimony was uncontroverted. The Board had commissioned a survey of lots to determine the number of RVs and trailers which Appellant contends was sufficient in showing that Appellees failed to rebut the presumption that the Directors acted reasonably and in the best interest of the corporation. However, Appellant made no attempt to address the testimony of the witnesses at trial except to simply state that the witnesses did testify that the Association's enforcement efforts were lenient in some instances. This was not a reasonable attempt to marshal the evidence as necessary under the circumstances of this case. In rebutting a factual finding one must first marshal all record evidence that supports the challenged finding. This requirement applies when a party challenges a court's or an agency's factual findings, regardless of the standard of review at issue. Supply, Inc. v Fradan Mfg. Corp., 2002 UT 94, paragraph 21, 54 P.3d 1177.

To find the lower court's factual findings as clearly erroneous, "an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in the light most favorable to the court below." United Park City Mines Co. v Stichting Mayflower Mountain Fonds., 2006 UT 35, paragraphs 37-38, 140 P.3d 1200. This Court is strictly bound to affirm the court's findings in the absence of marshalling. See Martinez v

Paymaster Plus, 2007 UT 42. In the present case, notwithstanding the testimony of Mr. Richards, Appellant fails to address the testimony of the other witnesses, which testimony was substantial. RV owners and Board members affirmed the fact that no action had been taken to ban the use of RVs, many of RV owners were told by Board members that such use was acceptable and who had actually received authorization to put in improvements, paid fees and were never challenged on their use. (R. at 2069, 2071, 2073-74, 2079, 2095, 2105, 2108, 2118-19, 2162, 2164-65, 2168-69, 2174, 2194, 2198, 2200, 2217-19, 2325, 2536, 2575) Board members acknowledged that they had never taken action against any RV user. A former Board member was quick to make clear that trailers and RVs were allowed and the focus was on keeping mobile homes out of the subdivision. (R. at 2551-53) Although many of the witnesses that testified had been Board members over the years, not a single witness testified that they had been involved in an action to remove RVs or trailers in Unit 3. One theme that ran true throughout the testimonies of all was that which was expressed by defense witness Janelle Pearce, who testified that it was the consensus of all cabin owners that their RV neighbors should not be required to leave. (R. at 2579) The language of the final resolution conveys this understanding in its attempt to form a compromise to place restriction on future property sales. Those that reside within the subdivision confirmed each parties' understanding of the CC&Rs and acknowledged RV use. In fact, the testimony of Mr. Richards confirmed and supported the judge's finding by reinforcing the fundamental tenet that a Board could make a resolution to clarify CC&Rs but could not change the interpretation of them to impose something more restrictive. (R. at 2460-62) The factual finding made clear that this was in fact what the

Board was attempting to do, to change the meaning of the CC&Rs. Testimony supporting the court's finding was substantial and this Court should not substitute its judgment for that of the trial court when considering all of the evidence in the record, both favorable and contrary, in determining whether a reasonable mind would reach a different conclusion. See Checketts v Providence City, 2018 UT App 48, paragraph 18, 420 P.3d 71; see also LJ Mascaro, Inc. v Herriman City, 2018 UT App 127, paragraph 20, 420 P.3d 4; and JP Furlough Co. v Board of Oil, Gas and Mining, 2018 UT 22, paragraph 25, 424 P.3d 858.

E.
The Evidence supports Waiver and Abandonment regarding Enforcement to exclude RVs and Trailers.

Appellant's argument presumes that the CC&Rs preclude the use of RVs and trailers. The evidence presented at trial establishes that this interpretation was only made in 2015 by Board members but not the Association members even though the CC&Rs had been in effect for the subdivision since 1977, which had long allowed RV use. Appellant argued that such exclusion was intended by developers and subsequent Board members when lack of enforcement clearly showed that if so, such provision was waived and abandoned. The standard of review for waiver and abandonment involve the intentional relinquishment of a known right. See Soter's Inc. v Desert Fed. Sav. & Loan Ass'n, 857 P.2d 935, 942 (Utah 1993). This includes non-action taken by Board members and their acknowledgment of RV use within the subdivision.

With a waiver there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it. Lucky Seven Rodeo Corp. v Clark, 755

P.2d 750, 753 (Utah Ct. App. 1988) Although the trial court did not address the anti-waiver provision directly, evidence supported its finding that the right to exclude RVs and trailers was relinquished by accepting Association fees, allowing RV users to make improvements, and by advising them that RV use was permitted within the subdivision. The issue is a mixed question of law and fact and whether the trial court applied the proper standard of waiver presents a legal question to be reviewed for correctness. Actions and events allegedly supporting waiver are factual in nature and should be viewed as factual determinations to which deference is given to the district court. See Gilespie, 1999 UT 54, paragraph 16, 982 P.2d 572; and Chandler v Blue Cross Blue Shield, 833 P.2d 356 (Utah 1992).

The evidence in this case shows that these individuals knew of the intentions of the developer and later Board members were well aware of RV use and accepted the same as conforming. An intention to relinquish in the case for which the testimony is replete with Board members and cabin owners each stating what they believed to be language excluded RVs chose not to do so until the last resolution passed by the Board. Yet, even this manifested their desire not to have their RV user neighbors evicted, only to try and not allow them to sell their property to someone else who might continue such use. Appellees contend that this is evidence showing relinquishment and waiver and supports the court's decision.

VI
CONCLUSION

The trial court correctly determined that the CC&Rs of the Association did not bar the use of RVs or trailers in this mountain subdivision and that the strained interpretation made by its governing Board created ambiguity. It also correctly ruled that the Board could not change the CC&Rs by resolution and that the action taken by the Board was not justified under the Business Judgment Rule, The Court's consideration of extrinsic evidence was proper to determine ambiguity and it acted within its discretion to apply the Board's restrictive resolution prospectively after proper notice to further purchasers. The trial court's judgment and decree should be affirmed and the Appellees awarded their costs and fees.

DATED this 19th day of July, 2021.

/s/ J. Bryan Jackson_____
J. BRYAN JACKSON
Attorney for Appellees

CERTIFICATE OF EMAILING

I hereby certify that on the 19th day of July, 2021, I emailed a true and complete photocopy of the above and foregoing *BRIEF OF APPELLEES* to the following:

Lisa A. Collins
Clerk of Court
450 South State Street
P.O. Box 140230
Salt Lake City, UT 84114-0230
courtofappeals@utcourts.gov

Bruce Jenkins
285 W. Tabernacle Ste 301
St. George, UT 84770
bcj@jenkinsbagley.com

/s/ Alauna Erickson .
Alauna Erickson, Legal Assistant

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Utah Rules of Appellate Procedure 24(g)(l) because according to the word processing program used to prepare this brief (Word 2007), this brief contains 13,830 words, excluding the parts of the brief exempted by Utah Rules of Appellate Procedure 24(g)(2).

2. This brief complies with Utah Rules of Appellate Procedure 21(g) governing the filing of public and private records.

3. This brief complies with the typeface requirements of Utah Rules of Appellate Procedure 27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 13-point Times New Roman font.

July 19th, 2021

/s/ Alauna Erickson .
Alauna Erickson, Legal Assistant

IN THE UTAH COURT OF APPEALS	
ARTHUR W. COCKS and JULIE L. COCKS, Trustees of the Cocks Family Trust, dated August 11, 2006, Appellees, v. SWAIN'S CREEK PINES LOT OWNERS' ASSOCIATION, Appellant.	Case No. 20200961-CA

ADDENDUM TO BRIEF OF APPELLEES

Appeal from Judgment and Decree entered November 20th, 2020, and Memorandum, constituting Findings of Fact and Conclusions of Law dated October 13th, 2020, from the Sixth Judicial District Court in and for Kane County, State of Utah, before the Honorable Marvin D. Bagley.

BRUCE C. JENKINS (5972)
KIMBALL A. FORBES (12511)
KATHRYN LUSTY (10269)
JENKINS BAGLEY SPERRY, PLLC
285 West Tabernacle, Suite 300
St. George, UT 84770
(435) 696-8200
bcj@jenkinsbagley.com
kaf@jenkinsbagley.com
kl@jenkinsbagley.com
Attorneys for Appellant

J. BRYAN JACKSON, P.C. (4488)
THE LAW OFFICE @ 456
456 West 200 North
P.O. Box 519
Cedar City, Utah 84721-0519
(435) 586-8450
bryan@lawoffice456.com
Attorney for Appellees

TABLE OF CONTENTS

EXHIBIT 1

The Order of the Court is stated below:
Dated: November 20, 2020 10:24:38 AM **/s/** MARVIN D BAGLEY
District Court Judge

THE LAW OFFICE @ 456
J. BRYAN JACKSON, P.C. (4488)
Attorney for Plaintiffs
456 West 200 North
P.O. Box 519
Cedar City, Utah 84721-0519
(435) 586-8450
bryan@lawoffice456.com

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR KANE COUNTY, STATE OF UTAH	
ARTHUR W. COCKS and JULIE L. COCKS, Trustees of the Cocks Family Trust, dated August 11, 2006, Plaintiffs, v. SWAIN'S CREEK PINES LOT OWNERS' ASSOCIATION, Defendant.	**JUDGMENT AND DECREE** Civil No. 170600114 Judge: Marvin D. Bagley

THIS COURT having entered its memorandum decision constituting findings of fact and conclusions of law on or about the 13th day of October, 2020, now submits therewith its judgment and decree as follows:

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiffs are entitled to continue to use their property, lots 526 and 527, Swains Creek Pines Subdivision, for RV purposes until such time as there is a change of use;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the October 1, 2016 resolution of the Swains Creek Pines Lot Owners Association board may be recorded to give notice to future interest holders of the Association's interpretation of its governing documents including the CC&Rs, for perspective application and imparting notice to current and future lot

owners, board members, realtors and contractors of the same for the future. The Association is hereby authorized to record the same accordingly.

_____

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.

EXHIBIT 2

THE LAW OFFICE @ 456
J. BRYAN JACKSON, P.C. (4488)
Attorney for Plaintiffs
456 West 200 North
P.O. Box 519
Cedar City, Utah 84721-0519
(435) 586-8450
bryan@lawoffice456.com

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR KANE COUNTY, STATE OF UTAH		
ARTHUR W. COCKS and JULIE L. COCKS, Trustees of the Cocks Family Trust, dated August 11, 2006, Plaintiffs, v. SWAIN'S CREEK PINES LOT OWNERS' ASSOCIATION BOARD, Defendants.		**MEMORANDUM DECISION CONSTITUTING, FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 170600114 Judge: Marvin D. Bagley

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 placement[2] 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 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 Sevrs. 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.

EXHIBIT 3

DECLARATIONS OF ESTABLISHMENT OF

PROTECTIVE CONDITIONS, COVENANTS, RESERVATIONS AND

RESTRICTIONS AFFECTING THE REAL PROPERTY KNOWN AS

"SWAINS CREEK PINES UNIT NO. 3"

SITUATED IN THE COUNTY OF KANE, STATE OF UTAH

KNOW ALL MEN BY THESE PRESENTS:

J. B. INVESTMENT CO., a Utah corporation, being the owner of that certain tract of real property located in Sections 26, 27 and 34, Township 38 South, Range 7 West, Salt Lake Meridian, in the County of Kane, State of Utah, and described as follows, to-wit:

> Those subdivided lots numbered 352-711, both inclusive, as shown on that certain map entitled, "Swains Creek Pines Unit 3" as filed in the Office of the County Recorder of Kane County, Utah, on March 15, 1977, in Book "S", at Page 81 thereof, as Entry No. 30373,

has established a general plan for the improvement and development of such premises, and does hereby establish the covenants, conditions, reservations and restrictions upon which and subject to which all lots and portions of such lots shall be improved or sold and conveyed by it as owner thereof. Each and every one of these covenants, conditions, and reservations, and restrictions is and all are for the benefit of each owner of land in such subdivision, or any interest therein, and shall inure to and pass with each and every parcel of such subdivision, and shall bind the respective successors in interest of the present owner thereof. These covenants, conditions, reservations, and restrictions are and each thereof is imposed upon such lots, all of which are to be construed as restrictive covenants running with the title to such lots and with each and every parcel thereof, to-wit:

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, built 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 or 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, 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 guest house may be erected, placed, or maintained on any lot in such premises.

2. NO COMMERCIAL RESTRICTIONS.

3. NATIVE GROWTH. The native growth of such premises shall not be permitted to be destroyed or removed except as approved in writing by the reversionary owner hereinafter named. In the event such growth is removed, except as stated above, the reversionary owner may require the replanting or replacement of same, the cost thereof to be borne by the lot owner.

4. TAXES AND GOVERNMENT LIMITATIONS. Any conveyance of such property is made subject to taxes and other assessments, if any, levied or assessed against the property in the year in which it is conveyed and subject to all restrictions and limitations imposed by governmental authority.

5. SEWERS. In the event governmental authority should require the installation of sanitary sewers and appurtenances in part or in all of the subdivision, the purchasers or owners of the lot or lots in the subdivision shall pay his or their proportionate share of the cost and expense of installing the sewer system. This proportionate share will be computed by dividing the total number of lots served by such sewer system into the total cost of such system. All building, in lots to be served by such sewer system, must be connected to such system as soon as same is constructed and thereafter further use of septic tanks or other sanitary disposal systems on such lots shall be prohibited. Owners of lots shall pay a reasonable monthly minimum and monthly charge for the use of the sewage system.

6. SETBACK LINES. No building, structure, fence, outbuilding, or appurtenance of any nature shall be located closer than 15 feet from any lot or property line.

7. SIGNS. No billboards or advertising signs of any character shall be erected, placed, permitted or maintained on any lot or improvement thereon except as herein expressly permitted. A name and address sign, the design of which shall, upon request, be furnished to the lot owner by the reversionary owner, shall be permitted. No other sign of any kind or design shall be allowed. The provisions of this paragraph may be waived by the reversionary owner only when in his discretion the same is necessary to promote the sale of property in and the development of the subdivision area. Nothing herein shall be construed to prevent the reversionary owner from erecting, placing, or maintaining sign structures and offices as may be deemed necessary by him for the operation of the subdivision.

8. LETTER AND DELIVERY BOXES. The reversionary owner shall determine the location, color, size, design, lettering and all other particulars of all mail or paper delivery boxes, and standards and brackets and name signs for such boxes in order that the area be strictly uniform in appearance with respect thereto.

9. NUISANCES. No owner of any part of the property will do or permit to be done any act upon his property which may be or is or may become a nuisance.

10. ANIMALS. No animals, birds or fowl shall be kept or maintained on any part of the property, except dogs, cats and pet birds (except parrots) which may be kept thereon in reasonable numbers as pets for the pleasure and use of the occupants but not for any commercial use or purpose. Birds shall be confined in cages.

11. EASEMENTS. Easements and rights-of-way are hereby expressly reserved for the creation, construction and maintenance of utilities, such as gas, water, telephone, telegraph, electricity, sewers, storm drains, public, quasi-public, utility or function deemed necessary or expedient for the public health and welfare. Such easements and rights-of-way shall be confined to the rear six feet of every lot and six feet along the side of every building plot, and along every street of the subdivision.

12. BUILDING PLANS. Plans and specifications for all structures must be submitted to the reversionary owner for written approval as to quality or workmanship and materials, harmony of external design, size and existing structures, and as to location with respect to topography and finish grade elevation prior to the commencement of any construction in such subdivision.

13. ROAD EASEMENTS. No owner of any lot shall convey or grant an easement or right-of-way to be used for the purpose of constructing or maintaining a public road, without the prior consent in writing having been first had and obtained from the reversionary owner.

14. GARBAGE AND REFUSE DISPOSAL. No lot or common area shall be used or maintained as a dumping ground for rubbish. Trash, garbage or other waste shall not be kept except in sanitary containers and shall be installed either underground or screen or placed and kept so as to not be visible from any street or adjacent lot, except during times of refuse collections. No garbage incinerators shall be permitted.

15. MAINTAINING NATURAL DRAINAGE. No construction, diversion or confining of the existing channels through which surface water in time of storms naturally flows upon and across any lot, shall be made by any lot owner in such a manner as to cause damage to other properties.

16. OFFENSIVE ACTIVITY. No noxious or offensive activities shall be carried on upon any lot hereinbefore described or any part or portion thereof, nor shall anything be done thereon which may become an annoyance or nuisance to the occupants of other lots within the subdivision.

17. CHANGES IN GROUND LEVEL. No change in ground level may be made on any lot in excess of one foot from existing grades without the written approval of the environmental control committee obtained prior to the commencement of work.

18. FENCES. No fence shall be erected or maintained upon any lot without the written approval of the reversionary owner having been first obtained. Applications for such approval shall specify the type of fence to be constructed,

the materials to be used, the location of the fence on the lot and such other information as the committee may require. No fence shall be approved unless constructed substantially of natural wood and unless constructed in such a way and in such a location on the lot so as to minimize any detrimental effect which it may have on the natural mountainous setting of the subdivision.

19. LOT OWNERS' ASSOCIATION. For the purpose of providing common community services of every kind and nature required or desired within the subdivision area for the general use and benefit of all lot owners, each and every lot owner, in accepting a deed to or contract to purchase any lot in such premises, agrees to and shall be a member of and be subject to the obligations set forth in the Articles of Incorporation of the Swain's Creek Pines Lot Owners' Association, a Utah nonprofit corporation; said Articles of Incorporation as initially filed in the office of the Utah Secretary of State at Salt Lake City, Utah, reading as follows:

ARTICLES OF INCORPORATION
OF
SWAIN'S CREEK PINES LOT OWNERS' ASSOCIATION
(A Nonprofit Corporation)

- -

We, the undersigned, being natural persons over twenty-one years of age and residents of the State of Utah and acting as incorporators for creating a nonprofit corporation under the laws of the State of Utah, do hereby certify as follows:

ARTICLE I

The name of the corporation shall be and is SWAIN'S CREEK PINES LOT OWNERS' ASSOCIATION.

ARTICLE II

This corporation shall have perpetual existence unless sooner dissolved in accordance with the laws and statutes of the State of Utah.

ARTICLE III

The purposes for which said nonprofit corporation is organized are as follows:

1. To develop, manage and control the facilities to provide the owners of lots in the hereinafter designated subdivisions with those services desirable and necessary to the health and well being of such owners and to the enhancement and preservation of the recreational and scenic values essential to a proper enjoyment of such subdivision lots by such owners; said subdivisions being identified and designated as (a) Swain's Creek Pines-Unit No. 1 and Swain's Creek Pines-Unit No. 2, each being Utah subdivisions presently platted and of record in the County of Kane, State of Utah, and (b) any other subdivisions, adjacent to said subdivisions, acquired and/or subdivided by J. B. Investment Company, a Utah corporation, for the use and benefit of the owners of lots within said subdivision areas.

2. To acquire, own, manage and control culinary water facilities and the distribution of water to owners of lots within such subdivisions.

3. To acquire, own, manage and control the facilities necessary to provide garbage collection, fire protection, airport and other like services to the owners of lots within such subdivisions and to perform all acts necessary to provide such services.

4. To negotiate for, promote, manage and control recreational facilities for the use and benefit of such lot owners.

5. To make assessments to pay for services provided to lot owners, real and personal property taxes, insurance and other reasonable expenses incurred by the corporation.

811

6. To obtain, through negotiation and agreement, access to property, in the area so such subdivisions, for the recreational use of the members of the corporation and to grant grazing rights and other rights (not inconsistent with the enjoyment and use for its members) of property owned by it in exchange for the use by its members of other and adjoining property for the recreational pursuit of its members.

7. To take such reasonable measures as may preserve the natural state of the common areas of said subdivisions and to reduce and eliminate fire hazards.

8. To adopt and enforce reasonable rules and regulations governing the use of said subdivision lots and any other properties and facilities under its jurisdiction.

9. The foregoing objects and powers are in addition to any other and further powers authorized by the Utah Nonprofit Corporation Act.

ARTICLE IV

Membership in this corporation shall consist of the owners of lots in the hereinbefore referred to subdivisions. One voting membership shall be issued for each lot within said subdivisions regardless of the number of persons or parties having a legal or equitable interest in said subdivision lot. Membership in said corporation shall be appurtenant to the lots for which they are issued and shall be automatically transferred when the legal or equitable ownership to the lots are transferred. In cases where more than one person or party owns a lot within said subdivisions and less than all of the owners thereof are present at any annual or special meeting, the owner or owners present at any such meeting shall be entitled to cast the one vote appurtenant to such lot. "Owners", as used herein, is defined to be those individuals, corporations or other legal entities listed on the records of the County Recorder of Kane County, Utah as owning the legal title to a lot in any subdivision in such area and any individual, corporation or other legal entity receiving a Deed to or Contracting to purchase any lot in any subdivision in such area, whether or not such Deed or Contract of purchase has been duly and regularly recorded on the records of said County Recorder. Anything to the contrary herein contained notwithstanding, owners of lots in Swain's Creek Pines-Unit No. 1 are not now and shall not automatically become members of this corporation. However, it is intended that all of such owners shall be invited to voluntarily become members of this corporation.

ARTICLE V

The governing board of said corporation shall initially consist of three trustees. One of the trustees shall be designated as chairman, one as vice-chairman and one as secretary and treasurer. The initial Board of Trustees shall serve until the first annual meeting of the corporation and until their successors are duly elected and qualified. At the first election of trustees, two trustees shall be elected for a term of one year (one to be designated as vice-chairman and one to be designated as secretary and treasurer), and one trustee shall be elected for a term of two years, (to be designated as chairman), and until their successors have been duly elected and qualified. Thereafter, the trustees elected by the membership, to fill expiring terms, shall serve for a period of two years and until their successors have been duly elected and qualified.

The governing board shall include at least one trustee from each platted and recorded subdivision unit within the area, but each trustee shall be elected by a majority of all of the voting members in attendance at any annual or special membership meeting held for such purpose; provided, however, that this provision shall not be operative as to Swain's Creek Pines-Unit No. 1, unless and until the owners of all lots in said subdivision voluntarily consent to become members of this corporation.

812

ARTICLE VI

Assessments shall be levied by the corporation upon the lot owners for corporate purposes. In the event any such assessment is not paid, the same shall become a lien upon the real property of such lot owners in the subdivision or development. The lien of a mortgage or deed of trust placed upon any lot for the purpose of permanent financing of a residence or other improvement thereon shall be superior to any such lien as provided for herein.

ARTICLE VII

The corporation shall hold an annual meeting of the members on May 1st of each year or, if such day be a Sunday or legal holiday, on the first day thereafter that is not a Sunday or a legal holiday. Other membership meetings may be held at such time and place as the governing board shall determine. Meetings of members shall be called by the governing board to consider corporation matters upon the petition of at least fifteen percent (15%) of the outstanding voting memberships of said corporation.

ARTICLE VIII

The initial governing board shall consist of:

NAME	OFFICE
Keith Christensen	Trustee-Chairman
L. Derral Christensen	Trustee-Vice-Chairman
Barbara Christensen	Trustee-Secretary/Treasurer

ARTICLE IX

The initial principal office of the corporation is 372 West Main, Delta, Utah 84624. The registered agent at such address is Thorpe Waddingham.

ARTICLE X

The name and address of each incorporator is as follows:

NAME	ADDRESS
Keith Christensen	826 South 600 West #27 Provo, Utah 84601
L. Derral Christensen	372 West Main Delta, Utah 84624
Barbara Christensen	372 West Main Delta, Utah 84624

IN WITNESS WHEREOF, we, the incorporators hereinbefore named, have hereunto set our hands this 24th day of May, A.D., 1974.

s/Keith Christensen
Keith Christensen

s/L. Derral Christensen
L. Derral Christensen

s/Barbara Christensen
Barbara Christensen

813

STATE OF UTAH)
: ss:
COUNTY OF MILLARD)

KEITH CHRISTENSEN, L. DERRAL CHRISTENSEN and BARBARA CHRISTENSEN, being first duly and severally sworn on oath, depose and say: That they are the persons who signed the foregoing document as incorporators, and that the statements therein contained are true.

s/Keith Christensen
Keith Christensen

s/L. Derral Christensen
L. Derral Christensen

s/Barbara Christensen
Barbara Christensen

Subscribed and sworn to before me this 24th day of May, A.D., 1974.

My Commission Expires:

9/9/77

s/Jetta B. Swalberg
Notary Public
Residing at Delta, Utah

20. SUBJECT TO LAWS, ORDINANCES, ETC. OF POLITICAL SUBDIVISIONS. Said subdivision and each of the lots thereof shall be subject to any and all rights and privileges which the County of Kane, State of Utah, may have acquired through dedication or the filing and recording of maps and plats of the subdivided areas, as authorized by law and provided further, that all activities carried on by the owners of any subdivision lot shall be in strict conformity with all laws, statutes, ordinances, rules and regulations of the United States of America, the State of Utah and the County of Kane, Utah.

21. REVERSIONARY OWNER. The reversionary owner herein metioned is J. B. Investment Company, by and through its President, L. Derral Christensen and his successors in office as such. The reversionary owner shall have the right to grant and convey any and all its rights to enforce these covenants, conditions, reservations, and restrictions to the Swain's Creek Pines Lot Owners' Association, at such time as in the sole judgment of the reversionary owner the Lot Owners' Association is ready to undertake the obligation of enforcing them. Upon such conveyance and grant, the said Lot Owners' Association shall have and shall succeed to all rights and duties with the same powers as if the Association had been named as reversionary owner herein.

22. REMEDIES FOR VIOLATIONS. In the event of a violation or breach of any of these covenants, conditions, reservations and restrictions, the reversionary owner or the owner or owners of another lot in said subdivision or any of them, acting individually or severally, shall have the right to proceed at law or in equity to compel compliance with the provisions herein set forth or to prevent the violation or breach of any provision hereof. In addition, to the foregoing right, the reversionary owner shall have the right, whenever there shall have been build on any lot any structure which is in violation of any of the provisions set forth herein, to enter upon the lot where such violation exists and summarily abate or remove the same at the expense of the owner, and further, any such entry and abatement or removal shall not be deemed to be a trespass.

The reversionary owner may employ counsel to enforce any of the foregoing covenants, conditions, reservations or restrictions, or reentry, by reason of such breach and should he do so, all costs incurred in such enforcement, including a reasonable fee for counsel, shall be paid by the owner of such lot or lots and the reversionary owner and/or lot owners, as the case might be, shall have a lien upon such lot or lots to secure payment of all such accounts.

No delay or omission on the part of the reversionary owner or the owners of other lots in such premises in exercising any rights, power, or remedy herein provided, in the event of any breach of the covenants, conditions, reservations, or restrictions herein contained, shall be construed as a waiver thereof or acquiescence therein, and no right of action shall accrue nor shall any action be brought or maintained by anyone whatsoever against the reversionary owner for or on account of its failure to bring any acion on account of any breach of

these covenants, conditions, reservations, or restrictions, or for imposing restrictions herein which may be unenforceable by the reversionary owner.

The breach of any of the foregoing covenants, conditions, reservations, or restrictions or any reentry by reason of such breach, shall not defeat or render invalid the lien or any mortgage or deed of trust made in good faith for value as to any lot or lots or portions of lots in such premises, but these covenants, conditions, reservations, and restrictions shall be binding upon and effective against any such mortgage or trustee or owner thereof, whose title thereto or whose grantor's title is or was acquired by foreclosure, trustee's sale, or otherwise.

23. AMENDMENT. J. B. Investment Company hereby reserves the right to alter or amend these covenants at any time prior to the conveyance or sale by it of any lots or parcels contained within said subdivision and thereafter with the unanimous written consent of all lot owners.

24. TERMINATION. All of the foregoing covenants, conditions, reservations, and restrictions shall continue and remain in full force and effect at all times as against the owner of any lot in such premises, regardless of how he acquired title, until the commencement of the calendar year 2000, on which date these covenants, conditions, reservations, and restrictions shall terminate and end, and thereafter be of no further legal or equitable effect on such premises or any owner thereof; provided, however, that these covenants, conditions, reservations, and restrictions shall be automatically extended for a period of ten years, and thereafter in successive ten-year periods, unless on or before the end of one of such extension periods or the base period the owners of a majority of the lots in the subdivision shall by written instrument, duly recorded, declare a termination of the same. In the event the provisions hereunder are declared void by a court of competent jurisdication by reason of the period of time herein stated for which the same shall be effective, then and in that event such time shall be reduced by such court, to a period of time which shall not violate any rule against perpetuities as set forth in the laws of the State of Utah, or otherwise effective in said State.

25. VALIDITY. It is understood and agreed that if any section, part, clause or word of this Declaration be declared by judicial decree of a court of competent jurisdiction to be void, or any section, part, clause or word of this Declaration be made inoperative by any legislative enactment, such decree or enactment shall not effect the other sections, parts, clauses or words contained herein, which shall continue to bind the parties hereto, or any of them, their and each of their heirs, devisees, executors, administrators, successors, assigns, and grantees.

IN WITNESS WHEREOF, J. B. Investment Company, a Utah corporation, has caused this instrument to be executed by its duly authorized officer, and its corporate seal to be hereto affixed this 3rd day of May, A.D., 1977.

J. B. INVESTMENT COMPANY

BY _____
L. Derral Christensen, President

STATE OF UTAH)
: ss:
COUNTY OF MILLARD)

On this 3rd day of May, A. D., 1977, personally appeared before me L. DERRAL CHRISTENSEN, who, being by me duly sworn, did say that he is the President of J. B. Investment Company, a Utah corporation, and that said instrument was signed on behalf of said corporation by authority of a resolution of its Board of Directors, and said L. Derral Christensen acknowledged to me that said corporation executed the same.

_____
Notary Public
Residing at Delta, Utah
My Commission
Expires: January 9, 1978

EXHIBIT 4

SWAINS CREEK PINES LOT OWNERS ASSOCIATION ("ASSOCIATION")
RECREATIONAL VEHICLE/TRAILER POLICY ("RV RESOLUTION")

RESOLUTION AND RULE OF THE BOARD OF THE DIRECTORS

WHEREAS the Board of Directors of the Association is charged with the responsibility of managing and controlling the facilities to provide the owners of lots in the designated subdivisions with those services desirable and necessary to the health, safety and well-being of such owners and to the enhancement and preservation of the recreational and scenic values essential to the proper enjoyment of such subdivision lots by the lot owners.

WHEREAS the Board has the duty to administer the enforcement of the protecting conditions, covenants, reservations and restrictions, and to this end shall have the power to adopt and enforce reasonable rules and regulations governing the use of lots and any other properties and facilities under its jurisdiction.

WHEREAS the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions affecting the Real Property known as "Swains Creek Pines Unit No. 1" were recorded in the records of the Kane County Recorder's Office 8-4-1969, sometimes referred to as "Swains Creek Pines Unit 1A" states:

Conditions A:

The Conditions under which all lots are to be sold and held are in general that they will be used, built 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 or abuse and from undesirable commercialism, and specifically but not in limitation:

(1) As single family residence lots not subject to further subdivision or partitions by sale, but each lot shall be re-sold intact when sold.

(2) Subject to strict observance of all State, County and Tract laws, statutes, ordinances, rules and regulations, and securing proper permits before:
   (a) Putting any tent, camper, shelter, cabin or house on the lot;
   (b) Erecting or installing any toilet, bathroom, laundry, or other outbuilding.

Reservations C:

Reservations hereby declared and agreed to by and between the parties are:

(1) The use of all of this land for single family, residential, mountain cabin, recreational occupancy;

Restrictions D:

(2) No trailer of less than 30 feet may be placed permanently on any lot and trailer must be metal finished and of good exterior quality.

(3) No tents, shelters or campers may be brought onto any lot and left longer than thirty (30) days.

WHEREAS (a) the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions affecting the Real Property known as "Swains Creek Unit No. 1" were recorded in the records of the Kane County Recorder's Office 10-28-1976;

(b) the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions affecting the Real Property known as "Swains Creek Pines Unit No.2" were recorded in the records of the Kane County Recorder's Office 6-12-1974;

(c) the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions affecting the Real Property known as "Swains Creek Pines Unit No. 3" were recorded in the records of the Kane County Recorder's Office 5-17-1977;

(d) the property owners of "Swains Creek Pines Unit No 4" (established by a plat recorded in the records of the Kane County Recorder's Office 09-11-1989) agreed to abide by the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions affecting the Real Property known as "Swains Creek Pines Unit No. 1" were recorded in the records of the Kane County Recorder's Office 10-28-1976; and

(e) the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions affecting the Real Property known as "Harris Spring Ranches" were recorded in the records of the Kane County Recorder's Office 4-17-1978.

WHEREAS Section 1 of the Declarations of Swains Creek Pines Units 1, 2, 3, 4 and Harris Spring Ranches state as follows:

> "No improvement or structure whatever, other than a **first class private dwelling house**, patio walls, swimming pool, and customary outbuildings, garage, carport, servant's quarters, or guest house may be erected, placed, or maintained on any lot in such premises."
>
> (Emphasis added)

WHEREAS certain recreational vehicles ("RV") and/or trailers within Swains Creek Pines Unit 1A are in violation of the Declarations for being less than 30 feet in length;

WHEREAS recreational vehicles ("RV") and/or trailers within Swains Creek Pines Units 1, 2, 3, 4 and/or the Harris Spring Ranches are in violation of Declarations for not being a "first class private dwelling house";

WHEREAS such RVs and/or trailers are not grandfathered and are not legally conforming under the Swains Creek Pines 1A Declarations or the Swains Creek Pines Units 1, 2, 3, 4 and Harris Spring Ranches Declarations as such RVs and/or trailers have always been non-conforming and in violation;

WHEREAS the Board desires to clarify the Swains Creek Pines Unit 1A Declarations and the Swains Creek Pines Units 1, 2, 3, 4 and Harris Spring Ranches Declarations by adopting a definition of what constitutes an RV and/or trailer and prohibiting future proliferation of non-conforming RV and/or trailer placements;

WHEREAS the current Board anticipates that determination on the type of enforcement action, if any, against existing non-conforming RV and/or trailer placements may be made sometime after the incoming Board is seated in January 2016 and the adoption of this RV Resolution and Rule is not intended to imply acceptance, exception, waiver or exemption for existing, non-conforming RVs and/or Trailers or to preclude future boards from taking action.

NOW THEREFORE, BE IT RESOLVED that the following Rule be adopted for all phases/units of Swains Creek Pines:

1. A trailer shall have the same definition as an RV.

2. An RV and/or trailer is defined as:

   "A motor vehicle or trailer equipped with living space and amenities found in a home which may include one or more of the following: a kitchen, bathroom, bedroom, living room, water or sewer; including, but not limited to, a camper van, motor home, travel trailer, fifth wheel trailer, pop up trailer, truck camper and slide-in camper."

3. A dwelling house is defined as:
   "A building or structure, or portion of a building or structure, occupied as, designed as, or intended for occupancy as a residence." An RV or trailer is not a dwelling house.

BE IT FURTHER RESOLVED that the following Rule be adopted for Swains Creek Pines Unit 1A:

4. All RV's and/or trailers must be metal finished and of good exterior quality.
5. Only RVs or trailers 30 feet or more may be placed permanently on any lot.
6. The placement of any RV or trailer must conform to all state, county & local regulations, as well as the Swains Creek Pines Architectural Standards.
7. Prior to permanently placing an RV or trailer of 30 feet or more. an Architectural Request must be submitted and approved by the Architectural Committee
8. No RV and/or trailer less than 30 feet may be placed for more than 30 days in any calendar year.
9. Only one (1) RV or trailer may be located on a lot.

BE IT FURTHER RESOLVED that the following are the only exceptions to the RV Rule in Swains Creek Pines Units 1A:

10. An RV or trailer less than 30 feet in length may be utilized while a cabin is under construction for up to one (1) year with a valid building permit from Kane County.
11. Prior to placing an RV or trailer during construction, an Architectural Request must be submitted and approved by the Architectural Committee.
12. One (1) guest RV or trailer may be located on a lot for no more than 30 days in any calendar year.

BE IT FURTHER RESOLVED that the following Rule be adopted for Swains Creek Pines phases/units 1, 2, 3, 4 and Harris Spring Ranches:

13. An RV and/or trailer is not considered a "first class private dwelling house" and any new placement of an RV or trailer is prohibited from the date of the signing of this RV Resolution.

BE IT FURTHER RESOLVED that the Board has determined that the creation of a new site/pad or placement of an RV and/or trailer, with or without hook-ups, is prohibited in Swains Creek Pines Units 1, 2, 3, 4 and Harris Springs Ranches from the date of the signing of this RV Resolution and Rule.

BE IT FURTHER RESOLVED that the following are the only exceptions to the RV Rule in Swains Creek Pines Units 1, 2, 3, 4 and Harris Springs Ranches:

14. An RV or Trailer can be located on a lot with an existing cabin.
15. An RV or Trailer may be utilized while a cabin is under construction for up to one (1) year with a valid building permit from Kane County.
16. The placement of any RV or trailer must conform to all state, county & local regulations, as well as the Swains Creek Pines Architectural Standards.
17. Prior to placing an RV or trailer during construction, an Architectural Request must be submitted and approved by the Architectural Review Committee.
18. Only one (1) RV or Trailer may be located on a lot during the exception period.
19. One (1) guest RV or trailer may be located on a lot without a cabin for no more than 30 days in any calendar year.

BE IT FURTHER RESOLVED that FUTURE placement of non-conforming RVs and/or trailers in all phases/units of Swains Creek Pines will be prohibited from the date of the signing of this RV Resolution and Rule.

This RV Resolution and Rule has been duly adopted by the Board of Directors by way of majority vote at the October 24th, 2015 meeting of the Board of Directors.

Signed: s/s Charles Costa
Chairman

Signed: s/s Cheryl Case
Secretary

EXHIBIT 5

SWAINS CREEK PINES LOT OWNERS ASSOCIATION ("ASSOCIATION")
RECREATIONAL VEHICLE/TRAILER POLICY ("RV RESOLUTION")

REVISED RESOLUTION AND RULE OF THE BOARD OF THE DIRECTORS
DECEMBER 14, 2015

WHEREAS the Board of Directors of the Association is charged with the responsibility of managing and controlling the facilities to provide the owners of lots in the designated subdivisions with those services desirable and necessary to the health, safety and well-being of such owners and to the enhancement and preservation of the recreational and scenic values essential to the proper enjoyment of such subdivision lots by the lot owners.

WHEREAS the Board has the duty to administer the enforcement of the protecting conditions, covenants, reservations and restrictions, and to this end shall have the power to adopt and enforce reasonable rules and regulations governing the use of lots and any other properties and facilities under its jurisdiction.

WHEREAS the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions affecting the Real Property known as "Swains Creek Pines Unit No. 1" were recorded in the records of the Kane County Recorder's Office 8-4-1969, sometimes referred to as "Swains Creek Pines Unit 1A" states:

Conditions A:

The Conditions under which all lots are to be sold and held are in general that they will be used, built 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 or abuse and from undesirable commercialism, and specifically but not in limitation:

(1) As single family residence lots not subject to further subdivision or partitions by sale, but each lot shall be re-sold intact when sold.
(2) Subject to strict observance of all State, County and Tract laws, statutes, ordinances, rules and regulations, and securing proper permits before:
  (a) Putting any tent, camper, shelter, cabin or house on the lot;
  (b) Erecting or installing any toilet, bathroom, laundry, or other outbuilding.

Reservations C:

Reservations hereby declared and agreed to by and between the parties are:

(1) The use of all of this land for single family, residential, mountain cabin, recreational occupancy;

Restrictions D:

(2) No trailer of less than 30 feet may be placed permanently on any lot and trailer must be metal finished and of good exterior quality.
(3) No tents, shelters or campers may be brought onto any lot and left longer than thirty (30) days.

WHEREAS (a) the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions affecting the Real Property known as "Swains Creek Unit No. 1" were recorded in the records of the Kane County Recorder's Office 10-28-1976;

(b) the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions affecting the Real Property known as "Swains Creek Pines Unit No.2" were recorded in the records of the Kane County Recorder's Office 6-12-1974;

(c) the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions affecting the Real Property known as "Swains Creek Pines Unit No. 3" were recorded in the records of the Kane County Recorder's Office 5-17-1977;

(d) the property owners of "Swains Creek Pines Unit No 4" (established by a plat recorded in the records of the Kane County Recorder's Office 09-11-1989) agreed to abide by the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions affecting the Real Property known as "Swains Creek Pines Unit No. 1" were recorded in the records of the Kane County Recorder's Office 10-28-1976; and

(e) the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions affecting the Real Property known as "Harris Spring Ranches" were recorded in the records of the Kane County Recorder's Office 4-17-1978.

WHEREAS Section 1 of the Declarations of Swains Creek Pines Units 1, 2, 3, 4 and Harris Spring Ranches state as follows:

> "No improvement or structure whatever, other than a **first class private dwelling house**, patio walls, swimming pool, and customary outbuildings, garage, carport, servant's quarters, or guest house may be erected, placed, or maintained on any lot in such premises."
>
> (Emphasis added)

WHEREAS certain recreational vehicles ("RV") and/or trailers within Swains Creek Pines Unit 1A are in violation of the Declarations for being less than 30 feet in length;

WHEREAS recreational vehicles ("RV") and/or trailers within Swains Creek Pines Units 1, 2, 3, 4 and/or the Harris Spring Ranches are in violation of Declarations for not being a "first class private dwelling house";

WHEREAS such RVs and/or trailers are not grandfathered and are not legally conforming under the Swains Creek Pines 1A Declarations or the Swains Creek Pines Units 1, 2, 3, 4 and Harris Spring Ranches Declarations as such RVs and/or trailers have always been non-conforming and in violation;

WHEREAS the Board desires to clarify the Swains Creek Pines Unit 1A Declarations and the Swains Creek Pines Units 1, 2, 3, 4 and Harris Spring Ranches Declarations by adopting a definition of what constitutes an RV and/or trailer and prohibiting future proliferation of nonconforming RV and/or trailer placements;

WHEREAS the current Board anticipates that determination on the type of enforcement action, if any, against existing non-conforming RV and/or trailer placements may be made sometime after the incoming Board is seated in January 2016 and the adoption of this RV Resolution and Rule is not intended to imply acceptance, exception, waiver or exemption for existing, nonconforming RVs and/or Trailers or to preclude future boards from taking action.

NOW THEREFORE, BE IT RESOLVED that the following Rule be adopted for all phases/units of Swains Creek Pines:

1. A trailer shall have the same definition as an RV.

2. An RV and/or trailer is defined as:

   "A motor vehicle or trailer equipped with living space and amenities found in a home which may include one or more of the following: a kitchen, bathroom, bedroom, living room, water or sewer; including, but not limited to, a camper van, motor home, travel trailer, fifth wheel trailer, pop up trailer, truck camper and slide-in camper."

3. A dwelling house is defined as: "A building or structure, or portion of a building or structure, occupied as, designed as, or intended for occupancy as a residence." An RV or trailer is not a dwelling house.

BE IT FURTHER RESOLVED that the following Rule be adopted for Swains Creek Pines Unit 1A:

4. All RV's and/or trailers must be metal finished and of good exterior quality.
5. Only RVs or trailers 30 feet or more may be placed permanently on any lot.
6. The placement of any RV or trailer must conform to all state, county & local regulations, as well as the Swains Creek Pines Architectural Standards.
7. Prior to permanently placing an RV or trailer of 30 feet or more, an Architectural Request must be submitted and approved by the Architectural Committee.
8. No RV and/or trailer less than 30 feet may be placed for more than 30 days in any calendar year.
9. Only one (1) RV or trailer may be located on a lot.

BE IT FURTHER RESOLVED that the following are the only exceptions to the RV Rule in Swains Creek Pines Units 1A:

10. An RV or trailer less than 30 feet in length may be utilized while a cabin is under construction for up to one (1) year with a valid building permit from Kane County.
11. Prior to placing an RV or trailer during construction, an Architectural Request must be submitted and approved by the Architectural Committee.
12. For those lots with existing RVs, one (1) guest RV or trailer may be located on a lot for no more than 30 days in any calendar year.

BE IT FURTHER RESOLVED that the following Rule be adopted for Swains Creek Pines phases/units 1, 2, 3, 4 and Harris Spring Ranches:

13. An RV and/or trailer is not considered a "first class private dwelling house" and any new placement of an RV or trailer is prohibited from the date of the signing of this RV Resolution.

BE IT FURTHER RESOLVED that the Board has determined that the creation of a new site/pad or placement of an RV and/or trailer, with or without hook-ups, is prohibited in Swains Creek Pines Units 1, 2, 3, 4 and Harris Springs Ranches from the date of the signing of this RV Resolution and Rule.

BE IT FURTHER RESOLVED that the following are the only exceptions to the RV Rule in Swains Creek Pines Units 1, 2, 3, 4 and Harris Springs Ranches:

14. An RV or Trailer can be located on a lot with an existing cabin.
15. An RV or Trailer may be utilized while a cabin is under construction for up to one (1) year with a valid building permit from Kane County.
16. The placement of any RV or trailer must conform to all state, county & local regulations, as well as the Swains Creek Pines Architectural Standards.
17. Prior to placing an RV or trailer during construction, an Architectural Request must be submitted and approved by the Architectural Review Committee.
18. Only one (1) RV or Trailer may be located on a lot during the exception period.
19. For those lots with existing RVs, one (1) guest RV or trailer may be located on a lot without a cabin for no more than 30 days in any calendar year.

BE IT FURTHER RESOLVED that FUTURE placement of non-conforming RVs and/or trailers in all phases/units of Swains Creek Pines will be prohibited from the date of the signing of this RV Resolution and Rule.

This RV Resolution and Rule has been duly adopted by the Board of Directors by way of majority vote at the December 14th, 2015 meeting of the Board of Directors.

Signed: s/s Charles Costa
Chairman

Signed: s/s Cheryl Case
Secretary

EXHIBIT 6

SWAINS CREEK PINES LOT OWNERS ASSOCIATION
RESOLUTION REGARDING RECREATIONAL VEHICLES

This Resolution is made the 1st day of October, 2016, by the Board of Directors (referred to generally as the "Board") for SWAINS CREEK PINES LOT OWNERS ASSOCIATION (the "Association").

WHEREAS, for purposes of this Resolution, the Board defines a "Recreational Vehicle" ("RV(s)") as: "a motor vehicle or trailer equipped with living space and amenities found in a home which may include a kitchen, bathroom, bedroom, living room, water and sewer; including, but not limited to, a camp trailer, motor home, travel trailer, fifth wheel trailer, pop up trailer, and slide-in camper";

WHEREAS, the Board finds that the following provisions do not allow for placement of RV's on lots within the Association[1]: Section D of the Declaration of Establishment of Protective Conditions, Covenants, Reservations and Restrictions Affecting the Real Property Known as "Swains Creek Pines Unit No. 1", also known as "Unit 1 Amended", recorded August 4, 1969; Section 1 of the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions Affecting the Real Property Known as "Swains Creek Unit No. 1", also known as "Blackman Hill", recorded October 28, 1976; Section 1 of the Declaration of Establishment of Protective Conditions, Covenants, Reservations and Restrictions Affecting the Real Property Known as "Swains Creek Pines Unit No. 2", recorded June 12, 1974; Section 1 of the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions Affecting the Real Property Known as "Swains Creek Pines Unit No. 3", recorded May 17, 1977; Section 1 of the Establishment of Protective Conditions, Covenants, Reservations and Restrictions Affecting the Real Property Known as "Harris Spring Ranches", recorded April 17, 1978; and Section 1 of the Declarations of Establishment of Protective Conditions, Covenants, Reservations and Restrictions Affecting the Real Property Known as "Swains Creek Pines Unit No. 1" which the property owners of the Real Property Known as "Swains Creek Pines Unit No. 4", established by a plat recorded September 11, 1989, agreed to abide by as recorded on October 28, 1976 (referred to collectively as "CC&Rs");

WHEREAS, the Board after a fair review, acting in good faith, and without conflict of interest finds that that one or more lot owners within the Association have placed nonconforming RVs on their lots within the Association prior to the date of this Resolution ("Prior Non-conforming Lots");

WHEREAS, as the list of all the lots within the Association designated as Prior Non-conforming Lots is attached hereto as Exhibit A;

WHEREAS, the Association seeks to adopt a policy with regard to the placement of RVs

[1] However, the Board finds that the Declaration of Establishment of Protective Conditions, Covenants, Reservations and Restrictions Affecting the Real Property Know as "Swains Creek Pines Unit No. 1" also known as "Unit 1 Amended", recorded August 4, 1969, allows for permanent trailers on the Lots within that Unit, provided said trailers are over 30 feet in length.

on the Prior Non-conforming Lots that is in the best interest of the Association and the Members of the Association;

WHEREAS, on October 1, 2016, a quorum of the Board of the Association met to consider adoption of this Resolution regarding a waiver of enforcement as to placement of RVs on the current Prior Non-conforming Lots within the Association; and

WHEREAS, Utah Code §57-8a-213(1)(b) provides, in pertinent part, that an "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 . . . it is not in the association's best interests to pursue an enforcement action, based upon hardship, expense, or other reasonable criteria;" and

WHEREAS, pursuant to Utah Code §57-8a-213(b), the Board after a fair review, acting in good faith, and without conflict of interest finds that under the particular circumstances described above it is not in the Association's best interests to pursue enforcement action as it relates to the current placement of RVs on the Prior Non-conforming Lots based upon hardship and expense; and

WHEREAS, by electing not to enforce the violation of the current placement of RVs on the Prior Non-conforming Lots does not govern whether there has been a waiver or abandonment of the covenants in the CC&Rs governing RVs (Utah Code §57-8a-213(3)).

NOW THEREFORE, BE IT RESOLVED that, pursuant to Utah Code §57-8a-213, the Association will not pursue enforcement action as it relates to the placement[2] of RVs on the Prior Non-conforming Lots until such time:

(1) The CC&Rs are amended to state otherwise; or

(2) A Prior Non-conforming Lot is sold, whereupon the "Prior Non-conforming Lot" designation will be removed with regard to that 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 limited liability company, corporation, partnership, or other business entity, the sale or transfer of more than 75% of the business entity's share, stock, membership interest, or partnership interests in a twelve (12) month period.

[2] This Resolution not to enforce relates only to the ***placement*** of RVs on the Prior Non-conforming 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 Non-conforming Lots or future placements.

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 next of kin is also not considered a sale. For this purpose, next of kin shall mean the lot owner's closest living relation.

If any provision of this Resolution is determined to be null and void, all other provisions of the Resolution shall remain in full force and effect.

This Resolution of the Association has been duly adopted at the OCTOBER 1, 2016 meeting of the Board of Directors.

Swains Creeks Pines Owners Association

By: _____

Its: CHAIRMAN

Date: 10/01/2016

EXHIBIT 7

DIRECT EXAMINATION

BY MR. JENKINS:

Q. Sir, could you please state your name for the record?

A. Keith S. Christensen.

Q. Is it okay if I call you Keith?

A. It certainly is.

Q. Thank you. Keith, let me ask, are you familiar with the Swain's Creek Pines development?

A. I am.

Q. And how did you become familiar with that?

A. I was involved at Swain's Creek early on, at the very beginning. My father had developed other property in the area. He did some of the property over at Movie Ranch, and then Strawberry Valley. And then Swain's Creek was the last big piece of property that he developed. And he asked me at the time to be involved. I was younger when he did the earlier properties. But Swain's Creek I was involved at the outset.

Q. Okay. And let me step back just a little bit. Your profession at the time you were involved, do you have a profession other than assisting your father with development?

A. I'm not sure I understood the question.

Q. Did you have a profession in addition to or other than assisting your father with the development?

A. Well, at the time that I started I was still in school. I was in college. I had finished high school, and I was

through this with you.

A. I know there are a couple of places. I don't mean to interrupt you.

Q. Okay. No, go ahead. If you can identify them--

A. Well, we've got language about--we got more careful about what people could do. For example, if they were to build, they had to submit plans, building plans in paragraph number 12. Plans and specifications for any structure must be submitted to the revisionary owner and blah, blah, blah. You can read that. But the approval needed to be obtained. That's on page 8--the handwritten number 810.

On page number 811, in article number 3 of the articles of incorporation of the Association, paragraph number one describes what you can and can't do there. And I think it's very clear that the properties were to be used for recreation, mountain recreation cabin sites.

Q. And let me have you look at page number 809, the handwritten 809.

A. 8-0-9?

Q. Yeah.

A. Okay.

Q. And you said something, the Mountain Recreation cabin sites.

A. That's paragraph number one.

Q. Would you mind reading paragraph number one out loud,

you had in [inaudible] when you referred to a cabin?

MR. JACKSON: Objection, foundation, Your Honor.

THE COURT: Sustained.

BY MR. JENKINS:

Q. Okay. Did you assist in the drafting of this document?

A. I was involved with it. I wasn't the lawyer that did it. But I read it, and reviewed it, and talked with the lawyers about it.

Q. Okay. And it was you as the manager that caused this document to actually be recorded with the County and submitted as part of the company documents for this project. Is that correct?

A. That is correct.

Q. Okay. And you had read and understood this document before you did that, correct?

A. That is correct.

Q. And in that process did you form any understanding of what a cabin was intended to be?

A. Yes.

Q. And what was that understanding?

A. It was clear to my father, my mother and I that, as I said before, the provision to allow trailers in Unit 1 was a mistake. So we used the word "cabin, cabins and building" as I understood it then and now. It was clearly intended that only cabins be permitted in this unit.

Q. And there's another phrase within that. It says there should be nothing other than a first-class private dwelling house.

A. Right.

Q. Did you have an understanding of what that meant?

A. Yes.

Q. And what was that?

A. It was it would have to be a cabin, a stick-built, framed building such as a cabin is. It could be a log cabin. It could be structurally stick built, but it had to be a cabin under roof. It couldn't be a trailer.

Q. Okay. Do you recall yourself ever personally approving someone to place an RV in Unit Number 3?

A. Never.

MR. JENKINS: Okay. No further questions, Your Honor.

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. JACKSON:

Q. How are you this morning, Mr. Christensen?

A. I'm good. Thank you.

Q. You indicated that you aren't the one that drafted this, right?

A. That's correct.

Q. In fact, you were still in college?

A. That is accurate.

A. Right.

Q. And then under paragraph 2 of that same document, the only restriction language in the entire document has to do with no commercial restrictions, right?

A. I don't read it that way.

Q. Well, I mean--

A. It says no commercial use, but it also restricts what you can place on the property to first-class mountain cabins, correct?

Q. All right. So I'm going with you here. If that was your intention, if you wanted to restrict RVs and restrict trailers such as you are restricting no commercial restrictions that's set forth in paragraph 2, why wouldn't you just state no RVs, no trailers?

A. Well, if you look at number one, the language in Unit Number 1, it has express language that allows trailers defined as the document defines it, 30 feet or longer, and good exterior [inaudible].

Q. That's in the other document?

A. That's correct. Now you're asking me why we didn't name trailers? Well, we didn't authorize trailers in Unit 2 or 3, or the other projects. But we restricted the use of the property, and we believed that we had done it properly. We believed we were restricting the use of the land as expressly worded in this document in Unit Number 3. You can do certain

things on the land, and that's it.

Q. Well, let's go through this language that you claim is the restriction here. This is under residential use paragraph 1, right?

A. Okay, now what document are we on?

Q. I'm on the CC&Rs in Exhibit Number B, or letter B, which is Unit Number 3.

A. Number B?

Q. It says "residential use" on the first page, paragraph 1.

A. Okay, I'm with you.

Q. All right. So the first sentence basically says that all lots are for residential purposes, right?

A. Correct.

Q. Okay. I mean, that doesn't restrict RVs, does it? Residential purposes?

A. It doesn't talk about an RV there.

Q. Okay. And these are established covenants, conditions and restrictions, and reservations and restrictions upon which the subject to which all lots and portions of said lots shall be improved or sold and conveyed by it as owner thereof. Each and every--the word is each and every one of these covenants, conditions and restrictions, reservations and restrictions is and all are for the benefit of each owner of the land in such subdivision, right?

A. Well, it's not a trailer. It doesn't have wheels on it.

Q. But where does it define a cabin?

A. Do you want me to continue reading?

Q. Yeah. I mean, basically that phrase that you just referred to, it doesn't say it has to be a mountain cabin.

A. It states, "no building"--in continuing, "no building or structure intended for adapted to business use." It was on restricting commercial use.

Q. Right. I mean, that's what it's referring to, isn't it?

A. Then it says, "no improvement or structure whatever, other than a first-class private dwelling house."

Q. So what's a house?

A. I didn't then, and don't now, believe a house is a trailer when you use the word "mountain cabin." A cabin is a cabin. A trailer is a trailer. A duck is a duck, and a horse is a horse. You can say this property is restricted for the use of horses, okay? That doesn't mean you can have a pig farm on it because we didn't restrict it to pigs. That's how I would read this. So I'm telling you it was our intent at the time. We had done Unit 1. People had put some trailers up there, and they were unsightly. And it was clear that that was a mistake, and it was going to kill sales on the rest of the project.

Q. And so what you chose to do--

It could be a pig farm, right?

Q. Right.

A. We're going to have them move it. So we didn't list a pig farm either. And I'm sorry. Honestly, I don't mean to be combative or disrespectful in any way, but I know what we did and why we did it, and I know what we intended. And this language is clear enough to accomplish it. To twist it around and make it something else is just not right.

Q. So the language in here, it says that the foregoing right--"the revisionary owner shall have the right whenever there shall have been built on any lot a structure which is in violation of these provisions as set forth herein to enter upon the lot where such violation exists and summarily abate and remove the same at the expense of the owner," right?

A. Right.

Q. Did you ever do that?

A. Didn't have to while I was there.

Q. So the answer is no, you didn't ever do that?

A. I did not, no.

Q. Was that ever done by any lot owner?

A. Not while I was there.

MR. JACKSON: No other questions, Your Honor.

THE COURT: Re-direct?

RE-DIRECT EXAMINATION

BY MR. JENKINS:

Q. And when did you purchase?
A. In summer of 2015.
Q. Okay. And was a realtor involved with you in that purchase?
A. Yes.
Q. Do you recall who that realtor was?
A. Mike Kenner.
Q. And when you were looking for a lot, was there a particular kind of lot that you were looking for, a purpose for which you intended to use your lot for?
A. Yes. We had a fifth-wheel toy hauler travel trailer. And so we would like to put it on the property.
Q. Okay. And did your realtor--I assume you conveyed that to your realtor, that you wanted to place an RV on whatever lot you were looking for.
A. Absolutely, yeah.
Q. And what did your realtor say to you, if anything?
A. He, right before we--as we got serious with the lot that we found, I have to be honest with you guys. There was some hub-bub - hub-bub is my word - going on about enforcement of CC&Rs, and that trailers may or may not be allowed.
Q. Okay. And when you were looking at the property, did you notice whether there were both RVs and cabins on some lots within the project?
A. Yes. Yeah.

A. We had a general contractor build it for us.
Q. Okay. But you also had a fairly substantial investment into the RV, right?
A. Years before we even bought the property, yes.
Q. And you also indicated that you've been up, and you've gone through the subdivision before you bought it?
A. Yes.
Q. And you gave some sort of a figure in terms of percentages of RVs versus cabins that you saw up there, right?
A. Right.
Q. And you're aware that there's like 600 lots in Swains Creek, right?
A. I am now, yes. Yeah.
Q. So are you saying that you saw 60 cabins--or 60 RVs? Sixty trailers up in that subdivision?
A. I said 10, 15 percent just off the top of my head.
Q. So ten percent of 600 lots would be about 60 RVs. But not every lot up there has a cabin or an RV, right?
A. Correct. There are empty lots.
Q. So you have an idea about how many RVs you saw?
A. I wouldn't venture to guess.
Q. More than 10?
A. Yeah, probably more than 10.
Q. More than 20?
A. I don't know.

that question--those questions if you choose to.

MR. JENKINS: Yeah, I would like to.

RE-DIRECT EXAMINATION

BY MR. JENKINS:

Q. Dan, based on your prior testimony, and correct me if I'm wrong, but as I hear you now, I think you are saying you were hoping maybe you could use an RV. But you came to a conclusion that you could not, and you bought notwithstanding with the conclusion that you couldn't have an RV there?

A. Yeah. The rules said we couldn't.

MR. JENKINS: No further questions.

RE-CROSS EXAMINATION

BY MR. JACKSON:

Q. Was I incorrect in understanding that you actually bought your lot from someone who had used it as an RV lot?

A. Correct. Yes, I did.

Q. Do you know how long they used it as an RV lot?

A. They thought--they had only owned it for like three months.

Q. And so why were they selling it? Did they tell you?

A. They bought it sight-unseen from California. And they didn't appreciate the four-wheelers and the side-by-sides. So they didn't like the noise.

Q. I see. So they sold it because it wasn't what they had bargained for? They were looking for something else?

A. Oh, definitely.

Q. Okay. And do you have any recollection of what type of structures those CC&Rs allowed or prohibited?

A. The CC&Rs clearly state that the property is to have a single-family home on them. It's to have a first-class single-family dwelling on the property.

Q. Okay. And do you recall whether the CC&Rs referred to cabins, or RVs, or any other specific type of structure?

A. Only outer structures, if you wanted, for guests or things like that.

Q. Okay. And with those CC&Rs--strike that. Let me go back. On the vacant lot, do you park an RV on that vacant lot?

A. No, sir. We do not.

Q. And is there a reason you don't?

A. We don't own one.

Q. Okay. And if you did park on RV on that lot, do you think that it would be in compliance with or in violation of the CC&Rs?

A. If it was there for longer than 30 days, it would be in violation.

Q. Okay and is there a time since you purchased that you became aware of owners in Swains Creek, some in favor of RVs and some opposed to RVs?

A. Yes, sir. I'm aware of that.

Q. And about when, if you know, did that discussion

really start to be prevalent at Swains Creek?

A. Seems to me three or four years ago.

Q. Okay. Do you think it was in or around the time that you bought your second lot in 2014, or not?

A. I don't recall.

Q. Okay. When you purchased in Swains Creek was it important to you to buy in a project that did not allow RVs, or was that not important to you?

A. That was important to us.

Q. And why was that?

A. Property values, riff-raff kind of ownership, a lot of reasons like that.

Q. So you were looking forward to buying and living in a community that had cabins, mountain cabins. Is that fair to say?

A. That is correct.

Q. Okay. And have you attended any of the board meetings where the issue between cabins and RVs has been discussed?

A. Yes, sir, I have.

Q. And to the best of your recollection, what were those discussions?

A. They were very heated. People were--I mean, there's people that were opposed to RVs, and people that wanted RVs. So they were very heated normally, and not pleasant meetings.

Q. Okay. And are you aware of whether the Association Board did anything to address the issue to try and dissolve the

Q. Is there a lot of trailers up there?
A. Sir, I have no idea.
Q. Okay. Has there been any riff-raff up in that subdivision?
A. Oh, yes, sir. There's been plenty.
Q. What is it that you mean by riff-raff?
A. People that only come up there on the weekends do not pay attention to the laws of the subdivision and ride their ATVs flying down the road. Do not take care, you know, do not observe the speed limit, partying all night, and doing donuts in the middle of the road where they are tearing up the roads so that the Association pays money to have to be treated to keep the dust down. People that just take their ATV and run through the forest where there's no roads, people that just do not abide by the CC&Rs, the governing rules that protect everybody.
Q. And are you associating those individuals that use ATVs that way as being RV owners?
A. A majority of them are.
Q. There's no cabin owners that have ATVs?
A. Oh, yeah, there's cabin owners. Yes, sir. There's cabin owners that have ATVs, but they abide by the laws of Swains Creek, by the CC&Rs. They abide by the rules. They ride on the road. They don't make their own road. They don't--I'm not saying that there isn't somebody that has caused some problems, but they don't normally ride their ATVs on the runway and things

Q. Okay. Have you known anyone that has had an RV on their lot that then later built the cabin?

A. No.

Q. Okay. Do you recall ever looking at the CC&Rs for Unit Number 3?

A. Yes. We received a copy of the CC&Rs.

Q. And when you say you received a copy, was that at the time you were looking to purchase?

A. It was at purchase.

Q. Okay. And do you recall whether those CC&Rs you reviewed allowed for RVs or not?

A. Only in Unit 1-A.

Q. Okay. And do you recall what kind of structures the CC&Rs required in Unit 3?

A. The kind of structure? It had to be a solid structure. It had to be something that didn't have wheels.

Q. Okay. When was the last time you looked--

A. A cabin.

Q. Yeah. So when you say a cabin, is that word a specific recollection when you say that the CC&Rs referred to a cabin?

A. As a permanent residence as opposed to a mobile one.

Q. Well, I'm just asking if you remember the use of the word "cabin" within the CC&Rs that you reviewed.

A. Yeah, not specifically.

Q. Would it have made a difference to you in buying at

Q. I think your response was that it's about every month that the Association was meeting during the summer months. Is that what your recollection is?

A. I don't remember exactly, but yeah. I'd say yes.

Q. Fairly regularly you were meeting--the Association meetings were fairly common. Is that fair to say?

A. Well the Board meetings were, yeah. And we would have one--and people were--the Board meetings were, you know, would be open to the public during the summer months.

Q. And how often would you and your husband attend?

A. I think my husband attended more often than I did. But occasionally.

Q. Would you say that you attended at least one of those meetings during the summer each year?

A. Yes. Yes.

Q. And the times that you were at the meetings, how often did they discuss this issue with regard to RVs and cabins.

A. I don't recall.

Q. By saying that you don't recall, are you saying that you don't have a recollection of them ever discussing RVs and cabins at any of the Association meetings that you attended?

A. Yeah, I don't really remember. I don't remember if they did or not. I know there was discussion about it, but yeah, I was familiar pretty much with what was going on on the mountain. But I don't remember being at a big discussion about

you know, you had to have a structure. You weren't allowed to have"--

A. Right.

Q. "You weren't allowed to have a cabin or anything that, you know, it had to be a permanent structure, nothing that could roll away." That's what your response was to me. Is that the way you remember it?

A. Yes. That's correct.

Q. And is that what the realtor represented to you?

A. Yes.

Q. So that wasn't something that you read in the CC&Rs?

A. We were told that when we were looking at the property. We were told that from the very beginning? Sorry?

Q. Let me ask the question this way. You were told by the real estate agent, that it was not something that you came to understand by reading the CC&Rs. Is that true?

A. Correct. True.

Q. All right. You were aware that there were trailers up there in the subdivision, but it was in another section. Is that true?

A. True.

Q. You had understood that there's--one of the sections allowed for trailers, but the one that you were in did not allow for trailers. Is that accurate?

A. Yes.

Q. Just for clarification. So Exhibit C is actually an amendment to the articles of incorporation for the Association, which you were referring to happened around 1990?

A. Yes. That's correct.

Q. And then the CC&Rs, if you will look at the CC&Rs, there's also incorporated the articles of incorporation for Swains Creek Pines Lot Owners Association that's somewhat embedded in the CC&Rs. Does that make sense?

A. Yes, sir.

Q. Paragraph 1 is the paragraph that we're all concerned about. In this particular case the CC&Rs make reference to or-- yeah, make reference to said lots to be used, built 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 or abuse. And then it says, "no building or structure intended for or adapted to business purposes, and no apartment house," and goes on after that. Now in your case you were buying a piece of property that had an RV on it?

A. Yes, sir.

Q. Did this concern you, this language that was in the CC&Rs?

A. No. It did not. The reason I was even up there is I had a very good friend of mine who had just purchased a lot up there, oh, earlier that spring of '99. And we took our motor

Honor.

THE WITNESS: I gave copies of all these to the Court months, and months, and months ago when we had depositions.

MR. JACKSON: And it's not introduced as an exhibit, Your Honor. We're not going to introduce it as an exhibit. But it does go to his testimony as to what he recalls about the purchase of the property.

BY MR. JACKSON:

Q. Let me ask you a question this way. Had anybody from the Association, at the time you bought it or afterward, from the time that you owned this property had anybody approached you from the Association saying that you could not have your RV there?

A. The first time we ever heard anything about it was 2015 and 2016, and that's when everything hit the fan and all of a sudden RVs weren't allowed.

Q. Up until that time you had--

A. Never had an issue.

Q. Never had an issue. Nobody had ever brought it to your attention that you couldn't have one there. Do you pay homeowners' dues?

A. Yes.

Q. Every year?

A. Yes, sir.

Q. How much do you pay in homeowners' dues a year?

chain saws, the trailers. I take my dump trailer up. Last year I took my tractor up there and helped clean up a couple of different lots. Good community. Great community of people up there.

Q. How would you describe the condition of your lot compared to lots that have cabins in conjunction with--

A. I've got one of the nicest lots on Swains Creek. It's beautiful. It's very well maintained. I've got beautiful walkways that are 3/4-inch rock graveled. We've got solar lighting that lights them up at night. We've got a beautiful lot. We're lucky. We border the Forest Service. So it's very, very nice. Beautiful.

Q. You take pride, in other words, in your lot?

A. Yes.

Q. And for years you've maintained these lots?

A. Yes, sir.

Q. You've also helped the Association in the upkeep in keeping the rest of the subdivision kept looking nice.

MR. JENKINS: Objection, relevance.

THE COURT: There was a witness that you put on that talked about riff-raff. So I guess I'll overrule that.

BY MR. JACKSON:

Q. With regard to these activities, do you feel that the Association up there is a close-knit group of people that have in mind to trying to do everything they can to better this

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. JENKINS:

Q. Todd, let me ask about your lot, and I'm going to maybe paraphrase some things. I want to make sure I got your testimony accurately. You bought your lot 562, and it had an RV on it at the time you purchased it. Is that correct?

A. That's correct.

Q. All right. And you read the CC&Rs which Mr. Jackson went through with you, and it talked about a mountain cabin. But if I understand right, you didn't feel concerned about your particular lot because you already had an RV on it?

A. The way that I read that information was if you were going to build, this is what it had to be. But I wasn't building anything. So probably bad on my part. But I was also told by the real estate agent that we went through that we were legal.

Q. Okay. So fair clarification. Let me ask a little bit about that. So it was your understanding if someone actually were to put a structure together, it needed to be a cabin up there. Is that what you're saying?

A. Yes. If you were going to build, it needed to be a-- you couldn't build a rental or, you know, the things that were in here as far as commercial or anything else is the way that I understood it, and that I was explained it.

Q. Okay. So when you felt assured as to the lot you

purchased, lot 562, that you could continue with an RV there, is it because an RV existed there when you purchased? And so you felt comforted that you could continue with an RV thereafter?

A. Well, there were RVs all over the mountainside in that subdivision. So I wasn't confident just in my lot. I was confident in buying a future lot and being able to use one as well.

Q. Okay. So do you have any understanding of how many phases or units have been developed up at Swains Creek?

A. I believe four. To answer your question, I'm not real familiar.

Q. Do you know where the boundary lines are between those various units?

A. No. I do not.

Q. Do you know if any of those units specifically allow in the CC&Rs for RVs and trailers?

A. I understand after 2016, when all of this started coming up, that Unit 1 was supposedly the only one they were claiming that allowed for them.

Q. Okay. But at the time you purchased, you weren't aware--

A. No, sir. I wasn't aware of that.

Q. Okay. And you wouldn't know today where unit 1 is in relation to where your lot is, do you?

A. I've got an approximate location, but I can't tell you

was removed, and something was put in its place?

A. We actually ended up with the lot next door which had a 1,200-gallon concrete, legal, tested. So that's the system that we use.

Q. Okay. All right.

A. Yes.

MR. JENKINS: I don't have any other questions.

THE COURT: Re-direct?

RE-DIRECT EXAMINATION

BY MR. JACKSON:

Q. You indicated that you bring up a fairly nice trailer, right?

A. Yes, sir.

Q. It's because of the business that your wife is in, it's not the same trailer every year?

A. No. It's a brand-new trailer every year.

Q. So every year you bring up a new trailer?

A. Yes.

Q. And you've been doing that for how long?

A. Probably at least, I'd say 16 years.

MR. JACKSON: No other questions.

THE COURT: Okay. You can step down. Can he be excused?

MR. JACKSON: Yes.

THE COURT: All right. You are free to go, or free to stay. I just want to admonish you not to talk about the case

although 563 says Eileen Blake, but you're saying you guys own that one as well?

A. That lot was part of my inheritance. When my parents passed away I received that property. And I understood it was fine. I did turn that in to the Board, and they let it go. But it was okay, because it was through the family.

Q. Okay. So do you personally have a problem if the Association says to owners of lots currently using them for RVs that upon re-sale to a third party it should be used as a cabin lot thereafter?

A. I have concerns about that. I can't say I--I don't like telling somebody that has a cabin that they can use an RV, get rid of their cabin sort of thing. And they can't get rid of their cabin, but they can get rid of my home. That's kind of the way I'm looking at it, is I look at it as a home to me. I don't look at it as just a--that is my second home. And I've been able to use it, and I should be able to sell it as what I use it for. And that's how we've developed our property. And I feel that part of it, am I angry? No. I just feel like things are--have been going the wrong direction. And I think nobody--if people have that and it's developed that way, just like me, I purchased that property and the RV on it attached and set up. And I felt like that's how I should be able to sell it, and that shouldn't have to change, is my personal opinion.

Q. Okay. Let me have you look at Exhibit B in that white

about them.

Q. They've never approached you about it either. Is that right?

A. No, up until they sent that resolution.

Q. This was the resolution that--how did that come to your attention?

A. We got it in the mail.

Q. You were mailed a copy of the resolution? Let me have you--there's a white binder in front of you there. I'm going to have you look at Exhibit D, identified as Exhibit D in that binder.

A. I'm sorry?

Q. Is there a white binder in front of you there?

A. Yes.

Q. There's tabs there. Look under D.

A. Okay.

Q. And if you will look through there, there will be a document right behind D. Can you take a look at that?

A. Which tab?

Q. D, the letter D, as in dog.

A. Okay.

Q. It's not a very clear copy, and I apologize for that. But when you said--you referred to the thing that was sent to you in the mail, was this it? Was it this document? I'll represent to you that this is identified as being RV resolution

A. We just didn't want a cabin. We wanted to be able to go and do other things. Because of the people I know that in the past that have had properties, recreational cabins and stuff like that, they spend all their time going to the cabin. They don't ever go anywhere else. I worked with a guy that had had a cabin in Mammoth Creek for 25, 30 years, and that's all they ever did was go to the cabin. They never went anywhere else. And I didn't want to be tied to another house. It's hard enough to take care of one house, much less two.

Q. And having an RV offered to you a way of being able to go somewhere else?

A. Yeah. We go a lot of places in our RV.

Q. I mean, you don't just go up to the property that you own, then. Is that right?

A. Right.

Q. So using the RV allows you more flexibility?

A. Yeah. Yes. We took a cross-country--we've taken cross-country trips many times.

Q. Using your RV?

A. One time we were gone for three months, and went 9,500 miles in our RV.

Q. What is it that appealed to you about having your RV up in Swains Creek?

A. Well, we're guaranteed to have a lot up there when we go camping, a campsite. Because before we bought our lot, we'd

in the CC&Rs?

A. Yeah, because they detail what you can and can't do with your lot. And they don't say you can't use your RV on your lot. And according to what I've been told, and my understanding is that when there are CC&Rs involved, if it does not say you can't do it, then whatever city code--if it doesn't address it like it doesn't address RVs. So the county code would address RVs, and that would apply to your use of your lot in Swains Creek because we are in the county. And it says that you can have your recreational vehicles up there six months out of the year.

Q. And so that's an opinion you formed on your own?

A. Yes, and we were told by numerous boards since we bought our property up there that Swains Creek allowed the use of RVs on our lots.

Q. Can you tell me the name of the board members who--

A. Al Hoffmeister, Bob Runkle, I think--

Q. And they specifically said you can use an RV on your lot?

A. --Ken Kromer.

Q. Each one of those specifically said you can use an RV on your lot?

A. Yes.

Q. And do you know if they said that to any other lot owner?

A. I have no idea what they said to other lot owners.
Q. And are you certain those people were board members?
A. Yes.
Q. For my satisfaction, how was it you came to know they were board members?
A. I'm sorry?
Q. How was it you came to know they were board members?
A. How do I know those board members?
Q. How did you know that they were both members?
A. Because of documents, and also because they told me they were board members. We met Al Hoffmeister when we very first looked at the property because he and his wife Shirley owned the property right behind the lot we were looking at. And they came out to meet us and wanted to know what we were up to. And we told them what we were doing, and that what we wanted to buy the lot for. And Al said that we were correct in assuming that we could put our RV up there because he was on the board. And he assured us that there would be no problem.
Q. Do you remember what year or years those statements were made to you?
A. 1993.
Q. So it was--those comments were all made to you the year you bought, 1993?
A. Yes.
Q. Okay. Subsequent years also, or just that year?

Q. Who was it that, you mentioned we, who was it that you owned the property with?

A. Well, I just owned it by myself, but I brought my kids up there. I had three little boys at that time.

Q. I see. Were you a single parent?

A. Yes, I was.

Q. And you essentially bought this property by making payments each month?

A. Correct.

Q. And then after a period of time you purchased a trailer?

A. Yes. A couple times during my time. My uncle bought me one and he used to pull it up for me.

Q. Okay.

A. But we'd camp for, you know, a few weeks in the summer. And then later on, it was in 1997, I believe, maybe '96, that I bought my first trailer and had it up there every, all the time since, every summer.

Q. So you had it up there from the first of the summer to the end of the summer?

A. Yes.

Q. What kind of a trailer was that?

A. That was a 1965 Nomad trailer. It was turquoise and white. And I had it fixed up real girly. And I camped in it and loved it.

place up there where you could dump your waste and sewage?

A. Yes. We used to take it off and take it to a dump site.

Q. Was that--

A. My kids would do that for me. So I don't even know. I think it was right there by the Duck Creek pond, lake, whatever.

Q. So it was--

A. I think that's where we used to dump it.

Q. So it was part of what the association had?

A. Oh no. We'd have to take it off and dump it and then bring it back.

Q. Okay.

A. If it ever got full. You know?

Q. And during that period of time had anybody from the association ever told you that you could use the property as a trailer?

A. Never.

Q. Up until recently, right?

A. Whenever they started, I don't know exactly the date they started that phase of trying to get the, say you couldn't have a trailer up there, you had to build.

Q. Would you say that you used the property for a tent from 1977 to 1996?

A. Pretty much. And I also had a van. I slept in the back of a van, too.

Q. I see.

A. I just used it for camping. And I finally put a, I didn't know, I don't know when they started that, the fire department, that you had to have your firepit inspected and all that. But me and my grandson put that all in. Went and got cinders and we got a great big ring and put in the ground, dug a great big hole, put that in, got it inspected so we could have a good firepit that was, you know, complied with fire regs.

Q. Do you keep your property up?

A. Oh yes. It's very nice. I left wood, two huge trees on it, and then cut paths in between. And I made a driveway, a circular driveway that goes in one side and out the other. And I put rocks all the way around everything and around the trees and areas. And I do all the pine needles, get all them out, and either burn them or hail them away.

Q. So you keep the property up?

A. Yes, I do.

Q. And have you used it every year?

A. Have I used it what?

Q. Have you used the property every year?

A. Oh yes. You know, sometimes, I mean, I worked when I was younger. Sometimes it was just on the holidays or a few weekends out of the year. But most of the time it was whenever I could get up there, I was up there. I loved it.

Q. Is that still true today?

A. Correct.
Q. Anybody else make use of it?
A. Well, my grandkids come. I mean, I don't, you know, let a lot of people hang around there. And there, sometimes my grandkids are only there a few times a year. I don't let them, I give them rules. I don't let them right their motorcycles around loud and, or their quads, and that. I tell them you go out in the forest before you ever get all carried away.
Q. Is this piece of property pretty important to you?
A. Oh, it's my life. It has actually been my saving grace for many, many years.
Q. To be able to go up there and use the property?
A. Correct.
Q. Has any neighbors or any other members of the association ever told you that you needed to stop using your property for--
A. Well, I've been called trailer trash, yeah. I've heard people say, you know, I don't want to live by all those trailers. I don't want to, you know, but most of the people up there right around me have been very, very good to me. Dean Cortrin, that lived across the street, I left my battery. I left my key on, one time. And he had to come jump me. He's helped me with water. All different kinds of things. You know, they've all been very good to me up there. I've been a single woman going up there alone a lot for many years, and everybody's treated me

very well.

Q. How many other trailers are there in your area?

MR. JENKINS: Objection, foundation. I'm not sure what area.

THE COURT: Sustained.

MR. JACKSON: Yeah. Okay.

BY MR. JACKSON:

Q. How many trailers are there around you, in your immediate vicinity, near your lot?

A. I don't think there's any that don't, there's a lot of cabins up there now.

Q. Is there?

A. Yes.

Q. Do you have an idea of about how many cabins are now there? This is the same general vicinity.

A. There's 10, 15 in the block around me, you know. There's no cabins on every single lot.

Q. But there's a lot of cabins?

A. There's quite a few cabins, yeah.

Q. And all of these have been built since you've owned your property, right?

A. All but one, uh-huh.

Q. All but the one.

A. Yep.

Q. These other people that you had mentioned that have

Q. Okay.

MR. JENKINS: I don't have any other questions, Your Honor.

THE COURT: Re-direct?

RE-DIRECT EXAMINATION

BY MR. JACKSON:

Q. When you said you were referring in general terms to, they said that you could have a trailer on there, you purchased the lot from Mark Jacobs. Is that right?

A. Correct.

Q. Was it Mark Jacobs that told you that you could have a trailer on the property?

A. Yes, it was Mark Jacobs. I told him what I would, I wanted to use the property for. And before I signed the papers, I said it again, "I can use this for camping and if I ever get a trailer?" He says, "Yes, you may."

Q. Did you ever have any further--

A. And he did tell me I couldn't leave it up there year-round, that I couldn't build a lean-to. That's his words. I remember that. His lean, "You can't build a lean-to over your--

Q. Trailer.

A. --trailer. You have to take it down every year. You can't leave it there for the winter." Because there was, when I looked into area one, there was trailer in there with lean-tos built over them. And they were old trailers that had been there

Q. Do you have improvements on the lot based upon (inaudible)?

A. I have. There's a shed on it.

MR. JENKINS: Objection, relevance, Your Honor.

THE COURT: Yeah, I think we were going to limit it to what you proffered.

MR. JACKSON: The impact. Okay.

BY MR. JACKSON:

Q. So have you had, have you tried to sell the lot?

A. Yes, I've been trying to sell it.

Q. And why is that?

A. Well, originally when I put it up for sale, I put it up for sale because the land was booming up there and I would have made a heck of a profit. So I listed it at the high end of the market. It never sold. And then when the real estate went down, I had to lower it. And then my in-laws got sick and I couldn't use it anymore. So then I really tried to sell it. But it's not sellable.

Q. And do you have some reason to believe why it's not sellable?

A. Yeah. Because my real estate says the majority of calls she gets for land is for land that they can put an RV on just like I did. And she says, "I can't advertise or sell your lot as an RV lot." So she says, "I have very few people looking for the lots like yours."

B. Do you recognize that document?
A. Yes, I do.
Q. What is that?
A. That is the CC&Rs for unit three.
Q. When did you first see the CC&Rs?
A. When I was doing my research before purchase.
Q. Was this something that was also on the website?
A. Yes, that's where I found out.
Q. And so I, did you, you said that you read through the document?
A. Many times.
Q. I draw your attention to paragraph number one of that document where it states basically that said lots to be, "Used, built upon, improved and held in such a way as to preserve and enhance their pastoral scenic beauty as mountain cabin residential recreation sites free from unsightly neglect or abuse."
A. Yes.
Q. What did you come to understand that to mean?
A. With what we saw when we drove around the community, that it could be either a cabin lot or a recreational site since we saw trailers scattered throughout.
Q. And so you did take the opportunity to look on site, see what was on the properties surrounding this property?
A. Yes.

So it was probably amended for other reasons. His testimony is that I reviewed this document, or I reviewed this rule and understood that to mean trailers. That's why that was something that he relied upon in purchasing the lot. Again, he's got, you can go to the website now, but they've updated the rules to reflect the new amendment. What we don't have, there's no way to retrieve, is those original rules, unless the association has rules that suggests that this was not something that preexisted prior to the amendment.

THE COURT: He's allowed to testify that when he looked at the rules that's what he read. But motion to strike is granted as to it being part of this document dated April 9th of 2016.

MR. JACKSON: That's fine.

BY MR. JACKSON:

Q. Let me ask you a question with regard to, did you talk to anybody within the subdivision at the time you purchased this property?

A. Yes, I spoke with my friend, that we were staying in his cabin, and then I spoke to his neighbor. Her family had been there since the late 70s.

Q. And did the neighbor use the property as a cabin site or as an RV site?

A. She would use it as a cabin site.

Q. And did you discuss with them whether you could put a

is put on the property is in line with those. That's my understanding of it.

Q. And is there an application process to be able to make improvements?

A. Yes. There's a form. You fill it out and you submit it.

Q. And did you do that for the architectural committee?

A. Yes.

Q. What were the improvements that you were requesting?

A. We requested to change some of the grading. The land we bought was unimproved. You couldn't even drive on it. It had never been touched. So we had to bring in all the utilities, except for the septic tank which we did two years later, or a year later, rather. So power, water, all the trenching, the grading for the driveways, firepit, the gravel, and we also included an RV pad on that form.

Q. And was this reviewed by the committee?

A. It was.

Q. Was it approved?

A. It was approved through email from the manager at the top.

Q. Did, was there any condition or made part of this permit or this application that required that you build a cabin?

A. No.

Q. Was there discussions between you and members of the

desires to clarify the Swains Creek Pines Unit 1-A declarations and the Swains Creek Pines units one, two, three and four, and Harris Spring Ranches declarations by adopting a declaration of what constitutes an RV and a trailer and prohibiting future proliferation of nonconforming RV and trailer placements," correct?

A. Yeah. It says, "Definition of what constitutes," yes.

Q. So this is an attempt made by the association to define what the language of the CC&Rs means for the first time?

A. The first time I've ever seen any definitions, yes.

Q. Then it goes on and it says, "The current board anticipates that determination of or the type of enforcement action, if any, against existing nonconforming RV and or trailer placements may be made sometime after the incoming board is seated in January of 2016." And "The adoption of this RV resolution and rule is not intended to imply acceptance, exception, waiver or exception for existing nonconforming RVs and or trailers or to preclude future boards from taking action." And again they're attempting to qualify what they're defining, right?

A. Yes, and this is the paragraph that gave me the most concern.

Q. And why?

A. All of it concerned me, but that was--

Q. And why was that?

A. It's a cloud hanging over our head. They've now defined us, newly defined us as nonconforming. And the new board in 2016, which was just a few months later, could take action against us.

Q. And essentially that's why you were saying this is an eviction notice?

A. The language in the September meeting minutes I believe in my heart is what their true intention was. And this affirmed it. But now they have made themselves, they've given themselves the authority to take action against what they consider nonconforming RV lots.

Q. Based upon what they've designated as their recitals in the document, now they made resolutions, right?

A. Yes.

Q. And the first resolution basically says that a trailer shall have the definition as an RV. That's what it states in paragraph one, right?

A. Yes.

Q. Then it goes on. It says, "RVs and trailers are defined as a motor vehicle or trailer equipped with living space and amenities found in a home, which may include more or, one or more of the following." And then it says kitchen, bathroom, living quarters, whatever, the key language basically being a motor vehicle, right? Makes it a motor vehicle.

A. It could, yes.

Q. And then it defines what a dwelling house is, right?
A. Yes.
Q. And a dwelling house at this point is defined as being a structure. But then specifically says an RV or trailer is not a dwelling house, right?
A. That's what it says.
Q. So this is the first time that you've seen something that says your trailer is not considered to be a dwelling house?
A. Yes.
Q. Then it goes into basically adopting other provisions that have to do with matters that are consistent with the county ordinance. Is that right?
A. No. The first one, unit A, I think that is from their CC&Rs, that trailers must be metal finished, good exterior quality. This looks like some of this came out of the unit one CC&Rs, existing CC&Rs.
Q. Then before as they had a resolution to address the issue of first-class dwelling house, now there's a resolution for paragraph 13?
A. Yes.
Q. What does it state?
A. An RV and or trailer is not considered a first-class private dwelling house and any new placement of an RV or trailer is prohibited from the date of the signing of this RV resolution.

A. I'm not sure whether it was 2014 or 2015, but it was not, I don't believe it was too awfully long after they purchased the property.

Q. Now, I'm going to try to bracket that just a little bit by the seasons. Do you know if that conversation was in the spring or in the fall?

A. I believe it was the spring.

Q. So either the spring of 2014 or 2015?

A. Yes, sir.

Q. Okay. Do you attend the annual meetings of the homeowner's association?

A. I attend some of the meetings of the homeowner's association, as many as I can get to.

Q. Okay. Do you recall attending a homeowner's meeting in September of 2015?

A. I believe so. I believe we were there, yes.

Q. And you think this conversation with Art about his intent to build a cabin and your husband's response, "Good because RVs are not allowed," do you think that occurred before that September meeting?

A. I believe it was.

Q. Okay. Let me have you look at the white binder up there. Do you see it?

A. Yes, sir.

Q. And then turn to Exhibit B as in boy. Have you seen

of what a mountain cabin would allow or not allow RVs?

A. Yes, sir, we did. When we purchased--

Q. Go ahead.

A. When we purchased the property, we spoke directly with Derryl Christensen. My husband and my father and I were altogether. And he took us up to show us the piece of property that we wound up buying in unit three. We specifically asked him were trailers and RVs allowed in unit three. And he showed us the CC&Rs and said that it was a mountain cabin community, and they were not allowed by the building codes that were currently in existence.

Q. They meaning RVs were not allowed?

A. No. He did not mention, he did not specifically say RVs.

Q. Okay.

A. The word we used was trailers.

Q. Okay.

A. Because we did not want to live in a community where they were allowing trailers, especially year-round trailers. And he assured us that unit three was a cabin community and that they were not allowed in that area.

Q. Okay.

A. And that was the only reason we specifically chose unit three.

Q. When you looked at Swains Creek had you seen trailers

Q. So what did you do for the first ten years that you owned the lots?

A. The first ten years we did nothing with the lot. We dry camped on the lot two separate times. Other than that, we did not use the property at all.

Q. So for, when you say dry camped, that meant that you used either a trailer or a tent?

A. Actually, we had a station wagon and pulled a little cargo trailer behind it with some camping gear in it, a camp stove and sleeping bags, and we slept in the back of the station wagon.

Q. Did you build the cabin yourself?

A. We had the frame, the basement and the frame, built by (inaudible) and we completed the inside of the cabin.

Q. Did you utilize a trailer while you were building the cabin?

A. We did. For two summers we had a trailer up there while we were doing construction on the cabin.

Q. And did anybody, as you were using that trailer, come to you and complain about you putting a trailer on the property?

A. No. We had no neighbors at that time.

Q. In fact, isn't it true, there weren't many cabins in 1979?

A. I'm sorry?

Q. Isn't it true that there weren't many cabins in 1979?

Q. Did they come in and start using it within unit three?
A. Yes, they did.
Q. Did you file any complaints or take any action as to them using trailers for lots in unit three?
A. I did.
Q. With who?
A. I brought it up at one of the board meetings.
Q. Do you remember--
A. As to why they were being allowed when they were specifically not in the CC&Rs.
Q. Do you remember when that was?
A. No, sir, I do not.
Q. Would it have been before you started building your trailer?
A. No.
Q. Or building your cabin.
A. I don't believe so.
Q. It would have been after?
A. It would have been after.
Q. 1989?
A. Yes.
Q. Did the association do anything about that?
A. No, they did not.
Q. You mentioned that you had loaned a piece of equipment to Mr. Cocks to help him clean his lot.

A. Yes.

Q. Okay. So you would serve for two years. And is there any time limitation on the number of terms you can serve consecutively?

A. There's a maximum of two terms of two years each, back to back. And there were times where somebody had resigned off of the board, so I ended up doing five years together instead of four.

Q. Okay. Over that period of time, from 1983 until the last time you served on the board, how many years do you think that you served collectively?

A. I need to clarify. I purchased, we purchased in 1983, but my first term on the board was in 1998.

Q. Okay. So from 1998 until what year was that again, that you last served?

A. 2018.

Q. Okay. So during that period of time, how many years total?

A. More than 16.

Q. Okay. And let me have you look then at exhibit, the white exhibit book. Do you see that white book up there?

A. Yes.

Q. Let me have you look at Exhibit B.

A. Yes.

Q. Have you seen that document before?

Q. All right. And then--
THE WITNESS: Was that clear, Your Honor?
THE COURT: Yes.
THE WITNESS: Thank you.
BY MR. JACKSON:
Q. Then give me just a second here. Now looking at 1002, again under subsection 7, it makes reference to action taken by the architectural committee.
A. Okay.
Q. Yes. Under A, it makes reference to construction on Spruce is a driveway and septic tank. Rudy is installing an RV pad and has not submitted an ARVC, or ARC request yet. Is that true?
A. It does say that, yes.
Q. Was his RV pads approved?
A. I don't know.
Q. If RV pads were not allowed, why would they even, why wouldn't they just state it in there that they're not allowed?
A. That's a good question. I don't have the answer for that. I can tell you I do report what is said.
Q. Right. I appreciate that. And that's kind of why, so now let me have you look at 1004.
A. Okay.
Q. Under facilities, under the section three, cement was placed around the ground stop and waste valves for pavilion,

an RV lot at the time that the association took over enforcement?

MR. JENKINS: Objection, foundation to the extent she may or may not know Holly Hunter.

THE COURT: Sustained.

BY MR. JACKSON:

Q. Let me ask the question this way. Has the association ever took any action against Holly Hunter while you served on the board?

A. I don't believe Holly Hunter, the name Holly Hunter ever came to the board as being in noncompliance. I don't believe the board was ever made aware of a problem.

Q. Give me just a second here. Did you serve on the board, by chance, with Al Hoffmeister?

A. I could look that up. I worked with him on the election committee, but I'm not sure if he was a board member. Don Culvert was our chairman when I started on the board. So if Al Hoffmeister was a board member at that time, I could have. I worked with him on financial, on the budget and on the elections.

Q. At any time--

A. But I--

Q. --did Mr. Hoffmeister inform the rest of the association that Patricia and Chuck Martin were using their property as an RV lot?

A. Not while I was on the board. So I must not have worked, I can't tell you for sure if I worked with him on the board or just in committees. But while I was on the board, I did not become aware of the Martin. You said Martin?

Q. The Martins, yes.

A. Correct. That didn't happen.

Q. So there was no action taken against them as far as you know while you were on the association, involved in the association?

A. There was never, the board was never aware of an issue to have action taken on.

Q. Okay.

MR. JACKSON: No other questions of this witness, Your Honor.

THE COURT: Re-direct?

RE-DIRECT EXAMINATION

BY MR. JENKINS:

Q. You've been asked to look at a few minutes of the association, particularly in 2014, that referred to RV pad?

A. Yes.

Q. And just from looking at those minutes, is it the case that you're not able to tell whether that RV pad might have been in unit 1-A or any other unit within the association, just from looking at those minutes?

A. That's correct. There's no reference to a unit.

is from the association's perspective you can own the property, right?

A. People are allowed to purchase property, correct.

Q. Pay the association dues, correct?

A. People join into the association and would be obligated to pay dues.

Q. But you can't camp on it?

A. I don't believe unit three allows camping. Not that I'm aware of.

Q. You can't put--

A. But I could review the CC&Rs again to be sure.

Q. So you can't camp on it and you can't put a trailer on it?

A. Not to my knowledge.

Q. The only way--

A. Unless you're building, if you're building a cabin, you can put your trailer on there while you're building.

Q. So the only way you get to use your property is if you're building a cabin?

A. For unit three.

Q. The association believes that it has the power to keep someone else from using their own property up in the mountains on Cedar Mountain except if they build a cabin?

A. So I would be more comfort--

MR. JENKINS: Objection, asked and answered and

the Association prior to your purchase of your property?

A. No, sir.

Q. So you're not really aware of the activities that took place prior to that?

A. Only by being on the committee and having them discussed in nearly every committee meeting I've sat in.

Q. Since 2016?

A. Yes, sir.

Q. Actually, since 2018?

A. I actually went to some of the board meetings as soon as I got the property. So I think I went to the last board meeting in 2016. And then since then I have either, I've attended all the board meetings that are available. The lot owners' meetings, I should say.

Q. Is it fair to say that this is a pretty hot topic?

A. I think you would have to define that. There are many things which are of great importance to the people on the mountain. It's a divisive issue. I think that's probably the best way to put it at the moment. Everybody's hoping we can get to some kind of resolution with it, on both sides, I'm sure.

Q. And is this always a matter now, since you've been on the board, is this something that's been addressed by the board?

A. I would think that either the, every board meeting or executive session, questions come up about it. So there are some questions around it in every meeting, yes, sir. If that answers

take me in the recreational vehicle concept would be into single-wide trailers. And otherwise, it becomes personal property that's really outside my licensure, and personal property would be, include cars, campers, RVs with wheels, and so, and had motors to them, so that's really outside my purview, and I don't think anyone would consider those a cabin.

Q. Okay, and so those items you mentioned, those with wheels, those are not considered real estate. I understand you say that those are not part of your practice area, but you understand what those are, so you know what isn't part of your practice area, correct? You know what an RV is so that you can understand--well, that's a poor question. Let me rephrase that. In your experience, when you look to appraise something, if you're asked to do an appraisal and an RV is there, you wouldn't be appraising the value of that RV, correct?

A. That's correct.

Q. But you have to understand what an RV is to know that it's not in the purview of what you get to appraise, correct?

A. That is correct.

Q. All right and so when you look at these CC&Rs of Swains Creek and they refer to a mountain cabin, that has a meaning to you based upon your experience, doesn't it?

A. That's correct.

Q. And your experience with respect to mountain cabin, again, what do you, what's your opinion about what this phrase

standards to know what that means, and you can look to what the parties may say about it, you can look to dictionaries, you can look to other usage that's in the area. So, yes, I'm trying to have Mr. Dahlin opine on what he understands these usages to be in his experience in this area and in this property.

THE COURT: Here's my analysis, the interpretation of paragraph one is a legal interpretation, that is for the Judge to decide. It's not for anybody else, it's for the Judge to decide. If he's going to tell me how to interpret it, then I have to sustain the objection. You lawyers are trained and so you can make legal arguments, but he's not been to law school, so he can't make legal arguments. Now, if you're asking him about something that is within his expertise as an appraiser or even as a builder, then yeah, I'll listen to his opinion, but if the reason you have him on the stand is to tell me how to interpret that language, I have to sustain the objection because that's my job. You're taking my job away from me.

MR. JENKINS: And I understand that as well, and that's not what I'm intending to do, and so I'll re-ask the questions, but really what I'm looking at here, Your Honor, is you do have to interpret what that paragraph means and what those words mean and you can rely upon--

THE COURT: And I suspect that by you putting him on, you're pretty much admitting that it's ambiguous.

MR. JENKINS: No, I have to, because of the nature of

associations that their covenants include the phrase or one similar to it first-class private dwelling house?

A. Yes, no question about that.

Q. Okay, and in any of those situations has a mountain cabin been interpreted by your boards as a, to include an RV?

A. Not in my experience.

Q. And in any of your experience, have any of your boards interpreted a first-class private dwelling house to be inclusive of an RV?

A. Never.

Q. Okay, so let me have you go back to Exhibit K. The first recital then, the board defines a recreational vehicle. In your experience, is it within the purview of a board to provide a definition to a document that they are, to a rule they're creating?

A. In the association industry, there's basically, that I've seen nationwide, there're three types of resolutions that are passed, procedural, behavioral, and interpretative resolutions. This first part is an interpretative resolution interpreting the term recreational vehicle.

Q. And it's something that is reasonable for a board to do when it's preparing a rule or resolution?

A. Absolutely. As part of its authority, it's my opinion that boards can interpret the terms that they're about to enforce or not enforce.

Q. Okay. The second whereas, it says, "The board finds that the following provisions do not allow for the placement of RVs on lots within the association," and within that long list, I think you'll see that it refers to Swains Creek Pines unit number three, do you see that?

A. I do, yes.

Q. Okay. Next, "Whereas the board after a fair review acting in good faith and without conflict of interest finds that one or more lot owners within the association have placed non-conforming RVs on their lots within the association prior to the date of this resolution (prior to non-conforming lots)," do you see that?

A. I do see that.

Q. Is that consistent with what you testified as part of the business judgement rule that a board should act in good faith and without conflict of interest?

A. That's consistent with my understanding with the business judgement rule. It's consistent with how I've seen it interpreted in various states where I've lectured and taught and in part of my experience with different organizations at the community association institute and my own practice, but the first thing I did notice when I read that in preparation of today was I noticed that was a lot of the same language right out of the statute we've been talking about, section 213.

Q. Okay and it does say, "The board after fair review,"

A. Correct. This is extremely common, back to what I said earlier, and it's not just for this particular case, but whether an association has imposed a ban on rentals, a rental capper, a no more smoking clause in a high-rise condo, there's always these provisions to allow it to be fair to those who are there then and now and allow them, in this case, even their errs to maintain the rights that they have, it's only when there's a future event that the policies would change. And I say change, my opinion is we're getting back to where the CC&Rs should've had you many, many years ago.

MR. JENKINS: No further questions, Your Honor.

THE COURT: I guess I have a couple questions. Does the business judgement rule allow a board to by resolution change restrictions in the CC&Rs?

THE WITNESS: So, Your Honor, my opinion, very firm on that, a resolution can interpret, clarify, and procedurally improve upon what's already there. It cannot change what's in the CC&Rs.

THE COURT: And CC&Rs are a contract?

THE WITNESS: Correct.

THE COURT: A contract between the landowners, the association, and the developer or those who succeed an interest to the developer?

THE WITNESS: Absolutely, yes. And I can follow up on that if the Court wants (inaudible).

THE COURT: Does the business judgement rule give a board's interpretation of a restriction in a CC&R more weight than an individual's interpretation?

THE WITNESS: That's a really good question. With the, I think it actually depends on what authority is given to that board in their governing documents, in the bylaws. If it's expressly stated and we have (inaudible) from the nonprofit statute, but if the board is elected to manage the affairs of the association, then yes, their decision would have priority over an individual homeowner's decision, that'd be my opinion.

THE COURT: And did you look in this case to see if that's--

THE WITNESS: I looked at the bylaws or the provision and--

THE COURT: And did you see anything like that in the--

THE WITNESS: I did, yes.

THE COURT: What did you see?

THE WITNESS: A very generic statement in one of the articles in the bylaws beginning, I don't have them up with me, it might be in here, but it says the board manages the affairs of the association, and that has usually been interpreted to mean as long as they're not being inconsistent with what's already in the governing documents, the board can fill in the gaps with interpretive policies and resolutions to make sure the committee can operate and it can fulfill its duties under the

CC&Rs. I don't think, I certainly wouldn't have been here today if the covenants didn't have the two provisions that are already in article one regarding cabin properties and first-class private homes, that's the authority that gives the, in my opinion, that gives the board the ability to come in and say, "Let's define and make sure it's clear as to what those phrases mean."

THE COURT: If there's a need to be clear, isn't that an indication that it's not clear?

THE WITNESS: I'm not so sure that it means that it's legally unclear, I think it might mean that the owners, lay people, might not know what is permitted or not permitted. The board can step in and as long as they can legally and lawfully interpret what the CC&Rs and bylaws mean, I think it's legally clear with the authority, but it might, because they, just because a board has to jump in and interpret the governing documents, it certainly isn't an indication, the home owners might have some confusion, but it doesn't necessarily mean that the law is confused on the issue.

THE COURT: There was one other question I wrote down as you were testifying. You said that the best way to, in the industry, that's the way I interpreted what you said, that in the industry right now, there's a philosophy that the best way to phase out non-conforming use is either by allowing them to extend to some period, which is a sale or an amendment of the

CC&Rs, what about until the change of use? Shouldn't that be one of those factors as well?

THE WITNESS: The, that is sometimes a decision of boards. Usually, to, when we get into a situation where there's been a determination of the board that there's a violation, there's been violations occurring, and we, if this is our baseline compliance with the CC&Rs and we deem that the behavior of certain compliance has fallen below our standard, if we implement, my experience has been if the board adopts an enforcement policy that says, "When there's a change of use, we'll eventually get back to where we want to be on our baseline and (inaudible)," that could take decades upon decades, and so could a sale, I acknowledge that, but it can take so long that the purpose of the board, which is to maintain integrity of the covenants, property values, quality of life, livability, that becomes frustrated if you wait for a change of use. So usually what I've seen in the industry is a sale is the trigger to come back into what we deem compliance. The other remedy takes too long.

THE COURT: But if they're a vested contractual interest, it has to take that long?

THE WITNESS: I'd absolutely agree with the Court's statement in that regard, so as a general rule of law, yes. The, I think the differentiating factor here is that we've got covenants that, in my opinion, say cabin properties and homes--

BY MR. JENKINS:

Q. Let me go back, Gina, a little bit. During your time on the board in 2014 and 2015, you read this paragraph, the one with the CC&Rs, is that right?

A. I read them when we bought and I read them again as a board member, so--

Q. Okay.

A. --yes, sir.

Q. And when you say you bought, did you buy in unit three?

A. No.

Q. Okay, you read a similar set?

A. Yes.

Q. Okay.

A. That part, residential use, is in all of them.

Q. Okay, so with respect to a mountain cabin, did you have an opinion while serving on the board as to what that meant?

A. In my opinion, yes, I thought I knew what it meant, but as a board, what we did is we actually investigated different terminology and did research to determine what, you know, what's considered a cabin and a single-family dwelling, and we did a lot of discussion about could it be something other than this, and we determined, no, there's no RV.

MR. JACKSON: Objection to foundation, Your Honor.

Q. And 33 RV lots in a 300, 400, or 700 lot subdivision is a proliferation of RVs?

A. Over the years, 2010 to 2015, adding 24 to the membership appeared to be a continuing trend towards proliferation, in my opinion.

Q. So what is the harm of having an RV on a lot?

A. My role as a board member was to enforce the governing documents.

Q. Which you didn't do because what you did is you chose to amend the governing documents?

MR. JENKINS: Objection, foundation.

MR. JACKSON: I'll restate the question, Your Honor.

THE COURT: Yeah, restate it.

BY MR. JACKSON:

Q. So if your duty was to enforce the CC&Rs, the approach you took was not to enforce the CC&Rs, but to amend the CC&Rs, that's what the resolution does, isn't it?

MR. JENKINS: Objection, foundation. It mischaracterizes evidence.

THE COURT: Well, as, I think he, did you say the effect of?

MR. JACKSON: Yes.

MR. JENKINS: He said it--

THE COURT: I think he said--

MR. JENKINS: --amends the CC&Rs, the resolution amends

I went down my driveway, introduced myself, he introduced himself, I welcomed him to the neighborhood as you would any new neighbor, and we started talking generally about what's going on, what are you doing, not interrogating, just friendly conversation. He mentioned that he was planning on building a cabin within the next year or two. He was a little behind, he had just put out a lot of money, so when he got his finances back up, he was going to build his cabin. I mentioned where his driveway was somewhat close to the street and there's a lot of ATV traffic, so a lot of dust, and so (inaudible) him, "You might want to move back down the hill a bit to keep the dust off your cabin," and that was it. I told him if he needed anything to swing on by.

Q. Okay, and so the discussion about the cabin placement was move it further into the property as opposed to being too close to the street?

A. Right. Obviously, he could put it anywhere he wanted, but I just suggested he move it away from the street just to keep the dust down.

Q. Okay, and have you served on any committees for the association?

A. I've served on the board, I'm not sure about subcommittees.

Q. You've worked on, you've served on the board?

A. Yes, sir.

Q. Did you tell him, "You can't put an RV on your property"?

A. I don't believe I did.

Q. Hadn't you been a member of the association of the board?

A. Oh, yes, sir.

Q. Didn't the board have the understanding at that point that you couldn't put an RV on properties?

A. The RV being placed on the property would've gone through an ARC approval committee. I was not on that committee.

Q. So the fact that you saw him place an RV on his property, that didn't cause you to approach him and say, "Wait a minute here, you can't put that RV here"?

A. No, it brought me to the point where I approached him just to be a neighbor and said, "How are you doing? What's going on? Welcome to the neighborhood."

Q. Isn't it true that he helped you cut some trees, some limbs down, and you helped him because Julie had broken her leg at that point, so you were kind of helping each other, does that sound familiar?

A. Is Julie his wife?

Q. Wife, yeah.

A. I don't believe I've ever met her formally. I believe when he, I don't even know what year it was, but her dog had got entangled with a leash around her leg. I believe they had EMTs

A. To remove an RV? Yes, sir.
Q. To remove an RV?
A. A single RV, yes, sir.
Q. Was that one in unit one?
A. Yes, sir.
Q. That was less than 30 feet?
A. That's correct.
Q. Was that RV there for like 25 years before you enforced it?
A. It was there for a long time. I don't know when it moved in.
Q. But (inaudible) the single time that basically you guys took action to enforce that provision?
A. It's the only time I'm aware of.
MR. JACKSON: No other questions.
THE COURT: Re-direct?
MR. JENKINS: I don't have any other questions for you, Alan.
THE WITNESS: Yes, sir.
THE COURT: Okay. Thank you. We instruct you to not talk about the case with any other witness until there's a decision by the Court. Can he be excused?
MR. JENKINS: Yes.
THE COURT: You're free to go or free to stay.
THE WITNESS: Thank you, sir.

Q. Well, you spoke of approval being given to place a trailer in unit three while someone was building a cabin.

A. On a temporary basis, yeah.

Q. And is that what you understood the nature of those approvals to have been while you were on the board?

A. Yes, I didn't believe them to be a blanket approval, "Yeah, okay, you can live there," or "Bring it every year if you want and make this your, this is what you're going to use your property for," it was always on a temporary basis while you're building your cabin.

Q. Okay. Thank you.

RE-CROSS EXAMINATION

BY MR. JACKSON:

Q. You mentioned, you used the term mobile home, wasn't the concern back in that day bringing in a mobile home?

MR. JENKINS: Objection, foundation.

MR. JACKSON: That's the question that, that's the term that he used, Your Honor.

THE WITNESS: A stick-built on a foundation is the term I used.

MR. JACKSON: No, when you made reference to a mobile home.

BY MR. JACKSON:

Q. The concern that the Christensens had was allowing mobile homes to be brought up there?

A. That was their concern, yes.
Q. In conjunction with that, we're talking about mobile homes back in the 1970s?
A. Yeah, I think.
Q. I think your comment also was that it really didn't address RVs.
A. It did not.
Q. So RVs that we're talking about now, that's different than the mobile home problem that they were trying to stop back--
A. When they mentioned trailer in the CC&Rs, they were referring to mobile homes, not RVs.
Q. Which the mobile home basically was something that they were going up there, trying to set it up, take the wheels off, set it down on foundation, and having that in the subdivision?
A. That's the way I interpret a mobile home, yeah.
Q. But the whole idea, I mean, there weren't really any RVs back in the 1970s, were there?
A. No, there wasn't. They weren't that popular.
Q. I mean, we're talking about first generation Winnebagos.
A. Right.
Q. So the whole RV issue was not one that was even contemplated at the time, was it?

A. I guess not, no.

MR. JACKSON: No other questions.

THE COURT: Just one second. Any more re-direct?

MR. JENKINS: No.

THE COURT: Okay. Mr. Long, thank you. You're going to be excused. All right, you're free to stay or free to go.

THE WITNESS: Thank you.

THE COURT: I'd just instruct you not to talk about the case with any other witness until there's a final decision.

THE WITNESS: I can stay and listen?

THE COURT: You can--

THE WITNESS: Thank you.

THE COURT: --if you choose. I'm not sure that would be the best way to spend your retirement years, but you're welcome to.

THE WITNESS: That's not what I've got in mind. No, I want to go to Texas.

MR. JENKINS: Okay, the next witness would be Jenelle Pearce.

JANELLE KRAFT PEARCE called as a witness, having been duly sworn, was examined and testified on her oath as follows.

THE COURT: Go ahead, Mr. Jenkins.

DIRECT EXAMINATION

K, this new resolution. Your action, in other words, after you've got now a vote basically against the resolution and a vote against the amendment to the CC&Rs, the action of the board is not to leave it alone, but rather now to pass something that you've now classified as being a declaration of nonenforcement. What was the reason for doing that after you already knew that that's not what the people wanted?

A. Based on the number of votes that were cast and the comments and concerns that I received as chairman of the board, the majority of people that spoke to me did not want to make their neighbors leave. They didn't want permanent RVs in the area, but they did not want to make their neighbors have to pack up and leave their property. That resolution was the compromise between all parties to try to satisfy everyone, and it did.

MR. JACKSON: No other questions for this witness, Your Honor.

MR. JENKINS: Re-direct?

MR. JENKINS: No questions, Your Honor.

THE COURT: Okay, you can step down. You've heard the admonition.

MR. JENKINS: Your Honor, she is our final witness. I know that there may be time for oral argument, it'd be my preference, if possible, to be able to recess and then make oral argument first thing in the morning. I say that for a couple of reasons, one is I don't know if the Court has had the

EXHIBIT 8

Effective 5/12/2015

57-8a-217 Association rules, including design criteria -- Requirements and limitations relating to board's action on rules and design criteria -- Vote of disapproval.

(1)
(a) Subject to Subsection (1)(b), a board may adopt, amend, modify, cancel, limit, create exceptions to, expand, or enforce the rules and design criteria of the association.
(b) A board's action under Subsection (1)(a) is subject to:
(i) this section;
(ii) any limitation that the declaration imposes on the authority stated in Subsection (1)(a);
(iii) the limitation on rules in Sections 57-8a-218 and 57-8a-219;
(iv) the board's duty to exercise business judgment on behalf of:
(A) the association; and
(B) the lot owners in the association; and
(v) the right of the lot owners or declarant to disapprove the action under Subsection (4).

(2) Except as provided in Subsection (3), before adopting, amending, modifying, canceling, limiting, creating exceptions to, or expanding the rules and design criteria of the association, the board shall:
(a) at least 15 days before the board will meet to consider a change to a rule or design criterion, deliver notice to lot owners, as provided in Section 57-8a-214, that the board is considering a change to a rule or design criterion;
(b) provide an open forum at the board meeting giving lot owners an opportunity to be heard at the board meeting before the board takes action under Subsection (1)(a); and
(c) deliver a copy of the change in the rules or design criteria approved by the board to the lot owners as provided in Section 57-8a-214 within 15 days after the date of the board meeting.

(3)
(a) Subject to Subsection (3)(b), a board may adopt a rule without first giving notice to the lot owners under Subsection (2) if there is an imminent risk of harm to a common area, a limited common area, a lot owner, an occupant of a lot, a lot, or a dwelling.
(b) The board shall provide notice under Subsection (2) to the lot owners of a rule adopted under Subsection (3)(a).

(4) A board action in accordance with Subsections (1), (2), and (3) is disapproved if within 60 days after the date of the board meeting where the action was taken:
(a)
(i) there is a vote of disapproval by at least 51% of all the allocated voting interests of the lot owners in the association; and
(ii) the vote is taken at a special meeting called for that purpose by the lot owners under the declaration, articles, or bylaws; or
(b)
(i) the declarant delivers to the board a writing of disapproval; and
(ii)
(A) the declarant is within the period of administrative control; or
(B) for an expandable project, the declarant has the right to add real estate to the project.

(5)
(a) The board has no obligation to call a meeting of the lot owners to consider disapproval, unless lot owners submit a petition, in the same manner as the declaration, articles, or bylaws provide for a special meeting, for the meeting to be held.
(b) Upon the board receiving a petition under Subsection (5)(a), the effect of the board's action is:
(i) stayed until after the meeting is held; and

(ii) subject to the outcome of the meeting.

(6) During the period of administrative control, a declarant may exempt the declarant from association rules and the rulemaking procedure under this section if the declaration reserves to the declarant the right to exempt the declarant.

Amended by Chapter 325, 2015 General Session