IN THE UTAH COURT OF APPEALS

ARTHUR W. COCKS and JULIE L. COCKS, Trustees of the Cocks Family Trust, dated August 11, 2006 Cocks/Appellees v. SWAIN'S CREEK PINES LOT OWNERS' ASSOCIATION; CHARLES F. COSTA; ALAN W. ZELLHOEFER; GINA M. CHAPMAN; JANELLE PEARCE; WILLIAM G. MOSER; JAMES BRADFORD; ELIZABETH MARIE BAYLEY; CHERYL CASE; DOES I-XX, Defendants/Appellant	Case No. 20200961-CA

On appeal from the ruling of the Sixth District Court for Kane County
The Honorable Marvin D. Bagley

APPELLANT'S BRIEF

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Charles F. Costa, Alan W. Zellhoefer, Gina M. Chapman, Janelle Pearce, William G. Moser, James Bradford, Elizabeth Marie Bayley, and Cheryl Case are not parties on appeal, having been dismissed in the trial court.

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I. INTRODUCTION

Appellees Arthur W. Cocks ("Arthur") and Julie L. Cocks (collectively, the "Cockses") brought this action against the Swain's Creek Pine Lot Owners' Association ("the Association") and the members of the Board of Directors[1] to prevent the Association from enforcing its governing documents prohibiting the Cockses and their successors from using the Cockses' lots for recreational vehicles (RVs) and trailers[2] until a change of use occurred. The Cockses asserted five causes of action: declaratory judgment, selective enforcement, breach of the implied covenant of good faith and fair dealing, taking without just compensation, and prejudgment relief. The trial court dismissed certain claims and otherwise limited trial to the Cockses' claim for declaratory relief as it related to the interpretation of the restrictive covenants and the Association's ability to enforce the RV restrictions against the Cockses only, and not other owners in the subdivision. After trial, the trial court issued a memorandum decision in which it concluded that the Cockses were entitled to a judgment allowing them to continue to use their property for RV purposes, and it entered judgment in for the Cockses.

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[1] Claims against the individual Board members were dismissed.

[2] Unless the context indicates otherwise, the Association refers to RVs and trailers collectively as "RVs."

This Court should reverse the judgment because the trial court incorrectly held that the CC&Rs do not unambiguously prohibit RVs and that the extrinsic evidence supported an interpretation that RVs are allowed. Additionally, the trial court misinterpreted and misapplied the business judgment rule to the Board's October 1, 2016 resolution, which allowed the Cockses to keep an RV on their lots until sold to an unrelated third party, by improperly substituting its judgment for the Board's. Further, the trial court's finding that the Association took no action to prevent the use of lots for RV purposes is against the clear weight of evidence. Finally, the Court did not give appropriate weight to the antiwaiver provision of the CC&Rs.

II. STATEMENT OF ISSUES

A.

The CC&Rs provide that lots are "mountain cabin recreational sites" and prohibit any structure other than a "first class private dwelling house, patio walls, swimming pool, and customary outbuildings, garage, carport, servants' quarters, or guest house" to be "be erected, placed, or maintained on any lot." Did the trial court correctly find that the CC&Rs did not prohibit RV use and were ambiguous?

Standard of Review. An appeals court reviews a trial court's legal interpretation of restrictive covenants, including a determination that the

covenants are ambiguous, for correctness, *View Condo. Owners Ass'n v. MSICO, L.L.C.*, 2005 UT 91, ¶ 17, 127 P.3d 697, giving no deference to the trial court's ruling, *McNeil Eng'g & Land Surveying, LLC v. Bennett*, 2011 UT App 423, ¶ 7, 268 P.3d 854.

Preservation. This issue was preserved at R. 1952-54, 2090, 2429-30, 2435, 2612-14, and 2617.

B.

The trial court allowed extrinsic evidence to determine that the CC&Rs were ambiguous. Despite contrary testimony from the CC&Rs' drafter, the court found that the intent of the parties in the CC&Rs was not to prohibit RVs. Did the trial court correctly allow extrinsic evidence and were its findings about the intent clearly erroneous?

Standard of Review. An ambiguity is resolved according to the parties' intent, "which is a question of fact." *McNeil*, 2011 UT App 423, ¶ 7. This Court reviews a trial court's factual findings for clear error. *See, e.g.*, *Linebaugh v. Gibson*, 2020 UT App 108, ¶ 23, 471 P.3d 835. "A finding of fact is clearly erroneous only when, in light of the evidence supporting the finding, it is against the clear weight of the evidence." *State in Interest of D.M.*, 2013 UT App 234, ¶ 2, 312 P.3d 932.

Preservation. This issue was preserved at R. 1969-74, 1978-84, 2544-45, and 2548-52.

C.

Relying on Utah Code § 58-8a-213's codification of the business judgment rule, the Board determined that it was in the Association's best interest to forego enforcing the RV restriction against lots currently being used for RVs until those lots were sold or transferred to unrelated third parties. Did the trial court incorrectly interpret and apply the business judgment rule by failing to apply a presumption of reasonableness and substituting its judgment for the Boards' judgment?

Standard of Review. The district court's conclusions of law are reviewed for correctness. *Fort Pierce Indus. Park Phases II, III & IV Owners Ass'n v. Shakespeare*, 2016 UT 28. "This includes 'questions of contract interpretation.'" *Id.* (quoting *Holladay Towne Ctr., L.L.C. v. Brown Family Holdings, L.L.C.*, 2011 UT 9, ¶ 18, 248 P.3d 452 (citation omitted)). Findings of fact are reviewed for clear error. *Id.* ¶ 16.

Preservation. This issue was preserved at R. 1955-57, 2444-46, 2452-55, 2460-62, 2615-26, and 2619-22.

D.

The trial court found that the Association took no action to prevent the use of lots for RV purposes before it passed the resolution in October 2016 allowing the Cockses to keep an RV on their lots until sold to an unrelated third party. The court found, "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. The association cannot now change horses in mid stream [*sic*] to deprive [the Cockses] of the full use of their property." (R. at 1891-92.) Is the trial court's finding supported by the clear weight of evidence?

Standard of Review. The standard of review is the same standard for factual findings stated in Issue B.

Preservation. This issue was preserved at R. 2471-2472, 2545-46, and 2615-2621.

E.

The trial court failed to apply the antiwaiver provision in the CC&Rs and found that the Association had waived its right to enforce the RV restriction against any third party unrelated to the Cockses who acquired the Cockses' lots. Did the trial court apply the improper standard of waiver by disregarding the antiwaiver provision, and were the trial court's findings that the Association had waived its right to enforce clearly erroneous?

Standard of Review. Whether a trial court used the proper standard of waiver is a matter of law reviewed for correctness. *Pioneer Builders Co. of Nevada Inc. v. KDA Corp.*, 2018 UT App 206, 437 P.3d 539. "[T]he actions or events allegedly supporting waiver are factual in nature and should be reviewed as factual determinations." *Pledger v. Gillespie*, 1999 UT 54, ¶ 16, 982 P.2d 572.

Preservation. This issue was preserved at 1954-56, 2217, 2271, 2304-05, 2616-18.

III. STATEMENT OF THE CASE

A. The governing documents

The Swains Creek Pines Single-Family Residential Subdivision is in Kane County, Utah (the "Subdivision"). (R. at 402). The Subdivision consists of six units or phases.[3] (R. at 412-13.) The developer of the Subdivision was J. B. Investment Co. and referred to in the Subdivision CC&Rs as the "reversionary owner." (R. at 409.) Prior to the events giving rise to this litigation, J. B. Investment had assigned its reversionary-owner rights to the Association. (R. at 1998.)

[3] They are (i) Swains Creek Pines Unit No. 1, (ii) Swains Creek Unit No. 1 (also known as Blackman Hills), (iii) Swains Creek Pines Unit No. 2, (iv) Swains Creek Pines Unit No. 3, (v) Swains Creek Pines Unit No. 4, and (vi) Harris Spring Ranches. (All of the Units are collectively referred to as the "Subdivision.") (R. at 244-45.)

The original Declaration of Establishment of Protective Conditions, Covenants, Reservations and Restrictions Affecting the Real Property Known as "Swains Creek Pines Unit No. 1" was recorded by J. B. Investment with the Kane County Recorder on August 4, 1969 ("Unit No. 1 CC&Rs"). (R. at 244-45.) CC&Rs for the subsequent units were recorded at various times thereafter. The Declaration of Establishment of Protective Conditions, Covenants, Reservations and Restrictions Affecting the Real Property Known as "Swains Creek Pines Unit No. 3" was recorded by J. B. Investment with the Kane County Recorder on May 17, 1977 ("Unit No. 3 CC&Rs"). (R. at 236-44.) (The Unit No. 3 CC&Rs are attached as Addendum 1.) The dispute before this Court principally relates to Unit No. 3, though for historical purposes and interpretation of the CC&Rs, the Unit No. 1 CC&Rs have some relevance.

With respect to the type of structures allowed within Unit No. 1, the Unit No. 1 CC&Rs provide, "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." (R. at 1968.) By contrast, the types of structures allowed within Unit No. 3 include the following:

> 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 improvement or structure whatever, other than a first*

> *class private dwelling house*, patio walls, swimming pool, and customary outbuildings, garage, carport, servants' quarters, or guests house may be erected, placed, or maintained on any lot in such premises.

(R. at 236 (emphases added).) Neither the Unit No. 1 CC&Rs nor the Unit No. 3 CC&Rs define "mountain cabin," "trailer," or "first class private dwelling house." The Unit No. 3 CC&Rs also include the following antiwaiver provision:

> 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 action 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.

(R. at 241-42.)

Additionally, the Association's Guidelines, Rules & Regulations ("Rules"), applicable to the entire Subdivision, include the following relevant language:

> 16. 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.

(R. at 1884.)

B. The Cockses' purchase of lots in Unit No. 3

The Cockses, as trustees of the Cocks Family Trust, dated August 11, 2006, acquired title to lots 526 and 527 of Unit No. 3 on or about July 16, 2014. (R. at 402.) Prior to purchasing lots 526 and 527, the Cockses undertook certain actions, including the following:

- Studying the Unit No. 3 CC&Rs (R. at 622, 2194);
- Studying the Association's articles of incorporation ("Articles") and bylaws ("Bylaws") (R. at 2201-2202);
- Studying some, but not all, of the minutes of the Association, which were available on the Association's website (R. at 2193, 2205);
- Reviewing certain rules of the Association (R. at 2196);
- Speaking to a friend who built a cabin in Unit No. 3 (R. 2198-99); and
- Driving through parts of the Subdivision and noting that there were some RVs and located on some lots, though significantly fewer RVs than there were cabins on lots (R. 2193).

Though the Cockses performed some due diligence, they did not undertake the following efforts prior to purchasing lots 526 and 527:

- They did not use a realtor to purchase of their lots, nor did they hire legal counsel to assist them with their review of the Unit No. 3 CC&Rs or the Association's Articles, Bylaws, or Rules. (R. at 2192, 2268-69.)
- Despite having all the minutes from the Association's board meetings and annual meetings on the Association's website, the Cockses did not look at the minutes for the years 2007 and 2013, which discussed proposed enforcement actions against owners who stored RVs on their lots. (R. at 2262-64.)

- Arthur did not look at the plat maps for the Subdivision's units, all of which had been subdivided and platted decades before. Thus, when the Cockses saw an RV or trailer in the Subdivision, they had no idea which unit it was located in. (R. at 2266.)
- Arthur had no idea how many RVs or RV lots were located in Unit No. 3. (*Id.*)
- Arthur also failed to inquire about the proposed CC&R amendments in 2013, which were noted in the 2013 minutes of the Association on the Association's website. (R. at 2274).

Based upon his own research and interpretation of the Unit No. 3 CC&Rs, Arthur concluded that RVs were allowed in Unit No. 3. (R. at 2193.) He also concluded that, under the first paragraph of the Unit No. 3 CC&Rs, a cabin was only required when a structure was "built upon" the property. (R. at 2194, 2207-08.) Thus, because an RV was not built upon the property, he believed that the Unit No. 3 CC&Rs did not prohibit RVs. (R. at 2208).

Before buying their lots, Arthur further studied the antiwaiver provision in section 22 of the Unit No. 3 CC&Rs, and he agreed that "if there's some nonenforcement of these covenants, it wouldn't prohibit later enforcement." (R. at 2273.) Arthur believed, however, that the antiwaiver provision could be overcome by "laches." (*Id.*) The Cockses did not mention laches in their pleadings, however. (*See* R. at 213-232.)

During the fall of 2014, the Cockses began clearing lots 526 and 527 of debris. (R. at 2211.) About that time, the Cockses met with Kathy Cox, who owns

the lot next to them in Unit No. 3. (R. at 2318-19.) They discussed with her their intention to initially place an RV on their lots and then construct a cabin. (R. at 2319.) Cox told Arthur that building a cabin would be a good idea because RVs were not allowed as permanent structures on a lot and that cabins were required. (*Id*.)

The Cockses did not attend Board meetings or member meetings during 2014 or the summer of 2015, as they were busy cleaning up their lots and installing Utilities and infrastructure. (R. at 2260-61.) In 2014, the Cockses submitted a couple of requests to the architectural review committee and received approval for a "driveway and pad" and shed. (R. at 2290.) The "pad" was simply a wide area within the gravel driveway. (R. at 2290-91.)

At some point after the Cockses placed an RV on their lots, they told Alan Zellhoefer[4] that they intended to build a cabin on their lots within a year or two. (R. at 2528.) The Cockses proceeded in 2015 to install electricity, water, and a septic tank ("Utilities") on their lots. (R. at 2260.) They specifically designed and installed these Utilities to accommodate future cabin construction, rather than simply having the Utilities accommodate an RV. (R. at 2259-60.)

[4] Zellhoefer served on the Board at various times from 2005 to 2017. (R. at 2529.)

C. Events leading to the October 2016 Resolution

In 2014 and 2015, the Association Board began receiving complaints from various lot owners regarding the increasing number of RVs and threats of legal action if the Board did not deal with the proliferation of RVs in Unit No. 3. (R. at 2454, 2473-75.) During the summer of 2015, the Board asked Gina Chapman, one of the directors, to survey all improvements on the lots in the Subdivision to determine whether the lots were: (i) empty (not improved with either a cabin or RV), (ii) had a cabin on the lot, or (iii) had an RV or appeared to have RV improvements on the lot. (R. at 2493-2500.) Based upon that survey, the Board learned that less than ten percent of the over seven hundred lots in the Subdivision had ever had an RV or RV improvements. (R. at 2442.) This included lots in Unit No. 1A, which allows trailers. (*Id*.)

At its September 6, 2015 meeting, the Board discussed RVs. (R. at 2301.) The minutes of that meeting state:

> RVs / trailers – Chuck Costa.[5] The Board will address RVs. A survey of lots in the subdivision shows 10% have RV pads. A few years ago there was an attempt to amend the CC&Rs to include RVs. An amendment needs 2/3 approval to amend; there were not enough votes. There was a lot of opposition to RVs. The Board is working on developing an RV rule. The CCRs refer to mountain cabin dwelling. RVs would be prohibited except for people building a cabin with a valid building permit, or as an accessory to a cabin or certain period of time. Notice will go to lot owners before there is a vote. This will be discussed at the October meeting. Comments can be sent to board

[5] Charles Costa was the president of the Board at the time. (R. at 2224.)

> members. There will be a grace period. The Board is working with the attorney on this issue.

(R. at 923.) Though the Cockses did not attend the September 6, 2015 Board meeting, they did receive a copy of the minutes and the proposed RV resolution and rule ("RV Resolution and Rule"). (R. at 2300.)

At its October 3, 2015 meeting, the Board discussed the RV Resolution and Rule with the membership in attendance. (*Id.*) Later, at the October 24, 2015 Board meeting, the Board approved the RV Resolution and Rule, commonly referred to as Rule 19, which prohibited the future placement of RVs and identified other restrictions, and allowances, with respect to RVs. (R. at 262-262, 1328.)

In or about the end of October 2015, the Cockses began circulating a petition against the RV Resolution and Rule. (R. at 2224-25.) In December of 2015, the Cockses delivered the petition to the Association's contracted bookkeeper, seeking a meeting of the membership to overturn the RV Resolution and Rule. (R. at 2301).

At a special meeting of the Board later that month, the Board adopted revisions to the RV Resolution and Rule ("Revised RV Resolution and Rule") and restated the intent to allow existing RVs to remain while limiting future placement of RVs. (R. at 279-281.) Based upon the Cockses' Petition, the Board

afterward scheduled a special meeting of the Association's members for April 2016 to consider overturning the Revised RV Resolution and Rule. (R. at 2289.)

In April 2016, a majority of the membership that cast ballots voted to overturn the Revised RV Resolution and Rule. (R. at 2302.) In response, the Board rescinded the Revised RV Resolution and Rule. (*Id.*) In a further effort to address the issue and the member complaints, the Board formed a "CC&R Committee" to provide suggested language for a proposed CC&R amendment that would address RVs. (R. at 2302-03.) Arthur was a member of that committee. (R. at 2236, 2303.)

By July 2016, the CC&R Committee had reached a consensus and provided the Board with language for a proposed CC&R amendment. The language would grandfather existing RVs until the lot was sold. (R. at 2303.) Despite being a member of the CC&R Committee, Arthur's position at trial was that he only went along with the consensus of the Committee and did not fully agree with the proposed CC&R amendment. (R. at 2280.)

At the annual member meeting on September 4, 2016, the membership voted on the proposed CC&R amendment. (R. at 2303.) The proposed CC&R amendment did not pass. (*Id.*) The Board and CC&R Committee subsequently continued communicating about the RV issue to try to reach a compromise; they considered a resolution that would allow those currently using their lots for an

RV to continue to do so until the lot was sold to an unrelated third-party or until the members voted to amend the CC&Rs. (R. at 2303.) Arthur participated in those communications and approved the proposed resolution of non-enforcement. (R. at 2564-65.) But in his trial testimony, he did not recall those meetings (R. at 2580.)

On October 1, 2016, the Board adopted the non-enforcement resolution ("October 2016 Resolution"). (R. at 286-88.) (The October 2016 Resolution is attached as Addendum 2.) Attached was a list of the lots in the Subdivision affected by the October 2016 Resolution. (R. at 2243).

D. Enforcement testimony at trial

The Subdivision covers a vast area in a mountainous region with several isolated pockets of development. At trial, Board members testified that they were not always aware of the placement or proliferation of RVs until Association members started complaining in or around 2014 and the Board inventoried the lots in 2015. (R. at 2493-2500.)

As stated in more detail below, the evidence at trial showed that RVs proliferated in the Subdivision not just because Association enforcement measures may not have been aggressive, but because some owners and their realtors advertised cabin lots as RV lots to make a sale, and contractors built RV improvements without first seeking approval from the Association. (R. at 2506-

07.) It also became clear at trial that certain purchasers within Unit No. 3 bought lots based on representations made to them, or their independent understanding, that RVs were not allowed in Unit No. 3 and that they would not have purchased their lots if RVs were allowed. (R. at 2034-35, 2053, 2321, 2379.) On the other hand, at least some lot owners within Unit No. 3 purchased lots for RV use based upon their subjective belief that RVs were allowed or because they were willing to chance that they would eventually be allowed. (R. at 2608, 2507.)

For example, Unit No. 3 lot owner Dan Theisen testified that before he purchased his lot, his realtor told him that because of the CC&Rs "trailers may or may not be allowed" (R. at 2002). Theisen ultimately elected to "take the chance" and buy a lot in that Unit and place an RV there. (R. at 2004). But he acknowledged that the "rules said we couldn't" put an RV on his lot. (R. at 2027.)

Another owner, Dinah Hood, testified that her real estate agent told her that the Unit No. 3 CC&Rs prohibited placing RVs on the lot for longer than 30 days. (R. at 2034.) This information was important to her choice to purchase a lot in Unit No. 3. (R. at 2035.) She also testified that in her 30 years' selling homes as a realtor, she never sold RVs. (R. at 2036.) Unlike RVs, in her experience, a first-class dwelling was "normally attached to the ground." (R. at 2040).

Other witnesses testified that they inquired specifically about RVs prior to purchasing lots in Unit No. 3. Pamela Szemanski, who owned three lots in the

Unit (R. at 2049), testified that her real estate agent told her that the Unit was for "residential cabins only." (R. at 2050). She also testified that if Unit No. 3 had allowed RVs, she would have been "discouraged from buying there." (R. at 2053.) Similarly, Kathy Cox testified that she and her husband "specifically chose" Unit No. 3 because it did not allow RVs. (R. at 2321.) David Pugh testified of purchasing with a similar desire in mind. (R. at 2379-80.) To his understanding, further, a "mountain cabin" was "not an RV." (*Id.*)

By contrast, Todd Call testified that he bought his property in Unit No. 3 in 1999 from a couple who had an RV and pad there. (R. at 2064.) He felt like he would not "have an issue" because there had already been an RV on the lot. (R. at 2068.) Although he testified, "There was a lot of RVs up there," (*id.*), on cross-examination, he was not aware where Unit No. 1 (where RVs were allowed) was in relation to his lot, nor was he sure whether the RVs he saw were ones that remained for more than a weekend. (R. at 2075.) His wife, Sandra Call, testified that she was allowed to use an RV but stated, "Actually I haven't had anybody come and tell us that we couldn't. *I mean, they brought up the CC&Rs, and brought all that to our attention, and we tried to fix the problem.* But I haven't had anyone say you cannot use your RV here, no one." (R. at 2092, emphasis added.)

At least one owner, Holly Hunter, had acquired her property in Unit No. 3 from J.B. Investment, in 1977, the year the Unit No. 3 CC&Rs were first recorded.

(R. at 2158.) She camped on her lot in either a tent or her van, off and on, over a period of twenty years before she acquired the RV that she placed upon her lot in 1996 or 1997. (R. at 2162.) She believed there was no issue with her RV being on her lot until she learned of the Board's actions related to RVs in or around 2015. (R. at 2164.) She admitted, however, that she had no written statement from the Association supporting her belief that RVs were permitted on her lot. (R. at 2171.)

Another lot owner, Patricia Martin, testified that she "was never approached" about her fifth-wheel trailer until the October 2016 Resolution was passed. (R. at 2105.) She claims to have had "many discussions" with Board members over the years that led her to conclude that RVs were permitted in Unit No. 3. (R. at 2119-2120.) She also admitted, however, that she had no written documentation to support the assertion that she had a right to an RV on her lot. (R. at 2120.) She also agreed that an RV is not a house. (*Id.*)

Cheryl Case, a Board member who served at various times from 1998 to 2018 (R. at 2339), testified that RVs were not allowed in Unit No. 3 (R. at 2340) and about how the Board was asked questions about whether RVs were allowed in Unit No. 3. (*Id.*) In her experience, "The boards would explain the CC&Rs don't allow for RVs in [U]nit [T]hree." (*Id.*) She also testified that this "explanation was given in numerous board meetings." (*Id.*)

Following the October 2015 Board meeting, Arthur stated that he undertook an exhaustive review of the Association minutes that were posted on the Association website, including minutes that were on the Association website when the Cockses purchased their property in 2014. (R. at 2261-62.) Based upon that review, he discovered that RV-enforcement issues had come before the Board in at least the years 2007 and 2013. (R. at 2264.) Arthur concluded that "it shows that the Board not only knew that RVs were here, documented, but also believed that RVs were contrary to the CC&Rs." (*Id*.) That is, he felt that though the Association's past Boards construed the Unit No. 3 CC&Rs to not allow RVs, they "hadn't taken significant enforcement action with respect to all RV owners." (*Id*.)

The Cockses contended, as evidence that RVs were allowed, that the Association maintained an approved RV sewage dump facility. (R. at 2345-46.) However, former board member Alan Zellhoefer, recalling his statement during a Board meeting on June 25, 2016, testified that the bathrooms at the barn facilities were "not an approved dumping site" and that some people had used the cleanout pipe for the septic tank serving the barn bathroom as a dump for their RVs. (R. at 2530.) Following that Board meeting, the Association's onsite manager, following Zellhoefer's instructions, sealed off the barn bathroom

facilities for dumping RV sewage into the barn's septic system, rendering them unusable. (R. at 2532.)

At trial, the Cockses also argued that because RVs were present next to some cabins, RVs were acceptable in the Subdivision, including Unit No. 3. (R. at 2220, 2510-11.) However, despite some conflicting testimony, former Board member Janelle Pearce clearly testified that while there had been efforts in the past to allow RVs with a cabin (R. at 2557), there was no current policy allowing RVs on a lot where a cabin already exists. (R. at 2560.)

Keith Christensen, an officer in and manager of J. B. Investment (the company that developed the Subdivision) (R. at 1962), testified about his experience as an incorporator of the Association and one of the original Board members. (R. at 1962-64.). He testified that although RVs were allowed in Unit No. 1, the Board made the decision not to allow RVs in subsequent Units of the Subdivision. (R. at 1975.) He testified that it had been a marketing mistake to allow RVs in Unit No. 1. (R. at 1969.) He also testified that the phrase "mountain cabin" in the Unit No. 3 CC&Rs did not include RVs. (R. at 1973.) He explained that "mountain cabin" constituted an affirmative statement of what was allowed in the Subdivision and that it was unnecessary to include a negative statement that RVs were not allowed. (R. at 1983.) Based upon the same reasoning,

Christensen testified that an RV was not contemplated as a "first-class private dwelling house." (R. at 1973.)

E. Expert testimony

The Association's expert, Chris Dahlin, an appraiser familiar with the Subdivision and other residential developments in surrounding areas (R. at 2423-24), testified that the meaning of a "mountain cabin" and "first-class private dwelling house" must be considered in the context of Swains Creek Pines being a single-family residential subdivision located in a mountain area. (R. at 2426.) He explained that a "mountain cabin" is not the same as a cabin in an airplane or truck, as the Cockses had contended. (R. at 2434-36.)

The Association's other expert, John Richards, an attorney whose practice emphasizes community association law (R. at 2349), testified that the Board had appropriately exercised its business judgment to pass the October 2016 Resolution. (R. at 2452, 2465). He opined that the business judgment rule is partially codified in the Utah Community Association Act at Utah Code § 57-8a-213. (R. at 2445.) Richards further testified that grandfathering existing RVs and related improvements with a "prior non-conforming" classification was reasonable based on Unit No. 3's CC&Rs requiring "mountain cabins" and "first-class private dwelling houses." (*Id*.) Those phrases, in his opinion and experience, do not include RVs. (R. at 2449, 2451.) He also opined, based on his

experience, that the triggering event for losing the classification of "prior non-conforming" upon the sale to an unrelated third-party was a customary and acceptable means for bringing lot owners back into conformity with the CC&Rs after a grandfathering period. (R. at 2463). The Cockses offered no expert testimony to counter the Association's experts.

F. The trial court's decision

After trial, the trial court issued a memorandum decision with findings and fact and conclusions of law. (The decision is attached as Addendum 3.) It rejected the Association's arguments about plain meaning and found that "nothing in the CC&Rs expressly prohibits RV use." (R. at 1887.) It also stated,

> 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; [*sic*] and also when juxtaposed against the language in Rule 16 which includes "trailers" as a permitted "structure."

(*Id*.) Additionally, the trial court held that the Association's actions were not an appropriate exercise of business judgment:

> [T]he "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 [the Cockses] have enjoyed (with the association's tacit approval) since they purchased their property.

(R. at 1880; emphasis in original). The court determined, "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." (R. at 1893.) Giving no deference to the Board's efforts to find a solution to the RV situation, the court concluded the Board had impermissibly "change[d] its interpretation of what constitutes a violation of the governing documents." (*Id.*)

Moreover, the trial court found that the Association took no action to prevent the use of lots for RV purposes prior to the October 1, 2016 Resolution complained of by the Cockses. The trial found what it considered lack of enforcement action to be "consistent with the interpretation that the CC&Rs allow RV use." (R. at 1888.) The court also stated, "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. . . . The association cannot now change horses in mid stream [*sic*] to deprive [the Cockses] of the full use of their property." (R. at 1891-92.)

The trial court was unconvinced by Keith Christensen's testimony that the Board considered the Unit No. 1 CC&Rs, which allowed trailers, to have been a mistake and that the Unit No. 3 CC&Rs were specifically written with the intent of prohibiting RVs. (R. at 1975.) The trial court also doubted Keith Christensen's testimony based on the court's view of what "mountain land use generally" includes:

> 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.

(R. at 1891.)

The court instead relied on the testimony of resident Theodore Long to find that that the developer intended only to exclude mobile homes from Unit No. 3 (R. at 1887.) Long formed his belief from a meeting he had with Barbara Christensen, and what he understood about the Christensen family's "concerns" about mobile homes. (R. at 2545.)

The trial court did not mention the antiwaiver clause of the Unit No. 3 CC&Rs and determined that the Association's enforcement actions were not prompt enough:

> [The Association] 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 [the Association's] argument is that it comes too late. [The Cockses] were entitled to rely upon the interpretation of the CC&Rs the association adopted prior to the adoption of the October 1, 2016 resolution.

(R. at 1891.) The trial court did not void the RV Resolution entirely, but found that it "can be recorded in some manner to give notice to future interest holders of the [A]ssociation's interpretation of its governing documents, i.e.[,] the CC&Rs." (R. at 1894.)

IV. SUMMARY OF ARGUMENT

The trial court erred in concluding that the Unit No. 3 CC&Rs were ambiguous and considering extrinsic evidence to determine whether the CC&Rs were ambiguous. Alternatively, the clear weight of the extensive evidence at trial supported finding the intent of the contracting parties was to prohibit RVs in Unit No. 3. The trial court also conflated the Unit No. 1 CC&Rs, which allow RVs, and Unit No. 3 CC&Rs, which do not. In finding that the Association took no action to prevent RVs before the enforcement actions complained of by the Cockses, the trial court disregarded the clear weight of contrary testimony. The trial court also gave short shrift to the business judgment rule, failing to apply a "presumption of reasonableness" to the Board's decision enforcing the RV rule. The trial court also incorrectly concluded that the RV rule was an amendment to the CC&Rs, which it was not. Lastly, the trial court failed to correctly interpret the law and apply the facts as to the antiwaiver provision of the Unit No. 3 CC&Rs.

V. ARGUMENT

A. The Trial Court Incorrectly Interpreted the CC&Rs as Not Prohibiting RVs, and Incorrectly Found that the CC&Rs Were Ambiguous.

Contrary to the trial court's holding, the Unit No. 3 CC&Rs are unambiguous and may be interpreted according to their plain language. Because restrictive covenants "form a contract between subdivision property owners as a

whole and individual lot owners" they are interpretated using "the same rules of construction as those used to interpret contracts." *Swenson v. Erickson*, 2000 UT 16, ¶ 11, 998 P.2d 807. The first step in interpreting restrictive covenants is looking at "the plain language within the four corners of the document." *S. Ridge Homeowners' Ass'n v. Brown*, 2010 UT App 23, ¶ 1, 226 P.3d 758, 759. When interpreting the plain language, courts "look for a reading that harmonizes the provisions and avoids rendering any provision meaningless." *Id.* (quoting *Peterson & Simpson v. IHC Health Servs., Inc.*, 2009 UT 54, ¶ 13, 217 P.3d 716). "[T]he ordinary and usual meaning of the words used is given effect, which ordinary meaning is often best determined through standard, non-legal dictionaries." *Brown*, 2010 UT App 23, ¶ 1 (quotation simplified). "An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless, or inexplicable." *UDAK Properties v. Canyon Creek Com. Ctr. LLC*, 2021 UT App 16, ¶ 15, 482 P.3d 841 (quoting 11 Williston on Contracts § 32:5 (4th ed. 2020). If the language within the four corners is unambiguous, courts "look no further than the plain meaning of the contractual language." *Id.* ¶ 14.

Section 1 of the Unit No. 3 CC&Rs provide, in pertinent part:

> 1. RESIDENTIAL USE. Each and all of said lots are for single-family residential purposes only … 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 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.

(R. at 1881.) The trial court nevertheless concluded that "nothing in the CC&Rs expressly prohibits RV use." (R. at 1887.) The court reasoned that use of the word "cabin" and "first class private dwelling house" do not "expressly exclude RVs" and that the word "RV" is not used in Section 1. (R. at 1887.) And the court placed special significance that "RV" was not used in the last sentence of Section 1. (R. at 1887.)

Failing to prohibit RVs by name, however, is not the same thing as allowing RVs, and the plain language of the CC&Rs shows the trial court was mistaken in its interpretation. First, the lots in Unit No. 3 are limited to single-family residential purposes. Section 1 begins by stating, "[e]ach and all of said lots are for single-family residential purposes only." (R. at 1881.) Merriam-Webster's Dictionary defines "residential" as "restricted to or occupied by residences." *Residential,* Merriam-Webster, https://www.merriam-webster.com/dictionary/residential (last accessed 25 April 2021). "Residence" is defined as "the place where someone lives as distinguished from one's domicile or place of temporary sojourn." *Residence*, Merriam-Webster, https://www.merriam-webster.com/dictionary/residence (last accessed 25

April 2021). Thus, the ordinary and usually meanings of "residential" and "residence" mean that Unit No. 3 is a community of permanent structures, like cabins, and not a community comprised of recreational *vehicles*, which are mobile by their nature.

Second, RVs do not preserve and enhance the pastoral and scenic beauty of lots. Section 1 mandates that lots are to be "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. (R. at 1881.) Merriam-Webster defines "pastoral" as "of or relating to the countryside: not urban." *Pastoral*, Merriam-Webster, https://www.merriam-webster.com/dictionary/pastoral (last accessed 25 April 2021). The obvious interpretation is that to the Unit No. 3 CC&Rs intended to create a mountain cabin community that blends into and becomes part of the countryside, not an RV park comprised of metal RVs that may move in and out each year, doing nothing to "enhance"[6] the pastoral and scenic beauty of the area.

Third, the plain language of Section 1 restricts lots in Unit No. 3 for use as "mountain cabin residential recreational sites," and an RV is not a cabin. In the

[6] To "heighten, increase: *especially*: to increase or improve in value, quality, desirability, or attractiveness," *Enhance*, Merriam-Webster, https://www.merriam-webster.com/dictionary/enhance (last accessed 25 April 2021).

phrase “mountain cabin residential recreation sites,” the term “mountain cabin” describes “residential recreation sites.” Any other interpretation would not make sense as there is no comma or conjunction between the words “mountain cabin” and “residential recreational sites.” The Cockses’ interpretation would eliminate “mountain cabin” from the phrase, rendering it superfluous.

Fourth, RVs are not one of the permitted structures identified in Section 1 of the Unit No. 3 CC&RS. The last sentence of Section 1 of provides: “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 lots in such premises.” (R. at 1881, emphasis added.) This sentence identifies the improvements or structures that may be “placed” in Unit No. 3. RVs are not one of them.

While the trial court correctly noted that the last sentence of Section 1 does not include RVs, it reached the wrong conclusion about the sentence’s meaning. By beginning with the phrase, “No improvement or structure whatever, *other than*,” this sentence prohibits any improvement or structure except for those in the list that follows “other than.” Because an RV is not in that list, the plain of Section 1 unambiguously prohibits RVs from being placed on any lot in Unit No. 3. Consequently, the trial court incorrectly interpreted Section 1.

The interpretive maxim *expressio unius est exclusio alterius* emphasizes the trial court's incorrect interpretation. "[T]he maxim appropriately applies only where in the natural association of ideas the contrast between a specific subject matter which is expressed and one which is not mentioned leads to an inference that the latter was not intended to be included." *Monson v. Carver*, 928 P.2d 1017, 1025 (Utah 1996); *see also Cross Country Land Servs., Inc. v. PB Telecommunications, Inc.*, 276 F. App'x 825, 838 (10th Cir. 2008 (applying maxim to contract interpretation); *Pulham v. Kirsling*, 2019 UT 18, n.9, 443 P.3d 1217, 1224. Because RVs are not listed as one of the improvements or structures that may be placed on lots, this maxim means RVs were intentionally excluded.

In sum, Section 1 of the Unit No. 3 CC&Rs unambiguously restrict RVs. As a consequently, the trial court incorrectly determined that Section 1 did not prohibit RVs and incorrectly found that Section was ambiguous.

B. The Trial Court Improperly Admitted Extrinsic Evidence to Conclude that the Unit No. 3 CC&RS Were Ambiguous, and Its Found Against the Clear Weight of that Evidence that the Intent of the CC&Rs Did Not Prohibit RVs.

Because the plain language of Section 1 of the Unit No. 3 CC&Rs unambiguously prohibits RVs, the trial court improperly allowed extrinsic evidence. Even so, the trial court's findings that intent of the parties in the CC&Rs was not to prohibit RVs were clearly erroneous. Even where restrictive covenants are ambiguous, "the intention of the parties is controlling," *Equine*

Holdings LLC v. Auburn Woods LLC, 2021 UT App 14, ¶ 25, 482 P.3d 880 (quoting *Swenson*, 2000 UT 16, ¶ 11). Intention is determined by "the meaning intended by the parties at the time they entered into the agreement." *Uintah Basin Med. Ctr. v. Hardy*, 2005 UT App 92, ¶ 12, 110 P.3d 168.

A contract is ambiguous if "it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." *UDAK Properties*, 2021 UT App 16, ¶ 15 (quoting *Brady v. Park*, 2019 UT 16, ¶ 54, 445 P.3d 395). "[A] reasonable interpretation is an interpretation that cannot be ruled out, after considering the natural meaning of the words in the contract provision in context of the contract as a whole, as one [of] the parties could have reasonably intended." *Id*. "If the contract is ambiguous, a court will look at extrinsic evidence. *Id.*

But before determining whether the plain language of restrictive covenants is ambiguous, a court must "first attempt to harmonize all of the contract's provisions and all of its terms when determining whether the plain language of the contract is ambiguous." *Gillmor v. Macey*, 2005 UT App 351, ¶ 19, 121 P.3d 57, 65 (quotation simplified). Accordingly, although a court may consider ambiguity "in the light of surrounding circumstances," a court may not "allow surrounding circumstances to create ambiguity where the language of a contract would not otherwise permit." *Daines v. Vincent*, 2008 UT 51, ¶ 27, 190 P.3d 1269, 1276.

"Thus, . . . a finding of ambiguity after a review of relevant, extrinsic evidence is appropriate only when reasonably supported by the language of the contract." *Id.* (quotation simplified). However, "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 interests." *Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶ 17, 133 P.3d 428

Here, the trial court determined that Section 1 was ambiguous based on extrinsic evidence. Because, as shown in the previous section, Section 1's plain terms prohibit RVs, the trial court improperly allowed extrinsic evidence to find ambiguity. Even so, that evidence does not create an ambiguity.

The trial court determined that the Section 1 of the Unit No. 3 CC&Rs was ambiguous "[w]hen juxtaposed against the language of the Association Rules," specifically Rule 16. (R. at 1887.) Rule 16 provides,

> 16. 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.

(R. at 1884 (trial court's emphasis).) The trial court indicated that because this definition of structures includes trailers, the Association supports and approves RV use in the Subdivision.

What the trial court failed to recognize, however, is that the Subdivision includes multiple Units, and each Unit has separate CC&Rs. The Unit No. 1 CC&Rs specifically allow trailers. Because Rule 16 applies to all Units, the list of structures in Rule 16 naturally includes trailers. But this does not mean that RVs or trailers are allowed in all Units. On the contrary, Rule 16 shows that the trial court's interpretation is flawed because Rule 16 indicates that trailers are considered *structures*. And RVs and trailers are not on the list of structures allowed in the Unit No. 3 CC&Rs.

The trial court also found that Section 1 was ambiguous when "juxtaposed against the way the association has interpreted and applied through the years." (R. at 1887.) The court also found ambiguity based on what realtors, board members, and contractors only told purchasers and lot owners what they wanted to hear about whether RVs were allowed.

Even assuming that these findings were entirely correct—though they are not—this would not support a finding of ambiguity. In other words, when considering whether the Unit No. 3 CC&Rs are ambiguous, it does not matter how the Association, realtors, board members, or purchasers acted if the *text itself* does not support an interpretation that allows RVs. As shown above, the Unit No. 3 CC&Rs do not support an interpretation that allows RVs.

The trial court also misapprehended the meaning of the Unit No. 3 CC&Rs. The court relied on the testimony of resident Theodore Long that the developer intended only to exclude mobile homes from Unit No. 3 and did not address RVs because mobile homes are permanent while RVs are temporary. (R. at 1887.) Long's testimony in this regard included a second-hand account of the drafters' "concerns" as he understood them based on a meeting he had with Barbara Christensen. (R. at. 2551-52.) Long testified that because of the meeting, he did not "believe" that the Unit No. 3 CC&Rs addressed RV. (R. at 2545.) Instead, he testified, that "I think" the Christensen family was concerned with allowing mobile homes when the Unit No. 3 CC&Rs were drafted in the 1970s. (R. at 2551-52.)

In admitting extrinsic evidence, the court disregarded the testimony of Keith Christensen,[7] who actually who drafted the Unit No. 3 CC&Rs and the witness who was in the best position to explain the developer's intent at the time the CC&Rs were executed. Christensen was an officer and manager in the company that developed the Subdivision, an incorporator of the Association, and one of the original members of the Association Board and thus in a position to testify about the meaning intended by the parties at the time the CC&Rs were

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[7] The Memorandum Decision refers to the witness as "Keith Christiansen." (R. 1890.)

drafted and recorded. He testified at trial that the Unit No. 3 CC&Rs were never intended to allow RVs. He explained that the developer considered its decision to allow RVs in Unit No. 1 to be a mistake and that consequently the decision was made not to allow RVs in subsequent units in the Subdivision.

The trial court invalidated Christensen's testimony because it was inconsistent with ownership of mountain property in Utah, which the trial court believed generally entails certain rights. (R. at 1891.) The trial court determined:

> 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.

R. at 1891.)

In finding that this interpretation would be "not in harmony with mountain land use generally," the trial court did not support its assertion any reference to particular facts on the record about "mountain land use." (See R. at 1891.) Christensen's testimony, however, is supported by the language of the documents themselves. A comparison of the wording of the Unit No. 1 CC&Rs and the Unit No. 3 CC&Rs shows the clear intent to disallow RVs and trailers in Unit No. 3 by the marked absence of any reference to RVs or trailers in the later CC&Rs.

The Court's decision also appears to reflect local assumptions about mountain property rights that are unsupported by Utah law or the governing documents. Restrictive covenants, after all, are a form of contract. *See, e.g., Swenson*, 2000 UT 16, ¶ 11. And "it is not the judiciary's role to draft better agreements for parties than those they draft for themselves." *PC Riverview, LLC v. Xiao-Yan Cao*, 2017 UT 52, n.2, 424 P.3d 162 (citing *Rio Algom Corp. v. Jimco Ltd.*, 618 P.2d 497, 505 (Utah 1980)). Parties are entitled to determine for themselves what is an appropriate use of their respective properties. Thus, restrictive covenants "can be used for any purpose that is not illegal or against public policy." *Smith v. Simas*, 2014 UT App 78, ¶¶ 14-15, 324 P.3d 667 (citing Restatement (Third) of Property (Servitudes) § 1.1 cmt. a (2000)). The trial court's views of what "mountain land use generally" entails, therefore, should not be allowed to displace the covenants the parties agreed to themselves.

In sum, the trial court improperly allowed extrinsic evidence to find that Section 1 was ambiguous. Nevertheless, the extrinsic evidence does not support that Section 1 was ambiguous.

C. The Trial Court Misinterpreted and Misapplied the Business Judgment Rule to the Board's October 2016 Resolution and Improperly Substituted Its Judgment for that of the Boards'.

The trial court's decision is also flawed in that it did not afford the Board the appropriate level of deference to its judgment in enforcing the CC&Rs and

rules. The Utah Community Association Act's ("UCCA") codification of the business judgment rule requires an association board to "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." Utah Code § 57-8a-213(1)(a) (2021). If "after fair review and acting in good faith and without conflict of interest," the board determines (in relevant part) that "a technical violation has or may have occurred . . . and the violation is not material as to a reasonable person or does not justify expending the association's resources" or that "it is not in the association's best interests to pursue an enforcement action, based upon hardship, expense, or other reasonable criteria," the association may forego enforcement action. *Id.* § 57-8a-213 (b), (b)(iii)-(iv). In determining whether to forego enforcement action, however, the "board may not be arbitrary, capricious, or against public policy in taking or not taking enforcement action." *Id.* § 57-8a-213(3).

When a court reviews a board's exercise of business judgment, it should "apply a presumption of reasonableness." *Fort Pierce*, 2016 UT 28, ¶ 28 (citation omitted.) And while "there is considerable room for debate on what is reasonable and what is not reasonable in a business context," a court "must be careful not to substitute its judgment for that of the Board." *Id.* ¶ 26 n.12 (quotation simplified).

Here, the trial court held that Utah's statutory business judgment rule gives the Association authority "for prospective application of the board's interpretation of the [CC&Rs]," but "it does not provide the authority to adversely affect the rights [the Cockses] have enjoyed (with the association's tacit approval) since they purchased their property." (R. at 1893.) The trial court also held that "[a]dversely impacting [the Cockses'] rights by reversing its prior position[] is arbitrary, capricious and against public policy[] as it relates to [the Cockses.]" (*Id.*) The trial court concluded:

> 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.

(*Id.*) The trial court was incorrect because it improperly substituted its own judgment for that of the Association's Board. While it is true that the Board's enforcement decisions were not always aggressive and that some residents were confused about what the CC&Rs required, the trial court's findings do not reflect the "presumption of reasonableness" that a court must apply under the business judgment rule.

The evidence at trial showed that the before passing the October 2016 Resolution, the Board fairly reviewed the RV-enforcement issue in good faith

and without a conflict of interest: The Board (1) considered owner complaints and the pervasiveness of the RV violations; (2) conducted a physical inventory of all lots to determine the number of RVs actually present in the Subdivision, particularly Unit No. 3; (3) passed the non-enforcement resolution after two failed attempts to amend the Unit No. 3 CC&Rs to address RVs and trailers; (4) discussed the RV issue at several Board meetings; and (5) formed and took input from the CC&R Committee, including Committee member Arthur Cocks.

As a result of this deliberative process, the Board determined in the October 2016 Resolution to forego enforcement action until each lot with an RVs was transferred or sold to an unrelated party. This allowed existing RV owners to continue placing their RVs on their lots while gradually ensuring that future lot owners complied with the RV prohibition in the Unit No. 3 CC&Rs. Consequently, the October 2016 Resolution was the result of deliberation and consensus-seeking, and it was neither arbitrary nor capricious.

The October 2016 Resolution was also not against public policy. The Utah legislature has used a grandfathering procedure in similar contexts. Under the UCCA, if an association prohibits or imposes restrictions on the number and term of rentals, it must allow existing rentals to continue until certain triggering events occur. Utah Code § 57-8a-209(2)(c) (2021). Like to the October 2016

Resolution, one triggering event that would terminate the right to rent is the transfer of the lot. *Id.* § 57-8a-209(2)(c)(iii).

The legislature set out a similar standard in section 57-8a-218 (9) (2021). There, subsection (9)(a) provides that "[a] rule may not require a lot owner to dispose of personal property that was in or on a lot before the adoption of the rule or design criteria if the personal property was in compliance with all rules and other governing documents previously in force." Subsection (b)(ii), however, states that such an exemption "does not apply to a subsequent lot owner who takes title to the lot after adoption of the rule described in Subsection (9)(a)." Because the legislature used similar grandfathering procedures in those statutes—which might also be said to deprive existing owners of a right they previously enjoyed—the trial court wrongly held that the foregoing enforcement of the RV prohibition until the lot owners sell or transfer their lots to an unrelated third party is against public policy.

The trial court also appears to have held that the October 2016 Resolution was is not a valid exercise of business judgment because it modified the governing documents. Specifically, the court determined that the Resolution "constitute[d] a change in the governing documents" and that "the board was not using its best judgment to determine whether to pursue enforcement of a

violation . . . [but] to change its interpretation of what constitutes a violation." (R. at 1893.) The trial court's meaning is foggy at best.

It does not appear that the court meant the October 2016 Resolution modified the CC&Rs, because if that were the case, the court would have invalidated the Resolution on that ground alone. *See* Utah Code § 57-8a-228(5) (specifying that the CC&Rs control over a conflicting board resolution). After all, the trial court held that the "[R]esolution 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." (R. at 1894.) The interpretation that best harmonizes the trial court's seemingly contradictory reasoning is that the Association somehow waived enforcement or was estopped from enforcing the Resolution against the Cockses. However, as explained in Section E below, the trial court's waiver and estoppel analysis is legally incorrect.

D. The Trial Court's Finding that the Association Took No Action to Enforce the RV Prohibition Was Against the Clear Weight of Evidence.

The trial court presumably implicitly found that the Cockses had established facts rebutting the presumption that the Board acted reasonably and in the Association's best interests. The clear weight of evidence shows otherwise. "The burden is on the party challenging the decision of an association board to establish facts rebutting the presumption that the directors acted reasonably and

in the best interests of the corporation." *Fort Pierce*, 2016 UT 28, ¶ 28 (quoting *Bender v. Schwartz*, 172 Md. App. 648, 917 A.2d (Md. Ct. Spec. App. 2007).

The trial court found, "There was a consistent theme among witnesses.… 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." (R. at 1888.)

Although some witnesses did testify that the Association's enforcement efforts were lenient in some instances or that they were told by realtors or others that RVs were allowed, the trial court's finding disregards the clear weight of evidence. For instance, as set forth above, in 2007 and 2013 the Board took enforcement action against owners who stored RVs or trailers on their lots. Prior to 2013, there evidence showed that the Board only allowed owners to place RVs or trailers on their lots while their cabins were being built. (R. at 2546-47.) Moreover, the Board commissioned the survey of lots to determine the number of RVs or trailers in the Subdivision, passed the non-enforcement resolution after the failed attempts to amend the Unit No. 3 CC&Rs to address RVs, engaged in discussions of the RV issue at several Board meetings, and considered the recommendations from the CC&R Committee, including Committee member Arthur Cox.

The Cockses have failed to overcome the presumption of reasonableness and failed to show that the Association was "arbitrary, capricious, or against public policy." The evidence—including the uncontroverted testimony of attorney John Richards—demonstrated that the Board deliberately and reasonably exercised its business judgment in deciding when and how to take enforcement action. The evidence showed that the Board considered owner complaints and the pervasiveness of the violations in reaching its decisions. It also showed that the Board formed the CC&R Committee to fairly and in good faith consider the problem and to formulate an enforcement policy with input from the owners—including Mr. Cocks. The evidence also showed that the October 2016 Resolution was a reasonable alternative after the failure of the CC&R amendment. Given all the factors to be considered and balanced, it is clear that the Board's actions were careful and deliberative, not arbitrary or capricious.

E. The Trial Court Ignored the Antiwaiver Provision in the CC&Rs and Found Against the Clear Weight of Evidence that the Association Waived Enforcement of the RV Restriction.

The trial court's waiver analysis did not include a proper consideration of the events or the antiwaiver clause. Whether a trial court used the appropriate standard of waiver is a matter of law reviewed for correctness. *Pioneer Builders,* 2018 UT App 206, ¶ 10. However, "the actions or events allegedly supporting

waiver are factual in nature and should be reviewed as factual determinations." *Pledger v. Gillespie*, 1999 UT 54, ¶ 16, 982 P.2d 572.

"A party may establish waiver only where there is an 'intentional relinquishment of a known right.'" *Mounteer Enterprises, Inc. v. Homeowners Ass'n for the Colony at White Pine Canyon*, 2018 UT 23, ¶ 17, 422 P.3d 809 (quoting *Wilson v. IHC Hosps., Inc.*, 2012 UT 43, ¶ 61, 289 P.3d 369). Waiver may be express or implied. *Id*. But to be implied, "[t]he waiving party's conduct 'must evince unequivocally an intent to waive, or must be inconsistent with any other intent.'" *See Pioneer Builders Co.* 2018 UT App 206, ¶ 14, (quoting *Medley v Medley*, 2004 UT App 179, ¶ 17, 93 P.3d 847). "Courts do not lightly consider a contract provision waived, however." *Mounteer*, 2018 UT ¶ 17.

It is even more difficult to prove waiver "when a contract also contains an antiwaiver provision." *Id*. ¶ 19. "When a contract contains an antiwaiver provision, a party cannot waive a contractual right merely by failing to enforce the provision establishing that right." *Id*. "For these reasons a party asserting waiver in the face of an antiwaiver clause must establish 'a clear intent to waive both the [antiwaiver] clause and the underlying contract provision.'" *Id*. ¶ 21 (quoting 13 *Williston on Contracts* § 39:36 (4th ed. 2018). "And this second waiver must meet the same standard as waiver of the underlying provision—there must be an intentional relinquishment of that right." *Id*. "But the mere failure to insist

on performance under the . . . provision cannot give . . . a reasonable basis for concluding that [a party] relinquished its right to insist on exact performance," because "such conduct is entirely compatible with the antiwaiver clause," *id*. ¶ 26, whose "aim [is] to give the contracting parties flexibility in enforcing their rights under the contract" without losing those rights, *id*. ¶ 19.

At trial, the Cockses argued that the Association had waived its right to enforce the Unit No. 3 CC&Rs consistent with the October 2016 Resolution. (R. at 1891.) The Association countered that because waiver requires the intentional relinquishment of a known right, the Association would have had to intentionally chosen to forego enforcement of the RV restriction altogether rather than enforce the restriction in accordance with the October 2016 Resolution. (*See* R. at 1891.) The trial court agreed with the Cockses, holding that they "were entitled to rely upon the interpretation of the CC&Rs the association adopted prior to the adoption of the [October 2016 Resolution.]" (R. at 1891.) The court concluded that the October 2016 Resolution "took away the Cocks' [*sic*] rights to sell their property as an RV lot to someone outside their family" and that the Association "cannot now change horses mid stream to deprive [the Cockses] of the full use of their property." (R. at 1891-92.)

The trial court, however, failed to consider the antiwaiver provision in the Unit No. 3 CC&Rs. The provision provides:

> No delay or omission on the part of the [Association] . . . 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 . . . .

(Cite.) In other words, the Association's delay or failure to enforce the Unit No. 3 CC&Rs does not waive the Association's right to enforce.

Under the standards set out above and this provision, the Cockses therefore had the burden of establishing not only that the Association waived its right to enforce the RV restrictions on the Cockses' lots, but that the Association waived the antiwaiver provision. The trial court, however, failed to apply the proper standard for waiver because it failed to even mention or account for the antiwaiver provision in the Unit No. 3 CC&Rs. There are therefore no findings supporting any conclusion the Association waived the antiwaiver provision. As a consequence, the trial court failed to apply the heightened standard for waiver that applies when a contract contains an antiwaiver provision.

While the trial court essentially concluded that the Association waived its right to enforce the RV restriction, it did so based on findings that were against the clear weight of evidence. The court found that from the time they bought their lots, RV use was allowed. (R. at 1891.) The court also found that the Cockses "could have, at any time since they purchased

their property, sold their property, for RV use, to someone outside their immediate family." (R. at 1891.)

The court further found that "there was deliberate interaction between cabin owners and RV owners for many years" involving "cleanup and improvement functions and even assisting neighbors when needed." (R. at 1891-92.) Finally, the court found "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" and that "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." (R. at 1892.)

None of these findings, however, are clear evidence that the Association had intentionally relinquished its right to enforce the RV restriction. That the Association has not forced the Cockses to remove their RV or that the Cockses could have sold their lots for RV use to someone outside their family are not evidence of waiver. Nor are interactions between owners (deliberate or not) involving cleaning and improving lots. A finding that owners and members of the Board or the Association did not intend to restrict RV use is also not evidence of waiver. The same goes for the finding that the Board (much less the owners) failed to interpret or enforce the RV restriction before the October 2016 Resolution.

At most, these findings are evidence that the Association failed to enforce, and at some point did not intend to enforce, the RV restriction. But a contractual right cannot be waived by mere failure to enforce. *Pioneer Builders*, 2018 UT App 206, ¶ 19. Thus, there are no findings that the Association clearly manifested its intent to relinquish the right to enforce the RV restriction.

Not only that, the clear weight of evidence defeats these findings. The trial evidence showed that RVs had only been placed on a small percentage of the lots in Unit No. 3 when the Cockses purchased their lots. Also, before and around the time the Cocks bought their lots, the Association acted to enforce the RV and trailer restrictions when owner began to complain about the RVs on other owners' lots.

The October 2016 Resolution is, itself, evidence that the Association did not waive the RV restriction. All in all, the trial evidence also showed that rather than waiving the antiwaiver provision, the Association employed the flexibility afforded by the antiwaiver provision to enforce restrictions in a manner that balanced the competing interests of its members without waiving its ability to strictly enforce the restrictions in the future.

The Association's course of dealings with the Cockses is like that of the association in *SPUR at William Brice Owners Association, Inc. v. Lalla*, 415 S.C. 72,

781 S.E.2d 115 (S.C. Ct. App. 2015). In that case, the association filed a declaratory judgment action against an owner seeking enforcement of a restrictive covenant prohibiting rental of condominium units to unrelated college students. *See id*. at 79–81. In defense, the owner argued that the association had waived its right to enforce the restriction because it had previously allowed other non-related students to rent units. *See id*. at 92. The court disagreed. *Id*. It found "that even if the Association previously failed to monitor the rental of units, the record reflects that, upon receiving a complaint, the Association took action to enforce the restrictive covenant prohibiting rentals to unrelated college students." *Id*. The court therefore found that the association had not waived its right to enforce the restrictive covenant. *Id*. Similarly, in this case, the evidence at trial showed that the Association acted to enforce the RV and trailer restrictions when owners complained.

Rather than applying the waiver standard, the trial court conclusion's that the Cockses were "entitled to rely upon" (R. at 1891) the Association's purported non-enforcement of the RV restriction before October 2016 and that the Association "cannot change horses mid stream" (R. at 1892), indicates that court's rationale more closely followed an estoppel analysis. Even so, the court failed to apply the legal framework for estoppel.

But assuming the trial court somehow implicitly applied the framework, evidence shows that estoppel does not apply. "To prevail on a claim of equitable estoppel, a party must establish three elements." *Salt Lake City Corp. v. Big Ditch Irr. Co.*, 2011 UT 33, ¶ 41, 258 P.3d 539. They are: "first, a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; next, reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act; and, third, injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act." *ZB, N.A. v. Crapo*, 2017 UT 12, ¶ 27, 394 P.3d 338 (quotation simplified).

The purpose of estoppel is "to rescue from loss a party who has, without fault, been *deluded* into a course of action by the *wrong* or *neglect* of another." *Big Ditch*, 2011 UT 33, ¶ 40, quoting *Morgan v. Bd. of State Lands*, 549 P.2d 695, 697 (Utah 1976) (emphasis in original). Consequently, "[a] party claiming an estoppel cannot rely on representations or acts if they are contrary to his own knowledge of the truth or if he had the means by which with reasonable diligence he could ascertain the true situation." *Larson v. Wycoff Co.*, 624 P.2d 1151, 1155 (Utah 1981). "[T]he party claiming estoppel must show that he or she put forth some degree of diligence to investigate the accuracy of the representation." *Crapo*, 2017 UT ¶ 35. "Furthermore, a determination of the issue of estoppel is not dependent on

the subjective state of mind of the person claiming he was misled, but rather is to be based on an objective test, [i.e.], what would a reasonable person conclude under the circumstances." *Id.*

For estoppel to apply, then, the trial court would have to have found that (1) the Association did not enforce the RV restriction when the Cockses bought their lots, which was inconsistent with the October 2016 Resolution; (2) the Cockses reasonably acted or failed to act based on the Association's purported lack of enforcement; and (3), that the Cockses were injured by the October 2016 Resolution.

The first element of estoppel "is met only when the party sought to be estopped has intentionally or through culpable negligence induced the other party to change its position by relying on the inconsistent act." *Big Ditch*, 2011 UT 33, ¶ 42, The evidence at trial showed that when the Cocks purchased their lots, only a small percentage of all lots included only RVs. It also showed that the Association acted to enforce the RV restrictions when owners began complaining about the proliferation of RVs in violation of the restrictive covenants.

Further, the Association's conduct in enforcing the restrictions must be understood in the context of the antiwaiver provision in the CC&Rs and the UCCA's business judgment rule. The purpose of an antiwaiver provision is "to give the contracting parties flexibility in enforcing their rights under the

contract" without losing those rights. *Mounteer*, 2018 UT 23, ¶ 19. In addition, the UCCA permits an association to exercise its reasonable judgment in deciding whether to pursue enforcement actions. *See* Utah Code § 57-8a-213 (2021). Thus, even if the Association did not always strictly enforce the restrictions, the Association's conduct was still consistent with its later judgment to enforce the restrictions in the best interests of its members. Thus, the weight of evidence does not support the first element of estoppel.

The second element of estoppel cannot be met because the evidence does not clearly show that the Cockses reasonably relied or changed their position as a result of the Association not always enforcing the RV restriction. Rather, the Cocks bought their lots aware of the issues and capitalized on them to claim the right to use an RV. At trial Arthur admitted that before buying lots in Unit No. 3, he read the Unit No. 3 CC&Rs, was aware of the antiwaiver provision, but believed it could be overcome by laches. The trial evidence showed that the Cocks represented to the Association that they planned to build a cabin and that the RV improvements were being built in a manner that would accommodate the future cabin. The Association approved the improvements based on the Cockses' representations. Thus, the trial evidence showed that the Cocks were both aware of the restrictions and acted in a manner that recognized the Association's continued ability to enforce them.

Further, for the Cocks' reliance to be reasonable, they needed to show that they "put forth some degree of diligence to investigate" their beliefs about the RV restriction. *See Crapo*, 2017 UT ¶ 35. Although the Cocks did some due diligence before purchasing their lots, their conclusion that RVs were permitted was not reasonable. They did not consult legal counsel or a real estate professional. They neglected to review meeting minutes where the Association proposed enforcement actions against owners who placed RVs on their lots. And the Cocks did not look at the plat maps and, as a result, misunderstood the reason why some RVs existed in Unit No. 1. The Cockses therefore did not reasonably rely on the Association's conduct when they decided to buy their lots and placed an RV on them.

This case is like *Leaver v. Grose*, 610 P.2d 1262, 1264 (Utah 1980), in which the court determined estoppel did not apply. In that case, the defendant owned property in a subdivision governed by restrictive covenants that restricted property to single-family dwellings. *Id.* The defendant nevertheless began building a separate apartment in her basement based on her opinion that the covenants had expired. *Id.*

The appellate court held that the "defendants' untenable position was occasioned by her own action, and there is no basis in equity to shift the responsibility therefor to the plaintiffs." *Id.* at 1264. "At the outset . . ., defendant

convinced herself that restrictive covenants were unenforceable" and "took a calculated risk that plaintiffs would not seek a judicial determination of the issues, or, if they did that they would not achieve success." *Id.* The court concluded that "it was not plaintiffs' actions, or inactions, which induced defendant to proceed with the project to her ultimate detriment, but her own erroneous legal conclusion that the restrictive covenants were no longer enforceable." *Id.* In short, the second element of estoppel does not apply.

Finally, for the third element of estoppel to apply the trial court would have had to have found evidence that that Cockses were harmed because of their reliance on the Association's less-than-zealous enforcement of the RV restriction. The evidence showed the contrary: that the October 2016 Resolution allowed the Cockses to continue using their RV on their lots. Accordingly, the Cocks failed to establish all of the elements necessary to prove estoppel.

VI. CONCLUSION

The trial court incorrectly ruled that the Unit No. 3 CC&Rs were ambiguous. It also erred in resorting to extrinsic evidence to prove ambiguity. Further, it erred in finding that the Association took no action to prevent the use of lots for RV purposes prior to the acts complained of by the Cockses. The trial court also misapplied the business judgment rule. Finally, it failed to give appropriate effect to the antiwaiver provision of the CC&Rs.

Given the foregoing, the Court should reverse the trial court.

Date: May 10, 2020

JENKINS BAGLEY SPERRY, PLLC

/s/ Kathryn Lusty
Bruce C. Jenkins
Kimball A. Forbes
Kathryn Lusty
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(l) because according to the word processing program used to prepare this brief (Word 365), this brief contains 13,072 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).
2. This brief complies with Utah R. App. P. 21(g) governing the filing of public and private records.
3. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 13-point Book Antiqua font.

May 10, 2021

/s/Kathryn Lusty
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2021, I emailed a copy of the foregoing APPELLANT'S BRIEF to the following:

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Utah Court of Appeals
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/s/Kathryn Lusty
Attorneys for Appellant

ADDENDUM 1

Unit No. 3 CC&Rs

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.

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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 propmote 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.

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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.

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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

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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 thereor 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 [signature]

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.

[signature]

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

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ADDENDUM 2

October 1, 2016 Resolution

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 _/_, 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.

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[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: [signature]

Its: CHAIRMAN

Date: 10/01/2016

ADDENDUM 3

Memorandum Decision Constituting Findings of Fact and Conclusions of Law

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
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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.

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ADDENDUM 4

Judgment and Decree

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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.