24-1250

In The Supreme Court Of The United States

R-Ranch Property Owners' Association, et al.,
Plaintiff, Cross-Defendants, Respondents,
v.
Art Bullock, James Goguen, et al.,
Defendants, Cross-Complainants, Appellants

On Petition For Writ Of Certiorari
To United State Court Of Appeals
For The Ninth Circuit

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

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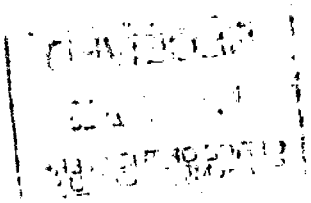

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Appendix A. Appellate Court Opinion (9/9/24).

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Siskiyou)

R-RANCH PROPERTY OWNERS' ASSOCIATION,
Plaintiff, Cross-defendant and Respondent,
v.
ART BULLOCK et al.,
Defendants, Cross-complainants and Appellants;
RON BUCHER et al.; Cross-defendants and Respondents.

C086537
(Super. Ct. No. SCSCCVCV12132)

This appeal arises out of a January 21, 2012 recall of four members of the board of directors of the R-Ranch Property Owners' Association (Owners' Association). Appellants Art Bullock and Jim Goguen (Appellants) are two of the individuals who were {pg.1} recalled in that election, and their appeal focuses primarily on two rulings made by the trial court. The first ruling disposed of Appellants' cross-claim under Corporations Code section 7616 for a determination of the validity of the election by concluding

the recall was valid and replacement directors were properly appointed by the remaining board members. The second ruling awarded attorneys' fees to the Owners' Association and the replacement directors as prevailing parties against Appellants. Because Appellants have not established any error in either ruling, or any other error necessitating reversal, we will affirm the judgment.

I. BACKGROUND

A. Factual Background

R-Ranch is a 5,000-acre recreational community with open spaces and common facilities for the benefit of its members. The Owners' Association is a nonprofit mutual benefit corporation. Each member of the Owners' Association owns a share consisting of a 1/2500th undivided interest in the property that allows them the nonexclusive right and easement of enjoyment in the common areas within the properties. More than one person may own a share, but they are deemed to be one member; there is only one vote per share. R-Ranch is not a residential community. The Owners' Association is governed by a declaration of covenants, conditions, and restrictions (CC&Rs), bylaws, and relevant statutes. The CC&Rs provide that the property only can be used for ranching, grazing, hiking, camping, horseback riding, hunting, fishing, swimming, sports, or other recreational uses authorized by the Owners' Association. At the time of this dispute, camping was limited to 210 days and then the owner had to stay away for at least 30 days before camping for up to 210 days again.

The Owners' Association has a board of directors (Board) that consists of seven members of the Owners' Association elected for two-year terms, with four directors elected in even years and three in odd years. Appellants were both elected to the Board in {pg.2} July 2011. The Board elected Bullock to be the president of the Owners' Association. In

November 2011, Goguen was elected vice president.

The bylaws of the Owners' Association (Bylaws) allow for removal by recall of a director during that director's term by the affirmative vote of the members. A recall election may be initiated by presentation to the president, vice president, or secretary of the Owners' Association of a petition signed by at least five percent of the members. The petition triggers a duty on the part of the Board to call a special meeting or announce the procedures for a written ballot within 20 days. If the Board fails to act, the petitioning members may call a meeting on their own.

In early September 2011, certain R-Ranch owners initiated petitions requesting the recall of four directors--Goguen, Bullock, Brian Gallant, and Roger Gifford. At least five percent of members signed petitions that were served on these directors. The Board, however, did not call a special meeting or announce procedures for conducting a written ballot within 20 days.

The petitioning members proceeded on their own with the recall election. One of these members, Hal Glover, contracted with Lisa Davis-Schwartz of the Ballot Box to conduct the recall meeting and election as the inspector of election. Written ballots and notices of a special members meeting on January 21, 2012, to conduct a recall vote were mailed to members. The notice explained that members could return their ballots in the mail or present them at the meeting.

At the January 21, 2012 special meeting, Davis-Schwartz conducted the meeting as the inspector of election and prepared a report. (Corp. Code, §7614, subd.(c) ["Any report or certificate made by the inspectors of election is prima facie evidence of the facts stated therein"].) Davis-Schwartz determined a quorum was present at the meeting. Of the 2,030 members in good standing constituting the total voting power, 722 were present either in person or by absentee

ballot. Five-hundred seven owners voted to remove Bullock and 203 voted not to remove him. Five-hundred three owners voted to remove {pg.3} Goguen and 205 voted not to remove. Gallant and Gifford were removed by similar margins.

On January 28, 2012, the directors remaining on the Board appointed respondents Ron Bucher, Mark Grenbemer, Timothy Caswell, and John Crosby (the Replacement Directors) to fill the vacancies created by the recalls.

B. Procedural Background

On January 31, 2012, the Owners' Association filed a complaint against the recalled directors for injunctive relief and appointment of a receiver. The complaint alleged causes of action for usurpation of office, interference with contractual relations, and declaratory relief. The trial court granted the Owners' Association's ex parte application for a temporary restraining order against the recalled directors prohibiting them from exercising the authority of directors or officers of the Owners' Association.

Goguen filed a cross-complaint against the Owners' Association and the Replacement Directors. His cross-complaint alleged causes of action for: (1) a determination under Corporations Code section 7616 that the recall failed and the Replacement Directors are not entitled to hold office, (2) usurpation of office, (3) intentional interference with contractual relations, and (4) negligent interference with contractual relations. On April 2, 2012, Bullock filed a cross-complaint alleging substantially the same causes of action as Goguen against the same defendants. The other recalled directors are not parties to this appeal. Later in April 2012, default was entered against Gifford and the court granted a motion to dismiss Gallant without prejudice.

Prior to Bullock's appearance in the case, the parties agreed that the court should first hear and decide Goguen's

first cause of action to determine the validity of the recall action pursuant to Corporations Code section 7616. The parties subsequently agreed to hear Goguen's and Bullock's Corporations Code section 7616 challenges concurrently. The evidentiary hearing took multiple days. On January 28, 2013, the court issued a 13-page {pg.4} decision finding that the recall election was valid.[1] We will discuss specific portions of this decision where relevant to Appellants' arguments. For now, we note the court summarized its ruling as follows: "The members who conducted the recall were all owners authorized to pursue a recall of the directors without cause. They initiated their recall with the requisite number of signatures, timely and properly served on the subject directors, proceeded to at their own expense hire an independent professional to conduct the recall election and act as an inspector of election for the written ballots. They noticed a special members meeting and there was no dispute that the membership list utilized was one obtained from the [Owners' Association]. The notice of the special meeting and written ballots were in proper form, maintained confidentially, verified and tallied. The recall election results were certified. The process was open to any member who wanted to participate, and information was available to any member who wished to obtain that information. A sufficient number of members in good standing voted to recall Jim Goguen, Art Bullock, Roger Gifford and Brian Gallant on January 21, 2012. Pursuant to Corporations Code Section 7616, the court finds the recall election was valid. R-Ranch is only the real property and improvements thereon owned jointly by its owners, as undivided tenants in common, who

1 We dismissed an appeal from this order as violating the one final judgment rule. (*R-Ranch Property Owners Association v. Bullock* (Nov. 28, 2016, C073461) [nonpub. opn.]. We explained the order is not an injunction and therefore not appealable as such.

have agreed to be managed by the [Owners' Association], a nonprofit mutual benefit corporation. This case represents the most disparate views of how R-Ranch should be governed."

On October 11, 2017, the trial court granted the Owners' Association's and Replacement Directors' motions for judgment on the pleadings as to both cross-complaints. The court concluded that its determination that the recall election and appointment of the Replacement Directors was valid precluded Appellants' other causes {pg.5} of action for usurpation of office, intentional interference with contractual relations, and negligent interference with contractual relations from stating a claim as a matter of law. The trial court entered judgment against Appellants on December 4, 2017. Appellants filed a timely appeal.[2]

The trial court subsequently awarded $320,654 in attorneys' fees to the Owners' Association and $327,796.50 to the Replacement Directors.

II. DISCUSSION

A. Standards for Appellate Briefs

We begin with a few words regarding appellate briefing. These rules of appellate procedure apply to Appellants even though they are ostensibly representing themselves on appeal.[3] (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 523.)

Orders and judgments are presumed to be correct, and the appellant must affirmatively show error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.] When

2 The reply briefs were not filed in this case until January 29, 2024. The parties continued to file and respond to motions after that point.

3 Appellants admit they have "their own advising attorneys."

a point is asserted without argument and authority for the proposition, 'it is deemed to be without foundation and requires no discussion by the reviewing court.' [Citations.] Hence, conclusory claims of error will fail." (In re S.C. (2006) 138 Cal.App.4th 396, 408.) With respect to citations to the record, the appellant must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).) As the reviewing court, we will not perform an independent, unassisted review of the record in search of error or grounds to support the judgment. (*McComber v.* {pg.6} *Wells*, supra, 72 Cal.App.4th at p. 522.) That relevant record citations may have been provided elsewhere in the brief, such as in the factual background, does not cure a failure to support specific legal arguments with citations to the record. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn.16.) This is particularly so in this appeal where Appellants have submitted hundreds of pages of briefing. Furthermore, any arguments raised or only supported by authority on reply have been waived. (*People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.)

In addition, the appellant must "[s]tate each point under a separate heading or subheading summarizing the point." (Cal. Rules of Court, rule 8.204(a)(1)(B).) "This is not a mere technical requirement." (In re S.C., supra, 138 Cal.App.4th at p. 408.) It is designed so that we may be advised "'of the exact question under consideration, instead of being compelled to extricate it from the mass.'" (Ibid.) "Failure to provide proper headings forfeits issues that may be discussed in the brief but are not clearly identified by a heading." (*Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 179.) Appellants' arguments "echo each other under their different headings in contravention of the requirements for

focused briefing." (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 202.) Appellants' briefs are also difficult to decipher. As such, "[w]e address [their] claims as best we can discern them." (*County of Sacramento v. Singh* (2021) 65 Cal.App.5th 858, 861.) Further, we will address only those arguments that were not forfeited under the standards we have laid out.

B. Respondents' Briefs

Two respondent's briefs have been filed in this appeal. Appellants challenge the propriety of both. {pg.7}

1. Owners' Association's Brief

One respondent's brief was filed on behalf of the Owners' Association. On November 29, 2023, Appellants filed a motion that requested we strike this brief and dismiss the Owners' Association as a non-party to this appeal. On December 13, 2023, this court deferred decision pending calendaring and assignment of the panel. We now deny this motion and address the overlapping argument Appellants made in their opening brief.

Appellants argue the Owners' Association lacks standing to appear in this appeal because they "cannot represent the corporate interests in this dispute." They cite authority indicating that in a case where "the issue is whether plaintiff or defendants rightfully control the corporation," the corporation is not a necessary party to the action. (*American Center for Education, Inc. v. Cavnar* (1972) 26 Cal.App.3d 26, 37.) The plaintiff in that case had been on the board of directors with three other individuals. (Id. at p. 28.) When one resigned, the two others (who were both named as defendants) voted to remove the plaintiff and appointed the third defendant to fulfill his term. (Ibid.) The court found "[u]nder these circumstances the corporation is not in a position to represent its position in court, for the very purpose of the action is to determine who speaks for the

corporation. Thus any appearance by the corporation is indeed...pro forma, and we conclude that the issues raised by the individual parties on appeal may be disposed of without the appearance of the corporation in this court." (Id. at p. 37.) Here, the propriety of the Owners' Association's action is not before us because it dismissed its complaint. We are addressing the trial court's ruling on Appellants' causes of action under Corporations Code section 7616. The Owners' Association's complaint did not seek a determination of the validity of the election under Corporations Code section 7616. The statute provides that a copy of the complaint must be served upon the corporation. (Corp. Code, §7616, subd.(c).) Even if the corporation is not a necessary defendant to such an action, Appellants cite no authority indicating that where they have {pg.8} named the corporation as a defendant, a corporation is prohibited from defending the action on the merits. Nor would that appear appropriate here. This case is not a dispute between two rival factions of a board who have all been named as parties to the lawsuit. The cross-complaint challenged the validity of Appellants' recall by hundreds of members of the Owners' Association in an election that had been certified by an independent inspector of election. (Corp. Code, §7614, subd.(c).) The only defendants Appellants named other than the Owners' Association were the individuals who were nominated to replace them after their recall. The directors who remained on the Board because they were not subjects of the recall were not named as defendants, nor were any other members. Appellants simply did not frame their dispute as one between rival factions but rather as one challenging their recall. Under these circumstances, the association that represents the many members who voted to recall Appellants would seem an appropriate defendant. Moreover, having been awarded their attorneys' fees for prevailing in

this action, the Owners' Association is a proper party on appeal to contest a challenge to this award. We reject Appellants' assertions that the Owners' Association has no role in this appeal.

2. Respondent's Brief Filed by Bartley Fleharty

Another respondent's brief was filed by Bartley Fleharty from the Law Office of Bart Fleharty on behalf of "Cross-defendant and Respondent Ron Bucher et al." on September 5, 2023. Fleharty had previously filed documents on behalf of all of the Replacement Directors as a member of the law firm Wells, Small, Fleharty & Weil. On November 27, 2023, Appellants filed a motion to strike this respondent's brief based on the assertion Bucher died "years ago" and is no longer represented by Fleharty. The motion argued this respondent's brief should be stricken for: (1) violating California Rules of Court, rule 8.204(b)(10)(D) by not naming the party represented by the attorney and violating California Rules of Court, rule 8.208(d)(3) by failing to file a certificate of interested entities or persons; (2) failing to file a notice of substitution under California {pg.9} Rules of Court, rule 8.36 signed by the represented party in this court; and (3) violating California Rules of Court, rule 8.32(c) by having multiple email addresses as Fleharty's contact information.[4] The balance of the motion responds to arguments raised in the respondent's brief. Also on November 27, 2023, Appellants filed a motion to vacate this court's September 19, 2023 order which set a deadline of November 27, 2023, to file a reply brief and indicated further extensions would require an exceptional showing of good cause. In particular, Appellants argued not all of the Replacement Directors had filed a respondent's brief and this court failed to notify them of their failure to do so.

On December 11, 2023, Fleharty filed a declaration in

4 This is no longer the case.

response to the motion to strike the respondent's brief he filed. Appellants have objected to this declaration on the grounds that it was not made "under penalty of perjury." We sustain the objection and do not consider Fleharty's declaration. (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 609-610.) On December 12, 2023, Fleharty filed a substitution of attorney that was dated December 2022. In this document, Grenbemer and Crosby consented to the substitution of Bart Fleharty from the Law Office of Bart Fleharty as their representative in place of Bartley Fleharty from Wells, Small, Fleharty & Weil. The consent makes no mention of Caswell or Bucher. On December 13, 2023, this court issued an order denying the motion to vacate the court's September 19, 2023 order and deferring decision on the motions to strike the respondents' briefs pending calendaring and assignment of the panel. This order was mailed to Fleharty at the address for Wells, Small, Fleharty & Weil. On the same date, this court issued an order extending the deadline to file the reply briefs to January 29, 2024. This order was mailed to Fleharty at the address for the Law Office of Bart Fleharty. {pg.10}

On January 22, 2024, Appellants filed a new motion criticizing this court's decision to defer its rulings until after the deadline for filing a reply brief and arguing we should issue 15-day notices under California Rules of Court, rule 8.220(a)(2) regarding Caswell's and Bucher's failure to file respondent's briefs and vacate the deadline for filing a reply brief. This court deferred decision on this motion pending calendaring and assignment of the panel as well.

We now deny these outstanding motions. The record indicates, and Appellants do not demonstrate otherwise, that Fleharty was counsel of record for the Replacement Directors before and after he filed a respondent's brief in this matter. Under these circumstances, courts have rejected

challenges based on a failure to file a formal substitution. (*Crocker National Bank v. O'Donnell* (1981) 115 Cal.App.3d 264, 268.) Additionally, "[w]here the actual authority of the new or different attorney appears, courts regularly excuse the absence of record of a formal substitution and validate the attorney's acts, particularly where the adverse party has not been misled or otherwise prejudiced." (*Baker v. Boxx* (1991) 226 Cal.App.3d 1303, 1309.) Where a respondent fails to file a respondent's brief after receiving a 15-day notice, this court may decide the appeal on the record, the opening brief, and any oral argument by the appellant. (See Cal. Rules of Court, rule 8.220(a)(2).) Here, the court did not provide notification that Caswell or Bucher may have failed to file a respondent's brief, but it does not appear there could be any prejudice to any party for not doing so. If we attempted to provide this notice now as suggested by Appellants, the result would not change. We will decide the matter on the briefing of the other parties just as we would if we officially sanctioned a respondent for failing to file a brief. And because our decision is to affirm the trial court's rulings, the filing of any additional respondent's brief would not change the outcome of this proceeding. Likewise, we see no value in ordering Fleharty to correct the respondent's brief he filed to reflect the parties he represents. (See Cal. Rules of Court, rule 8.204(e)(2)(C) [we may disregard noncomplying briefs].) The record is clear at this {pg.11} point that the certificate of interested entities or persons included in the respondent's brief and the respondent's brief filed by Fleharty were filed on behalf of Grenbemer and Crosby, whom the record indicates he does represent. Fleharty's prior law firm, if it still exists, has received some level of notice of these proceedings and we have received no indication that they disagree with Fleharty's continued representation of his clients in this proceeding. In these

unusual circumstances, it is not in the interest of justice that the resolution of this case be delayed further when there is no indication that separate briefs would be submitted on behalf of Caswell or Bucher and further briefing would not change the outcome of these proceedings. To the extent Appellants argue Fleharty's actions violated Business & Professions Code section 6068, subdivision (d) by seeking to mislead this court with a false statement, given the limited record before us, it is not clear that Fleharty did so. The balance of Appellants' arguments lack merit and do not establish grounds for striking a respondent's brief. Having denied the outstanding motions in this appeal, we now turn to the remaining issues raised by the parties.

C. Alleged Mootness

The Owners' Association, Grenbemer, and Crosby argue the appeals should be dismissed as moot because the terms to which Appellants were elected have already expired and new directors have been elected. This argument is unavailing because it fails to address the trial court's award of attorneys' fees. "[I]f the appeal of the order on fees is not subject to dismissal, neither is the appeal of the judgment on which the fees award rests." (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 881; see also *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1750-1751 ["Even if this appeal were otherwise moot as a result of the City's actual compliance with the writ's mandate, the trial court's award of attorney fees...would preclude us from dismissing the appeal"].) As such, we will turn to the merits of Appellants' claims. {pg.12}

D. Judgment

Appellants note the judgment entered in this case stated that "[o]n October 27, 2017, the [Owners' Association] dismissed its Complaint without prejudice thereby disposing

of the last remaining unresolved causes of action in the case," but the record suggests that the clerk's office rejected the Owners' Association's request for dismissal on the basis that judgment was already entered on the complaint on October 11, 2017. Appellants contend this is error but cite no authority suggesting this forms any basis for reversal or requires any correction at this point. It does not. At best, Appellants have identified that the clerk failed to grant a request for dismissal. But the clerk's duty to enter the dismissal is ministerial. (*Egly v. Superior Court* (1970) 6 Cal.App.3d 476, 479; 6 *Witkin*, Cal. Proc. (6th ed. 2021) Proceedings Without Trial §353, p. 851.) Where a dismissal is in proper form, it is effective immediately even if the clerk refuses to enter it. (*Rosen v. Robert P. Warmington Co.* (1988) 201 Cal.App.3d 939, 943; Egly, supra, at pp.479-480.)

E. The Trial Court's Determination of the Validity of Recall Election

Appellants raise various challenges to the trial court's order determining, pursuant to Corporations Code section 7616, that the January 21, 2012 recall election and appointment of the Replacement Directors was valid.[5] This statute permits any "director," "member" or "person who had the right to vote" in a nonprofit corporation's election to bring an action to determine the validity of an election or appointment of a director.[6] (Corp. Code, §7616, subd.(a).) The

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5 Appellants filed separate briefs raising different legal issues but adopted each other's arguments. (See Cal.Rules of Court, rule 8.200(a)(5) ["Instead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal"].)

6 "Upon the filing of the complaint, and before any further proceedings are had, the court shall enter an order fixing a date for the hearing, which shall be within five days unless for good cause shown a later date is fixed." (Corp. Code, §7616, subd.(c).) Appellants argue but fail to demonstrate with sufficient authority and supporting references to the record that the court erred in not ruling sooner.

court "may determine the person entitled {pg.13} to the office of director or may order a new election to be held or appointment to be made, may determine the validity, effectiveness and construction of voting agreements and voting trusts, the validity of the issuance of memberships and the right of persons to vote and may direct such other relief as may be just and proper." (Id., subd.(d).)

To the extent Appellants' contentions challenge the trial court's application of the CC&Rs, bylaws, and statutes to essentially undisputed facts, they are subject to our de novo review. (*Lake Lindero Homeowners Assn., Inc. v. Barone* (2023) 89 Cal. App.5th 834, 844.) "Likewise, insofar as the contentions concern the trial court's construction of the [Owners'] Association's [CC&Rs,] bylaws and our state's governing statutes, these issues too are subject to our de novo review." (Ibid.) "Our review of documents in the case is independent as well, provided no conflicting extrinsic evidence on the meaning of the documents was presented to the trial court." (*Committee to Save the Beverly Highlands Homes Ass'n v. Beverly Highlands Homes Ass'n* (2001) 92 Cal.App.4th 1247, 1261.) "We must uphold any factual determination of the trial court, express or implied, so long as there is substantial evidence in the record to support it." (*Singh v. Singh* (2004) 114 Cal.App.4th 1264, 1293.) We consider only the evidence and documents that were before the court at the time of its ruling. (*Sacramento Area Flood Control Agency v. Dhaliwal* (2015) 236 Cal.App.4th 1315, 1328, fn. 5.)

1. Applicability of the Davis-Stirling Common Interest Development Act

Appellants raise various arguments that assert their removal did not comply with various provisions of the Davis-Stirling Common Interest Development Act (the Davis-Stirling Act or the Act) (Civ. Code, §4000 et seq.),

particularly former Civil Code section {pg.14} 1363.03 regarding procedural rules for elections.[7] Whether the Act applies to the Owners' Association is a nuanced question.

"The Davis-Stirling Act, enacted in 1985 (Stats. 1985, ch. 874, §14, pp. 2774-2786), consolidated the statutory law governing condominiums and other common interest developments." (*Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal.4th 73, 81.) The Act "applies and a common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed." (Civ. Code, §4200, italics added; see also former Civ. Code, §1352.) "In a planned development, 'separate interest' means a separately owned lot, parcel, area, or space." (Civ. Code, §4185, subd.(a)(3); see also former Civ. Code, §1351, subd.(l)(3).)[8] The trial court noted that "[h]istorically there has been an ongoing disagreement amongst R-Ranch owners on whether Davis-Stirling applies at all." The court concluded the Act "would not apply as a matter of law" to R- Ranch and the Owners' Association given the lack of any separate interests. As the court found, "There are no separate interests in R-Ranch. Members do not have permanent residency rights at R-Ranch. The properties are used solely for ranching, grazing, hiking, camping, horseback riding, hunting, fishing, swimming, sports and other recreational uses authorized by the [Owners' Association]." Appellants have failed to

7 This Act was reorganized effective January 1, 2014. (Stats. 2012, ch. 180, §§2-3.) Unless otherwise noted, we cite the relevant provisions where they are currently codified.

8 "In a stock cooperative, 'separate interest' means the exclusive right to occupy a portion of the real property, as specified in [Civil Code] Section 4190." (Civ. Code, §4185, subd.(a)(4); see also former Civ. Code, §1351, subd.(l)(4).) Here, each owner has a "nonexclusive right and easement of enjoyment in and to the Common Areas."

demonstrate any error in this conclusion. Nonetheless, the trial court explained that members adopted specific statutory provisions of the Act in their governing documents. They did not, {pg.15} however, adopt the entirety of the Act. We agree with this interpretation of the governing documents.

The CC&R's and Bylaws are interpreted according to the usual canons for interpreting written instruments. (*14859 Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1410; *Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726, 730.)

"The fundamental canon of interpreting written instruments is the ascertainment of the intent of the parties. [Citations.] As a rule, the language of an instrument must govern its interpretation if the language is clear and explicit. [Citations.] A court must view the language in light of the instrument as a whole and not use a 'disjointed, single-paragraph, strict construction approach' [citation]. If possible, the court should give effect to every provision. [Citations.] An interpretation which renders part of the instrument to be surplusage should be avoided. [Citations. ¶] When an instrument is susceptible to two interpretations, the court should give the construction that will make the instrument lawful, operative, definite, reasonable and capable of being carried into effect and avoid an interpretation which will make the instrument extraordinary, harsh, unjust, inequitable or which would result in absurdity. [Citation.] If a general and a specific provision are inconsistent, the specific provision controls." (*Ticor Title Ins. Co. v. Rancho Santa Fe Assn.*, supra, 177 Cal.App.3d at p. 730.)

We agree with the trial court that the provisions of the governing documents identified by Appellants do not make all of the Act applicable to the Owners' Association. For

instance, the CC&Rs state: "'Association' means R-Ranch Property Owners Association, a California nonprofit corporation (formed pursuant to the Nonprofit Corporation Law of the State of California), its successors and assigns. The Association is an 'Association' as defined in [former] California Civil Code section 1351(a)." Former Civil Code section 1351, subdivision (a) (current Civil Code section 4080), in turn provides that an "'Association' means a nonprofit corporation or unincorporated {pg.16} association created for the purpose of managing a common interest development." Reading the CC&Rs together with the statute does not make R-Ranch itself a common interest development or adopt the entirety of the Act. We do agree with the trial court's conclusion that that governing documents, as evinced by this definition of "Association" in the CC&Rs, incorporate portions of the Act. For instance, section 7.1 of the Bylaws states, "Subject to the provisions of the California Nonprofit Corporation Law, the Davis-Stirling Common Interest Development Act...and any limitations in any of the Governing Documents relating to action required to be approved by the Members, the business and affairs of the Association shall be vested in and exercised by the Association's Board of Directors." That is not an adoption for all purposes. In contrast, section 14.7 of the Bylaws provides: "Unless the context requires otherwise or a term is specifically defined herein, the general provisions, rules of construction, and definitions in the California Nonprofit Mutual Benefit Corporation Law shall govern the construction of these Bylaws." Nowhere do any of the governing documents provide that all of the Act shall govern their construction or apply to the Owners' Association. Importantly, the Bylaws sets forth its own procedures for elections and removal of directors. Interpreting the governing documents as a whole, we read

them as intending to apply these provisions to recall elections and not specific statutory provisions of the Act that were not incorporated by reference. Accordingly, we reject Appellants' arguments that rely on portions of the Act, such as former Civil Code section 1363.03, that are not among those adopted through the governing documents.

2. Collateral Estoppel

Appellants argue on appeal that collateral estoppel prevents the relitigating of this question among others. The trial court's ruling does not discuss this doctrine. Rather, the ruling explains Appellants argued that the Owners' Association should be precluded from arguing the Act does not apply because it had taken a contrary position in other cases. Appellants also argued that some of the cases now cited in Appellants' collateral estoppel {pg.17} argument were precedential authority. The trial court explained that it did not take judicial notice of unpublished appellate court cases or findings of other superior court cases that were not relevant to the proceedings and there was no binding legal precedent on the issue of whether the Act applies to a recall election. (See, e.g., *Watts v. Civil Service Bd.* (1997) 59 Cal.App.4th 939, 949-950 [unpublished decision may not be used as authority]; Cal. Rules of Court, rule 8.1115(a)-(b).) We agree with this conclusion.

"'[C]ollateral estoppel must be proved [in the trial court] or it is waived.'" (*Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 332.) It does not appear that this issue was adequately raised in the trial court before the court's ruling on the validity of the recall election. As such, we conclude this issue has been forfeited.

Even if we were to find it was not forfeited, we would conclude Appellants have not fulfilled their burden to prove collateral estoppel applies to the question of whether R-Ranch is a common interest development under the Act.

Our Supreme Court has "frequently used 'res judicata' as an umbrella term encompassing both claim preclusion and issue preclusion, which [it] described as two separate 'aspects' of an overarching doctrine." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823 (*DKN Holdings*).) The primary aspect is now referred to as "claim preclusion" rather than "res judicata." (Id. at p. 824; *Samara v. Matar* (2018) 5 Cal.5th 322, 326.) The secondary aspect is now referred to as "issue preclusion" rather than "direct or collateral estoppel." (*DKN Holdings*, supra, at p. 824; *Samara v. Matar*, supra, at p. 326.) "Issue preclusion prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. [Citation.] Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action." (*DKN Holdings*, supra, 61 Cal.4th at p. 824, emphasis removed.) It differs from claim preclusion in that it "does not bar entire causes of action" but "prevents relitigation of previously decided issues." (Ibid.) The doctrine applies {pg.18}

"(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (Id. at p. 825.) "And while these threshold requirements are necessary, they are not always sufficient: 'Even if the[ ] threshold requirements are satisfied, the doctrine will not be applied if such application would not serve its underlying fundamental principles' of promoting efficiency while ensuring fairness to the parties. [Citations.] It is the burden of the party seeking to prevent relitigation based on prior findings to raise the defense and establish its elements." (*People v. Strong* (2022) 13 Cal.5th 698, 716.) Appellants have failed to meet their burden.

"For purposes of collateral estoppel, an issue was actually

litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding. [Citation.] In considering whether these criteria have been met, courts look carefully at the entire record from the prior proceeding, including the pleadings, the evidence, the jury instructions, and any special jury findings or verdicts." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511; accord *People v. Curiel* (2023) 15 Cal.5th 433, 452.) The record Appellants have produced of these earlier proceedings is sparse.

Appellants rely on this court's 1996 unpublished decision in *R-Ranch Property Owners Association v. Lemke* (Aug. 28, 1996, C020577) [nonpub. opn.]. That opinion, however, avoids answering whether R-Ranch is a common interest development. It also set forth facts that would preclude that possibility, stating that "no owner has the exclusive right of ownership or possession of any portion of R-Ranch." Appellants' argument is based on that opinion's later rejection of the notion that a resolution could not be enforced as an equitable servitude. In rejecting this argument, this court cited former Civil Code section 1354 and *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 378 and held the CC&Rs are enforceable as equitable servitudes. Nahrstedt explained that former Civil Code section 1354, subdivision (a) stated, in relevant part: "The covenants and restrictions in the declaration shall be enforceable {pg.19} equitable servitudes, unless reasonable, and shall inure to the benefit of and bind all owners of separate interests in the development." (See Nahrstedt, supra, at p. 378.) The CC&Rs make express reference to former Civil Code section 1354 and the Lemke opinion did not explain the basis for this court's implicit conclusion this statute applied. Thus, we cannot conclude Appellants proved this court previously decided all of the Act applied to R-

Ranch because it was a common interest development. As such, we cannot conclude issue preclusion applies.

Appellants cite a 2009 tentative decision issued in trial court proceedings in *Weber v. R-Ranch Property Owners Association, Inc.* (Superior Court of Siskiyou, case No. SCSCCVCV 08-001618). The record does not demonstrate this tentative decision was ever adopted by the trial court. The judgment did state that the court "finds that the Association's Bylaws require the affirmative vote of a majority of the voting power in order for an elected director to be recalled or removed." Significantly, this provision of the Bylaws was amended in 2010. As such, it cannot collaterally estop on that point. (See *People v. Strong*, supra, 13 Cal.5th at p. 716 ["preclusion does not apply when there has been a significant change in the law since the factual findings were rendered that warrants reexamination of the issue"].)

Appellants also cite a 2009 decision in an arbitration between the Owners' Association and Goguen. The opinion states the first issue presented was whether a horse boarding fee of $100 a month for R-Ranch owners' horses violated the Act and the CC&Rs. The opinion then stated R-Ranch is "organized as a common interest development and subject to the provisions of the Davis-Stirling Act. As such, it must comply with the provisions of [former] Civil Code section 1366.1," which prohibited an association from imposing or collecting a fee that exceeded the amounts necessary to defray the costs for which it is levied. On this limited record, it is not clear the arbitrator's statements regarding R-Ranch being a common interest development were based on an issue that was actually litigated. The trial court here explained that the {pg.20} members adopted Civil Code section 1366.1 in the governing documents. Even if we could conclude Appellants produced enough evidence and authority to demonstrate the threshold requirements for

applying collateral estoppel were met, we would be prevented by issues of fairness from applying the doctrine based on this record. The trial court found, "There are members/owners who have strong opinions that Davis-Stirling does not apply at all, and members/owners who have equally strong opinions that it does apply. Depending on the constitution of the board, there will be an inherent contradiction of how the [Owners' Association] will be run." The record does not suggest that the arbitration proceeding allowed members with contradictory views to adequately adjudicate this issue. Under these circumstances, we cannot apply collateral estoppel to reverse the sound conclusion of the trial court that R-Ranch is not actually a common interest development even though some of the Act applies to it.

3. Judicial Estoppel

Appellants contend judicial estoppel also prevented the relitigation of the question of whether R-Ranch is a common interest development.

"'"Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary.'" [Citation.] The doctrine applies when '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.'" (*Aguilar v. Lerner* (2004) 32 Cal.4th 975, 986-987.) Appellants reference these

criteria but do not adequately support their assertion that each criteria are met with analysis and record citations. For instance, as to the first element, Appellants do not cite {pg.21} anywhere in the record where the Owners' Association took a position on whether R- Ranch is a common interest development or otherwise subject to the Act for all purposes. Additionally, judicial estoppel is an equitable doctrine, and its application, even when all of its elements are met, is discretionary. (*People v. Castillo* (2010) 49 Cal.4th 145, 156.) Appellants have not demonstrated the doctrine should apply here.

4. Rule of Property

Appellants argue the rule of property prevents the religitation of the question of whether R-Ranch is a common interest development. A rule of property is "'[a] settled rule or principle, resting usually on precedents or a course of decisions, regulating the ownership or devolution of property. [Citations.] The principle appears to be an extension of the 'stare decisis' rule, which it is said 'seems to apply with peculiar force and strictness to decisions which have determined questions respecting real property and vested rights, although it embraces as well those matters of general commercial importance which tend to influence future business transactions. It has often been held that decisions long acquiesced in, which constitute rules of property or trade or upon which important rights are based, should not be disturbed, even though a different conclusion might have been reached if the question presented were an open one, inasmuch as uniformity and certainty in rules of property are often more important and desirable than technical correctness. Thus, judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, as where the evils of the principle laid down will be more injurious to the community

than can possibly result from a change, or upon the clearest grounds of error.'...The same principle is applied in California to avoid injustice which would result from the overruling of a judicial decision upon which parties have relied in investing money or acquiring property interests." (*Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 456-457.) As in Abbott, we cannot conclude the rule applies because "there appear to be neither guiding judicial decisions nor reliance thereon." (Id. at p. 457.) {pg.22}

5. Amendment of Section 7.6(d) of the Bylaws

As amended in 2010, section 7.6(d) of the Bylaws provides that "a director may be removed from office prior to expiration of his or her term only by the affirmative vote of the members." Previously, it provided that "a director may be removed from office prior to the expiration of his or her term only by the affirmative vote of a majority of the voting power of the Members." Appellants argue the board lacked authority to amend this provision. As relevant here, section 14.4.2 of the Bylaws provides that the Board may amend the Bylaws when it "is needed to conform a particular provision or provisions of the Bylaws to changes in applicable California State statutory law which are nondiscretionary in nature." The Board must receive a written opinion from counsel confirming that the change in law necessitates an amendment before doing so. Otherwise, the Bylaws may be amended only by the affirmative vote of a majority of the owners entitled to vote. Appellants argue the earlier version of the Bylaws did not conflict with any relevant law. This is incorrect. "[Corporations Code] section 7151, subdivision (e) expressly prohibits a nonprofit mutual benefit corporation with 50 or more members (like the Association) from requiring a greater proportion of votes than is specified in section 7222, subdivision (a)(2) for the removal of a director." (*Lake Lindero Homeowners Assn., Inc. v. Barone*, supra, 89

Cal.App.5th at p. 846.) Further, Corporations Code section 7222, subdivision (a)(2) requires only "approv[al] by the members," which is satisfied "'by the affirmative vote of a majority of the votes represented and voting at a duly held meeting at which a quorum is present.'" (Lake Lindero, supra, at p. 846.) As such, the Board had the authority to amend the Bylaws and received the required opinion authorizing them to do so. We reject Appellants' assertion that the Bylaws required the opinion to include citations or more specificity than it did. The 2010 amendment of section 7.6(d) of the Bylaws was lawful. Further, even it was not, we could not apply the former provision of the Bylaws to invalidate the recall election because it conflicts with the law. (Lake Lindero, supra, at p. 846.) {pg.23}

6. Validity of Petition for Recall

Under section 7.6(d) of the Bylaws, a recall requires that a petition be mailed to the president, vice president, or secretary of the Owners' Association and carry the signatures of members in good standing who represent at least five percent of the voting power of the membership. The petition must set forth "the reason(s) the petitioners are seeking the director's removal." Appellants argue the recall was void because no valid petition was filed pursuant to these provisions. We disagree. Each recall petition stated the name of the owner in good standing, share number, that the signing member supported the recall of the specified board member, and the reasons therefor. The Bylaws do not require, as Appellants suggest, a request for a meeting. Appellants appear to contend that because the recall petition was misspelled "recall pitition," it was not a petition for a recall. We are unpersuaded. The meaning of the documents was clear. Appellants citation to authorities explaining, with respect to statutes, "[t]itle or chapter headings are unofficial and do not alter the explicit scope, meaning, or intent of a

statute" are inapplicable. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 602.) In construing a written instrument, we consider subject matter headings. (*Myers Building Industries, Ltd. v. Interface Technology* (1993) 13 Cal.App. 4th 949, 974.) Here, the title was part of the document signed by the members. We reject Appellants' assertion that the recall was void for lack of a valid petition.

7. Mailing of Ballots

Appellants argue Corporations Code section 7513 and section 7.6(d)(ii) of the Bylaws required the Owners' Association to send ballots. Corporations Code section 7513 explains that, unless otherwise prohibited, "any action which may be taken at any regular or special meeting of members may be taken without a meeting if the corporation distributes a written ballot to every member entitled to vote on the matter." (Corp. Code, §7513, subd.(a).) Section 7.6(d)(ii) of the Bylaws provides that within 20 days of receiving a petition for removal of a director, "the Board shall either call a special {pg.24} meeting or announce the procedures for conducting a written ballot of the members to vote upon the requested recall.... If the board fails to set a date for...such meeting or written ballot within 20 days, the members initiating the petition may call such meeting on their own initiative without Board approval or sanction." Appellants argue the fact that Section 7.6(d)(ii) of the Bylaws does not specify that members can announce procedures for conducting a written ballot means that members only had the power to call a meeting and not to distribute ballots. The trial court concluded, and we agree, that "[t]o give effect to and implicit in Section 7.6 is that the members can conduct a recall election when the board fails to act." Otherwise, calling a meeting would serve no purpose. Further, reading section 7.6(d)(ii) of the Bylaws in conjunction with Corporations Code section 7513 demonstrates that members

are authorized to conduct a recall on their own where the Board does not, but members, unlike the Board, must convene a meeting when they do so. Having called a meeting as required, we cannot conclude the election can be invalided because it involved the distribution of written ballots. Indeed, other provisions suggest there must be written ballots.

8. Rebuttal of Charges

Appellants argue the recall was void because they were denied the right to rebut charges in writing and have those charges included in the ballot as required by section 7.6(d)(iii) of the Bylaws. This provision provides: "The director whose removal is being sought shall have the right to rebut the allegations contained in the petition orally, in writing, or both. If the rebuttal is in writing, it shall by mailed by the Association or otherwise provided to all members, together with the recall ballot." The trial court found that "[t]he directors subject to the recall received timely notice in September 2011. There was no evidence that they were prevented from submitting written rebuttals including having materials included in the recall group's newsletter or website. The recalled directors had time and opportunity to submit written rebuttals. They received the same mailings from the recall that all members/owners received, and which contained contact {pg.25} information and return addresses on the mailings. The fact is they did not submit any written rebuttal materials because they had already taken the position that the recall was not valid and they chose to ignore the recall effort." Appellants have not effectively responded to these findings. They cite no evidence that they did not receive timely notice that the recall was occurring. The Bylaws provide that Appellants had the right to submit a rebuttal; they did not require that Appellants be informed that they could submit a written rebuttal or that they be

asked for one.

9. Authority to Call Meeting

Appellants argue the recall was void for failure to call a properly requested owners' meeting as required by section 5.3(b) of the Bylaws and Corporations Code sections 7510, subdivision (e), and 7511, subdivision (c). Corporations Code section 7510, subdivision (e) states: "Special meetings of members for any lawful purpose may be called by the board, the chairperson of the board, the president, or such other persons, if any, as are specified in the bylaws. In addition, special meetings of members for any lawful purpose may be called by 5 percent or more of the members." Corporations Code section 7511, subdivision (c) provides: "Upon request in writing to the corporation addressed to the attention of the chairperson of the board, president, vice president, or secretary by any person (other than the board) entitled to call a special meeting of members, the officer forthwith shall cause notice to be given to the members entitled to vote that a meeting will be held at a time fixed by the board not less than 35 nor more than 90 days after the receipt of the request." Section 5.3(b) of the Bylaws explains that "[i]f a special meeting is called by Members other than the Board of Directors or President, the request shall be submitted by such Members in writing, specifying the general nature of the business proposed to be transacted, and shall be delivered...to the President, any Vice President, or the Secretary of the Association." Appellants argue the recall was void because the members did not request a special meeting. As the trial court explained, section 5.3 of the Bylaws and Corporations Code sections 7510 and 7511 set {pg.26} forth the general rules regarding when members may call for a special meeting, but section 7.6(d) of the Bylaws is a specific provision that covers the authority of members to remove directors without cause. Notably, they effectively

achieve the same result. As relevant here, within 20 days of receiving a recall petition signed by at least five percent of the voting power of the membership, the Board must call a special meeting and give notice thereof or announce the procedures for conducting a written ballot. If they do not, the members initiating the petition may call a meeting on their own without Board approval. We reject Appellants' assertion that a separate written meeting request was required.

10. Inspector of Election

Appellants raise various issues related to the appointment of the inspector of election. The trial court found that the owners who were actively assisting with the recall effort asked for bids from three providers to conduct the recall election and selected the Ballot Box as the lowest bidder. A contract was signed between Davis-Schwartz of the Ballot Box and one member of the recall group, Glover. The members who attended the January 21, 2012 special meeting were not provided an opportunity to elect a chair, and Davis-Schwartz conducted the meeting as the inspector of election. As explained by the trial court, Bullock was present at the meeting and attempted to voice his protest about the proceedings. He was also not allowed to vote the proxies he continued to hold from the July 2011 election. Section 4.7(a) of the Bylaws and Corporations Code section 7614, subdivision (a), both provide that, before a members meeting, the Board may appoint an inspector of election. Additionally, the Bylaws provide that if none is appointed, the chairman of the meeting may, and on the request of any member, appoint one. Appellants argue Glover was not authorized by any of these provisions to hire an inspector of election. The trial court explained that "[t]o give effect to and implicit in Section 7.6 [of the Bylaws] is that the members can conduct a recall election when the Board fails to act." Appellants have not cited any authority that indicates that,

under {pg.27} these circumstances, the recall can be deemed invalid based on the appointment of an inspector of election or the meeting being run by one. We similarly reject Appellants' argument that Glover's contract with the inspector of election is void for violating public policy because it was not made with the Board.[9] Given that the recall was being conducted because the Board refused to Act, we see no basis for nullifying the results merely because the members attempted to find a neutral party to conduct the election.

Appellants have also failed to persuade us the trial court erred in concluding Davis-Schwartz was not required to consider proxies. (See Bylaws §4.4(a).) In the context of discussing shares with multiple owners, the Bylaws state that if no notification of the owner designated by his or her co-owners as having the sole right to vote the membership is received, "the Secretary may accept the vote of any single multiple Owner of Record, by proxy or by ballot at the meeting, as the vote attributable to the Share in question." (Bylaws §3.3, italics added.) Here, members were mailed ballots. Appellants point to no provisions that required the acceptance of proxies at the special meeting as well. Additionally, the trial court found, "There was...no evidence that if the proxies had been considered the results of the recall would have been different." Appellants have failed to refute that statement. As such, this argument furnishes no basis to declare the results of the election invalid.

Appellants argue Davis-Schwartz failed to fulfill her duties because she did not determine the number of memberships outstanding and the voting power of each. (Bylaws §4.7(b).) The record, however, reflects that Davis-Schwartz did make the required determination. The Bylaws do not specify how

9 The Election Services Agreement states it was negotiated outside the Owners' Association's authority and permission.

this determination is to be made. {pg.28}

11. Fairness

Appellants argue the recall was void for lack of fairness. The trial court rejected this argument as unsupported by the evidence, explaining, "The subject directors all knew about the recall petitions and the member drive recall process. They chose to ignore it even after receiving the newsletters from the recall effort that were being sent to all members. There is no evidence that recall signatures were coerced. There was no evidence that any member/owner who voted was deceived by any of the recall materials or allegations contained therein. As any board, the recalled board had its own forum, R- Ranch Roundup, in which to highlight its accomplishments and policies." Substantial evidence supports the trial court's findings. There is evidence to support the finding that the directors were served with the recall petitions. This gave them notice of the recall in advance of the ballots being sent. They also had notice of the meeting which was conducted by a third-party inspector of election. Appellants have failed to demonstrate the election results should be voided for lack of fairness.

12. Appointment of Replacement Directors

Appellants argue the Replacement Directors were not validly appointed. We disagree. Section 7.6(f) of the Bylaws provides that "[v]acancies on the Board of Directors shall be filled by a majority vote of the remaining directors though less than a quorum, or by a sole remaining director unless the vacancy is created through removal of a director for cause." While the petitions stated reasons for wanting each targeted director removed, Appellants have not established they were removed for "cause." As such, the appointment of replacement directors by the remaining remembers of the Board was proper.

F. Motions for Judgment on the Pleading

1. Effect of Earlier Appeal

As set forth above, on October 11, 2017, the trial court granted the Owners' Association's and the Replacement Directors' motions for judgment on the pleadings. {pg.29}

Appellants argue the trial court lacked jurisdiction to grant these motions due to the pendency of their appeal in *R-Ranch Property Owners' Association v. Bullock* (case No. C078598) because there should have been an automatic stay. That appeal was dismissed by order of this court on October 13, 2017.

Appellants argument is based on Code of Civil Procedure section 916, subdivision (a), which provides, unless certain exceptions apply, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." "'[W]hether a matter is "embraced" in or "affected" by a judgment [or order] within the meaning of [Code of Civil Procedure section 916] depends on whether postjudgment [or postorder] proceedings on the matter would have any effect on the "effectiveness" of the appeal,'" and "a proceeding affects the effectiveness of the appeal if the very purpose of the appeal is to avoid the need for that proceeding." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189, 190.) "[A]n appeal does not stay proceedings on 'ancillary or collateral matters which do not affect the judgment [or order] on appeal' even though the proceedings may render the appeal moot." (Id. at p. 191.) "A postjudgment or postorder proceeding is...ancillary or collateral to the appeal despite its potential effect on the appeal, if the proceeding could or would have occurred regardless of the outcome of the appeal." (Ibid.) Our order dismissing the earlier appeal

explains that the appeal was from an order on ancillary and collateral matters arising out of the withdrawal of Goguen's counsel. As such, no automatic stay applied.

2. Service

Appellants argue the trial court had no jurisdiction to grant the motions for judgment on the pleadings because Goguen was not served. Goguen filed an objection and opposition to the motion that attached a document indicating that the motion filed by {pg.30} the Replacement Directors was served on his withdrawn counsel on July 6, 2017. Appellants cite authorities to support their assertion that this argument is not waived, but nothing that supports their underlying argument that the trial court lacked jurisdiction to grant the motions. Accordingly, we reject this claim.

G. Challenges to Underlying Complaint

Appellants raise various challenges to the underlying complaint that we must reject because the complaint was dismissed as to them:

Appellants argue the trial court lacked subject matter jurisdiction because no Board approved the Owners' Association's complaint. Appellants also argue the trial court lacked subject matter jurisdiction because there was no prefiling alternative dispute resolution. Section 9.6(a) of the CC&Rs provide that court actions to enforce the governing documents on behalf of the Owners' Association may only be initiated upon approval of the Board. Further, the Bylaws provide that before initiating any court action seeking declaratory or injunctive relief to interpret or enforce the governing documents, the Owners' Association must comply with former Civil Code section 1354 "or comparable superseding statute, relating to alternative dispute resolution." These arguments fail because the propriety of the Owners' Association's complaint is not before us.

Appellants argue the trial court lacked subject matter

jurisdiction because counsel for the Owners' Association lacked authority to sue a current client. This argument additionally fails because, at a minimum, it presupposes that Appellants prevail on their claim that they were improperly removed from the Board, which they have not.

Appellants argue the trial court lacked subject matter jurisdiction because the Owners' Association's complaint was filed under a conflict of interest that rendered it void by public policy. Again, because the complaint was dismissed as to Appellants, its propriety is not before us. Neither is this general issue. Appellants cite nowhere that the trial court addressed this issue and no authority indicating the conflict of interest issues {pg.31} they raise are a question of subject matter jurisdiction. This is significant because the issue they raise is a factual one and record citations do not establish that the Owners' Association's counsel ever represented individual directors.

H. Award of Attorneys' Fees

The trial court awarded $320,654 in attorneys' fees to the Owners' Association and $327,796.50 to the Replacement Directors as prevailing parties under Civil Code section 1717 and *Tract 19051 Homeowners Assn. v. Kemp* (2015) 60 Cal.4th 1135, 1138-1139 which held attorneys' fees could be awarded under former Civil Code section 1354, subdivision (c) (now section 5975)[10] of the Act to defendants who

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10 Civil Code section 5975 (former Civil Code section 1354) provides:

"(a) The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both.

"(b) A governing document other than the declaration may be enforced by the association against an owner of a separate interest or by an owner of a separate interest against the association.

prevailed on an action to enforce the governing documents of a common interest development on the basis that the plaintiffs failed to prove the housing development satisfied the requirements of a common interest development under the Act. The trial court further noted the award was also pursuant to section 9.2 of the CC&Rs. Appellants raise various challenges to this award.

"'"On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees {pg.32} and costs in this context have been satisfied amounts to statutory construction and a question of law.'" [Citation.] In other words, 'it is a discretionary trial court decision on the propriety or amount of statutory attorney fees to be awarded, but a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo.'" (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751.)

1. Statutory Basis

Appellants argue the trial court erred in awarding attorneys' fees because Civil Code sections 1717 and 5975 do not apply. Because the award of attorneys' fees was proper under Civil Code section 1717, we need not address Appellants' arguments pertaining to Civil Code section 5975.

"Code of Civil Procedure section 1021 codifies the 'American rule' that each party to litigation ordinarily pays its own attorney fees. [Citation.] But [Civil Code section] 1717 provides an exception where the parties enter into an enforceable agreement authorizing an award of fees." (*Westwood Homes, Inc. v. AGCPII Villa Salerno Member, LLC* (2021) 65 Cal.App.5th 922, 926-927.) "In any action on a

"(c) In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs."

contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Civ. Code, §1717, subd.(a).) "An action (or cause of action) is 'on a contract' for purposes of [Civil Code] section 1717 if (1) the action (or cause of action) 'involves' an agreement, in the sense that the action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party's rights or duties under the agreement, and (2) the agreement contains an attorney fees clause." (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 241-242.) CC&Rs are contracts for these purposes (*Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 Cal.App.4th {pg.33} 847, 852) and section 9.2 of the applicable CC&Rs contains an attorneys' fees clause: "In any action brought because of any alleged breach or default of any Owner or other party hereto under this Declaration, the court may award to any party in any such action such attorneys' fees and other costs as the court deems just and reasonable." The CC&Rs provide that the "governing documents" include the CC&Rs and Bylaws and the governing documents are binding on all owners. Appellants' cross-complaint claimed the recall election violated the Act and the governing documents. Appellants have failed to demonstrate that Civil Code section 1717 did not authorize the attorneys' fees awarded in this action.

Appellants argue former Civil Code section 1363.09 specifically disallows attorneys' fees. We are unpersuaded. Former Civil Code section 1363.09, subdivision (a), is part of

the Act and provided: "A member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by an association of which he or she is a member, including, but not limited to, injunctive relief, restitution, or a combination thereof." Former Civil Code section 1363.09, subdivision (b) provided, as relevant here: "A member who prevails in a civil action to enforce his or her rights pursuant to this article shall be entitled to reasonable attorney's fees and court costs, and the court may impose a civil penalty of up to five hundred dollars ($500) for each violation.... A prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation." The Owners' Association did not need to prove entitlement to attorneys' fees under this provision in order to receive an attorneys' fee award under a separate statute such as Civil Code section 1717.

2. Collateral Estoppel

Appellants argue the award of attorneys' fees is barred by collateral estoppel based on a trial court's ruling on attorney's fees in *Weber v. R-Ranch Property Owners Association, Inc.* (Superior Court of Siskiyou, case No. SCSCCVCV 08-001618). We {pg.34} disagree. In that case, the plaintiff sought to void a recall election pursuant to former Civil Code section 1363.09. Judgment was entered in favor of the Owners' Association. The court denied a request for attorneys' fees made under former Civil Code section 1354 based on that statute's interplay with former Civil Code section 1363.09, which is part of the same Act. The trial court denied attorneys' fees to the Owners' Association because of its factual determination under former Civil Code section 1363.09, subdivision (b) that the action was not frivolous, unreasonable, or without foundation. The court did not address the potential applicability of Civil Code section

1717, which is not part of the Act, and was apparently not a basis on which the Owners' Association requested attorneys' fees. Therefore, the court's ruling in Weber cannot preclude the Owners' Association from establishing an entitlement to attorneys' fees under Civil Code section 1717 in this proceeding.

3. Request for Evidentiary Hearing

Appellants suggest the trial court erred in refusing their request under California Rules of Court, rule 3.1306 for an evidentiary hearing on attorneys' fees. They have cited no authority showing the trial court was required to grant this request. (See Cal. Rules of Court, rule 3.1306(a) ["Evidence received at a law and motion hearing must be by declaration or request for judicial notice without testimony or cross-examination, unless the court orders otherwise for good cause shown"].) Indeed, they have identified no authority granting a request to put on similar evidence.

4. Amount Awarded

Appellants argue the amount awarded to the Owners' Association and the Replacement Directors was excessive but cite mainly their own opposition briefs and not any papers supporting the requests for attorneys' fees. This is insufficient to demonstrate error. "In challenging attorney fees as excessive because too many hours of work are claimed, it is the burden of the challenging party to point to the specific items challenged, with a sufficient argument and citations to the evidence. General arguments that fees {pg.35} claimed are excessive, duplicative, or unrelated do not suffice." (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.) We will address only Appellants' arguments that cited to a particular charge for which the Owners' Association sought reimbursement.

First, Appellants argue the Owners' Association's request

should have been reduced by $942.50 for three "unnecessary 2.9-hour asset searches." The cited page indicates counsel performed a public records search and reviewed this information in response to a motion to force use of a settled statement due to inability to pay. Appellants conclusory statement has failed to demonstrate that this work was unnecessary or otherwise not a proper subject for reimbursement.

Second, Appellants argue the Owners' Association's attorneys' fees should have been reduced by $7,924.50 for time that was not charged. The cited pages show three entries indicating $6,796.50 in total time was not charged. However, the record demonstrates that while the Owners' Association initially requested $329,473.50 in attorneys' fees, it reduced its request by $6,819.50 to $322,654 after conceding these charges were not billed. The trial court awarded $320,654 in attorneys' fees to the Owner's Association based on this reduced request. As such, Appellants have failed to demonstrate any uncharged time requires any reduction of the attorneys' fee awards.

I. Withdrawal of Counsel

Appellants raise various complaints related to the withdrawal of Timothy Stearns as Goguen's counsel. In November 2014, Stearns submitted a motion to be relieved as counsel pursuant to Code of Civil Procedure section 284(2) and California Rules of Court, rule 3.1362. Code of Civil Procedure section 284(2) provides: "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: [§]...[§] 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other." The motion states that after the legal services for which Stearns was hired were complete, Stearns told {pg.36} Goguen as much, and Goguen came to Stearns' office and picked up all

of the files. Stearns then initiated a lawsuit against Goguen to collect the fees and costs he was owed under their contract. Stearns stated that "for the first time in over one year--and in defense to my collection lawsuit, *Stearns v. Goguen et al.*, Mr. Goguen claims that I still represent him in [this lawsuit]. Therefore, out of an abundance of caution, I am filing the motion for a court order to be relieved as counsel." The motion included a proof of service showing service on Goguen only. The court heard from Goguen and Stearns and granted the motion explaining, "It appears to be and I find credible that the...contract for services has been performed. That an additional ground is a breach of the agreement to pay fees and the cost." The court also found that due to their appearance and filing of an opposition, the parties waived service of the motion.[11] (See *Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 930 ["party who appears and contests a motion in the court below cannot object on appeal...that he had no notice of the motion or that the notice was insufficient or defective"].) The order further explains: "After discussion with the parties, the Court has reviewed the documents under seal and orders protection only as to page 9, line 23 and page 10, lines 24 through 26. Further the Court represents it will photocopy the...pages and redact the sealed portion and the document will then be filed...and the filed document will not remain under seal."

Appellants assert Stearns failed to give the requisite notice to Goguen that he wanted to withdraw or document this

11 "It is settled that ""[c]onflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."" [Citations.] We thus disregard all contentions challenging the trial court's credibility determinations as insufficient to support reversal of the order." (*Lake Lindero Homeowners Assn., Inc. v. Barone*, supra, 89 Cal.App.5th at p.838, fn.2, emphasis omitted.)

notice, but the motion demonstrates that Goguen had notice. The notice of motion and motion are on the required Judicial Council form, {pg.37} but the Declaration of Stearns is not on the required form and a proposed order was not prepared using the required form. (See Cal. Rules of Court, rule 3.1362.) Nonetheless, Appellants do not cite any authority that demonstrates that the failure to use these forms is a basis for reversal of the court's order. Here, given the peculiar nature of the request, we cannot conclude that it is. At a minimum, we can discern no prejudice. Stearns was apparently not representing Goguen at the time he filed his motion "out of an abundance of caution." Goguen himself filed a substitution of attorney on August 13, 2013, indicating he had been representing himself but was now being represented by Rebecca Moore. The record reflects he filed documents in the trial court in pro per starting in June 2013. This court in *Stearns v. Goguen* (Feb. 25, 2022, C083948) [nonpub. opn.] affirmed the judgment against Goguen in Stearns's action. We explained: "Defendants claim that plaintiff's actions in [*R-Ranch Property Owners' Assn. v.*] *Bullock* and his withdrawal as counsel in that matter violated the Rules of Professional Conduct, fiduciary duties, and Goguen's due process rights, all of which in turn voided the attorney fee contract. Many of the same allegations appear in defendants' cross-complaint. [¶] As a result of the discovery sanctions and the order deeming all requests for admission to be true, defendants did not present evidence for these contentions to the trial court. We will not entertain these factual allegations in the first instance. Relatedly, defendants' request for judicial notice and motion for sanctions are denied." (Ibid.) Appellants have failed to demonstrate any error in the trial court's rulings or that they may relitigate the question of the propriety of Stearns' withdrawal in this proceeding.

J. Request for Injunction and Stay of Proceedings

Goguen filed a motion for preliminary injunction and stay of proceedings that sought to enjoin Stearns and prevent him from litigating *Stearns v. Goguen*. The trial court rejected the motion on the grounds that Stearns is not a party to these proceedings. The authorities cited by Appellants on appeal fail to establish any error in the trial court's reasoning. {pg.38}

III. DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

RENNER, J.

We concur:

DUARTE, Acting P. J.

BOULWARE EURIE, J.

EURIE, J.

Appendix B. Appellate Court Order (9/28/24).

In The Court Of Appeal Of The State Of California
In And For The Third Appellate District

R-RANCH PROPERTY OWNERS' ASSOCIATION,
Plaintiff, Cross-Defendant and Respondent,
v.
ART BULLOCK et al.,
Defendants, Cross-complainants and Appellants;
RON BUCHER et al., Cross-defendant and Respondent.

C086537
Siskiyou County No. SCSCCVCV12132

BY THE COURT:
Appellants' petition for rehearing is denied.
DUARTE, Acting P.J.

Appendix C. California Supreme Court Order (10/7/24)

S287682 Docket Entry

R-Ranch Property Owners' Association
v.
Bullock, Goguen, et al.

The Request for publication has been considered and is denied for the reason that the Court of Appeal does not find said opinion meets the criteria for publication as set forth in rule 8.1105(c).

Appendix D. California Supreme Court Order
(12/31/24)
S287682 Docket Entry

R-Ranch Property Owners' Association
v.
Bullock, Goguen, et al.

Dec.31, 2024

The petitions for review are denied.

The request for an order directing publication of the opinion is denied.

J. Guerrero
Chief Justice

Appendix E. Pertinent Constitutional Provisions.

United States Constitution, Article XIV, Sec.1 (14A).

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution Pertinent Provisions.

Constitutional provisions are arranged chronologically. Historical amendment text is based on official documents archived by the Office Of The Clerk at the California Assembly (clerk.assembly.ca.gov).

California Constitution, Article VI, Sec.4, As Amending 11/8/1904. (CAC-A6§4(1904)).

The Supreme Court shall make and adopt not inconsistent with law for the government of the Supreme Court and of the District Courts of Appeal and of the officers thereof, and for regulating the practice in said courts. [As Amended 11/8/1904].

California Constitution, Article VI, Sec.1a, As Amended 11/2/1926 (CAC-A6§1a(1926)).

There shall be a Judicial Council. It shall consist of the Chief Justice or Acting Justice, and of one Associate Justice of the Supreme Court, three Justices of District Courts Of Appeal, four judges of courts: one judge of a police or municipal court, and one judge of an inferior court, assigned by the Chief Justice to sit thereon to serve a term of 2-years, provided, that if any judge so assigned shall cease to be a judge of the court he was so assigned, his term shall so

terminate. The Chief Justice or acting CJ shall be chairman. No act of the Council shall be valid unless concurred in by 6 members. [As Amended 11/2/1926].

California Constitution, Article VI, Sec.1a(6), As amended 11/2/1926 (CAC-A6§1a(6)(1926)).

The Judicial Council shall from time to time:...(6) Adopt or amend rules of practice and procedure for the several courts not inconsistent with laws that are now or that may hereafter be enforced. [As Amended 11/2/1926].

California Constitution, Article VI, Sec.4, As Amended 11/6/1928 (CAC-A6§4(1928)).

The supreme court shall have appellate jurisdiction on appeal from the superior court in all cases in equity, except such as arise in municipal or justices' courts; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment. toll, or municipal fine also, in all such probate matters as may be provided by law; also, on questions of law alone, in all criminal cases where judgment of death has been rendered; the said court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a district court of appeal, which shall be ordered by the supreme court to be transferred to itself for hearing and decision, as hereinafter provided. The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writ necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the supreme court or before any district court of appeal, or before any justice thereof, or before any superior court in the state, or before any judge thereof. [As Amended November 6, 1928.]

California Constitution, Article VI, Sec.6(a), As Of 2025 (CAC-A6§6(a)(2025)).

The Judicial Council consists of the Chief Justice and one other judge of the Supreme Court, three judges of courts of appeal, 10 judges of superior courts, two nonvoting court administrators, and any other nonvoting members as determined by the voting membership of the council, each appointed by the Chief Justice for a three-year term pursuant to procedures established by the council; four members of the State Bar appointed by its governing body for three-year terms; and one member of each house of the Legislature appointed as provided by the house.

California Constitution, Article VI, Sec.14, As Of 2025 (CAC-A6§14(2025)).

The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person. Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

Appendix F. Pertinent California Statutes And Rules Of Professional Conduct.

Business & Professional Code (B&P), Sect.6068 (B&P.§6068).

B&P.§6068. It is the duty of an attorney to do all of the following:

B&P.§6068(a). To support the Constitution and laws of the United States and of this state.

B&P.§6068(b). To maintain the respect due to the courts of justice and judicial officers.

B&P.§6068(c). To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

B&P.§6068(d). To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

B&P.§6068(e)(1). To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

B&P.§6068(f). To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

B&P.§6068(g). Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

B&P.§6068(m). To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

California Code of Civil Procedure (CCP), Section 1858 (CCP.§1858).

In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

California Code of Civil Procedure (CCP), Section 284 (CCP.§284).

The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes; 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other.

California Code of Civil Procedure (CCP), Section 285 (CCP.§285).

When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney.

California Code of Civil Procedure (CCP), Section 367 (CCP.§367).

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.

California Code of Civil Procedure (CCP), Section 581 (CCP.§581).

CCP.§581(a). As used in this section:

CCP.§581(a)(1). "Action" means any civil action or special proceeding.

CCP.§581(a)(2). "Complaint" means a complaint and a cross-complaint.

CCP.§581(a)(3). "Court" means the court in which the action is pending.

CCP.§581(a)(4). "Defendant" includes a cross-defendant.

CCP.§581(a)(5). "Plaintiff" includes a cross-complainant.

CCP.§581(a)(6). "Trial." A trial shall be deemed to actually commence at the beginning of the opening statement or argument of any party or his or her counsel, or if there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

CCP.§581(b)(1). With or without prejudice, upon written request of the plaintiff to the clerk, filed with papers in the case, or by oral or written request to the court at any time before the actual commencement of trial, upon payment of the costs, if any.

CCP.§581(b). An action may be dismissed in any of the following instances:

CCP.§581(c). A plaintiff may dismiss his or her complaint, or any cause of action asserted in it, in its entirety, or as to any defendant or defendants, with or without prejudice prior to the actual commencement of trial.

CCP.§581(i). No dismissal of an action may be made or entered, or both, under paragraph (1) of subdivision (b) where affirmative relief has been sought by the cross-complaint of a defendant or if there is a motion pending for an order transferring the action to another court under the provisions of Section 396b.

CCP.§581(j). No dismissal may be made or entered, or both, under paragraph (1) or (2) of subdivision (b) except upon the written consent of the attorney for the party or parties applying therefor, or if consent of the attorney is not obtained, upon order of dismissal by the court after notice to

the attorney.

Civil Code (Civ). Sections 1350-1378 (Civ.§1350-1378).

Notice To The Court: In 2012, after this case was filed, California Assembly Bill AB-805 repealed Davis-Stirling (Civ. §1350-Civ.§1378) and reenacted it with new numbers (Civ.§4000-§6150), effective 1/1/2013, operative 1/1/2014. Davis-Stirling before reenactment governs this case, filed 1/31/12. A later-enacted statute doesn't govern cases with accrual dates before the statute's enactment date, unless the legislature specifically provided for retroactivity. Civ.§4000-6150 has no such retroactive requirement. Thus, per *Evangelatos v. S.C.* (1988) 44 Cal.3d 1188, 1205-1206 and *Aetna Casualty & Surety Co. v. Industrial Accidents Commission* (1947) 30 Cal.2d 388, 391-392, Civ.§1350-1378 governs this case, not Civ.§4000-§6150.

Civ.§1350. This title shall be known and may be cited as the Davis-Stirling Common Interest Development Act.

Civ.§1351(a). "Association" means a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development.

Civ.§1351(j). "Governing documents" means the declaration and any other documents, such as bylaws, operating rules of the association, article of incorporation, or articles of association, which govern the operation of the common interest development or association.

Civ.§1351. As used in this title, the following terms have the following meanings: (a) A declaration. (b) A condominium plan if any exists. (c) A final map or parcel map, if Division 2 (commencing Section 66410) of Title 7 of the Government Code requires the recording of either a final map or parcel map for the common interest development.

Civ.§1352. This title applies and a common interest development is created whenever a separate interest coupled

with an interest in the common area or membership in the association is, or has been, conveyed, provided, all of the following recorded:

Civ.§1354(a). The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both.

Civ.§1354(b). A governing document other than the declaration may be enforced by the association against an owner of a separate interest or by an owner of a separate interest against the association. In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs.

Civ.§1354(c). In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs.

Civ.§1363.09(b). Member who prevails in a civil action to enforce his or her rights pursuant to this article shall be entitled to reasonable attorney's fees and clerk costs, and the court may impose a civil penalty of up to five hundred dollars ($500) for each violation, except that each identical violation shall be subject to only 1 penalty if the violation affects each member of the association equally. A prevailing association shall not recover any costs unless the court finds the action to be frivolous, unreasonable, or without foundation.

<u>"1992" California Rules Of Professional Conduct (RPC)</u>
<u>(Effective from 9/14/1992 to 10/31/2018)</u>

Notice To The Court: In 2018, RPC Rules were revised, restructured, and renumbered. These are the RPC rules as

of the accrual date (11/10/11). These previous rules are located at www.calbar.ca.gov.

RPC.3-200. Prohibited Objectives of Employment{.}

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

(A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

RPC.3-310. Avoiding the Representation of Adverse Interests{.}

RPC.3-310(A). For purposes of this rule: (1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client; (2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure; (3) "Written" means any writing as defined in Evidence Code section 250.

RPC.3-310(B). A member shall not accept or continue representation of a client without providing written disclosure to the client where:

RPC.3-310(B)(1). The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

RPC.3-310(B)(2). The member knows or reasonably should know that: (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and (b) the previous

relationship would substantially affect the member's representation; or

RPC.3-310(B)(3). The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

RPC.3-310(B)(4). The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

RPC.3-310(C). A member shall not, without the informed written consent of each client:

RPC.3-310(C)(1). Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

RPC.3-310(C)(2). Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

RPC.3-310(C)(3). Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

RPC.3-310(E). A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

RPC.3-600(A). Organization as Client{.}

In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

Appendix G. Governing-Document Provisions.

R-Ranch POA's Relevant Declaration Of Covenants, Conditions, And Restrictions (CC&Rs) of 2002 And R-Ranch POA's Relevant Bylaws (Byl.) of 2002.

CC&Rs Article IX, Section 6 (CC&Rs.§9.6(2002)). Court Actions--Arbitration{.}

CC&Rs.§9.6(a)(2002). Court actions to enforce the Governing Documents on behalf of the Association may only be initiated upon approval of the Board. Before initiating any court action seeking declaratory or injunctive relief to interpret or enforce the governing documents (including either of those actions coupled with a claim for monetary damages not in excess of $5000), the Association shall first comply with the provisions of Civil Code §1354, or comparable superseding statute, relating to alternative dispute resolution. The mediation procedures described in paragraph (b), below, are intended to satisfy the Civil Code alternative dispute resolution requirements and all notices issued and procedures followed in the mediation process shall comply with the specific requirements imposed by Civil Code §1354.

Bylaw Article IV, Section 6 (Byl.§4.6(2002)).

Byl.§4.6(2002). Shares held by the Association. Shares held by the Association cannot be voted for or against any candidate for the Board of Directors, any recall of the Board of Directors, or any Issue that comes before the Membership at any regular or special meeting of the Members. However, Shares held by the Association can be used in order to establish a quorum at any meeting of the Members.

Bylaw Article VII, Section 1 (Byl.§7.1(2002)).

Byl.§7.1(2002). General Association Powers. Subject to the

provisions of the California Nonprofit Corporation Law, the Davis-Stirling Common Interest Development Act (Civil Code Sections 1350-1376) and any limitations in any of the Governing Documents relating to action required to be approved by the Members, the business and affairs of the Association shall be vested in and exercised by the Associations Board of Directors. Subject to the limitations expressed in Article X. Section 1, the Board may delegate the management of the activities of the Association to any person or persons, management company, or committee, provided that notwithstanding any such delegation the activities and affairs of the Association shall continue to be managed and all Association powers shall continue to be exercised under the ultimate direction of the Board.

Bylaw Article VII, Section 3 (Byl.§7.3(2002)).

Byl.§7.3(2002). Term of Office. The directors of this Association shall serve for a term of 1 year. Each director, including a director elected to till a vacancy or elected at a special meeting of Members, shall hold office until the expiration of the term for which elected and until a successor has been elected and qualified. There shall be no limitation on the number of consecutive terms to which a director may be reelected.

Bylaw Article VII, Section 6 (Byl.§7.6(2002)).

Byl.§7.6(2002).Vacancies on Board of Directors.

Byl.§7.6(a)(2002). Vacancies Generally. A vacancy or vacancies in the Board of Directors shaft be deemed to exist on the occurrence of any of the following: (I) the death, resignation, or removal of a director under paragraphs (c) and (d) below; (ii) an increase of the authorized number of directors; or (iii) the failure of the Members, at any meeting of Members at which any director or directors are to be

elected, to elect the number of directors to be elected at such meeting.

Byl.§7.6(b)(2002). Resignation of Directors. Except as provided in this paragraph, any director may resign, and such resignation shall be effective on giving written notice to the President. the Secretary, or the Board of Directors, unless the notice specifies a later time for the resignation to become effective. If the resignation of a director is effective at a future time, the Board of Directors may elect a successor to take office when the resignation becomes effective.

Byl.§7.6(c)(2002). Authority of Board to Remove Directors. The Board of Directors shall have the power and authority to remove a director and declare his or her office vacant if he or she (i) has been declared of unsound mind by a final order of court. (ii) has been convicted of a felony: (W) has been found by a final order or judgment of any court to have breached any duty under Corporations Code Sections 7233. 7236 (relating to the standards of conduct of directors): or (iv) fails to attend 3 consecutive regular meetings of the Board of Directors that have been duly noticed in accordance with California law unless excused for cause.

Byl.§7.6(d)(2002). Authority of Members to Remove Directors. Except as otherwise provided In subparagraph (C) of this Article VII, Section 6, a director may be removed from office prior to expiration of his or her term only by the affirmative vote of a majority of the voting power of the Members. Any Membership action to recall or remove a director shall be conducted in accordance with the following procedures.

Appendix H. *R-Ranch v. Lemke* Opinion (8/24/1996).

FILED AUG 28, 1996

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT
(Siskiyou) CO20577 (Super. Ct No. 48680)

R-RANCH PROPERTY OWNERS ASSOCIATION,
Plaintiff, Cross-defendant and Respondent
V.
KURT H. LEMKE, et al, Defendants,
Cross-complainants and Appellants

The defendants are each owners of a 1/2,500th undivided interest in R-Ranch in Siskiyou County. They have taken up permanent residence at R-Ranch. The plaintiff, R-Ranch Property Owners Association (Association), brought this action for an injunction preventing the defendants from permanently residing on R-Ranch. The trial court granted the Association's summary judgment motion and entered a judgment enjoining the defendants. We affirm.

FACTS AND PROCEDURE

R-Ranch consists of approximately 5,000 acres in Siskiyou County and was established in 1971 by Jeff Dennis. There are 2,500 undivided interests in fee simple in R-Ranch, so each owner owns an undivided I/2,500th interest in R-Ranch. In addition, no owner has the exclusive right of ownership or possession of any portion of R-Ranch.

The declaration of covenants, conditions, and restrictions (CC&Rs) filed before sale of the undivided interests provide that the entire R-Ranch will be used *solely* for ranching

grazing, hiking, camping, horseback riding, hunting, fishing, swimming, sports, *and other recreational uses authorized by the Association.*" (italics added) and permit the Association to "enforce charges. restrictions, conditions and covenants existing upon and created for the benefit of R-Ranch or the owners...." The CC&Rs also declare the various restrictions constitute "mutual equitable covenants and servitudes for the protection and benefit of R-Ranch and the owners thereof; and failure by the Developer or any other person or persons entitled to do so to enforce any measure or provision in violation thereof, shall not stop or prevent enforcement thereafter or be deemed a waiver of the right so to do." "The entire R-Ranch shall be used solely for the purposes which do not provide for exemption or exceptions from the real property taxation laws of the State of California." Finally, the CC&Rs make each purchaser of an interest in R-Ranch subject to the covenants, conditions, and restrictions.

The bylaws of the Association allow it to "enforce charges, easements, restrictions conditions and agreements existing upon or created for the benefit of the real property in R-Ranch.

The Final Subdivision Public Report, which is given to each purchaser before the sale provides, in part:

"Your purchase of an undivided interest will not entitle you to a specific lot or parcel of real property, but use of the entire acreage and facilities, subject to such rules and regulations as may be published by the Association. {¶...}

"The Board of Directors [of the Association], among other things, may: Enforce the Restrictions, Bylaws, and Association rules. {¶...}

"The entire R-Ranch shall be used solely for ranching, grazing, hiking, camping horseback riding, hunting, fishing, swimming, sports and other recreational uses authorized by the Association.

On March 21. 1992, the Board of Directors passed a resolution (the Resolution establishing specific rules to prevent the defendants and all other owners from permanently residing at R-Ranch.

In pertinent part, the Resolution provides:

"WHEREAS,... some R-RANCH members seem to be of the opinion they are entitled to establish their residence or domicile on the R-RANCH property; and

"WHEREAS, it is the intent and purpose of the Board of Directors by the following resolution to: (1) eliminate any such uncertainty or confusion; (2) to reconfirm and make clear the purpose of R-RANCH as a recreational community; and (3) to more clearly define the nature and extent of the use of R-RANCH;

"NOW, THEREFORE, BE IT RESOLVED THAT THE PURPOSE OF R-RANCH WAS, FROM ITS CREATION, A RECREATIONAL COMMUNITY; THAT R-RANCH HAS ALWAYS BEEN A RECREATIONAL COMMUNITY; AND THAT R-RANCH SHALL CONTINUE TO BE A RECREATIONAL COMMUNITY;

"BE IT RESOLVED FURTHER., THAT NO MEMBER OF R-RANCH SHALL BE ENTITLED TO ESTABLISH RESIDENCE OR DOMICILE ON THE R-RANCH PROPERTY;

"RESOLVED FURTHER THAT THE R-RANCH BOARD OF DIRECTORS SHALL ESTABLISH SPECIFIC RULES AND REGULATIONS TO ENFORCE THE DECLARED POLICY AGAINST R-RANCH MEMBERS ESTABLISHING RESIDENCE OR DOMICILE ON R-RANCH PROPERTY;

"RESOLVED FURTHER, THAT 'RESIDENCE OR DOMICILE' SHALL BE DEFINED AS BEING THAT LOCATION WITH WHICH EVERY PERSON IS CONSIDERED TO HAVE THE MOST SETTLED AND PERMANENT CONNECTION AND WHERE HE OR SHE

INTENDS TO REMAIN AND/OR RETURN TO. RE'SIDENICE OR DOMICILE MAY BE ESTABLISHED BY ANY ONE OR MORE OF THE FOLLOWING CONDITIONS BEING APPLICABLE TO A MEMBER:

"(1) The R-RANCH member or a member of his or her family or his or her household (associate member) residing with the R-RANCH member is a registered voter in Siskiyou County, California and uses R-RANCH as the residence qualifying the member to register, or Use member has no other residence in Siskiyou County which he or she could use to qualify as a registered voter;

"(2) The R-RANCH member or a member of his or her family or household (associate member) residing with the R-RANCH member is gainfully employed in Siskiyou County California or Jackson County, Oregon while staying at R-RANCH and having no other bona fide residence or domicile in either of said counties;

"(3) The R-RANCH member or a member of his or her family or household (associate member) residing with the R-RANCH member has been staying at R-RANCH on what appears to be a continuous basis and it is determined that the R-RANCH member or associate member(s hold himself/herself/themselves out to b residents of, or domiciled at R-RANCH. "(4) An R-RANCH member and/or associate member(s) who has been staying at R-RANCH on a substantially continuous basis for in excess of 210 days, shall be presumed to be attempting to establish his or her residence or domicile at R-RANCH.

The Resolution also authorized R-Ranch to take legal action against those found to be in violation of the Resolution's prohibitions. After R-Ranch owners were given notice of the Resolution, the defendants, who have all resided at R-Ranch continuously for more than 210 days, refused to move off R-Ranch. Accordingly, the Association

filed suit seeking a permanent injunction, enjoining the 21 defendants "from maintaining and continuing to maintain domicile and/or permanent residency on the R-RANCH property...." The defendants filed a cross-complaint for a permanent injunction against R-Ranch's attempts to prevent their residing on the property and seeking damages for interference with their property interests.

The Association moved for summary judgment, which the trial court granted. It issued a decision declaring, in part.

"The Court finds that the Board of Directors had, as a matter of law, the authority to make rules and regulations governing the use of the premises of R-Ranch as articulated in the Resolution adopted by the Board of Directors on March 21, 1992. The Court finds there is no proof that there was any irregularity in the passage of the disputed Resolution and there is no proof that the Resolution was outside the scope of the authority of the Board of Directors and was arbitrary or capricious.

"The authority to make the disputed Resolution is derived from the [CC&Rs] R-Ranch...which particularly authorizes the Association to establish rules and regulations covering the use of all of R-Ranch and the facilities under its control or management'....

"Such authority was duly delegated by Article IV, Section 1 of the By Laws which provides: 'all corporate powers of the Association shall be exercised by or under the authority of, and the business and affairs of the Association shall be controlled by, the Board of Directors.... {¶...}

"In support of their contention that the Resolution was *ultra vires,* Defendants submit a variety of documents and purported declarations, which claim representations were allegedly made to them giving rise to their right of permanent residence, and also that they have, in some manner, acquired prescriptive rights. Both of these

contentions are without merit and fail to raise a triable issue of material fact. In the first place, the claimed representations are barred by the parol evidence rule [CCP §1856(a)], and defendants have established no exception to that rule in their pleadings, [*Harding v. Robinson*, 175 Cal. 534, 540 (1917), *Chastain v. Belmont*, 43 Ca1.2d 45, 52 (1954): Fraud in the execution or inducement of a written contract may be shown and revision of a written contract may be sought, where the mistake or imperfection of the writing is put in issue by the pleadings.] In the second place, there has been no proof that the claimed rights were asserted against the remaining owners in a hostile, exclusive manner [4 *Witkin* Summary of California Law, Real Property, §462] or that the remaining owners bad notice of such a claim [4 *Witkin*, Summary of California Law, Real Property, §100. {¶...}

"The Court construes the [CC&Rs] as expressly contemplating the disputed Resolution. Section 4(a) of the Declarations...provides:

> "'The entire R-Ranch shall be used solely for ranching, grazing hiking, camping, horseback riding, hunting, fishing, swimming sports and other recreational uses authorized by the Association.' [emphasis added]

"The words emphasized imply activities of leisure and diversion. These words must be taken in their ordinary and popular sense. *Witkin* Summary of California Law, Contracts, §685 As defined in Webster's Third New International Dictionary, the primary meaning of 'camping' a verb, is 'to live, usually temporarily, in a camp or outdoors, especially for recreation'. A 'camp', a noun, is 'a place of temporary shelter, often at a distance from urban areas...' {¶...}

"That the disputed Resolution must be reasonable is required both by the [CC&Rs] and law [citation]. The determination of reasonableness in this instance is resolved

in favor of [the Association]. The declaration of Lea Rau demonstrates that the disputed Resolution did not become immediately effective, as California Code of Regulations, §2792.20(e)(2) required the resolution to be communicated to the membership of the Association because posting in a common area would have been unsuitable due to the fact that most owners are not physically present...." (Underlining in original).

The trial court entered judgment for the Association on November 28, 1994, concluding the Resolution could be enforced against the defendants as an equitable servitude. The defendants moved to set aside the judgment, but the trial court denied the motion. The defendants appeal.

DISCUSSION

I. Exclusion of Parol Evidence

The trial court, in its ruling on the motion for summary judgment, excluded evidence submitted by the defendants in support of their interpretation of the CC&Rs. The basis of the court's ruling was the parol evidence rule.

Specifically, the defendants proffered evidence Jeff Dennis and his sales force said the owners of R-Ranch could stay there as long as they wanted and could even retire there. They also offered evidence many members other than the defendants had, in the past, stayed at R-Ranch for periods of up to several years.

Without reference to the deeds by which they obtained their interests in R-Ranch, the defendants concede the CC&Rs are an integrated writing, binding upon them. They argue however, that the trial court erred in refusing to admit the parol evidence which does not contradict the CC&Rs as an aid in interpreting the CC&Rs. We, therefore, must consider whether the interpretation the defendants seek to give the CC&Rs, with the aid of the parol evidence, is an interpretation to which the CC&Rs are reasonably

susceptible. (*Banco De Brasil S.A. v. Latian. Inc.* (1991) 234 Cal.App.3d 973, 1001.)

The defendants do not allege the representations, which they assert entitle them to reside at R-Ranch permanently, were fraudulent. Instead, they assert the representations were consistent with a reasonable interpretation of the CC&Rs. "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." (Code Civ. Proc., §1860).

Having made this argument, the defendants do not, under the parol evidence beading in their opening brief, attempt to show that the parol evidence leads to an interpretation to which the CC&Rs are reasonably susceptible. Accordingly, we go on to the remaining contentions keeping in mind that the parol evidence is admissible if, and only it it leads to an interpretation to which the CC&Rs are reasonably susceptible. (Code Civ. Proc., §1856).

II. Issues of Fact.

Under six subheadings, the defendants assert the trial court erred in granting summary judgment because disputed issues of fact remained. The purpose of the summary judgment procedure is to determine whether there is evidence requiring the fact-finding procedures of trial (*Decker V. City of Imperial Beach* (1989) 209 Cal.App3d 349, 353.) "[T]he trial court in ruling on a motion for summary judgment is merely to determine whether such issues of fact exist, and not to decide the merits of the issues themselves." (*Molko v. Holy Spirit Assn.* (1988) 46 Ca1.3d 1092, 1107.) The trial court determines whether triable issues of material fact exist by reviewing the affidavits and evidence and drawing reasonable inferences. (*Gootee v. Lightner* (1990)

224 Cal.App.3d 587, 591).

A. Adoption of the Resolution

The defendants claim there remains a triable issue of fact because it is unclear whether the Association duly adopted the Resolution on March 21, 1992. We reject this contention All five members of the Board of Directors of the Association signed the Resolution. In May 1992, a copy of the resolution was sent to every owner. This was deemed by the Board the most appropriate means of communicating the Resolution to the owners because most lived away from R-Ranch.

The defendants take great pains to assert that R-Ranch is not a common interest development. At the same time, the defendants complain the Board of Directors failed to follow the statutory and regulatory procedures required to make changes in a common interest development. However, the statutes and regulations apply to property owners' associations in common interest developments. (See Cal. Code Regs., tit 10, § 2792.8, providing for the creation of an organization (called the "Association") of owners in a common interest development.) The defendants make no attempt to explain why these statutes and regulations apply to this Association They also make no attempt to show the adoption of the Resolution did not comply with the requirements of the CC&Rs and the Bylaws.

In any event, the Board of Directors complied with the regulations applicable to common interest developments. When a resolution is passed by unanimous written consent (as was the MSC here), the resolution must be posted within three days in a common area or, if the common area is unsuitable, must be communicated to the owners by an appropriate means. (Cal. Code Regs., tit.10, §2792.20(e)(2).) The defendants attempt to dispute whether the common areas at R-Ranch were suitable for posting of the Resolution. Nonetheless, such a dispute is immaterial Even if it could be

argued the common areas of R-Ranch were suitable for posting of the Resolution, mailing of the Resolution to the owners, by which all instead of some of the owners got notice of the Resolution, substantially complied with the regulation.

B. "Camping

The defendants assert that remains a material dispute concerning the word "camping" as found in the CC&Rs. The language most relevant to this dispute in the CC&Rs is as follows:

"The entire R-Ranch will be used solely for ranching, grazing, hiking, camping, horseback riding, hunting, fishing, swimming, sports, and other recreational uses authorized by the Association." The defendants assert their residency at R-Ranch can be termed "camping." They claim both the word, itself and the mutual intent of the parties at the time of purchase supports the conclusion they are doing nothing more than camp, albeit permanently, at R-Ranch.

The word "camping" must be viewed in the context of the CC&R provision. R-Ranch can be used "solely" for "camping...and other recreational uses authorized by the Association" In this sentence, camping is identified as a recreational use. By using the word "other," the provision included the listed activities, including camping, as subsets of the superset "recreational uses." Thus, only recreational uses such as recreational camping are permitted by the provision. (See *People v. Steele* (1991) 235 Cal.App.3d 788, 794.)

There is no other interpretation to which the CC&R provision is reasonably susceptible For example, the defendants claim it allows permanent camping. However, if the camping is permanent, it is not a recreational use. We must give effect to all of the words used. Were we, or a trier of fact, to interpret "camping" to include permanent

residence, it would render meaningless the word "recreational".

Given this interpretation; there is no material dispute concerning the intent:of the parties Even though the defendants offered parol evidence of statements which they claim led them to believe they could reside permanently at R-Ranch, that parol evidence contradicts the integrated writing and is therefore inadmissible for the purpose of interpreting the writing. (Code Civ. §1856).

The defendants also assert that under the rules of R-Ranch, they must not remain in a specific campsite for more than 90 days. Since they must move from site to site, they argued they do not camp at any one site permanently: This argument fails because moving from site to site to satisfy the letter of the rule still does not make the camping recreational, rather than permanent.

C. "Recreational Community"

The defendants contend the use of the term "recreational community" in the CC&Rs means that they and Dennis contemplated people residing at R-Ranch. "Recreational community" appears in the following sentence from the CC&Rs: "Developer desires to create in R-Ranch a recreational community with open spaces, recreational and other common facilities for the benefit of the said community...."

This sentence is found in the "Recitals" section of the CC&Rs and does not purport to grant any rights to or impose any restrictions on the use of R-Ranch. At we discussed above, the CC&Rs specifically restrict the use of R-Ranch to recreational uses; accordingly, whatever may be the meaning of the term "recreational community," its use in the recitals does not give the defendants the right to reside at R-Ranch permanently.

D. Use of R-Ranch by the Defendants for Authorized

Recreational Activities

The defendants assert there remains a triable issue of fact concerning whether they are using R-Ranch for authorized recreational uses. in support, they cite the declarations of three of the defendants who say they spend their leisure time fishing, horseback riding, playing tennis, engaging in social activities, and enjoying the outdoors at R-Ranch.

This argument misses the point. The Association is not attempting to prevent the defendants from using R-Ranch for these leisure time activities. It wishes to prevent the defendants from permanently residing at R-Ranch. Any factual issue as to what else the defendants may do fit R-Ranch is immaterial.

E. "Ranching

The defendants contend they are "ranching" at R-Ranch, which is one of the permissible uses. "Ranching" appears in the same sentence as "camping" in the CC&Rs: "The entire Ranch will be used solely for ranching, grazing, hiking; camping, horseback riding, hunting, fishing, swimming, sports, and other recreational uses authorized by the Association." As we noted in connection with the word "camping," the word "ranching" is necessarily modified in this sentence by "recreational". Hence, permanent residence at R-Ranch violates the CC&Rs.

F. Whether the Resolution was Arbitrary and Capricious

The defendants assert the trial court erred because whether the Resolution was arbitrary and capricious is a factual issue for the jury. To support this contention, the defendants offer one sentence: "However well intended, following an unauthorized course of action could be found to be arbitrary and capricious.

The Resolution was not unauthorized. As we explained, the CC&Rs restrict use of R-Ranch to recreational uses. The CC&Rs also give the Association the authority to enforce the

restrictions. Since the Resolution was not unauthorized, the contention fails.

III. Property Rights

The defendants claim the Association could not take away their property rights by adopting a resolution. While this may be true, the premise, that they have a property right to reside permanently at R-Ranch, is false.

The defendants offered evidence they were told by Jeff Dennis and his sales force they could stay at R-Ranch as long as they chose and could even retire there. In other words, they could permanently reside there. The CC&Rs cannot reasonably be interpreted in this fashion. R-Ranch is restricted to recreational uses only. Accordingly. the evidence of representations made to the defendants cannot be used to modify the CC&Rs and did not create a property right (Code Civ. Proc. §1856).

The defendants also offered evidence others were permitted to live on R-Ranch for long periods of time. This evidence cannot be used to modify the restriction in the CC&Rs, only to aid in achieving a reasonable interpretation. Again, permanent residence, to which the defendants claim a property right, is not a reasonable interpretation of the language of the CC&Rs. Furthermore, the CC&Rs specifically prevent a waiver of the Association's right to respond to a breach of the restrictions: "A waiver of a breach of any of the foregoing conditions or restrictions...shall not be construed as a waiver of any succeeding breach of violation Since the defendants did not have a property right to reside permanently at R-Ranch, the Association did not violate such right by adopting the Resolution

IV. Estoppel and Laches

The defendants, for the first time on appeal, raise estoppel and laches as defenses to the summary judgment We do not consider issues raised for the first time on appeal. (See

People v. Mesaris (1988) 201 Cal.App.3d 1377, 1382.) Even though the defendants raised estoppel and laches as affirmative defenses in their answer to the complaint, they did not assert them as defenses to the summary judgment motion and, therefore, did not properly preserve those issues for appeal. (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1785.). They also make no assertion they had good cause for their failure to raise the issues below.

V. Reasonableness and Enforceability of the Resolution

The defendants assert the Resolution is unenforceable because it is unreasonable. The assertion, however, is based on the premise that the Resolution takes away a right possessed by the defendants. For example. they state: "In the instant case. [the Association's] actions in adopting and attempting to enforce [the Resolution] were neither fair nor reasonable, were not made in good faith, and *were arbitrary because the (Association) is seeking to avoid the legal obligations it has to the owners.* The [Resolution] *attempts to deprive the ranch owners of rights which were transferred to them by the developer....*" (Italics added.) As discussed above, the premise, that the defendants ever had a property right to reside permanently at R-Ranch, is false.

Based on the property interests actually held by the defendants and the remaining owners of R-Ranch, the Resolution is reasonable. The CC&Rs limit the uses of R-Ranch to recreational uses. Invoking its powers granted by the CC&Rs to enforce the restrictions, the Association adopted the Resolution, which prevents the maintenance of a permanent resident at R-Ranch by prohibiting a stay of more than 210 days and also prohibiting establishment of other indicia of permanent residence, such as a domicile for voting purposes.

The Resolution is reasonable because the CC&Rs restrict R-Ranch to recreational uses thus prohibiting permanent

residence. Preventing one from staying at a permanent residence for more than 210 days would seem unreasonable and strain the definition of a residence as "permanent." On the other hand, a stay of more than 210 days would manifest something more than just "recreation." The Association was put to the task of drawing a line to enforce the restriction of uses of R-Ranch to recreational uses. The Association drew the line at 210 days That line is reasonable.

Since 1971 there have been but 857 campsites. It is not possible for each of the 2,500 anticipated or 2,300 plus actual members to physically occupy, much less enjoy 857 campsites simultaneously. Even assuming the legal propriety, indeed, the practical possibility of disregarding the existence of only 857 campsites and opening up R-Ranch for 2,500 families to permanently reside there, such a move would transform the recreational facility into something far different. Defendants' argument *some can permanently reside* on R-Ranch and "recreate" at the same time is untenable if all simultaneously enjoy such a right.

VI. Fiduciary Duty.

The defendants claim the Association, or, more specifically, the Board of Directors of the Association, violated a fiduciary duty when it adopted the Resolution. This claim appears based on some heightened duty invoked because, they claim, the developer (Jeff Dennis) controls the board of directors. (*Raven's Cove Townhouses. Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 800).

Once again, however, this contention is based on the premise the defendants and other R-Ranch owners had the right to reside permanently at R-Ranch. It is, therefore, without merit.

VII. Equitable Servitude.

Citing only a practice guide and giving no reasoning in support in their opening brief, the defendants contend the

trial court erred when it ruled the Resolution could be enforced as an equitable servitude. While the defendants may be technically correct, it makes no practical difference to them and does not support reversal of the judgment that enjoins them from violating the Resolution.

While the CC&Rs are enforceable as equitable servitudes (Civ.§1354), there apparently is no authority for enforcement of a resolution made to enforce the CC&Rs as an equitable servitude. (See Civ.§1468.) Nonetheless, that does not mean the resolution at issue here is unenforceable. The CC&Rs were clearly enforceable as equitable servitudes. The trial court did not err in deeming the Resolution a reasonable and enforceable interpretation of the CC&Rs. (See *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 378 Civ.§1354(a).) Accordingly, the judgment enforcing the Resolution must be affirmed, even though it may not be fully equivalent to an equitable servitude.

VIII. Reliance on Tax Status

The CC&Rs prohibit R-Ranch owners from using R-Ranch in a manner that would provide them with a residential homestead exemption. The parties did not argue below that this provision was relevant to the determination of whether summary judgment should be granted However, the trial court cited it as one of the reasons for granting summary judgment. The defendants contend such reliance was improper because one must have an exclusive right to occupancy and possession to be entitled to a homestead exemption.

We need not resolve this issue. "'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the

case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation (*D'Amico v. Board Medical Examiners* (1974) 11 Ca1.3d 1, 19.) Since we have already concluded the Resolution was a valid exercise of the Association's authority to enforce the CC&Rs, we need not consider the complexities of the tax laws.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur,
DAVIS, Acting P.J.
MORRISON, J.