Karey Burkholder and Douglas Thompson, Jr. v. Palisades Park Owners Association, Inc.

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COURT OF APPEALS OF VIRGINIA

Present: Judges Athey, Chaney and Raphael Argued at Winchester, Virginia

KAREY BURKHOLDER AND DOUGLAS THOMPSON, JR. OPINION BY v. Record No. 0187-22-4 JUDGE STUART A. RAPHAEL FEBRUARY 7, 2023 PALISADES PARK OWNERS ASSOCIATION, INC.

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY William T. Newman, Jr., Judge

Norman A. Thomas (Robert O. Wilson; Norman A. Thomas, PLLC; Wilson Law PLC, on briefs), for appellants.

William L. Mitchell, II (Richard E. Armstrong, IV; Eccleston & Wolf, P.C., on brief), for appellee.

The Virginia Property Owners that as expressly

an association cannot make an

assessment or impose a charge against a lot or a lot owner unless the charge is a fee for services

provided or related to use of the common area Code § 55.1-1805. Appellee Palisades Park

Owners Association, Inc. imposes an annual assessment that includes a fee for inspecting each

. We conclude that this

practice violates Code § 55.1-1805 because the assessment for lot-compliance inspection fees is

by declaration and the fees are not for services relating to

BACKGROUND

The material facts here are undisputed. Appellants Karey Burkholder and Douglas

Thompson, Jr. (the Homeo are married and own a home in the Palisades PUBLISHED association development. The Homeowners allege that Palisades is violating the Virginia

Property Owners Association Act, Code §§ 55.1-1800 to 55.1-1836, by imposing assessments

on members that fund lot-compliance inspections . The

Homeowners argue that Code § 55.1-1805 allows such assessments only if expressly authorized

in the as say lacks that clarity. 1

Palisades does not dispute that it assessments to pay for lot-compliance

inspections. It says the inspections , articles of incorporation, bylaws, and architectural review board

guidelines. The board of directors of Palisades obtained a legal opinion that using assessments to

cond

Disagreeing with that conclusion, the Homeowners sued Palisades in Arlington County

Circuit Court, seeking to enjoin the association from continuing to use assessment moneys to

fund lot-compliance inspections. 2 At the close of the Homeowners -in-chief, the circuit

court struck their evidence and found for Palisades. The court later awarded Palisades

$67,481.68 in attorney fees -shifting provisions in Code § 55.1-1828. The

Homeowners appeal.

1 See generally Code § 55.1- 2 The Homeowners also sued Richard Shewell, Jr. individually and doing business as claims before trial (along with certain other claims against Palisades). ANALYSIS

- compliance inspections (Assignments of Error 1-2).

The Homeowners argue that Code § 55.1-1805 precludes Palisades from imposing

assessments for lot-compliance inspections because such assessments are not expressly

authorized in They claim that the circuit court thus erred in granting

(Assignment of Error 1) and in failing to grant judgment in their favor

(Assignment of Error 2). The standard of review differs for those two claims. We view the facts in the light most favorable to the Homeowners when considering whether the court erred in striking their evidence. E.g., , 300 Va. 99, 109 (2021). But we

consider the facts in the light most favorable to Palisades when determining whether the Homeowners are entitled to judgment as a matter of law. E.g., Carson ex rel. Meredith v. LeBlanc, 245 Va. 135, 139-40 (1993). Because the facts are not in dispute, however, the differing standards of review make no difference in the outcome.

This case turns on the proper interpretation of Code § 55.1-1805.

interpretation . . . are subject to de novo review on appeal, and we owe no deference to the circuit

Esposito v. Va. State Police, 74 Va. App. 130,

133 (2022). is to ascertain and give

effect to legislative intent, Va. Elec. & Power

, 295 Va. 256, 262-63 (2018) (quoting Cuccinelli v. Rector & Visitors

of the Univ. of Va., 283 Va. 420, 425 (2012)). e must determine the legislative intent by what

Miller & Rhoads Bldg., L.L.C. v.

City of Richmond, 292 Va. 537, 541-42 (2016) (quoting Carter v. Nelms, 204 Va. 338, 346 (1963)). Code § 55.1-1805 restricts the imposition of assessments to pay for services unrelated to the common area unless authorized by

declaration. 3 The first sentence provides that

assessment

or impose a charge against a lot or a lot owner unless the charge is a fee for services provided or

related to use of the common area. -1805. is owned, leased, or required by the declaration to be maintained

or operated by a property owners association for the use of its members and designated as a

common area in the declaration. -1800. The inspections here are made of each lot

not for services provided or related to use of the

comm The Homeowners thus read the first sentence of the statute to forbid charging

assessments that include fees for lot-compliance inspections that the Homeowners say are not

expressly authorized by Palisades declaration or otherwise permitted by statute.

3 Code § 55.1-1805 provides:

Except as expressly authorized in this chapter, in the declaration, or otherwise provided by law, no association shall (i) make an assessment or impose a charge against a lot or a lot owner unless the charge is a fee for services provided or related to use of the common area or (ii) charge a fee related to the provisions set out in § 55.1-1810 or 55.1-1811 that is not expressly authorized in those sections. Nothing in this chapter shall be construed to authorize an association or common interest community manager to charge an inspection fee for an unimproved or improved lot except as provided in § 55.1-1810 or 55.1-1811. The Common Interest Community Board may assess a monetary penalty for a violation of this section against any (a) association pursuant to § 54.1-2351 or (b) common interest community manager pursuant to § 54.1-2349, and may issue a cease and desist order pursuant to § 54.1-2352. 1. Code § 55.1- .

Palisades argues at the outset that the Homeowners misunderstand Code § 55.1-1805.

Palisades says that the statute applies to charges imposed on an individual lot and lot

owner as opposed to assessments imposed on the community as a whole Since assessments for

lot-compliance inspections are imposed on all the lot owners, and not on the plaintiffs

individually, Palisades argues that the statute is irrelevant.

Palisades cites no precedent for its interpretation, and we reject it. Palisades misplaces its

reliance on the singular terms a lot or a lot owner services unrelated to the common area. Under Code § 1- Thus, applying the

predecessor version of that statute, the Supreme Court held in Wolfe v. Commonwealth, 167 Va. 486 (1937), that a defendant who stole five cows could not evade criminal responsibility simply because the statute criminalized the a cow. Id. at 488-89 (emphasis added). Wolfe

found it appears before the names of the animals embraced

Id. at 489. The

same principle applies here. Palisades cannot escape the restrictions in Code § 55.1-1805 by imposing an otherwise illegal fee on two or more property owners or on all the owners rather than on a single owner individually.

We disagree with Palisades that its interpretation finds support in Commonwealth v. Berry, No. 1350-17-2, 2017 WL 6598484 (Va. Ct. App. Dec. 27, 2017). Berry is both non-binding, Rule 5A:1(f), and distinguishable. Berry rejected the claim that the Commonwealth could pursue multiple pretrial appeals under Code § 19.2-398(A), which allows the

a pretrial appeal from . . . an in a felony case. Id. at *5. We said

that the normal rule in Code § 1-227 that the singular includes the plural was overcome because the context provided by the remainder of the statutory scheme strongly suggests that the use of

the singular . . . was intended to limit the Commonwealth to only one appeal of a suppression ruling. Id. After canvassing the various rules expediting Commonwealth pretrial appeals, we concluded the Commonwealth s right to appeal is limited and must be pursued

expeditiously or not at all . . . . To allow the Commonwealth multiple bites at the same appellate apple would render [those] deadlines essentially meaningless. Id. at *6.

Palisades does not persuade us that reading the singular to include the plural would

undermine Code § 55.1-1805 in the same way. To the contrary, our reading protects residential

property owners by prohibiting assessments not expressly authorized in the declaration if the

moneys are used to fund items unrelated to the common area. , by

contrast, would permit assessments for all manner of things unrelated to the common area as

long as the assessment is imposed on two or more lot owners, or on all of the owners.

reading would therefore

expectations.

interpretation lacks a limiting principle. Palisades acknowledged at oral

argument that its reading would permit an association to impose assessments to fund the

installation of balconies and skylights on every member home. Its limiting principle that

the democratically elected members of an burdensome requirements on members. That answer is not reassuring; it provides cold comfort

to purchasers concerned about unforeseeable costs for their own lots that might be imposed by an

-eager board. 2. We do not reach whether the second sentence of Code § 55.1-1805 prohibits the lot-compliance fees in question.

Neither party has briefed whether the second sentence of Code § 55.1-1805, standing

alone, prohibits the inspection-fee assessments at issue. That by name: in [the Act] shall be construed to authorize an association . . . to charge an

inspection fee . . . except as provided in § 55.1-1810 or 55.1-1811 Code §§ 55.1-1810

and -1811, in turn, appear in Article 2, which governs the disclosure requirements that apply

when a lot is sold. The seller must disclose to the buyer, among other things, that the Act

sociation disclosure

- that any

improvement or alteration made to the lot, or uses made of the lot or common area assigned to such lot, is or is not in violation of the declaration, bylaws, rules and regulations, architectural guidelines, and articles of incorporation, if any, of the association -1809(A)(9). 4

To collect and disclose that information, of course, the association must inspect the lot. The Act therefore empowers the association to charge for those inspection costs. The procedures to charge for the inspection fee are governed by Code § 55.1-1810, if the association is professionally managed, and by Code § 55.1-1811, if the association is not professionally managed.

Although the Homeowners argued in the circuit court that the second sentence of Code § 55.1-1805 prohibits an association from charging inspection fees except in connection with disclosure packets, they have abandoned that argument on appeal. The Homeowners instead maintained at oral argument that assessments may include a charge for lot-compliance

4 The buyer has the right to cancel the purchase within a set time after receiving the disclosure packet. See Code § 55.1-1808(D). inspections only if according to the first sentence of Code § 55.1-1805 such charges are

expressly authorized . . . in the declaration 5 Accordingly, we leave for another day whether assessments for lot-compliance inspections that are not needed

for disclosure packets. See Butcher v. Commonwealth, 298 Va. 392, 395 (2020) (accepting

not as a basis for deciding the contested issue of law, but as a basis for not

(emphasis altered) (quoting Simms v. Van Son, No. 150191, 2016 WL 3208951, at

*2 n.4 (Va. Feb. 12, 2016) (per curiam))).

3. Code § 55.1-1805 imposes a clear-statement rule.

Given that assumption, the outcome here turns on whether an assessment for lot-

expressly authorized declaration. Code § 55.1-1805.

We agree with the Homeowners that t It

imposes a clear-statement rule legal drafter use clarity of expression Clear-

Statement Rule, (11th ed. 2019). the result sought must

be unquestionably expressed in the text Id. 6

distinction, which conflicts with standard

expressly and explicitly as synonyms. Expressly, 5

The Homeowners still find the second sentence relevant. They say it shows that the General Assembly prohibited the use of assessments except as expressly authorized in the declaration. 6 The Homeowners argue that a clear-statement rule is also required by Sainani v. Belmont Glen Homeowners Association, Inc. Id. at 722. Sainani considered restrictive covenants as applied to the display of holiday lighting, id. at 718-19, rather than assessments to pay for services. Because we find that the first sentence of Code § 55.1-1805 imposes a clear-statement rule, we need not decide whether that rule is also required by Sainani. International Dictionary (2002) 1: in direct or unmistakable terms: in an express manner:

EXPLICITLY, DEFINITELY, DIRECTLY (emphasis added)). So does the O.E.D. Expressly, The

Compact Edition of the Oxford English Dictionary In direct or plain terms;

clearly, explicitly See also Express,

synonymous).

It makes s

declaration speak with unmistakable clarity before authorizing assessments to fund services or

improvements unrelated to the common area. Assessments to fund services or improvements in the common area are different in kind from assessments to fund services or improvements on individual lots. Because the common area is shared and jointly owned by members of the community-interest association, the association needs rules and a governance structure (1) to make decisions about the common area, and (2) to ensure that members pay their fair share of common-area expenses and do not free-ride on the contributions of others. Individually owned lots are different. So long as lot owners conduct themselves within the established rules of the the absolute right to property consists in the free use,

by the laws of the land. , 297 Va. 714, 722

(2019) (alterations in original) (quoting 1 William Blackstone, Commentaries *138)). Requiring services

related to individual lots but not common areas comports with the stronger property rights that inhere in an individually owned lot. lot-compliance inspections.

The proper interpretation of the declaration and its covenants presents Id.; , 284 Va. 409, 419-20 (2012) (same). Palisades tries to satisfy the clear-statement requirement mainly by pointing to three provisions of the declaration. Article III, § 3(c)(3) empowers board

of d Article III,

§ 3(c)(5) empowers

supervise such persons or entities as may be appropriate to manage, conduct, and perform the business obligations and duties of the A And Article V, § 3(a)(viii) allows annual

assessments to

Palisades concludes

from these provisions that the declaration expressly authorizes it to impose assessments on its

members, employ agents to carry out authorized tasks, and use assessments to enforce the

We agree s far as it goes.

But what the declaration does not expressly authorize

unmistakably communicate[] or to communicate Express,

, supra is the authority to use assessments to pay for the lot-compliance

inspections at issue. Such authority may well be implied. But it is not express.

The drafters knew how to expressly authorize specific assessments when they wanted to.

For instance, Article V, § 4(b) empowers Pali

Lot whose owner fails to maintain such Lot, as Article VI,

§ 2(b) then provides that, [w]hen so assessed, a statement for the amount thereof shall be

rendered to the Owner of said Lot, at which time the assessment shall become due and payable That express authority to impose a restoration assessment

highlights the lack of similar express authority to spend assessment moneys on lot-compliance

inspections. Article VI, § 2(b) runs on for a page and a half. But conspicuously absent is any

mention of assessments to fund lot inspections to see if the homeowners are breaking any rules.

We disagree with the dissent that Article III, § 4 provides express authority to impose

assessments to fund lot-compliance inspections. That section empowers the Architectural

plan

be accomplished without paying a third-party to perform annual lot-compliance inspections of

every lot. Indeed, that section says nothing about lot-compliance inspections, let alone assessments to fund such inspections. That section might have been an excellent place to provide for assessments to fund lot-compliance inspections, if that is what the drafters had in mind. The dissent infers the existence of such pow

implied, it is not express.

We conclude that imposing assessments for lot-compliance inspections fails the clear-statement test: those assessments are not declaration. Code

§ 55.1-1805. As a result, the circuit because

the Homeowners . of Isle of Wight,

299 Va. 150, 170 (2020) (quoting Brown v. Koulizakis, 229 Va. 524, 531 (1985)).

Although Palisades requests that we remand this case for a new trial if we find error in

the circuit] civil case shall not be remanded for a trial de novo except when

the ends of justice require it. Code § 8.01-681. If warranted by the record, an appellate court

such judgment as to the court shall seem right and

proper Id. We conclude that the ends of justice do not require a new trial. As noted at the outset, the material facts are not disputed. We asked the parties at oral argument whether there

would be anything left to try about the validity of the inspection fees if we find that Code

§ 55.1-1805 applies and that the fees are not expressly authorized by the declaration. Palisades

could not identify any disputed facts. Nor can we. Accordingly, we find that Code § 55.1-1805

bars Palisades from imposing an assessment on its members for the costs of lot-compliance

inspections that are not expressly authorized in the declaration. 7

Still, we stop short of entering the permanent injunction against Palisades that the

Homeowners requested as general relief in their opening brief. to replace

traditional equitable considerations with a rule that an injunction automatically follows eBay

Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392-93 (2006)

association violates the Act. A trial judge, sitting as a chancellor, applies equitable principles

when determining whether a permanent injunction is warranted. See, e.g., Fancher v. Fagella,

274 Va. 549, 556-57 (2007) The decision whether to grant an injunction always rests in the

sound discretion of the chancellor, and depends on the relative benefit an injunction would

confer upon the plaintiff in contrast to the injury it would impose on the defendant. Any burden

imposed on the public should also be weighed. Id. at 556. complaint identified various forms of relief that might be appropriate, including declaratory

relief, disgorgement, and a permanent injunction. The parties, however, have not addressed

not of first view. Cal. Condo. Ass n v. Peterson, 301 Va. 14, 23 (2022) (quoting Bailey v.

7 Nothing in this opinion prohibits Palisades from charging inspection fees in accordance with preparing disclosure packets, as provided in [Code] § 55.1-1810 or 55.1-1811 § 55.1-1805. Loudoun Cnty. Sheriff s Off., 288 Va. 159, 181 (2014)). So we leave it to the circuit court to

fashion the appropriate remedy in the first instance.

B. The Homeowners are entitled to reasonable attorney fees and costs (Assignments of Error 3-4).

Our reversal of the judgment for Palisades renders moot the Homeowners attorney fees awarded to Palisades were excessive. Because we find that Code § 55.1-1805

prohibits Palisades from imposing assessments to fund lot-compliance inspections that are not

authorized by the declaration

or costs under Code § 55.1-1828(A). Instead, the Homeowners have prevailed

and are thus entitled to recover their reasonable attorney fees and costs under that statute.

CONCLUSION

failing to enter

judgment for the Homeowners on their claim that Code § 55.1-1805 prohibits Palisades from charging assessments for the lot-compliance inspections at issue. As prevailing parties, the Homeowners are entitled under Code § 55.1-1828 to their reasonable attorney fees and costs for litigating these issues in the circuit court, on appeal, and on remand.

We remand this case for the circuit court to determine, consistent with this opinion, the appropriate remedy and the reasonable attorney fees and costs to which the Homeowners are entitled.

Reversed and remanded. Athey, J., dissenting.

I agree with the majority that Code § 55.1-1805 requires that the use of the annual assessment to fund lot- declaration.

communi as expressed by the plain meaning of the words used in the statute

, 301 Va. 82, 95 (2022)

(quoting Llewellyn v. White, 297 Va. 588, 595 (2019)). Since I believe the majority errs by requiring that the declaration explicitly authorize the use of annual assessments for lot-compliance inspections, I respectfully dissent.

The majority concludes that Article III, § 3(c)(3), Article III, § 3(c)(5), and Article V, § 3(a)(viii), when read together, may imply authority to use the annual assessment to fund lot-compliance

pay for lot-compliance inspections. The majority seemingly requires that for the declaration to

expressly authorize funding lot-compliance inspections from the annual assessment, the

d authorized to use funds raised by the annual assessment to fund the inspection of lots to evaluate

whether the lot compli majority supports their conclusion by first observing that in a separate section of the declaration

ociation may

levy a Restoration Assessment upon any Lot whose owner fails to maintain such Lot, as provided

4(b). Contrasting this explicit language authorizing a

restoration assessment with the language in Article V, § 3(a)(viii), the majority concludes that authority to spend annual assessment moneys on lot- with the majority

Article III, §

employ, enter into contracts with, delegate authority to, and supervise such persons or entities as

may be appropriate to manage, conduct, and perform the business obligations and duties of the

implementation, administration, and enforcement of this Declaration, including, but not limited

4 the architectural review board is tasked with

creating architectural standards and monitoring lot-compliance with those standards. Finally,

Article VI, § 2(b), grants the a

committees, to enter upon and inspect any Lot at any reasonable time for the purpose of

ascertaining whether any violation of the provisions or requirements of this Declaration exists on

such Lot or in such Living Unit . . . judgment, these clauses, when read in conjunction,

board of directors

has the express authority to collect the annual assessment and employ or contract with a party to

conduct lot-compliance inspections. Because conducting lot-compliance inspections is an enumerated power of the association and creating standards for compliance is the duty of the architectural review b

I therefore disagree with the majority because I find it inescapable that the declaration expressly authorizes the use of annual assessment funds to fund lot-compliance inspections without the necessity of a clause as explicit as the majority requires. Article V, § grant to use annual assessment funds to implement, administer, and enforce the declaration is general, but express. A power granted expressly though in general terms, is not a power granted the plain meanin

55.1-1805 as would be

lowering the bar by allowing an implicit authorization to suffice.

Finally, since we should seek to effectuate the intent of the General Assembly when the majority advocates will both encourage litigation and require serial amendments to a large percentage of association declarations throughout the Commonwealth, I cannot agree that the majority opinion effectuates the likely intent of the General Assembly as expressed in the statutory framework. For that additional reason, I would have adopted a less exacting interpretation of the adverb contractual language as generally expressed in various articles in the declaration. Hence, I would

judgment and therefore must respectfully dissent.