I.
ENFORCEMENT OF THE CONDOMINIUM PLAN
(UNIT BOUNDARIES)

This first cause of action is for enforcement of the boundaries between Common Areas and Separate Interest Unit space as defined in Association's recorded 2005 Restated CC&R Section 1.22 defining "Condominium Plan", Section 1.74 defining "Unit" and Section 1.18 defining "Common Areas." Enforcement of the boundaries is for the purpose of removing trespassing common area pipes that service neighborhood Units, only; they are not outlets or stub-outs for Forbush's Units. Association failed to properly investigate Forbush's claims, ignored their concerns about the common area pipes and rejected Forbush's offer to resolve the matter.

FACTS

Hamilton Cove ("HC") is a common interest airspace condominium development located on Santa Catalina Island, City of Avalon, County of Los Angeles. Constructed adjacent to the shoreline, 185 condominium Units ("Units") are built, or stacked, against the rising hillside. Catalina Island and some aspects of the governing of HC fall within the jurisdiction of the California Coastal Commission which has planning, regulatory, and permitting responsibilities, in partnership with local governments, over all "development" within the coastal zone.

Hamilton Cove Homeowners Association ("Association") is a California mutual benefit corporation with 185 voting members. It has a five-person Board of Directors elected by the members. Officers, who are also directors, are elected by the board. The officers manage the Association in accordance with the 2005 Restated CC&Rs and policies adopted by the Board of Directors. No management company is involved. (Attachment 1. County of Los Angeles recorded CC&R #05-2391948.)

The board members are:

Norris Bishton: President/Director. He is also a law partner of the Bishton-Gubernick law firm located in the City of Los Angeles. Mr. Gubernick provides legal services to Association, often adversarial to the membership, with legal fees paid by Association funds that are derived from the membership, including Forbush. This raises a potential conflict of interest for Mr. Bishton.

Bart Glass: Executive Vice President/Director/Architectural Committee member. Mr. Glass is also a real estate broker who "originally sold all of Hamilton Cove for the Developer" and has since "sold more Hamilton Cove Villas, then all agents in Avalon combined". He also runs a sales and vacation rental business that offers many HC villas to the general public on the internet for short-term vacation rental. [1] As Board Director, Mr. Glass is in a privileged position regarding sales and rentals at HC which may pose a conflict of interest for Mr. Glass.

Honorable Richard Kirschner: Vice President/Treasurer/Director. He is also currently serving as a judge of the Superior Court of Los Angeles County. A potential conflict of interest may arise should this matter proceed to litigation within the county of Los Angeles. [2]

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[1] Mr. Glass' profile on https://www.realtor.com/realestateagents/5b2e8c7d51bf680012d93d89. See also Hamilton Cove Real Estate, www.hamiltoncove.com for his sales and vacation rental business.

[2] See https://trellis.law/judge/richard.h.kirschner

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Mike Owens: Vice President/Director/Architectural Committee member. He also owns Pacific West Controls, Inc. located in Visalia, CA, which provides energy solutions for the commercial, institutional and industrial markets.

Martin Curtin: Vice President/Secretary/Director/Architectural Committee Chair. Retired, former owner of Catalina Island Inn.

Prior to January 26, 2010, the homeowners held subleases to their condominiums. The land, improvements and infrastructure were owned by a subsidiary of the Santa Catalina Island Company. On January 26, 2010, Association purchased the land, improvements and infrastructure and became the sublessor on the 185 subleases. Association immediately sold a 1/185 undivided fractional interest in the land, improvements and infrastructure and fee interest in their condominiums to the members.

Mark and Carol Forbush ("Forbush") are the fee simple owners of two adjoining Units located at the bottom of a hill with several other Units directly above them on the hillside. Unit 82 was acquired in 2010 and received a short-term rental license from the City of Avalon in April 2022. Unit 81 was purchased in 2017 and is also licensed as a short-term vacation rental offered on the internet to the general public. The combined upper and lower-level square footage of each Unit is 1,200. Forbush does not reside full-time in either Unit.

Recorded Condominium Plan Establishes Unit Boundaries Which Are Located Behind Unrecorded Concealment Walls

Units 81 and 82 are adjoining two-level airspace condominiums located in building 8 which is constructed over a foundation slab that covers the hillside slope ("foundation"). Much like stacking blocks against a slope, the box-style construction of the Units created pockets of subfloor crawlspaces, or dead-spaces, between the boundary walls and floor of the Units and the sloping hillside ("dead-space"). Common area pipes of various types, including copper and sewer, run along the *top* of the hillside foundation and within the dead-space. The pipes are not buried underground.

In late October 2017, Forbush received from Association a requested copy of the floor plan for their Units. Forbush noticed a substantial discrepancy between the floor plan and the Units as-built; the water heaters, located in the laundry room of each Unit, were actually installed several feet from the location indicated on Association's floor plan. Both heaters should have been placed behind what appeared to be a solid wall. The floor plan also depicts no step-up into the laundry room. However, as built, the laundry rooms have a step-up from the entryway. This drew Forbush's attention to the wall that blocks the proper location of the heaters and to the floor that has a step-up into the laundry room. [3] (Attachment 2. Emails and Association's floor plan, October 23, 2017).

In both Units, the upper-level laundry rooms are perpendicular to a bathroom. Association's floor plan depicts these perpendicular rooms as adjoining at an unobstructed 90-degree corner. Forbush could not locate this 90-degree corner in either Unit due to solid-appearing walls, one in the laundry room and the other in the bathroom, which blocked access to the adjoining corner depicted on

[3] As the holder of a general contractor's license, Mark Forbush is familiar with the reading of floor plans.

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Association's floor plan. Forbush, therefore, suspected the adjoining corner depicted in Association's floor plan was, in fact, concealed *behind* the solid-appearing walls ("concealment walls"). The step-up into the laundry remained unexplained at this point.

Forbush obtained from the County of Los Angeles a copy of the recorded Condominium Plan ("Condominium Plan") for their two Units. The Condominium Plan boundary walls and adjoining laundry-bathroom corners match Association's floor plan. Nowhere on the recorded Condominium Plan do the concealment walls appear for either Unit. Also, the Plan shows no step-up into the laundry rooms. (Attachment 3. Recorded Instrument No. 88-1069141. Condominium Plan Parcel Map No. 14686, pages 10, 11, 47, 48 of 105 pages. Lots No. 94 and 95.) [4]

Forbush obtained from the Office of Assessor County of Los Angeles a copy of the recorded subdivision airspace map. The boundary walls and adjoining laundry-bathroom corners on the airspace map match those depicted in Association's floor plan and the recorded Condominium Plan. Nowhere do the concealment walls show on the recorded airspace map. (The airspace map records the outer boundaries of Units, not their interior configuration.) (Attachment 4. Tract No. 69836; Lot 1; Parcel Map 14686, Condominium PM 151-3-12, Lots 94 and 95.)

Investigating further, Forbush retained a private surveyor, Chris Nelson & Associates, Inc., to map the boundary walls of their two Units. The Surveyor Report proved to be an overlay of Association's floor plan, the recorded Condominium Plan and the Los Angeles County airspace subdivision map. (What appears as partition walls in the survey report are actually structural beams in the ceiling.) Nowhere are the concealment walls recorded for purposes of creating a survey report. (Attachment 5. Chris Nelson & Associates, Inc.'s Surveyor Report.)

Unable to find any public recording of the concealment walls and step-up into the laundry rooms, or reproduce them through a professional surveyor, Forbush then contacted Chicago Title Company and Fidelity National Title Group ("Title Company") for their Units and requested an investigation be made to explain the discrepancy between the recorded and surveyed boundary walls and the as-built concealment walls and raised laundry floors. Title Company found no recorded modifications to the Condominium Plan or airspace map and no recorded variance or easement for the concealment walls and elevated laundry room floor for either Unit.

Based on the foregoing, on April 11, 2019, Forbush opened the concealment walls for exploratory purposes and confirmed that the boundary walls depicted in Association's floor plan, the recorded Condominium Plan, the recorded county airspace map and the surveyor report are, in fact, located *behind* the concealment walls. The southwest corner of Unit 81 bathroom and the adjoining northwest corner of Unit 82 bathroom (mirror images of one another) are completely walled off by concealment walls measuring 5' x 6' x 8' in each Unit. The effect of the concealment walls is the loss of interior Unit space with a combined square footage of 5' x 12' x 8'. (Attachment 6. Photo of Units 81 and 82; Digital composite image of Condominium Plan Style 20; Composite Condominium Plan Style 20 as built.)

[4] Condominium Plans are printed on several pages similar to the old Thomas Guides where the image on one page is continued on another page. The images on pages 10 and 11, and on 47 and 48, have been combined for easier viewing.

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Forbush's visual inspection behind the concealment walls suggest that the elevated laundry room floor is the result of either lateral placement of pipes above the hillside foundation or a feature of the foundation slab itself. Images of the hillside slab, taken early in the construction of the project and during 2020, show no pipes on top of the slabs. Pipes were, however, laid above the slab for Building 8 after the black/white image was taken because they are, in fact, there. This is contrary to the original recorded "Development Agreement", executed on March 19, 1982 between HC and the City of Avalon, wherein it states, "All utility service shall be installed underground." (Attachment 7. Hillside slab images; Recorded Development Agreement, Item No. 34, p. 39 of 180)

Forbush is not asserting a construction defect of their Units. Their Unit boundary walls are constructed in substantial accordance with the recorded Condominium Plan; the walls are built as intended. Their separate interest Units are also built as intended, save for the trespassing concealment walls. Rather, Association's common area pipes should have been buried underground but due to their placement above the hillside slab, they pierce through the Unit walls, entering separate interest Unit space. These common area pipes are the sole responsibility of Association.

Above-Ground Common Interest Neighborhood Pipes Intrude into Forbush's Separate Interest Unit Space

Forbush's visual inspection also discovered multiple pipes penetrating the vertical western boundary wall of both Units. The pipes enter at a downward angle consistent with the abutting hillside, extend into Forbush's Unit spaces then penetrate the Units' subfloor in a downhill trajectory to their street connections. The construction of Building 8 is such that the rise and run of the building's foundation, in relation to the hillside foundation, resulted in the skewering of Forbush's two Units with multiple pipes running *on top of* the hillside foundation. The pipes should have been either buried under the hillside foundation or located in the dead-space subfloor. Instead, the pipes run through Forbush's two Units. (Attachment 8. Pipe images.)

There are twenty (20) trespassing pipes consisting of copper and sewer lines. At the point of trespass, none of the pipes are stub-outs to either Forbush Unit. If all the pipes were capped off at the point of trespass, all utilities to Forbush's Units would remain fully functional. All water and sewage stub-outs for the Forbush Units are located below the point of trespass and enter the Units from the subfloor dead-space at this lower location. Therefore, the trespassing pipes are water and sewer lines servicing the Units above Forbush.

Both Forbush Units are located at the bottom of a densely populated hillside. If the neighborhood sewer or water lines breach due to earthquake movement or pipe corrosion, Forbush's dwellings would be inundated with raw sewage and water rendering the Units uninhabitable. This would come at a great cost to Association because such a breach could go undetected for some time as Forbush does not reside in either Unit.

HC utilizes a pressurized copper pipe, *salt water*, flush system thereby making the lines highly susceptible to salinity corrosion. Coupled with their above-ground exposure to sea air, this raised the

level of Forbush's concern. [5] By attorney letter dated March 11, 2020, Forbush notified Association of their concern. Association deflected Forbush's concerns by diverting the conversation from the pipe risks to an irrelevant discussion of Forbush's standing to enforce the agreement between Developer and City and conflating lateral lines (including sewer) running above ground with Unit stub-outs. (Association also defined "underground" as on top of the hillside slab.) Regardless, any construction defect concerning these common area pipes is for Association to pursue with Developer. Here, the issue is Forbush's concern over potential pipe rupture, located in their Units, which Association dismissed and never investigated. [6] (Attachment 9. Letter dated March 11, 2020.)

Forbush Notified Association of the Breached Boundary Walls and Intrusive Pipes; Association Claims all Pipes are Common Areas Wherever Located

By letter dated June 19, 2019, Forbush, through counsel, notified Association of the trespassing pipes and concealment walls. (Attachment 10.)

By letter dated July 18, 2019 [7], Association rejected Forbush's claims by asserting that all pipes and their enclosures, conduits or chutes, *wherever located*, (within concealment walls) are common areas under Association management and control. Further, that the concealment walls define Forbush's separate interest Unit space because they are "existing physical boundaries". (Attachment 11.)

Association's denial on July 18, 2019 of the trespass and, thereby, the boundaries between common areas and Forbush's separate interest Unit space was made without review of the recorded Condominium Plan. By email dated January 8, 2020, in response to Forbush's request for copies of their Condominium Plan, Association responded:

> "Association does not have copies of the various Condo Plans. The Developers destroyed them. Attached are copies of the two Condo Plans I obtained from a Title Company." (Attachment 12.)

The copies provided by "a Title Company" are likely the same copies provided to Forbush as a result of the claims they filed with their Title Companies in late September 2019. Association's position has remained steadfastly unchanged even after they received a copy from "a Title company".

Forbush Attempted to Resolve the Matter Through Proposed Modifications of Their Units

Forbush recognized the significance of the intruding pipes and concealment walls including, but not limited to 1) perpetual loss of use and enjoyment of separate interest square footage/airspace used for

[5] To help reduce the demand for the limited fresh water on Catalina Island, in the 1970s the City of Avalon established a salt water system, AMC 6-6.09. Avalon requires a second plumbing system piped to toilets, AMC 8-5.05. Forbush Units were built in 1988 with pressurized saltwater copper pipe toilet systems that are now, in 2021, at least 33 years old.
[6] In 2011, the Natural Resources Defense Council listed Avalon as one of the 10 most chronically polluted beaches in the nation for failing state health tests as much as 73% of the time. This was the result of old corroded lateral sewer lines leaking into coastal waters. In 2012,the Los Angeles Regional Water Quality Control Board ordered the city of Avalon to fix the leaky sewage system which included repair and replacement of lateral sewage lines.
[7] This letter is signed by Jeff Gubernick, law partner of Association president, Norris Bishton.

a common area purpose, 2) perpetual diminution in value, 3) property taxes and insurance paid on square footage used for a common area purpose, 4) perpetual risk of property damage caused by pipe breach, and 5) perpetual risk of loss of short-term rental income caused by uninhabitability.

Taking into consideration the logistics in relocating the multiple pipes versus all the risks they force upon Forbush, Forbush created a concept design modification that would accommodate the pipes and concealment walls and atone for their perpetual intrusion and risks. (*Infra*, Enforcement of CC&R Article IV.) Forbush made several requests of Association to participate in an onsite review of their modification proposal wherein the Unit boundaries would be discussed in relation to the common area neighborhood pipes and concealment walls. Association refused, citing COVID restrictions. [8] Instead, on January 4, 2021, falsely claiming lack of access to Forbush's Units, Association "viewed the interior of a Unit identical to Unit 81", allegedly located somewhere on the property. (Association has never revealed the location of this so-called "identical Unit".) They also performed a limited-access inspection within the subfloor dead-space of Building 8 which does not provide a view of the pipes and concealment walls inside Forbush's Units. (Attachment 13. See p. 1.)

Forbush's proposal includes the following:

1) permit the pipes and concealment walls to remain;
2) assume the perpetual risk of damage should the pipes breach (assumption of the risk, however, does not relieve Association of their duty to repair and maintain the pipes in good order);
3) continue to pay property tax value on private dwelling space occupied by the pipes and concealment walls;
4) stay further legal proceedings.

In exchange for:

Full approval of Forbush's concept design proposal and project which includes perpetual grant of certain exclusive common areas. Forbush proposes the following authorities for exclusive use of common areas:

1) CC&R 4.08 providing for recorded variances;

2) Civil Code §§4600(b)(3)(B), (E), (F), (K) providing several exceptions to the requirement of membership approval for exclusive use of common areas.

By letter dated January 18, 2021, Association rejected Forbush's proposal. (See Attachment 13.)

DISCUSSION

An association has the duty to enforce the restrictions set forth in its CC&Rs. When it fails to do so, "a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the [CC&Rs]." (*Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1246.) No

[8] This is further discussed in the second cause of action herein.

physical damage or financial harm need be shown in a CC&R enforcement action. (*Biagini v. Hyde* (1970) 3 Cal.App.3d 877.)

A homeowners association, through its board of directors, has a duty to enforce its governing documents. (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 373-374, 380-383.) The enforcement of CC&Rs must be "in good faith, not arbitrary or capricious, and by procedures which are fair and uniformly applied." (*Liebler v. Point Loma Tennis Club* (1995) 40 Cal.App.4th 1600, 1610; *Nahrstedt*, supra, 8 Cal.4th at p. 383; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App 3d 642, 650-652.)

By far, the largest body of law regulating Associations is the Davis-Stirling Common Interest Development Act, Civil Code Section 4000 et seq. The Davis-Stirling Act applies to all common interest developments in California. Included within the various forms of common interest developments are condominium projects. (Civil Code § 4100.) The portion of real property within a condominium project that is owned individually by a property owner is the owner's "separate interest" or "Unit". (Civil. Code §§ 4185(a)(2), 4125(b).) The majority of condominium Units within California condominium projects are structured as "airspace" condominium Units.

HC is a common interest development condominium project structured as "airspace" condominium Units. The project originally consisted of 185 subleasehold condominium Units that subsequently converted to fee simple. Forbush owns a separate interest in two adjoining Units plus a fee simple 1/185 undivided fractional interest in the land, improvements and infrastructure for each Unit. It is not a leasehold estate. Therefore, Forbush has standing to bring action to enforce the CC&Rs.

How Are the Physical Boundaries of Forbush's Separate Interest Units Determined?

In *Eith v. Ketelhut* (2018) 31 Cal.App.5th 1, [w]e do not defer to the Board's interpretation of the CC&Rs. The interpretation of CC&R's is a legal question to be decided by the courts, not the Board. "CC&R's are interpreted according to the usual rules for the interpretation of contracts generally, with a view toward enforcing the reasonable intent of the parties."

Courts must consider the CC&Rs as a whole and construe the language in context rather than interpret a provision in isolation. If the contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. (*Starlight Ridge v. Hunter-Bloor* (2009) 177 Cal.App.4th 440, 447.)

Association defines and identifies Forbush's boundaries through their interpretation of CC&R 1.22 ("Condominium Plan"), CC&R 1.74 ("Unit"), and CC&R 1.18 ("Common Areas"). Of the several governing documents referenced in the management of a condominium project, the Condominium Plan is often the least understood and most overlooked even though it is referenced in every single deed to a condominium. As a management tool, the Condominium Plan has two primary functions. First function is the description of Units versus Common area which is extremely important in the identification of ownership rights and maintenance responsibilities which are often assigned according to whether a particular feature is common area or part of a Unit. Second function is the identification and location of Units and their assigned exclusive use common areas.[9]

[9] Assignment of exclusive use common areas will be further discussed under the third cause of action, Enforcement of CC&R 1.18 - Common Areas.

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Here, by letter dated July 18, 2019 (see Attachment 11) Association declared the concealment walls are Forbush's Unit boundaries because they physically exist. Association made this determination without referencing the recorded Condominium Plan which they admit (see Attachment 12) they did not possess until one was provided by "a Title Company", the result of a claim submitted by Forbush. Association relied on their interpretation of CC&Rs 1.22, 1.74 and 1.18 for their determination of Forbush's Unit boundaries. Following are the applicable 2005 Amended and Restated CC&Rs:

Condominium Plan

CC&R 1.22, Condominium Plan, is defined as follows:

> "Condominium Plan" shall mean the engineering drawings and related materials for an Increment,[10] as amended from time to time, showing the diagrammatic floor plans of the Condominiums, **the boundaries of the Condominiums**, the Common Areas, and, where applicable, dimensions, specific alternative uses as authorized by this Restated CC&Rs, and such other information reasonably necessary to identify a Condominium in such Increment as approved by the Design Committee." (Bold added.)[11]

Association offers no recorded amendments to the recorded Condominium Plan and airspace map, notwithstanding CC&Rs 1.18 and 1.22 provision for amendments from time to time. Association provides no recorded variance or other right of easement for the pipes and concealment walls. Therefore, the diagrammatic floor plans of Forbush's Units, the boundaries of their condominium Units, are those depicted in the recorded Condominium Plan and airspace map. [12]

Condominium Units

CC&R 1.74 defines the boundaries of airspace Units as follows:

> "Unit" shall mean the elements of a Condominium not owned in common with the Owners of other Condominiums in the Project. Each of the Units shall be a separate subleashold estate[13], as separately shown, numbered and designated in any **Condominium Plan**. Each such Unit consists of a living area space or spaces ("Residential Element") bounded by and contained within the interior unfinished (meaning exclusive of wall coverings, floor coverings, fixtures or decorations) surfaces of the *perimeter walls,* floors, ceilings, windows and doors of each Residential Element, **as shown and defined in the Condominium Plan**. In interpreting deeds, declarations and plans, **the existing physical boundaries** of the Unit or a Unit

[10] "Increment" is defined in CC&R §1.39 as "the construction and development of Condominium Buildings or Single Family Residential Lots and appurtenant Improvements that shall constitute separate construction phases of Phase 5." Forbush's Units are not included in Phase 5, however, 1984 CC&R §1.31 defining "Increment" provides for the Forbush Units.

[11] Civil Code §§4120 and 4285 define and describe "condominium plan".

[12] Civil Code §4295 provides for the amendment or revocation of a Condominium Plan.

[13] Since publication of this CC&R, Forbush's subleashold estate was transferred to a fee simple estate.

> **constructed or reconstructed in substantial accordance with the Condominium Plan and the original thereof, if such plans are available, shall be conclusively presumed to be its boundaries, rather than the description expressed in the deed, Condominium Plan, Original Declaration, or this Restated CC&Rs**, regardless of settling or lateral movement of the building and regardless of **minor variances** between boundaries as shown on the Condominium Plan or defined in the deed, the Original Declaration and this Restated CC&Rs, and the boundaries of a building as constructed or reconstructed.[14] (Bold added.)

The boundaries of an airspace condominium Unit typically include a cube of air bounded by the interior, unfinished surfaces of the Unit's "perimeter walls", floors, ceilings, windows and doors. [15] Association relies on "perimeter walls" for their assertion that the concealment walls, because they physically exist, are the "perimeter walls" defining Forbush's airspace boundaries.

CC&Rs 1.15 and 1.74 clearly state the airspace Unit is "...bounded by and contained within the interior unfinished.....surfaces of the perimeter walls.....*as shown and defined in the Condominium Plan*." (Italics added.) The concealment walls are not shown or defined in the Condominium Plan or the airspace map; the Chris Nelson survey was unable to reproduce these walls.

Setting aside the description expressed in the deed, Condominium Plan, original Declaration, or the Restated CC&Rs, the existing physical boundaries of the Units *constructed in substantial accordance with the Condominium Plan*, in fact, physically exist *behind* the concealment walls. They are built with robust construction material necessary for Unit boundaries which are often weight-bearing (as compared to the concealment walls that are built with lighter interior partition wall material.) These are the Unit walls that "shall be conclusively presumed to be its boundaries." Association offers no explanation for these walls. Instead, Association asserts that the physically existing and recorded boundary walls, depicted in the Condominium Plan and airspace map, are true and correct in all respects *except* in the location of the unrecorded concealment walls. Somehow the recorded, and physically existing, boundary wall magically jumps over to the unrecorded concealment walls and then magically jumps back to the recorded boundary wall. This proposition is an absurdity because it would shatter every definition of separate interest Unit space and common areas and render recorded Condominium Plans and airspace maps meaningless. The definitions and identification of separate interest and common areas would become whatever Association says it is, wherever they need it and for any reason. Associations everywhere could then wall off separate interest space for common area purposes by simply erecting a barrier.

Hypothetically characterizing the concealment walls as a "minor variance", they are superseded by the physical walls, located behind them, constructed in substantial accordance with the Condominium Plan and depicted on the recorded documents.

Therefore, Association's interpretation of CC&R 1.51, restated and recorded as 1.74, is without merit. Forbush's Unit boundaries are the walls located behind the concealment walls.

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[14] Civil Code §§4185(b) and 4220 are the correlating codes for CC&R Section 1.74.

[15] Where such provisions are absent or ambiguous, Civil Code §4185(b) establishes this default boundary structure.

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Condominium Common Areas

The boundaries of Forbush's separate interest Units also depend upon the scope and type of common area within the condominium project. In condominium projects, every component of the common interest development is common area except for the Units.

CC&R 1.18 defines common areas as:

> "[A]ll areas on the Project, **except the Units**. Common Areas shall include, without limitation, for maintenance purposes of the Association, but not necessarily by way of fee title, *all gas, water and waste pipes, all sewers, all ducts, chutes, conduits, wires and other utility installations of the Project Improvements wherever located (except the outlets thereof when located within the Units),* the land upon which the Project Improvements are located and the airspace above the Project Improvements, all bearing walls, columns, unfinished floors, the roofs, foundation slabs, party walls, utility walls, foundations, private streets or driveways, walkways, common stairways, parking areas and landscaping on those **areas of the Project which are not defined as a part of the Units.**" (Italics and bold added.)

Association relies on "*all gas, water and waste pipes, all sewers, all ducts, chutes, conduits, wires and other utility installations of the Project Improvements wherever located (except the outlets thereof when located within the Units)"* for their impossible assertion that the pipes are *both* common area utilities encased within a common area chute (the concealment walls), and separate interest "outlets....located within the Units". Association ignores the fact that Forbush's water and sewage stub-outs are all located *below* the point of trespass and enter Forbush's Units from the dead-space below. Therefore, the trespassing pipes cannot be utility outlets located within Forbush's Units.

Association ignores the CC&R's exception, bookended at the beginning and end of the paragraph. "Except the Units" and "those areas of the Project which are not defined as a part of the Units" are superseding exceptions to utilities and conduits defined and identified as common areas. Common areas are "wherever located" *except* where the Units are located. Association's interpretation shifts the definition into reverse: Units are located except where common area pipes and conduits are located. This interpretation would render recorded Condominium Plans and airspace maps meaningless. Therefore, Association's interpretation of CC&R 1.14, restated and recorded as 1.18, is without merit. The space within the concealment walls is Forbush's recorded separate interest Unit space.

CC&R 6.01(e) provides for encroachments as follows:

> "The Association and Owners of contiguous Residences shall have a reciprocal easement appurtenant to each of the Residences over the Residences and the Common Property for the purpose of (1) **accommodating any existing encroachment of any wall of any Improvement,** and (2) maintaining the same **and accommodating authorized construction**, reconstruction, repair, shifting, movement or natural settling of the Improvements or any other portion of the Project housing their respective Condominiums or Residences. Easements and reciprocal negative **easements for utility services** and repairs, replacement and maintenance of the same over all of the Common Property are specifically reserved for the benefit of the

> Owners. Association expressly reserves for the benefit of the Common Areas, and for the benefit of the Owners and the Association, reciprocal nonexclusive easements for drainage of water over, across, and upon the Common Areas. The foregoing easements **shall not unreasonably interfere with each Owner's use and enjoyment of adjoining Residences**."

"[A]ccommodating any existing encroachment of any wall of any Improvement" means the *walls* of "all structures and appurtenances thereto of every type and kind, including but not limited to, buildings, the exterior surfaces of any visible structure, and the paint on the surfaces and the Infrastructure." (CC&R 1.38.)

Here, the relevant *walls* are those of Building 8 and the appurtenant Units therein. As discussed above, the concealment walls are not the walls of either Building 8 or the Units therein; they are interior partition walls designed to hide the pipes within. Association fails to provide any authority for the "authorized construction" of the concealment walls located well inside separate interest Unit space.

What Authority Permits Neighborhood Pipes to Pass Through Separate Interest Units?

When the concealment walls are hypothetically removed, we are left with the boundary walls pierced with 20 pipes that then pierce the subfloor on their downward trajectory to their street connections. Association offers no building codes or set-backs, past or present, that provide authority for neighborhood common area pipes to pass through another neighbor's separate interest Unit. Association provides no developer-controlled Board minutes, committee minutes or prior CC&Rs that would show such an invasion was planned or authorized during construction. There are no engineering drawings or related materials showing any amendments to Forbush's diagrammatic floor plans or dimensions. Association provides no recorded amendments to the Condominium Plan and airspace map or specific alternative uses authorized by any CC&Rs that might alter these recorded documents. Association provides no recorded variances or easements. Therefore, there is no legal basis upon which common area neighborhood pipes may penetrate Forbush's boundary walls and invade Forbush's separate interest Units.

Therefore, Forbush is the record owner of the space occupied by the concealment walls and common area neighborhood pipes. There are no recorded modifications or variances to alter Forbush's ownership rights to that space.

Does Judicial Deference Protection Apply to Association's Interpretation of the CC&Rs?

The judicial deference rule does not encompass legal questions that may involve the interpretation of the covenants, conditions, and restrictions (CC&Rs) of a homeowners association. Courts decide legal questions. (*Eith v. Ketelhut*, 31 Cal.App.5th 1).

However, should judicial deference apply, following is an analysis of judicial deference within the facts of this case.

I.
ENFORCEMENT OF THE CONDOMINIUM PLAN (UNIT BOUNDARIES)

In *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249 [87 Cal.Rptr.2d 237, 980 P.2d 940], our Supreme Court cautioned courts to give judicial deference to certain discretionary decisions of duly constituted homeowners association boards. Where the board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise. The Supreme Court recognized the essence of an association's duty to maintain and repair is a duty to *act* based on reasoned decision-making. The court observed, "[T]he Declaration [of CC&Rs] here, in assigning the Association a duty to maintain and repair the common areas, does not specify *how* the Association is to act, just that it should." (Id. at 270.)

In *Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, the judicial deference doctrine does not shield an association from liability for **ignoring problems**; instead, it protects Association's good faith decisions to maintain and repair common areas. The Court observed, "[t]here may be some rare situations in which an association's decision to do nothing to address a common area maintenance issue deserves judicial deference. For example, we can envision a scenario in which an association faces two extreme choices: doing nothing or adopting a prohibitively expensive course of action. A court may decide to extend judicial deference to an association's choice of inaction in that narrow context, **if the choice stemmed from deliberations that carefully weighed the alternatives and gave primacy to the best interests of the association and its members**." (Bold added.)

Lamden and *Affan* do not apply here because "ordinary maintenance" does not apply to the pipes in this case. [16] The pipes that traverse through Forbush's Units may run as far as the top of the hill, servicing several other Units. Rectifying the continuous exposure to corrosive salt water, sea air and earthquake displacement would require an undertaking beyond "ordinary maintenance". The pipes are located above the hillside foundation, minimally accessible in some areas by subfloor crawlspaces that offer limited views.

Assuming *Lamden* is broadly applied to major maintenance, Association failed to satisfy *Affan* by performing a "reasonable investigation, in good faith". Association performed a limited-view inspection from the subfloor dead-space of Building 8 which provides no view of the pipes and concealment walls within Forbush's Units. Claim of lack of access to Forbush's Units is disingenuous based on Forbush's multiple requests for an onsite review of their concept design proposal that encompass the issues here. Association chose to inspect an undisclosed, so-called "identical Unit" somewhere on the property rather than Forbush's Units. In California, it is a well settled principal of law that, within the context of specific performance, a party is allowed to compel the purchase or sale of a property because land is presumed unique. It follows, then, that if land is unique to compel transfer of property, then one property is not "identical" to the other. Association fails to establish that the unidentified so-called "identical Unit" they inspected is, in fact, situated precisely as the Forbush Units, directly above pipes that run above the hillside foundation to their street connections. Even so, such a Unit, by virtue of their different location, would encounter the pipes in a different manner.

[16] Catastrophic events caused by failure of infrastructure exposed to the long-term corrosive effects of salt air, has been well documented in the public domain.

Therefore, it cannot be held that Association performed a reasonable investigation, in good faith, of Forbush's Units. Without the information such an inspection would provide, and without a proper understanding of the Unit boundaries defined in the CC&Rs, Association did not weigh the facts and engage in reasoned decision-making.

Visual inspection aside, by its own admission, Association did not possess the Condominium Plan when they made their original determination that the pipes and concealment walls do not occupy separate interest space. This steadfast determination, even after receipt of the Condominium Plan, is the basis for Association's dismissal of Forbush's concerns regarding the risks the pipes pose for their Units. In *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1121-25), since associations have a duty to enforce restrictions it follows that they have a duty to investigate complaints by residents.

In *Ritter & Ritter v. Churchill Condominium Association* (2008) 166 Cal.App.4th 103, the court held that the Association's slab penetrations [openings in the slab for pipes] in the common area which deviated from the original architectural plans constituted a fire hazard to the owners and was the cause of second-hand cigarette smoke intrusion. Plaintiff owner filed an action against the Association and its directors for breach of the CC&R's, negligence, breach of fiduciary duty and injunctive relief. The jury found the Association liable. The court stated at pages 120-121: "Traditional tort principles impose on landlords, including homeowners associations that function as landlords in maintaining the common areas of a large condominium complex, a duty to exercise care for the residents' safety in those areas under their control." See also *Sands v. Walnut Gardens Condominium Ass'n Inc.* (2019) 35 Cal.App.5th 174, when the standard of maintenance is controlled by language within an association's CC&Rs, an association's failure to perform maintenance in accordance with those standards may constitute a breach of contract by the Association.

An association's common area maintenance responsibilities places a duty on the board of directors to inspect the common areas at least once every three (3) years and to prepare a reserve study. The reserve study is used to determine the amount of reserve funds that should be set aside for the maintenance and repair of *major* components which the Association is obligated to maintain, and which have a remaining useful life of less than thirty (30) years. (Civil Code § 5550; See also "Reserve Study.")

Here, the above-ground pipes are at least 33 years old, continuously exposed to pressurized salt water and sea air and subject to earthquake displacement. Association has an absolute obligation to determine how the life-span of above-ground pipes is affected by continuous exposure to these corrosive elements. Should they breach, Forbush's Units would be inundated with water and raw sewage which could go undetected for some time because Forbush is not a full-time resident of either Unit. This would cause uninhabitability and irreparable harm to property and health that could be avoided with proper inspection and maintenance. By failing to investigate the pipes *inside* the Units, Association waived its claim to judicial deference protection.

Do Common Area Pipes and Concealment Walls
Encroach into Separate Interest Space?

When the record owner gives neither express nor implied permission, an encroachment constitutes a trespass or nuisance, subject to a timely suit to quiet title for recovery of possession of the property, injunctive relief and damages. (*Harrison v. Welch* (2004) 116 Cal.App.4th 1084, 1088; *Christensen v. Tucker*

(1952) 114 Cal.App.2d 554, 557.) A special rule applies to a latent encroachment. In California, one remedy available to homeowners to remove a latent encroachment is self-help (i.e., removing the encroachment at the encroacher's expense without resorting to litigation) after giving reasonable notice and an opportunity to remove the encroachment. (*City of Berkeley* v. Gordon (1968) 264 Cal.App.2d 461, 468-469; see, e.g., *People ex rel. Dept. of Public Works v. Henry* (1961) 93 Cal.App.2d 476.

Forbush is the record owner of two adjoining Units. Common area pipes were installed and enclosed behind concealment walls within Forbush's separate interest Units which exceed the two-foot set back permitted by the condominium project Tract Map. The developer-controlled and subsequent owner-controlled Associations never received an easement for use of Forbush's separate interest Unit space or amended the recorded Condominium Plan. Forbush purchased the square footage represented by the recorded Condominium Plan, attached to the deed, and did not give express or implied permission for the pipes and concealment walls. Therefore, the pipes and conduits constitute a trespass and/or nuisance because they are encroaching into private separate interest Unit space. Forbush is entitled to exercise self-help to remove the encroaching pipes and conduit, should Association fail to do so.

Have Prescriptive Easement or Adverse Possession Rights Accrued?

California law defines when and under what circumstances – given time or other factors – an encroachment can ripen into either a prescriptive taking of the land or, more likely, qualify for the imposition of an easement to continue to occupy the land. Generally, one can appropriate a legal interest in another's land (either by ownership or an easement) through adverse possession by (1) possession under claim of right or color of title; (2) actual, open, and notorious occupation of the premises in such a manner as to constitute reasonable notice to the true owner; (3) possession which is adverse and hostile to the true owner; (4) possession which is uninterrupted and continuous for at least five years; and (5) payment of all taxes assessed against the property during the five year period. (*Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020; *Gilardi v. Hallam* (1981) 30 Cal.3d 317, 321; *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 587.) To gain actual ownership of the land the adverse possessor must pay all property taxes levied on the land during the five-year prescriptive period. (Code Civ. Proc. § 325(b).) An encroacher generally should not obtain a prescriptive easement for the adverse, exclusive use of a portion of their neighbor's land because it would be tantamount to actively appropriating ownership without paying property taxes levied. (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1305-1306.)

It cannot be disputed that Forbush is the legal owner of the separate interest Units and has the exclusive and absolute right to the use and enjoyment of the entire airspace depicted on the recorded Condominium Plan and airspace map. While Association might contend that it has acquired prescriptive rights for use of portions of the Units, including an interest where the pipes and concealment walls are encroaching, there are no such rights benefitting Association in this situation. Since the pipes and the space they occupy were constructed in such a way that no reasonable person would suspect that private dwelling space had been harvested to contain intruding common area pipes that should have been placed under the subfloor, Association cannot meet the open and notorious use elements necessary for a prescriptive easement or adverse possession.

Moreover, Association never gave Forbush actual or constructive notice that it had any interest in the Units adverse to the Forbush. There are no doors, windows or any kind of portal into the concealed space accessible from inside Forbush's Units. Generally, Association's access to subfloor pipes within

the complex is accomplished by crawl spaces under the subfloor but even this access provides no view of the pipes within Forbush's Units. There is no recordation of any easements or any amendments to the Condominium Plan or airspace map. Lastly, there is absolutely no evidence that Association made five years of property tax payments on the portion of the Forbush's Units where the encroachments reside. Therefore, it is impossible for Association to claim any interest in the Forbush Units for the pipes and concealment walls.

Is Association Entitled to an Equitable Easement?

To determine whether Association is entitled to an equitable easement, courts utilize a "relative hardship" test. (*Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1009.) Under the relative hardship test, three factors are required to establish an equitable easement: (1) the defendant must be innocent, i.e., his or her encroachment must not be willful or negligent; (2) unless rights to the public would be harmed, the court should enjoin the encroachment if the plaintiff will suffer irreparable injury, regardless of the injury to the defendant; and (3) the hardship to the defendant by enjoining the encroachment must be greatly disproportionate to the hardship caused to the plaintiff by allowing the encroachment to remain. (Id.) Courts will only use their equitable powers where the party seeking to maintain the encroachment was neither knowing and willful nor sufficiently negligent in causing the encroachment. (*Morgan v. Veach* (1943) 59 Cal.App.2d 682, 690.) Therefore, one who intentionally encroaches should never enjoy an equitable easement and, instead, needs to satisfy all the elements of adverse possession. (*Brown Derby Hollywood Corp. v. Hatton* (1964) 61 Cal.2d 855, 858, 860.) When the courts grant equitable easements, they usually require the encroacher to compensate the record owner for the ongoing use of the land and pay damages if proved. (*Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 267-268.)

Clearly, the balance of harms weighs in favor of Forbush. The hardship to Forbush would be greatly disproportionate because they cannot use and enjoy a significant portion of their Units; they bear the perpetual risk of pipe breach which would inundate their Units with water and raw sewage; they bear the perpetual diminution in value of their Units due to the presence of the pipes; and they have, and continue, to pay property taxes and insurance on square footage/airspace they cannot use yet benefits Association. In contrast, there is little hardship to Association in the approval of Forbush's Unit modifications that includes an offer to keep the pipes where they are. Modification of their Units would cause little inconvenience to Association and other members which will be further discussed in the next cause of action.

Since it is likely the pipes and concealment walls were installed when the Units were constructed, there will be little to no evidence that Association can produce which demonstrates that it, or its contractors, were innocent and, more significantly, not negligent when they incorrectly installed the pipes by exceeding the set-back requirements. Thus, Association's ability to obtain an equitable easement for use of Forbush's Unit space is remote. Regardless, should a Court award Association with an equitable easement, Forbush would be entitled to compensation from Association for the ongoing use of their Unit space.

Forbush Offer to Resolve the Matter

Forbush proposed several provisions to resolve this matter which Association rejected. These will be discussed in the next cause of action, Enforcement of CC&R Article IV, *infra*.

II.
ENFORCEMENT OF CC&R ARTICLE IV
ARCHITECTURAL COMMITTEE
(Concept Design Submission)

This second cause of action is for the enforcement of CC&R Article IV which provides for an Architectural Committee to process owner applications for Unit modifications pursuant to the process, scope and authority expressed therein. Forbush claims Committee arbitrarily and capriciously denied their proposal, arriving at their determination in bad faith because they failed to apply the standards of Article IV and exceeded their scope of authority.

FACTS

After Forbush's investigation and findings regarding the boundaries of their Units, they formulated a design modification for both their Units to offer a solution to the trespass and to provide greater access to their Units ("concept design").

Forbush's Concept Design

Forbush's adjoining Units have two levels; the lower level with a bedroom and bathroom, and the upper level comprising the kitchen, dining, living, bath and laundry rooms. Forbush's concept design modifies the adjoining Units to provide greater street-level access via an elevator and between the upper and lower levels via an interior lift. Currently, access into both Units from street-level, and between the upper and lower levels inside the Units, is by multiple steep stairs only. The concept design also provides for the opening of the upper-level adjoining wall and balcony wall between the Units and the lower-level dead-space to provide interior access to both Units. The only exterior modification involves an exterior elevator. All other modifications are contained within the interiors of Units 81 and 82. Following is a description of the project:

(Attachment 14. Exterior Elevator; Attachment 15. Current and Proposed Modified Floor Plans.)

Exterior Elevator (Common Area) - An exterior elevator would rise from street level to the lower level of Unit 82. It would be built adjacent to the exterior wall of the condominium building and occupy an empty air space currently existing between the front of the building and existing exterior stairs. [17] The street-level entry door to the elevator would be inconspicuously located behind the existing exterior stairs. The elevator would rise to the lower level of Unit 82 at the location of an existing exterior window which would be reconstructed into a door that opens into Forbush's Unit. The now-converted window would then be replicated onto the exterior facade of the elevator, thereby maintaining the appearance of a window at that location. The finished exterior facade of the elevator shaft would be built aesthetically consistent with the surrounding architecture, including windows and, if requested, capped-off planter boxes. All electrical functions would be wired into Forbush's Unit and operate off Forbush's electrical meter.

[17] Hamilton Cove was originally designed with built-in exterior planter boxes containing live plants to effectuate a Mediterranean Villa appearance. This feature has long since been abandoned by Association with the permanent capping-off of the planters with stone tile; they no longer function as planter boxes. In some areas, such as where the proposed elevator would be located, they serve no function at all except providing the appearance of capped-off planter boxes.

II.
ENFORCEMENT OF CC&R ARTICLE IV
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Unit 82

Lower Level - The lower-level bathroom would be modified to accommodate the exterior elevator landing. The large walk-in closet would be reduced to accommodate the bathroom modifications. The door to the hallway would be relocated along the same wall to accommodate an interior lift.

Interior Lift - The proposed exterior elevator opens into the lower level of Unit 82. The interior stairwell to the upper level of this Unit would be modified to accommodate a lift approximately 36 inches x 36 inches. (The lift would be in addition to the existing interior stairs.) The structural requirements for the lift include access to internal ceiling and floor joists. All electrical functions would be wired into Forbush's existing electrical meter.

Upper Level - The adjoining interior wall would be opened, with appropriate structural reinforcement, in the dining room and kitchen to allow free access between the two Units. The kitchens in both Units would remain fully independent to retain an autonomous two-Unit configuration. No modifications would occur between the Units (such as plumbing, electrical, gas, and structural) to alter the full autonomy of each Unit.

Unit 81

Interior Stairwell - The stairwell would be closed-off at the upper level, creating a floor for a new bedroom on the upper level. The remaining stairwell below would be converted into storage space. The lower-level bedroom would retain ingress/egress according to code.

Upper Level - A portion of the dining room would be walled off to create a new bedroom over the now closed-off stairwell.

Lower-Level Connecting Hallway (Common Area) - Dead-space previoulsy permitted by Association to be used for storage in Unit 82 would be opened for both Units. A connecting door would be installed between the Units with appropriate structural reinforcement.

Upper-Level Connecting Hallway (Pipes and Concealment Wall Issue) - The large upper-level laundry rooms in both Units would be reduced to accommodate a connecting hallway between the Units. The intruding pipes and concealment walls are located at this proposed hallway location. The hallway would be constructed so that the pipes remain in their current location.

Balcony Short-wall - One contiguous balcony serves both Units with a short-wall separating balcony space between the Units. A closeable gate would be installed into this short-wall to provide both free access and secure closure.

II.
ENFORCEMENT OF CC&R ARTICLE IV
ARCHITECTURAL COMMITTEE
(Concept Design Submission)

Forbush's First Concept Design Submission and Committee's Rejection

In July 2018, Forbush submitted to Committee their proposed concept design.[18] By email dated August 10, 2018 (Attachment 16), Association stated in relevant part:

> "Manny has reviewed your project plan request with Martin. Martin needs to get the rest of the architecture committee and board involved with this the review of this project request. Once they have had a chance to meet they will contact you with an update and set up another meeting with you if needed."

Manny is employed by Association in the capacity of facilities manager. At the time, he was neither a HC homeowner nor a board member which disqualified him as a member of the Architectural Committee. The scope of his role could only be that of facilities manager adviser. [19]

Martin Curtin is a HC homeowner, board member and serves as chairman of Committee. By his own description, Curtin's background includes hotel ownership/management and unspecified construction (Attachment 17.)

By letter dated August 29, 2018, (Attachment 18) followed nearly a year later by letter dated July 18, 2019 (see Attachment 11) Committee and Association relied on CC&Rs 1.20, 1.74, 2.09, and 4.02 for their authority to reject Forbush's application on the following grounds that[20]:

- Forbush held a "fractional undivided interest" in the common areas of the Property which prevented them from making any alterations;
- Forbush does not understand their ownership interest described in CC&R 1.74 defining Unit and CC&R 1.20 defining Condominium;
- The proposed work would affect the foundation and bearing walls of Building 8 which Committee could not approve;
- Section 2.09 bars all modifications to any structural component;
- Installation of a dumb waiter would require access to ceiling joists;
- A kitchen would be minimized;
- Additional bedrooms would be created within the Unit space;
- The balcony wall that divides the Units would be removed;
- Common area pipes servicing other Units could "possibly" be involved;

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[18] Forbush's concept design is a drawing depicting detailed outlines of the proposed modifications based on known dimensions of the property. At no time was Forbush permitted by Association to conduct any type of structural engineering investigation for the purpose of creating any type of engineering report or perfecting the concept design.

[19] CC&R 4.01 defines the members of Committee.

[20] The plan was rejected with the exception of the balcony short-wall which Committee requested detailed construction plans even though permission was denied to conduct exploratory investigations of structural components. Also, opening the wall between the Units was contingent upon the wall being a party wall rather than a weight-bearing wall. No exploration was permitted to determine the construction of the wall.

- Adjacent Units could be disrupted;
- Committee had "leery feelings" which prevented them from approving the opening of walls for investigatory purposes to perfect the design concept;
- Forbush exceeded prior permission to use interior dead-space in Unit 82 for storage, alleging the space is being used as a "bedroom" based on the presence of a mattress in that space.

Association further stated:

> "Because your clients' proposed plans seek to use the dead-spaces, and to alter/modify bearing walls, foundation slabs, foundations and other structural components of the building that are Common Property, the Architectural Committee...will not approve your proposed plans..." [21]

Association also stated that Committee "consistently denied requests" based on structural modifications and that further review would be granted for plans that would not affect structural components.

In its July 18, 2019 letter, Association conflated Units 81 and 82 regarding Forbush's permitted use of dead-space.[22] Association claimed that Forbush accessed dead-spaces in "both Units" when, in fact, such permitted access was made only in Unit 82 which is used by Forbush family and friends. Dead-spaces were permissively opened for storage and access to the shower pan for repairs. The allegation that the space was used for an unlawful "bedroom" was based on the presence of a mattress which, ultimately, Forbush discarded.

Dead-spaces in Unit 81 were never opened by Forbush because it is a licensed short-term vacation rental offered on the internet to the general public which would require that such dead-spaces not be opened. Association threatened, however, "...to prevent any other than your clients and their immediate family members from accessing Unit 81..." The dead-spaces became a pivotal criterion for whether Committee would further consider Forbush's concept design proposal.

Forbush's Second Concept Design Submission
and Committee's Rejection

After reviewing the denial from Committee, Forbush further investigated the suspicious concealment walls and elevated laundry room floor. Confirming their recorded ownership rights, Forbush revised the original concept design to incorporate an offer to resolve the trespassing pipes and concealment walls.

Following the exchange of at least seventeen (17) scheduling emails between Forbush and Committee, an onsite meeting was set for the second submission of Forbush's concept design. On September 9,

[21] Letter sent by Jeff Gubernick, law partner of Norris Bishton, president of Association's board.
[22] Association letter dated July 18, 2019 (bottom page 2), shows Association granted other homeowners access to these "dead-spaces" for storage within their Units.

II.
ENFORCEMENT OF CC&R ARTICLE IV
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(Concept Design Submission)

2019, Forbush, Curtin and Pete Edwards met at the property [23]. Arriving late, Curtin participated in the review of Unit 82 only, refusing to enter and review the plans for Unit 81, flippantly stating over his shoulder as he left the meeting, "what's the point, it's all the same". Further stating he had a plane to catch to visit his daughter in Ohio, Curtin aborted the meeting. [24] Nowhere in the multiple emails to set up this meeting did Curtin mention a conflicting travel arrangement which could have been accommodated during the multiple scheduling emails exchanged between the parties. Instead, Curtin aborted Forbush's concept design presentation thereby failing to obtain the full facts about the proposal.

By email dated September 17, 2019, Forbush sought confirmation from Curtin regarding permission to open certain walls for exploratory purposes to ascertain weight-bearing and party walls. By email dated September 23, 2019, Curtin responded (Attachment 19):

> "The board met to discuss the project request below. The board requests that Unit 8/82 be brought back to the original condition before any further renovation plans are approved. Once this has been completed please let us know. We will then set up an inspection meeting. After the inspection meeting we can continue discussions regarding future project plans...."

During 2020, numerous communications were exchanged between the parties with multiple requests by Forbush for an onsite meeting which Association and Committee repeatedly flatly denied. Claiming COVID concerns and restrictions, Association refused to avail itself even though other construction projects involving HC, Association and Committee moved forward.[25]

Further, Curtin included Pete Edwards as a recipient of this rejection notice thereby interfering with Forbush's business contractual relationship with Edwards and Fine Line Construction. Curtin knew Forbush had a business relationship with Edwards because Forbush and Edwards worked together on the concept design and it was Forbush who invited Edwards to the onsite meeting. Curtin and Edwards did not collaborate on Forbush's project. After Curtin's rejection email was sent to Edwards, Edwards became reluctant to work further with Forbush on the concept design, expressing doubt that Curtin would ever approve any plan submitted by Forbush.

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[23] Pete Edwards of Fine Line Construction has the reputation of being the preeminent contractor-builder on Catalina Island. Edwards worked with Forbush on the concept design and was Forbush's intended builder-contractor.

[24] The only reason Forbush knew of the trip was because Curtin threw it out there as he aborted the meeting.

[25] Association availed itself to the City of Avalon during COVID year 2020 for the planning and construction of roadside curbs involving Hamilton Cove. During a time when Association restricted and even prevented homeowners' access to their property, the board nonetheless permitted outside construction personnel to traverse the entire property in their construction of individual homes on the northern parcels. One individual was imaged without a mask when masks were "strictly required" by Association while on-property. In short, on-property COVID restrictions were not "strictly required" for some but were a complete bar to Forbush for any onsite meeting with Association or Committee.

II.
ENFORCEMENT OF CC&R ARTICLE IV
ARCHITECTURAL COMMITTEE
(Concept Design Submission)

Forbush's Third Concept Design Submission and Committee's Rejection

By letter dated November 15, 2020, Forbush requested a meet and confer pursuant to Civil Code §5900 et seq and Association's Internal Dispute Resolution. (Attachment 20.) On December 15, 2020, the meeting was held by recorded video conference. Association's board attended the meeting with the exception of Richard Kirschner, Vice President/Treasurer/Director.[26] Forbush submitted their concept design for the third time and without benefit of an onsite meeting which Association and Committee steadfastly refused.

Of significance, on January 4, 2021 Committee held an allegedly onsite meeting at HC without the knowledge or presence of Forbush. The stated purpose of the meeting was to review the concept design and "...to the extent possible examine the Units in question." Without access to the interior of Forbush's Units, which Committee did not seek, "...the Committee did view the interior of a Unit identical to Unit 81". (See Attachment 13.) This rejection of Forbush's application was based on the grounds that:

- An unnamed "identical" Unit not belonging to Forbush proved the design concept unacceptable;
- The proposed modifications would involve common areas;
- The proposal sought exclusive use of common areas;
- The proposal sought disability access via an elevator;
- Exterior alterations would be a detrimental change in appearance;
- Structural integrity would be impaired;
- Footing would be impaired;
- It is impossible for Committee to know the location of all the pipes, conduits and structural elements and whether such are compliant with current building codes;
- Association has not approved such a plan in over 30 years and does not want to set any precedents; if Association "regularly undertook changes involving structural elements", what would happen with that?
- Section 8.07 limits Committee from approving any structural alterations;
- Committee has no authority to approve or disapprove the proposal;
- Civil Code 4600(a) does not apply;
- There are no trespassing pipes.

By email dated September 21, 2021, Forbush requested from Association the location of the so-called "identical Unit". By email dated September 24, 2021, Association stated, "No 'identical unit' was used in denying your requests to make structural changes to the two Units you own. Your requests were considered by the Architectural Committee and the Board solely on their own merits." This reply is at odds with Committee which stated, "The Committee Members were not able to enter the Units 81

[26] Richard Kirschner is also a sitting Superior Court Judge for the County of Los Angeles.

and 82. However, the Committee did view the interior of a Unit identical to Unit 81." (Attachment 21.)

Also, it shall be noted here that Forbush's proposal was "considered by the Architectural Committee *and the Board*..." (italics added) which relieves Forbush of any further appeal to the Board. (Civil Code §4765(a)(5).

Forbush's Fourth Concept Design Submission
and Committee's Rejection

Despite the CC&R's complete absence of any process or protocol for the appeal of a denied proposal, on December 2, 2021 Forbush submitted their fourth concept design to Committee, proposing the following (Attachment 28):

Exterior Elevator-Lift: A minimalist self-contained elevator-lift ("exterior lift") would be attached to the wall of Building 8 with no subterranean structural intrusions except a surface concrete slab. (An image of the type of lift is included in the proposal.) The elevator enclosure was reduced by 50% by having it service Unit 82 only rather than both Units. Since the exterior lift now opens into Unit 82 only, all remodeling of Unit 81's bathroom is eliminated. This results in an overall 50% reduction in bathroom remodeling for the two Units.

Interior Elevator-Lift: One elevator-lift ("interior lift") is proposed between the interior lower and upper levels of Unit 82 only. (An image of the type of lift is included in the proposal.) The interior elevator in Unit 81 is eliminated, producing a 50% reduction in interior lifts.

Desalinization Unit: A desalinization Unit is added to reduce freshwater usage by the Units and to offset water usage by occupants of the additional bedrooms. It would tap into the existing, common area salt water intake system.

Bedrooms: Two additional bedrooms are added in place of, and at the location of, the formerly proposed interior-lift in Unit 81.

Laundry/Bathroom: This submission converts the existing laundry room located in Unit 81 into a ¾ bathroom. Full laundry facilities continue in Unit 82 which is accessible from Unit 81.

Upper-Level Hallway Connecting the Units: A hallway between the Units is added at the location of the trespassing pipes which require removal so Forbush can fully enjoy all of their recorded separate interest square footage.

By Committee Meeting Minutes dated January 6, 2022 (Attachment 29), Committee stated this is a "first-stage review of a preliminary submission of sketches and a description of the proposed work" and that "inadequate information prevents them from making a decision" [27]. Nonetheless, Committee rejected the submission in its entirety as follows:

[27] Committee has not defined the rules and protocols of the "first-stage" review and how many stages there are thereafter.

Exterior Elevator-Lift: denied on grounds of "Civil Code Section 4600 and for the reasons stated in the 1/18/2021 Minutes";

Interior Elevator-Lift: denied "for the reasons stated in the 1/18/2021 Minutes particularly as to structural integrity issues;

Desalinization Unit: denied for lack of detailed plumbing and operational information and on Committee's own suppositions;

Additional Bedrooms: denied on grounds of "Civil Code Section 4600 and for the reasons stated in the 1/18/2021 Minutes";

Laundry-Bathroom: denied on grounds of "Civil Code Section 4600 and for the reasons stated in the 1/18/2021 Minutes".

Upper-Level Hallway Connecting the Units: denied on grounds of "Civil Code Section 4600 and for the reasons stated in the 1/18/2021 Minutes" and on grounds that the common area pipes in that location are located inside a common area chute, not separate interest space.

Committee Approval or Knowledge of Other Unit Modifications

Following are at least two Unit modifications that Committee either approved or had knowledge of:

In mid-June 2021, Forbush discovered construction occurring in Building 10, Unit 66 Playa Azul, now owned by HC Facilities Manager, Manny Rodriquez. A building permit, issued by the City of Avalon ("City") on February 22, 2021, was displayed and encompassed rough plumbing, rough electrical, rough mechanical and drywall inspections for a kitchen and bathroom remodel which strongly suggests Rodriquez was tearing into the walls for major remodel. (Attachment 22.) [28]

According to City, express permission from Association is required before a construction permit is issued by City. (Attachment 23.) Forbush sought clarification from Board president Bishton regarding Committee's denial of Forbush's construction proposal on the grounds that Association "consistently denied requests" that involved structural modifications. Forbush has not received a reply.

In August 2019, Association Director and Architectural Committee member, Bart Glass, was the listing agent for 51 Playa Azul. This Unit has a floor plan similar to Forbush's Units, however, the description of Unit 51 includes a "large converted sleeping area upstairs". The images attached to the listing clearly show the upper-level dining room has been closed off from the kitchen and the passageway between the dining and living room was converted into a wall with a door, thereby creating a new bedroom. (Attachment 24. pp 2-3.)

[28] The prior owners of this Unit also received a building permit, No. 18-12, from the City of Avalon for their construction project. Forbush obtained a copy of this permit but was denied a copy of Rodriguez's permit because it was active and open, not yet subject to a Public Records request.

II.
ENFORCEMENT OF CC&R ARTICLE IV ARCHITECTURAL COMMITTEE (Concept Design Submission)

DISCUSSION

An association's authority to establish and enforce architectural standards is premised upon the impact that aesthetics has on the property values of the association's members. "Maintaining a consistent and harmonious neighborhood, one that is architecturally and artistically pleasing, confers a benefit on the homeowners by maintaining the value of their properties." (*Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 976.) Preserving "the aesthetic quality and property values within the community" is recognized by courts as an "important function" of an association. (*Cohen v. Kite Hill Community Assn.* 142 Cal.App.3d at 648.)

"It is a settled rule of law that homeowners' associations must exercise their authority to approve or disapprove an individual homeowner's construction or improvement plans in conformity with the declaration of covenants and restrictions" and that they must do so in good faith, consistent with their fiduciary obligations to the homeowners. (*Cohen v. Kite Hill Community Assn.* 142 Cal.App.3d at 650-51; see also *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 383.)

The interpretation of CC&R's is a legal question to be decided by the courts, not the Board. "CC&R's are interpreted according to the usual rules for the interpretation of contracts generally, with a view toward enforcing the reasonable intent of the parties. [Citations.]" (*Harvey* (2008) 162 Cal.App.4th at 817.) See also *Starlight* 177 Cal.App.4th at 447 for contract principles applied to the interpretation of CC&Rs.

CC&R Article IV Provides for an Architectural Committee and Their Scope of Authority

CC&R Article IV grants Association and Committee the scope of authority to consider and act upon plans submitted for proposed modifications. It also provides the procedural process Committee shall follow in its review of modification proposals.

Section 4.02 provides the criterion for reviewing the overall aesthetics of the concept design and its impact on the surrounding area, providing enforcement authority through inspections. Committee "shall approve" proposals or plans and specifications submitted for its approval when:

- construction, alterations or additions will not be detrimental on the appearance of the surrounding area of the Project as a whole;
- the appearance of any structure affected thereby will be in harmony with the surrounding structures;
- the construction thereof will not detract from the beauty, wholesomeness and attractiveness of the Common Property or the enjoyment thereof by the Members;
- Committee shall inspect construction in progress;
- Committee shall assure construction is compliant with approved plans;
- Committee shall assure that no modifications commence without prior written approval by Committee.

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Section 4.07 states Committee's approval or disapproval shall be based *solely* on the considerations set forth in Article IV which defines the scope of review granted to Committee when reviewing modification plans. Committee shall review and approve or disapprove all modification plans submitted to it on the basis of:

- aesthetic considerations including aesthetic aspects of the architectural designs, placement of buildings, landscaping, color schemes, exterior finishes and materials and similar features;
- consistency with the Restated CC&Rs;
- overall benefit or detriment which would result to the immediate vicinity and the Project generally

Section 4.07 also limits Committee's scope of review:

> "[T]he Architectural Committee **shall not be responsible for reviewing**, nor shall its approval of any plan or design be deemed approval of, any plan or design **from the standpoint of structural safety or conformance with building or other codes**." [Bold emphasis added]

CC&R Section 8.07 Provides for General Installation and Use Restrictions

Section 8.07 provides general use restrictions for the condominium Project concerning inside and outside installations. In relevant part:

> "[N]o exterior addition, change or alteration to any Condominium or Residence shall be commenced **without the prior written approval of the Architectural Committee**.....Nothing shall be done in any Condominium or in, on, or to the Common Areas which will or may tend to impair the structural integrity of any building **except as otherwise expressly provided herein**." (Bold added.)

CC&Rs are enacted for the mutual benefit of all members of an association and are to be interpreted so as to give effect to the main purpose of the CC&Rs and avoid an interpretation which will make the CC&Rs extraordinary, harsh, unjust, inequitable or which would result in absurdity. (*Battram v. Emerald Bay* (1984) 157 Cal.App.3d 1184, 1189.)

Section 8.07 provides for general add-on installations of various items. Should structural modification be required for such add-ons, Section 8.07 requires *prior written approval of the Architectural Committee*. Prior written approval by Committee is obtained through the provisions provided by Article IV. Association cannot circumvent its duties under Article IV by invoking Section 8.07 which refers back to Article IV. An architectural standard may not be used to circumvent a contradictory provision contained in the CC&Rs (*Ekstrom v. Marquesa at Monarch Beach HOA* (2008) 168 Cal.App.4th 1111), but may be used to clarify ambiguous CC&R provisions. (*Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28.)

II.
ENFORCEMENT OF CC&R ARTICLE IV
ARCHITECTURAL COMMITTEE
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Was Committee's First Rejection Proper?

By letter dated August 29, 2018, followed nearly one year later by letter dated July 18, 2019, Committee and Association relied on CC&R 1.20, 1.74, 2.09 and 4.02 for their authority to reject Forbush's concept design. (See Attachments 18 and 11.)

CC&R 1.20 and 1.74, defining Condominium and Unit respectively, is relevant to Committee's authority to act on concept design submissions because Committee should know the difference between condominium common areas and separate interest Units. This was discussed at length in this first cause of action so it shall not be repeated here.

CC&R 2.09 states in relevant part:

> "[No] bearing walls, ceilings, floors or other structural or utility bearing portions of the buildings housing the Condominium shall be pierced or otherwise altered or repaired **without the prior written approval of the plans** for the alteration or repair by the Architectural Committee." (Bold added.)

Conceptual design is an early phase of the design process in which the broad outlines of function, form and aesthetics are articulated. It is not intended to convey structural safety or conformance with building or other codes. Its purpose is to present the aesthetic aspects of the design as it relates to the overall beauty, wholesomeness and attractiveness of the property and its harmony with the surrounding structures including color schemes, exterior finishes, material and similar features.

CC&R 2.09 is not an absolute bar to any alteration of walls, ceilings, floors or other structural or utility components as Association asserts. It is a permissive rule that allows for modifications *so long as prior written approval is obtained from Committee.* Prior written approval is obtained through the submission process provided by Article IV which is not intended to be a club to beat down every proposed modification simply because such modifications have never been done before on the property or involves structural components. Association's practice that it "consistently denied requests" that involved structural modifications renders Article IV null and void in its entirety and futile ab initio for any homeowner to pursue. Association misapplied CC&R 2.09 as a battering ram on the structural components of the concept design, rather than applying it as a permissive rule allowing modification of structural components with prior written approval. Therefore, denial based on these grounds is null and void.

CC&R 4.02 provides the aesthetics criteria for the evaluation of a concept design proposal. Nowhere did Committee or Association provide any findings that the design would be detrimental on the appearance of the surrounding area of the Project as a whole; that the appearance of any structure affected by the proposed design concept will not be in harmony with the surrounding structures; or, that the construction of the proposed modification would detract from the beauty, wholesomeness and attractiveness of the Common Property or the enjoyment thereof by the Members. Therefore, denial of the concept design based on 4.02 is without merit.

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CC&R 4.07 contains two prongs. First, it provides criterion that Committee "shall" employ to assess the aesthetics, and overall benefits or detriment to the surrounding property, remaining consistent with the Restated CC&Rs. The overall benefits or detriment analysis is intended to be applied within the context of CC&R 4.02 aesthetics criteria which Committee failed to apply.

The second prong of CC&R 4.07, consistently overlooked by Association and Committee, prohibits Committee from considering structural safety and code conformance in their evaluation of concept design proposals. But that is precisely what Committee did; they denied the proposal based on "leery feelings" concerning weight-bearing walls, foundations, and underground pipes and conduits. By their own admission, Association and Committee did not possess or review any as-built engineering or building plans that would show existing placement of bearing walls, pipes and conduits. They offer no facts to establish that modifications made by licensed professional contractors would result in detrimental harm to any foundation or infrastructure. Modification per se, especially by a professional builder-contractor, is not the definition of "detrimental harm". They offer no engineering reports that identify weight-bearing and party walls and, in fact, barred Forbush and Fine Line Construction from conducting any structural exploration for the purpose of identifying such walls. Their findings are based on personal conjecture, "feelings", and past practice that they "consistently denied requests" of the type submitted by Forbush. Committee was tasked with evaluating the *design* proposal within the context of its overall *aesthetic* conformance with the surrounding property. Committee failed to perform their duty under Sections 4.02 and 4.07 by attacking the design with their perceived personal notions about structural components.

In *Woodridge Escondido Property Owners Assn*. v. Nielsen (2005) 130 Cal.App.4th 559, 572, Association's architectural committee and board do not have the authority to approve the construction of improvements which are expressly prohibited by the provisions of the association's CC&Rs.

Here, CC&R 4.07 does not expressly forbid construction that involves structural safety and code conformance. Instead, it shields Committee from liability by barring its review of structural safety and code conformance components that is best left to industry experts. Therefore, denial of the concept design, based on personal conjectures and criterion not provided by Section 4.07, is null and void.

<u>Impermissible Criterion</u>

Section 4.07 states Committee's approval or disapproval *shall* be based *solely* on the provisions set forth in Article IV which defines the criterion and scope of review granted to Committee when reviewing modification plans. Committee failed to apply Article IV when it invoked allegations of exceeded permissible use of interior dead-space used for purposes other than storage. If Forbush exceeded Association's scope of permission to use dead-space in Unit 82 for storage, Association was within their right to revoke that permission. However, Committee exceeded its scope of review by extrapolating Association's revocation of prior permission into the realm of Forbush's Article IV modification submission. Also, Association's threat to shut down Forbush's Unit 81 for short-term vacation rentals by restricting its use to clients and family only, is not only unlawful but bad faith heavy-handed intimidation. In *City of Chula Vista v. Pagard* (1981) 115 Cal App. 3d 785, such restrictions that limit occupancy to persons related by blood, adoption or marriage are no longer enforceable. See also *Greenfield v. Mandalay Shores Community Association* (2018) 21 Cal.App.5th 896, where Association

within a coastal zone may not have the ability to restrict short-term rentals without approval of the California Coastal Commission.

Association admits it granted similar permission to other homeowners to use their Unit dead-space for storage purposes. Association fails to show that it followed its own standards and procedures when it took action to enforce their scope of permission relating to use of dead-space in Forbush's Unit 82. (See *Ironwood Owners Association IX v. Solomon* (1986) 178 Cal.App.3d 766, where Association must show that it has followed its own standards and procedures when taking action to enforce violations of its governing documents.)

Association failed to follow its procedures in reviewing Forbush's architectural applications, employing personal conjecture and impermissible criterion. Therefore, pursuant to CC&R 4.02, Forbush's concept design must be deemed approved based on Committee's failure to accept or reject on grounds provided by Article IV and within forty-five (45) days of submission of the proposal.

Was Committee's Second Rejection Proper?

By Curtin email dated September 23, 2019(see Attachment 19), the second concept design submission was denied based on the following:

- that Unit 82 be brought back to its original condition concerning interior dead-space that had been previously permitted for storage;
- inspection of the Unit to confirm "original condition"

Architectural standards are operating rules which may impose additional architectural restrictions beyond those contained in an association's CC&Rs, provided that there is empowering language in the CC&Rs to that effect. (Bear Creek Planning Committee v. Ferwerda (2011) 193 Cal.App.4th 1178.)

Association failed to provide any empowering language in the CC&Rs that impose the additional architectural restrictions of "original condition", not contained in Article IV, leaving Forbush to speculate on its meaning. For Forbush, "original condition" meant the return of their Unit space to its original recorded boundaries by removal of the trespassing common area pipes in the upper-level bathrooms (discussed *supra*, "Enforcement of the Condominium Plan"). If "original condition" meant the removal of the offending mattress then rejection on that basis was in bad faith because it does not fall withing the provisions of Article IV and it had long been removed which Curtin should have confirmed when he entered Unit 82.

Curtin's rejection of Forbush's proposal was in bad faith and based on facts not in existence because Curtin *never* entered Unit 81 to review Forbush's concept design. Forbush's two Units are not, in fact, "all the same" as claimed by Curtin. Each Unit is unique and serves a particular purpose for Forbush: Unit 81 is used, and licensed, for public short-term renters and Unit 82 is used by Forbush family and friends. Based on the functional differences between the Units, the proposed modifications for Unit 81 were not "all the same" as those for Unit 82. Curtin's refusal to enter Unit 81 resulted in misrepresentation of the concept design to the board which led to baseless allegations and threats by the board to Forbush.

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In letter dated July 18, 2019, Association president Bishton employed his personal law firm to further reject Forbush's concept design. Presumably based on Committee's representations to the board, Association president Bishton's law partner, Mr. Gubernick, conflated the Units, claiming walls in "both Units" had been opened to access dead-space storage. (Such permissive access was, in fact, made in Unit 82 only.) This conflation of Units resulted in allegations of facts not in existence and Bishton's threat to restrict Forbush use of Unit 81 to family and friends only. This conflation of Units thereby rendered the board's "original condition" demand unattainable.

In *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, the association cannot adopt standards that contradict the CC&Rs. The criterion "that Unit 8/82 be brought back to the original condition" is nowhere to be found in the CC&Rs. (There is no CC&R that requires the Units be brought back to "original condition" even after modification.) Their failure to define "original condition", especially regarding Unit 81, left Forbush to speculate on its meaning.

In *Cohen v. Kite Hill Community Association* (1983) 142 Cal.App.3d 642, when exercising its architectural control authority, an association owes a fiduciary duty to its members to act in good faith, and to not make decisions that are arbitrary or capricious.

Here, Committee's second denial was in bad faith because Forbush's proposal involved both Units which required Committee to review both Units. Curtin breached his fiduciary duty as Committee Chair when he refused to enter Unit 81 to review the proposed plans for that Unit, instead aborting the meeting to catch a plane to Ohio to visit his daughter. Curtin then acted arbitrarily when he asserted Forbush's Units are "all the same" when in fact they are not because they are set up to serve different functions. This "all the same" attitude resulted in Committee and the board conflating the Units regarding the existence of permissive use of dead-space storage areas, alleging such spaces exist in Unit 81 when, in fact, they do not. Rejection of Forbush's proposal was then based on the arbitrary "original condition" demand which is neither a criterion under Article IV nor based on any factual findings, especially in regards to Unit 81.

Therefore, Committee arbitrarily, capriciously and in bad faith denied the second plan submission based on no factual findings applicable under CC&R Article IV. Pursuant to CC&R 4.02, Forbush's concept design must be deemed approved based on Committee's failure to accept or reject on grounds provided by Article IV and within forty-five (45) days of submission of the proposal.

Was Committee's Third Rejection Proper?

By Association and Committee document dated January 18, 2021, (see Attachment 13), the plan was denied based on the following:

- claimed lack of access to Forbush's Units 81 and 82;
- investigation by Committee of a Unit "identical to Unit 81";
- Committee's history of past plan reviews that "never permitted two units to be joined...";
- the proposed modifications involve common areas;
- modification of common areas involves exclusive use;

- modifications do not conform to ADA requirements, Civil Code Section 4760(a)(2)(C);
- modifications alter the exterior appearance of Units 81 and 82, citing CC&R 4.02 and asserting that exterior alterations not in accordance with the original design will be in conflict with the original design;
- structural impairment of Building 8;
- actual foundation is not as depicted in the design plan;
- alterations to joists and bearing walls;
- Association does not possess any plans that show location of pipes, conduits and structural elements;
- current as-built construction of the building might not meet current building codes;
- reluctance "to unnecessarily disturb any structural element";
- approval of Forbush's project would set an unwanted precedent as such changes have not been allowed in the past 30 years;
- homeowners should not be allowed to make structural changes;
- Committee authority is limited by membership vote for "approving alterations which will or may tend to impair the structural integrity of any building in the Project or which would structurally alter any such building except as otherwise expressly provided [in the CC&Rs]", citing CC&R 8.07;
- that Committee, the Board and members have no authority to approve the plan;
- none of the exceptions of Civil Code §4600(a) apply for the approval of the plan;
- Forbush's claim of trespassing pipes is not meritorious, citing CC&R 1.18.

Committee's claim that Units 81 and 82 were not available for access during their January 4, 2021 alleged onsite Committee meeting is in bad faith, disingenuous and simply false. During 2020, Forbush made multiple requests for an onsite meeting which Committee steadfastly refused. Association and Committee *did not* contact Forbush to request access to their Units for their January 4, 2021 onsite meeting. Had Committee at long last done so, Forbush would have immediately complied because such a meeting was what Forbush repeatedly sought in 2020.

Alternately, CC&R 6.02, Right of Entry, provides the Board the authority to enter Units upon a three-day notice of entry. In relevant part:

> "The Board of Directors shall have limited right of entry in and upon the Common Areas and the interior of all Condominiums for the purpose of inspecting the Project and taking whatever corrective action may be deemed necessary or proper by the Board of Directors...[S]uch entry upon the interior of a Condominium shall be made, except to effect emergency repairs or other emergency measures, only after (3) three days prior written notice to the Owner of such Condominium and after authorization of two-thirds (2/3) of the Board of Directors."

At no time relevant to Forbush's three concept design submissions, or Committee's January 4, 2021 so-called onsite meeting, did the Board invoke CC&R 6.02 for the purpose of inspecting either

Forbush Unit. If Committee's prior "original condition" criterion was as pivotal to Committee's further review of Forbush's proposal, as they claimed in Curtin email dated September 23, 2019 (see Attachment 19), then Committee could have invoked Section 6.02 to ascertain Forbush's compliance with their demand. Committee and Association neither availed themselves of their right of entry nor requested permission to enter . Instead, they accessed an undisclosed so-called "identical" Unit somewhere on the property as if that were an acceptable practical and legally relevant substitute. This other Unit substantially contributed to the basis for Committee's rejection of Forbush's proposal. Therefore, the Board and Committee did not, in fact, conduct an onsite meeting of either Forbush Unit. Any findings based on this irrelevant field trip is wholly without merit.

All other grounds for denial were repeated in the third rejection which have been discussed, *supra.*

Was Committee's Fourth Rejection Proper?

Committee incorporates the denials contained in their prior Committee Minutes, dated January 18, 2021, for their rejection of all components in the fourth submission, with the exception of the desalinization unit (See Attachments 13 and 29). Forbush's discussion offered, *supra*, starting at page 21, for those rejections, and for Committee's comments concerning "structural integrity issues", discussed *infra* at page 33, are incorporated by reference here. Further:

Desalinization Unit: rejected despite Committee's declaration that they lacked sufficient information to make a decision. Instead, they interjected their own unfounded ideas based on no evidentiary facts or construction industry reports, whatsoever. By assuming the responsibility of making such determinations, it appears Committee seeks to remove liability protection afforded Association when it reasonably relies upon the findings of construction professionals.

Upper-Level Hallway: denied on grounds that they believe the trespassing pipes, and the separate interest area they occupy, are all common area. This is discussed at length, *supra*, under the first cause of action and is incorporated by reference here.

Civil Code §4600: Committee finally recognizes that Civil Code §4600 applies here because the CC&Rs fail to declare the provisions of this statute. Forbush agrees, as previously stated, *supra*, at page 6 and, *infra*, under heading "Forbush's Offer to Resolve the Matter".

Was Association's Participation in Forbush's Four Submissions Fair?

Association and Committee consistently failed to provide a description of the procedure for reconsideration of Committee's decision by the board, leaving Forbush to offer their good faith attempts to do so. This failure is contrary to Association's participation, even during COVID lockdowns, in the design and construction of Class III projects located within Hamilton Cove.[29] This is relevant on the issue of Association's fiduciary duty owed to all Class Owners as it relates to project development and aesthetics.

[29] CC&Rs 1.13 through 1.16 define three Classes of land and owners. One set of identical CC&Rs was recorded for all three Classes; there are no other separately recorded CC&Rs for any Class Land. Forbush is a Class I owner.

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Of relevance here, CC&R Section 3.09(a) and (b) establishes the Design Committee of which "the Association shall have the right to name a member (the "Design Committee".) The purpose and authority of the Design Committee is to establish design and use criteria for Class III Residences, review and approve all plans and construction scheduling, and determine whether the proposed construction conforms with the Class III Design Criteria and any applicable provisions of this restated CC&Rs." Therefore, pursuant to the Design Committee, Class III "*will be developed in such a way that the exterior architecture, colors, quality and scale of the buildings and other improvements and landscaping are compatible with the improvements and landscaping of the Class I Land.*" [30] (Italics added.)

CC&R 3.09(b) provides for the disbandment of the Design Committee, its responsibilities for the Class III properties turned over to Association's Architectural Committee, thereby establishing, along with Association's right to name a member of the Design Committee, the interconnectedness of the Class III Design Committee, Association and its Architectural Committee.

Aesthetic Appearance Standards

While the CC&R Design Committee does not apply to Class I it does, however, establish Association's actual experience in working with owners and construction professionals for the completion of construction projects. It also establishes Association's fiduciary duty to ensure that Class III construction projects conform to the overall appearance of Class I Improvements which should be accomplished through the participation of Association's named member on the Design Committee, pursuant to CC&R 3.09(a).

Association diligently worked with the Class III Design Committee during Forbush's submissions because Class III home construction continued even through COVID lockdowns as shown by workers driving construction equipment on the property, maskless, and by their actual completion. Substantial Class III building variances were allowed including, but not limited to (Attachment 30):

- Super-sized lots with no airspace subdivision and ownership in fee simple, compared to Class I lots with airspace subdivision and fractional ownership;
- Construction of single-family homes as large as 6,800 square-feet with private garage, swimming pool and a huge man-cave dug into the hillside containing a band stage and wine cellar with oversized glass walls that had to be dropped in first before the house could be built;
- Balconies that do not cantilever out over the slope creating a flat facade appearance;
- Transparent balcony baluster material instead of the wood used throughout HC;
- Angular or diamond-shaped windows instead of square and rectangle;
- Retractable doorways as large as 10-feet high instead of standard 6' 8" doorways found throughout HC.

[30] CC&R 1.38 defines "Improvements" as "all structures and appurtenances thereto of every type and kind, including but not limited to, buildings, the exterior surfaces of any visible structure, and the paint on such surfaces and the Infrastructure."

Conversely, Association diligently worked to delay and deny Forbush's project, without any procedure for reconsideration of Committee's decision by the board. Association steadfastly refused to grant *any* exterior construction variances from the original design, claiming that if the project does not strictly adhere to the original design of the original project, it must be denied. Their claim that they have never before granted such variances from the original design is disingenuous based on their participation on the Design Committee for Class III projects.

Since Association participated on the Design Committee for Class III projects, via its named participant, it could be argued that the variances in Class III construction are "compatible with" the improvements and landscaping of the Class I Land. *Therefore, when the construction projects on Class III Land are incorporated into HC upon completion, all construction and aesthetic features of the Class III properties become part of the construction and aesthetic standards of HC.* There are no CC&Rs providing for Class III structural and aesthetic carve-outs once incorporated into HC.

Therefore, Forbush is entitled to be granted any construction and aesthetic feature or variance "compatible with" the improvements incorporated into HC standards by Class III projects.

Structural Integrity

As stated in *Starlight*, supra, 177 Cal.App.4th at 440, 447, Courts must consider the CC&Rs as a whole and construe the language in context rather than interpret a provision in isolation. Read as a whole, CC&R Sections 4.07 and 3.09(b) restrict Association's Architectural Committee and Design Committee named member from analyzing the "soundness of the proposed structure, any engineering aspect of the proposed structure, or the conformance of the proposed structure with any law or regulation." The committees may employ independent inspectors and other building or construction professionals to verify the construction is sound and in accordance with the approved plans. The purpose of this is to provide Association liability protection by reasonably relying upon the findings of the construction professionals. To allow Committee to make such determinations based on their presumptive, unfounded, personal beliefs shifts liability from reasonable reliance on industry professionals to Association.

Therefore, Forbush's fourth design concept must be reviewed by construction professionals.

Does Judicial Deference Apply to Committee's Interpretation of its CC&Rs and the Procedures it Followed?

In *Dolan-King v. Rancho Sante Fe Association* (2000) 81 Cal.App.4th 965, an association may grant discretionary authority to an Architectural Committee to apply subjective, aesthetic criteria for approving member applications for proposed architectural improvements.

Here, Committee applied neither subjective nor objective aesthetic criteria. Instead, it applied a strict standard of compliance with the original property *construction*. If the "exterior alterations [were not] in accordance with the original design" then it would "be in conflict with the original design". In other words, any design that is not the original construction will be in conflict with the original design simply because it is not the original construction. Association insists that only the original construction is

permitted and that all modifications will be, per se, not in accordance with the original design. CC&R 4.02 and 4.07 does not require strict construction of only the original design. Article IV seeks to preserve compliance with existing aesthetic appearance. If Article IV is interpreted to mean that only the original construction is permitted, then Article IV and all case law that address subjective criteria based on artistic aesthetics, would be pointless because strict compliance to the original construction does not require subjective artistic evaluation.

Committee again exceeded the scope of their authority under CC&R 4.07 which prohibits review of proposals from the standpoint of structural safety and conformance with building codes. Committee's unfounded conjectures that there will be "structural impairment of Building 8"; that the "actual foundation is not as depicted in the design plan"; that "alterations to joists and bearing walls" will occur; that "current as-built construction of the building might not meet current building codes; and, that they are reluctant "to unnecessarily disturb any structural element" are all prohibited criteria under CC&R 4.07 because they are from the standpoint of structural integrity and conformance with building codes. Alterations to structural components by a licensed professional builder-contractor is not, per se, the definition of "structural impairment" and does not establish noncompliance with "current building codes."

Committee again admits they "[do] not possess any plans that show location of pipes, conduits and structural elements." This is offered as some kind of free pass for Committee to deny all proposals involving structural modifications. They provide no factual findings that any structural impairment would occur to Building 8, its foundation, joists or bearing walls under a licensed, professional builder-contractor. They prohibited Forbush and Fine Line Construction from conducting any exploratory investigation to identify and assess structural components. They simply declared Forbush's concept design to be structurally unsafe based on pure unfounded personal conjecture. Therefore, these so-called criteria fail under Article IV for rejecting the concept design.

Committee's denial based on its unofficial policy that it has never permitted two Units to be joined; that approval of Forbush's project would set an unwanted precedent as such changes have not been allowed in the past 30 years; and, that homeowners should not be allowed to make structural changes, effectually renders null and void Article IV which provides for proposals involving structural modifications. Committee's position that it never has, and never will, permit any structural modification renders such proposals futile ab initio and Article IV unenforceable.

Of note, Committee either knew of or approved other construction projects that required city permits, issued only after Committee approved the project. One such recent project involves Association's Facilities Manager, its own employee. This invokes at least the appearance of impropriety and possibly arbitrary bad faith towards Forbush. Therefore, Committee cannot rely on its claim that prior structural modifications have never been approved.

Committee misapplies Section 8.07 for its authority to completely bar any and all structural alterations. This section is a permissive rule allowing for alterations, even structural modifications, *with prior written approval of the Architectural Committee*. This statement should have referred Committee back to Article IV which provides the criterion and process for prior written approval.

Therefore, Committee arbitrarily and capriciously denied the third plan submission based on no factual findings applicable under CC&R Article IV. Pursuant to CC&R 4.02, Forbush's concept design must be deemed approved based on Committee's failure to accept or reject on grounds provided by Article IV and within forty-five (45) days of submission of the proposal.

Forbush's Offer to Resolve the Matter

Forbush offers to leave the pipes as they are in exchange for approval of their modification plan which includes exclusive use of common areas. Conversely, Forbush will withdraw their application for Unit modification only if the pipes are removed from their Units.

Forbush offers Civil Code §4600 et seq. as authority for Association to grant exclusive use of common areas and, alternatively, CC&R 4.08 which empowers Committee to execute a recorded variance or easement. CC&R Article XII, subsection (d)(4) requires prior written approval of at least sixty-seven percent (67%) of the owners before Association or any owner may encumber, sell or transfer common property. Therefore, a majority of the membership would be required to approve Forbush's request to use the lower-level dead-space for a connecting hallway and a portion of the exterior of building 8 for an elevator-lift *unless* an exception applies to nullify the vote requirement.

Civil Code §4600, et seq.

Civil Code §4600(a) provides for exclusive use of common areas with membership approval. However, subsections (b)(3)(B), (E), (F), (K) provides Forbush and Association with several exceptions to the requirement of membership vote:

1) The pipe intrusion is the result of errors in construction of Forbush's Units as shown in the recorded Condominium Plan and airspace map and defined by the 2005 Restated CC&Rs 1.22, 1.74, 1.18. Association offers no evidence to the contrary. Civil Code §4600(b)(3)(B) provides the authority to eliminate or correct encroachments due to errors in construction of any improvements.

2) The exterior wall of Building 8 that would provide for an elevator-lift, and the dead-space inside Forbush's Units that would provide a lower-level connecting hallway, are generally inaccessible and of no general use to the membership at large. While the exterior wall itself serves the membership as the structure for the building, Association offers no evidence that an elevator lift attached to the exterior surface interferes with the membership's interest in that portion of the wall as it serves to provide a building. The current window at that location is exclusive use common area. When that window is converted to a door, a small portion of the building wall would be converted from common area to exclusive use common area same as all exterior doors to all Units. This wall area is also generally inaccessible and of no general use to the membership at large. Association offers no evidence that conversion of this small section of the wall from a window to a door would interfere with the membership's interest in that area as it serves as a wall for the building. Civil Code §4600(b)(3)(E) provides for the transfer of the burden of management and maintenance of any common area that is generally inaccessible and

not of general use to the membership at large. Forbush would be responsible for maintenance and repair of this area.
Forbush does not seek transfer of ownership of common area deadspace for their proposed lower-level connecting hallway. In contrast to certain detached common area laundry closets that some members were led to believe they own with their Units (they do not), along with the idea that such laundry closets are transferrable (they are not), Forbush seeks a transferrable easement, in perpetuity, signed by all parties. (Certain detached common area laundry closets, thought to be owned by the members who exclusively use them, is the subject of the third cause of action at page 38.

3) Forbush offers Unit 81 as a short-term rental to the general public on the internet. In its current unmodified configuration, all disabled persons who cannot navigate stairs are barred from enjoying Forbush's Unit and its direct access to public coastal beach. This is a de facto barrier to the use and enjoyment of public coastal areas adjacent to HC. (See *Greenfield* 21 Cal.App.5th 896, *supra*.) Civil Code §4600(b)(3)(F) corrects this discrimination against disabled access and enjoyment of public beaches adjacent to short-term public rental accommodations. [31]

4) Acceptance of Forbush's offer to leave the pipes where they are in exchange for full approval of their modification project moves Association from their current non-compliance with their own governing document (Condominium Plan) to a recorded mutual agreement, thereby relieving both parties of further liability and litigation. (Civil Code §4600(b)(3)(K).)

In *Harvey v. The Landing Homeowners Assn*., 162 Cal.App.4th at 820, homeowners sought to use attic space directly above their Units for storage space. The court held that the CC&Rs allowed the board "to designate storage areas in the common area." They also gave the board "the exclusive right to manage, operate and control the common areas." (Ibid.) The court held, "Under the 'rule of judicial deference' adopted by the court in *Lamden*, we defer to the Board's authority and presumed expertise regarding its sole and exclusive right to maintain, control and manage the common areas when it granted the fourth floor homeowners the right, under certain conditions, to use up to 120 square feet of inaccessible attic space common area for rough storage." (Id. at p. 821.)

CC&Rs 3.01 and 6.01(b) provide Association's duty to maintain common areas. CC&R 3.04(b) provides the right of Association to consent to or otherwise cause the *construction* of additional Improvements on the common property and to consent to or otherwise cause the *alteration* or removal of any existing Improvements on the common property *for the benefit of the Members of the Association*. Under *Harvey*, the rule of judicial deference adopted by the court in *Lamden* would apply to Association's authority and presumed expertise regarding a well-balanced decision to approve Forbush's project to save the membership costly and extensive litigation that seeks to enforce these Declarations and the excessive cost and disruption of relocating the pipes should it be so ordered. [32]

[31] The jurisdiction of the California Coastal Commission includes disabled access to public coastal beaches. Forbush seeks to provide that access through their short-term rental Unit which is located mere yards from the public beach.
[32] Should this matter proceed to litigation, Forbush will seek to recuse Association president Bishton's personal Law firm, Bishton-Gubernick, from any fee based services on grounds of conflict of interest based on self-enrichment.

II.
ENFORCEMENT OF CC&R ARTICLE IV
ARCHITECTURAL COMMITTEE
(Concept Design Submission)

CC&R 4.08 Variance

CC&R 4.08 empowers Committee to authorize variances from compliance with *any* of its architectural provisions including, relevant here, floor area or placement of structures when circumstances such as topography (hillside foundation) or hardship (moving the pipes) may require such variance. The variance would be a recorded document, signed by Forbush and a majority of the Committee (majority of the Board or membership is not required.) Such recordation would remove Association from its current position of violation of the CC&Rs. The variance would apply only to Units 81 and 82 and without affecting either party's obligation to comply with all governmental laws and CC&Rs.

CC&R 3.04(c) provides the right of Association to grant, consent to or join in the grant or conveyance of easements, licenses or rights-of-way in, on or over the common property for purposes not inconsistent with the intended use of the Project as a residential Condominium project.

Through its power to authorize variances and grant rights-of-way over common property, Association has several tools at its disposal to fairly and completely resolve this matter without lengthy and costly litigation to be charged to the membership.

CONCLUSION

Forbush offers a reasonable resolution that saves the membership costly litigation. Should the pipes be ordered removed, the balance of harm and disruption to the membership outweighs the modification components contained in Forbush's proposal, most of which are contained within the Units (except the exterior elevator) which would have no aesthetic impact on the membership at large. Committee failed to employ Article IV criterion and procedures, exceeding their authority by denying the proposal based on unfounded grounds and personal conjecture concerning structural integrity. Committee failed to arrive at a well-reasoned decision because it steadfastly refused to investigate Forbush's claims of neighborhood pipes *inside* their Units. Committee viewed a so-called undisclosed "identical Unit" and claimed both Forbush Units to be "all the same", thereby abdicating its duty to investigate the design proposal as to both Units.

Therefore, Forbush's design proposal is deemed approved pursuant to CC&R 4.02 following failure of Committee to approve, or deny, the proposal pursuant to Article IV and within forty-five (45) days.

III.
ENFORCEMENT OF CC&R 1.18
(Exclusive Use Common Area Laundry Closets)

This third cause of action is for the enforcement of CC&R 1.18 providing for common areas and provisions within the Declaration providing for exclusive use. Forbush alleges Association unlawfully granted private exclusive use of common area closets to some individuals for private storage and laundry facilities. Some homeowners believe these closets were included in the purchase of their Units and that they privately own these areas. Forbush seeks to enforce the Declarations and Civil Codes providing for the proper granting of private exclusive use of common areas.

FACTS

There are four adjoining Units at Forbush's location: Units 80, 81, 82 and 83. Forbush owns Units 81 and 82 with laundry facilities located within the boundaries of each Unit's recorded Condominium Plan. Units 80 and 83 do not have laundry rooms located within their Units; "their" laundry rooms are located in closets across a common area outside hallway ("laundry closets"). These closets do not appear on the recorded airspace map which means they are not included with any Unit. By comparison, the airspace map also shows similarly situated closets that the developer intended, and *did*, record as included with a particular Unit. There are several such unrecorded and recorded detached closets throughout HC. Therefore, the airspace map clearly shows an intent by the developer to classify some detached closets as common area and others as separate interest space included with a particular Unit. (Attachment 25.)

In conversation with the owners of Units 80 and 83, Forbush discovered that they believe the detached closets near their Units were included in the purchase of their Units. This perception is supported by their prepurchase MLS listings which states for Unit 80, "This property has its own laundry room and separate storage, both with locking doors." Further, "Dryer Included, Individual Room, Outside, Washer Included." MLS listing for Unit 83 states, "A laundry and storage room allows plenty of space for your beach toys and laundry needs." (Attachment 26.)

The closets are wired and plumbed for laundry appliances with room for storage. On Catalina Island, electricity and water are scarce resources obtained at a premium cost which prompted Forbush to inquire of Association whether utilities in these closets are metered to the owners of Units 80 and 83. Further, Forbush expressed an interest in having access to one or both of these closets for their own storage as they are located next to Forbush's Units.

Association asserts these closets are common areas because they contain pipes that service other Units which Association accesses for maintenance purposes. (Attachment 31). Association, however, fails to address the issue that only two owners, those of Units 80 and 83, to the exclusion of all others, also have access to these locked closets for their private exclusive use for storage and laundry appliances. Association also fails to answer whether the laundry utilities are metered to Units 80 and 83.

By Revised and Restated Rules and Regulations, dated July 1, 2018, Association created "Shared Laundry Rooms" for Buildings 1 and 2 . (Attachment 27. p. 14, No. 30.) Two Units in each building, to the exclusion of all others, share a detached closet containing a washer and dryer. Permission of the owners is required for anyone else to use these closets. The Shared Laundry Rooms are plumbed so that each owner may use water from his or her Unit while doing laundry.

III.
ENFORCEMENT OF CC&R 1.18
(Exclusive Use Common Area Laundry Closets)

DISCUSSION

There are three distinct grounds for the use of common areas: 1) common areas available for use by the condominium owners collectively; 2) "exclusive use common areas" that are *designated under the CC&Rs* as available to fewer than all owners, and 3) a portion of common area which the association or the board has granted, *by an established process*, to an owner for the owner's exclusive use.

In relevant part, CC&R 1.18 defines "common areas" as *all areas* on the Project, *except* the Condominiums and Single-Family homes.

CC&R 1.74 defines "Unit" as a separate estate shown, numbered and *designated in any Condominium Plan*. In interpreting deeds, declarations and plans, the existing physical boundaries of the Unit or a Unit constructed or reconstructed in substantial accordance with the *Condominium Plan* and the original thereof, if such plans are available, shall be conclusively presumed to be its boundaries, *rather than the description expressed in the deed*, Condominium Plan, Original Declaration, *or this Restated CC&Rs*, regardless of settling or lateral movement of the building and regardless of minor variances between boundaries as shown on the Condominium Plan or defined in the deed, the Original Declaration and this Restated CC&Rs, and the boundaries of a building as constructed or reconstructed. (Italics added.)

By tying the definition of "Unit" to the Condominium Plan, the Declaration incorporated the Condominium Plan's identification of the boundaries of each Unit, *rather than the description expressed in the deed or CC&R*.

A subset of common area is "exclusive use common area" which is a portion of common area *designated by the CC&Rs* for the exclusive use of one or more, but fewer than all, of the owners within the development. (Civil Code § 4145(a).) (Italics added.)

CC&R 8.15 confines the designation of "exclusive use areas" to balconies and stairways. "Each balcony in the Common Areas and the stairways providing access to such balcony are reserved for the exclusive use of the Owners of the Condominiums served by such balcony and stairways."

CC&R 1.40 defines "Infrastructure" as *all Improvements* and "*Common Area facilities*" *except* buildings, housing, Condominiums, and Single-Family Residences. (Italics added.) Common area facilities would include detached laundry/storage closets.

Do Units 80 and 83 Have an Exclusive Right of Use to the Closets?

Based on the owners' claim of ownership of the detached closets, any purported encumbrance in the deeds of Units 80 and 83 contradict the recorded airspace map, Condominium Plan and the Declaration. The detached laundry closets are not identified on the recorded airspace map as being included with the separate interest space of these Units. They are not identified under CC&R 8.15 as appurtenant exclusive use areas. Therefore, those closets are unassigned common areas. Association offers no evidence that either a membership vote or a board resolution was approved providing lawful

conveyance, or private exclusive use, of these common area closets. Based on Board member Bart Glass' ("Glass") personal experience as a real estate broker, boasting of 35 years of specializing in HC real estate, and originally selling "all" of HC for the Developer, Glass would be in a position of knowing whether these Units, and all similarly situated Units, were originally transferred with detached common area laundry closets "included" in the conveyance. This places Glass in a position of possible personal liability for the original transfers and, possibly, the cascade of subsequent transfers thereafter.

CC&R 3.04(d) provides Association the right to reasonably restrict access to roofs, maintenance and landscaped areas and similar areas of the Property. Association claims the closets are "maintenance" areas requiring a locked door because they contain pipes that service other Units, and for these reasons the closets cannot be private exclusive use closets. Association misinterprets the meaning of common area and private exclusive use; the defining criterion is whether the *membership* has access to these common area closets, not whether Association has access. Forbush asserts it is unlawful to permit some owners, and not others, access to these common area closets without Association showing lawful procedure for granting private exclusive use. Also, Association fails to provide any evidence that the owners of Units 80 and 83 are paying for the common area water and electricity that is being supplied to their privately owned laundry appliances.

Therefore, they are common area closets that have not been granted to Units 80 and 83 for private exclusive use by any lawful procedure. The only thing the owners can transfer is an unfounded "idea" that they own these spaces.

Have Units 80 and 83 Obtained a Right of Adverse Possession to the Closets?

The doctrine of adverse possession is defined and limited by statute. Relevant here, Code of Civil Procedure §325 provides, "[i]n no case shall adverse possession be considered established under the provision of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have timely paid all state, county, or municipal taxes that have been levied and assessed upon the land for the period of five years during which the land has been occupied and claimed. Payment of those taxes by the party or persons, their predecessors and grantors shall be established by certified records of the county tax collector." (Id., subd. (b).) Thus, "[t]he possessor must pay all of the taxes levied and assessed upon the property during the period." (*West v. Evans* (1946) 29 Cal.2d 414, 417.)

The requirement that all taxes be paid is essential to a claim of adverse possession, and the payment of taxes by the rightful owner is sufficient to prevent a claimant from satisfying this requirement. "There are no equities in favor of a party seeking by adverse holding to acquire the property of another . . . : 'Section 325 of the Code of Civil Procedure requires that one who seeks or claims to obtain title by adverse possession shall have paid "all the taxes, state, county, or municipal, which have been levied and assessed upon such land during the five years of his adverse occupancy." If, when he offers to make a payment to the tax collector, the tax which has been levied has been already paid, he cannot comply with one of the requirements of the statute, and must fail to acquire a title by adverse possession. There is no hardship in this construction. If the owner of the land pays the taxes as they fall due, there is no reason why his title should be impaired by a subsequent payment by another. The

statute makes the payment of taxes as important an element as actual occupancy of the land for the purpose of gaining a title by adverse possession, and the burden is upon the claimant to do the acts required to create the adverse title. He should be as vigilant in paying the taxes as in holding possession of the land. He is seeking to gain the title of another through statutory authority, and it is for him to see that he does all of the acts which the statute requires.' " (*Glowner v. De Alvarez* (1909) 10 Cal.App. 194, 196.)

Each condominium owner pays a 1/185 share of the taxes on the detached common area laundry closets because they are part of the common area of the development. Association cannot show any documentary evidence that tax payments, such as county assessments or payment receipts, were adjusted to exclude the detached laundry closets located near Units 80 and 83.

The closets next to Units 80 and 83 are common areas as shown on the recorded airspace map. They are not designated in the CC&Rs as exclusive use common areas. Association provides no documentary evidence that these closets have been properly granted to the owners for their private exclusive use. Association cannot show that the owners have obtained adverse possession by their payment of all taxes on these closets. Therefore, exclusive right to use the detached common area laundry closets has not been obtained through adverse possession.

Association continues to elude Forbush's reasonable inquiries regarding the payer of the utilities used in these laundry closets. Association must disclose who has, and is, paying for the utilities supplying these closets. Association must inform the owners that they are not the recorded owners of these closets and that Forbush, and all owners, have a 1/185 interest in the use of these areas. Association must remove the lock on the doors, or provide a key, so that Forbush and all owners may access these closets for laundry and storage. Association must follow statute or its own procedures, contained in the Declarations, for the lawful transfer of ownership or right of exclusive use of these closets.

Were Exclusive Use "Shared Laundry Rooms"
Properly Created in the Revised Rules and Regulations?

After Forbush voiced their concern regarding the detached laundry closets next to Units 80 and 83, Association published its Revised Rules and Regulations containing a newly created section, Rule No. 30, entitled "Shared Laundry Rooms". This section describes the detached laundry closets located in Buildings 1 and 2 as "shared laundry facilities" for the exclusive use of certain owners only.

Association's Revised Rules and Regulations cannot effectuate a legal change of status of any common area because as the court stated in *Ekstrom v. Marquesa at Monarch Beach Homeowners Association* (2008) 168 Cal.App.4th 1111, an "association's board of directors may not adopt rules that are in conflict with the CC&Rs." The fact that the closets are "shared" means they are not separate interest space of any Unit as recorded on the airspace map. And they are not assigned as exclusive use areas pursuant to CC&R 8.15 which confines the designation of "exclusive use areas" to balconies and stairways. There is no other empowering language in the Declaration that permits Association to grant such private exclusive use of common area closets to certain members. Therefore, these common area closets remain general common areas open to the entire membership unless 67% of the membership

approve reclassification to private exclusive use or the board applies a valid legal exception. Association provides no documentary evidence that either criterion have been satisfied.

Rules and Regulations apply "generally to the management and operation of the common interest development or the conduct of the business and affairs of the association." (Civil Code § 4340(a).) Unlike CC&Rs, operating rules are not contained in a recorded document and generally do not require membership approval for their adoption, amendment or repeal by the board, although the membership has limited rights to veto recently adopted or amended operating rules. Therefore, Association cannot circumvent its Declarations by creating operating rules to provide what must be declared in the CC&Rs.

Civil Code §4355 identifies specific subject areas where a rule or regulation, adopted by the board, would constitute an operating rule. Those subject areas include, but is not limited to, use of the common area or of an exclusive use common area. Association deems this language to mean it is permissible to *create* within its Rules and Regulations exclusive use common areas that are not otherwise provided in the Declarations or statutes.

Association misinterprets Civil Code §4355 which provides Association the authority to *manage*, through adopted rules and regulations, common areas and assigned exclusive use common areas. Rules and regulations are designed to interpret, clarify, and assist in the administration of the Declarations. Typically, they contain language concerning the *use* of common areas and exclusive use common areas, presupposing that such areas already legally exist. Therefore, rules and regulations cannot *create* exclusive use common areas, they *manage* those areas.

Therefore, Association erroneously attempted to create exclusive use detached "shared laundry rooms" for specific owners in Buildings 1 and 2 through its Revised Rules and Regulations, thereby circumventing the Declarations and statutes.