Filed 6/17/15 Bel Air Ridge HOA v. Rosenberg CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BEL AIR RIDGE HOMEOWNERS ASSOCIATION, Plaintiff and Respondent, v. MARK ROSENBERG et al., Defendants and Appellants.	B253492 (Los Angeles County Super. Ct. No. SS023684)

APPEALS from an order of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Dickstein Shapiro, James H. Turken and Christopher Kadish for Defendant and Appellant Mark Rosenberg.

Dapeer, Rosenblit & Litvak, William Litvak and Eric P. Markus for Defendants and Appellants William Litvak and Andrew Bagnall.

Kulik Gottesman & Siegel and Glen L. Kulik for Plaintiff and Respondent.

Appellants Mark Rosenberg (Rosenberg), William Litvak (Litvak), and Andrew Bagnall (Bagnall) appeal from an order under Civil Code section 1356[1] to reduce the required voting percentage and approve the First Restated Declaration of Covenants, Conditions and Restrictions of the Bel Air Ridge Homeowners Association (HOA). Appellants contend the trial court abused its discretion in granting the petition because various requirements of section 1356 were not met. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Bel Air Ridge*

Bel Air Ridge is a common interest development located south of Mulholland Drive and adjacent to Beverly Glen Boulevard. It was constructed on five separate lots. It contains 337 townhomes and detached houses.

The original Declaration of Covenants, Conditions and Restrictions (original CC&Rs) for Bel Air Ridge[2] were written by the developer and recorded in 1976. In particular, they provided: "This Declaration may be amended only by an instrument executed and acknowledged by (i) the Owners of at least seventy-five percent (75%) of the Condominiums in the Project, and (ii) the holders of all Mortgages which are of record prior to the effective date of such amendment." The original CC&Rs have never been amended.

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[1] Section 1356 was part of the Davis-Stirling Common Interest Development Act (Davis-Stirling Act), Civil Code section 1350 et seq. The act was repealed and reenacted operative January 1, 2014 in Civil Code section 4000 et seq. (Stats. 2012, ch. 180, §§ 1, 2.) Section 1356 has been renumbered section 4275. For ease of reference, unless otherwise specified, statutory references are to the former provisions of the Davis-Stirling Act, under which this case was decided.

[2] The development originally was called Beverly Glen Village, then became Glenridge, and finally Bel Air Ridge.

The original declarant of the CC&Rs was BGP Corporation. In 1977, a notice of designation of declarant was filed, adding a number of declarants, including Fountainwood-Agoura, a general partnership.

B. *The Davis-Stirling Act*

The Davis-Stirling Act was adopted in 1985 and became operative January 1, 1986. (Stats. 1985, ch. 874, § 14.) It "consolidated the statutory law governing condominiums and other common interest developments." (*Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal.4th 73, 81.) Among other things, the Act contains provisions concerning amendment of the declaration of Covenants, Conditions and Restrictions (CC&Rs) governing a common interest development. Section 1356 provides a mechanism by which an association, or an individual member, may petition the court for relief when the CC&Rs require a supermajority vote to effectuate an amendment.

Section 1356[3] (stats. 1985, ch. 1003, § 1) provides "'that a homeowners association, or any member, may petition the superior court for a reduction in the

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[3] Section 1356 provides: "(a) If in order to amend a declaration, the declaration requires members having more than 50 percent of the votes in the association, in a single class voting structure, or owners having more than 50 percent of the votes in more than one class in a voting structure with more than one class, to vote in favor of the amendment, the association, or any owner of a separate interest, may petition the superior court of the county in which the common interest development is located for an order reducing the percentage of the affirmative votes necessary for such an amendment. The petition shall describe the effort that has been made to solicit approval of the association members in the manner provided in the declaration, the number of affirmative and negative votes actually received, the number or percentage of affirmative votes required to effect the amendment in accordance with the existing declaration, and other matters the petitioner considers relevant to the court's determination. . . ."

Section 1356 further provides: "(c) The court may, but shall not be required to, grant the petition if it finds all of the following:

"(1) The petitioner has given not less than 15 days written notice of the court hearing to all members of the association, to any mortgagee of a mortgage or beneficiary of a deed of trust who is entitled to notice under the terms of the declaration, and to the

percentage of affirmative votes required to amend the CC & R's if they require approval by "owners having more than 50 percent of the votes in the association . . . ." [Citation.] The court may, but need not, grant the petition if it finds all of the following: Notice was properly given; the balloting was properly conducted; reasonable efforts were made to permit eligible members to vote; "[o]wners having more than 50 percent of the votes, in a single class voting structure, voted in favor of the amendment"; and "[t]he amendment is reasonable." [Citation.]' [Citation.]" (*Mission Shores Assn. v. Pheil* (2008) 166 Cal.App.4th 789, 794.)

Section 1356 was enacted "to give a property owners' association the ability to amend its governing documents when, because of voter apathy or other reasons,

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city, county, or city and county in which the common interest development is located that is entitled to notice under the terms of the declaration.

"(2) Balloting on the proposed amendment was conducted in accordance with all applicable provisions of the governing documents.

"(3) A reasonably diligent effort was made to permit all eligible members to vote on the proposed amendment.

"(4) Owners having more than 50 percent of the votes, in a single class voting structure, voted in favor of the amendment. In a voting structure with more than one class, where the declaration requires a majority of more than one class to vote in favor of the amendment, owners having more than 50 percent of the votes of each class required by the declaration to vote in favor of the amendment voted in favor of the amendment.

"(5) The amendment is reasonable.

"(6) Granting the petition is not improper for any reason stated in subdivision (e). [¶] . . . [¶]

"(e) Subdivisions (a) to (d), inclusive, notwithstanding, the court shall not be empowered by this section to approve any amendment to the declaration that:

"(1) Would change provisions in the declaration requiring the approval of members having more than 50 percent of the votes in more than one class to vote in favor of an amendment, unless owners having more than 50 percent of the votes in each affected class approved the amendment.

"(2) Would eliminate any special rights, preferences, or privileges designated in the declaration as belonging to the declarant, without the consent of the declarant.

"(3) Would impair the security interest of a mortgagee of a mortgage or the beneficiary of a deed of trust without the approval of the percentage of the mortgagees and beneficiaries specified in the declaration, if the declaration requires the approval of a specified percentage of the mortgagees and beneficiaries."

important amendments cannot be approved by the normal procedures authorized by the declaration. [Citation.] In essence, it provides the association with a safety valve for those situations where the need for a supermajority vote would hamstring the association." (*Blue Lagoon Community Assn. v. Mitchell* (1997) 55 Cal.App.4th 472, 477.)

C. *The First Attempt To Amend the Original CC&Rs*

Over the years, Bel Air Ridge's general counsel discussed with members of the HOA's Board of Directors (Board) the need to rewrite the original CC&Rs to modernize them and to make them consistent with the provisions of the Davis-Stirling Act. The HOA had encountered situations "where legal issues arose in which the CC&Rs, due to their age and the fact that they were written by the developer, either did not address an issue at all or did not address it clearly." Some of these resulted in litigation which, counsel believed, "probably could have been avoided had the CC&Rs been clear and up to date."

In 2005 the HOA held an election to amend the CC&Rs but was unable to get 75 percent of the homeowners' vote in the election. In August 2006 the HOA filed a petition under section 1356 to reduce the required voting percentage and approve the amended CC&Rs. The court denied the petition under subdivisions (e)(2) and (e)(3) of section 1356, finding that the amended CC&Rs eliminated rights of the declarant and impaired the security interest of a mortgagee. (*In the Matter of Glenridge Homeowners Association* (Super. Ct. L.A. County, 2006, No. SS014657).)

D. *The Second Attempt To Amend the Original CC&Rs*

In 2009 the Board decided to make a second attempt to amend the original CC&Rs. It formed a CC&R Amendment Committee (Committee) comprised of HOA members. The Board, the Committee and legal counsel came to the conclusion that the CC&Rs should be completely rewritten. Counsel drafted new CC&Rs and presented the first draft of the proposed Restated CC&Rs to the Board and the Committee early in

2010. Between February 2010 and May 2011, six drafts of the Restated CC&Rs were presented to the Committee and critiqued. Members of the HOA were notified about the progress in drafting new CC&Rs at HOA meetings and in the minutes of the meetings, which were available to all homeowners. The Board approved the sixth draft of the proposed Restated CC&Rs.

On August 9, 2011, the Board sent a copy of the sixth draft of the proposed Restated CC&Rs and a comparison with the original CC&Rs to the homeowners. The Board also notified the homeowners that it would hold two "town hall" meetings for comments and questions. Following the meetings, a seventh and final draft of the Restated CC&Rs was prepared in response to input from the homeowners.

On September 30, 2011, the Board sent a copy of the Restated CC&Rs to all homeowners, along with a summary of changes to the CC&Rs, a secret ballot, and voting instructions. The Board informed the homeowners that "**[i]n order to adopt the Restated CC&Rs, we need the approval of at least 75% of the [HOA] Members, and all of the mortgage holders.** Accordingly, it is extremely important that you review all of the enclosed documents and vote." The Board also requested that the homeowners provide it with contact information for the mortgage holders. The deadline for voting was the start of the annual HOA meeting on December 8, 2011. However, the ballot itself advised the homeowners "THAT THE BOARD RESERVES THE RIGHT TO EXTEND THE DEADLINE DATE BY WHICH SECRET BALLOTS ARE TO BE RETURNED BY PROVIDING WRITTEN NOTICE OF SUCH EXTENSION."

On November 28, 2011, the Board wrote to the homeowners reminding them to vote and extending the voting deadline to April 2, 2012. On February 7, 2012 the Board sent a letter to the homeowners reminding them to vote and of the April 2 deadline.

The Board wrote to the homeowners again on March 12, 2012, reminding them to vote and extending the voting deadline to October 1, 2012. The Board sent out a reminder letter on July 30, announcing that 203 out of 377 homeowners had submitted their ballots.

On September 19, 2012, the Board wrote to the homeowners reminding them to vote and extending the voting deadline to February 1, 2013. The Board noted that 211 out of 377 homeowners had submitted their ballots. The Board sent a letter to the homeowners on January 8 reminding them to vote and extending the voting deadline to May 15. The Board stated that 223 homeowners had submitted their ballots.

On March 22, 2013, the Board sent the homeowners another letter reminding them to vote and included a copy of the secret ballot in case the first one had been misplaced. On April 26, the Board sent reminder letters and copies of the secret ballot to all homeowners who had not yet voted. Board members also called homeowners who had not voted and knocked on doors to encourage homeowners to vote. The Board sent out a final letter on May 30, extending the deadline to June 5, when a meeting would be held to open the ballots and count the votes. The Board stated that 244 out of 377 homeowners had submitted their ballots.

At the June 5, 2013 meeting, the Board opened the ballots and counted the votes. There were 198 votes approving the Restated CC&Rs, 13 approving except disapproving as to certain sections, and 40 votes opposed. Those in favor (not disapproving of any sections) constituted 53 percent of the homeowners.

In addition to the difficulties in getting the homeowners to vote, the Board had difficulty in getting them to provide information regarding their mortgage holders. The HOA retained a title insurance company to obtain information as to the mortgage holders. Once this information was obtained, the Board wrote to the mortgage holders regarding the vote. The Board notified the mortgage holders that if they did not return a ballot opposing the Restated CC&Rs, they would be deemed to have approved. Only 10 mortgage holders voted; 9 in favor of the Restated CC&Rs in whole or in part and 1 opposed. Seventy-one ballots were returned as undeliverable.

The Board also contacted BGP Corporation, the declarant in the original CC&Rs. BGP Corporation signed a declaration agreeing to deletion of references to the declarant in the Restated CC&Rs and acknowledging that it no longer had any rights or interests under the CC&Rs.

E. ***The Section 1356 Petition***

The HOA filed the instant petition on August 15, 2013, seeking "an order dispensing with the requirement in the current CC&Rs that all amendments be approved by 75% of the voting power, and all 'Mortgagees of record,' and substituting therefor the court's order that, by virtue of substantial compliance with the provisions of Section 1356 of the Civil Code, the First Restated CC&Rs can be and hereby are deemed adopted by virtue of approval of a majority of the total voting power of the [HOA] . . . ."

Rosenberg filed opposition to the petition on September 13, 2013. He claimed the HOA did not meet the requirements of section 1356, the Restated CC&Rs would impair the security interests of the mortgagees, and the Restated CC&Rs would eliminate his rights and status as a declarant. In his supporting declaration, Rosenberg stated: "My family, including me specifically, comprise Fountainwood-Agoura." Rosenberg also requested that the court take judicial notice of the first section 1356 petition and the denial of that petition.

Bagnall and Litvak each filed opposition to the petition. Bagnall pointed to the denial of the first section 1356 petition and claimed lack of compliance with section 1356. He sought not only denial of the petition but also an award of attorney's fees and costs to himself;[4] removal of the Board, counsel, and the HOA manager "since the [HOA] can no longer govern itself honestly and fairly on behalf of its homeowners"; and an award of sanctions against the HOA. Litvak claimed the balloting was not conducted in accordance with the law, and the Restated CC&Rs were unreasonable.

On September 25, 2013, Rosenberg filed a "Notice of Bank of America, N.A.'s Objection to" the petition. Attached as an exhibit was a one page document purporting to be Bank of America's disapproval of the Restated CC&Rs on the ground "they do **substantially impair our security interest**" in properties in Bel Air Ridge. The document did not address the manner in which those interests were impaired.

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[4] Bagnall and Litvak are both attorneys and represented themselves.

The matter was heard on September 27, 2013. A number of homeowners spoke at the hearing. The trial court allowed Litvak to file a sur-reply brief but indicated that if it was not persuaded by the brief, it would grant the petition. On October 17, after reading Litvak's sur-reply brief and the HOA's response, the trial court granted the petition.

DISCUSSION

A. *Standard of Review*

Section 1356, subdivision (c), provides the trial court with broad discretion in ruling on the petition. (*Mission Shores Assn. v. Pheil*, *supra*, 166 Cal.App.4th at p. 795.) We review the trial court's ruling on the petition for abuse of discretion. (*Quail Lakes Owners Assn. v. Kozina* (2012) 204 Cal.App.4th 1132, 1139; *Mission Shores Assn.*, *supra*, at p. 795.) The trial court is not required to make any particular findings in ruling on the petition. It is sufficient if the record shows that the court considered the requisite factors in making its ruling. (*Quail Lakes Owners Assn.*, *supra*, at p. 1140.) However, to the extent we are required to interpret the applicable statutes or the governing documents, our review is de novo. (*Friars Village Homeowners Assn. v. Hansing* (2013) 220 Cal.App.4th 405, 411-412 [suit to enforce CC&Rs]; see *Villa De Las Palmas Homeowners Assn. v. Terifaj*, *supra*, 33 Cal.4th at p. 82 [application of rules of statutory construction in interpreting Davis-Stirling Act].)

B. *Section 1356, Subdivision (c)(2), Whether the Balloting Was Properly Conducted*

1. *Whether the Ballots Sent to the Homeowners Complied with the Bylaws*

Under subdivision (c)(2) of section 1356 (as it existed at the time the petition was approved), the trial court may not grant the petition unless it finds "[b]alloting on the proposed amendment was conducted in accordance with all applicable provisions of the governing documents." Appellants contend that balloting was not conducted in accordance with the governing documents because the repeated extensions of the voting

deadline violated section 3.7(c) of the Restated Bylaws of the HOA (Bylaws). The Bylaws are part of the "'[g]overning documents'" of the HOA. (§ 1351, subd. (j).)

Appellants claim the balloting was not conducted in accordance with the governing documents because section 3.7(c) of the Bylaws permits only one 30-day extension of the voting deadline. Respondent contends that the voting extensions did not violate section 3.7(c) of the Bylaws and that, in any event, the requirements of section 3.7(c) of the Bylaws have been displaced by the enactment of section 1363.03 governing the conduct of homeowner association elections.

Section 3.7 of the Bylaws is entitled "Action by Written Consent of Members." That section provides that other than the election of directors, "any action which may be taken at any annual or special meeting of Members may be taken without a meeting if the [HOA] distributes a written ballot to every Member entitled to vote . . . ." As a threshold issue, we must then consider whether amendment of the CC&Rs is an action which may be taken at a special or annual meeting within the meaning of section 3.7 of the Bylaws. We conclude it is not, and the strictures of section 3.7(c) regarding voting extensions are thus inapplicable to the CC&R amendment process.

The original CC&Rs provide that "[t]his declaration may be amended only by an instrument executed and acknowledged by (i) the Owners of at least seventy-five percent (75%) of the Condominiums in the Project, and (ii) the holders of all Mortgages which are of record prior to the effective date of such amendment." This section does not otherwise specify how the written instrument is to be obtained. Further, the CC&Rs provide that at annual meetings of the HOA, the HOA shall conduct such business as shall be provided in the Bylaws.

The Bylaws provide for both meetings of the members, as well as meetings of the Board. The Bylaws do not specify that amendment of the CC&Rs can be effectuated at an annual or special meeting of members. However, the Bylaws do provide that there shall be at least one meeting of the owners each year "for the purpose of electing directors and conducting any other legitimate business of the [HOA]."

The CC&Rs and Bylaws do not appear to expressly contemplate that obtaining written consent to CC&R amendments would take place at an annual or special meeting of the members. If so interpreted, the Bylaws would directly conflict with section 1363.03.

The Bylaws were adopted in 2003. In 2005, the Legislature adopted section 1363.03, governing homeowner association elections. (Stats. 2005, ch. 450, § 3.) Subdivision (b) of section 1363.03 provides in pertinent part: "Notwithstanding any other law or provision of the governing documents, elections regarding . . . amendments to the governing documents . . . shall be held by secret ballot in accordance with the procedures set forth in this section." Thus after the passage of section 1363.03 any bylaw in conflict with that section is preempted. To the extent the Bylaws here could be interpreted as allowing amendment to occur at an annual or special meeting of the members thus triggering the applicability of section 3.7 of the Bylaws, that provision cannot be enforced.

Nothing in the language of section 1363.03 precludes a homeowners' association from adopting rules regarding elections which are not inconsistent with the provisions of the section. As a whole, the text of section 1363.03 demonstrates a legislative intent to provide minimum requirements for elections, and to preempt only those provisions of the governing documents which are in conflict with the statute. (See, e.g., § 1363.03, subd. (b) ["[a] quorum shall be required only if so stated in the governing documents]; and § 1363.03, subd. (c)(3)(H) [an election inspector is to "[p]erform any acts as may be proper to conduct the election with fairness to all members in accordance with this section . . . and all applicable rules of the association regarding the conduct of the election that are not in conflict with this section"].)

Here, however, if the Bylaws were interpreted to allow amendment to CC&Rs to occur at a meeting of the members, that rule would be in direct conflict with section 1363.03 which, among other things, requires a secret ballot to be mailed to every member "not less than 30 days" (*id.*, subd. (e)) prior to the deadline for voting, and for votes to be tallied by the inspector of elections at an open and public meeting of the directors or

members. If amendment to CC&Rs is not an act which may occur at a meeting of the members (since section 1363.03 specifically requires a secret ballot), section 3.7 of the Bylaws is wholly inapplicable to the CC&R amendment process.[5] In that case we look to the statute itself, which contains no restrictions on extensions of time to cast a ballot on amended CC&Rs. We conclude that the balloting on the proposed amendments was consistent with the applicable provisions of the governing documents and statute for purposes of section 1356.

2. *Whether the Ballots Sent to Mortgage Holders Complied with the CC&Rs*

Rosenberg also contends that the ballots sent to the mortgage holders violated article 23 of the original CC&Rs and thus the trial court abused its discretion in finding under subdivision (c)(2) of section 1356 that the "[b]alloting on the proposed amendment was conducted in accordance with all applicable provisions of the governing documents."

Article 23, section 23.1, of the original CC&Rs provides in pertinent part: "This Declaration may be amended only by an instrument executed and acknowledged by . . . the holders of all Mortgages which are of record prior to the effective date of such amendment." The letters sent to the mortgage holders stated: "If you, as a lender, do not complete and return your ballot in a timely manner indicating your disapproval of all or part of the document, it will be deemed that you have voted in favor of approving the entire Restated CC&Rs." (Bold omitted.)

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[5] Further, if section 3.7 of the Bylaws were applicable, arguably the balloting procedures employed by the HOA here did not violate that provision. Section 3.7(c) allows the Board to extend the balloting period when the time for return of the ballots has run, but no quorum achieved. Here, with the exception of the final 20 day extension, all of the previous extensions were adopted and announced weeks prior to the voting deadline. None were expressly premised on the failure to achieve a quorum. Section 3.7(c) does not state that extensions may *only* be granted for lack of a quorum.

Rosenberg argues that deeming the non-receipt of a ballot to be consent to the amendment is not "an instrument 'executed and acknowledged'" by a mortgage holder. In addition, because so many of the ballots were returned as undeliverable, "the balloting process did not even ensure simple *acknowledgement* by the mortgage holders," and the Board "did not make the . . . effort to ensure receipt, acknowledgement, and endorsement of the proposed changes by the lenders."

The record demonstrates that the HOA made reasonably diligent efforts to notify mortgage holders of the election and to seek their approval. The HOA sought mortgage holder information directly from its members and retained a title insurance company to obtain information as to the mortgage holders. Despite those efforts, 71 ballots were returned as undeliverable. Of the 10 mortgage holder ballots returned, one was a disapproval.

Even if the trial court did not consider the non-return of ballots of the mortgage holders as an approval, section 1356 still permits approval of an amendment that does not meet the voting threshold set forth in the governing documents, as long as certain requirements are met. With respect to approval by mortgage holders, section 1356 permits approval of the amendment as long as it does not "impair the security interest of a mortgagee of a mortgage or the beneficiary of a deed of trust without the approval of the percentage of the mortgagees and beneficiaries specified in the declaration, if the declaration requires the approval of a specified percentage of the mortgagees and beneficiaries." (§ 1356, subd. (e)(3).) The trial court did not abuse its discretion in failing to deny the petition under subdivision (c)(2) of section 1356 on the ground the balloting did not comply with the governing documents. Whether the amendment impaired the security interest of mortgagees under subdivision (e)(3) is discussed in section D below.

C. *Section 1356, Subdivision (c)(5), Whether the Amendment Is Reasonable*

1. *Rosenberg's Claims of Unreasonableness*

Under subdivision (c)(5) of section 1356, the trial court may not grant the petition unless it finds "[t]he amendment is reasonable." Rosenberg noted in his opening brief that the HOA did not simply amend the CC&Rs but presented the homeowners with entirely new CC&Rs. He stated: "Far from seeking and justifying a single amendment, the [HOA] bears the burden of proving the reasonableness of the wholesale replacement of the [original] CC&Rs. Aside from making conclusory statements about the more 'streamlined, user friendly, and focused on the law' Proposed CC&Rs . . . , the [HOA] has not demonstrated the reasonableness of the Proposed CC&Rs, and the Superior Court did not find that the [HOA] had done so."

Neither in his opening brief nor in the trial court did Rosenberg identify a single provision in the Restated CC&Rs that he contends is unreasonable. In his reply brief, Rosenberg listed seven paragraphs of the Restated CC&Rs, which he identified as unreasonable. He did not explain why they were unreasonable but reiterated that the HOA failed to meet its burden of establishing that the Restated CC&Rs were reasonable.

"'Perhaps the most fundamental rule of appellate law is that the judgment [or order] challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error.'" (*Ruelas v. Superior Court* (2015) 235 Cal.App.4th 374, 383, quoting *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573; accord, *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "'To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.]' [Citation.] 'Mere suggestions of error without supporting argument or authority other than general abstract principles do not properly present grounds for appellate review.' [Citation.] 'Hence, conclusory claims of error will fail.' [Citation.]" (*Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1457; accord, *Rojas v. Platinum Auto Group, Inc.* (2013) 212 Cal.App.4th 997, 1000, fn. 3.) "'[E]very brief should contain a legal argument with

citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations].'" (*Mission Shores Assn. v. Pheil*, *supra*, 166 Cal.App.4th at p. 796, quoting 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.)

While the HOA had the burden of establishing the reasonableness of the Restated CC&Rs in the trial court, Rosenberg has the burden on appeal of demonstrating that the court abused its discretion in finding the provisions reasonable. He has failed to meet that burden, and his claim of unreasonableness fails.

2. *Litvak and Bagnall's Claims of Unreasonableness*

For purposes of ruling on a section 1356 petition, "[t]he term 'reasonable' . . . has been variously defined as 'not arbitrary or capricious' [citations], 'rationally related to the protection, preservation and proper operation of the property and the purposes of the Association as set forth in its governing instruments,' and 'fair and nondiscriminatory.' [Citation.]" (*Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, 577; see also *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 382.) In determining the reasonableness of a provision of CC&Rs, the court's focus is on the effect of that provision on the development as a whole, not its effect on individual homeowners. (*Nahrstedt*, *supra*, at pp. 387, 389.)

a. Elimination of Easements of Enjoyment

Litvak and Bagnall contend that the Restated CC&Rs are unreasonable because they eliminate easements owned by the homeowners. Section 5.3 of the original CC&Rs, entitled "Easements of Enjoyment," provided: "Every Owner shall have a right and nonexclusive easement of enjoyment in and to all the Common Area included within the Project, wherever located, and notwithstanding location on other than his Condominium Lot, and such easement shall be appurtenant to and for the benefit of his Unit . . . ."

The Restated CC&Rs contain no provision for easements of enjoyment. They provide in section 2.2, "**Right of Ownership**. Each Member shall have the following ownership interests in the Development: (i) fee title interest in a Unit, (ii) the right to exclusive use of his or her Exclusive Use Common Area, and (iii) an equal, undivided, fractional interest, as tenant-in-common, in the Common Area situated within the Common Area Lot on which his or her Detached Dwelling or Townhouse is situated . . . ."[6] In addition, section 2.3 of the Restated CC&Rs provides that "[w]hen an Owner has an actual, bonafide need to maintain, repair or replace his or her Unit or Exclusive Use Common Area, in order to access such area when there is no other reasonable alternative, he or she shall have a nonexclusive easement over all portions of the Common Area, Exclusive Use Common Area, and Common Area Lots." Section 16.1 of the Restated CC&Rs provides that all homeowners "shall have and are hereby granted the right to use and enjoy the Recreational Facilities . . . ."

Litvak and Bagnall did not raise this issue of elimination of easements of enjoyment in the trial court. Having not raised it below, the claim is waived. (*Fourth La Costa Condominium Owners Assn. v. Seith*, *supra*, 159 Cal.App.4th at p. 582, fn. 5 ["[t]he first restated CC&R's contain dozens of new provisions and amended provisions, and the trial court could not be expected to comb through them and independently research each one to determine its reasonableness" and "[i]t was incumbent on [the appellant] to raise all objections she had"].)

Even if we were to consider the claim, Litvak and Bagnall have not shown it would have been an abuse of discretion to find the easement provision reasonable. While the restated CC&Rs may eliminate certain easement rights previously held by

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[6] The Restated CC&Rs define "'**Common Area**'" as "the entire Development except for the Units and Exclusive Use Common Areas . . . ." (Restated CC&Rs, § 1.7.) "'**Exclusive Use Common Areas**'" are portions of the common areas "reserved for the exclusive use of one Owner . . . ." (*Id*., § 1.18.) "'**Common Area Lots**'" are "the separate parcels of real property" on which the development was constructed. (*Id*., § 1.8.)

unit owners, that does not in and of itself dictate that the amendment is unreasonable. Homeowners are specifically granted the right to enjoy recreational facilities, no matter upon which lot their unit is located. The HOA argues that the common areas on lots other than those upon which the unit is located consist of unusable slope area and some landscaped areas. Litvak and Bagnall fail to show that a loss of easements to these areas is unreasonable, i.e., arbitrary or capricious or not rationally related to the protection, preservation or proper operation of the property and the purposes of the HOA as set forth in its governing instruments.

b. Elimination of Easements Created by the Developer

Section 5.4 of the original CC&Rs provided that "[i]f any part of a Unit encroaches or shall hereafter encroach upon the Common Area, or upon another Unit, a valid easement shall exist for the encroachment and for the maintenance of same, so long as the encroachment shall and does exist." Section 2.9 of the Restated CC&Rs provides: "As of the date this Declaration is adopted, if any part of a Unit or Improvement encroaches upon the Common Area, by inadvertence and without intent of the Owner or his or her predecessors, a valid easement exists for the encroachment and for the maintenance of same so long as there is no serious threat of injury or damage to other Owners or the [HOA]."

Litvak and Bagnall argue that "[t]he language of [section] 2.9 [of the Restated CC&Rs] disallows an easement if the predecessor in interest acted intentionally. In laying out the locations of the buildings, the developer often acted intentionally and without regard for the exact location of the homes, as identified on the condominium plan. Thus, overnight, easements for encroachments that might have existed for thirty (30) or more years were eliminated."

Litvak and Bagnall point to no evidence to support their claim of intentional encroachment by the developer or of elimination of 30-year-old easements. The theoretical possibility that section 2.9 of the Restated CC&Rs could eliminate easements created when the properties were developed does not render the section unreasonable.

The HOA persuasively argues that nothing in the new CC&Rs would retroactively affect an encroachment which was lawful under the original CC&Rs or revive an expired statute of limitations. Litvak and Bagnall have failed to demonstrate that the challenged provision of the Restated CC&Rs is unreasonable.

c. Judicial Reference

Section 10.11 of the Restated CC&Rs provides: "Any dispute arising from or related to the Governing Documents or to the management and operation of the [HOA] or the Development shall be submitted for determination by judicial reference pursuant to [s]ections 638[] et seq. of the Code of Civil Procedure.[7] The decision of the referee shall be the decision of the court and shall be entered as a judgment pursuant to [s]ection 644[, subdivision] (a) of the Code of Civil Procedure. The decision of the referee shall be appealable in the same manner as any other court judgment or order is appealable." (Italics omitted.) We conclude this provision is not unreasonable.

Litvak and Bagnall contend this provision is unreasonable because "the parties lose the right to have a public trial by a duly authorized public officer," they must pay in advance the high cost of a private judge, and they lose the right to a jury trial.[8] Litvak and Bagnall claim "[t]he courts have already determined that a judicial reference is not appropriate for a homeowners association."

Treo @ Kettner Homeowners Assn. v. Superior Court (2008) 166 Cal.App.4th 1055 (*Treo*), on which Litvak and Bagnall rely, involved a construction defect lawsuit

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7 Code of Civil Procedure section 638 provides: "A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties: [¶] (a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision."

8 The HOA does not appear to dispute that judicial reference would result in the elimination of a jury trial.

by a homeowners association against a developer. The CC&Rs required disputes between the association and the developer to be decided by a judicial referee. (*Id*. at p. 1059.) The association challenged the trial court's order for general reference on the ground the CC&Rs were not a contract within the meaning of Code of Civil Procedure section 638, and the judicial reference provision was unconscionable and unenforceable. (*Ibid*.)

The *Treo* court ultimately determined the judicial reference procedure in the CC&Rs could not be enforced. The court noted that waiver of the right to a jury trial requires "actual notice and meaningful reflection." (*Treo, supra*, 166 Cal.App.4th at p. 1066.) While acknowledging that Code of Civil Procedure section 638 allowed parties to agree to a judicial reference by contract in lieu of a jury trial, the *Treo* court concluded that CC&R provisions are not the type of agreement contemplated under that section. (*Id.* at p. 1067.) Although the question presented here regarding the propriety of the judicial reference requirement in the Restated CC&Rs differs somewhat from that presented in *Treo*,[9] we recognize our conclusion that the judicial reference provision is reasonable cannot be fully squared with the *Treo* decision.

We are guided in our conclusion by the California Supreme Court's more recent analysis in *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223 (*Pinnacle*). *Pinnacle* upheld as reasonable a provision in CC&Rs that required disputes between the homeowners association and the developer to be resolved through binding arbitration. The California Supreme Court reviewed the history of enforceability of CC&Rs as equitable servitudes, concluding that "there appears no question that, under the Davis-Stirling Act, each owner of a condominium unit either has expressly consented or is deemed by law to have agreed to the terms in a recorded

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[9] *Treo* involved CC&Rs created by the developer without agreement by the homeowners and prohibited amendment of the provision without the developer's consent. Here the Restated CC&Rs were created by the HOA and submitted to a vote by the homeowners. Further, the Restated CC&Rs do not prohibit the reference provision from being subsequently amended.

declaration." (*Id*. at p. 241.) *Pinnacle* specifically disagreed with the lower court's finding that the arbitration provision embedded in a recorded declaration was not binding because "'the waiver of the right to a jury requires an actual "agreement."'" (*Id*. at p. 244.)

While *Pinnacle* did not expressly overrule *Treo*, it distinguished and impliedly criticized that holding. The *Pinnacle* court observed that *Treo* had relied on the Supreme Court's prior decision in *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944. *Pinnacle* noted that "*Grafton* also distinguished predispute jury waivers from the very type of predispute reference agreement at issue in *Treo*, noting that Code of Civil Procedure section 638 authorizes reference agreements." (*Pinnacle*, *supra*, 55 Cal.4th at p. 245, fn. 10.)

Alternative dispute resolution through arbitration, just as through judicial reference, requires agreement by the parties. (Compare Code Civ. Proc., § 1281 with Code Civ. Proc., § 638.) *Pinnacle* found the binding nature of CC&Rs to satisfy this requirement for arbitration. If the binding nature of CC&Rs equates to an agreement to arbitrate, it is equally valid as to an agreement for reference. *Treo*'s additional requirement that a reference agreement be the product of "actual notice and meaningful reflection" suffers from two infirmities. That condition is not contained in the language of Code of Civil Procedure section 638, and is contrary to the reasoning in *Pinnacle*. We conclude that the reference provision in the Restated CC&Rs constitutes a predispute agreement authorized by Code of Civil Procedure section 638, and does not violate the right to a jury trial.

Finally, Litvak and Bagnall have failed to show that the costs involved, or non-public nature of dispute resolution through reference renders the reference provision otherwise unreasonable.

d. Regulation of Pets

Section 6.13 of the original CC&Rs provided "that dogs, cats or other domestic household pets may be kept in a Unit and permitted upon the Common Appurtenant

Area surrounding the Unit and upon any other portion of the Common Association Area designated therefor by the [HOA] . . . ." However, such pets could not be kept "in unreasonable numbers" or "for any purpose if there would be involved an odor or noise such as would unreasonably disturb the use and enjoyment of any portion of the Project by the Owners." Pet owners agreed to indemnify the Board, HOA, and other homeowners for losses caused by their pets and to accept liability for such losses.

Section 9.19 of the Restated CC&Rs contains similar provisions. It provides: "a. ***Number and Size.*** The Board may decide in its absolute discretion whether the number or size of pets living in a Unit is unreasonable, and it may include such standards in the Rules.[10] [¶] . . . [¶] c. ***Removal.*** The Board may cause the removal of any animal or pet which in its subjective opinion is disturbing the quiet enjoyment, health, safety or welfare of any other Owner."

Litvak and Bagnall challenge as unreasonable the absolute discretion given to the Board to determine which pets may live in a unit and to order a pet removed from a unit. They claim the Board should not be able to take pets away "without any hearing and without any criteria."

Both *Nahrstedt v. Lakeside Village Condominium Assn.*, *supra*, 8 Cal.4th 361 and *Villa De Las Palmas Homeowners Assn. v. Terifaj, supra,* 33 Cal.4th 73 involved challenges to pet restrictions in CC&Rs. In both cases, the court upheld a use restriction prohibiting pets entirely, finding such a restriction "not unreasonable as a matter of law." (*Villa De Las Palmas*, *supra*, at p. 93.)

Here, rather than a complete pet ban, the Restated CC&Rs vest discretion in the Board to determine whether the number or size of pets living in a unit is unreasonable and to include standards in its rules. Litvak and Bagnall argue that investing the Board with "sole discretion" renders the restriction unreasonable as a matter of law. However,

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10 The rules are the "rules and regulations . . . adopted and amended from time to time in accordance with [s]ections 1357.100[] et seq. . . ." (Restated CC&Rs, § 1.33, italics omitted.)

numerous courts have reviewed the exercise of discretion by a homeowners board and imposed a requirement that the discretion be exercised in good faith and not in an arbitrary or capricious fashion. (See, e.g. *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 265 [discretion to determine method for eradicating termites]; *Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772 [discretion to approve landscaping plans]; and *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 650 [discretion to approve or disapprove construction plans].) Thus, while the Restated CC&Rs vest "sole discretion" in the Board to determine the appropriate number and size of pets, the Board will be obligated to exercise its discretion in good faith in a non-arbitrary or capricious manner.

Litvak and Bagnall also challenge the grant of authority to the Board to "cause the removal of any . . . pet . . . which in its subjective opinion is disturbing the quiet enjoyment, health, safety or welfare of any other Owner." The HOA argues that this provision does not allow self-help; the HOA would be obligated to enforce this provision in the same manner as it imposes other discipline through a hearing process before the Board. As the Restated CC&Rs do not otherwise define the method by which a pet could be removed, the HOA's interpretation that any method would require a hearing before the Board is consistent with the body of law discussed above requiring a Board to exercise its discretion in a non-arbitrary or capricious manner. Appellants have not shown that the trial court abused its discretion in concluding the Restated CC&R provisions concerning pets were reasonable.

e. Maintenance and Improvements

Section 4.9 of the Restated CC&Rs provides: "If an Owner fails, in the Board's opinion, to adequately maintain, repair or replace the exterior of his or her Unit or Exclusive Use Common Area, or any elements thereof, the [HOA] may, after giving not less than twenty (20) days written notice to the Owner (except in case of an emergency), enter the Unit or Exclusive Use Common Area and make the necessary repairs or perform maintenance on the Owner's behalf. In such event, Owner shall reimburse the [HOA] for

all costs incurred and should Owner fail to do so the [HOA] may impose a Special Assessment on the Owner for the cost which shall be enforceable by any means available under this Declaration of California law."

Article 8 of the Restated CC&Rs provides that "[i]t is the [HOA's] duty to exercise architectural and landscaping control over Improvements constructed or installed in the Development . . . ." The Board is required to appoint an architectural and landscaping committee (§ 8.2), and no alteration or improvement to the exterior of a Unit may be commenced without prior approval of the committee (§ 8.3). In making a decision whether to approve an alteration or improvement, "the Committee may properly consider (i) its subjective belief that the plans are or are not consistent with the general design, construction, appearance, and harmony of other improvements in the Development . . . ." (§ 8.6.)

Litvak and Bagnall challenge as unreasonable these provisions which allow the Board to employ its "**sole 'opinion'**" in requiring homeowners to perform maintenance or repairs and allow the architectural and landscaping committee to base its decisions on proposed improvements on its "subjective belief." Courts "have long upheld such general covenants vesting broad discretion in homeowners associations or boards to grant or withhold consent to construction." (*Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 977) [finding discretion to apply subjective aesthetic criteria to be reasonable].) Litvak and Bagnall fail to show that a grant of discretion to determine the need for maintenance should be treated any differently. We uphold the trial court's determination that such provisions in the Restated CC&Rs are reasonable.[11]

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[11] As the HOA points out, the original CC&Rs allowed the Board to order a homeowner to make repairs "as may be deemed necessary in the judgment of the Board." (§ 6.2.) Article 12 of the original CC&Rs provided the architectural committee with broad discretion over proposed improvements. Thus, the discretion provided in the Restated CC&Rs is not significantly broader than that provided in the original CC&Rs.

f. Limitation of Liability

Section 3.7 of the Restated CC&Rs provides that "[i]n the absence of clear and convincing evidence of negligence or willful misconduct," the HOA and its officers and agents will not be liable for loss or damage. Litvak and Bagnall challenge the "clear and convincing evidence" standard as unreasonable particularly since the Restated CC&Rs "did not create a *clear and convincing* burden of proof for claims made *by* the Board ***against*** a homeowner."

The original CC&Rs did not contain a clear and convincing evidence burden of proof regarding misconduct by the Board. However, the original CC&Rs limited liability unless "gross negligence" on the part of the HOA and its officers and agents was shown, not simple negligence. (§ 8.11.)

In *Franklin v. Marie Antoinette Condominium Owners Assn.* (1993) 19 Cal.App.4th 824, the court found an exculpatory clause in CC&Rs which provided that the association was not liable for damages to property in the project resulting from leaking water unless it was grossly negligent to be reasonable. The court reasoned: "[b]y reducing the Association's risk of liability, the condominium owners have reduced their own risk. The condominium owners are, after all, the ones who are assessed to pay for improvements, insurance premiums, liability judgments not covered by insurance, and the like. . . . A reasonable and fair reduction of the Association's risk which mutually benefits the condominium owners as a whole does not suddenly become violative of public policy upon the nonnegligent infliction of property damage to an individual unit. While plaintiff may bear the loss in this case, she may benefit in the next." (*Id*. at p. 833.)

Similarly here requiring clear and convincing evidence of negligence before the HOA may be held liable may benefit the owners as a whole by reducing the potential the owners' assessment will be increased to cover the costs of HOA liability. Litvak and Bagnall have failed to demonstrate that the clear and convincing evidence standard in section 3.7 of the Restated CC&Rs is unreasonable.

g. Occupancy Restrictions

Section 9.16 of the Restated CC&Rs provides that "[t]he maximum number of Persons who may reside in any Unit at any time shall not exceed two (2) Persons per bedroom, plus one. . . . The [HOA] may require Owners to disclose in writing the names of the Persons residing in the Unit at any time."

Litvak and Bagnall assert that the occupancy restrictions may open the HOA up to liability under the Federal Fair Housing Act (42 U.S.C. § 3604(b)), the California Fair Housing Act (Gov. Code, § 12955) and the Unruh Civil Rights Act (Civ. Code, § 51), which bar discrimination in housing. Even "facially neutral numerical occupancy restrictions" may violate the law "if they have a discriminatory effect, irrespective of intent." (*Fair Housing Council of Orange County, Inc. v. Ayres* (C.D. Cal. 1994) 855 F.Supp. 315, 318.)

However, restrictions on population density are valid if tied "'to objective standards such as across-the-board minimum floor space per person requirement, person per quantum of open space, persons per a bedroom or bathroom, or any other generally accepted standard which defines "overcrowding."' [Citation.]" (*Park Redlands Covenant Control Committee v. Simon* (1986) 181 Cal.App.3d 87, 97; see *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 131-134.) Litvak and Bagnall do not identify any discriminatory effect of section 9.16 of the Restated CC&Rs but merely claim it "places the HOA in peril of lawsuits based on violations of myriad constitutional rights." The theoretical possibility that section 9.16 could lead to a discrimination lawsuit does not render the section unreasonable.

Litvak and Bagnall also claim that "[n]o reasonable person could believe that one can be forced to disclose the identity of guests or those persons living in one's home. Such an invasion of privacy cannot be justified." However, those who choose to live in a common interest development are necessarily subject to restrictions on the use of their property. (*Nahrstedt v. Lakeside Village Condominium Assn.*, *supra*, 8 Cal.4th at p. 373 ["restrictions on the use of property in any common interest development may limit activities conducted in the common areas as well as in the confines of the home itself"].)

In support of its petition, the HOA presented the declaration of Robert Avila, its general manager, who stated that Bel Air Ridge has 377 members living on 100 acres, and the development is not gated. Recreational facilities are for the use of residents and guests only, and entry to those facilities is secure since members of the public are able to enter the development. "To provide safety and security, our staff needs access to the names of all residents of the community" to make sure only authorized people are using the facilities. "In addition, we employ a security company that has a roving patrol in order to prevent break-ins and burglaries. They must be able to determine if a person they see inside or adjacent to a property is a resident and thus authorized to be there." Because use of recreational facilities and presence in portions of the development is restricted to residents only, it is not unreasonable to require homeowners to disclose who is residing in their units.

h. Executive Sessions of the Board

Section 1363.05 of the Davis-Stirling Act, the Common Interest Development Open Meeting Act (*id*., subd. (a)), provides that any member of a homeowners association may attend meetings of the board of directors "except when the board adjourns to, or meets solely in, executive session to consider" certain matters including "member discipline." (*Id*., subd. (b).) Section 10.5 of the Restated CC&Rs, governing hearing procedures, provides that before the Board may impose a fine or suspension, "[t]he Board shall convene a hearing in executive session to consider the issue of possible discipline against the Owner." (*Id*., subd. a.) The homeowner has the right to attend the executive session and to have an attorney present. (*Id*., subd. c.)

Litvak and Bagnall contend a homeowner should be allowed the choice to have his or her discipline considered at a public meeting. But the question before us is not whether a homeowner should be allowed such a choice but whether the requirement that discipline be considered in executive session is reasonable, i.e., "'not arbitrary or capricious' [citations], 'rationally related to the protection, preservation and proper operation of the property and the purposes of the Association as set forth in its governing

instruments,' and 'fair and nondiscriminatory.' [Citation.]" (*Fourth La Costa Condominium Owners Assn. v. Seith*, *supra*, 159 Cal.App.4th at p. 577; see also *Nahrstedt v. Lakeside Village Condominium Assn.*, *supra*, 8 Cal.4th at p. 382.)

Because the Davis-Stirling Act permits the Board to consider member discipline in executive session and there is a rational reason for doing so—allowing matters of discipline to remain private in order to avoid embarrassing homeowners or making their private business public—we conclude the trial court did not err in finding section 10.5 of the Restated CC&Rs is reasonable.

i. Power To Assess Fines and Accelerate Dues

Section 10.4 of the Restated CC&Rs gives the Board the power "to assess fines against any Owner who violates the Governing Documents, or if there is a violation by his or her Residents or Guests. In the case of ongoing violations the fine may be imposed on a daily basis. The Board shall adopt a fine schedule as described in [s]ection 1363[, subdivision] ([f]) . . . and may impose other conditions on the imposition of fines in the Rules. No fine may exceed $500 per incident, or, in the case of continuing violations, $500 for the first day and $200 per day thereafter."

Section 5.8 of the Restated CC&Rs governs delinquencies in payment of assessments. Subsection c provides: "At the Board's election the total Regular Assessment due to be paid by the delinquent Owner during that fiscal year may be accelerated in which case the total annual Regular Assessment will be due and payable immediately by that owner."

Litvak and Bagnall claim these provisions grant excessive power to the Board. They complain that "a simple violation that goes for a month without abatement may result in fines totaling $6,300.00; or, over $72,000.00 per year." In addition, "[t]here is absolutely no restriction on what the Board may consider or how it will exercise its power." Finally, they point out that under "[s]ection 1365.1 of the Davis-Stirling Act, no fines under $1,800.00 can be a basis for a nonjudicial foreclosure. With fines permissible

under the new scheme, it is conceivable that all violations could result in someone losing their home."

Subdivision (f) of section 1363 requires the board of a homeowners association intending to impose monetary fines to "adopt and distribute to each member . . . a schedule of the monetary penalties that may be assessed for those violations . . . ." This schedule serves as a limitation on the Board's exercise of discretion to impose fines.

Both the Davis-Stirling Act and the Restated CC&Rs contain procedural safeguards against wrongful foreclosure. Litvak and Bagnall cite no authority for the proposition that a homeowners association cannot foreclose on a unit for nonpayment of fines where the statutory prerequisites have been followed.[12]

Litvak and Bagnall also complain that the Restated CC&Rs provide "[n]o standards, procedures, guidelines or requirement[s]" for acceleration of annual regular assessment payments. As previously discussed, discretion must be exercised in good faith and in a non-arbitrary and fair manner.

Under the circumstances, we conclude the challenged provisions of the Restated CC&Rs are "'not arbitrary or capricious' [citations], 'rationally related to the protection, preservation and proper operation of the property and the purposes of the Association as set forth in its governing instruments,' and 'fair and nondiscriminatory.' [Citation.]" (*Fourth La Costa Condominium Owners Assn. v. Seith*, *supra*, 159 Cal.App.4th at p. 577; see also *Nahrstedt v. Lakeside Village Condominium Assn.*, *supra*, 8 Cal.4th at p. 382.)

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[12] The HOA argues that under section 1367, subdivision (b), "foreclosure is for delinquent regular and special assessments only and no matter what may be stated in the governing documents a fine cannot be treated as an assessment." Section 10.6 of the Restated CC&Rs states: "Unless prohibited by law, any fine imposed pursuant to this Declaration shall constitute a Special Assessment against the Owner and shall be enforceable by any means available under this Declaration or as prescribed in the Civil Code." Because Litvak and Bagnall do not establish that foreclosure for nonpayment of fines is per se unreasonable, we need not address the question whether a homeowners association may treat delinquent fines as a special assessment.

Accordingly, the trial court did not abuse its discretion in finding these provisions reasonable.

D. *Section 1356, Subdivision (e)(3), Whether the Amendment Impaired the Security Interests of the Mortgagees*

Subdivision (e)(3) of section 1356 provides that "the court shall not be empowered by this section to approve any amendment to the declaration" if the amendment "[w]ould impair the security interest of a mortgagee of a mortgage or the beneficiary of a deed of trust without the approval of the percentage of the mortgagees and beneficiaries specified in the declaration, if the declaration requires the approval of a specified percentage of the mortgagees and beneficiaries."

Rosenberg claims "there is no doubt that the [Restated] CC&R's substantially impair the security interests of mortgagees" by "*eliminat*[*ing*] the rights of lenders to notification and approval of some amendments that may affect their security interests." This is because, he claims, section 18.1 of the Restated CC&Rs "allows for amendments without the consent of any lender."

We reject the argument put forward by the HOA that Rosenberg lacks standing to assert this claim (see *Quail Lakes Owners Assn. v. Kozina*, *supra*, 204 Cal.App.4th at pp. 1137-1139). Unlike the objector in *Quail Lakes*, Rosenberg is not attempting to enforce the due process rights of third persons, but rather is contesting whether the statutory requirements of section 1356 have been met.

Although he has standing to raise the issue, Rosenberg fails to demonstrate that the Restated CC&Rs impair the security of the mortgage holders. Section 18.1 of the Restated CC&Rs merely allows the Board "by unanimous vote [to] permit minor amendments to the Declaration which only correct errors associated with the restatement process, typos, internal inconsistencies, and any other technical errors."

Section 17.2 of the Restated CC&Rs, by contrast, expressly protects a mortgagee against amendments to which it has not agreed: "No amendment to this Declaration shall adversely affect the rights of the Mortgagee of any Mortgage . . . provided that any such

mortgage is recorded prior to the recordation of such amendment; and provided further that the benefit of this Section shall not apply to the Mortgagee of any such Mortgage if such Mortgagee shall (i) join in the execution of such document or (ii) approve said amendment in writing."

We fail to discern any impairment of the security interests of the mortgagees.

E. ***Section 1356, Subdivision (e)(2), Whether the Amendment Eliminated Rosenberg's Rights and Status as a Declarant***

Section 1356, subdivision (e)(2), prohibits the court from granting the petition if the amended CC&Rs "[w]ould eliminate any special rights, preferences, or privileges designated in the declaration as belonging to the declarant, without the consent of the declarant."

The declarant in the original CC&Rs is BGP Corporation which signed a declaration agreeing to deletion of all references to the declarant, and acknowledging it had no ongoing rights or interest under the CC&Rs. Rosenberg submitted a copy of a recorded document indicating that in 1977 additional declarants were added, including Fountainwood-Agoura, a general partnership. Rosenberg stated in a declaration, "My family, including me specifically, comprise Fountainwood-Agoura." He claims, "[a]ccordingly, as set forth in Rosenberg's Declaration, Rosenberg is authorized to act on behalf of Fountainwood-Agoura, who is a Declarant." The HOA's counsel provided a declaration indicating that there is no reference to Fountainwood-Agoura with the Secretary of State's office.

It is Rosenberg's burden to demonstrate that he is a declarant, or authorized to represent the interests of the declarant. A statement that his family, including him, "comprises" Fountainwood-Agoura is insufficient to establish that he is authorized to represent Fountainwood-Agoura. (See Corp. Code, §§ 16301-16308 [authority of partners to represent partnership].) Rosenberg does not state his position in the general partnership, if any, nor his authority to act on its behalf.

Moreover, in his opening brief, Rosenberg failed to identify any "special rights, preferences, or privileges" that the Restated CC&Rs eliminated. In response, the HOA claimed that the only special rights reserved for the declarant expired in 1986, when development and sale of the units was complete. Rosenberg, in his reply brief, claims that "multiple sections of the original CC&Rs continue to grant special rights and privileges to the Declarant that survive the building and development phase." He lists those sections, without any discussion of how they are relevant, i.e., what special rights they currently provide the declarants.

Ordinarily, we do not consider points raised for the first time in reply briefs unless good cause is shown for the failure to raise them in the opening brief. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4; *In re Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 355.) Rosenberg makes no showing of good cause. He also includes no "'meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error.'" (*Multani v. Witkin & Neal, supra,* 215 Cal.App.4th at p. 1457.) We therefore deem his claim of error forfeited.

F. *Whether the Trial Court Weighed the Relevant Factors*

Rosenberg argues that the record does not reflect that the trial court weighed the relevant factors in considering the section 1356 petition (*Quail Lakes Owners Assn. v. Kozina*, *supra,* 204 Cal.App.4th at p. 1140), requiring reversal of the order granting the petition. However, the record reflects that the parties discussed the requirements for granting a section 1356 petition and the trial court read and considered those papers before ruling there was good cause for granting the petition. Nothing more was required. (*Ibid*.)

G. *Whether the Petition and Solicitation for Votes Were Deficient, Inaccurate and Misleading*

Litvak and Bagnall contend the section 1356 petition and the documents sent to homeowners to solicit votes on the Restated CC&Rs were deficient, inaccurate, and

misleading. In particular, they claim the comparison chart between the original CC&Rs and the Restated CC&Rs was so deficient that it "must be deemed to be a violation of a basic equitable principle that a person seeking equity must act with equity and fairness." Therefore, they claim, the HOA acted with unclean hands and should have been denied relief.

Unclean hands is an affirmative defense which should be raised in the trial court. (See *Park Place Estates Homeowners Assn. v. Naber* (1994) 29 Cal.App.4th 427, 433; 3 Witkin, Cal. Procedure (5th ed., 2014 supp.) Actions, § 622A, p. 64.) Neither Litvak nor Bagnall raised the issue of unclean hands in the trial court. They therefore cannot raise it on appeal. (Cf. *People v. Simmons* (2012) 210 Cal.App.4th 778, 793 [factual determinations related to the statute of limitations waived if not raised at trial]; *JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1526 [res judicata is an affirmative defense which must be pled or is waived]; *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 812-813 [affirmative defenses must be pled or are waived].)

As to their claim that the documents sent to the homeowners were deficient, inaccurate, and misleading, Litvak and Bagnall made that claim below, and the trial court impliedly found it did not provide a basis for denying the section 1356 petition. On appeal, they argue in their opening brief that the documents did not clearly explain how the Restated CC&Rs differed from the original CC&Rs, and the chart in which the Board attempted to list the major differences between the two documents provided little substantive information and was so vague as to be misleading as to the nature of the changes. Other than noting that the provisions to which they now take exception were not identified in the chart, Litvak and Bagnall do not point to specific misleading portions of the documents or cite any authority to support a claim that the failure to set forth the changes in the CC&Rs is grounds for denying the petition.

In its August 9, 2011 letter to the homeowners, accompanying the sixth draft of the proposed Restated CC&Rs, the Board stated: "We wish to stress that this is a new document, not a copy of our current document with a few isolated changes. Therefore, it

is not possible to simply send you a mark up of what we have now to show you the changes. However, while we encourage you to actually read the proposed Restated CC&Rs, which are very streamlined over what we have now, enclosed is a chart in which we attempt to list some of the major differences between the existing CC&Rs and the proposed Restated CC&Rs. [¶] . . . [¶] We realize the enclosed proposed Restated CC&Rs, though shorter than the current document, are still lengthy. However, we urge each and every [HOA] Member to participate in this very important process by reading the document in its entirety."

In the September 30, 2011 letter accompanying the final draft of the Restated CC&Rs, the Board noted that it had made changes to the proposed Restated CC&Rs previously distributed in response to input received from the homeowners, and it was enclosing a redlined version showing these changes. It again encouraged the homeowners to read the entire document. The Board repeated this exhortation in subsequent letters.

Litvak and Bagnall do identify in their reply brief portions of the comparison chart which they claim contained "misinformation." The claimed misinformation is the omission from the chart of what Litvak and Bagnall consider to be important information, such as the failure to notify the homeowners about the provision regarding judicial reference, the Board's power to remove pets based on its subjective opinion, and the Board's power to accelerate annual regular assessment payments based on delinquency.

Litvak and Bagnall also claim that they presented evidence they were misled. Litvak stated in his declaration that in discussions with other homeowners, when he mentioned the portions of the Restated CC&Rs to which he objected, he "was met with uniform concern and confusion." Additionally, "[i]n reviewing the documents, it was impossible to discern the substantive changes being made. Substantial time was necessary to compare the two documents, requiring a substantial number of hours and much of my legal experience to get an understanding of the changes."

Litvak and Bagnall conclude that due to the "misrepresentation" in the comparison chart, the HOA "should be deemed to have failed to meet their burden of proof under . . . [s]ection 1356 (e.g. that the amendment was reasonable)."

These are all points that Litvak and Bagnall should have raised in their opening brief, and their failure to do so forfeits the points on appeal. (*Julian v. Hartford Underwriters Ins. Co.*, *supra*, 35 Cal.4th at p. 761, fn. 4; *In re Marriage of Turkanis & Price*, *supra*, 213 Cal.App.4th at p. 355.) In any event, that the Restated CC&Rs were long and required a substantial amount of time to review, that there were portions which may have been confusing to a layperson, and that the comparison chart did not contain an in-depth analysis of the changes from the original CC&RS, does not necessarily make the Restated CC&Rs unreasonable. Litvak and Bagnall point to no requirement that the Board provide the homeowners with an in-depth comparison chart. Moreover, in addition to the chart, the Board held two "town hall" meetings for comments and questions from the homeowners regarding the proposed Restated CC&Rs.

Neither do Litvak and Bagnall cite any authority for the proposition that proof of reasonableness within the context of a section 1356 petition focuses on the steps taken in seeking homeowner votes on proposed amendments to CC&Rs rather than the provisions of the amended CC&Rs themselves. Section 1356, subdivision (c)(3) and (5), provide that the court may grant the petition if "[a] reasonably diligent effort was made to permit all eligible members to vote on the proposed amendment," and "[t]he *amendment* is reasonable." (Italics added.)

Litvak and Bagnall have failed to meet their burden of demonstrating that the trial court abused its discretion in granting the section 1356 petition based on deficiencies in the documents sent to the homeowners regarding the differences between the original CC&Rs and the Restated CC&Rs.

DISPOSITION

The order is affirmed. The HOA shall recover its costs on appeal from Rosenberg and from Litvak and Bagnall.

STROBEL, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.