[Cite as *Nikolai v. Deer Run Owners' Assn.*, 2009-Ohio-6590.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

PAUL J. NIKOLAI, et al.	:	
	:	Appellate Case No. 23503
Plaintiff-Appellees	:	
	:	Trial Court Case No. 2008-CR-0628
v.	:	
	:	
DEER RUN OWNERS' ASSOCIATION	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 11th day of December, 2009.

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BROGAN, J.

{¶ 1} The Deer Run Owners' Association ("Deer Run") appeals from the trial court's declaratory judgment that unanimous approval is required to amend Deer Run's governing document to reclassify condominium roofs from "common areas" to "limited common areas."

{¶ 2} In its sole assignment of error, Deer Run contends the trial court erred in entering summary judgment in favor of appellees Paul and Carolyn Nikolai on their complaint for declaratory judgment. Deer Run argues that reclassifying the roofs did not require unanimous approval from condominium unit owners. Instead, Deer Run asserts that approval from only seventy-five percent of the owners was required.

{¶ 3} The facts underlying the present appeal are undisputed. Deer Run is a non-profit corporation that administers and maintains property known as Deer Run condominiums, a community consisting of unconnected, single-family condominium units. The Nikolais own a condominium unit in the community, which is governed in part by a document known as the "original declaration." Deer Run's original declaration has been amended over the years to account for additional units being built.

{¶ 4} Deer Run's original declaration defines a "unit" as the interior of a building in the community. A "unit owner" is a person who owns the fee simple estate in a unit along with an undivided interest in the "common areas and facilities." Under the declaration,"common area and facilities" include all property and improvements other than the individually owned units. The declaration defines "limited common areas" as a subset of common areas. It provides that "limited common areas" are "those common areas serving exclusively one unit or more than one but less than all units, the enjoyment, benefit or use of which are reserved by [the] declaration to the lawful occupants of the unit or units served." Deer Run's declaration states that common areas are owned by the unit owners as tenants in common. It further provides that each unit owner's undivided interest in common areas "is based on the proportion that the size (square footage) of the unit bears to the aggregate size (square footage) of all units[.]"

Under the declaration, each unit owner enjoys a non-exclusive right to use the common areas for all permitted purposes.

{¶ 5} As set forth above, however, with regard to the subset of common areas identified as limited common areas, the declaration restricts "enjoyment, benefit, or use" to the occupants of the unit or units served. Article VIII of the original declaration identifies certain common areas that are deemed limited common areas "designated and reserved for the exclusive use of the appurtenant unit or units." Prior to November 5, 2003, these limited common areas included "[t]he exterior surface of the building containing a unit, *excluding the roof and skylights* * * *." (Emphasis added). As a result of this exclusion, unit roofs were classified as common areas rather than limited common areas.

{¶ 6} On November 5, 2003, Deer Run filed a fifty-ninth amendment to the original declaration. This amendment, which had been approved by at least seventy-five percent but less than all of the unit owners, reclassified unit roofs from common areas to limited common areas and made individual unit owners, rather than the Association, responsible for roof repair and replacement. Most amendments to Deer Run's original declaration require approval from seventy-five percent of unit owners. However, an amendment altering "the percentage of interest in the common areas and facilities of each unit as expressed in the original declaration" requires unanimous approval pursuant to both Article XX, Section B of the original declaration and former R.C. 5311.04(D) as it existed on November 5, 2003.[1]

[1]Effective July 20, 2004, the General Assembly rewrote portions of the Ohio Condominium Act, R.C. Chapter 5311. The act now refers to "common areas" as "common elements" and "limited common areas" as "limited common elements." Deer

{¶ 7} The Nikolais filed a multi-count complaint against Deer Run on January 18, 2008, seeking declaratory relief and a quieting of title. Deer Run responded with a counterclaim and a third-party complaint. By agreed entry, the parties ultimately dismissed all of their claims except count one of the Nikolais' complaint, which sought declaratory judgment as to the validity of the fifty-ninth amendment to the original declaration. The Nikolais argued that the fifty-ninth amendment was invalid because it altered their percentage of interest in the common areas and facilities of the Deer Run community. That issue came before the trial court on cross motions for summary judgment. In a January 12, 2009, ruling the trial court sustained the Nikolais' motion and overruled Deer Run's motion.

{¶ 8} On appeal, Deer Run insists that the fifty-ninth amendment did not alter the unit owners' interest in the common areas and facilities. It insists that the amendment merely reclassified a roof from a common area to a more specific type of common area, namely a limited common area. Deer run asserts that this reclassification did not change any property interest because the unit owners still own all of the roofs as tenants in common, just as they did before the amendment. Deer Run reasons that an alteration

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Run's original declaration likewise has been amended to reflect this change in terminology. In addition, the requirement for unanimous approval previously set forth in R.C. 5311.04(D) and quoted above now is found in R.C. 5311.04(E) with slightly different language. As amended, it provides that "the undivided interest in the common elements of each unit as expressed in the original declaration shall not be altered except by an amendment to the declaration unanimously approved * * *." For purposes of our analysis herein, however, we will apply the language of former R.C. 5311.04(D) and use the language of the original declaration and the fifty-ninth amendment as they all existed on November 5, 2003, when the Deer Run Owners' Association filed the fifty-ninth amendment. We note, however, that the General Assembly's subsequent amendment of the Ohio Condominium Act in 2004 would not appear to have any substantive impact on the issue before us.

to the unit owners' interest in the common areas would exist if the fifty-ninth amendment had made each roof a part of an individually owned unit. But it did not. Instead, it merely gave each unit owner exclusive use of, and responsibility for maintaining, his or her roof. Because the roofs remain common areas, albeit limited ones, Deer Run argues that all owners still own their undivided interest in the roofs. (Id. at 8).

{¶ 9} As we understand it, the essence of Deer Run's argument is that a change in ownership of a common area is required for unanimous consent to be needed. Deer Run contends a change in control or use of a common area—for instance, a change restricting use to a single unit—is not enough to require unanimous consent. Absent a change in ownership, Deer Run reasons there is no change in a unit owner's undivided interest in common areas, as each unit owner still owns the same percentage interest in those areas even if he or she has lost the right to control or use them.

{¶ 10} Upon review, we find Deer Run's argument to be unpersuasive. Deer Run's original declaration grants unit owners an undivided interest in common areas. It also measures each unit owner's interest in percentage terms. The original declaration does not, however, define the term "interest" or preclude finding a change in a unit owner's "percentage of interest" when the exclusive right to control or use a common area is granted to a particular unit, thereby converting a common area to a limited common area.

{¶ 11} Our research and the parties' briefs reveal that case law touching upon the issue before us has been inconsistent. Indeed, some of the cases cited by the parties herein have been recognized as producing seemingly conflicting results.[2] In any event,

[2]See Kenton L. Kuehnle & Jack S. Levey, Baldwin's Ohio Practice, Ohio Real

our analysis of the present dispute is guided primarily by our own decision in *Falls Homeowners' Assoc., Inc. v. Aveyard* (July 27, 1994), Montgomery App. No. 14250, which was relied on by the trial court below.

{¶ 12} The dispute in *Aveyard* involved a condominium unit owner's construction of a patio that encroached into a common area. After the condominium association discovered the problem, it granted the unit owner a license to continue the encroachment. The license was not approved by all unit owners, however, and a disagreement subsequently arose. The result was a declaratory judgment action regarding the unit owner's right to maintain the encroachment. The trial court held that the unit owner could not maintain the patio. We affirmed the trial court's determination that the encroachment diminished the other unit owners' percentage of interest in the common areas. In so doing, we first noted that the license at issue actually was in the nature of an easement, which is an interest in land. We then reasoned that "[b]ecause the right [to maintain the patio] constitutes an interest in land that operates in derogation of the rights of all other unit owners, it cannot be validly created except through 'an amendment to the [condominium] declaration unanimously approved by all unit owners affected.'"

{¶ 13} In an effort to distinguish *Aveyard*, Deer Run stresses that it involved *construction* in a common area that took away other unit owners' right to use part of that common area. Deer Run points out that no similar construction occurred in the present case. While we do not dispute this factual distinction, it ignores a broader legal principle. *Aveyard* establishes that granting a unit owner an easement for use of a common area

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Estate Law, Section 32A:13, Changing Exclusive Use (2008).

requires unanimous approval because it operates in derogation of the rights of all other unit owners. In the present case, converting roofs from common areas to limited common areas essentially gave each unit owner an easement for exclusive use of his or her roof even though shared ownership of the roofs did not change.[3] See, e.g., *Greenhouse Condominium Assoc., Inc. v. Silverman* (N.J. Super. Ch. July 1, 2005), No. BER-C-178-04, 2005 WL 1593602, quoting Wendell A. Smith & Dennis A. Estis, New Jersey Condominium & Community Association Law: A Practical Guide to Community & Other Common Interest Communities, §6:5.04 (2004) ("'There is no independent ownership of limited common elements as they are all common elements. * * * [A]nother way of viewing the concept is to think of a limited common element as an easement to utilize a portion of the common elements for the benefit of one or more, but less than all unit owners.'"); *Goss v. Coffee Run Condominium Council* (Del. Ch. April 30, 2003), No. Civ.A. 18981-NC, 2003 WL 21085388, n.37, quoting 1 Patrick J. Rohan and Melvin A. Reskin, Condominium Law and Practice §7.05(2)(c), at 7-15 (2002) ("'[Limited Common Elements], while owned in common, are subject to exclusive use or easement rights vested in one or more [but less than all] owners.'"); *Gaffny v. Reid* (Me. 1993), 628 A.2d 155, 157 ("Defendant's license to exclusively use the limited common area adjacent to her cottage is analogous to an exclusive easement."). As in *Aveyard*, granting each Deer Run unit owner an exclusive easement to use his or her roof operated in derogation of

[3]As a practical matter, we recognize, of course, that unit owners were unlikely to use one another's roofs even before they were changed from common areas to limited common areas. The fact remains, however, that prior to the fifty-ninth amendment, unit owners had a right to do so. Moreover, the issue is not limited to roofs. If roofs may be converted from common areas to limited common areas with less than unanimous approval, then so can any other common areas, which include things such as drives, yards, and shared amenities.

the rights of all other unit owners, and, therefore, required unanimous approval. See, also, *Penny v. Assoc. of Apt. Owners of Hale Kaanapali* (Haw. 1989), 70 Haw. 469, 776 P.2d 393, syllabus paragraph two ("Conversion of a common element to a limited common element diminishes the common interest appurtenant to each apartment. * * * [C]onsent of all the apartment owners is required to effect such a change."); *Carney v. Donley* (Ill. App. 1994), 261 Ill.App.3d 1002, 1008, 633 N.E.2d 1015, 1020 ("[W]e do not agree that the Board's authority extends to approving the diminishment of the common elements by granting an individual unit owner exclusive use of some part of the common elements. In order for this to occur, a unanimous vote of the unit owners is required[.]"); *Bogomolov v. Lake Villas Condominium Assoc. of Apt. Owners* (Wash. App. 2006), 131 Wash. App. 353, 127 P.3d 762 (holding that assignment of boat slips built in common areas to individual unit owners for their exclusive use effectively converted common areas to limited common areas and required unanimous consent); *Kaplan v. Boudreaux* (Mass. 1991), 410 Mass. 435, 440, 573 N.E.2d 495, 498-499 ("Clearly, a transfer of the sum total of a unit owner's interests in a portion of the common area to another unit owner would affect percentage interest in the common area of both owners. It is not necessary, however, to transfer the sum of one owner's interests in a portion of land in order to change the comparative interests held by each. Transfer of an interest that is smaller than an 'ownership' interest would suffice to alter the percentage interest held by each.").

{¶ 14} In reaching the foregoing conclusion, we note that our decision in *Recknagel v. Bd. of Managers of Edenwood Condominium Owners Assoc*. (March 9, 1983), Clark App. No. 1736, which is cited by both parties on appeal, is not contrary to

our ruling herein. In *Recknagel*, we recognized that a condominium association's declaration and by-laws properly provided for all expenses related to limited common areas to be charged to unit owners who benefitted from the limited common areas. Although *Recknagel* might support Deer Run's decision to assess individual unit owners for costs associated with maintaining their roofs, provided the roofs were limited common areas, the case says nothing about whether unanimous approval would be required to convert roofs from common areas to limited common areas in the first place.

{¶ 15} Based on the reasoning set forth above, we conclude that the trial court properly found unanimous approval from condominium unit owners necessary to reclassify roofs from common areas to limited common areas. Accordingly, we overrule Deer Run's assignment of error and affirm the judgment of the Montgomery County Common Pleas Court.

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DONOVAN, P.J., concurs

GRADY, J., dissenting:

{¶ 16} R.C. 5311.04(E) does not prohibit an increase in or a diminution of the totality of the common elements owned by a condominium association unless all unit owners agree. Rather, that section requires unanimous agreement of the unit owners when the interest of any unit in the totality of the common areas is altered. That interest is a specified proportionate share of the undivided whole of the common areas. Article XX, Section B of the original declaration of the Deer Run condominium likewise requires unanimous agreement of the unit owners to any amendment that alters the "percentage of interest in the common areas and facilities of each unit."

{¶ 17} The amendment at issue reclassifying roofs from "common areas" to "limited common areas" may or may not have diminished the totality of the common areas or elements the Deer Run Condominium association owns. However, the record does not reflect that the undivided proportionate interest or percentage of interest of any unit owner in the possibly diminished common areas or elements was altered in any way. That reclassification may have been a ploy to shift the cost of roof repair, but it was not done in an amendment for which either R.C. 5311.04(E) or Article, XX, Section B of the condominium declaration requires unanimous consent of the unit owners.

{¶ 18} I would reverse.

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