**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| SUE EICHERLY,<br>Plaintiff and Appellant,<br>v.<br>PALM BEACH PARK ASSOCIATION,<br>Defendant and Respondent. | G052396<br>(Super. Ct. No. 30-2014-00720598)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Robert Moss , Judge. Affirmed.

Law Office of Patrick J. Evans and Patrick J. Evans for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Jeffrey A. Miller, Cary L. Wood and Arezoo Jamshidi; Allan B. Weiss & Associates, Allan B. Weiss, Allen L. Thomas and Allison A. Arabian for Defendant and Respondent.

## I. INTRODUCTION

We face two issues in this companion to *Chodosh v. Palm Beach Park Association* (G053798) (*Chodosh*). One is procedural, the other substantive. The procedural issue is straightforward: Did the trial judge abuse his discretion in upholding a homeowners' association's election, in 2013, to ratify assessments of $200,000 levied equally on the association's 126 members back in 2007? Our answer is that despite admitted irregularities in the election process – most notably the absence of safeguards to assure absolute secrecy – the trial judge's decision was within the bounds of reason. It was reasonable to conclude the irregularities would not have made any difference.

The substantive issue is more problematic. The equal assessments of $200,000 against all members of the association were levied in order for the association to buy the land beneath a mobilehome park. But those equal assessments did not take into account wide disparities in the nature and value of the 126 individual spaces so the equal assessments constituted a a case of treating unequals equally. As Aristotle said over 2,300 years ago, treating unequals equally is just as unjust as treating equals unequally.[1]

Even so, we affirm the trial court's decision to uphold the election against the substantive challenge. Simply put, the relevant statute and regulations governing homeowner association assessments under the Davis-Stirling Act (currently Civ. Code, § 4000 et seq.)[2] make equal assessments the *default* result, but they also *allow* associations to have bylaws that provide for some other means of apportioning assessments. Here, the whole point of the election was to amend the bylaws to provide for equal, as distinct from proportional, assessments. Though the equal assessment bylaws under the circumstances of this case present us with a counter-intuitive result in

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1 See generally Aristotle, Nicomachean Ethics, book 5.

2 All further statutory references are to the Civil Code unless otherwise indicated.

the abstract, they still pass muster. As our Supreme Court has said of homeowner association bylaws, "[n]onenforcement would be proper only if such restrictions were arbitrary or in violation of public policy or some fundamental constitutional right." (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 377 (*Nahrstedt*)) We cannot say that here. The equal assessment arrangement obviates the administrative headache of figuring out precise values of 126 mobilehome spaces, and also reflects the underlying reality that a single corporation, not 126 individual space tenants, owns the land beneath the property. So while problematic, it was permissible and we must accept it.

## II. BACKGROUND

This case is a spinoff of the *Chodosh* case filed in 2010. Greater detail on the background behind the Palm Beach Park Association's (PBPA) acquisition of the land beneath the Palm Beach mobilehome park in 2007 is provided there. The essential facts pertinent to *this* case are stated here:

In 2007, the residents of the Palm Beach mobilehome park were all members of the Palm Beach Park Association, or PBPA. The PBPA didn't own the land underlying the park. Rather, it had a lease due to expire in 2018. The PBPA also had a right of first refusal if a third party made an offer to the owners of the land. In 2007, a third party did indeed make such an offer, so the PBPA seized the opportunity to buy the land, for about $24.75 million. To raise the money to pay for the land, the PBPA assessed its members on an equal per membership basis – $200,000 each. There were no "no" votes against the purchase, and the $200,000 assessments were approved by the association's board. Over the next three years, however, the payments on the $200,000 assessments proved to be too onerous for some of the residents. In 2010, nine of those residents filed the *Chodosh* case, contesting various aspects of the 2007 transaction.

One of the issues in the *Chodosh* case was the validity of the $200,000 assessments. The park consists of 126 rented spaces on a slope facing the ocean. The spaces at the top have better views. The spaces at the bottom are sometimes called "bungalows" and they are smaller than the rest of the spaces in the park.[3] We take it as a given that the value of each of the bunglalow spaces is considerably less than the value of other spaces in the park.

The *Chodosh* litigation was divided into four phases, and in phase 1 the issue of the validity of the $200,000 assessments was tried to the court. In the spring of 2013 Judge Nancy Weiben Stock ruled that the PBPA did *not* have the "legal authority" to impose the $200,000 assessment.

In response to the ruling, the PBPA conducted a new election, taking place on August 3, 2013, to amend the bylaws to ratify the 2007 equal assessments of $200,000. Notice of the election had been posted on the community bulletin board and the election took place at the park clubhouse. Before the vote at the August 3 meeting, the president of the PBPA spoke in favor of the resolution, and Eicherly's present counsel spoke against. After the speeches, the vote was conducted with the voters filling out the ballots, which were collected by volunteers, and then counted in a separate room.

There were three specific resolutions voted on: (1) To amend the bylaws to authorize members to approve a special assessment, divided equally among the members, to cover the cost of purchasing the park. (2) To ratify and adopt the 2007 decision of the association's board to levy a special assessment of $200,000 equally on all PBPA members (and on any new member subject to a credit for any amount previously paid). And (3) to provide that if a court were to invalidate the 2007 decision, to again assess each member $200,000, subject to a credit for any amount previously paid. The vote was an overwhelming 95 to 3 in favor of all three proposals.

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[3] So small that we cannot say on the record in *Chodosh* whether any given unit necessarily exceeds 320 square feet in size.

Several months later, Sue Eicherly, alone, filed this suit seeking to void the election. The complaint listed four causes of action: (1) breach of contract of the member leases, (2) procedural irregularities, (3) breach of fiduciary duty, and (4) for declaratory relief that the 2013 ratification election was void.

After a trial to the court, Judge Moss found a number of procedural irregularities in the conduct of the election – irregularities that meant the existing bylaws governing elections had not been complied with. These irregularities centered on the lack of provisions to assure secret ballots. Ballots were not sent to members 30 days prior to the election complete with double envelopes so that an anonymous member ballot would be put into an envelope without identifying marks which would then be put inside another envelope which would have the member's name. Ballots were distributed at the election on August 3. Perhaps even worse from a secrecy perspective, tally sheets were kept from which a voter's actual vote could be discovered by correlating the sheets with the vote count.

Despite these findings, the trial court exercised its discretion to uphold the election. The court noted these factors: The *Chodosh* plaintiffs had "actual notice" of the election and, despite their disputed membership status, were allowed to vote in it. Moreover, the vote was preceded by speeches about the measure, and the plaintiffs' attorney was even allowed to address the voters. Secrecy was not a big issue, since pretty much everybody in the park already knew where the plaintiffs stood, given that by then the *Chodosh* litigation had gone on for about three years. Moreover, no one had actually engaged in the work of correlating the tally sheets necessary to figure out how each voter voted. The bottom line, according to the trial judge, was that the election was "reasonably fair." The court further reasoned that because the election had not complied with the existing *bylaws*, there was no reason to go on to address the issue of compliance with the Davis-Stirling Act.

The idea that, regardless of the vote, it was impermissible to assess unequals equally was clearly raised in the plaintiffs' motion for new trial. But the trial court denied the new trial motion, finding the problem of equal assessments against disproportionately small and less valuable spaces not to have been one of the "issues in this case." Eicherly then brought this appeal.

## III. DISCUSSION

### A. *Election Irregularities*

The lead case on irregularities in homeowner association elections is Justice Ikola's opinion for another panel of this court, *Wittenburg v. Beachwalk Homeowners Assn.* (2013) 217 Cal.App.4th 654 (*Wittenburg*). *Wittenburg* is particularly instructive for the case at hand because it confronted a very flawed homeowner association election, but only sent the case back for the court to exercise discretion as to *whether* the flaws were so bad as to require invalidation, as distinct from invalidating the election directly at the appellate level.

*Wittenburg* arose out of a condo board's idée fixe of getting rid of the condo's pools. The hitch was that doing so would cost more than the board had authority to spend without a vote (*Wittenburg, supra*, 217 Cal.App.4th at p. 658), and there was considerable opposition to the idea among the residents (*id*. at p. 659). In fact, it took no less than three separate elections before the board received a favorable vote, and it might have taken more had the board not threatened to keep holding elections until it got its way. (See *id*. at p. 662.)

Additionally, the condo board unashamedly used the resources of the association to promote its agenda: The association's newsletter lobbied openly in favor of the board's position, while opponents were denied use of the clubhouse, common areas, and community bulletin board. (*Wittenburg, supra*, 217 Cal.App.4th at pp. 659, 661.) The board even kept the voting open a week so that it could finally receive the votes it wanted. (*Id*. at pp. 661-662).

As this court later determined, the condo board's denial of equal access to the association's resources contravened a provision of the Davis-Stirling Act, former section 1363.03 (see now § 5105). That statute reflects the Legislature's intent that homeowner associations make their "media" available to dissenting voices when a vote is to be held. The trial court had erroneously thought the statute applied only to *candidates*, not the association itself, (see *Wittenburg, supra*, 217 Cal.App.4th at pp. 662-663).

This court held that the trial court's interpretation of section 1363.03's equal access language contravened both the text and spirit of the statute. (*Wittenburg, supra,* 217 Cal.App.4th at p. 664.) "Having engaged in advocacy, under subdivision (a)(1) the association was bound to permit other members equal access to association media. The undisputed evidence shows the association failed in its duty. On at least one occasion the board outright refused to publish an article in the newsletter opposing an advocacy article the board had published." (*Id.* at p. 667.)

That said, the contravention of the statute did not require *automatic* invalidation of the election. We pointed to another statute, former section 1363.69, which governs civil actions in the wake of violations of the election rules prescribed in the Davis-Stirling law, including section 1363.03. The key language from section 1363.69, quoted in *Wittenburg*, was: "'Upon a finding that the election procedures of this article . . . were not followed, a court *may* void any results of the election.'" (*Wittenburg, supra,* 217 Cal.App.4th at p. 667, italics added.) Noting the word "may" in the statute, the *Wittenburg* court's thesis was that the decision to invalidate a homeowner association's election for violation of procedures prescribed by the Davis-Stirling Act was within the discretion of the trial judge. (*Id.* at p. 667.)

Accordingly, the disposition of the case was *not* a reversal with directions to invalidate the election. Rather, we reversed the judgment upholding the election and returned the case to the trial court with instructions for it to consider anew *whether* the

election should be invalidated. "As noted above, however, we do not hold the court *must* void the August 2011 results, only that the violations of subdivision (a)(2) described above are relevant and should be considered in deciding whether to void the results of the August 2011 election." (*Wittenburg, supra,* 217 Cal.App.4th at p. 670.)

With *Wittenburg* as backdrop, we now consider Eichlerly's procedural challenge to the August 2013 election here. Technically, she makes two procedural arguments. The first argument seems to have been engendered by the *Wittenburg* decision itself. Eicherly tried to present evidence that one of the residents opposed to the proposals, Bonnie Harris, had been denied access to the PBPA member list, newsletter, and clubhouse. The trial court cut the inquiry short. On appeal, Eicherly points out that what happened to Harris appears to have been a prima facie violation of section 1303.03, quite similar to what happened in *Wittenburg*.

The argument fails in light of elementary pleading rules. The trial court was, in this instance, correct to exclude Harris' evidence, since violation of the equal access provisions of section 1303.03 had not been alleged in the complaint. The case was explicitly brought pursuant to Corporations Code section 7616, the PBPA's bylaws, and section 1369.09. A new factual theory not set forth in the complaint cannot support a recovery on that complaint without actual amendment. (See *Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 210-211) [contract breach claim insufficiently presented in complaint because plaintiff failed to specify nature of the particular oral promise on which it later based its case].)

The second argument, however, was not waived. It is that since the bylaws were violated, the trial court was *required* to strike down the election.[4] But this argument is directly refuted by *Wittenburg's* teaching that the striking down of a homeowners' association election is a matter of trial court discretion.

Eicherly has no answer for that. Indeed, at no point in the opening brief does it confront the point from *Wittenburg* that the decision to invalidate an election is discretionary with the trial court. The opening brief's argument parallels the incorrect assumption that both sides made in *Wittenburg*, and which this court refuted – that invalidation is automatic. *Wittenburg* says it is not.

The closest the opening brief comes to the issue is its argument that because section 1369.03 provides that an association "shall" abide by certain election rules, the trial court had "no discretion" to allow the PBPA to "bypass" that statutory obligation. But this argument fails to acknowledge the subject of the respective impositions: There is a difference between what a statute requires a private party "shall" do, and what another statute says a court "may" do if that private party doesn't comply with its mandatory duty.

"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) Considered under such a standard, the trial judge's decision was certainly *reasonable*. The election was fundamentally fair, even if the bylaws on secret ballots were not followed.

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[4] Another argument raised in the reply brief to the effect that *Wittenburg* does not apply to this case because the PBPA is not a true "Davis Stirling HOA" has been waived, since it was not raised in the opening brief. "Issues not raised in the appellant's opening brief are deemed waived or abandoned." (*W.S. v. S.T.* (2018) 20 Cal.App.5th 132, 149, fn. 7.) Indeed, the reply brief's argument impliedly contradicts opening brief arguments which explicitly rely on various provisions of Davis-Stirling.

However, we see no reason to strike the reply brief, as the PBPA asks us to do, and deny that request.

Eicherly proffers no evidence at all that anyone was somehow dissuaded from voting against the proposals because of possible repercussions arising out of the failure to assure absolute secrecy. Thus the trial court was certainly reasonable to think that, given the extreme lopsidedness of the vote in combination with the long running litigation, the failure to assure punctilious secrecy did not make any difference.

Finally, we also note that, in contrast with the favoritism shown by the condo board in *Wittenburg* – which didn't want to expose the membership to any dissenting voices – Eicherly's attorney was allowed to address the assembled electorate just prior to the voting. The opening brief is conspicuous in *not* confronting the idea that a re-done election would have made any difference, and we cannot find any reason to quarrel with the trial court's resolution of the question.

B. *Unequals Equally Treated*

Eicherly also argues (indeed, it is the major theme of the opening brief) that even if the election had been totally fair, the very idea of assessing all residents $200,000 regardless of the value of their spaces was legally impermissible, since it amounted to the majority imposing "unfair costs on the minority."

We are sympathic to this argument.[5] And we think the trial court *incorrectly* avoided the merits of the issue on the new trial motion by saying it had not been raised. This issue was indeed raised: It was raised in the complaint, which pointed out the putative inequity of equal assessments on the less valuable spaces in the park, in Eicherly's opening statement[6] and in the closing argument.[7]

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5 "The concept of tyranny of the majority is as old as majority rule . . . early users of the phrase include, among others, John Adams; Alexis de Tocqueville, who popularized it; and John Stuart Mill." (Eric A. Posner & E. Glen Weyl, *Voting Squared: Quadratic Voting in Democratic Politics* (2015) 68 Vand. L. Rev. 441, 443, fn. 2.)

6 "So the problem is, fundamentally, is that it doesn't work. The majority has no proper [*sic*] to impose on the minority this disparate allocation of what really was the purchase price of the land."

7 "A guy gave a $200,000 will never work [*sic*], it doesn't work and no matter how many votes or whatever you do it's not going to work." In context, this was counsel's shorthand way of saying that even if the vote was proper, the assessment was wrong.

That said, we find our hands tied by the existing law on the issue of assessments in homeowner associations, as articulated in the statutes and regulations discussed in the main case Eicherly relies on, *Cebular v. Cooper Arms Homeowners Assn.* (2006) 142 Cal.App.4th 106 (*Cebular*).

*Cebular* involved a stock cooperative apartment building built back in 1923 which three-fourths of the members decided to convert to condominiums. The respective units were apparently of different values – indeed in some cases arbitrarily so, and only for historical reasons. (See *Cebular, supra*, 142 Cal.App.4th at p. 128 (conc. opn. of Mosk, J.) ["For historical reasons, identical units pay different assessments. Whether or not the correlation between votes and assessments made sense in 1923 when the stock cooperative was established, the connection seems more tenuous today for the condominium."].) Thus some owners had more shares than others. For example, unit 215 only had 19 shares (later 19 "interests") while the owner of unit 1101 had 85. (*Cebular, supra*, 142 Cal.App.4th at p. 111.) And assessments, including those for capital improvements, were levied in proportion to an owner's shares. (*Id*. at p. 112.)

An owner who bought into the building in 1997 filed a complaint asserting the assessment method did not take into account the fact each member "equally share[s] the common area located on the property." He asserted each member "should be equally assigned maintenance obligations" (*Cebular, supra*, 142 Cal.App.4th at p. 116) thus "voting rights and assessments must be allocated equally." (*Id*. at p. 117.) That argument lost at trial, with the court concluding that the allocation method did not violate "California law generally" or the "Davis-Stirling Act specifically." (*Id*. at p. 117.)

And the decision was affirmed on appeal.[8] The *Cebular* court noted that former section 1362 contemplates that common areas are to be "owned as tenants in common" *unless* the declaration establishing the respective CCR&Rs (covenants,

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8 There was a reversal of the attorney fee award but that doesn't concern us.

conditions and restrictions) regulating the property "*otherwise provides*." (*Cebular, supra*, 142 Cal.App.4th at p. 120.)

Likewise, regulations promulgated by California's Real Estate Commissioner (Cal. Code Regs., tit. 10, § 2792.16) were to the same effect. Those regulations also provide that assessments to defray the costs of ownership, operation and furnishing of common areas are to be equal, but again with the proviso that when it was reasonable to anticipate that when "any owner will derive as much as 10% more than any other owner in the value of common services," a formula could provide for equitable proportionality. (*Cebular, supra*, 142 Cal.App.4th at p. 120.)

Nor did the court find an unequal arrangement irrational. (See *Nahrstedt, supra,* 8 Cal.4th at pp. 382-383.) The recorded restrictions provided for the unequal arrangement, making it "presumptively reasonable." And it found no violation of any public policy. (See *Cebular, supra*, 142 Cal.App.4th at p. 120.) In particular there was no violation of a public policy that "inure[d] to the public at large." (*Id*. at p. 123.)

*Cebular* is the converse of the case before us. And the clearest take-away from *Cebular* is its exposition of former section 1362 and regulation 2792.16: equal assessments are *the default* result. However, that default result can be varied by the governing documents of the association. In this case, Eicherly can cite no bylaw (or declaration or article of incorporation or anything else for that matter) which *requires* unequal assessments in some proportion to the value of each member's space. *Cebular* establishes that there is no *statute* or regulation that might so provide either. Furthermore, Eicherly identifies no constitutional provision or public policy that would *require* unequal assessments under these circumstances. And she certainly has not identified any public policy inuring to the public at large that requires unequal assessments in the context of a case like this one. We thus lack the authority to strike down the election as somehow imposing a result in contravention of a bylaw, article, regulation, statute, public policy or constitutional provision.

Finally, we must note that as appealing as Eicherly's main point is – the putative unfairness of assessing the owners of the tiny bungalow plots the same as the owners of much larger plots with better views – there are clear and rational arguments for equal assessments under the circumstances of this case. It takes no imagination to foresee the years of endless wrangling that might have ensued if the PBPA had tried to devise an assessment scheme based on the fair market value of each space. Doing so might easily result in years of what might be called "condemnation litigation in reverse," with the various members poormouthing their own spaces and asserting how much more valuable their neighbors' spaces were.

Additionally, we must acknowledge that in the case at hand the equal assessments accurately reflect the underlying property relationship between the PBPA and the various residents of the park. It was the PBPA that in 2007 bought the land beneath the park, taking title in itself as a single entity. The land was never subdivided. Each member of the PBPA simply had a voting share in the corporation that owned the park, not a fee interest in the land beneath their mobilehome. Equal assessments reflected that underlying reality.

In practical fact, most homeowner associations do very well assessing each unit equally, even though the value of the various units can vary considerably. As much as we find the equal assessments on both the high end spaces and the low end bungalows to be unsatisfying in the abstract,[9] such assessments were rational under *Nahrstedt* standards.

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[9] Recalling Anatole France's off-quoted dictim about the law in its majestic equality forbidding both rich and poor from sleeping under bridges. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1124 (dis. opn. of Mosk, J.).

## IV. DISPOSITION

The judgment of the trial court validating the 2013 election is affirmed. Using our own discretion, we believe the interests of justice best served by each party bearing its own costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.