IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-001286-23T4

ON APPEAL FROM ORDER AND FINAL DECISION SIGNED AND SERVED TO PARTIES ON NOVEMBER 15, 2023 IN DOCKET NO. CPM-C-26-23 SUPERIOR COURT OF NEW JERSEY, CAPE MAY COUNTY, CHANCERY DIVISION

SAT BELOW:
THE HONORABLE M. SUSAN SHEPPARD, J.S.C.

WALTER KRASINSKY,

PLAINTIFF-RESPONDENT,

V.

CANTERBURY MANOR CONDOMINIUM ASSOCIATION, INC.,

DEFENDANT-APPELLANT.

BRIEF OF DEFENDANT-APPELLANT, CANTERBURY MANOR CONDOMINIUM ASSOCIATION, INC.

SUBMITTED JUNE 27, 2024

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I. PRELIMINARY STATEMENT

This is a dispute between a unit owner (Plaintiff-Respondent Walter Krasinsky) and a condominium association (Defendant-Appellant Canterbury Manor Condominium Association, Inc. referred to herein as the "Association") over an amendment to the Master Deed that reallocated the responsibility for maintenance of limited common element areas used exclusively by individual adjoining unit owners from common expense, to being maintained at the expense of the unit enjoying exclusive use.

In the Spring of 2023, the Association through its Board proposed an amendment to the governing documents to clarify and confirm the responsibility for maintenance and repair of the limited common element decks and porches associated with each unit. The Board determined that the most reasonable approach was to make an across-the-board and generally applicable rule that each unit would be responsible for the maintenance and repair of the exclusive limited common element associated with each individual unit. In other words, with the benefit of exclusive use goes the responsibility for ordinary care and maintenance. The amendment also reserved responsibility for the structural elements which support, cover, or enclose the limited common elements which are to remain a common expense. In other words, the

Board assigned some but not all the responsibility for the limited common elements used exclusively.

The Board provided notice to all unit owners of its intent to act on the amendment. The Master Deed does not require unanimous approval for amendments to the governing documents. All unit owners returned their votes to the Board with a final vote of 4-1 in favor of the amendment. Krasinsky was the lone "no" vote on this amendment.

On May 18, 2023, Krasinsky filed his complaint against the Association to void the amendment. On June 29, 2023, the Association Answered and asserted its affirmative defenses. On July 28, 2023, Krasinsky moved for summary judgment. On September 12, 2023, the Association opposed and cross-moved for summary judgment to dismiss Krasinsky's complaint and affirm the amendment. On November 15, 2023, the Trial Court issued a Final Judgment and Memorandum of Decision voiding the amendment on the basis that it constituted a "change" to the unit. This appeal followed.

Here, the Trial Court erred as a matter of law. The amendment did not change or alter the dimensions of Krasinsky's unit. The amendment also did not alter or impair the use any of the areas within his unit or the limited common areas reserved for his exclusive use. Nor did the amendment confiscate any property interest for the Association's own use. In other words,

Krasinsky enjoys the same dimensions of his unit and exclusive use of the deck after the amendment, as he did before.

Instead, what this amendment did was confirm that each unit owner is responsible for the ordinary maintenance of the limited common element reserved for their exclusive use, rather than all unit owners paying for ordinary maintenance of limited common areas for which they have no right of use or access. The Association made the decision to amend the Master Deed, not out of malice, personality conflicts, or to punish any particular owner, but to simply establish a rational and reasonable maintenance responsibility that was proportional to the exclusive use enjoyed by each unit. This is the type of decision-making that can and should be protected by the business judgment rule.

In this case, there is no "confiscation" of Krasinsky's unit. The unit owners were either partially responsible for all the limited common element decks or solely responsible for the limited common elements reserved for their unit. The Board determined the latter was a more reasonable outcome and where more than one method is suitable, the Board had the discretion to make that determination. Accordingly, the decision of the Trial Court, which establishes a new avenue for upsetting reasonable board action, was made in error and must be reversed.

II. PROCEDURAL HISTORY.

On May 18, 2023, Krasinsky filed his complaint against the Association to void the amendment. Da99-108; Da83-86. On June 29, 2023, the Association Answered and asserted its affirmative defenses. Da109. On July 28, 2023, Krasinsky moved for summary judgment. Da115-127. On September 12, 2023, the Association opposed and cross-moved for summary judgment to dismiss Krasinsky's complaint and affirm the amendment. Id. On October 6, 2023, the Trial Court heard oral argument on the motion and cross-motion but reserved decision. Id. Both parties acknowledged that the material facts were not in dispute and that the decision boiled down to a matter of law to be decided by the Court. Id.

On November 15, 2023, the Trial Court issued a Final Judgment and Memorandum of Decision voiding the amendment on the basis that it constituted a "change" to the unit. Id. This appeal followed. Da128.

III. STATEMENT OF FACTS

The Canterbury Manor Condominium is located in Cape May, New Jersey. The condominium consists of five (5) units, each of which are uniquely shaped and have exclusive decks and porches of various sizes associated with each individual unit. The decks exclusive to each unit are designated as "limited

common elements" and may only be used by the designated owner and are not for common use. Da2.

In the Spring of 2023, the Association through its Board proposed an amendment to the governing documents to clarify and confirm the responsibility for maintenance and repair of the limited common element decks and porches associated with each unit. Da2-3. The Board determined that the most reasonable approach was to make an across-the-board and generally applicable rule that each unit would be responsible for the maintenance and repair of the exclusive limited common element associated with each individual unit. Da83. In other words, with the benefit of exclusive use goes the responsibility for ordinary care and maintenance. Id. The amendment also reserved responsibility for the structural elements which support, cover, or enclose the limited common elements which are to remain a common expense. Da9-10; Da83. In other words, the Board assigned some but not all the responsibility for the limited common elements used exclusively. Id.

Pursuant to the governing documents, the Board provided notice to all unit owners of its intent to act on the amendment. Da63-72. In connection with the notice, the Board provided a proposed resolution, copy of the amendment, and the ability to attend the meeting, or, for their convenience, each unit owner could indicate their vote in writing in advance. Id.

The Master Deed does not require unanimous approval for amendments to the governing documents. Da39. The Master Deed requires a majority vote of the Board of Trustees and a 2/3rds vote of the Unit Owners (in this case 4/5 unit owners). Id.

All unit owners returned their votes to the Board with a final vote of 4-1 in favor of the amendment. Da74-81. Krasinsky was the lone "no" vote on this amendment. Id.

On May 18, 2023, Krasinsky filed his complaint against the Association to void the amendment. Da99-108; Da83-86. On June 29, 2023, the Association Answered and asserted its affirmative defenses. Da109. On July 28, 2023, Krasinsky moved for summary judgment. Da115-127. On September 12, 2023, the Association opposed and cross-moved for summary judgment to dismiss Krasinsky's complaint and affirm the amendment. Id. On October 6, 2023, the Trial Court heard oral argument on the motion and cross-motion but reserved decision. Id. Both parties acknowledged that the material facts were not in dispute and that the decision boiled down to a matter of law to be decided by the Court. Id.

On November 15, 2023, the Trial Court issued a Final Judgment and Memorandum of Decision voiding the amendment on the basis that it constituted a "change" to the unit. Id. This appeal followed. Da128.

IV. ARGUMENT

A. The Trial Court erred as matter of law and conflated "Limited Common Elements" with the "Common Elements" in its interpretation of N.J.S.A. 46:8B-14. (Da122; (November 15, 2023))

The issues on appeal relate to the trial court's legal conclusions, and the application of those conclusions to the facts. These issues are subject to plenary review by the Court. See Spangenberg v. Kolakowski, 442 N.J. Super. 529, 535 (App. Div. 2015) (quoting Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)).

The Trial Court erred and effectively created new law in the State of New Jersey in holding that an Association is without authority to assign responsibility for maintenance of limited common elements based on its interpretation of N.J.S.A. 46:8B-14(a), which provides:

> **The association**, acting through its officers or governing board, **shall be responsible** for the performance of the following duties, the costs of which shall be common expenses:
>
> (a) The maintenance, repair, replacement, cleaning and sanitation of the **common elements**.

See N.J.S.A. 46:8B-14(a) (emphasis added).

This portion of the Trial Court's decision rests entirely on the premise that common elements and limited common elements are indistinguishable.

This interpretation is not supported in the Condominium Act which separately defines the two.

The definition of "limited common elements" under N.J.S.A. 46:8B-3(k) refers to "*those common elements* which are for the use of one or more specified units to the exclusion of other units" and therefore, the Association is without power to reallocated responsibility. The Trial Court expressly relied on this definition in support of its finding.

However, the Trial Court failed to consider or reconcile its premise with the other available definition. Pursuant to N.J.S.A. 46:8B-3(d), the definition of "common elements" expressly ***excludes*** certain items as follows:

> "Common elements" means:
>
> (i) the land described in the master deed;
>
> (ii) as to **any improvement, the foundations, structural and bearing parts, supports, main walls, roofs, basements, halls, corridors, lobbies, stairways, elevators, entrances, exits and other means of access, *excluding any specifically reserved or limited to a particular unit or group of units***;
>
> (iii) **yards, gardens, walkways, parking areas and driveways, *excluding any specifically reserved or limited to a particular unit or group of units***;

See N.J.S.A. 46:8B-3 (emphasis added).

In other words, even if the Appellate Division were to accept the premise that "maintenance, repair, replacement, cleaning and sanitation ***of the common elements***" could not allocated by the Association, the Trial Court failed to recognize that the "common elements" referenced in N.J.S.A. 46:8B-14 incorporates express exclusions and the exclusive decks are the type of item "specifically limited to a particular unit" and ***excluded*** from the definition of "common elements". The governing documents also separately define "common elements" and "limited common elements" in the same manner. The Trial Court failed to consider the plain language of the statute and should be reversed on that basis.

If this decision is allowed to stand, this will result in new law and absurd results in the State in which no Association may allocate responsibility for Limited Common Elements and they must be a common expense to all unit owners regardless of exclusive use. This type of allocation of responsibility is prevalent throughout the State in governing documents and if allowed to stand, would render void similar existing provisions throughout the State.

B. The Trial Court erred as matter of law finding that the amendment regarding maintenance responsibilities constituted a "change" to plaintiff's unit. (Da123; (November 15, 2023)).

The New Jersey Condominium Act governs the creation and operation of condominiums within the State. See Siddons v. Cook, 382 N.J. Super. 1, 6, 887 A.2d 689 (App. Div. 2005) (citing N.J.S.A. 46:8B-1 to -38). A condominium is created under the Act by the recording of a master deed. See N.J.S.A. 46:8B-8. Thereafter, a condominium association is "'responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners.'" Flinn v. Amboy Nat'l Bank, 436 N.J. Super. 274, 288 (App. Div. 2014) (quoting N.J.S.A. 46:8B-12).

An association must act in accordance with its master deed, by-laws, and the Condominium Act. See Thanasoulis v. Winston Towers 200 Association, 110 N.J. 650, 656 (1988). Pursuant to the power granted to an association by its governing documents and the Act, an association may adopt, distribute, amend, and enforce rules governing the use and operation of common elements. See Brandon Farms Prop. Owners Ass'n v. Brandon Farms Condo Ass'n, 180 N.J. 361, 368-69 (2004) (citing N.J.S.A. 46:8B-14(c)).

Section 11 of the Act governs the process for amending a Master Deed. See N.J.S.A. 46:8B-11. The Act provides that a "master deed may be amended or supplemented in the manner set forth therein." Id. However, "no amendment shall change a unit unless the owner of record thereof and the holders of record

of any liens thereon shall join in the execution of the amendment or execute a consent thereto with the formalities of a deed." Id.

The Act defines a "Unit" as "a part of the condominium property designed or intended for any type of independent use, having a direct exit to a public street or way or to a common element or common elements leading to a public street or way or to an easement or right of way leading to a public street or way, and includes the proportionate undivided interest in the common elements and in any limited common elements assigned thereto in the master deed or any amendment thereof " See N.J.S.A. 46:8B-3(o).

Section 5 of the Master Deed also describes what constitutes the boundary of a unit, stating that the units "contain all space within the area bounded by the interior surfaces of the exterior walls and the first floor and the roof of the building…" Da35.

The Master Deed in this case specifically references "decks" as a limited common element and *not* as part of the description of the "units" indicating that "**decks appurtenant to units shall be a limited common element for the unit to which the deck is appurtenant**..." Da36. Limited Common Elements are "those common elements which are for the use of one or more specified units to the exclusion of other units." See N.J.S.A. 46:8B-3(k).

A court's role in interpreting a statute is "'to determine and effectuate the

Legislature's intent.'" See State v. Revie, 220 N.J. 126, 132 (2014) (quoting State v. Friedman, 209 N.J. 102, 117 (2012)). A court is instructed to "'look first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen.'" Friedman, 209 N.J. at 117 (quoting Pizzullo v. New Jersey Mfrs. Ins. Co., 196 N.J. 251, 264 (2008)). A court must read a statute as a whole and avoid "seiz[ing] upon one or two words as a fixed guide to the meaning of the entirety." Id. (citing Singh v. Sidana, 387 N.J. Super. 380, 386 (App. Div. 2006), certif. denied, 189 N.J. 428 (2007)). A statute is "'to be read sensibly rather than literally . . . .'" Id. (quoting Mayfield v. Comty Med. Assocs., P.A., 335 N.J. Super. 198, 205 (App. Div. 2000)).

The Legislature did not define "change" as it relates to the prohibition against amendments that "change a unit" without consent. See N.J.S.A. 46:8B-11. Undoubtedly, if the Association sought to alter the dimensions of plaintiff's unit or change the percentage interests in the common elements allocated to each unit, those are changes that would require consent. However, this case involves neither.

In this case, the proposed amendment did not "change" plaintiff's units in violation of N.J.S.A. 46:8B-11. Under the terms of the Master Deed, a Unit owner owns its Unit. The Master Deed unambiguously defines the term "Unit"

as not including “decks appurtenant to each unit" but as including the proportionate undivided interest in the Common Elements assigned thereto in this Master Deed “or any amendment thereof." See N.J.S.A. 46:8B-3(o). Thus, the property right given to the Unit Owner by the Master Deed is not a right to a specific common element, but rather to a "proportionate undivided interest" in the Common Elements.

In this case, the Amendment to the Master Deed did not alter plaintiff's proportionate undivided interest in the Common Elements and it did not strip plaintiff of his ability to exclusively use and enjoy the deck assigned to his unit. Although the responsibility for ordinary maintenance of the Limited Common Element may have changed, plaintiff's proportionate undivided interest in the Common Elements remained the same. Thus, as defined in the Master Deed, plaintiff did not experience a change in its units or a change in its property rights. Therefore, the Amendment to the Master Deed did not "change a unit," and its adoption was not a violation of N.J.S.A. 46:8B-11.

Furthermore, the impact of the amendment in this case does not rise to the level of “confiscation” as set forth by the Court in Thanasoulis, supra. The facts of this case differ substantively from the facts of Thanasoulis. In Thanasoulis, the defendant association adopted a resolution that required a unit owner's tenant to lease a parking space directly from the association at an

increased price. Id. at 663. The Court correctly held that the resolution had the "**effect of confiscating a portion of the property interest [the unit owner] acquired when he purchased his unit, thereby denying plaintiff the economic value of a portion of his unit**." Id. The Court focused on the confiscatory effect of the amendment at issue because the Court previously had observed that "'[t]he individual condominium purchaser owns his unit together with an undivided interest in common elements.'" Id. at 657 (quoting Siller v. Hartz Mountain Ass'n, 93 N.J. 370, 375 (1983)). Ultimately, the Court found that that amendment had the effect of reducing the plaintiff's property interest, which therefore constituted a "'change' in the plaintiff's unit in contravention of the Act." Id.; See also, Asbury Park Law Ctr., LLC v. Asbury Grand Condo, Ass'n, 2015 N.J. Super. Unpub. LEXIS 2956 (Law Div. 2015) (Opinion by Hon. Katie A. Gummer, J.A.C. citing Thanasoulis and determining that question of whether an amendment constitutes a "change" must be tied to an analysis of its "confiscatory effect").

Plaintiff misunderstands the decision in Thanasoulis v. Winston Towers 200 Ass'n, 110 N.J. 650, 656 (1988) and the Trial Court adopted this flawed reasoning in its decision. Thanasoulis involved an association that had a discriminatory policy requiring nonresident owners to pay nearly three times more for a parking space rental. In that case, the Court found the policy to be

discriminatory and to constitute a "confiscation" of the value to the unit owner.

This case is far removed from the facts in Thanasoulis. Here, in stark contrast, the Board adopted a non-discriminatory amendment that impacts all unit owners and simply ties maintenance responsibility for LCE to the unit owner that enjoys exclusive use of the same. This amendment is uncomplicated, reasonable, and reflects basic notions of fairness. Unlike Thanasoulis, it cannot be said that this amendment "expropriates the economic value" of Plaintiff's deck "for its own use". The Board and the other units have no use of the Plaintiff's deck, and vice versa – that is the basic premise of the amendment.

The fundamental question for the Court is *not* whether Plaintiff will have to pay more, or, whether the Court agrees with the wisdom of a particular decision. If the question of "paying more" is the deciding factor, this flawed reason could presumably extend to, and place in jeopardy, any other decision an Association has to make to manage its affairs that might cause an uptick in cost to the unit owner from what existed at the time they purchased. This cannot be the rule following Thanasoulis as it would turn the principles underlying condominium governance on their head. If it is, the Courts should be prepared for a new flood of challenges to any board action that results in an increased cost in maintenance (and regardless of the nature of that change) and

citing this case in support. The more rational and measured reading of Thanasoulis would require the Court to evaluate whether the amendment constitutes a change *rising to the level of "confiscation" of the unit owner's property interest*. This rule would still leave room for change (as it must in order for Condominiums to function) but only restrict an Association from taking "confiscatory" action.

The question is whether the action taken by the Board and the Amendment was reasonable and is protected by the Business Judgement Rule because the Board acted without fraud, malice, or unconscionable conduct. If the Master Deed intended unanimous approval for every amendment, it would have stated so. Plaintiff has alleged no fraud, self-dealing, or unconscionable conduct and because of that, the Board's action must be protected by the Court

Rather than adhering to the rule in Thanasoulis, the Trial Court expanded its reach to include any rulemaking by the Association that would cause an "increased economic burden". The practical impact of this ruling is that any unit owner whose responsibilities increase during their ownership can now apply to the court and seek to freeze their financial commitment to the amount set as of the date they purchased their unit and rely on this decision as a basis. This is not the type of result contemplated by the Condominium Act or the Court in Thanasoulis.

The conduct of the defendant association in Thanasoulis stands in stark contrast to the amendment proposed in this case which simply stands for the generally applicable and basic principal that with the benefit of exclusive use should go the responsibility for ordinary maintenance. This rule would apply to all five unit owners with regard to their status and would not restrict any use of the property they acquired at closing. The net result of the change is that all unit owners, including plaintiff, are responsible for ordinary maintenance of the limited common element deck assigned exclusively to their unit, but in the same amendment they were also relieved from the financial obligation of contributing to ordinary maintenance of the other unit decks to which they had no right of access or use.

The Amendment to the Master Deed had no confiscatory effect on plaintiff's property interest – which is test established by the Supreme Court in Thanasoulis, not whether it had any conceivable economic impact. If left to stand, this flawed reasoning would provide any unit owner who is merely unhappy with the financial decisions made by their Association the ability to apply to the Court, claim an impact that differs from when they purchased, and turn the Business Judgment Rule on its head. The Condominium Act was not designed to be this inflexible where an Association is acting reasonably and the Trial Court's decision must be reversed.

C. The Trial Court erred as matter of law failing to apply the Business Judgement Rule. (Da126; (November 15, 2023)).

Decisions made by a condominium association board are reviewed using the same business judgment rule which governs the decisions made by other types of corporate directors." See Walker v. Briarwood Condo Ass'n, 274 N.J. Super. 422, 426 (App. Div. 1994); Accord Courts at Beachgate v. Bird, 226 N.J. Super. 631, 641 (Ch. Div. 1988); Papalexiou v. Tower West Condo., 167 N.J. Super. 516, 527 (Ch. Div. 1979).

The business judgment rule creates 'a rebuttable presumption' that the actions of a Board are valid." Alloco v. Ocean Beach & Bay Club, 456 N.J. Super. 124, 136 (App. Div. 2018)(quoting In re PSE&G S'holder Litig., 173 N.J. 258, 276-77 (2002)). It places an initial burden on the person who challenges a corporate decision to demonstrate the decisionmaker's "self-dealing or other disabling factor." If a challenger sustains that initial burden, then the "presumption of the rule is rebutted, and the burden of proof shifts to the defendant or defendants to show that the transaction was, in fact, fair to the corporation." Id. Generally, the business judgment rule reflects the courts' reluctance to interfere with business decisions absent a showing of bad faith. Exadaktilos v. Cinnaminson Realty Co., Inc., 167 N.J. Super. 141, 151 (Law Div. 1979).

The test is "(1) whether the Associations' actions were authorized by statute or by its own bylaws or master deed, and if so, (2) whether the action is fraudulent, self-dealing or unconscionable." Owners of the Manor Homes of Whittingham v. Whittingham Homeowners Ass'n, 367 N.J. Super. 314, 322 (App. Div. 2004); accord Chin v. Coventry Square Condo. Ass'n, 270 N.J. Super. 323, 328-29 (App. Div. 1994). To "promote and protect the full and free exercise of the power of management given to the directors," the second prong of the business judgment rule "**protects a board of directors from being questioned or second-guessed on conduct of corporate affairs, except in instances of fraud, self-dealing, or unconscionable conduct**." In re PSE&G S'holder Litig., 173 N.J. 258, 276-77 (2002) (quoting Maul v. Kirkman, 270 N.J. Super. 596, 614 (App. Div. 1994))(emphasis added). If a contested act of the association meets each of these tests, the judiciary will not interfere." Billig v. Buckingham Towers Condo. Ass'n I, Inc., 287 N.J. Super. 551, 563 (App. Div. 1996). Condominium governing documents can and do change all the time and there are adequate guard rails.

The Condominium Act and the governing documents of set forth the procedure for amendment – to which the Association adhered to the letter. In this case, plaintiff has a right to participate in the process of the amendment, but he has no right to veto the decisions of the Board.

Here, this is no dispute that the Association would meet the second prong of the rule. There is no allegation of disqualifying factor in the decision-making except for plaintiff's claim that the amendment constituted a "change" to his unit and required his consent.

If an Association is unable to do what the Association did here, then the Condominium Act will effectively be rewritten to provide that unit owners will enjoy a unilateral "veto" over any decision that has any conceivable economic impact on their ownership and argue that it constitutes a "change" to their unit – which would be nearly all decisions made by condominium associations.

For the reasons set forth above, the Appellate Division should reverse the Trial Court's decision and reject the argument that the Board is without the authority to define maintenance responsibilities for the Limited Common Elements. So long as those decisions are not "confiscatory" the decision must stand.

In this case, all unit owners remain responsible for a deck (either their own, or a proportionate share of all the others). This is precisely the authority vested in the Association, provided the regulation is "reasonable". See N.J.S.A. 46:8B-13(d); See Greenhouse Condominium Association, Inc. v. Silverman, 2005 WL 1593602 (N.J. Super. Ch. Div. 2005).

IV. CONCLUSION

The amendment in this case is reasonable and cannot fairly be described as a "confiscation" of the value to the unit owner or a change that "expropriates the economic value" of plaintiff's unit for the Association's use. For the reasons set forth herein, defendant respectfully requests the Appellate Division reverse the November 15, 2023 Order entered by the Trial Court.

Respectfully submitted,

GILLIN-SCHWARTZ LAW

By:_____

Dated: 6/27/24 CHRISTOPHER GILLIN-SCHWARTZ, ESQUIRE

WALTER KRASINSKY,

Plaintiff/Appellee,

v.

CANTERBURY MANOR CONDOMINIUMS ASSOCIATION, INC.,

Defendant/Appellant,

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-001286-23T4

CIVIL ACTION

On Appeal From:
November 15, 2023 Final Order And Decision of the Superior Court of New Jersey, Cape May County – Chancery Division

Docket Number: CPM-C-26-23

Sat Below:
Hon. M. Susan Sheppard, P.J.CH.

BRIEF OF PLAINTIFF-APPELLEE WALTER KRASINSKY

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Re-submitted on: September 13, 2024

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Plaintiff-Appellee Walter Krasinsky ("Krasinsky"), through his undersigned counsel, submits this brief in opposition to Defendant-Appellant Canterbury Manor Condominium Association, Inc's (the "Association") Appellant Brief.

PRELIMINARY STATEMENT

At the crux of this matter are two paragraphs of an amendment adopted by the Association on April 25, 2023. The amendment consists of nine paragraphs, however, Krasinsky only objects to Paragraphs 1 and 2 which change his unit and his percentage in the Common Elements, which cannot be done without his consent ("the Amendment"). Da9-10.

On October 17, 2008, Krasinsky purchased Unit Number 5, 735 Washington Street, Cape May, New Jersey ("Krasinsky's Unit"), which is part of the Association. Da12. At the time of purchase, Krasinsky acquired the Property under and subject to the Master Deed for Canterbury Manor Condominiums (the "Master Deed") and the By-Laws of Canterbury Manor Condominiums (the "By-Laws" and together with the Master Deed the "Governing Documents"). Id.; Da32-62. Krasinsky purchased Unit 5, which has three decks (including one large deck), while all other Units in the Association (including Unit 5, the "Units") only have one porch or deck (the "Decks"). Da9-10. Under the Governing Documents, the Decks are a Limited Common

Element. Da36. All repairs and replacements to the common elements, both general and limited are made by the Association and charged to the Unit Owners as a common expense. Da56.

On March 17, 2023, Counsel for the Association sent an email to all Unit Owners (the "March 17, 2023 Correspondence") and therein attached the proposed Amendment to the Master Deed and By-Laws. Da63. The Amendment consists of nine (9) paragraphs. Id. Krasinsky opposed the adoption of Paragraphs 1 and 2 as they reallocate the responsibility for the Non-structural Repairs and Maintenance (hereinafter defined) of the Decks from the Association to the Unit Owners, which would negatively and disproportionately impact Krasinsky's property rights as he has more and larger Decks than the other Unit Owners. Da74. However, while the potential financial gain of the Association shows their motivation for seeking the Amendment, it is not the primary legal issue in this case. The primary issue in this case is that the Amendment changes Krasinsky's Unit, which cannot be done without his consent.

Through Paragraphs 1 and 2 of the Amendment, the Association sought to redesignate the responsibility for the repair and maintenance of certain limited common elements, specifically, "the exterior finished surface of the decks and porch, the railings adjacent to the decks and porch, light fixtures installed

adjacent to the decks and porch, designed to illuminate the same" (the "Non-structural Repairs and Maintenance") from the Association to the individual Unit Owners. Da9.

On April 25, 2023, Counsel for the Association sent an email to all Unit Owners indicating that the Association adopted the Amendment as the outcome of the vote was 4-1 in favor of the Amendment, with Krasinsky being the "no" vote. Da74. As evident from Paragraph 1 of the Amendment, Krasinsky's Unit has three Decks, where all other Units only have one. Da9-10. Although the exact square footage of the Decks is unknown, it is important for the Court to understand that Krasinsky's Unit has more decking than all the other Units combined. In accordance with Paragraphs 1 and 2 of the Amendment, Krasinsky is now responsible for the Non-structural Repairs and Maintenance of the three decks appurtenant to his Unit and all other Unit Owners are responsible for the one deck attached to each of their Units. This is a significant change as when Krasinsky purchased his Unit, the Association was responsible for the Non-structural Repairs and Maintenance of all Decks. It is evident that the other Unit Owners voted to adopt the Amendment because they would receive the greatest financial benefit from the Amendment as they have fewer and much smaller decks. Again, this illustrates the Association's motivation for seeking an

Amendment, but the primary legal issue remains that the Association cannot change Krasinsky's interest in the common elements without changing his Unit.

Regardless of financial impact, the Association cannot "change" the nature of Krasinsky's Unit under New Jersey law without Krasinsky's consent. The reallocation of the responsibility for the Non-Structural Repairs and Maintenance from the Association to the Unit Owners constitutes a change to Krasinsky's Unit. N.J.S.A. 46:8B-11 states "no amendment shall change a unit **unless the owner of record thereof and the holders of record of any liens thereon shall join in the execution of the amendment or execute a consent** thereto with the formalities of a deed." (Emphasis supplied). The Trial Court rightfully found that the adoption of Paragraphs 1 and 2 of the Amendment constituted an impermissible change to Krasinsky's Unit, which cannot be done without his consent.

CONCISE PROCEDURAL HISTORY

On May 18, 2023, Krasinsky filed his Complaint against the Association (the "Complaint"). Da99-108. Through the Complaint, Krasinsky pled two causes of action: (1) declaratory judgment; and (2) breach of fiduciary duty. Da107-108. The Association filed its Answer to the Complaint with Affirmative Defenses on June 29, 2023. Da109-114.

On July 28, 2023, Krasinsky moved for summary judgment ("Krasinsky's Motion for Summary Judgment"). Da115-127. On September 12, 2023, the Association opposed Krasinsky's Motion for Summary Judgment and filed a Cross Motion for Summary Judgment (the "Association's Motion for Summary Judgment"). Id. Both parties acknowledged that there were no genuine issues of material fact, but rather that this case calls for a legal interpretation regarding whether the Association can amend the Governing Documents to reallocate the responsibility of the maintenance and repairs of the Common Elements to the Unit owners and whether the reallocation constitutes a change to Krasinsky's Unit, which cannot be done without Krasinsky's consent. Id.

On October 6, 2023, the Trial Court heard oral argument on Krasinsky's Motion for Summary Judgment and the Association's Motion for Summary Judgment, and did not render a decision. Id. On November 15, 2023, the Trial Court issued a Final Judgment and Memorandum of Decision voiding the amendment on the basis that it constituted an impermissible "change" to Krasinsky's Unit (the "Final Judgment and Memorandum of Decision"). Da117-127.

The Association filed a Notice of Appeal on December 29, 2023, through which it seeks appellate review of the Trial Court's Final Judgment and Memorandum of Decision. Da128. Thereafter, the Association filed its

Amended Appellant Brief on June 26, 2024. Appellee Krasinsky submits this Brief in response.

On July 31, 2024, Krasinsky filed a Motion for Attorney's Fees (the "Motion") before the Trial Court. The Association requested that the Motion be stayed pending the outcome of this Appeal. Krasinsky agreed to withdraw the Motion, without prejudice, based on the understanding that the Motion may be refiled once the appeal is concluded and deemed as filed July 31, 2024, thereby preserving the original filing date.

CONCISE STATEMENT OF FACTS

On November 8, 2004, William C. Reinert, James P. Reinert, Paul M. Reinert and Philip J. Reinert as Grantor, submitted the property designated as Block 1079, Lot 7 on the official tax map of the City of Cape May, Cape May County, New Jersey (the "Condominium Property"), to the condominium form of ownership by filing the Master Deed, recorded in the Office of the Cape May County Clerk on December 3, 2004, in Deed Book 3122 at Page 264 et seq. Da32-62. Pursuant to the Master Deed, the Association was to consist of one (1) three story frame dwelling and five (5) residential units. Da35. Each of the Units have at least one Deck attached to the Unit for the respective unit owner's exclusive use. Da47.

As laid out in the Master Deed, Section 6(I), "[d]ecks appurtenant to units shall be a limited common element for the unit to which the deck is appurtenant and landing steps shall be a general common element, as graphically shown in Exhibit 'B.'" Da36. Exhibit B to the Master Deed states that "stairs, landings, porches, decks and driveways are limited common areas exclusive to the units they access to/from except as noted." Da47. Under the By-Laws, Article VI, Section 1, "[a]ll interior and exterior maintenance, repairs and replacements to the Common Elements, both general and limited, shall be made by the Board and charged to the Unit owners as a common expense." Da56. Unit 5, Krasinsky's Unit included three Decks at the time of purchase, where all other Units only have one. Da9-10.

On March 17, 2023, Counsel for the Association sent March 17, 2023 Correspondence to all Unit Owners and therein attached a Notice of Special Meeting, a Resolution Authorizing an Amendment to the Master Deed and By Laws, Consent to Action in Writing in Lieu of Formal Meeting and the Amendment See Exhibit 4. Da65-72. The Amendment consists of nine (9) paragraphs. Da70-72. Paragraphs 1 and 2 read as follows:

> 1. **LIMITED COMMON ELEMENTS.** As a result of this Amendment, the responsibility and costs of maintenance, repair, replacement, or improvement of certain Limited Common Elements, the use and enjoyment of which is limited to the owner of a

particular designated Unit or Units, shall be the responsibility of the designated Unit as follows:

(i) Unit 1. The Limited Common Element to Unit 1 includes a first-floor front open porch deck and adjacent railings as generally depicted in the condominium survey referred to as "Exhibit B" (recorded as an Amendment in the Office of the Cape May County Clerk in Deed Book 3216, Page 871). Unit 1 shall be responsible for the exterior finished surface of the decking of the porch, the railings adjacent to the decking of porch, light fixtures installed adjacent to the porch and designed to illuminate the same.

(ii) Unit 2. The Limited Common Element to Unit 2 includes an enclosed sun deck/porch at the rear of the condominium building as generally depicted in the condominium survey referred to as "Exhibit B". Unit 2 shall be responsible for all interior surfaces including the finished flooring, finished interior of the walls and ceilings, light fixtures, any electrical or plumbing within the porch, doors and windows attached to the enclosing walls of this limited common element.

(iii) Unit 3. The Limited Common Element to Unit 3 includes a second-floor front open porch deck and adjacent railings generally depicted in the condominium survey referred to as "Exhibit B". Unit 3 shall be responsible for the exterior finished surface of the decking of the porch, the railings adjacent to the decking of porch, light fixtures installed adjacent to the porch and designed to illuminate the same.

(iv) Unit 4. The Limited Common Element to Unit 4 is a second-floor rear enclosed porch/deck at the rear of the condominium building as generally depicted in the condominium survey referred to as "Exhibit B". Unit 4 shall be responsible for all interior surfaces including the finished flooring, finished interior of the walls and ceilings, light fixtures, any electrical or plumbing

within the porch, doors and windows attached to the enclosing walls of this limited common element

(v) Unit 5. The Limited Common Element to Unit 5 includes a third-floor rear open deck, side facing third floor open deck, second floor front open porch deck and adjacent railings generally depicted in the condominium survey referred to as "Exhibit B". Unit 5 shall be responsible for the exterior finished surface of the decks and porch, the railings adjacent to the decks and porch, light fixtures installed adjacent to the decks and porch, designed to illuminate the same.

2. **COMMON MAINTENANCE RESPONSIBILITIES**. Notwithstanding the description and responsibilities for maintenance, repair, and replacement set forth above in Section 1, all structural elements which support, cover, or enclose Limited Common Elements will be considered Common Elements and remain the responsibility of the Association.

Unless specific responsibility is set forth in Section 1 above, any other exterior painting, including exterior walls adjacent to limited common property, exterior railings that are painted, exterior walls that enclose limited common elements that are painted, exterior steps and their railings, including those that lead up to limited common enclosed and open porches, shall be considered Common Elements and remain the responsibility of the Association, unless such repair or replacement is necessitated by the intentional act or neglect of a unit owner, or their guests or invitees.

To the extent specific responsibility is set forth in Section 1 and a Unit owner fails to maintain a Limited Common Element, the Association may, in their exercise of Business Judgement, undertake maintenance, repair or other improvements deemed necessary or appropriate by the Association, and in that

> case, the costs of the same may be assessed against the designated Unit and the Association shall have a lien for the same.
>
> Da70-71.

Upon receipt of the March 17, 2023 Correspondence, Krasinsky responded to Counsel for the Association that his interest in the Common Elements and interest in his Unit cannot be changed without his consent. Da82. Section 11(b)(B) of the Master Deed reads as follows: "[n]o amendment or supplement to the Master Deed shall change a unit or its percentage in the Common Elements unless the owner of the unit and the holders of any first mortgage liens on the unit or units shall join in the signing of the amendment or they shall sign a consent thereto in a form recordable in the office of the Cape May County Clerk, New Jersey." Da39. Article XI of the By-Laws states that amendments to the By- Laws "shall be adopted and proposed in the same manner established in the Master Deed." Da61.

Counsel for the Association replied that the Amendment does not alter the dimensions of any Unit or the percentage interest in the Common Elements and that the Proposed Amendment deals only with responsibilities for maintenance and related items that are within the authority of the Association to adopt pursuant to the procedures outlined in the Amendment. Da88. To summarize, on March 21, 2023, Krasinsky again replied to Counsel for the Association that the

Amendment would constitute a change to his Unit without his consent and that he disagreed with the Association's position regarding the Amendment. Da86-87. On March 22, 2023, Counsel for the Association replied:

> Thank you for sharing your thoughts on this amendment and I will forward these to the Board members for their consideration. As to the threshold question of whether this amendment can proceed at all, my position on that remains unchanged. Very simply, this amendment reflects a very basic principle that with the right (of exclusive use of a LCE) goes certain responsibilities. This amendment impacts all unit owners and those responsibilities are not unlimited and are reasonably defined in scope by the proposed amendment. The amendment does nothing to alter the dimensions of any unit and percentage interest in the common elements. The maintenance obligations are proportional to the LCE area so that some individual responsibility go along with the benefits of individual/exclusive use. Governing documents and rules regarding maintenance obligations can and do change all the time in the State of New Jersey. The Board is adhering to the procedures for doing so in this case, and you are a part of that process. However, unanimous consent is not the rule set forth in the Master Deed for this amendment. Accordingly, the Board's consideration of this amendment will proceed as previously indicated and you have the option to indicate that vote in writing in advance or at the time of the meeting.
>
> Da85.

Krasinsky responded on March 23, 2023:

> The salient point in our discussion is whether the proposed amendment would constitute a change to my unit. As stated previously, any change to my percentage

interest in the common elements is a change to my unit, as the two are inseparable.

To further clarify my point of view, it may be helpful to define "interest in the common elements" as set forth in our Master Deed, and how it affects our discussion.

1.) Section 7 of our Master Deed states that our "Proportionate undivided interest in common elements and limited common elements" is as stated in Exhibit "C" of the Master Deed.

2.) Exhibit "C": "Percentage of unit interest in common elements AND EXPENSES (emphasis added)" clearly states that an interest in the common element expenses is to be a part of the proportionate undivided interest in the common elements as set forth in Section 7 of the Master Deed.

3.) Per NJ §46:8B-14(a), common element expenses include maintenance and repair of the common elements.

Thus, any change to the financial responsibility for the repairs and maintenance as is proposed by this amendment would constitute a change to the common element expenses (per §46:8B-14a). Furthermore, any change to the common element expenses would cause a change in the proportionate undivided interest in the common and limited common elements (per Exhibit "C" and Section 7 of our Master Deed), which ultimately would cause a change to my unit. For the reasons mentioned above, the proposed amendment is prohibited to be considered for implementation, as it causes a change to my unit and thus is not permitted by both our Master Deed and condominium law.

> Chris, I very much appreciate that you are responding to my emails in a timely manner. I know that you are busy, and I value your opinion and time. Therefore, to help me to better understand your position and respond in an informed and succinct manner, I am respectfully asking that you address the specific issues mentioned in this email. Namely, that any change to the financial responsibility for the repairs and maintenance of our limited common elements constitutes a change to the interest in the common expenses, which effectively is a change to my unit as outlined above. The common expenses are clearly stated to be a integral part of the "Proportionate undivided interest in common elements and limited common elements" as per Schedule "C" of our Master Deed, which is given the authority to define same as per Section 7 of our Master Deed.
>
> Da84.

On March 31, 2023, Counsel for the Association replied:

> In an exercise of judgment, the Board "is intending to provide reasonable definition to responsibility for maintenance and repair of the Limited Common Elements which is exclusive to each unit and reserving as a common expense the structural elements. On a very basic level, this recognizes that with exclusive rights to a LCE should come some level of responsibility. That principal is reflected in the Condominium Act, where N.J.S.A. 46:8B-3d(ii)'s excludes from common elements any improvements "specifically reserved or limited to a particular unit or group of units." The Board and Association has the authority to define these responsibilities and is doing pursuant to the governing documents. This amendment would apply to all unit owners, not just your unit. Yes, some units happen to have larger limited common areas associated with their unit. In an attempt to arrive at a fair application to all, the responsibility for exterior maintenance and repair of these LCE areas is designed to be proportional to that

> exclusive benefit, and is not without limitation. The Board is proceeding in good faith based on these fundamental notions of fairness. You may disagree with the Board's judgment. However, the governing documents do not call for unanimous vote to make an amendment. Accordingly, this matter is proceeding forward."
>
> Da83.

Krasinsky responded the same day:

> "Thank you again for your response. My interest in the common elements includes both an ownership interest and an expense interest. Neither can be changed without changing my unit, as they are inseparable. The amendment directly seeks to change my expense interest, which is not permitted without my consent. Since we seem to be at an impasse, it is best to seek a Judge's intervention to help us bring resolution to this matter. It would be most cost effective to hear the Judge's decision prior to the actual filing of any amendment, as the cost involved with filing the amendment would be misspent if overturned after the fact."
>
> Da82.

On April 7, 2023, Counsel for Krasinsky sent a letter to Counsel for the Association again asserting Krasinsky's objection to the Amendment. Da92-96.

After conversations with Counsel for the Association, on April 17, 2023, Counsel for Krasinsky sent a letter to Counsel for the Association again setting forth Krasinsky's objection to the Amendment. Da97-98. Krasinsky indicated that while he understands that if the Unit Owners adopt the Amendment the

Association will still be responsible for "all structural elements which support, cover, or enclose Limited Common Elements," the Association still cannot change Krasinsky's Unit without his consent. Id. On April 25, 2023, Counsel for the Association sent an email to all Unit Owners indicating that all five Unit Owners consented to voting on the Amendment via email and that the outcome of the vote was 4-1 in favor of the Amendment, with Krasinsky being the "no" vote. Da74.

LEGAL ARGUMENT

STANDARD OF REVIEW

An appellate court reviews a grant or denial of summary judgment de novo and applies the same standard as the trial court; facts are viewed in the light most favorable to the non-moving party and the moving party must show there is no genuine issue as to any material fact challenged and that it is entitled to a judgment as a matter of law. Bank of New York Mellon v. Corradetti, 466 N.J. Super. 185, 246 (App. Div. 2020), rev'd and remanded, 245 N.J. 136, (2021).

"Reversal is reserved only for those circumstances when we determine the factual findings and legal conclusions of the trial judge went 'so wide of the mark that a mistake must have been made. Such a mistake can arise in many ways from manifest lack of inherently credible evidence to support significant findings, obvious overlooking or underevaluation of crucial evidence, or a

clearly unjust result. However, if we are satisfied that the trial judge's findings and result could reasonably have been reached on sufficient credible evidence in the record as a whole, his [or her] determination should not be disturbed." Id. at 207 (internal citations and quotations omitted). In this instance, reversal is not warranted as the Trial Court rightfully found that Paragraphs 1 and 2 of the Amendment constitute a change to Krasinsky's Unit.

POINT I. THE REALLOCATION OF THE RESPONSIBILITY FOR THE NON-STRUCTURAL REPAIRS AND MAINTENANCE FROM THE ASSOCIATION TO THE UNIT OWNERS CONSTITUTES A CHANGE TO KRASINSKY'S UNIT, WHICH CANNOT BE DONE WITHOUT KRASINSKY'S CONSENT.

I. Krasinsky must retain the same property rights as when he purchased his Unit, unless he consents to same being altered.

The Supreme Court of New Jersey has defined what actions change a unit and found that unit owners maintain significant property rights in their common and limited common elements. In Thanasoulis v. Winston Towers 200 Ass'n, 110 N.J. 650, 658 (N.J. 1988), the Court reinforced the significance of a unit owner's property rights in common elements and analyzed whether a condominium association can charge nonresident unit owners higher monthly parking fees than it charges resident owners in order to retain the extra revenue for the association's benefit. Id. at 652. The Court found that because the property interest in the common elements is inseparable from the unit, and because the N.J. Condominium Act (N.J.S.A 46:8B-1) prohibits a change to the

unit without the owner's consent, the higher parking fee constituted a change to the unit in violation of the Act. Id. at 663-664. The Court stated that:

> **"The Act does not define the phrase 'change in a unit,' but we assume that the legislative intent was that a unit owner should retain essentially the same property rights originally deeded to him for as long as he owns his unit, unless he affirmatively consents to their being altered.** A parking space in a 614-unit condominium complex that is situated in a congested area is obviously a vital component of the unit. **The revised parking rules have the effect of confiscating a portion of the property interest he acquired when he purchased his unit, thereby denying plaintiff the economic value of a portion of his unit.** The revised rules, therefore, did constitute a 'change' in plaintiff's unit in contravention of the Act."
>
> (Emphasis supplied). Id. at 663.

Further, in Matter of 560 Ocean Club, L.P., 133 B.R. 310 (Bankr. D.N.J. 1991), the Court found that revised rental regulations establishing strict time frames for the duration of leases effectively confiscates a portion of the property interest acquired by the unit owners, when they purchased their units. Id. at 317. Therefore, the rental limitation passed by the Association was invalidated as a "change" to the unit without the owner's consent, in contravention of the Condominium Act. Id. at 320-31. This case is similar to the Thanasoulis and Ocean Club cases, because when Krasinsky purchased his Unit, the Unit Owners split the costs of the Non-Structural Repairs and Maintenance of all Decks. The Association is now changing the terms under which Krasinsky purchased his

Unit and making him 100% responsible for the repairs to his Decks. This case is even more compelling than the Thanasoulis case, as the Association is directly changing Krasinsky's interest in the common expenses, which per the Governing Documents, cannot be done without his consent. There are no new variables in this case, other than the other Unit Owners now coming to the realization that they are not happy with the agreement they made when purchasing their Units. The Amendment changes the original rights under which Krasinsky purchased his Unit, which cannot occur without his consent.

The Association misstates the Trial Court's decision. Da117-127. The Association states:

> "…the trial court expanded its reach to include any rulemaking by the Association that would cause an "increased economic burden". The practical impact of this ruling is that any unit owner whose responsibilities increase during their ownership can now apply to the court and seek to freeze their financial commitment to the amount set as of the date they purchased their unit and rely on this decision as a basis."
>
> See Brief of Defendant-Appellant, Canterbury Manor Condominium Association, Inc. Submitted June 21, 2024 at p. 23-24.

The Trial Court found that Paragraphs 1 and 2 change Krasinsky's Unit, not because of the increased financial burden, but rather because Krasinsky must retain the same property rights originally deeded to his when he purchased the Unit, unless he consents to them being altered:

> [Krasinsky] bought Unit 5 in which the costs of the limited common elements of the decks were apportioned by percentage as common expenses. [Krasinsky] purchased his unit with the express understanding that he owed a certain percentage interest in common elements and expenses. The Amendment adjusts his unit interests in common elements and expenses. [Krasinsky] has an economic expense interest as a unit owner. The Amendment changes [Krasinsky]'s common element expense interests, and under Thanasoulis amounts to a change of [Krasinsky]'s unit requiring his consent as unit owner under N.J.S.A. 46:8B-11. This proposal is an increased economic burden which has the effect of depriving [Krasinsky] of the benefit of his original bargain and without his consent.
>
> Da124.

Although Krasinsky would have an increase economic burden from the Amendment, this is not the basis for the Trial Court's Final Judgment and Memorandum of Decision. The Trial Court's decision was correctly based on the fact that changing the common element expense interest would cause a change to Krasinsky's Unit, which cannot be done without his consent.

Further, the Association argues that Paragraphs 1 and 2 "simply stands for the generally applicable and basic principle that with the benefit of exclusive use should go the responsibility for ordinary maintenance." See Brief of Defendant-Appellant, Canterbury Manor Condominium Association, Inc. Submitted June 21, 2024 at p. 24. However, the founders of the Association chose to divide the cost of the Non-Structural Repairs and Maintenance of the

Decks amongst the Unit Owners, rather than hold each Unit Owner responsible for the Non-Structural Repairs and Maintenance of their exclusive Decks, and this is the agreement that every Unit owner signed and agreed to when they purchased their Unit. If the Unit Owners wanted to live in a condominium where each Unit Owner is responsible for the ordinary maintenance of the limited common elements to which they have exclusive access, they should have purchased a unit in a different condominium, or negotiated the change to the Governing Documents prior to signing and accepting title.

Instead, by accepting title, all Unit owners agreed to the terms of the By-Laws and Master Deed, which state that the Decks are a limited common element and that the repairs and maintenance of the Decks are to be made by the Board and charged to the Unit Owners as a common expense, even though the Units do not have identical Decks. N.J.S.A. 46:8B-3 reads as follows:

> The common expenses shall be charged to unit owners according to the percentage of their respective undivided interests in the common elements as set forth in the master deed and amendments thereto, or in such other proportions as may be provided in the master deed or by-laws. The amount of common expenses charged to each unit shall be a lien against such unit subject to the provisions of section 21 of this act. **A unit owner shall, by acceptance of title, be conclusively presumed to have agreed to pay his proportionate share of common expenses accruing while he is the owner of a unit.** However, the liability of a unit owner for common expenses shall be limited to amounts duly assessed in accordance with this act, the master deed

> and by-laws. No unit owner may exempt himself from liability for his share of common expenses by waiver of the enjoyment of the right to use any of the common elements or by abandonment of his unit or otherwise…"
>
> (Emphasis supplied)

Also, see Universal N. Am. Ins. Co. v. Bridgepointe Condo. Ass'n, Inc. 456 N.J. Super. 480, 490 (Law Div. 2018) (by acceptance of title, a unit owner is presumed to agree to the condominium association's master deed and by-laws) (internal citations omitted). Here, the Trial Court agreed with Krasinsky that this is simply a case of buyer's remorse and that the Unit Owners now regret the terms under which they purchased their Units. Da125.

As the Supreme Court found in Thanasoulis, unit owners should retain essentially the same property rights originally deeded to them for as long as they own the unit, unless they affirmatively consent to their being altered. See Thanasoulis, supra at 663. By adopting the Amendment, the Association has altered Krasinsky's property rights as he is now responsible for the Non-Structural Repairs and Maintenance to his Decks, which was not the case when he purchased the Unit and constitutes a change to his Unit without his consent, which is not permitted per the Governing Documents.

II. Paragraphs 1 and 2 of the Amendment Result in Recalculation of Each Unit Owner's Percentage Interest in the Common Elements and Expenses, which constitutes a change to the Units and cannot be done without all the Unit Owners' Consent.

The Amendment redesignates the responsibility for the Non-Structural Repairs and Maintenance from the Association to the Unit Owners. Simply stated, the Amendment "changes" all Units, but most significantly Krasinsky's Unit, which cannot be done without his consent. N.J.S.A. 46:8B-11 reads as follows:

> "The master deed may be amended or supplemented in the manner set forth therein. **Unless otherwise provided therein, no amendment shall change a unit unless the owner of record thereof and the holders of record of any liens thereon shall join in the execution of the amendment or execute a consent thereto with the formalities of a deed.** Notwithstanding any other provision of this act or the master deed, the designation of the agent for service of process named in the master deed may be changed by an instrument executed by the association and recorded in the same office as the master deed."
>
> (Emphasis supplied).

Section 11(b) of the Master Deed mirrors the language of N.J.S.A. 46:8B-11 and requires the Unit owner's consent to change their Unit and is also, even more specific, reinforcing that the percentage in the common elements is part of the Unit:

> …No amendment or supplement to the Master Deed shall change a unit **or its percentage in the Common Elements** unless the owner of the unit and the holders

> or any first mortgage liens on the unit or units shall join in the signing of the amendment or they shall sign a consent thereto in a form recordable in the office of the Cape May County Clerk, New Jersey."
>
> (Emphasis supplied).

Article XI of the By-Laws states that amendments to the By-Laws "shall be adopted and proposed in the same manner established in the Master Deed." Therefore, the Master Deed and By-Laws are consistent with N.J.S.A. 46:8B-11, which require Krasinsky's consent to change his Unit. Counsel for the Association argues that "[t]he Master Deed does not require unanimous approval for amendments to the governing documents," but fails to mention that the Unit Owner's consent is required when changing a Unit. See Brief of Defendant-Appellant, Canterbury Manor Condominium Association, Inc. Submitted June 21, 2024 at p. 13.

N.J.S.A. 46:8B-3 defines unit as follows:

> "Unit" means a part of the condominium property designed or intended for any type of independent use, having a direct exit to a public street or way or to a common element or common elements leading to a public street or way or to an easement or right of way leading to a public street or way, and **includes the proportionate undivided interest in the common elements and in any limited common elements assigned thereto in the master deed or any amendment thereof**.
>
> Emphasis supplied.

Further, N.J.S.A. 46:8B-6 reads as follows:

> The proportionate undivided interest in the common elements assigned to each unit shall be inseparable from such unit, and any conveyance, lease, devise or other disposition or mortgage or other encumbrance of any unit shall extend to and include such proportionate undivided interest in the common elements, whether or not expressly referred to in the instrument effecting the same. The common elements shall remain undivided and shall not be the object of an action for partition or division. The right of any unit owner to the use of the common elements shall be a right in common with all other unit owners (except to the extent that the master deed provides for limited common elements) to use such common elements in accordance with the reasonable purposes for which they are intended without encroaching upon the lawful rights of the other unit owners.

In accordance with N.J.S.A. 46:8B-3 and N.J.S.A. 46:8B-6, Krasinsky's undivided interest in the common elements is part of, and inseparable from his Unit. Accordingly, the Association acknowledges that "[u]ndoubtedly, if the Association sought to alter the dimensions of [P]laintiff's [U]nit or change the percentage interests in the common elements allocated to each unit, those are changes that would require consent." See Brief of Defendant-Appellant, Canterbury Manor Condominium Association, Inc. Submitted June 21, 2024 at p. 19-20. Paragraphs 1 and 2 of the Amendment do indeed effect Krasinsky's percentage interest in the common elements and expenses and therefore constitute a change to Krasinsky's Unit.

An undivided percentage interest in the common elements includes an undivided percentage interest in the common expenses. This is further reinforced by Exhibit "C" of the Master Deed, which lays out each Unit Owner's proportionate undivided interests in the common elements and expenses:

> PERCENTAGE OF UNIT INTEREST
> IN COMMON ELEMENTS **AND EXPENSES**
>
> | UNIT | INTEREST |
> |---|---|
> | 1 | 26.63% |
> | 2 | 20.92% |
> | 3 | 14.41% |
> | 4 | 17.50% |
> | 5 | 20.54% |
>
> (Empasis supplied). Pa4.

As the Association has acknowledged, it cannot change Krasinsky's percentage interest in the common elements without his consent. Therefore, the Association argues that there is no change to Krasinsky's Unit because there is no change to his percentage interest in the common elements and expenses. However, this is blatantly untrue. The Association is attempting to remove the Non-structural Repairs and Maintenance of the Decks from the Unit Owner's percentage interest in the common elements and expenses and created a new column of expenses for each Unit Owner, without Krasinsky's consent. Accordingly, Krasinsky would now be responsible for 100% of the Non-structural Repairs and Maintenance to his Decks, rather than 20.54%, even

though the Decks are still a limited common element. This would cause a direct change in the percentage interests in the common expenses, which would create a change to Krasinsky's Unit without his consent. In other words, even though the Decks are classified as a limited common element, the Non-structural Repairs and Maintenance of the Decks would no longer be based upon each Unit Owner's percentage interest in the common elements and expenses, which would change the percentage interest in the common expenses and thus change Krasinsky's Unit. A percentage interest in the common elements includes an ownership interest and an expense interest, and neither can be changed without changing a Unit.

As laid out in the Governing Documents and acknowledged by the Association, each Unit's percentage interest in the common elements and expenses is based upon the square footage of each Unit. Da83; Da47. Yet, by adopting Paragraphs 1 and 2 of the Amendment, the Association is no longer holding each Unit Owner responsible for their percentage share in the common elements and expenses based upon the square footage of their Unit, but instead creating a new formula in which each Unit owner is now 100% responsible for the Non-Structural Repairs and Maintenance of the Decks to which they have exclusive access. However, the Association recognizes that it cannot change each Unit Owner's percentage interest in the common elements and expenses

without Krasinsky's consent, so the Association is attempting to backdoor the change. The Association is no longer having each Unit Owner pay their proportional share for the Non-Structural Repairs and Maintenance of the Decks based upon the square footage of their Unit, but the Association is also not recalculating how each Unit Owner's percentage share in the common elements and expenses is calculated, even though it should because the percentages are clearly no longer based strictly upon the square footage of each Unit.

In other words, to properly adopt and put in effect Paragraphs 1 and 2 of the Amendment, the Association would need to recalculate each Unit Owner's interest in the common elements and expenses because the percentages are clearly no longer based solely upon the square footage of each Unit. The Association is not doing so because it knows this would constitute a change to Krasinsky's Unit, which cannot be done without his consent. Counsel for the Association states:

> The amendment did not change or alter the dimensions of Krasinsky's unit. The amendment also did not alter or impair the use any of the areas within his unit or the limited common areas reserved for his exclusive use. Nor did the amendment confiscate any property interest for the Association's own use. In other words, Krasinsky enjoys the same dimensions of his unit and exclusive use of the deck after the amendment, as he did before.

> See Brief of Defendant-Appellant, Canterbury Manor Condominium Association, Inc. Submitted June 21, 2024 at p. 9.

As already discussed, Counsel fails to mention that the Amendment does indeed change Krasinsky's Unit by changing his Unit's interest in the common expenses, which are an inseparable part of the interest in the common elements, from 20.54% to 100% of the deck repairs and maintenance. Overall, the basic fact remains that the however the Association attempts to word the changes they are making, the Amendment is indeed changing Krasinsky's Unit by changing his percentage interest in the repairs and maintenance of the Decks from 20.54% to 100%, which requires his consent.

POINT II. THE ASSOCIATION'S ADOPTION OF PARAGRAPHS 1 AND 2 IS NOT PROTECTED BY THE BUSINESS JUDGMENT RULE.

The Association argues that its decision to enact the Amendment was reasonable and therefore is protected by the Business Judgment Rule:

> The Board determined that the most reasonable approach was to make an across-the-board and generally applicable rule that each unit would be responsible for the maintenance and repair of the exclusive limited common element associated with each individual unit. In other words, with the benefit of exclusive use goes the responsibility for ordinary care and maintenance.
>
> See Brief of Defendant-Appellant, Canterbury Manor Condominium Association, Inc. Submitted June 21, 2024 at p. 7-8.

> The Association made the decision to amend the Master Deed, not out of malice, personality conflicts, or to punish any particular owner, but to simply establish a rational and reasonable maintenance responsibility that was proportional to the exclusive use enjoyed by each unit.
>
> Id. at p. 10.

Whether or not the Amendment is reasonable or not reasonable has no relevance in our case, as reasonableness is not the test. As the Trial Court correctly stated:

> …since there has been a "change" in ownership interest/expense, whether it is an equitable change cannot be considered by the court pursuant to N.J.S.A. 8B-11 since plaintiff does not consent.
>
> Da124 at fn 1.

In accordance with the Governing Documents and N.J.S.A. 46:8B-11, the Association cannot change Krasinsky's Unit without his consent, therefore the Association should not be afforded any protection under the Business Judgment Rule. The test for when protection under the Business Judgment Rule applies is as follows:

> The test is "(1) **whether the Associations' actions were authorized by statute or by its own bylaws or master deed, and if so**, (2) whether the action is fraudulent, self-dealing or unconscionable."
>
> Emphasis supplied. Owners of the Manor Homes of Whittingham v. Whittingham Homeowners Ass'n, 367

> N.J. Super. 314, 322 (App. Div. 2004); accord Chin v. Coventry Square Condo. Ass'n, 270 N.J. Super. 323, 328-29 (App. Div. 1994).

In this case, the Court does not get to the second part of the test because as laid out above, the Association's actions were prohibited by N.J.S.A. 46:8B-11, the By-Laws and the Master Deed since the Association cannot change Krasinsky's Unit without his consent. The Trial Court agreed with Krasinsky and correctly found that the Association's actions were not authorized by statute, and therefore not protected by the Business Judgement Rule. Da126.

POINT III. THE ASSOCIATION CAN DESIGNATE RESPONSIBILITY OF LIMITED COMMON ELEMENTS TO UNIT OWNERS; HOWEVER, IT MUST BE DONE IN COMPLIANCE WITH THE GOVERNING DOCUMENTS AND APPLICABLE STATUTES.

N.J.S.A. 46:8B-14(a) reads as follows:

> The association, acting through its officers or governing board, shall be responsible for the performance of the following duties, the costs of which shall be common expenses:
>
> (a) The maintenance, repair, replacement, cleaning and sanitation of the common elements.

Per our By-Laws, Article VI, Section 1:

> All interior and exterior maintenance, repairs and replacements to the common elements, both general and limited, shall be made by the Board and charged to the unit owners as a common expense.

At signing, and by acceptance of title, all unit owners agreed that the maintenance and repairs of the decks would be shared as a common expense.

Counsel for the Association makes several incorrect interpretations when discussing the results of Trial Court. One incorrect interpretation is as follows:

> The Trial Court erred and effectively created new law in the State of New Jersey in holding that an Association is without authority to assign responsibility for maintenance of limited common elements based on its interpretation of N.J.S.A. 46:8B-14(a)…
>
> See Brief of Defendant-Appellant, Canterbury Manor Condominium Association, Inc. Submitted June 21, 2024 at p. 14.

Counsel later continues:

> If this decision is allowed to stand, this will result in new law and absurd results in the State in which no Association may allocate responsibility for Limited Common Elements and they must be a common expense to all unit owners regardless of exclusive use. This type of allocation of responsibility is prevalent throughout the State in governing documents and if allowed to stand, would render void similar existing provisions throughout the State.
>
> Id. at p. 16-17.

The Association exaggerates the Trial Court's decision by stating that it means: "no [a]ssociation may allocate responsibility for Limited Common Elements and they must be a common expense to all unit owners regardless of exclusive use." Id. at p. 16. This is not what the Trial Court found. Rather, the

Trial Court found that in this case, the Decks are a limited common element and that the Association is responsible for the maintenance of same, unless all Unit Owners agree to a change, which is the correct decision based upon the Governing Documents and applicable law, which require Krasinsky's consent to change his Unit. Da117-127.

An Association indeed may assign responsibility for maintenance of limited common elements to unit owners or to the Association, but it must either be done at signing when assuming title, or by an amendment that is written in compliance with governing documents and applicable statutes. The Amendment violates both the Governing Documents and applicable statutes by changing Krasinsky's Unit without his consent. The Association again misstates the Trial Court's decision and reasoning:

> …the Trial Court's decision rests entirely on the premise that common elements and limited common elements are indistinguishable. This interpretation is not supported in the Condominium Act which separately defines the two.
>
> See Brief of Defendant-Appellant, Canterbury Manor Condominium Association, Inc. Submitted June 21, 2024 at p. 15.

The correct and intended interpretation of the Condominium Act is that some common elements have general use, and some common elements have limited use, with the only distinction between the two being exclusive use or general

use. The Trial Court correctly found that in this case, the common elements and limited common elements are indistinguishable based upon the Governing Documents. In this case, the Decks are common elements, with the only distinction being exclusive use of the Unit Owners to which the Decks are appurtenant, and thus given the title limited common elements. In all other ways, including financial obligation, general and limited common elements are indeed indistinguishable as set forth in the Governing Documents. In accordance with N.J.S.A. 46:8B-3(d),"common elements" is defined as:

> (i) the land described in the master deed;
> (ii) as to any improvement, the foundations, structural and bearing parts, supports, main walls, roofs, basements, halls, corridors, lobbies, stairways, elevators, entrances, exits and other means of access, excluding any specifically reserved or limited to a particular unit or group of units;
> (iii) yards, gardens, walkways, parking areas and driveways, excluding any specifically reserved or limited to a particular unit or group of units;

N.J.S.A. 46:8B-3(k) defined "limited common elements" as follows:

> k. "Limited common elements" means those common elements which are for the use of one or more specified units to the exclusion of other units.

The By-Laws, Section XIV, define "common element" and "limited common element" as follows:

> "**Common Element**: All land and all portions of the property not located in any unit, including, but not limited to roof, foundation, walls, curbs, sidewalks,

> outside **stairways, porches, patios,** fences, including whatever areas on the premises are necessary to the safety and upkeep of the property which are in common use."
>
> "**Limited Common Element**: Shall mean all parts of the property which are reserved for the sole use of the owner of a unit but which are annexed to the unit such as **porches, patio, staircases and balcony**."
>
> (Emphasis supplied). Da61-62.

Both definitions of "common elements" include stairways, porches and patios. This supports the correct interpretation that common elements can have general or exclusive use. In summary, everything outside of the physical boundaries of a unit is a common element. A limited common element is a common element and is to be treated as such, with the only distinction being exclusive use, which is defined in the Governing Documents. In every other way, including financial obligation, a limited common element and a general common element are both common elements and are treated the same unless laid out differently in the Governing Documents.

In summary, Per N.J.S.A. 46:8B-6, The proportionate undivided interest in the common elements assigned to each Unit shall be inseparable from such Unit. Thus, any change to the interest in the common elements constitutes a change to the Unit. The percentage interest in the common elements includes a percentage interest in the common expenses, as outlined in Schedule C of the

Master Deed. The Amendment directly changes Krasinsky's interest in the common elements by changing his interest in the common expenses, namely from 20.54% of the maintenance and repairs of his decks to 100% of the maintenance and repairs of his decks. Regardless of the negative financial impact Krasinsky would experience, this would constitute a change to his Unit and requires his consent.

CONCLUSION

For all the reasons stated herein, this Court should affirm the Trial Court's November 15, 2023 Order.

Respectfully submitted,

FOX ROTHSCHILD LLP

By: _____

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October 1, 2024

Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
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Re: WALTER KRASINSKY V. CANTERBURY MANOR CONDOMINIUM ASSOCIATION, INC.
DOCKET NO. A-001286-23T4

REPLY BRIEF PURSUANT TO R. 2:6-5

Honorable Judges:

On behalf of appellant Canterbury Manor Condominium Association, Inc. ("the Association"), please accept this letter brief in reply to the submission of respondents. R. 2:6-5.

TABLE OF CONTENTS

I. PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Association incorporates the procedural history and statement of facts from its principal brief.

II. ARGUMENT

The issues on appeal relate to the trial court's legal conclusions, and the application of those conclusions to the facts. These issues are subject to plenary review by the Court. See Spangenberg v. Kolakowski, 442 N.J. Super. 529, 535 (App. Div. 2015) (quoting Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)).

Plaintiff seeks to convince the Court that any change to condominium governing documents that may have some financial impact is a "change" to the unit interest acquired at the time of purchase. This new "rule", if allowed to stand, functions as a nullification of the Business Judgment Rule and handcuffs Associations from making reasonable changes by granting veto power to any dissenting unit owner claiming a differing financial impact from when they purchased.

Both parties cite the same authority in support of their arguments. However, plaintiff does not describe the law in the State of New Jersey. Plaintiff seeks to rewrite condominium law in the State and proposes an interpretation of Thanasoulis that can be used as a *sword* to nullify any

condominium action with which they disagree - **rather than as a *shield* guarding against actions that rise to the level of "confiscation**." See Thanasoulis v. Winston Towers 200 Association, 110 N.J. 650, 663 (1988)

In other words, there are a range of actions by an Association that may have a differing financial impact to the unit owners, but do not rise to the level of a "confiscation" of the unit owner's interest. For example, the Association may decide to change landscaping contractors for the next calendar year which will result in an increase in costs to the unit owner from when they purchased. That can certainly be characterized as a change, but the Court must decide whether they agree with plaintiff's argument that *any change from the conditions of when they purchased* is automatically a change rising to the level of a confiscation contemplated in Thanasoulis. Accepting that position requires the Court to create new law.

Instead, courts have found that **change is a feature of owning a unit in common interest communities** - not a bug. Courts have held that a dissenting owner "cannot claim a vested and immutable right" in one provision of a governing document to the exclusion of the applicability of another provision that authorizes amendments to the document. See Cape May Harbor Village and Yacht Club Ass'n Inc. v. Sbraga, 421 N.J. Super. 56 (App. Div. 2011).

For example, in Cape May Harbor Village a dissenting owner challenged

an amendment which provided for a complete restriction on rental where the owner had originally purchased without that restriction in place. There, the Association enacted an amendment eliminating the ability to rent altogether, without any durational limit. The Court analyzed the "reasonableness" of the amendment and rejected the argument by the dissenting owner that they could exempt themselves from the rule because they purchased without it in place. The Court found that although the governing documents "did not prohibit (and indeed contemplated) leasing of homes, **it also contained provisions authorizing amendments of its provisions. Therefore, any purchaser was on notice that the provisions in the Declaration were not immutable**." Id. at 68 (emphasis added). The Appellate Division upheld the rental restriction as reasonable and rejected the dissenting owner's argument that it unreasonably infringed on a "valuable property right." Id.

Here, the Association is not proposing anything even approaching the restriction on use *upheld* in Cape May Harbor Village. Instead, it has proposed an amendment to reorder the obligation for ordinary maintenance of certain limited common elements to be tied to the units with exclusive use and control of those limited common elements. In other words, before the amendment all unit owners were responsible for a proportionate share of all limited common element decks. After the amendment, all unit owners are responsible for only

those limited common elements decks exclusively benefiting their unit. This rule does nothing to strip plaintiff of dominion, control, or exclusive use of the limited common element associated with his unit. Nor does the amendment seek to individually punish or discriminate against one owner.

Instead, the Association sought to simply amend the Master Deed to recognize uniformly *that with the right of exclusive use to certain limited common areas, should go the responsibility for maintenance*. The fact that the responsibility may be framed another way in the governing documents, does not render it "immutable". Like the documents in Cape May Harbor Village, the governing documents here contained provisions for amendment – which plaintiff was on notice of when he purchased.

The Condominium Act and the governing documents set forth the procedure for amendment –which the Association followed to the letter. In this case, plaintiff has a right to participate in the process of the amendment, but his dissent cannot function as a veto. **Not every change is a confiscation**.

Plaintiff enjoys the same unit dimensions and exclusive use of a deck both before and after the amendment. Plaintiff was also responsible for maintenance both before and after the amendment – except with the amendment in place, he *avoids* responsibility for the other decks to which he has no right to use and is only responsible for the areas reserved for *his*

exclusive use and likewise to the other units in the community.

When plaintiff purchased his unit, he did so with knowledge that if 2/3rds of the unit owners voted in favor of an amendment, the amendment could pass and have the force of law in the community – whether he agrees or not. That is what occurred here.

Plaintiff should not enjoy a unilateral veto over any decision that has any conceivable economic impact - which would implicate almost all Association decisions and create a new "rule" in this State for review of condominium board action. If the Court applies established law, plaintiff must show that the action fits the narrower category of changes having a "confiscatory effect." Because the amendment is reasonable and plaintiff fails to meet the burden of showing the change functions as a confiscation of unit, the decision by the Trial Court must be reversed and the amendment affirmed.

III. CONCLUSION

Based on the foregoing, the Court should reverse the decision of the Trial Court and affirm the amendment.

Respectfully submitted,

GILLIN-SCHWARTZ LAW

By:_____

Dated: 10/1/2024 CHRISTOPHER GILLIN-SCHWARTZ, ESQUIRE