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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

NEIL GROSSMAN et al., Plaintiffs and Respondents, v. PARK FORT WASHINGTON ASSOCIATION, Defendant and Appellant.	F063125 (Super. Ct. No. 09CECG02121) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Robert J. Rosati for Defendant and Appellant.

Michael A. Milnes for Plaintiffs and Respondents.

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INTRODUCTION

This appeal involves a dispute between a homeowners association and property owners who built a cabana and fireplace in their backyard without obtaining prior approval from the homeowners association. The homeowners association contends the applicable governing documents prohibited the cabana and fireplace. Thus, the homeowners association concludes it properly denied the owners' request for a variance and properly imposed a fine of $10 per day until the cabana and fireplace were removed.

The trial court interpreted the governing documents as allowing the cabana and requiring the fireplace to be 10 feet from the property line. Applying this interpretation, the court required the fireplace to be modified, concluded a variance was not needed for the cabana, and vacated the continuing fine. The trial court also awarded statutory attorney fees to the property owners after deducting 10 hours for the unsuccessful claims. The fee award included attorney time spent on pre-litigation mediation.

We conclude that the trial court properly interpreted the governing documents, did not abuse its discretion by apportioning only 10 hours of attorney time to the unsuccessful claims, and correctly awarded fees for pre-litigation mediation.

We therefore affirm the judgment and the order granting the motion for attorney fees.

FACTS

Parties

In 1997, plaintiffs Neil and Doredda Grossman (the Grossmans) purchased a home located on a hilltop in the Chelsea Knolls Village (formerly, Quincy Estates Village) within the Dominion development in northeast Fresno.

The Dominion is a common interest development as that term is defined in the Davis-Stirling Common Interest Development Act (the Davis-Stirling Act) (Civ. Code, § 1350 et seq.). It contains 528 acres, of which 510 acres are divided into six separate villages including the Chelsea Knolls Village. The development includes single family homes, multi-unit residential dwellings and commercial uses.

Defendant Park Fort Washington Association (the Association) is a homeowners association organized as a California nonprofit mutual benefit corporation. The powers and obligations of the Association are established by the Davis-Stirling Act and the Association's governing documents, which include (1) a Master Declaration of Covenants, Conditions, Restrictions & Easements recorded in September 1984 (CC&R's or master CC&R's); (2) amendments and supplements thereto; (3) articles of incorporation and corporate bylaws; and (4) rules validly implemented by the Association.

The Cabana and Request For Approval and Variance

In early 2007, the Grossmans undertook a renovation project of their backyard, which included a new pool, spa, concrete decking, changes in landscaping, and construction of a cabana and fireplace. They did not obtain prior approval from the Association for these renovations.

In May 2007, the Architectural Committee of the Association sent the Grossmans a letter advising them that they needed approval from the committee to construct the cabana. The Grossmans immediately applied in writing to the Architectural Committee for approval of the cabana and included copies of plans and specifications as well as photographs of the cabana.

In July 2007, the Architectural Committee sent the Grossmans a letter stating that the cabana was not approved, that it was not acceptable because it could be seen from the adjoining side and rear yards, and that the CC&R's did not allow such structures.

The Grossmans filed another request for a variance, pursued appeals allowed under the Association's governing documents, and participated in a mediation before a retired justice. These procedures are not described in detail in this opinion because they are not relevant to the interpretation of the CC&R's and the central question whether the cabana was allowed or prohibited by the CC&R's and other governing documents.

Provisions of the Governing Documents

The following provisions from the CC&R's are related to the issues raised in this appeal.

"7.14 TEMPORARY BUILDINGS. No out building, basement, tent, shack, or shed or other temporary building or improvement of any kind shall be placed upon any portion of the COVERED PROPERTY either temporarily or permanently, except such sheds or construction shacks as may be maintained in the development of the RESIDENTIAL UNITS."

"10.06 AUTHORITY. No fence, wall, landscaping or other improvements within the COVERED PROPERTY shall be constructed, maintained, repaired, altered, reconstructed, improved or permitted to remain within COVERED PROPERTY, … unless and until the plans and specifications therefore showing the nature, kind, shape, height, width, color, materials and location thereof shall have been submitted to the Architectural Committee of the VILLAGE within which such construction … [or] improvement … is proposed, and approved in writing by such Committee."

"10.12 VARIANCE. An Architectural Committee may authorize variances from compliance with any of the Architectural provisions of this DECLARATION when circumstances such as topography, natural obstructions, hardship, aesthetic, or environmental considerations require.… If variances are granted, no violation of the DECLARATION shall be deemed to have occurred with respect to the matter for which the variance was granted …."

"17.01 GENERAL DUTIES AND POWERS.… [T]he primary purpose of the ASSOCIATION is to further and promote the common interests and welfare of the OWNERS and to provide ownership, management, maintenance, preservation and control of the COMMUNITY FACILITIES and maintenance, preservation and control of the landscape setbacks."

"19.15 TITLES. All titles used in [these CC&R's] are intended solely for convenience of reference, and the same shall not affect that which is set forth in [the CC&R's] nor the meaning thereof."

"19.16 INTERPRETATION OF RESTRICTIONS.… [W]here [these CC&R's] impose[] a greater restriction upon the use or occupancy of any RESIDENTIAL or COMMERCIAL UNIT or the COMMUNITY FACILITIES, or upon the construction of buildings or structures, or in connection with any other matters that are imposed or required by such provisions of law or ordinances or by such rules, regulations or permits, then the provisions of [these CC&R's] shall control."

In addition to the foregoing provisions from the master CC&R's, provisions from other governing documents are relevant to this case. A Supplemental Declaration of Restrictions (Supplemental CC&R's) applicable to the Chelsea Knolls Village was recorded July 31, 1987. Section 1.2 of that document states:

> "No building shall be erected, altered or permitted to remain on any LOT other than one detached single-family dwelling and its appurtenant garage and other necessary and usual outbuildings incidental to the residential use of the LOT including buildings to be occupied by domestic servants employed on the LOT, which garage and buildings must be architecturally compatible with the RESIDENCE upon such LOT."

Section 1.8 of the same document provides that an owner must obtain prior written consent of the Architectural Committee before making any "structural alterations or modifications to the exterior of his RESIDENCE or any other structure situate upon such OWNER'S LOT …."

In September 1987, a "First Amendment" to the Supplemental CC&R's was recorded. As a result of the amendment, section 1.12 of the Supplemental CC&R's specified a 10-foot sideyard setback for all structures on a residential lot, unless written approval was obtained from the Architectural Committee.

In October 1987, the Association recorded a "Third Amendment" to the Supplemental CC&R's that expanded section 1.2 to add the language we have italicized below:

> "No building shall be erected, altered or permitted to remain on any LOT other than one detached single-family dwelling and its appurtenant garage and other necessary and usual outbuildings incidental to the residential use of the LOT including buildings to be occupied by domestic servants employed on the LOT, which garage and buildings must be architecturally compatible with the RESIDENCE upon such LOT. *The maximum height of any such building, single family dwelling and its appurtenant garage or other necessary and usual outbuildings incidental to residential use on a LOT shall not exceed 35 feet, whether one story in height or two stories in height*."

Board's Final Decision

The Association and its board of directors reached a final decision regarding the Grossmans' request for a variance for the cabana in September 2008. The board of directors voted to deny the appeal on the request for a variance and to fine the Grossmans $50, plus $10 for each day the structures remained in place beginning September 16, 2008. The fines were stayed until November 13, 2008.

PROCEEDINGS

Pleadings

In June 2009, the Grossmans filed this lawsuit. The operative pleading in this case is an amended complaint filed on November 2, 2009. The amended complaint named the Association and seven members of its board of directors as defendants.

The Grossmans' first cause of action for declaratory relief sought a judgment stating that the Association had no authority to order the removal of the improvements or levy a fine in excess of $50.00 against the Grossmans. The second cause of action sought to invalidate provisions of the governing documents and the assessment of the daily fine. The third cause of action sought money damages against the Association and the

individual directors for intentional and bad faith breaches of duty. The fourth cause of action sought money damages against the same defendants for negligent breach of duty.

In February 2010, the Association filed a cross-complaint for injunctive and declaratory relief. The Association requested (1) a permanent injunction directing the Grossmans to remove the cabana and related amenities from their lot, (2) damages of $50 plus $10 per day from September 16, 2008, (3) a declaration that the Grossmans are bound by the CC&R's and the decision of the Association's board of directors enforcing the CC&R's, and (4) costs and attorney fees.

Trial and Trial Court Decision

In November 2010, a three-day bench trial was held.[1] During the trial, the court viewed the cabana and some of the surrounding area, including the backyard of the neighbors located directly behind the Grossmans' home.

In March 2011, the trial court issued its tentative decision, which allowed the cabana to remain in place, required modification of the fireplace and vacated any fine in excess of $50. The Association filed a request for a statement of decision.

On April 29, 2011, the trial court filed a statement of decision, which included the following findings:

> "The cabana itself is detached from the house and is located on the west side of [the Grossmans'] lot, adjacent to the swimming pool. It consists generally of a roof structure situated on four columns which are themselves located on a [concrete] platform approximately eighteen inches high. Though the cabana is physically imposing, its total height is substantially less than thirty five feet and it is architecturally very compatible with, if not identical to, [the Grossmans'] home. At the rear of the cabana is a fireplace, the rear of which is approximately nine and one half feet from the west fence. The cabana itself is at least ten feet from the fence.… [The cabana] is easily visible from the back yard of the [neighbor's] property."

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[1] On the first day of trial, the Grossmans dismissed one of the Association's directors. On the third day, the parties stipulated to the dismissal of the remaining six directors.

After interpreting the CC&R's, the trial court concluded that the Grossmans were entitled to (1) a declaratory judgment finding the cabana in full compliance with the CC&R's and vacating any fines in excess of $50 and (2) an award of attorney fees and costs pursuant to Civil Code section 1354, subdivision (c). The court also determined that the Association was entitled to a mandatory injunction requiring the removal of the fireplace or its modification so that it did not violate the 10-foot setback requirement in the CC&R's.

In June 2011, the trial court filed a judgment implementing its decision. In early August, the Association filed a notice of appeal.

Attorney's Fees Motion and Award

Later in August 2011, the Grossmans filed a motion for attorney fees. The motion asserted that the attorney for the Grossmans spent 331.9 hours in the litigation, including the mediation conducted prior to the lawsuit. Based on an hourly rate of $350, the total fees requested were $116,165. The attorney's declaration in support of the motion included an 18-page attachment that itemized the 331.9 hours claimed, beginning in July 2007 and ending in July 2011. The entries included a date, a description of the activity, and the amount of time in tenths of an hour that the attorney spent on that activity.

The Association opposed the motion for attorney fees on the grounds that (1) recovery for time spent on pre-litigation mediation was not authorized by the statute, (2) the motion failed to apportion the time incurred between claims for which fees were authorized by statute and the claims seeking money damages, and (3) the amounts claimed should be reduced to reflect the partial or limited success of the Grossmans in the litigation.

In reply to the Association's opposition, the Grossmans' attorney filed a declaration that addressed the allocation of time to the third and fourth causes of action—the claims that sought money damages rather than the enforcement of the CC&R's. The declaration asserted that, beyond pleading the causes of action, no other significant time

was spent pursuing those claims. To illustrate this point, the declaration also asserted that no discovery was conducted and no person deposed in connection with the third and fourth causes of action.

The trial court issued a tentative ruling to grant the motion for attorney fees in the amount requested. Subsequently, the trial court issued a statement of decision regarding the motion for attorney fees that deducted 10 hours from the lodestar calculation submitted by the Grossmans and awarded them $112,665 in attorney fees.

DISCUSSION

I. RULE OF JUDICIAL DEFERENCE

A. Parties' Contentions and Trial Court's Ruling

The Association's opening brief contends that the trial court erred by concluding that the judicial deference rule established by the California Supreme Court in *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249 (*Lamden*) did not apply in this case.

The Grossmans argue that the rule of judicial deference is not available in the circumstances presented and the rule is an affirmative defense that the Association relinquished by failing to plead it.

The trial court dealt with the rule of judicial deference on multiple levels. First, it quoted case law describing the narrow scope of the rule. (See *Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, 940 ["a rule of deference to the *reasoned decisionmaking* of homeowners association boards concerning ordinary maintenance"].) Second, the court described the rule as an affirmative defense that must be pleaded and proven by the homeowners association and stated the Association had done neither. Third, the court stated that even if the rule applied and required the Grossmans to prove that the Association's decisions were arbitrary and capricious, the Grossmans had carried that burden of proof.

B. Narrow Rule Does Not Apply in This Case

Our Supreme Court announced the rule of judicial deference to certain decisions of homeowners associations in *Lamden*:

> "Where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise." (*Lamden*, *supra*, 21 Cal.4th at p. 253.)

The scope of the rule of judicial deference was discussed by the court in *Affan v. Portofino Cove Homeowners Assn.*, *supra*, 189 Cal.App.4th at p. 940:

> "It is important to note the narrow scope of the *Lamden* rule. It is a rule of deference to the *reasoned decisionmaking* of homeowners association boards concerning ordinary maintenance. It does not create a blanket immunity for all the decisions and actions of a homeowners association. The Supreme Court's precise articulation of the rule makes clear that the rule of deference applies only when a homeowner sues an association over a maintenance decision that meets the enumerated criteria. (See *Lamden*, *supra*, 21 Cal.4th at p. 269 ….)"[2]

Here, the Association is not being sued over the discharge of its "obligation to maintain and repair a development's common areas …." (*Lamden*, *supra*, 21 Cal.4th at p. 253.) Therefore, we conclude that the rule of judicial deference does not apply to the decisions made by the Association in this case.

Alternatively, even if we were to hold that the *Affan* court read *Lamden* too narrowly and deference should be granted to all decisions by an association board *where the governing documents grant the association discretion*, the outcome in this case would remain the same. Here, the decisive issue is the proper interpretation of the CC&R's. The governing documents do not commit interpretation of the CC&R's to the

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[2] This discussion was quoted by the trial court in its statement of decision.

Association's discretion. Thus, any deference that might be given a discretionary exercise of authority is not applicable to the Association's interpretation of the CC&R's. Instead, the interpretation of the CC&R's is subject to the standard of review and the rules of construction set forth in Part II, *post*.

Based on the foregoing conclusions, we do not address whether the Association forfeited arguments based on the rule because it failed to plead the rule as an affirmative defense.

II. DETERMINING THE MEANING OF THE CC&R's

The Association contends that the trial court misconstrued the relevant provisions of the CC&R's and Supplemental CC&R's. We disagree, but before interpreting those provisions, we set forth the applicable standard of review and some of the principles that govern the construction of CC&R's.

A. Standard of Review

The Association contends that because no extrinsic evidence was presented on the meaning of the written documents, the interpretation of those documents is a question of law subject to de novo review by this court. (See *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [interpretation of written instrument when there is no extrinsic evidence is essentially a judicial function].)

The Grossmans do not contest the application of a de novo (i.e., independent) standard of review to the interpretation of the CC&R's and Supplemental CC&R's.

Under California law, the process of interpreting a written document involves a well established sequence of questions. The threshold question is whether the written document is ambiguous—that is, reasonably susceptible to more than one interpretation. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) The question of ambiguity is a question of law subject to independent review on appeal. (*Ibid*.)

If the language is ambiguous, the analysis applied to resolve that ambiguity is determined by whether the parties presented extrinsic evidence relevant to the meaning of the ambiguous language. In this case, the trial court explicitly stated that the no extrinsic evidence was offered regarding the intent of the original parties to the CC&R's. Because the parties have not contested this statement or referred this court to extrinsic evidence, we conclude that the ultimate interpretation of the written documents in this case is a question of law and subject to our independent review on appeal. (*Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1166; *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1121 [interpretation of provisions of a homeowners association's CC&R's is a question of law addressed de novo on appeal].) In other words, the interpretation adopted by the trial court plays no role in our analysis of the meaning of the CC&R's.

B. Legal Principles Governing the Interpretation of CC&R's

The parties agree that the rules for interpreting a contract apply to CC&R's. (*Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, 575; see *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US)* (2012) 55 Cal.4th 223, 240 [courts have described recorded declarations as contracts].)

In *Zabrucky v. McAdams* (2005) 129 Cal.App.4th 618, the court approached the interpretation of CC&R's by referencing the usual rule about the intent of the parties governing as well as the general rule that "'restrictive covenants are construed strictly against the person seeking to enforce them, and any doubt will be resolved in favor of the free use of land.'" (*Id*. at p. 622.) In addition to this general rule regarding restrictive covenants, our independent interpretation of the CC&R's will be guided by the following principles generally applicable to contracts:

> "'The mutual intention of the contracting parties at the time the contract was formed governs. [Citations.] We ascertain that intention solely from the written contract, if possible, but also consider the circumstances under

> which the contract was made and the matter to which it relates. [Citations.] We consider the contract as a whole and construe the language in context, rather than interpret a provision in isolation. [Citation.] We interpret words in a contract in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. [Citation.] If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. [Citation.]'" (*Starlight Ridge South Homeowners Assn. v Hunter-Bloor* (2009) 177 Cal.App.4th 440, 447 [interpretation of conflicting provisions in CC&R's].)

The principle about considering the document as a whole and construing language in context is related to the rule that courts, when possible, should adopt an interpretation that gives effect and meaning to every part of the document, rather than an interpretation that renders some provisions nugatory, inoperative or meaningless. (*Bear Creek Planning Committee v. Ferwerda* (2011) 193 Cal.App.4th 1178, 1183; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473; Civ. Code, § 1641.)

Another rule of contract interpretation—one that is lower in the hierarchy of those rules—is set forth in Civil Code section 1654: "In cases of uncertainty not removed by the preceding rules, the language of the contract should be interpreted most strongly against the party who caused the uncertainty to exist." Some courts have stated that this rule against the drafter applies only where extrinsic evidence is not presented to aid in the determination regarding what the parties intended the terms of the document to mean. (*Steller v. Sears, Roebuck & Co.* (2010) 189 Cal.App.4th 175, 183-184.)

III. SCOPE OF SECTION 7.14 OF CC&R's

A. Text of Provision Under Dispute

The parties disagree about the scope of section 7.14 of the CC&R's and whether it prohibits the construction of *all* out buildings and improvements or only *temporary* out buildings and improvements. The text of the disputed provision reads:

> "7.14 TEMPORARY BUILDINGS. No out building, basement, tent, shack, or shed or *other temporary* building or improvement of any kind

> shall be placed upon any portion of the COVERED PROPERTY either temporarily or permanently, except such sheds or construction shacks as may be maintained in the development of the RESIDENTIAL UNITS."[3] (Italics added.)

B. Ambiguity

The first question we address is ambiguity—specifically, whether section 7.14 is ambiguous as to whether it covers all out buildings or improvements or is limited to temporary out buildings and improvements. The dispute regarding ambiguity involves the phrase "or other temporary building or improvement" and the phrase "either temporarily or permanently …."

1. Out Buildings

The Association argues section 7.14 is clear and explicit—its restrictions prohibit both temporary and permanent buildings. In particular, the Association argues that the phrase "either temporarily or permanently" establishes that section 7.14 covers permanent buildings. In the Association's view, the interpretation advocated by the Grossmans and adopted by the trial court is clearly wrong because it reads the word "permanently" out of section 7.14.

Our consideration of the text of section 7.14 begins with the earlier phrase "or other temporary building …." The Grossmans argue that this phrase, and every word in it, should be given effect, which the Association's interpretation fails to do so. Essentially, the Grossmans are arguing that the words "other temporary building" imply that the other items listed in section 7.14 are temporary also. In their view, the failure to accept this implication negates the word "other."

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[3] In accordance with section 19.15 of the CC&R's, we do not consider the section's heading or title in determining the meaning of that section.

We conclude that the inferences the Grossmans draw from the word "other" are possible and that they have presented a reasonable interpretation of the phrase "or other temporary building."

Next, our analysis of the threshold question of ambiguity leads us to consider whether the Association has presented a textual analysis so strong that it establishes the clear and unambiguous meaning of section 7.14 and thereby renders the interpretation offered by the Grossmans unreasonable.

The Association argues that because section 7.14 applies to any improvements placed, "either temporarily or permanently," on the covered property, section 7.14 necessarily prohibits both permanent and temporary buildings. In the Association's view, it makes no sense to interpret section 7.14 as prohibiting the permanent placement of temporary out building on the covered property while allowing the permanent placement of a permanent out building. Also, the Association's view suggests that a permanently placed temporary out building is the functional equivalent of a permanent out building.

The Association asserts its position is explicitly set forth in the CC&R's. We disagree. The adverbs "temporarily" and "permanently" modify the verb phrase "shall be placed." They are not adjectives that explicitly modify "out buildings." Thus, the Association's argument, like the Grossmans' argument, uses inferences to derive the meaning of the language in section 7.14. Stated in its simplest terms, the Association contends that a prohibition against out buildings being placed permanently on the covered property necessarily implies that permanent out buildings are prohibited. To prevail on its position that section 7.14 is not ambiguous, the Association's inference must be the *only* reasonable inference, not just one of the possible reasonable inferences drawn from the language.

We conclude that while the inferences the Association has drawn from the use of the adverb "permanently" are possible and reasonable, they are not the only possible

inferences. For example, the trial court drew a different inference. It viewed section 7.14 as recognizing "that buildings, though temporary in character, may nevertheless be affixed to the land permanently." To illustrate this point, the category of temporary buildings is broad enough to include structures such as huts, booths, tepees, wickiups and portable toilets. Such structures could be affixed permanently to a lot in a variety of ways.

We conclude that the Association's inferences are not so strong that the drafter must necessarily have intended that result. Because it is possible to permanently place a temporary "out building, basement, tent, shack or shed" on real property, section 7.14 can be interpreted as intending to prohibit the permanent placement of temporary structures and to allow the permanent placement of permanent out buildings.

In summary, section 7.14 is not a model of clarity. It is ambiguous. The phrase "either temporarily or permanently" might have been intended to prohibit both permanent and temporary out buildings. Alternatively, that phrase and the phrase "other temporary building" might have been intended to prohibit only temporary out buildings, even when they were permanently affixed to the property. Therefore, we conclude section 7.14 of the CC&R's is ambiguous regarding whether its prohibition extends to all out buildings or only temporary out buildings.

2. Improvements of Any Kind

The next possible ambiguity we address concerns whether the word "temporary" in section 7.14's phrase "other temporary building or improvement of any kind" also modifies "improvement of any kind."

The question is relatively straightforward. It is possible to interpret the phrase in two ways. First, the word "temporary" could modify both "building" and "improvement," two nouns joined by "or." Second, the word "temporary" could modify only "building," the noun that immediately follows it. In short, the language is

reasonably susceptible to more than one interpretation and, thus, is ambiguous. (*Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1165.)

C. Resolving the Ambiguity in Section 7.14

Resolving the ambiguity in section 7.14 of the CC&R's requires this court to examine the document as a whole. (Civ. Code, § 1641.)[4] We have reviewed the other provisions in article VII of the CC&R's and they do not shed any light on the meaning of section 7.14 and whether it was intended to prohibit permanent out buildings and improvements.

Therefore, based on the general rule that "'restrictive covenants are construed strictly against the person seeking to enforce them, and any doubt will be resolved in favor of the free use of land'" (*Zabrucky v. McAdams*, *supra*, 129 Cal.App.4th at p. 622) and the principle that uncertainty is construed against the drafter (Civ. Code, § 1654), we

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[4] During oral argument, counsel for the Association mentioned that the record contains board minutes and letters reflecting board decisions that are evidence of the longstanding, practical interpretation that the Association applied in this case. This reference seems to imply to that we should weigh that evidence as part of our de novo determination of the proper interpretation of the CC&R's. We will not use this evidence in our analysis of the meaning of section 7.14 of the CC&R's.

First, assuming that evidence is relevant under the principle that courts may determine the original intentions of parties to a contract by looking at their subsequent conduct (see *Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851 [practical interpretation of a contract, evidenced by party's subsequent actions, can be used to show meaning of the contract]; *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912 [subsequent conduct of parties is an objective manifestation of their mutual intent]; see also Civ. Code, § 1647), the evidence is not undisputed. At trial, the Grossmans introduced photographs of many structures that were visible from the street and had not been approved by the Association. When all the evidence is viewed in the light most favorable to the trial court's judgment, we cannot accept counsel's factual assertion that the Association has been consistent in the application and enforcement of the interpretation it advocates in this case. Second, assuming this extrinsic evidence was relevant, the existence of the dispute over consistent enforcement would change our standard of review to the substantial evidence test—a standard unfavorable to the Association and its position that our review is de novo.

conclude that the ambiguity in section 7.14 regarding whether its prohibition extends to permanent out buildings and improvements must be construed against the Association. Consequently, we conclude that section 7.14 is limited to temporary out buildings and improvements.

D. Application of Interpretation to Facts of This Case

The trial court found that the cabana was permanent under the definition that permanent means designed to continue indefinitely without change. In challenging the trial court's decision, the Association has not contended that (1) the trial court adopted the wrong definition of permanent or (2) the court's finding that the cabana was a permanent building, not temporary one, is not supported by substantial evidence.

We conclude that the trial court's finding that the cabana is a permanent building is supported by substantial evidence, which evidence includes the matters observed by the court when it conducted an onsite examination of the structure. Because this finding resolves the application of section 7.14 to the instant case, we do not address the trial court's alternative finding that the cabana was not an "out-building."

IV. MEANING AND APPLICATION OF SUPPLEMENTAL CC&R's

The trial court stated that if the cabana was considered an out building, it was expressly permitted by section 1.2 of the Supplemental CC&R's, which allows the erection of an "appurtenant garage and necessary and usual outbuildings which are incidental to the residential use of the lot." The court explicitly found the cabana's purpose is to provide shade and seating around the Grossmans' pool and, accordingly, "the cabana is a 'usual outbuilding' which is 'incidental to the residential use of the lot.'"

The Association characterized the trial court's conclusion as a holding that the Supplemental CC&R's supersede *inconsistent* provisions of the master CC&R's.[5] Based

[5] If the CC&R's and all of its supplements and amendments are regarded as creating a single document, then the principle that the document should be read as a whole and

on this characterization, the Association argues that the trial court misinterpreted and misapplied the Supplemental CC&R's because both the Supplemental CC&R's and the master CC&R's contain provisions indicating that the Supplemental CC&R's can only provide for *more restrictive* development and cannot loosen or negate restrictions imposed by the master CC&R's.

We need not discuss the Association's argument at length because the Association's argument is based on its erroneous interpretation of section 7.14 of the CC&R's. Under our interpretation, section 7.14 of the CC&R's allows permanent out buildings. Section 1.2 of the Supplemental CC&R's is more restrictive because it allows only those out buildings that are necessary, usual and incidental to residential use. Thus, the Association has incorrectly described the provisions of section 1.2 of the Supplemental CC&R's as more lenient that those contained in section 7.14 of the CC&R's.

Therefore, we reject the Association's argument that the trial court erroneously allowed section 1.2 of the Supplemental CC&R's to override restrictions in section 7.14 of the CC&R's.

V. DENIAL OF A VARIANCE AND IMPOSITION OF A FINE

A. Trial Court's Determinations

The trial court found that, "except for the location of the fireplace, the cabana complies with the CC&Rs and other governing documents." The court also found that "here no variance was necessary because, with the exception of the fireplace, which is six

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inconsistencies avoided undermines the Association's argument that the Supplemental CC&R's are not consistent with the master CC&R's. The interpretation of section 7.14 adopted by this court, the trial court, and the Grossmans creates no inconsistency and complies with the principle of giving "effect to every part, if reasonably practicable …." (Civ. Code, § 1641.)

inches too close to the fence line, the cabana fully complies with the CC&Rs and other governing documents." The court also stated:

> "The finding that defendant has not proven that its decision was made in good faith, after a reasonable investigation, and did not act in a way which was arbitrary and capricious naturally flows from this finding, as, at a minimum, a homeowners association must comply with its own CC&Rs [citation]."

To summarize, the trial court concluded that the Association did not follow the CC&R's when it contended the Grossmans needed a variance for the cabana and the Association's failure to abide by the CC&R's rendered, as a matter of law, its actions arbitrary and capricious.

B. Association's Contentions

The Association contends that the trial court erroneously concluded that it did not act in good faith by denying the Grossmans' request for a variance. Part of the Association's argument is based on the rule of judicial deference, which we have concluded does not apply in this case. (See pt. I.B, *ante*.)

The other part of the Association's argument is based on the position that there is no substantial evidence to support the trial court's finding that the Association acted in bad faith or arbitrarily. As an alternate ground for upholding the trial court's judgment, we conclude this finding has adequate evidentiary support.

The trial court found the Association did not act in good faith based on inferences it drew from the fact that (1) no one from the Architectural Committee actually visited the site until long after the initial decision to require removal was made and well into the ADR process; (2) the Association acted upon and denied the Grossmans' appeal even while the ADR process was ongoing (which violated the spirit of Civ. Code, § 1363.820); and (3) the Association's decision was partially based on the Grossmans' failure to secure

prior approval from the Architectural Committee.[6] The record contains sufficient evidence to establish each of these facts. Therefore, substantial evidence (albeit circumstantial) supports the trial court's finding regarding the absence of good faith. This evidence and finding regarding the lack of good faith adequately supports the trial court's ultimate finding that the Association's decision was arbitrary and capricious.

C. A Variance Was Not Needed

The Association's arguments related to the denial of the variance, like its arguments that the Supplemental CC&R's were inconsistent with the master CC&R's, is based on its erroneous interpretation of section 7.14 of the CC&R's. Under that erroneous interpretation, the cabana is a prohibited out building. Under our interpretation, section 7.14 does not prohibit the cabana and, therefore, the construction of the cabana did not require a variance. From our interpretation, it follows that the Association cannot establish that its denial of the variance for the cabana—a variance that was unnecessary in the first place—should be upheld.

Therefore, we will uphold the trial court's conclusion that the Grossmans are entitled to a declaratory judgment that the cabana is in full compliance with the CC&R's and other governing documents of the Association.

D. Invalidity of the Continuing Fine

The Association's contention that it acted fairly and reasonably in imposing a continuing fine of $10 per day also is based on its erroneous view that the cabana violated section 7.14 of the CC&R's.

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[6] The Grossmans' violation of the requirement for prior approval of the project did not provide a legitimate ground for denying their late-filed application. (See *Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772 [homeowners violated CC&R's by planting palm trees without filing a plan and obtaining written approval of architectural committee; the violation did not justify mandatory injunction compelling removal of trees].)

Because the cabana did not violate the CC&R's, the Grossmans cannot be fined for its continued existence on their property. Accordingly, we uphold the trial court's conclusion that the Grossmans are entitled to a declaratory judgment stating "that any fines in excess of $50 are unlawful and, therefore vacated."

E. Violation of Prior Approval Requirement and $50 Fine

We, like the trial court, conclude that the $50 fine was appropriate because of the Grossmans' single violation of the requirement to obtain the Architectural Committee's prior approval of a project such as the cabana and fireplace. Even though the cabana itself did not require a variance, the Grossmans were required to submit it to the Architectural Committee so the committee could review the criteria identified in section 10.06 of the CC&R's, such as "shape, height, width, color, materials and location" and determine whether any alterations were warranted. The trial court explicitly found the cabana was architecturally compatible with the Grossmans' house and consistent with the CC&R's and all of the pertinent supplements and amendments. Thus, denial of the Grossmans' application cannot be justified based on the criteria listed in section 10.06 of the CC&R's.

Furthermore, as indicated in footnote 6, *ante*, the Association's denial of the application was not warranted by the Grossmans' violation of the requirement for prior approval of the project. (*Ironwood Owners Assn. IX v. Solomon*, *supra*, 178 Cal.App.3d at p. 772.)

VI. ATTORNEY FEES FOR PRE-LITIGATION ADR

A. Statutory Provisions

The Davis-Stirling Act includes provisions addressing alternative dispute resolution (ADR), including the initiation of such nonjudicial procedures, the timeline for completing ADR, and the relationship between ADR and any subsequent litigation. (See Civ. Code, §§ 1369.510-1369.590.) Among other things, the legislation provides that an

"association or an owner or a member of a common interest development may not file an enforcement action in the superior court unless the parties have endeavored to submit their dispute to alternative dispute resolution pursuant to this article." (Civ. Code, § 1369.520, subd. (a).)

The Davis-Stirling Act also includes the following mandatory attorney fees provision: "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs."[7] (Civ. Code, § 1354, subd. (c).)

One way this attorney fee provision and the ADR requirements interact is addressed in Civil Code section 1369.580: "In an enforcement action in which fees and costs may be awarded pursuant to subdivision (c) of Section 1354, the court, in determining the amount of the award, may consider whether a party's refusal to participate in alternative dispute resolution before commencement of the action was reasonable."

B. The Association's Contentions

The Association reads the statutory language in subdivision (c) of Civil Code section 1354 as authorizing only the recovery of fees and costs *incurred in the action* to enforce the governing documents. Based on this interpretation, the Association argues that the Grossmans are not entitled to recover fees and costs incurred in pre-litigation ADR and the trial court erred, as a matter of law, in awarding such fees and costs.[8]

The Association's argument is purely textual. It has not presented any legislative history that demonstrates, either directly or by implication, the Legislature intended to

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[7] It is undisputed that the CC&R's and Supplemental CC&R's are "[g]overning documents" for purposes of this attorney fees provision. (See Civ. Code, § 1351, subd. (j) ["[g]overning documents" defined].)

[8] The attorney fees relate to 38.1 hours incurred between July 12, 2007, and November 26, 2008. The costs include $875 paid as one-half of the fee charged by a retired justice to conduct the ADR proceeding.

have attorney fees and costs incurred in ADR excluded from the award. Also, the Association has indentified no public policy that would be promoted by its interpretation of the statute.

C. Interpretation of Attorney Fees Statute

Civil Code sections 1354, subdivision (c) reads: "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." This text does not explicitly limit the recovery of attorney fees and costs to those items *incurred in* the lawsuit itself. Instead, it specifies two conditions that must exist before the award of reasonable attorney fees and costs is mandatory. The first statutory condition is the existence of an "action to enforce the governing documents …." (Civ. Code, § 1354, subd. (c); see *Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 670 [attorney fees provision expressly limits award to actions to enforce governing documents].) The second condition is the existence of a prevailing party. (*Chapala Management Corp. v. Stanton* (2010) 186 Cal.App.4th 1532, 1546 [attorney fees are awarded as a matter of right to the prevailing party].)

Here, the Grossmans satisfied both conditions. The lawsuit was an action to enforce the governing documents—particularly the terms of section 7.14 of the CC&R's. Also, the trial court determined the Grossmans were the prevailing party, a determination not challenged on appeal.

Thus, if the analysis is limited to the actual language in subdivision (c) of Civil Code section 1354, the critical word to deciding whether attorney fees and costs expended in ADR are recoverable is whether those fees and costs were "reasonable."

Our analysis of what is reasonable is affected by Civil Code section 1369.520, subdivision (a), which requires a prospective plaintiff to endeavor to submit the dispute to ADR before filing a lawsuit to enforce the governing documents. This provision effectively makes ADR mandatory and, therefore, precludes a determination that the time

and effort spent pursuing ADR was unreasonable per se. In addition, the Legislature's adoption of a provision stating that a party's refusal to participate in ADR before the start of the action could affect the amount of the attorney fees awarded (Civ. Code, § 1369.580), strongly implies that the attorney fees the other side spent attempting to submit the dispute to ADR could be recovered, if otherwise reasonable. Furthermore, we have not found, and the Association has not identified, any policy reasons for excluding attorney fees and costs incurred in ADR from the award given to a party that has pursued ADR and subsequently prevailed in the subsequent litigation.

We conclude that, because the Legislature has required ADR, a party acts reasonably when it spends money on attorney fees and costs during pre-litigation ADR. The alternate view—that such expenditures are categorically unreasonable—is contrary to the strong public policy of promoting the resolution of disputes through mediation and arbitration. (E.g., *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), supra*, 55 Cal.4th at p. 235, fn. 4 [public policy favors arbitration as a means of dispute resolution].) Thus, when attorney fees and costs expended in pre-litigation ADR satisfy the other criteria of reasonableness, those fees and costs may be recovered in an action to enforce the governing documents of a common interest development. (Civ. Code, § 1354, subd. (c).)

Thus, the trial court did not err in awarding those fees and costs.

VII. APPORTIONMENT OF ATTORNEY FEES

A. Contentions of the Association

The Association argues that the trial court committed reversible error by failing to properly apportion the attorney fees between the Grossmans' successful claims and (1) claims not covered by the attorney fees statute and (2) claims on which the Grossmans were not successful.

B. The Trial Court's Decision

The trial court issued a tentative decision that addressed apportionment of the attorney fees, pre-litigation ADR, the total hours claimed, and a multiplier. Subsequently, the court filed an 11-page statement of decision that granted the Grossmans' motion for attorney fees, deducted 10 hours from the Grossmans' lodestar calculation, and awarded fees of $112,665.[9]

The trial court rejected the argument that the Grossmans' attorney spent excessive time on the case, stating: "Overall the Court finds the litigation was managed efficiently and without any discernible wasted effort."

In addressing apportionment, the trial court referenced the rule that limited success by a plaintiff should be considered when determining reasonable attorney fees (see *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 250) and acknowledged that the lodestar amount should be adjusted based on a plaintiff's limited success. The court also mentioned the rule that "a prevailing party generally may not recover for work on causes of action on which the party was unsuccessful." (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 342.)

In applying these rules to the facts presented, the trial court stated that the construction of the cabana was the central claim and "occupied in excess of 95% of the time spent in the case." The court stated its view was corroborated by the Grossmans' attorney, who asserted that the location of the fireplace was a minor issue and the monetary claims in the Grossmans' third and fourth causes of action were not pursued beyond the pleading stage. The court also made the following findings:

> "Clearly, however, some time was devoted to the issues related to the location of the fireplace, the third and fourth causes of action, and the $50 fine. Based upon the representations of counsel and the Court's own experience both as a practicing attorney for 18 years and judge for almost

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9 The trial court declined to apply a multiplier to its lodestar calculation.

> 13, almost 10 of which has been devoted virtually exclusively to civil cases such as the instant one, the Court allocates 10 hours of time to these issues and deducts that amount from the lodestar."

The Association's challenge to the trial court's analysis is set forth in its opening brief as follows:

> "The reduction of only 10 hours—i.e., less than 3% of the total fees claimed—was an abuse of discretion because it bears no relationship to the actual work performed and does not reflect a reasoned analysis of the time expended on unsuccessful claims or any real reduction for partial success."

We disagree with the Association's assessment of the trial court's analysis of the issues concerning the apportionment of attorney time among the various aspects of the litigation. The trial court's statement of decision regarding attorney fees demonstrates that the court was aware of the applicable rules of law regarding partial success and the inclusion of causes of action for which fees were not authorized. Thus, the trial court did not abuse its discretion by applying the wrong legal principles. Furthermore, in accordance with applicable law, the trial court allocated time to those minor portions of the case on which the Grossmans were not successful. Typically, appellate courts regard experienced trial judges as being in the best position to assess the professional services rendered in their court. (*Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1240.) Thus, a trial court's exercise of discretion in reducing hours claimed will be reversed only if the decision exceeds the bounds of reason. (*Ibid*.)

Here, the Association presents a general argument that an allocation of 10 hours of attorney time to the unsuccessful causes of action was too small. While this amount may seem small, the trial court found that the cabana was the central claim of the lawsuit and occupied over 95 percent of the time spent on the case. The trial court's reasoning was based on its personal observations and we are not convinced its determination exceeds the bounds of reason.

Finally, the Association's argument that the Grossmans' attorney was obligated to identify the hours spent on claims which were not successful is not consistent with

California's law on the recovery of attorney fees. (See 2 Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 3d ed. 2012) §§ 9.83, 9.84, pp. 516-518.) "Because time records are not required [for an award of attorney fees] under California law [citation], there is no required level of detail that counsel must achieve. [Citations.]" (*Id.*, § 9.84, p. 517.) Thus, the lack of detail in the attorney time records is not a ground for reversal in this case.

DISPOSITION

The judgment and the order granting the motion for attorney fees are affirmed. The Grossmans shall recover their costs on appeal.

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Franson, J.

WE CONCUR:

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Levy, Acting P.J.

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Gomes, J.