

DISTRICT COURT, EAGLE COUNTY, COLORADO 885 Chambers Ave.; P.O. Box 597 Eagle, CO 81631	DATE FILED: April 4, 2023 11:27 AM CASE NO. 2018CV30207 DIVISION 3
<p>Plaintiffs: 2001 BEAVER CREEK POINT ASSOCIATION, INC., a Colorado nonprofit corporation; DAVID H. and MARY ANN SCHERPF; PAUL NOWAK TRUST and LAURIE NOWAK TRUST; HUGH and TEMPLE S. JOYCE; and DOUGLAS A. and LISA J. CURREY. v.</p> <p>Defendant: MALAHIDE, LLC, a Colorado limited liability company.</p>	
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT	

THIS MATTER is before the Court following a five-day bench trial held on July 14, 2022 through July 18, 2022. The Court, having heard the evidence at trial and reviewed all pertinent documents submitted by the parties, now issues these findings of fact, conclusions of law, and judgment.

I. BACKGROUND

Defendant Malahide, LLC (“Defendant”) is the owner of certain real property located within and part of a five-property common interest community known as 2001 Beaver Creek Point formed pursuant to C.R.S. § 38-33.3-101 *et seq.* in the Wildridge Subdivision in Avon, Colorado (the “Property”). This action was initiated by Plaintiffs 2001 Beaver Creek Point Association, Inc. (the “Association”), David H. and Mary Ann Scherpf, Paul Nowak and Laurie Nowak Trusts, Hugh and Temple S. Joyce, and Douglas A. and Lisa J. Currey (collectively, “Plaintiffs”) on August 21, 2018 and involves, *inter alia*, Defendant’s requests for the Association’s approval of certain proposed additions to its residence on the Property.

Before the Court is the Association’s request for a permanent injunction prohibiting

Defendant from constructing any improvement in the Exterior Maintenance Area, defined and discussed further *infra*, without the written consent and permission of the Executive Board of the Association. Also presented for the Court's consideration are Defendant's counterclaims for Breach of Covenant, Breach of Good Faith pursuant to C.R.S. § 38-33.3-113, Breach of the Implied Covenant of Good Faith and Fair Dealing, and Breach of Fiduciary Duty.

II. FINDINGS OF FACT

1. On September 14, 1982, the Wildridge Subdivision recorded its Restatement of the Third Amendment to Protective Covenants of Wildridge Subdivision ("Master Declaration").

2. Within Sections 1.2B and 4.0 of the Master Declaration, Wildridge Subdivision designated the Town of Avon as its Design Review Board.

3. Section 3.0 of the Master Declaration provides that the "basic purpose of the guidelines is to maintain the aesthetic and ecological qualities of the subdivision by directing that all structures and landscaping be compatible with one another and insofar as possible, are in harmony with the natural surroundings."

4. Section 3.0 of the Master Declaration additionally provides that more detailed guidelines are published elsewhere.

5. The more detailed guidelines are set forth in the Town of Avon Municipal Code, Section 7.28.090 of which this Court took judicial notice.

6. On October 15, 1999, Wildridge 1999, LLC, a Colorado limited liability company, recorded the Declaration of Covenants, Conditions, Restrictions and Easements for 2001 Beaver Creek Point ("BCP Declaration").

7. Section XV of the BCP Declaration provides that "[t]he provisions for architectural

control contained in this Declaration shall be in addition to, and not in lieu of, the architectural control provisions contained in the Master Declaration.”

8. Section 22.4B of the BCP Declaration goes on to further provide, “[T]he covenants, restrictions and provisions of this Declaration shall be cumulative with those of the Master Declaration; provided, however, in the event of a conflict between or among the provisions of this Declaration, the Bylaws, Articles of incorporation or rules and regulations pursuant thereto and the Master Declaration, the Master Declaration shall be superior. The foregoing priorities shall not prevent enforcement by the [2001 Beaver Creek Point Homeowner’s Association] of provisions or rules which are stricter than those of the Master Declaration.”

9. The design review guidelines for 2001 Beaver Creek Point are found in Article XV of the BCP Declaration and state, “The Executive Board shall exercise its best judgement to the end that all modifications to structures and on land within the Project conform to and harmonize with existing surroundings and structures.”

10. Nothing in the Declarations, Covenants or Guidelines precludes expansion, development, or improvement of individual properties within 2001 Beaver Creek Point.

11. All homeowners within 2001 Beaver Creek Point have or have had access to the original plat and design scheme that set forth the building envelopes for the structures on each property; hence, all homeowners had notice of what was expected to be protected within any potential view corridor.

12. The parties stipulated that “[o]n May 28, 2015, Defendant took title to Lot 111C, 2001 Beaver Creek Point, a resubdivision of Lot 111, Block 1, Wildridge Subdivision, Town of

Avon, County of Eagle (defined *supra* as the “Property”).

13. The Property is included within 2001 Beaver Creek Point and subject to the BCP Declaration according to Section 6 of the General Notes on the Plat.

14. The Association does not own or lease any common elements; however, it possesses limited authority pursuant to the BCP Declaration to make repairs to the Residences, to landscape, and to approve or deny projects in the unbuilt portion of each lot, called the Exterior Maintenance Area.

15. Section 2.1(M) of the BCP Declaration defines “Exterior Maintenance Area” as “the exterior of any Residence . . . , and the Lot surrounding the Residence and any improvements on such Lot other than the Residence” (“Exterior Maintenance Area”).

16. Article IX of the BCP Declaration provides that the Association shall maintain the exterior of all Residences, maintain landscaping of the Lots surrounding the perimeter of the Residences and the Common Area, including but not limited to lawns, trees and shrubs and the Association shall also maintain all walls, gates, sidewalks, and driveways (including snow removal services).

17. The Association’s authority was limited in 2007 by a clarification recorded with the Eagle County Clerk and Recorder, which stated that homeowners are responsible for their own individual home repairs, except that painting and staining would be arranged by the Association, and the cost for each residence would be paid by each homeowner (the “Clarification”).

18. The Clarification has been followed in practice and the Association has merely landscaped and engaged in snow removal.

19. Section 9.2 of the BCP Declaration provides that the Association is granted access to the Property to perform these limited duties.

20. Section 8.6 of the BCP Declaration provides that an easement is reserved to the Association and any member of the Executive Board “upon, across, over, in and under the Property...to exercise its rights under Article IX below, including the right to enter upon any Residential Unit for the purpose of performing maintenance to the exterior of any Residence, as set forth in Article IX....”

21. Brent Biggs created a Setback Exhibit on the Property and testified that he had conducted a title search, reviewed the BCP Declaration, and concluded that no easements affect the building envelope on the Property or the driveway.

22. The lack of easements affecting that area was confirmed by Matt Pielsticker, Avon Town Planner.

23. Article V(A) of the BCP Declaration limits rule making authority to the Exterior Maintenance Area only.

24. Article 4.2 of the Rules and Regulations provides that the Association members must comply with the Master Declaration, and federal, state, and local law.

25. The May 8, 2018 letter of Mark Payne corroborated that view corridors are only mentioned in the Rules and Regulations and are not defined.

26. Roger Day and Brent Biggs both corroborated that they did not locate any established view corridors. Also, Mr. Biggs indicated that he would have been the one to document them, but he was not asked to do so at the time of the original development (for which he was the surveyor).

27. In April 2015, Defendant inquired about the process for submitting plans for the construction of a deck attached to the southern portion of his residence, located within the platted building envelope on the Property.

28. Attached to Defendant's request was a simple pencil outline of where the deck would be located (over the patio location set forth in the original plans drafted by 2001 Beaver Creek Point's original architect, Russell Geis, and within the unused building envelope).

29. Mr. Geis drafted the original plans for all of the residences located in 2001 Beaver Creek Point. He designed Defendant's residence to include a patio within the Property's building envelope.

30. The patio, as set forth in Russell Geis's plans, would affect privacy, entrance way ambiance, and the flower bed in the exact same manner as the proposed deck.

31. On April 21, 2015, without having received or reviewed architectural plans/specifications, the Association's then Board President, Mr. Scherpf, sent an email to Mr. Ruemmler, a principal of Defendant, stating that the Association had held a meeting (via phone poll), reviewed the proposal, and that "[w]e [the Board of Directors] rejected the deck proposal for the following reasons: (1) change in entrance way ambiance (2) architectural symmetry of the [five] homes (3) privacy (4) preservation of view and view corridors [and] (5) intrusion to entranceway berm flower bed completed last year."

32. On April 22, 2015, Mr. Scherpf sent a second email to Mr. Ruemmler stating that "[the Association] envisions no pathway allowing the addition of a deck to the south end of [the Property]" and "The [Association] is not willing to entertain a meeting to consider adding a deck to the south end of [the Property's] residence."

33. The Association's decisions stated in the emails dated April 21, 2015 and April 22, 2015 were made without contacting all homeowners within 2001 Beaver Creek Point, without notice to Defendant of the meeting and/or vote, without reviewing architectural plans, and without allowing Defendant to present and explain its conceptual plans.

34. The Association's decisions to reject Defendant's proposal were predicated in part on preservation of views and view corridors; however, at the time of the proposal's submission in 2015, pine and aspen trees obstructed all views within the location of the proposed plan.

35. On March 21, 2018, Defendant inquired with the Association with regard to the concept of a solar addition to the south end of his residence and located entirely within the building envelope.

36. On March 25, 2018, the Association, again without reviewing any plans or specifications, through its acting president, Hugh Joyce, responded that "[n]one of the 4 other homeowners see a pathway to expanding your home South into the yard, beds and driveway area, all of which are controlled b[y] the [A]ssociation and its legal and recorded easement over the exterior – architecturally would face a difficult pathway to approval."

37. Defendant forwarded its proposed project plans for the solar addition to the Association in late April or early May 2018.

38. On May 8, 2018 and as reflected in its meeting notes, the Association denied Defendant's submission for the following reasons:

- a. It was problematic in scale next to the driveway and other homes in 2001 Beaver Creek Point;
- b. It was out of character with other existing homes;

- c. It was not in concert with the surrounding architecture; and
- d. It would only ever be approved if it was on the roof.

39. On May 10, 2018, Defendant submitted the same project plans to the Town of Avon to obtain design approval.

40. On July 5, 2018, the Town of Avon, acting as the Master Association Design Review Board, conducted a public hearing regarding design approval of the project.

41. Representatives of the Association attended the July 5, 2018 public hearing and objected to Defendant's proposed solar project.

42. On July 23, 2018, the Association's denial was formalized in a letter to Defendant from Robert Sperberg, then acting as the Association's counsel, in which he added different reasons for denial of the project: (1) the project would materially and negatively obstruct the view corridors; (2) the project would encroach into the Exterior Maintenance Area; (3) the project would not harmonize with the existing surroundings; and (4) the project would protrude into the entry flower bed creating an unattractive entry.

43. Defendant submitted revised plans for the project to the Town of Avon which conducted a second public hearing on August 21, 2018.

44. The Association attended the August 21, 2018 public hearing and Mr. Scherpf stated that the Association would "deny [the project] in any form."

45. Between August 2018 and April 2019, Defendant took no steps to obtain design approval from the Town of Avon.

46. The Court took judicial notice that on April 3, 2019, at a status hearing before the Court, the Court approved a stipulation among counsel to allow Defendant to continue with its

design approval process with the Town of Avon.

47. On June 26, 2019, the Town of Avon fully and finally approved Defendant's entire project, which incorporated a revised gable roof design, concluding that the entire solar project conforms to and harmonizes with the surrounding environment and all applicable provisions of the development code; however, the approval was based on the mistaken assumption that the proposed addition was part of the existing structure. Because the addition was designed as a separate structure, it violated the Town of Avon building code.

48. On July 13, 2019, Defendant submitted the revised plans to the Association for approval.

49. On July 29, 2019, the Association held a meeting to vote on Defendant's proposed revised design.

50. At the July 29, 2019 meeting, Defendant initially presented three alternative designs (Plans A, B and C) in an attempt to work with some of the Association's initial objections to the project.

51. The Board summarily voted to deny all three designs.

52. Mr. Joyce drafted the minutes denying the project in advance of the meeting; the Association only wanted to give Defendant three minutes to present its project – but Paul Nowak cautioned that would be seen as arbitrary and capricious.

53. At the July 29, 2019 meeting, Paul Nowak suggested that a fourth option be added denying any future construction in Defendant's southwest corner building envelope. This proposal was reworded by the Board President, Hugh Joyce, to deny "any like construction in the former original building envelope" and voted upon as Option D.

54. Notwithstanding the wording in the later developed minutes, a recording of the meeting shows that the discussion regarding Option D was to deny “any construction in the former original building envelope.”

55. The Association adopted Option D as reworded by Mr. Joyce.

56. With respect to Options A – C, and notwithstanding that the project was not materially altered from Defendant’s 2018 submission, the Association offered additional reasons for its denial:

- a. The project encroaches into the Exterior Maintenance Area;
- b. The project is architecturally imbalanced and lacks harmony as compared to other residences;
- c. Negatively impacts the design founding design elements of the Association – design massing and scale; view corridors; and privacy by placement;
- d. Too close to the driveway – safety and visibility hazard;
- e. Extends into the entrance area flower bed and negatively impacts arrival presentation;
- f. Ruins entrance harmony;
- g. Drainage ditch will be disturbed causing potential water and ice problems;
- h. Footing disturbance may extend into driveway;
- i. Creates potential safety hazard in winter for drainage, snow storage and drive access; and
- j. Not in harmony with master development concepts.

57. Many of the above referenced reasons for denial bear no resemblance to the criteria set forth in Article XV of the BCP Declaration; that is, to conform to and harmonize with existing surroundings and structures.

58. The reasons continued to change even at the Preliminary Injunction hearing in October of 2019, where Mr. Joyce testified to further reasons never discussed with Defendant – such as “snow off of the roof.”

59. The Association presented no evidence supporting some of these additional reasons, such as a drainage inspection, inspection, a survey, or a legal opinion as to whether the Association in fact did own the Exterior Maintenance Area.

60. The Association’s assertion that the project would encroach on the drainage ditch, the driveway, and the snow storage easement seems to be refuted by the survey showing the location of Defendant's building envelope.

61. The Association’s assertion of a visibility/safety issue and a privacy issue is refuted by this Court's site visit before trial.

62. The Association did not attempt to negotiate or troubleshoot any of its concerns (i.e. revegetate in other areas, provide a revised drainage plan, provide screening work on an entranceway solution, change products, etc.), nor did the Association retain any professionals to study the alleged drainage or safety concerns.

63. The Association did not consult with Dan Fitchett or Russell Geis during the review process in 2015 and 2018.

64. The evidence demonstrates that the additional reasons proffered by the Association for denying Defendant’s proposal reflect its unalterable opposition to any

improvements within Defendant's building envelope, despite the original plans including a patio in the location of the proposed improvements.

65. In June 2020, Defendant submitted further revised plans that reoriented the solar project so the panels would no longer be visible from Mr. Joyce's home to again address the concerns of the Association.

66. The Association refused to hold a meeting to view the proposal, demanding instead that to obtain review, Defendant would need to withdraw its original submissions, agree the Association acted in good faith, stipulate to a permanent injunction on those plans, and pay all of the Association's attorney fees.

67. On February 10, 2022, Defendant again requested review of the revised plans submitted in writing.

68. The Association did not respond to Defendant's February 10, 2022 request.

69. It is clear from the language of Article XV of the BCP Declaration that the Association would expect construction to occur in an unbuilt building envelope because this provision anticipates review of "construction, modifications, alterations and improvements."

70. The Association should have had an expectation that Defendant would use its unbuilt building envelope as the Association's own architect, Mr. Geis, who designed all residences in the subdivision, included a patio within Defendant's unbuilt building envelope.

71. Plaintiffs have attempted to demonstrate that the other residences in the 2001 Beaver Creek Point development have not maximized their building envelope; however, all other residences in the development have maximized their usable building envelope.

72. Defendant contends that Roger Day, who drafted Defendant's solar pergola plans,

had always been designed as a pergola to be slightly detached from the existing residential structure. However, the Town of Avon clearly believed the proposed structure was an extension of the existing building. In fact, Defendant concedes that the solar array is designed to support only itself, with steel structural beams, wrapped in wood, to make the structure look like it was connected when in fact it is not.

73. The Court took judicial notice of Town of Avon Municipal Code Section 7.08.010, which provides in part:

Accessory building means a subordinate building or structure, the use of which is customarily incidental to that of the main building or to the main use of the land, which is located on the same lot (or on a contiguous lot in the same ownership) with the main building or use. Accessory buildings are only permitted when they are incidental or accessory to an existing and permitted principal or conditional use. Accessory structure means a subordinate building that is located on the same lot on which the main building is situated and which is reasonably necessary and incidental to the conduct of the primary use of such building or main use. Accessory uses are uses of land that are found on the same parcel as the principal use but are subordinate and incidental.

74. The Court took judicial notice of Town of Avon Municipal Code Section 7.20.070(d)(2), which provides that “no accessory structure shall be located within ten (10) feet of the site’s principal structure.”

75. The solar array was not approved as an “Accessory building” within the meaning of the Town of Avon Municipal Code Section 7.08.010.

76. Pielsticker indicated that the engineering of the structure would not be known until the structural plans are submitted for permit approval.

77. Defendant has neither obtained a building permit nor submitted structural plans to the Town of Avon building department.

78. Mr. Clubine testified that Defendant would not be able to ground mount a solar array in its yard.

79. The Association proposed that Defendant place solar across the street, despite having no interest in or control over the property.

80. Defendant would not be able to place solar panels across the street because that location is Town of Avon property.

81. The pathway and setback requirements for the solar array are not determined until the permit stage and so cannot be known with certainty until that time.

82. The structure for the solar array is a pergola as testified to by Day, which is defined as arbor, trellis . . . a structure usually consisting of parallel colonnades supporting an open roof of girders and cross rafters, which is not consistent with the architectural design and style of the existing structures.

83. Mr. Moritz testified that he could place 16 Solaria 425 rated watt panels on the solar array, at a cost of \$4.41 per panel. He further testified that the 16 SunPower solar array is rated at 6800 watts, and with its azimuth at 122 degrees azimuth, would produce 10,322 annual watts and meet Defendant's needs. It was not clear whether his conclusion was formulated by any recognized standard for calculating the cost. He testified that he believed that the cost per watt for Moritz's system is 15 cents.

84. Defendant asserts that Richard Clubine's system on the existing southeast facing roof would be much less efficient, producing only 18 cents per watt. Again, it is unclear whether this conclusion is a guesstimate opinion or based on an objective and reliable standard for determining the cost.

85. Moritz asserted that it is not industry standard to install solar panels on wood shake shingle and that it is not industry standard to install over vents; however, Clubine testified that seminars and classes to direct and guide installations of solar panels on wood shingles are offered to installation professionals.

86. Prior to the second Town of Avon public hearing on August 21, 2018, referenced *supra*, and before Defendant obtained approval from the Town of Avon, the Association filed the present action against Defendant.

87. This lawsuit took Defendant by surprise because on August 27, 2018 Defendant had received correspondence on that same day from then president Mr. Joyce asking Defendant to be patient and indicating that the Association would work with Defendant and negotiate in good faith.

88. Mr. Joyce testified that he sent the correspondence on August 27, 2018 before Defendant was served with the lawsuit but after it was filed with the Court.

89. Defendant was also surprised by the commencement of the litigation because Defendant had offered to provide the Association with 20 days-notice prior to any construction to allow the Association time to file a lawsuit should it become necessary.

90. Mr. Joyce admitted that the Association and its Board of Directors, including himself, owe a fiduciary duty to Defendant, among other homeowners, to act in good faith, deal fairly, be honest, make full disclosures, and that he, as a Board member, must put the interest of the other homeowners, collectively, in front of his own.

91. As noted *supra*, the Court took judicial notice that on April 3, 2019, at a status hearing with this Court, this Court approved a stipulation among counsel to allow Defendant to

continue with its design approval process with the Town of Avon.

92. Notwithstanding the April 3, 2019 stipulation, the Association continued to argue in this litigation that Defendant breached the BCP Declaration by obtaining approval of its proposed project with the Town of Avon.

93. The evidence demonstrates that the Association had no intention of granting Defendant's request for anything in the proposed location of Defendant's project.

III. CONCLUSIONS OF LAW

A. Law of the Case.

The following conclusions of law are law of the case. They were holdings by the Court in its *Order re: Defendant's Motion for Summary Judgment Pursuant to C.R.C.P. 56(b)*, January 5, 2021. Because no evidence was introduced to counter these holdings, they should not be disturbed:

- a. "...finds the language of the Association Governing Documents [the Declaration, Master Declaration, and Rules and Regulations] clear on their face, the [Defendant's] Property is subject to them, and they are valid and enforceable against the [Defendant's] Property." *Order re: Defendant's Motion for Summary Judgment Pursuant to C.R.C.P. 56(b)*, January 5, 2021, at 5.
- b. "...rules that the provisions of the Declaration and the Rules and Regulations are valid and enforceable against each owner in the Community and specifically Defendant and the [Defendant's] Property." *Id.* at 6, 8.

B. The Association's Claim for a Permanent Injunction.

A permanent injunction must be issued when the party seeking the injunction meets the following four elements: (1) he or she has achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction, if issued, will not

adversely affect the public interest. *Rinker v. Colina-Lee*, 2019 COA 45, ¶ 64.

The Association seeks a permanent injunction prohibiting Defendant from constructing any improvement in the Exterior Maintenance Area without the written consent and permission of the Association's Board. The Court has already held that "Defendant and the other owners in the Community are required to have the written permission of the Association before constructing any improvements in the Exterior Maintenance Area." *Order re: Defendant's Motion for Summary Judgment Pursuant to C.R.C.P. 56(b)*, January 5, 2021.

The Court disagrees that irreparable harm will result unless the injunction is issued. Plaintiffs contend that Defendant has already moved forward with its proposed addition by submitting it to the Town of Avon Planning and Zoning Commission in defiance of the covenants of the Declaration which require that approval first be obtained by the Association. They assert that Defendant's actions demonstrate its willingness to move forward without the Association's approval. The Court disagrees with this interpretation. Defendant pursued other avenues to establish the reasonableness of its proposal only after the Association repeatedly, arbitrarily, and capriciously rejected every possible proposal that its position that Defendant should have no remedy.

The Court also finds that the threatened injury, the theoretical potential that Defendant goes forward with its proposed addition, does not outweigh the harm that an injunction may cause to Defendant. Defendant will be harmed by the injunction since it validates the arbitrary and capricious nature of the Association and alters the plain terms of the BCP Declaration. Specifically, nothing in the BCP Declaration precludes Defendant from developing the Property. If anything, there is an inference that proposals within the original building envelope would be

avored. The BCP Declaration still requires that any proposal has Association approval. In this instance, the Association's rejection of the proposal was coincidentally proper. This is because the proposed structure may violate the Town of Avon building code setbacks and its design may not be architecturally harmonious with existing structures within the 2001 Beaver Creek Point development. Still, any injury seems to be incurred by Defendant.

The Court also finds that the injunction, if issued, will not adversely affect the public interest. This is a dispute between a homeowners' association and one of its members regarding construction of an addition on property owned by the member to which the association has an easement. As such, it does not affect the public interest in any way and the injunction may be issued.

C. Defendant's Claims.

As agreed by the parties in the Trial Management Order, Defendant's claims can be categorized under two separate issues: (1) whether the Association's denial of Defendant's proposed addition was made in good faith and not arbitrary or capricious, and (2) whether the Colorado solar statutes trump the Association's ability to deny Defendant's proposed addition.

1. Whether the Association's Denial of Defendant's Proposed Addition was Made in Good Faith and was not Arbitrary or Capricious.

Defendant's breach of covenant, breach of good faith, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty claims all question whether the Association's denial of Defendant's proposed addition was made in good faith.

At issue is the "DESIGN REVIEW" set forth in Article XV of the BCP Declaration.

Pursuant to that article:

**ARTICLE XV
DESIGN REVIEW**

No alteration of the exterior of a Residence or other structure located on a Lot, including repainting of the structure, shall be made unless first approved in writing by the Executive Board. The Executive Board shall exercise its best judgement to the end that all modifications to structures and on land within the Project conform to and harmonize with existing surroundings and structures. The Executive Board has the absolute right to deny any requested changes which the Executive Board reasonably determines do not conform to and harmonize with existing surroundings and structures. The provisions for architectural control contained in this Declaration shall be in addition to, and not in lieu of, the architectural control provisions contained in the Master Declaration. The granting of approval for proposed work hereunder shall not dispense with the need also to comply with the approval procedures set forth in the Master Declaration. All proposed construction, modifications, alterations and improvements shall be approved pursuant to this Declaration before being submitted for approval pursuant to the Master Declaration.

Restrictive covenants placed on land for the benefit of purchasers within a subdivision are valid, not against public policy, and enforceable in equity against all purchasers. *Rhue v. Cheyenne Homes, Inc.*, 449 P.2d 361, 363 (Colo. 1969). Covenants regarding architectural design review, like here, must be upheld “against the contention that they lacked specific restrictions providing a framework within which the architectural committee must act” as long as the “refusal to approve plans was reasonable and made in good faith and not arbitrary or capricious.” *Gleneagle Civic Ass’n v. Hardin*, 205 P.3d 462 (Colo. App. 2008). A decision is arbitrary and capricious only if the conclusion is “such that reasonable [persons] fairly and honestly considering the evidence *must reach contrary conclusions.*” *J.S. v. Chambers*, 226 P.3d 1193, 1201 (Colo. App. 2009) (emphasis in original); *see also Lawley v. Dept. of Higher Educ.* 36 P.3d 1239, 1252 (Colo. 2001) (“Capricious or arbitrary... By exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.”); *also applied in Dept. of Corrections v. Stiles*, 2020 CO 90, ¶ 4; *Colorado Bd. of Accountancy v. Paroske*, 39 P.3d 1283, 1288 (Colo. App. 2001).

Furthermore, under *Chambers*, because “arbitrary or capricious” affords a “presumption” of correctness, a challenging party can only overcome such a decision under the heightened “clear and convincing” standard. *Chambers, supra*, 226 P.3d at 1200. The same standard applies to the Association’s decisions here.

Defendant claims that the Association breached its covenants, i.e., its Governing Documents, by arbitrarily and capriciously denying Defendant’s proposed additions.

First, the Association failed to apply and enforce its covenants in a uniform and nondiscriminatory manner. As presented at trial, requests to build in the area to the southwest of the Property had been considered and denied on several occasions. Initially, the original architect and developer considered building a wraparound deck on Defendant’s residence that would include decking in the southwest area. However, that idea was discarded by the architect and developer due to concerns for privacy and views for the other homeowners in the community. The original drawings for Defendant’s Property included a patio in that same area. Defendant’s predecessor-in-interest then requested a deck expansion that would extend the existing deck on the south and include a wraparound deck to the southwest. That proposal was denied in part. The expansion of the deck to the south was allowed, but the wraparound portion to the southwest was again denied. Finally, the proposed expansion, as presented by Defendant in 2015, was denied before Defendant had even purchased the Property.

Second, while other deck expansions in the 2001 Beaver Creek Point development have been approved, they all have one thing in common that is different from Defendant’s requested addition: the Association claims these other deck expansions did not affect the privacy or views of other neighbors. The Court finds the contrary: the area that was sought to be developed on

Defendant's Property borders public streets on three sides. Therefore, the only privacy that would have been impacted by any of the proposals would have been the privacy of Defendant's residence. Further, claims that development would have affected the views of other residences is questionable. At least for some of the proposals, the views would not have been impacted, and any impact could have been anticipated by other homeowners based on the original development design. Consequently, the Association did not apply and enforce its covenants in a uniform and nondiscriminatory manner.

Third, finding "that reasonable [persons] fairly and honestly considering the evidence *must reach contrary conclusions*" is impossible under the circumstances. The relevant evidence shows that the proposed addition would not significantly impact views and privacy of other residents, yet it was consistently rejected when submitted by Defendant both before and after it purchased the Property. The Court must find that a reasonable person would reach the contrary conclusion under this circumstance. The decision by the Association's Board to deny Defendant's proposed addition was, therefore, arbitrary and capricious.

D. The Proposed Addition is in both the Exterior Maintenance Area and Common Area.

The BCP Declaration creates an "Exterior Maintenance Area" defined as the exterior of any Residence (excluding windowpanes) and the Lot surrounding the Residence and any improvements on such Lot other than a Residence, i.e. the entire Community other than a Residence. BCP Declaration, § 2.1(M). A "Residence" is defined as the residence constructed on any Lot, i.e., the structure as it was originally built. *Id.* at § 2.1(Y). A "Lot" is simply a plot of land subject to the BCP Declaration, that is, the entire piece of real property deeded to an owner in the Community. *Id.* at § 2.1(P). As it relates to Defendant's Property, everything

outside of the existing structure is part of the “Exterior Maintenance Area.”

The Association, acting by and through its Board of Directors, is charged with the responsibility to maintain the Exterior Maintenance Area to maintain a uniform appearance and a high standard of maintenance. *Id.* at § 9.1. It obligates the Association to serve homeowners as set forth in the BCP Declaration; it does not create a property or control interest in that portion of a homeowner’s property.

Similarly, a “Common Area” is defined by the BCP Declaration as all the real property and improvements thereon, if any, in which the Association owns an interest for the common use and enjoyment of all of the owners on a non-exclusive basis. *Id.* at § 2.1(G). The BCP Declaration further states that such interest includes any easement held by the Association. *Id.*

The BCP Declaration creates two easements in favor of the Association. The first is a blanket easement for the installation, repair, maintenance and replacement of landscaping, including a common water sprinkler system, if any, on the property, including without limitation the unimproved portions of the Lots, i.e. all areas of the Property other than where the residence was built. *Id.* at § 8.4(E). The second easement is a general maintenance easement upon, across, over, in and under the property to perform, among other things, the duties and functions which the Association is obligated or permitted to perform pursuant to the Association Documents. *Id.* at § 8.6. With respect to maintenance, the Association is charged with the responsibility to maintain a high standard of maintenance and uniform appearance of the Exterior Maintenance Area, i.e., the entire 2001 Beaver Creek Point community other than a Residence. *Id.* at § 9.1.

Defendant’s proposed addition is in the area to the southwest of its residence. This area is not, and has never been, occupied by any structure or improvement. As a result, the area is both

Exterior Maintenance Area and Common Area for the benefit of an individual homeowner and the Association.

E. The Relationship Between Common Area and the “Building Envelope.”

In addition to being in the Association’s Exterior Maintenance Area and Common Area, Defendant’s proposed addition also falls within the original “building envelope” of the Property. This legal conclusion, however, is not inconsequential. The “building envelope” defined the area of the Property that the residence could be built within and provided notice to all owners where future development or additions could be expected.

Absent a variance, any proposed project presented to the Town of Avon must be located within the original building envelope. This ensures that all Town setback requirements are met. Still, as clarified by the *Order re: Defendant’s Motion for Summary Judgment Pursuant to C.R.C.P. 56(b)*, the Town of Avon’s design review process is separate and apart from the Association’s design review process. That is, any proposed addition must obtain written approval from the Association whether it is in an original building envelope or seeks a variance to build beyond the original building envelope. Because they have different review standards, a proposal could be approved by the Association and rejected by the Town of Avon or rejected by the Association and approved by the Town of Avon. They are separate and distinct review processes with separate and distinct standards and requirements.

The Clarification to the Declaration recorded August 19, 2007 does not change the fact that the area outside Defendant’s residence is a Common Area maintained by the Association. The Clarification is limited to “repairs,” such as roof and deck “repairs,” and not maintenance or other responsibilities of the Association with respect to maintaining a uniform appearance of the

Exterior Maintenance Area (defined as the entire 2001 Beaver Creek point community other than a residence). Those duties, including without limitation landscaping, snow removal and driveway, remained the responsibility of the Association pursuant to the easements described above. Nothing in the Clarification affected the Association's easements or the fact that the area outside the residence on Defendant's Property is a Common Area maintained by the Association.

The Association suggests that somehow, the Association (and hence all owners) have some additional interest in the common elements and/or easements. A "Common Area" is defined by the Declaration as all the real property and improvements thereon, if any, in which the Association owns an interest for the common use and enjoyment of all of the Owners on a non-exclusive basis. *Id.* at § 2.1(G). The Declaration further states that such interest includes any easement held by the Association. *Id.* However, to interpret that the Association has some additional rights to control a Common Area is illogical. Under the Association's interpretation, if any homeowner wants to have a picnic in a neighbor's yard, they could as it would be a common element. The Court rejects that any homeowner or the Association would embrace that analysis in any other context. Hence, the rights and obligations of the Association in the common areas in not unlimited.

In summary, the residence that exists on Defendant's Property today was built by the developer and constituted the residence as defined in the BCP Declaration. The plat map was filed prior to construction of the residence, and not all of the buildable area was used for the residence. Although once Defendant's residence was constructed, the remainder of the Property became Common Area under the Declaration and the care and maintenance of such area became

a duty of the Association, it does not change the status or potential development of that part of the Property. Thus, the area where Defendant now desires to construct a shed, deck, gable roof, and solar array is still subject to the BCP Declaration and the Rules and Regulations which prohibit any owner from constructing anything without the express written consent of the Association.

F. The Town of Avon's Approval is Irrelevant.

As held by the Court in its *December 13, 2019 Order for Preliminary Injunction*, the Association is not bound by the findings of the Town or its Planning and Zoning Commission. Colorado law is clear that associations are quasi-governmental organizations whose fiduciary duties may be breached if they fail to enforce covenants. *Colo. Homes v. Loerch-Wilson*, 43 P. 3d 718, 721-22 (Colo. App. 2001). As quasi-governmental organizations, associations parallel in almost every case the powers, duties and responsibilities of a municipal government. *See, McIntyre v. Jones*, 194 P.3d 519, 526 (Colo. App. 2008) (*citing Cohen v. Kite Hill Community Assn.*, 142 Cal App. 3d. 642, 191 Cal. Rptr. 209, 214 (Cal. Ct. App. 1983). Protection of aesthetics, including view corridors, is a legitimate function of a legislature. *Landmark Land Co. v. Denver*, 728 P.2d 1281, 1285 (Colo. 1986).

Nothing in the Master Declaration prevents an association within the subdivision from enforcing its own covenants. The Association, along with its BCP Declaration (prohibiting any construction to a residence within the 2001 Beaver Creek community without design review by and approval of the Association's Board), was approved by the Town of Avon as part of the Association's subdivision application to the Town of Avon. The signature of the Town on the final plat, which incorporates the BCP Declaration in General Note #6, is proof of such approval.

Thus, the Association, as a quasigovernmental agency, may enforce its covenants without being bound by findings of the Town or the Planning and Zoning Commission on an application in which it was never a party. There is no Colorado law to the contrary.

Moreover, the BCP Declaration addresses this very issue. Under Article XXII of the BCP Declaration the “covenants, restrictions and provisions of this Declaration shall be cumulative with those of the Master Declaration...The foregoing priorities shall not prevent enforcement by the Association of provisions or rules which are stricter than those of the Master Association.”

Here, Defendant’s proposed addition is reviewed differently by the Association than by the Town of Avon. The evidence at trial established that the criteria used by the Town and its Planning and Zoning Commission does not include findings or conclusions with respect to preserving established view corridors, entrance ambiance, safety concerns from water and ice runoff from the proposed roof onto the entrance driveway, disturbance of the drainage from the property, impedance of snow storage areas, interference with the privacy of the other owners in the 2001 Beaver Creek Point community and other important considerations of the Association in reviewing Defendant’s application for the proposed addition to its residence. As such, the findings and conclusions by the Town of Avon and its Planning and Zoning Commission do not constitute the sole criteria under which the Association must make in its decision with respect to any application.

G. The Applicability of C.R.S. § 38-30-168.

1. The Statute is Not Applicable in this Case.

C.R.S. § 38-30-168 makes void and unenforceable any “...covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the

transfer or sale of, or any interest in, real property that effectively prohibits or restricts the installation or use of a renewable energy generation device....”

Defendant’s argument is that the BCP Declaration falls under and is subject to the statute. This is incorrect.

First, C.R.S. § 38-30-168 applies to a “deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property.” The only documents that conceivably affect real property are the BCP Declaration, its Bylaw and Rules and Regulations, and the various deeds from one homeowner to another.

Second, neither the BCP Declaration, nor any other instrument, contains any “covenant, restriction, or condition...that effectively prohibits or restricts” solar energy devices. To “contain” something is to “have or hold within.” Nowhere within the BCP Declaration is there a specific mention of solar or any other “renewable energy generation device.” There has been no evidence that any of the documents affecting real property mention renewable energy generation devices, let alone contain any restrictions on solar.

If the court can give effect to the ordinary meaning of words of a statute, the statute should be construed as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant what it clearly said. *See State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000). If a statute is clear and unambiguous, the court may not look further. *Id.* Only when a statute is ambiguous such that the words chosen do not inexorably lead to a single result may a court resort to legislative history to ascertain the legislative intent. *Id.* at 501. The statute here is clear and unambiguous and therefore the analysis ends there. There is no provision in the BCP Declaration

that any party can point to that should be voided as a result of this Statute.¹ Therefore C.R.S. § 38-30-168 does not apply.

Defendant argues that the decision by the Association’s Board of Directors to reject Defendant’s proposed addition pursuant to its design review rights under Article XV of the BCP Declaration amounts to a “covenant, restriction, or condition” that effectively prohibits solar. If this was true, which it is not, then the entirety of Article XV would be void since, on its face, it does not fall within the limited exceptions set forth in subsection 2 of C.R.S. § 38-30-168. The discretionary decision made by the Association, as discussed further below, falls under a separate statute. The statute here voids only expressly stated restrictions in an instrument affecting real property. As a result, it is not applicable.

2. C.R.S. § 38-30-168(2) Does Not Apply.

As addressed above, express prohibitions or restrictions on solar in instruments affecting real property are void under C.R.S. § 38-30-168. However, C.R.S. § 38-30-168(2) provides for limited exceptions, thereby allowing express prohibitions in narrow instances. Defendant argues that the Association’s decision under Article XV of the BCP Declaration should be analyzed under this exception. For the reasons stated above, the statute is inapplicable and therefore its exceptions are equally inapplicable.

Even if the statute and its exceptions did apply, the exceptions stated in C.R.S. § 38-30-168(2)(a) apply only to aesthetic “provisions that impose reasonable restrictions on the dimensions, placement, or external appearance of a renewable energy generation device....” As addressed above, there are no “provisions” in the BCP Declaration that even mention any

¹ To Defendant’s argument on this point: yes, the “covenant, restriction, or condition” must be expressly contained in the instrument to fall under the statute.

renewable energy generation device.

Moreover, the carveout for aesthetic restrictions applies only to “aesthetic provisions” that “[i]ncrease the cost of the device by more than ten percent” or “[d]ecrease the performance or efficiency of the device by more than ten percent.” In this way, it is the ten percent change in the cost or efficiency “of the device” that is at issue. Not only does the BCP Declaration not address the installation or use of a renewable energy generation device, but it also does not restrict the dimensions, placement, or appearance of the device. For instance, the BCP Declaration does not specify that one device (*e.g.*, the SunPower 425W) must be used instead of another (*e.g.*, the Solaria 370R) because the Association prefers the aesthetic appearance of the former device. If that was the case, then the provision would fall squarely within C.R.S. § 38-30-168 and its exceptions under subsection (2). Then, under C.R.S. § 38-30-168(2), the trial would be about whether the restriction met the exception under subsection 2, that is, whether the SunPower 425W was either 10% more expensive or 10% less effective than the Solaria 370R. Similarly, the Association does not specify that renewable energy devices can only be installed on the northern side of the roof. That would also be an express provision and would likely be voided under the statute since a north facing roof would likely decrease the efficiency of a given solar device by 10% or more when compared to a south facing roof. These are not the questions before the Court. Again, a “provision” is an expressly written condition or requirement in a document. The question before the Court is whether the Association has the right to reject a proposed garage/deck/roof/solar addition. This statute does not apply to address that right. Instead, there is a separate statute under the Colorado Common Interest Ownership Act (“CCIOA”) that applies.

3. The Legislative History of C.R.S. § 38-30-168 Supports the Association's Interpretation.

When legislators introduced amendments to C.R.S. § 38-30-168, they also added a “conforming amendment” to a solar provision in CCIOA. Defendant argues that somehow the term “conforming amendment” means that the exceptions under C.R.S. § 38-30-168(2) also apply to the solar provision under CCIOA, C.R.S. § 38-33.3-106.5.

As noted *supra*, if the court can give effect to the ordinary meaning of words of a statute, the statute should be construed as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant what it clearly said. *See State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000). If a statute is clear and unambiguous, the court may not look further. *Id.* Only when a statute is ambiguous such that the words chosen do not inexorably lead to a single result may a court resort to legislative history to ascertain the legislative intent. *Id.* at 501.

The statute here is clear and unambiguous and therefore the analysis ends there. There is no provision in the BCP Declaration that any party can point to that should be voided as a result of this statute. A “covenant, restriction, or condition” is an express statement contained in an instrument. Because the statute is clear and unambiguous, the Court should not read into the legislative history.

However, the legislative history of C.R.S. § 38-30-168 demonstrates the opposite of what Defendant has argued. In the committee hearing concerning a 2008 amendment to C.R.S. §38-30-168, Senator Tupa “explained that the bill adds a conforming amendment to the ‘Colorado Common Interest Ownership Act,’ to include other energy efficient devices and restrict the use of solar energy devices in common interest communities.” The implication of this statement is that the “conforming amendment to [CCIOA]” was necessary so that the restrictions would also

apply to common interest communities, like the Association. Stated another way, it is the conforming amendment to CCIOA (C.R.S. § 38-33.3-106.5) that is applicable to common interest communities and not C.R.S. § 38-30-168.

4. CCIOA Applies.

While C.R.S. § 38-30-168 does not apply to the Association's decision to reject Defendant's proposed addition, a similar statute under CCIOA does apply. Under that statute, "an association shall not effectively prohibit renewable energy generation devices...." C.R.S. § 38-33.3-106.5(1.5) (the "CCIOA Statute"). Unlike C.R.S. § 38-30-168, the CCIOA Statute is not limited to covenants, restrictions, or conditions contained within instruments affecting real property, but broadly applies to both association documents and acts taken by an association. It is under the CCIOA Statute, not C.R.S. § 38-30-168, that the Association's conduct must be assessed.

This is not dissimilar to the dual statutory scheme regarding housing discrimination in Colorado. Like the solar statutes here, the legislature provided for two separate statutes: one addressing express discrimination and another discretionary discrimination. With respect to express discrimination, any restrictive covenants which are based on race or religion are void and unenforceable. *See* C.R.S. § 38-30-169. Not only is the language similar to C.R.S. § 38-30-168, but it is the statute immediately following. A separate statute sets forth rules when there is no express restrictive covenant based on race or religion but when there is still discretionary discrimination taking place, i.e., discrimination taking place when a person has a decision to make. *See* C.R.S. § 24-34-502. Under that law, persons may not refuse to sell to a person based on race or religion (among others). The same scheme is in place as it affects solar energy devices

in a common interest community: C.R.S. § 38-30-168 applies to express restrictions and the CCIOA Statute applies when a discretionary decision is made (such as during a design review).

Here, nothing on the record supports the proposition that the Association has effectively prohibited solar panels. First, nowhere in its Governing Documents does the Association explicitly prohibit solar panels. For instance, nothing in the BCP Declaration states that solar panels are not allowed within the 2001 Beaver Creek Point community.

Second, the Association has not prohibited solar panels. What the Association has done in this instance is deny the building of an addition that contains solar panels on top of it. It has not prohibited solar panels generally or the installation of solar panels on existing structures. To the contrary, the Association has previously allowed the Currey Plaintiffs to install solar panels on the roof of their residence and has continually informed Defendant that it would work with Defendant to design solar panels on Defendant's existing roof. Defendant has never submitted a proposal that would place solar panels on its existing structure. The evidence before the Court shows that the Association has prohibited the construction of an addition to the southwest portion of Defendant's Property, not that it has prohibited the installation of solar panels generally.

5. Even if the Statute is Applicable, It Relates Only to the Solar Panel and not the Addition.

A mere physical connection between a solar energy device and a separate device is insufficient to bring the separate device within the protection of § 38-30-168. *See Governor's Ranch Homeowner's Ass'n v. Gunther*, 705 P. 2d 1011, 1012 (Colo. App. 1985). In *Gunther*, the homeowner used solar panels to power his evaporative cooler. The homeowners' association in that case sought an injunction, arguing that the evaporative cooler violated express provisions of the association's covenants. The Colorado Court of Appeals concluded that the evaporative

cooler together with the solar panel constituted an “integrated solar energy device” that fell within the statute.

Here, the addition has nothing to do with the solar panels. It is not integrated in any way other than simply to be an elaborate expansion of a home that happens to include solar panels on the roof. A homeowner cannot be allowed to blanketly justify constructing any addition to their home over the objections of their homeowners’ association simply because the addition is intended to include solar panels. The addition is not integrated into the device in the same way the evaporative cooler was powered by the solar panels in *Gunther*. Therefore, even if the Association’s decision regarding Defendant’s proposed solar panels fall under C.R.S. § 38-30-168, which it does not, it does not extend to the Association’s denial of the underlying structure. The Association has every right to deny the underlying structure pursuant to the powers granted to it in the BCP Declaration. Denial of the underlying structure is therefore not denial of a solar project.

6. Even if the Statute is Applicable, the Association Does not Require Installation of any Specific Solar Device.

Under C.R.S. § 38-30-168(2)(a), the statute does not void restrictions as long as it does not (a) increase the cost of the device by more than 10% or (b) decrease the performance or efficiency of the device by more than 10%. The statute does not reference the “system,” the “array,” or “installation,” but limits itself to the “device.”

Nowhere does the Association require one type of device over another. For example, there is no suggestion that the Association requires use of the Solaria solar panels (which are all black) and disallows the SunPower solar panels (which are black-and-white checkered). Therefore, there can be no claim that the cost of the device has been increased or that the

efficiency of the device has been decreased.

7. Even if the Statute is Applicable in its Entirety, And it Relates to the Proposed Addition, And it Applies to the Entire Installation Cost and not Just the Cost of the Device, Placing Solar Panels on the Roof is Neither 10% More Expensive Nor 10% Less Effective.

If the BCP Declaration applies to installation of the entire solar array on the proposed addition, it does not impose a restriction that increases the cost of the solar device by more than 10% and does not decrease the performance or efficiency of the device by more than 10%. Therefore, it is excepted under C.R.S. § 38-30-168(2)(a)(I).

It is possible to place solar panels on the roof of Defendant's existing structure. This is evidenced by the existing solar paneling on the roof of the neighboring home owned by the Currey Plaintiffs which was built at a similar time with the same roofing style and materials.

At trial there was disagreement between experts as to the amount of energy that could be produced by solar panels on Defendant's roof as compared to the proposed addition. The Court finds the testimony of both inconclusive.

First, Mr. Clubine compares like panels on top of each roof. Mr. Moritz, on the other hand, compares different panels on each roof: SunPower on the addition and Solaria on the existing roof. The Court finds that comparing the same panel, that is, apples-to-apples, is more appropriate for comparing efficiency and cost differential between installation of solar panels on the proposed addition and the existing roof.

Second, Mr. Moritz assumes in his report that the proposed addition is detached, which would allow for additional paneling to be installed. However, as discussed above, the proposed addition cannot be approved by the Town of Avon as a detached structure since it is not 10 feet away from the main structure. Therefore, the proposed addition, as designed, must conform with

requirements for an attached structure which means that the structure must adhere to the roof setbacks requirements by the Town of Avon. Therefore, Mr. Moritz's proposition, that panels can be installed across the entire roof of the addition from end-to-end, is not possible.

Third, Mr. Clubine calculates a system loss that is similar between the panels on the roof and panels on the proposed addition. This system loss, as testified by Mr. Clubine, was calculated using historical data collected by his solar company. It accounts for losses due to snow accumulation and weather, including loss due to cloud coverage. Mr. Moritz, on the other hand, applied a similar loss to the existing roof, but applied only the default system loss (due to internal panel electrical transfer loss and inefficiencies) to the panel on the proposed addition without any allowance for snow accumulation or cloud coverage. The Court find Mr. Clubine's calculations more credible.

As shown in diagrams attached to Mr. Clubine's report, the Property can accommodate up to 16 Solaria brand solar panels on its southeast facing roof. With a system loss of 25.06%, these panels would expect to produce approximately 7,713 kilowatt hours of energy per year (kWh/yr) (if the more expensive SunPower panels were used, 13 panels for 7,199 kWh/yr). If additionally installed on the northwest roof, the total production on the main residence would be 12,644 kWh/yr. The same panels on the proposed addition (including the necessary setbacks for an attached addition) would accommodate only 5 panels for a total production of only 2,774 kWh/yr (if the more expensive SunPower panel were used, 5 panels for 3,187 kWh/yr at 14.09% system loss, 3025 kWh/yr at the correct 25.06% loss).

As calculated by Mr. Clubine, using the more expensive SunPower panels, the difference in expected output, or efficiency, between the panels on the southeast side of the roof versus the

proposed addition, when using the correct system loss, is only 9.25% per panel (3025 kWh/yr / 5 = 605 kWh/yr/panel versus 7,199 kWh/yr / 13 = 553.77 kWh/yr/panel). Because requiring that the panels be placed on the roof of the residence does not decrease the performance or efficiency of the proposed solar array by more than 10%, it is excepted under C.R.S. § 38-30-168(2)(a)(I).

The cost difference is similarly minimal. Mr. Clubine testified that installation of solar panel on an existing cedar shake roof costs approximately 1.3% more than on the proposed new addition (due to removal and replacement of shingles). Because requiring that the panels be placed on the roof of the residence does not impose a restriction that increases the cost of the solar device by more than 10%, it is excepted under -168(2)(a)(I).

Additionally, if the underlying structure itself is sufficiently integrated into the solar array as to bring it under the protection of C.R.S. § 38-30-168, as argued by Defendant, then the Court must consider the entire cost of the addition. Although there was no evidence at trial as to the estimated cost of the proposed addition, the Court can reasonably conclude that such cost would outpace the cost of installation of solar panel on the roof significantly such that the cost of placing solar on the roof would not increase the overall cost.

H. Attorney Fees and Costs.

Pursuant to C.R.S. § 38-33.3-123(c), in any civil action to enforce or defend the provisions of CCIOA or of the declaration, bylaws, or rules and regulations of an association, the court “shall award” reasonable attorney fees and costs to the prevailing party. Here, neither party prevailed.

Based on the reasons set forth herein, the Court does not find in favor of Plaintiffs for their request for a permanent injunction. The Association did act arbitrarily or capriciously in

denying all of Defendant's proposed additions, although there was a legitimate basis for denying the most recent proposal and the Court finds the Association did not effectively prohibit renewable energy devices pursuant to C.R.S. § 38-33.3-106.5(1.5). Accordingly, a permanent injunction is therefore not entered in favor of Plaintiffs that prohibits Defendant from constructing any improvement in the Exterior Maintenance Area without the written consent and permission of the Association's Board. Additionally, Plaintiffs are not entitled to their attorney fees and costs related to this action under C.R.C.P. 121, § 1-22.

Further, the Court does not find in favor of Defendant on any of its counterclaims or defenses. The Court therefore also denies Defendant's request for an award of attorney fees to be later determined.

IV. JUDGMENT AND ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that judgment be, and is hereby entered by the Court as follows:

1. Judgment is entered in favor of Defendant Malahide, LLC, and against Plaintiff 2001 Beaver Creek Point Association, Inc. and any individual Plaintiffs who joined in this claim, on Plaintiff 2001 Beaver Creek Point Association, Inc.'s claim for a permanent injunction. The claim is hereby dismissed with prejudice.
2. Judgment is entered in favor of Plaintiff 2001 Beaver Point Association, Inc. and all individual Plaintiffs, and against Defendant Malahide, LLC on Defendant Malahide, LLC's First Counterclaim for Relief (Breach of Covenant); Second

Counterclaim for Relief (Breach of Good Faith – C.R.S. § 38-33.3-113); Third Counterclaim for Relief (Breach of the Implied Covenant of Good Faith and Fair Dealing); and Fourth Counterclaim for Relief (Breach of Fiduciary Duty). Each of these claims is hereby dismissed with prejudice.

3. The Court finds there is no prevailing party in this action. Accordingly, each party shall bear their own attorney fees and costs.

So ordered this 3rd day of April, 2023.

By the Court:



Jonathan K. Shamis
District Court Judge