IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NANCY R. BENNER,	)	
	)	
Petitioner,	)	
	)	
v.	)	C.A. No. 7503-ML
	)	
THE COUNCIL OF THE NARROWS ASSOCIATION OF OWNERS,	)	
	)	
	)	
Respondent.	)	

MASTER'S REPORT
(Cross-Motions for Summary Judgment)

Date Submitted: June 18, 2014
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LEGROW, Master

The owners of units in a Sussex County condominium complex are required by various deed restrictions to obtain the approval of the condominium's governing council before undertaking any addition, alteration, or improvement to a unit. This type of deed restriction, commonly called an "architectural review covenant," is enforceable if it articulates a clear, precise, and fixed standard the reviewing body must apply. Other than requiring the governing council's approval, the deed restrictions at issue here do not specify any standard the council must apply in considering a unit owner's proposal.

The current dispute arose when one unit owner sought to enclose her porch using large windows, rather than sliding glass doors, on the rear-side of the unit. After extensive back and forth, the governing council denied the unit owner's request, insisting that it violated the council's sliding door "rule." The problem with this decision, however, is that it rests on an interpretation of the governing documents that is unreasonable and unsupportable. Because the sections of the governing documents that require approval of the council for improvements to a unit do not contain any standard animating the factors the council should apply in evaluating a request, the sections are unenforceable under Delaware law. In addition, even if the governing documents could be read – as the council urges – to require improvements to be "substantially similar to the original construction" of the units, the council has applied that standard arbitrarily by rejecting the unit owner's request based on a different standard. For those two independent reasons, the council's denial of the unit owner's request to use windows on her porch enclosure was improper. This is my final report on the parties' cross-motions for summary judgment.

BACKGROUND

The parties each have moved for summary judgment, but each argues that disputed issues of material fact preclude entry of judgment for the opposing party. Except as otherwise noted, the following facts are not in dispute. The petitioner, Nancy R. Benner, and her late husband, George D. Benner, purchased a unit in The Narrows condominium community on July 5, 1991. The Narrows is a fifteen unit, three building condominium complex in Fenwick Island, Delaware. Nancy and George jointly owned Unit 2 in the Narrows until George's death in April 2009, at which time Nancy became the sole owner of the property.

The Council of The Narrows Association of Owners (the "Council") is an elected three member council of unit owners charged with managing the affairs of the Narrows. The Narrows, and the Council's management of its operations, is governed by a Declaration Submitting Real Property to Provisions of Unit Property Act (the "Declaration") and a Code of Regulations for the Narrows Baltimore Hundred, Sussex County, Delaware (the "Regulations," and collectively with the Declaration, the "Governing Documents"). Both the Declaration and the Regulations were adopted and recorded in 1985 and have not been amended since that time. Although a member of the Council suggested in 2010 that the unit owners should consider updating and revising the Governing Documents, the unit owners expressed little interest in that suggestion and no revisions were undertaken.[1]

[1] App. to Opening Br. of Pet'r Nancy Benner in Supp. of her Mot. for Summ. J. (hereinafter cited as "A-__") Ex. 9.

The Governing Documents describe the units in the Narrows as three story units with "three (3) decks with loft, a screened porch and outside shower."[2] Mrs. Benner's unit is in what the residents refer to as the "Bay Building." A picture of the Bay Building at the time the Benners purchased Unit 2 shows the five units in that building, each with uniformly sized porches on the first, second, and third levels.[3] On the first and second levels of each porch, a single sliding glass door leads out onto the porch. On the third level, a single door opens to the top deck, and a large picture window also overlooks that deck.

Approximately 10 years ago, the Benners replaced the screens on their porches on the first and second floor with three-season vinyl windows. In 2011, after Mr. Benner's death, Mrs. Benner decided to enclose the first and second floor porches, as several of her neighbors had done. Mrs. Benner contacted Luke Hevner, who previously had replaced her third floor picture window. On August 2, 2011, Mr. Hevner met Mrs. Benner at Unit 2, where he prepared a sketch of the work he proposed to undertake and showed her pictures of the Anderson replacement windows he suggested for the project.[4] The windows Mr. Hevner suggested were approximately five feet wide and seven feet tall, with the bottom eighteen inches operating as a casement window that opened outward. Mr. Hevner's plan also included additional framing to support the windows, along with a

[2] A-2, § 4.
[3] A-10.
[4] App. to the Council of the Narrows Association of Owners' Opening Br. in Supp. of its Cross-Mot. for Summ. J. (hereinafter cited as "B-__) Ex. 18 at 21-23, 48-49 (Hevner dep.).

knee wall to accommodate windows on the side of the structure.[5] Mrs. Brenner approved Mr. Hevner's plan that day and gave him a deposit to purchase the windows.

Mrs. Brenner did not seek or receive the approval of the Council before she instructed Mr. Hevner to begin enclosing the porches. At a chance meeting with her next door neighbor, Raymond Buckley, as Mr. Hevner was leaving Unit 2 on August 2, 2011, Mrs. Benner told Mr. Buckley, who was a newly-elected member of the Council, about the work she and Mr. Hevner had been discussing.[6] Mr. Buckley did not indicate to Mrs. Benner that she would need approval from the Council before beginning work.[7]

Mr. Hevner began work on the project shortly after the August 2 meeting. On the first floor porch, he removed the existing panels and began to install the windows on the rear (west) side and south side of the enclosure, while on the second floor he removed the existing panels on the rear side.[8] Approximately a week into the project, Mr. Hevner

[5] B-18 at 43-44 (Hevner dep.)

[6] A-14 at 65-67 (Buckley dep.); B-18 at 51-54 (Hevner dep.). There is a factual dispute about how much information Mrs. Benner provided Mr. Buckley regarding the nature of the work she was planning, but because this factual dispute does not factor into my recommendation it does not preclude judgment as a matter of law.

[7] A-14 at 74. Again, the parties disagree about precisely what was said at this meeting, particularly regarding the extent to which the proposed work was described to Mr. Buckley and what he said in response. Mrs. Benner contends that she informed Mr. Buckley that she planned to enclose the porch and install Anderson windows and asked Mr. Buckley if she needed the Council's approval for the work, and that Mr. Buckley indicated she did not need to seek approval. *See* Pet'r's Opening Br. in Supp. of Mot. for Summ. J. (hereinafter "Pet'r Opening Br.") at 8-9. The Council, on the other hand, argues that Mrs. Benner indicated she was thinking about doing some work, offered a vague description of the work, and never asked Mr. Buckley about Council approval. *See* Resp't's Opening Br. in Supp. of Cross-Mot. for Summ. J. (hereinafter Resp't's Opening Br.") at 22-23. This factual dispute does not preclude summary judgment because I do not rely on this conversation to form the basis of my recommendation and because I have assumed for purposes of the cross-motions that the Council's version of this conversation is accurate.

[8] B-18 at 47 (Hevner dep.).

realized that, if the porch railing was reinstalled as planned, the casement portion of the new windows would not open. Mr. Hevner therefore suggested extending the deck an additional two feet, as other unit owners had done, to allow reinstallation of the porch railing while maintaining the functionality of the windows.[9]

In early September, one or more of Mrs. Benner's neighbors complained to the Council regarding the work being done on Unit 2. The president of the Council, Alex Karlin, wrote to Mrs. Benner on September 9, 2011 and instructed her to cease work on the porch enclosure until a written request had been submitted and the Council had approved the work. Mr. Hevner then immediately ceased work on the enclosures.

After Mr. Karlin instructed Mrs. Benner to halt work on the construction, Mrs. Benner's attorney submitted on her behalf a written request for approval of Mrs. Benner's planned improvements, including the enclosure of the first and second floor porches and the extension of the decks on those floors.[10] The initial request submitted by Mrs. Benner's attorney included a description provided by Mr. Hevner of the work completed and what remained unfinished.[11] Two days later, Mrs. Benner's attorney met Mr. Karlin and Mr. Buckley at Unit 2 to discuss Mrs. Benner's request. During that meeting, Mr. Karlin indicated that the owners of Unit 3 had expressed privacy concerns regarding the

[9] *Id.* at 37-38 (Hevner dep.); Verified Compl. ¶ 15.
[10] A-17.
[11] *Id.*

proposed deck extensions.[12] Mr. Karlin also expressed concern regarding the proposed use of windows rather than sliding doors on the rear façade of the enclosures.[13]

On October 9, 2011, Mrs. Benner's attorney submitted to the Council a revised request for approval of Mrs. Benner's planned improvements. The revised request continued to call for the use of windows rather than sliding doors, but reduced the size of the proposed deck extension to address the privacy concerns raised by the owners of Unit 3.[14] On November 2, 2011, the Council sent Mrs. Benner and her attorney a letter rejecting Mrs. Benner's revised proposal. The November 2 letter explained that Mrs. Benner's request was not approved because it was "not substantially similar to the original construction of all Units at the Narrows and [was] not consistent with maintaining the 'substantial similarity' of the exterior appearance of the Narrows."[15]

The Council contends – and contended in its November 2 letter – that several provisions in the Governing Documents required Mrs. Benner to obtain the approval of the Council before beginning work on her porch, and permitted the Council to approve or deny her request based on whether the proposed improvements were "substantially similar to the original construction and installation" and would maintain the "substantial similarity" of the exterior appearance of the Narrows. For example, the Declaration provides:

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[12] A-18 at 1; Pet'r's Opening Br. at 10.
[13] A-18 at 2; Pet'r's Opening Br. at 10.
[14] A-18.
[15] A-19 at 4. Although the Council rejected Mrs. Benner's request entirely, it does not appear that the Council had concerns regarding the size of the proposed deck extensions detailed in the revised request.

> 8. Use of Units. Each Unit and the Common Elements shall be occupied and used as follows:
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> * * *
>
> (i) All parts of the Unit which are exposed to the elements, including by way of illustration and not limitation, the decks, deck rails, patios, stairs, stair carriage and front door, shall not be changed or the appearance of such be changed without obtaining the prior written approval of the Council.[16]

The Regulations contain a similar requirement, and provide:

> Section 7. Additions, Alterations or Improvements By Unit Owners. No Unit Owner shall make any structural addition, alteration or improvement in or to his Unit without the prior written consent thereto of the Council. The Council shall be obligated to answer any written request by a Unit Owner for approval of a proposed structural addition, alteration or improvement in such Unit Owner's unit within sixty (60) days after such request, and its failure to do so within the stipulated time shall constitute a consent by the Council to the proposed addition, alteration or improvement. Any application to any governmental authority for a permit to make an addition, alteration or improvement in or to any Unit may be executed by the Council without[,] however, incurring any liability on the part of the Council or any of them to any contractor, subcontractor or materialman on account of such addition, alteration, or improvement, or to any person having any claim for injury to person or damage to property arising therefrom.[17]

The Council concedes, as it must, that neither of these two paragraphs elucidate a standard the Council must apply when considering a Unit Owner's request to add to, alter, or improve her property. The Council maintains, however, that the standard may be drawn from a separate section of the Regulations governing "Maintenance and Repair." Article V, Section 5 of the Regulations assigns responsibility for maintenance, repair, and replacement of units and common elements to the Council or a unit owner, depending on

[16] A-2 at ¶8(i).
[17] B-4 at 15, Art. V, § 7.

the element involved. The last paragraph of that Section contains the language on which the Council relies and states:

> (c) Manner of Repair and Replacement. All repairs and replacement shall be substantially similar to the original construction and installation. The method of approving payment vouchers for all repairs and replacement shall be determined by the Council.[18]

Notably, repairs and replacements do not require the prior approval of the Council. The interplay of these two sections requires the Council to take the odd position that Mrs. Benner's enclosure plans were an improvement, rather than a repair or replacement, and therefore required the prior approval of the Council, while simultaneously contending that the "substantially similar" standard governing repairs and replacements also governs the Council's consideration of Mrs. Benner's proposed improvement.

Over the years, various unit owners have made improvements and additions to their units with the approval of the Council, including several unit owners who have enclosed their screen porches. At least six unit owners have enclosed – to various degrees – the first and second floor decks or porches on their unit. All of the unit owners in the Bay Building other than Mrs. Benner have enclosed their decks or porches to some degree. The pictures and descriptions of those enclosures show the dissimilarities of those improvements to the original construction of the Narrows.[19] For example, the owners of Unit 1 enclosed the second floor porch and extended the deck on the second

[18] *Id.* Art. V, § 5(c). The Council also recites Article VII of the Regulations, which governs "Repair and Reconstruction after Fire or Other Casualty," and states that "[a]ny such reconstruction or repair shall be substantially in accordance with the plans and specifications under which the property was originally constructed." *Id.* at 21, Art. VII, § 2(c).

[19] *Compare* A-10 (picture taken in 1991 when the Benners purchased the property) *with* A-12 and A-13 (recent pictures showing the units in the Bay Building as they currently exist).

floor. The rear portion of the enclosure now includes two sets of sliding glass doors rather than the single set of sliding glass doors in the original construction. The owners of Units 4 and 5 enclosed both their first and second level porches, the deck on Unit 4 was extended on both levels, and each unit owner added two sets of sliding glass doors to the rear façade of each level. The owners of Units 4 and 5 also added a "transom" window above the sliding doors on the second level of their respective enclosures. The change to Unit 3 is perhaps the most dissimilar to the original construction; the owners of Unit 3 not only enclosed the first level porch, but also extended the enclosure the entire width of the unit. The rear façade of the first level of Unit 3 now includes three sets of sliding glass doors, where the original construction included only one door. Other unit owners have noted that the improvements to the various units have resulted in a lack of similarity, or "hodge podge" appearance, when the units are viewed from the exterior.[20] Even the Council concedes that the improvements to Unit 3 were "unusual in several respects."[21]

The Council points out that none of the units owners who have enclosed their decks or porches have added windows to the rear façade of the unit, other than the narrow transom windows above the sliding doors on Units 4 and 5. The Council attaches a great deal of significance to this fact, and to the fact the Council previously denied requests by

[20] *See, e.g.* A-29 (e-mail from another unit owner to the Council, disagreeing with the Council's rejection of the Benner proposal and expressing the view that all units in the Bay Building "have made changes that show no visual conformity to anything, except the plastic railing … From the back, the units look like a hodge podge result of many minds deciding how to suitably improve what they have."); App. to Pet'r's Reply Br. in Supp. of Mot. for Summ. J. (hereinafter cited as "C-_") at Ex. 4 (e-mail from owners of Unit 7 stating "we fail to see the uniformity of these enclosures").

[21] C-4 (e-mail from then Council president responding to e-mail from Unit 7 owners).

two other unit owners to enclose their rear decks with windows. The record reflects that the owners of Unit 15 submitted four alternate proposals to the Council in 2004, two of which included options for windows on the rear façade of the enclosure.[22] The Council approved the proposals that included sliding doors on the rear façade, stating in its approval letter that "[y]ou may proceed with sketches 6-7, railings cannot be removed on the East or South ends per County codes."[23] There is a factual dispute about the reasons for the Council's decision. Ms. Benner argues that the owners' proposal to use windows was rejected because it required removal of the deck railings. For purposes of the pending cross-motions, however, I will assume that the Council rejected the proposals that included windows because the Council was following its sliding glass door "rule."

In 2006 and 2007, the owners of Unit 7 also sought approval of proposals to enclose their rear porch with windows.[24] The Council denied both proposals. Dennis Obermayer, who was president of the Council from 2007 to 2010, stated in an affidavit in this action that these proposals prompted him to include in the agenda to the 2007 Annual Owners Meeting an item seeking "[c]ommunity guidance on how strictly to enforce variance rules, particularly enclosures of screen porches."[25] The minutes from this meeting (the "2007 Minutes") reflect that the Unit Owners voted unanimously "that the Council enforce uniformity based upon Code requirements, precedent and Bylaw

[22] B-14.
[23] *Id.*, Ex. B.
[24] B-16.
[25] *Id.*

regulations, [sic] any major changes."[26] Shortly after this meeting, the Council again rejected the proposal to enclose the rear porch on Unit 7 using windows.[27]

There is a factual dispute regarding the factors driving this 2007 decision, and Ms. Benner points out that the Council's letter rejecting the proposal for Unit 7 again references the fact that the proposal would require the removal of deck railings. There is no mention in the Council's letter of a preference for, or rule requiring, sliding glass doors.[28] Nonetheless, for purposes of the pending cross-motions I will assume that the Council rejected the request because it called for windows, rather than sliding glass doors.

These earlier proposals, and the Council's rejection of proposals that called for windows on the rear façade of the enclosure, are relevant because they apparently factored into the Council's deliberation and decision regarding Mrs. Benner's proposal. Tellingly, although the Council maintains in this litigation that the "substantially similar to the original construction" provision in Article 5, Section 5(c) of the Regulations was the standard applicable to the Council's review of Mrs. Benner's request, the Council's letter of November 2, 2011 that rejected Mrs. Benner's proposal repeatedly described the Council's decision as being based on both the original construction of the Narrows *and* the subsequent development of the Units.[29] Although the three members of Council who

[26] *Id.* Ex. B, p. 3.
[27] *Id.* Ex. D.
[28] *Id.*
[29] *See, e.g.* A-19 at 2 ("[w]e all hoped that, when Mr. Martin saw the situation on the 17th, he would clearly recognize that Ms. Benner's proposal was not 'substantially similar to the original construction' (and subsequent development) of every other unit at the Narrows … ."); *see also*

were deposed each provided a different explanation of their decision to reject Mrs. Benner's request, none of the Council members testified that their decision depended exclusively on the proposal's similarity to the original construction of the Narrows. For example, Mr. Buckley testified that the standard he applied when considering Mrs. Benner's request was whether the proposed improvements were "structurally similar" to the other 14 units in the Narrows, although Mr. Buckley could not articulate where in the Governing Documents that standard could be found.[30] Ms. Filipour testified that the Council denied Mrs. Benner's proposal "to be consistent" with "[p]revious rulings on exactly the same issue."[31] Ms. Filipour's understanding of the "previous rulings" with which she strove to be consistent was based on what others on the Council told her, rather than on her review of past Council decisions on other similar requests.[32] Mr. Karlin also readily conceded that the Council considered the subsequent development of the Narrows, rather than solely the original construction, in deciding to reject Mrs. Benner's request.[33]

After the Council rejected her proposal, Mrs. Benner filed this action in May 2012. In March 2013, the Council filed a motion seeking summary judgment in its favor on each of Mrs. Benner's claims. After oral argument, I issued a final report recommending that the Court deny that motion because the Council had not shown as a matter of law

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id. at 4 (the Benner request is "not consistent with maintaining the 'substantial similarity' of the exterior appearance of the Narrows").
[30] A-14 at 87-88, 91-92 (Buckley dep.).
[31] A-20 at 38-39 (Filipour dep.).
[32] *Id.* at 25-26.
[33] A-4 at 33-34 (Karlin dep.).

that Mrs. Benner was not entitled to the relief she sought.[34] I also instructed the parties to conduct discovery and determine whether to submit the case for decision on cross-motions for summary judgment or whether a trial would be necessary.[35] After conducting some discovery, Mrs. Benner filed a motion for summary judgment on February 28, 2014. I allowed the Council to complete its discovery, including various depositions, after which the Council filed its own motion for summary judgment. This case is now before me on the parties' competing motions.

ANALYSIS

Summary judgment should be awarded if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[36] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[37] A party seeking summary judgment bears the initial burden of showing that no genuine issue of material fact exists.[38] If the movant makes such a showing, the burden then shifts to the non-moving party to submit sufficient evidence to show that a genuine factual issue, material to the outcome of the case, precludes

[34] *Benner v. The Council of Narrows Ass'n of Owners*, C.A. No. 7503-ML (May 6, 2013) (TRANSCRIPT) at 83.
[35] *Id*. at 84.
[36] *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).
[37] *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).
[38] *Johnson v. Shapiro*, 2002 WL 31438477, at *3 (Del. Ch. Oct. 18, 2002).

judgment before trial.[39] Summary judgment will be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a trial."[40]

I. The Validity of Restrictive Covenants Generally and the Narrows' Prior Approval Restriction Specifically

The enforcement of restrictive covenants implicates two competing legal interests: (1) the right of a willing buyer and a willing seller to enter into a binding contract, and (2) the special nature of land, which historically has been permitted free use.[41] In an effort to reconcile these two interests, the Delaware courts have developed particular rules governing the application of restrictive covenants. Although restrictive covenants are recognized and enforced when the parties' intent is clear and the restrictions are reasonable, ambiguous covenants are construed so as to limit the effect of the restriction.[42]

Restrictions like those contained in the Governing Documents requiring unit owners to obtain the prior approval of the Council before making any improvement to a unit commonly are called "architectural review covenants." Such covenants generally are upheld as valid, but are viewed with suspicion due to the tendency of such review to be arbitrary, capricious, and therefore unreasonable.[43] Such review covenants will be upheld

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[39] *Id.*; *Conway v. Astoria Fin. Corp.*, 837 A.2d 30, 36 (Del. Ch. 2003).
[40] *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).
[41] *Lawhon v. Winding Ridge Homeowners Ass'n, Inc.*, 2008 WL 5459246, at *4-5 (Del. Ch. Dec. 31, 2008); *Chambers v. Centerville Tract No. 2 Maint. Corp.*, 1984 WL 19485, at *2 (Del. Ch. May 31, 1984).
[42] *Point Farm Homeowner's Ass'n, Inc. v. Evans*, 1993 WL 257404, at *2-3; *Chambers*, 1984 WL 19485, at *2.
[43] *Seabreak Homeowners Ass'n, Inc. v. Gresser*, 517 A.2d 263, 268 (Del. Ch. 1986); *Point Farm Homeowner's Ass'n, Inc.*, 1993 WL 257404, at *3.

if they contain "clear, precise, and fixed standards of application."[44] Where, however, an architectural review covenant is vague, imprecise, or unclear, the grant of authority normally is not enforceable.[45] Settled Delaware law requires strict construction of such covenants.[46]

The Council concedes, as it must, that the sections of the Governing Documents requiring the Council's prior approval of all improvements do not contain any standard governing how the Council must apply that authority. Although the Council argues that the applicable standard is the "substantially similar to the original construction" principle articulated in the "Repairs and Replacements" section of the Regulations, that standard is found in a separate section of the Regulations and governs when no prior approval of the Council is required. There is nothing on the face of the Governing Documents to indicate that the standard governing repairs and replacements – for which no architectural review is required – also applies to the architectural review conducted by the Council for additions, alterations, or improvements to units, nor is there anything in the structure or content of Regulations suggesting those provisions are interwoven. The Council nevertheless argues that the parties intended this standard to apply to the Council's review, a conclusion the Council contends is confirmed by the parties' course of performance since the Governing Documents were adopted. The flaw in this argument is

[44] *Lawhon*, 2008 WL 5459246, at *5; *Bethany Village Owners Assoc., Inc. v. Fontana*, 1997 WL 695570, at *2 (Del. Ch. Oct. 9, 1997); *Point Farm Homeowner's Assoc., Inc.*, 1993 WL 257404, at *3.

[45] *Seabreak Homeowners Ass'n, Inc.*, 517 A.2d at 269 (citing *Alliegro v. Home Owners of Edgewood Hills*, 122 A.2d 910, 912 (Del. Ch. 1956)). *See also Point Farm Homeowner's Ass'n, Inc.*, 1993 WL 257404, at *3.

[46] *Dolan v. Villages of Clearwater Homeowner's Ass'n, Inc.*, 2008 WL 2810724, at *3 (Del. Ch. Oct. 21, 2005); *Seabreak Homeowner's Ass'n, Inc.*, 517 A.2d at 269-70.

that it conflicts with settled principles of contractual construction, particularly those governing the interpretation of restrictive covenants.

Deed restrictions are contractual agreements and, as such, ordinary principles of contract law govern their interpretation.[47] This Court construes all contracts by seeking to determine the intent of the parties.[48] When language in a contract is clear and unambiguous, this Court will ascertain the parties' intent by according the language its plain and ordinary meaning.[49] Only if the language of the contract is ambiguous may the Court consider extrinsic evidence of the parties' intent, including the parties' course of performance.[50]

The Council's position on this point meanders. At times, the Council appears to argue that the absence of a governing standard in the architectural review covenant renders the deed restriction ambiguous and permits the Court to consider extrinsic evidence,[51] while at other times the Council maintains the deed restriction is unambiguous but urges the Court to consider extrinsic evidence to supply a missing term.[52] Neither argument allows the Court to graft the "substantially similar" standard into the architectural review covenant governing improvements to the units.

As I read it, there is no ambiguity in the portion of the deed restriction requiring the Council's approval of any improvements to a unit. A contract is ambiguous only

[47] *Goss v. Coffee Run Condo. Council*, 2003 WL 21085388, at *7 (Del. Ch. Apr. 30, 2003); *see also Chambers*, 1984 WL 19845, at *2.
[48] *Andrews v. McCafferty*, 275 A.2d 571, 573 (Del. 1971).
[49] *The Council of the Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 5 (Del. 2002). *See also Lawhon*, 2008 WL 5459246, at *6.
[50] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).
[51] Resp't's Opening Br. at 37-38.
[52] *Id.* at 38-39.

when the provisions in controversy "are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[53] The language in the architectural review covenant is not, in my view, susceptible to different interpretations. Instead, the Council appears at times to argue that the absence of a clear and fixed standard renders the restriction ambiguous. This is not an accurate statement of Delaware law. This Court consistently has held that the absence of a clear, precise, and fixed standard in an architectural review covenant renders that portion of the deed restriction unenforceable, not ambiguous. Even if the Court concluded the language was ambiguous, I do not believe the Court could consider extrinsic evidence. Rather, a conclusion that the language is ambiguous would require the Court to conclude the deed restriction was unenforceable.

Because the language is not ambiguous, I may not consider extrinsic evidence of the parties' intent,[54] which the Council argues is necessary to conclude that the "substantially similar to the original construction" standard governs the Council's review of improvement applications. "Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty."[55] The plain language of the deed restriction indicates that the parties did not supply any standard to govern architectural review.

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[53] *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996).
[54] *Lawhon*, 2008 WL 5459246, at *6 ("If [the restriction's] language is unambiguous then no other evidence is necessary to determine intent").
[55] *Rhone-Poulen Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

At other times, however, the Council appears to argue that, although the architectural review covenant is unambiguous, the Court may consider extrinsic evidence to supply an "omitted" term. As an initial matter, I believe that argument misstates Delaware law. The Delaware Supreme Court consistently has held that extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity.[56] Even if the Council correctly was stating the law,[57] however, resorting to extrinsic evidence to add terms to a deed restriction would be inconsistent with the law governing interpretation of restrictive covenants. That law requires notice to property owners who are subject to deed restrictions, as well as strict construction of such restrictions, and neither principle may be achieved if the Court looks to the parties' course of performance to supplement the restrictions with additional terms, no matter the salutary purpose of such a term. As the Delaware Supreme Court aptly stated, "[w]e certainly understand the benefit that a uniform exterior would likely present to the ownership group [of a condominium] as a whole … [but] [i]t is not within our purview to add unilaterally to the terms of an agreement to strengthen its perceived

[56] *See, e.g. Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997); *Pellaton v. Bank of N.Y.*, 592 A.2d 473, 478 (Del. 1991).

[57] The Council cites two cases for this proposition. The first, *LeMay v. New Castle Cnty.*, 1992 WL 101136 (Del. Ch. May 6, 1992) is not persuasive because the Court there concluded the contract was ambiguous before resorting to extrinsic evidence. In the second, *City of Wilmington v. Wilmington FOP Lodge #1*, 2004 WL 1488682 (Del. Ch. Jun. 22, 2004), the Court referenced the possibility of considering evidence of course of performance to supply an omitted term in a collective bargaining agreement, but ultimately declined to do so because the evidence did not support that step. *City of Wilmington* does not stand for the proposition that course of performance evidence may be used to add terms to a deed restriction, and the Council has cited no precedent to support such a conclusion.

goal."[58] To conclude that the absence of a governing standard in the Narrows' architectural review covenant was an "omitted term" that the Court could supply through the parties' course of performance would upend Delaware precedent governing the interpretation and enforceability of such covenants, permitting the Court to fix any covenant the Court held was vague or imprecise. Although the Council may find that result desirable, it can point to no case in which a Delaware court has undertaken to "fix" a restrictive covenant by supplying a standard omitted by the parties.

The Council advances three other arguments it contends require the Court to read the architectural review covenant as though it contained the "substantially similar to the original construction" standard. First, the Council contends that any other reading would work an absurd result, offering as a hypothetical that if a unit owner made an improvement to his unit that later was destroyed by fire or other casualty, the reconstruction must be "substantially in accordance with the plans and specifications under which the property was originally constructed" under Article VII of the Regulations. The absurdity the Council sees is not apparent to me. To the contrary, it seems perfectly reasonable to require repairs and replacements generally to be "substantially similar to the original construction," as such work does not require the prior approval of the Council. In fact, it would seem something of a paradox to require

[58] *The Council of the Dorset Condo. Apartments*, 801 A.2d at 8. Even if I concluded that I could consider the Council's course of performance to create a clear and fixed standard where none currently exists, the Council would not be entitled to summary judgment. There are disputed issues of material fact regarding the basis for the Council's previous decisions rejecting certain applications that included windows rather than sliding doors, as well as disputed factual issues raised by the Obermayer affidavit, which attempts to introduce new facts regarding the 2007 Minutes and the Council's interpretation of its mandate after that May 2007 meeting.

an "addition, alteration or improvement" to be "substantially similar" to the original construction, as additions, alterations, and improvements by their very nature seem likely to diverge from the original construction, unlike a repair or replacement. In any event, the language to which the Council points regarding reconstruction after a fire or casualty appears only to govern the work for which the Council or its insurers is responsible. It is not absurd to conclude that the Council would not undertake in its governing documents to restore units to their "altered" or "improved" state, as that might involve a substantial increase in the cost and risk undertaken by the Council.

The Council next argues that, if I conclude that the "substantially similar to the original construction" standard governing repairs and replacements cannot be read into the architectural review covenant governing alterations, additions, or improvements, I will render the architectural review covenant illusory and meaningless, a result that Delaware courts endeavor to avoid when construing a contract.[59] Although the Council correctly recites the law governing construction of contracts, it does not explain how the conclusion that the "substantially similar" standard does not apply to the architectural review covenant would render the covenant illusory or meaningless, other than the *ipse dixit* statement that the "standard will be illusory or meaningless if it cannot be applied by [the] Council to unit owners' requests to alter or improve their rear façades to require installation of sliding glass doors, as were present in the original construction of the rear façades of the first and second floors of every unit."[60] In asserting this argument, the

[59] *See* Resp't's Opening Br. at 44.
[60] *Id.*

Council appears to confuse "illusory and meaningless" with "unenforceable." The conclusion that the architectural review covenant does not – by its terms – contain any standard governing the Council's review does not render that section "illusory" or "meaningless." That conclusion would be apt if the Court concluded that the architectural review covenant had no purpose or meaning apart from the other terms of the contract. That is not the conclusion I have reached, nor is it the position taken by Mrs. Benner. Rather, the deed restriction has its own independent and plain meaning within the context of the Governing Documents, but is unenforceable under Delaware law because of the absence of any clear and precise standard governing the review.

Finally, the Council urges that the 2007 Minutes offer evidence of "every unit owner's (including Plaintiff's own Unit 2) shared intent or common meaning attributed to the Regulations' use of 'substantial similarity' as the standard governing additions, alterations or improvements to units at the Narrows."[61] Although the Council appears to contend that the Governing Documents alone provide a sufficiently clear standard under Delaware law, the Council points to the 2007 Minutes as "extrinsic persuasive evidence" of the Association's shared intent and argues that the minutes serve as evidence of the reasonableness of the judgments made by the Council.[62] For the reasons discussed above, I do not believe that a court faced with an unambiguous agreement properly may consider extrinsic evidence to ascertain the parties' intent or to create a standard not contained within the deed restrictions. I also do not find persuasive the Council's

[61] Resp't's Reply Br. in Supp. of Cross-Mot. for Summ. J. (hereinafter "Resp't's Reply Br.") at 11.
[62] *Id.* at 10-11 n.6.

reliance on this Court's decision in *Village of Manley Civic Association v. Becker*[63] for the Council's contention that the Court may consider the 2007 Minutes. The Council contends that, in *Village of Manley*, the Court considered unrecorded "guidelines" established and adopted by the association and concluded that the guidelines provided the concrete and precise standard lacking in the architectural review covenant contained in the deed restrictions at issue in that case.[64] First, the language on which the Council relies is dicta; the Court in *Village of Manley* concluded it did not need to reach the merits of the plaintiff's TRO application, but nevertheless offered its "preliminary assessment of the merits, so that the [homeowners might] properly assess the risk they would assume by proceeding with the project pending the outcome of th[e] litigation."[65] Accordingly, the Court's "preliminary guidance" cannot be read to overrule the very clear statements in several other Delaware cases providing that architectural review covenants that are vague, imprecise, or unclear are not enforceable, and that such covenants will be strictly construed in favor of the free use of property.

Second, and perhaps more importantly, the guidelines at issue in *Village of Manley* stand in stark contrast to the 2007 Minutes the Council contends remedy the absence of a standard in the Governing Documents. Even if I were to conclude that the Court could consider the 2007 Minutes as extrinsic evidence to resolve ambiguity in the architectural review covenant, the 2007 Minutes do little to provide any clarity or precision to the

[63] 1997 WL 793045 (Del. Ch. Dec. 17, 1997).
[64] *Benner v. The Council of Narrows Ass'n of Owners*, C.A. No. 7503-ML (Jun. 18, 2014) (TRANSCRIPT) at 61-62.
[65] *Village of Manley Civic Ass'n v. Becker*, 1997 WL 793045, at *3 (Del. Ch. Dec. 17, 1997).

Council's review. All the 2007 Minutes provide is "that the Council enforce uniformity based upon Code requirements, precedent and Bylaw regulations, [sic] any major changes."[66] In comparison, the guidelines at issue in *Village of Manley* provided very detailed provisions regarding the civic association's review of homeowner's applications, including three paragraphs alone addressing the types of fences homeowners could erect, which was the issue before the Court in that case. The 2007 Minutes do not explain or attempt to articulate what "[c]ode requirements" the Council should consider, what "precedent" the Council should follow, and what bylaw regulations are referenced (indeed, to my knowledge the Narrows does not even have a set of bylaws).[67] If anything, the Council's decision to seek "community guidance" as to how it should exercise its architectural review authority offers further support for the conclusion that the Governing Documents do not contain any clear or precise standard.[68] Finally, the Council cannot point to any facts indicating that the members of the Council were aware of, or considered, the 2007 Minutes when they evaluated Mrs. Benner's request. To the contrary, none of the three members of the Council mentioned the minutes in their testimony or suggested that they considered the standard the Council now argues

[66] B-16, Ex. B, p. 3.
[67] In its briefs, the Council offers the Obermayer affidavit to explain the meanings of these terms. Mr. Obermayer's understanding, however, cannot fix the ambiguity in these terms, which do not expound on the meanings of "Code requirements," "precedent" or "Bylaw regulations."
[68] *See Bethany Village Owners Ass'n, Inc. v. Fontana*, 1997 WL 695570, at *4 ("[t]he 1989 memorandum, sent by the [architectural control committee] to all lot owners, provides further proof that the terms of the [d]eclaration are imprecise and susceptible of more than one interpretation.").

provides the clarity and precision necessary to make the architectural review covenant enforceable.[69]

II. The Reasonableness of the Council's Rejection of Mrs. Benner's Request

Having concluded that the portions of the Governing Documents on which the Council relied to reject Mrs. Benner's request are unenforceable, I need not consider the second level of analysis this Court applies when a property owner challenges a decision made under an architectural review covenant. I nevertheless will engage in that analysis for the sake of efficient judicial review. Under this second layer of review, even if a reviewing court concludes that an architectural review covenant contains a clear and precise standard, the court still must determine whether the reviewing authority exercised its review function reasonably and not arbitrarily.[70]

If, as the Council argues, the standard governing its review of unit owners' plans for additions, alterations, and improvements is whether the proposal is "substantially similar to the original construction," the Council nevertheless bears the burden of showing that it acted reasonably in applying that standard.[71] Any doubts as to the

[69] Although the Council argues in its brief that it "had the benefit of" the 2007 Minutes, it cites no facts in support of that statement, and I could not find anything else in the record suggesting that the members of the Council who considered Mrs. Benner's request were aware of the 2007 Minutes when they rejected her proposal in November 2011. None of the Council members referenced the 2007 Minues during their deposition.

[70] *Seabreak Homeowners Ass'n, Inc. v. Gresser*, 517 A.2d 263, 270 (Del. Ch. 1986) (citing *Alliegro v. Home Owners of Edgewood Hills*, 122 A.2d 910 (Del. Ch. 1956)).

[71] *See Dolan v. Villages of Clearwater Homeowner's Ass'n*, 2005 WL 2810724, at *4 (Del. Ch. Oct. 21, 2005).

reasonableness of the Council's decision rejecting Mrs. Benner's request must be drawn in favor of Mrs. Benner.[72]

Typically, the reasonableness of a decision of this nature would appear to be a disputed issue of fact requiring the Court to hear testimony from the witnesses. In this case, however, the testimony of the members of the Council demonstrates that the Council did not apply the standard it contends the parties intended to govern the architectural review. That is, each of the three members of the Council testified in their depositions that the standard they applied in rejecting Mrs. Benner's request was not solely whether the proposed improvement was "substantially similar to the original construction," but whether it was similar to other unit owners' improvements or alterations to their property. Even the Council's precisely drafted rejection letter explicitly states that the Council based its decision on whether the proposal was similar to the "subsequent development" of the Narrows. Because the undisputed facts show that the Council applied a standard different from that the Council argues governed its review, the Council cannot demonstrate the reasonableness of its decision. The apparent unreasonableness of the Council's decision is further underscored by the Council's decision to reject Mrs. Benner's request to extend her deck when identical extensions had been approved for several other unit owners.

It is my recommendation that the Court grant summary judgment in favor of Mrs. Benner on the independent basis that the Council concedes it did not apply the standard it urges the Court to adopt, and therefore the Council cannot carry its burden of showing

[72] *Seabreak Homeowners Ass'n, Inc.*, 517 A.2d at 268

that its decision was reasonable. At a minimum, this dispute raises a material issue of fact that precludes summary judgment in the Council's favor. That is, having conceded that it considered both the original construction and the subsequent development of the Narrows, and having conceded that in approving several other requests for improvements or additions the Council permitted unit owners to deviate from the original construction of the Narrows – at times substantially – the Council cannot show on this record that its rejection of Mrs. Benner's request was reasonable. For example, the Council argues that Mrs. Benner's request, if approved, would be "unique to … all 3 buildings and all 15 units."[73] In the past, however, the Council has permitted unit owners to proceed with improvements that were unique within the complex, such as the Council's decision to allow the owners of unit 3 to extend and enclose their deck across the entire width of the rear façade, the decision to allow various unit owners to increase the number of sliding doors across the rear façade of the unit, or the decision to allow two unit owners to place transom windows above their sliding doors. In light of these departures from the original construction, the Council's decision to base its "sliding door rule" on a strict adherence to the original construction suggests an arbitrary and unreasonable application of the standard. More than anything, however, it suggests that even the "substantially similar to the original construction" standard the Council contends governs its review is so vague and imprecise as to be unenforceable.

[73] Resp't's Opening Br. at 43.

III. Appropriate Relief

Having established that the architectural review covenant in the Governing Documents is vague and unclear, Mrs. Benner is entitled to a declaratory judgment that those sections of the Governing Documents requiring the Council's prior approval of additions, alterations, or improvements are unenforceable and that she may proceed with her planned improvements without the Council's prior approval. Mrs. Benner also seeks a permanent injunction prohibiting the Council from enforcing the deed restrictions regarding architectural review of additions, alterations, and improvements. To obtain a permanent injunction, a plaintiff must show: "(1) actual success on the merits of the claims; (2) that the plaintiff will suffer irreparable harm if injunctive relief is not granted; and (3) that the harm to the plaintiff outweighs the harm to the defendant if an injunction is granted."[74] Although she has prevailed on the merits of her claim, it is not clear from the record that Mrs. Benner will suffer irreparable harm if an injunction is not granted. That is, if the Court issues an order declaring that Paragraph 8(i) of the Declaration and Article V, § 7 of the Regulations are not enforceable and that Mrs. Benner may proceed with her planned improvements without obtaining the approval of the Council, it is not clear that Mrs. Benner will need any additional relief.

In her exceptions to my draft report, Mrs. Benner argued that this Court should permanently enjoin the Council from enforcing the architectural review covenant or compel the Council to acknowledge in writing that its approval of Mrs. Benner's

[74] *Examen, Inc. v. VantagePoint Venture P'rs 1996,* 2005 WL 1653959, at *2 (Del. Ch. July 7, 2005) (quoting *Christiana Town Ctr. LLC v. New Castle Cty.*, 2003 WL 21314499, at *2 (Del. Ch. June 6, 2003), *aff'd*, 841 A.2d 307 (Del. 2004) (TABLE)).

proposed improvements is not required. Mrs. Benner professes concern that the Council will continue to obstruct – or will not cooperate with – her application for a building permit. Mrs. Benner points to no evidence to support her speculation that the Council may behave in this manner, other than the Council's defense of this litigation. The Council, however, did not take exception to my recommendations in the draft report, and has given the Court no basis to assume that it will not abide by a declaratory judgment issued by the Court. Because an injunction is an extraordinary remedy,[75] I do not believe the Court should issue one based on mere speculation as to how the Council may behave. Mrs. Benner also expresses concern that the Building Permit Office may not understand the Court's order and may refuse to issue a permit without the written consent of the Council. Again, this concern is speculation, at best. In addition, the Council suggested that a specific order from the Court identifying the improvements that are the subject of the Court's ruling will reduce any confusion for the Building Permit Office. The parties are free to provide those specifics in a proposed order they submit to the Court once Mrs. Benner's exceptions are resolved. I therefore recommend that the Court deny without prejudice Mrs. Benner's request for a permanent injunction, subject to a later factual showing that such additional relief is necessary.

IV. Attorneys' Fees

Mrs. Benner also seeks her attorneys' fees associated with maintaining this action against the Council. Under the American Rule and Delaware law, litigants normally are

[75] *Koehler v. NetSpend Holdings, Inc.*, 2013 WL 2181518, at *9 (Del. Ch. May 21, 2013); *Real Estate of 299 Assocs., LLC v. Rutkoske*, 2000 WL 1805388, at *1-2 (Del. Ch. Nov. 9, 2000) (Master's Report).

responsible for paying their own attorneys' fees.[76] One of the recognized exceptions to this rule is when a contract contains a fee-shifting clause.[77] Mrs. Benner argues that Article X, Section 1(c) of the Regulations is just such a provision, and that the Council is required to pay her attorneys' fees under subsection. The Council, on the other hand, argues that the fee-shifting provision in subsection (c) only applies when the Council or an aggrieved unit owner initiates an action against a unit owner who allegedly is in default of the Governing Documents.

Article X, Section 1 pertinently provides:

> Section 1. Relief. Each Unit Owner shall be governed by, and shall comply with, all of the terms of the Declaration, this Code of Regulations, and any amendments of the same. A default by a Unit Owner shall entitle the Association of Owners, acting through its council or through the managing agent, to the following relief:
>
> (a) Legal Proceedings. Failure to comply with any of the terms of the Declaration, this Code of Regulations, and the Rules and Regulations shall be grounds for relief which may include, without limiting the same, an action to recover any sums due for money damages, injunctive relief, foreclosure of the lien for payment of all assessments, any other relief provided for in this Code of Regulations, or any combination thereof, and all of which may be sought by the Association of Owners, the Council, the managing agent, or, if appropriate, by any aggrieved Unit Owner.
>
> * * *

[76] *See, e.g. Mahani v. Edix Media Gp., Inc.*, 935 A.2d 242, 245 (Del. 2007).
[77] *Id*.

> (c) Costs and Attorney's Fees. In any proceeding arising out of any alleged default by a Unit Owner, the prevailing party shall be entitled to recover the costs of the proceedings, and such reasonable attorneys' fees as may be determined by the Court.[78]

Pointing to Section 1(c), Mrs. Benner argues that this action arises out her alleged default in failing to obtain the Council's prior approval of her porch enclosure and in failing to comply with the "substantial similarity" standard the Council argued applied to her proposal, and that as the prevailing party she is entitled to have her reasonable attorneys' fees paid by the Council. I agree that this action arose out of Mrs. Benner's failure to obtain the Council's prior approval. The inquiry, however, does not end there. If Section 1(c) was read in a vacuum, it would be reasonable to conclude that the Section entitled Mrs. Benner to shift her attorneys' fees to the Council. The subsection, however, must be read in the context of the other portions of Article X, Section 1.[79] When read in context, it is plain that the reference to a "proceeding" in Section 1(c) refers to a legal proceeding initiated under Section 1(a). The legal proceedings described in Section 1(a) are limited and do not include any proceeding involving a unit owner, or even any proceeding "arising out of any alleged default by a Unit Owner." Instead, the legal proceedings referenced in Section 1(a) – and to which the fee-shifting provision in Section 1(c) applies – are only those actions arising out of alleged default *and* initiated by

[78] B-4 at 24-25, Art. X, § 1.
[79] *See, e.g. Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 854 (Del. 1998) (a contract must be read as a whole); *MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *6 (Del. Ch. Dec. 30, 2010) (same).

"the Association of Owners, the Council, the managing agent, or, if appropriate, by any aggrieved Unit Owner."[80]

Mrs. Benner's ability to recover her attorneys' fees under Section 1(c) therefore depends on whether she is an "aggrieved Unit Owner" within the meaning of Section 1(a). I do not believe the Regulations fairly may be read to include Mrs. Benner within the meaning of that term because Section 1 deals not with obligations imposed on the Council, but only with the obligation of the unit owners to abide by the Declaration and Code of Regulations. That meaning is made clear by the preamble to Section 1. In other words, when read in the context of Section 1, and its application to unit owners' obligations to follow the Governing Documents, an "aggrieved Unit Owner" must mean an owner who is harmed by another owner's failure to abide by the Governing Documents. Although Mrs. Benner may be aggrieved by the Council's decision to reject her proposal and by the Council's attempt to enforce an unenforceable architectural review covenant, she was not aggrieved by another unit owner's violation of the Governing Documents and therefore cannot be said to have brought this action under Section 1(a) of the Regulations.

[80] In her exceptions to my draft report, Mrs. Benner argued that I misinterpreted Section 1(c) by reading Section 1(a) too narrowly, because the "Legal Proceeding" caption in Section 1(a) cannot be read as a limitation on the application of that section. As support for that position, Mrs. Benner points to the "without limiting the same" language in Section 1(a) and the clause in Section 3 of the Regulations providing that captions should not be used to limit the scope of any section. First, it is not only the caption, but the entirety of Section 1(a), that refers to legal proceedings. Second, even if Mrs. Benner is correct that Section 1(a) affords other remedies to those acting under that Section, that fact does not alter my conclusion that the only reasonable reading of "proceeding" in Section 1(c) is a proceeding described in Section 1(a). In other words, whether Section 1(a) includes relief beyond that sought in a legal proceeding is not the issue before me. Section 1(a) unambiguously refers to legal proceedings, and the use of the word "proceeding" in Section 1(c) refers back to those proceedings.

That conclusion is buttressed in two ways. First, Section 1(a) only allows an "aggrieved Unit Owner" to initiate an action under that section "if appropriate." That language supports the conclusion that the Section applies only to certain actions instituted by unit owners, and not to any action initiated by a unit owner against the Council or against another unit owner. Second, it would be illogical to conclude that a defaulting unit owner also could be an "aggrieved unit owner" within the meaning of Article X, Section 1. To so conclude would create a circularity that would eviscerate the intent of that Section, creating a host of rights and remedies for defaulting unit owners in a Section that by its plain terms only refers to rights and remedies available to the Association of Owners or a party acting on its behalf.

This interpretation is not, as Mrs. Benner contends, unreasonable or unfair. The Regulations are a contract and the parties are free to structure their relationship and shift risk as they deem appropriate. It is reasonable to conclude that the Council only agreed to undertake the risk of fee-shifting in actions it initiates against a unit owner, rather than in actions a unit owner initiates against the Council. The fact that my recommendation would be different if the Council had initiated this action is not unfair. Rather, the Council chose only to undertake the risk of fee-shifting in cases where it made a calculated decision to pursue litigation. Nor can I conclude, as Mrs. Benner urges, that the Council initiated this proceeding by refusing to approve her request. Again, Section 1 cannot be so broadly read; a "proceeding" under Section 1(a) refers to "an action" for relief "sought by the Association of Owners, the Council, the managing agent, or, if appropriate, by an aggrieved Unit Owner." The Council did not seek any of the relief

described in that section, it simply defended its actions when Mrs. Benner sought injunctive and declaratory relief.

Finally, Mrs. Benner cites two decisions of the Delaware Superior Court that she contends support her position that Section 1(c) permits the Court to shift fees in this case. As Mrs. Benner correctly points out, the Superior Court has twice awarded attorneys' fees to the prevailing party in a unit property dispute based on a fee-shifting provision identical to that contained in Section 1(c).[81] Each case, however, involved an action initiated by the condominium's governing council against a unit owner allegedly in default of the governing documents. For that reason, neither case supports the interpretation Mrs. Benner urges here.

CONCLUSION

For the foregoing reasons, I recommend that the Court grant Mrs. Benner's motion for summary judgment as to her claim for declaratory judgment and deny the Council's motion for summary judgment. I also recommend that the Court deny Mrs. Benner's request for an order compelling the Council to pay her attorneys' fees incurred in this action. This is my final report and exceptions may be taken in accordance with Rule 144.

Respectfully submitted,

/s/ *Abigail M. LeGrow*
Master in Chancery

[81] *See Council of Unit Owners of Windswept Condo. Ass'n v. Schumm*, 2013 WL 6133621 at *7 (Del. Super. Nov. 20, 2013); *Council of the Wilmington Condo. v. Wilmington Ave. Assocs., L.P.*, 1997 WL 817843, at * 11 (Del. Super. Oct. 24, 1997).