NO. COA14-377

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

CAROLINA MARLIN CLUB MARINA
ASSOCIATION, INC. d/b/a MOREHEAD-
BEAUFORT YACHT CLUB,
Plaintiff,

v. Carteret County
No. 11 CVD 415

HARRY PREDDY and VALERIE PREDDY,
Defendants.

Appeal by defendants from judgment entered 14 August 2013 by Judge L. Walter Mills in Carteret County District Court. Heard in the Court of Appeals 8 September 2014.

Wheatly, Wheatly, Weeks, Lupton & Massie, P.A., by Claud R. Wheatly, III, for plaintiff-appellee.

Amie M. Huber, Attorney at Law, PLLC, by Amie M. Huber, for defendants-appellants.

McCULLOUGH, Judge.

Harry Preddy and Valerie Preddy ("defendants") appeal from a judgment entered in favor of Carolina Marlin Club Marina Association, d/b/a Morehead Beaufort Yacht Club (the "Association"). For the following reasons, we affirm.

I. Background

On 11 April 1988, the Department of Natural Resources and Community Development and the Coastal Resources Commission

issued a permit to Gene McClung ("declarant") "authorizing development [of private property] in Carteret County at Newport River, adjacent to Ware and Runsel Creeks[.]" Thereafter, in accordance with the permit, declarant constructed an upland marina on the private property by excavating a basin with channel to the Newport River.

In connection with the construction of the marina, on 22 June 1989, declarant made and entered into a Declaration of Unit Ownership (the "Declaration") subjecting the marina to the North Carolina Condominium Act, Chapter 47C of the North Carolina General Statutes (the "Condominium Act"), as a condominium development known as Carolina Marlin Club Marina. Additionally, as provided in the Declaration, declarant created the Association as a non-profit corporation charged with maintaining and administering the common facilities; performing maintenance on buildings, docks, the basin, and other improvements; administering and enforcing covenants and restrictions in the Declaration; and levying, collecting, and disbursing assessments and charges allowed by the Declaration. The Declaration, along with the bylaws of the Association, was recorded in the Carteret County Register of Deeds office on 23 June 1989.

As originally recorded, the Declaration described the marina as common areas and docking facilities, referred to as units or slips, for forty-four vessels. However, shortly after the Declaration was recorded, declarant, in accordance with Article VI of the Declaration, constructed additional docking facilities so as to increase the total number of slips to seventy-four. An amendment to the Declaration entered into on 8 December 1989 and recorded on 15 December 1989 subjected the additional slips to the terms and conditions of the Declaration.

By General Warranty Deed made and entered into on 15 June 1992 and recorded on 22 June 1992, defendants acquired from declarant "Slip #46, Carolina Marlin Club Marina, a condominium as described in [the] Declaration . . . together with the undivided interest in the common areas appurtenant to each such slip or unit[.]" At all times relevant to this appeal, defendants had a 1/73 undivided interest in the Association as the Association owned one slip.

Since the time defendants acquired Slip #46, the Association has levied assessments for numerous maintenance projects. This case concerns the validity of a special assessment levied against members for dredging in 2010.

In 2009, the Association determined extensive dredging was needed in the access channel and marina basin, including the areas beneath individual slips. At that time, the Association held a Coastal Area Management Act ("CAMA") permit allowing it to maintain a water depth of six feet. In preparation for dredging, at the December 2009 annual members meeting, the members voted and passed an assessment of $2,750.00 per slip (the "spoils assessment") to cover the estimated $200,750.00 cost of modifying and enlarging the dredge spoils area to accommodate future dredging spoils. However, bids for the spoils rebuild were less than expected, resulting in excess funds upon completion of the project.

In January 2010, a newly elected board called a special meeting for 6 February 2010. Two proposals were to be submitted for member approval: (1) approval of the 2010 operating budget and (2) use of the excess funds from the spoil assessment and an additional $500.00 special assessment (the "dredge assessment") to cover the balance of the dredging costs.

Notice of the 6 February 2010 special members meeting was included in the Association's "Smooth Sailing Newsletter," which was emailed to defendants on 17 January 2010. Around the same time, Mr. Preddy, the webmaster for the Association, posted

notice on the website indicating "there was going to be a special meting . . . on February 6th at 1:00." A second notice that the time of the 6 February 2010 special members meeting had been changed to 3:00 was later sent to defendants by email on 26 January 2010.

Additionally, Mr. Preddy received a call from the Association's President, Mr. Joseph Barwick, on 1 February 2010 informing him that Mr. Barwick had been designated as his representative. During their conversation, Mr. Preddy raised his concern over not receiving notice of the special meeting in the mail. Mr. Preddy recalled that Mr. Barwick informed him that the emails were his notice.

Despite Mr. Preddy's concerns regarding the notice provided by email, defendants attended the meeting on 6 February 2010. At the meeting, Mr. Preddy orally objected to the notice of the meeting and submitted a written objection, joined by other members, to the board. Defendants, however, remained at the meeting and Mr. Preddy voted against the assessment as the owner of Slip #46.

The minutes from the 6 February 2010 special members meeting indicate the dredge assessment was approved.

Following approval of the dredge assessment, several members, including defendants, sent letters to the N.C. Department of Environment and Natural Resources, Division of Coastal Management (the "NCDENR-DCM") disputing the Association's authority to dredge the submerged lands beneath their slips by claiming that they owned the property. Upon reviewing the objections, the NCDENR-DCM, based on an opinion from the N.C. Attorney General's office that the submerged lands under the slips in question were privately owned by the members, revoked the Association's permit to dredge the marina by letter dated 5 March 2010. However, on 20 October 2010, a modified CAMA permit was issued allowing the Association to dredge the marina basin, including the submerged land under those slips owned by members granting the Association permission to dredge. Defendants and five other members refused to allow the Association to dredge beneath their slips.

Dredging of the marina pursuant to the modified CAMA permit took place late in 2010. The access channel and all portions of the marina basin, except those six slips owned by members who objected, were dredged.

At a special members meeting of the Association on 22 May 2010, the Association put to a vote certain amendments to the

bylaws. An amendment to allow electronic notice of meetings was passed by the members. Thereafter, on 11 January 2011, notice of a special meeting to be held 5 February 2011 was sent to members by US mail and email. As stated in the notice, "[t]he purpose of the meeting [was] to **revote** a proposal to (1) use remaining funds from the dredge spoils project for the dredging project and (2) to assess the members $500 per slip for the purpose of dredging the channel, basin and slips." Sixty-three members voted in favor of the dredge assessment at the special members meeting.

Following approval of the dredge assessment, defendants were billed for $500.00. When defendants refused to pay, the Association commenced this suit against defendants by means of the issuance of a summons and the filing of a complaint in Carteret County District Court on 16 March 2011. In the complaint, the Association sought to collect the dredge assessment, interest, attorneys' fees, and costs.

Defendants responded to the complaint by filing an answer and counterclaim on 16 May 2011. In their response, defendants asserted each slip was private property and the dredge assessment could not be used to maintain private property. Following an arbitration decision in favor of the Association,

defendant filed a request for a trial *de novo* on 12 August 2011. The case came on for a bench trial in Carteret County District Court before the Honorable L. Walter Mills on 21 February 2013. The trial carried over to 22 February 2013, was continued, and later tried to its conclusion on 17 April 2013. Upon the consideration of the evidence, on 14 August 2013, the trial court entered judgment in favor of the Association. Defendants filed notice of appeal to this Court on 9 September 2013.

II. Discussion

On appeal, defendants challenge specific findings of fact and conclusions of law made by the trial court.

> When reviewing a judgment from a bench trial, "our standard of review 'is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.'" *Town of Green Level v. Alamance County*, 184 N.C. App. 665, 668–69, 646 S.E.2d 851, 854 (2007) (citation omitted). The trial court's "'[f]indings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary.'" *Id.* at 669, 646 S.E.2d at 854 (citation omitted). This Court reviews the trial court's conclusions of law *de novo*. *Id.*

Southern Seeding Service, Inc. V. W.C. English, Inc., 217 N.C. App. 300, 303-04, 719 S.E.2d 211, 214 (2011).

Finding of Fact #9

In the first issue on appeal, defendants challenge the trial court's finding of fact number nine, which provides, "[t]he description of a slip, as set forth [in the Declaration], is two-dimensional only. The slip is the area between the pilings and the dock and would not include the bottom. That all boat slips subject to the Declaration are in the basin which constitutes common area." Specifically, defendants argue there is no evidence in the record that the description of a slip is two-dimensional only and does not include the bottom. Defendants argue the testimony of Mr. Preddy and Mr. Barwick, together with the description of a slip in the Declaration, support the proposition that the slips are three-dimensional, including the bottom. We are not persuaded.

The terms "unit" and "slip" are used interchangeably throughout the Declaration. Article I of the Declaration provides that the terms "shall mean and refer to an individual docking space, or slip, designated for separate ownership or occupancy, the boundaries of which are described pursuant to [the] Declaration." Article II of the Declaration then provides for the identification of slips and common areas. Concerning slips, the Declaration describes the boundaries as follows: "Each unit, or slip, is bounded by the dock running

longitudinally with the shoreline at its shoreward end; on either side by the centerlines of its adjoining finger piers, extended to the centers of the mooring pilings on either side of the slip opening; and at its outer end by a line connecting the centers of said two mooring pilings."

During the trial, Mr. Preddy testified using an aerial diagram of the marina to identify different portions of the marina. When questioned specifically about the boundaries of his slip, Mr. Preddy read through the description of a slip in the Declaration and used the diagram to plot the boundaries of Slip #46. In plotting the boundaries described in the Declaration, Mr. Preddy never indicated that the slip extended to the submerged land.

Mr. Barwick also testified concerning the description of a slip in the Declaration. Despite defendants' insinuations on appeal, Mr. Barwick never stated that the description of a slip encompassed the submerged land. Although Mr. Barwick acknowledged that the slips were bounded by lines running through the center of the mooring pilings, which are placed into the bottom, Mr. Barwick maintained that the slip is described in the Declaration longitudinally with the shoreline. When questioned whether he contends the Association owned the

submerged land beneath the individual slips, Mr. Barwick responded, "[y]es, because the declaration makes no reference to the bottom whatsoever. The only thing the declaration does is provide the longitudinal parameters of a slip which they define very clearly as a docking space."

Although there is evidence to the contrary, based on the description of the slip boundaries in the Declaration and the testimony of Mr. Preddy and Mr. Barwick concerning the boundaries of Slip #46, we hold the trial court's ninth finding is supported by competent evidence and, therefore, is binding on appeal.

Defendants do not specifically challenge any of the trial court's other findings of fact. As a result, the remaining findings are binding on appeal. *See In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) ("Unchallenged findings of fact are presumed correct and are binding on appeal.")

Conclusion of Law #1

Defendants next challenge conclusion of law number one. In conclusion one, the trial court concluded "[t]he marina basin and the slips located therein contain public trust waters subject to the riparian rights of the [Association] and, as

such, all areas in the marina basin including slips are common area properties subject to the control of the Association . . . ." Defendants break this issue down into two parts: whether (1) the marina basin and the slips contain public trust waters subject to the Association's riparian rights; and (2) all areas in the marina basin including the slips are common area properties subject to the Association's control.

Concerning part one, defendant claims the public trust doctrine is inapplicable to this case because each slip is private property.

North Carolina has long applied the common law to recognize that "[t]itle to public trust waters is 'held in trust for the people of the State[.]'" *RJR Technical Co. v. Pratt*, 339 N.C. 588, 592, 453 S.E.2d 147, 150 (1995) (quoting *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 526, 44 S.E. 39, 42 (1903)). As codified in N.C. Gen. Stat. § 1-45.1 (2013), the public's rights in public trust waters "include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State[.]" When determining whether certain waters are public trust waters, the determinative inquiry is navigability. As our Supreme Court recognized in *Gwathmey v. State*, 342 N.C. 287, 301, 464 S.E.2d

674, 682 (1995), "if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose." Pursuant to this Court's decision in *Fish House, Inc. v. Clarke*, 204 N.C. App. 130, 693 S.E.2d 208 (2010), the test for navigability applies equally to natural and manmade waterways.

In *Fish House*, the plaintiff and the defendant owned adjacent tracts of land, upon which each operated a fish house along a manmade canal situated on the western border of the plaintiff's property and to the east of the defendant's property. *Id.* at 131-32, 693 S.E.2d at 210. After the defendant had used the canal for years, the plaintiff commenced a trespass action to enjoin the defendant from entering the canal. *Id.* at 132, 693 S.E.2d at 210. On appeal by the plaintiff from the trial court's dismissal of the action, this Court affirmed the trial court, holding "the [c]anal, although manmade, [was] a navigable waterway held by the state in trust for all citizens of North Carolina." *Id.* at 134, 693 S.E.2d at 211. In so holding, the Court addressed the question of "whether the test for navigability is different when applied to a manmade canal." *Id.* at 134, 693 S.E.2d at 211. Relying on

our Supreme Court's *Gwathemy* decision, the South Carolina case of *Hughes v. Nelson*, 303 S.C. 102, 399 S.E.2d 24 (1990), which this Court found instructive, and portions of the NCDENR-DCM's CAMA Handbook for Development in Coastal Carolina that define navigable waters and identify various public trust areas, this Court held "the controlling law of navigability concerning the body of water in its natural condition reflects only upon the manner in which the water flows without diminution or obstruction." *Id.* at 135, 693 S.E.2d at 212. Thus, this Court held "any waterway, whether manmade or artificial, which is capable of navigation by watercraft constitutes navigable water under the public trust doctrine of this state." *Id.* at 135, 693 S.E.2d at 212.

Subsequent to *Fish House*, this Court has addressed whether those owning property bounded or traversed by manmade waterways have riparian rights in those waterways. In *Newcomb v. County of Carteret*, 207 N.C. App. 527, 701 S.E.2d 325 (2010), this Court explained the following:

> Riparian rights are vested property rights that arise out of ownership of land bounded or traversed by navigable water. All watercourses are regarded as navigable in law that are navigable in fact. For that reason, riparian rights are available to the owners of property that are adjacent to or encompass bodies of water that are navigable

in fact.

Id. at 541, 701 S.E.2d at 337 (quotation marks and citations omitted). Recognizing the holding in *Fish House* and "that the concept of 'navigability' as used in the 'public trust' and the riparian rights contexts is identical," in *Newcomb* this Court held the extent to which the plaintiffs had riparian rights in a manmade harbor did not hinge upon whether the harbor was natural or manmade. *Id.* at 542, 701 S.E.2d at 325. Thus, "given that [the harbor was] clearly 'capable of navigation by watercraft,' the owners of property bordering the harbor clearly [had] riparian rights in its waters." *Id.*

In the present case, it is clear that the marina is navigable; thus, as the trial court found and concluded, the waters in the marina are public trust waters. Moreover, as the Association owns all lands bounded or traversed by the public trust waters, it has riparian rights in the waters. Thus, we hold conclusion of law number one is an accurate statement of the law as applied to this case and the trial court did not err in concluding that the waters in the marina are public trust waters subject to defendants' riparian rights.

Nevertheless, we agree with defendants that the public trust doctrine has little significance in this case. As both parties acknowledge on appeal, there is no allegation of

trespass by the Association; in fact, the Association concedes that defendants have the right to enter the marina, dock their boat at their private slip, and use the common areas. The critical inquiry in this case is whether the entire marina basin, including the submerged land under defendants' privately owned slip, is common property subject to the control of the Association, or whether the submerged land under defendants' slip was transferred by declarant to defendants by the 15 June 1992 deed, which incorporates the Declaration.

Similar to defendants' contention regarding the description of a slip addressed in the first issue on appeal, in part two of defendants' challenge to conclusion one, defendants claim not all areas in the marina basin are common area subject to the control of the Association. Specifically, defendants argue their slip extends to the basin floor and encompasses the submerged land under their slip. In support of their argument, defendants again cite to the description of a slip in the Declaration and point out that Article III of the Declaration provides that each slip "shall be conveyed and treated as an individual property interest capable of independent use and fee simple ownership[.]" Defendants further cite testimony by Mr. Barwick indicating that members own their own slip; the 5 March

2010 letter to the Association by James H. Gregson, Director of the NCDENR-DCM, revoking the CAMA permit to dredge the marina based on an opinion of the N.C. Attorney General's office that the submerged lands under the slips are owned by the slip owners; testimony by Betty Gray, owner of Slip #62, concerning dredging in 2001, when less than all slips were dredged and the owners of individual slips covered the costs of dredging their own slips without an assessment against all members; and testimony by Ms. Gray concerning a 2008 letter sent by the Association to members indicating "[d]redging of privately owned slips is not included in permissible uses of the assessment."

Upon review, we acknowledge that the evidence cited by defendants tends to show members own the submerged land under their slips as private property. However, we are also cognizant that this same evidence was presented to and considered by the trial court; and upon consideration of the evidence, the trial court found the description of a slip in the Declaration to be two-dimensional, encompassing the area defined as a docking space between the finger piers and mooring pilings that does not include the submerged land underneath a slip. Thus, as the trial court further found, "all boat slips subject to the Declaration are in the basin which constitutes common area."

Because evidence supports the trial court's finding, it is binding on appeal and confines our analysis of conclusion one.

Accepting the trial court's finding, we hold the submerged land underneath defendants' slip is not defendants' private property, but is part of the marina basin, which is a common area. As the trial court concluded in uncontested conclusion of law number two, "[d]efendants own a 1/73 undivided interest in the Association and its property and the exclusive right to utilize [Slip #]46, subject to the Declaration . . . and the Amendments thereto." Thus, the trial court did not err in concluding the entire marina basin is common property subject to the control of the Association.

Conclusion of Law #3

Defendants also take issue with the trial court's third conclusion of law, "[a]ll the docks, pilings and bottom (soil) under each slip are common property." Defendants' contentions with this conclusion are essentially the same as those advanced in opposition to conclusion of law one – "defendants['] boat slip and bottom soil under each slip is private property." For the reasons discussed above, we hold conclusion three is supported by the trial court's findings and the evidence.

Conclusion of Law #4

In the fourth issue on appeal, defendants contend the trial court erred by making conclusion of law four, which provides "[t]he Association, by a 2/3 vote of its membership at a properly called meeting, had the right to create assessments for the dredging and maintenance of all of the marina facilities, including the slips and the land or silt under them." Defendants raise three separate challenges to conclusion four: whether (1) the 6 February 2010 special members meeting was properly noticed; (2) the Association had the right to create assessments for the dredging and maintenance of all the marina facilities, including the slips; and (3) whether the assessment was passed by a 2/3 vote.

Although defendants raise these challenges in regards to conclusion four, conclusion four does not conclude there was proper notice or that the assessment was approved by a two-thirds vote. Conclusion four merely provides that "the Association . . . had the right to create assessments[,]" such as the one at issue in this case, "by a 2/3 vote of its membership at a properly called meeting[.]" Defendants' first and third challenges to conclusion four are more properly asserted in regards to conclusion of law number five, which provides "[t]he assessment of $500.00 was properly approved."

Therefore, we only address defendants' second challenge to conclusion four and address defendants' remaining challenges in response to defendants' attack on conclusion five.

Defendants argue the Association does not have the right to create assessments for dredging and maintenance of all the marina facilities, including the slips. In support of their argument, defendants cite provisions in the Condominium Act and the Declaration.

Under the Condominium Act, "[e]ach unit owner is responsible for maintenance, repair and replacement of his unit." N.C. Gen. Stat. § 47C-3-107(a) (2013). Additionally, "[a]ny common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited[.]" N.C. Gen. Stat. § 47C-3-115(c)(2) (2013).

Considering these statutes in conjunction with the provisions of the Declaration defining a "unit" or "slip" as "an individual docking space . . . designated for separate ownership or occupancy," indicating a "unit" or "slip" is to be conveyed and treated as "an individual property interest capable of independent use and fee simple ownership[,]" and identifying the different elements of the condominium and defining "common elements" as "all of the condominium with the exception of

[u]nits[,]" defendants assert they are solely responsible for maintaining Slip #46. In defendants' own words, "[b]ecause . . . [d]efendants did not agree to have their slip dredged and did not benefit by having the other individual slips dredged, fewer than all of the units must be assessed; therefore, in accordance with the above statutes, [d]efendants are not required to pay for the dredging of other slips."

While we agree with defendants that members are responsible for maintaining their own slips, defendants' argument against paying the assessment at issue in this case fails for two reasons.

First, as found by the trial court and already discussed above, the description of a "slip" does not encompass the submerged land underneath individual slips. The submerged land is part of the marina basin, which is common area controlled by the Association.

Article IX of the Declaration provides, "[t]he common expenses of the condominium shall be shared by the slip owners in the same proportion that the undivided interest in the common areas appurtenant to each owner's slip bears to the total of all undivided interest in the common areas appurtenant to all

condominium slips." As found by the trial court, "Article X of the Declaration provides for [a]ssessments."

Defendants acknowledge Article X on appeal but claim the only provision allowing for an assessment for dredging, Section 2, does not list an individual slip as part of the maintenance and upkeep allowed in an assessment. Citing A*rmstrong v. Ledges Homeowners Association*, 360 N.C. 547, 633 S.E.2d 78 (2006), defendants further assert that the final statement in Article X, Section 2, that assessments shall be used for "such other needs as may arise[]" is ambiguous, unclear, indefinite, and uncertain and raises the issue of the reasonableness of the Declaration. We disagree.

Given the trial court's finding that the description of a slip does not include the submerged land beneath the slip, defendants' arguments are misguided. Among the identified uses for assessments, Section 2 of Article X expressly provides that an assessment shall be used for "the maintenance and upkeep of all streets, roadways, parking areas, docks, piers, bulkheads, pilings, *and maintenance of water depths in the basin, the access channel and in the channel to the Intracoastal Waterway*[.]" (Emphasis added). The Declaration further provides that "the Association may levy special assessments for the

purpose of defraying in whole or in part, the cost of any construction reconstruction, repair, or replacement of capital improvements upon the marina area" and "[t]he Association, at its expense, shall be responsible for the maintenance, repair, and replacement of all the project areas, including those portions thereof which are contained within the area defined as a unit[.]"

Accepting the trial court's finding that the slip does not include the submerged land underneath the slip, we hold the provisions discussed above allow the Association to levy assessments for the maintenance of the common areas, including those portions of the marina basin beneath the slips.

Second, contrary to defendants' argument that they did not benefit from dredging, the trial court considered evidence and made findings that "the members of the Association and the [d]efendants benefitted from the dredging" and "the marina will be unable to function as a marina without proper dredging and the removal of spoil material within the marina is to the benefit of all members." Furthermore, the trial court found in finding of fact number forty-four that "[t]he $500.00 assessment was the balance due from [d]efendants for the dredging of the entire basin and access channel and was not that portion to be

allocated for the slip of the [d]efendants." Defendants did not specifically challenge any of these findings.

Where the assessment owed by defendants was for the dredging of the entire basin and access channel, defendants' argument that they did not benefit from the dredging because the submerged land beneath their slip was not dredged fails.

Conclusion of Law #5

In the fifth issue on appeal, defendants challenge the trial court's conclusion that "[t]he assessment of $500.00 was properly approved by the Association (Plaintiff) and the [d]efendants are obligated to pay said assessment to the [Association] plus eighteen percent (18%) interest through date of filing of judgment."

As noted above, defendants first argue they did not receive proper notice of the 6 February 2010 special members meeting. Defendants further assert that they did not waive the notice required by the bylaws and the substance of the notice provided was inadequate. Apart from defendants' challenge to the notice, defendants also argue the dredge assessment was not properly approved by two-thirds of the members. As a result of these alleged failures, defendants contend they are not bound by the

action taken at the meeting, namely, the obligation to pay the dredge assessment.

Concerning the notice of the 6 February 2010 special meeting to members, the trial court made the following findings:

> 29. A newsletter advising that a meeting would be had on February 6, 2010 was emailed to the [d]efendants eleven (11) days prior to said meeting.
>
> 30. Later, a separate email was sent to the [d]efendants more than ten (10) days prior to said meeting, advising the [d]efendants of the meeting.
>
> 31. On or about February 1, 2010 the [d]efendant, Harry Preddy, called Joe Barwick, the new president and commodore of the Association, and complained about the notice not being mailed to him. The [d]efendants had actual notice of said meeting.
>
> 32. The special meeting was held on February 6, 2010 and the [d]efendant, Harry Preddy, prior to the meeting, presented an opinion that the meeting was not properly noticed yet stayed at the meeting and participated in the same. . . .
>
> 33. The February 6, 2010 meeting was held . . . . The [d]efendants voted no during said meeting for the assessment and yes for the budget.
>
> 40. On February 4, 2011, the Plaintiff called for another special meeting concerning the dredge assessments. Notice of such meeting was sent via US mail and through email. At said meeting, 63 members of the Association voted for the assessment

> with no votes cast against. The Defendants protested but did not vote.

In order to determine whether this notice was proper, we look to both the Condominium Act and the North Carolina Nonprofit Corporation Act, Chapter 55A of the North Carolina General Statutes (the "NCA"). The Condominium Act provides in pertinent part:

> Not less than 10 nor more than 50 days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand-delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner, or sent by electronic means, including by electronic mail over the Internet, to an electronic mailing address designated in writing by the unit owner. The notice of any meeting must state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove a director or officer.

N.C. Gen. Stat. § 47C-3-108(a) (2013). Under the NCA, N.C. Gen. Stat. § 55A-1-41 specifies general principles governing notice. It provides that "[n]otice may be communicated in person; by electronic means; or by mail or private carrier." N.C. Gen. Stat. § 55A-1-41(b)(2013). Yet, "[i]f [the NCA] prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws

prescribe notice requirements not inconsistent with this section or other provisions of [the NCA], those requirements govern." N.C. Gen. Stat. § 55A-1-41(h). "Written notice need not be provided in a separate document and may be included as part of a newsletter, magazine, or other publication regularly sent to members if conspicuously identified as a notice." N.C. Gen. Stat. § 55A-1-41(i). Specifically regarding notice of special meetings, the NCA provides, "[a] corporation shall give notice of meetings of members by any means that is fair and reasonable and consistent with its bylaws." N.C. Gen. Stat. § 55A-7-05(a)(2013).

While both the Condominium Act and the NCA provide electronic email is an option for notice, the NCA makes clear that the bylaws control when they are not inconsistent with the statutes.

In this case, at the time notice of the 6 February 2010 special meeting was sent electronically, Article III, Section C, of the Association's bylaws provided that:

> Notice of all member's meetings[, both annual and special,] shall be given in writing by the Secretary to each member, unless waived in writing, such notice to state the time and place of the meeting, and the purpose of the meeting. Such notice shall be given not less than 10, nor more than 60, days prior to the meeting date.

> Such notice shall be delivered personally, or mailed in the U.S. Mails, postage prepaid, to the last known address of such member.

It is obvious to this Court that the electronic notices of the 6 February 2010 special members meeting to defendants did not comply with the requirements in the bylaws.

What is more, the Association does not even argue electronic notice was proper. Instead the Association responds to defendants' arguments that defendants did not waive the notice requirements in the bylaws and the content of the notice in the newsletter was inadequate. Without citing supporting authority, the Association argues that because defendants had actual notice of the special members meeting, defendants have waived notice or should be estopped from challenging the notice as improper. The association further argues the substance of the notice was adequate and, in any event, defendant cannot challenge the validity of the Association action as *ultra vires*. *See* N.C. Gen. Stat. § 55A-3-04 (2013).

Yet, we need not address these issues in the present case. Assuming arguendo that the 6 February 2010 meeting was not properly noticed and defendants are not bound by the actions taken by the Association, we hold defendants are bound by the

approval of the assessment at the subsequent special members meeting held on 5 February 2011.

Prior to the 5 February 2011 meeting, a special meeting was held on 22 May 2010, at which members of the Association approved an amendment to the bylaws allowing for electronic notice of meetings. Thereafter, on 11 January 2011, a special members meeting was called for 5 February 2011 to revote the proposals to use the excess funds from the spoil assessment and impose the dredge assessment on members. As the trial court found, this meeting was properly noticed via US Mail and through email. Members of the Association then approved the dredge assessment with sixty-three votes in favor of the assessment; there were zero votes against. It was not until after the dredge assessment was approved at the 5 February 2011 meeting that the Association took legal action to collect the dredge assessment from defendants and began assessing interest.

In their reply brief, defendants argue the Association cannot cure defects in the 6 February 2010 meeting by revoting at a subsequent special members meeting called for the same purpose. As defendants state it, the Association cannot "retroactively ratify . . . improper actions." In support of their argument, defendants cite *American Travel Corp. v. Central*

Carolina Bank, 57 N.C. App. 437, 442, 291 S.E.2d 892, 895 (1982), for the definition of ratification and other cases standing for the propositions that statutes do not apply retroactively and are presumed to be prospective only. We are not persuaded by defendants' argument.

It seems to this Court that if notice of the 6 February 2010 meeting was improper, the only corrective action that the Association could take would be to hold another, properly noticed, special members meeting to revote the assessment. The fact that some members had already paid the assessment and dredging had already occurred is of no consequence. In this case, the Association is seeking to collect the assessment from defendants, who have refused to pay.

In regard to approval of the assessment by two-thirds vote, defendants argue certain proxy votes at the 6 February 2010 special members meeting should not have counted under Roberts Rules of Order. Assuming arguendo that defendant's assertion is correct, as noted above, the dredge assessment was approved at the subsequent 5 February 2011 special members meeting by sixty-three members. Thus, defendant's argument is overruled.

Considering the above, we hold the trial court did not err in concluding the dredge assessment was properly approved in conclusion five.

Conclusion of Law #6

Defendant's last challenge on appeal is to the trial court's conclusion of law number six, which provides "[p]ursuant to the Declaration, the [d]efendants are entitled to pay to the [Association] interest, reasonable attorney's fees and the cost of this action." Specifically, defendants contend the award of attorney's fees for the Association should be stricken.

As defendants acknowledge, the Condominium Act provides that "[t]he court may award reasonable attorney's fees to the prevailing party." N.C. Gen. Stat. § 47C-4-117 (2013). "It is left to the sound discretion of the trial court whether attorney fees will be granted." *Rosenstadt v. Queens Towers Homeowners' Ass'n., Inc.*, 177 N.C. App. 273, 276, 628 S.E.2d 431, 433 (2006).

On appeal, defendants' argument against the award of attorney's fees is premised on the reversal of the trial court's judgment. Having upheld the trial court's judgment, we find no abuse of discretion in the award of attorney's fees for the Association.

III. Conclusion

For the reasons discussed above, we affirm the trial court's judgment in favor of the Association.

Affirmed.

Judges ERVIN and BELL concur.