STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: July 24, 2017)

W.H.I., INC.,	:	
Plaintiff,	:	
Defendant in Counterclaim,	:	
	:	
v.	:	
	:	
JAMES COURTER; SORGENFREI, LLC,	:	
Defendants,	:	
Plaintiffs in Counterclaim,	:	
and Third Party Plaintiffs,	:	
	:	
- and -	:	
	:	
JVLV REALTY, INC.; HOWARD L. HARONIAN, M.D.; HJM LLC; JAMES & LYNN VALLIDES; and SALLY MERRY,	:	
Involuntary Plaintiffs in Counterclaim,	:	
	:	
- and -	:	**C.A. No. WC-2015-0463**
	:	
JVLV REALTY, INC.; HOWARD L. HARONIAN, M.D.; HJM LLC; JAMES & LYNN VALLIDES; and SALLY MERRY,	:	
Involuntary Third Party Plaintiffs	:	
	:	
- and -	:	
	:	
MERRILL LYNCH CREDIT CORPORATION; DIME BANK;	:	
Parties-In-Interest,	:	
	:	
v.	:	
	:	
PETER V. CATALANO; WATCH HILL INN HOTEL CONDOMINIUM ASSOCIATION (a.k.a. WATCH HILL INN CONDOMINIUM ASSOCIATION); WATCH HILL PROPERTIES, LLC; and WHI PARKING, LLC.	:	
Third Party Defendants.	:	

DECISION

STERN, J. Before this Court is a motion for partial summary judgment filed by Defendants/Plaintiffs in Counterclaim/Third Party Plaintiffs James Courter (Courter) and Sorgenfrei, LLC (Sorgenfrei), together with Involuntary Plaintiffs in Counterclaim/Involuntary Third Party Plaintiffs JVLV Realty, Inc. (JVLV), Howard L. Haronian, M.D. (Dr. Haronian), James Vallides and Lynn Vallides (collectively, the Vallideses), and Sally Merry (Merry) (collectively with Courter, Sorgenfrei, and the Vallides, the Unit Owners). The Unit Owners move for partial summary judgment against Plaintiff/Counterclaim-Defendant W.H.I., Inc. (W.H.I., Inc. or Declarant) and Third Party Defendant Peter V. Catalano (Catalano) on their claims seeking a determination that (1) W.H.I., Inc.'s declarant rights under the Condominium Act, G.L. 1956 §§ 34-36.1 et seq., expired and, as such, Declarant's ability to unilaterally control the Watch Hill Inn Condominium Association's (WHICA) executive board expired; (2) the actions of the Declarant in effectuating certain changes to the Amended and Restated Declaration of Condominium were ultra vires and therefore void ab initio; and (3) certain changes to the Amended Declaration were not made in conformance with the Condominium Act and therefore void ab initio. Plaintiff/Counterclaim Defendant W.H.I., Inc.; Third Party Defendant Catalano; Third Party Plaintiff Watch Hill Properties, LLC (WHP); and Involuntary Counterclaim/Third Party Plaintiff HJM, LLC (collectively, WHI) object to the Unit Owners' Motion for Partial Summary Judgment and have filed a cross-motion requesting that partial summary judgment be entered in WHI's favor on the same issues. This Court's jurisdiction is pursuant to Super. R. Civ. P. 56 and G.L. 1956 § 9-30-1.

I

Facts[1] and Travel

The instant matter involves a historic condominium development located at 38 Bay Street, Westerly, Rhode Island, currently known as Watch Hill Inn Condominium.[2] Watch Hill Inn Condominium was originally built in 1845 under the name Narragansett Inn. See Catalano Aff. ¶¶ 6-7. On December 23, 1985, the property was purchased by W.H.I., Inc. and renamed "Watch Hill Inn." See id. at ¶ 7. Between 1986 and 2005, W.H.I., Inc. renovated and upgraded Watch Hill Inn to include sixteen efficiency hotel units, one residential apartment, a banquet facility, an indoor/outdoor restaurant, and sixteen on-site compact parking spaces primarily for staff use. Id. at ¶ 8. After the Rhode Island Fire Codes were amended as a result of the Station Nightclub fire of 2005 so as to require that structures exceeding twenty-five years of age conform to the new Rhode Island Fire Regulations, Watch Hill Inn was cited with sixty-five violations, forced to shut down, and given a deadline to conform to the new regulations. Id. at ¶ 9. W.H.I., Inc. appealed the violations to the State of Rhode Island Rehab Board for an administrative approval permitting W.H.I., Inc. to perform a complete rehabilitation by granting an approval for a continued, non-conforming "mixed-use status." Id. at ¶ 10. W.H.I., Inc. was eventually approved for eleven units consisting of ten residential dwelling units and one restaurant. Id. at ¶ 11.

Having been issued the necessary permits, W.H.I., Inc. employed the legal services of Marc Gertsacov, Esq. in January 2006 to draft a public offering statement, a declaration, and bylaws so as to create a condominium complex. Id. at ¶ 15. Pursuant to the Declaration of

[1] The facts as articulated are undisputed.
[2] "Watch Hill Inn Condominium" changed its name from "Watch Hill Inn Hotel Condominium" in August 2007.

Condominium Watch Hill Inn Hotel Condominium, recorded at Book 1504, Page 174 (Declaration), Watch Hill Inn Hotel Condominium was created on February 17, 2006, with the Declarant listed as W.H.I., Inc. See W.H.I., Inc., Catalano, WHP and HJM, LLC's Objection to Motion for Partial Summary Judgment and Cross Motion for Summary Judgment, Ex. 3 (hereinafter, WHI Motion).

On June 1, 2006, Declarant entered into a Management Agreement with WHP, which named WHP as the property manager for WHICA. See WHI Motion, Ex. 5. Thereafter, WHP entered into a Rental Management Agreement with Carmen Courter, Katrina Courter, and Donica Dohrenwend (collectively, the Courter Parties) nine days later, which provided in part:

> "The Watch Hill Inn is a commercial hotel and as such is considered to be an income producing property. In order to participate in the [Rental Management] Program and derive rent income from the Unit, the Unit Owner authorizes the Agent to rent the Unit to the general public in accordance with the Watch Hill Inn Rate Schedule and Policies as published in its website and publications." WHI Motion, Ex. 6.

Subsequently, amendments to the Declaration were formalized in the Amended and Restated Declaration of Condominium, which was recorded in the Town of Westerly Land Records on July 7, 2006 at Book 1550, page 187 (First Amended Declaration). In part, the First Amended Declaration provided:

> "**ARTICLE VII: RESTRICTIONS ON USE AND ALIENABILITY**
>
> "**Section 7.1. Commercial Hotel and Restaurant Use.**
> "The following restrictions shall apply to the use of the Condominium:
>
> "a) The Units in the Condominium (with the exception of any Units during the time period when they are being used by the Declarant as a sample, model or sales office) are restricted to Hotel / Commercial restaurant use and may not be used for any other

> purpose other than as Hotel Unit with an efficiency kitchen or a restaurant in the case of the Restaurant Unit.
> . . .
>
> "h) It is intended that the Hotel Units may be used for transient and/or hotel rentals. As such, leasing of Units or portions thereof, shall not be subject to the approval of the Association and/or the Hotel Unit Owner and/or any other limitations, other than as expressly provided herein. However, all leasing of Units or portions thereof shall be made in accordance with any applicable zoning designation and/or state codes, ordinances, and regulations. In no way or fashion may a Unit Owner continually occupy the premises for ten (10) consecutive weeks."[3] WHI Motion, Ex. 7.

After the First Amended Declaration was put into place, Declarant sold the first unit of the Watch Hill Inn to the Courter Parties on July 17, 2006. See WHI Motion, Ex. 8. Declarant then sold the second unit to Merry on August 11, 2006. See WHI Motion, Ex. 11. In addition, on November 22, 2006, the third unit was sold from Declarant to William and Carol Reudgen (the Reudgens) and, on February 16, 2007, the fourth unit was sold from Declarant to the Vallideses. See WHI Motion, Exs. 13, 16. On August 15, 2007, Dr. Haronian entered into an option to purchase one unit from WHI. See WHI Motion, Ex. 20.

Over the course of the following two years, the First Amended Declaration was amended four times. See supra note 3. As is relevant to the issues presently before the Court, the Third

[3] The First Amended Declaration was subsequently amended four times. The First Amendment to the First Amended Declaration (First Amendment) occurred on July 21, 2006. See WHI Motion, Ex. 9. The First Amendment has not been challenged by the Unit Owners. The Second Amendment to the First Amended Declaration (Second Amendment) was recorded on October 17, 2006. See WHI Motion, Ex. 12. The Second Amendment is also not subject to challenge by the Unit Owners. The Third Amendment to the First Amended Declaration, recorded on August 30, 2007 at Book 1665, Page 296 (Third Amendment), made a "nominal" change by replacing the word "Hotel" with "Residential" "for marketing and financing purposes and did not change the nature or use of the units[.]" See Marc B. Gertsacov, Esq. Aff. ¶ 7; WHI Motion, Ex. 21. Although the Third Amendment is the subject of one of WHI's supplemental arguments, it is not currently being challenged by the Unit Owners as being void ab initio. Thereafter, the Fourth Amendment to the First Amended Declaration (Fourth Amendment) was recorded in December 2007. See WHI Motion, Ex. 25. The Unit Owners do not challenge the Fourth Amendment as being void ab initio.

Amendment to the First Amended Declaration altered the language of § 7.1, and stated in its entirety:

> "This Third Amendment to the [First Amended Declaration] . . . is being recorded to remove the word 'Hotel' in all instances with regard to the Declaration of Condominium, and all exhibits thereto. In every instance the words 'Hotel Unit' shall be replaced with 'Residential Unit' in the Declaration, and all exhibits thereto.
>
> "Accordingly, the amended name of the Condominium is now the 'Watch Hill Inn Condominium' and the amended name of the condominium association shall now be 'Watch Hill Inn Condominium Association'.
>
> "Further, the following revisions shall also be made:
>
> "Section 7.1 (a) shall be deleted in its entirety and shall now read:
>
> "The Units in the Condominium (with the exception of any Units during the time period when they are being used by the Declarant as a sample, model or sales office) are restricted to Residential/ Commercial restaurant use and may not be used for any other purpose other than as Residential Unit with an efficiency kitchen or a restaurant in the case of the Restaurant Unit.
>
> "Section 7.1 (h) shall be deleted in its entirety and shall now read:
>
> "It is intended that the Residential Units may be used for transient, hotel rentals and/or as residential dwellings. As such, leasing of Units or portions thereof, shall not be subject to the approval of the Association and/or the Hotel Unit Owner and/or any other limitations, other than as expressly provided herein. However, all leasing of Units or portions thereof shall be made in accordance with any applicable zoning designation and/or state codes, ordinances and regulations." WHI Motion, Ex. 21.[4]

Subsequently, Declarant sold the fifth unit of the Watch Hill Inn to Watch Hill Design, LLC on July 25, 2008. See WHI Motion, Ex. 31. At that time, Dr. Haronian was the only member of Watch Hill Design, LLC. See WHI Motion, Ex. 32.

[4] The Third Amendment did not provide a definition for "Residential Unit," the term which replaced the term "Hotel Unit."

Further amendments to the First Amended Declaration as amended were formalized in the Second Amended and Restated Declaration, which was recorded on October 8, 2009 at Book 1839, Page 24 of the Town of Westerly Land Records Office (Second Amended Declaration). The Second Amended Declaration further revised the language of § 7.1:

> "**ARTICLE VII: RESTRICTIONS ON USE AND ALIENABILITY**
>
> "**Section 7.1. Mixed Use.**
> "The building has a pre-existing non-conforming 'Mixed Use' status, and as contemplated by the Declarant, such Mixed Use shall continue for Residential and Commercial Restaurant. The following restrictions shall apply to the use of the Condominium:
>
> "a) The Units in the Condominium (with the exception of any Units during the time period when they are being used by the Declarant as a sample, model or sales office) are restricted to Residential and Commercial restaurant use; and as such, may not be used for any other purpose other than as Residential Unit with kitchen, or a restaurant in the case of the Restaurant Unit which may be converted to a Residential Unit at a later date.
> . . .
>
> "(h) Residential Units may be rented to a third party on a monthly basis or through the preapproved Rental Program operated by the Property Management. As such, leasing of Units or portions thereof shall not be subject to the approval of the Association and/or the Unit Owner, and/or any other limitations, other than as expressly provided herein. However, all leasing of Units or portions thereof shall be made in accordance with any applicable zoning designation and/or state codes, ordinances and regulations." WHI Motion, Ex. 44.

Thereafter, on December 16, 2009, Dr. Haronian purchased Watch Hill Design, LLC's unit directly from Watch Hill Design, LLC. See WHI Motion, Ex. 49. In addition, the unit owned by the Reudgens was foreclosed on by the mortgagee on or about April 5, 2010. See WHI Motion, Ex. 50.

Subsequent amendments to the Second Amended Declaration were thereafter formalized via the Third Amended and Restated Declaration of Condominium, which was recorded in the Town of Westerly Land Evidence Records on December 14, 2010 at Book 1883, Page 50 (Third Amended Declaration). See WHI Motion, Ex. 62. The Third Amended Declaration converted Unit W204, the restaurant unit owned by Declarant, to a residential unit. See id. In addition, the Third Amended Declaration revised the language of § 7.1 of the Second Amended Declaration to read as follows:

> "**ARTICLE VII: RESTRICTIONS ON USE AND ALIENABILITY**
>
> "**Section 7.1. Mixed Use.**
> "The building has a pre-existing non-conforming 'Mixed Use' status, and as contemplated by the Declarant, such Mixed Use shall continue for Residential and Commercial Restaurant. The following restrictions shall apply to the use of the Condominium:
>
> "a) Use – The Units in the Condominium (with the exception of any Units during the time period when they are being used by the Declarant as a sample, model or sales office) are restricted to Residential/ Commercial restaurant use and may not be used for any other purpose other than as Residential Unit or as a restaurant, in the case of the Restaurant Unit. Declarant reserves the right to convert the Restaurant Unit designated as W204 to a two bedroom residential unit with patio terrace. Declarant has designated the area located under Unit W203 as Common Element to be used exclusively by Management staff for the purpose of storing outdoor furniture. Such use is limited to seasonal or emergency access frequency verses [sic] daily access activity which would otherwise be an unnecessary burden on Unit W203.. [sic] No Unit Owner is permitted to access this area.
> . . .
>
> "h) Rental Program – Residential Units may only be used as residential dwelling units. Unit Owners may opt to rent their Unit to derive revenue either with the Rental Program offered by Watch Hill Properties LLC, the 'Managing Agent'; or directly to the general public with or without the use of a real estate broker. In the case of the general public rental, the Unit must be rented for no less than thirty (30) consecutive days. In the case of the Managing

> Agent's Rental Program, the duration is determined by the Managing Agent." See id.

On June 14, 2011, JVLV, an entity owned in part by the Vallideses, purchased the foreclosed unit from the bank that foreclosed on the unit once owned by the Reudgens. See WHI Motion, Ex. 72. In addition, on or about September 7, 2012, Sorgenfrei purchased the Courter Parties' Unit W301. See WHI Motion, Ex. 87. During that same month, on September 28, 2012, HJM, LLC purchased the sixth unit—the former restaurant unit—from Declarant. See WHI Motion, Ex. 89.

Thereafter, the Third Amended Declaration was replaced by the Fourth Amended and Restated Declaration of the Watch Hill Inn Condominium, which was recorded on July 23, 2014 in the Town of Westerly Land Evidence Records at Book 2014, Page 12500 (Fourth Amended Declaration). In relevant part, the Fourth Amended Declaration altered the language of § 7.1 of the Third Amended Declaration to provide:

> "**ARTICLE VII: RESTRICTIONS ON USE AND ALIENABILITY**
>
> "**Section 7.1. Mixed Use.**
> "The building has a pre-existing non-conforming 'Mixed Use' status, and as contemplated by the Declarant, such Mixed Use shall continue for Residential and Commercial Restaurant. The following restrictions shall apply to the use of the Condominium:
>
> "a) Use – The Units in the Condominium (with the exception of any Units during the time period when they are being used by the Declarant as a sample, model or sales office) are restricted to Residential use and may not be used for any other purpose other than as Residential Unit. Declarant has designated the area located under Unit W203 as Common Element to be used exclusively by Management staff for the purpose of storing outdoor furniture. Such use is limited to seasonal or emergency access frequency verses [sic] daily access activity which would otherwise be an unnecessary burden on Unit W203. No Unit Owner is permitted to access this area.
> . . .

> "h) Rental Program – Units may only be used as residential dwelling units. Unit Owners may opt to rent their Unit to derive revenue either with the Rental Program offered by Watch Hill Properties LLC, or its Assignee, which shall be deemed to be the 'Managing Agent'; or directly to the general public with or without the use of a real estate broker. In the case of the general public rental, the Unit must be rented for no less than thirty (30) consecutive days, provided that the Unit Owner provide to the Managing Agent and the Executive Board a fully executed copy of the Lease; however, the financial terms of the amount of the rent and security deposit may be redacted in the copy provided to the Managing Agent and Executive Board. In the case of the Managing Agent's Rental Program, the duration is determined by the Managing Agent. All leases must clearly state that the Tenant/Lessee is to strictly abide by the Declaration of Condominium, By-Laws, Rules and Regulations and the Executive Board and Managing Agent has the power [of] attorney from the Unit Owner to cease any offensive activity or violation of the Declaration of Condominium, By-Laws and/or Rules and Regulations. Said clause must be separately acknowledged by the Tenant/Lessee. Unit Owners remain responsible for the conduct of the Tenant/Lessee and are subject to fines and/or costs incurred by the Tenant/Lessee's actions or conduct." WHI Motion, Ex. 115.

In large part, alterations in the language of § 7.1 between the Second Amendment to the First Amended Declaration and the Fourth Amended Declaration have resulted in the instant cross-motions for partial summary judgment. The Court held a hearing on the cross-motions on June 9, 2017 to entertain oral arguments and ascertain the positions of the parties on the issues now before the Court. At the conclusion of the hearing, the Court reserved on the instant motions.

II

Standard of Review

Super. R. Civ. P. 56(c) states that a court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as matter of law." "When 'ruling on a motion for summary judgment[,] the [hearing] justice must consider affidavits and pleadings in the light most favorable to the opposing party, and only when it appears that no genuine issue of material fact is asserted can summary judgment be ordered.'" Multi-State Restoration, Inc. v. DWS Props., LLC, 61 A.3d 414, 418 (R.I. 2013) (quoting O'Connor v. McKanna, 116 R.I. 627, 633, 359 A.2d 350, 353 (1976)). The nonmoving party "carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1225 (R.I. 1996). Accordingly, summary judgment is appropriate if the nonmoving party "'fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . .'" Beauregard v. Gouin, 66 A.3d 489, 493-94 (R.I. 2013) (quoting Lavoie v. Ne. Knitting, Inc., 918 A.2d 225, 228 (R.I. 2007)). The mere existence of a factual dispute alone will not preclude summary judgment; rather, "'the requirement is that there be no genuine issue of material fact.'" Bucci v. Hurd Buick Pontiac GMC Truck, LLC, 85 A.3d 1160, 1169 (R.I. 2014) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

III

Analysis

The Uniform Declaratory Judgments Act (UDJA), §§ 9-30-1 et seq., grants this Court the power to "declare rights, status, and other legal relations" of litigants. Sec. 9-30-1. Specifically,

> "[a]ny person interested under a deed, will, written contract, or other writings constituting a contract . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder." Sec. 9-30-2.

A declaratory judgment "is neither an action at law nor a suit in equity but a novel statutory proceeding[.]" Newport Amusement Co. v. Maher, 92 R.I. 51, 53, 166 A.2d 216, 217 (1960). The purpose and intention of a declaratory judgment action is to "allow the trial justice to facilitate the termination of controversies," or otherwise remove uncertainties. Bradford Assocs. v. R.I. Div. of Purchases, 772 A.2d 485, 489 (R.I. 2001) (internal quotation marks omitted); Fireman's Fund Ins. Co. v. E.W. Burman, Inc., 120 R.I. 841, 845, 391 A.2d 99, 101 (1978). Accordingly, the UDJA "confers broad discretion upon the trial justice as to whether he or she should grant declaratory relief." Cruz v. Wausau Ins., 866 A.2d 1237, 1240 (R.I. 2005); see also § 9-30-6; Woonsocket Teachers' Guild Local Union 951, AFT v. Woonsocket Sch. Comm., 694 A.2d 727, 729 (R.I. 1997); Lombardi v. Goodyear Loan Co., 549 A.2d 1025, 1027 (R.I. 1988). The Rhode Island Supreme Court has repeatedly cautioned that a "declaratory-judgment action may not be used 'for the determination of abstract questions or the rendering of advisory opinions,' nor does it 'license litigants to fish in judicial ponds for legal advice.'" Sullivan v. Chafee, 703 A.2d 748, 751 (R.I. 1997) (quoting Lamb v. Perry, 101 R.I. 538, 542, 225 A.2d 521, 523 (1967); Goodyear Loan Co. v. Little, 107 R.I. 629, 631, 269 A.2d 542, 543 (1970)). For such reasons, "[w]hen confronted with a request for declaratory relief, the first order of business for the trial justice is to determine whether a party has standing to sue." Bowen v. Mollis, 945 A.2d 314, 317 (R.I. 2008); see also N & M Props., LLC v. Town of W. Warwick ex rel. Moore, 964 A.2d 1141, 1144-45 (R.I. 2009).

WHI argues that Dr. Haronian, JVLV, and Sorgenfrei lack standing to make any claims as to rights or statements contained in the Public Offering Statement. WHI avers that Dr. Haronian, JVLV, and Sorgenfrei did not purchase their unit from Declarant and, therefore, as subsequent purchasers, were only required to receive a resale certificate pursuant to § 34-36.1-

4.09. WHI maintains that, as subsequent purchasers, Dr. Haronian, JVLV, and Sorgenfrei lack standing to assert claims regarding any alleged misrepresentations contained in the Public Offering Statement.

WHI arrives at such conclusion based on its reading of two sections of the Condominium Act. Under § 34-36.1-4.02,

> "(c) Any declarant or other person in the business of selling real estate who offers a unit for his or her own account to a purchaser shall deliver a public offering statement in the manner prescribed in § 34-36.1-4.08(a). As between the declarant or other person specified in subsection (b), the person who prepared all or a part of the public offering statement is liable under §§ 34-36.1-4.08--34-36.1-4.17 for any false or misleading statement set forth therein or for any omission of material fact therefrom with respect to that portion of the public offering statement which declarant prepared. If a declarant did not prepare any part of a public offering statement that he or she delivers, he or she is not liable for any false or misleading statement set forth therein or for any omission of material fact therefrom unless declarant had actual knowledge of the statement or omission or, in the exercise of reasonable care, should have known of the statement or omission."

When a unit is subsequently sold by the party who initially purchased the unit from the declarant, the subsequent purchaser is entitled to a resale certificate. See § 34-36.1-4.09. Notably, under the explicit language of the Condominium Act, such resale certificate need not necessarily include the same information contained in the Public Offering Statement. Compare § 34-36.1-4.09(a) with § 34-36.1-4.03(a). WHI combines §§ 34-36.1-4.02 and 34-36.1-4.09(a) to come to the conclusion that subsequent purchasers under the Condominium Act lack standing to rely upon or challenge the provisions of a public offering statement because they are only entitled to a resale certificate.

This Court perceives no connection among §§ 34-36.1-4.02, 34-36.1-4.09(a), and the standing of a subsequent purchaser to rely upon or challenge the provisions of a public offering

statement. Nowhere in the Condominium Act does it prohibit a subsequent purchaser from bringing a claim based on false and misleading statements contained in or omissions from a public offering statement. The Condominium Act also does not require that subsequent purchasers be furnished with a public offering statement, nor does the Condominium Act state that subsequent purchasers need not be furnished with such public offering statement. Rather, the Condominium Act requires that subsequent purchasers receive a resale certificate, and makes no mention of whether a subsequent purchaser can bring a claim based on misleading statements contained in or omissions from a public offering statement. The relevant section of the Condominium Act extends liability to a declarant for misleading statements or omissions in the public offering statement to the extent that the declarant prepared such statements, caused such omissions, actually knew of such misleading statements or omissions, or in the exercise of reasonable care should have known of such misleading statements or omissions. See § 34-36.1-4.02; see also O'Connell v. Walmsley, 156 A.3d 422, 426 (R.I. 2017) (stating that courts must interpret statutes literally). Simply put, nowhere in the Condominium Act does it prohibit a subsequent purchaser of a condominium unit from relying on the provisions of a public offering statement.

Accordingly, this Court does not read §§ 34-36.1-4.02(c) and 34-36.1-4.09(a) as a limitation on a subsequent purchaser's standing as it pertains to his or her reliance upon or challenge to statements contained in a public offering statement. In fact, this tribunal's analysis of a litigant's standing posits an entirely different inquiry. "When called upon to decide the issue of standing, a trial justice must determine whether, if the allegations are proven, the plaintiff has sustained an injury and has alleged a personal stake in the outcome of the litigation[.]" Bowen, 945 A.2d at 317. "The requisite standing to prosecute a claim for relief exists when the plaintiff

has alleged that 'the challenged action has caused him injury in fact, economic or otherwise[.]'" Id. (quoting R.I. Ophthalmological Soc'y v. Cannon, 113 R.I. 16, 22, 317 A.2d 124, 128 (1974)). Such injury has been described as "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Pontbriand v. Sundlun, 699 A.2d 856, 862 (R.I. 1997) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)). "[T]he necessity of a 'concrete' injury has been the subject of particular emphasis in this jurisdiction. '[M]ere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render'" the injury concrete. Watson v. Fox, 44 A.3d 130, 136 (R.I. 2012) (quoting Blackstone Valley Chamber of Commerce v. Pub. Utils. Comm'n, 452 A.2d 931, 933 (R.I. 1982)). Further, to be "'particularized,'" a plaintiff must "'demonstrate that he [or she] has a stake in the outcome that distinguishes his [or her] claims from the claims of the public at large.'" Id. (quoting Bowen, 945 A.2d at 317).

With the above-articulated principles in mind, this Court finds that, even as subsequent purchasers, Dr. Haronian, JVLV, and Sorgenfrei have standing to rely on, and have standing to challenge, statements contained in the Public Offering Statement. Dr. Haronian, JVLV, and Sorgenfrei have alleged an injury by asserting that the Second, Third, and Fourth Amended Declarations, purportedly enacted in violation of an express mandate of the Condominium Act, illegally deprived them of their ability to achieve rental income without the use of a management company for rentals spanning less than thirty days, in contravention of statements contained in the Public Offering Statement. Such Amended Declarations are being challenged as being void ab initio, i.e., void from inception, because, as the Unit Owners contend, they were entitled to unanimously approve such Amended Declarations. As such, Dr. Haronian, JVLV, and

Sorgenfrei have alleged an injury in fact to their interests which are entitled to them under statute and, therefore, have the requisite standing before this Court. See Burns v. Sundlun, 617 A.2d 114, 116 (R.I. 1992).

Accordingly, because the Unit Owners have the requisite standing under the UDJA,[5] this Court proceeds to make its discretionary finding that justiciable controversies exist as to whether (1) Declarant control has ended, and (2) the Amended Declarations are void ab initio. Thus, declaratory relief is proper. See Cruz, 866 A.2d at 1240; Woonsocket Teachers' Guild Local Union 951, AFT, 694 A.2d at 729.

A

Declarant Control

The Unit Owners first contend that Declarant never reserved development rights in accordance with the Condominium Act. Drawing from that, the Unit Owners maintain that Declarant's control expired two years after Declarant filed the Declaration that included eleven units, pursuant to § 34-36.1-3.03(d)(1)(iii). In response, WHI argues that Declarant's ability to exercise control has yet to expire because none of the triggering events laid out in § 34-36.1-3.03 have occurred. Specifically, WHI argues that it has never added new units since the establishment of the Watch Hill Inn via the Declaration. Alternatively, WHI contends that the earliest date that Declarant's control expired was July 7, 2011, should the Court recognize additional triggering factors as set forth in the First Amended Declaration.

[5] Even assuming arguendo that Dr. Haronian, JVLV, and Sorgenfrei lack standing to challenge or rely upon the language of the Public Offering Statement, this Court is not precluded from considering the Public Offering Statement in making its declarations. Indeed, WHI has not challenged the standing of Merry or the Vallideses—Unit Owners who purchased their units directly from Declarant. Merry and the Vallideses—like Dr. Haronian, JVLV, and Sorgenfrei—seek a declaration that the Second, Third and Fourth Amended Declarations are void ab initio because such Amended Declarations caused a change in use without unanimous consent.

Declarant control of a condominium association is governed by § 34-36.1-3.03(d)(1), which provides:

> "Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which period a declarant, or persons designated by him, may appoint and remove the officers and members of the executive board. Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earlier of:
>
> > "(i) Sixty (60) days after conveyance of eighty percent (80%) of the units which may be created to unit owners other than a declarant;
> >
> > "(ii) Two (2) years after all declarants have ceased to offer units for sale in the ordinary course of business; or
> >
> > "(iii) Two (2) years after any development right to add new units was last exercised."

In the instant case, it is undisputed that eighty percent of the units have yet to be conveyed to unit owners other than Declarant; Declarant to this date still owns five out of the eleven units, or thirty-six percent of the units in Watch Hill Inn. It is also undisputed that the Declarant has not ceased offering units for sale in the ordinary course of business, as units have been for sale since the establishment of the condominium development. As a result, this Court must only consider whether two years have passed since "any development right to add new units was last exercised." Sec. 34-36.1-3.03(d)(1).

This Court is satisfied that under the triggering provisions explicitly set forth in § 34-36.1-3.03(d)(1), Declarant's control has yet to expire. The Condominium Act is very specific in its terminology: under § 34-36.1-3.03(d)(1)(iii), declarant control terminates "[t]wo . . . years after any development right to add <u>new</u> units was last exercised." Sec. 34-36.1-3.03(d)(1)(iii) (emphasis added). "Development rights" are specifically defined by the Condominium Act to mean "any right or combination of rights <u>reserved</u> by a declarant <u>in the declaration</u> to: (A) Add

real estate to a condominium, (B) Create units, common elements, or limited common elements within a condominium, (C) Subdivide units or convert units into common elements, or (D) Withdraw real estate from a condominium." Sec. 34-36.1-1.03(11) (emphasis added). Such an express reservation was absent from the condominium documents. Therefore, development rights could not be exercised in order to add new units because such rights were not expressly reserved in the Amended Declaration. See id. Section 34-36.1-3.03(d)(1) does not apply to condominium developments where all units were declared and constructed at the outset and where no new units are able to be added. It clearly applies to future actions subsequent to the declaration. See § 34-36.1-3.03 cmt. 3 ("Subsection (d) and (e) recognize the practical necessity for the declarant to control the association during the developmental phases of a condominium project.").

However, this Court is not constrained in a manner that would only permit consideration of the explicit triggering provisions laid out in the Condominium Act to the exclusion of the relevant condominium documents, such as the Declaration. The Condominium Act provides for occasions where a declaration may include provisions different than those provided for in the Condominium Act. See, e.g., § 34-36.1-2.17(a). This includes the very provision of the Condominium Act at issue, § 34-36.1-3.03(d)(1), which allows the period of declarant control to be set forth in the declaration. Accordingly, this Court specifically takes note of Article XI, § 11.3 of the First Amended Declaration, which provides:

> "**Section 11.3. Control.**
>
> "a) Until the sixtieth (60th) day after conveyance of more than eighty percent (80%) of the Units which may be created, to Unit Owners other than the Declarant, Declarant shall have the right to appoint and remove any and all officers and members of the Executive Board. Declarant may not unilaterally remove any

> members of the Executive Board elected by unit Owners other than Declarant.
>
> "b) Not later than sixty (60) days after the conveyance of more than eighty percent (80%) of the Units which may be created to Unit Owners other than the Declarant, one of the three members of the Executive Board shall be elected by Unit Owners other than Declarant.
>
> "c) Not later than five (5) years after the date of the recording of [the First Amended Declaration], all members of the Executive Board shall resign, and Unit Owners (including Declarant to the extent of Units owned by Declarant) shall elect a new three-member Executive Board, at least a majority of whom must be Unit Owners." WHI Motion, Ex. 7 (emphasis added).

This Court finds the self-imposed triggering events applicable to the extinguishment of Declarant's control. See § 34-36.1-3.03(d)(1). Accordingly, this Court declares that under the terms of the First Amended Declaration, in accordance with the Condominium Act, Declarant control expired as a matter of law on July 7, 2011.

B

Validity of Amendments and Amended Declarations

The Unit Owners have also challenged the amended declarations subsequent to the First Amended Declaration, arguing that such amended declarations are void ab initio because of a lack of unanimous consent. Specifically, the Unit Owners argue that the Second, Third, and Fourth Amended Declarations are void ab initio because the amendments caused a change in the "use[]" of the units and, thus, implementation of the Second, Third, and Fourth Amended Declarations required unanimous consent of the unit owners in order to take effect. See § 34-36.1-2.17(d). With regard to the Unit Owners' second argument, the Unit Owners state that the Public Offering Statement made it abundantly clear that the units were to be used for transient rental and hotel purposes, and by requiring that the Unit Owners go through a rental management

agency for any rentals spanning a period of less than thirty days, the Second Amended Declaration, Third Amended Declaration, and Fourth Amended Declaration changed the use to which the units were restricted and are thus void ab initio in the absence of unanimous consent.

In response, WHI maintains that the Second, Third, and Fourth Amended Declarations are valid and not void ab initio because unanimous consent was not required. Instead, WHI claims that only sixty-seven percent of the votes in the association was required, as outlined in § 34-36.1-2.17(a). Moreover, WHI contends that the unanimous consent provision of the Condominium Act does not apply to the Second, Third, and Fourth Amended Declarations because these amended declarations did not change the uses to which the units could be utilized because Watch Hill Inn has, since its inception, remained as a "mixed-use" zoning designation. WHI avers that the requirement that Unit Owners go through the rental management agency for rentals lasting less than thirty days is a matter of internal governance that does not alter the use of the units, similar to a provision that limits the number of pets allowed in a particular unit.

Because the Unit Owners claim that the amendments changed the use of their units, and because subsection (d) expressly limits subsection (a),[6] this Court begins its analysis by considering whether the amendments to the First Amended Declaration, or the Second, Third,

[6] This Court agrees that in this case, in the absence of a change in use, sixty-seven percent of the votes in the association is required under the Condominium Act. See IDC Props., Inc. v. Goat Island S. Condo. Ass'n, Inc., 128 A.3d 383, 392 (R.I. 2015). In accordance with § 34-36.1-2.17(a):

> "(a) Except in cases of amendments that may be executed by a declarant . . . or certain unit owners . . . and except as limited by subsection (d) of this section, the declaration, including the plats and plans, may be amended only by vote or agreement of unit owners of units to which at least sixty-seven percent (67%) of the votes in the association are allocated, or any larger majority the declaration specifies. The declaration may specify a smaller number only if all the units are restricted exclusively to nonresidential use." Sec. 34-36.1-2.17(a) (emphasis added).

and Fourth Amended Declarations caused a change in the use of the condominium units. See IDC Properties, Inc., 128 A.3d at 392. In accordance with § 34-36.1-3.17(d),

> "(d) Except to the extent expressly permitted or required by other provisions of this chapter, no amendment may create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners." Sec. 34-36.1-2.17(d) (emphasis added).

Whether any of the amended declarations "change" the "use" to which any "unit" is restricted are issues of statutory interpretation. In matters of statutory interpretation, it is this Court's "'ultimate goal . . . to give effect to the purpose of the act . . . .'" O'Connell, 156 A.3d at 426 (quoting Raiche v. Scott, 101 A.3d 1244, 1248 (R.I. 2014)). "'[W]hen the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" Id. (quoting Raiche, 101 A.3d at 1248). "'However, the plain meaning approach must not be confused with myopic literalism; even when confronted with a clear and unambiguous statutory provision, it is entirely proper for [the Court] to look to the sense and meaning fairly deducible from the context.'" Id. (quoting Raiche, 101 A.3d at 1248) (internal quotation marks omitted). "'Therefore, [the Court] must consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.'" Id. (quoting Raiche, 101 A.3d at 1248) (internal quotation marks omitted). Notably, "'[i]f a mechanical application of a statutory definition produces an absurd result or defeats legislative intent, this [C]ourt will look beyond mere semantics and give effect to the purpose of the act.'" Id. at 428 (quoting Commercial Union Ins. Co. v. Pelchat, 727 A.2d 676, 681 (R.I. 1999)).

Although there is minimal case law with respect to § 34-36.1-2.17(d) in the context of a change in use, our Supreme Court has had the occasion to briefly discuss the statute in two instances. In Sisto v. Am. Condo. Ass'n, Inc., 68 A.3d 603, 614 (R.I. 2013), the Court held that the language "change the boundaries of [any] unit" requires unanimous consent when a unit owner sought to expand his unit onto an area that was a limited common element. As is relevant to this case, the Court in Sisto characterized the word "change" in the context of § 34-36.1-2.17(d) to be synonymous with the word "alteration." See id. at 610. Three years after the decision in Sisto, our Supreme Court also touched on a unanimous consent provision found in a declaration that "clearly and unambiguously echoe[d]" the unanimous consent provision in § 34-36.1-2.17(d). See Am. Condo. Ass'n, Inc. v. Mardo, 140 A.3d 106, 114 (R.I. 2016). In fact, the Court in Mardo noted that the language of the declaration at issue in that case "contain[ed] the same amendment language as § 34-36.1-2.17(d)." Id. The Court in its analysis noted that "[i]t would not be possible for [the] Court to rule that the language of [the declaration] was ambiguous without engaging in the 'mental gymnastics' and 'stretching [of] the imagination' which [the court has] consistently refused to do when confronted with clear contractual language." Id. (quoting Bliss Mine Road Condo. Ass'n v. Nationwide Prop. & Cas. Ins. Co., 11 A.3d 1078, 1083 (R.I. 2010)).

Sisto and Mardo together stand for two principles important to the instant matter. First, § 34-36.1-3.17(d) is clear and unambiguous. See Mardo, 140 A.3d at 114. As such, this Court is obligated to "'interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" Sisto, 68 A.3d at 611 (quoting In re Estate of Manchester, 66 A.3d 426, 429-30 (R.I. 2013)). Second, in accordance with the plain language of the statute, this Court interprets the word "change" to be synonymous with the word "alter." See id. at 610.

The Court next reviews the phrase "uses to which any unit is restricted." Regarding this phrase, the Unit Owners point out that neither the Public Offering Statement nor the First Amended Declaration required that a unit owner must rent or lease to the general public through the use of a rental management company. Likewise, neither the Public Offering Statement nor the First Amended Declaration contained provisions limiting the time period for which a unit could be rented to the public without use of such rental management agency. Accordingly, the Unit Owners contend that the Second Amended Declaration changed the use of the units by adding such procedures, thereby triggering the unanimous consent requirement under the Condominium Act. See § 34-36.1-2.17(d).

In stark contrast, WHI argues that characterizing the Second Amended Declaration as causing a "change in use" requiring unanimous consent paints with a broad brush and ignores the underlying zoning of the development, which has remained unchanged throughout the various amended declarations. WHI points out that Watch Hill Inn is zoned "SC-WH Shore Commercial-Watch Hill," according to a zoning certificate issued by the Town of Westerly's Zoning Official, Jason A. Parker. See WHI Motion, Ex. B. The zoning certificate further states that "in 2006 the units within the structure were converted to residential condominium units." Id. WHI also notes that Mixed-Use Development is permitted within a SC-WH District. Edward Pimental, a land use expert, states in an affidavit: "The initial and subsequent . . . declaration amendments always documented the presence of a combination of land uses, evidencing the continued presence of a 'Mixed-Use Development.' The initial declaration acknowledged the presence of a Hotel and Commercial Restaurant, or a mixture of land uses." Id. Pimental goes on to determine that the "mixed-use" characterization of the property was never altered by the amendments to the declaration. See id. Accordingly, WHI characterizes the

amendments to § 7.1(h) not as restrictions on use, but rather as issues of governance no different than those analogous to restrictions on the number of pets permitted in a particular unit. WHI also contends that, because "Residential" and "Hotel" use are in the same category of uses under the Westerly Zoning Ordinances, no change in use has occurred via the Second, Third, or Fourth Amended Declarations.

To get to the heart of WHI's argument, this Court looks to the language of the Condominium Act. The Condominium Act defines a "[u]nit" as "a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to § 34-36.1-2.05(a)(5)." Sec. 34-36.1-1.03(28). Notably, however, the Condominium Act does not provide a definition of the term "uses." Under Rhode Island law, when a statute is clear and unambiguous, yet has terms left undefined, this Court must give the undefined term its plain and ordinary meaning. See D'Amico v. Johnston Partners, 866 A.2d 1222, 1224 (R.I. 2005). "In carrying out the process of determining the meaning of the words employed by an enacting legislature, reference to contemporaneous dictionaries is appropriate and often helpful." Chambers v. Ormiston, 935 A.2d 956, 962 (R.I. 2007). "Use," as defined by the dictionary, is broad. The dictionary defines "use" as "the act or practice of employing something," "the privilege or benefit of using something," "the legal enjoyment of property that consists in its employment, occupation, exercise, or practice," and "a particular service or end." See Merriam-Webster's Online Dictionary, use (last visited June 13, 2017). The dictionary also defines "use" as "the benefit in law of one or more persons; specifically the benefit or profit of property established in one other than the legal possessor." Id. Accordingly, this Court's duty of interpretation as it pertains to the word "use" is at an end, as the plain and ordinary meaning is

controlling. See A.F. Lusi Constr., Inc. v. R.I. Convention Ctr. Auth., 934 A.2d 791, 796 (R.I. 2007); Chambers, 935 A.2d at 960.

However, recognition of the plain and ordinary meaning of the word "use" does not end this Court's analysis of the statute. Indeed, this Court must "determine the intent of the General Assembly by looking to 'the language, nature, and object' of the enactments of that body." Chambers, 935 A.2d at 959-60. Accordingly, this Court notes that the word "use" refers not to just any use of a unit, but only to a use that is restricted via declaration. See § 34-36.1-2.17(d); see also Filmore LLLP v. Unit Owners Ass'n of Ctr. Pointe Condo., 355 P.3d 1128, 1131 (Wash. 2015). Notably, the positioning of section 7.1 within article 7 of the Amended Declarations—which in all the Amended Declarations is titled "RESTRICTIONS ON USE AND ALIENABILITY"—indicates that for purposes of the First Amended Declaration, transient rentals and/or hotel use are "uses" that are restricted. See Filmore LLLP, 355 P.3d at 1131. Therefore, under § 34-36.1-2.17(d), alterations to such uses would require unanimous consent.

Whether subsequent amendments to the First Amended Declaration altered the restricted transient rental and/or hotel uses involves a comparison between how the units were used prior and subsequent to the Amended Declarations. As it pertains to the use of the units prior to the Second Amended Declaration, this Court considers the language of the First Amended Declaration and the provisions of the Public Offering Statement as relevant. Among other things, § 3 of the Public Offering Statement provides: "The Units in the Condominium are restricted to commercial hotel and restaurant use (temporary dwelling and dining, respectively, unless Declarant chooses to convert the Commercial Unit)[.]" Fourth Am. Countercl., Third-Party Compl. and Answer to Pl.'s Compl., Ex. A. In addition, under § 11 of the Public Offering Statement, "Declarant warrants that the Watch Hill Inn is a pre-existing hotel and restaurant and

the Unit and the Common Elements in the Condominium are suitable for the hotel and restaurant uses of real estate." Id. Moreover, the First Amended Declaration had language to the effect that "the Hotel Units may be used for transient and/or hotel rentals." First Am. Declaration § 7.1(h), WHI Motion, Ex. 9. In comparison, the Second Amended Declaration altered § 7.1(h) to read as follows: "Residential Units may be rented to a third party on a monthly basis or through the preapproved Rental Program operated by the Property Management." WHI Motion, Ex. 44.

This Court concludes that based on the language of the First Amended Declaration juxtaposed with the Second Amended Declaration, a change in use to which the units were restricted occurred; specifically, at § 7.1(h), a unit owner's unilateral use of his or her unit as an investment property for hotel and transient use—a use that was explicitly restricted by the First Amended Declaration—was eliminated. Such change in use was not merely a matter of internal governance. The First Amended Declaration provided that the units could be rented without any explicit restriction. The Second Amended Declaration stated that they could be rented, but if for less than thirty days, such rentals must go through the rental management agency. This change fundamentally altered the manner in which the Units Owners could use their units for rental income. Total elimination of the unit owner's use of his or her unit that is restricted by the declaration constitutes a change in use warranting unanimous consent. Compare Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC, 215 P.3d 27, 34 (Nev. 2009) (holding that removal of a ninety-nine-year exclusive rental provision did not require unanimous consent because the declaration as amended still permitted the party challenging the amended declaration to rent lots) with Filmore LLLP, 355 P.3d at 1131-32 (holding that a special supermajority affirmative vote, as required spelled out in Washington's version of the law, was needed when an amendment was implemented requiring that no more than 30% of units could be rented). An amendment to a

declaration that requires unanimous consent is void ab initio if unanimous consent is not obtained. Am. Condo. Ass'n, Inc. v. IDC, Inc., 844 A.2d 117, 130 (R.I. 2004). Accordingly, because unanimous consent was not obtained, the Second Amended Declaration is void ab initio. See id.

In addition, this Court is unmoved by WHI's argument that the term "use" has anything to do with zoning and the continued "mixed-use" designation of Watch Hill Inn. Such an interpretation conflicts with common sense and the plain meaning of the word "use." Cf. Labor Ready Ne., Inc. v. McConaghy, 849 A.2d 340, 345 (R.I. 2004). As stated previously, this Court must apply the plain and ordinary meaning to undefined terms. See D'Amico, 866 A.2d at 1224. Ascribing a zoning designation as the definition of "use" as used in § 34-36.1-2.17(d) would not be consistent with the plain and ordinary meaning of the word. In addition, there are several instances throughout the Condominium Act where the word "uses" is used in conjunction with a zoning designation such as "residential" or "non-residential." See, e.g., §§ 34-36.1-4.01, -4.04. Therefore, if the Legislature intended to tie "uses" as used in § 34-36.1-2.17(d) to a particular zoning designation, it would have done so. Moreover, the statute in question concerning unanimous consent speaks to amendments to a declaration that change or alter the uses to which any unit is restricted, irrespective of the entire condominium development. See § 34-36.1-2.17(d). Accordingly, even if the plain and ordinary meaning of the word "use" did not attach, the zoning designation of Watch Hill Inn would be of no moment to this Court's analysis.

Finally, this Court's ruling that a change in use occurred between the Third Amendment to the First Amended Declaration and the Second Amended Declaration underscores the policy concerns implicated by the Condominium Act. The Condominium Act has been characterized as a consumer protection statute by our Supreme Court on multiple occasions. See Sisto, 68 A.3d

at 614 n.9; Am. Condo. Ass'n, Inc. v. IDC, Inc., 870 A.2d 434, 437 (R.I. 2005); Am. Condo. Ass'n, Inc., 844 A.2d at 128. Through that lens, this Court is satisfied that the alterations to the First Amended Declaration as amended, although disguised as a change in internal governance procedure, were, in fact, changes in use requiring unanimous consent. Indeed, this Court is not distracted in its analysis by a seemingly reasonable restriction that nonetheless fundamentally changes the use to which a unit is restricted. Under WHI's theory, the "internal governance" of the condominium development could, in theory, unilaterally require that tenants renting from unit owners for a period of less than thirty days be subjected to a credit check and background check, pay in Mexican Pesos, or impose some other restriction that in practice discourages a use to the point of elimination. In order to offer protection to consumers against such abuses, fundamental changes in use via amendments to a condominium development's declaration require the unanimous consent of the unit owners. See § 34-36.1-2.17(d).

C

Equitable Defenses

WHI claims that the Unit Owners cannot challenge the validity to amendments to the Declaration under the doctrines of laches, waiver, and estoppel. Such equitable defenses apply to matters arising under the Condominium Act. See § 34-36.1-1.08. As such, the Court will consider these equitable defenses in seriatim.

1

Laches

Most prominently, WHI argues that laches bars the Unit Owners from challenging the Amended Declarations as being void ab initio. "'Laches is an equitable defense that involves not only delay but also a party's detrimental reliance on the status quo.'" Am. Condo. Ass'n, Inc.,

844 A.2d at 133 (quoting Adam v. Adam, 624 A.2d 1093, 1096 (R.I. 1993)). Such delay under the laches doctrine must be unreasonable. See id. More specifically:

> "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities and other causes, but when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief." Id. at 134 (quoting Adam, 624 A.2d at 1096).

"When confronted with a defense of laches, a trial justice must apply a two-part test: 'First, there must be negligence on the part of the plaintiff that leads to a delay in the prosecution of the case. . . . Second, this delay must prejudice the defendant.'" Hazard v. E. Hills, Inc., 45 A.3d 1262, 1270 (R.I. 2012) (quoting Sch. Comm. of Cranston v. Bergin-Andrews, 984 A.2d 629, 644 (R.I. 2009)). In addition, although summary judgment is not precluded on the issue of laches, "[w]hether or not there has been unreasonable delay and whether prejudice to the adverse party has been established are both questions of fact, and a determination must be made in light of the circumstances of the particular case." Raso v. Wall, 884 A.2d 391, 396 & n.13 (R.I. 2005).

This Court need not address the factual circumstances surrounding WHI's laches argument because, as a matter of law, laches does not apply to instruments that are void ab initio. Williston has explained that

> "[w]hen a bargain is void, it is as if it never existed. It is a legal nullity. In particular, 'void ab initio' means a bargain is null from the beginning, as from the first moment when the purported contract was entered into. A bargain that is void ab initio is a nullity because it is based on a promise for breach of which law neither gives a remedy nor otherwise recognizes any duty of

> performance by the promisor." Williston on Contracts § 1:20 (4th ed. 2017) (footnotes omitted).

As a corollary, our Supreme Court has ruled that "when . . . [an] amendment being challenged is determined to be void ab initio, the one-year statute of limitations does not apply to any subsequent action taken by an interested party." Am. Condo. Ass'n, Inc., 844 A.2d at 133 (citing Theta Props. v. Ronci Realty Co., 814 A.2d 907, 913 (R.I. 2003) (stating that judgments "entered against a party who has not been properly served with process, or who has not made an appearance in the lawsuit, is void ab initio")).

Similarly, in the context of void judgments, our Supreme Court has stated that such judgments are "nothing more than a piece of paper which can be expunged from the record at any time." See Reynaud v. Koszela, 473 A.2d 281, 284-85 (R.I. 1984) (citing Lamarche v. Lamarche, 115 R.I. 472, 475, 348 A.2d 22, 23 (1975)). In accordance with that principle, the court in Reynaud stated that "[t]he successful claim of laches cannot give efficacy to a judgment that has no efficacy. The judgment is void at its inception. It matters not how, or in what way, or at what time the objection to its presence is brought to the court's attention." Id. at 285 (emphasis added).

Under identical reasoning, the Ninth Circuit has found that "the doctrine of estoppel by conduct or by laches, or even ratification, has no application to a contract or instrument which is void because it violates an express mandate of the law or the dictates of public policy." Hirschfeld v. McKinley, 78 F.2d 124, 133 (9th Cir. 1935) (citing Colby v. Title Ins. & Tr. Co., 117 P. 913, 918 (Cal. 1911)). Indeed, an instrument which was never valid "has no legal entity for any purpose, and neither action nor inaction of a party to it can validate it; and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity." Id.; see also Colby, 117 P. at 918.

In this instance, the Amended Declarations are challenged by the Unit Owners as—and have been ruled as being—void ab initio. As such, the instruments were void at inception. See Reynaud, 473 A.2d at 285. Just as the statute of limitations does not apply to declarations which have been ruled to be void ab initio—see Am. Condo. Ass'n, Inc., 844 A.2d at 133—the same holds true for delay that would ordinarily give rise to a successful invocation of laches. Cf. Reynaud, 473 A.2d at 285 (stating instruments that are void ab initio "can be expunged from the record at any time"). Accordingly, the Court concludes as a matter of law that the Unit Owners are not barred by laches from challenging the declarations as being void ab initio.

2

Waiver

In addition, WHI contends that the Unit Owners waived their ability to challenge the validity of the Amended Declarations either because the individual Unit Owners' deeds took subject to the Amended Declaration "as amended," and/or because individual Unit Owners approved of the subsequent amendments to the First Amended Declaration.

Waiver occurs when there has been a voluntary and intentional relinquishment of a known right, and can result from action or inaction. See Tidewater Realty, LLC v. State, Providence Plantations, 942 A.2d 986, 995 (R.I. 2008); Sturbridge Home Builders, Inc. v. Downing Seaport, Inc., 890 A.2d 58, 65 (R.I. 2005). The burden of proof lies on the party asserting a claim of waiver. See Sturbridge Home Builders, Inc., 890 A.2d at 65. That burden may be satisfied "'indirectly by facts and circumstances from which intention to waive may be clearly inferred[.]'" Id. (quoting 28 Am. Jur. 2d at § 225). "On summary judgment, the party asserting waiver . . . has the affirmative duty to produce evidence demonstrating the existence of an issue of fact concerning the voluntary relinquishment of a known right." Id. Waiver by

implication can be proven by submitting evidence of "'a clear, unequivocal, and decisive act of the party who is alleged to have committed waiver.'" Id. (quoting Ryder v. Bank of Hickory Hills, 585 N.E.2d 46, 49 (Ill. 1991)).

In this instance, WHI has not met its burden of establishing that the doctrine of waiver applies to the Unit Owners as a matter of law. Specifically, WHI has fallen short of satisfying its heavy factual burden on the issue of the intent of the Unit Owners as a whole to waive the collective right to vote on the Amended Declarations. The Unit Owners were collectively entitled to vote on the Amended Declarations, and such Amended Declarations changing the use of the units could not be passed unless unanimous consent was achieved under § 34-36.1-2.17(d). The Amended Declarations that have been declared as void ab initio were not approved unanimously by the Unit Owners. Accordingly, this Court concludes that because the amendments required unanimous consent, and because unanimous consent was not obtained, and without any evidence as to the Unit Owners' collective intent, WHI has not submitted evidence that the Unit Owners intentionally relinquished their right to collectively approve of the change in use put into the declaration in a manner that would entitle WHI to judgment as a matter of law.

3

Estoppel

Finally, WHI avers that the Unit Owners are precluded from challenging the validity of the amendments and amended declarations under the theory of estoppel. "'Under the doctrine of equitable estoppel, a party may be precluded from enforcing an otherwise legally enforceable right because of previous actions of that party.'" Sturbridge Home Builders, Inc., 890 A.2d at 66-67 (quoting Ret. Bd. of the Emps.' Ret. Sys. of R.I. v. DiPrete, 845 A.2d 270, 284 (R.I. 2004)). "'[T]he applicability of equitable estoppel is dependent upon '[t]he facts and

circumstances of each case.'" State v. Parrillo, 158 A.3d 283, 292 (R.I. 2017) (quoting Lerner v. Gill, 463 A.2d 1352, 1362 (R.I. 1983)). Our Supreme Court has characterized equitable estoppel as "'extraordinary' relief, which 'will not be applied unless the equities clearly [are] balanced in favor of the part[y] seeking relief.'" Sturbridge Home Builders, Inc., 890 A.2d at 67 (quoting Southex Exhibitions, Inc. v. R.I. Builders Ass'n, Inc., 279 F.3d 94, 104 (1st Cir. 2002)). Application of equitable estoppel therefore requires:

> "'an affirmative representation or equivalent conduct on the part of the person against whom the estoppel is claimed which is directed to another for the purpose of inducing the other to act or fail to act in reliance thereon; and . . . , that such representation or conduct in fact did induce the other to act or fail to act to his injury.'" Id. (quoting Southex Exhibitions, Inc., 279 F.3d at 104).

The party asserting the doctrine of equitable estoppel bears the burden of proving the necessary elements "'with the requisite degree of certainty; no element may be left to surmise, inference, or speculation.'" Parrillo, 158 A.3d at 292 (quoting Faella v. Chiodo, 111 A.3d 351, 357 (R.I. 2015)); see also 28 Am. Jur. 2d Estoppel and Waiver § 166 at 633 (2011).

Based on the principles outlined above, and in accordance with this Court's ruling on laches, the Court concludes that WHI has not satisfied its burden that the Unit Owners are estopped from challenging the Amended Declarations as being void ab initio as a matter of law. As stated previously, instruments that are void ab initio due to a lack of unanimous consent under the Condominium Act never had any legal effect. See Reynaud, 473 A.2d at 285. Therefore, the fact that certain individual Unit Owners expressed agreement with the Second, Third, and/or Fourth Amended Declarations is insignificant; the Unit Owners cannot be estopped from challenging the procedure undertaken in passing such amendments. In other words, the failure to obtain the collective agreement of the Unit Owners cannot somehow be estopped by pointing out that certain individuals may have approved of the changes in use. Moreover, any

individual representation—without the representations of all the Unit Owners—cannot be relied upon when unanimous consent is required. As such, as a matter of law, WHI has not invoked the doctrine of equitable estoppel and, as a matter of law, equitable estoppel does not apply.

IV

Conclusion

For the above-stated reasons, this Court in part grants the Unit Owners' motion for partial summary judgment and denies WHI's motion for partial summary judgment in full. This Court therefore declares that the Declarant's control expired under the terms of the First Amended Declaration on July 7, 2011, and also declares that the Second Amended Declaration is void ab initio because the Second Amended Declaration changed the use to which units were restricted without unanimous consent. For the same reasons, this Court declares that the Third and Fourth Amended Declarations are void ab initio. In addition, this Court denies WHI's motion for partial summary judgment as it pertains to laches, waiver, and estoppel, and grants the Unit Owners' cross-motion for partial summary judgment on laches and equitable estoppel. Counsel for the Unit Owners is directed to prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**W.H.I., Inc. v. James Courter, et al.**
CASE NO:	**WC-2015-0463**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**July 24, 2017**
JUSTICE/MAGISTRATE:	**Stern, J.**

ATTORNEYS:

For Plaintiff:	**John O. Mancini, Esq.**
For Defendant:	**Jeffrey H. Gladstone, Esq.; Cale P. Keable, Esq.; John Deacon, Esq.; Americo M. Scungio, Esq.; Catherine V. Eastwood, Esq.; Erich J. Hasselbacher, Esq.**
For Special Master:	**William M. Russo, Esq.** **John A. Dorsey, Esq.**