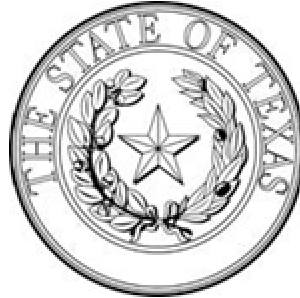
Motion for Rehearing Granted; Opinion filed August 29, 2023 Withdrawn; Judgment filed August 29, 2023 Vacated; and Opinion on Rehearing filed on February 29, 2024.



In The

Fourteenth Court of Appeals

NO. 14-22-00395-CV

DUN HUANG PLAZA ASSOCIATION, INC., Appellant

V.

SUN9028, INC., Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 2019-44332A

OPINION ON REHEARING

We issued our original opinion in this case on August 29, 2023. Appellant Dun Huang Plaza Association, Inc. filed a motion for rehearing. We grant its motion for rehearing, withdraw our previous opinion, vacate our previous judgment and issue this opinion and judgment to clarify our holding in this matter.

The issue in this appeal is whether failure to follow certain voting

procedures in the Uniform Condominium Act (the Act) results in a void action that can be challenged beyond the one-year limitations period set out in the Act.[1] We conclude it does not.

Appellant Dun Huang Plaza Association, Inc. amended its condominium declaration to increase the square footage attributed to the building owned by appellee SUN9028, Inc. (the building owner) in 2017. The association did not secure the building owner's approval to the change, nor did it receive the statutory unanimity requirement for altering the allocated interest of a condominium owner within the regime pursuant to the Act. After the building owner filed suit two years later, the trial court rendered a final judgment voiding the amendment ab initio.

On appeal, the association argues the building owner's declaratory-judgment claim was time barred and it is entitled to a take-nothing judgment on the building owner's claim as a matter of law. In addressing what appears to be an issue of first impression for this court, we conclude the amendment was voidable, not void, and the building owner's challenge to the validity of the amendment was barred by the statute of limitations. We therefore reverse the judgment of the trial court and render the judgment the trial court should have rendered, dismissing the building owner's declaratory-judgment claims.

I. BACKGROUND

Dun Huang Plaza is a shopping and dining destination in the Chinatown area of Houston, composed of nonresidential condominiums.[2] In 2014, the building

---

[1] Uniform Condominium Act, Tex. Prop. Code Ann. §§ 82.001–.164.

[2] Under the Act, "condominium" means "a form of real property with portions of the real property designated for separate ownership or occupancy, and the remainder of the real property designated for common ownership or occupancy solely by the owners of those portions." Tex. Prop. Code Ann. § 82.003(a)(8). "Real property is a condominium only if one or more of the common elements are directly owned in undivided interests by the unit owners." *Id*. "A condominium may be created under this chapter only by recording a declaration" that contains

owner purchased building B, a former grocery store, which conveyed an 11.8105% allocated interest in the common elements.[3] The other four buildings in Dun Huang Plaza have various owners and are divided up into smaller condominium units. The association governs and administers the condominium regime and its common elements.[4]

In 2017, the association adopted by resolution a fifth amendment to the condominium declaration,[5] increasing the square footage of building B and thereby increasing its allocated interest to 17.0567%. This change resulted in increased expenses to the building owner for its share of the common-area expenses.

The building owner became aware of the proposed amendment after many of the unit owners in the condominium regime had already approved by signature the proposed amendment. Although the building owner was aware of the amendment before its recordation in the county records in September 2017, the building owner explains that it was not aware of its legal right to challenge the amendment until much later. As a result, the building owner did not file suit against the association until June 2019 seeking declaratory relief to void the amendment ab initio. The building owner also sought damages for its allegations of fraudulent

---

certain information, including a description of the property, the number of units, and the name of the unit owners' association. Tex. Prop. Code Ann. § 82.051(a) (condominium created "only by recording a declaration executed in the same manner as a deed"); *see also* Tex. Prop. Code Ann. § 82.055 (listing declaration requirements).

[3] Under the Act, "allocated interest" means "the undivided interest in the common elements, the common expense liability, and votes in the association allocated to each unit." Tex. Prop. Code Ann. § 82.003(2).

[4] A condominium is managed by an association consisting of its unit owners, who vote according to the provisions of the declaration and the Act. Tex. Prop. Code Ann. §§ 82.057, .101.

[5] Under the Act, "declaration" means "an instrument, however denominated, that creates a condominium, and any amendment to that instrument." Tex. Prop. Code Ann. § 82.003(a)(11). The declaration for the condominium unit must contain any restrictions on use, occupancy, or alienation of the units. Tex. Prop. Code Ann. § 82.055(9).

misrepresentation and fraud by nondisclosure.

The association filed a traditional summary-judgment motion arguing that the building owner's one-year period to challenge the validity of the amendment had expired, precluding the building owner's declaratory-judgment claims. The association also sought summary judgment on the building owner's fraudulent misrepresentation and disclosure claims because it alleged the building owner's pleadings negated its fraud causes of action.

In response, the building owner filed a motion for partial summary judgment on the basis that it conclusively proved that the amendment was void ab initio. The building owner further argued that Property Code section 82.067(c) did not apply because the amendment was never adopted by the association as provided in the Act. In March 2020, the trial court granted the association's traditional motion for summary judgment and denied the building owner's partial motion for summary judgment.[6]

The building owner filed a motion for new trial arguing that the trial court erred in rendering summary judgment. The trial court agreed, granted the building owner's motion for new trial, set aside the summary judgment in favor of the association, granted the building owner's partial motion for summary judgment and declared the amendment void ab initio.

The association next filed a no-evidence motion for summary judgment on the building owner's fraud claims. The trial court granted the association's

[6] In an amended petition, the building owner added Siuhong Cheung, Huey Tat a/k/a Thomas Tat, and Qiao Li as additional defendants and asserted breach-of-fiduciary-duty claims against them. Because the association's summary-judgment motion did not address those claims, the summary-judgment order was not a final judgment. The trial court severed the building owner's claims against the association from its claims against individual defendants to make the interlocutory summary-judgment final.

no-evidence motion and signed a final judgment in May 2022.[7] Both parties filed notices of appeal; however, the building owner decided not to pursue its appeal and did not brief any appellate issues. We therefore dismiss the building owner's appeal for want of prosecution and consider only the appellate issue raised by the association. Tex. R. App. P. 38.8(a)(1).

II. ANALYSIS

On appeal, the association raises a single issue asserting the trial court erred in declaring the amendment void because the building owner's challenge was outside the statute of limitations. The building owner's summary-judgment motion was filed on the grounds that the association did not comply with the Act in adopting the amendment and specifically that the association did not comply with (1) the statutory requirement that changes to an owner's allocated interest require approval by all owners within the regime and (2) the statutory procedure for adopting an amendment to the declaration.

Because the exhibits to the building owner's partial summary-judgment motion are not in the record, we must conclude the exhibits support the building owner's claims that the association did not comply with the Act.[8] *See Enter.*

---

[7] The final judgment contains unequivocal finality language: "Accordingly, the Court ORDERS plaintiff to take nothing on its causes of action against defendant for (1) Fraudulent Misrepresentation and (2) Fraud by Nondisclosure. This [is] a Final Order disposing of all claims between all Parties and is appealable." *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192–93, 200 (Tex. 2001).

[8] The association included the following statement in its appellate brief: "On August 30, 2022, [the association] asked the clerk to supplement the Clerk's Record to include exhibits omitted in [the association]'s initial designation. [] The First Supplemental Clerk's record . . . failed to include most of the pleadings and exhibits designated by [the association] in its request to supplement. [The association] will nevertheless proceed on the existing record." Although the sole exhibit to the association's traditional motion for summary judgment—the copy of the amendment as filed in the Harris County real property records—was omitted, another copy is present in the record, attached as an exhibit to the building owner's response to the association's no-evidence motion for summary judgment.

Leasing Co. of Houston v. Barrios, 156 S.W.3d 547, 550 (Tex. 2004) ("If the pertinent summary judgment evidence considered by the trial court is not included in the appellate record, an appellate court must presume that the omitted evidence supports the trial court's judgment."). We now consider whether the limitations period in the Act barred the building owner's challenge notwithstanding the association's noncompliance with the Act.

A. Standard of review

We review a trial court's ruling on summary judgment de novo. *Traveler's Ins. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). In conducting that review, we examine the entire record in the light most favorable to the nonmovant, crediting evidence a reasonable juror could credit and disregarding contrary evidence unless a reasonable juror could not. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). Our review is limited to the issues presented to the trial court in the motion for summary judgment, as the judgment may be affirmed only on grounds presented in the motion. Tex. R. Civ. P. 166a(c); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 676 (Tex. 1979).

A court must grant a "traditional" motion for summary judgment "if [the summary judgment evidence] show[s] that . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out." Tex. R. Civ. P. 166a(c). "A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense." *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 593 (Tex. 2017) (quoting *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999)).

B. Statutory construction

Construction of statutory language is a question of law we review using the

de novo standard. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). When construing a statute, the court's primary objective is to give effect to legislative intent. *Colorado Cnty. v. Staff*, 510 S.W.3d 435, 444 (Tex. 2017). "The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). When interpreting the legislature's words, however, we must never "rewrite the statute under the guise of interpreting it," and it is not appropriate to rely on documents beyond the statutory text for assistance in determining legislative intent unless the statutory text is susceptible to more than one reasonable interpretation. *See In re Ford Motor Co.*, 442 S.W.3d 265, 284 (Tex. 2014); *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012).

C. Applicable law

The Act provides that at least 67% of the votes of units in the association for a condominium regime are required to amend the declaration. Tex. Prop. Code Ann. § 82.067(a). However, if the amendment is designed to "create or increase special declarant rights, increase the number of units, change the boundaries of a unit, alter or destroy a unit or limited common element, [or] change a unit's allocated interest," then the amendment must be approved by 100% of the votes in the association. Tex. Prop. Code Ann. § 82.067(e). The parties do not dispute that the amendment at issue changed the building owner's allocated interest, which should have required approval by 100% of the votes in the association. It is also undisputed that the amendment was not approved by 100% of the votes in the association.

The Act further provides that an "action to challenge the validity of an amendment adopted by the association under [section 82.067] must be brought

before the first anniversary of the date the amendment is recorded." Tex. Prop. Code Ann. § 82.067(c). Therefore, under the Act, the building owner had one year from September 17, 2017, when the association recorded the amendment, to bring its challenge. The building owner did not challenge the validity of the amendment until 2019. Unless the amendment was void, the building owner's challenge is time barred under the plain language of the Act. [9]

D. Statutory Analysis

The Act bars challenges to the *validity* of an amendment brought more than one year after recording the amendment. Since the statute does not define "validity," we look to the definition of the word "valid" to determine its ordinary meaning. *See* Code Construction Act, Tex. Gov't Code Ann. § 311.011 (words and phrases construed according to common usage). "Valid" is defined as "[l]egally

---

[9] The Act is the enactment of the Uniform Condominium Act (UCA) in Texas. "While the Texas act is a substantial adoption of the major provisions of the Uniform Act, it departs from the official text in such manner that the various instances of substitution, omission, and additional matter cannot be clearly indicated by the statutory text." Unif. Condo. Act eds. note (amended 1980), 7 pt. 2 U.L.A. 485 (2012). UCA section 2-117 provides: "No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded." Unif. Condo. Act § 2-117 (amended 1980), 7 pt. 2 U.L.A. 564 (2012). In comparison, the Act provides that an "action to challenge the validity of an amendment adopted by the association under [section 82.067] must be brought before the first anniversary of the date the amendment is recorded." Tex. Prop. Code Ann. § 82.067(c). Although the phrasing of section 82.067(c) is not identical to UCA section 2-117, the substance of these two provisions is the same.

Because the language of the Act resolves the legal question at issue in this appeal, we need not analyze precedent from other jurisdictions interpreting the UCA. However, we note that this legal issue has been reached in other states with differing conclusions and results. *Compare Bilanko v. Barclay Court Owners Ass'n*, 375 P.3d 591, 595 (Wash. 2016) ("Nothing in [the statute] suggests that the legislature intended to make amendments not passed with the required supermajority void and subject to challenge at any time. It strains credulity to believe that it would not make such a draconian consequence explicit in the statute.") *with America Condo. Ass'n v. IDC, Inc.*, 844 A.2d 117, 125, 128–29 (R.I. 2004) (concluding that amendments passed without required unanimity were void ab initio and statute of limitations was inapplicable because unanimity requirement protects unit owners from "amendments favoring the declarant made without their consent").

sufficient; binding." *See Valid*, *Black's Law Dictionary* (11th ed. 2019). This limitation period, then, is intended to prevent challenges to whether an amendment is legally sufficient or binding brought more than a year after recording the amendment.

The building owner challenges the validity or legal sufficiency of the amendment for not receiving unanimous approval from all the owners. The building owner argues that the amendment is void—not because the association did not have the power to amend the declaration—but because the association did not follow the procedures outlined in the Act.[10] The building owner's argument is premised on its assertion that the amendment "violates the public policy reflected in" the Act, because the amendment did not comply with the statutory requirements in the Act. However, the building owner cites no language in the Act reflecting that an amendment passed without observing the unanimity requirement is void. The building owner only cites cases which address actions taken by property owners' associations which are contrary to statute, but no authority involving a condominium regime or similar type of limitations period.[11] The Act

[10] The building owner argues that the limitations period applies only to amendments that were passed "pursuant to," or "in compliance with" the requirements of section 82.067. However, adopting this approach would require us to consider the merits of a challenge before determining whether the limitations bar applies—an approach not supported by the language of the statute.

[11] *See Chu v. Windermere Lakes Homeowners Ass'n, Inc.*, 652 S.W.3d 899, 902 (Tex. App.—Houston [14th Dist.] 2022, pet filed) (restrictive covenant limiting or prohibiting short-term rentals did not violate public policy); *see also Roddy v. Holly Lake Ranch Ass'n, Inc.*, 589 S.W.3d 336, 344 (Tex. App.—Tyler 2019, no pet.) (amendment exceeded statutory management authority granted to board of directors in accordance with Business Organizations Code); *Epernay Cmty. Ass'n, Inc. v. Shaar*, 349 S.W.3d 738, 743–44 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (two property owners' associations did not have authority or power to amend restrictive covenants of one of associations by contract with each other). Not only are property owners' associations governed by a different statutory scheme, but these cases are also distinguishable because they involved associations exercising powers they did not have or could not have, rather than following invalid procedures. *See generally Swain v. Wiley Coll.*, 74 S.W.3d 143, 148 (Tex. App.—Texarkana 2002, no pet.) ("Although unduly convened, the Wiley

does specifically provide in other sections that certain actions are void, but says nothing about voiding noncompliant amendments in section 82.067.[12] Given the long-reaching repercussions, the Act does not support the conclusion that failure to comply with statutory procedures and requirements renders an amendment void.

Voidable means that a contract is valid and effective unless and until the party entitled to avoid it takes affirmative steps to disaffirm it.[13,14] *See Contract*, *Black's Law Dictionary* (11th ed. 2019) (defining "voidable contract" as "[a] contract that can be affirmed or rejected at the option of one of the parties"); *Murchison v. White*, 54 Tex. 78, 81 (1880) ("[a] voidable act is one . . . which may be made finally valid . . . by subsequent ratification or confirmation"). The Act permits condominium associations to amend or change the allocated interest of condominium owners. The amendment could have been ratified or approved by the building owner, which supports the conclusion that the amendment was voidable,

---

College board was not illegally constituted, and the decision made at the May 13 meeting was not a nullity but only voidable at the instance of someone with standing to complain.").

[12] *E.g.*, Tex. Prop. Code Ann. §§ 82.057(f) ("Any purported conveyance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements without the unit to which that interest is allocated is void."), .104(e)(4) (any attempt to exercise certain rights is void), .110 ("A proxy is void if it is not dated or if it purports to be revocable without notice."). It does not, however, generally provide that actions taken not in compliance with the Act are void.

[13] "Condominium declarations are treated as contracts between the parties." *Schwartzott v. Etheridge Prop. Mgmt.*, 403 S.W.3d 488, 498 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *see also Bundren v. Holly Oaks Townhomes Ass'n, Inc.*, 347 S.W.3d 421, 434 (Tex. App.—Dallas 2011, pet. denied).

[14] The distinction is important because a void contract is a nullity from its inception, while a voidable contract continues in effect until repudiated. *In re Estate of Riefler*, 540 S.W.3d 626, 632 (Tex. App.—Amarillo 2017, no pet.); *see also Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542, 547 (Tex. 2016) (explaining that "a void act is one which is entirely null, not binding on either party, and not susceptible of ratification," and "a voidable act is one which is obligatory upon others until disaffirmed by the party with whom it originated and which may be subsequently ratified or confirmed") (internal quotation marks & citations omitted); *Murchison v. White*, 54 Tex. 78, 81 (1880) ("[a] void act is one entirely null within itself, not binding on either party, and which is not susceptible of ratification or confirmation").

not void.

The undisputed facts here involve a nonresidential condominium owner who was aware of the amendment before it was recorded. The building owner could have brought its challenge within the statutory limitations period but did not. Statutes of limitation are "the Legislature's procedural device for establishing a point of repose for past actions and for ensur[ing] that the search for truth is not impaired by stale evidence or the loss of evidence." *Godoy v. Wells Fargo Bank, N.A.*, 575 S.W.3d 531, 538 (Tex. 2019) (internal quotation marks omitted) (quoting *Segal v. Emmes Capital, L.L.C.*, 155 S.W.3d 267, 281 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd)). If the validity of an amendment to a condominium declaration could be challenged at any time for failure to follow statutory procedures and requirements, the statute of limitations in the Act would serve no purpose.[15] Therefore, we hold that the amendment was voidable, but not void ab initio, and conclude the trial court erred. We sustain appellant's sole issue on appeal.

---

[15] The Act provides additional relief to adversely affected unit owners. Tex. Prop. Code Ann. § 82.161 (a) ("If a declarant or any other person subject to this chapter violates this chapter, the declaration, or the bylaws, any person or class of persons adversely affected by the violation has a claim for appropriate relief."). Our sister court has concluded that the historical and statutory notes to section 82.161 indicate it is similar to section 4–117 of the UCA. *Bever Properties, LLC v. Jerry Huffman Custom Builder, L.L.C.*, No. 05-13-01519-CV, 2015 WL 4600347, at *14 (Tex. App.—Dallas July 31, 2015, no pet.). The comments to section 4–117 provide that the section creates a general cause of action or claim for relief for the failure of a declarant or any other person subject to the UCA's provisions to comply with the UCA. It indicates such persons include "unit owners, persons exercising a declarant's rights of appointment pursuant to Section 3–103(d), or the association itself." Unif. Condo. Act § 4–117, cmt. (amended 1980), 7 pt. 2 U.L.A. 673 (2012). A "claim for appropriate relief" could include "damages, injunctive relief, specific performance, rescission or reconveyance if appropriate under the law of the state, or any other remedy normally available under state law." *Id*. Section 82.161 of the Act, like section 4–117 of the UCA on which it is modeled, creates a general cause of action for a person who is adversely affected when a person subject to the Act violates the Act. Tex. Prop. Code Ann. § 82.161(a).

III. CONCLUSION

We reverse the portion of the trial court's judgment regarding the building owner's claims for declaratory relief and render judgment, in part, that the building owner take nothing by way of those claims. Tex. R. App. P. 43.2(c), 43.3. The remainder of the trial court's judgment has not been challenged and remains unchanged.

/s/ Charles A. Spain
Justice

Panel consists of Justices Wise, Bourliot, and Spain.