IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ASHLEY ADAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 4262-VCP
	)	
CALVARESE FARMS MAINTENANCE CORPORATION, INC.,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: May 19, 2010
Decided: September 17, 2010

Ms. Ashley Adams, Bear, Delaware; *Pro Se Plaintiff*

Cynthia G. Beam, Esquire, LAW OFFICE OF CYNTHIA G. BEAM, Newark, Delaware; *Attorney for Defendant*

PARSONS, Vice Chancellor.

This action involves a myriad of claims by *pro se* Plaintiff, Ashley Adams, against Defendant, Calvarese Farms Maintenance Corporation ("CFMC"), over actions taken by the CFMC board of directors (the "Board"), which Adams argues violate various provisions of CFMC's governing documents and Delaware law. The two most important of these claims focus on whether CFMC had authority to and properly did (1) amend its Landscape Plan and (2) levy annual assessments against the CFMC homeowners (the "Members").

This Opinion reflects my post-trial findings of facts and conclusions of law on Adams's claims against CFMC. As explained below, I find that CFMC had authority to seek revision of its Landscape Plan and properly did so, but that, in accordance with CFMC's Maintenance Declaration, it may not levy annual assessments against Members unless CFMC obtains the consent of a majority approval of the Members who are voting in person or by proxy at an annual meeting. The analysis section also includes my individual rulings on each of Adams's other claims, including her request for relief.

I. BACKGROUND

A. The Parties

Plaintiff, Adams, is a Delaware citizen who owns lot 16 in the Calvarese Farms subdivision in Bear, Delaware.[1] Defendant, CFMC, is a non-profit, incorporated civic organization which governs that subdivision.[2]

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1 JX 1.

2 PX 28, Certificate of Incorporation, §§ 1, 10. The membership of CFMC is made up of all persons currently owning lots in Calvarese Farms. *Id*. § 4.

B. The Genesis of CFMC and the Calvarese Farms Landscape Plan

In early 2003, owners of several parcels of land in Bear, Delaware sought to create a subdivision consisting of 145 residential dwellings and appurtenant common areas. Pursuant to Chapter 27 of the New Castle County Uniform Development Code (the "UDC"), the owners formed CFMC, a maintenance organization tasked with maintaining the subdivision's common areas prior to recording a declaration memorializing the subdivision plan.[3] In doing so, they adopted a certificate of incorporation (the "Certificate") and Bylaws for CFMC.[4] Immediately after that, pursuant to §§ 40.27.130-.140 of the UDC, the owners entered into a Maintenance Declaration (the "Declaration") on April 24, 2003, which officially designated the parcels as a subdivision to be known as "Calvarese Farms" and established a number of covenants running with the land.[5] Finally, the owners contracted with Gemcraft Homes ("Gemcraft"), a real estate developer, to develop the subdivision and control its common areas until such time as control could be transferred to the homeowners of the subdivision under § 40.27.400 of the UDC.

Also in 2003, the New Castle County Department of Land Use ("Land Use Department") approved the original landscape plan for Calvarese Farms prepared by

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3 *See* New Castle Cty. C. § 40.27.110-.150.

4 Compl. ¶¶ 8-10.

5 Declaration 1.

Delaware registered landscape architect, Ellen Mercurio (the "Landscape Plan").[6] That plan includes an "Open Space Management Program Matrix" (the "Matrix") that describes management requirements for the Calvarese Farm common areas, or Open Spaces (the "Open Spaces"), for each season of the year by vegetation type.[7] The Matrix designates and describes maintenance requirements for three types of vegetation areas pertinent to this action: Turf,[8] Reforestation,[9] and Meadow.[10] Specifically, the Matrix establishes the mowing and height requirements for grass in each of these areas as follows: Turf (no more than 4 to 6 inches), Reforestation (8 to 16 inches), and Meadow (8 to 24 inches).[11]

As residents moved into the subdivision from 2003 onward, they were required under the UDC to pay an initial fee to Gemcraft to be held in escrow to cover its costs associated with maintaining the Open Spaces.[12] During these initial years, Gemcraft

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6 PX 12; Trial Transcript ("T. Tr.") 10 (Adams), 31 (Mercurio). Where, as here, the identity of the witness is not clear from the text, it is indicated parenthetically.

7 JX 1; PX 12.

8 JX 1 ("Turf grass areas are maintained lawn located within open space . . . . At a minimum[,] the turf should be maintained at a height of no more than 4" – 6".").

9 *Id*. ("Reforestation Areas . . . shall be cut and maintained at a height of 8" – 16" until the canopy and leaf litter are sufficient to prohibit weed and invasive growth . . . .").

10 *Id*. ("Meadow areas shall be cut and maintained at a height of 8" – 24".").

11 PX 12.

12 *See* New Castle Cty. C. § 40.27.220; T. Tr. 519-20 (Adams).

maintained a list to track which homes had been sold and which remained unsold.[13] On or about June 26, 2007, control and ownership of CFMC, as well as the aforementioned escrow account, passed from the developer to the homeowners of Calvarese Farms pursuant to § 40.27.400 of the UDC.[14] After this time, members of Calvarese Farms governed the subdivision, including its Open Spaces.

C. The Revision of the Calvarese Farms Landscape Plan

Upon the transfer of control in June 2007, CFMC held its first election for directors and officers of CFMC (the "Governing Body").[15] On July 5, 2007, the newly-elected Governing Body held its first meeting and, among other things, discussed lawn maintenance issues and approved a motion to allow CFMC to cut the Meadow areas to Turf level.[16] Specifically, after discussing the height requirements for grass in the Meadow and Turf areas of the Open Spaces, "[a] motion was made and seconded to keep

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13 *Id*. 351 (Pinkett).

14 PX 23; T. Tr. 34 (Mercurio), 90-91, 98, 106-07 (Munson), 519, 553 (Adams).

15 JX 5-6. On June 26, 2007, the Members elected the following individuals to the Governing Body: Matthew Iannarella as President; Mark Bennett, Andrew Papanicolas, and Glenda Pinkett as Vice Presidents; Delores McLamb as Secretary; Chuks Umoete as Treasurer; and Denise Berry, Joanne Irby, Terese Johnson, Tim Munson, Andrew Papanicolas, and Prasadaraju Sagiraju as the Board of Directors. JX 4; T. Tr. 93, 182-83 (Munson), 344 (Pinkett), 395-99 (McLamb). In Part II.B.4 *infra*, I address Adams's arguments regarding the flawed composition of the Governing Body in 2007.

16 JX 4; T. Tr. 105-08, 172-73 (Munson).

At the July 5, 2007 meeting, the Governing Body also discussed providing Members with a "Community Directory" listing the names and addresses of all homeowners in Calvarese Farms. PX 15 ("Approval will be requested from the homeowners before this idea goes forward."), 20; JX 20.

the grass cut at 4½ inches tall throughout the year," and the Governing Body unanimously approved that motion.[17]

At the next meeting of the Governing Body on August 9, 2007, the question was raised again whether CFMC could cut the Meadow grass to a lower level because, among other reasons, certain residents felt that Calvarese Farms "look[ed] a mess" and that "there may be a danger in children getting bit by a snake" if the grass remained at Meadow length.[18] The minutes indicate that, after then-president Iannarella reminded Governing Body members of the Landscape Plan's requirements for maintaining Meadow grass at between 8 and 24 inches, Representative Melanie Marshall agreed to contact New Castle County on behalf of the community about having the land re-designated.[19]

On August 23, 2007, CFMC received a Notice of Violation from the New Castle County Office of Code Enforcement ("Code Enforcement Office") informing them that a certain Open Space area that was supposed to be maintained as Meadow grass was being

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17 JX 20; PX 15, 20; T. Tr. 348-50 (Pinkett).

18 PX 13. In addition to safety concerns, the Governing Body and the fourteen homeowners in attendance at the August 9 meeting discussed concerns about maintenance costs and aesthetic considerations related to the height of the Meadow grass. *Id*.; T. Tr. 166, 180, 187 (Munson), 459-60, 467-68 (McLamb), 591 (Aidoo). Unless otherwise indicated, any references herein to "Aidoo" are to Yaw Aidoo; his wife, Ninette Aidoo, did not testify at trial.

19 PX 13. An email from Iannarella to the CFMC Board members indicated Marshall's status as a lawyer and State Representative, 5th District. *Id*. The record does not indicate, however, any other involvement of Marshall in the actions taken to have the Landscape Plan revised.

cut below eight inches.[20] The Code Enforcement Office directed CFMC to advise its grass cutting service to follow the recorded Landscape Plan as to the length at which to cut Meadow and Turf grass.[21] That same day, Iannarella received a call from Frank Walsh, a property maintenance and housing inspector from the Code Enforcement Office, who explained the nature of the violation and that it resulted from the Office's receipt of an anonymous complaint.[22] After speaking with Walsh, Iannarella called the landscaper and informed him of the need to maintain the Meadow areas at 8 to 24 inches.[23] Iannarella also spoke with New Castle County Councilman George Smile and advised him of CFMC's request through Marshall to "see if N.C.C. Land use [sic] can change the meadow grass."[24]

At its next meeting on September 6, 2007, the Governing Body discussed the Notice of Violation and the steps required to comply with the Landscape Plan.[25] In addition, the Governing Body again determined to seek revision of the Landscape Plan to allow CFMC the discretion to maintain the Meadow areas at Turf level. To this end, the

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20 PX 25.

21 PX 26.

22 JX 3; PX 25.

23 JX 3.

24 *Id*.

25 JX 21. At this same meeting, the Governing Body again discussed a possible "Directory of Homeowners." T. Tr. 350-53, 358-60 (Pinkett), 401-03 (McLamb).

Governing Body delegated to Munson the responsibility to seek such a revision on behalf of CFMC.[26]

After receiving this authorization, Munson spoke with a representative at New Castle County who directed him to Mercurio. Mercurio informed Munson that he would need to talk with the Land Use Department.[27] After being contacted by Munson, the Land Use Department discussed CFMC's proposal with Mercurio and agreed to approve a revision to the Landscape Plan, noting that there was "no legal or environmental reason not [to] afford [CFMC] the requested flexibility."[28] As a result of these discussions, on

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[26] JX 21. T. Tr. 105-08 (Munson), 346-47, 350-53 (Pinkett), 401, 424-25, 457 (McLamb).

[27] PX 11 ("I [Munson] spoke with Ellen Mercuro [sic] . . . and she has agreed to change the plans at NCC, at no cost, to allow us to have the meadow grass mowed at whatever length we desired except in wetland areas."); T. Tr. 35 (Mercurio) ("A member of the community association contacted me . . . [a]nd they expressed concern that they wanted to reduce the amount of meadow and have more lawn. And I explained to them that the recorded plan is the recorded plan, and it has to stay that way unless it's revised and New Castle County approves the revision."), 105-06, 115, 118-19 (Munson) ("I first had a conversation with the county because we did not know whom to contact in reference to getting the landscaping . . . changed. Someone at the county referred me to Miss Mercurio. . . . I had a conversation with her about the land, and she provided me an okay and said she would talk with the county and give them the okay to change the height that we can cut the grass.").

[28] PX 11, 12; JX 10-11, 13-14; T. Tr. 76 (Mercurio) ("Q: So then there was no reason, in your mind, to not approve the request of the community to cut the meadow grass areas down to turf level? A: If they want to cut grass, they can cut grass."), 218-19 (Faux) ("And since there's no legal reason why not, and no environmental reason why not, we said, 'All right. Well, we can change the plan if that's what they want.'").

October 4, 2007, Munson, Mercurio, and Steven Faux[29] met to sign the revised Landscape Plan.[30] The revision added the following two notes under the maintenance descriptions for the Meadow and Reforestation areas, respectively:

- "However, at the discretion of the maintenance organization, certain areas designated as meadow may be cut as lawn at 4" – 6" cutting ht."
- "Note: All reforestation must remain as meadow and not be cut short on a regular basis as lawn."[31]

Thus, the revision did not "mandate the additional cutting of meadow areas," but rather gave CFMC "the discretion to do so if they desire."[32]

In a letter dated June 5, 2008, Adams asked the Land Use Department to reconsider its approval of the amendment to the Landscape Plan.[33] Faux's letter response summarized the Land Use Department's reasons for approving the revision as follows:

> The County Code does not dictate which portions of open space must be turf or meadow nor does it address grass heights for open spaces. The Code requires that a registered Delaware Landscape Architect design the Landscape Plan and

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29 Faux is a Planner III at the Land Use Department. Primarily, he "administer[s] the Unified Development Code." T. Tr. 214 (Faux).

30 JX 1; T. Tr. 40, 42 (Mercurio), 118-20 (Munson), 225-26 (Faux).

31 JX 1; T. Tr. 43 (Mercurio), 142 (Munson). The note amending the Landscape Plan was prepared by Mercurio. T. Tr. 38, 40 (Mercurio).

32 PX 12; T. Tr. 67 (Mercurio), 255-56 (Faux) ("You know, honestly, the county doesn't care whether they're cut short or not cut short. If the maintenance corporation wants to cut them short, we have no reason why we should say no.").

33 PX 12.

> propose a logical open space management program. The Landscape Architect for this project has explained that the primary reason she designated certain areas to be cut short as turf grass and others to be taller grass meadows was related to generally minimizing the maintenance burden for areas that would not likely be used for active recreation. She did not differentiate the areas for any scientific, environmental, or legal reason. . . . The [Land Use] Department saw no legal or environmental reason not for [sic] afford the requested flexibility and agreed to approve a revision to the Landscape Plan. . . . The change to the plan . . . did not mandate the additional cutting of meadow areas but rather simply gives [CFMC] the discretion to do so if they desire . . . .[34]

Faux's letter response notwithstanding, the Land Use Department received several complaints from Adams in 2008 and 2009 about "meadow grass within the open space being cut more often than what the plan requires."[35] After inspecting the property, Walsh issued a violation notice to CFMC on May 20, 2008 informing CFMC of three locations where it was not following the Landscape Plan.[36] But, after McLamb, who was the CFMC secretary in 2007, called Walsh and notified him of the October 4, 2007 revision of the Plan, the Code Enforcement Office promptly closed the matter.[37] On November 16, 2009, Walsh wrote a letter addressed to all Calvarese Farm residents notifying them that, after investigating multiple complaints regarding maintenance of the

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34 *Id*.

35 PX 24; T. Tr. 281-82, 286-87 (Walsh).

36 JX 7.

37 JX 10, 15; T. Tr. 283, 286 (Walsh). In July 2009, the Code Enforcement Office investigated another complaint from Adams and advised her by letter dated July 30, 2009, that they found no violation of the revised Landscape Plan. JX 13.

Open Spaces at Calvarese Farms, the Land Use Department determined that the "open space grounds are being maintained according to the updated record plan and that there is no violation of county code."[38]

D. Procedural History

Adams filed her complaint against CFMC on December 31, 2008 (the "Complaint"). CFMC later moved for summary judgment. On January 22, 2010, I granted that motion in part and denied it in part. Beginning on January 25, 2010, I conducted a three-day trial on all of Adams's remaining claims against CFMC. After the parties completed their post-trial briefing, I heard their final arguments on May 19, 2010.

E. The Governing Documents

Many of the issues raised by Adams require interpretation of CFMC's Bylaws,[39] Certificate of Incorporation, and Maintenance Declaration (the "Declaration")[40] (collectively, the "Governing Documents"). I address relevant provisions of each of these documents below.

1. Maintenance Declaration

On April 24, 2003, the then-owners of the parcels of land being developed into Calvarese Farms (together, the "Declarant") entered into the Declaration, which details certain covenants and agreements running with the land and is "binding upon the

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38 JX 14.

39 PX 8.

40 PX 9.

Declarant, its successors and assigns, for the benefit of all owners of lots" in Calvarese Farms.[41] The Declaration was recorded on April 25, 2003.[42]

The Declaration requires that a maintenance corporation (*i.e.*, CFMC) be organized and obligates all owners to become Members of CFMC. It mandates that Members "be bound by all of its rules and regulations and . . . [be] subject to all of the duties and obligations imposed by membership" in CFMC.[43] Through the Declaration, each Member covenants to pay necessary annual assessments.[44] Specifically, the Declaration provides that

> [a]n **annual assessment, if necessary, shall be set by a majority vote of the members who are voting in person or by proxy at the annual meeting**, and any special assessments shall be set by a majority vote of the members who are voting in person or by proxy at the annual meeting or at a meeting duly called for this purpose.[45]

The Declaration provides that each Member shall have "free and uninterrupted use of all common areas" and prescribes the consequences of failing to pay one's assessments.[46]

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41 Declaration. Declarant is defined as "Elmer D. Saienni and Salvatore J. Saienni t/a Saienni Enterprises, a Delaware general partnership and Parkway Gravel, Inc., a Delaware corporation, their successors and assigns." *Id*. § 5(e).

42 *Id*.

43 *Id*. §§ 1(a), 2.

44 *Id*. § 1(b).

45 *Id*. § 1(c) (emphasis added).

46 *Id*. § 4.

Any modification of the covenants in the Declaration requires the consent of 51% of the lot owners and the New Castle County Council.[47]

2. Certificate of Incorporation

The Certificate for CFMC was filed on February 20, 2003. It requires, among other things, that "[t]he business and affairs of [CFMC]" be carried on by a Board of Directors consisting of no less than two and no more than six persons.[48] As defined, the "nature of the business of" CFMC

> is to provide for snow removal, maintenance, repair, replacement, and regulation of roads, streets, drives and entrance ways . . . to maintain, repair and replace paved common area walkways; to obtain and maintain liability and other insurance; to promulgate and enforce rules and regulations; to maintain and repair the open spaces, pumping station areas, storm water management areas and systems, sanitary sewer systems and utility easements; to accept responsibility . . . to enforce existing restrictive covenants; to accept and hold title to any private roads, streets, open spaces, storm water management areas and other common facilities; and to perform all other activities allowed by law as provided for [CFMC] under Maintenance Declaration.[49]

The Certificate also includes an exculpation clause for directors[50] and a provision detailing the requirements for amending the Certificate.[51]

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47 *Id*. § 6.

48 Certificate § 6. The Certificate states that "Directors shall be elected as provided in the By-Laws," and that "[a]ny vacancy occurring in the Board . . . may be filled by a majority of the remaining members of the Board until the next annual meeting of the members." *Id*.

49 *Id*. § 3.

50 *Id*. § 7.

Finally, as to annual assessments, the Certificate provides that "[a]t the regular annual meeting . . . the Directors shall levy an assessment for the purposes of [CFMC] upon property owners . . . ."[52] The Certificate also notes that such assessments shall be apportioned "pursuant to a method to be established in the By-Laws" and states that the Board may "elect to levy special assessments pursuant to the relevant provisions in the By-Laws."[53] All assessments must be made for a proper corporate purpose as defined in the Certificate.[54]

3. Bylaws

Under the Bylaws, the Board has the same "general and specific powers" as are conferred on corporations by the Delaware General Corporation Law ("DGCL").[55] Additionally, the Bylaws authorize the Board, upon written unanimous resolution, to "promulgate and enforce such rules and regulations as the Board of Directors, in it [sic] sole discretion, deem necessary."[56]

Importantly, the Bylaws establish a procedure for setting and collecting annual and special assessments. Specifically, Section 19 provides that

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51 *Id*. § 8. Any amendment to the Certificate requires the approval of at least two-thirds of all members of the Corporation.

52 *Id*. § 4.

53 *Id*.

54 *Id*. §§ 3-4.

55 Bylaws § 5.

56 *Id*. § 25.

> [a]ll snow removal, maintenance, repair, replacement, insurance, utility, and other property assessments, **if any, shall be established annually by majority vote of the Directors. . . .** In addition to annual assessments . . . the Board of Directors may levy . . . a special assessment, applicable to that year only, for the purpose of defraying, in whole or in part, the cost of any construction or reconstruction, or unexpected repair or replacement of a capital improvement upon the Calvarese Farms subdivision, or other lawful purposes, provided that any such special assessment . . . shall receive the assent of two-thirds (2/3) of all of the votes eligible to be case [sic] by all of the . . . members.[57]

The Bylaws also detail the requirements for Member and director meetings,[58] the duties of officers of the corporation,[59] voting rights of Members,[60] and the rights of Members to obtain access to CFMC's books and records.[61] Any amendment to the Bylaws requires the approval of at least two-thirds of the Members.[62]

F. Parties' Contentions

Though her post-trial arguments address numerous claims in a somewhat disjointed fashion, Adams essentially asserts that CFMC did not properly revise the Landscape Plan because (1) the Governing Documents do not authorize such a revision, (2) the general Membership of CFMC did not approve it, (3) the Board was not properly

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57 *Id*. § 19 (emphasis added).

58 *Id*. §§ 3, 6.

59 *Id*. §§ 8-14.

60 *Id*. § 17.

61 *Id*. § 21.

62 *Id*. § 23; PX 14.

constituted in 2007 when it voted to seek revision of the Plan, (4) the Board sought to revise the Plan for self-serving reasons and acted fraudulently and in bad faith, and (5) the Land Use Department did not have authority to approve an amendment to the Plan. Additionally, Adams challenges the CFMC Board's authority to levy an annual assessment against Members without a Member vote. Adams also asserts that CFMC is unlawfully mowing the Reforestation areas in violation of the revised (and original) Landscape Plan, did not have authority to contract with Emory Hill Real Estate Services ("Emory Hill") for the provision of management services, and unlawfully disseminated her personal and business information in the form of a Neighborhood Directory. In addition, Adams appears to claim that Board members breached their fiduciary duties of care and loyalty in connection with a number of those alleged wrongs.[63]

CFMC first points out that I already dealt with many of Adams's post-trial arguments when I ruled on CFMC's motion for partial summary judgment.[64] CFMC also argues that the Board acted in good faith in accordance with its Governing Documents and the DGCL. Additionally, though it admits that the Board was improperly constituted in 2007, CFMC claims that a subsequent, properly-constituted Board ratified the decisions of its predecessor, including the decision to revise the Landscape Plan. CFMC further asserts that Adams cannot be granted any of the relief she seeks because she failed

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63 Although Adams included numerous other claims in her Complaint, she failed to pursue them in her Pre-Trial Order or post-trial arguments and, as such, those claims are waived. *See infra* Part II.D.7. I do address in Part II.E below, however, all of Adams's arguments regarding the relief she seeks.

64 *See* Docket Item ("D.I.") 55, 65.

to meet her burden of proof regarding the alleged Neighborhood Directory, breach of fiduciary duties by the Board, and mowing of the Reforestation areas. Finally, CFMC contends that any other issues raised by Adams in her Complaint must be dismissed because she failed to pursue those issues after trial.

G. A Note on Homeowners Associations

Preliminarily, I note that this litigation illustrates all too well some of the procedural and legal pitfalls that the generally volunteer leadership of homeowners associations can experience if they fail to pay attention to their governing documents. Real estate developers establish homeowners associations to control the appearance of a residential subdivision and manage its common area assets during the marketing, managing, and selling of homes in the subdivision. Initially, the developer effectively governs the maintenance organization or entity. The governing documents also provide a mechanism for the developer eventually to disengage itself from the financial and legal responsibility of the maintenance organization, typically by transferring ownership of the entity to the homeowners after selling off a predetermined number of lots.

After control of a maintenance organization is transferred to the homeowners in the form of the homeowner's association, the association's primary purpose becomes to maintain community facilities, enforce restrictive covenants, and provide services for the benefit of the residents. Many associations, such as CFMC, are incorporated and controlled by boards made up of community homeowners. In that regard, they are

subject to a well-defined body of corporate law, like the DGCL.[65] But, the members of the homeowners association who take governance positions on the board frequently have little to no experience with corporations or the laws that govern them and, as a result, may end up taking actions that conflict with the association's governing documents or the law. The problems of running a homeowners association often are compounded by the difficulty of finding individuals willing to serve on the board in the first place. Similar problems arise when only a relatively small percentage of the homeowners in a subdivision attend important meetings of their homeowners association, like the annual meeting.

As illustrated below, Calvarese Farms experienced at least some of these difficulties. Indeed, those difficulties were exacerbated by an internal inconsistency among the Governing Documents.

II. ANALYSIS

A. Standard of Review

As Plaintiff, Adams bears the burden of proof in this case and, to prevail on her claims against CFMC, must show by a preponderance of the evidence that she is entitled to relief on each issue.[66] To address the numerous issues raised by Adams, I will proceed

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[65] For instance, in this case, the Bylaws dictate that the CFMC Board "shall have such general and specific powers as are conferred upon corporations by the [DGCL]." Bylaws § 5. The DGCL is codified at 8 *Del. C.* §§ 101 to 398.

[66] *Estate of Osborn v. Kemp*, 2009 WL 2586783, at *4 (Del. Ch. Aug. 20, 2009) ("Typically, in a post-trial opinion, the court evaluates the parties' claims using a preponderance of the evidence standard."), *aff'd*, 991 A.2d 1153 (Del. 2010); *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *13 (Del. Ch. Feb. 18, 2010)

as follows. First, I examine whether the Landscape Plan was properly amended. Second, I determine whether CFMC may levy an annual assessment without a Member vote. Third, I address a number of Adams's additional complaints, including whether CFMC unlawfully mowed Reforestation areas, whether CFMC had authority to contract with Emory Hill for management services, whether the CFMC Board unlawfully created and disseminated a neighborhood directory, whether the CFMC Board breached their fiduciary duties of care and loyalty, and whether certain witness testimony should be excluded under Delaware Rule of Evidence 403. I then turn to CFMC's request that I admonish Adams for spurious accusations and name calling. Finally, I discuss Adams's claims for declaratory, injunctive, and other forms of relief.

B. Was the Landscape Plan Properly Amended?

The most important issue in this action, at least in terms of the amount of time the parties devoted to it, is whether the Landscape Plan was properly amended. In this regard, Adams argues that the Plan was not properly amended because the Governing Documents do not allow amendment of the Plan, the Members did not vote to approve the amendment, the Board was improperly constituted and acted in bad faith when it voted to amend the Plan, and the Land Use Department did not have authority to approve such an amendment. CFMC counters that the Board and the Land Use Department had

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("Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not.") (quoting *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002)).

the authority, respectively, to seek and approve such a revision and that no members of the Board acted fraudulently or in bad faith, but rather sought to further the interests of Calvarese Farms and its Members.

Addressing each of these arguments in turn below, I find that (1) the Governing Documents authorized the Board to seek a revision to the Landscape Plan without a vote of the Members, (2) the CFMC Board, though improperly constituted at the time, did not act fraudulently or in bad faith when it sought revision of the Plan, and (3) the Land Use Department had authority to and did properly grant CFMC's request to revise the Landscape Plan. As such, I hold that the Landscape Plan was properly amended and the Board may, in accordance with the revised Landscape Plan, exercise its discretion in determining the length at which to maintain grass in the Meadow areas.[67]

1. Do the Governing Documents grant CFMC authority to revise the Plan?

In my ruling on CFMC's motion for summary judgment, I held that the Governing Documents do authorize the CFMC Board to seek revision to the Landscape Plan.[68] Specifically, I held that:

> In accordance with the [Governing Documents] . . . a properly constituted board of directors of CFMC (the "Board") would have whatever power may be necessary to conduct, promote, or attain the business or purposes of CFMC as set out in its certificate of incorporation, including, among other things, the power to (i) *maintain and repair open spaces*, [and] (ii)

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[67] In accordance with the revised Landscape Plan, such discretion does not extend to the mowing of the Reforestation areas, which must be maintained at 8 to 16 inches as required by the Plan. JX 1; *see infra* Part II.D.1.

[68] D.I. 65.

> *seek approval from the New Castle County Department of Land Use for an amendment to the CFMC landscape plan . . . .*

Because this represents the law of the case, there is no need to address further Adams's post-trial arguments on this point.

2. Was a Member vote necessary to authorize revision?

Additionally, in that same summary judgment ruling, I held that "[i]n accordance with the Governing Documents, the Board may make decisions that fall within their power to manage the business and affairs of CFMC *without seeking CFMC member approval*."[69] The decision to seek a revision to the Landscape Plan was within the Board's power. Thus, the Board did not need a Member vote to authorize the revision.

3. Did the CFMC Board vote to seek revision of the Plan?

Though it is not entirely clear from her post-trial briefing, Adams appears to argue that the Landscape Plan was not properly amended because the Board never formally voted to seek that revision. While the evidence on this issue may be somewhat sparse, it supports the opposite conclusion. Indeed, it appears that at one of the first three Board meetings held in the summer of 2007, members of the Board considered a resolution to revise the Landscape Plan to maintain the Open Spaces at 4½ inches and unanimously approved that motion.[70] Therefore, I find that the Board did approve the decision to seek revision of the Landscape Plan.

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69 *Id*. (emphasis added).

70 JX 20 (July 5, 2007 meeting minutes with notes written by Pinkett with "passed unanimously" written next to "properly moved & seconded to keep meadow grass

4. Was the CFMC Board properly constituted when it sought to revise the Plan?

Adams claims that because the CFMC Board was improperly constituted when it voted to seek revision of the Landscape Plan, its decision and all related actions taken after that decision, are void *ab initio*. CFMC admits that the Board was improperly constituted when it sought to revise the Landscape Plan in 2007.[71] Nevertheless, it argues that the 2007 Board did not act in bad faith and that, in 2008, a properly constituted Board examined and ratified the decisions made by the Board in 2007, particularly the decision to amend the Landscape Plan. CFMC contends that the 2008 Board's ratification cured any deficiency of the prior Board's actions.[72]

I agree with CFMC. While the Board was improperly constituted when it decided to revise the Landscape Plan in 2007, its decision was merely voidable because it was within the authority of the Board and the Board did not act fraudulently or in bad faith when it voted.

Delaware law distinguishes between Board actions that are void as opposed to those that are only voidable.

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at 4-1/2 inches – open space."); *see also* T. Tr. 345-48 (Pinkett), 591 (Aidoo) ("At a homeowners' meeting, we decided as homeowners that we wanted to have the neighborhood cut even.").

[71] DAB 13 ("Defendant concedes that the initial Board of Directors did not properly appoint its president and vice president from the sitting board members as required under the controlling documents . . . .").

[72] *Id*. at 13-14.

> The essential distinction between voidable and void acts is that the former are those which may be found to have been performed in the interest of the corporation but beyond the authority of management, as distinguished from acts which are *ultra vires*, fraudulent or gifts or waste of corporate assets. The practical distinction . . . is that voidable acts are susceptible to cure by shareholder approval . . . while void acts are not.[73]

Thus, void acts—including acts that are *ultra vires*, fraudulent, or corporate waste—are "illegal acts or acts beyond the authority of the corporation" and are not ratifiable "because the corporation cannot, in any case, lawfully accomplish them."[74] Voidable acts, on the other hand, may be ratified because "the corporation can lawfully accomplish them if it does so in the appropriate manner."[75]

The Bylaws and Certificate of Incorporation require that the Board be made up of no less than two and no more than six Directors.[76] Additionally, the Bylaws provide that both the president and vice president must "be chosen from among the Directors."[77] In 2007, the Governing Body consisted of a president, three vice presidents, a secretary, a treasurer, and six Board members, with one of the vice presidents also serving on the

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73 *Michelson v. Duncan*, 407 A.2d 211, 218-19 (Del. 1979).

74 *Nevins v. Bryan*, 885 A.2d 233, 245 (Del. Ch. 2005) (citing *Harbor Fin. P'rs v. Huizenga*, 751 A.2d 879, 896 (Del. Ch. 1999)).

75 *Id*.

76 Bylaws § 4.

77 *Id*. § 8. Any vacancies on the Board or of any Officer must be filled by the majority vote of the remaining Directors. *Id*. §§ 4, 8. Additionally, the Bylaws allow for multiple vice presidents, a secretary, treasurer, or any other such officer chosen by the Board. *Id*. § 8.

Board.[78] While the Board's size (six directors) complied with the Bylaws, the President was not a member of that six-person Board.[79] Thus, the Board was improperly constituted for failure to select the president from among the directors.[80]

Adams correctly asserts that an improperly constituted Board calls into question the validity of actions taken by that Board. Nevertheless, nothing in Delaware law or the Governing Documents prohibited the Board from seeking a revision to the Landscape Plan.[81] Nothing in the record suggests that the Board willfully violated the Governing Documents by not selecting the president from among the Board, or that it acted fraudulently or in bad faith.[82] Thus, the 2007 Board's decision was merely voidable, not void.

As a result, I must decide whether the 2007 Board's decision subsequently has been validated. The decision could have been made lawful, for example, through ratification by a majority vote of shareholders.[83] There is some evidence that Members

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78 JX 4.

79 *Id*.

80 Adams did not present any evidence that the 2007 Board improperly allowed either its secretary or treasurer to vote on decisions regarding CFMC. A question also could be raised about the propriety of having three vice presidents, only one of whom was a Board member. I need not reach that issue, however.

81 *See supra* Part II.B.1.

82 Indeed, the evidence indicates that the decision of the 2007 Governing Body to seek and obtain revision of the Landscape Plan was unanimous. *See supra* note 70; T. Tr. 121 (Munson) ("this was a collective decision by the Board").

83 *Michelson v. Duncan*, 407 A.2d 211, 218-19 (Del. 1979).

of CFMC approved the 2007 Board's decision to revise the Landscape Plan at a meeting in late 2007.[84] This purported Member vote, however, was exceedingly informal and the product of a debate among Board members that was opened up for discussion with the few non-Board members present. Regardless of whether this vote is legally sufficient to constitute ratification under the Governing Documents and Delaware law, I find that CFMC ultimately cured the problem with the 2007 Board's decision. As previously discussed, the Board itself had authority to seek a revision of the Landscape Plan without Member approval.[85] Evidence adduced at trial established that since 2008, the CFMC Board has been properly constituted in accordance with the Governing Documents.[86] The record also shows that a properly constituted Board in 2008 revisited all of the issues addressed by its predecessor Board to ensure that in implementing the decisions of the prior Board, the 2008 Board was in compliance with the Governing Documents. In so doing, the 2008 Board effectively ratified the decision to seek revision of the Landscape Plan by not making any change to, or seeking to overturn, that decision.[87] Any

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84 T. Tr. 105 (Munson), 592-93, 598-99 (Aidoo).

85 *See supra* Part II.B.2.

86 JX 25; T. Tr. 408-10 (McLamb) ("Based on the bylaws, when we have an election, the community elects the board of directors. Once the board of directors have been elected, we call another meeting of the board. The board of directors from there pick the president, the vice president, secretary and treasurer from the six people, and that's the way it was conducted in 2008 forward.").

87 T. Tr. 423 (McLamb) ("Q: When the board of directors reconvened in 2008, were you aware, as president of the board of directors, that the landscape plan management matrix had been modified with the New Castle County? A. I was aware of that, yes. Q. So you were aware and the other board members were

deficiency with the 2007 Board's actions, therefore, was cured as a result of the properly constituted 2008 Board's review and tacit approval of the decision to seek the revision.[88]

Thus, because the 2008 Board revisited, agreed with, and essentially ratified the decision of its predecessor, I uphold the validity of the Board's decision to revise the Landscape Plan even though the Board was improperly constituted when it originally made that decision.

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aware that the modification allowed the mowing of the meadow grass down to the turf level; correct? A. Yes. Q. And did anyone from — on the board of — directors have any concerns regarding that revision? A. Well, when the new board came in, we — what we did, we revisited everything that had happened the prior year to insure that we were in compliance with all the deed restrictions and what the bylaws stated.").

[88] This is not a case where Board ratification of a previous Board decision is invalid because the time during which the Board was "free" to change its original decision had passed. *See Smith v. Van Gorkom*, 488 A.2d 858, 886-89 (Del. 1985); *see also Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 121 n.16 (Del. 2006) (noting that a board's review and re-approval of a stock purchase transaction was insufficient to ratify an earlier uninformed board approval because the purported ratification occurred after the transaction's closing date). In *Van Gorkom*, for example, the Delaware Supreme Court indicated that, under appropriate circumstances, an invalid business decision made by a board may be timely cured by the board without shareholder approval. *See Van Gorkom*, 488 A.2d at 885-86 (citing *Muschel v. Western Union Corp.*, 310 A.2d 904 (Del. 1973)). In that case, however, the Court found that the board's January 26, 1981 approval of the Pritzker merger was insufficient to ratify the board's uninformed approval of the merger at meetings on September 20, 1980 and October 8, 1980, respectively, because, among other things, by January 1981 the board's freedom of action in terms of approving the merger had become more limited than it was when the original decision was made. *See id*. at 886-88. Here, the decision to revise the Landscape Plan, unlike a decision to approve a merger or stock purchase transaction, can be made on an ongoing basis and can be reviewed and revised by each subsequent CFMC Board. *See* T. Tr. 35 (Mercurio), 220-22 (Faux), 542 (Adams).

5. Did CFMC Board members act in bad faith or self-interest in seeking to revise the Plan?

Adams argues that the Landscape Plan was not properly amended because the CFMC Board acted in bad faith and for self-serving purposes when it sought to revise the Plan in 2007.[89] She alludes, without offering specifics, to certain Board members' ulterior motives in seeking the revision.[90] CFMC responds that Board members sought to revise the Plan pursuant to a good faith belief that increasing the amount of Turf areas in the development would be in the best interests of the community.[91]

The only evidence Adams adduced in support of her accusations were her own assertions that Munson and Aidoo had an interest in seeking the revision because of the proximity of their properties to the areas subject to the additional Turf-cutting.[92] She argues that they desired to have CFMC pay for mowing to improve the appearance of areas surrounding their own properties—a benefit that would inure disproportionately to land owners nearest to those areas.

These bare accusations, however, are insufficient to prove Adams's claim. No other evidence suggests bad faith or self-interest on the part of any of the Board

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89 POB 11; PRB 23-24.

90 POB 11, 26; PRB 23-24.

91 DAB 19.

92 POB 26; *see also* Tr. T. 597-98 (Aidoo).

members, including Munson and Aidoo, regarding the revision of the Landscape Plan.[93] On the other hand, Defendants presented several legitimate reasons for the Board's decision to seek a revision to the Landscape Plan, including reducing costs, safety of neighborhood children, and aesthetic considerations.[94] In fact, Munson testified that one of the motivating factors in seeking the revision was the fact that snakes had been gathering in the higher Meadow grass and parents had expressed concerns about the safety of children playing in or near the grass.[95] Based on these considerations and the other evidence of record, I find that Adams failed to prove the Board members acted in anything other than the best interests of CFMC and its Members.

As such, I reject Adams's claim that the Board members voted to revise the Landscape Plan in bad faith or because of self-interested motives.

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93 In that regard, I note that both Munson and Aidoo testified at trial and were subject to examination by Adams. Munson testified, for example, that: "The board was voted on by the residents of the community so that we could make decisions to keep the community, maintain the open area, keep it in a safe environment, so to speak, so that our homes would not depreciate in value. That is my understanding. They have faith in us and that's why they voted for us." T. Tr. 110. I found Munson and Aidoo to be credible witnesses.

94 T. Tr. 35 (Mercurio), 166, 180, 187 (Munson), 459-60, 467-68 (McLamb), 591 (Aidoo). CFMC argued that, despite Adams's theory otherwise, more frequent mowing to a lower uniform height actually would be lower in cost as compared to less frequent mowing of a portion of the Open Spaces to a higher height because of the higher costs associated with maintaining the various vegetation areas at different heights. *See, e.g.*, T. Tr. 152, 180-81 (Munson).

95 T. Tr. 166.

6. Did Munson fraudulently misrepresent himself as president of CFMC to revise the Plan?

In a letter to Adams dated July 8, 2008, Faux of the Land Use Department mistakenly referred to Munson as the President of CFMC.[96] Based on that letter, Adams claims that the Board did not properly revise the Landscape Plan because Munson fraudulently held himself out as president to induce the Land Use Department to agree to the revision. Faux's letter referring to Munson, stated that "[t]he change to the plan . . . was prompted by, and signed by, the president of the Corporation. That individual was elected by the residents and is authorized to render decisions such as this on behalf of Calvarese Farms."[97] CFMC responds that Munson never held himself out as president, but was simply the duly authorized representative of CFMC sent on its behalf to seek a revision of the Landscape Plan.

The record supports CFMC's position. When the Board decided to seek revision of the Landscape Plan, Iannarella served as president of CFMC.[98] During the first several meetings of the Governing Body from July to September 2007, however, Iannarella delegated responsibilities to various members of the Board.[99] At some point during these

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96 *See* PX 12.

97 *Id*.

98 Iannarella resigned, however, on September 20, 2007 and Mark Bennett, then a vice president of CFMC, was appointed as President Pro Tem. PX 19; *see also* Bylaws § 11; T. Tr. 96 (Munson).

99 T. Tr. 108 (Munson) ("[A]ssignments are delegated, and that particular assignment was delegated to me."), 345-47 (Pinkett) ("This was the agenda for the first meeting that was held at the president's home, who was Matt Iannarella, and these

first meetings, the Board authorized Munson to seek the revision to the Landscape Plan.[100] Therefore, I find that Munson acted as the Board's duly authorized representative when he talked with Mercurio and the Land Use Department about revising the Landscape Plan and when he signed that revised Plan on October 4, 2007.

Additionally, there is no persuasive evidence that Munson ever represented himself to the Land Use Department (or anyone else) as being the president of CFMC. Indeed, the only evidence Adams points to for that proposition is Faux's July 8, 2008 letter. But, when asked about that letter, Faux testified that he "jumped to the conclusion" that Munson was the president and that Munson never represented himself as such.[101] Thus, I find that Adams has not shown that Munson fraudulently presented himself as president of CFMC in his efforts to revise the Landscape Plan. Rather, the

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were the topics we needed to discuss and to delegate responsibilities . . . when we talked about each item on the agenda, different board members volunteered to handle the different project for the corporation, and people agreed to individuals handling those things because one person couldn't do it all.").

100 T. Tr. 349-50 (Pinkett) ("At a particular meeting where this was discussed, Mr. Munson volunteered to handle [the issue of seeking revision to the Landscape Plan]. All the members that were in attendance at that meeting agreed that he should—would be delegated that responsibility."), 593 (Aidoo) ("Homeowners voted, at which point, right there at the homeowners' meeting, if my memory serves me right, Mr. Tim Munson was basically given the onus to forge ahead with the changes.").

101 T. Tr. 227-28 ("Q. Can you explain to the Court why it was that you referred to Mr. Munson as the president instead of a duly-appointed representative of the board? A. I see here that I did make that reference. And I—it's—I might have to admit that I jumped to that conclusion. Q. You don't recall Mr. Munson specifically telling you that he was the president of the maintenance association? A. No.").

evidence shows that Munson acted only as the duly-authorized representative of CFMC with authority to seek a revision to the Landscape Plan.

7. Did the Land Use Department have authority to amend the Landscape Plan?

Adams argues that the Land Use Department either did not have authority to revise the Landscape Plan, or, if it did, did not follow proper procedures in effectuating the revision.[102] In response, CFMC emphasizes that Adams has not provided any authority or evidence for either proposition. Yet, in her briefs, Adams appears to rely on three different statutory provisions.[103]

First, Adams unpersuasively argues that the Land Use Department had no jurisdiction to authorize the revision because it was not approved by 75% of the Calvarese Farms homeowners. Adams cites 22 *Del. C.* § 305 for the proposition that 75% of homeowners must vote in the affirmative to authorize a landscape plan change.[104] This provision of Delaware municipal zoning law, however, governs the voting requirements of a municipal legislative body when affected landowners object to a proposed legislative zoning amendment.[105] Here, Adams presented no evidence or

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102 POB 6, 8-9.

103 Adams cites 22 *Del. C.* § 305, 9 *Del. C.* § 6917, and New Castle Cty. C. § 40.31.410.

104 POB 6.

105 *See* 22 *Del. C.* § 305 (the provision reads, in relevant part: "The [zoning] regulations, restrictions and boundaries may from time to time be amended, supplemented, changed, modified or repealed. In case, however, of a protest against such changes signed by the owners of 20 percent or more, either of the

argument that a New Castle County municipal legislative body proposed any changes to zoning regulations or any other circumstance existed that would make § 305 applicable in this case. In fact, the statute has no application here for at least three reasons. First, it governs voting requirements of elected officials and not subdivision homeowners. Second, the statute applies to municipalities and not to a subdivision or county. Moreover, pursuant to my analysis, *supra* Part II.B.1, the Governing Documents authorize the CFMC Board to seek revision to the Landscape Plan, and no vote of the Members is required. And third, the challenged revision to the Landscape Plan is not the equivalent of a change to zoning regulations.

Next, Adams contends that CFMC failed to file an Environmental Impact Statement ("EIS") with the Land Use Department when it sought a revision to the Landscape Plan.[106] She makes this claim in a single sentence in her Opening Post-Trial Brief without citing any legal authority for it. Moreover, she presented no evidence at trial to establish that CFMC has such an obligation. Therefore, Adams has not shown that the absence of an EIS provides any basis to invalidate the Land Use Department's approval of the Landscape Plan revision.

Finally, Adams argues that even if the Land Use Department had jurisdiction to authorize the revision, it failed to take into account five statutory factors it was required

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> area of the lots included in such proposed change or of those immediately adjacent thereto . . . such amendment shall not become effective except by the favorable vote of three fourths of all the members of the legislative body of the municipality.")

[106] POB 6.

to consider in making such a decision. Adams grounds this contention on 9 *Del. C.* § 6917 and § 40.31.410 of the UDC.[107] Section 6917, governing appeals to the Sussex County Board of Adjustment regarding zoning issues, is wholly inapposite to this dispute because the Sussex County governing body has no jurisdiction over Calvarese Farms. Nevertheless, recognizing Adams's relative unfamiliarity with Delaware law as a self-represented Plaintiff, I assume she cited § 6917 and § 40.31.410 only to illustrate the types of factors that the Land Use Department must consider when authorizing a zoning map amendment, which she evidently considers analogous to the revision of a subdivision's landscape plan.[108]

In any event, there is no basis to find that the Land Use Department failed to follow required or adequate procedures in authorizing the revision at issue here. Indeed, Adams failed to present any evidence suggesting that the Land Use Department failed to follow any mandatory provision of the UDC or other applicable Delaware statutes. By contrast, the evidence overwhelmingly established that a request to amend a housing development landscape plan is routine and is handled in the Land Use Department's

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107 *Id*.

108 *See* New Castle Cty. C. § 40.31.410 (this provision reads, in relevant part: "In determining whether a zoning map amendment should be recommended or approved, all of the following factors shall be considered: A. Consistency with the Comprehensive Development Plan and the purposes of this Chapter; B. Consistency with the character of the neighborhood; C. Consistency with zoning and use of nearby properties; D. Suitability of the property for the uses for which it has been proposed or restricted; E. Affect on nearby properties; and F. Recommendations by the Department.").

ordinary course of business—as it was in this case.[109] Consistent with its usual procedure, the Land Use Department had a representative of the maintenance corporation, the landscape architect, and the developer sign the revision and file it with the Land Use Department.[110] Specifically, Munson, as an authorized representative of CFMC, sought approval for the revision from the Land Use Department. The Department then consulted with Mercurio, as required by the UDC, and found no compelling reason that certain areas of the Open Spaces had to remain as Meadow grass.[111] Consequently, the Department agreed to give CFMC the flexibility to decide whether to maintain the Meadow areas outside of Reforestation areas at Turf or Meadow grass levels because it found that there was no legal or environmental reason to preclude such discretion.[112] Thus, I hold that the Land Use Department acted within its jurisdiction and according to its normal procedures in authorizing the revision at issue here.

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109 Mercurio testified that the CFMC revision was very similar to other revisions on which she worked. T. Tr. 35. She explained that: "I, on projects all the time, revise landscape plans after they have been transferred over to community associations . . . . It's common practice. They coordinate it with New Castle County, to make sure that it's amenable to them. And then they will have me, or any other landscape architect, go into the County, revise the mylar, and they have it kept on file then as a revised plan." *Id*.

110 T. Tr. 222, 253-56 (Faux).

111 *Id*. at 218-20.

112 *Id*. ("[T]he county was simply trying to be accommodating to a situation where there was no reason legally that they shouldn't be allowed to have the discretion.").

C. May CFMC Levy an Annual Assessment without a Member Vote?

1. Are the assessments at issue annual or special assessments?

Adams challenges the validity of at least three different "assessments" levied upon the Members of Calvarese Farms, including $590.00 in 2007, $100.00 in 2008, and $590.00 in 2009.[113] As a preliminary matter, I must decide whether any of these assessments are annual assessments under the Governing Documents for the purposes of determining whether a Member vote is required.[114]

Section 19 of the Bylaws states that annual assessments should be assessed for costs relating to "snow removal, maintenance, repair, replacement, insurance, utility, and other property" expenses. Special assessments, on the other hand, should be assessed only to defray the costs of "construction or reconstruction," "unexpected repair or replacement of a capital improvement upon the" subdivision property, or "for other lawful purposes."[115] Adams contends that at least one of the disputed $590.00 assessments is a special assessment because it relates to the increased cost to CFMC of mowing additional grass to Turf level under the revised Landscape Plan.[116] CFMC counters that the act of mowing grass is clearly maintenance of open space and not

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113 PRB 25; T. Tr. 86-87 (Munson), 407, 464 (McLamb), 571-72 (Aidoo).

114 According to § 19 of the Bylaws, an annual assessment may be approved by a majority vote of the Board whereas a special assessment requires, in addition to Board approval, the assent of two-thirds of the Members of CFMC.

115 Bylaws § 19.

116 PRB 25.

construction or a capital improvement, making any related assessment an annual assessment.[117]

I hold that all of the assessments at issue are, in fact, annual assessments. To the extent that they reflect costs of mowing the subdivision's Open Spaces, they qualify as "maintenance" costs under § 19 of the Bylaws, which are subject to an annual assessment. Moreover, Adams failed to prove that any part of the challenged assessments constitute costs from construction or capital improvements.

2. May the Board levy an annual assessment against Members of CFMC without a Member vote?

Adams claims that the Board may not levy an annual assessment against Members of CFMC unless the assessment is approved by a Member vote.[118] CFMC disagrees, arguing that § 19 of the Bylaws authorizes the Board to levy annual assessments for "snow removal, maintenance, repair, replacement, insurance, utility, and other property" needs without Member approval.

As to this issue, however, an inconsistency exists between the Declaration and the Bylaws over whether the CFMC Board alone may set an annual assessment or whether the Members must be allowed to vote on such an assessment. According to the Bylaws, annual assessments can be set by a majority vote of the CFMC Board.[119] The Declaration, on the other hand, provides that an annual assessment must be set, if at all,

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117 DAB 22.

118 POB17-18; PRB 25.

119 Bylaws § 19. The CFMC Certificate contains a similar provision. Certificate § 4.

by the majority vote of Members voting in person or by proxy at the annual meeting.[120] When the provisions of a real covenant[121] conflict with the bylaws or certificate of a homeowners maintenance corporation established pursuant to the covenant, the provisions of the covenant generally govern.[122] Thus, to the extent a bylaw or a provision of a certificate of a homeowners maintenance corporation cannot be harmonized with a provision of a real covenant governing the homeowners maintenance corporation, the contravening bylaw or certificate provision will be invalid until such time as the covenant is amended.

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120 Declaration § 1(c) ("An annual assessment . . . shall be set by a majority vote of the members who are voting in person or by proxy at the annual meeting, and any special assessments shall be set by a majority vote of the members who are voting in person or by proxy at the annual meeting or at a meeting duly called for this purpose.").

121 A real covenant is defined as "[a] covenant that, because it relates to the land, binds successor grantees indefinitely." *Blacks Law Dictionary* 393 (8th ed. 2004).

122 *See Hutchins v. Quillen's Point Homeowners Ass'n, Inc.*, 1994 WL 198759, at *4 (Del. Ch. May 17, 1994). The plaintiffs in *Hutchins* argued that a homeowners association's current budget was not duly adopted because it was not formally presented to the membership for its approval pursuant to Article IX, § 8 of the association's bylaws. Chancellor Allen stated that the plaintiffs' reading of § 8 of the bylaws would bring § 8 into conflict with Article V, § 5 of the relevant covenants, which gave the defendant-board-members the power to fix the amount of the annual assessment and, by clear implication, to adopt a budget in doing so without a member vote. *See id*. He noted that had there been a true conflict, "the Covenants would be considered the document of greater dignity and would control; but that conclusion might turn on facts (for example, whether the By-laws were adopted by a two-thirds vote)." Here, there are no facts that would support a finding that the Declaration, which was adopted roughly contemporaneously with the Bylaws, is not the document of greater dignity.

Here, the Declaration entered into in 2003 binds owners of the parcels of land in Calvarese Farms to certain covenants and restrictions.[123] The covenants in the Declaration run with the land and, as all Members received notice of them in their deeds, they have the effect of a binding contract on Members of the Calvarese Farms subdivision, including CFMC itself.[124] CFMC, and its incorporators, therefore, could not take any action inconsistent with the real covenants set forth in the Declaration. CFMC argues that because the Board is tasked with maintaining the subdivision's Open Spaces and requiring an annual Member vote to authorize assessments would be unduly cumbersome, this Court should read § 19 of the Bylaws as amending the contradictory portion of the Maintenance Declaration.[125] This argument is untenable, however, because § 6 of the Declaration provides that the covenants contained in the Declaration may not be amended "except by consent of fifty-one percent (51%) of the lot owners and of the New Castle County Council." Thus, even if § 19 of the Bylaws was intended to amend the Declaration, it would be invalid because there is no evidence that 51% of the lot owners approved the bylaw—the only way CFMC could alter the Declaration covenant that requires a vote of Members to levy an annual assessment.

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123 Declaration § 3 ("These covenants and restrictions shall be taken to be real covenants running with the land and binding thereon perpetually.").

124 *See* 21 C.J.S. Covenants § 32 (2010) ("Generally, covenants affecting property are, even when running with the land, nonetheless contractual in nature.").

125 DAB 24.

Because the Declaration trumps inconsistent provisions in the Certificate and Bylaws, I hold that CFMC could not levy an annual assessment on Members of Calvarese Farms unless the assessment was approved by a "majority vote of the members who are voting . . . at the annual meeting."[126] Thus, unless and until the Declaration is amended, only the Members of CFMC are empowered to set an annual assessment.

3. What are the consequences of levying an annual assessment in the absence of a required Member vote?

Any assessments levied by the CFMC Board without Member approval as required by § 1(c) of the Maintenance Declaration are voidable.[127] That is, the annual assessments imposed in 2008 and 2009 are invalid, but could be ratified by a Member vote because CFMC lawfully could levy such assessments as long as they do so in the appropriate manner under the Maintenance Declaration.[128] Until such time as Members ratify these assessments, however, they are invalid.

4. Is Adams entitled to recover monies she paid to CFMC in the form of invalid annual assessments?

Adams seeks to recover the sums she paid to CFMC in the form of annual assessments from 2007 to 2009. For the reasons set forth below, I grant her request to

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126 Declaration § 1(c).

127 *Nevins v. Bryan*, 885 A.2d 233, 245 (Del. Ch. 2005) (citing *Harbor Fin. P'rs v. Huizenga*, 751 A.2d 879, 896 (Del. Ch. 1999)); *see also supra* Part II.B.4.

128 *See Huizenga*, 751 A.2d at 896. The record is incomplete as to the circumstances surrounding the $590.00 charged by Gemcraft before June 2007, which loosely might be characterized as an "assessment." To the extent Adams challenges that charge, therefore, she has failed to prove her claim.

recover sums paid as part of the 2008 and 2009 annual assessments, but deny her request to recover sums paid to Gemcraft in 2007.

Preliminarily, I find that Adams has not established that she paid money to CFMC in 2007 as part of an annual assessment, let alone in the absence of a Member vote. The record indicates that Adams paid a sum of $590.00 into escrow when she settled on her home in 2007.[129] This sum, however, was paid not to CFMC, but to Gemcraft, which had not yet transferred ownership of the Open Spaces or the contents of the escrow account to CFMC. In fact, Adams admits that she received notice of such transfer to CFMC approximately two months after she had moved into Calvarese Farms.[130] Under the Declaration, the mandate in § 1(c) requiring a Member vote approving an annual assessment applies only to CFMC and not to CFMC's predecessor, Gemcraft, before the transfer of ownership of the Open Spaces to CFMC.[131] Thus, any settlement fees or assessments that Adams paid to Gemcraft in 2007—before governance responsibility for the Open Spaces was transferred to CFMC—were not required to be approved by a Member vote. Therefore, Adams has not shown that those fees or assessments are invalid and, as such, I hold that she is not entitled to recover the $590.00 she paid to Gemcraft in 2007.

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129 *Id*. at 548.

130 *Id*. at 519-20; PX 23; Compl. ¶ 2.

131 Declaration § 1.

On the other hand, Adams has met her burden to show by a preponderance of the evidence that the 2008 and 2009 annual assessments were authorized in the absence of a Member vote, in contravention of § 1(c) of the Maintenance Declaration. She presented, for example, a letter to CFMC Members dated January 8, 2008 announcing that the Governing Body voted to assess a $100.00 annual assessment for that year.[132] CFMC failed to rebut the inference raised by this letter that no Member vote occurred. The evidence was less clear as to whether the Board assessed dues in 2009 without a Member vote, but I find that Adams met her burden with regard to this assessment, as well. Aidoo, for example, testified that the Board set the 2009 annual assessment at $590.00 after realizing that the much smaller 2008 annual assessment would lead to a CFMC budget shortfall if the Board did not make an adjustment in the following year.[133] I infer from this testimony that the 2009 assessment, like the 2008 assessment, resulted from the Board's belief that it had the power to set the amount of the annual assessment without Member involvement. This conclusion is consistent with Aidoo's further testimony that he understood that the Board would have to seek a Member vote to approve a special assessment, but believed the $590.00 assessment in 2009 to be an annual assessment.[134] Thus, Adams did show that the 2008 and 2009 annual assessments were established without the requisite Member approval.

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132 JX 24; *see also* T. Tr. 407 (McLamb).

133 T. Tr. 572-73.

134 T. Tr. 575.

Adams also proved by a preponderance of the evidence that she did, in fact, pay the 2008 and 2009 annual assessments set by CFMC. She testified that she paid $100.00 in 2008 and approximately $618.00 in 2009.[135] CFMC did not rebut this testimony and appears to have conceded that Adams paid these sums.[136]

Thus, based on all of the evidence and argument, I hold that Adams is entitled to recover the sums she paid to CFMC in the form of annual assessments for 2008 and 2009, including any late charges.

D. Other Issues

1. Did CFMC unlawfully mow Reforestation areas?

Adams alleges that the Board improperly mowed grass in areas designated as Reforestation areas, which everyone agrees are required to be kept at Meadow-level height under both the original and revised Landscape Plans.[137] She further asserts that as a result of such improper mowing, "more than 100 trees are dead,"[138] and now she, as a member of Calvarese Farms, must help foot the bill for forty thousand dollars in replacement costs.[139]

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135 T. Tr. 547-49. Adams had to pay more than the stated $590.00 in 2009 because late charges were applied to her bill. *Id*. at 549.

136 T. Tr. 551, 59 (Adams); *see also id*. at 467 (McLamb).

137 POB 12-13; PRB 28; DAB 26-27.

138 POB 13.

139 PRB 32, 34.

There is no dispute that CFMC has no authority to mow Reforestation areas to Turf level. Both the original and revised Landscape Plans make clear that Reforestation areas must remain at Meadow length and not be cut short on a regular basis.[140] Thus, while the Board has discretion to mow Meadow area grass to Turf level, it cannot mow Reforestation areas below eight inches.[141]

To prove her claim, Adams must show: (1) the Board improperly mowed Reforestation areas to lower than Meadow height; (2) the improper mowing caused the loss of 100 trees; and (3) what it has or will cost CFMC to replace the lost trees. In each case, Adams has the burden to prove her allegations by a preponderance of the evidence.[142]

The parties presented conflicting evidence as to whether the Reforestation areas were cut below Meadow height. In contending that the Board authorized improper mowing, especially behind Oregano Court,[143] Adams principally relied upon two assertions. First, she reasons by analogy that because a Reforestation area at "the beginning of the development" contained newly planted trees, the area behind Oregano

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140 JX 1; T. Tr. 37 (Mercurio) ("I explained . . . that the natural resource areas and the reforestation could not be touched.").

141 JX 1.

142 *Estate of Osborn v. Kemp*, 2009 WL 2586783, at *4 (Del. Ch. Aug. 20, 2009), *aff'd*, 991 A.2d 1153 (Del. 2010).

143 PRB 28.

Court also must be a Reforestation area because it, too, contained newly planted trees.[144] Second, Adams testified that when viewed with the proper scale, two pictures of a turf-mowed area with newly planted trees taken by Walsh showed that the trees in the picture of the disputed area would be within what is designated as Reforestation area on the Landscape Plan.[145]

But, Adams failed to present evidence supporting either of these bare assertions. The evidence regarding the existence of newly planted trees in the area behind Oregano Court is insufficient to prove whether the grass in the disputed Reforestation area was mowed improperly to less than Meadow height. Moreover, I am not persuaded by Adams's claim that Walsh incorrectly measured the area behind Oregano Court during his investigation. Walsh testified that he physically examined the land at issue behind Oregano Court on three separate occasions from July 28, 2009 to January 1, 2010, and found no improper mowing of Reforestation areas in violation of the Landscape Plan.[146] Walsh took multiple measurements of the property using a measuring wheel, compared them to the Landscape Plan Matrix, and found that the Board was in compliance with its recorded plan.[147] Having carefully considered the evidence on this issue, I find that

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144 T. Tr. 331-34 (Walsh).

145 T. Tr. 521-26; *see also* JX 2, 16, 17.

146 T. Tr. 289, 294, 305.

147 *Id*. at 294, 304-05; JX 12.

Adams failed to meet her burden of proving that the Reforestation areas were mowed to less than Meadow height.

Moreover, even if Adams had shown the Reforestation areas were cut too low, her claim would fail because she did not prove that action caused the loss of numerous trees in the Calvarese Farms subdivision. There was testimony at trial that a number of trees, on the order of 100, had died in the subdivision.[148] Adams, however, did not establish where these trees were located or why they died. Instead, Adams proffered nothing but conclusory allegations on the issue of causation.[149] This Court generally cannot determine causation as to the death of trees in a subdivision without the assistance of expert testimony. Adams herself has not demonstrated expertise in the area of tree husbandry and she failed to introduce any expert testimony or other probative evidence in support of her allegations as to causation. As such, Adams has not proven that aspect of her claim, either.[150]

Thus, I find that Adams did not carry her burden to establish that CFMC violated the recorded Landscape Plan by improperly mowing in Reforestation areas, thereby causing the demise of certain trees and attendant damages.

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148 T. Tr. 440 (McLamb), 570 (Aidoo).

149 For example, Adams's own testimony suggested that weed-whacking around such trees, and "probably running into them," precipitated their demise. T. Tr. 543.

150 In addition, Adams failed to show by a preponderance the cost to CFMC of replacing the dead trees in the subdivision.

2. Does CFMC have authority to contract with Emory Hill?

In my ruling on CFMC's motion for summary judgment, I held that the Governing Documents authorize the CFMC Board to contract for management services with a company such as Emory Hill.[151] Specifically, I concluded that, in accordance with the Governing Documents, a properly constituted CFMC Board may "contract with a firm such as Emory Hill Real Estate Services to provide services to the Board to help it carry out its responsibilities." Thus, this aspect of Adams's claim will be dismissed.

3. Neighborhood Directory

Adams next alleges that CFMC created and disseminated a "neighborhood directory" of all members in Calvarese Farms, which included her name, address, and telephone number.[152] She claims that CFMC did so to defraud her by "[the] use of her telephone number."[153] CFMC denies that it ever compiled or disseminated such a directory. [154] They further contend that Adams failed to produce any evidence of the existence of such a directory and that trial testimony from current and former Board members overwhelmingly indicates to the contrary.

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151 D.I. 65.

152 POB 5, 32-39; PRB 12-13. I also note that witnesses and documents occasionally referred to the alleged directory by different names, including "neighborhood directory," "community directory," and "members list." For the sake of clarity, I use "neighborhood directory."

153 POB 37.

154 DAB 7-8.

I agree with CFMC that Adams failed to adduce sufficient evidence to show that CFMC actually created and distributed a neighborhood directory, or took any other action in that regard that caused her to suffer compensable harm. Adams relies primarily on three pieces of evidence to establish the existence of a directory with her telephone number in it: (1) Munson's testimony that he recalled receiving a directory with his name and address in it;[155] (2) a list of homeowners and addresses attached to an agenda from a meeting of the CFMC Governing Body on September 6, 2007 that referenced an attached homeowner list;[156] and (3) various letters and meeting agendas that referred to a proposal to create some sort of neighborhood directory.[157] Yet, despite this evidence, Adams admitted that she never received, or saw, a copy of any directory.[158]

The record does show that the Board contemplated creating a neighborhood directory in 2007 if it received homeowner approval to move forward with the idea.[159] To this end, the Board notified Members that it would discuss the idea at a meeting on July 5, 2007, which explains why meeting agendas made reference to such a proposal.[160]

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155 T. Tr. 167-68.

156 JX 21.

157 PX 15, 20-21.

158 T. Tr. 559.

159 PX 15; T. Tr. 352 (Pinkett).

160 PX 15, 21.

This idea never came to fruition, however, and no such directory ever was created by CFMC.[161]

If this is the case, Adams understandably asks why would Munson recollect having received a copy of a neighborhood directory sometime in 2007 or 2008? Trial testimony and documentary evidence demonstrated that members of the Governing Body in 2007, which included Munson, received an electronic file attachment with a copy of an agenda for the July 5, 2007 meeting that included a listing of Calvarese Farms homeowners and their addresses.[162] Aside from names and addresses, this listing contains no other information.[163] Both McLamb and Pinkett, who were officers of CFMC in 2007, testified that the Board did not create this list and that it most likely received the list from Gemcraft (the "Gemcraft List"), the subdivision developer.[164] They also explained that the Gemcraft List was intended only for distribution to officers and directors for the purpose of apprising them of which lots remained unsold so that they could properly apportion and collect homeowners association dues.[165] Thus, I find that

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161 T. Tr. 352 (Pinkett), 403 (McLamb).

162 T. Tr. 350-52 (Pinkett), 401-02 (McLamb); JX 21.

163 JX 21.

164 Before Gemcraft transferred responsibility for the Open Spaces to CFMC, Gemcraft was responsible for collecting a maintenance fee from each new homeowner at settlement. The List also gave the addresses of the lots that had not been sold yet, and indicated that those lots still were owned by Gemcraft. JX 21; T. Tr. 351-52, 429.

165 T. Tr. 357, 401-02.

the Gemcraft List was not distributed to other Members, and that the most plausible explanation for Munson's testimony is that he received a copy of the Gemcraft List by virtue of his position on the Board in 2007. This finding comports with Munson's testimony that he received a directory that included only names and addresses of homeowners, but no telephone numbers.[166]

As a result, I hold that Adams has not shown by a preponderance of the evidence that CFMC created and disseminated a neighborhood directory that contained her telephone number or other personal information. Further, even if CFMC has taken such actions, I still would find for CFMC on this claim because Adams failed to prove that she suffered any legally cognizable harm resulting from the inclusion of her contact information in any purported directory. She conclusorily asserts that CFMC "perpetrated [a fraud]" on her by the use of her telephone number,[167] but she failed to present any evidence that CFMC or its Members ever distributed or used her telephone number, or that she might have suffered any harm as a result of its distribution or use. Therefore, I will dismiss Adams's claim regarding the alleged neighborhood directory with prejudice.

4. Did the CFMC Board breach their fiduciary duties of care and loyalty?

Adams makes a myriad of allegations regarding her belief that members of the CFMC Board breached their fiduciary duties of care and loyalty in connection with the

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166 T. Tr. 167-68.

167 POB 37.

challenged actions previously discussed and others.[168] To the extent Adams seeks injunctive or declaratory relief against CFMC, these claims seem at least colorable. Accordingly, I will address the fiduciary duties of care and loyalty in turn. It is important to note, however, that none of the current or former directors or officers of CFMC is a party to this action. Therefore, Adams has not presented any claim for damages against any of those directors and officers personally.

a. The duty of care

Directors of a Delaware corporation owe a fiduciary duty of care to the stockholders or, as here, members of the corporation.[169] This duty requires that directors "'use the amount of care which ordinarily careful and prudent men would use in similar circumstances' and 'consider all material information reasonably available' in making business decisions."[170] To establish a breach of the duty of care, a claimant must prove a

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168 Based on my review of Adams's often disjointed briefing, I understand her to complain that at various times certain board members (1) harassed or slandered her, (2) caused her harm by disseminating a neighborhood directory with her personal information in it, (3) issued checks drawn on the CFMC account to pay for personal lawn care services, (4) improperly decided to cut Meadow grass to Turf level, and (5) agreed to pay Emory Hill for its management services before it even began to provide accounting services to CFMC. *See* POB 18-19, 28-31; PRB 23-24.

169 To the extent any of Adams's claims implicate officers of CFMC who were not also directors, I apply the same standards for each duty because "fiduciary duties of officers are the same as those of directors." *See, e.g.*, *Gantler v. Stephens*, 965 A.2d 695, 708-09 (Del. 2009); *Hampshire Gp., Ltd. v. Kuttner*, 2010 WL 2739995, at *11 n.75 (Del. Ch. July 12, 2010).

170 *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 749 (Del. Ch. 2005).

director took an action that was grossly negligent.[171] Gross negligence is defined as a "'reckless indifference to or a deliberate disregard of the whole body of stockholders' or actions which are 'without the bounds of reason.'"[172]

A challenged board decision, however, may be entitled to the benefit of the business judgment rule, which holds that, absent evidence of fraud, bad faith, or self-dealing, the court should presume that in making a business decision directors acted in an informed manner and in the belief that their action taken was in the best interests of the corporation.[173] Under the business judgment rule, a board's decision will be upheld unless it cannot be "attributed to any rational business purpose."[174]

In this case, Adams contends that several decisions of the CFMC Board amount to breaches of various Board members' duties of care. In particular, she argues that Board members breached their duties through their decision to increase the amount of Turf

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171 *See, e.g.*, *id.*; *Kuttner*, 2010 WL 2739995, at *11.

172 *Disney*, 907 A.2d at 750.

173 *See id*. at 746-47.

174 *Id*. Furthermore, directors may be immune from having to pay damages resulting from a breach of the duty of care if, as here, the certificate of incorporation includes an exculpatory clause pursuant to DGCL § 102(b)(7). *See* 8 *Del. C.* § 102(b)(7); Certificate § 7. This statute authorizes a corporation to include in its certificate: "A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit."

grass, thereby increasing Members' annual assessment dues. In addition, she claims Board members caused her harm by improperly disseminating a neighborhood directory with her personal information in it and agreeing to pay Emory Hill before it began providing accounting services to CFMC.[175]

For the reasons previously discussed, I have concluded that none of the disputed actions mentioned were improper or violated any law or regulation. Therefore, I am not persuaded that any of the alleged wrongdoing by the CFMC Board or its officers constitutes gross negligence. As a result, Adams has failed to show the existence of any breach of the duty of care, let alone one that would justify injunctive or declarative relief in this action. Furthermore, aside from the frequent use of the term "bad faith" in her briefs, Adams has failed to present a single shred of probative evidence that any director made any corporate decision in bad faith. Thus, I will dismiss with prejudice Adams's claims against CFMC based on an alleged breach of the duty of care.

b. The duty of loyalty

Directors of a Delaware Corporation also owe stockholders a duty of loyalty whereby they must pursue the best interests of the company in good faith.[176] Directors breach this duty when they place their own "interests, preferences, or appetites before the

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175 *See* POB 18-19, 29-30; PRB 23.

176 *See Kuttner*, 2010 WL 2739995, at *11.

welfare of the corporation."[177] One of the most common instances of a breach of this duty is when a director receives a personal benefit not shared by all stockholders.[178] Bad faith conduct on the part of directors also may give rise to a breach of the duty of loyalty.

As the business judgment rule would not apply to actions taken in bad faith or otherwise in the context of a breach of the duty of loyalty, I address each of Adams's claims in turn. First, Adams asserts that she was harassed by Board members when they assessed her a fine of $300.00 without identifying the reason for doing so.[179] Adams also makes a vague allegation that Board members slandered her after she disagreed with their decision to revise the Landscape Plan. Aside from some comments in her opening statement, Adams provided no evidence that she ever was fined $300.00 or paid such a fine and failed to identify any specific conduct taken by a Board member to "harass" her. Similarly, she presented no evidence of any Board member ever having slandered her. Thus, she has failed to carry her burden of proof on these aspects of her breach of fiduciary duty claim.

Next, Adams avers that the Board improperly disseminated her personal contact information through a neighborhood directory, as well as certain letters she wrote to the

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177 *See Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 75 n.179 (Del. Ch. 2008) (citing *In re RJR Nabisco, Inc. S'holder Litig.*, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989)).

178 *See Disney*, 907 A.2d at 751.

179 PRB 23.

Board to object to various governance issues with which she disagreed.[180] As discussed *supra* Part II.D.3, Adams failed to show that the Board actually created and disseminated a neighborhood directory. Moreover, she presented no evidence at trial that any Board member disseminated her personal letters addressed to the Board, or otherwise acted in bad faith. Thus, I hold that she has not demonstrated a breach of loyalty with regard to these issues.

Third, Adams claims that the directors sought and approved a revision to the Landscape Plan to allow for an increase of Turf-level grass in the Open Spaces for self serving purposes, which had the effect of increasing Member dues. The evidence, however, fails to show that the Board or a majority of its members acted for any purpose other than to advance the best interests of the subdivision. Indeed, it appears that the Board considered a number of factors in making its decision to increase the amount of Turf grass, including cost to Members, safety of neighborhood children, and aesthetic considerations.[181] Thus, Adams's claim that the decision to increase the amount of Turf grass was taken in bad faith or in breach of the duty of loyalty also fails.[182]

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180 *Id*.

181 *See supra* Part II.B.5.

182 The directors' decision not to submit the revision issue to a Member vote provides no basis for finding that they breached their duties of loyalty. *See supra* Part II.B.2.

Fourth, Adams alleges that Board Members wastefully paid Emory Hill for a period of time before it began providing any accounting services to CFMC.[183] Specifically, she claims that despite being paid $775.00 a month beginning in April 2008, Emory Hill did not start providing accounting services for CFMC until October 2008. Again, however, Adams failed to prove that the directors acted in bad faith when they chose Emory Hill as the subdivision's management firm or decided to pay Emory Hill for their services beginning in April. Indeed, it appears that the Board chose Emory Hill after conducting competitive interviews because it believed that obtaining Emory Hill's services would be in the best interest of the Members.[184] In addition, Emory Hill provided more than just accounting services. In fact, one of the Board's primary purposes in retaining its services was so that it would enforce deed restrictions and relieve Board members of that duty and the attendant awkwardness of confronting noncompliant neighbors.[185] Thus, even if Emory Hill did not begin providing accounting services until October 2008, which is not clear from the evidence presented, that does not mean it failed to provide *any* services to CFMC before then.[186] The Board properly could find that harmony among subdivision residents was a paramount concern and retaining

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183 POB 30.

184 T. Tr. 414 (McLamb) ("So I figured it would be to the best interest of the people involved to get an outside company to enforce [the deed restrictions] . . .").

185 *Id*.

186 Simon testified that Emory Hill handled Member complaints, managed property issues, and enforced deed restrictions, among other things, in addition to providing accounting services to CFMC. T. Tr. 492-95, 501.

and paying a firm to enforce deed restrictions, even if it had not yet begun providing accounting services, would serve the best interests of Calvarese Farms. I find, therefore, that the CFMC Board did not breach their duty of loyalty by retaining and paying Emory Hill beginning in April 2008 to provide management services.

Finally, Adams alleges that two directors on the 2008 board, Aidoo and his wife, Ninette Aidoo ("N. Aidoo"), breached their duties of loyalty by drawing a check on the CFMC corporate account to pay for their personal lawn care services. According to Adams, Aidoo and his wife, by virtue of their positions as Board members and vice president and treasurer, respectively, used CFMC funds to pay "Mr. Clark" for $100.00 worth of lawn cutting at their personal residence.[187]

It is well settled that a director breaches her duty of loyalty if she receives a personal benefit using corporate funds to the exclusion of other stockholders.[188] Here, Adams presented some evidence that the Aidoos used their Board positions, and in particular N. Aidoo's check-writing authority as CFMC treasurer, to pay Clark to cut their own lawn using corporate funds.[189] Aidoo acknowledged on cross examination that Clark mowed his family's lawn from time to time.[190] He also admitted that, to his knowledge, the CFMC president was required to countersign all checks drawn by the

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187 POB 29; PRB 24.

188 *See Disney*, 907 A.2d at 751.

189 See PX 32.

190 T. Tr. 577.

CFMC treasurer, but that the disputed check to Clark did not contain any such countersignature.[191] Although this latter fact is suspect, this evidence is sufficient to support a reasonable, but not conclusive, inference that the Aidoos may have used CFMC funds to pay for their own expenses.

Adams, however, has the burden to show by a preponderance of the evidence that the Aidoos did in fact use such funds to secure a private benefit to the exclusion of other Members. She did not carry this burden. Aidoo testified that CFMC had contracted with Clark to perform services for the corporation in the past and, to the best of his recollection, the $100.00 check was given to Clark after he removed a damaged tree from an area near the Calvarese Farms sign, but unrelated to the Aidoos' property.[192] Moreover, Adams did not present testimony from Clark, or any other witness, who could corroborate her assertions about why the check was drawn. Without more, I am not persuaded that the Aidoos violated their fiduciary duties of loyalty with regard to the challenged payment to Clark.[193]

5. Should the testimony of Pinkett and Aidoo be excluded under Delaware Rule of Evidence 403?

Adams argues that the testimony of Pinkett and Aidoo was not relevant to any issues at trial and, in any case, should be excluded under Delaware Rule of Evidence 403

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191 *Id*. at 582; PX 32.

192 T. Tr. 580-81.

193 I further note that the allegedly improper payment of $100.00 would not support any of Adams's claims against CFMC for declaratory or injunctive relief. In addition, neither Yaw nor Ninette Aidoo is a defendant in this action.

because the "prejudice [of their testimony] outweighs the relevance."[194] Pursuant to Rule 402, all relevant evidence is admissible.[195] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[196] Some evidence, even if relevant still may be excluded under Rule 403 if the trial judge concludes that its probative value is substantially outweighed by the danger of unfair prejudice.

Adams's objections to the testimony of Pinkett and Aidoo on relevance and unfair prejudice grounds are without merit. She has failed to offer any convincing argument as to why either individual's testimony is not relevant. Aidoo's testimony was probative of, among other things, the procedure the Board followed when it took actions to revise the Landscape Plan, the amount and number of assessments levied on Members, and matters relating to the logistics and costs of mowing various areas of Calvarese Farms.[197] Pinkett's testimony related to, among other things, Munson's authority to contact the Land Use Department to obtain a revision to the Landscape Plan and the alleged creation

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194 POB 5; T. Tr. 3-5. At the beginning of trial Adams also objected to the testimony of N. Aidoo. Because N. Aidoo did not testify, however, I consider the portion of Adams's Rule 403 argument related to her to be moot. *See* T. Tr. 564.

195 D.R.E. 402.

196 D.R.E. 401.

197 T. Tr. 565, 567, 571-75.

and dissemination of a neighborhood directory containing Members' personal information.[198]

In addition, Adams has not explained how or why the challenged testimony is unfairly prejudicial to her case under Rule 403. This is especially important in the context of a bench trial, such as this, because a trial judge is better able than a jury to ignore any arguably improper inferences.[199] Thus, I deny Adams's motion to exclude the testimony of Pinkett and Aidoo.

6. Should the Court admonish Adams for spurious accusations and name calling?

Based on various statements made by Adams at trial and in her post-trial briefs, counsel for CFMC asks this Court to admonish Adams for her name calling, unfounded accusations of falsehood, and statements impugning the character and reputation of defense counsel and various witnesses. This Court, like all Delaware courts, "expects civility among parties, even when such parties are *pro se*" or self-represented.[200] In most respects, Adams did an admirable job representing herself in this case and becoming familiar with the applicable law and procedures. Over the course of the litigation, however, Adams repeatedly made unnecessary, and often personal, attacks on the

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198 T. Tr. 344, 349, 352, 358-61.

199 *See Tracinda Corp. v. DaimlerChrysler AG*, 362 F. Supp. 2d 487, 497 (D. Del. 2005).

200 *Nevins v. Bryan*, 885 A.2d 233, 255 (Del. Ch. 2005).

integrity and motives of CFMC's counsel and cast unfounded aspersions on the truthfulness and character of several witnesses.[201]

I consider Adams's outbursts and instances of hyperbole to be inappropriate and disrespectful of the litigants and this Court. Therefore, I admonish her to avoid them in the future and to exhibit greater self-control in her efforts to press her arguments in this or any other court.

7. Is Adams entitled to relief on issues not addressed in her post-trial briefing?

Adams raised several other issues earlier in this litigation, which she did not pursue after trial.[202] Because Adams did not address these items in her post-trial briefs or

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201 *See, e.g.*, POB 5, 28-29 ("The credibility of Yaw Aidoo is critically challenged, and even his appearing 'well-studied', [sic] prepared and staged answers prompted by defense counsel, his testimony was entirely plagued with falsehoods [sic]."); PRB 5-6 (implying that defendant Board members are fascists); T. Tr. 11-12 (implying that CFMC is a fascist society).

202 These include whether: (1) the Board had been enforcing deed restrictions discriminatorily; (2) the Board's decision to cut certain areas designated as Meadows to Turf level lowered the value of her property; (3) CFMC has the authority to change the entrance to Calvarese Farms without Member approval; (4) CFMC or its Members singled out and harassed Adams; and (5) CFMC failed to collect assessments from all homeowners.

Adams also listed many forms of relief in her Complaint for which she did not marshal any evidence or present any argument in her post-trial submissions, including: removal of CFMC Board members with a conflict of interest and appointment of a custodian; a decree quieting title to Adams's property; an order requiring CFMC to allow Adams to inspect its books and records pursuant to 8 *Del. C.* § 220; an examination of the validity of an unspecified Board election under 8 *Del. C.* § 225; and a declaratory judgment regarding the election process for directors on the CFMC Board, including (1) the qualifications to vote or be an electoral candidate and (2) the validity of the Board's imposition of fines.

otherwise cogently present evidence and argument regarding them in connection with the trial, she has waived them.[203]

E. Relief Sought

Due to the number and disparate nature of the remedies sought by Adams in connection with the trial, I address each remedy in turn below.

1. Damages[204]

a. Money paid by Plaintiff

In her Complaint, Adams asks the Court to require CFMC to reimburse her for alleged payments of $590.00 in 2007, $100.00 in 2008, and approximately $590.00, plus late charges in 2009, because such sums represent invalid assessments levied in violation of the Declaration. As discussed *supra* Part II.C.4, Adams is entitled to recover her payments of $100.00 in 2008 and $590.00 in 2009, plus late charges actually paid. I deny

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Thus, in addition to waiving the issues she failed to brief, I also deny Adams's petition for any form of relief for which she did not present argument or evidence.

[203] *See Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.") (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993); *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 140 n.3 (Del. 1997)).

[204] Among other things, Adams seeks punitive damages for alleged breaches by the CFMC directors and officers of their fiduciary duties of care and loyalty. The Court of Chancery, however, lacks jurisdiction to award punitive or exemplary damages unless it has received express statutory authority from the Delaware Legislature. *See Beals v. Wash. Int'l, Inc.*, 386 A.2d 1156, 1158-59 (Del. Ch. 1978); *see also* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 2.05 (2010). The Legislature has not authorized punitive damages for a director's breach of fiduciary duty; thus, Adams's claim for such relief must be denied.

her claim to recover the 2007 sum, however, because that payment was made to Gemcraft before control over the Open Spaces was transferred to Defendant.

b. Money spent by CFMC

Adams also seeks to require CFMC to repay all money collected in prior assessments and paid to landscaping companies that mowed the Open Spaces in violation of the Landscape Plan, money paid to Emory Hill, and money spent by CFMC on "Meet and Greet Your Neighbor" events.[205]

Adams, however, brought and prosecuted this action in her individual capacity, and not derivatively on behalf of all similarly situated CFMC Members.[206] In terms of a derivative action, Adams also has not alleged with specificity that she made a demand on the CFMC Board before filing this action or that demand is excused as required by Rule 23.1. Similarly, Adams has not moved the Court to approve her as a representative of a certified class action under Court of Chancery Rule 23, nor has she offered any other basis for authorizing her to proceed in a representative capacity.[207] As a result, she is precluded from seeking damages that were not suffered uniquely by her in her personal capacity as a CFMC Member.[208] Accordingly, I deny Adams's request to have CFMC return all improperly assessed sums collected from any Members other than herself.

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205 Compl. ¶¶ 13(5), 13(7)-(9).

206 *See* Compl. at Prayer for Relief; Pl.'s Proposed Pre-Trial Order.

207 T. Tr. 438-39 (Adams).

208 *See, e.g.*, *Alston v. State*, 2002 WL 184247, at *3 (Del. Super. Jan. 28, 2002) (noting that a court will consider only the plaintiff's personal claims, and not

2. Declaratory judgment

Adams also seeks a declaratory judgment regarding various issues.

a. Whether notice of elections to Adams was provided timely or at all?

Adams claims that she did not receive notice, timely or otherwise, of CFMC Board elections as is required under the Bylaws.[209] According to the Bylaws, Members are entitled to notice of all annual meetings at which they shall elect, by a plurality vote, a board of directors.[210]

The evidence, however, weighed heavily in favor of finding that the CFMC Board fully complied with its notice obligations under the Bylaws. McLamb, for example, credibly testified that each Member received a first-class mailing, along with a proxy statement, before each upcoming meeting to elect directors.[211] In addition, the Board attempts to place a large sign at the entrance to the subdivision to apprise Members of the date and location of upcoming meetings.[212] Maria Ann Simon, CFMC's current property manager from Emory Hill, testified that Emory Hill took over notice responsibilities from

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claims on behalf of a putative class of persons, where class certification is denied); *cf. In re Countrywide S'holders Litig.*, 2009 WL 846019, at *10-11 (Del. Ch. Mar. 31, 2009) (explaining that the prerequisites of Rule 23 must be met before class certification may be granted).

209 POB 40.

210 Bylaws § 3 ("Notice of all meetings shall be mailed or hand delivered . . . to each member of record entitled to vote . . . for annual meetings . . . ten (10) days . . . prior thereto.").

211 T. Tr. 416-17. McLamb personally mailed the letters until June 2008 when Emory Hill took over such responsibilities. *Id*. at 504-05 (Simon).

212 *Id*. at 504-05 (Simon).

the Board and continued the practice of providing notice by mail and signage.[213] Adams repeatedly denied receiving notice of any such meetings, but admitted on cross examination that she had seen a notice sign at the entrance to the subdivision in January 2010.[214] Adams also acknowledged that she had received a notice announcing a meeting to hold 2008 annual elections, but alleged that she did not receive it until after the meeting took place—a notice McLamb convincingly stated had timely been sent to all Members.[215]

Having considered all the evidence, I find that Adams failed to carry her burden of showing by a preponderance of the evidence that she did not in fact receive notice of any annual meeting at which Board members were elected. Instead, Adams offered only bare assertions that she had not received such notice, which I consider less reliable than the evidence to the contrary presented by CFMC. Thus, I deny Adams's claim for declaratory relief on this issue.

b. Whether Members must pay assessments not duly authorized?

In her Complaint, Adams requests a declaratory judgment that CFMC incorrectly levied annual assessments against Members without the Member vote required by the

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213 *Id*.; Tr. 418-19 (McLamb).

214 Adams contended that the date of the meeting noticed on the sign was changed deliberately so that the meeting would conflict with Adams's obligations to attend this trial. T. Tr. 541.

215 *Id*. at 560-61.

Maintenance Declaration.[216] As discussed *supra* Part II.C, unless and until the Declaration is amended, only the Members of CFMC are empowered to set annual assessments pursuant to § 1(c) of the Declaration and any contrary provisions of the Certificate or Bylaws are inoperative. Thus, any assessments levied on Members without the assent of a majority vote of the Members voting in person or by proxy at the annual meeting, pursuant to § 1(c) of the Declaration, are voidable.

In accordance with my analysis above, Adams is entitled to recover the $100.00 annual assessment she paid in 2008 and the $590.00 annual assessment, plus late charges, she paid in 2009. She is not entitled to recover her $590.00 payment to Gemcraft in 2007.

3. Permanent Injunction

In her Pre-Trial Order, Adams also seeks a permanent injunction (1) requiring CFMC to enforce certain deed restrictions and prohibiting it from (2) cutting the Meadow areas to Turf, (3) contracting with Emory Hill Real Estate Services, (4) installing speed bumps, (5) placing liens on her property for refusing to pay assessments or fines issued in violation of the Governing Documents, and (6) making further assessments.[217] To obtain a permanent injunction, a plaintiff must show: "(1) actual success on the merits of the claims; (2) that the plaintiff will suffer irreparable harm if injunctive relief is not granted;

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216 Compl. ¶ 5.

217 *See id*. ¶¶ 2, 4, 6-8 and Prayer for Relief.

and (3) that the harm to the plaintiff outweighs the harm to the defendant if an injunction is granted."[218]

Here, Adams's request for a permanent injunction must be denied as to the first four matters she challenges because she has not shown actual success on the merits. In my ruling on CFMC's motion for summary judgment, for example, I rejected items 3 and 4 by ruling that the Governing Documents authorize the CFMC Board to install speed bumps[219] and contract with a firm, such as Emory Hill, to provide services to the Board to help it carry out its responsibilities.[220] Additionally, although Adams has shown that CFMC may not force Members to pay assessments made in violation of the Maintenance Declaration or place liens on a Member's property for refusing to pay assessments or fines issued in violation of the Governing Documents, she has not shown that she will suffer irreparable harm if injunctive relief is denied. Rather, Adams has an adequate remedy at law in that she may seek recovery of any money she pays for an unlawful assessment or fine imposed by CFMC. Accordingly, I deny Adams's claims for injunctive relief.

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

219 Furthermore, the evidence shows that no speed bumps were ever installed.

220 D.I. 65.

4. Attorneys' fees and costs

In their respective pleadings, Adams and CFMC each seek to recover their costs of litigation, including attorneys' fees.[221] For the reasons stated below, I deny Adams's request in full and award CFMC's reasonable costs under Rule 54(d).

a. Attorneys' fees

Delaware follows the American Rule, under which each party must bear its own litigation expenses, including attorneys' fees.[222] Two well settled exceptions to this rule exist for "cases where the underlying . . . conduct of the losing party was so egregious as to justify an award of attorneys' fees as an element of damages, and . . . cases where the court finds that the litigation was brought in bad faith, or that a party's bad faith increased the costs of litigation."[223] A moving party bears a heavy burden to show entitlement to fees based on the bad faith conduct of the opposing party, as she must do so by clear evidence.[224] Moreover, Delaware, like many other states, does not grant attorneys' fees to self-represented litigants.[225]

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221 Compl. ¶ 13(6); DAB 30.

222 *FGC Hldgs. Ltd. v. Teltronics, Inc.*, 2007 WL 241384, at *5 (Del. Ch. Jan. 22, 2007).

223 *Cove on Herring Creek Homeowners' Ass'n v. Riggs*, 2005 WL 1252399, at *1 (Del. Ch. May 19, 2005).

224 *See, e.g.*, *M & G Polymers USA v. Carestream Health Inc.*, 2010 WL 1611042, at *67 (Del. Super. Apr. 21, 2010); *FGC Hldgs.*, 2007 WL 241384, at *7.

225 *See Clark v. D.O.W. Fin. Corp.*, 2000 WL 973092, at *7 (Del. Super. May 26, 2000) ("there is no Delaware precedent for granting a *pro se* litigant attorney's fees."); s*ee also* 20 C.J.S. Costs § 138.

Based on the facts and circumstances of this case, I hold that Adams is not entitled to recover her litigation expenses or "attorneys' fees." She has failed to establish that CFMC's conduct falls into a recognized exception to the American Rule. CFMC's underlying conduct, including its flawed attempt to impose certain annual assessments, does not rise to the "high level of egregiousness" necessary to make it liable for Adams's fees as an element of her damages.[226] Likewise, Adams has not shown that CFMC acted in bad faith or vexatiously to increase the costs of this litigation. Thus, Adams is not entitled to recover any expenses in the nature of attorneys' fees.

As to CFMC's claim against Adams for its attorneys' fees and expenses, the only issues are whether Adams brought this action in bad faith or prosecuted it in bad faith or vexatiously to increase the costs of litigation. While Adams occasionally resorted to inflammatory rhetoric during the litigation,[227] she generally acquitted herself well and endeavored to comport with this Court's rules and procedures. CFMC also has not demonstrated that she brought frivolous claims without a good faith belief in the correctness of her position or deliberately took any action to increase the costs of the litigation. As such, I deny CFMC's request to recover its attorneys' fees.

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226 *See FGC Hldgs.*, 2007 WL 241384, at *5.

227 *See supra* Part II.D.6

b. Costs

Under the American Rule, litigants are generally responsible for their own costs.[228] Court of Chancery Rule 54(d), however, creates an exception to the general rule whereby costs "shall be allowed as of course to the prevailing party unless the court otherwise directs."[229] Under Rule 54(d), the "prevailing" party is a party who successfully prevails on the merits of the main issue[230] or the party who prevailed on *most* of her claims.[231] Courts interpret the term "prevailing" to mean that a party need not be successful on all claims, but rather must succeed on a general majority of claims.[232] Moreover, the Court of Chancery has "wide discretion" in awarding or apportioning costs in each particular case,[233] including the discretion to find that no party may be regarded as having prevailed.[234]

In this case, I find that CFMC is the prevailing party under Rule 54(d) and, thus, is entitled to its costs. While I sustained Adams's claim that the Board may not levy an

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228 *See FGC Hldgs.*, 2007 WL 241384, at *5.

229 For the purposes of Rule 54(d), costs include "expenses necessarily incurred in the assertion of a right in court, such as court filing fees, fees associated with service of process or costs covered by statute. . . . [I]tems such as computerized legal research, transcripts, or photocopying are not recoverable." *Id*. at *17.

230 *See FGC Hldgs.*, 2007 WL 241384, at *17.

231 *Brandin v. Gottlieb*, 2000 WL 1005954, at *27 (Del. Ch. July 13, 2000).

232 *See FGC Hldgs.*, 2007 WL 241384, at *17.

233 *See Barrows v. Bowen*, 1994 WL 514868, at *1 (Del. Ch. Sept. 7, 1994).

234 *See Vianix Del. LLC v. Nuance Commc'ns, Inc.*, 2010 WL 3221898, at *28 (Del. Ch. Aug. 13, 2010).

annual assessment without a Member vote pursuant to the Maintenance Declaration, I found for CFMC on each of Adams's other claims, which were at least as important and clearly outnumbered the claims on which Adams prevailed. Therefore, I hold that Adams must pay CFMC's costs of litigation pursuant to Rule 54(d).

III. CONCLUSION

For the foregoing reasons, I hold that: (1) the revision to the Calvarese Farms Landscape Plan adopted in or around October 2007 is valid and that Adams has not shown that the CFMC Board or the New Castle County Department of Land Use acted improperly in connection with that revision; (2) CFMC may not levy an annual assessment upon Members of the subdivision unless the assessment is approved by a majority vote of the Members who are voting in person or by proxy at the annual meeting pursuant to § 1(c) of the Declaration; (3) CFMC Board members did not unlawfully approve or condone mowing in Reforestation areas identified in the Landscape Plan, create or disseminate a neighborhood directory containing Adams's telephone number or other personal information, or breach their fiduciary duties of care and loyalty; (4) the CFMC Board has authority to, and properly did, contract with Emory Hill; and (5) Adams has waived any other issues that she did not brief or otherwise pursue after trial.

I further hold that: (6) Adams is entitled to recover only the monies she paid to CFMC as part of past annual assessment collections for 2008 and 2009, plus any late charges; (7) in accordance with Rule 54(d), Adams must pay CFMC's costs in connection with this litigation; (8) Adams is not entitled to declaratory judgment on the issues of improper notice of Board elections or payment of assessments not duly authorized under

the Maintenance Declaration, except as stated in item (6) above; and (9) Adams is not entitled to a permanent injunction against the CFMC Board. In all other respects, Adams's claims in this action are dismissed with prejudice. Plaintiff and Defendant's competing claims for attorneys' fees and expenses, other than costs recoverable under Rule 54(d), are denied. I am entering concurrently herewith a final judgment reflecting these rulings.