

1 STATE OF WISCONSIN CIRCUIT COURT ROCK COUNTY

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3 PATRICIA ULRICH, et al.,

4 Plaintiffs,

5 vs.

Case No. 2011CV1847

6 WISCONSIN'S ROCK RIVER

7 LEISURE ESTATES,

8 Defendant.

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11 PROCEEDINGS: Motion Hearing

12 DATE: July 19, 2012

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14 COURT: The Honorable Daniel T. Dillon
15 Circuit Court Judge, Presiding

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18 APPEARANCES: Harry Charles O'Leary, Jr., Attorney
19 At Law, appearing on behalf of the
20 Plaintiffs, and plaintiffs in person;
21 Timothy H. Lindau, Attorney at Law,
22 Appearing on behalf of the defendants.

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25 REPORTER: Linda M. Blum

1 THE COURT: This is in the matter of Case No.
2 11 CV 1847. The plaintiffs are, the lead plaintiff is
3 Patricia Ulrich. There are other enumerated plaintiffs.
4 The defendant is the Wisconsin Rock River Leisure Estates
5 Home Owners Association. Could we have the appearance
6 for the plaintiffs, please?

7 MR. O'LEARY: Attorney Harry O'Leary appears on
8 behalf of the plaintiffs, Your Honor.

9 THE COURT: And for the defendant?

10 MR. LINDAU: Your Honor, Nowlan & Mouat law
11 firm appears by attorney Tim Lindau appears on behalf of
12 the defendant, who also appears by the president of the
13 board, Les Prisk.

14 THE COURT: All right. Now just so the
15 plaintiffs who are present in court can at least be
16 recognized, there is a list of plaintiffs in the
17 complaint which include, looks like 32 owners, who's here
18 in that classification?

19 MR. O'LEARY: Your Honor, to be honest with
20 you, I'm not sure.

21 THE COURT: You may raise your hands just so I
22 can see who the people are. All right. Thank you.
23 We're not going to list all of your names, in the
24 interest of time, but you are recognized by the court.
25 Normally you'd have a right to sit at counsel table. We

1 don't have enough room.

2 All right. What's before the court this
3 morning, reciprocal motions, in other words a motion
4 brought by each side essentially asking for the same
5 relief. In other words, both parties are saying we think
6 that the facts are clear and you should rule in our
7 favor.

8 The plaintiff has brought a motion for
9 declaratory judgment, the defendant has responded with a
10 motion for summary judgment. I'm going to ask, I've read
11 your submissions, counsel, I'm going to hear your
12 arguments. Both of you argued in the companion, I'm
13 going to call it the companion case, the matter involving
14 Mr. And Mrs. Sarto. I'm familiar with the transcript
15 that's been furnished the court. As far as that's
16 concerned, some of the information, background
17 information that was discussed, is the same in this case.
18 The factual determination of that case, as I specifically
19 determined in other words, what the definition of
20 permanent residency is, what a permanent residency
21 standard is was left open by me in that case. I did not
22 make a determination as to that fact in that case. What
23 I did is make a determination that if you defined
24 permanent residency in any way, based on the facts of the
25 occupancy of the property by the Sartos, who had no other

1 residence, either on a very temporary basis or the last
2 ten years, they would qualify as permanent residents.

3 The so here we are. Also at the conclusion of
4 the hearing I suggested that mediation might be fruitful.
5 I don't think I specifically ordered mediation and I
6 don't know that there was any mediation. I would
7 recognize that when a legal issue is still pending when a
8 matter of law is still pending in a controversy sometimes
9 mediation is difficult.

10 All right. Let's decide who's going to argue
11 first. I think Mr. O'Leary brought the lawsuit. He gets
12 to argue in his motion and the reply to his motion first,
13 and then you get to do the same thing, Mr. Lindau, so
14 we'll hear what both of you have to say. If the court
15 has any questions, I'll give, I'll ask a question
16 directly of whomever I think I need to have the answer,
17 but then I'll let the other side respond as well, and you
18 will be both given a complete opportunity to argue the
19 case to the fullest extent, then I'll decide as I listen
20 to the argument. If it is possible for the court to rule
21 from the bench today, if I decide it is not I'll take the
22 case under advisement.

23 So, Mr. O'Leary, you may proceed.

24 MR. O'LEARY: Your Honor, you've indicated
25 you'd read our submissions already so I don't want to

1 regurgitate what's been submitted to you, perhaps ad
2 nauseam. What we look at from the plaintiffs'
3 perspective is the key issue here is the definition of
4 permanent residence. The board has submitted standards
5 that they are trying to impose upon all residents within
6 the recreational site, Wisconsin Rock River Leisure
7 Estates, in which individuals would be defined as
8 permanent residents if they stay on their property for
9 nine months, more than nine months, and it's that issue
10 that we object to based on the manner in which they're
11 trying to impose that restriction.

12 The covenants are clear, and within the
13 declarations that have been on file for over 40 years,
14 that the only way they can be amended, or added to, or
15 deleted for that matter, is by a three-quarters vote of
16 the members of the association, of which there is more
17 than 496 property owners within this association at this
18 point in time.

19 There has been no vote of that nature. The
20 board, in my opinion, is trying to play a game of
21 semantics and is trying to say they are allowed to
22 prepare standards, or resolutions, or guidelines by which
23 they will enforce the covenants. They may be able to
24 establish some restrictions under the covenants, but in
25 this particular instance, what they are doing is

1 implementing, using terminology that clearly defines what
2 a permanent residence is. And what I submit to the court
3 is that if not for the standard being proposed by the
4 board today, we would not know what a permanent residence
5 is other than what the court has already decided within
6 the Sarto case of year-round residence, 365 days a year.
7 That's pretty common sense. That's someone is living
8 there all year long.

9 So in that context if we're interpreting it
10 that way, the way the court did in the Sarto case, we
11 can't object to that, that's common sense that 365 days a
12 year is permanent residence. Anything beyond that,
13 unless it is changed by the members of the association by
14 a vote within the covenants, which are a contract, within
15 the declarations of court and Register of Deeds pursuant
16 to statute of frauds and all this, unless they are
17 changed in the manner they had contracted with the
18 association, they don't have the authority to be able to
19 place an implementation that restricts their use of the
20 property.

21 And to that I refer to the Crowley case, many
22 occasions, I think, in my brief, and I believe that that
23 case is on point with what our issue here is here and
24 what our point is here. In that case the court had to
25 deal with the issue of the term family, which just like

1 permanent residence was undefined within the
2 declarations, and the trial court defined family as
3 something with continuity or marriage or much more
4 restrictive interpretation, and the Supreme Court came
5 back and said no, unless it's clear and unambiguous you
6 can't insert some other type of definition that's going
7 to create a restriction on the use of property because in
8 Wisconsin public policy is that an individual has free
9 and unencumbered use of their property unless there's
10 language that clearly says to the contrary.

11 And in this instance, we're the same. We have
12 a term permanent residency. Over the course of 40 some
13 years we've had people buying and selling these
14 properties with this vague terminology of permanent
15 residence. One person might interpret it different from
16 another person as to what does that mean, how do we
17 defeat that term, if I'm away a weekend, I'm away a day,
18 I'm away two weeks, the board here is trying to implement
19 saying they have to be away approximately three months
20 out of a year, and perhaps that's reasonable, but it's
21 only reasonable if three-quarters of the association
22 agrees to it and votes to change that within the
23 covenants, and which is the contractual understanding
24 that everybody has.

25 Mr. Lindau has provided the papers that

1 everybody signs when they purchase the lot saying they
2 agree to abide -- Well, I'll just go from there. They
3 agree to provide the paperwork that says that the
4 individuals that are buying the lots will abide by the
5 covenants and the restrictions.

6 As I said --

7 THE COURT: Let me interrupt you to get you
8 back on track. I was listening carefully. Sometimes I
9 mean the court reporter can only take two hundred words a
10 minute, you are going at about 205 right there. But what
11 you were saying was that it's only reasonable if
12 three-quarters of the association agrees to it and votes
13 to that change within the covenants. You are arguing
14 from the covenants to the rules, and then you suggested
15 that Mr. Lindau has provided the paperwork, in other
16 words, the documents that all of the individuals sign to
17 become owners, that they agree to, and I think what you
18 were going to say was is within the terms of agreement
19 are the, is the language of permanent residency or not
20 permanent residency, but a definition of what a permanent
21 resident is doesn't show up in it.

22 MR. O'LEARY: Thank you, Your Honor. That was
23 the point I was trying to get to is that. But within
24 that document that signed, and it's not just by Mr.
25 Lindau, it's the association that submits it to the

1 property owners when they purchase their lots.

2 THE COURT: I think we agreed in the Sarto case
3 that it's clear that the, all of the ownership documents,
4 all of the deeds incorporate if they are, if they are or
5 are not permanent residents, there's a reference to this,
6 we clearly understand this will not be a permanent
7 residence.

8 MR. O'LEARY: Yes.

9 THE COURT: I don't have exact language but I
10 think that's very clear. The issue is what does that
11 mean. What does permanent resident mean. And at the end
12 of the Sarto case one of the arguments that was left
13 unanswered because the Sartos self-defined themselves as
14 permanent residents, not having lived anyplace else
15 anywhere for years, the question that was left unanswered
16 was how do you meet the definition of permanent resident
17 if you don't know what it is. So does it mean one
18 weekend a month, one month out of the year, two months
19 out of the year, three months out of the year, and in the
20 documents of ownership and the deeds and the other
21 documents that are referred to, from the beginning that
22 term of residence, permanent residence, has never been
23 defined, and now what's happened is the board has,
24 through what the board believes is its lawful authority
25 as the board of directors, has defined the term.

1 And the crux of the issue is does the board by
2 itself have the authority to define the term or does it
3 have to go to the membership at large in the more global
4 provisions of the corporate structure.

5 I'm getting your argument. I don't want to
6 interrupt you. Apparently I guess I do want to interrupt
7 you because I did, but I apologize if I lost, caused you
8 to lose your train of thought. You may proceed.

9 MR. O'LEARY: No, Your Honor. I mean, and I
10 don't want to belabor the point. That is the crux of the
11 issue. I guess the point I'm trying to make is that we
12 strongly believe the board does not have that authority
13 to which the court referred.

14 THE COURT: Well, I will tell you, counsel,
15 you're not belaboring the point. You should make the
16 point to whatever extent you think it is appropriate.

17 MR. O'LEARY: And I understand. In our
18 opinion, the board does not have the authority to
19 implement any kind of proposals unilaterally by which
20 they've defined a permanent residence. And they may want
21 to try to term it as not a definition, that they're just
22 placing a restriction on a property. But we submit that
23 anything that they do that places a limitation on the use
24 of the property is contrary to the Crowley case. They
25 are defining it by no other terms, and this particular

1 instance saying nine months. And I would submit to the
2 court that if we use some kind of means by gauging as to
3 whether or not these individuals are living on this
4 property permanently, there's a limitation, too, in that
5 respect, and where I'm going with that is that they
6 propose nine months. I've got tax clients in Nevada and
7 in Florida where we look at six months and a day. They
8 live in Wisconsin, IRS recognizes them as permanent
9 residents in Florida and Nevada because they're there six
10 months and a day. Based on the board's logic here, if we
11 have nine months they would still be able to use this
12 residence as their tax base, as their voting base, as
13 perhaps a base where they would have their vehicles
14 registered, and things of this nature, so those types of
15 standards can't be used to determine that they are
16 permanent or not permanent. The only thing that can
17 define that is are they there 365 days out of the year?
18 And if the answer to that is no, with the way the
19 declarations are specifically stated, then they are not
20 permanent residents.

21 And that is the crux of the issue that we have.
22 Unless the board gets a three-quarters vote of the
23 members of the association and pursuant to the covenants
24 they cannot themselves define anything other than 365
25 days out of the year.

1 THE COURT: I misspoke earlier, Mr. O'Leary.
2 Both, and I could tell I said something that you didn't
3 agree with just by the look on your face. Both sides
4 have brought motion for summary judgment. Declaratory
5 judgment, motion for summary judgment.

6 MR. O'LEARY: Right.

7 THE COURT: Does that complete your argument?

8 MR. O'LEARY: Yes, Your Honor.

9 THE COURT: Mr. Lindau?

10 MR. LINDAU: Thank you, Your Honor. I do
11 somewhat intend to belabor the point because I think this
12 is an important matter, and I appreciate that you've
13 reviewed the submissions and given the pure volume that
14 has been submitted to you I'm going to try to summarize
15 them to the best of my ability. And you've already
16 identified, Your Honor, what the issue at play here is,
17 and that is does the board have the authority to place
18 the standards or define the standards of what a permanent
19 residency is.

20 All of the relevant facts are undisputed, Your
21 Honor. I don't think attorney O'Leary would argue that
22 point. I don't think this is something that is right for
23 anything other than summary judgment.

24 The facts are as follows: The Rock River
25 Leisure Estates Home Owners Association was formed as a

1 nonstock corporation by filing the articles of
2 incorporation January 23, 1975. The declaration or the
3 servitude that runs with the property was recorded on
4 June 13, 1975. I bring this up because the historical
5 context here is important. Prior to the recording of the
6 declaration, Your Honor, the part which was to be
7 established as a planned unit development was taken to
8 the county level which at the time had both the land use
9 and the zoning authority over the park. One of the
10 issues at that time was not allowing permanent residency
11 on recreational vehicle lots. The intent at the time was
12 that this not be a mobile home park, but that it be a
13 vacation destination of sorts.

14 As a result of those negotiations with the
15 county, Your Honor, the developer agreed to three
16 separate home sites, to which the county agreed.
17 Permanent home sites, vacation cottage sites, cottage
18 sites, and recreational vehicle lots. The permanent home
19 sites, by amendment to the declaration, were later
20 removed so today we have the recreational vehicle lots
21 and the vacation cottage sites, and it is the vast
22 majority of the sites are recreational vehicle lots.

23 The recreational vehicle lots, Your Honor, have
24 the specific prohibition against permanent residency.
25 The declaration reads that a recreational vehicle on a

1 recreational vehicle lot shall not be used as a permanent
2 residence. That of course is the provision that is at
3 play here today.

4 Noting the importance of that prohibition, Your
5 Honor, the association has long required that any
6 purchaser of a lot is required to complete and sign the
7 acknowledgement form that specifically says that no
8 permanent residency is permitted on a recreational
9 vehicle lot. This has been a dispute for a number of
10 decades now, and despite the acknowledgement and despite
11 the declaration, there are numerous residents, including
12 some of the plaintiffs we believe that have been living
13 permanently on the property on a recreational vehicle
14 lot.

15 So in order to address this issue, the
16 association, by its board of directors, enacted the
17 permanent residency standard which provides that any
18 person living more than nine months per year on their
19 recreational vehicle lot is a permanent resident. It
20 further provides for reasonable fines, and the ability to
21 levy liens, and other grandfather provisions and things
22 of that sort.

23 Prior to enacting the standards the board
24 considered the health, safety and social needs of the
25 park and the community as a whole, also considering the

1 pressure that is exerted upon it, the board, by the town
2 of Fulton, who now has zoning authority. It even
3 provided the standard to the residents and the members
4 and asking their feedback and input on the standard.

5 Knowing how difficult the issue was, they also
6 provided for a grandfather provision that allows members
7 who are living on their lots permanently prior to 2007,
8 which is when this definition was first considered, to
9 live permanently in exchange for a nominal fee. The
10 plaintiffs of course are claiming that the board lacks
11 this authority.

12 Now that we have the undisputed facts, we can
13 now apply those facts to the law. Both parties agree
14 that there is a binding contract between the members and
15 the association. This is clearly set forth in a number
16 of cases. The most recent, and one that I will get into
17 in more detail later, is Solowicz versus Forward Geneva
18 National, LLC, which I believe is the case that governs
19 our conduct here today.

20 Solowicz provides that the declaration articles
21 and bylaws, including the acknowledgement, are contract
22 between the parties. The question is then what are the
23 terms of those contracts? Plaintiff's point almost
24 exclusively, if not exclusively, to the declaration, that
25 only contains a portion of the terms of the contract.

1 There are also provisions, very important and vital
2 provisions in the articles, the bylaws and the
3 acknowledgement, which also contractually bind the
4 members and the association. Here is some quotes and
5 some provisions from the contracts between the parties.

6 Under the articles of incorporation the
7 association is required to promote the health, safety and
8 welfare of the residents as provided in the bylaws, and
9 for this purpose to enforce any and all covenants,
10 restrictions, or agreements, and insofar as permitted by
11 law to do any other thing in the opinion of the board
12 that will promote the common benefit and enjoyment of the
13 residents in the development.

14 The declaration and its preamble provides the
15 association, that they are in charge of administering and
16 enforcing covenants and rules. It also says, as attorney
17 O'Leary has pointed out, that the association shall
18 establish control and enforce lot restrictions and
19 control and enforce lot covenants.

20 The articles points to the bylaws as the
21 membership agreement between the association and
22 establish the board's power in the bylaws. Even
23 Wisconsin law under Chapter 181 conveys significant
24 importance on the bylaws. It says that bylaws may
25 contain any provision for regulating and managing the

1 affairs of the corporation that is not inconsistent with
2 its articles of incorporation or with the laws of the
3 state.

4 So what do the bylaws say? They make it clear
5 that the association is to enforce any and all covenants,
6 restrictions, or agreements applicable to the
7 development, they also say that the direction and
8 administration of the association and of all property
9 subject to any degree of control by the association shall
10 be vested in the board. Nothing in these bylaws shall
11 interfere with the right and duty of the association to
12 uphold the declaration. And it goes on to say so long as
13 the association is obligated to uphold the declaration
14 under its terms and conditions the board has the
15 authority to levy fines and/or penalties for violation of
16 the bylaws, covenants, and rules and regulations. That's
17 another provision set forth in the bylaws.

18 As we've already talked about in the
19 acknowledgement, residents specifically state that they
20 further agree to be bound by and comply with the
21 articles, bylaws and declaration of covenants and rules
22 of the association. Particularly no permanent residence
23 on a recreational lot. These contractual provisions
24 clearly provide the association by the board the
25 authority to enforce the rules and regulations of the

1 park. I don't believe this point can be refuted.

2 It is important to look further then into the
3 role of the board and consider the broad authority and
4 power given to it under the law. Under Chapter 181, the
5 nonstock corporation statute, all corporate power shall
6 be exercised by or under the authority of and the affairs
7 of the corporation managed under the direction of the
8 board. In the Am. Jur. On condominiums, a condominium
9 association similar to an association such as this, a
10 common interest community, it says a declaration shall
11 not be so narrowly construed so as to eviscerate the
12 association's intended role as the governing body of the
13 community. It also states that a board's authority
14 includes the power to issue reasonable regulations
15 governing an owner's use of the unit in order to prevent
16 activities which might prove annoying to general
17 residents. In the restatement on servitudes it states
18 that except to the extent limited by statute or the
19 governing documents, a common interest community has the
20 power to enforce the governing documents. In addition to
21 seeking court enforcement, the association may adopt
22 reasonable rules and procedures to encourage compliance
23 and deter violations, including the imposition of fines,
24 penalties, late fees and the withdrawal of privileges to
25 these common, recreational and social facilities. Boards

1 are given authority to adopt standards for enforcement
2 because as corpus juris secundum points out, declarations
3 themselves contain just the broad statements of general
4 policy but do notice that the association's board is
5 empowered to implement these policies and address
6 day-to-day problems in the association's operation. This
7 framework of the declaration establishing the general
8 policy and the board providing specific detail allows
9 flexibility in the administration and enforcement of the
10 association's restrictions.

11 It allows democratically elected
12 representatives to establish and enforce the standards
13 and restrictions. Obviously under the business judgment
14 rule under the Dodge court's decision, which I will get
15 to in a bit, the board must enact the standard and
16 enforce it in a reasonable manner, it must be done in
17 good faith and it cannot be arbitrary and capricious.
18 Further, the board acts as a fiduciary to the association
19 members. The, if the board acts reasonably, then under
20 the business judgment rule a court's review of the
21 board's decisions are limited to whether the board's
22 actions were made in good faith and in furtherance of the
23 association's legitimate interests. The court cannot
24 substitute its judgment for that of the board's.

25 Pursuant to the undisputed facts before this

1 court, the board has the contractual authority to adopt
2 the standards. The declaration and articles give
3 authority and obligation to enforce to the board, and the
4 bylaws specifically state that the direction and
5 administration of the association belongs to the board
6 and grant that the board have the authority to adopt and
7 levy fines and liens.

8 Further, the board has a legal authority to act
9 on behalf of the association to enforce the clear and
10 unambiguous restriction contained in the declaration.
11 Because of this authority, under the business judgment
12 rule and the decision in Dodge, this court cannot set
13 aside permanent residency standards since they were
14 adopted in good faith and are reasonable.

15 Leaving this decision to the board is not only
16 in the best interest of the members of the association,
17 it also is in the best interests, it also serves the best
18 interest of the people of the town of Fulton and of Rock
19 County. Stripping the board of its contractual and
20 statutory authority would require that all violators of
21 the prohibition be brought before this court. That is a
22 waste of time and money, and in light of the law and the
23 contract between the parties, is wholly unnecessary.

24 Now I understand that is an argument that we
25 have raised, and attorney O'Leary and the plaintiffs

1 would suggest that well, none of that matters because the
2 phrase is ambiguous. And so to touch on attorney O'Leary
3 and the plaintiffs' point, which I don't believe we need
4 to get to, but I will anyway, I believe that he is
5 arguing two things. One, that the prohibition lacks a
6 definition and therefore can only be enforced by amending
7 the declaration or the prohibition lack of a definition
8 makes it ambiguous and therefore it should be
9 disqualified. The two arguments are inherently
10 contradictory in my mind but I will address them
11 nonetheless.

12 In order to be successful under either argument
13 the plaintiffs must first show that the prohibition is
14 ambiguous. Your Honor, the prohibition is not ambiguous,
15 it merely lacks a definition. I understand that the
16 distinction may appear silly on its surface, but it is
17 very important. Ambiguity means that a word or phrase
18 lends itself to more than one interpretation. A
19 definition in this case means that their objective
20 standards that have been assigned to the prohibition.
21 One thing is clear, the prohibition does not lend itself
22 to more than one interpretation. Not one reasonable
23 person can look at that phrase and come to any conclusion
24 other than I cannot live here permanently. Obviously the
25 provision is clear as day. If you live in a recreational

1 vehicle on a recreational vehicle lot you cannot do so as
2 a permanent resident.

3 Plaintiffs cannot reasonably argue that this is
4 open for interpretation. Again, we understand that it
5 does lack a definition, and therefore, plaintiffs argue
6 that it requires a three-quarters vote of the membership.
7 Requiring a drafter of a declaration to contemplate all
8 known and unknown facts and circumstances and thus
9 requiring him to define every single term is neither
10 realistic, nor do I believe is it legally required. The
11 lack of a definition does not, as plaintiffs would argue,
12 doom the prohibition and, in fact, it does not even
13 alleviate the board's ability, or in this case its
14 obligation to define the restriction for purposes of
15 enforcement.

16 In Dodge versus Carauna the court was dealing
17 with the restrictive covenant that required property
18 owners in an association to get approval of the grantor
19 or his successor in interest prior to erecting a
20 building. Like here, the defendant argued that this
21 restriction was ambiguous and, therefore, unenforceable
22 because it lacked objective standards. The court
23 rejected this argument but instead adopted the approach
24 of many other states which said that a standardless
25 restriction may be enforced if the power to do so is

1 exercised reasonably. Wisconsin has adopted this
2 reasonableness approach when looking to the enforcement
3 actions of association boards.

4 In other words, it is incumbent upon the board
5 to develop standards that are objective, honest and
6 reasonable. If this is done, the board can proceed with
7 enforcement of the restriction despite the fact that
8 objective standards were not originally included in the
9 restrictive covenant.

10 As mentioned earlier, the board went out of its
11 way to develop a standard that is reasonable by
12 considering the needs of the community, deciding on a
13 period that is not harsh, eliciting feedback from the
14 residents, and providing for a grandfather provision.
15 The board, by adopting the permanent residency standards,
16 did not amend, create, or add to the existing covenants,
17 it did not need to. Rather the board acted in good faith
18 and reasonably in adopting standards which would assist
19 it in fulfilling its obligation to enforce the
20 unambiguous prohibition against permanent residency.

21 What is frustrating from the board's
22 perspective, Your Honor, is that it is finally trying to
23 establish a bright line standard that can be applied
24 universally and fairly. All of these plaintiffs and
25 others living permanently have done so with actual

1 knowledge that they are violating the declaration.
2 Regardless of this, they now attempt to paint the board
3 as the enemy. The vagueness to which attorney O'Leary
4 referred to in his arguments is exactly why the board is
5 dealing with this issue now, it's to benefit the members
6 of the association, not to harm them.

7 As to attorney O'Leary's point with regard to
8 the disqualification as a result of the ambiguity.
9 Again, Your Honor, the restriction is not ambiguous.
10 They rely, as attorney O'Leary pointed out on the Crowley
11 case, the facts of which were recited in both
12 submissions, both plaintiffs' and defendant's
13 submissions.

14 First, the Crowley case did not, as plaintiff
15 suggests, disqualify the restrictive covenant at issue
16 there, it merely found that the property owners were not
17 in violation of it. Further, Crowley did not deal with
18 the board's authority to enact a standard to enforce a
19 restriction. What Crowley did was say that in this
20 particular instance these plaintiffs were not in
21 violation of the covenant. The facts are clearly
22 contradictory to one another, they're not analogous, and
23 for that reason I don't believe Crowley is controlling.

24 Even further, well, I would agree that Crowley
25 states that unambiguous phrases should be interpreted to

1 encourage free and unrestricted use of property, I would
2 submit to this court that Wisconsin law has actually
3 moved from that hard line approach from Crowley in recent
4 years. The two main cases now on restrictive covenants
5 are Zinda versus Krause and Solowicz versus Forward
6 Geneva National, LLC. The Solowicz case stands for the
7 opposite of what plaintiffs are requesting, and that is
8 that the intent of the contract can be ascertained from
9 the document, if the intent can be ascertained from the
10 document it will be enforced. The reason for this is
11 because the declaration itself establishes a master
12 scheme or plan for the entire park and must be considered
13 as a whole, which means provisions should not be singled
14 out and taken on their own.

15 In Solowicz residents challenged the
16 declaration governing the Geneva National resort by
17 arguing the term when control of the association would
18 shift from the developer to the association. In arguing
19 that the term conveyance was ambiguous, the plaintiffs
20 pointed to the fact that the developer actually redefined
21 what was meant by conveyance on two different occasions.
22 This they argued makes clear that the term conveyance is
23 ambiguous because it is susceptible to more than one
24 interpretation. The Supreme Court disagreed and stated
25 that the court must give effect to the entire document

1 saying the declaration is unambiguously an attempt to
2 position control of Geneva National with the declarant
3 until significant number of residential units are sold to
4 allow the declarant to control the orderly development of
5 property. Under Solowicz the court stated that the
6 document need not expressly prohibit the specific
7 activity in question. It further stated that the
8 declarant's two explanations of what constitutes a
9 conveyance did not redefine the term, but instead served
10 to reinforce the declaration's purpose. Solowicz is
11 directly on point when differentiating between ambiguity
12 and definition and what that means to enforcement. It
13 also recognized the fact that in establishing the overall
14 goal of the declaration or master plan is paramount when
15 interpreting servitude. There is no argument that the
16 entire structure of the property, the association, the
17 membership, everything at the Wisconsin Rock River
18 Leisure Estates is based upon the single intent of the
19 declaration that recreational vehicle lots not be used as
20 permanent residence. Suggesting anything otherwise would
21 turn the park on its entire head.

22 Your Honor, summary judgment is appropriate in
23 this matter because there is no genuine issue of material
24 fact. The only issue that must be addressed is whether
25 the board has the authority to adopt and enforce the

1 permanent residency standard. If so, under the decision
2 in Dodge, are the permanent residency standards
3 reasonable? Based upon the law and the contract between
4 the parties, it is clear that the permanent residency
5 standards are reasonable and fair, and the board was well
6 within its authority to adopt them.

7 For this, we would ask that you please grant
8 the defendant its motion for summary judgment. In the
9 same way, plaintiffs' motion for summary judgment must be
10 denied. The declaration centers upon a single clear and
11 unambiguous restriction against permanent residency which
12 the board is obligated to enforce, that is precisely what
13 the permanent residency standards do. Thank you, Your
14 Honor.

15 THE COURT: Thank you, Mr. Lindau. Mr.
16 O'Leary?

17 MR. O'LEARY: Your Honor, we still get to the
18 heart of the matter in defining what is a permanent
19 residence. Solowicz, Geneva National resorts case, the
20 Supreme Court came out and decided that the terminology
21 associated with conveyance was ambiguous, so I don't
22 think that case is really on point with regard to what
23 Mr. Lindau is referring to. The Crowley case, on the
24 other hand, clearly indicates the use of a term, within
25 the declarations that is undefined by the original

1 drafter cannot be defined by a board subsequently, or
2 anyone else for that matter subsequently, if other people
3 can reasonably believe it to mean something else. We
4 have an instance in this particular case where even
5 another attorney within Mr. Lindau's firm rendered an
6 opinion to the board back in 2007 in which he indicates
7 standards cannot be applied to define a restrictive
8 covenant. Now they're trying to say they're not defined,
9 they're trying to say that they're simply just trying to
10 implement standards because they're obligated to do so,
11 but restrictive covenants by their very nature are
12 restrictions on a property and they're recorded with the
13 Register of Deeds office. If we're to allow the board to
14 come up with standards now that in and of themselves
15 define a permanent residence, that those documents cannot
16 be recorded with the Register of Deeds office because
17 they haven't been voted on upon the three-quarters
18 majority of the members of the association. So we have
19 standards floating around out there that perhaps this
20 board in this day and this age thinks are appropriate and
21 reasonable under the circumstances. But 20 years from
22 now we may have a totally different board, we will have a
23 totally different board that thinks otherwise. And to
24 accept their argument that they're allowed to implement
25 standards, for all intents and purposes, really just

1 subjects this whole association to the same thing, for
2 example, that the city of Janesville does year in and
3 year out in its sidewalk policy, one council can't commit
4 another council to another one with regards to the
5 sidewalk policy year to year. When the city council
6 rolls over, we have a different change in policies or
7 standards or rules, or whatever you want to define them,
8 and I submit this is the same, similar situation with
9 what's going on here. They believe nine months, okay.
10 Fine, nine months today. What will it be tomorrow?

11 And as far as the argument goes with regards to
12 disqualification, our argument lies within the
13 disqualification of any kind of standards that the board
14 tries to implement on its own. Anything that they try to
15 implement on that, that cannot be allowed. If they make
16 an argument that any resident is there 365 days out of
17 the year and they're able to establish that, then I
18 believe that common sense says they're a permanent
19 resident, but on this particular situation that's not
20 what we're being asked to do, and it's not what we're
21 arguing. We're simply arguing that the board doesn't
22 have the authority to unilaterally establish a standard
23 within the declarations that are recorded under which
24 most members of the association, all members of the
25 association, have contractual relationship saying that a

1 permanent residence is up in the air. We don't know what
2 it is.

3 Finally with regards to the declarations, Mr.
4 Lindau pointed out they were recorded back in 1975. We
5 keep hearing terminology the board has responsibility to
6 do this for the health, safety and social needs of the
7 association. We haven't heard any health issues, we
8 haven't heard any social issues, we haven't heard any
9 safety issues as far as problems that have arisen due to
10 the fact that we have residents residing there during
11 winter months of the association. In my opinion, it is
12 just terminology that's being thrown out there trying to
13 make an argument one way or another. The township hasn't
14 expressed any kind of concerns. In that respect we have
15 an affidavit from the town chairman, and that's the
16 extent of it. Beyond that they apparently don't have any
17 concerns because they haven't filed litigation with
18 regard to health, safety or social needs of the
19 association.

20 And also submit that the Crowley case is on
21 point with regards to the board being able to do with it,
22 or the county, or the town of Fulton being able to
23 implement any kind of restriction now after the horse has
24 been let out of the barn. They approved this plan unit
25 development back in '74, '75, saying you can't have a

1 permanent residence, they had the opportunity to restrict
2 that, define it, whatever it might be, they did not do
3 so. Hindsight might be 20/20 now, but they didn't do so
4 at that point in time. And to allow them to make a
5 restriction now that further restricts use of property in
6 our opinion is contrary to public policy based on the
7 case law in Crowley.

8 That's all I have, Your Honor.

9 THE COURT: That was Mr. O'Leary's reply in
10 support of his own motion. Now I'll let you reply in
11 support of yours.

12 MR. LINDAU: Your Honor, I don't have too much
13 to add to what I've already submitted. Oral argument --

14 THE COURT: As a courtesy to you I gave you
15 the opportunity. If there's nothing --

16 MR. LINDAU: I have nothing to add, Your Honor.

17 THE COURT: If you felt an invitation to
18 respond in the comment of Mr. O'Leary, I just gave you
19 that permission. You need not say anything.

20 MR. LINDAU: Thank you, Your Honor.

21 THE COURT: Let's see if we can go back to the
22 beginning and, counsel, you help me. Tracking the legal
23 documents which establish Wisconsin's Rock River Leisure
24 Estates and the Home Owners Association, what came first?
25 Articles of incorporation. Want to go to the white

1 board, Mr. Lindau?

2 MR. LINDAU: I would love to, Your Honor.

3 THE COURT: Mr. O'Leary, you can go, too.
4 Whoever, whoever writes better.

5 MR. LINDAU: I got a C in first grade.

6 THE COURT: Give yourself enough room. Very
7 top articles. We all know those are articles of
8 incorporation. Now, start any corporation in this state
9 you need to file your articles of incorporation. The
10 articles of incorporation.

11 In this entity, consist of 11 articles, that
12 are filed on July 22nd of 1975, they said the corporation
13 will be called Wisconsin Rock River Leisure Estates Home
14 Owners Association. They say in article three what the
15 purpose of the association is, and that's, as pointed out
16 by Mr. Lindau, to promote health, safety and welfare of
17 the residents within Wisconsin's Rock River Leisure
18 Estates, and such additions as may be hereafter be
19 brought within the jurisdiction of the corporation as
20 provided in the bylaws, and it talks about purposes, and
21 purposes are own, acquire, build, operate, maintain
22 parks, playgrounds, swimming pools, golf facilities,
23 commons, streets, all referred to as common properties
24 and facilities, to provide exterior maintenance for the
25 buildings, to provide garbage and trash collections, snow

1 removal, street maintenance, supplement municipal
2 services, to fix assessments or charges to be levied
3 against the common properties, pay taxes on the common
4 properties, so far as permitted by law to do any other
5 thing in the opinion of the board of directors will
6 promote the common benefit and enjoyment of the residents
7 in the development.

8 It goes on to say the intent of the association
9 to provide for the protection of the values, amenities,
10 and qualities in the development, and the maintenance,
11 improvement, regulation and preservation of the grounds
12 of the property. So those are the articles of
13 incorporation.

14 Article nine talks about who can be a member.
15 The association consists of all owners of property in
16 Wisconsin's Rock River Leisure Estates. Each lot owner
17 has one vote, all with equal rights and privileges. I'm
18 not reading all of this, I'm just referring to
19 highlights. If there's more than one owner of a lot, for
20 example, if a husband and wife own a lot, that is one
21 vote. The matters to be voted on include the election of
22 directors, alterations of covenants, and alterations of
23 rules, shall be further provided in the bylaws of the
24 association.

25 Then you have article ten. Article ten just

1 talks about other provisions, and it says the bylaws of
2 the association shall also be the membership agreement
3 signed by each lot owner upon the purchase of his lot, of
4 course it can be her lot. The board may adopt, amend or
5 repeal bylaws within the authority of a specific section
6 of the Wisconsin Statutes 181.13. The board may adopt,
7 amend or repeal within the authority of the statutes.

8 The articles may be amended in a manner
9 authorized by law at the time of the amendment. So those
10 are the articles of incorporation.

11 It says who's in the association, who gets to
12 vote, purpose of the association, talks about bylaws.
13 Usually at the same time that you file the articles of
14 incorporation you file the bylaws. You prepare your
15 bylaws. Let's put down bylaws next. Thank you, Mr.
16 Lindau. Okay.

17 Here's the bylaws. The bylaws were revised on
18 June 14th of 2003. Is it relevant to go back any earlier
19 than June 14th of 2003 for purposes of this discussion?

20 MR. O'LEARY: I don't --

21 THE COURT: You don't think so, Mr. O'Leary?

22 MR. LINDAU: No, Your Honor.

23 THE COURT: All right. So then let's start
24 there. But we know that there must have been original
25 bylaws because the 2003 bylaws specifically say revised,

1 so there must have been something that was in effect that
2 was revised. So now we have bylaws. And the bylaws were
3 written and presented to the board of directors to
4 replace any and all existing bylaws. There were seven
5 board members present, and those seven board members, by
6 unanimous vote, adopted the bylaws on June 14th of 2003.
7 What authorizes the bylaws? The articles of
8 incorporation.

9 Now we're talking about 2003. And I'm talking,
10 I'm not talking about 40 years ago anymore. What do the
11 bylaws say? They talk about the association, they talk
12 about the fact that it's a nonprofit, nonstock
13 corporation organized under the same statutes, Chapter
14 181, as the original corporation. They talk about common
15 properties, owners, board, and section eight talks about
16 covenants and rules. Covenants and rules. Section eight
17 of article one. And that shall mean the declaration of
18 covenants and rules, and any amendments which are
19 recorded with the recorders office of Rock County and
20 applicable as restriction upon title of each lot. Then
21 there's a discussion, basically article one is a
22 glossary, it's a list of definitions. And there's a
23 definition of facilities, park manager, bylaws,
24 development, rules, rules are defined as the rules and
25 regulations adopted and approved by the board as from

1 time to time amended, then in effect, for the use and
2 enjoyment of common property.

3 And in section 17 is a catch all, it says
4 further definitions necessary to apply the declaration of
5 covenants and rules of the bylaws are set forth in the
6 declaration. Okay.

7 Then article three talks about membership,
8 membership is the same as it has always been, there's one
9 class of membership, there aren't two tiers, it isn't
10 like voting stock or nonvoting stock, all owners are
11 members.

12 And then there's a discussion about meetings of
13 the membership, there's annual meetings, there's a voting
14 procedure, then under article five there's voting
15 procedures and rights of members. Each owner has one
16 vote. Same thing if you have multiple lot ownership by
17 one person, you have no more than one vote, if a lot is
18 jointly owned by several persons, there's only one vote
19 from that group.

20 Section 2 says, of articles five, that the
21 membership shall have the authority consistent with the
22 covenants to approve the following matters by voting in
23 person. Changes in the covenants require a three-fourths
24 vote. Changes in the rules require a two-thirds vote.
25 Three-fourths for covenants, two-thirds for rules. To

1 get on the board, representation on the board, requires a
2 majority vote. Three-fourths, two-thirds, majority.
3 Majority is one more than one half. To borrow money on
4 behalf of the association, a majority vote of the
5 membership is required to borrow more than ten thousand
6 dollars. To put a mortgage on the property, on the
7 common property, for instance, you need a two-thirds vote
8 of the membership. Capital improvements would require a
9 three-fourths vote of the membership, and spending,
10 spending ten thousand dollars or more beyond the budget
11 requires a majority of the membership.

12 Covenants and rules. Changes in covenants,
13 three-fourths vote, changes in the rules two-thirds vote.
14 If you want to be on the board, that's called the
15 membership. If you want to be on the board, however,
16 it's a majority vote, but that puts you on the board.
17 The question is, question, the real question is the whole
18 debate is discussing is what is the power of the board.
19 It's not, although Mr. Lindau makes this point, it's not
20 whether the board acted in coming up with a resolution of
21 the definition of permanent resident or permanent
22 residency, however the phrase is. It's not whether
23 that's a reasonable definition. You could argue whether
24 it's a reasonable definition. It is certainly an attempt
25 to be reasonable. The question is whether the board had

1 the power to do it.

2 And I'm not saying it is reasonable or
3 unreasonable, but clearly it is grandfather rights, for
4 owners who have been in the premise in the RV lots to
5 obtain permanent residency, there's a definition of nine
6 months out of the year of occupancy, there's, I think
7 there was a hardship provision if you just can't go
8 anyplace else you can make a modification, or apply for
9 an exemption to the rule. There's a lot of thought that
10 went into that.

11 I think it was passed under the guise of a
12 rule, was it not?

13 MR. LINDAU: A standard.

14 THE COURT: A standard. Regardless of the
15 reasonableness of that proposal, if Mr. O'Leary's
16 argument is on behalf of the plaintiffs is the board by
17 itself, a majority of the board, four people out of
18 seven, is there seven board members?

19 MR. LINDAU: Yes.

20 THE COURT: Four people don't have the right
21 to make that decision. That's the point. It's not
22 whether it is a bad decision. Okay. So then we have
23 articles, the bylaws and three, we have the standard.
24 Don't put that in because three we have, in the
25 definitions we have covenants and rules. So put in

1 covenants and rules. That's three. Covenants and rules,
2 and that comes from section eight of article one.

3 MR. O'LEARY: I'm sorry, Your Honor?

4 THE COURT: We at least know where that's
5 defined. And now we have here, which is the subject of
6 what the court is being asked to find is sufficient for
7 this lawsuit to be concluded one way or the other is the
8 standard. Okay. So four is the standard.

9 MR. LINDAU: Am I relieved of my duties?

10 THE COURT: You could have written a little
11 bit bigger, but that's okay. It is legible. So that's
12 what we're dealing with. When you go to the glossary,
13 when you go to article one of the bylaws, the definition
14 section, maybe I can't find it but I don't see the word
15 standard defined.

16 Getting back to the bylaws, the bylaws from
17 2003, the association purposes and powers are spelled
18 out. It reiterates some of what I previously read to you
19 from the articles of incorporation, promote the health,
20 safety and welfare, maintain the facilities, maintain
21 unkempt lands and trees, provide garbage and trash
22 collections, remove the snow, and do anything else
23 insofar as permitted by law to do any, insofar as
24 permitted by law, to do any other things that in the
25 opinion of the board of directors will promote the common

1 benefit and enjoyment of the residents in the
2 development.

3 There are a number of committees set up in the
4 bylaws. Article ten, there's a committee for
5 architecture, budget, audit, maintenance, covenants,
6 bylaws, nominating, voting, those are two separate
7 committees, boat dock, shoreline, and storage, and
8 regulation and enforcement. There's a lot of committees
9 dividing up the work of the association.

10 And the committee's responsibility to advise
11 the board of directors, assist the board of directors,
12 review covenants, bylaws and rules, and keep the board of
13 directors and members updated. Different
14 responsibilities.

15 Then there's article 13, and mind you, I'm on
16 the bylaws now. Article 13, section 1, of the bylaws
17 says these bylaws may be amended by a majority vote of
18 the members of the association, of the association
19 members.

20 MR. LINDAU: May I interject for a second, Your
21 Honor?

22 THE COURT: That isn't all that it says. Go
23 ahead.

24 MR. LINDAU: That actually was amended in 2003.
25 It used to be that it was just the authority of the board

1 to amend the bylaws, and in 2003 the most recent revised
2 version they actually called for, which under the
3 statutory guidelines they can do, they can call for it by
4 the amendment by the members.

5 THE COURT: But article 13 now says that the
6 bylaws may be amended by a majority vote of the
7 association.

8 MR. LINDAU: That's correct, Your Honor.

9 THE COURT: Okay. But it also says provided
10 that any matter governed by the declaration of covenants
11 and rules applicable to the properties may not be amended
12 except as provided in that declaration. If a declaration
13 said it is going to take more than a majority to amend
14 this, that still stands.

15 In section 2 of article 13 says if there's any
16 conflict between or among the articles, covenants, the
17 bylaws and the rules, the articles control. And in the
18 case of any conflict between the declaration of covenants
19 and rules which apply to properties, the declaration of
20 covenants and rules shall control. That is set out in
21 section one, article one.

22 Now, where do we have and how many places will
23 you find the phrase or variation of the phrase permanent
24 resident, permanent residency? Where does that show up?
25 Let's see. There is an acknowledgement of membership by

1 each purchaser of real estate, as I understand it,
2 because I, this was explained to me in the case involving
3 Mr. And Mrs. Sarto. And the acknowledgement contained
4 provisions that whoever takes ownership agrees to be
5 bound by and comply with the articles, bylaws and
6 declarations, covenants and rules, and in particular, in
7 the instance that we're discussing here today,
8 acknowledgement of membership says I, we, either/or,
9 further agree to be bound by and comply with the
10 articles, bylaws and declaration, covenants and rules of
11 the association, particularly no permanent residence on a
12 recreation lot. Shows up in the acknowledgement of
13 membership. Each, ostensibly each member has signed when
14 they acquired an ownership of their property. No
15 permanent residence on a recreation lot.

16 Then there are reported in June 13th of 1975
17 with the Register of Deeds office in volume 556, page
18 486, section four, covenants relating to recreational
19 vehicles, and I was advised in the Sarto case that nobody
20 disputes that those covenants apply to the recreational
21 vehicle sites. We didn't have all of the same parties
22 here but I assume you would agree with that, Mr. O'Leary?

23 MR. O'LEARY: Yes.

24 THE COURT: And four A says the only buildings
25 allowed on these lots are nondwelling such as storage

1 sheds and garages. And all initial site preparation for
2 recreational vehicle lots or extension of sewer and water
3 thereto shall be constructed exclusively by the
4 developer.

5 And section C, another section only says one
6 recreational vehicle for six thousand nine hundred square
7 feet site, self-contained, full bath, no fuel storage
8 exceeding a hundred gallons of LP gas, maximum of 40 feet
9 in length and eight and a half feet, width restricting
10 the, that's all in these covenants.

11 And then there's a provision that no second RV
12 may be parked or stored in any recreational lot. And
13 then the no recreational vehicle shall be used as a
14 permanent residence, then it goes on the other way
15 around. Recreational vehicle lot shall not be used as a
16 permanent residence. So we have no permanent residence,
17 permanent residence. And residence is spelled
18 R-E-S-I-D-E-N-C-E.

19 Now, nowhere up to and including the Sarto
20 case, which was I think heard by me last May, May 20th of
21 last year, nowhere has it ever been defined what a
22 permanent residence is until the board now has attempted
23 to do so. Am I right to say that? Do you agree with
24 that?

25 MR. O'LEARY: I believe so, Your Honor.

1 THE COURT: Do you agree with that, Mr.
2 Lindau.

3 MR. LINDAU: Yes, Your Honor, although attempts
4 have been made in the past.

5 THE COURT: I'll grant you that. I'm sure
6 attempts have been made. What are the consequences, it
7 may be a red herring, I don't, what I'm curious about the
8 summary judgment material, the affidavit from Mr. Sayre
9 in the town of Fulton, where does that go? What's the
10 relevance of that?

11 MR. LINDAU: Well, Your Honor, the town of
12 Fulton, as the zoning authority, has a legitimate
13 interest into seeing that the declaration be enforced as
14 to permanent residency. They are the ones that regulate
15 it, oversee it, they are a taxing authority out there and
16 they are not of the opinion that of the park is set up
17 for year-round permanent residency, and so that's their
18 legitimate interest in it. It just shows, it was used to
19 show, Your Honor, that there is pressure exerted from
20 outside forces on the board of directors to do something
21 about this.

22 THE COURT: Well, Mr. O'Leary, your position
23 is that the methodology, first your position is that what
24 is required here is an amendment of something more than
25 covenants and rules. And there's a requirement of a

1 greater number of owners, either a rule amendment
2 requires a two-thirds vote, an article covenant
3 amendment, I think I previously read, requires a
4 two-thirds vote. What do you think it is, do you think
5 it is a covenant or a rule?

6 MR. O'LEARY: It, that's a good question, Your
7 Honor. I believe, speaking for the plaintiffs, we
8 believe that this is addition to the covenants because if
9 not for this language, you don't have a definition for a
10 permanent residence. I understand where the plaintiffs
11 are coming from, they realize that hurdle they have to
12 jump of a three-quarters vote, so they're trying to
13 define it as a standard or a rule and say that there's a
14 majority vote. I would perhaps correct His Honor or just
15 in perhaps one aspect. The position wasn't that a
16 majority vote of the board to implement this standard, it
17 was a majority vote that they were submitting was a
18 majority vote of the association to implement this
19 standard.

20 THE COURT: I think the board passed this
21 standard.

22 MR. LINDAU: Correct, Your Honor.

23 MR. O'LEARY: Based on my understanding, Your
24 Honor, in Exhibit C and Exhibit D, and such was being
25 passed around the association submitting a vote to

1 approve the standard.

2 MR. LINDAU: Feedback was elicited, Your Honor,
3 from the members.

4 THE COURT: I think ultimately it was what
5 passed the standard was a vote of the board. Now I think
6 what I heard, or what I heard said and what I reviewed
7 was that there was soundings taken. There was, you know,
8 feedback if you want to call it from various owners if
9 perhaps, I don't know, if a census was taken or some
10 questionnaire was sent out to everybody, but that's what
11 I gathered happened, but I don't, I don't consider that
12 to mean that the ownership ever voted as an entity on
13 the, on this modification, this resolution, or whatever
14 you want to call it. It was adopted by the majority of
15 the board.

16 MR. LINDAU: And, Your Honor, we did tally up,
17 we sent it out as an advisory ballot. It came back and
18 if you're interested in the numbers, I can share those
19 with you.

20 THE COURT: No. I don't think we should talk
21 about that. The reason I don't is because, you know, an
22 advisory poll, for instance, isn't the same thing as a
23 vote. Votes have to be specified as to what's intended,
24 what the resolution is, and when the vote is going to be
25 taken, who is going to count the votes, so on, so forth.

1 Now, the definition of ambiguity, okay. Let's,
2 what's going to happen here? What are some of the things
3 that could happen here? For starters, there is no
4 dispute that that phrase no permanent residence still
5 exists. It's been here from the very beginning. And it
6 could very well be that there could be individual
7 lawsuits brought against each individual who the board
8 believes is violating the no permanent residence
9 restriction. Nothing stops that from happening.

10 If that were, let's say this case never
11 happened, let's say that the board had done nothing by
12 attempting to pass a standard that resolves the problems,
13 there could be another case, and now the question is how
14 do you prove no permanent residence? But it doesn't go
15 away. It is still in the language of every property that
16 was originally purchased for the purpose of not being a
17 permanent residence.

18 All of the documents that at least convey
19 ownership to the lots in question are contracts. And
20 there's been some discussion as to whether words and
21 phrases or the word and phrase, for instance, in the
22 acknowledgement of membership, no permanent residence on
23 recreational lot, no permanent residence on recreational
24 lot, whether that is ambiguous. We have the word
25 permanent, most people know what permanent means. We

1 have the word residence, most people know what residence
2 means, but we have no permanent residence on a
3 recreational lot. What does that mean? And the word is
4 ambiguous or a phrase is ambiguous, a phrase is a
5 combination of words, in a contract when those words or
6 phrases, within reason, can mean more than one thing.
7 Are they reasonably susceptible of more than one meaning?

8 And the argument made by the defendants is that
9 they're not ambiguous. The phrase is not ambiguous. It
10 is more than one word. The phrase no permanent residence
11 on a recreational lot is not ambiguous, because it means
12 you can't, you can't have a permanent residence on a
13 recreational lot. The plaintiffs say they don't know
14 what that means. They don't know what it takes, as in
15 the Sarto case, to become less than a permanent residence
16 to comply with the standards or to comply with the
17 phrase. And what the board did was they passed the
18 standard to clarify what that means, and what the
19 plaintiffs are saying is you can't do that. The board
20 doesn't have the power to do that. That has to be
21 submitted to the ownership, and what would you say, Mr.
22 O'Leary, have you thought this through? Under your
23 thesis is this a three-quarters vote, a two-thirds vote,
24 or a no vote.

25 MR. O'LEARY: As to what I think is necessary,

1 Your Honor, I think it's a three-quarters vote from the
2 same argument I made before, I believe this is addition
3 to the phrase permanent residence.

4 THE COURT: But the phrase no permanent
5 residence on a recreational lot, we already have that,
6 but you think it's an addition to say what that means
7 because --

8 MR. O'LEARY: For exactly the reason the court
9 has already stated earlier. If not for that language, no
10 one knows how to not be a permanent residence.

11 THE COURT: Because it is reasonably
12 susceptible to more than one meaning.

13 MR. O'LEARY: Yes.

14 THE COURT: You think the only authority to
15 define the meaning is a three-quarters vote of the entire
16 membership?

17 MR. O'LEARY: I believe so under the covenants,
18 yes.

19 THE COURT: And Mr. Lindau, you say no, that
20 should be a majority of the board.

21 MR. LINDAU: That is what I say, yes.

22 THE COURT: And frankly, to become a member of
23 the board only takes a 50 percent vote of the membership.

24 MR. LINDAU: Correct.

25 THE COURT: So this board can be turned over

1 by the next election and somebody else will deal with
2 this. But that wouldn't make any difference to Mr.
3 O'Leary's proposition because he says it requires
4 three-quarters vote. He doesn't care how many people are
5 on the board, and he does that by his interpretation from
6 a legal perspective of the contract. And we all agree
7 that this is one big contract that we're trying to
8 interpret here?

9 The construction of a written contract is
10 normally a matter of law for the court. And the court is
11 to first consider the plain language of the agreement,
12 and I'm also required to construe specific provisions by
13 looking at the whole contract, the context of the
14 contract as a whole. And the meaning of the contract
15 interpretation is to determine the intent of the parties,
16 what do the parties intend when they entered into the
17 contract?

18 And if you can just look at the language, and
19 if you can read the language and you say okay, applying
20 common, plain English, meaning to the words in the
21 contract, I can be reasonably certain from the language
22 of the contract itself, then you make your decision. The
23 court does not need to go anyplace else. It need not use
24 extrinsic evidence. Extrinsic, in other words, outside
25 evidence, to construe the contract outside of the four

1 corners of the contract. In determining the intent of
2 the parties, the court may consider events which happened
3 before and after the signing of the agreement.

4 But another step in the construction of the
5 contract is determine whether there's a material
6 ambiguity in its terms. And I believe when we had the
7 Sarto case that there was no guidance to the court, to
8 this court or any other court, to figure out what no
9 permanent residence meant. Not just to a court but there
10 wasn't anybody else either. That applies to the board of
11 directors as well as the individual owners. Of all the
12 things that weren't, that were covered and all this
13 documentation up until now, the fact that there was never
14 a definition of permanent residence, now 40 years after
15 the fact and long before that I'm sure it's been observed
16 has been one big, glaring omission, but to complain about
17 it now is to curse the darkness.

18 Contract construction, ambiguities in an
19 agreement must be construed consistent with the dominant
20 purpose of the contract and consistent with the
21 accomplishment of that purpose. Contract construction is
22 to give reasonable meaning to all provisions, and that's
23 preferred to just determining that part of the language
24 is just useless or inexplicable. Doesn't make any sense
25 so I'm going to ignore it. And we, I think, all know

1 that no permanent residence on the recreational lot, that
2 does mean something. It's not useless. It's not
3 inexplicable. The question is to whom under the other
4 provisions of this contract, to whom is entrusted and to
5 whom falls the responsibility of overcoming the
6 ambiguity. It could be a court, it could be an
7 individual lawsuit, it could be a jury. If the board
8 determines to bring an action against each and every
9 individual who thinks it violates the the permanent
10 residency rule, then they let the jury decide and you try
11 to fashion jury instructions for each and every jury,
12 because regardless of what I do here today, that language
13 still exists.

14 Words in the contract are to be construed in
15 the usual sense unless there is evidence that they are
16 not to be used in such a manner. Well, what usual sense
17 is available for this court to construe the meaning of no
18 permanent residence. R-E-S-I-D-E-N-C-E. Dwelling is a
19 residence, a person who lives there is a resident.
20 Residence with an S if there's more than one, but
21 residence is the place you occupy. No permanent
22 residence on a recreational lot. What's that mean? Is
23 that ambiguous to you? These dwellings, if there's
24 anything like the dwelling of Mr. And Mrs. Sarto,
25 certainly are capable of year round occupancy. Power and

1 light, heat, water, utilities, it's a year-round
2 residence by those definitions. What makes it less than
3 a year-round residence is that they can't be there year
4 round. And the bylaws, the articles of incorporation,
5 they don't say why that is. At this point, you are led
6 to speculate why that is.

7 Ambiguities in an agreement must be construed
8 consistent with the contract's dominant purpose and
9 consistent with the accomplishment of that purpose. What
10 is the dominant purpose of this contract? Is there one?
11 Dominant purpose is to set up, seems to me, and maintain
12 the Rock River Leisure Estates with the appropriate
13 amenities, maintaining its natural attractiveness, the
14 owners, maintain the value of their property, take care
15 of it, take care of all the common areas, and maintain
16 the, insofar as it's necessary, be able to compel the
17 individual residents to take care of their places for the
18 benefit of the whole. It's also to collect the necessary
19 funds to do that. Nobody has ever said one word to me
20 about whether money is involved. A case that we've
21 talked about is that Geneva National case. Geneva
22 National case, as I read the case, was an action which
23 was in part brought overspending because there was an
24 gatehouse to Geneva National, and the board decided they
25 needed a better-looking gatehouse. And they changed the

1 configuration of the gatehouse and put in a splendid
2 approach with multiple lanes, the gatehouse, and
3 basically a garden post, and very beautiful, and very
4 expensive, and then told the members you have to pay for
5 it, and two of the members started a lawsuit and said not
6 so fast, we don't need this gatehouse. And the Supreme
7 Court determined under the interpretation of that
8 contract once it finally got to the Supreme Court that
9 the board had the power to do that. I think it was the
10 spending issue.

11 This is a definition of something a little bit
12 different, it's what's a permanent residence. And
13 getting back to where we started, isn't a question we
14 determine today whether what the board has done in the
15 standard, number four of the board, I question whether
16 that's reasonable or fair, or somebody else could do any
17 better if they had to deal with the problem. Question is
18 whether they had the power to do it. Did they have the
19 power to do it, and that's what I have to think about.

20 An analogy, it's not a perfect analogy, but
21 what goes through my mind is the amendment process to the
22 United States Constitution. The law, there is no greater
23 law in all law and every state derives from the
24 Constitution of the United States. And there is an
25 amendment process, and the amendment process requires

1 that the Constitution may only be amended by either first
2 you cannot propose an amendment unless you have a
3 two-thirds majority in both houses, two-thirds of the
4 senate, two-thirds of the congress, that's the method to
5 propose an amendment, or there can be a Constitutional
6 convention, and congress, if the legislatures of
7 two-thirds of the states, the states demand a
8 Constitutional convention, congress has to schedule a
9 Constitutional convention. That's how you propose an
10 amendment. An amendment can only be passed upon a
11 three-quarters vote of the legislatures of all the
12 states, or by convention in three-quarters of the states.
13 That's how you amend the Constitution.

14 Now, Constitution delegates to the states, and
15 then each state has set up its own Constitution, the
16 right to set up their houses of government on the
17 executive branch, the judicial branch, and the right to
18 pass laws that apply to that state, and those laws are
19 passed not by a Constitutional amendment but by the
20 majority vote of both houses subject to the
21 interpretation by the judiciary as to whether those
22 enactments are Constitutional. If they are not
23 Constitutional, they have no meaning, they are of no
24 force and effect.

25 Are we doing the same thing here? Are we

1 making a constitutional amendment in the United States
2 but we're having a discussion about the powers of the
3 board because the board effectively is the legislative
4 body of the association. And the constitution, if you
5 want to call it that, that the association, excuse me,
6 the board members of the association are required to
7 follow, are the articles and the bylaws. That's what I
8 have to think about.

9 And I'm going to take this case under
10 advisement. And I have already given a great deal of
11 thought, I've carefully listened to arguments of counsel,
12 and I think they've listened to each other's argument.
13 We have a clear difference of opinion here, but at the
14 end of the day, regardless of what happens in this
15 lawsuit, you still have articles, bylaws, existing
16 covenants and rules, and you still have, no matter what
17 side of the issue you're on, you have the right to bring
18 individual actions it seems to me, as the Sartos were
19 named defendants, and you have a right to ask the court,
20 if need be a jury, to determine what these ambiguities
21 are, what the plain meaning is of residency, and one by
22 one by one you may have to go through this. It would be
23 better served to resolve, that's why I thought the
24 possibility of mediation should be considered, although
25 whether this case is susceptible to mediation is not for

1 me to say. It may be impossible, but good lawyers on
2 both sides of this case, their responsibilities are to
3 represent their clients.

4 So with that, I think I've heard all the
5 arguments from counsel, but if I've said anything that
6 you feel invites a response, if you want to clarify
7 anything that I've said so far, I'll give you the right
8 to respond. Mr. O'Leary?

9 MR. O'LEARY: No, Your Honor.

10 THE COURT: Mr. Lindau?

11 MR. LINDAU: No, Your Honor.

12 THE COURT: All right. Thanks very much for
13 coming. Court is in recess. I will state this to the
14 parties who are here, the court has 90 days from the
15 completion of briefing and argument, I have 90 days from
16 the completion of briefing and arguments, otherwise I
17 have 90 days from today to get a decision.

18 Counsel, do you anticipate the need for any
19 further briefing, either side?

20 MR. LINDAU: No, Your Honor.

21 MR. O'LEARY: I don't, Your Honor.

22 THE COURT: All right. Thank you.

23
24 (10:21 a.m.)
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STATE OF WISCONSIN)
SS.)
COUNTY OF ROCK)

I, LINDA M. BLUM, Official Court Reporter,
hereby certify that I reported in Stenographic shorthand
the proceedings had before the Court on this 19th day of
July, 2012, and that the foregoing transcript is a true
and correct copy of the said Stenographic notes thereof.

Dated this 23rd day of July, 2012.

LINDA M. BLUM - - - - -
Official Court Reporter

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