

CAN WE DO THAT? DEFINING THE SCOPE OF RULEMAKING
AUTHORITY IN OREGON’S COMMON INTEREST
DEVELOPMENTS

PART II: DISCRETIONARY RULEMAKING AUTHORITY IN
GOVERNING DOCUMENTS

by
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This Article is the second part in a four-part series that examines the scope of rulemaking authority in Oregon’s common interest developments (CIDs). Part I examined the provisions of the Oregon Planned Community Act and the Oregon Condominium Act that govern rulemaking authority. This Article, Part II, examines the methods for determining if a particular rule is within the scope of discretionary authority that a CID’s governing documents confer. This Article attempts to provide an analytical process for determining the validity of such rules by considering the effect of governing document provisions that expressly authorize an association to adopt rules by resolution. Part III will return to a discussion of Oregon’s statutory scheme to explore how its provisions limit that discretionary authority. The fourth and final part of this series will draw upon Parts I, II, and III to make specific, simple, and pragmatic recommendations for best practices that board members in Oregon can employ during the rulemaking process to ensure that their rules are valid.

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I. INTRODUCTION

This Article is Part II of a four-part series that examines the scope of rulemaking authority in Oregon’s common interest developments (CIDs). Owners within CIDs frequently challenge the validity of rules adopted by boards of directors. Determining whether rules are valid is a complicated and inherently obfuscated matter. It involves both contractual and statutory interpretation, along with application of court-made standards of review. This series attempts to light a path through the fog, so to speak. Part I of this series discussed the scope of rulemaking authority that Oregon’s statutory scheme confers to the associations that govern CIDs. That article explored the scope of rulemaking authority when the governing documents are silent on the matter. Commonly, governing documents contain provisions conferring rulemaking authority to the board of directors. For instance, a declaration might include a provision similar to the following broadly drafted delegation of authority:

The Board of Directors shall have the authority to promulgate reasonable rules governing the use of the Property.

Other times, the declaration might include a narrower, more specific delegation, such as:

The Board of Directors shall have the authority to promulgate reasonable rules governing the parking of vehicles anywhere on the Property.

However, often the drafter of the governing documents declines to include—either intentionally or as an oversight—any rulemaking delegation at all. Part I explored the question of what rulemaking authority boards may exercise, if any, when the governing documents do not directly confer that authority. The discussion focused on the scope of rulemaking authority that Oregon’s statutes confer.

Parts II and III, by contrast, explore the authority to adopt rules by resolution pursuant to authority-conferring language contained in the governing documents. The goal of these parts is to elucidate an analytical process by which courts,

attorneys, and board members can determine the validity of a rule adopted by resolution. Part II examines the method for determining if a particular rule is within the scope of discretionary authority that the governing documents confer. Part III will return to a discussion of Oregon's statutory scheme to explore how its provisions limit that discretionary authority. The fourth and final part of this series will draw upon Parts I, II, and III to make specific, simple, and pragmatic recommendations for best practices that board members in Oregon can employ during the rulemaking process to ensure their rules are valid.

A. *Summary of Part I*

Part I of this series began with a Note on Terminology that set forth the definitions of key terms, including “common interest development,” “covenant,” “declaration,” “resolution,” and “rule.”¹ This Article employs those same definitions. As Part I pointed out, commentators and courts often use these terms in conflicting ways which can lead to confusion. This Article does not reiterate all of those definitions, but it will be useful to point out here one key distinction that is particularly relevant to the analysis that follows.

This Article considers “rule” to mean “a prescribed, suggested, or self-imposed guide for conduct or action.”² In this sense, a rule might be found in the common law,³ statutes,⁴ declarations,⁵ bylaws,⁶ or resolutions.⁷ The term rule refers to a substantive provision, whereas the term “resolution” refers to a procedural mechanism. Associations may adopt rules by three distinct procedural mechanisms:

¹ Bruce Lepore, *Can We Do That? Defining the Scope of Rulemaking Authority in Oregon's Common Interest Developments, Part I: Statutory Scope of Rulemaking Authority*, 23 LEWIS & CLARK L. REV. ONLINE 1, 8–10 (2018).

² *Rule*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 2002).

³ *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (establishing the rule that racially restrictive covenants are invalid).

⁴ *E.g.*, OR. REV. STAT. § 94.630(1)(n) (2017) (setting forth the rule that associations must give owners notice and an opportunity to be heard prior to levying fines).

⁵ *E.g.*, *Declarations, Restrictions, Protective Covenants and Conditions for Wild River, Deschutes County, Oregon*, WILD RIVER OWNERS ASS'N (July 19, 1972), http://www.wildriveroa.org/wp-content/uploads/2012/02/Section_C_2007_Jan_6_WR_CC_R_s.pdf (setting forth the rule that “[n]o building other than a family dwelling for private use may be constructed on any lot”).

⁶ *E.g.*, *Amended By-Laws of Portland Plaza Unit Owners Association*, PORTLAND PLAZA (May 8, 1981), https://www.theportlandplaza.com/editor_upload/File/Governing/Current%20ByLaws%20amended.pdf (setting forth the rule that “[a] unit owner shall use a unit for residential purposes only”).

⁷ *E.g.*, *Portland Plaza Rules and Regulations*, PORTLAND PLAZA (June 25, 2019), https://www.theportlandplaza.com/editor_upload/File/Governing/Portland%20Plaza%20Rules%206-25-19.pdf (“The following Rules and Regulations (‘Rules’) have been established by the Board of Directors . . .”).

(1) amendment of the declaration,⁸ (2) amendment of the bylaws,⁹ and (3) resolution.¹⁰

Technically, resolutions come in various forms. Most commonly, it means a resolution of the board of directors—that is, approval by a majority of directors present at a meeting at which a quorum exists.¹¹ However, an association can also adopt resolutions at a meeting of the owners.¹² In this manner, a resolution requires approval of a majority of owners present at an owner meeting where a quorum exists.¹³ The voting threshold for a resolution of the owners is typically lower than the voting threshold for an amendment of the bylaws¹⁴ or a declaration.¹⁵ In some cases, the governing documents confer authority to adopt rules and regulations to a committee—usually an architectural committee.¹⁶ This Article considers resolutions of owners, of boards of directors, and of committees to be roughly equivalent in authority.¹⁷ They all represent a procedural mechanism by which the association may adopt rules or take actions, but which are less authoritative than amendment of the governing documents. This Article refers to rules that an association adopts by resolution as “board-level rules” because, most commonly, it is the board of directors that exercises this authority.

The third section of Part I explored the three legal frameworks that support and impact interpretation of covenants and governance of CIDs.¹⁸ The law of CIDs is an amalgam of traditional property law, contract law, and the law of municipal governance. Covenants, and the associations that administer them, initially developed against a backdrop of an American policy that favors the unfettered use of real property.¹⁹ Courts developed an onerous set of elements that land owners

⁸ OR. REV. STAT. §§ 94.590, 100.135.

⁹ *Id.* §§ 94.635(16), 100.410(3).

¹⁰ *Id.* §§ 94.630(1)(a), 100.405(4)(a).

¹¹ *Id.* § 65.351(3) (“If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present when the act is taken is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors.”).

¹² *Id.* §§ 94.630(1)(a), 100.405(4).

¹³ *Id.* §§ 94.655, 100.408.

¹⁴ *See id.* §§ 94.635(16), 100.410(4).

¹⁵ *See id.* §§ 94.630, 100.135.

¹⁶ *E.g.*, WILD RIVER OWNERS ASS’N, *supra* note 5, at 5 (“[T]he Architecture Review Committee may, by unanimous vote, from time to time and in its sole discretion, adopt, amend, and repeal rules and regulations to be known as the ‘Architecture Review Committee Rules’ establishing its operating procedures and interpreting, detailing, and implementing the provisions of the instruments pursuant to which it is charged with responsibility.”).

¹⁷ It is beyond the scope of this Article to dissect the various intricate ways in which the governing documents might set forth gradations of intersecting and overlapping authority to adopt resolutions.

¹⁸ Lepore, *supra* note 1, at 23–37.

¹⁹ *See* JERRY L. ANDERSON & DANIEL B. BOGART, PROPERTY LAW: PRACTICE, PROBLEMS,

needed to prove in order to enforce covenants that “run with the land.”²⁰ Over time, courts began to recognize the practical benefits of restrictive covenants. A freedom of contract policy came to dominate the traditional policy in favor of unrestricted land use.²¹ However, Oregon courts continue to apply a “constructional preference against restrictions limiting the use of land.”²² That is to say, although Oregon courts accept the practical necessity of enforcing restrictive covenants in general, they interpret any ambiguity in those covenants “most strictly against the covenant.”²³ More recently, commentators have characterized CIDs as quasi-governmental agencies.²⁴ These commentators argue in favor of limitations on the exercise of CID authority akin to constitutional limitations on municipal governments.²⁵ Oregon courts have not adopted the quasi-governmental view, but Oregon’s statutory scheme adopts several of these limitations, such as a notice and an opportunity to be heard prior to the levy of fines.²⁶

Section IV of Part I argued that the terms “restrictions” and “requirements” in the Oregon Planned Community Act (PCA) and the Oregon Condominium Act (OCA) refer to types of rules.²⁷ Oregon’s statutory scheme²⁸ confers broad authority to adopt rules.²⁹ Each statute also requires specified restrictions and requirements to be included in the governing documents.³⁰ The following chart outlines those requirements:

AND PERSPECTIVES 48–49 (2014); EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 32 (1994).

²⁰ See, e.g., *Hudspeth v. E. Or. Land Co.*, 430 P.2d 353, 354–55 (Or. 1967).

²¹ Grant J. Levine, *This Is My Castle: On Balance, the Freedom of Contract Outweighs Classifying the Acts of Homeowners’ Associations as State Action*, 36 NOVA L. REV. 555, 557–58 (2012).

²² *Rodgers v. Reimann*, 361 P.2d 101, 103 (Or. 1961).

²³ *Yogman v. Parrott*, 937 P.2d 1019, 1022 (Or. 1997) (quoting *Scott Co. v. Roman Catholic Archbishop for Diocese of Or.*, 163 P. 88, 90 (Or. 1917)); see also *Hawkins View Architectural Control Comm. v. Cooper*, 250 P.3d 380, 383 (Or. Ct. App. 2011); *Turudic v. Stephens*, 31 P.3d 465, 470 (Or. Ct. App. 2001).

²⁴ MCKENZIE, *supra* note 19, at 122–49; see also *Cohen v. Kite Hill Cmty. Ass’n*, 191 Cal. Rptr. 209, 214 (Cal. Ct. App. 1983) (“The Kite Hill Community Association’s approval of a fence not in conformity with the Declaration is analogous to the administrative award of a zoning variance.”); *Colo. Homes, Ltd. v. Loerch-Wilson*, 43 P.3d 718, 722 (Colo. App. 2001).

²⁵ MCKENZIE, *supra* note 19, at 132.

²⁶ *Lepore*, *supra* note 1, at 31–35.

²⁷ *Id.* at 27.

²⁸ See generally OR. REV. STAT. §§ 65, 94, 100 (2017).

²⁹ *Id.* §§ 94.630(1)(a), 100.405(4)(a).

³⁰ The term “governing documents” refers collectively to the declaration and bylaws of a CID.

Type of rule reserved	Planned Communities		Condominiums	
	Governing Document	Statutory provision (ORS)	Governing Document	Statutory provision (ORS)
Restrictions on use of unit	Declaration	94.580 (2)(o)	Bylaws	100.415(1)(r)
Restrictions on occupancy of unit	Declaration	94.580 (2)(o)	Bylaws	100.415(1)(r)
Restrictions on enjoyment of unit	N/A ³¹		Bylaws	100.415(1)(q)
Restrictions on maintenance of unit	Declaration	94.580 (2)(o)	Bylaws	100.415(1)(q)
Restrictions on alienation of unit	Declaration	94.580 (2)(l)	Declaration	100.105(1)(p)
Restrictions on rights with respect to unit	Declaration	94.580 (2)(t)	N/A	
Requirements for maintenance of unit	N/A		Bylaws	100.415(1)(q)
Requirements for architectural controls ³²	Declaration	94.580 (2)(t)	N/A	

The provisions that reserve certain restrictions and requirements to the governing documents act as carve outs, removing significant substantive areas from the broad statutory grant of rulemaking authority. The rulemaking authority that remains available for adoption by resolution is limited primarily to operational rules governing the administration of the association and rules governing use of the common property.

Part I's second significant insight was that the terms "restrictions" and "requirements" in the PCA and OCA should be interpreted as carving out only those rules that would impair an owner's legal property rights.³³ That is to say, a "restriction on the use"³⁴ of a lot, for instance, means a rule that prohibits a use to which the owner would otherwise be entitled. For example, a rule prohibiting nude sunbathing on the front lawn is *not* a "restriction on the use" of a lot because that

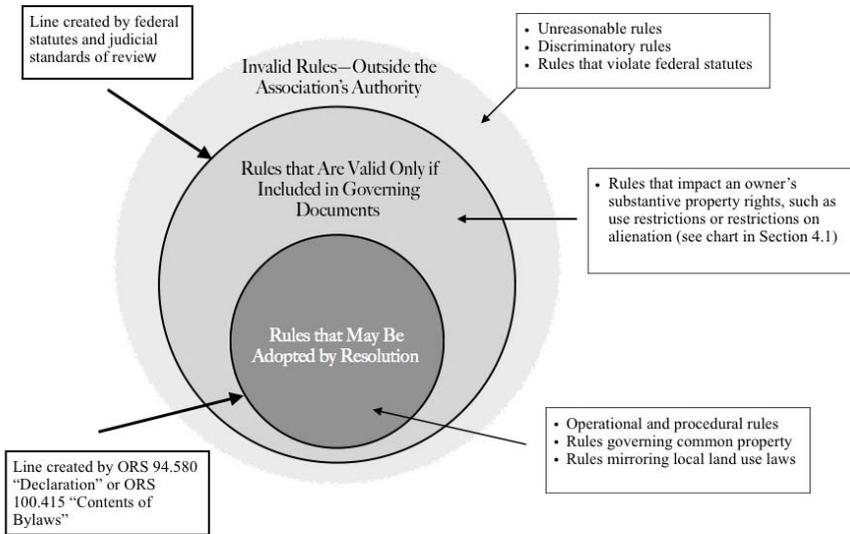
³¹ In this chart, "N/A" means that this particular type of rule is not mentioned in the statute.

³² The PCA lists both requirements for "architectural controls" and requirements for "architectural review." In practice these seem difficult to distinguish, so "architectural controls" as used here includes both.

³³ See Lepore, *supra* note 1, at 27–28.

³⁴ OR. REV. STAT. § 94.580(2)(o).

use is already illegal. The upshot of this interpretation is that Oregon's statutes confer to associations the authority to adopt—by resolution—rules mirroring local land use ordinances, even if the governing documents do not contain rulemaking provisions. Based on this analysis, Part I offered the following visual depiction of rulemaking authority³⁵:



The PCA and OCA simply state that associations may adopt rules.³⁶ There are no substantive limitations contained in the statutes themselves. However, judicial standards of review in many states, along with federal statutes, create an outer limit on the exercise of rulemaking authority.³⁷ Although Oregon courts have not specifically adopted a reasonableness standard of review for association rules, Oregon courts have imposed limitations on the arbitrary exercise of discretionary authority.³⁸ The PCA and OCA create the inner circle, separating rules that are valid

³⁵ Lepore, *supra* note 1, at 31.

³⁶ OR. REV. STAT. §§ 94.630(1)(a), 100.405(4)(a).

³⁷ Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U. J.L. & POL'Y 663, 666–67 (2000).

³⁸ See, e.g., *McKenzie v. Pac. Health & Life Ins. Co.*, 847 P.2d 879, 881 (Or. Ct. App. 1993) (finding a duty “to refrain from arbitrarily refusing to pre-authorize medical treatment”). This Article assumes that Oregon courts would be willing to invalidate at least some rules based on reasonableness or a similar standard. Exactly where Oregon courts would draw the line is

only if included in the governing documents from rules that may be adopted by resolution.

B. *Introduction to Part II*

While the analysis in Part I is mostly relevant to associations in which the governing documents are silent on rulemaking authority, Part II considers the effect of governing document provisions that expressly authorize an association to adopt rules by resolution. For example, a provision in the declaration of an HOA might state:

The Board of Directors shall have the authority to adopt reasonable rules, in addition to those rules included in this Declaration, governing the use of the Lots and the Common Property.

Pursuant to this provision, the board of directors might be inclined to adopt all sorts of rules that limit the owners' ability to use their individually owned property. For instance, the board might adopt a resolution with the following rule:

Owners must obtain approval from the board for the design, color and location of all permanent or semi-permanent outdoor furniture prior to installing or placing the furniture for longer than 24 hours in any location that is visible from any roadway within the subdivision.

This Article attempts to provide an analytical process for determining if that rule is valid given the authority-conferring provision in the declaration.

Owners frequently challenge board-level rules on a theory that the rules are *ultra vires*—beyond the scope of the board's legal authority.³⁹ One recent lawsuit serves as a good example. An owner of a lot in the Wild River Owners Association was hanging a "Don't Tread on Me" flag from the window of his home.⁴⁰ According to *The Oregonian*, the flag is "seen by some as a symbol of racism."⁴¹ The association had previously adopted a rule, published in its Architectural Review Committee Guidelines, stating "ARC approval is required for the display of any flag or banner other than the American flag."⁴² The Architecture Review Committee adopted the flag rule pursuant to an authority-conferring provision in the declaration that states:

unknown. For present purposes, this Article uses the term "unreasonable rules."

³⁹ *Ultra vires*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 2002).

⁴⁰ Aimee Green, *Central Oregon Man's "Don't Tread on Me" Flag Vexes Neighbors*, OREGONIAN (Jan. 29, 2019), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2018/10/central_oregon_mans_dont_tread.html.

⁴¹ *Id.*

⁴² *Architectural Review Committee Guidelines for New Construction, Remodeling, Lot Improvement*, WILD RIVER OWNERS' ASS'N 3 (Dec. 2012), <http://www.wildriveroa.org/wp-content/uploads/2013/02/Architectural-Review-Committee-Guidelines-December-2012.pdf>.

[T]he Architecture Review Committee may, by unanimous vote, from time to time and in its sole discretion, adopt, amend, and repeal rules and regulations to be known as the “Architecture Review Committee Rules” establishing its operating procedures and interpreting, detailing, and implementing the provisions of the instruments pursuant to which it is charged with responsibility.⁴³

The association notified the owner that his flag violated the association’s rules, and subsequently issued fines when the owner refused to comply.⁴⁴ When the owner refused to pay the fine, the association filed a lien on his property with the Deschutes County Clerk.⁴⁵ On October 2nd, the owner filed a complaint in the Circuit Court for Deschutes County to quiet title and seek an injunction prohibiting enforcement of the flag rule.⁴⁶ At the time of this writing, the outcome of this case is unknown. Because cases like this one often settle, it is possible that the court will never render an opinion on whether the flag rule is valid.⁴⁷ The purpose of this Article, along with the forthcoming Part III, is to provide an analytical method for determining the validity of rules in similar circumstances. Ultimately, this Article will argue that in this particular instance, the flag rule in the Wild River Architectural Review Committee Guidelines is beyond the scope of the association’s authority to adopt rules by resolution and the court should rule in the owner’s favor.

Reaching that conclusion requires two analytical steps. The first step involves contract interpretation. It asks whether the rule that the association adopted by resolution is within the scope of authority that the governing documents confer. Note that this question focuses exclusively on the language at issue. The language at issue in an *ultra vires* challenge includes both the authority-conferring provision in the governing documents and the text of the board-level rule. This first question does not consider the effect of the statutory “carve outs” listed in the chart above.⁴⁸ Those statutory limits are considered in step two.⁴⁹ Answering this first question requires understanding Oregon’s method for interpreting contractual grants of discretionary authority. That method was set forth in a famous case called *Yogman v. Parrott*.⁵⁰ This Article, Part II, explores that method in detail and demonstrates how it should be applied to *ultra vires* challenges to board-level rules. As a threshold

⁴³ WILD RIVER OWNERS ASS’N, *supra* note 5, at 6.

⁴⁴ Green, *supra* note 40.

⁴⁵ *Id.*

⁴⁶ Complaint at 6, *Boyd v. Wild River Owners Ass’n*, No. 18CV44780 (Deschutes Cty. Cir. Ct. 2018).

⁴⁷ The complaint also alleges that the association failed to provide notice and an opportunity to be heard prior to levying the fine. *Id.* at 9. That allegation potentially provides grounds for the court to decide the case without deciding the validity of the rule.

⁴⁸ See *supra* notes 29–31 and accompanying text.

⁴⁹ Step two will be analyzed in Part III of this series.

⁵⁰ *Yogman v. Parrott*, 937 P.2d 1019 (Or. 1997).

matter, this Article explores the question of *who* gets to interpret the scope of discretion contained in governing documents. This requires understanding the distinction between interpretive authority and rulemaking authority. One may think that a board of directors should have some basic authority to determine the *meaning* of the covenants that it administers. As will be discussed, however, courts generally do not defer to a board's interpretation. On the other hand, courts may defer to an architectural committee's interpretation under certain circumstances. However, those circumstances are very narrow. After examining *who* gets to interpret the governing documents, this Article then considers *how* that task is done. This Article elucidates *Yogman's* three-step methodology and applies it to a hypothetical board-level rule.

Ultimately, however, the *Yogman* analysis is only half the battle. Even if an authority-conferring provision authorizes a particular board-level rule, a court must consider whether the statute overrides that authorization. Thus, the second step involves statutory interpretation. It asks whether the relevant statute allows the association to adopt the rule in question by resolution or whether that particular rule is only valid if included in the governing documents. Consider the example provided at the beginning of this Section. A declaration of an HOA states:

The Board of Directors shall have the authority to adopt reasonable rules, in addition to those rules included in this Declaration, governing the use of the Lots and the Common Property.

Pursuant to this provision, the board of directors adopts the following board-level rule:

Owners must obtain approval from the board for the design, color and location of all permanent or semi-permanent outdoor furniture prior to installing or placing the furniture for longer than 24 hours in any location that is visible from any roadway within the subdivision.

However, the PCA contains the following provision:

The declaration shall include: . . . A statement of any restriction on the use, maintenance or occupancy of lots or units . . .⁵¹

Step one compares the board-level rule with the authority-conferring provision and asks, is the board-level rule within the scope of authority that the drafters intended? Step two asks, even if the rule is within the intended scope of authority, does the statute nonetheless invalidate the rule?

This second step is complicated and there are no easy answers. Unfortunately, there are no cases precisely on point. The forthcoming Part III of this series will consider this question in detail. Part III will argue that the answer depends on the specificity of the authority-conferring provision in the governing document. In the

⁵¹ OR. REV. STAT. § 94.580(2)(o) (2017).

example above, the board-level rule is probably invalid because the authority-conferring provision from the declaration is too broadly worded. In essence, if the authority-conferring provision is specific enough, then it operates as a “restriction on the use”⁵² in and of itself. Therefore, board-level rules adopted pursuant to that specific authority are valid. Admittedly, this interpretation is strained. The more literal, plain-meaning reading of the statutes indicates that “any” of the specified restrictions must be included in the governing documents—and therefore cannot be adopted merely by resolution. But, as will be discussed more fully in Part III, this series’ proposed interpretation is the more reasonable and pragmatic conclusion in light of the statutes’ purposes and prevailing industry practices.

II. HOW COURTS INTERPRET AUTHORITY-CONFERRING PROVISIONS

Oregon courts consider governing documents of CIDs to be contracts.⁵³ This Section describes how Oregon courts apply contract interpretation methodology to governing documents. For the most part, contract interpretation is an exercise in resolving ambiguous provisions.⁵⁴ It is obviously impossible to elucidate exactly how Oregon courts will interpret contractual language in every instance, given the practically infinite combinations of diction, grammar, and syntax available to the contract drafter. Indeed, whether a court concludes that a specific contractual provision is ambiguous depends on the provision’s context within the document as a whole.⁵⁵ However, this Article will set forth some clear guideposts that will aid board members in understanding the scope of rulemaking authority contained in their organization’s governing documents.

As a threshold matter, it will be useful to understand *who* has the authority to interpret the governing documents. This involves distinguishing interpretive authority from rulemaking authority. Although in practice these types of authority often overlap—which is to say, a board might exercise both types of authority in a single resolution—they are nonetheless distinct. As will be shown, contract interpretation in Oregon is usually a question of law for the courts to decide.⁵⁶ The

⁵² *Id.*

⁵³ *Yogman*, 937 P.2d at 1022 (interpreting a declaration according to contract interpretation principles); *WSB Invs., LLC v. Pronghorn Dev. Co., LLC*, 344 P.3d 548, 557 (Or. Ct. App. 2015) (approving a breach-of-contract action brought against a homeowners association and noting that the trial court’s ruling was “consistent with the well-established legal principle[] that . . . the bylaws of a corporation are a contract”).

⁵⁴ *Yogman*, 937 P.2d at 1021.

⁵⁵ *Id.* (“First, the court examines the text of the disputed provision, in the context of the document as a whole. If the provision is clear, the analysis ends.”).

⁵⁶ *Id.* *But see* *Valenti v. Hopkins*, 926 P.2d 813, 814 (Or. 1996) (deferring to an Architectural Control Committee’s interpretation of a restrictive covenant).

upshot is that boards typically do not have interpretive authority. That fact is an important consideration for boards when contemplating the adoption of so-called “interpretive resolutions.”⁵⁷ Section II.A argues that boards should be particularly cautious when adopting these kinds of resolutions as they are unlikely to carry much weight in a legal dispute.

Section II.B explores one exception to that general rule. In certain circumstances, courts may *defer* to an association’s interpretation of its own documents. In *Valenti v. Hopkins*, the Oregon Supreme Court held that courts must defer to an architectural committee’s interpretation of its association’s covenants when provisions within the documents appoint that committee as the arbitrator of disputes.⁵⁸ This Article describes the specific circumstances under which “*Valenti* deference” applies and points out some problems with the court’s reasoning. Section II.B.1 explores the application of *Valenti* deference to the adoption of interpretive resolutions. Section II.B.2 then explores the application of *Valenti* to governing document provisions that confer rulemaking authority to the board or to a committee.

Sections II.A and II.B discuss important concepts but are ultimately somewhat tangential to the main purpose of this series. Section II.C returns to the primary task of understanding the scope of rulemaking authority. To understand that scope, one must understand *how* courts interpret authority-conferring provisions. Section II.C outlines the *Yogman* methodology that courts apply to all contractual language. *Yogman* set forth a seemingly straightforward three-step analysis.⁵⁹ However, in the context of an *ultra vires* challenge to a rule adopted by resolution, the *Yogman* steps can be tricky. For one thing, an *ultra vires* challenge usually does not depend solely on interpreting the scope of the authority-conferring provision, but also depends on comparing the challenged rule to that scope. In addition, if the court finds the authority-conferring provision to be ambiguous, it is not always clear what extrinsic evidence the court will consider in its attempt to resolve the ambiguity. After discussing the three-step analysis in detail, this Section concludes by analyzing a hypothetical board-level rule to demonstrate how *Yogman* works in practice.

⁵⁷ NW. HOA L. CTR., THE OFFICIAL HOA HANDBOOK ch. 12 (Richard Vial ed., 3d ed. 2007) (“Interpretive resolutions are adopted to clarify portions of the declaration and bylaws that are subject to varying interpretations. . . . Example: A condominium association’s declaration describes windows, window frames, door and door frames as both part of the unit and general common elements. Since maintenance and replacement obligations turn on the definition of these terms, the board should adopt an interpretive resolution that clarifies the matter. Note - It behooves the board to consult legal counsel prior to the adoption of any such resolution.”).

⁵⁸ *Valenti*, 926 P.2d at 818.

⁵⁹ See *Hawkins View Architectural Control Comm. v. Cooper*, 250 P.3d 380, 383 (Or. Ct. App. 2011) (citing *Yogman*, 937 P.2d 1019); *Andrews v. Sandpiper Villagers, Inc.*, 170 P.3d 1098, 1103 (Or. Ct. App. 2007) (citing *Yogman*, 937 P.2d 1019); Lepore, *supra* note 1, at 16–17.

Section II.D points out a potential pitfall that a board should avoid when considering whether it has the authority to adopt a particular rule. A separate line of cases construing *discretionary authority* in contractual provisions contains language that can be misleading.⁶⁰ These cases extrapolate from the doctrine of good faith the rule that when a contract provides unilateral discretion to one party, that discretion must be construed to effectuate the *reasonable expectations of the parties*.⁶¹ That language may lead one to believe that the test for whether a rule is within the scope of an authority-conferring provision is whether the members of the association could reasonably expect the rule. However, as Section II.C explains, the correct test is whether the *intent of the drafter* was to authorize the rule. The difference is subtle, but it matters. Section II.D describes a real-world circumstance in which the application of the reasonable expectations test would inaccurately construe an association's authority.

Section III concludes by summarizing this Article and posing the question that will be the focus of the forthcoming Part III of this series: What is the result when the governing documents authorize the association to adopt a rule that the statute ostensibly requires to be included in the governing documents? The knee-jerk reaction may be to conclude that a board-level rule that falls within the substantive scope of one of the statutory carve-outs is invalid. As Part III will discuss in detail, that reaction is most likely incorrect. Section III will also briefly introduce some of the concepts that Part III will tackle in depth.

A. *Contractual Interpretation as a Question of Law Under Yogman*

In general, interpretation of a written contract is a matter of law for the courts to decide.⁶² In *Yogman*, the Oregon Supreme Court set forth the methodology that courts must employ when interpreting contracts.⁶³ This is an important concept for board members to understand, because it means that courts generally will not defer to a board's interpretation of the governing documents. Several cases demonstrate the importance of this concept.⁶⁴ In *Yogman*, neighbors in a subdivision disputed

⁶⁰ *Best v. U.S. Nat'l Bank of Or.*, 739 P.2d 554, 558 (Or. 1987) (construing a contractual provision conferring discretionary authority "to effectuate the reasonable contractual expectations of the parties").

⁶¹ *Tolbert v. First Nat'l Bank of Or.*, 823 P.2d 965, 970 (Or. 1991) (citing *Best*, 739 P.2d at 554).

⁶² *Ross Bros. Constr. Co. v. State*, 650 P.2d 1080, 1082 (Or. Ct. App. 1982) ("Construction of a contract is a question of law.").

⁶³ *Yogman*, 937 P.2d at 1021 ("To interpret a contractual provision, including a restrictive covenant, the court follows three steps.").

⁶⁴ In addition to the two cases discussed in this section, see *Eagle-Air Estates Homeowners Ass'n, Inc. ex rel. Harp v. Haphey*, 354 P.3d 766, 770 (Or. Ct. App. 2015); *Hawkins View*, 250 P.3d at 383; *Andrews*, 170 P.3d at 1102.

the meaning of a restrictive covenant in their declaration.⁶⁵ The declaration stated that “[a]ll lots within said tract shall be used exclusively for residential purposes and no commercial enterprise shall be constructed or permitted on any of said property.”⁶⁶ The Board interpreted “residential purposes” to exclude renting out houses as short-term vacation rentals.⁶⁷ The court held that “residential purposes” is ambiguous because it could reasonably be construed to either include or exclude vacation rentals.⁶⁸ The court gave no deference to the Board’s interpretation and simply interpreted the provisions according to a three-step methodology.⁶⁹ Ultimately, the court decided against the Board and held that vacation rentals were a permitted use.⁷⁰

Similarly, in *Turudic v. Stephens*, the Oregon Court of Appeals held that an association misinterpreted a provision of its declaration.⁷¹ In that case, a husband and wife built an animal holding pen without approval from the board as required by the declaration.⁷² The couple then moved their two pet cougars into the holding pen “without notice to their neighbors.”⁷³ The board of directors demanded that the holding pen and the cougars be removed on the grounds that, one, the holding pen was not approved prior to construction, and, two, the cougars were prohibited by the terms of the declaration.⁷⁴ The second ground was based on the following language from the declaration:

(b) *Use of the Property.* Property may be reasonably and normally used for agricultural farming, tree farming or residential use only.

(c) *Nuisances.* No nuisance shall be permitted to exist or operate upon any Property so as to be detrimental to any other Property in the vicinity thereof or to its occupants. The decision of the Association as to what is a nuisance is presumptively correct. No normal or reasonable use of the Property, as described in subparagraph (b) above, shall be a nuisance.⁷⁵

The association interpreted “residential use” to *exclude*, but “nuisance” to *include*, the keeping of cougars.⁷⁶ The court disagreed on both accounts.⁷⁷ The cougars, the

⁶⁵ *Yogman*, 937 P.2d at 1020.

⁶⁶ *Id.* at 1020.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1021.

⁶⁹ *Id.* at 1021–23.

⁷⁰ *Id.* at 1023.

⁷¹ *Turudic v. Stephens*, 31 P.3d 465, 472–74 (Or. Ct. App. 2001).

⁷² *Id.* at 467.

⁷³ *Id.*

⁷⁴ *Id.* at 468.

⁷⁵ *Id.* at 469.

⁷⁶ *Id.* at 470–73.

⁷⁷ *Id.*

court reasoned, were “family pets,” and “keeping family pets is a ‘residential activity.’”⁷⁸ Furthermore, the trial court interpreted “nuisance,” as used in the declaration, to refer to a common law nuisance. The trial court stated:

[T]he court must avoid interpreting terms of the CCRs that have the effect of expanding their application beyond that intended by the drafters. The court must assume that the term “nuisance” was selected to mean a common law nuisance. If the court were to interpret the word to mean “use” or “condition”, [sic] a different result could occur, but those words were not used by the drafter.

Nor is it not appropriate to use hindsight to conclude that the CCRs would have included a prohibition on keeping of cougars or similar exotic animals if this issue had been anticipated by the drafter. The absence of any restrictions on the type or number of animals suggests either the drafter did *not* intend such animals to be prohibited, *or* just did not consider it. Either way, it is not for the court to read into the CCRs something that is not there.⁷⁹

Remarkably, the trial court reached this conclusion despite the statement in the declaration that the “decision of the Association as to what is a nuisance is presumptively correct.”⁸⁰ The drafter of the declaration was seemingly telling the court to defer to the association, but the court declined to do so. That being said, the question of deference was not actually reviewed by the appellate court. The Court of Appeals noted that the defendants did not challenge the trial court’s interpretation of “nuisance” on appeal.⁸¹ However, the Court of Appeals gave no indication that it disagreed with the trial court’s analysis on the matter. By quoting the trial court’s analysis at length, the Court of Appeals gave at least tacit approval of the trial court’s conclusions.⁸² As in *Yogman*, the court gave no deference to the association’s interpretation. It simply interpreted the declaration as a matter of law.⁸³

The main point is that boards should not presume that they have the interpretive authority required to determine the meaning of the governing documents. If an owner challenges a board’s action in a court of law, courts usually

⁷⁸ *Id.* at 471.

⁷⁹ *Id.* at 470.

⁸⁰ *Id.* at 469.

⁸¹ *Id.*

⁸² *Id.*

⁸³ To add insult to injury, so to speak, the court held that the association could not demand removal of the holding pen even though the owners had not received the requisite approval prior to construction. While building the pen without approval was clearly a violation of the declaration, the owners sought approval after the fact. The court held that the board could not withhold approval unreasonably. Because the keeping of cougars was a permissible use, the board had no reasonable grounds upon which to deny construction of the holding pen. *Id.* at 473–74.

will not give weight or credence to a board's interpretation. That is not to say a court will never agree with a board's interpretation. One case in which the court agreed with a board's interpretation of its covenants is *Andrews v. Sandpiper Villagers, Inc.*⁸⁴ However, in that case, the court reached its conclusion by following its own independent analysis, not by deferring to the board's judgment.⁸⁵ As discussed below, this point is relevant to understanding the scope of a board's rulemaking authority.⁸⁶ To determine if a provision in the governing documents authorizes a particular rule, a court must interpret that particular provision. Board members should realize that under most circumstances, a court will reach its own conclusions even if the governing documents ostensibly instruct the court to defer to the board's interpretation.

B. *The Valenti Exception*

While the cases above stand for the proposition that courts will not defer to an association's interpretation of its governing documents, in one case, *Valenti v. Hopkins*, the Oregon Supreme Court reached precisely the opposite conclusion.⁸⁷ The facts in *Valenti* are complicated. The dispute was between two owners within a subdivision governed by an HOA.⁸⁸ The defendant, Hopkins, purchased a vacant lot directly across the street from the home of the plaintiff, Valenti.⁸⁹ Hopkins applied to the Architectural Control Committee (ACC) for approval of construction plans for a new home.⁹⁰ The ACC approved his plans.⁹¹ Valenti objected to the approval because the new home would interfere with his view of the mountains.⁹² The ACC refused to consider the impact on Valenti's mountain views during its review of Hopkins' construction plans.⁹³ Valenti then filed suit directly against Hopkins seeking an injunction preventing construction on the grounds that the plans violated the declaration.⁹⁴

The opinion quotes a number of provisions from the declaration.⁹⁵ The quoted language includes provisions that establish the ACC, confer discretionary authority

⁸⁴ *Andrews v. Sandpiper Villagers, Inc.*, 170 P.3d 1098, 1104 (Or. Ct. App. 2007).

⁸⁵ *Id.* at 1102–05.

⁸⁶ *See infra* Section II.B.2.

⁸⁷ *Valenti v. Hopkins*, 926 P.2d 813, 818 (Or. 1996).

⁸⁸ *Id.* at 813, 815.

⁸⁹ *Id.* at 815.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 814–15.

to the ACC, and set forth the standard for reviewing building heights. The most important of those provisions are as follows:

[Article I] Section 1. *Architectural Control Committee.*

(A) An Architectural Control Committee is hereby established. This Committee shall consist of three (3) lot owners with the selection being made by an annual vote of all then lot owners to be held on or about May 1st of each year, with each lot owner entitled to one vote regardless of the number of lots owned. . . .

(B) Generally, the Committee will be responsible for approval of plans and specifications of private areas and for promulgation and enforcement of its rules and regulations governing the use and maintenance of private areas and improvements thereon. . . .

. . .

Section 2. *Architectural Control Committee Consent.*

Consent of the Architectural Control Committee is required for all new construction, exterior remodel, landscaping, and any major improvements upon the lot. In all cases, the following provisions shall apply

. . .

(B) Architectural Control Committee Discretion and Guidelines.

The Architectural Control Committee may at its discretion withhold consent with respect to any proposal which the Committee finds would be inappropriate for the particular lot or would be incompatible with the neighboring homes and terrain within West Ridge Subdivision. Considerations such as size, height, color, design, view, effect on other lots, disturbance of existing terrain and vegetation, and any other factor which the Committee reasonably believes to be relevant, may be taken into account by the Committee in determining whether or not to consent to any proposal.

. . .

[Article III] Section 4. *View and Building Height.*

The height of improvements or vegetation and trees on a lot shall not materially obstruct the view of adjacent lot owners. The Architectural Control Committee shall judge the suitability of such heights and may impose restrictions.⁹⁶

The ACC interpreted the word “adjacent” in Article III, Section 4 to mean only those lots with common boundaries.⁹⁷ Because Hopkins’ lot was across the

⁹⁶ *Id.* (emphasis omitted).

⁹⁷ *Id.* at 815.

street, the ACC concluded it was not “adjacent” to Valenti’s lot, “and, therefore, that [Valenti] did not have a protected western view.”⁹⁸

The central question in *Valenti* was whether the court should defer to the ACC’s interpretation of “adjacent,” or whether the meaning of “adjacent” was a question of law for the court to decide.⁹⁹ The trial court deferred to the ACC’s interpretation.¹⁰⁰ The Court of Appeals reversed after “conclud[ing] that it was not required to defer to the ACC’s interpretation of the enabling covenant or to its findings on the merits.”¹⁰¹ The Supreme Court reversed the Court of Appeals, holding that “the appropriate standard of review of the ACC’s interpretation of the language in the covenants” was “review for fraud, bad faith, or failure to exercise honest judgment.”¹⁰² The Supreme Court’s opinion in *Valenti* is somewhat convoluted and difficult to follow. But the court focused on the broad discretion conferred to the ACC, and specifically the phrase “shall judge”:¹⁰³

The ACC is given broad authority to consider “height, . . . view, effect on other lots . . . and any other factor it reasonably believes to be relevant” in determining whether or not to consent to any proposal. The covenants provide that “[t]he height of improvements . . . on a lot shall not materially obstruct the view of adjacent lot owners,” but they further provide that “[t]he [ACC] shall judge the suitability of such heights and may impose restrictions.” (Emphasis added.) We take the use of the words “shall judge” to mean that in the context of the broad range of authority granted, the ACC is intended to be the final arbiter both as to the applicable law and the facts, with respect to height restrictions.¹⁰⁴

The court concluded the ACC had the authority to judge the suitability of heights, and its judgment would stand absent fraud, bad faith, or dishonesty.¹⁰⁵

In essence, the court considered the ACC to be designated as the *arbitrator* of disputes over height restrictions. The characterization of the ACC in *Valenti* as the “final arbiter” is problematic on many levels. First, as Justice Fadeley noted in dissent, “the majority opinion permits a subdivision’s architectural committee to

⁹⁸ *Id.*

⁹⁹ *Id.* at 814 (“The issue is whether the decision of a contractually created private architectural control committee is reviewable *de novo* by the courts, with no deference being given to the committee’s interpretation of the enabling restrictive covenants or to its conclusions on the merits.”).

¹⁰⁰ *Id.* at 815.

¹⁰¹ *Id.* at 816.

¹⁰² *Id.* at 818.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

determine the extent of its own arbitration jurisdiction, contrary to law.”¹⁰⁶ The declaration stated:

The height of improvements . . . on a lot shall not materially obstruct the view of adjacent lot owners. The [committee] shall judge the suitability of such heights and may impose restrictions.¹⁰⁷

However, according to Justice Fadeley, the ACC refused to make a suitability determination regarding Hopkins’ building plans.¹⁰⁸ Rather, the ACC decided that it did not need to consider the impact on Valenti’s mountain views.¹⁰⁹ In essence, the ACC interpreted the declaration to determine the scope of its own jurisdiction. According to Justice Fadeley, that kind of interpretation should have been subject to *de novo* review.¹¹⁰ Only an arbitrator’s decision on the merits should be accorded deference.

Second, the majority considered the ACC to be “a contractually designated third party.”¹¹¹ That is a surprising characterization. The commonsense understanding is that a committee is a part of the association, as opposed to an independent third party. Although the majority did not discuss the ACC selection method, it may have reached its conclusion because the owners selected the members of the ACC directly. When the owners select an ACC directly, as opposed to its members being appointed by the board, the ACC acts as a kind of separate authority. This is not uncommon, but in many cases an architectural committee is appointed by and serves at the pleasure of the board of directors.¹¹² The court did not discuss this distinction at all.

Even when an ACC is elected directly by the owners and operates without board oversight, the conception of an ACC as a neutral third party seems misplaced. Courts should consider an architectural committee to be a committee *of the association*, rather than a separate and distinct entity. For one thing, both the PCA and OCA contain record retention provisions that require an “association” to retain “all” records.¹¹³ If the ACC were separate and distinct from the association then

¹⁰⁶ *Id.* (Fadeley, J., dissenting).

¹⁰⁷ *Id.* at 819 (emphasis omitted).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 817.

¹¹² *See, e.g., Amended and Restated Declaration of Covenants, Conditions and Restrictions for Awbrey Butte*, AWBREY BUTTE 15, https://grist.files.wordpress.com/2011/07/aboa_amended_restated_ccrs_6_9_08.pdf (last visited Oct. 19, 2019) (“The members of the Architectural Review Committee shall be appointed by and may be removed for any reason or no reason by a majority of the Board.”); WILD RIVER OWNERS ASS’N, *supra* note 5, at 5 (“The Architecture Review Committee shall consist of three persons appointed by the Board of Directors. Members may be removed and replaced at the discretion of the Board.”).

¹¹³ OR. REV. STAT. §§ 94.670(1) (2017), 100.480(1).

there would seem to be no statutory requirement for the ACC to maintain its records. This is not how associations typically operate. Even when the members of an association elect an architectural committee directly, the commonsense understanding is that the committee is a component of, and subordinate to, the association. The court's characterization of the ACC as a "contractually designated third party" is at odds with that commonsense understanding.

Contractual arbitration provisions frequently provide a method by which the parties select the arbitrator or panel of arbitrators.¹¹⁴ The governing documents of a CID are a contract between the members of the association, and between the association and its members.¹¹⁵ Typically, the contractual selection process contains provisions that require parties to nominate some third party. In order to avoid challenges for unconscionability, the nomination must be fair.¹¹⁶ But in *Valenti*, the ACC consisted only of members of the association. Even if the ACC as an entity was distinct from the association, it nonetheless was composed of a subset of the parties. It may have been that the ACC members were not parties to the *dispute*—it appears that neither Valenti nor Hopkins were serving as members of the ACC at the time of the lawsuit—but the ACC members were nonetheless parties to the contract. Given that the dispute was over the *meaning of the terms* of the declaration, arguably every member of the association had at least a minor interest in the outcome, which undermined their qualifications as arbitrators.¹¹⁷ The court focused on the words "shall judge" in the declaration and interpreted them to indicate that the parties elected to arbitrate their disputes regarding building heights.¹¹⁸ But the court did not appear to consider whether the ACC could properly serve as an arbitrator according to Oregon law.¹¹⁹

Valenti is somewhat of an outlier and has created significant confusion on the issue of whether courts should defer to an association's interpretation of its covenants. Oddly enough, the Oregon Supreme Court quoted *Valenti* in a recent opinion as support for the proposition that, "[a]s a general rule, the construction of

¹¹⁴ Thomas H. Oehmke & Joan M. Brovins, *Arbitrator Selection and Service*, 97 AM. JURIS. TRIALS 319 § 31 (West 2019).

¹¹⁵ WSB Invs., LLC v. Pronghorn Dev. Co., 344 P.3d 548, 557–58 (Or. Ct. App. 2015) (approving of the trial court's use of "the well-established legal principle[] that . . . the bylaws of a corporation are a contract 'between the members of the corporation, and between the corporation and its members'" (quoting *Dentel v. Fidelity Sav. & Loan*, 539 P.2d 649, 650–51 (Or. 1975))).

¹¹⁶ Oehmke & Brovins, *supra* note 114, § 6 ("An arbitration process may be unconscionable (and unenforceable) unless it provides a fair arbitrator selection process.").

¹¹⁷ *Id.* § 5 ("The cornerstone of any arbitrator's qualifications is disinterest in the outcome of the arbitral process.").

¹¹⁸ *Valenti v. Hopkins*, 926 P.2d 813, 818 (Or. 1996).

¹¹⁹ See OR. REV. STAT. § 36.645(2) (2017) ("An individual who has a known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.").

a contract is a question of law.”¹²⁰ It is worth noting that *Yogman*—Oregon’s paradigmatic case on contract interpretation—was decided a mere six months after *Valenti*. The issue in *Yogman* was essentially the same as in *Valenti*; in *Yogman*, a board of directors sought a declaratory judgment that its interpretation of “residential purposes” was correct.¹²¹ Yet, remarkably, the court in *Yogman* did not mention *Valenti* or even consider the question of deference. Perhaps that omission supports the proposition that the court considered the ACC in *Valenti* as a fundamentally distinct kind of entity—a third party—from that of the board in *Yogman*.

Appellate courts have been reluctant to apply *Valenti* deference. In *Little Whale Cove Homeowners Ass’n, Inc. v. Harmon*, the court explicitly distinguished *Valenti* from *Yogman* on the basis that no deference is owed to a board of directors.¹²² The court stated, “[w]hatever deference might be owed to the Architectural Committee’s decision, none is owed to the Board’s.”¹²³ The court did not discuss whether, in that case, the board appointed the architectural committee, or the members elected the committee directly. No other cases decide the question of deference on the distinction between an architectural committee and a board of directors. In *Andrews v. Sandpiper Villagers, Inc.*, the defendant association argued that, “in the absence of any showing of fraud or bad faith,” the court should defer “to the [architectural review committee]’s interpretation” of the declaration.¹²⁴ The court, however, interpreted the declaration as a question of law, applying the *Yogman* three-step analysis.¹²⁵ As it happened, the court reached the same interpretation of the challenged provision that the board had reached, not by deferring to the board, but independently by applying *Yogman*.¹²⁶ Interestingly, however, the declaration in that case contained a provision directing the court to defer. The court stated in a footnote:

[W]e need not decide whether Section 8.3 of the 1994 CCRs—which provides in part that, “[i]f a provision is subject to more than one reasonable interpretation, any reasonable interpretation adopted by [the board] shall control”—would be relevant in this case.¹²⁷

The facts in *Sandpiper Village* were similar to those in *Valenti* in one important aspect: the declaration expressly designated authority to interpret its provisions to a

¹²⁰ State v. Heisser, 249 P.3d 113, 121 (Or. 2011) (quoting *Valenti*, 926 P.2d at 816).

¹²¹ *Yogman v. Parrott*, 937 P.2d 1019, 1020 (Or. 1997).

¹²² *Little Whale Cove Homeowners Ass’n, Inc. v. Harmon*, 986 P.2d 616, 619 (Or. Ct. App. 1999).

¹²³ *Id.*

¹²⁴ *Andrews v. Sandpiper Villagers, Inc.*, 170 P.3d 1098, 1101 (Or. Ct. App. 2007).

¹²⁵ *Id.* at 1102–03.

¹²⁶ *Id.* at 1105.

¹²⁷ *Id.* at 1105 n.4.

body other than the courts. However, in *Sandpiper Village* the designated body was the board rather than a committee. Regardless, the court did not defer to the board and did not provide any meaningful explanation as to why.

1. Valenti's Impact on Interpretive Rules

It will be worthwhile here to discuss briefly the distinction between interpretive authority and rulemaking authority and how they sometimes seem to overlap. Interpretive authority is a familiar concept in the field of administrative law.¹²⁸ However, in administrative law, interpretive authority is, at bottom, a separation of powers issue. The question is when and how much authority the legislature can delegate to the executive branch. In the context of a CID, the question is whether courts or boards have the authority to say what a governing document means. Interpretive authority in this context is probably exercised most frequently during the resolution of a dispute. For instance, in *Valenti*, one owner felt his mountain views were protected and another owner felt they were not. The dispute resolved around the meaning of "adjacent." The question was who had the authority to decide what adjacent meant. In *Valenti*, the court deferred to the ACC to resolve that dispute. As discussed above, though, in most cases the court will independently decide the meaning of a disputed term.

However, when a board of directors adopts an interpretive rule, it is exercising both interpretive authority and rulemaking authority at the same time. Again, this concept is somewhat analogous to aspects of administrative law.¹²⁹ For instance, in *Valenti*, the ACC had promulgated a rule explaining that the word "adjacent" meant contiguous and did not include lots separated by roads.¹³⁰ By promulgating that rule, the ACC was simultaneously exercising its interpretive authority and its rulemaking authority. However, the court deferred to the ACC because the declaration indicated that the ACC was the arbitrator of disputes. The court held that the ACC had authority to interpret the law when resolving disputes related to building heights. It is unclear what import, if any, the court placed on the fact that the ACC had previously promulgated its interpretation in the form of a resolution.

How, then, should a board of directors proceed when confronted with ambiguous provisions in its governing documents? Attorneys and professional managers frequently recommend the adoption of interpretive rules that clarify the

¹²⁸ See, e.g., *Blachana, LLC v. Bureau of Labor & Indus.*, 318 P.3d 735, 742 (Or. 2014) ("When a disputed statutory term is part of a regulatory scheme to be administered by an administrative agency, this court first determines whether that term is an 'exact' term, an 'inexact' term, or a 'delegative' term—that is, how much *interpretive authority* the legislature delegated to the agency when using that term." (emphasis added)).

¹²⁹ *Trebesch v. Emp't Div.*, 710 P.2d 136, 141 (Or. 1985) ("Agencies generally may express their interpretation of the laws they are charged with administering either by adjudication or by rulemaking, or both.").

¹³⁰ *Valenti v. Hopkins*, 926 P.2d 813, 820 (Or. 1996).

meaning of such provisions.¹³¹ However, if interpretation of the governing documents is a matter for a court to decide, then an interpretive rule adopted by resolution may be meaningless. One rule that boards can confidently glean from the cases discussed in Section II.B is that, absent some specific language in the governing documents that confers interpretive authority, a court will not defer to the board's interpretation. As a practical matter, then, the best a board can do is attempt to predict the interpretation that a court would reach by applying the *Yogman* analysis. That can be a difficult task, but Section II.C will provide some guidance.

On the other hand, even if the governing documents *do* ostensibly confer interpretive authority, it is not clear if courts will defer. Case law seems to suggest that courts will only defer when the authority-conferring provision is worded in a way that indicates intent to arbitrate disputes.¹³² This indicates that the provision of the declaration must be strongly worded and clearly evince an intent to arbitrate. Although ambiguity in an arbitration provision is often resolved in favor of arbitration, “a court should order arbitration only when it is satisfied that the parties agreed to commit the particular dispute to arbitration.”¹³³ Interestingly, the specific provision that the court focused on in *Valenti* was arguably not very clear in this regard. The declaration merely stated, “[t]he Architectural Control Committee shall judge the suitability of such heights and may impose restrictions.”¹³⁴ But, as Senator Feingold noted in a discussion of the merits and drawbacks of arbitration policy, “[b]ecause mandatory, binding arbitration is so conclusive, it is a credible means of resolving disputes only when all parties enter into the agreement fully and intelligently.”¹³⁵ In this light, the critiques that some commentators have expressed regarding the freedom of contract theory of covenants—that constructive notice is a legal fiction and that covenants are contracts of adhesion—apply to the *Valenti* decision as well.¹³⁶ Even if the plaintiff, *Valenti*, had actually read the declaration

¹³¹ See, e.g., NW. HOA L. CTR., *supra* note 57, at ch. 12 (“[T]he board should adopt an interpretive resolution that clarifies the matter.”); *HOA Resolutions and Your Board*, CEDAR MGMT. GROUP (2018), <http://www.cedarmanagementgroup.com/hoa-resolutions-and-your-board/> (“At times the governing documents can be inconclusive about certain important issues. In the event that the documents do not give enough information to guide the board in a decision, it may be necessary to implement a policy or interpretive resolution. These resolutions work to clarify vague portions of the documents.”); Greg Coxe, *Resolutions and Your Community*, VF LAW (Feb. 17, 2012), <https://www.vf-law.com/articles/resolutions-and-your-community/> (“[T]he board can adopt interpretive resolutions. These are resolutions that are adopted to clarify ambiguities in the association’s governing documents.”).

¹³² See *Adair Homes, Inc. v. Dunn Carney Allen Higgins & Tongue, LLP*, 325 P.3d 49, 56 (Or. Ct. App. 2014).

¹³³ *Id.* at 56–57.

¹³⁴ *Valenti v. Hopkins*, 926 P.2d 813, 814–15 (Or. 1996).

¹³⁵ Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281, 284 (2002).

¹³⁶ See Lepore, *supra* note 1, at 35–37.

prior to purchasing his home, it is difficult to imagine that he could have guessed from the sentence quoted above that he was agreeing to arbitrate any disputes over his mountain views.

In any case, whether it is possible for the *board of directors* to act as the “final arbiter” is unclear. The cases indicate that it is probably not possible. However, *Valenti* and to a lesser degree *Little Whale Cove* indicate that it is possible for interpretive authority to be vested in an *architectural committee*. The rationale behind that possibility is somewhat obscure. It seems that the basic ingredients necessary to vest interpretive authority in an architectural committee are that: 1) the governing documents specifically confer interpretive authority, and 2) the committee is elected directly by the members. If an association’s governing documents do not contain these two ingredients, then the association should hesitate to interpret its documents other than by applying the *Yogman* methodology.

2. *Applying Valenti to Authority-Confering Provisions*

The issue of *Valenti* deference is also important in understanding the general scope of rulemaking authority, which is the central question of the remainder of this Article. This is because it is important to understand whether an association has the authority to interpret the provisions of a governing document that confer rule-making authority. To illustrate this importance, it may be helpful to review the hypothetical scenario from Section I.B and then explain how the case law discussed above would guide a court in resolving a subsequent dispute.

In this scenario, however, rather than the broadly worded authority-confering provision posited in Section I.B, imagine that the declaration of an HOA contains the following provision:

Section 3.1 Landscaping. The Board of Directors shall have the authority to promulgate reasonable rules and regulations governing the landscaping of the lots.

This provision is seemingly straightforward. The board can regulate landscaping. But, as with all language, it does not take long to find some ambiguity. Assume that “landscaping” is not defined elsewhere in the declaration. In that case, who has the authority to decide what the term “landscaping” encompasses? Based on the case law discussed above, the answer to that question seems clear. A court of law will be the final interpreter of the meaning of this authority-confering provision.

A board of directors faced with this provision might understandably be inclined to adopt an interpretive resolution that clarifies the meaning of landscaping. For instance, the board might adopt the following language:

Resolution of the Board of Directors

Recitals:

- The Board of Directors finds the language in Article III Section 3.1 of the Declaration to be ambiguous.

- The Board finds it to be in the best interest of the Association to clarify the meaning of Article III Section 3.1.
- Therefore, pursuant to the authority conferred to the association by ORS 94.630(1) (“a homeowners association may: (a) Adopt and amend bylaws, rules and regulations for the planned community”) and ORS 94.640(1) (“The board of directors of an association may act on behalf of the association except as limited by the declaration and the bylaws.”), the Board of Directors hereby adopts the following resolution interpreting Article III Section 3.1.

It is hereby resolved that

1. The intent of Article III Section 3.1 is to give broad discretionary authority to the Board of Directors to ensure that the community maintains high standards for all visible features of the Lots.
2. “Landscaping” as used in Article III Section 3.1 means any activity that modifies the visible features of Lots, including: living elements, such as flora or fauna; natural elements such as landforms, terrain shape and elevation, or bodies of water; human elements such as structures, buildings, fences or other material objects created and/or installed by humans exclusive of the architectural design of the single-family residences on each Lot.¹³⁷

On its face, this resolution appears reasonable. Although the board has interpreted the term “landscaping” broadly, the definition is congruent with common usage of the term.

Now imagine that at the next annual meeting of the owners in this HOA, there is uproar over patio furniture. One owner has installed a large, brightly colored gazebo and dining set in the middle of their front lawn. The residents are appalled. At the meeting, the board takes a poll, and 80% of those present indicate that such patio furniture should not be allowed. At the following board meeting, the board of directors adopts by resolution the rule stated in Section I.B above:

Resolution of the Board of Directors

Recitals:

Pursuant to the authority conferred by Article III, Section 3.1 of the Declaration, and by ORS 94.630(1) (“a homeowners association may: (a) Adopt and amend bylaws, rules and regulations for the planned community”) and ORS 94.640(1) (“The board of directors of an association may act on behalf of the association except as limited by the

¹³⁷ This hypothetical definition is borrowed from Wikipedia. *Landscaping*, WIKIPEDIA, <https://en.wikipedia.org/w/index.php?title=Landscaping&oldid=902536400> (last visited Sept. 29, 2019).

declaration and the bylaws.”), the Board of Directors hereby adopts the following resolution.

It is hereby resolved that

Owners must obtain approval from the Board for the design, color and location of all permanent or semi-permanent outdoor furniture prior to installing or placing the furniture for longer than 24 hours in any location that is visible from any roadway within the subdivision.

This resolution seemingly falls within the scope of authority as the board defined it in the interpretive resolution. However, if an owner were to challenge the validity of the outdoor furniture resolution in a court of law, the case law discussed above indicates that the court would simply ignore the interpretive resolution. The court will interpret Section 3.1 on its own, according to the *Yogman* methodology. Based on that analysis, the court will determine if Section 3.1 authorizes the board to adopt the lawn art rule. The answer to that question is not immediately clear.¹³⁸ Section II.C below will explore the *Yogman* analysis in more detail and attempt to predict whether a court would uphold or invalidate the lawn art rule.

On the other hand, imagine the declaration contains an alternative Section 3.1 as follows:

Section 3.1 Landscaping. The Architectural Control Committee (ACC) shall have the authority to promulgate reasonable rules and regulations governing the landscaping of the lots. The ACC may determine, in its sole discretion, what activities are included in the term “landscaping,” and may promulgate rules and regulations. In any dispute over the application or enforcement of rules promulgated pursuant to this Section, the ACC shall be the sole judge and its determination shall be final and binding on all members.

Now imagine that all the facts in this hypothetical are the same, except it was the ACC, and not the board, that adopted the interpretive resolution and the outdoor furniture resolution. The key differences are that 1) the ACC is the actor rather than the board, and 2) the language in the declaration effectively nominates the ACC as the arbitrator. In this circumstance, there would appear to be a strong argument that *Valenti* deference would apply. As such, the court would merely review the ACC's decision “for fraud, bad faith, or failure to exercise honest judgment.”¹³⁹ The case law does not specifically address whether it matters if the ACC is appointed by, and serves at the pleasure of, the board. But it would seem to follow logically that that

¹³⁸ Note, however, that Oregon courts frequently resort to Webster's Third Dictionary when defining contractual terms. In this case, the definition of the verb “landscaping” in that dictionary is significantly narrower than the Wikipedia definition that the board relied upon in this hypothetical scenario. See *Landscaping*, WEBSTER'S THIRD INT'L DICTIONARY (unabridged ed. 2002) (“[T]o make a landscape of; to improve by landscape architecture or gardening; to engage in landscape gardening”).

¹³⁹ *Valenti v. Hopkins*, 926 P.2d 813, 818 (Or. 1996).

fact would weaken the argument for applying *Valenti*. Furthermore, there are good reasons to question *Valenti*'s continued relevance. As discussed above, its logic is flawed. Courts follow *Yogman* as a matter of course when interpreting contractual language. This author could not locate a single appellate court or Supreme Court case that applied *Valenti* deference to a committee or an association's interpretation of its governing documents.¹⁴⁰

C. *Applying Yogman to Authority-Confering Provisions*

The court in *Andrews v. Sandpiper Villagers, Inc.* summarized nicely the *Yogman* approach to contract interpretation:

We first examine the text of disputed provisions in the context of the document as a whole. If the text's meaning is unambiguous, we decide the meaning of the provisions as a matter of law. The provisions are ambiguous if they have no definite meaning or are capable of more than one sensible and reasonable interpretation in the context of the agreement as a whole. Dictionary definitions may be used in the first step of the analysis to determine whether a provision is ambiguous. If the disputed provisions are ambiguous, we proceed to a second step that involves examining extrinsic evidence of the contracting parties' intent, including, if helpful, evidence regarding the parties' "practical construction" of an agreement. If resort to such extrinsic evidence does not resolve the ambiguity, then we proceed to a third and final step, namely resort to "appropriate maxims of construction."¹⁴¹

The *Yogman* approach is not particularly remarkable. The approach is an offshoot of the parol evidence rule, which the Oregon legislature has enacted by statute.¹⁴²

¹⁴⁰ However, *Valenti* is still good law and may be useful to an association seeking to defend its decisions in a court of law. For instance, in a recent circuit court case, *Santoro v. Eagle Crest Homesite Owners Association*, the court discusses *Valenti* and points out that the defendant association relied heavily on *Valenti* to establish its authority to deny the plaintiff's construction application. The court in that case ruled in favor of the association, clearly relying on *Valenti* in reaching its conclusion that, "[i]t was within the ARC's authority, conferred by the CC&Rs to deny Plaintiffs' building plans." *Santoro v. Eagle Crest Homesite Owners Ass'n*, No. 16CV39203 (Deschutes Cty. Cir. Ct. 2019).

¹⁴¹ *Andrews v. Sandpiper Villagers, Inc.*, 170 P.3d 1098, 1103 (Or. Ct. App. 2007) (citations omitted) (citing and quoting *Yogman v. Parrott*, 937 P.2d 1019, 1020 (Or. 1997)).

¹⁴² OR. REV. STAT. § 41.740 (2017) ("When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except where a mistake or imperfection of the writing is put in issue by the pleadings or where the validity of the agreement is the fact in dispute. However this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term 'agreement' includes deeds and wills as well as contracts between parties.").

However, in the context of an *ultra vires* challenge to a board-level rule, its application can be a little tricky. One clarification that is important to note is that the goal of the *Yogman* approach, like all contract interpretation, is to determine the “meaning . . . that was most likely *intended* by the *parties*.”¹⁴³ As will be discussed below, the “parties” in the context of a CID means the *original* parties—the developer, the association while under the developer’s control, and the initial purchasers. In other words, the court seeks the *intent* of the *drafters*.¹⁴⁴ This observation is relevant at step two of the analysis, when the court considers extrinsic evidence. This section examines the *Yogman* three-step analysis by applying it to hypothetical authority-conferring provisions and board-level rules.

1. *Ambiguity*

The first step in the *Yogman* analysis is to determine whether the provisions of a contract are ambiguous.¹⁴⁵ “Ambiguity” has a specific meaning in the legal profession. As the court noted in *Andrews*, “provisions are ambiguous if they have no definite meaning or are capable of more than one sensible and reasonable interpretation in the context of the agreement as a whole.”¹⁴⁶ In the context of an *ultra vires* challenge to a board-level rule, ambiguity can arise in two seemingly different ways. First, the authority-conferring provision itself might be ambiguous in that it can be read in more than one reasonable way. The authority-conferring provision in the hypothetical in Section II.B.2 above is an example of an ambiguous provision:

Section 3.1 Rules. The Board shall have the authority to promulgate reasonable rules and regulations designed to prevent inconveniences or annoyances to Members, and to promote the general welfare of the Association and its Members.

This provision is ambiguous (or vague)¹⁴⁷ because reasonable people could disagree on the scope of authority that the drafter intended to confer.

¹⁴³ *Andrews*, 170 P.3d at 1102 (emphasis added).

¹⁴⁴ See, e.g. *Kramer v. Dalton Co.*, 234 P.3d 1008, 1012 (Or. Ct. App. 2010) (“Had the drafters of the covenants intended the phrase ‘residential purpose’ to refer to a purpose that serves *any* residence—that is, to simply distinguish an allowed ‘residential’ use more generally from a commercial or business use—the more logical placement of that language would have been in section 4. But the drafters did not put it there.”).

¹⁴⁵ *Yogman*, 937 P.2d at 1021.

¹⁴⁶ *Andrews*, 170 P.3d at 1103.

¹⁴⁷ Some commentators might consider this provision to be vague rather than ambiguous. For the purposes of this analysis, the distinction is not particularly useful. As one commentator put it, “[t]he terms ‘vagueness,’ ‘contestability,’ and ‘ambiguity’ are themselves vague, contestable, and ambiguous.” Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 513 n.9 (1994).

Second, even if the authority-conferring provision appears to be drafted precisely, a subsequently adopted board-level rule may test the provision's bounds. For example, consider the example authority-conferring provision from previous sections:

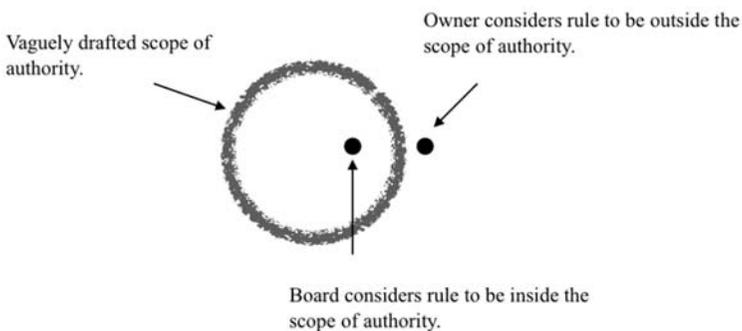
Section 3.1 Landscaping. The Board of Directors shall have the authority to promulgate reasonable rules and regulations governing the landscaping of the lots.

On its face, this provision seems clear. There does not appear to be much uncertainty about the intent. However, as discussed above, the board of directors might adopt the following rule pursuant to this provision:

Owners must obtain approval from the Board for the design, color and location of all permanent or semi-permanent outdoor furniture prior to installing or placing the furniture for longer than 24 hours in any location that is visible from any roadway within the subdivision.

This board-level rule makes the ambiguity in the declaration apparent. "Landscaping" has at least two reasonable interpretations. On the one hand, the term might refer to anything that one places on the landscape.¹⁴⁸ On the other hand, the term could refer merely to plant cover.¹⁴⁹ Because the term "landscaping" is susceptible to more than one reasonable interpretation, it is ambiguous.

Regardless of how ambiguity may arise, however, at bottom the first step in an *ultra vires* challenge to a board-level rule is a line-drawing exercise. The proponent of the rule will argue that the rule is within the scope of authority, and the opponent will argue that the rule is outside the scope. Even if the scope of authority itself is unclear, the court's task is the same. The question is whether the rule is authorized.



¹⁴⁸ See *Landscaping*, *supra* note 137.

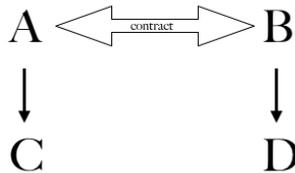
¹⁴⁹ See *Landscape*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/landscape> (last visited Oct. 19, 2019) ("to modify or ornament (a natural landscape) by altering the plant cover").

Regardless of how vaguely the authority-conferring provision is drafted, the first step in the *Yogman* approach is simply to decide if there is more than one reasonable interpretation. If not, then the analysis ends, and the court will decide the question as a matter of law. If both interpretations are reasonable, then the court proceeds to step two.

2. *Extrinsic Evidence*

If the court finds the authority-conferring provision ambiguous, then it will consider extrinsic evidence. The goal is to determine if one of the two reasonable interpretations is the one “most likely intended by the parties.”¹⁵⁰ That is to say, the court will inquire whether or not a challenged rule is within the *intended* scope of the authority-conferring provision. Because the text and context of the governing document did not clarify the drafter’s intent, the court will consider other evidence of intent. In the context of a CID, however, evidence of the drafter’s intent is often elusive. This is because in many cases the developer who drafted the original governing documents is no longer involved with the association when a dispute over a rule arises. The parties to an *ultra vires* dispute are often successors in interest to the original parties. If the developer that drafted the documents is not available to comment, there may not be much relevant extrinsic evidence available.

To illustrate this concept, imagine a contract between two parties, A and B. After forming the contract, A assigns and delegates its rights and duties under the contract to C. B assigns and delegates its rights and duties to D.



Now, C and D are parties to the contract. If a dispute arises between C and D over the meaning of the terms in the contract, a court will resolve the dispute by seeking the intent of A and B at the time the contract was originally formed.

Evidence that indicates the developer’s intent—or the association’s intent at the time of an amendment—is often hard to find. Indeed, research for this Article uncovered only one Oregon case in which a court resolved a dispute between an association and an owner based on extrinsic evidence. In *Andrews*, evidence of the drafter’s intent was dispositive.¹⁵¹ In that case, however, the provision in question was adopted by amendment. The “drafter” was the association at the time of amendment, as opposed to the original developer. The court considered affidavits

¹⁵⁰ *Andrews*, 170 P.3d at 1102.

¹⁵¹ *Id.* at 1105.

and letters from the Association's legal counsel, Dumas:¹⁵² "In his affidavit, Dumas attested that he [had] prepared [the amended declaration] for recording."¹⁵³ The court noted that "stylistic changes" Dumas made in the amended declaration, according to a letter Dumas wrote to the Association, were not intended to change the substance of the [previously recorded declaration]."¹⁵⁴ The court weighed this evidence against the plaintiff's scant and "insufficient" evidence.¹⁵⁵ Ultimately, the court concluded that extrinsic evidence resolved the dispute: "Specifically, Dumas's contemporaneous communications indicate[d]" that the amended provision "was intended to have the same substantive effect" as the previously recorded provision.¹⁵⁶ This case appears to be an outlier. In most cases, if a court finds ambiguity in a residential covenant, extrinsic evidence is unlikely to clarify the drafter's intent.

That being said, returning to the above illustration regarding successors in interest, the interpretations that C and D give to the contractual terms are relevant. In *Yogman*, the court stated, "the parties' practical construction of an agreement may hint at their intention."¹⁵⁷ The Court of Appeals in *Hawkins View* explained that "[t]he practical construction of the contractual provision applied by the contracting parties *and their successors*—that is, the manner in which the parties applied the contractual term at issue—is a useful clue to the meaning of a textually ambiguous provision."¹⁵⁸ In the context of a CID, this means that the manner in which the board and the members have applied an authority-conferring provision can be evidence of what the original drafter intended.

Allowing a board's interpretation of the covenants to be an indicator of the drafter's intent seems somewhat at odds, however, with the general rule that courts do not defer to a board's interpretation.¹⁵⁹ If a board of directors interprets a declaration in a certain way, and operates under that interpretation for a significant amount of time, that may be evidence of a practical construction by the parties. But if a court resolves an ambiguity based on the board's interpretation, the court is essentially deferring to the board. The only logical way to reconcile the two concepts is to recognize that the parties' practical construction is merely a "clue,"¹⁶⁰ and not in any way dispositive. Extrinsic evidence that a board has interpreted an authority-conferring provision in a certain way is unlikely, in and of itself, to persuade a court

¹⁵² *Id.* at 1104.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1105.

¹⁵⁶ *Id.*

¹⁵⁷ *Yogman v. Parrott*, 937 P.2d 1019, 1022 (Or. 1997).

¹⁵⁸ *Hawkins View Architectural Control Comm. v. Cooper*, 250 P.3d 380, 383 (Or. Ct. App. 2011) (emphasis added).

¹⁵⁹ See *supra* Sections II.B–II.D.

¹⁶⁰ *Hawkins*, 250 P.3d at 383.

that the board's interpretation is the only reasonable one. However, if that interpretation has been firmly in place since the formation of the CID, such that all subsequent purchasers might be deemed to have agreed, evidence of that interpretation may be more persuasive.

3. *Maxims of Construction*

If resorting to extrinsic evidence does not resolve the ambiguity, then the court will apply “maxims of construction.”¹⁶¹ Maxims of construction, also referred to as “canons of construction,” are established rules that courts apply to resolve ambiguities in texts.¹⁶² There are many maxims, and courts choose them depending on the context.¹⁶³ Some research indicates that courts choose the maxim that serves their own predisposition about the case.¹⁶⁴ In Oregon, however, courts have been remarkably consistent about applying a maxim that strictly construes restrictive covenants.¹⁶⁵ This means that when faced with two reasonable interpretations of a governing document provision, “in the absence of an understanding of the parties’ actual intent,” the court will adopt the interpretation that least restricts the owner’s property rights.¹⁶⁶ In short, ambiguity in the governing documents typically does not work in an association’s favor.

4. *An Example*

How, then, would a court resolve a dispute over the hypothetical outdoor furniture rule described in Section II.B.2 above? To reiterate the main points of that hypothetical, imagine that a declaration contains the following provision:

Section 3.1 Landscaping. The Board of Directors shall have the authority to promulgate reasonable rules and regulations governing the landscaping of the Lots.

Imagine also that the board adopts an interpretive resolution that includes the following:

“Landscaping” as used in Article III Section 3.1 means any activity that modifies the visible features of Lots, including: living elements such as flora

¹⁶¹ *Yogman*, 937 P.2d at 1019.

¹⁶² *Canons of Construction*, FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/Canons+of+Construction> (last visited Oct. 19, 2019).

¹⁶³ James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 6 (2005).

¹⁶⁴ *Id.*

¹⁶⁵ *Kramer v. Dalton Co.*, 234 P.3d 1008, 1010 (Or. Ct. App. 2010) (“The maxim ordinarily applied in this context is that restrictive covenants are to be construed strictly.”); *see also, e.g., Hawkins*, 250 P.3d at 383; *Andrews v. Sandpiper Villagers, Inc.*, 170 P.3d 1098, 1103 n.1 (Or. Ct. App. 2007); *Turudic v. Stephens*, 31 P.3d 465, 470 (Or. Ct. App. 2001); *Yogman*, 937 P.2d at 1023.

¹⁶⁶ *Yogman*, 937 P.2d at 1023.

or fauna; natural elements such as landforms, terrain shape and elevation, or bodies of water; human elements such as structures, buildings, fences, or other material objects created and/or installed by humans exclusive of the architectural design of the single-family residences on each Lot.¹⁶⁷

Imagine further that the board of directors adopts the following rule pursuant to that resolution:

Owners must obtain approval from the Board for the design, color, and location of all permanent or semi-permanent outdoor furniture prior to installing or placing the furniture for longer than 24 hours in any location that is visible from any roadway within the subdivision.

A dispute arises and an owner files suit challenging the validity of the outdoor furniture rule. The owner claims that Section 3.1 does not authorize the board to restrict use of outdoor furniture.

To resolve the dispute, the court will first determine if Section 3.1 is ambiguous in relation to the outdoor furniture rule. Obviously, the board believes that the rule is authorized and the owner believes it is not. The question is whether one interpretation is the only reasonable interpretation. As discussed in Section II.B.2, the court will not defer to the board's interpretive resolution. The meaning of "landscaping" as used in Section 3.1 is a question of law that the court will decide. To determine the meaning, the court will examine the provision in the context of the entire document. In this hypothetical, we do not have the other provisions of the declaration. If, hypothetically, some other language in the declaration indicated that the board had authority to regulate storage of items on the lots, a court might consider that to be an indication that the drafter intended an expansive definition of landscaping. If the context within the declaration is unhelpful, then at this first step of the *Yogman* analysis, the court may also revert to dictionary definitions. If the language contains a term of art, then the court may adopt that term's meaning. Otherwise, courts typically give words their ordinary meaning. Here, each of the two proposed interpretations is reasonable. The board's interpretation, drawn from Wikipedia, includes "human elements." The dictionary definition does not. Absent more, the provision is likely ambiguous in regard to the outdoor furniture rule.

If the court finds the provision ambiguous, it will resort to extrinsic evidence. In this hypothetical, the board adopted the outdoor furniture rule after an uproar at an owner's meeting. Apparently, then, the developer did not adopt the interpretation that outdoor furniture was subject to landscaping regulations. It is unlikely that this interpretation would be considered the parties' practical construction. The board would need to put forth some compelling evidence that the drafter of the covenants intended the landscaping provision to encompass outdoor furniture. Without very compelling evidence, the court would move to step

¹⁶⁷ See *supra* note 137.

three and apply the maxim that covenants are construed strictly against the covenant. In other words, if the provision is ambiguous, the court will apply the interpretation that favors the rights of the individual property owner. Even though the board's interpretation of Section 3.1 is reasonable, its interpretation is not the only reasonable one. In short, the court would find that the outdoor furniture rule is *not* authorized.

The upshot is that boards should take a conservative approach when adopting rules. Unless a rule is unambiguously within the scope of the board's authority, the rule is subject to challenge and is likely invalid. If a developer or an association desires to confer broad discretionary rulemaking authority to the board, the covenants should be drafted or amended to make that intent clear. Frequently, governing documents contain broad statements of general rulemaking authority, such as: "The Board shall have the authority to adopt rules and regulations governing the Property." Courts will construe such provisions narrowly. Broad statements of general rulemaking authority probably do not confer any additional authority beyond what the statutes already provide.¹⁶⁸

D. Good Faith and the Reasonable Expectations of the Parties

The foregoing discussion sets forth the standard that courts will apply when resolving an *ultra vires* dispute over a board-level rule. This section, by contrast, discusses the standard that courts apply when reviewing the exercise of discretionary authority. The following discussion is included in this Article because there is potential for confusion. The language that courts have used when discussing discretionary authority is potentially misleading.

Every contract contains an implied duty of good faith and fair dealing.¹⁶⁹ In a number of cases, the Oregon Supreme Court has held that the duty of good faith requires a party to apply discretionary authority in a contract "in a manner that will 'effectuate the reasonable contractual expectations of the parties.'"¹⁷⁰ Board members should not confuse the "reasonable expectations" standard with the "intent of the drafter" standard. The duty of good faith applies to the *manner* in which a party exercises discretion but not to the *scope* of that discretion. The substantive terms of the contract determine the scope of discretion.¹⁷¹ A court will not decide whether a declaration authorizes a particular board-level rule on the

¹⁶⁸ Part I discussed in detail the scope of authority contained in Oregon's CID statutes, and the forthcoming Part III explores in more detail the effect those statutes have on broad delegations of authority.

¹⁶⁹ See *Uptown Heights Assocs. Ltd. P'ship v. Seafirst Corp.*, 891 P.2d 639, 643 (Or. 1995).

¹⁷⁰ *Pac. First Bank v. New Morgan Park Corp.*, 876 P.2d 761, 767 (Or. 1994) (quoting *Best v. U.S. Nat'l Bank*, 823 P.2d 554, 558 (Or. 1987)).

¹⁷¹ *U.S. Nat'l Bank of Or. v. Boge*, 814 P.2d 1082, 1092 (Or. 1991) ("The obligation of good faith does not vary the substantive terms of the bargain . . .").

grounds that the owners could reasonably have expected the rule. The question that a court will seek to answer is whether the drafter of the declaration intended to authorize that particular rule.

To illustrate the distinction between the substantive scope of discretion and the implied duty of good faith, consider the following example. The declaration for an HOA contains the following two provisions:

Section 1: Powers.

The Board shall have the power to adopt and publish Rules and Regulations governing the use and operation of the Property and the personal conduct of the Members and their family members, tenants, guests, licensees or invitees thereon, and to establish penalties for the infraction thereof.

Section 10: Parking.

Each Single-Family Residence must include garage space sufficient to park two vehicles. In addition, each Lot must provide for a minimum of two outdoor parking places and must meet the standards set by the Architectural Review Committee.

The board of directors adopts the following rule by resolution:

Parking:

Vehicles may not be parked on the streets within the subdivision or in any visible location on the Property except for the ARC approved parking spaces on each Lot.

This rule is arguably within the reasonable expectations of the parties. The declaration requires a minimum of four parking spaces on each lot. One should expect that the purpose of requiring parking spaces is to avoid street parking. However, the proper test, as discussed in Section II.C above, is whether the drafter intended to authorize rules restricting parking. The authority-conferring provision in this case is rather broad. One could reasonably interpret the provisions above to mean that the board can adopt rules governing the use of the common property and the operations of the association but not behavior such as parking. After all, if this broadly phrased provision authorizes the board to regulate parking, then what limits are there on the board's authority? A reasonable interpretation is that the drafter included the parking section of the declaration merely to ensure *sufficient* space. It is not clear that the drafter intended to restrict all street parking.

Based simply on the language quoted above, a court would likely find ambiguity in regard to the authority to regulate parking. Reasonable minds could disagree about whether the declaration authorizes the board to regulate parking. Because the scope of authority is ambiguous in regard to the parking rule, the court would review extrinsic evidence of the intent of the drafters. Given the language above, the drafter may have actually intended to authorize the board to regulate parking. But, absent some evidence of that intent a court would construe the

covenant narrowly and find that the parking rule is not authorized. In short, looking at rules through the prism of the “reasonable expectations of the parties” may validate some rules that the *Yogman* three-step analysis would not. Because “[t]he obligation of good faith does not vary the substantive terms of the bargain,”¹⁷² that conclusion would be incorrect.

Of course, the inverse is also true. A rule that is unambiguously within the scope of authority may nonetheless fall outside the reasonable expectations of the parties. The reasonable expectation test relates to the exercise of discretion in *good faith*. Here is an example of how a board might violate this duty. A declaration contains the following:

Section 1: Powers.

The Board shall have the power to adopt and publish Rules and Regulations governing the parking of vehicles anywhere on the Property.

The board of directors adopts the following rule:

Parking:

John Doe may not park his vehicles in any visible location on any Lot.

Here it would be difficult to argue that the scope of authority is ambiguous vis-à-vis the parking rule. The declaration authorizes the regulation of parking, and this rule regulates parking. But this rule violates the duty of good faith. John Doe, when purchasing his property, could not have reasonably expected that the board might adopt a rule that arbitrarily applies only to his vehicles. It goes without saying that John Doe could successfully persuade a court to invalidate this particular rule.

III. CONCLUSION TO PART II

The bottom line for board members is that courts construe rulemaking authority narrowly. Boards should avoid stretching the authority contained in their governing documents. If the governing documents can reasonably be interpreted as not authorizing a particular rule, then in most cases the rule is probably out of bounds. Part I of this series discussed Oregon courts’ “constructional preference against restrictions limiting the use of land.”¹⁷³ That preference is reflected in the third step of the *Yogman* analysis. In essence, whenever there is an ambiguity in the governing documents that resorting to extrinsic evidence cannot resolve, courts will err on the side of unfettered property rights. That being said, nothing in the *Yogman* analysis indicates that governing documents can never confer rulemaking authority to a board of directors. The important point for developers to understand is that the intent to confer authority must be unambiguous to be effective.

¹⁷² *Boge*, 814 P.2d at 1092.

¹⁷³ *Rodgers v. Reimann*, 361 P.2d 101, 103 (Or. 1961).

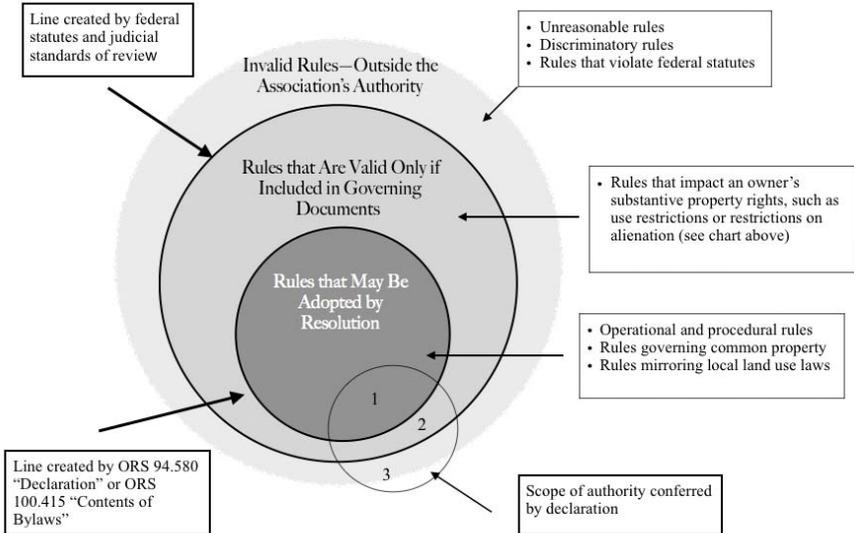
The question remains, however, as to what effect Oregon’s CID statutes have on the scope of rulemaking authority. That question will be the focus of the forthcoming Part III of this series. The issue is illustrated by the following example. A declaration contains the following provision:

The Board shall have the power to adopt and publish Rules and Regulations governing the parking of vehicles anywhere on the Property.

The board of directors adopts the following three rules:

1. No vehicles may be parked anywhere on the Common Property.
2. No recreational vehicles may be parked for more than 24 hours within view from an adjacent Lot or from the public streets.
3. No vehicles may be parked for more than 24 hours within view from an adjacent Lot or from the public streets, except for Lexus or BMW models.

Based on the analysis in this Article, all three of these rules would seem to be within the scope of the authority-conferring provision. All three rules govern the parking of vehicles. Only the third rule is problematic. That is because it likely violates the duty of good faith and the “reasonable expectations of the parties” test. The diagram below shows the scope of this provision and these three rules plotted against the overall diagram of rulemaking authority from Section I.A.



The scope of authority encompasses “the parking of vehicles anywhere on the Property.” The text embraces both valid and invalid rules. Rule 3 is probably invalid because it is arbitrary. As discussed in Section II.D, the duty of good faith and fair dealing requires the board to exercise its discretion in accordance with the “reasonable expectations of the parties.” No owner could expect a rule disallowing

all vehicles other than Lexus and BMW models. So, while Rule 3 is *within* the authority that the declaration confers, it is *outside* the association's authority to adopt.¹⁷⁴ Rules 1 and 2 are *within* the authority that the declaration confers and are also seemingly reasonable. These two rules do not appear to be the kind that a court would invalidate based on some judicial standard of review. Necessarily, then, the scope of the authority-conferring provision overlaps the outer line in the diagram created by federal statutes and judicial standards of review.¹⁷⁵

Rule 1 governs parking on the common property. As discussed in Part I of this series, rules governing common property are inherently within the board's regulatory powers. This is because the PCA and OCA confer broad rulemaking authority subject to the "carve outs" that require certain enumerated kinds of rules to be included in the governing documents. Rules governing common property are not among the "carve outs." As such, the residual rulemaking authority includes rules governing the common property. Rule 1 is *within* the authority that the declaration confers, and also within the scope of rules that boards may adopt by resolution. Necessarily, then, the scope of the authority-conferring provision overlaps the inner circle created by the "carve out" provisions in Oregon Revised Statutes (ORS) § 94.580 and § 100.415.

The interesting question relates to Rule 2. One of the "carve outs" in ORS § 94.580 states: "The declaration shall include . . . [a] statement of any restriction on the use, maintenance or occupancy of lots or units."¹⁷⁶ Rule 2 states:

No recreational vehicles may be parked for more than 24 hours within view from an adjacent Lot or from the public streets.

That is unquestionably a restriction on the use of a lot. So although the declaration unambiguously authorizes the rule, the statute seemingly invalidates it by requiring any such rules to be included in the declaration. Part III of this series, however, will argue that Rule 2 is valid because the authority-conferring provision in the declaration is specific. In essence, the authority-conferring provision is *itself* the "restriction" on use that the statute requires to be in the declaration.

Parts I and II have covered significant ground. In reviewing the background law of CIDs and setting forth notes on specific terminology, Part I laid the foundation for the discussion that follows. Part I then took a deep dive into the PCA and OCA, Oregon's statutory scheme governing CIDs. That exploration revealed

¹⁷⁴ An interesting question is whether Rule 3 would be valid if an association adopted it by amendment of the declaration. That question is beyond the scope of this Article but is worth exploring at a future time. For the time being, this Article assumes that such an arbitrary rule would be invalid regardless of whether it is adopted by resolution or amendment to the governing documents.

¹⁷⁵ The "reasonable expectations of the parties" test is a judicial standard of review extrapolated from the judicially imposed duty of good faith and fair dealing.

¹⁷⁶ OR. REV. STAT. § 94.580(o) (2017).

that the while the statutes confer broad discretionary rulemaking authority, the “carve out” provisions narrow the scope of that authority significantly. The discussion in Part I assumed that the governing documents are silent on the issue of rulemaking. The practical result is that a board relying solely on statutory rulemaking authority is essentially limited to adopting rules governing operation and administration of the association, rules governing the common property, and rules that mirror local land use laws.

Part II then turns to an exploration of authority-conferring provisions contained within governing documents. The focus in this Part is on the resolution of *ultra vires* challenges to rules adopted pursuant to authority-conferring provisions. However, as a starting point, Part II distinguishes between two kinds of authority: interpretive authority and rulemaking authority. Interpretive authority is the authority to determine the meaning of the governing documents. As discussed, in general, interpretation of governing documents is a matter of law for the courts to decide. Very rarely, if at all, will courts defer to a board’s interpretation. That is an important point because it means that in resolving an *ultra vires* dispute, courts usually will interpret the authority-conferring provision without regard to a board’s interpretation. Courts will apply the *Yogman* three-step analysis. That framework involves asking whether the provision is ambiguous vis-à-vis the disputed rule. If not, then the court decides the dispute as a matter of law. If it is ambiguous, then the court will consider extrinsic evidence to the extent that it exists. If the ambiguity is not resolved by extrinsic evidence, then the court will resolve the dispute in favor of the property owner. Board members should take note that ambiguity in the governing documents has the effect of diminishing the association’s authority. Furthermore, boards and their attorneys should resist the temptation to view rulemaking authority through the lens of the “reasonable expectations of the parties” test. That test is used to review whether the board exercised discretion in good faith but not to determine if a particular rule is authorized. Authorization is a question of the intent of the drafter.