FST-CV20-6047921S

ANNE YANG DWYER

VS.

THE WILSON POINT PROPERTY OWNERS' ASSOCIATION

CONNECTICUT SUPERIOR COURT

JUDICIAL DISTRICT OF STAMFORD

NORWALK AT STAMFORD

May 17, 2024

MEMORANDUM OF DECISION

Background

In a sense, this case involves an "almost" version of the metaphorical scenario of an irresistible force meeting an immovable object. More precisely, the (almost) irresistible force is the power of a homeowners association, and the (almost) immovable object is a homeowner digging her feet in on a position from which she refused to move. The Wilson Point Property Owners' Association (hereafter, Association) has made this something of a high-stakes dispute, imposing a fine of $100 per day, going back several years, based on the homeowner's refusal to abide by requirements sought to be enforced by the Association – at the time of the trial, the aggregate fines were well in excess of $160,000.

The plaintiff[1] has been a long-term owner of property within the jurisdiction of the Association. Prior to 2015, an accessway abutting her property was cleared by the Association, in order to allow access of other owners to certain facilities within the Association's grounds. That prompted the plaintiff (and her husband, since deceased)

[1] Most of the underlying events occurred at a time when the plaintiff's late husband was still alive. Although he therefore would have been included in interactions with the Association, at least in a nominal sense, the court will refer to the plaintiff as if she were the only one involved. The companion foreclosure matter identifies her as ", Anne Yang A/K/A Anne Yang Dwyer, as Trustee of the Anne Yang Revocable Trust," but again, for simplicity, to the extent there are references to the foreclosure action, the court will refer to her in the same manner.

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to construct a fence along that boundary, as usage of the passway implicated privacy concerns. There was a contention by the Association that the fence was not authorized, as constructed. Eventually an agreement was reached whereby the fence would be allowed to remain for a period of 10 years (with some modifications) but after that period had elapsed, the fence would have to be removed. The Association does not challenge that such an agreement/authorization became operative in 2015. The stipulation of the parties includes a statement that the plaintiff complied with her obligations.

After this agreement had been reached, the plaintiff's garage suffered fire damage. In order to obtain authorization to reconstruct the garage, the plaintiff had to comply with a standard requirement of the Association, requiring a property owner to provide security for the Association, typically embodied in the form of a construction agreement. The primary purpose for the agreement was to ensure that there would be no liability to the Association arising from construction activities, and therefore contained an indemnification agreement as well as a requirement for appropriate insurance.

As a result of evolutionary changes in Association rules relating to fences, the Association had begun inserting language relating to fences into its construction agreements. As a result, a provision relating to fences was inserted into the proposed construction agreement for the plaintiff's proposed rebuilding of her garage. The plaintiff signed the agreement but deleted two provisions. The Association insisted on execution of the agreement without changes, and eventually imposed a $100/day fine -- the fine nominally was for a fence violation (the subject of the fence agreement), but the precipitating event was the plaintiff's refusal to sign an unaltered version of the construction agreement containing language relating to the fence agreement.

This action was commenced by the plaintiff, and a separate action was commenced by the Association against the plaintiff, seeking to foreclose on the plaintiff's property as a result of the accumulation of unpaid charges assessed against her (in excess of $160,000 as of the evidentiary hearing). The foreclosure action technically is brought against the plaintiff in her capacity of trustee of a revocable trust, a distinction that the court will not address except to the extent that the parties may make such a distinction. Further, since the outcome of this case will likely dictate the outcome of the foreclosure action, i.e., determine the extent, if any, to which there are unpaid charges for which a foreclosure might be an appropriate remedy, the court will treat the case brought by the plaintiff as the focus of concern (again, except to the extent that the parties or court might deem the foreclosure action in need of being addressed).

Claims

The plaintiff's claims are directed to the Association and two members/officer of its board of directors, defendants Nagler and Palais. (The individual defendants, as property owners, also are members of the Association.) The first count asserts a violation of the obligation of good faith and fair dealing as required under Connecticut's Common Interest Ownership Act. The second count asserts similar claims arising under Connecticut's non-stock corporation statutes and especially General Statutes § 33-1104(a). The third count asserts that the conduct of the defendants constituted a breach of contract, based on the contention that the Association's by-laws essentially establish a contractual relationship between the plaintiff and the Association, with the conduct of the Association constituting a breach of its obligations. Building on the third count, the fourth count asserts that the defendants have breached the covenant of good faith and fair dealing. Finally, the

fifth count seeks declaratory relief, partly reformulating the claims of wrongdoing and partly seeking affirmative relief of a prospective nature.

In addition to denying essentially all of the material assertions of wrongdoing, the defendants have asserted special defenses. They allege that allegations substantially preceding the time of commencement of this action are barred by what are claimed to be the applicable statutes of limitation (General Statutes §§ 52-576 and 52-577); that the plaintiff is barred from relief by her unclean hands; and that the plaintiff has failed to mitigate damages.

In the companion matter, the Association, as the plaintiff, seeks to foreclose on the plaintiff's property, based on the accrued and unpaid fines levied against Ms. Dwyer (a/k/a Ms. Yang). The property owner generally has denied the allegations of the foreclosure complaint, and after the date on which briefs were filed, Ms. Yang Dwyer filed a request to amend, seeking to add a special defense.[2] The Association filed an objection to that proposed amendment, and there does not appear to have been any attempt to have the court adjudicate the objection.

Somewhat simplified, there are two complementary issues before the court: did the plaintiff engage in conduct that reasonably justified fines such as were imposed, and were those fines properly imposed?

[2] The proposed amendment reads: "The lien Plaintiff seeks to enforce is invalid because the fines on which it is based (a) were not imposed pursuant to a legitimate vote by Plaintiff's Board of Directors, and (b) were imposed as a result of arbitrary and capricious action by Plaintiff's Board of Directors."

Discussion

The court starts off with the understanding that homeowner associations can and do serve important functions. There are certain functions that need to be undertaken on a collective basis, such as maintenance of common areas. Often explicitly, a homeowner association is charged with taking steps reasonably calculated to maintain property values. The association often serves as a mechanism for resolving or preventing disputes between property owners.

At the same time, the court is aware that associations sometimes under-react and sometimes over-react, the latter category often findings its way into media outlets reporting on arguably excessive intrusion of owner interests. (A current topic in this regard is the extent to which an association can limit or prohibit the installation of chargers for electric or hybrid electric (plug-in) vehicles, resulting in some states passing statutes addressing the issue.)

This case focuses on approval or regulation of fences bordering properties (or within a certain distance of property boundaries). There does not appear to be a serious dispute as to the authority of an association to impose limits and conditions on fences near or along boundaries between property owners or along the boundary with a passageway (pedestrian or vehicular). The plaintiff does argue that there is no health or safety implication, especially as to the fence in question, but maintaining property values – which often has aesthetic implications – often is an explicit directive for homeowner associations, and is not an improper concern even when not an explicit purpose. (Limiting hours of construction activity and noise levels are other quality-of-life considerations often enforced by homeowner associations – including the Association.)

Rather than building to the largely dispositive issue, the court will start with it: the Association exceeded its authority and/or acted improperly when, on a retroactive basis, it sought to compel the plaintiff to agree to its inclusion in a 2018 construction agreement (relating to rebuilding a garage damaged/destroyed by a fire) provisions relating to an already-agreed resolution of the 2015 dispute relating to a fence along the passageway bordering her property. There was no factual connection and no temporal connection. To the extent that the Association claimed that in the interim, it had adopted a policy of including notice to residents in such agreements of the existence of updated rules relating to fences, this was not in the nature of a notice of updated rules, but was an attempt to compel memorialization of an already existing agreement. The Association compounded the problem by treating that refusal as constituting a violation of the fence rules, a situation that had been resolved by the agreement reached in 2015, with plaintiff in full compliance as of 2018 (subject to future obligations that had not matured).

This was accentuated by the language sought to be required relating to the agreement running with the property. There does not appear to have been any precedent for such a requirement, it was not part of the original agreement (to the extent the motivation may have been to memorialize the original agreement) and it would be potentially confusing if not imposing greater burdens on the plaintiff's property.

As the court recalls testimony, at least some board members were not even familiar with the concept of a restriction running with the land (or property). There also is inherent ambiguity as to what was intended to run with the property – was it the prohibition on the existing fence after the expiration of the term allowed (ten years) or the obligation to remove the fence at the end of the ten-year period (or something else) or the agreement as a whole? There was no apparent precedent for imposing

conditions or requirements, especially subject to being acknowledged to run with the land; it appears that August 2018 was the first time that the Association had included extensive new language in proposed construction agreements, and especially references to fences and the agreement running with the property.

To be sure, the plaintiff and Association could have agreed to allow the fence to remain for ten years, with a recording on the land records of the agreement to be a condition or term, with a further agreed condition or term that whatever the agreement might be, it was to run with the land. There is no suggestion of any such agreement in 2015 and the absence of any evidence of similar requirements in prior agreements between the Association and a property owner precludes any suggestion that it was accepted practice and should have been expected.

The court has little difficulty in rejecting the plaintiff's narrow claim that she was the subject of arbitrary treatment relating to fences, as a prelude to the fence agreement. Putting aside the possible merits of the defendants' efforts to distinguish other fences identified by the plaintiff (argued by her not in compliance with the rule deemed applicable to her fence), the plaintiff overlooks the existence of an agreement by which she became obligated to remove the fence in exchange for cessation of efforts by the Association to compel its removal immediately. Parties routinely settle disputes, before or after commencement of litigation, resolving disputes as to which side is "right" by way of an agreement that often embodies some level of compromise. Parties to disputes often reach an agreement where one side or both may be seeking to "buy peace," not acknowledging wrongdoing but recognizing that a cost-benefit analysis of continuing the dispute suggests no net value to prolonging the process. The Board also has discretion as to if, how and when to enforce rules – exemplified by the agreement for delayed removal of the plaintiff's fence, and there has been no

demonstration of abuse of discretion or arbitrariness in the Board's decisions relating to treatment of other fences.

The court recognizes that when litigation is commenced, a complaint may assert expansive claims, often seeking to revisit matters that are beyond the actual core of the dispute. The court finds it inappropriate, particularly in the context of claims that the defendants have acted in arbitrarily and in violation of contract-type rights, for the plaintiff to seek to have the court negate her agreement of 2015, triggered by event occurring in 2018.

In 2015, the plaintiff agreed to terms by which the Association would allow her fence to remain, subject to an agreed 10-year limitation. By that agreement, the plaintiff was obligated to remove the fence after 10 years. She also was obligated to make certain other changes to her property, and eventually satisfied those additional obligations. That she may have had second thoughts about that agreement and the eventual-fence-removal commitment does not warrant a challenge to the enforceability of that agreement, absent circumstances not seemingly present here (e.g., fraud in the inducement).

That same principle, however, also applies to the Association. The agreement in 2015 did not provide for any filing on the land records, or characterize the agreement as running with the land. There was no credible evidence (if evidence at all) suggesting that there might be a permanency to the agreement as would be reflected by an agreement that would run with the property. There had been no contemporaneous request for a written acknowledgment by the plaintiff.

The court appreciates that the Association might be concerned that if the property were to be transferred to a third party, there might be a challenge to enforceability of the agreement to remove the fence after 10 years as to such a

transferee. Whatever legitimacy such a concern may have had in 2015 in terms of shaping the terms of an agreement (or the manner in which the Association agreed to adopt the agreement), second-thoughts, years later, is not a basis for unilateral changes of a material nature.

If the concern was whether the plaintiff, in turn, had had second thoughts about abiding by her obligation to remove the fence after 10 years, seeking to insert a formal "sub-agreement" into a construction agreement some three years later was not an authorized or proper remedy. If the plaintiff were to transfer the property but not disclose the agreement, she likely would be exposing herself to legal liability, and the existence of the rules prohibiting the fence would remain a basis for enforcement against any successor.

It might be debatable as to whether simply seeking memorialization of the 2015 agreement in the 2018 construction agreement would be an abusive practice. Certainly, there would be no harm in asking, but it would seem to be unrelated to any legitimate purpose for a construction agreement. Treating a refusal to sign an agreement that contained such an unrelated-to-construction provision, and also included a never-adequately-explained provision stating that the agreement was to run with the property, effectively was an exercise of raw power due to control over an independent transaction.[3]

It is not clear as to extent to which the plaintiff may have invited that action, inappropriate as it may have been. During the trial, there were indications that the

[3] The provision stating that the agreement would run with the property appears to have been new and unprecedented as of August 2018. While it appears to have been intended as new boilerplate to be inserted into all construction agreements on a going-forward basis, the lack of clarity as to purpose/function/meaning and with an accompanying explicit provision relating to the plaintiff's fence, the language might reasonably have been interpreted as personal to the plaintiff's situation.

plaintiff may have had second thoughts as to whether she actually would remove the fence, as required, after 10 years. To the extent that the Board may have learned, directly or indirectly, of such reservations, it may have perceived a need for action whereby the plaintiff's obligations would be better memorialized. The court's recollection, however, is that any such evidence related to statements/conduct after she had refused to sign an unaltered construction agreement.

There was evidence that on at least one occasion, the plaintiff had told a Board member that she would not remove the fence in 2025 as required. The plaintiff denied that that statement had been made. As the court understood the testimony, this was in the context of the escalating dispute concerning the already-existing draft construction agreement containing provisions relating to the agreement; it was not a statement predating that draft agreement that led to the perceived need to include such language in the construction agreement. The perceived intrusion on privacy and limitation on autonomy over her property clearly were sensitive areas for the plaintiff; that the Association chose to bring the issue up some three years into an agreement may have elicited an intemperate reaction/comment, given the facial unrelatedness of a construction agreement and the status of fencing. The court recognizes the likelihood of a self-referential reinforcement – raising the issue elicited a response seemingly justifying the concern – but in context, the court concludes that if the statement had been made, it had been an intemperate reaction in a situation where the plaintiff was obligated to do something that she very much did not want to do, and likely was reacting to what was perceived to be a gratuitous reminder of that obligation in the form of not-so-subtle pressure being applied.

Defendant Palais somewhat overstates the plaintiff's ambivalence about removal of the fence. At page 11 of his post-hearing brief, he states: "Indeed, at trial, the plaintiff advised the Court—and the Board of WPPOA—that she in fact had no

intention of abiding by the terms of the accommodation, and instead would '[decide] in 2025' whether to remove her fence.") Any lack of definiteness as expressed by the plaintiff was a reflection of candor – it would have been easy to feign certainty rather than her true feelings. Whatever hesitancy she might have, in her testimony she did concede that, if necessary, she would remove the fence -- but recognized that the rules might change and that she might ask for an extension or exception from the Board which might avoid the need for removal.

At this point, a clarification may be appropriate. The court has referred to the existence of an agreement between the plaintiff and the Association relating to the fence being allowed to remain for a 10-year period. There was no formal written agreement/contract to that effect. Rather, it was more in the nature of an implied-in-fact agreement:

> "As this court has previously explained in cases of implied in fact contracts, [a] contract implied in fact depends on an actual agreement that there be an obligation created by law that imposes a duty to perform, and it may be inferred from words, actions or conduct.... It is not fatal to a finding of an implied contract that there were no express manifestations of mutual assent if the parties, by their conduct, recognized the existence of contractual obligations.... Whether and on what terms a contractual commitment has been undertaken are ultimately questions of fact which, like any other findings of fact, may be overturned only if the trial court's determinations are clearly erroneous." (Internal quotation marks and citation, omitted.) *Connecticut Light & Power Co. v. Proctor*, 158 Conn. App. 248, 253, 118 A.3d 702 (2015).

The Association passed a resolution subject to certain conditions, and the plaintiff complied with the then-present conditions; see, ¶¶ 18-22 of stipulation of facts (and especially ¶ 22 indicating that the plaintiff had complied with the terms of the recited conditions). Despite that compliance, the Association sought to impose

additional conditions on the plaintiff for continued allowance of the challenged fence, as expressed in the terms the plaintiff sought to delete from the construction agreement – a written confirmation of that agreement and facial applicability of a "runs with the property" provision.

The court does not wish to put undue weight on the "runs with the property" provision, but it is an aspect of arbitrariness that cannot be ignored. Defendant Palais argues that the plaintiff never indicated that she would have signed the construction agreement if that provision had been deleted – the defendants never suggested that that was a possibility. The evidence indicates that the Board's position had been that the agreement was not subject to modification; what would have been the point of offering a compromise in the face of a no-compromise position by the Board? Why did the Board not offer such a compromise, if it would have been acceptable?

The proposed language that was unacceptable to the plaintiff identified duties with respect to the condition of the fence, slightly at variance from the terms set forth in the resolution allowing the fence to remain for 10 years; the court infers that the issue was not so much the variation in language as the inclusion of the language at all. The court has alluded to another aspect that seems to be totally outside the scope of the resolution, that the agreement must be one that runs with the land.

In a sense, the Association's actions suggest the existence of three classes of owners. All owners are subject to rules/regulations relating to fences, simply because there are adopted rules to that effect and all owners are subject to enforcement of the rules.

There is a second, narrower, class of owners, those who are required to execute (and comply with) construction agreements, limited to owners seeking authorization for activities requiring such an agreement, in which agreements there

is language relating to prohibition of board fences – even if the project does not involve installation or modification of any fences.

Deferring, for the moment, that the plaintiff did not have such standard language in her construction agreement, the defendants appear to be attempting to use the language in other agreements in a questionable manner.

On page 3 of the Association's post-hearing submission, it quite reasonably states that

> "[t]hese agreements held several purposes; in addition to providing certain insurance requirements and indemnification clauses so as to insulate the WPPOA community at large from any incidental damage caused by construction, the agreements also reiterated various WPPOA rules by which contractors were expected to abide. These agreements would therefore help ensure compliance with those rules, which included certain provisions on the types of allowable construction." (Footnote omitted.)

That immediately transitions, however, to being characterized as "a recitation of the WPPOA rule prohibiting solid board fences." A seemingly proper scope of "types of allowable construction" seems to be being converted or expanded to being a directive relating to already-existing conditions, patently outside the seemingly-intended (and likely interpreted) scope of and purpose for a "construction" agreement.

The Association submitted an exhibit comprised of construction agreements, to demonstrate the practice of including such language (Exhibit 80). The court has reviewed the exhibit (if not in microscopic detail), and certain observations are pertinent. First, many of the documents submitted (including the first two in the exhibit) include a modifier "new" in the prohibition ("No new solid board" fence/fencing is allowed), and some also include reference to prohibition of chain link fences. That

is entirely consistent with a construction agreement and identification of dos and don'ts associated with a construction project. It is less consistent (if not inconsistent) with the notion of the language being a reminder of a general obligation under the Association's rules.

The inconsistent use of the modifier "new" applies as well to generators and to power lines. The requirements for construction as generally applicable are framed in terms of new power lines, but many of the agreements lack that precision. Nonetheless, it would seem that the only reasonable interpretation of construction agreements making reference to underground power lines relate to new or replacement lines being installed as part of a project, and not as a retroactive requirement.

While perhaps somewhat technical or over-technical, notwithstanding the claim (in email correspondence and otherwise) that the construction approval process can be utilized as a means of enforcing any claimed violation of any rule, there is no express authority for that proposition. The Board is authorized to review and approve plans for construction, prior to construction, to ensure compliance with Article II, section 8. There does not appear to be any expressed intent for retroactive or plenary enforcement of rules in connection with the approval process for plans for construction.

That is not to say that there could not be a rule or by-law or other formal adoption of a requirement that there be no identified violations of unrelated rules as a precondition to approval of a construction plan, but no such formal procedure has been identified. Further, in this case, there was no identified "active" violation as of the submission of construction plans; the claimed violation was subject to an agreed delayed enforcement period, such that there was no corrective action required of the plaintiff in 2018 for which she might be deemed in violation. Therefore, even an

implied ability to insist on no existing violations would not seem to have been applicable to the plaintiff's fence.

Although the court has not checked for universality, the language relating to fencing in construction agreements seems generally if not always to follow language relating to generators and pool equipment. The generator/pool equipment provisions, in turn, generally provide for lack of visibility of the equipment, and often includes a reference to some form of enclosure. There are, in at least some agreements, references to noise attenuation. Indeed, the agreement starting at page 14 of the Exhibit explicitly states that "[t]he equipment shall have a sound attenuation enclosure (60db) and further enclosed by shrubbery." Consistent with the general layout of the construction agreements, the next entry states that "No solid board fencing is permitted," with a follow-up reference to the existing "rules for clarifications."

In this quoted instance, and perhaps more generally, the juxtaposition of the need to hide or enclose certain equipment followed immediately by the prohibition of solid fences could be perceived as intentional – an implied linkage – and therefore more limited in scope than is being argued by the defendants in this case. In the quoted instance, there is a reference to Association rules, but for purposes of clarification of the terms of the agreement, to the extent clarification might be needed.

As owners seeking authorization for construction projects are not, at least in a categorical sense, seeking authorization for an activity relating to fences, even accepting the broad interpretation advanced by the Association, the Association would be seeking no more than an affirmative acknowledgment of a general obligation to comply with fence rules/regulations. That is not what it was seeking from the plaintiff.

If the language were to be given the broadest effect/intent as seems to be suggested by the Association, the insertion of language in construction agreements has no apparent substantive effect; it appears that the inclusion of such language was intended as something in the nature of a reminder.[4] Perhaps foreshadowing the issue in this case, if an owner refused to sign a construction agreement containing a generic "reminder" of fence obligations, would that make any substantive difference as to the relationship between the Association and the owner with respect to enforcement of fence rules/regulations? Why would the refusal to acknowledge an obligation to comply with fence regulations require singling out such a "refuser" when all owners not seeking authorization for construction also would be in the position of not having signed any such acknowledgment? (Is this something of a variation on divide-and-conquer, seeking acknowledgments on an individual level whereas seeking formal acknowledgments from all residents at one time might be more likely to invoke some level of resistance/opposition?)

Further emphasizing the creation of a limited (if growing) distinct class of owners, the agreements "run with the property" – but what does that mean? Are the agreements being recorded on the land records? If not, what notice is there to subsequent purchasers/transferees? Which provisions run with the property – indemnification? Insurance? Compliance with the then-current prohibition on solid board fences – but even if the rules were to change in the future?

[4] If it were not simply in the nature of a reminder, why would there not be a requirement that all owners provide a written acknowledgment of the obligation to comply with fence rules/regulations? Why would a written acknowledgment only be sought from owners seeking authorization for unrelated-to-fencing construction activities? If the language was intended to be substantive and directed to a specific project, then the language in the plaintiff's proposed agreement would be outside that scope.

The plaintiff is the sole member of what appears to be a third class. There already is, in place, an agreement, memorialized in the Association's records, relating to the plaintiff's fence(s). There is a stipulation that the plaintiff had honored her obligations under that agreement (other than the not-yet-ripe obligation to remove/remedy current fencing in 2025). The fencing language sought to be included in the proposed construction agreement was not merely a generic reminder of an obligation to honor fence rules/regulations, nor was it a modified generic reminder explicitly stated to be subject to the already-existing agreement. The court does not recall there being any testimony concerning a formal adoption by the Association (through its Board or any other official procedure) whereby a construction agreement could be used (n a mandatory sense) for purposes unrelated to the proposed construction. To put if differently, there is no identified authority for the requirement of a construction agreement to be used as a carte-blanche authorization to require any unrelated matter to be incorporated into a construction agreement as a condition for obtaining approval for construction.

The Association argues that the inclusion of such a language was a customary requirement in construction agreements: "One of the standard clauses in every construction agreement WPPOA provided to residents beginning at least as early as August of 2018 included a recitation of the WPPOA rule prohibiting solid board fences." (There is an associated footnote, referring to two such agreements in Exhibit 80.) In isolation, that statement is suggestive of an established practice. In context, it is an overreach. The relevant context is that the plaintiff's proposed construction agreement was dated August 2018; it appears that on or about August 5-6, 2018, the Board authorized issuance of at least three proposed construction agreements, two containing the boilerplate statement that "[n]o solid board fencing is permitted" (as noted earlier, immediately after a requirement for an enclosure for generator-type

equipment). The plaintiff's proposed agreement omitted the seemingly-boilerplate language relating to generators (in some agreement accompanied by mention of pool equipment) and added property-specific reference to the pre-existing agreement relating to eventual removal of the existing fence. The agreement presented to the plaintiff differed in a number of respects from the boilerplate format that was first being instituted in August 2018.

Recognizing that there may not be inclusion of all such agreements in Exhibit 80, it seems clear that prior to August 2018, there was a much more abbreviated form of boilerplate-type language for construction agreements, and agreements dated on or after that date contain far more extensive details. Even the boilerplate-type language is somewhat variable, at times blurring the distinction between existing conditions and future conditions (presumably including the project at hand). Virtually every August 2018 and later agreement (except the plaintiff's) contains a paragraph 12 addressing generators (and sometimes pool equipment). Some of the agreements containing such language are worded in absolute terms, that such equipment "shall not be located" while some are worded more narrowly in terms of "new or replacement" equipment (e.g., agreement starting at page 37 of Exhibit 80). Does that mean that owners of property with existing equipment in violation of the requirements of ¶ 12, who are not replacing the equipment as part of the project, are required to comply with the language recited, if the agreement does not contain the qualifier "new or replacement"? Must existing equipment and surrounding area be modified to meet the decibel requirements cited in some of the agreements (e.g., agreement starting on page 58 of Exhibit 10, one of the agreements dated August 5, 2018), or is compliance not needed if the project does not involve new or replacement equipment?

This is compounded by the unacceptable-to-the-plaintiff language stating that the property owner agrees that "[t]his agreement runs with the Property." Again, this appears to have been added at or around August 2018, such that it does not appear to have been an existing requirement for prior construction agreements. Aside from the newness of the provision, there is a not-insubstantial question of what it means and how it applies. The court is familiar with the term "runs with the land" – is this an imprecise or indirect reference to that principle? "Runs with the land" is something of a term of art; runs with the property appears to be, at best, a colloquial reference to a relationship somewhat similar but not inherently (or necessarily) the same.[5]

Adding something of a surreal feel, in Exhibit 21 (and at least twice in the initial pages of the post-hearing brief (on page 4)), there is a claim/contention that the inclusion of the terms of the 2015 agreement in the 2018 construction agreement was for the plaintiff's benefit (protecting her, ostensibly, from a change in attitude/posture by a subsequent Board). The effort to frame it as a benefit to the plaintiff, and for her protection, may have been an attempt to convince the plaintiff to sign, but it is a strange benefit (or form of protection) that, upon refusal, led to imposition of daily fines that now, cumulatively, are approaching $200,000.

The plaintiff's refusal to sign was consistent with the description of the purpose of a construction agreement as recited early in the defendants' brief (page 3):

> "Construction agreements were documents executed between WPPOA residents seeking to commence construction of a certain type and/or value. These agreements held several purposes; in addition to providing

[5] In Lexis, there were 6 hits for a search of Connecticut caselaw for the phrase "runs with the property" and 224 hits for the phrase "runs with the land." A similar search in Westlaw resulted in the same number of hits for "runs with the property" and 214 hits for the phrase "runs with the land." All of the hits for "runs with the property" appear to have been descriptive in nature rather than having a more formal operative meaning.

> certain insurance requirements and indemnification clauses so as to insulate the WPPOA community at large from any incidental damage caused by construction, the agreements also reiterated various WPPOA rules by which contractors were expected to abide. These agreements would therefore help ensure compliance with those rules, which included certain provisions on the types of allowable construction." (Footnotes omitted.)

While much of the language in the construction agreements was quasi-boilerplate, similar in intent but with some level of variations,[6] it seems likely that there was often over-inclusion of terms (did almost every if not every construction project, other than the plaintiff's, involve a generator and/or pool equipment?). The very omission of any provision making reference to a generator reflected the ability to tailor an agreement more closely to the specific circumstances. Was there any real concern that in constructing/reconstructing a replacement garage, a new fence might be installed? Exhibit L reflects the editing of another August 2018-vintage construction letter so as to be applicable to the plaintiff's project, with multiple changes and deletions. References to septic fields, driveway paving, generators, etc., were omitted from the plaintiff's proposed agreement (although those provisions seem to have become more or less standard provisions if subject to variations in wording in later agreements (Exhibit 80)).

Again, although the defendants argue that the reference to fencing was a standard term in every construction agreement "beginning at least as early as August of 2018," the record seems to reflect that a more accurate description is that it seems to have become a standard term starting in August 2018. It also would be accurate to state that "beginning at least as early as August of 2018," every agreement has a

[6] For example, as noted elsewhere in this decision, some references to generators also included references to pool equipment, and some but not all qualified those types of equipment by a narrowing to new or replacement equipment.

provision relating to generators (often also referring to pool equipment), but such a provision intentionally had been omitted (deleted) from the plaintiff's agreement.

The court understands the plaintiff's concern about the validity of the record reflecting the vote to impose the $100/day fine. A board member testified, at trial, that she did not recall voting for the imposition of the fine, and she was sure that she never would have voted for a daily fine of that magnitude (and the minutes of the meeting report a unanimous vote in favor of the daily fine). The plaintiff seeks to impeach the validity of the imposition of the fine based on this testimony.

The court finds the relevant testimony to have been generally credible, but ultimately insufficient to have a material impact on the result of this case. It is hardly surprising that, five years after a vote, which may or may not have been sufficiently remarkable to be remembered, a board member does not recall the specific vote. It would not be surprising if there were no specific recollection even a year after the vote.

The board member's assertion, in relatively absolute terms, that she never would have agreed to a daily fine of $100, is credible, but it only tends to impeach (at least directly), the unanimity that was reported; it does not impeach the existence of a vote in favor of imposition of a fine. It does not eliminate the possibility that the testifying board member did not recognize the existence of a reference to a daily fine when the topic of imposition of a fine was submitted for a vote, and there was an effort to suggest that there were reasons that the Board member may not have been focused on such details at that time.

The never-would-have-voted quality of the testimony could be perceived as a challenge to the existence of any vote, or it could be a testament to some level of ambiguity as to whether it was clearly articulated that the to-be-imposed fine was to