Circuit Court for Montgomery County
Case No. 448261-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2647

September Term, 2018

WILLOUGHBY CONDOMINIUM OF CHEVY CHASE

v.

LAWRENCE D. DILLIN, JR., ET AL.

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: October 14, 2020

This case concerns whether the Board of Directors ("the Board") of the Willoughby Condominium of Chevy Chase ("the Willoughby") properly provided notice of a special Board meeting at which a contract was approved to upgrade the condominium's fire alarm system. Also at issue is whether the Board *had* the power to approve the contract without also obtaining approval from the condominium's unit owners. We agree (albeit on different grounds) with Montgomery County's Commission on Common Ownership Communities ("CCOC") that because insufficient notice of the Board meeting was provided to the unit owners, the Board's action at the meeting in question was invalid. However, unlike the CCOC and the Circuit Court for Montgomery County, we are not persuaded that the project was the sort of "improvement" under the Willoughby's bylaws that requires unit owner approval, rather than a "repair" or "replacement" that does not require such approval. Therefore, we shall vacate and remand the judgments with respect to the "improvement" issue.

BACKGROUND & PROCEDURAL HISTORY

There is no dispute that the Willoughby's 50-year-old fire alarm system must be updated to comply with the Montgomery County Code. Currently, the Willoughby's (now outdated) system has vertical fire pull stations and audible alarms at the exits on each floor of the 815-unit condominium, which is located in Friendship Heights near the border with Washington, D.C. To bring the fire alarm system into compliance with the County Code, the Willoughby's engineers planned (among other features) to install additional pull stations, smoke detectors, and strobe alarms every 40 feet along the

hallways on each floor. The Willoughby decided to run the wiring required for this setup vertically along the walls,[1] with the wall-mounted wiring to be encased within pilasters measuring 4 inches by 6 inches.[2]

After a series of initial consultations and site visits (that are not directly at issue on appeal), the Willoughby's Board was set to meet on November 21, 2017 to approve a contract for the project. Ultimately, however, the Board held an earlier special meeting that is now the focus of this appeal.

In the morning of Tuesday, October 31, 2017, notice was posted on the Willoughby's lobby bulletin board, as well as on the condo association's website, of a special Board meeting that was to be held on Thursday, November 2, 2017. The November 2 meeting, which began at 6:00 p.m., was attended by three of the Willoughby's five Board members, as well as about 20 residents. At the meeting, a $1,194,198 contract for the fire alarm project was approved.

[1] Though not entirely germane to this appeal, the Willoughby explained to the CCOC why it believed other design alternatives would not have been viable. Running the wires within the walls would have required cutting into drywall every 40 feet and dealing with asbestos inside the walls. The Willoughby also argued that running surface-mounted wiring horizontally along the walls would not have been feasible, given (1) warping concerns, (2) the fact that the hallways themselves do not run entirely straight, and (3) each condo unit's recessed doorframe would render crown molding impractical.

[2] A pilaster is a "shallow rectangular column that projects slightly beyond the wall into which it is built[.]" Deriving from the Greek architectural *anta*, in ancient Rome "the pilaster gradually became more and more decorative rather than structural, as it served to break up an otherwise empty expanse of wall." *See* "Pilaster," *Britannica*, available at https://www.britannica.com/technology/pilaster (last visited Oct. 14, 2020).

On November 9, 2017, Willoughby tenants Lawrence Dillin and Cecilia Casale filed a Complaint with the Montgomery County Commission on Common Ownership Communities ("CCOC"), as provided for by Chapter 10B of the Montgomery County Code.[3] As is relevant to this appeal, two core contentions were raised before the CCOC. The first concerned whether adequate notice was given to unit owners in advance of the November 2 special Board meeting. The second concerned whether, under the Willoughby's bylaws, the pilaster design constituted a "repair or replacement" that is within the Board's power to make (without having to obtain the approval of a majority of unit owners), or an "improvement" that requires such owner approval.

The CCOC held a hearing on March 26, 2018 and issued a panel decision (which included a concurring opinion) on May 11, 2018. The CCOC held: (1) the Maryland Condominium Act[4] requires ten days' notice to unit owners before a special Board meeting, and (2) the entire proposed system upgrade was, under the Willoughby's bylaws, an "improvement" that required a majority vote of unit owners. (As we shall explain further, this second finding went beyond the position that had been taken by the

[3] The Willoughby suggests that Mr. Dillin lacks standing to challenge the Board's actions, given that he was merely a tenant in Ms. Casale's condo, and not a unit owner. However, the Montgomery County Code sets forth that tenants can bring claims before the CCOC. *See* Montgomery County Code, § 10B-8(8)(c) (Defining the "part[ies]" that may file CCOC disputes as including "an occupant of a dwelling unit in a common ownership community."); *see also* § 10B-13(e) (Providing for judicial review of CCOC decisions). In any event, the Willoughby does not contest that Ms. Casale owned her unit.

[4] Md. Code (1974, 2015 Repl. Vol.), Real Property Article, § 11-101 *et seq*.

claimants during the hearing; Mr. Dillin had only argued that the *pilasters* constituted an "improvement").

Among other requirements, the CCOC's decision ordered the Willoughby's Board not to take any action to advance a fire alarm system replacement without a meeting and majority vote from the unit owners. As part of this requirement, the CCOC ordered the Board to "include with the meeting notice a discussion of the advantages and disadvantages of the alternative designs and [to] set forth the cost comparison information available to them in a reasonably clear comparative statement." The CCOC subsequently denied a Motion for Reconsideration filed by the Willoughby.

The Willoughby sought judicial review in the Circuit Court for Montgomery County, which held a hearing on September 24, 2018. In an oral ruling, the circuit court held (contrary to the CCOC's reasoning) that only three days' notice is required before having a special Board meeting, but that because this requisite three days' notice was nonetheless not provided, the CCOC's decision to invalidate the Board's action was correct. Though the circuit court stated the notice issue "basically t[ook] care of the case," the court then added (without elaboration) that substantial evidence supported the CCOC's conclusion that the fire alarm system was an "improvement." In short, the circuit court affirmed the CCOC's decision, albeit on different reasoning with respect to the notice issue. The circuit court later denied a Motion to Amend in which the Willoughby asked the court to note that the CCOC had erred in finding that ten days' notice was statutorily required to hold a special Board meeting.

This appeal ensued.

DISCUSSION

On appeal, the Willoughby maintains that the CCOC (and the circuit court) erred with respect to the notice that was required before the special Board meeting. Specifically, the Willoughby contends that neither the Maryland Condominium Act nor the Willoughby's bylaws require *any* notice to unit owners before a special Board meeting. Additionally, the Willoughby argues that the CCOC legally erred in finding that the new fire alarm system was an "improvement" that required unit owner approval. We first conclude, as did the circuit court, that because the requisite three days' notice was not given to unit owners before the special Board meeting, the CCOC did not err in invalidating the action taken at that Board meeting (even though the CCOC was incorrect when it concluded that ten days' notice was required). Second, we are not persuaded that the CCOC correctly interpreted the Willoughby's bylaws when it determined that the system upgrade was an "improvement" and not a "repair" or "replacement." Given that the Board will need to take further action anyhow with respect to the fire alarm system (on account of the failure to provide proper notice), we vacate the judgments with respect to the "replacement" or "improvement" issue, to allow for further development of the record (and maximum flexibility) on remand.

The CCOC is an administrative agency, and "[i]n an appeal from judicial review of an agency action, we review the agency's decision directly and not the decision of the Circuit Court . . . ." *Hollingsworth v. Severstal Sparrows Point, LLC*, 448 Md. 648, 654

(2016). In doing so, we are "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Cosby v. Dep't of Human Res.*, 425 Md. 629, 638 (2012) (Citation omitted). Though we must "defer to the agency's fact-finding and drawing of inferences if they are supported by the record" and we "review the agency's decision in the light most favorable to it[,]" *Motor Vehicle Admin. v. Carpenter*, 424 Md. 401, 413 (2012), we do not defer to agency conclusions "based upon errors of law." *State Ethics Comm'n v. Antonetti*, 365 Md. 428, 447 (2001). Given the issues before us on appeal, we note that "in interpreting bylaws we apply the general principles of contract construction[,]" *Floyd v. Mayor & City Council of Balt.*, 179 Md. App. 394, 450 (2008), and "[t]he interpretation of a contract . . . is a question of law, subject to *de novo* review by an appellate court." *Id*. at 451 (Citation and quotation marks omitted, alteration in original); *see also Tackney v. U.S. Naval Academy Alumni Ass'n, Inc.*, 408 Md. 700, 716 (2009) ("It is a fundamental principle that the rules used to interpret statutes, contracts, and other written instruments are applicable when construing corporate charters and bylaws.") (Citation and quotation marks omitted).[5]

[5] For this reason, the circuit court was incorrect to uphold the CCOC's conclusion as to the "improvement" issue on a substantial evidence standard. Whether updating the fire alarm system is an "improvement" or "repair" under the Willoughby bylaws is a legal conclusion that should be reviewed *de novo*.

I. THE WILLOUGHBY FAILED TO PROVIDE PROPER NOTICE OF THE SPECIAL BOARD MEETING TO UNIT OWNERS.

The Willoughby argues that the CCOC (and the circuit court) erred in finding that insufficient notice was provided to unit owners regarding the November 2, 2017 special Board meeting. Specifically, the Willoughby argues that notice of a special Board meeting is not explicitly required—by either the Maryland Condominium Act or the Willoughby's bylaws—to be given to unit owners, and is only required to be given to Board members. The Willoughby further contends that because all the Board members waived any challenge to the notice that was given to them (either by showing up to the special Board meeting or by failing to challenge the notice), the issue was not properly before the CCOC or the circuit court. We disagree.

As is relevant here, § 11-109(c)(5) of the Maryland Condominium Act states that "[n]otice of special meetings of the board of directors shall be given . . . [a]s provided in the [condo's] bylaws[.]" Article III, § 10 of the Willoughby's bylaws, in turn, provides for three business days' notice to *Board members* of special Board meetings, but does not explicitly state that unit owners shall be given similar notice.[6] Thus, the Willoughby

[6] The full bylaws provision states: "Special meetings of the Board of Directors may be called by the President on three business days notice to each Director, given by mail or telegraph, which notice shall state the time, place and purpose of the meeting. Special meetings of the Board of Directors shall be called by the President or Secretary in like manner and on like notice on the written request of at least two Directors."

Article III, § 11 of the Willoughby's bylaws goes on to state that Board members may waive notice of any Board meeting, and that attendance by a Board member at any meeting constitutes a waiver of notice. Article III, § 16 also states that "[a]ny" action by the Board of Directors that is permitted to be taken at any meeting may be taken without

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argues that it did not fail to provide sufficient notice of the special Board meeting, because neither the Maryland Condominium Act nor the Willoughby's bylaws expressly required notifying unit owners about the meeting.

To be sure, § 11-109(c)(5) of the Maryland Condominium Act does not explicitly state that unit owners must be notified about a special Board meeting. However, the Act's full language and context indicates that such notice is expected to be given to unit owners. Section 11-109(c)(6) of the Act states that, subject to an exception not relevant here, a meeting of a governing body, which includes a Board of Directors, "shall be open. . . ." Likewise, § 11-109(c)(7)(ii) states that subject to certain exceptions, "a governing body shall provide a designated period of time during a meeting to allow unit owners an opportunity to comment on any matter relating to the condominium." Moreover, § 11-109.1 sets forth the limited purposes for which a Board of Directors meeting may go into closed session. None of these statutory provisions, which clearly establish a policy preference for open meetings and transparency, would make sense if the Board did not have to notify unit owners about a special Board meeting. *Kilmon v. State*, 394 Md. 168, 177 (2006) (We presume the General Assembly acts "in pursuit of sensible public policy[,]" and we "avoid construing a statute in a manner that would produce farfetched, absurd, or illogical results which would not likely have been intended by the enacting body.").

a meeting if the Board members consent in writing. Though not directly at issue in this appeal, this latter provision is likely in conflict with the Maryland Condominium Act's general requirements for open meetings.

As such, we believe that it only makes sense that the Board was required to provide to unit owners the same three business days' notice that the bylaws required providing to Board members. Implicitly, the Willoughby's own actions reflect the same understanding, as notice of the special Board meeting was posted on the Willoughby's lobby bulletin board and on the condo association's website. The real issue, it appears, is that insufficient notice was given: notice was provided on Tuesday October 31 for a meeting that was held on Thursday November 2. In other words, the Willoughby missed the three days' notice requirement by one business day. *See* Md. Code (2014), General Provisions Article, § 1-302(a) ("In computing a period of time described in a statute, the day of the act, event, or default after which the designated period of time begins to run may not be included."); *Equitable Life Assur. Soc. of U.S. v. Jalowsky*, 306 Md. 257, 262 (1986) ("It is the general common law rule that when time is to be computed from a particular day, act or event, the designated first day is excluded and the last day of the period is included.").

In addition, the Willoughby's contention that any error here was effectively harmless, because Mr. Dillin and Ms. Casale were actually in Europe at the time of the special Board meeting, is unavailing. Whether or not Mr. Dillin and Ms. Casale would have personally been able to attend a properly-flagged Board meeting does not excuse the Board from having failed to properly notify all the unit owners about the special Board meeting. *Cf. Frazier v. McCarron*, 466 Md. 436, 449 (2019) (In the context of the State Open Meetings Act, violations are never "harmless": "A violation may not cause specific

demonstrable injury to individual members of the public, but it does necessarily clash with and detract from the public policy that the Legislature declared . . . is essential to the maintenance of a democratic society[.]") (Quotation marks omitted); *Williams v. Pub. Serv. Comm'n*, 277 Md. 415, 420 (1976) (Disclaiming the proposition that "once a hearing is scheduled in response to a statutory mandate, the required statutory notice need not be given to those whose rights may be affected[]"; in that case, even though notice had been given to interested industrial actors, "[n]otice by publication should [also] have been given to residential consumers and other interested persons[.]"). To a certain extent, a challenge to improper notice of a condominium Board's open meeting should always be conceptualized as being effectively brought on behalf of the rights of the tenants or owners writ large; otherwise, if the action were conceived as truly individualized, a Board could always justify any failure to provide notice as "harmless" on the basis that it simply would not have been swayed by, or seriously listened to, the particular litigant(s) involved.

Accordingly, the CCOC correctly concluded (albeit for incorrect reasons[7]) that the Willoughby provided insufficient notice of the special Board meeting, and that the Board's action at the meeting was invalid.

[7] The CCOC panel majority concluded that the 10-day notice requirement contained in § 11-109(c)(4) of the Maryland Condominium Act applies to special Board meetings. However, as recognized by the CCOC panel's concurring opinion, § 11-109(c)(4) only applies to regular or special meetings of *the council of unit owners*.

II. WE ARE NOT PERSUADED THAT THE FIRE ALARM PROJECT CONSTITUTES AN "IMPROVEMENT" REQUIRING UNIT OWNER APPROVAL.

The second issue on appeal concerns whether the Willoughby's bylaws allowed the Board to approve the fire alarm system contract without obtaining approval from a majority of unit owners. As mentioned above, interpreting bylaws is a legal question reviewed *de novo*. *Floyd*, 179 Md. App. at 450-51.

The issue arises from two somewhat overlapping, and not entirely clear, provisions in the Willoughby's bylaws. Article V, § 11 of the bylaws states that the Board of Directors shall be responsible for "the maintenance, repair and replacement" of all the common elements in the condominium, and the provision does not explicitly require the Board to obtain approval from the unit owners to make such repairs or replacements. Article V, § 12, however, states that "additions, alterations or improvements" that cost more than $10,000 in any given year shall require approval from a majority of the unit owners.[8] Accordingly, the Willoughby and the Appellees take different views as to whether the fire alarm project more properly constitutes a "repair and replacement" (that does not require owner approval) or an "improvement" (that

[8] The provision also states that the $10,000 limit shall increase annually, on a basis that is pegged to the percentage increase in the condominium's annual budget. The parties agree that the relevant figure is now about $33,000.

does).[9] We believe that further action on remand will be helpful to conclusively resolve the issue.

Neither the Maryland Condominium Act nor the Willoughby's bylaws define the terms "repair," "replacement," or "improvement." Nor do we believe that resorting to a dictionary conclusively solves the issue. There is inherently a certain textual overlap in the question of whether any work is a "repair and replacement" or an "improvement": *any* repair or replacement should inherently constitute an improvement, and it would be a shoddy contractor whose repair work did not "improve" a building. *See Balderston v. Balderston*, 71 Md. App. 390, 399 (1987) (Routine maintenance can "improve" a property in the sense of increasing its value or attractiveness); *id.* at 400 ("[B]ecause of the vagaries that exist in attempting to distinguish between repairs and capital improvements, broad discretion must be vested in the trial judges to draw the lines based on the particular facts presented to them.") (Footnote omitted); *Rose v. Fox Pool Corp.*, 335 Md. 351, 376-77 (1994) (In the context of whether a swimming pool was an "improvement to real property" for the purposes of a specific statute of repose, the Court of Appeals approvingly quoted from the Black's Law Dictionary definition of "improvement," but then concluded that whether something was an "improvement to real property" for the purposes of the statute in question was a "case by case determination.").

[9] Neither side has suggested that the provisions might be complementary, *i.e.*, that something could be both a repair and an improvement, and that the critical question is whether the (adjustable) $10,000 threshold has been hit.

Rather, we believe that a proper conclusion regarding the project must be discerned from the full context, purpose, and structure of the Willoughby's bylaws. The full context and structure of the Willoughby's bylaws suggest that the Board's delegated duty to make "repair[s] and replacement[s]" is with respect to the sort of obligatory, routine, or non-transformative work that must be made when a component of the common elements has become defective or fallen into disrepair.[10] On the other hand, "alterations or improvements" could refer to significant and non-routine changes in the building's construction,[11] and/or to discretionary decisions that are perhaps not strictly necessary from a structural or regulatory standpoint, but which are undertaken for a more aesthetic or quality of life purpose. Again, there is some conceptual overlap between the two categories, and we make no final determination of the issue here. Rather, we believe that the Board (and, if necessary, the CCOC) can better shine light on this issue in the course of the subsequent action that the Board will have to take anyway, as a result of the failure to provide proper notice.[12]

[10] For instance, Article V, § 11(c) of the bylaws ("Manner of Repair and Replacement") specifies that "[a]ll repairs and replacements shall be substantially similar to the original construction and installation and shall be of good quality."

[11] While the portion of the bylaws dealing with repairs and replacements obligates unit owners to keep their own units in good condition and repair, the section dealing with alterations and improvements states that "[n]o Unit Owner shall make any structural addition, alteration or improvement in or to his Unit without prior written consent of the Board of Directors[.]"

[12] Because the Board must take further action anyway on account of its failure to provide proper notice, we do not believe that by vacating and remanding on this second

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We do emphasize that our view of the "repair" or "improvement" issue is shaped in no small part by the posture taken by the Appellee, Mr. Dillin, at the CCOC hearing, during which he conceded that were the new fire alarm system's wiring to be run horizontally along the building's hallways, behind crown molding, such a decision would merely constitute "repair" work that would not require the Board to seek unit owner approval. Frankly, we are puzzled by the position that running three miles' worth of wiring horizontally behind crown molding would merely be a "repair" or "replacement," yet placing that same wiring behind a series of vertical pilasters somehow transforms the action into an "improvement" that requires owner approval. (Given Mr. Dillin's position during the hearing that only the pilasters constituted an improvement, we are further puzzled by the CCOC's cursory, two-sentence conclusion that the entire project constituted an improvement. Though we agree it seems somewhat Solomonic to conceptually cleave the pilasters from the rest of the project—an exact cost breakdown of each project component was not presented to the CCOC—the CCOC did not fully explain why it went beyond even Mr. Dillin's position on this matter.).

Furthermore, while the Appellees suggest that the pilaster design, as chosen, is unnecessarily ornamental, it seems to us that the pilasters—which, admittedly, would constitute a new feature to the hallways—could be a reasonably necessary way of complying with the Montgomery County Code. Without deciding the matter, we note that

issue we will be adding to the delay of a project that has already (and regrettably) been delayed.

§ 8-14 of the County's Building Code requires that building alterations, additions, repairs, and maintenance all meet the ICC International Building Code's standards and requirements; similarly, § 17-2 and § 17-3 of the County's Electrical Code set forth that the National Electrical Code shall be the basis for the County's electrical code and regulations—including "for the installation of fire alarm systems."[13] A cursory review of the 2020 edition of the National Electrical Code suggests that wiring of the sort at issue here would need to be covered or secured in some manner. After all, the Willoughby could hardly just leave the wires dangling on the walls.

Our (non-conclusive) reference to the Montgomery County Code also illustrates why we suspect the chosen pilaster design might be better understood as the sort of necessary repair or maintenance that would not require unit owner approval under the Willoughby's bylaws: simply put, there is no dispute from the Appellees that the fire alarm system must be updated to comply with the County Code. Notably, not only does Article V, § 14(3) of the Willoughby's bylaws require that "[a]ll laws, orders, rules, regulations or requirements of any governmental agency having jurisdiction thereof relating to any portion of the Property shall be complied with," but the provision goes on to state that compliance shall be the responsibility of a unit owner or the Board of

[13] Section 22-4(a) of the Montgomery County Fire Safety Code states that "any alterations, additions or changes in buildings required by the provisions of this code which are within the scope of the building code shall be made in accordance therewith." Section 22-90(a) of the Fire Safety Code states that "[i]t shall be unlawful to maintain any electrical wiring appliance, apparatus or device in violation of the Montgomery County electrical code."

Directors, depending on "whichever shall have the obligation to *maintain or repair* such portion of the Property[.]" (Emphasis added). It would strike us as curious to require *pro forma* unit owner approval for regulatory-compliance work that, pursuant to this section of the Willoughby's bylaws, the Board must carry out and the owners are obligated to comply with.[14]

Moreover, it could be helpful to know whether the Willoughby's unit owners have historically been required to approve analogous upgrades to other structural or mechanical elements of the building, such as the elevators or boilers. The condominium's previous handling of such matters could illuminate how the bylaws have been commonly understood within the building. *See, e.g.*, *Richard F. Kline, Inc. v. Shook Excavating & Hauling, Inc.*, 165 Md. App. 262, 277-78 (2005) (The parties' conduct can determine the controlling terms of a contract); *Univ. Nat'l Bank v. Wolfe*, 279 Md. 512, 522 (1977) (same); *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (The Supreme Court has treated a regular course of practice as "an important interpretive factor" in Constitutional

[14] True, the CCOC ordered that the Board present the unit owners with various cost proposals for the fire alarm system project, no doubt to avoid burdening the owners with unnecessary costs (*i.e.*, perhaps slimmer or cheaper pilasters *could* be chosen to cover the wiring). Although we have no doubt that the owners would act sensibly and reasonably if presented with the various sort of options envisioned by the CCOC, in theory a "runaway" or illogical majority of unit owners could still choose to vote down every Board proposal. Simply put, it does not entirely make practical sense to require unit owner approval for a regulatory upgrade that the owners are legally obligated to comply with, especially when Board decisions that are taken in good faith would generally be shielded under the business judgment rule (*i.e.*, otherwise-valid Board decisions do not generally have to be the most economical or business-savvy decision possible to be legally valid).

interpretation). We are hesitant to affirm that the pilasters are an "improvement" under the bylaws and thereby set a precedent that would unwittingly force the unit owners to start voting on all sorts of various work projects at the Willoughby, which is one of the largest condo buildings in Montgomery County.

In sum, we believe that it would be helpful to allow the Board (and other relevant parties such as tenants or unit owners) to further consider whether the fire alarm project is a "repair" or "replacement" or "improvement." Given that subsequent Board action will be necessary anyway, in light of the improperly provided notice, we believe that vacating the portion of the judgments concerning the "improvement" question will provide for maximum flexibility on remand. Our opinion is not meant to stake out the precise range of ground that must be covered to resolve this interpretive issue. Of course, the CCOC can, if necessary, review the Board's follow-up action.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED TO THE CIRCUIT COURT FOR REMAND TO THE CCOC, FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE EVENLY DIVIDED.