

IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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CRAYTON-WEST PROPERTIES, LLP)

- vs -)

GUILFORD COUNTY
17 CVS 4738

OAK RIDGE MEADOWS TOWNHOUSES)
HOMEOWNERS ASSOCIATION, INC.)

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TRANSCRIPT, Volume I of I

Wednesday, August 9, 2017

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Transcript of proceedings in the General Court of Justice,
Superior Court Division, Guilford County, North Carolina at
the August 7, 2017 Session before the Honorable John O.
Craig, III, Judge Presiding.

APPEARANCES:

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1 Wednesday, August 9, 2017, 9:40 a.m.

2 THE COURT: I'll call the next case, Crayton-West
3 matter.

4 MR. PINTO: I've prepared a notebook.

5 (Document tendered to the Court.)

6 THE COURT: So Mr. Pinto, you represent the
7 plaintiff.

8 MR. PINTO: Yes, Your Honor.

9 THE COURT: May I -- if you'll indulge me, may I
10 tell you a quick story?

11 MR. PINTO: Absolutely.

12 THE COURT: Back in the days when I was practicing
13 law -- I guess it would have been probably the mid to late
14 nineties -- I was representing a contractor who had been sued
15 by a homeowner. And we had counterclaimed for monies owed
16 under the construction, but it was pursuant to a renovation
17 of the house and the replacement of a roof.

18 And the homeowner alleged that the work on the roof
19 had been defective and it was -- we had stipulated it could
20 be a nonjury case. The case was to be heard by the Honorable
21 Julius Rousseau, who was well before your time, but
22 Mr. Younce may remember Judge Rousseau.

23 MR. YOUNCE: I do, Your Honor.

24 THE COURT: He was very gruff and he just was -- he
25 was extremely fair and had a heart of gold and was honest as

1 the day was long, but he just had that kind of personality
2 where he would gripe and bark and be gruff at you.

3 I came into the courtroom to prepare for getting
4 ready for trial, and opposing counsel came in, we had all our
5 stuff laid out, and then Judge Rousseau came in in open court
6 and he looked at the file and asked me if I was representing
7 the plaintiff or the defendant. And I said I'm representing
8 the defendant, Your Honor.

9 And he said, well, you're seated at the wrong
10 counsel table. And he said, don't you know the difference
11 between the plaintiff and the defendant? And really gave me
12 a hard time about being seated at the wrong counsel table. I
13 offered to move so that -- because I was -- I was seated over
14 here at the table closest to the jury box, which I was used
15 to. And I offered to move and he said, no, I'll just have to
16 be ambidextrous this time.

17 So but that's, you know, that prompts me to say
18 you're seated at the wrong counsel table, Mr. Pinto. But you
19 don't have to move.

20 MR. PINTO: Absolutely. Thank you.

21 That's -- Your Honor, I do think we need to address
22 first in this the motion to dismiss from -- Mr. Younce's
23 motion to dismiss. I'll say that we object to that being
24 heard today by the court.

25 Under local rule 5.2, it was never noticed, it was

1 never calendared. Local rule 5.2 is pretty clear. It says
2 the calendar must be submitted. I'm sure Mr. Younce would
3 like to respond.

4 THE COURT: Mr. Younce.

5 MR. YOUNCE: Your Honor please, the motion was
6 filed with the memorandum in support of defendant's motion to
7 dismiss. And so it duly noticed plenty of time ago. So
8 that's our position. We'd ask it be heard.

9 THE COURT: So the motion to dismiss was filed as
10 part of the answer?

11 MR. YOUNCE: No, sir. It was filed as part of the
12 memorandum in support of the defendant's motion.

13 THE COURT: Okay. And when was that filed?

14 MR. YOUNCE: Let's see. It was served on Mr. Pinto
15 June the 5th, 2017.

16 THE COURT: Okay. So the only problem is that it
17 was not -- there was no notice of hearing or no calendaring
18 of the matter.

19 MR. PINTO: Yes, Your Honor. And it is my
20 understanding that his motion to dismiss was actually a part
21 of his answer, which was June 1st, and then there was a --
22 then he's correct, on the 5th day of June it was served upon
23 me. But our position is that it's not properly before the
24 court. Because of rule 5.2, it is not properly noticed to
25 the court or requested.

1 THE COURT: Do you have a copy of the rule? We
2 can't find one.

3 MR. PINTO: If I may approach, Your Honor.

4 THE COURT: Please.

5 (Document tendered to the Court.)

6 THE COURT: All right. When did you learn,
7 Mr. Pinto, that Mr. Younce was going to wish to have his
8 motion to dismiss be heard?

9 MR. PINTO: Your Honor, this petition was
10 originally scheduled for June 8th. And that was moved. On
11 June 5th, Mr. Younce, via fax, served us -- or served me with
12 a memorandum in support of defendant's motion to dismiss.
13 The petition was moved to this date.

14 And I believe that -- Mr. Younce can correct me if
15 I'm wrong, but I believe two days ago I had received a fax
16 that was four documents that were supplemental documents to
17 his motion to dismiss. So it was never served again or it
18 was never noticed. But I -- I didn't know that he had filed
19 that with the court on June 5th.

20 THE COURT: Okay. Rule 5.2 also has a sentence at
21 the end of it that says, "Any motion filed is presumed to be
22 ready for hearing." And given the fact that it's been
23 pending since June, I'm going to use my discretion and rule
24 that we can go ahead and hear the motion to dismiss today
25 because it has been pending for a long enough time.

1 Now, if it had been sprung on you just within this
2 week, I think that I would not be wanting to hear it. But
3 since it's been pending since June and the memorandum has
4 been out there since that time, I believe I'll fall back on
5 that sentence that says, "Any motion filed is presumed to be
6 ready for hearing."

7 So Mr. Younce, I don't know if you're going to --
8 before we get into this mandamus question, I don't know if
9 you want to go ahead and argue your motion to dismiss.

10 MR. YOUNCE: Your Honor, I'll do it either way.
11 But I, too, have prepared a notebook in due course. What
12 I've tried to do --

13 THE COURT: Mr. Pinto, let me give you your book
14 back.

15 MR. PINTO: Thank you, Your Honor.

16 THE COURT: Otherwise, it will get lost up here.

17 MR. PINTO: Thank you.

18 MR. YOUNCE: What I've attempted to do, Your Honor,
19 is to do this seriatim because there's so many. Mr. Pinto
20 and I have a completely different perception of the
21 applicable law in this case. And what I did was to take each
22 and every one of his allegations in the petition and deal
23 with those in my response. And they do follow in close
24 order.

25 And when we get to the motion, if it's okay with

1 the court, I'd like to wait until my turn comes and then
2 treat it that way, go through the notebook when the court has
3 it before it.

4 THE COURT: Okay. So you would prefer that
5 Mr. Pinto go first on the --

6 MR. YOUNCE: Yes, sir.

7 THE COURT: Okay. Well, that will work.

8 MR. PINTO: That's fine with us, Your Honor.

9 THE COURT: So what sort of kicked this --

10 MR. PINTO: Sure.

11 THE COURT: -- this matter off was the actual
12 petition for the writ. Was there a complaint filed?

13 MR. PINTO: There was not. This is just -- it's
14 just a petition, Your Honor.

15 THE COURT: Okay.

16 MR. PINTO: I'll kind of kick it off, as I think
17 background is important in this one. The background is also,
18 obviously, in the petition, in exhibits attached to the
19 petition.

20 I became engaged in this matter in January where my
21 clients, Crayton-West Properties, engaged me to -- after they
22 were unable to receive documentation from the HOA that they
23 were members of that they had requested. Crayton-West
24 Properties is a property company that owns multiple
25 properties, I believe 19, inside of Oak Ridge Meadows

1 Homeowners Association. They are members of the homeowners
2 association. I don't think there's any argument about that.

3 In January of that year I reviewed the governing
4 documents of the HOA. And I sent a letter, which is Exhibit
5 1 to the petition, to Lambeth Management and Realty
6 requesting certain documents pursuant to the bylaws and the
7 declaration of the governing documents.

8 In response, I received a letter from Mr. Younce,
9 who is the attorney for Oak Ridge Meadows Townhouses
10 Homeowners Association, Incorporated. In that response, they
11 refused to give any of the documents that were requested. I
12 believe the stated reasons were, they're not described with
13 reasonable particularity, nor do they state the purpose that
14 you're requesting these documents.

15 Mr. Younce and I had a phone conversation in which
16 he explained that he believed that we were bound to request
17 the documents pursuant to North Carolina General Statute
18 55A-16-02, which is the Nonprofit Corporation Act, Your
19 Honor. While I disagree with that and my clients disagreed
20 with that, in order to try to move along the document
21 request, you'll see in Exhibit 3 that we complied with
22 55A-16-02.

23 We asked -- and that -- and that statute, which is
24 Section D of the notebook, asked for a number of things,
25 including that you have to ask for proper purpose and

1 reasonable particularity and describe the documents you want
2 to have. So we did that in early February. We did that in
3 Exhibit 3. It's a fairly lengthy letter that describes all
4 the things that we are requesting and it describes the
5 reasons why we are requesting them.

6 I will note that Crayton-West began their request
7 because an insurance company asked them for these documents.
8 Because the insurance company writing the insurance for all
9 of these wanted to know the financial health of the HOA in
10 order to assess risk, and their stuff, and when they're
11 giving insurance to Crayton-West. That's what kicked the
12 whole thing off.

13 After the February letter, which is Exhibit 3 to
14 the petition, we received a prompt response from the HOA
15 which said that they would allow inspection of some
16 documents, which are basically the bylaws and the articles of
17 incorporation, the governing documents and stuff that is
18 easily available online, and but they denied the financial
19 and accounting documents that were requested and the contract
20 information that was requested.

21 They cited -- they said that this is a fishing
22 expedition and that it was an attempt to micro-manage the
23 association's affairs. So two requests, two denials on the
24 main information we are looking for.

25 On March 15th there was another letter sent that

1 dealt with one other issue. And a document request on Page 5
2 of Exhibit 5, the document request sets out the exact bylaws
3 excerpt, which is Article 8 of the bylaws books and records
4 which states, "The books, records and papers of the
5 association shall at all times during reasonable
6 business hours be subject to inspection by any
7 member."

8 THE COURT: Tell me where that is.

9 MR. PINTO: Sure. That's Page 5 of Exhibit 5. And
10 that is also in your notebook. It would be -- the
11 declaration is under Tab J and the bylaw is under Tab K.

12 THE COURT: Okay. Now I see the -- I mean, I'm
13 looking at Page 5 in the exhibit.

14 MR. PINTO: Oh, I apologize, Your Honor, Page 6.
15 Right at the top of Page 6. I apologize for that.

16 THE COURT: Okay.

17 MR. PINTO: And that declaration excerpts, Article
18 10, Section 7 information says, "The association shall make
19 available to you, the owners and lenders and the
20 holders insure" --

21 THE COURT: Now, slow down. It's being taken down
22 by the court reporter.

23 MR. PINTO: Oh, I apologize -- "and guarantors of
24 any first mortgage current copies of the
25 declaration, bylaws, other rules concerning the

1 project, and the books, records and financial
2 statements of the association. Available means
3 available for inspection upon request during normal
4 business hours or under other reasonable
5 circumstances."

6 So again, we're requesting the documents under the
7 governing documents. We believe we're entitled to them by
8 way of the governing documents. But to ease Mr. Younce's and
9 the HOA's contention that it is -- actually has to be
10 requested under 55A-16-02, we also requested under that.

11 And here we went through our proper person --
12 proper purpose, reasonable particularity, good faith and that
13 they're directly connected to the purpose because there are
14 no such requirements.

15 And then we asked for them again. And this time,
16 we added a reason for it, which was any possible
17 mismanagement of the company or any possible misappropriation
18 of the HOA's assets. And at this time, we added this in as
19 another reason for our purpose of requesting them as a proper
20 purpose in good faith. Because at this time, we had been
21 denied the documents so many times, we had suspicion and we
22 wanted to pursue that.

23 And there's a great case on this subject, which is
24 the Parsons versus Jefferson Pilot. It's a North Carolina
25 Supreme Court, it is from 1993. It's in your -- it's in your

1 notebook under Tab F.

2 But in that case, there is a shareholder who wishes
3 to see the financial information of a corporation. And the
4 Supreme Court held that -- that, quote -- I'll get the exact
5 -- "any possible mismanagement of the company or any possible
6 misappropriation of the company's assets was
7 reasonable particularity."

8 Because the person could not possibly know which
9 exact documents they are asking for if they've never seen the
10 documents and have no idea. So our demands, we fully
11 contend, are made in proper purpose, good faith and with
12 reasonable particularity.

13 But after that, you move to Exhibit 6. We, again
14 -- oh, also, sorry to backtrack on you. But in Exhibit 5, we
15 also demanded arbitration pursuant to the governing
16 documents, which is Article 10 of General Provisions Section
17 6. It's an arbitration clause.

18 It says, "Any dispute arising between the declarant
19 of the association between declarant and any
20 member as herein defined concerning the
21 interpretation of any provision of this
22 declaration, each party shall choose one arbitrator
23 and such arbitrator shall choose one additional
24 arbitrator and the decision shall be by the
25 majority of all the arbitrators. The resulting

1 fees and other expenses associated with any such
2 arbitration shall be paid equally by the parties to
3 the arbitration."

4 I mention that, Your Honor. Obviously, we're in
5 front of the court today, but we never wanted to be in front
6 of court. And even though we couldn't agree on the
7 documents, we offered arbitration and demanded mandatory
8 arbitration under the governing documents very early on. We
9 believe that the arbitration clause in the governing
10 documents is mandatory.

11 Nevertheless, the HOA took a different position.
12 And they said that they would not arbitrate and they did not
13 believe that it was mandatory. Further, they declined to
14 produce documents, again, in Exhibit 6.

15 Exhibit 7 is, again, another attempt and another
16 demand of arbitration.

17 Exhibit 8 is another denial.

18 Exhibit 9 breaks down into very minute details of
19 documents requested. That document also requests proof of a
20 fidelity bond, which is another thing that is required under
21 the governing documents that the HOA or anyone managing HOA
22 funds -- which would also be a property company -- have and
23 hold a fidelity bond.

24 Exhibit 10 denies to produce any evidence of
25 fidelity bond from the HOA. It also basically states that

1 some stuff has been produced and some stuff will not be
2 produced.

3 And stuff has been produced. There's -- there's no
4 doubt about that. It's filtered through, as this
5 disagreement has continued. I mean, we have a decent stack
6 here of different financials. But we have requested multiple
7 times more financial backup.

8 At that point, we filed a petition for a writ of
9 mandamus. And it is an interesting cause of action, Your
10 Honor. There was much discussion with other attorneys that I
11 work with. And I'll give you the reasons for filing this
12 petition. First, we think it's the right thing to file in
13 this situation. And we believe that the Parsons case, Knotts
14 versus Popinberger and Cook V. Alton all outline that this is
15 proper to pursue this.

16 However, we also -- we didn't want to sue the HOA.
17 We aren't seeking monetary damages and we aren't trying to
18 sue an HOA that we're a member of. I mean, my clients are
19 having -- had to engage me and they're also in some way
20 paying for the other side to fight them.

21 They have no interest in suing these people that
22 they see every day. They did not want to have monetary
23 damages. Likewise, they're not trying to make them stop
24 doing something. They simply want the documents that they're
25 requested -- that have been requested that they believe they

1 are entitled to pursuant to the governing documents and
2 pursuant to Statute 55A-16-02.

3 And if Your Honor -- and I can point out the direct
4 parts in Parsons and in Cook and in Knotts that discusses
5 briefly the writ of mandamus and how that power lies with --

6 THE COURT: I'd like to see that. Because in
7 Parsons, they ask for an injunctive relief.

8 MR. PINTO: Absolutely. And that's one of the
9 difficult things, is a lot of these things included a number
10 of things. But in Parsons, I believe it's Number 3, it says
11 that shareholder -- a shareholder who seeks -- its the last
12 paragraph on Page 3.

13 It says, "Further, a shareholder who seeks to
14 exercise their common law right as opposed to
15 statutory rights to examine corporate records for a
16 proper purpose also has a common law right to
17 utilize the mandamus power of the courts to compel
18 a reluctant corporation to disclose its corporate
19 records pertinent to that purpose."

20 In Knotts V. Popinberger, on Page 3, which is under
21 Tab H, it says, "An examination is generally enforceable by
22 mandamus proceedings against the corporation and
23 its officers or agents having charge of the books
24 and records sought to be reached."

25 That's quoting the Cook decision, which is also --

1 right behind that, it also quotes Parsons in that. And
2 that's a 2004 case, Your Honor.

3 THE COURT: Okay.

4 MR. PINTO: So we believe that it's the correct
5 action. We simply want the production of these documents.
6 And whether Your Honor feels -- if Your Honor feels that we
7 have to request another statute as opposed to just under the
8 governing documents, I certainly can argue more than that.

9 But I will say, in the Planned Community Act, which
10 is Chapter 47F of North Carolina Statutes, it does say that
11 -- let me find it.

12 It says under 47F-3-118, which is entitled
13 "association records" that "All financial and other
14 records, including records of meetings of the
15 association and executive board, shall be made
16 reasonably available for examination by any lot
17 owner and the lot owners' authorized agents as
18 required by the bylaws" -- which there is a
19 requirement in the bylaws here, which is very
20 clear. And says, "And by Chapter 55A of the
21 general statutes."

22 So Your Honor, that's why we pled Chapter 55A in
23 the alternative, although we feel that the bylaws are very
24 clear and the declaration is very clear and that, really,
25 there shouldn't be a reliance on 55A.

1 I've searched up and down. Honestly, things like
2 this don't happen very often. There's not very much case law
3 on it. I could not find a case exactly on point that said
4 that you have to defer to the governing documents or the
5 other way that says you have to defer to Chapter 55A. If --
6 I haven't seen a case like that. If Mr. Younce has a case,
7 I'd like to hear it. We've asked for any cases that support
8 that position. But we've pled both of them and will
9 absolutely argue both of them.

10 I will go into a little bit of the documents that
11 we've gotten and the documents that we still are requesting.
12 We have received -- we have received a check register. We
13 have received a financial review which, apparently, says the
14 delinquencies in it. We received "year-end" is what they
15 were described as. However, there were only December 12,
16 December 13, December 14 and December 15 and December 16
17 income and expense statements which we did receive.

18 We received the audits from '16, '15, '14, '13 and
19 '12, which have not very much information in them. We
20 received the balance sheets as of the very end of the year
21 for December 31st, '13, '16, '15, '14, I believe.

22 And we received a number of the minutes of the
23 meetings. We also received governing documents. But of
24 course, we already had access to the governing documents. We
25 also received the newsletters which are sent to members every

1 month, I believe.

2 But what we haven't received and what we've
3 requested are important. We receive -- we asked for backup
4 documentation to support these check registers. We received
5 these check registers just before the last hearing and, to
6 us, that raises a number of questions to us. And I'll
7 briefly -- I don't want to waste the court's time by going
8 through things.

9 But in the things that raised our concern -- and
10 we've actually -- we've been denied any backup documentation
11 for these check registers. In 2016, there was \$55,000 spent
12 on postage and office expenses by Lambeth Management. In
13 2014, though, there was 37 -- \$37,567.66 spent on coupon
14 books and statements to Lambeth Management.

15 Further, there are payments from -- purportedly
16 from Oak Ridge Meadows to a number of board members.
17 And in the governing documents, it's very clear that board
18 members cannot be paid, however, they can be reimbursed. And
19 we have gone through these things and found a number of
20 things.

21 For instance, there's a check to Mrs. Gear, who is
22 the president of the association. The reason, question mark.
23 That's \$106.74. Mrs. Gear has been reimbursed for club
24 furniture, \$11,200, rugs, \$271.21, yard sale, gift card,
25 miscellaneous reimbursement for \$582.75. In total in the

1 past four years, she's been reimbursed 19,350 -- \$19,358.93.

2 And we don't -- we're not accusing her of using
3 these funds improperly. But as a member who pays over --
4 almost \$50,000 of membership dues a year, and pursuant to the
5 governing documents and pursuant to the statute, we believe
6 that we're entitled to at least receive backup accounting
7 records that prove that all this stuff is fine.

8 THE COURT: May I ask a question?

9 MR. PINTO: Absolutely.

10 THE COURT: The original purpose in seeking these
11 documents was to -- I believe you said to provide them to the
12 underwriter for insurance companies so that you could get
13 coverage on those units.

14 MR. PINTO: That is my understanding, Your Honor.

15 THE COURT: How much was the -- once these
16 documents were eventually provided, was that satisfactory to
17 your --

18 MR. PINTO: They had to -- they had to go -- by the
19 time we got most of these documents, the insurance had
20 already been written and it was a 25 percent increase.

21 THE COURT: Okay.

22 MR. PINTO: Whether that was -- you know, they
23 would not say whether it was due to not receiving that or
24 not. But we were not able to provide them that in time for
25 the insurance.

1 THE COURT: Okay. All right. That's all I need to
2 know.

3 MR. PINTO: Okay. And I don't want to belabor the
4 point and go through every single check thing. But we --
5 there's a number of issues. I mean, that -- the club
6 furniture I mentioned --

7 THE COURT: Okay. Let me just try to move forward.

8 MR. PINTO: Understood.

9 THE COURT: You're asking for backup documents, you
10 know, checks and any submittals by board members that would
11 have been used to provide proof to the HOA that they were
12 entitled to reimbursement. What other items?

13 MR. PINTO: Absolutely. Then we're asking for
14 that. We're asking for proof of fidelity bonds. As this
15 continued on, we eventually got an answer that the HOA did
16 not have a fidelity bond, but that the property management
17 had a fidelity bond. We were told that we would receive
18 documentation of this. We never received that documentation.

19 We were also told that, I guess, pursuant to us
20 bringing up the point that it's required that the board was
21 now seeking a fidelity bond, we'd like any type of proof of
22 that.

23 We've also asked for contract information, that is,
24 information as to the contracts with subcontractors and what
25 those contracts say and state. We've asked for the bids that

1 have gone out to other contractors.

2 And those are really the three things we have left.
3 It's not a large amount of information. And honestly, it is
4 a little baffling to me that they produce a check register,
5 but then refuse to produce anything backing it up. I mean,
6 are we just supposed to rely on something that -- I'm not
7 saying this happened. I believe it's absolutely truthful.

8 But why -- you know, someone -- anyone could have
9 produced this. We have to rely on something that they could
10 have produced -- been produced on anyone's computer. And for
11 a corporation that has a large investment in this HOA, has
12 had an investment in this HOA from the beginning, it's very
13 troubling that as a member we are being denied access to
14 information about the management of the HOA.

15 I'm happy to go into further things with Chapter
16 55A. But I think that sets out a pretty clear outline of
17 where we are. And I'm happy to let Mr. Younce --

18 THE COURT: How often does the association hold the
19 meetings in which the members of the association are allowed
20 to attend and ask questions?

21 MR. PINTO: Annual. Annually.

22 THE COURT: All right. And when does that annual
23 meeting take place?

24 MS. MAZZURCO: Typically, January.

25 MR. PINTO: January.

1 THE COURT: Okay. And this was before all of this
2 got cranked up.

3 MR. PINTO: Yes.

4 THE COURT: The next meeting in which questions
5 could be asked of the board members would be next January, I
6 presume.

7 MR. PINTO: I'd presume that. I do understand that
8 the board holds, you know, monthly meetings as well. I'm not
9 sure about just the open conduct -- you know, the openness of
10 those meetings. But yes, presumably it could be next
11 January.

12 THE COURT: All right.

13 MR. PINTO: Thank you, Your Honor.

14 THE COURT: Thank you. Mr. Younce.

15 MR. YOUNCE: Your Honor, I believe tit for tat is
16 not going to do any good here. I believe I need to be very
17 specific with the court. And interestingly enough, my
18 notebook pretty much parallels Mr. Pinto's notebook because
19 it's about the same subject matter.

20 But before I go into my notebook, if I may, I'd
21 like to comment on a few things that Mr. Pinto had suggested.
22 The Parsons case is actually a for profit case. It involves
23 a de novo disclosure by investors who have to give their
24 permission. So that's distinguishable to that extent.

25 The arbitration, that applies only to the

1 declaration, only as to issues in the declaration of
2 covenants, conditions and restrictions.

3 The third point he made was the checks. He's never
4 asked for the checks. We sent him the detailed listing which
5 I'll go through in the notebook. And I said specifically in
6 a letter that Your Honor will see in just a moment, if you'd
7 like to look at specific checks, let us know. He never did
8 that.

9 And finally, on the fidelity bond, the reason
10 there's no fidelity bond is that the -- no cash goes to the
11 association board. It passes through that magic agent. All
12 the duties go to that and they pay all the bills. All of
13 this would be demonstrable in the notebook.

14 That having been said, may I approach, Your Honor?
15 I'll bring you --

16 THE COURT: Yes, sir.

17 I think before we get into this in any greater
18 detail, it's time to take our short break. I want to give
19 the staff their opportunity to take a restroom break. So
20 Ms. Simmons, we'll take a 10 minute recess.

21 (Recess.)

22 (All parties are present at 11:23 a.m.)

23 THE COURT: All right. Mr. Younce, thank you. I
24 apologize for the delay.

25 MR. YOUNCE: Your Honor has before you a notebook

1 that I put together. And as I indicated earlier, it pretty
2 much parrots the allegations in the petition. And I'd like
3 to go through it in some detail, but not long detail, and
4 point out to the court some things that I think are
5 important.

6 If the court would look at the motion index inside
7 of the notebook. The petition for a writ of mandamus,
8 Mr. Pinto has covered that more than adequately and I don't
9 think I need to get into that.

10 So if the court would call its attention to Tab 2,
11 which is the defendant's response to petition and the motion
12 to dismiss. The first three pages are responses you admit or
13 deny. So the court and Mr. Pinto would turn to Paragraph 4
14 -- excuse me, Page 4.

15 This is the further answer in defense. And what
16 I'm pointing out here is that "a mandamus is an extraordinary
17 court order that all of the following elements
18 must be present to grant it. The parties
19 seeking relief must demonstrate a clear legal
20 right to the act requested, that defendant
21 must have a clear legal duty to perform the
22 act, and the duty must be clear and not
23 reasonably debatable."

24 "Third, performance of the duty-bound act must
25 be ministerial in nature and not involve the

1 exercise of discretion."

2 "Fourth, the defendant must have neglected or
3 refused to perform the act requested and the time
4 for the performance must have expired."

5 "And five, the court may only issue a writ of
6 mandamus in the absence of an alternative legally
7 adequate remedy."

8 I've got a court -- a case in here, Your Honor,
9 which I think is directly on point we'll get to. On the
10 motion to dismiss, there are five reasons that we feel we're
11 entitled to the motion to dismiss.

12 First, in A, that the plaintiff has failed to
13 demonstrate a clear right to mandamus; B, the defendants have
14 performed their legal duty to produce records and the issue
15 as to whether or not other records must be produced is
16 reasonably debatable; C, performance or production of records
17 is not ministerial and does involve the exercise of
18 discretion; D, the defendants have not neglected or refused
19 to produce records, as will be shown.

20 And in fact, we produced voluminous records, as
21 evidenced by the exhibits in plaintiff's petition. Excuse
22 me.

23 E, the court may only issue a writ in the absence
24 of an alternative legally adequate remedy -- which in this
25 case is a civil action -- where the rules of discovery will

1 determine the rights of the parties.

2 In fact, this whole thing is almost moot, Your
3 Honor. When you see what records have been produced, our
4 side of the story, I hope the court will maybe see that. So
5 we're requesting that the petition be denied and with
6 prejudice -- with prejudice, and that we recover our
7 attorneys fees in this expensive action here.

8 If the court will turn to Tab 3. This is really
9 the heart of the whole situation, Your Honor.

10 THE COURT: Give me just one moment.

11 MR. YOUNCE: Memorandum in support of defendant's
12 motion to dismiss.

13 THE COURT: Yes.

14 MR. YOUNCE: Okay. By way of background, if I may
15 add to what Mr. Pinto has said. Lambeth Management, one of
16 the defendants, is the managing agent for this complex which
17 has 266 townhomes in it.

18 On Page 2, Scott Lambeth is the owner of the
19 Lambeth Management, the managing agent. There are nine
20 individual directors who have been named in this action. And
21 on April the 19th, as the court is aware, the petition for
22 mandamus was filed.

23 The defendants responded to each request in a
24 timely and complete fashion. And I invite the court's
25 attention to D1, Tab D1.

1 THE COURT: Yes.

2 MR. YOUNCE: And this sets the standard, if you
3 will, for how they responded. Mr. Pinto would write me a
4 letter, I would respond. This is the first one that the
5 court is looking at.

6 On April the 4th, Mr. Pinto requested certain
7 records, audit documents and requests in Paragraph A through
8 J in this letter. Three days later, we responded.

9 On February 17th, he had requested the 2016
10 year-end balance sheets and income expense statement which
11 also contained the 2017 budget. These were produced on
12 February 22, five days later.

13 March 15, his letter raised concerns that were
14 fully responded to in my letter of March 24, nine days later.

15 March the 30th, we produced audit reports for 2012
16 through 2016 which included the balance sheet, income expense
17 statement and operating capital for each year. There are no
18 other financial records.

19 April the 4th, the same requests were again made in
20 his letter. It was almost -- it was duplicated. As to his
21 audit request, he said that he was -- these were not
22 certified audits. Well, they are. That's the way audits
23 come. And he asked about a seal. There is no seal on an
24 audit. The auditor performs the audit and puts the
25 certification in there, but there's no seal.

1 On the next page, responding to Paragraphs A
2 through F, he made the same request he made in his letter on
3 April the 4th, which were duplicated and unnecessary.

4 Paragraphs G through H, there are no such
5 contracts. There are no contracts with subcontractors. We
6 contract -- the association contracts only with contractors
7 and they have subcontractors, so we couldn't produce what we
8 don't have.

9 Paragraph J, I suggest that this might be
10 micro-management. And I'm not going to get into that any
11 more.

12 If we can go back to -- excuse me -- Exhibit 2,
13 Defendant's Exhibit 2 is the letter that I'm going to respond
14 to in a moment on behalf of the association. In fact, if the
15 court will turn its attention to Defendant's Exhibit 3, D3.

16 This is a response to his letter in which I
17 responded to his correspondingly numbered paragraphs of his
18 letter June 1. And this was done on June 5, four days later.

19 In Paragraph 1 we produced all of the minutes of
20 2016 through October. They had been sent to Mrs. Mazzurco,
21 who is sitting at the right of counsel. And they were mailed
22 on -- e-mailed to she and Mr. West, the principal in the
23 case, on November 29, 2016. We have a receipt by them
24 acknowledging that they received them on 12-1.

25 2A, the year-end reports of the 2012 through 2016,

1 had already been provided. At that time, we offered the
2 check registers, which we don't have because we didn't have
3 the cancelled checks.

4 So at that time -- and this is important -- I
5 stated that after review of the check registers, if you have
6 any questions, they can be obtained from the bank. We --
7 today was the first day I heard of any questions about any
8 documentation we produced.

9 And there was a financial review in Paragraph B,
10 2B, dated 5-31 which reflects the accounts receivable, the
11 delinquencies in which he was interested for the years 2008
12 through 2017 in April. So since he then requested these
13 check registers, we told him we'd get them to him. The bank
14 statements of 2012 through 2016 were produced.

15 So the next thing I'd like to get into, if you'll
16 turn to D4, please. This is the leading case in North
17 Carolina, to the best of my knowledge, about writs of
18 mandamus. And this is Justice Timmons-Goodson who, in 2008,
19 it was a question about the systematic failure of District
20 Courts to adhere to the statutory time limits which involved
21 instability to the parties, particularly children. And so
22 this case is about that.

23 But if you'll turn to Page 6, this is the part
24 we're talking about in this mandamus. Mandamus translates
25 literally as "we command." It goes down to, "Mandamus

1 applies when the following elements are present:
2 First, the party seeking relief must demonstrate a
3 clear legal right to the act requested. Second,
4 the defendant must have a clear legal duty to
5 perform the act. The duty must be clear and not
6 reasonably debatable."

7 "Third, performance of the duty-bound act must be
8 ministerial in nature and not involve the exercise
9 of discretion."

10 "Fourth, the defendant must have neglected or
11 refused, in quotes, the act requested and the time
12 performance of the act must have expired."

13 And finally, "The court may only issue a writ of
14 mandamus in the absence of an alternative legally
15 adequate remedy."

16 And they held in this case on the next page that
17 mandamus was the proper remedy in this particular case.

18 The next item, Your Honor, is -- if you'll turn
19 your attention to Tab 4. This is Mr. Pinto's letter to me of
20 June 1 in which he requested some minutes, financial requests
21 and so forth. And again, if you'll turn to Page 5 -- excuse
22 me, Tab 6, I'm sorry. Tab 6, my response to that letter.

23 It says, "This is in response to the corresponding
24 paragraphs of your letter of June 1."

25 This letter is dated June 5, four days later.

1 "1A, all the minutes from 2016 through October were
2 sent to Mrs. Mazzurco." Won't go into that again.
3 Court's already heard that.

4 "2A, the year-end reports for 2012 through 2016
5 have already been provided." We offered the check
6 registers because we don't have the cancelled checks.

7 "If you have questions about specific checks, they
8 can be obtained from the bank. B, attached" --

9 THE COURT: When you say they can be obtained from
10 the bank, do you mean that the homeowners association could
11 obtain them from the bank?

12 MR. YOUNCE: Yes, sir. Yes, sir. We would do
13 that. If he'd have requested them, we'd have gone to it.

14 "B, attached is the financial review dated 5-31-17
15 which shows the delinquencies for the years 2008
16 through 2017, nine years. If you now request the
17 check registers, they will be produced. Bank
18 statements of 2012 through 2016 will be produced."

19 And if you skip over a couple pages, Your Honor,
20 you're gonna see cash disbursements and enumeration of cash
21 disbursements by the HOA.

22 THE COURT: Yes.

23 MR. YOUNCE: This is 32 pages of cash
24 disbursements. If you'll look at the one on the top on this
25 particular count, March 26, '12, check number so-and-so,

1 Davis Roofing Company, who was a vendor. The check amount
2 was \$6900 for roofing.

3 Now, if Mr. Pinto had requested specific checks
4 like I heard him request today, we can provide those. But
5 there's never been any request.

6 Finally, Your Honor, I'm getting to the close here.
7 I'm sure you'll be glad. If you'll turn to Tab 8, this is a
8 letter from Mr. Pinto at the Lambeth Management Company and
9 the Oak Ridge Board of Directors.

10 Now, on June the 9th -- this is Tab 8. On June the
11 9th, I wrote Mr. Pinto a letter and called his attention to
12 CPR 4.2. And I said, don't communicate with my clients,
13 communicate to me. I represent all the defendants.

14 In this letter before you, Paragraph 1, he says,
15 "Nowhere in the governing documents does it state
16 that a member is required to provide its leases to
17 the HOA" and recites the bylaw provision that has
18 the word "lease" in it.

19 Then he goes to the declaration and he says, "As
20 you can see, there's nowhere in the above section"
21 -- which he's talking about the declaration --
22 "that states that an owner is required to provide
23 leases to the board of directors."

24 And finally, he says, "There is no discernible
25 reason for Lambeth Management to request

1 Crayton-West leases."

2 If I may approach, I've got the relevant parts of
3 the documents for the court and Mr. Pinto. May I approach?

4 THE COURT: Yes, sir.

5 (Document tendered to the Court.)

6 MR. YOUNCE: Your Honor please, the first document
7 I'd like to call the court's attention to is the declaration.
8 I may have given the court two copies of the bylaws. The
9 declaration, I've highlighted the relevant parts for both of
10 you.

11 If you'll turn to Page 3 of the declaration on page
12 -- Paragraph D, it says, "The right of the association to
13 impose regulations for the use and enjoyment of the
14 common area and improvements thereto."

15 So they have the right to read those regulations.
16 Bylaws, turn to Page 3, which is attached, "Powers
17 and duties of the board of directors."

18 "The board of directors shall have authority --
19 power, excuse me, to adopt and publish rules and
20 regulations governing the use of the common area
21 and facilities and the personal conduct of the
22 members and the guests thereon and to establish
23 penalties for the infraction thereof."

24 Finally, Your Honor, pursuant to that authority you
25 have before you, the procedure for leasing the units -- which

1 has been highlighted for both of you -- and it says, "When
2 leasing your unit" -- and this is a regulation
3 that's been adopted by the association -- "the
4 following procedures must be followed: Number one,
5 the owners intending to lease the unit must provide
6 the management company with an alternate address,
7 phone number, an e-mail address, if one exists, to
8 the unit owner."

9 "Two, a copy of the lease must be sent to the
10 management company including the name and address
11 of the tenants residing in the unit and the length
12 of the lease."

13 "B, certification that a background check of the
14 tenant has been completed with the form attached to
15 it."

16 "Three, the terms of the lease must comply with all
17 association official documents, bylaws, articles,
18 declarations, covenants, conditions and
19 restrictions."

20 And "fourth, the owner is responsible for providing
21 the tenant with copies of the association's
22 official documents."

23 Your Honor, I think these --

24 THE COURT: Now, let me ask a question, though.
25 Under the declaration or the bylaws, what is the -- what

1 authority under the bylaws is Oak Ridge Meadows Homeowners
2 Association proceeding under in order to promulgate this
3 procedure?

4 MR. YOUNCE: I'm sorry, Your Honor, I missed that.
5 I don't understand the question.

6 THE COURT: Sure. It was probably a poor question.
7 You've got the bylaws and you've got the declaration. And
8 the bylaws empower the board of directors to establish, I'm
9 sure, establish certain procedures --

10 MR. YOUNCE: That's correct.

11 THE COURT: -- and to give them some discretionary
12 ability to promulgate procedures.

13 MR. YOUNCE: Yes, sir.

14 THE COURT: This procedure for the leasing of units
15 was done by the homeowners association. And I want to know
16 under what authority did they do this in the bylaws.

17 MR. YOUNCE: It's in the bylaws.

18 THE COURT: Yes.

19 MR. YOUNCE: It says article -- Section 1, "Board
20 of directors shall have power to adopt and publish
21 rules and regulations."

22 THE COURT: Governing the use and regulation of the
23 common area, right, and facilities. Now, doesn't that
24 restrict it to rules and regulations governing the common
25 area and the facilities that are on it -- that are in the

1 common area, such as, for instance, a swimming pool or
2 something like that?

3 MR. YOUNCE: Well, then you've got the Planned
4 Community Act, Your Honor, which speaks to this. And
5 Mr. Pinto has referred to it. 47F gives authority to do all
6 these things we're talking about in the Planned Community
7 Act.

8 THE COURT: Okay.

9 MR. YOUNCE: And now all of a sudden --

10 THE COURT: I haven't seen 47F.

11 MR. YOUNCE: I'm sorry, I missed -- I'm sorry, I
12 missed bringing that out. But there are four things that are
13 the governing documents here. You've got the articles of
14 incorporation, you've got bylaws, you've got the declaration,
15 covenants, conditions and restrictions, and you've got the
16 Planned Community Act, which is kind of the umbrella over all
17 these other things. That's the basis for it.

18 THE COURT: Okay. And the Chapter 47 act that
19 you're referring to gives the homeowners association the
20 authority to promulgate --

21 MR. YOUNCE: Right.

22 THE COURT: -- procedures such as this.

23 MR. YOUNCE: Right.

24 THE COURT: Okay.

25 MR. YOUNCE: Your Honor, that's all I have unless

1 the court has further questions.

2 THE COURT: Okay. Nothing at this point. Thank
3 you, Mr. Younce.

4 MR. PINTO: Your Honor, if I may. Briefly, and
5 with all respect, I don't know what the lease issue has to do
6 with this hearing today. We filed a petition to ask for
7 documents. The lease issue is a totally separate and apart
8 issue from this hearing. And if the court wants us to go
9 into that, we will happily go into that, but I just don't
10 think it's related at all to the reasons we're here today.
11 So to respond --

12 THE COURT: Let me just ask Mr. Younce. What was
13 the point being made with the lease requirements?

14 MR. YOUNCE: What it was, Your Honor, Mr. Pinto in
15 his letter said he can't understand the reason. And on
16 Exhibit 8 he said, "There's no discernible reason for Lambeth
17 Management or the HOA to request Crayton-West leases."

18 Well, before the court there's a policy which says
19 that everybody has to do that. Everybody.

20 THE COURT: Okay. So that was part of a letter you
21 wrote. But you're saying --

22 MR. PINTO: That letter -- sorry.

23 THE COURT: -- is not actually anything to do with
24 this petition for the writ of mandamus.

25 MR. PINTO: Absolutely, Your Honor. I represent

1 Crayton-West Properties on a number of different issues.
2 That is a different and completely different issue.

3 THE COURT: Okay. Fair enough. Go ahead.

4 MR. PINTO: Absolutely. You know, I think we have
5 satisfied enough to get past the motion to dismiss. As to
6 the fifth prong, that there's another legally adequate thing
7 -- and I believe that Mr. Younce is asking for us to file a
8 civil lawsuit for breach of contract or for something instead
9 of filing a writ. I went through our reasoning before. We
10 feel that the petition is the correct thing to file in this
11 situation.

12 We're simply asking for an order from the court
13 commanding them to follow the declaration, the bylaws and the
14 governing documents to provide the documents that we have
15 outlined and requested. I've gone through those documents
16 already.

17 I will point the court's attention to something.
18 And Mr. Younce didn't really get into 55A. And I know that
19 we pled that in the alternative. But I do think it's
20 important to note -- this is Tab D of my notebook.

21 THE COURT: Tab what?

22 MR. PINTO: Tab D, Your Honor.

23 THE COURT: D as in dog?

24 MR. PINTO: D as in dog. That's Section 55A-16-02,
25 inspection of records by members. And if you go down to D2,

1 it says the power that -- "This section does not affect the
2 power of the court independently of the chapter to
3 compel the production of corporate records for
4 examination."

5 So I'd say even if the court found that there was
6 some sort of insufficiency under 55A, that the court still
7 has the total power to compel these records and --

8 THE COURT: Well, let's talk about what's been
9 produced and what remains to be produced. Given the large
10 stack of documents that have been produced and then your
11 recitation of those items you're still wanting, one of them
12 was copies of the cancelled checks. And Mr. Younce has said
13 that upon giving a specific list of checks you want to see,
14 they will provide that.

15 MR. PINTO: Well, Your Honor, that's the first we
16 heard that. I have an e-mail --

17 THE COURT: It's in his letter.

18 MR. PINTO: I have an e-mail right here that says
19 that -- I asked for the specific checks. I asked for the
20 specific checks. And Mr. Younce's reply was -- I sent this
21 on June 14th.

22 It says, "Therefore, at this time we are requesting
23 backup documentation related to Nancy Orihuela,
24 Mary Grear, Robin Amelkin, Terry Schoff, Adrian
25 Alma, Tusa Mazilla, Dave Macelroy and Elizabeth

1 Hill, their indicated documents."

2 And further in that e-mail I talk about after they
3 produce the check registers. Mr. Younce's reply that same --
4 the next day, he put -- and this, quote, "As to your request,
5 without any explanation for any -- for all the
6 checks written to six persons and one business, the
7 association will not do so. The check register for
8 each check clearly states what each check is for.
9 In view of your statement that there may be
10 additional requests after the voluntary production
11 of the voluminous records, it is clear that nothing
12 will satisfy your client through you. Let me
13 clearly state that your 'fishing expedition' is
14 over. No further information will be voluntarily
15 provided."

16 That's when we rescheduled the hearing. I mean,
17 the position was -- that's as clear as it gets. They are not
18 going to produce backup for the check registers. And not
19 only that, they're not gonna produce any more information.
20 I have that e-mail here if the court wants to see it. It's
21 not in my notebook, but I do have that e-mail. And that's
22 what spurred us to reschedule this hearing and have to go in
23 front of Your Honor.

24 MR. YOUNCE: Your Honor, if I may.

25 THE COURT: Well, I saw somewhere in one of

1 Mr. Younce's letters -- he may have changed his position on
2 that. Because he has -- he clearly stated that they would
3 get copies -- they would obtain copies from the bank if they
4 had a --

5 MR. PINTO: Yes, Your Honor. I'll stipulate to
6 that. I do know that that's in a letter. And that's why
7 when we -- this information slowly came out, slowly came out,
8 we got the check registers. In my e-mail, I clearly asked
9 for additional information. Then I get a response on June
10 15th, which I believe might have been the last -- which was
11 the last correspondence we had about this document
12 production.

13 And I don't know if Mr. -- it seems extremely clear
14 to me they absolutely refuse to provide that stuff even
15 though I believe in my e-mail to him I say that we've
16 discussed this and I'm aware that you will provide this. And
17 then not only do they say, well, they will not provide the
18 check backup information, they say they will not voluntarily
19 provide anything more. So you know, at that point, we only
20 had one option, in our view.

21 THE COURT: Let me ask this question. Other than
22 the copies of the cancelled checks, what else you are still
23 wanting or --

24 MR. PINTO: We'd like any type of accounting backup
25 for those checks. I mean, if there's a receipt for a

1 reimbursement, Your Honor, we would like to see that
2 information.

3 We're also still asking for fidelity bond
4 information that was told that we would receive but we
5 haven't received yet.

6 THE COURT: From Lambeth.

7 MR. PINTO: No. From the association and from
8 Lambeth. Yes, you're correct.

9 THE COURT: Well, he's already affirmatively stated
10 that there is no fidelity bond for the HOA.

11 MR. PINTO: That is correct.

12 THE COURT: You can't produce what you don't have.

13 MR. PINTO: Absolutely, Your Honor. We 100 percent
14 agree on that. But they did say that they would produce it
15 for Lambeth, who Mr. Younce also represents in this action.

16 Also, we would request the contracts to contractors
17 and subcontractors. The argument that they don't contract, I
18 mean, the check register clearly shows that they contracted
19 with multiple contractors. We request those contracts and
20 any bid process that went into those contracts.

21 THE COURT: Well, now, the request --

22 MR. PINTO: Those would be --

23 THE COURT: -- your request was for subcontractors.
24 And they -- for instance, just using this as an example, if
25 they do a contract with Davis Roofing, that's a direct

1 contract with Davis Roofing. They don't have any access to
2 subcontractor contracts or agreements that Davis may enter
3 into with its subs.

4 MR. PINTO: Well, Your Honor, I'll have to go back
5 through, but I do believe we asked for contracts with
6 contractors or subcontractors. It was our understanding that
7 the HOA hires Lambeth Management, who then hires contractors,
8 which would make those contractors subcontractors in some
9 way, shape or form. But if we misstated that -- I do believe
10 we asked for contractors as well, but I'd have to go back
11 through every letter. But that's what we're asking for
12 today, Your Honor.

13 THE COURT: Okay. I'm going to deny the petition
14 for the writ of mandamus. I think that you've gotten 90
15 percent or more of what you sought. And with the -- with the
16 petition for writ of mandamus hanging over like a sword of
17 Damocles, you've achieved your -- most of your purposes
18 without the need to go the final step and issue a writ.

19 For instance, as to the cancelled checks,
20 Mr. Younce has basically gone on record that they will be
21 produced and copies obtained from the banks. I do not know
22 -- I'm not satisfied that the -- that they would be required
23 to provide information that delves much more deeply into the
24 cancelled checks.

25 I mean, if they -- it would be a good accounting

1 practice -- I'm sure Mr. Younce would agree with this -- it
2 would be a good accounting practice when a check is requested
3 from a board member that the board member would have to
4 provide receipts. For instance, if a board member buys
5 \$11,000 worth of furniture, a good accounting practice would
6 be that receipts would have to be there for backup, because
7 that's what an auditor would want to see. And if the
8 financials had to be audited, they're bound to exist.

9 I would suggest -- Mr. Younce, if you would
10 stipulate to this -- that the checks requested can be --
11 copies can be obtained and that the receipt information to
12 support the issuance of those checks can be produced, then
13 the only remaining thing is this question of the fidelity
14 bond and the question of contractors and subcontractors.

15 But as far as the requests for contracts and
16 possibly subcontracts, I'm not convinced that the 55A-16-02
17 would cover that, such that it's not a statutory obligation
18 to provide that unless there is -- unless it's done pursuant
19 to discovery in a lawsuit.

20 But my thinking is that you have an adequate remedy
21 other than the writ of mandamus. Because you've gotten most
22 of the documents produced. You will have an upcoming members
23 -- homeowners association members meeting in January in which
24 questions could be raised to the board members and requests
25 made.

1 And if you feel, based upon your examination of the
2 documents that you have and your analysis of the checks and
3 the receipts, if you feel that there's some hanky panky going
4 on, you have the remedy of filing a civil suit in a separate
5 civil action, which is a remedy that is not as drastic as a
6 writ of mandamus, but would be adequate.

7 Now, to the question of the fidelity bond, is there
8 any statutory requirement that that be produced?

9 MR. PINTO: I'm --

10 THE COURT: Let me put it this way. Is there any
11 statutory requirement that a fidelity bond be in place?

12 MR. PINTO: There might be. I'm not aware, Your
13 Honor. But there is in the governing documents. And I'll
14 flip -- it's in the declaration that the HOA have one. But
15 give me one second to flip through it.

16 And here it is, Your Honor. This is the
17 declaration, Article 13, Section 3. It says --

18 THE COURT: Okay. I don't have a -- where is that?

19 MR. PINTO: Oh, I apologize, Your Honor. It's
20 under J of my notebook, Tab J.

21 THE COURT: Section 13, you say?

22 MR. PINTO: Yes, Your Honor. Section 13, Section
23 3. It's actually the last section in the declaration.

24 THE COURT: I see it.

25 MR. PINTO: And it clearly states, "All persons

1 responsible for or authorized to expend funds or
2 otherwise dealing assets of the association or
3 those held in trust shall first be bonded by
4 fidelity insured to indemnify the association for
5 any loss or default in the performance of their
6 duties in the amount equal to six months
7 assessments plus reserve accumulated."

8 That's -- I think that's clearly stated in the
9 declaration. And clearly, the HOA is authorized to deal with
10 funds, as evidenced by the check registers. Also, we believe
11 Lambeth is authorized to deal with funds as the property
12 management of that.

13 MR. YOUNCE: Your Honor, before the court rules and
14 he finishes, may I comment on some of these things?

15 THE COURT: Yeah.

16 MR. YOUNCE: Okay. Now? Okay. I'll take in them
17 in reverse order, Your Honor. On the question of fidelity
18 bonds, nobody questions what the declaration says. But my
19 information is -- and I think I made in my -- made a
20 statement in my argument that Lambeth Management, all the
21 funds go to Lambeth Management. None goes to the board of
22 directors. They don't have the checkbook. They have no
23 relation whatsoever to the funds that come in.

24 So the decision was made by the board some years
25 ago, why don't we do that? We've got Lambeth Management,

1 who's has got a million-plus dollar fidelity bond. That's
2 the reason for that.

3 THE COURT: Well, I think the fidelity bond might
4 be a document that would be pertinent to be produced under
5 Chapter 55.

6 MR. YOUNCE: Well, I don't have any objection to
7 producing the fidelity bond for Lambeth Management.

8 THE COURT: He's asked for that for quite some time
9 now and it's not been produced.

10 MR. YOUNCE: We can do that, Your Honor. There's
11 no reason to hold that from him. I think he said that I had
12 indicated we'd produce it. And we will.

13 THE COURT: Okay.

14 MR. YOUNCE: But the second thing, the audit
15 report, I think it's important to point out that the audit
16 report -- the court's familiar with audit reports. They are
17 under oath and everything. And they're sacrosanct. This
18 audit -- they've never had a management letter with an audit
19 report for this entire life of this association.

20 THE COURT: Well, thank you for providing it, then.

21 MR. YOUNCE: Sir?

22 THE COURT: I said, thank you for providing it.

23 MR. YOUNCE: If you want us to provide that, we
24 can. The audit -- we gave them the audit.

25 THE COURT: I think what he's wanting is receipts

1 to backup checks written to the board members.

2 MR. YOUNCE: Okay. We can do that. We'll do that.

3 MR. PINTO: I don't mean to interrupt. But Your
4 Honor, if there's information that they have provided -- if
5 they've provided all this information -- might be an easy
6 way. All the information they've provided to the auditors,
7 that's -- that's what we're looking for.

8 THE COURT: That's too broad.

9 MR. PINTO: Okay.

10 MR. YOUNCE: The other point, Your Honor, I wanted
11 to be sure -- the court asked me to stipulate that -- about
12 all the checks and receipts. Your Honor, I respectfully
13 suggest that unless there is a reason for looking at a
14 particular check, that we not be required to produce every
15 single check.

16 If there's -- like I said before in my letter to
17 him, if you have questions about specific checks -- and today
18 he mentioned a few -- let me know, we'll get that information
19 for you. We'll add to it the receipt part, which the court
20 has indicated we should. And we will.

21 THE COURT: Well, I think that he's asked for,
22 checks that were written to board members.

23 MR. YOUNCE: Okay.

24 THE COURT: And the backup information, such as
25 receipts, that's the -- that's all I would expect to be --

1 and I think we're gonna have to do this by way of -- in the
2 order that denies the writ of mandamus, we're gonna have to
3 do this by way of a stipulation on the part of the homeowners
4 association that these last few items that the court was
5 interested in will be produced.

6 MR. YOUNCE: Be glad to do that, Your Honor.

7 THE COURT: Now, in the -- in the order, I would
8 like to recite -- where is that case?

9 MR. YOUNCE: In THT?

10 THE COURT: Yes.

11 MR. YOUNCE: Let's see, Your Honor. I believe
12 that's -- back up here. I think it's Paragraph 3 and 4, or
13 Tab 3 or 4. Let me find it. It's tab --

14 THE COURT: I think mostly 3.

15 MR. YOUNCE: It's Exhibit 4 on Page 6 is the case
16 that I recited. That's where the discussion is. But the
17 caption for the case is 362 N.C. 446, In the Matter of THT,
18 2008 case.

19 THE COURT: Yes. Now, I want to make specific
20 findings. I want the order to note that the writ of mandamus
21 is an extraordinary court order and, hence, an extraordinary
22 remedy that is not lightly imposed, and that the elements
23 must be met, and that -- of course, at some point in your
24 order it should note that virtually all of the documents
25 requested have been produced already. But with regard to the

1 few remaining ones, the homeowners association is stipulating
2 to provide the additional items that we have agreed upon
3 during this hearing.

4 But as for anything else, it is not clear to the
5 court that the homeowners association has a clear duty to
6 produce and that it is reasonably debatable at this point as
7 to whether they would have to produce anything else, and that
8 any remaining acts would involve an exercise of discretion on
9 the part of the corporation and might go beyond the mere act
10 of being ministerial in nature.

11 And finally, that the court is of the opinion that
12 in the future the plaintiff would have an alternative legally
13 adequate remedy in the filing of a civil action, a civil
14 complaint that would, in the court's opinion, provide an
15 adequate remedy.

16 And of course, you'll need to let Mr. Pinto see
17 that before you -- when you get it to me. And I'll certainly
18 receive his comments on it. But it will be up to me to
19 decide the final wording of the order.

20 MR. PINTO: Your Honor, if I may, can -- if --
21 Mr. Younce, can we stipulate to a time that those documents
22 will be produced? I mean, 30 days is fine, 15 days. I don't
23 know how long it's going to take them, but we would like a
24 time limit in there.

25 THE COURT: Thirty days would be a reasonable

1 amount.

2 MR. YOUNCE: That's fine, Your Honor. That's fine,
3 Your Honor.

4 THE COURT: All right. Thank you very much. Let
5 me give you your notebook back.

6 (Hearing ends at 12:10 p.m.)

7 * END OF TRANSCRIPT *

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1 STATE OF NORTH CAROLINA GENERAL COURT OF JUSTICE
2 COUNTY OF GUILFORD SUPERIOR COURT DIVISION
3 CASE NO. 17 CVS 4738

4 CRAYTON-WEST PROPERTIES, LLP

5 - vs -

CERTIFICATE

6 OAK RIDGE MEADOWS TOWNHOUSES HOMEOWNERS ASSOCIATION, INC.,
7 LAMBETH MANAGEMENT & REALTY, INC., SCOTT LAMBETH,
8 MARY FAYE GREAR, PRESTON MCNEIL, ADRIAN ALMA, MARYANN JOSEPH,
9 ROBIN AMELKIN, DAVID HAMMOND, NANCY ORIHUELA, DENIS MURRAY,
10 ALICIA PRATT-TORRES

11 -----

12 This is to certify that this transcript of proceedings
13 was taken in Guilford County Superior Court on August 9,
14 2017, and it is a true and accurate transcription of said
15 proceedings as taken by me and transcribed by me.

16 I further certify that I am not related to any of the
17 parties or attorneys involved, nor do I have any interest in
18 the outcome of this action.
19

20 

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