

TO: Board of Directors
Fishing Creek Farm Homeowners Association, Inc.
FROM: Ursula Koenig Burgess
RE: Business Judgment Rule
Maintenance vs. Improvement
DATE: November 18, 2025

M E M O R A N D U M

The purpose of this memo is two-fold. First, it seeks to explain the import of the business judgment rule in protecting decisions made by the Board of Directors (the “Board”). In addition, it is to provide guidance to the Board regarding the distinction between maintenance and repair vs. additions or improvements to assist in evaluating whether the Board needs membership approval for a loan to perform the proposed erosion work.

Business Judgment Rule

Article VII, Section 2(g) of the Bylaws states, “It shall be the duty of the Board of Directors to cause the Recreational Facilities and Open Space¹ to be maintained.”

Under the business judgment rule, decisions made by the Board in furtherance of its duties are generally deemed valid unless they are made in bad faith or fraudulently. As stated in Cherinton Condominium v. Kenney:

The business judgment rule is “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption.

In Greenstein v. Council of Unit Owners of Avalon Court Six Condominium, the court held that owners could sue an association for failing to take an action. The business judgment rule was not argued in that case – ostensibly because the business judgment rule protects only actions of the Board and not a failure to act.

Accordingly, for the business judgment rule to apply, the Board must make affirmative decisions, even if the decision is to take no action, and provided those decisions are in good faith, they will be upheld. There is no one size fits all requirement for how the common areas in the community are to be maintained – the Board can make different decisions regarding the repair and maintenance of the Common Areas.

¹ There is no definition of Open Space other than the definition of Lot excludes Recreational Facilities and Open Space, so it is safe to equate Open Space to Common Area as defined in the Declaration.

Maintenance and Repair v. Improvement

Article II, Section 1(e) of the Declaration empowers “the Association in accordance with its Articles of Incorporation and By-laws, and with the consent of a majority of each class of the then members of the Association voting separately, to borrow money for the purpose of improving the common areas and community facilities in a manner designed to promote the enjoyment and welfare of the members”

As you are aware, there is nothing in the Association’s governing documents defining improvements vs maintenance. However, the courts have held that undefined words in governing documents should be given their plain meaning.

Black’s Law Dictionary defines maintain as “To care for (property) for purposes of operational productivity or appearance; to engage in general repair and upkeep.” It defines improvement as the following:

An addition to property, usu. real estate, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance. ...

- local improvement (1831) A real-property improvement, such as a sewer or sidewalk, financed by special assessment and specially benefiting adjacent property.

- necessary improvement (17c) An improvement made to prevent the deterioration of property.

The project, as I understand it, includes the addition of structures to prevent future erosion. I believe that by adding items to the common areas to protect the property would qualify as improvements vs. maintenance and that would require approval of 51% of the members for the Board to obtain a loan for the work.

UKB