

No. SC89407

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IN THE  
SUPREME COURT OF MISSOURI

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ESSEX CONTRACTING, INC.  
and FEDERAL INSURANCE CO.,  
Appellants,

v.

JEFFERSON COUNTY, MISSOURI,  
Respondent,

PATRICK J. ACHESON, ET AL.,  
Intervenors/Respondents,

J.H. BERRA PAVING CO., INC.  
and BOLING CONCRETE CONSTRUCTION, INC.,  
Respondents/Cross-Appellants.

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Appeal from the Circuit Court of Jefferson County  
The Honorable Timothy J. Patterson, Division No. 1

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SUBSTITUTE BRIEF OF INTERVENORS/RESPONDENTS

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## **JURISDICTIONAL STATEMENT**

Intervenors/Respondents, Patrick Acheson, Larry Dean and Lauren Monge, representatives and members of an unincorporated homeowners association, concur with Appellants' jurisdictional statement in this matter.

## **STATEMENT OF FACTS**

Intervenors/Respondents (hereinafter “Intervenors”) are dissatisfied with the accuracy and completeness of the Appellants’ Statement of Facts. In order to provide a full and accurate history, Intervenors include their own Statement of Facts, as follows:

### **Procedural History**

On May 15, 2001, alleging that it had “fully completed” the “improvements and developments” of the Winter Valley Subdivision, Essex Contracting, Inc. (“Essex”) filed a Petition for Declaratory Judgment in the Circuit Court in Jefferson County against Jefferson County, Missouri (the “County”), its three Commissioners, and its Manager of the Planning Division seeking a declaration that Essex had completed the Subdivision improvements and ordering the Manager of the Planning Department to recommend that the County Commission release the three Land Subdivision Bonds (“Bonds”) at issue to Essex or, alternatively, asking for the Court to declare what remaining actions needed to be taken by Essex to have the Bonds released. Legal File (“LF”) Tab 2.

On June 11, 2001, three homeowners in the Subdivision, Patrick Acheson, Larry Dean, and Lauren Monge, who were also members of the Winter Valley Homeowners Association, filed a Motion to Intervene on behalf of all lot owners in the Subdivision and the Association as Intervenors-Plaintiffs (“Intervenors”). Intervenors’ Supplemental Legal File (“Supp. LF”) Tab A. Along with their Motion, the Intervenors filed a Verified Petition for Injunction and Declaratory Relief and for Damages (the “Petition”). LF Tab 3. Intervenors argued they were entitled to intervene as of right because they have a

direct and immediate interest in the disposition of the Guarantee Under Subdivision Regulations (“Guarantee Agreement”) and the Bonds referenced in the Petition, and because their interests were not adequately represented by either Essex or the County. LF Tab 3. Specifically, the Bonds expressly provide that they “shall be available for the protection of...any resident of Jefferson County.” LF Tab 2, Appellants’ Substitute Appendix (Sub. Appx.), pp. A49-A64. Intervenors also sought to enforce the County’s Subdivision Regulations and require correction of numerous deficiencies with regard to the streets, common areas, and storm-water systems. LF Tab 3.

On the eve of the 4<sup>th</sup> of July holiday in 2001, Essex filed a cross claim seeking punitive damages against the three individual Intervenors for tortious interference with Essex’s “contractual relationship with Jefferson County to guarantee the completion of the Winter Valley Subdivision.” Supp. LF Tab E. Essex again alleged that it had “completed all improvements” in its Cross Claim. Supp. LF Tab E. The Court dismissed Essex’s Cross Claim on September 4, 2001. Supp. LF Tab G.

The County countersued Essex on December 26, 2001, and added the bonding company, Federal Insurance Company (“Federal”), as a third-party defendant for its failure to disburse the Bond funds. LF Tab 5.

On March 8, 2002, Federal cross-claimed against the County for a declaratory judgment that the Bonds were void as to Federal or that the Subdivision improvements had been completed. LF Tab 9. At the same time, Essex filed third-party claims against two paving companies used for construction and installation of Subdivision streets, J.H. Berra Paving Co., Inc. (“Berra”), and Boling Concrete Construction, Inc. (“Boling”) for

indemnity. Essex later amended each third-party petition to add breach of contract claims against Berra & Boling. LF Tab 8. Berra and Boling later added cross-claims against Essex. LF Tabs 21, 23.

On November 5, 2002, the Court certified Intervenors' action as a class action on behalf of a class consisting of "the current record owners, whether one or more persons or entities, of the fee simple title to any lot which is a part of the Winter Valley Subdivision, including contract sellers, but excluding those having such interests as security for the performance of an obligation and the subdivision's developer." LF Tab 17. The Trial Court held that Intervenors, as "members of an unincorporated association naming certain members as representative parties," could maintain the class action "because this Court finds that the representative parties will fairly and adequately protect the interests of the association and its members." LF Tab 17.

A bench trial in this matter was held September 26-29, 2005. Trial Transcript ("Tr.") 1-590. The Court issued its judgment on March 14, 2006. LF Tab 29.

A hearing was held on the issue of Intervenors' attorneys' fees on November 30, 2006. Tr. 591-622. The Court issued its final judgment and order on December 26, 2006. LF Tab 31.

### **Factual History**

Essex was the developer of the residential subdivision at issue, Winter Valley (the "Subdivision"). Tr. 183; Appellants' Sub. Appx. pp. A49-A64. Federal is the surety of the three Land Subdivision Bonds for the Subdivision. Tr. 21, Appellants' Sub. Appx. pp. A49-A64. Intervenors are homeowners in the Subdivision, members of the Winter

Valley Homeowners Association, and residents of Jefferson County. Tr. 510-11. Mr. Lauren Monge, who appeared at trial for Intervenor, is a class representative and a trustee of the Winter Valley Homeowners Association, an unincorporated association so denominated by the original developer trustees. Tr. 495-98, Intervenor's Sub. Appx. p. A67. Berra and Boling are the two paving companies that were hired by Essex to perform the construction of the streets in the Subdivision. Tr. 33-37.

In approximately 1995, Essex began development of the Subdivision as a joint venture with C.F. Vatterott ("Vatterott"). Tr. 14. Because Essex sought Subdivision plat approval prior to constructing the improvements, Essex provided the three Bonds payable to the County guaranteeing the completion of the Subdivision improvements to the County's satisfaction. Tr. 20-21. The three Bonds at issue were issued by Federal and numbered 8128-71-82 in the amount of \$2,256,372.00, 8145-62-25 in the amount of \$834,812.79, and 8145-63-28 in the amount of \$507,065.00. Appellants' Sub. Appx. pp. A49-A64.

The Bonds were necessary because Jefferson County Subdivision Regulations (the "Subdivision Regulations") require a developer to either install all Subdivision improvements prior to plat approval or else provide a sufficient improvement guarantee in the form of a monetary obligation to ensure that all public improvements (*i.e.*, streets, storm sewer systems, sanitary sewers, water) (the "improvements") are properly constructed. Tr. 20-21. The bond amount is in an amount equal to the estimated cost of actual construction of the Subdivision, plus a contingency amount. Appellants' Sub. Appx. pp. A70-A72, at §4.7e. The Subdivision Regulations were adopted pursuant to

Chapter 64 RSMo. and apply within all unincorporated parts of the County. LF Tab 29, p. 2.

After plat approval and the posting of the Bonds, the Subdivision construction began on land that was roughly half wooded, half open space and had a creek running through the middle of the Subdivision. Tr. 16. As part of its contractual obligations to complete the Subdivision improvements, Essex undertook the clearing and grading of the Subdivision, as well as preparing and compacting the subgrade (the soil beneath the streets) for the streets. Tr. 18. Essex contracted with Boling and Berra to pour the concrete streets within the Subdivision. Tr. 33-37. Berra's and Boling's contracts both required a specific concrete thickness as set forth in the Subdivision Regulations and the County-approved improvement plans. Appellants' Sub. Appx. pp. A86-A100 (hereinafter "Approved Plans"). Those Subdivision Regulations and Approved Plans required streets that were 26 feet in width to have a thickness of 6 inches and streets that were 30 feet in width to have a thickness of 7 inches. Tr. 43-44, Appellants' Sub. Appx. pp. A67-A85, Plaintiff's (Essex) Trial Exhibit 29.

Boling and Berra poured the concrete streets by using a slip-form paving technique wherein the concrete was laid in a continuous fashion and the control joints were added later creating what appear to be separate "slabs" of pavement. Tr. 557-60. The streets of the Subdivision were poured from approximately 1995 through 1998. Tr. 58.

Areas of the Subdivision streets began failing soon after they were poured, as early as 1996. Tr. 145; Intervenor's Sub. Appx. pp. A10-A15, A45-A59. Some of these failed

areas were repaired and replaced by Essex between 1997 and 1999. Tr. 58-64; Intervenor's Sub. Appx. pp. A77-A86.

The Subdivision is a large development, containing approximately 500 homes and 5 miles of streets. Tr. 498-99. Because the County does not accept subdivision streets for County maintenance, the Subdivision streets are private streets that become the sole responsibility of the Subdivision trustees to maintain with the Homeowners Association's funds on behalf of the Subdivision's property owners after the developers have completed the Subdivision improvements and the Bonds have been released. Tr. 84, 383; Intervenor's Sub. Appx. pp. A60-A65.

In or about July 2000, the time for completion of the Subdivision was about to expire prior to Essex's completion of the guaranteed Subdivision improvements, so Essex sought an extension from the County and entered into a Guarantee Under Subdivision Regulations ("Guarantee Agreement"). Tr. 88-89, 102-04; Appellants' Sub. Appx. A65-A66. Through the Guarantee Agreement, in exchange for one additional year to complete the Subdivision, Essex agreed that if it could not complete the Subdivision improvements within that year or if it abandoned the Subdivision, the County would be entitled to "complete, or have completed, the said improvements and the Surety shall disburse on the land subdivision bonds therefore, as ordered and directed by the County." Appellants' Sub. Appx. pp. A65-A66. The Guarantee Agreement expressly incorporates the Bonds and the obligations under those Bonds by reference. Appellants' Sub. Appx. pp. A65-A66.

The Subdivision Regulations require a “successful completion” of the Subdivision improvements before the bonds can be released. Appellants’ Sub. Appx. pp. A71-A72, at §4.7e(C). This determination of successful completion begins with the developer requesting an inspection when the developer believes it has completed all the Subdivision improvements. Tr. 392. An inspection is then performed by the County, a recommendation is made by County officials to the County Commission, and the County Commission then makes the final determination whether the improvements have been completed to the Commission’s satisfaction per the Approved Plans and Regulations and whether the Bonds should be released. Tr. 392. The County Inspector, in this case Fred Dishner, has no influence on the determination of whether the Bonds should be released and ultimately defers to his superiors with regard to that determination. Tr. 232.

On numerous occasions throughout the development of the Subdivision, Essex represented to the County that the Subdivision improvements were complete and requested release from its obligations in the Subdivision. Tr. 64-77. However, the County denied each of those requests based on the County’s finding that the Subdivision improvements were not complete as required by the Approved Plans and Subdivision Regulations and as guaranteed to the County. Intervenors’ Sub. Appx. pp. A4-A9, A17, A31-A42, A87-A88..

After receiving another deficiency list from the County, rather than address the enumerated deficiencies that the County set forth on these occasions, Essex ceased work on all improvements in the Subdivision and filed suit against the County on May 15, 2001, alleging that Essex had “fully completed certain improvements and developments

of Phase I, II and III of Winter Valley in compliance with the Subdivision [Regulations] of Jefferson County, Missouri.” Tr. 76-77; LF Tab 2, ¶13.

In June of 2001, after Essex filed its lawsuit, but before the Guarantee Agreement expired, William Koehrer, the County’s Public Works Director, re-inspected the streets to determine if the Bonds could be released. Tr. 374-75. Based on these inspections, Mr. Koehrer ultimately determined that 537 street panels needed to be replaced. Tr. 375-76; Intervenor’s Sub. Appx. pp. A27-A29. Mr. Koehrer issued a memo identifying areas where the streets were “cracking and faulting” and provided an estimated cost of replacement of those areas. Tr. 374-75; Intervenor’s Sub. Appx. pp. A27-A29. His memo stated that “if the work does not take place with[in] 12 months, an additional 3% should be added for inflation.” Tr. 376-77; Intervenor’s Sub. Appx. pp. A27-A29. Mr. Koehrer testified at trial that he estimated the cost to the County for replacement of the street panels would be approximately \$45.00 per square yard, including payment of the prevailing wage as required by law. Tr. 377.

On July 12, 2001, the County Commission, acknowledging that certain improvements in the Subdivision had been completed, authorized partial releases of the Bonds as follows: \$1,619,366.00 was released from Bond No. 8128-71-82, \$599,133.00 was released from Bond No. 8145-62-25, and \$363,913.00 was released from Bond No. 8145-63-28.. Tr. 139-40; Intervenor’s Sub. Appx. pp. A43-A44. After these partial releases, there was a total of \$1,015,837.79 remaining under the three Bonds to guarantee the proper completion/replacement of the streets and to correct other deficiencies as

based on the County's estimate of the costs to complete the improvements. Tr. 22; Intervenor's Sub. Appx. p. A17.

On July 26, 2001, the County Commission passed an order authorizing its Planning Division Manager "to file claims against the Land Subdivision Bonds identified [therein] for the completion of the subdivision improvements for Winter Valley in the amount of \$1,015,838.00." Tr. 384-85; Intervenor's Sub. Appx. p. A66. Based on this order, the County notified Federal by letter dated October 30, 2001, of the County's claim on the Bonds stating that as of that date, "the improvements have not been completed according to the approved improvement plans and the recorded subdivision plat." Tr. 384-85; Intervenor's Sub. Appx. p. A17. Federal has never disbursed the bond funds. Tr. 22.

During development of the Subdivision, the County intermittently inspected the construction of the Subdivision improvements. Tr. 229. Fred Dishner, the County's Inspector for the Subdivision, was the only Inspector the County had during the time the Subdivision streets were constructed and he was also concurrently responsible for inspecting 16 other subdivisions throughout the County. Tr. 229. Mr. Dishner had no involvement with the compaction testing of the subgrade and only started inspecting when the streets were cut. Tr. 213-14. While there was limited evidence about testing the compaction of the subgrade, the evidence showed that although those tests were usually performed within 24 hours of paving, the testing did not necessarily take place on the same day the streets were poured and no testing of the subgrade was ever performed *after* the paving trucks drove on the subgrade. Tr. 41, 438-39.

The Subdivision streets were designed to last 20-30 years with regular use. Tr. 265. However, the Subdivision streets suffer from two defects that have affected or will affect their design life—deficient thickness and excessive premature failure. Tr. 274. One important aspect of street construction is proper subgrade support under the poured streets. Tr. 260-62. During construction of the streets, concrete trucks were allowed to enter and drive on the subgrade in five (5) separate areas of the Subdivision. Tr. 432-33, 439-445. There were instances when concrete was poured where the paver believed that concrete should not be poured because of the inconsistent condition of the subgrade, including the moisture content of the subgrade. Tr. 432, 447-48. Although the pavers would try to re-compact the subgrade after driving the concrete trucks on it, in at least one spot Boling could not re-roll the subgrade with a steel drum because it was too wet and was sticking to the roller, which created lumps in the subgrade. Tr. 434-449. When the pavers redressed the subgrade after driving on it, they did so by eye only and no further testing was done to re-verify the integrity of the subgrade. Tr. 458. After attempting to redress the subgrade, the only quality control standard used was to try to make sure the subgrade *looked* the same way it had before they drove the concrete trucks on it. Tr. 458. Additionally, while the County Inspector was aware that concrete trucks drove on the subgrade on Copper Mountain Drive, he stated that he was unaware that they had driven on the subgrade elsewhere in the Subdivision. Tr. 216, 230. The County Inspector was not at the Subdivision site at all times and was responsible for inspecting approximately 16 other subdivisions at the same time. Tr. 229. The County Inspector did request that Boling and Essex re-compact the subgrade after driving their trucks on it

and to replace any street that later failed. Tr. 219. Mr. Dishner did not witness the actual re-compaction of the subgrade on Copper Mountain Drive. Tr. 221.

The County Director of Public Works, William Koehrer, voiced concerns that the lack of backfilling of the streets behind the curbs caused problems with the subgrade. Tr. 407. Backfilling is the process of pushing dirt back up against curb after the streets have been poured. Tr. 157. One of the stated reasons for backfilling in a timely manner is to protect the integrity of the subgrade from water infiltration. Tr. 158. Essex admitted it was Essex's responsibility as the developer to perform the backfilling of the streets after they were poured. Tr. 159. However, a letter from an employee of Vatterott to Essex reveals that Vatterott, not Essex, was "backfilling the streets after they were poured in some cases." Tr. 158-59, Intervenors' Sub. Appx. pp. A58-A59. The backfilling was typically done within 2-3 weeks after the completion of street pouring. Tr. 172-73. Furthermore, Todd Glandt testified on behalf of Berra that displacements in concrete sometimes occur because of subgrade or ditch failures. Tr. 574. Ditch failures, as explained by Mr. Glandt, occur when the areas where utilities to homes are placed under the street and the pavement collapses or fails causing displacement of the street panel. Tr. 574.

Brian Oliver, with Essex, admitted that a slab exhibiting displacement at the crack would be considered a failed slab and that a slab with a number of cracks may become a failure. Tr. 170-71. Mr. Oliver also admitted that Essex contracted for normal traffic for the design life of the streets and expected functional streets within the Subdivision. Tr. 208. In his capacity as Director of Public Works, Mr. Koehrer has viewed between 150-

200 subdivisions and he believes that the cracking in the streets in this Subdivision is more than would normally be seen compared to other subdivisions. Tr. 426-27.

The County, as the enforcer of Subdivision Regulations, deems Essex, as the developer, to be responsible for *all* of the improvements in the Subdivision and accordingly Essex must remedy anything that is identified at the time of inspection as deficient under the Subdivision Regulations before the Bonds can be released by the County. Tr. 416; Intervenors' Sub. Appx. pp. A6-A9, A31-A34. The evidence shows that the list of Essex's deficiencies stayed the same except for items that were removed once they were completed. Intervenors' Sub. Appx. pp. A31-A42.

As a result of concerns about pavement thickness compliance, the County, in 2000, required Essex to core test the streets for thickness. Tr. 103; Intervenors' Sub. Appx. p. A30. That coring was not done to the requirements of the County and the results were not complete. Tr. 394-95. In 2005, the trial court ordered that the streets be re-cored in conformity with Appendix E of the current Jefferson County subdivision regulations. The results of that core testing showed that some 218 areas were deficient in thickness by *more than* 0.3 inches. Tr. 83; Intervenors' Sub. Appx. pp. A24-A26. Thus, there currently exist at least 218 areas that do not meet the thickness requirement of the Subdivision Regulations and Approved Plans that require 26-foot wide streets to have a thickness of 6 inches and 30-foot wide streets to have a thickness of 7 inches. Tr. 379-380; Appellants' Sub. Appx. pp. A67-A85; Plaintiff's (Essex) Trial Exhibit 29. The County's officials, Mr. Koehrer and Mr. Dishner, testified that the failure to achieve the intended design thickness in the streets was a violation of the Subdivision Regulations

and the Approved Plans. Tr. 232, 380. Mr. Koehrer further testified that the County's practice before April, 2002 with regard to pavement that was deficient in thickness was to require complete replacement of those areas, not to assess penalties. Tr. 425-26. However, after April, 2002, the County's procedure, according to Appendix E of the Subdivision Regulations is as follows:

Whether the subdivider/developer has completed all the improvements prior to recording of the final plat or has entered into a guarantee agreement and provided security therefore, in order to gain permission to record the final plat, to obtain a release of all or a portion of the security the subdivider/developer must comply with the following requirements.

- c. Pavement that is deficient by 0.3 inch or less will be accepted. If any core measurement of thickness is deficient by *more than* 0.3 inches, the subdivider/developer will have the option of removing and replacing the pavement, or leaving the pavement in place and making a cash deposit into a Special Escrow Account to be established by the County Commission in accordance with the following schedule:

<u>Deficiency in of Thickness</u>	<u>Amount to be paid into Special Escrow (Percent of unit value)</u>
1.) .31 inches – .5 inches	20%
2.) .51 inches – .75 inches	40%
3.) .76 inches – Above	Replace

Appellants' Sub. Appx. pp. A67-A85 (emphasis added).

Todd Glandt testified on behalf of Berra that Berra has poured thin slabs in the Subdivision and is responsible for the cost of replacement of those under Appendix E of the Subdivision Regulations. Tr. 566-569.

Essex knew about problems relating to thickness and premature failures of the streets soon after the concrete was poured in the Subdivision. Intervenors' Sub. Appx.pp.A10-A16, A42-A59. Internal letters and memos among Essex and Vatterott demonstrate numerous complaints and questions regarding the status of the streets. Tr. 148-60. As far back as November 1998, a representative of C.F. Vatterott considered the streets to be in poor enough shape that he wanted to know why Essex could not be more aggressive in fixing them. Intervenors' Sub. Appx. p. A10. Essex had previously repaired and replaced numerous sections of the Subdivision streets. Tr. 58, Intervenors' Sub. Appx. pp. A77-A86.

Mr. Daniel Barczykowski, the expert on behalf of the County and the Intervenors, is a licensed geotechnical engineer experienced in evaluation of subsurface materials and how they perform under stress and strain and has extensive experience in geotechnical investigations of concrete and soils. Tr. 249-50. He undertook a comprehensive survey of the Subdivision and identified four types of problems within the subdivision: (1) settlement of fill, (2) poor subgrade support, (3) shrinkage of concrete after curing, and (4) steep grade. Tr. 259-60. Of those four types of problems, only settlement and poor subgrade support areas were identified in the Subdivision as needing replacement—but settlement and poor subgrade were the bulk of the areas identified with problems. Tr. 269-70. Mr. Barczykowski testified that he concluded that subgrade was the

overwhelming problem within the Subdivision after ruling out the other aspects of street design – the streets had been designed to last 20-30 years, the traffic volume and type were not outside their scope for the design of the streets, the quality of the concrete was good, and the thickness of the concrete was generally not the reason for the premature failures, thus leaving the soil as the identified cause for failures. Tr. 260-67.

From his survey, Mr. Barczykowski identified 315 concrete slabs in the Subdivision that needed to be replaced due to excessive cracking and displacement within the slab, which are deemed to be failed slabs because the structural integrity is compromised to the point that they have not met or will not meet their design life. Tr. 274, 344. Many of these identified slabs were either demonstrating vertical separation at the cracks or movement because of settlement or poor support resulting in tilting inward toward the fracture. Tr. 267. Mr. Barczykowski opined that the premature street failures are a result of poor subgrade support and settlement of fill after the streets were poured. Tr. 260-62. Furthermore, he testified that the random cracks with no defined pattern also supported the theory of poor subgrade support. Tr. 262. Mr. Barczykowski's opinion that the street failures were not related directly to thickness deficiencies was reinforced by the fact that of the 218 slabs that were deficient in the Court-ordered core-testing, only 9 overlapped with the 315 slabs that Mr. Barczykowski identified as failing. Tr. 542-43.

Because of a flood at the offices of Geotest, the company that undertook the testing for the fill and subgrade in the Subdivision at the time of development, most of the compaction test records were destroyed, leaving only the final letter form of the compaction results, and as a result, a thorough review of those findings was not possible.

Tr. 124. The compaction testing performed by Mr. Barczykowski showed that the subgrade in various places did not meet the Subdivision Regulations' minimum requirements. Tr. 287-93, 324; Intervenors' Sub. Appx. pp. A89-A98. Mr. Barczykowski testified that his company used a standard proctor that requires compaction to 95%. Tr. 329. However, Mr. Barczykowski's boring test results show four out of eight areas that were below the standard proctor, *i.e.*, 89%, 92.7%, 89.7%, and 78.6%. Tr. 289-93; Intervenors' Sub. Appx. pp. A89-A98. Further, based upon his review of the few records that Geotest still has, Mr. Barczykowski stated that, in the areas of fill, it is impossible to determine if those compaction results were taken from the first lift of fill or the final subgrade. Tr. 286. Further, based upon the sheer length of streets in the Subdivision, Mr. Barczykowski stated that he would have expected to see many more compaction test results than Geotest produced. Tr. 345.

Lauren Monge appeared as the class representative, a homeowner and a trustee and member of the Homeowners Association. Tr. 495-96. Mr. Monge became a trustee in 2003, at which time the developer trustees, non-resident trustees consisting of representatives who were responsible for development of the Subdivision, finally resigned. Tr. 496. He explained that issues of problems with the streets were raised as early as 1999 by other homeowners. Tr. 500. Because the developer controlled the Homeowners Association through the developer trustees at the time, the homeowners formed an action committee that documented problems in the Subdivision and contacted the developers about their concerns. Tr. 501. Because the developer trustees at the time

didn't want to get involved, the homeowners intervened on behalf of the Association in this action. Tr. 503.

Finally, the undisputed evidence shows that there are nine (9) slabs that overlapped for both thinness issues and premature failures as identified by Mr. Barczykowski, thereby decreasing the slabs that need to be replaced because of premature failures alone to approximately 305. Tr. 542-43; Intervenors Sub. Appx. pp. A68-A76.

The trial court found that Essex violated the County's Subdivision Regulations and standards and is in default of the Guarantee Agreement by failing to properly complete the Subdivision improvements, that the County and Intervenors are entitled to hold the Bonds, and that Essex and Federal must pay the remainder of the Bonds to the County so that the County can complete the Subdivision improvements. LF Tab 29. The trial court also ordered civil penalties for thin slabs in the amount of \$102,174.65 against Essex and Federal to be paid out of the Bonds. LF Tab 29. Finally, the trial court awarded costs in the amount of \$35,875.00 against Essex and Federal for Intervenors' costs for work performed to repair the prematurely failing streets, and Intervenors' attorneys' fees in the amount of \$219,277.00 against Essex, \$7,088.00 against Berra, and \$17,013.00 against Boling. LF Tab 29, 31. This appeal follows.

## ARGUMENT

### INTERVENORS' RESPONSE TO APPELLANTS' POINT RELIED ON I.

**THE TRIAL COURT DID NOT ERR IN ORDERING THAT THE REMAINDER OF THE BONDS SHOULD BE USED BY THE COUNTY TO COMPLETE THE SUBDIVISION IMPROVEMENTS IN ACCORDANCE WITH THE SUBDIVISION REGULATIONS AND APPROVED PLANS.**

#### Standard of Review

On appeal of a court-tried case, this Court's review is governed by Rule 84.13(d). *Burkholder ex rel. Burkholder v. Burkholder*, 48 S.W.3d 596, 597-98, n.5 (Mo. banc 2001). This Court must affirm the trial court's judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). It is fundamental that on appeal the trial court's action is presumed to be correct and the burden is on the appellant to establish that the action was error. *Linzenni v. Hoffman*, 937 S.W.2d 723, 725 (Mo. banc 1997); citing *Hardy v. McNary*, 351 S.W.2d 17, 20 (Mo. 1961). The presumption of validity that surrounds a judgment extends to every essential fact that must have existed in order for the court to enter a valid decree. *Id.* In reviewing a court-tried case, "the evidence, and permissible inferences therefrom, are viewed in the light most favorable to the judgment disregarding all contrary evidence and inferences." *Burkholder*, 48 S.W.3d at 597-98. "On appeal of a court-tried case, the appellate court defers to the trial court on factual issues because it is in a better position not only to judge

the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record.” *In re Adoption of W.B.L.*, 681 S.W.2d 452, 455 (Mo. banc 1984). “As the trier of fact, the trial court has leave to believe or disbelieve all, part or none of the testimony of any witness.” *Id.* The judgment of the trial court “will be affirmed if cognizable under any theory, regardless of whether the reasons advanced by the trial court are wrong or not sufficient.” *Business Men's Assur. Co. of America v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999); *see also Felling v. Giles*, 47 S.W.3d 390, 393 (Mo. App. E.D. 2001).

### **Overview of Subdivision Improvement Guarantee Process**

Jefferson County, using its statutory authority to regulate subdivision and development of property to protect the health, safety and welfare of its unincorporated areas, adopted Subdivision Regulations to provide protections for its citizens. Section 64.825 RSMo. Under those Subdivision Regulations there are two ways that a developer can install the Subdivision improvements when seeking approval of a subdivision plat. The developer can either complete the improvements in accordance with the approved improvement plans and County standards before approval of the record plat, or the developer can seek record plat approval prior to installation and completion of the improvements upon submission of an itemized estimate of the cost of construction plus a contingency of the improvements shown in the approved improvement plans that have not been completed and approved. Appellants’ Sub. Appx. pp. A70-A72 at §4.7e. If the developer installs all improvements prior to seeking record plat approval, the County

inspects the work to insure it meets the standards before approving the plat. If, however, a developer wants the plat approval first, the developer must guarantee that the improvements will be installed and completed to County standards. This is important because, generally, an owner of land cannot transfer or sell land by reference to or by other use of a plat of any purported subdivision of the land before the plat has been approved and recorded. *See* §§ 445.070 & 64.245 RSMo. Thus, if the developer chooses to complete the improvements prior to plat approval, no proposed lots can be sold until the improvements are completed and the plat approved. However, if the developer decides to obtain record plat approval first, the developer can begin to sell lots and homes in the subdivision even before installing subdivision infrastructure. Accordingly, it is important for the County to have assurance that the infrastructure to be added after plat approval is going to be completed and installed properly.

The County's Subdivision Regulations require the developer of a subdivision to guarantee completion by providing a guarantee backed by a bond or escrow. Appellants' Sub. Appx. p. A71 at §4.7e(B). Thus, if the developer defaults and fails to install the improvements, the tax payers or affected property owners are not left with the task of installing the vital infrastructure of a subdivision. The County's authority to impose this requirement comes from § 64.825 RSMo.:

Such regulations may provide that in lieu of the immediate completion or installation of the work, the county planning commission may accept bond for the county commission in the amount and with surety bond, cash bond, cash deposit with the county treasurer, letter of credit, or certificate of

deposit and conditions satisfactory to the county commission, **providing for and securing to the county commission the actual construction of the improvements and utilities** within a period specified by the county planning commission, and the county commission shall have power to enforce the bond, surety bond, cash bond, cash deposit with the county treasurer, letter of credit, or certificate of deposit by all proper remedies.

Section 64.825 RSMo. (emphasis added). As discussed above, this statute authorizes the County to utilize its police power to protect the health, safety and welfare of unincorporated areas within its jurisdiction. *Rosenberg v. Missouri Title Guaranty Co.*, 764 S.W.2d 684, 686 (Mo. App. E.D. 1988).

In this case, Essex chose to seek plat approval prior to installation of all the improvements pursuant to §4.7e(B) of the Subdivision Regulations and, thus, provided the Guarantee Agreement and the “Land Subdivision Bonds,” issued by Federal, to put the County in the secured position that the Subdivision would be completed and installed properly.

The Subdivision Regulations do not require the County to prove the cause of the failure or incompleteness or the perpetrator of any damage to the soon-to-be publicly dedicated improvements. To do so would place an extreme burden on the taxpayers to increase the staff that would be needed to inspect and administer the subdivision improvement guarantee process since it would require constant monitoring of every subdivision to have the proof necessary to enforce a guarantee.

Thus, guarantee agreements are designed to place the entire burden of completion on the developer and surety, not the government agency, the taxpayers, or the lot owners. To hold otherwise in this case undermines the entire purpose of the guarantee (and the Bonds<sup>1</sup>) – to put the County in a secure position that the improvements will be completed satisfactorily.

With this backdrop in mind, it is evident that the trial court’s decision is proper and based upon the substantial evidence in the record.

**Appellants Incorporation of Arguments Directed Towards the Application for Transfer and the Court of Appeals’ Decision are Improper**

Appellants’ First Point Relied On is an amalgamation of their former arguments mixed with new reliance on the Court of Appeals’ opinion from which this Court granted transfer as well as a refutation of points raised by Intervenors in their Application for Transfer. The last 8 paragraphs of section 1 (pp. 41-43) of Appellants’ Point Relied On I are nothing more than an opposition to Intervenors’ Application for Transfer or a claim of error *by this Court* in its decision to transfer—both of which violate Supreme Court Rule 83.04. (“No response to an application for transfer shall be filed unless requested by the Court.”) Appellants’ formally allege in their Substitute Brief (p. 72) that *this Court’s* action in transferring the case was “without merit” and in error, also in violation of Rule

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<sup>1</sup> The Bonds expressly made to protect the residents of Jefferson County. Appellants’ Sub. Appx. pp. A50, A55, A61 (“this bond ... shall be available for the protection of ... any resident of Jefferson County.”)

83.04 and 84.04(d)(appeal is not of this Court's decision to transfer). To that end, Appellants' opposition to transfer (pp. 41-43) and their allegation of this Court's error in transferring the case should be struck.

Furthermore, Rule 84.04(e) mandates that the "argument shall be limited to those errors included in the 'Points Relied On.'" Where the argument section under a Point Relied On contains "arguments which do not relate to the errors alleged in that point .... [the Appellate Court] will not consider these arguments, as they are not properly presented for our review." *Capital One Bank v. Hardin*, 178 S.W.3d 565, 572, n.3 (Mo. App. W.D. 2005); citing *Schmidt v. Warner*, 955 S.W.2d 577, 584 (Mo. App. S.D. 1997) ("Issues to which an appellant alludes only in the argument portion of his brief are not presented for review."); see also, *Stickley v. Auto Credit, Inc.*, 53 S.W.3d 560, 563 (Mo. App. W.D. 2001). These references to the Application for Transfer are outside the alleged errors included in the Point Relied On and can be disregarded.

Finally, although Appellants incorporate the opinion of the Court of Appeals, upon transfer to this Court, the opinion has no precedential value. See e.g., *Philmon v. Baum*, 865 S.W.2d 771, 774 (Mo. App. W.D. 1993) (decision of Court of Appeals in a case subsequently transferred to the Supreme Court is of no precedential effect.); *State v. Norman*, 380 S.W.2d 406, 407 (Mo. banc 1964) (where case was transferred to Supreme Court after opinion by Court of Appeals, "Court of Appeals' opinion and decision would be necessarily vacated and set aside and deemed *functus officio*."); see also *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 109 (Mo. banc 1989) ("A court of

appeals opinion ordinarily passes into limbo with the transfer of the case to this Court...”).

### **Argument**

The uncontroverted core test results submitted by the court-ordered independent testing company show that the 40% of the streets were not constructed to the County’s regulations for thickness—a condition that remains un-remedied to this day. The evidence also showed that Appellants are in default for failing to timely complete the subdivision and have left incomplete numerous deficiencies noted by the County in its inspection reports and that Essex failed to properly construct the streets, free from excessive and premature failures. All of this supports the trial court’s ruling in favor of the County and Intervenors’ and ordering the remainder of the Bonds to be used by the County to complete the Subdivision improvements. Yet in the face of all this, Appellants boldly continue to declare that they have completed the subdivision improvements.

The core of Appellants’ argument (for which they cite the Court of Appeals’ decision) is that, besides the violations in design thickness which they say are not violations (addressed in Section (a)(ii) below), there was no proof of a “specific failure on the part of Essex to properly construct the streets ... which resulted in premature failure” and the “causes of the street failures could not be specifically determined.” Appellants’ Sub. Brief, p. 40. Appellants then surmise that the trial court’s finding that the bonds were forfeited was not supported by substantial evidence. This argument is flawed on at least two levels.

First, and most important, this supposedly necessary finding of cause for the failures and defects prior to recovery on the Bonds and Guarantee is a red herring. It simply does not exist anywhere in §64.895, §89.491, the subdivision regulations, the Bonds, the Guarantee or the practice of the County and is antithetical to the purpose of the guarantee. Tr. 397. Appellants emphasize that their liability can only rest in contract by virtue of the “Bonds, as a contract, and nothing more,”<sup>2</sup> but then spend the remaining argument attempting to show a lack of proof of causation all the while never explaining where in the contract, subdivision regulations or statute this causation requirement exists. Appellants’ Sub. Brief, p. 30, *et seq.* In point of fact, the County and Intervenors do not need to prove why the streets are too thin, why Appellants failed to complete on time, or why the extensive concrete failures that have been experienced occurred; they only must demonstrate that such failures are neither in compliance with County standards nor as guaranteed to the County and therefore render the Subdivision incomplete.

As with the contractual documents, there is no requirement in Sections 64.895.2 and 89.491 RSMo., that the County or Intervenors prove “causation” or “negligence” on the part of Essex to be entitled to relief. Those sections simply require a showing of a violation. A mere showing that the streets are not in compliance with the Subdivision Regulations, Approved Plans or the Bonds and/or Guarantee Agreement is the requisite

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<sup>2</sup> Appellants are incorrect. As the trial court ruled, and as is further explained herein, liability also arises under Sections 89.491 and 64.895.2 RSMo.

substantial evidence that the Subdivision is incomplete. Such a finding is fully supported by the record.

Second, there is ample evidence of specific failures for which Appellants are responsible. Among the facts<sup>3</sup> supporting of the trial court decision are the following:

- During construction of the streets, concrete trucks were driven on the prepared subgrade in five different areas of the subdivision streets. Tr. 432-33;
- In some instances the paving company believed that the concrete should not be poured because of the condition of the subgrade, including the moisture content of the subgrade and pooling water directly adjacent to the subgrade. Tr. 432, 447-48, 451;
- There was no testing of the subgrade after the concrete trucks drove on the subgrade and testing did not necessarily take place on the day the streets were poured. Tr. 41, 438-39;
- Driving on subgrade can damage the subgrade leading to the concrete breaking and giving way to the sinking subgrade. Tr. 459-461;
- Areas where trucks were driven on the subgrade are showing cracks and signs of displacement. Tr. 461

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<sup>3</sup> These and other facts are set out more fully in the “Facts” section, pages 11 - 20, *supra*.

- Compaction testing showed subgrade in various places did not meet minimum requirements of the County's Subdivision Regulations. Tr. 287-93, 324; Intervenors' Sub. Appx. pp. A89-A98;
- Engineering compaction testing records from time of compaction were destroyed or inconclusive as to depth. Tr. 124, 286;
- Testing of subgrade was less than would have been expected for a subdivision with 5 miles of streets. Tr. 345;
- Subdivision streets contain failures that are not normal and in excess of wear and tear. Tr. 269, 397, 427.

Therefore, although unnecessary for liability to attach to Appellants, the overwhelming evidence establishes a multitude of reasons for the failures – that there were serious issues with the subgrade of the streets causing failures as demonstrated by the fact that after testing, concrete trucks were driven on the subgrade prior to pouring without retesting, that areas of the street were poured even though the paving company was not comfortable with the condition of the subgrade, and that there were problems with backfilling and sealing of the streets, all undermining the subgrade. Intervenors and County provided not only probative and competent expert evidence that the street conditions were caused by subgrade failures, but also the unrebutted expert testimony demonstrating that the street failures were substantial and construction-related. Tr. 248-370.

Appellants’<sup>4</sup> other strategy to undermine the trial court decision is to mischaracterize that decision as being based on a warranty theory and argue that the Bonds and Guarantee Agreement are the only controlling documents, while only half-heartedly acknowledging that the Guarantee incorporates the Subdivision Regulations and Approved Plans. Appellants ignore the sole purpose of the Guarantee Agreement and Bonds (and the statutes that authorize them; see § 64.241 RSMo.)—to make sure that the improvements are constructed, installed and completed properly according to the County’s standards and to the County’s satisfaction. Appellants’ Sub. Appx. A49-A66.

Appellants want to force the Court into wrangling over whether the bonds involved are performance bonds or warranty bonds and cite case law that elucidates on the purpose of a “performance” bond. Actually, Appellants are wrong either way. The bonds in question are neither a performance or warranty bonds—they are “Land Subdivision Bonds” and serve a different purpose altogether. Appellants’ Sub. Appx. pp. A49, A54, A60.

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<sup>4</sup> Seeking sympathy from this Court, Appellants attempt to portray themselves as “hostages.” Appellants’ Sub. Brief, p. 46. If anyone has been abducted, however, it is the homeowners who have lived from the Subdivision’s inception with failing streets and spent the entire time they have lived in the subdivision pursuing a developer that consistently refuses to take responsibility for the problems instead blaming its subcontractors, Boling and Berra.

Performance bonds are typically used where an owner hires a contractor to build something and the owner requires the contractor to secure the work with bond to ensure the project actually gets built. By contrast, the use by a public entity of bonds (such as the Land Subdivision Bonds used by the County here) is authorized by operation of state statute. *See, e.g.* § 64.241 RSMo. In fact, state statute specifically recognizes that such bonds that are required by local governments to ensure construction and installation of improvements are completely different and separate from typical contractor bonds. *See* § 89.410.6 RSMo. (“Nothing in this section shall apply to performance, maintenance and payment bonds...”); *see also Home Builders Ass'n of Greater St. Louis, Inc. v. City of Wildwood*, 107 S.W.3d 235, 239 (Mo. banc 2003) (recognizing maintenance bonds as not being included in ambit of bonds authorized under §89.410 to guarantee subdivision improvements).

The bonds at issue here were created and authorized by state statute not to benefit any one project owner, but to benefit the public at large by securing to the County “the immediate completion or installation of improvements.” Section 64.241 RSMo. Unlike in the performance bond situation where the public owner employs a contractor to construct a project, here the County did not hire Essex to construct a residential subdivision. The County’s only involvement in the subdivision construction process was to protect the public by ensuring that the improvements related to the subdivision (the streets, utilities, storm water system, common areas) that would be utilized by the public were properly and completely constructed and installed in a timely manner. All of the Appellants’ arguments regarding warranties vs. performance of the streets are extraneous

to the central purpose of the Guarantee and Bonds here—whether, at the time the County inspected the streets for approval and release, the streets had been properly constructed and installed. Another way to put it is: Had the County approved the streets has presented to it by Appellants, would the County have been fulfilling its obligation to protect the health, safety and welfare of the residents of Jefferson County? The substantial evidence taken by the trial court shows that it would not.

Do not be fooled. The County and Intervenors are not seeking maintenance and repair of once properly constructed streets as Appellants’ would have this Court believe. (Appellants’ Sub. Brief, 30, 40, 44). The trial court, rightly, was focused not on maintenance or repair but on proper completion of the streets before releasing Appellants forever from their joint obligation for subdivision improvements. The trial court simply and properly treated the Guarantee as Appellants’ promise that the improvements will actually be completed, installed and constructed per the County standards up until the day of inspection for release of the Guarantee. As the trial court pointed out, the word “guarantee” means that Essex was assuring “a particular outcome or condition.” LF 29, p. 22.

Thus, Appellants pledged, promised, and assured performance as specified. Period. There is no need for the County or Intervenors to prove negligence, causation or fault. The County simply needed to establish that its inspections showed that the construction of the improvements was defective, was unsatisfactory, or was not worthy of approval, all of which, as set forth below, was contained in the record.

**1. There Was Substantial Evidence to Support the Trial Court’s Decision**

**a. Essex Is In Default of its Obligations Under the Guarantee Agreement and Pursuant to Section 89.491**

The Trial Court was correct in finding that Appellants have breached their contractual obligations as guaranteed to the County and Intervenors, as third party beneficiaries, by failing to complete the Subdivision improvements at all, let alone within the time specified by the Guarantee Agreement, by failing to construct the concrete streets to the thickness required by the Approved Plans and Subdivision Regulations, and failing to properly construct the streets, free from excessive and premature failures.

Essex had a contractual duty to the County and Intervenors to complete the Subdivision improvements that arose from the posting of the Bonds and the subsequent Guarantee Agreement with the County wherein Essex agreed to complete the installation and construction of the Subdivision improvements to the County’s satisfaction and as prescribed and required by the Jefferson County Planning and Zoning Commission pursuant to the Subdivision Regulations adopted by the County. Essex was to be released from its obligations only when the improvements were “completed and approved.” Appellants’ Sub. Appx. pp. A71-A72 at §4.7e(C). Moreover, the work that Essex claimed was completed and for which it sought release had first to be satisfactory to the County. Appellants’ Sub. Appx. pp. A65-A66. The improvements for which Essex sought release were never completed and thus were never approved by the County, and as a result, Appellants have never been released from their contractual obligations.

In addition to Essex's default under the Bonds and Guarantee Agreement, but based on the same violations, the trial court was authorized to grant relief based on Intervenor's claim under an independent statutory cause of action that allows the court to order any necessary action to correct violations of the County's Subdivision Regulations, standards, and ordinances. Section 89.491 RSMo. provides:

1. Any person ... aggrieved by a violation described in this subsection may commence a civil action on his own behalf against any person who is alleged to be in violation of the provisions of chapter 64, RSMo, ... or in violation of any standard, regulation, or ordinance which has been adopted by any county or city pursuant to chapter 64, RSMo, ....

\* \* \*

3. The appropriate circuit court, as established in subsection 2 of this section, shall have jurisdiction to enforce the standard, regulation or ordinance alleged to have been violated, to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation. (emphasis added).

Similarly, Section 64.895.2 RSMo. provides that:

In the event any subdivision of land is begun or made in violation of sections 64.800 to 64.845, or of any official master plan or part thereof, or of any planning or zoning order, regulation or restriction made and adopted under the provisions of sections 64.800 to 64.845 or 64.850 to 64.880, or in the event any building or structure is constructed, reconstructed, relocated

or maintained, or any building, structure, lot or land is used in violation of sections 64.800 to 64.845 or 64.850 to 64.880, or of any planning or zoning plan, regulation, restriction or order made and adopted by authority conferred under the provisions of sections 64.800 to 64.845 or 64.850 to 64.880, the county commission, the county planning commission, the county zoning commission, ... the owner of any private property or any public body the property of whom or which is or may be affected by any such violation, may institute in the circuit court of the county, any appropriate action or proceedings to prevent the unlawful subdivision development or erection, construction, reconstruction, alteration, relocation or maintenance or use, or to restrain, abate or correct the violation, or to prevent the occupancy of the building or structure or unlawful use of land, and to prevent any illegal act, conduct, business or use in or about the premises. (emphasis added).

For the forgoing reasons, the trial court's decision that Essex has breached its contractual obligations as guaranteed to the County, and the Intervenors as third party beneficiaries, and violated Section 89.491 RSMo. was based on substantial and competent evidence that: (i) Essex failed to complete the Subdivision improvements at all, let alone within the time specified, (ii) Essex failed to properly construct the improvements by constructing streets that are deficient in thickness, and (iii) Essex failed to properly construct streets that are not excessively and prematurely failing.

**i. The Subdivision Improvements Were Not Timely Completed**

In the Guarantee Agreement, Essex guaranteed that all required improvements would be “installed, constructed and completed within one (1) year from the date of approval of” the Guarantee Agreement, which was approved July 26, 2000. Tr. 88; Appellants’ Sub. Appx. pp. A65-A66. It has defaulted on that Agreement. By the express terms of the Guarantee Agreement, Essex had until July 26, 2001 to complete all the improvements, seek an inspection from the County, and obtain an approval and release from the County Commission. Because the problem dated back to the time the streets were poured, there can be no doubt that the thickness of the streets was deficient at the time of expiration of the Agreement and thus the Subdivision was not complete at that time. Furthermore, the County had identified numerous areas of the streets and other common areas that were still not approved as complete by the County. Appellants’ Sub. Appx. pp. A101-A102; Intervenors’ Sub. Appx. pp. A27-A29.

The ramifications of failing to timely complete the Subdivision improvements are clear. The Guarantee Agreement provides that “in the event that the DEVELOPER shall abandon the Subdivision or fail to complete the improvements within one (1) year hence from the date of the COUNTY’S approval of this Guarantee Agreement, the COUNTY may complete, or have completed, the said improvements and the SURETY shall disburse on the land subdivision bonds therefore, as ordered and directed by the COUNTY.” Appellants’ Sub. Appx. pp. A65-A66 at ¶4 (emphasis added). Therefore, the Agreement expressly requires that the proceeds of the Bonds be disbursed to the County to allow it to complete, or have completed, the Subdivision improvements.

Essex's failures in the Subdivision streets and failure to comply with the County regulations and standards, as discussed more fully herein, *existed at the time of the expiration of the Guarantee Agreement* and thus the Subdivision improvements were not complete at that time, nor have they ever been completed. Thus, the trial court's finding that by abandoning the subdivision, Essex is in default under the Guarantee Agreement and the Subdivision Regulations and thus has forfeited the Bond proceeds is supported by the substantial evidence.

Appellants argue that Essex "notified the County that the improvements were complete" on March 5, 2001. Appellants' Sub. Brief, p. 39. In acknowledging the design thickness failures, Appellants acknowledge that the improvements were not complete, and the County never approved the improvements. In fact, Essex was told on multiple occasions by the County which improvements had to be completed before the Bonds could be released. Intervenors' Sub. Appx. pp. A4-A9, A17, A31-42; Appellants' Sub. Appx. pp. A101-102. Instead, Essex decided they would rather resort to litigation, now nearly eight years on, than simply fix the Subdivision streets.

**ii. The Subdivision Streets Do Not Meet the Required Thickness**

Appellants have also defaulted and failed to complete the Subdivision in that the streets are not built to the appropriate thickness as required by the Subdivision Regulations and Approved Plans, as evidenced at trial. The County has established minimum requirements for private subdivision streets per Appendices A and E of the Subdivision Regulations, and also as reflected in the Subdivision plans, whereby streets that are 26-foot wide must be six inches thick and streets that are 30-foot wide must be

seven inches thick. Tr. 379-380; Appellants' Sub. Appx. pp. A67-A85; Plaintiff's (Essex) Trial Exhibit 29 (Subdivision Plans; Page 52). The evidence and testimony reflects that these thin slabs alone are a violation of the plans and Subdivision Regulations. Of the approximately 527 panels tested as a result of the 2005 court-ordered core testing, over 40% were in violation, as 218 were deficient by more than 0.3 inches from the required thickness as established by Appendix E of the current Jefferson County Subdivision Regulations. Appellants' Sub. Appx. pp. A82-A85; Intervenor's Sub. Appx. pp. A24-A26. These deficiencies date to the time the streets were poured. The County cannot legally release Appellants from their obligations to the County or to the Intervenor and find that the improvements were a "successful completion" (Appellants' Sub. Appx. pp. A71-A72 at §4.7e(C)) when they have not complied with the terms of the Bonds, Guarantee Agreement, Subdivision Regulations, or Approved Plans. Tr. 232.

That the streets were not built as required because of inadequate concrete thickness supports the trial court's finding that the Subdivision was not complete. The County's Director of Public Works, who is responsible for overseeing subdivision compliance, testified that the failure to achieve the intended design thickness in the streets was a violation of the Subdivision Regulations and the Approved Plans. Tr. 380.

Undaunted by these facts, Appellants continue to claim that the Subdivision is complete and deny the existence of any deficiency that precludes release of the obligations under the Bonds and Guarantee Agreement. They argue that because there is a remedy available, this is not a failure to meet the regulation. They ignore the fact that neither they nor anyone else has replaced one of the 218 concrete slabs or paid one cent

to remedy this admitted failure! Yes, the trial court *ordered* a remedy; but no, the thickness deficiencies have not been remedied!

This fact totally rebuts Appellants' argument that because variations in concrete thickness are anticipated and that the County has a "remedy" by virtue of Appendix E, that *payment* pursuant to Appendix E "constitutes compliance with the Subdivision Regulations in completing the streets." Appellants' Sub. Brief, p. 45. Even if true, as stated, there has been no payment under Appendix E.

More important, Appendix E is merely a plan for testing the thickness of subdivision streets by using a series of core tests. Appellants' Sub. Appx. pp. A82-A85. It is an accommodation to developers<sup>5</sup> in that it allows "pavement that is *deficient* by 0.3 inches" or less to not be torn out even though not in compliance with the Approved Plans or the Subdivision Regulations. Appellants' Sub. Appx. pp. A82-A85 (emphasis added). But, even with such accommodation, it is no less "deficient" because penalties or complete replacement (if the deficiency is more than 0.75 inches) is required. Not even Appellants could argue that the approximately 112 slabs found by the core tests to be more than 0.75 inches thin and thus requiring replacement under Appendix E are not in violation of the Approved Plans and Subdivision Regulations.

As with all enforcement of subdivision regulations vis-à-vis guarantee agreements, there is no need to show causation as to these standards. Essex's failure to build the

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<sup>5</sup> Prior to the adoption of Appendix E, any slab found to be thin in any amount was required by the County to be completely replaced. Tr. 426.

streets to the requisite thickness—for whatever reason—is a breach of its contractual duties and a violation of the Subdivision Regulations and Approved Plans. Appellants’ Sub. Appx. pp. A67-A85; Plaintiff’s (Essex) Trial Exhibit 29 (Subdivision Plans; Page 52).

So, contrary to Appellants’ assertions, the County and Intervenors have not gotten exactly what they bargained for, nor will they get what they are entitled to receive, simply because Appellants are willing to blame its subcontractors for thin concrete. Essex, as the developer, still has a responsibility to complete the streets according to the Approved Plans and Subdivision Regulations. Moreover, as reflected in the record, some 112 slabs are required under Appendix E to be replaced and have not been.

Appellants’ argument that (a) the streets were constructed, (b) the violations didn’t stop anyone from using the streets, (c) the violations did not contribute to other failures, and (d) it is a common problem, effectively makes all building codes and similar regulations both worthless and unenforceable. Appellants’ Sub. Brief, pp. 43-44. Under the Appellants’ theory, an owner of a new building with a faulty sprinkler system can be excused from code violations by arguing with the code official, “yes, it is true that the sprinklers do not work, but they are installed! There haven’t been any fires, and my tenants are still using the building everyday without any problems; a lot of old buildings don’t even have sprinklers.” Such a result is simply absurd.

**iii. The Subdivision Streets Have Failed**

Appellants agree: The subdivision streets “should last for not less than 20 years.” Appellants’ Sub. Brief, p. 27. The evidence is that from the time they were poured, areas

of the streets suffered, and are still suffering, from excessive cracking, displacement, and abnormal deterioration—as evidenced by the at least 305 slabs identified as prematurely failing by Mr. Barczykowski and the 537 areas in need of repair identified by Mr. Koehrer, the County’s Director of Public Works. See, *e.g.*, Intervenor’s Sub. Appx. pp. A6-A15. The County’s standard for streets is that at the time of inspection, the streets cannot be cracking excessively or showing displacement within cracks in the slabs so as to be clearly not meeting their intended design life. Tr. 396, 405.

Appellants lightly brush off this major defect with a quip that, “of course, cracking in concrete streets is to be expected.” Appellants’ Sub. Brief, p. 39. Appellants then pile on assertions such as the “streets are not, in fact, failing”<sup>6</sup> and “the oldest of the streets have been used for over 12 years” so “it can be anticipated that some failures will occur in some sections prior to reaching the minimum [20 year] life expectancy.” Appellants’ Sub. Brief p. 32. Appellants’ assertions are simply illogical – of course the streets are now 12 years old (after 7½ years of litigation), but the evidence shows that they were not 12 years old when the problems developed. There were failures from the beginning. See Intervenor’s Sub. Appx. A4-A14, A45-A57. The sheer volume of slabs that have excessively cracked or become displaced since they were first poured testifies to

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<sup>6</sup> This factual assertion cannot stand against the weight of the evidence supporting the trial court’s finding that the streets have failed based on the testimony of Mr. Koehrer (Tr. 375, 405, 426-27) and Mr. Barczykowski (Tr. 274, 269). *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

defective construction .<sup>7</sup> Appellants' characterization of the widespread failures as "cracking" that is "expected" to occur before reaching 20 years is simply disingenuous.

The trial court's finding that the street failures were not the result of normal wear and tear is fully supported by the evidence. LF Tab 29, p. 23. Furthermore, the record is clear that at the time the County did its inspections identifying some 500 unacceptable slabs (or "panels") in 2001, the oldest of the streets was at most 6 years old and some were only 3-4 years old. The evidence was clear that the premature failures of the streets had been around *and known to Essex* "since the inception of the Subdivision." LF Tab 29, p. 12 (referencing Ex. 24-35 included in Intervenors' Sub. Appx. pp. A10-A11, A15, A42-A59, demonstrating that the failures began shortly after the streets were poured, as early as 1996). The failures did not suddenly appear after 12 years—that time period only reflects how long Essex has failed to correct the problems.

Appellants still want to argue the facts with this Court by asking it to find that the failures were normal, expected, typical, and just "cracks." But, the trial court heard all the evidence and rejected all of Appellants' claims of normalcy, instead believing the testimony that the degree and extent of deterioration was abnormal and excessive. Tr. 427; LF Tab 29. As noted previously, this Court reviews the evidence, and all reasonable inferences, in a light most favorable to the judgment of the trial court, and disregards all

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<sup>7</sup> The trial court obviously believed County Director of Public Works Koehrer's assessment that that the cracking in the streets in this Subdivision is more than would normally be seen compared to other subdivisions. Tr. 426-27.

contrary evidence and inferences. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

And, because Appellants guaranteed that Essex would complete the Subdivision improvements “in a manner satisfactory to the County,” not by merely laying concrete on the ground and calling it complete, these excessive and abnormal failures are not suitable for release. Appellants’ Sub. Appx. pp. A49-A64. Thus, it is clear that under the Bonds, “completion” means completion that is satisfactory to the County. Failure to meet the design thickness and design life and pouring streets that have significant cracking with displacement is not “complete.”

Appellants suggest that the County’s insistence that Essex be responsible for damage to the streets prior to finishing development of the Subdivision, even if Essex did not “cause” the damage, is a preposterous proposition. But Appellants’ argument disregards their ultimate responsibility for the Subdivision – Essex and Federal willfully undertook such responsibilities under the Bonds, which contain no exception for damage caused by other entities working in the Subdivision nor require the County to prove causation for any failures to meet the standards. As Appellants state, “the requirements placed on Essex and Federal must only be those requirements of the subdivision Bonds and Guarantee.” Appellants’ Sub. Brief, p. 30. So, Appellants are responsible for completion of all improvements until such time as the County determines that the improvements are constructed “in a manner satisfactory to the County,” that there has been a “successful completion” and the Bonds released. Appellants’ Sub. Appx. pp. A49, A54, A60, A71 (Bonds and Jefferson County Subdivision Regs. at §4.7e(C)). The

County's only requirement is that, on the day that an inspection takes place, the improvements be in a complete condition satisfying the County's standards.

Essex relies heavily on the trial court's statement in its Judgment that "as is discussed below<sup>8</sup>, there is no evidence of any negligence or failure of Essex to properly perform construction of the streets." LF Tab 29. But a careful reading of the Judgment reflects that Appellants' reliance on such statement is misplaced. First, the sentence is written as the last sentence in a paragraph relating to Essex's liability for thin slabs, vis-à-vis its subcontractors, not for the entire development. This is further supported by the remainder of the trial court's opinion, wherein Essex's failures are listed throughout and no further discussion is had in the Judgment as to Essex' lack of responsibility. Moreover, when reading the Judgment as a whole, Essex's reliance on the trial court statement, taken entirely out of context, that there was "no evidence of negligence or failure...to properly perform construction of the streets," only means that the trial court was stating that, of course, since Essex did not actually construct the streets, but rather its subcontractors did, then Essex could not be negligent performing the actual, physical construction of the streets relating to the standards for thickness. But Essex, in its capacity as developer and principal under the Bonds and Guarantee Agreement, is liable for the acts of its subcontractors, Boling and Berra, who did construct the streets. Essex

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<sup>8</sup> A review of the Judgment shows no facts or findings were ever "discussed below" in the Judgment that support the statement that Essex failed to "perform construction" of the streets. As such the statement is not based on substantial evidence.

even readily admits that it is liable for thin slabs, which amounts to a failure to properly perform the construction of the streets. Tr. 83-84; Appellants' Sub. Brief, p. 71. As such, Appellants' reliance on the trial court's statement pertaining to Essex's liability vis-à-vis the subcontractors as a general exculpatory statement as it relates to Appellants' liability under the Bonds and Guarantee Agreement is clearly out of context and not supported by the evidence.

**b. The Intervenors' Evidence Made a Submissible Case**

In all the cases cited by Appellants to support their incorrect conclusion that Intervenors and the County did not make a submissible case, the element of causation was necessary. This fundamental difference distinguishes those cases from the one at hand. Here, neither the Bonds, the Guarantee Agreement, the Subdivision Regulations, the Approved Plans, nor Section 89.491 RSMo., require proof that Essex caused the violation.

Furthermore, the evidence of the failure to complete (as set forth above) is "more than mere speculation and conjecture" contrary to Appellants' argument. As set forth in the trial court's Judgment, "neither the County nor the Intervenors are required to demonstrate the exact cause of the deficiencies, rather only that deficiencies exist. The Guarantee Agreement, Subdivision Regulations, and Section 89.410 all seek one goal – compliance with standards, regulations, and plans – they do not require proof of negligence or fault." LF Tab 29, p. 26 (emphasis added).

The evidence is clear that the Intervenors have shown, and the trial court found, in direct response to Count IV of Intervenors' Petition "that the Intervenors and class of lot

owners are aggrieved parties and are entitled to relief under §89.491 and 64.895” and thus the judgment specifically ruled in favor of the Intervenor. Appellants’ Sub. Appx. p. A31 (Judgment, p. 31). The trial court also “Ordered and Adjudged” that the “County *and Intervenor*s are entitled” to the bond proceeds and that “the civil penalties for thin slabs in the amount of \$102,174.65 are assessed against Essex and Federal to be paid out of the proceeds of the Bonds.” Appellants’ Sub. Appx. p. A32 (Judgment, p. 32). In response to Intervenor’s Count V, the trial court expressly found that and “are entitled to relief as third party beneficiaries as specifically identified within the language of the Bonds themselves.” Appellants’ Sub. Appx. p. A20 (Judgment, p. 20).

Therefore, Intervenor not only made a submissible case against Appellants but were entitled to relief at a minimum under Section 89.491.1 RSMo., where Intervenor were aggrieved by a violation of a standard, regulation, or ordinance adopted by a county or city pursuant to Chapter 64 RSMo., *and* as third party-beneficiaries to the Bonds and Guarantee that the Court found that Essex had breached by failing to complete the subdivision improvements.

## **2. Essex Did Not Meet Its Burden**

Appellants’ statement in its Point Relied On I, that “there is no evidence that Essex failed to complete construction of the subdivision improvements in accordance with the plans, specifications and Subdivision Regulations,” is an audacious statement, particularly in light of uncontroverted, independent coring proof reflecting that more than 40% of the Subdivision streets are in violation of the express, written County standards for design thickness. Appellants’ Sub. Brief, pp. 23, 27. These violations include “the

thin sections of the concrete streets” for which Appellants admit Intervenor and County are entitled to an award. Appellants’ Sub. Brief, p. 53. Clearly there is abundant evidence that Essex failed to complete construction of the Subdivision improvements at all, let alone in a timely manner, as evidenced by the terms of the Bonds and Guarantee Agreement, the thin slabs, the prematurely failing and excessively cracked and displaced streets, the testimony of Mr. Koehrer and Mr. Barczykowski, as well as the numerous exhibits presented at trial as to Essex’s complete disregard for the soundness of the streets. And this is not to mention all the other failures in the development of the Subdivision found by the County. Intervenor’s Sub. Appx. p. A4-A8; Appellants’ Sub. Appx. pp. A101-A102.

The trial court obviously determined that Appellants’ evidence at trial was lacking in expert testimony or credible evidence to support its arguments, and quite simply, they failed to meet their burden that the Subdivision improvements were complete. Instead the substantial and overwhelming evidence shows that when quality craftsmanship and materials are used, the subgrade is prepared properly, and the traffic load for the streets is within the intended design parameters, there is absolutely no reason to expect streets to fail prematurely to the extent experienced in the Subdivision. Tr. 260-61, 265, 269.

Appellants challenge the adequacy of proof “that Essex did not complete the improvements” based upon “the testimony of Mr. Barczykowski, an engineer, and Mr. Koehrer, the County Director of Public Works, also an engineer...as experts.” Appellants’ Sub. Brief, p. 34. Appellants argue that “[e]xpert testimony may be used as proof, but the party using the experts has ‘...the burden of establishing circumstances

from which the facts necessary to prove his claim may be inferred, without resort to conjecture and speculation, and the circumstances proved must point reasonably to the desired conclusion and tend to exclude any other reasonable conclusion,” relying on *Weatherford v. H.K. Porter, Inc.*, 560 S.W.2d 31, 34 (Mo. App. 1977). *Weatherford* is inapposite to this case on the grounds asserted by Appellants. *Weatherford* was a tort case, not a statutory action under §89.491 (only requires showing of a violation) or for breach of contract. A causal connection was required. But, ironically, this Court expressly sanctioned the trier of fact making an inference of causation from evidence in cases involving the “type of accident which common experience tells us would normally not occur in the absence of a defect.” *Weatherford*, 560 S.W.2d at 35. Thus, under *Weatherford* it is proper for the trial court to infer from the testimony of Mr. Barczykowski and Mr. Koehrer that the types of failures in the streets are not the type of cracking or ordinary wear and tear one would see in a subdivision of this age absent some design or construction defect. Tr. 269, 397, 427.

The trial court correctly determined that a showing of “causation” was not required, and that the street failures were not merely insignificant, ordinary cracking, but rather substantial deficiencies in construction that made it reasonable for the County to require their repair and replacement and further supporting the finding that the Subdivision is not complete. LF Tab 29. Thus, the evidence only needed to show the Subdivision streets were incomplete, not who *caused* the incompleteness. As such, the testimony of Mr. Koehrer and Mr. Barczykowski was both substantive and probative.

Appellants argue that the expert testimony was based on “speculation and conjecture.” But this argument again misapplies the law and reflects Appellants’ misunderstanding of the case. Appellants continue to argue for proof of causation, but the testimony of the County and Intervenor’s experts established that the Subdivision improvements are incomplete based on facts observed in the Subdivision and testing performed. This solid factual underpinning makes their testimony not only helpful, but also unassailable. The credibility of the witnesses and the weight to be given to their testimony is for the trial court, which is free to believe none, part, or all of the testimony of any witness. *Estate of Lee v. Hiler*, 141 S.W.3d 517, 520 (Mo. App. S.D. 2004), *citing Keller v. Friendly Ford, Inc.*, 782 S.W.2d 170, 173 (Mo. App. S.D. 1990). The Court will defer to the trial judge’s superior opportunity to assess the witnesses’ credibility. *Estate of Lee*, 141 S.W.3d at 520, *citing Harris v. Lynch*, 940 S.W.2d 42, 45 (Mo. App. E.D. 1997).

The record is replete with evidence of Essex’s shortcomings and failures related to the Subdivision improvements and those improvements still, to this date, have not been completed as Appellants’ guaranteed to the County pursuant to the County’s Subdivision Regulations, Approved Plans, Bonds, and Guarantee Agreement in violation of the Bonds, Guarantee Agreement and Section 89.491. Thus, the trial court’s judgment in favor of Intervenor and the County is supported by competent and substantial evidence and should be affirmed.

### 3. Trial Court's Judgment in Finding Waiver is Supported by the Evidence

Although Appellants' argument that the Court erred in finding waiver is defective in that it is not referenced as part of its point relied on, it is, nevertheless, without merit. The trial court was correct in finding that Essex has recognized its duty to repair streets that show displacement and failures prior to release. By making numerous repairs of failed slabs in the past at the County's request, Essex demonstrated its understanding that it was obligated to make those repairs. The testimony at trial was that such replacement was the practice of Jefferson County's Department of Public Works prior to release. Tr. 398. Essex's actions demonstrate its acquiescence to the County's policy that Essex is responsible for repairs of failed slabs. "Waiver is the intentional relinquishment of a known right" and can be implied from conduct that clearly and unequivocally shows a purpose to relinquish that right. *Link v. Kroenke*, 909 S.W.2d 740, 746 (Mo. App. W.D. 1995). Essex's prior act of replacing failing slabs at the County's request is inconsistent with its current position that it is no longer obligated to do so. If Essex truly believed, and if custom and practice in Jefferson County was, that a developer's only obligation was to get the concrete poured, but not have to replace failing areas that developed between the time of pouring and the County's inspection, Essex would never have agreed to replace any failing slabs.

## **Conclusion**

Stripped of all its adornment, the Appellants' argument lies naked before this Court as nothing more than this: To "complete" the subdivision streets, all Essex had to do was to pour concrete in a form of a street and tell the County it is so. The County on the other hand, when faced with streets that do not meet the County's standards for thickness, design life and functionality, has no recourse under the Bonds and Guarantee unless and until it can come forward with some actual proof, satisfactory to the Essex and their bonding company, of the cause of and reasons for the failures to meet the County standards.

Alas, Appellants are condemned by their own argument that their liability is controlled "by the terms of and conditions of the Guarantee and the Bonds" (Appellants' Sub. Brief, p. 29) for neither the Guarantee nor the Bonds require any such showing of causation. On their face, the Guarantee and Bonds Appellants are liable for any construction of the improvements that fails to be completed to the County's satisfaction, by a date certain, and in conformance with all standards of the County. The trial court's decision should be affirmed.

**INTERVENORS' RESPONSE TO APPELLANTS' POINT RELIED ON II.**

**THE TRIAL COURT DID NOT ERR IN FAILING TO ENTER JUDGMENT IN FAVOR OF ESSEX AND AGAINST BOLING ON ESSEX'S THIRD PARTY CLAIM.**

Intervenors do not believe that Appellants' Second Point Relied On relates in any way to the Intervenors' case. However, to the extent this Point does relate to Intervenors' case or the Court believes a response is suggested, the judgment of the trial court is supported by competent and substantial evidence and should be affirmed.

### **INTERVENORS' RESPONSE TO APPELLANTS' POINT RELIED ON III.**

**THE TRIAL COURT DID NOT ERR IN AWARDING INTERVENORS \$219,277.00 IN ATTORNEY'S FEES FROM ESSEX BECAUSE THE AWARD IS NOT EXCESSIVE, AND THE AWARD SHOULD NOT BE REDUCED.**

#### **Standard of Review**

Appellants' proposed standard of review is improper. It is well-established on appeal that the trial court is considered an expert on the question of attorneys' fees. *Roberds v. Sweitzer*, 733 S.W.2d 444, 447 (Mo. banc 1987). An award of attorneys' fees will not be disturbed on appeal absent a clear abuse of discretion. *Roberts v. McNary*, 636 S.W.2d 332, 338 (Mo. banc 1982), *rev'd on other grounds*, 820 S.W.2d 301. The setting of an award of attorneys' fees "is in the sound discretion of the trial court and should not be reversed unless the amount awarded is arbitrarily arrived at or is so unreasonable as to indicate indifference and a lack of proper judicial consideration." *Nelson v. Hotchkiss*, 601 S.W.2d 14, 21 (Mo. banc 1980); *see also Dominion Home Owners Ass'n v. Martin*, 953 S.W.2d 178, 182 (Mo. App. W.D. 1997).

In determining whether attorneys' fees are appropriate, "[t]he trial court is considered to be an expert on the question of attorney fees; the court that tries a case and is acquainted with all the issues involved may fix the amount of attorneys' fees without the aid of evidence." *Nelson*, 601 S.W.2d at 21 (internal quotations omitted); *see also Industry Financial Corp. v. Ozark Community Mental Health Center*, 778 S.W.2d 413, 417 (Mo. App. S.D. 1989). "When attorneys' fees are recoverable by contract or statute,

counsel is entitled to a reasonable fee unless otherwise specifically provided.” *Howard Constr. Co. v. Teddy Woods Constr. Co.*, 817 S.W.2d 556, 563 (Mo. App. W.D. 1991), *citing O’Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 71 (Mo. banc 1989) (emphasis added); and see *Next Day Motor Freight, Inc. v. Hirst*, 950 S.W.2d 676, (Mo. App. E.D. 1997).

**A. Appellants’ Substitute Brief Violates Rule 83.08 and Rule 84.04**

As a preliminary matter, in their Substitute Brief, Appellants seek to introduce a new argument by taking up the Court of Appeals’ opinion that Intervenors were not prevailing parties. This argument was not raised in Appellants’ briefs before the Court of Appeals and violates Rule 83.08 which states:

A party may file a substitute brief in this Court. The substitute brief shall conform with Rule 84.04, shall include all claims the party desires this Court to review, shall not alter the basis of any claim that was raised in the court of appeals brief, and shall not incorporate by reference any material from the court of appeals brief. Any material included in the court of appeals brief that is not included in the substitute brief is abandoned.

Appellants include, verbatim, in their Substitute Brief, their argument from the Court of Appeals Brief (that trial court’s award of attorneys’ fees is reasonable if reduced to \$100,000); but also now parrot the Court of Appeals’ unsupportable finding that Intervenors were not prevailing parties and are not entitled to attorneys’ fees.

A direct comparison of Appellants’ argument to the Court of Appeals (included in its substitute brief) to Appellants’ argument in this Court, illustrates that Appellants have altered the basis of their claim regarding attorneys’ fees:

Court of Appeals Argument –

- “Appellants request the Court to reduce the award of attorney’s fees to an amount which is reasonable under the circumstances. **Appellant believes a reduction to \$100,000.00 is reasonable and appropriate.**” (Appellant’s Sub. Brief, p. 54)
- “When these costs are reduced, the attorney’s fees award should also be reduced.” (Appellants’ Sub. Brief, p. 53)

Supreme Court Argument –

- This Court, as did the Court of Appeals, should review the award of attorney’s fees under all of the circumstances, specifically including the applicable determinations of law, and determine what amount, **if any**, should be awarded.” (Appellants’ Sub. Brief, p. 57)
- “Intervenors were not the prevailing party. They are **not entitled** to an award of attorney’s fees under the statute.” (Appellants’ Sub. Brief, p. 57)

Such a duplicitous argument cannot stand. First, in an effort to skate around the thin ice of a Rule 83.08 violation for altering the basis of their claim, Appellants try to convince this Court that when they claimed the trial court’s award of attorneys’ fees should be “reduced to \$100,000,” they meant that Intervenors are not entitled to attorneys’ fees. To redefine their prior argument, Appellants now explain their statement that “Appellant believes a reduction to \$100,000.00 is reasonable and appropriate,” (Appellants’ Sub. Brief, p. 54) was merely a “suggestion” not an admission. Call it what you will but Appellants’ Point Relied On III before the Court of Appeals acknowledged that Intervenors *were entitled* to attorneys’ fees, only that the *amount* should be reduced

to \$100,000. To now tell this Court that their argument was that Intervenors are not entitled to attorneys' fees (stated another way, entitled to \$0.00) is disingenuous and alters the basis of Appellants' claim raised in their Court of Appeals brief in violation of Rule 83.08.

One can only posit that Appellants do not completely abandon their "reduce to \$100,000" argument, so as to be able to tell this Court that they are not altering their argument but just informing this Court of what the Court of Appeals said. However, the Court of Appeals did not reduce the attorneys' fees; it said Intervenors were not entitled to them. Appellants want to now adopt the Court of Appeals' new theory that Intervenors did not prevail before the trial court.

In the end, this Court is left with two contradictory arguments: One that concedes that the trial court's award of attorneys' fees in the amount of \$100,000 would be reasonable and appropriate and another that attempts to convince this Court to ignore that concession and that an award of \$0.00 in attorneys' fees is the only award that is reasonable and appropriate. One that makes no claim of error by the trial court in awarding fees and one that does.

Missouri case law under Rule 83.08, however, reveals that this Court will not tolerate even the most subtle departures from the arguments presented to the Court of Appeals in substitute briefs presented to this Court. In *Lane v. Lensmeyer*, 158 S.W.3d 218 (Mo. banc 2005), this Court held that the appellants could not argue in the Supreme Court that a School District's collection of taxes was excessive based on an *100 percent* collection rate, where the appellants had previously argued in the lower courts that the

School District's collection of taxes was excessive based on a *94 percent* collection rate. *Id.* at 229-30. This shift in the appellants' theory "'altered the basis' for their claim in violation of 83.08(b)." *Id.* at 230. The instant case is not nearly as close as the case in *Lane*, where the appellant retained its overall legal theory that the School District's collection of taxes was excessive, but altered the underlying basis of the calculations supporting its theory. Here, the Appellants try to challenge the trial court's award of attorneys' fees on a completely new legal theory that clearly violates Rule 83.08. *Id.*; *see also Linzenni v. Hoffman*, 937 S.W.2d 723, 727 (Mo. banc 1997) ("On transfer to this Court, an appellant may not 'alter the basis of any claim that was raised in the brief filed in the court of appeals'" by inserting issues that were not raised in the brief before the court of appeals) and *see also, State ex rel. Zobel v. Burrell*, 167 S.W.3d 688, 691 (Mo. banc 2005) (alteration of the appellant's argument in challenging § 578.018 RSMo. was thought to be a violation of 83.08(b) meriting striking of the brief, but for the "unique situation" that the case was expedited below and written briefs were not submitted to the Court of Appeals).

Furthermore and just as important, Appellants fail to conform to the briefing requirements of Rules 83 and 84. Rule 83.08(b) provides, in part, "The substitute brief shall conform with Rule 84.04..." Rule 84.04(e) in turn provides that the "argument shall be limited to those errors included in the 'Points Relied On.'" Where the argument section under a Point Relied On contains "arguments which do not relate to the errors alleged in that point .... [the Appellate Court] will not consider these arguments, as they are not properly presented for our review." *Capital One Bank v. Hardin*, 178 S.W.3d

565, 572, n.3 (Mo. App. W.D. 2005); citing *Schmidt v. Warner*, 955 S.W.2d 577, 584 (Mo. App. S.D. 1997) (“Issues to which an appellant alludes only in the argument portion of his brief are not presented for review.”); see also, *Stickley v. Auto Credit, Inc.*, 53 S.W.3d 560, 563 (Mo. App. W.D. 2001).

Appellant’s Point Relied On III states:

The Trial Court erred in awarding Intervenors \$219,277.00 in attorneys’ fees because the award is excessive, in that the award should be reduced because the amount of the underlying judgment should be reduced as provided in Point Relied on I.

Appellants’ new arguments under Point Relied On III fail because this Point simply cannot be fairly read to include an argument that Intervenors are not prevailing parties and not entitled to attorneys’ fees (or as the Appellant would put it, Intervenors are entitled to attorneys’ fees in the reduced amount of \$0.00). For example, Appellants’ original brief and “Standard of Review”<sup>9</sup> in its Substitute Brief argue that the issue before the Court on appeal is whether *the amount* of fees awarded is *reasonable*. But, in the second half of Point Relied On III in their Substitute Brief, Appellants make an about-face and suddenly begin arguing that the Court is to review whether the trial court’s

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<sup>9</sup> Appellants cite *Knopke v. Knopke*, 837 S.W.2d 907 (Mo. App. W.D. 1992) as the proper standard of review for the review of the award of attorneys’ fees in this case. While Intervenors disagree that it is the proper standard, even if it was correct, *Knopke* involved a ratable reduction in attorneys’ fees (25%) not a reduction to zero.

award of attorneys' fees was arbitrary and capricious, unsupported by competent and substantial evidence, a manifest injustice and a miscarriage of justice—none of which claims are contained in the error alleged in Point Relied On III. Appellants' Sub. Brief, p. 56, 58. One would think that if Appellants had believed there was a "manifest injustice and a miscarriage of justice" perpetrated by the trial court, they would have included such a claim in their point relied on.

In sum, Appellants' arguments under Point Relied On III that the Intervenors are not entitled to attorneys' fees because they were not a "prevailing party" is an extraneous argument not presented in its Point Relied On III and thus, is not presented for review. Rule 84.04(e).

**B. Response to New Claim that Intervenors were not "Prevailing Parties"**

To the extent that the Court desires a response to this newly raised argument by Appellants, Intervenors state that the new issues are specious and the trial court was correct in holding that Intervenors are prevailing parties in that they were aggrieved parties entitled to their attorneys' fees for the following reasons:

Initially, it should be noted that Appellants erroneously rely on the cases of *State ex rel. Div. of Transp. v. Sure-way Transp., Inc.*, 948 S.W.2d 651, 655 (Mo. App. W.D. 1997) and *Hinton v. Director of Revenue*, 21 S.W.3d 109, 111-112 (Mo. App. W.D. 2000) to articulate the standard under which this Court should review the trial court's award of attorneys' fees, alleging that it is some sort of *de novo* review. The standard articulated in *Sure-way* and incorporated by *Hinton* came from § 536.087 RSMo., and dealt with judicial reviews of administrative decisions made by state agencies. *See Id.*

The *Sure-way* and *Hinton* cases are inapposite because they involved awards of attorneys' fees made *against* state agencies that cannot be made absent a waiver of sovereign immunity, which must be strictly construed. *Hinton*, 21 S.W.3d at 112. A waiver of sovereign immunity is not needed to award attorneys' fees against Appellants. The instant case is not an administrative review case, attorneys' fees were not awarded against a state agency, and the standard stated in *Sure-way* and *Hinton* are inapplicable; the correct standard of review is stated above.

As to the "merits" of Appellant's new argument, it is meritless. Intervenors in fact were prevailing parties and thus were entitled to attorneys' fees. Intervenors' Petition pleaded that "Essex has failed to comply with the County's Subdivision Regulations, Zoning Orders, standards, and/or ordinances" and that as a result, Intervenors were aggrieved and entitled to have the violations corrected, the imposition of civil penalties, as well as their costs and attorneys' fees. LF Tab 3, Count IV, paragraphs 84-88.

The trial court agreed, finding that Essex "violated the County's Subdivision Regulations and the standards thereunder" and "that the Intervenors and class of lot owners are aggrieved parties and **are entitled to relief** under §89.491 and §64.895." Appellants' Sub. Appx. pp. A31 (Judgment, p. 31) (emphasis added). The trial court was very clear that it was granting relief to Intervenors pursuant to §§89.491 and 64.895.

In addition, in response to Intervenors' Count V, the trial court expressly found that "**Intervenors are entitled to relief** as third party beneficiaries as specifically identified within the language of the Bonds themselves." Appellants' Sub. Appx. p. A20 (Judgment, p. 20).

Thus, the trial court's judgment made it abundantly clear that Intervenor, as well as the County, prevailed when the trial court also "Ordered and Adjudged" that the "County and Intervenor are entitled" to the bond proceeds and that "the civil penalties for thin slabs in the amount of \$102,174.65 are assessed against Essex and Federal to be paid out of the proceeds of the Bonds." Appellants' Sub. Appx. pp. A32 (Judgment, p. 32). The trial court expressly found that "Intervenor are third-party beneficiaries to the terms of the Bond and Guarantee Agreement." Appellants' Sub. Appx. pp. A19 (Judgment, p. 19). The trial court's authority to grant civil penalties comes from §89.491.

Similarly, Appendix E of the County's Subdivision Regulations provides that any civil penalties collected by the County for deficient pavement thickness are to be paid to the applicable homeowners association for its benefit. Specifically, Appendix E says that for "any core measurement of thickness [that] is deficient by *more than* 0.3 inches, the subdivider/developer will have the option of removing and replacing the pavement, or leaving the pavement in place and making a cash deposit *into a Special Escrow Account* to be established by the County Commission" and that the "County Commission *shall pay the funds* it has held in the special escrow *to the Subdivision Property Owners Association.*" Appellant's Sub. Appx. p. A82-A85 (emphasis added). Thus, Intervenor also prevailed when the trial court found that Appellants were liable for the thin slabs and ordered payment under Appendix E.

Finally, to the extent that the Appellants are truly only arguing that the trial court's award of attorneys' fees should be reduced, substantial evidence simply cannot support

an award of attorneys' fees to Intervenors in an amount less than \$100,000. Appellants' statement in their substitute brief that "Appellant believes a reduction to \$100,000.00 is reasonable and appropriate" (Appellants' Sub. Brief, p. 54), works as an admission to the question of the reasonableness of the attorneys' fees awarded by the trial court. *Williams v. Ford Motor Co.*, 454 S.W.2d 611, 615 (Mo. App. W.D. 1970) (Defendants' statements in reply brief constituted admissions by defendant); *see also Mitchell Eng'g Co., a Div. of CECO Corp. v. Summit Realty Co.*, 647 S.W.2d 130, 142 (Mo. App. W.D. 1982). ("[B]riefs filed in proceedings on appeal are to be accorded recognition as valid and acceptable sources of such admissions the same as pleadings, stipulations, affidavits and other writings.") Such admission is binding on Appellants and precludes them from now maintaining a contrary or inconsistent position. *Fairley v. St. Louis Public Service Co.*, 389 S.W.2d 378, 380 (Mo. App. 1965). While Intervenors believe and maintain that they are entitled to the full amount of attorneys' fees awarded by the trial court, there is simply no basis to award Intervenors less than \$100,000.00, even under Appellants' restated arguments in their Point Relied On III.

### **C. Irrelevant Arguments and References Should be Struck or Disregarded**

Appellants inappropriately use their brief to defend the Court of Appeals' opinion below and attack the "merits" of Intervenors' application for transfer and this Court's grant thereof. This Court's Rules are very clear on the proceedings regarding applications for transfer. "No response to an application for transfer shall be filed unless requested by the Court." Rule 83.04. This Court did not ask Appellants for a response to the Intervenors' application for transfer. Despite the lack of an invitation from this Court,

Appellants nevertheless attempt to utilize their brief to provide their response. Inexplicably, Appellants continually cite to the Intervenor's application for transfer within their substitute brief, despite the fact that the application for transfer is not the subject of review before this Court.

Furthermore, Appellants repeatedly refer to and rely on the holding of the Court of Appeals below despite the fact that the Court of Appeals' opinion, upon transfer to this Court, carries no precedential value and has no effect whatsoever. *See e.g., Philmon v. Baum*, 865 S.W.2d 771, 774 (Mo. App. W.D. 1993) (decision of Court of Appeals in a case subsequently transferred to the Supreme Court is of no precedential effect.); *State v. Norman*, 380 S.W.2d 406, 407 (Mo. banc 1964) (where case was transferred to Supreme Court after opinion by Court of Appeals, "Court of Appeals' opinion and decision would be necessarily vacated and set aside and deemed *functus officio*."); *see also Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 109 (Mo. banc 1989) ("A court of appeals opinion ordinarily passes into limbo with the transfer of the case to this Court...").

While it is understandable that Appellants would want to cling to the ruling rendered to it by the Court of Appeals, this stage of the proceeding simply provides no venue for review or defense of the Court of Appeals' opinion. Appellants need only present their claims anew to this Court, without regard to the Court of Appeals' opinion below. Mo. Const. Art. V, § 10 ("The supreme court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, **the same as on original appeal.**") (emphasis added); *see Collins v. Division of Welfare*, 270

S.W.2d 817, 818 (Mo. banc 1954) (where appeal of case had been transferred by the Supreme Court from the Court of Appeals because of importance and interest of questions involved, Supreme Court would consider cause as if appeal had been direct from Circuit Court to Supreme Court). The portions of Appellants' Substitute Brief that refer to Intervenor's application for transfer and rely on the Court of Appeals' opinion below should be struck, or at least disregarded, by this Court as irrelevant to the matters at hand.

**D. The Trial Court Award of Attorneys' Fees to Intervenor was Proper**

Finally, as to Appellants' original argument in Point Relied On III, Intervenor state as follows:

As stated in Appellants' original claim of error, Appellants do not dispute that Intervenor are entitled to the award of attorneys' fees. Their only claim is that the attorneys' fees should be reduced from \$219,277 to \$100,000 and they completely predicate their claim upon their success in challenging the underlying award. (*See* Appellants' Sub. Brief, pp. 52 (standard of review) and 53: "When these costs [of completion for subdivision awarded by trial court] are reduced, the attorney's fees award should also be reduced.") Their argument for reduction is that, while Appellants agree that the trial court correctly awarded the County and Intervenor \$102,174.65 in damages "to adjust for the thin sections of the concrete streets," the trial court should not have granted \$219,277 in attorneys' fees to Intervenor because that amount was tied also to the additional award for displaced slabs. Appellants' Sub. Brief, pp. 53-54. For the reasons set forth in Intervenor's response to Appellants' first Point Relied On, the trial

court was correct in finding that not only were *thin* slabs a violation of the Bonds, Guarantee Agreement, and County standards as Appellants concede, but so were the displaced and failing slabs. Moreover, the fact that there were violations of the regulations for thickness of the concrete is enough alone to justify the full grant of attorneys' fees. Appellants have no evidence to support their claim for reducing the fees, but rather suggest an arbitrary slash of one-half of the attorneys' fees.

Intervenors' right to attorneys' fees stems from Sections 89.491 RSMo. and 64.895 RSMo.<sup>10</sup> Section 89.491 mandates the grant of Intervenors' attorneys' fees when it uses the word "shall." When attorneys' fees are recoverable by contract or statute, counsel is entitled to a reasonable fee unless otherwise specifically provided. *Howard Constr. Co. v. Teddy Woods Constr. Co.*, 817 S.W.2d 556, 563 (Mo. App. W.D. 1991).

The trial court found that: (a) Intervenors and all class members were aggrieved parties (LF 29); (b) Section 89.491 entitles the Intervenors, as an aggrieved party, to

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<sup>10</sup> Sections 89.491 and 64.895 RSMo. provide similar remedies to property owners aggrieved or affected by violations of zoning orders, regulations, standards or restrictions made and adopted under the provisions Chapter 64 and give the court authority to remedy same. Statutes that relate to the same subject or matter are considered *in pari materia* and are construed together as though constituting one act and are intended to be read consistently and harmoniously in their several parts and provisions. *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991).

bring suit against anyone who violates “any standard, regulation, or ordinance which has been adopted by any county ... pursuant to chapter 64, RSMo., or this chapter....” (LF 29); (c) Jefferson County’s Subdivision Regulations were adopted pursuant to Chapter 64 RSMo. and apply within the unincorporated parts of the County. (Essex Trial Ex. 4 at §1.2); (d) there were violations of those regulations and the Guarantee entered pursuant thereto in that the Subdivision Regulations provided specific requirements for street thicknesses that were not met, and in that the County standards for streets were not met, as evidenced by the testimony of Mr. Koehrer because they have displacement and premature failures; and “that the Intervenor and class of lot owners are aggrieved parties and are entitled to relief under §89.491 and §64.895.” Appellants’ Sub. Appx. pp. A31 (Judgment, p. 31). LF 29.

The trial court was also within its discretion in the amount of its award. “In determining the amount of reasonable attorneys’ fees, consideration should begin with the rates customarily charged by the attorneys involved and by other attorneys in the community for similar services.” *Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175, 184 (Mo. App. W.D. 2002). “Evidence of payment of professional services is substantial evidence that the charges incurred were reasonable and necessary.” *Howard Const.*, 817 S.W.2d at 564. Furthermore, “evidence that a party has paid a particular amount of attorneys’ fees does constitute prima facie evidence of the reasonableness of those fees.” *Eagle v. Redmond Building Corp.*, 946 S.W.2d 291, 293 (Mo. App. W.D. 1997) (emphasis original).

The Intervenor has incurred and paid invoices for attorneys’ fees for several

years as a result of this protracted litigation. Lauren Monge testified that the Intervenors had incurred and paid attorneys' fees in the amount of \$193,910.86 before the trial or trial preparation began. Tr. 521. He also testified that the class would incur further expenses as a result of the trial of the matter. Tr. 522. Mr. Monge's testimony alone is *prima facie* evidence that the fees incurred and paid were reasonable, especially in light of the seven years' duration of the litigation and the number of parties involved. At the trial court's direction after trial, Intervenors filed a Motion for Attorneys' Fees, a Memorandum in Support of their Motion for Attorneys' Fees with supporting invoices, an Application for Attorneys' Fees with supporting affidavit, and a full hearing, at which Counsel for Intervenors testified, was held on Intervenors' attorneys' fees. Tr. 591-621.

The record is replete with evidence establishing not only the amount of attorneys' fees, but also the reasonableness of such fees. While Essex suggests that the Intervenors attorneys' fees should be reduced, such a result is completely unsupported by the evidence. The trial court is an expert on attorneys' fees and sets the appropriate amount of attorneys' fees. *Industry Financial Corp.*, 778 S.W.2d at 417.

In the end, Appellants readily admit that Intervenors are entitled to an award of attorneys' fees, they simply don't like the amount the trial court awarded. But, Appellants have shown nothing in the record that would justify a reduction in the trial court's award of attorneys' fees or that would indicate a clear abuse of discretion by the trial court or that the court's award was so arbitrary or unreasonable as to be a sign of indifference or lack of proper judicial consideration. *Dominion Home Owners Ass'n v. Martin*, 953 S.W.2d at 182. The judgment of the trial court should be affirmed.

**INTERVENORS' RESPONSE TO APPELLANTS' POINT RELIED ON IV.**

**THE TRIAL COURT'S JUDGMENT IN AWARDING ESSEX \$7,088.00 IN ATTORNEY'S FEES AGAINST BERRA AND \$17,013.00 IN ATTORNEY'S FEES AGAINST BOLING IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE.**

Intervenors do not believe that Appellants' Fourth Point Relied On relates in any way to the Intervenors' case. However, to the extent this Point does relate to Intervenors' case or the Court believes a response is suggested, the judgment of the trial court is supported by competent and substantial evidence and should be affirmed.

**INTERVENORS' RESPONSE TO APPELLANTS' POINT RELIED ON V.**

**THE TRIAL COURT DID NOT ERR IN AWARDING INTERVENORS' COSTS IN THE AMOUNT OF \$35,875.00 BECAUSE THE COSTS AWARDED WERE COSTS PAID BY THE TRUSTEES, WHO ARE PARTIES TO THIS ACTION, AND THE COSTS AWARDED WERE FOR REPAIRS OF THE PREMATURELY FAILING STREETS.**

**Standard of Review**

On appeal of a court-tried case, this Court's review is governed by Rule 84.13(d). *Burkholder ex rel. Burkholder v. Burkholder*, 48 S.W.3d 596, 597-98, n.5 (Mo. banc 2001). This Court must affirm the trial court's judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). It is fundamental that on appeal the trial court's action is presumed to be correct and the burden is on the appellant to establish that the action was error. *Linzenni v. Hoffman*, 937 S.W.2d 723, 725 (Mo. banc 1997); citing *Hardy v. McNary*, 351 S.W.2d 17, 20 (Mo. 1961). The presumption of validity that surrounds a judgment extends to every essential fact that must have existed in order for the court to enter a valid decree. *Id.* In reviewing a court-tried case, "the evidence, and permissible inferences therefrom, are viewed in the light most favorable to the judgment disregarding all contrary evidence and inferences." *Burkholder*, 48 S.W.3d at 597-98. "On appeal of a court-tried case, the appellate court defers to the trial court on factual issues because it is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character

and other trial intangibles which may not be completely revealed by the record.” *In re Adoption of W.B.L.*, 681 S.W.2d 452, 455 (Mo. banc 1984). “As the trier of fact, the trial court has leave to believe or disbelieve all, part or none of the testimony of any witness.” *Id.* The judgment of the trial court “will be affirmed if cognizable under any theory, regardless of whether the reasons advanced by the trial court are wrong or not sufficient.” *Business Men's Assur. Co. of America v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999); *see also Felling v. Giles*, 47 S.W.3d 390, 393 (Mo. App. E.D. 2001).

### **Argument**

Appellants’ argument that the *Intervenors* did not pay costs for street repairs in the amount of \$35,875.00, but that those costs were incurred by the *trustees*, who were not named parties, is wholly without merit. Lauren Monge, who is a trustee of the Subdivision, testified, and the pleadings and evidence reflects, that the *Intervenors* intervened not only as residents of the County and lot owners in the Subdivision, but also as representatives of the unincorporated entity governed by the trustees of the Subdivision and denominated by the developer trustees as the Winter Valley Homeowners Association (“Association). Tr. 495, 529-30; LF 3; *Intervenors’ Sub. Appx.* p. 67.

While this Association was never legally incorporated, it was established by the developer trustees as the nomenclature for the “trustees” who governed the Subdivision and in which all lot owners in the Subdivision had membership. Tr. 498; *Appellants’ Sub. Appx.* pp. A103-A123. Specifically, the unrefuted evidence was that the trustees

serve as the governing body for the Subdivision and have been and are commonly referred to as governing the Winter Valley Homeowners Association. Tr. 498; Intervenor's Sub. Appx. p. A67. So, because the trustees and the Association are one in the same, contrary to Appellants' assertion, the "trustees" are party to the suit.

Missouri courts have recognized homeowners associations as being the proper vehicle for collectively enforcing and protecting the rights of the lot owners in a subdivision development. See *Lake Arrowhead Property Owners Ass'n v. Bagwell*, 100 S.W.3d 840, 842-43 (Mo. App. W.D. 2003); *Chesus v. Watts*, 967 S.W.2d 97, 108 (Mo. App. W.D. 1998); *Terre Du Lac Ass'n v. Terre Du Lac, Inc.*, 737 S.W.2d 206 (Mo. App. E.D. 1987). Even if the Court did not believe that the trustees and the Association were not the same (and there is no testimony to the contrary), the Association (governed by trustees) is in the case and can accept the money on behalf of the class (lot owners and members of the Association).

And, while it may be true that as a general rule, that suits *involving trust property*, require the trustees as necessary parties, there is no "trust property" involved in the strict sense. The trustees are not involved in this suit over specific trust property, but merely suing to enforce the Guarantee and for violations of the County's standards. The Appellants' argument is meritless.

The trial court did not err in awarding Intervenor's costs in the amount of \$35,875.00, as those costs were incurred as a direct result of the defective and deficient streets that Essex has never completed in the Subdivision. Accordingly, the judgment of the trial court should be affirmed.

## **INTERVENORS' RESPONSE TO APPELLANTS' POINT RELIED ON VI.**

**THE TRIAL COURT DID NOT ERR IN ORDERING THAT THE COUNTY AND INTERVENORS ARE ENTITLED TO HOLD AND USE THE BONDS TO GUARANTEE COMPLETION OF THE SUBDIVISION IMPROVEMENTS IN ACCORDANCE WITH THE PLANS, SPECIFICATIONS AND SUBDIVISION REGULATIONS.**

### **Standard of Review**

On appeal of a court-tried case, this Court's review is governed by Rule 84.13(d). *Burkholder ex rel. Burkholder v. Burkholder*, 48 S.W.3d 596, 597-98, n.5 (Mo. banc 2001). This Court must affirm the trial court's judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). It is fundamental that on appeal the trial court's action is presumed to be correct and the burden is on the appellant to establish that the action was error. *Linzenni v. Hoffman*, 937 S.W.2d 723, 725 (Mo. banc 1997); citing *Hardy v. McNary*, 351 S.W.2d 17, 20 (Mo. 1961). The presumption of validity that surrounds a judgment extends to every essential fact that must have existed in order for the court to enter a valid decree. *Id.* In reviewing a court-tried case, "the evidence, and permissible inferences therefrom, are viewed in the light most favorable to the judgment disregarding all contrary evidence and inferences." *Burkholder*, 48 S.W.3d at 597-98. "On appeal of a court-tried case, the appellate court defers to the trial court on factual issues because it is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character

and other trial intangibles which may not be completely revealed by the record.” *In re Adoption of W.B.L.*, 681 S.W.2d 452, 455 (Mo. banc 1984). “As the trier of fact, the trial court has leave to believe or disbelieve all, part or none of the testimony of any witness.” *Id.* The judgment of the trial court “will be affirmed if cognizable under any theory, regardless of whether the reasons advanced by the trial court are wrong or not sufficient.” *Business Men's Assur. Co. of America v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999); *see also Felling v. Giles*, 47 S.W.3d 390, 393 (Mo. App. E.D. 2001).

## **Argument**

### **A. Appellants’ Point Relied On VI Should Be Dismissed**

Appellants’ Point Relied On VI asserts that the trial court erred in ordering that the County and Intervenors are “entitled to hold the Bonds to guarantee completion ...” because the Court’s order requires alteration of the terms of the Bonds and the Guarantee beyond their plain language because the Bonds and the Guarantee provide that Federal is to complete all the improvements.

The entire Sixth Point Relied On rests on Appellants’ complete misapplication of one phrase of the Court’s order—that the County was “entitled to hold the Bonds to guarantee and to complete such improvements.” Appellants’ Sub. Brief, p. 66. Appellants challenge this order of the trial court as a grant of affirmative relief in violation of the language of the Bonds. But, instead of granting relief to the County or Intervenors, the quoted phrase was expressly rejecting Essex’s claim in its pleadings that the County should have been required to release the bonds that it was already holding!

That the County was physically “holding” the Bonds is acknowledged by Essex in its Petition where it prayed for the court to “release plaintiff from its obligations under the three (3) bonds *and deliver the originals of said bonds to Plaintiff.*” LF 2. To better illustrate the Court’s reasoning, the entire paragraph containing the challenged phrase, as well as the paragraph before and the one following, are reproduced below:

IT IS HEREBY ORDERED AND ADJUDGED that Essex has violated the County’s Subdivision Regulations and the standards thereunder and is in default of the Guarantee Agreement in the Subdivision in that it failed to properly complete the Subdivision improvements in the time provided in the Subdivision Regulations and Guarantee Agreement including the Subdivision streets and related improvements.

IT IS FURTHER ORDERED AND ADJUDGED that it was the responsibility of Essex, and not the County or the Intervenors, to complete the Subdivision improvements and the County and Intervenors are entitled to hold the Bonds to guarantee and complete such improvements.

IT IS FURTHER ORDERED AND ADJUDGED that Essex and Federal, jointly and severally, are ordered to pay the entire remainder of the Bonds in the amount of \$1,015,838.00 to the County pursuant to the terms of the Bonds, the Guarantee Agreement, and Subdivision Regulations so the County may complete the Subdivision improvements consistent with the County’s and Intervenors’ evidence of deficiencies and in accordance with the Subdivision Regulations and approved plans.

The import of the trial court's order in the challenged second paragraph above is that it was a denial of Essex's claim in its Petition that the "original" Bonds should have been released by the County and delivered to Essex. To that end, the trial court pronounced that it was Essex's responsibility to complete the Subdivision, and having failed to do so, the County was "entitled to hold," that is, *not release*, the Bonds, such action being proper under the Bonds and Guarantee Agreement. Further demonstrating the trial court's clear reasoning, is that the Court then went on to order (third paragraph above) that the entire amount of the Bonds be paid to the County to complete the improvements—something it would not do if it only intended for the County to continue to "hold" the Bonds it already possessed.

As a result, the entire point relied on therefore challenges only the second clause of the grant of relief that relates only to Essex's claim against the County for failure to release. Appellants' Sixth Point Relied On should therefore be dismissed. *Thummel v. King*, 570 S.W.2d 679, 685 (Mo. banc 1978). Alternatively, even if the trial court's choice of wording could have been more precise, the intent of the Judgment is clear and this Court's concern on review is whether the trial court reached the proper result, not the route by which it reached that result. *Felling v. Giles*, 47 S.W.3d 390, 393 (Mo. App. E.D. 2001); *citing Corrigan v. Armstrong, Teasdale, et al.*, 824 S.W.2d 92, 94 (Mo. App. E.D. 1992).

**B. Point Relied On VI Relies on Language in the Bond that Doesn't Exist<sup>11</sup>**

Even if the Point Relied On survives the aforementioned scrutiny, it is still incorrect because the Bonds and Guarantee simply do not say that the Bonds “will remain in effect to allow the surety to complete all of the required improvements in accordance with the plans, specifications and Subdivision Regulations that Federal is to be allowed to complete the required improvements” as averred in Appellants’ Sixth Point Relied On.

As a preliminary, but important, matter, Appellants’ acknowledge that the obligations of Essex and Federal are co-extensive in that Essex is bound on the Guarantee to the County to complete the Subdivision improvements according to the plans, specifications and Subdivision Regulations and that Federal is bound to the County in the

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<sup>11</sup> Intervenors are not sure of the status of this Point Relied On VI in that, in their Reply Brief presented to the Court of Appeals, Appellants withdrew their argument about the use of bonds for payment of the award:

“Appellants hereby withdraw their argument in Point Relied on VI that if these amounts [award for repair or replacement of cracked street section, reimbursement of costs, and attorneys’ fees] are affirmed, or reduced amounts awarded, that they cannot be paid from the Bonds. Appellants stipulate that whatever amounts, if any, are awarded to Intervenors or the County, these amounts may be paid from the Bonds.”

Reply Brief of Appellants, p. 19.

same manner as the principal for such completion. Appellants' Sub. Brief, p. 29. Based on this, Appellants' Point Relied On VI is easily rejected.

Simply put, the trial court's disposition of the proceeds of the Bonds was in conformity with the specific terms of the agreements and Missouri law. The Bonds state on their face that the Bonds are to "indemnify" the County and "secure"<sup>12</sup> to the County the actual construction of the improvements "in a manner satisfactory to [the] County, in the event [Essex] shall fail to install said improvements and utilities" within the time frame allotted. The Bonds in no way limit or restrict the County (or the Court) on what manner it requests the surety to indemnify or secure the completion. Said another way, Federal cannot look to the Bonds for some limitation on its liability—it just does not exist under the terms of the Bonds. Sureties for hire are not favored under the law and the surety bond is to be construed most favorably to an obligee and against a surety. See *State ex rel. Hardy v. Farris*, 47 S.W.2d 198 (Mo. App. 1932), and *Kreski v. Continental Cas. Co.*, 908 S.W.2d 917, 920 (Mo. App. E.D. 1995). The rights and liabilities of a surety are measured by those of the principal, absent an agreement to the contrary. *City of Independence ex rel. Briggs v. Kerr Constr. Paving Co.*, 957 S.W.2d 315, 319 (Mo. App. W.D. 1997). Appellants have identified no agreement that limits the liability of Federal in relation to its principal Essex. There being no agreement otherwise, Federal's liability is the same as Essex's. *Id.*

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<sup>12</sup> Two of Bonds say "indemnify" and "secure" (Appellants' Sub. Appx. pp. A49-A59), while the third simply says "secure" (Appellants' Sub. Appx. pp. A60-64).

It follows then, that because Essex agreed in the Guarantee Agreement that the County had the right to complete the Subdivision improvements should Essex fail to do so, that the County is entitled to make a claim for and use the bonds to secure the construction of the improvements. Appellants' Sub. Appx. pp. A65-A66 (Guarantee Agreement, paragraph 4, provides that surety shall disburse as ordered and directed by the County). This is exactly what the County attempted to do. After having estimated the cost of completion by the County to be \$1,015,837.79, Mr. Koehrer of the County notified Federal by letter dated October 30, 2001, of the County's claim under the Bonds. The letter stated the basis of the claim – that “the improvements have not been completed....” LF 29; Intervenor's Sub. Appx. p. A17. The bonding company, Federal Insurance Company, never disbursed the Bond funds as ordered. LF 29.

It was completely reasonable for the trial court to order that time had run out on Federal to make the payment requested by the County in 2001, and as Federal promised under the Bonds should Essex fail to complete the improvements.

Finally, the trial court was correct in ordering the County's cost of supervising the repairs, the cost of Intervenor's repairs of prematurely failing streets as well as Intervenor's attorneys' fees. The County's subdivision improvement guarantee process authorized by its Subdivision Regulations was put into place to provide for and secure to the County Commission “*the actual construction of the improvements and utilities within a period specified.*” Section 64.895.2 RSMo. (emphasis added). Based on that principle, the trial court ordered the Bonds to be used by the County to complete the Subdivision

improvements *and to correct the violations* of the County’s standards, regulations, or ordinances under the authority granted by Sections 89.491 and 64.895 RSMo.

Simply put, the trial court determined that the County’s process pursuant to the Subdivision improvement guarantee process should proceed as established in the Guarantee Agreement and Subdivision Regulations. Sections 89.491 and 64.895 RSMo. are the vehicle for this relief—expressly granting the trial court the authority to enforce the standards, regulations and ordinances and order correction of the violations thereunder. The trial court simply ordered the Bond funds forfeited due to Essex’s default under the Bonds and Guarantee Agreement and ordered that the County, as provided in the Guarantee Agreement, complete the Subdivision improvements.

Appellants’ irrelevant complaint that the court’s order “cannot be implemented by the parties” is true, but not for the reason stated by Appellants. The trial court’s order does not contemplate the “parties” (i.e., Essex or Federal) being involved in its implementation or having any oversight of the Subdivision improvements – rather, only the County has the authority to implement the trial court’s order. LF 29. Essex and Federal now want a say in how the Subdivision improvements should be completed – which is unfortunate, since they had their chance for the past 12 years to do so.

### **ADDITIONAL ARGUMENT**

#### **MOTION FOR ATTORNEYS’ FEES ON APPEAL**

Pursuant to Sections 89.491 RSMo. and 64.895 RSMo, Intervenors/Respondents hereby move this Court for an additional order for attorneys’ fees on appeal. As

previously addressed herein, the trial court awarded Intervenor attorneys' fees for six years of litigation.

“A parties' entitlement to attorneys' fees on appeal stands upon the same ground as that at the trial court level.” *Vogt v. Emmons*, 181 S.W.3d 87, 97-98 (Mo. App. E.D. 2005) (Where party was entitled to attorneys' fees pursuant to Hancock Amendment in trial court, parties was also entitled to attorneys' fees on appeal where party was successful at appellate level.) Furthermore, an appellate court has the authority to allow and fix the amount of attorneys' fees on appeal. *Knopke v. Knopke*, 837 S.W.2d 907, 924 (Mo. App. W.D. 1992). Courts are considered experts on the subject of attorneys' fees and this expertise extends to the value of appellate services. *Heshion Motors, Inc. v. Western Int'l Hotels*, 600 S.W.2d 526, 541 (Mo. App. W.D. 1980).

Intervenor have incurred substantial expense in responding to Appellants' appeal. To date, Intervenor have incurred legal fees, which fees have been necessarily incurred as a direct result of this appeal. As such, Intervenor move this Court for an order for an award of attorneys' fees on appeal in such amount as established by authority of this Court or by cost bill, in addition to the attorneys' fees awarded by the trial court, as expressly authorized by Sections 89.491 and 64.895 RSMo.

### **CONCLUSION**

Essex has failed to complete the Subdivision improvements in accordance with the Subdivision Regulations and Approved Plans and has also breached its contractual obligations to the County by virtue of the Bonds and Guarantee Agreement. Essex further failed to meet its burden of proof by failing to produce any evidence that it did

complete the Subdivision improvements, including a failure to produce any expert evidence in support of its position, either in its case-in-chief or on rebuttal.

The trial court properly found that Essex violated the County's Subdivision Regulations and standards and is in default under the Guarantee Agreement by failing to properly complete the Subdivision improvements, that the County and Intervenors are entitled to relief including use of the remainder of the Bonds by the County to complete the Subdivision improvements. The trial court also properly ordered civil penalties for thin slabs in the amount of \$102,174.65 against Appellants to be paid out of the Bonds. Finally, the trial court awarded costs against Appellants in the amount of \$35,875.00 for Intervenors' costs for work performed to repair the prematurely failing streets, as well as Intervenors' attorneys' fees in the amount of \$219,277.00 against Appellants, \$7,088.00 against Berra and \$17,013.00 against Boling. The trial court's award should be affirmed for all the reasons set forth herein and because it is supported by competent and substantial evidence.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 14<sup>th</sup> day of October, 2008, one (1) copy of the Respondents/Intervenors' Brief in the form specified by Rule 84.06(a) and one (1) copy of Respondents/Intervenors' Brief in the form specified by Rule 84.06(g) were mailed, postage prepaid (unless otherwise requested), to the following counsel of record:

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**CERTIFICATE PURSUANT TO SUPREME COURT RULE 84.06(c)**

The undersigned hereby certifies that this Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains \_\_\_\_\_ words, excluding the cover, the Table of Contents, the Table of Authorities, the Certificate of Service, this Certificate, the signature block, and the Appendix, according to the word processing system used to prepare this Brief. The undersigned further certifies that the disk containing the Brief has been scanned for viruses and is virus-free.

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