IN THE SUPREME COURT OF MISSOURI

No. SC94693

THE ARBORS AT SUGAR CREEK HOMEOWNERS ASSOCIATION, et al.,

Plaintiffs/Appellants,

v.

JEFFERSON BANK & TRUST COMPANY, INC., et al.,

Defendants/Respondents.

Appeal from the Circuit Court of St. Louis County
Hon. Gloria C. Reno & Hon. James R. Hartenbach (ret.)

SUBSTITUTE BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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JURISDICTIONAL STATEMENT

Plaintiffs/Appellants, a group of homeowners in a St. Louis County subdivision, bring this appeal from the trial court's adverse judgment in favor of defendants—a bank and its developer. After a four-day evidentiary hearing, the trial court found, among other things, that the bank's executives were proper members of the board of the governing homeowners association (in contravention of the subdivision's written declaration of covenants and restrictions) and that the houses defendants planned to construct within the subdivision (and approved by the bank's "independent" executives serving as board members) complied with the requirements of the subdivision's recorded declaration of covenants and restrictions. (Appendix ("A") 2-28.) The trial court subsequently entered final judgment on all claims and counterclaims on January 22, 2013, including granting summary judgment to plaintiffs on the bank's counterclaims against them. (A29-31.) Plaintiffs filed a timely notice of appeal on March 1, 2013. (L.F. 1414.)

The Missouri Court of Appeals, Eastern District, filed its opinion and judgment on October 18, 2014 ("Ct. App. Op."), affirming in part and reversing in part the judgment of the trial court and remanding the case to the trial court. Defendants/Respondents' motion for rehearing or transfer to this Court was denied on December 15, 2014 by the Court of Appeals. This Court sustained Defendants' application for transfer on February 3, 2015.

INTRODUCTION

The individual plaintiffs in this case are the owners of five homes in the Arbors at Sugar Creek Subdivision, an 18-lot residential subdivision in Des Peres, Missouri (the "Subdivision"). (L.F. 20; A32.) The Subdivision is governed by a recorded indenture, called the Declaration of Covenants, Conditions and Restrictions for The Arbors at Sugar Creek (the "Declaration"), which, among other things, sets forth specific architectural requirements for the Subdivision's homes and requires that board directors for the governing homeowners association be "residents" of the Subdivision. (A32.)

Despite the Declaration's requirements, the defendant bank, after acquiring the undeveloped lots through foreclosure, stocked the board of the purported governing association with its own non-resident executives, and then promptly rubber-stamped the non-compliant construction plans proffered by the defendant builder. The defendant bank was well aware of the requirements of the Declaration long before it foreclosed on the unimproved lots as it had expressly consented to the Declaration and subordinated its interests to the Declaration.

Plaintiffs filed this lawsuit on May 27, 2010 seeking, among other things, injunctive and declaratory relief to ensure that any future homes built in the Subdivision would be in full compliance with the Declaration. Plaintiffs bring this appeal from the circuit court's adverse decisions and final judgment that: (a) found that bank's executives serving on the board of the homeowners' association were properly qualified to serve as board members; (b) granted partial summary judgment to the bank that its association was the proper governing association for the Subdivision; (c) denied plaintiffs injunctive

and declaratory judgment relief; (d) granted the bank's claim for declaratory judgment; and (e) granted a monetary judgment against plaintiffs for certain alleged maintenance costs incurred by the bank.[1]

Contrary to the concerns raised in the defendant bank's application for transfer and Judge Gaertner's dissenting opinion, this case does not involve issues relevant to the lending industry at large. Indeed, Missouri Bankers Association as amicus curiae did not even posit such concerns in its suggestions in support of transfer. The bank goes too far when it stated the Court of Appeals decision would "impair lenders' ability to rely on the terms of the subdivision governing documents" and would "discourage future lending and subdivision development." (Bank's Application for Transfer at 8.) The bank loaned money and subsequently foreclosed on the undeveloped lots in the subdivision with its eyes wide open, having consented to and subordinated its interests to the governing subdivision declaration. The bank then brazenly entered into a deal with the defendant builder whereby the bank was obligated to stock the board of the homeowners association and approve the builder's plans. Only after making this deal did the bank realize that the governing declaration did not allow its executives to serve as board members; rather, only "residents" of the subdivision could serve as board members. The bank then proceeded

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[1] The trial court also granted summary judgment to Plaintiffs on the bank's damage counterclaims against them. Plaintiffs, of course, raise no issue with this part of the trial court's ruling in this appeal.

to unilaterally "amend" the declaration to allow its non-resident executives to serve as board members.

If anything, allowing the trial court's order to stand will discourage lending and subdivision development because it authorizes a third party to completely hijack a subdivision and impose its will, regardless of what a recorded declaration provides. Subdivision development is possible only with customers, and allowing the trial court's decision to stand will deter customers from investing in homes if they cannot rely upon recorded declarations.

In short, the bank found itself with encumbered property that the bank wanted to sell, but the bank could not quickly dispose of the property as it desired, while still being faithful to the wording and spirit of the restrictive declarations that were superior to the bank's interests. In choosing between quick disposal and adherence to the declarations, , the bank acted in self-interest, entered into a joint venture agreement and became a de facto developer of the property, while completely ignoring the superior encumbering declaration and the property rights of the existing homeowners who had relied on the declaration as part of their earlier decisions to purchase their homes. The bank took the fastest and most profitable course for itself, unilaterally changed the written declaration, and ran roughshod over the interests of the homeowners, all in contravention of Missouri law.

STATEMENT OF FACTS

1. The Subdivision.

The Subdivision was created in or about 2006 by Evolution Developments L.L.C. (the "Developer"). (A35.) Defendant Jefferson Bank and Trust (the "Bank") was the Developer's lender for the Subdivision and advanced the Developer approximately $5 million for its acquisition and development of the Subdivision. (A60; Prelim. Tr.[2] 335.) Of the 18 lots in the Subdivision, five were improved with homes owned by the plaintiffs, Gregg and Katherine Lemley; Timothy and Martha Farrell; Mark and Corinne Stock; Lee and Jaclyn Ori; and William and Bonnie Choi (collectively, the "Homeowners"). During the course of this litigation, Defendant McKelvey Homes, LLC ("McKelvey"; together with the Bank, "Defendants") constructed an additional house on lot 13 (the "Lot 13 House"). (Perm. Tr. 554.) The other 12 lots of the Subdivision are vacant.

The Homeowners built their homes based on the Developer's vision for the Subdivision and in reliance on the protections afforded by the Declaration. The Developer represented that homes in the Subdivision would all be of a unique, contemporary style of architecture and incorporate green design elements. (Prelim. Tr. 44; Perm. Tr. 85, 227-28; see also Marketing Materials appended to Ex. P-1.)

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[2] The transcript of the hearing on the Homeowners' motion for a preliminary injunction is cited in this brief as "Prelim. Tr." The transcript of the hearing on the Homeowners' petition for a permanent injunction is cited as "Perm. Tr."

2. The Declaration.

The Subdivision is governed by the Declaration, which was recorded with the Office of the Recorder of Deeds for St. Louis County on May 18, 2006. (A32.) As the Developer's lender, the Bank consented by affidavit to the Declaration and subordinated its deeds of trust to the Declaration. (A60; Prelim. Tr. 336.)

The Declaration governs numerous aspects of the Subdivision, including architectural requirements for new home construction, board membership requirements, easements, and assessments, among other things. The portions of the Declaration most pertinent to this appeal are discussed below.

A. The Architectural Covenants.

Article X of the Declaration provides the architectural requirements for new home construction in the Subdivision. (A51.) The purpose of Article X is "to maintain the uniform quality and aesthetics of exterior architectural design for the best interests of the Community [a/k/a the Subdivision] as a whole." (A51 Art. X.) Article X states, among other things, that "[n]o Owner shall commence any Alteration,[3] as defined herein, on or to a Lot or the exterior of a Lot, Unit or Common Ground, without the prior written consent of the Board in accordance with this Article X." (A51 §10.1(a).) In making this determination, the board "shall consider harmony of exterior appearance with the existing

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[3] "Alteration" includes "new construction, such as erection of a new Unit." (A51-52 §10.1(a)(2).)

improvements in the Subdivision, including architectural design, height, grade, topography, drainage (including, but not limited to, impermeable areas on the Property), color and quality of exterior materials and detail, location, construction standards, and other such criteria." (A52 §10.1(e).)

B. A Homeowners Association.

The Declaration provides that "[t]here shall be a homeowners association," designated as the "Arbors at Sugar Creek Homeowners' Association." (A38 §3.1.) Indeed, that entity (the "Original HOA") already had been formed by the time the Declaration was recorded. (L.F. 374.)

The Declaration further provides that the homeowners' association shall have a board of directors. (A39 §3.5.) These directors are then assigned various duties, including approval of construction plans for new homes in the Subdivision and assessments to pay for various prescribed expenses related to the Subdivision. (A51 §10.1(a), A42 Art. VII.)

C. Board Member Eligibility.

The Declaration provides two methods for the selection of the association's board members. First, during a period of time called the "Period of Declarant Control," the Developer—referred to as the "Declarant"—had the sole authority to appoint board members. (A39 §3.5(b)(2).) Those appointed directors were not subject to any eligibility requirements. Upon conveyance of 25% of the Lots to persons other than Declarant, the Declaration required that one member of the board be elected.

Second, after the Period of Declarant Control expired, lot owners were to elect the entire slate of board members, annually. (A39-40 §3.5(b)(2).) Elected directors were subject to two eligibility requirements: (1) an elected director must be "a resident of the Community [a/k/a the Subdivision]" (A39 §3.5(a)); and (2) elected directors must be lot owners "other than Declarant" (A39 §3.5).

Thus, determining whether the board is properly constituted depends first upon whether the "Period of Declarant Control" has expired. The Declaration provides that this period expires upon the occurrence of any one of three dates:

(a) "the date two (2) years after the date Declarant has ceased to offer any Lot for sale in the ordinary course of business";

(b) "the date upon which Declarant voluntarily transfers control of the Association"; or

(c) "the date sixty (60) days after Declarant has conveyed sixty-six and sixty-seven one hundredths of one percent (66.67%) of the Lots which may be created to Owners other than Declarant."

(A39 §3.5(b)(1).)

3. Incorporation and Dissolution of Original HOA.

Consistent with the Declaration, the Developer created the Original HOA in November 2005. (L.F. 374.) The Missouri Secretary of State administratively dissolved the Original HOA for failure to file an annual report on December 29, 2006, well before the issues relevant to this litigation arose. (L.F. 376.)

4. The Initial Development of the Subdivision.

The Homeowners each had purchased their lots and built their homes no later than the end of 2009. (Perm. Tr. 67, 69.) The purchase prices paid by the Homeowners for their homes ranged from $1.3 million to $1.8 million. (Perm. Tr 85, 247; Prelim. Tr. 90; Ex. P-1.) Each of the existing homes is a custom-built, contemporary style home, unique to the St. Louis area, with exterior materials consisting entirely of stone and stucco. (Prelim. Tr. 118-19, 268-70, 296-98, 300-03; Perm. Tr. 227, 424.)

In February 2009, the Developer transferred 11 of the 13 remaining unimproved lots to Hanover Homes, LLC ("Hanover"). (Ex. P-13; Prelim. Tr. 340-42; Perm. Tr. 451.) To this end, Hanover and the Developer executed an Asset Purchase Agreement and a Quit Claim Deed, the latter of which was recorded in the real estate records. (Ex. P-13; L.F. 1061.) Thus, the Developer owned only two of 18 lots as of February 2009.

In March 2010, the Bank foreclosed upon the 13 unimproved lots and common ground and took title to the unimproved property in the Subdivision. (L.F. 142.) These 13 lots consisted of the 11 owned by Hanover (to whom the Developer had transferred them in February 2009) and the two lots still owned by the Developer.

5. The Homeowners' Association.

Without any active governing association (due to the dissolution of the Original HOA in 2006), the Homeowners formed their own association (the "Plaintiffs' Association") in April 2010 to protect their substantial interests and investments in the Subdivision. (L.F. 345.) The Plaintiffs' Association, like the Original HOA, was named the Arbors at Sugar Creek Homeowners' Association. The Bank, as then-owner of 13

lots, refused to participate in the Plaintiffs' Association and was thus expelled from it. (Perm. Tr. 358-59.)

6. The Filing of This Lawsuit.

Shortly after the Bank's foreclosure (and before the Bank entered into its agreement with McKelvey, which is discussed below), McKelvey began to offer various models of its houses in the Subdivision from the "mid-$500[,000]'s to the $900[,000]'s." (Ex. P-37; Perm. Tr. 249-50, 564-65, 617.) Immediately upon learning of Defendants' plans for the Subdivision, the Homeowners attempted to open a dialogue with Defendants to ensure that the planned construction complied with the Declaration. (Perm. Tr. 254-57; Ex. P-38.) This dialogue was not successful and the Homeowners filed this lawsuit in May 2010. (L.F. 20.)

7. The Bank's Agreement With McKelvey.

After its foreclosure, the Bank received inquiries from various custom home builders who were interested in building homes in the Subdivision. (Perm. Tr. 265, 427-28.) Instead of pursuing those options, the Bank executed a Purchase and Sale Option Agreement with McKelvey (the "Option Agreement") in May 2010. (Ex. P-14.) Pursuant to the Option Agreement, the Bank obligated itself to transfer certain lots to McKelvey and then to approve McKelvey's plans for new houses on those lots. (Ex. P-14 at 1-2 ¶¶1, 3 and at 12 ¶11.) There is no provision in the Option Agreement for the Bank to deny McKelvey's plans. (See Ex. P-14.) The Option Agreement further provides that the Bank shall share in McKelvey's anticipated profits to be derived from the Subdivision. (Ex. P-14 at 12-13 ¶13; Perm. Tr. 628-29.) Finally, the Option

Agreement obligated the Bank to appoint directors to the association's board. (Ex. P-14 at 12, §11.)

8. The Bank's Association.

In August 2010, the Bank bought an assignment of the Developer's remaining "Declarant" (or developer) rights under the Declaration by releasing the Developer and its principals from approximately $1 million in liability stemming from their default on the Bank's loan. (L.F. 274; Prelim. Tr. 338, 370; Perm. Tr. 451-56; Ex. P-16.)

Rather than go through the effort required to rescind the administrative dissolution of the Original HOA, however, the Bank then formed its own association, the ASC Homeowners Association ("ASC HOA") in September 2010 and immediately *elected* three of its executives to the association's board. (Ex. P-40 at 10-12; Prelim. Tr. 315.) The Bank's executives serving on the board are not residents of the Subdivision and never have been. (Prelim. Tr. 374-75; Perm. Tr. 429-30.)

The Bank then filed a motion for partial summary judgment on October 4, 2010, asking the trial court to rule that the ASC HOA was the governing association under the Declaration. (L.F. 113.) By an order dated January 27, 2011, the trial court (J. Hartenbach, ret.) ruled that the ASC HOA was the governing association for the Subdivision pursuant to the Declaration. (A1.) At the request of the Bank, the trial court expressly did not consider or decide whether the board of the ASC HOA, comprised solely of Bank executives at the time, was properly constituted. (A1; L.F. 414-15.)

9. The Bank's Initial Approval of McKelvey Plans.

Following the execution of the Option Agreement, McKelvey entered into contracts with a handful of customers to build houses in the Subdivision. (Perm. Tr. 566.) In November 2010, the Bank, acting through its three executives on the board of the ASC HOA at that time, approved McKelvey's plans for construction in the Subdivision. (Ex. P-42; Perm. Tr. 380, 469-70.)

10. The Bank's Purported Amendment of Declaration.

Once the trial court designated the ASC HOA as the governing homeowners' association for the Subdivision by virtue of its award of partial summary judgment in January 2011, the Homeowners attempted to call a meeting of the ASC HOA so that a board consisting of "residents" and owners "other than Declarant" could be elected. (Ex. P-44 at 5-8.) At the meeting called by the Homeowners in February 2011, the Homeowners nominated three residents of the Subdivision for board positions. (Id.) The Bank voted against each of the Homeowners' proposed resident board members. (Id.)

At this meeting in February 2011, the Bank further voted to "amend" the Declaration to, among other things, remove the residency and owners-other-than-Declarant board membership requirements. (Id. at 16-17; Ex. Bank H-1; Prelim. Tr. 316-19.) The Homeowners objected that Bank's actions were illegal and voted against this purported amendment. (Ex. P-42 at 16-17.) The Bank nevertheless approved and recorded the purported amendment. (Ex. Bank H-1.) Thereafter, the Bank again *elected*

its own executives to the board, none of whom are residents of the Subdivision. (Ex. P-44 at 20-24.)[4] The Bank's executives further voted to "ratify" the actions taken by the Bank's executives prior to the Bank's purported amendment of the Declaration. (Id. at 19-20.)

11. The Bank's Later Approval of McKelvey's Plans.

After purporting to "amend" the Declaration and ratify its prior actions, the Bank, through its executives on the board of the ASC HOA, further approved McKelvey's specific construction plans for the Lot 13 House.[5] (Ex. P-47 at 47-60; Perm. Tr. 380.) In an attempt to support the prior decision of its executives on the board of the ASC HOA to approve McKelvey's plans, the Bank retained two experts to render opinions that McKelvey's planned houses complied with the Declaration. (Ex. Merdinian 3, Bank K.) The Bank disclosed these two experts as its litigation experts in this lawsuit. (L.F. 1244-47.)

The Bank then transferred Lot 13 to McKelvey, ostensibly so that McKelvey could build a house for its customers, the Komloses. (See Ex. P-49; L.F. 554.) The Komloses contracted with McKelvey in September 2010, after this lawsuit had been filed

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[4] The Bank allowed the Homeowners to elect one board member (of three total). (Ex. P-42.)

[5] The Bank's executives on the ASC HOA originally approved the Lot 13 House for Lot 12 on November 26, 2010. (Ex. P-42 at 13-14; Ex. P-47 at 47-48; Perm.Tr. 633.)

and after the *lis pendens* had been recorded. (Compare Ex. P-49, with L.F. 20, 989; Perm. Tr. 633.) Under an amendment to their contract with McKelvey, the Komloses had the right to terminate the contract if construction had not begun by September 15, 2011. (Ex. P-49.) The Komloses agreed to be bound by any injunctive relief entered in this lawsuit. (Ex. P-50.)[6]

12. Architectural Style.

Among other things, this lawsuit concerns whether the Lot 13 House and the other houses McKelvey seeks to build in the Subdivision comply with the architectural requirements of the Declaration. Given the Declaration's language requiring that new construction be "harmonious" and "uniform" with existing improvements (A51 at Art. X), the architectural styles of both the Homeowners' homes and McKelvey's houses must be considered. Exhibits admitted at trial depict the five Homeowners' homes and the Lot 13 House, as of the time of the permanent injunction hearing. (Ex. P-5 – P-9 & P-22; these exhibits are also included in the appendix at A71-A76.)

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[6] Counsel for McKelvey obtained the Komloses' consent to be bound by such relief as part of the Court's denial of leave to the Homeowners to add the Komloses as parties. (See Ex. P-50; Perm.Tr. 635-36.)

13. The Bank's Amendment of the Landscape Plan.

The Declaration included a landscape plan that was to preserve as many mature trees in the Subdivision as possible. (A70.) This plan was confirmed by the City of Des Peres (the "City") in at least two ordinances. (Perm. Tr. 243.)

In August 2010, the Bank began its efforts to change the landscaping plan for the Subdivision. (Prelim. Tr. 353-54.) These efforts included Mr. Dulle, an officer of the Bank, making certain misrepresentations to the City of Des Peres. Among other things Mr. Dulle misrepresented to the City that (i) there were no architectural requirements governing construction within the Subdivision; (ii) the Bank could do whatever it wished within the Subdivision; and (iii) the lawsuit had been resolved in favor of the Bank. (Prelim. Tr. 353-57; Perm. Tr. 267-70.)

Ultimately, the Bank's actions with respect to the landscape plan resulted in numerous trees being cut down and the removal from the plan of certain street trees that were to be planted. (Perm. Tr. 92, 271-72.) Only after agreeing to bear the costs to maintain the street trees (which the Declarant was originally required to maintain), did the Homeowners get those trees reinstated to the landscape plan. (Perm. Tr. 271-73.)

In addition to the issues with the trees, the Bank further modified the landscape plan by grading within the Subdivision. (Perm. Tr. 273-78.) The Bank sought these grading modifications so that lots 7-10 would be able to accommodate McKelvey's houses, even though the ASC HOA had not yet approved any plans for lots 7, 9, or 10. (Perm. Tr. 277-78; Ex. P-42 & P-43 at 6-7.)

14. The Bank's Assessments.

In addition to approving McKelvey's plans, the Bank executives on the ASC HOA's board issued two special assessments against the Homeowners for the costs of the Bank's litigation experts, Messrs. Neff and Merdinian, in this matter. (Ex. P-48;[7] Ex. P-46 at 13-23; Ex. P-47 at 46-47; see also L.F. 1244, 1248.)

15. Procedural History

The Homeowners filed this lawsuit on May 27, 2010. (L.F. 20.) The operative petition at the time of final judgment included counts for declaratory judgment and injunctive relief, breach of fiduciary duty, civil conspiracy, tortious interference, and nuisance. (L.F. 901-18.) The Bank filed counterclaims against the Homeowners; its operative counterclaims at the time of final judgment included counts for declaratory judgment, slander of title, and abuse of process. (L.F. 1022-1031.)

On October 4, 2010, the Bank filed its motion for partial summary judgment solely on this issue of whether the ASC HOA was the authorized entity to govern the Subdivision under the Declaration. (L.F. 113.) The Bank asked the trial court not to rule on whether the board was properly constituted. (Id.) On January 27, 2011, the trial court

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[7] At the permanent injunction hearing, two Exhibit P-48's were admitted. (Perm.Tr. 521 and 620.) The Exhibit P-48 referenced in this section was the notice of assessments issued by the ASC HOA.

entered summary judgment on the Bank's behalf and found that the ASC HOA was the proper governing entity for the Subdivision under the Declaration. (A1.)

On August 17, 2011, the Homeowners moved for a temporary restraining order and preliminary injunction to enjoin further construction of the Lot 13 House, which the trial court (J. Hartenbach, ret.) denied after an evidentiary hearing. (L.F. 521, 763.)

Thereafter, the Homeowners filed two separate motions for summary judgment, one relating to the Bank's counterclaims for damages and the other relating to whether the Bank's executives were proper board members of the ASC HOA. (L.F. 764, 1034.) The Bank filed its own motion for summary judgment, which related to the board issues and its counterclaims. (L.F. 962.)

The trial court combined the hearing on the pending motions for summary judgment with the equitable claims (i.e., the Homeowner's claims for declaratory relief and a permanent injunction.) (Perm. Tr. 2-3.) Pursuant to Rule 92.02(c)(3), the trial court considered evidence offered by the parties in the preliminary injunction hearing at the hearing for declaratory relief and a permanent injunction. (A2.) This hearing took place over four days, on February 9, 2012, February 27, 2012, March 7, 2012, and April 5, 2012. (Perm. Tr. ii-v.)

On October 15, 2012, while the trial court was still considering the parties' motions for summary judgment and the Homeowners' request for a permanent injunction, the Bank moved for reimbursement of certain costs it had allegedly incurred in maintaining the Subdivision. (L.F. 1328.) The costs at issue had not been requested, or

even put at issue, in the Bank's counterclaims. (L.F. 1003.) The trial court granted the Bank's motion without an evidentiary hearing. (L.F. 1375.)

On December 20, 2012, the trial court entered its Findings of Fact and Conclusions of Law denying the Homeowners' request for permanent injunction (the "Permanent Injunction Order"). (A2.) After the parties filed various motions directed to the Permanent Injunction Order (L.F. 1403, 1405, 1409), the trial court entered final judgment on all claims and issues. (A29.)

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN RULING IN FAVOR OF THE BANK REGARDING WHETHER THE BANK'S EXECUTIVES WERE PROPERLY SERVING AS BOARD MEMBERS OF THE GOVERNING ASSOCIATION BECAUSE THEY WERE NOT QUALIFIED TO SERVE ON THE BOARD IN THAT THE DECLARATION REQUIRED BOARD MEMBERS TO BE RESIDENTS OF THE SUBDIVISION, WHICH THE BANK'S EXECUTIVES WERE NOT.

Rocky Ridge Ranch Property Owners Ass'n v. Areaco Invest. Co., 993 S.W.2d 553, 556 (Mo. App. 1999).

Harris v. Smith, 250 S.W.3d 804, 809-10 (Mo. App. 2008).

Webb v. Mullikin, 142 S.W.3d 822 (Mo. App. 2004).

II. THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT TO THE BANK DETERMINING THAT THE ASC HOA HAD AUTHORITY TO GOVERN THE SUBDIVISION PURSUANT TO THE DECLARATION BECAUSE THE ASC HOA HAD NO SUCH AUTHORITY UNDER MISSOURI LAW IN THAT THE ASC HOA WAS NEITHER THE ASSOCIATION DESIGNATED BY THE DECLARATION NOR AN ASSIGNEE OF THE ASSOCIATION DESIGNATED BY THE DECLARATION.

DeBaliviere Place Ass'n v. Veal, 337 S.W.3d 670 (Mo. banc 2011).

Valley View Village S. Improvement Ass'n, Inc. v. Brock, 272 S.W.3d 927 (Mo. App. 2009).

III. THE TRIAL COURT ERRED IN DENYING INJUNCTIVE RELIEF TO THE HOMEOWNERS AND IN GRANTING DECLARATORY JUDGMENT TO THE BANK BECAUSE THE ASC HOA AND THE BANK'S EXECUTIVES SERVING ON ITS BOARD DID NOT ACT REASONABLY OR IN GOOD FAITH IN APPROVING MCKELVEY'S PLANS IN THAT THE PURPORTED DUE DILIGENCE OF THE BANK'S EXECUTIVES WAS UNREASONABLE AND NOT TAKEN IN GOOD FAITH.

LeBlanc v. Webster, 483 S.W.2d 647 (Mo. App. 1972).

Marose v. Deves, 697 S.W.2d 279 (Mo. App. 1985).

Bennett v. Huwar, 748 S.W.2d 777 (Mo. App. 1988).

IV. THE TRIAL COURT ERRED IN DENYING INJUNCTIVE RELIEF TO THE HOMEOWNERS AND IN GRANTING DECLARATORY JUDGMENT TO THE BANK BECAUSE THE HOUSE MCKELVEY HAD UNDER CONSTRUCTION AND THOSE IT PLANNED TO CONSTRUCT VIOLATED THE DECLARATION'S ARCHITECTURAL REQUIREMENTS IN THAT THE HOUSES WERE NOT UNIFORM AND HARMONIOUS WITH THE HOMEOWNERS' EXISTING HOMES.

Blackburn v. Richardson, 849 S.W.2d 281 (Mo. App. 1993).

Bennett v. Huwar, 748 S.W.2d 777 (Mo. App. 1988).

Connelly v. Schafer, 837 S.W.2d 344 (Mo. App. 1992).

Wallace v. Grasso, 119 S.W.3d 567 (Mo. App. 2003).

V. THE TRIAL COURT ERRED IN DETERMINING THAT THE BANK WAS ENTITLED TO REIMBURSEMENT FOR CERTAIN ALLEGED MAINTENANCE COSTS BECAUSE THE BANK HAD NO LEGAL OR FACTUAL BASIS TO OBTAIN SUCH RELIEF IN THAT THE BANK NEVER ASSERTED A CLAIM FOR SUCH RELIEF, FAILED TO PRESENT ANY COMPETENT EVIDENCE TO ESTABLISH A RIGHT TO THIS RELIEF AND FAILED TO COMPLY WITH THE PROCEDURES OF THE DECLARATION.

Norman v. Wright, 100 S.W.3d 783 (Mo. banc 2003).

In re Marriage of M.A. & M.S., 149 S.W.3d 562 (Mo. App. 2004).

State ex rel. Nixon v. McIntyre, 234 S.W.3d 474 (Mo. App. 2007).

VI. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF DEFENDANTS ON THE HOMEOWNERS' CLAIMS FOR DAMAGES BECAUSE THE HOMEOWNERS WERE ENTITLED TO DAMAGES IN THAT DEFENDANTS BREACHED THE DECLARATION AND THEIR DUTIES TO THE HOMEOWNERS.

State ex rel. Nixon v. American Tobacco Co., 34 S.W.3d 122 (Mo. banc 2000).

STANDARD OF REVIEW

The proper standard of review when considering appeals from summary judgment is *de novo*. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). In such cases, "the Court will review the record in the light most favorable to the party against whom judgment was entered" and should give the benefit of all reasonable inferences from the record to the non-movant. Id. The "appellate court need not defer to the trial court's order granting summary judgment"; rather, "[t]he criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." Id. "Summary judgment will be upheld on appeal if there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law." Robbins v. McDonnell Douglas Corp., 27 S.W.3d 491, 496 (Mo. App. 2000).

As a general rule on appeal, the trial court's judgment in a bench-tried case should be sustained "unless there is no substantial evidence to support it, unless it is against the manifest weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976).

However, a trial court's "decision to grant an injunction will be reviewed for an abuse of discretion." Burg v. Dampier, 346 S.W.3d 343, 357 (Mo. App. 2011). The trial court abuses its discretion when "the judgment is clearly against the logic of the

circumstances then before the trial court and is so arbitrary and unreasonable as to shock the sense of justice and indicates a lack of careful consideration." Id.

Questions of law, including the trial court's interpretation of the Declaration, are reviewed under a de novo standard. Blue Pool Farms, L.L.C. v. Basler, 239 S.W.3d 687, 690 (Mo. App. 2007).

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING IN FAVOR OF THE BANK REGARDING WHETHER THE BANK'S EXECUTIVES WERE PROPERLY SERVING AS BOARD MEMBERS OF THE GOVERNING ASSOCIATION BECAUSE THEY WERE NOT QUALIFIED TO SERVE ON THE BOARD IN THAT THE DECLARATION REQUIRED BOARD MEMBERS TO BE RESIDENTS OF THE SUBDIVISION, WHICH THE BANK'S EXECUTIVES WERE NOT.

Even if the ASC HOA is the proper governing entity (which the Homeowners deny – see infra Point II), the actions taken by that entity are null and void because it was operating through invalid board directors, namely the Bank's non-resident executives. The Declaration is clear that *elected* board directors must be "residents" of the Subdivision, which the Bank's executives were not. (Perm. Tr. 429-30.) The parties do not dispute that the Bank's executives were not "residents" of the Subdivision. This issue is critical to the outcome of this appeal because, without approval of McKelvey's plans by a properly constituted board of the homeowners' association, the plans per se violate the Declaration's architectural provisions. (A51 at §10.1(a), requiring board approval for all new home construction.)

The parties do dispute whether the Bank's purported "amendment" of the Declaration to remove the residency requirement was effective. As set forth in this section, the "amendment" was not effective. Not only did the purported "amendment" constitute a breach of the Bank's duty of good faith and fair dealing (as the Court of

Appeals agreed), but it also imposes a new burden upon the Homeowners. Unanimous consent of all those affected is required when an "amendment" of a declaration imposes new burdens. Obviously, the Homeowners did not consent to the Bank stripping them of their right of self-governance. (Perm. Tr. 510.)

A. The Bank's Executives Are Not Qualified to Serve as Board Members Under the Declaration.

The Declaration provides two methods for selection of board members: (1) appointment by the Declarant during the Period of Declarant Control; and (2) election once the Period of Declarant Control expires. (A39 at §3.5.(b)(1)-(2).) Here, the Bank *elected* its non-resident executives to the board—twice. (Ex. P-40 at 10-12; Prelim. Tr. 315; Ex. P-42 at 20-24.) Moreover as explained below (infra §II.C), the Period of Declarant Control had expired by the time the Bank elected its executives to the board. Thus, this Court should analyze whether, as *elected* directors, the Bank's executives met the board eligibility requirements set forth in the Declaration.

Pursuant to the Declaration, elected directors were required to meet certain requirements to serve as board members: (1) an elected director must be "a resident of the Community [a/k/a the Subdivision]" and (2) an elected director must be a lot owner "other than Declarant." (A39 at §§3.5 & 3.5(a).) There is no dispute that the Bank's executives were not—and never were—"residents" of the Subdivision. (Prelim. Tr. 374-75; Perm. Tr. 429-30; Ex. P-44 at 9.) Second, to the extent the Bank was purporting to act as the successor Declarant, then the Bank's executives were further ineligible because

they were not owners "other than Declarant." (L.F. 274; Prelim. Tr. 370; Perm. Tr. 451-52.)

The rationale for the Declaration's board eligibility requirements is easy to see. DeBaliviere Place Ass'n v. Veal, 337 S.W.3d 670, 676-77 (Mo. 2011) ("When interpreting the declaration—which is simply a contract—it is necessary to ascertain the intent of the parties and give effect to that intention"). Once the Declarant washes its hands of the Subdivision (i.e., upon expiration of the Period of Declarant Control), authority to govern the Subdivision goes to those with the most significant and consistent vested interest in the subdivision—its residents. The Declaration was expressly designed to keep control of the Subdivision from some third party who does not have a vested interest (i.e., the Bank) after the Developer leaves the picture. (See Prelim. Tr. 334-35; Mr. Dulle admitted the Bank has only a "short term" interest in the Subdivision.) The Bank knew of this design all along when it consented to the Declaration and subordinated its mortgage interests to the Declaration. (Prelim. Tr. 336.) Nevertheless, the Bank would like this Court to approve its denial of self-governance to the Homeowners and somehow allow the Bank's subordinated interest to leapfrog the resident's superior legal interests.

B. The Bank's Attempt to "Amend" the Declaration to Allow Non-Residents and Owners "Other Than Declarant" to be Directors Is Invalid Under Missouri Law.

Recognizing that its non-resident executives were not qualified to serve as board members, the Bank purported to "amend" the Declaration to remove the residency

requirement for elected board members.[8] (Ex. Bank H-1, P-44.) The Bank's purported "amendment," however, is invalid under Missouri law for two separate reasons. First, the Bank breached its duty of good faith and fair dealing in so "amending" the Declaration. Second, the Bank's "amendment" is an amendment in name only; it actually constitutes a new restriction, which requires unanimous approval under Missouri law. Therefore, the eligibility requirements under the Declaration as originally drafted and recorded still govern and the Bank's executives remain ineligible to serve.

1. The Bank breached its duty of good faith and fair dealing by purporting to "amend" the Declaration.

Restrictive covenants, such as the Declaration, are treated like contracts in governing the rights of those affected. Rocky Ridge Ranch Property Owners Ass'n v. Areaco Invest. Co. Inc., 993 S.W.2d 553, 556 (Mo. App. 1999). As such, a duty of good faith and fair dealing is imposed upon those bound by restrictive covenants. Id. The Bank as a lot owner in the Subdivision owes a duty of good faith and fair dealing to act for the benefit of the Subdivision and the residents of the Subdivision. (See Prelim. Tr.

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[8] Though the Bank first elected its directors to the board in September 2010, it did not "amend" the Declaration to remove the residency requirements until February 2011. (Compare Ex. P-40, with Ex. P-44.) In February 2011, the Bank further voted to "ratify" the prior actions of its executives serving as board members (i.e., those actions taken before the Bank "amended" the Declaration). (Ex. P-44 at 19-20.)

334; testimony of Mr. Dulle admitting that the Bank owes fiduciary duties to the Homeowners); Young v. Lucas Construction Co., 454 S.W.2d 638, 639 (Mo. App. 1970) (finding that developer/trustee of subdivision "occupied a fiduciary capacity"). Moreover, the Bank was assigned the status of the Declarant and ostensibly took control of the Subdivision. The Bank breached its duty of good faith and fair dealing by defeating the Homeowners' reasonable expectations arising from the Declaration (i.e., their expectation that once the Period of Declarant Control expired, only "residents" could be board members and that the governing homeowners association would only approve plans that comported with the requirements of the Declaration). (See e.g. Prelim. Tr. 31-35 [G. Lemley]; Prelim. Tr. 87-90 [J. Ori]; and Prelim Tr. 235-236 [B. Choi].)

The covenant of good faith and fair dealing is breached if a party violates the spirit of a contract (or, as in this case, a recorded declaration) to deny the other party the expected benefits of the contract. Glenn v. HealthLink HMO, Inc., 360 S.W. 866, 879 (Mo. App. 2012). "Good faith is an obligation imposed by law to prevent opportunistic behavior, that is, the exploitation of changing economic conditions to ensure gains in excess of those reasonably expected at the time of contracting." Frontenac Bank v. T.R. Hughes, Inc., 404 S.W.3d 272, 280 (Mo. App. 2012) (quotations and citation omitted).

Proving violation of the covenant of good faith and fair dealing requires "substantial evidence" that the other party "acted in bad faith, or engaged in unfair dealing." Acetylene Gas Co. v. Oliver, 9393 S.W.2d 404, 410 (Mo. App. 1996). "Bad faith may be overt or may consist of inaction, and fair dealing may require more than

honesty." Restatement (Second) of Contract § 205 (1981). Examples of bad faith include: (1) "utiliz[ing] contract language that allow[s] unilateral action to improperly deny the other party from expected benefits flowing from the contract," Kroger v. Hartford Life Ins. Co., 28 S.W.3d 405, 412 (Mo. App. 2000) (citing Martin v. Prier Brass Mfg. Co., 710 S.W.2d 466, 473 (Mo. App. 1986)); and (2) effectuating an amendment to a subdivision's declaration through a "devious attempt to circumvent" the intent reflected in that agreement, Rocky Ridge, 993 S.W.2d at 556.

By "amending" the Declaration to make its otherwise ineligible directors eligible for board positions, the Bank's actions are comparable to those of the developer in Rocky Ridge. In Rocky Ridge, the court held that the developer's "procedure to amend the [original restrictive covenants] was nothing more than a poorly concocted voting sham." 993 S.W.2d at 556. The restrictive covenants there could be amended by a two-thirds vote of the lot owners. After selling approximately half of the originally platted lots, the developer then platted enough additional (albeit unsellable) lots so that it would hold two-thirds of the lots. With its newly-acquired two-thirds vote, the developer then unilaterally amended the restrictive covenants to the detriment of the other homeowners. The Court rejected this purported amendment, "find[ing] that the voting scheme contravenes the implied covenant of good faith and fair dealing." Id. The Court reasoned that the parties never intended that the developer could become a two-thirds owner simply by platting additional, unsellable lots.

Just like the developer in Rocky Ridge, the Bank here has violated its duty of good faith and fair dealing. Indeed, Mr. Dulle acknowledged that the Bank "amended" the

Declaration to serve the Bank's own interests. (Prelim. Tr. 382-83.) Indeed, the whole plan to "amend" the Declaration was concocted by the Bank's attorney, Mr. Mersman, who also purported to represent the ASC HOA. (Prelim. Tr. 382.) The Bank knew that control of the board meant control of what could be built in the Subdivision—the issue at the heart of this litigation. (Perm. Tr. 445-46, 513.)

There is no question that the interests of the Bank and the Homeowners were completely at odds with each other. (Perm. Tr. 511; Mr. Dulle admitted that "our [the Bank's] interests are different.") While the Bank admittedly had only a "short term" interest in the Subdivision and wanted to "dispose" of its foreclosed asset (the undeveloped lots in the Subdivision), the Homeowners, as residents of the Subdivision who had built homes, had a long-term interest in their neighborhood. (Perm. Tr. 439; Prelim. Tr. 334-35.)

After the Bank made its deal with McKelvey to sell the undeveloped lots (see Ex. P-14), the Bank knew it needed to control the board of the homeowners association in order to approve McKelvey's plan and fulfill its short-term interests. (Perm. Tr. 445-46, 513.) Indeed, in its agreement with McKelvey, the Bank obligated itself to select board members to the homeowners association. (Ex. P-14 at 12 ¶ 11.) Hence, the Bank's unilateral "amendment" of the Declaration to ensure that its executives could serve as board members. After all, the Bank's president, Mr. Dulle, stated that with a majority of the lots and a majority of the board members, "That's all there is to it." (Perm. Tr. 438.) Unsurprisingly, the Bank's executives serving as board members rubber-stamped McKelvey's construction plans. (Ex. P-42; Perm. Tr. 380, 469-70; Ex. P-47 at 47-60.)

The intent of the Declaration is clear: **residents** of the Subdivision shall serve as board members so that they can govern themselves. This is the benefit the Homeowners expected to receive under the Declaration. The Bank's unilateral "amendment" of the Declaration to remove this requirement is just as "devious" and self-serving as was the Rocky Ridge developer's attempt to plat additional lots. Rocky Ridge, 993 S.W.3d at 556. By "amending" the Declaration to remove those eligibility requirements its executives failed to meet, the Bank has ensured that it can do what it wishes with the Subdivision, regardless of whether other lot owners consent. The Rocky Ridge developer did just this when it platted additional lots so that it would control a two-thirds vote and thus do what it wished with the Rocky Ridge Subdivision, regardless of what other Rocky Ridge lot owners wanted. As the Court of Appeals succinctly stated: "Bank used its command of the Subdivision's affairs to advance its own financial interests in redeveloping the Subdivision in a manner contrary to the wishes of the newly disenfranchised residents." (Ct. App. Op. at 22.) Since the Bank violated its duty of good faith and fair dealing, its purported "amendment" of the Declaration should be deemed null and void.

2. The Bank's purported "amendment" is null and void because it creates a new restriction upon the Homeowners, which requires unanimous approval under Missouri law.

As originally drafted and recorded, the Declaration ensured that upon expiration of the Period of Declarant Control, the "residents" of the Subdivision held the sole authority to act as board members and govern the neighborhood in which they live. The

importance of this right is easy to see in a case such as this, where the Declaration contains architectural restrictions upon which the residents relied in deciding to move into this Subdivision—the very restrictions the non-resident Bank seeks to circumvent in order to line its own pockets. (See Perm. Tr. 445-46 & 513; Mr. Dulle admitted that the Bank needed to control the homeowners association in order to approve McKelvey's plans.) Once the Declarant is gone from the scene, only residents have long-term concerns about the Subdivision. This drama has been clearly played out in this litigation.

The Bank's purported amendment eliminates the Homeowners' right to self-governance by depriving them of any meaningful say in the governance of the Subdivision in which they live. Even when an indenture states that it may be amended by a less-than-unanimous vote, "amendments" that are, in reality, new restrictions upon those bound must be unanimously approved. See Harris v. Smith, 250 S.W.3d 804, 809-10 (Mo. App. 2008) (collecting cases and holding that "amendment" which imposed further restrictions on outbuildings required unanimous approval of all lot owners); Webb v. Mullikin, 142 S.W.3d 822, 827 (Mo. App. 2004) (holding that unanimous vote of all affected lot owners is needed to add new burdens, such as new financial obligations, even if the declaration provides that it can be amended by less than a unanimous vote); Bumm v. Olde Ivy Dev., LLC, 142 S.W.3d 895, 903 (Mo. App. 2004) (holding that new restrictive covenants, as opposed to mere amendments of existing covenants, must be

approved by unanimous vote of all affected lot owners). The Bank's "amendment" of the Declaration constitutes not a mere amendment, but the imposition of a new restriction.[9]

The "amendment" seeks to place complete control of the Subdivision in the hands of the Bank, which by its own admission has no long-term vested interest in the Subdivision. (Prelim. Tr. 335; testimony of Mr. Dulle admitting that the Bank "hope[s]" to have a short term interest in the Subdivision.) The danger of the "amendment," and the reason why it fundamentally changes the Declaration, is that it enables a third party

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[9] In the trial court, Defendants asserted that rather than constituting the imposition of a new restriction, the "amendment" actually eliminated a restriction on board eligibility and is thus not a disguised restriction prohibited by Missouri law. (E.g., L.F. 1142, 1144.) Defendants' argument elevates form over substance because it is no different than if the Bank passed an "amendment" which eliminated the restrictions for which the ASC HOA could pass assessments. Yes, such an "amendment" would eliminate a restriction, but it would nevertheless constitute a new burden, or restriction, as the lot owners would then be exposed to increased assessments. E.g., Webb, 142 S.W.3d at 827 (holding that amended indenture imposing new assessments was invalid for lack of unanimous approval). The "amendment" actually passed by the Bank here is no different. While it eliminates certain restrictions on who can serve as a board member, it imposes a new burden on the lot owners by removing their exclusive right to serve on the board.

such as the Bank, with no vested interest in the Subdivision, to completely alter any and all standards governing the Subdivision.

Essentially, the Bank could possess the power to make the Subdivision completely unrecognizable to the Homeowners who believed that such a change was never possible because they were protected by the Declaration. (Perm. Tr. 228-29.) The amendment also reinserts the Declarant—now the Bank—into control of the Subdivision after the Period of Declarant Control has expired. By taking away the Homeowners' governance of the neighborhood in which they live, the Bank is most definitely placing a new—and severe—restriction on the Homeowners. Because the Homeowners did not consent to this new restriction (Ex. P-44 at 16-17; Perm. Tr. 510), it is invalid for lack of unanimous approval.

Because the Period of Declarant Control had expired (see infra §I.C) and because the Bank's purported "amendment" is invalid, the board eligibility requirements in the Declaration remain in effect, and the Bank's executives fail to meet those requirements. Thus, Bank's executives are not proper board members and their actions should be deemed null and void.

C. The Bank Could Not Appoint Directors because the Period of Declarant Control had Expired.

As described briefly above, the Declaration provided for two methods of selecting board members for the homeowners association. During the Period of Declarant Control, the Declarant has the authority to appoint board members, with no applicable eligibility or other requirements (excepting the requirement that one board member be elected after

25% of the lots are conveyed to someone other than the Declarant). (A39 §3.5.(b)(1).) After the Period of Declarant Control ends, all of the board members are to be *elected* on an annual basis by lot owners. (A39-40 §3.5(b)(2).)

Notwithstanding that the Bank twice elected all of the Directors and went so far as to purport to amend the Declaration to ostensibly make the Bank's board members "qualified," Defendants may argue that the Period of Declarant Control had not expired and that the Bank, as the purported successor Declarant, had the right to appoint board members, regardless of their qualifications under the Declaration. Such an assertion is mistaken. In this case, the Period of Declarant Control had ended by the time the ASC HOA was created, leaving election as the only method for the Bank executives to be selected as board members.[10] Indeed, the Bank itself *elected* its board members, twice. (Ex. P-40 at 10-12; Prelim. Tr. 315; Ex. P-42 at 20-24.)

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[10] The Court of Appeals did not expressly address whether the Period of Declarant Control had expired as it found instead that the Bank was not a proper successor Declarant. (Ct. App. Op. at 23-24.) Per the Declaration, the term Declarant included not only the original Developer, but also its "successor and assigns, if such successors or assigns should acquire more than one unimproved Lot from the Declarant for the purpose of constructing a Dwelling Unit thereon." (A36 §1.7.) As noted by the Court of Appeals, foreclosure is a method to recoup an underlying debt and, following foreclosure, the Bank attempted to divest itself of the unimproved lots. (Ct. Ap. Op. at 23-24; Perm. Tr.

The Declaration provides that the Period of Declarant Control expires if one of the following three dates occur: (1) "the date two (2) years after the date Declarant has ceased to offer any Lot for sale in the ordinary course of business"; (2) "the date upon which Declarant voluntarily transfers control of the Association"; or (3) "the date sixty (60) days after Declarant has conveyed sixty-six and sixty-seven one hundredths of one percent (66.67%) of the Lots which may be created to Owners other than Declarant." (A39 at §3.5(b)(1).)

The Period of Declarant Control expired when one or more of the following events occurred:

- First, the Declarant conveyed all but two of the remaining 13 lots (i.e., more than 66.67%) to Hanover in February 2009. (Ex. P-13; Prelim. Tr. 340-42; Perm. Tr. 451.) Thus, as of February 2009, the Developer had conveyed 16 of 18 lots (five to the Homeowners and eleven to Hanover). The Bank's executives were not elected to the board of the ASC HOA until September 2010, well more than 60 days after this conveyance. (Ex. P-40 at 11-13.)
- Second, the Bank foreclosed upon the 13 unimproved lots in March 2010, thus causing a transfer of more than 66.67% of the lots. (L.F. 142.) Thus,

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439.) The Bank is thus not a proper successor Declarant because it did not seek to construct houses on the unimproved lots.

all lots had been conveyed as of March 2010. Again, the Bank's executives were not elected to the board of the ASC HOA until well more than 60 days after this occurrence.[11] (Ex. P-40 at 11-13.)

- Third, the Declarant allowed the Original HOA to become administratively dissolved long before any of the issues in this litigation arose, thereby ceding control of that association. (L.F. 376.)

Any one of these events alone is sufficient to end the Period of Declarant Control. Here, all three events occurred, thereby ending the Period of Declarant Control before the Bank elected its executives as board members.

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[11] In the trial court, the Bank contended that for a conveyance to count for the purposes of ending the Period of Declarant Control, it must be "a sale to a homeowner." (L.F. 1139.) The Declaration, of course, has no such requirement as it speaks only of lots being "conveyed." (A39 §3.5(b)(1)(iii)); see Kohner Props., Inc. v. SPCP Grp. VI, 408 S.W.3d 336, 342 (Mo. App. 2013) ("The terms of a contract are read as a whole to determine the intention of the parties and are given their plain, ordinary, and usual meaning").

II. THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT TO THE BANK DETERMINING THAT THE ASC HOA HAD AUTHORITY TO GOVERN THE SUBDIVISION PURSUANT TO THE DECLARATION BECAUSE THE ASC HOA HAD NO SUCH AUTHORITY UNDER MISSOURI LAW IN THAT THE ASC HOA WAS NEITHER THE ASSOCIATION DESIGNATED BY THE DECLARATION NOR AN ASSIGNEE OF THE ASSOCIATION DESIGNATED BY THE DECLARATION.

The trial court granted partial summary judgment in favor of the Bank, ruling that the Bank's homeowners' association, the ASC HOA, had authority to govern the Subdivision pursuant to the Declaration. (A1.) This ruling was erroneous because Missouri law is clear that a *successor* homeowners' association, such as the ASC HOA, cannot govern a subdivision unless it first receives an assignment from the original association created pursuant to the declaration. The Declaration explicitly designated The Arbors at Sugar Creek Homeowners Association, Inc., i.e., the Original HOA, as *the* homeowners' association for the Subdivision. (A38 at §3.1.)

The Bank, however, purports to rule the Subdivision through its separate association, the ASC HOA, which never received an assignment from the Original HOA. Accordingly, the ASC HOA is not a properly authorized homeowners' association under Missouri law and its actions are unauthorized and should be deemed null and void. Without approval of McKelvey's plans by a properly constituted homeowners'

association, they per se violate the Declaration's architectural provisions. (A51 §10.1(a), requiring board approval for all new home construction.)

A. The ASC HOA is Not the Association Designated by the Declaration.

It is undisputed that the ASC HOA did not exist at the time the Declaration was recorded. (Compare L.F. 325 ¶4, with L.F. 335 ¶31; see also A32.) Thus, it is not the designated governing association under the Declaration. See DeBaliviere Place, 337 S.W.3d at 677 ("Because the new DeBaliviere Place Association did not exist when the declaration was written, it cannot be the 'DeBaliviere Place Association' referred to in the declaration"). Indeed, the Original HOA, which has since been administratively dissolved, did exist at the time the Declaration was executed and recorded. For the ASC HOA to have any authority to govern the Subdivision, it must be a successor or assign of the Original HOA. (See A36 at §1.1, defining the Original HOA to include "its successor and assigns.")

B. Missouri Law Requires an Assignment For a Successor Homeowners' Association to Properly Govern a Subdivision.

Missouri law is clear: a successor homeowners' association must first receive an assignment from the original association in order to govern a subdivision. "For the new [homeowners'] association to be either a successor or assign there must have been a transfer of the rights and duties from the former [homeowners] association to the new [homeowners'] association." DeBaliviere Place, 337 S.W.3d at 677; see also Valley View Village S. Improvement Ass'n, Inc. v. Brock, 272 S.W.3d 927, 931 (Mo. App.

2009) (holding that, absent an assignment, the purported "successor" homeowners' association had no authority to govern the subdivision).

In Valley View, the original homeowners' association authorized by the indenture was no longer in existence. Id. at 928. Another association was formed, but the original association made no assignment to the second association. Id. The second association then sought to control certain property within the subdivision, which it claimed was common property of the subdivision. Id. at 928-29. The Court rejected this attempt, reasoning that, without an assignment from the original association, the second association had no right to bind the other lot owners who did not consent to its authority. Id. at 931.

C. The ASC HOA Has No Authority to Govern the Subdivision.

There is no dispute that (1) the ASC HOA is not the entity designated by the declaration; and (2) the ASC HOA did not receive an assignment from the Original HOA. (See supra §II.B; L.F. 419 ¶10.) In fact, on behalf of the Bank, its counsel, Mr. Mersman, admitted that "[t]he only entity that has authority to manage the subdivision is the [Original HOA]." (L.F. 418 ¶¶8-9; L.F. 354.) Likewise, the Bank further admitted that the ASC HOA received no assignment from the Original HOA. (L.F. 419 ¶10.) Yet, despite its lack of authority to govern the Subdivision, the Bank, purporting to act through the ASC HOA, has charged ahead with its agenda in the Subdivision, approving plans and making assessments, among other things.

This present case is the Valley View situation, just with different subdivisions. Both the Valley View and this case share the same factual similarities: (i) a recorded

declaration provided for a homeowners association; (ii) that association had become dissolved; (iii) certain lot owners called for a meeting to form a new association; (iv) the new association purported to be a successor to the original one; (v) the purported successor association did not receive an assignment from the first association; and (vi) the proponents of the purported successor association argued that it should be recognized because the declaration intended there to be a governing association.[12] The Valley View case is directly on point, rejects the pretend authority of a purported successor association without an assignment and settles this issue.

Moreover, no Homeowners acquiesced or consented to the purported authority of the ASC HOA. (L.F. 421 ¶17.) Even after the trial court's entry of partial summary judgment on this issue, the Homeowners participated in the ASC HOA under protest and subject to their objections. (E.g., Ex. P-45 at 4-6.) Therefore, neither the Bank nor the ASC HOA has any authority to govern the Subdivision or bind the Homeowners and the trial court erred in granting summary judgment.

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[12] Even without a governing homeowners association, the lot owners would still have recourse pursuant to the Declaration and the ability to manage their affairs. See, e.g., Wheeler v. Sweezer, 65 S.W.3d 565, 570 (Mo. App. 2002) (individual subdivision lot owner had standing to bring an action to enforce a restrictive covenant regarding building usage and appearance).

D. Defendants' Proffered "Substitutes" for an Assignment are Insufficient to Empower the ASC HOA.

Defendants have proffered various theories to circumvent the clear Missouri law discussed above. The most prevalent theories hawked by Defendants are: (1) the Original HOA could not assign its rights because it was administratively dissolved; (2) the Developer's assignment of Declarant rights to the Bank empowered the ASC HOA; and (3) the Bank's purported amendment of the Declaration to make it refer to the ASC HOA empowered the ASC HOA. These theories are not supported by Missouri law and should be rejected.

Any contention that the Original HOA could not make an assignment because it was administratively dissolved is simply wrong. This Court spoke directly to this issue In the DeBaliviere case: "The former [dissolved] DeBaliviere association can assign any right to the new DeBaliviere association without exercising that right." DeBaliviere Place, 337 S.W.3d at 675.

The Bank's purported assignment of Declarant rights from the Developer is not sufficient or equivalent to an assignment from the Original HOA. First, the Declaration required the Developer to form a homeowners association "not later than the conveyance of title to a Lot." (A38 at §3.1.) Thus, by the time the Bank acquired the Developer's Declarant rights in August 2010 (L.F. 276), the Declarant had no right to form another homeowners' association because the Developer had long since conveyed title to multiple lots. Second, the Declaration clearly delineated the Declarant's continuing rights. (See A50-51 §§9.1-9.2.) The right to form an additional homeowners' association was not one

of those rights. Third, Missouri case law clearly requires an assignment from the original association—not the developer—to the purported successor association. Valley View, 272 S.W.3d at 931.

Defendants may assert that because the Bank amended the Declaration's definition of "Association" to refer to the ASC HOA, the ASC HOA was not required to receive an assignment from the Original HOA. Again, however, the Valley View case spoke to this point: "Although the current homeowners certainly have the right to create an association of homeowners, they do not have the legal right to bind Appellant with their association decisions absent Appellant's acquiescence." 272 S.W.3d at 931. Regardless of whether the Declaration was amended, the Bank cannot foist a homeowners association upon the Homeowners if they do not consent to it.

While the Declaration provides that the Original HOA could be "modif[ied]" or "eliminate[d]" if an "adequate substitute is made," the ASC HOA is not an adequate substitute. (A55 §12.1(b).) In its ruling on the motion for partial summary judgment, the trial court made no finding that the ASC HOA was an adequate substitute for purposes of the Declaration and the Bank did not argue this issue in its summary judgment papers. (See A1; L.F. 113.) Upholding the award of partial summary judgment on such an unsupported factual determination would be improper. Conway v. St. Louis Cnty., 254 S.W.3d 159, 164 (Mo. Ct. App. 2008) (summary judgment may be affirmed only based upon a "theory supported by the record"). Moreover, the evidence demonstrates that the ASC HOA was not an "adequate substitute" to the Original HOA.

The Homeowners clearly never consented to governance of the Subdivision by the ASC HOA, which acted secretively and with hostility to the Homeowners. For instance, one of the "independent" experts the ASC HOA purportedly retained[13] was selected by the Bank's counsel and had rendered his report before the ASC HOA even approved him. (Ex. P-47 at 32-34; see also Ex. Bank-K.) By way of further example, the Bank's litigation counsel ran the meetings and cut off discussions between the sole Homeowner serving as a board member and the Bank's executives purporting to serve as board members. (Prelim. Tr. 80; see also Ex. P-40 – P-47; Perm. Tr. 517-18.)

Moreover, the ASC HOA could not have been an "adequate substitute" for the Original HOA so long as the Original HOA retained its power of governance of the Subdivision. Although the Original HOA sat dormant in a state of administrative dissolution, Missouri law allows for rescission of the administrative dissolution. Mo. Rev. Stat. §351.488. Only an actual dissolution of that entity or unanimous consent of all of the owners of property could have extinguished the authority of the Original HOA.

The ASC HOA was neither an assignee of the Original HOA nor an adequate substitute therefor. Accordingly, the trial court erred in granting summary judgment declaring that it was the authorized homeowners association for the Subdivision.

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[13] The "independent" experts were disclosed by the Bank as litigation experts. (L.F. 1244-47; see also L.F. 1248.)

III. THE TRIAL COURT ERRED IN DENYING INJUNCTIVE RELIEF TO THE HOMEOWNERS AND IN GRANTING DECLARATORY JUDGMENT TO THE BANK BECAUSE THE ASC HOA AND THE BANK'S EXECUTIVES SERVING ON ITS BOARD DID NOT ACT REASONABLY OR IN GOOD FAITH IN APPROVING MCKELVEY'S PLANS IN THAT THE PURPORTED DUE DILIGENCE OF THE BANK'S EXECUTIVES WAS UNREASONABLE AND NOT TAKEN IN GOOD FAITH.

In entering its Permanent Injunction Order, the trial court expressly deferred to the determinations made by the Bank's executives serving as board members of the ASC HOA and found that they acted reasonably. (A6 ¶18; A10 ¶38.) The trial court stated "[i]f there is a difference of opinion …, the determination of the homeowners' association is given deference." (A6 ¶18.) The trial court's deference to the Bank's executives was misplaced and improper.

A. The Trial Court's Use of a Standard of Review Deferential to the Decisions Made by the Bank's Executives Serving as Board Members Was Improper.

Under well-established Missouri case law, when a party challenges the decision of a homeowners association board, the court must determine, based on the evidence presented, whether the board's exercise of discretion was reasonable and in good faith. See LeBlanc v. Webster, 483 S.W.2d 647, 649 (Mo. App. 1972); Melson v. Guilfoy, 595 S.W.2d 404, 407 (Mo. App. 1980); Marose v. Deves, 697 S.W.2d 279, 288 (Mo. App.

1985) (all affirming the rule that the discretion given to approve or deny construction plans based on compliance with an indenture must be reasonably exercised).

In LeBlanc, the court specifically held that while the board is given discretionary power to reject any proposal, that power must be exercised reasonably and in good faith. 483 S.W.2d at 649 (citing Winslett v. Keeler, 137 S.E.2d 288 (Ga. 1964)). Reasonable exercise of discretion is particularly important "when the proposed building is not consistent and harmonious with the overall plan or actual construction within the subdivision or development or when the proposed building is in conflict (creating damages) with the neighboring properties." LeBlanc, 483 S.W.2d at 650.

A case with similar facts, Marose v. Deves, offers guidance on how the reasonable discretion standard should be applied in this case. In Marose, the pivotal issue before the court was whether the authority to approve building plans was reasonably exercised. 697 S.W.2d at 289. A builder began constructing homes in a subdivision that the other residents opposed. The subdivision's architectural committee denied approval of the building plans and sought an injunction against the builder. Upon reviewing the evidence relating to the design, style, exterior appearance, and size of the existing and proposed homes, the trial court found that there was evidence to support a finding that the proposed homes were "not consistent and in harmony" with the homes already in the subdivision. Id. Specifically, the court held, "while we profess no expertise in architecture or design, the photographs in evidence—showing every structure in [the subdivision]—support a finding that appellants' four completed buildings and two proposed buildings do not harmonize aesthetically with the overall development of [the subdivision]." Id. The

court granted the injunction and affirmed the review committee's denial of the proposed building plans.

Defendants will likely rely on Bennett v. Huwar, 748 S.W.2d 777 (Mo. App. 1988), to argue that the trial court was required to defer to the findings of the ASC HOA, and to not substitute its opinion for the Board's. Deference to the board's findings, however, is appropriate only when a party does not contest the reasonableness of the board's decisions. In fact, the Bennett court noted, "there was no claim by respondents that the Committee members acted unreasonably or arbitrarily in denying approval of the respondents' planned construction, nor did the court refuse to enforce the decision by the Committee because it was unreasonable." 748 S.W.2d at 780.

In this case, and as further explained below (see §III.B), the Homeowners *did*—and *do*—challenge the reasonableness of the Board's decision. Given the interests of the Bank, both in terms of promptly disposing of the property and being in a joint venture with McKelvey in the sale of homes in the Subdivision, the actions of the ASC HOA, as an instrumentality of the Bank, should be closely scrutinized with a "special intensity." Such a "special intensity" is relied upon by reviewing courts not to change the scope of review, but to indicate that when the Rule of Necessity requires that an otherwise biased or ineligible administrative board is required to act, the court will pay special attention in its review. See Barker v. Sec'y of State, 752 S.W.2d 437, 441 (Mo. App. 1988); see also Stonecipher v. Poplar Bluff School Dist., 205 S.W.3d 326, 328-29 (Mo. App. 2006) The trial court abused its discretion by using the wrong standard of review in evaluating

whether injunctive relief was proper to force the Bank and the ASC HOA to comply with the Declaration.

B. The ASC HOA Did Not Act Reasonably or in Good Faith in Approving McKelvey's Plans, Including Its Plans for the Lot 13 House.

In approving McKelvey's plans, the Bank's executives serving on the board of the ASC HOA purported to undertake certain due diligence. As acknowledged by the Bank's president, the Bank owed fiduciary duties to the Homeowners. (Prelim. Tr. 334; see also id. 324; testimony of Mr. Dulle acknowledging that the Bank "wear[s] two hats so to speak.") Thus, when the Bank's own interests are pitted against the Homeowners', the Bank, according to Mr. Dulle, purported to act as "independent as possible." (Id. 334.) To do so, the Bank hired two "independent" experts to provide opinions on whether McKelvey's houses complied with the Declaration, and Mr. Dulle drove around other subdivisions to inform his decision. (Id. 319-20, 322, 324.) The Bank's attempts to be independent, however, smack of unreasonableness and bad faith, as demonstrated below. Contra LeBlanc, 483 S.W.2d at 649; Melson, 595 S.W.2d at 407; Marose, 697 S.W.2d at 288 (all affirming the rule that the discretion given to approve or deny construction plans based on compliance with an indenture must be reasonably exercised).

1. Option Agreement.

When the Bank foreclosed in March 2010, Mr. Dulle, the Bank's current president, did not even know the Declaration was in place (even though the Bank had previously consented and subordinated its interests to the Declaration). (Prelim. Tr. 340; A60.) The Bank then proceeded to enter into the Option Agreement with McKelvey in

May 2010. Under the Option Agreement, the Bank is obligated to convey lots to McKelvey and to approve McKelvey's plans. (Ex. P-14 at 1-2 ¶¶1, 3 and at 12 ¶11.) There is no provision in the Option Agreement for the Bank to deny McKelvey's plans.

Moreover, the Bank obligated itself to appoint board members to the homeowners' association. (Ex. P-14 at 12 ¶11.) What is more, the Bank is to share in McKelvey's profits from the Subdivision. (Prelim. Tr. 351.) The Bank's motive in ensuring that McKelvey's plans were approved is thus plain to see.

2. "Independent" Experts.

In an attempt to provide support for its approval of McKelvey's plans, the Bank retained two purportedly "independent" experts. These experts, however, are anything but "independent." Moreover, both experts were retained *after* the Bank had already obligated itself to approve McKelvey's plans in the May 2010 Option Agreement. (Compare Ex. P-14, with Ex. P-41 (October 13, 2010 ASC HOA meeting approving retention of Mr. Merdinian), P-47 (July 1, 2011 ASC HOA meeting approving retention of Mr. Neff).) Further, Mr. Neff, the Bank's appraiser, did not issue his report until April 2011, well after the Bank's executives initially approved McKelvey's plans in November 2010. (Compare Ex. Bank-K, with Ex. P-42.)

Mr. Merdinian, the architect selected to review McKelvey's plans, was chosen from a list of architects provided by none other than McKelvey's president, Mr. Brennan. (Prelim. Tr. 358-60.) The Bank, through Mr. Dulle, even realized that McKelvey was "trying to influence the selection of the architect." (Id. 360; see also Perm. Tr. 462-64.) Additionally, Mr. Merdinian was first contacted not by the Bank's executives serving as

board members of the ASC HOA, but by Mr. Mersman, the Bank's attorney. (Prelim. Tr. 250.) Mr. Mersman, not the board members, then "explained … the situation" to Mr. Merdinian. (Id. 252; see also Perm. Tr. 480-81.)

To dispel any lingering notion that Mr. Merdinian was an "independent" expert, Mr. Merdinian testified that his opinions were to be used to "justify what the bank was trying to do in building the homes." (Prelim. Tr. 254.) He understood that there was at least the "potential" that his opinions would be used against the Homeowners. (Id.) Indeed, at one point in the process, Mr. Merdinian requested additional information from McKelvey because he "want[ed] to make sure they [the opinions] are accurate and will stand up in the event that I need to defend them." (Id. 277.)

Mr. Neff, the Bank's appraisal expert, likewise was engaged by the Bank, not by the ASC HOA. (Prelim. Tr. 289.) Mr. Mersman selected Mr. Neff and gave him direction. (Ex. P-47 at 33-34.) In fact, the ASC HOA did not even approve of Mr. Neff until after he had rendered his report. (Ex. P-47 at 32; see also Ex. Bank-K.)

Defendants' claim that both Mr. Merdinian and Mr. Neff were "independent" is further undermined by the fact that the Bank disclosed both as its litigation experts. (L.F. 1244-47; see also L.F. 1248; request of the Bank's litigation counsel for access to the Homeowners' homes for Mr. Neff "on behalf of Defendant Jefferson Bank so Mr. Neff can do his work.")[14]

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[14] As further evidence of the Bank's bad faith, it attempted to assess the

3. Other Subdivisions.

Even though Mr. Dulle allegedly drove around other subdivisions as part of his due diligence, he testified that he never mentioned this in a single meeting of the ASC HOA. (Perm. Tr. 417-18, 528.)[15] Moreover, what was done in other subdivisions was irrelevant because neither Mr. Dulle nor anyone else could say whether these other subdivisions had recorded indentures such as was present for the Subdivision. (Perm. Tr. 417-18.) As a result, these drive-by reviews by the Bank's representative are immaterial and add nothing to the analysis of this case.

Homeowners for the costs of its litigation experts via an assessment from the ASC HOA (see supra Statement of Facts §14), even though such an assessment is invalid under the Declaration. The Declaration provides: "In the event any professional services are required by the Association in connection with a request by an Owner, the fees incurred for such services shall be recoverable from the Owner making the request." (A41 at §4.9.) The Homeowners, obviously, did not request the services of Messrs. Merdinian and Neff in connection with the requests for approval by the Bank and McKelvey.

[15] The pictures of these other subdivisions presented by the Bank at the hearing were taken by the Bank's litigation counsel within a month of the hearing. (Perm.Tr. 416.) Thus, they were taken *after* the ASC HOA meetings.

4. Grading for McKelvey and the Landscape Plan.

The Bank approved grading within the Subdivision so that the lots could accommodate McKelvey's planned houses. (Perm. Tr. 277-78; Ex. P-43 at 6-7.) The grading work, however, concerned lots for which McKelvey had not even submitted plans. (See Ex. P-42.) By approving this grading, the Bank must have assumed it would also approve McKelvey's plans, whatever they were. After all, as explained above, the Bank was contractually obligated to do just that (and had an obvious financial interest to do so both in terms of more quickly selling the property and as a result of its profit interest in its joint venture with McKelvey).

5. Amendment of Declaration.

Mr. Dulle acknowledged that the Bank "amended" the Declaration, not in its capacity of controlling the board of the ASC HOA, but rather to serve its own interests. (Prelim. Tr. 382-83.) What is more, the Bank's attorney, Mr. Mersman, who also purported to represent the ASC HOA, concocted the whole plan to "amend" the Declaration. (Prelim. Tr. 382.) The Bank knew that control of the board meant control of what could be built in the Subdivision. (Perm. Tr. 445-46, 513.) The Bank's "amendment" of the Declaration is just another example of this.

6. ASC HOA Meetings.

Finally, the conduct of all the ASC HOA meetings shows that the Bank's executives were not acting independently. Mr. Mersman, the Bank's attorney, ran the meetings. (See Prelim. Tr. 80; see also Ex. P-40 – P-47 (Mr. Mersman chaired the ASC HOA meetings and often spoke for the Bank's executives, who were supposed to be

acting as "independent" board members).) Mr. Mersman would even cut off discussion at these meetings between Mr. Lemley, a board member, and the Bank executive board members. (Perm. Tr. 517-18.)

These facts demonstrate that the Bank's executives were not acting reasonably or in good faith in approving McKelvey's plans, including its plans for the Lot 13 House. Injunctive relief should thus have been granted to the Homeowners and declaratory judgment should not have been granted to the Bank.

IV. THE TRIAL COURT ERRED IN DENYING INJUNCTIVE RELIEF TO THE HOMEOWNERS AND IN GRANTING DECLARATORY JUDGMENT TO THE BANK BECAUSE THE HOUSE MCKELVEY HAD UNDER CONSTRUCTION AND THOSE IT PLANNED TO CONSTRUCT VIOLATED THE DECLARATION'S ARCHITECTURAL REQUIREMENTS IN THAT THE HOUSES WERE NOT UNIFORM AND HARMONIOUS WITH THE HOMEOWNERS' EXISTING HOMES.

Even though all witnesses acknowledged that McKelvey's planned houses, including the one built on Lot 13, involved an architectural style different from the Homeowners' homes, the trial court still found that the Bank's executives who sat as board members acted reasonably in approving McKelvey's plans, and thus denied the Homeowners injunctive relief. (A5-15.) Regardless of the standard used or level of deference given by the trial court to the decisions of the ASC HOA, the trial court's decision is against the weight of the evidence, which clearly established that McKelvey's houses do not comply with the Declaration's architectural requirements. Even Judge

Gaertner, the dissenting judge in the Court of Appeals, acknowledged that "the new McKelvey homes are not the exact same architecturally as the original five homes." (Ct. App. Op., J. Gaertner dissenting.)[16] Accordingly, the trial court should have granted the Homeowners injunctive relief.

A. McKelvey's Houses Do Not Comply With the Declaration.

The Declaration requires uniformity and harmony in style among the houses built in the Subdivision. Article X of the Declaration states that its purpose is "to maintain the uniform quality and aesthetics of exterior architectural design for the best interest of the Community [a/k/a the Subdivision] as a whole." (A51 Art. X.) Any new construction must be in "harmony of exterior appearance with the existing improvements in the Subdivision, including architectural design, height, grade, topography, drainage (including, but not limited to, impermeable areas on the Property), color and quality of exterior materials and detail, location, construction standards, and other such criteria." (A52 §10.1(e).)

Despite the clear mandate of the Declaration requiring uniformity and harmony among the houses in the Subdivision, the Bank, acting through its executives on ASC

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[16] The majority opinion did not reach this issue because it found that the Bank's executives were not properly qualified to serve as board members, rendering all of their decisions on behalf of the homeowners association (including approval of McKelvey's plans) null and void. (Ct. App. Op. at 25-26.)

HOA's board, approved McKelvey's houses, which differed in numerous and material aspects from the Homeowners' homes. These contrasts include: general architectural style; roof overhangs; roof slope and color; exterior wall materials; use of angular (i.e., other than 90 degree) shapes; location on lots; exposure of basement foundation; windows; front door; use (or in the case of the Homeowners' homes, the complete absence) of traditional architectural design features. This is not a list of minor, unnoticeable differences. While Defendants went to great lengths in the trial court to point out that the Declaration did not contain specific language of the requirements (e.g., "stucco," "contemporary style") and prohibitions (e.g., "red brick") the Homeowners allege must be present (Perm. Tr. 290-94), such "considerations are, however, implicit in the restrictions because the [board] is instructed to consider, in reviewing plans for approval, the harmony of the proposed construction with the surroundings …." Bennett, 748 S.W.2d at 780.

One need look no further than pictures of the houses to see the stark contrasts. (See pictures in Appendix at A71-A76; compare P-5 through P-9 (the Homeowners' homes) with Ex. P-22 (the Lot 13 House); see also P-21 (aerial shots of Subdivision with partially completed Lot 13 House); Prelim. Tr. 118-34, 261-64, 274-75, 414-17.) The Bank ignored the mandates of the Declaration and failed to give any teeth to the requirements of harmony and uniformity.

A chart prepared by architect Dennis Bolazina succinctly sets forth the contrasting architectural characteristics of the houses:

Feature	**Plaintiffs' Existing Homes**	**Defendants' Planned Home**
Architectural Style	Exclusively contemporary design, completely devoid of any traditional, revivalist architecture	Front façade of exclusively traditional, revivalist architecture; remaining sides devoid of any architectural style
Roof Overhangs	Large roof overhangs	Very minimal roof overhangs
Roof	Low slope, hipped roofs of uniform color and material	Steep slope intersecting gabled roof; color unknown
Exterior Wall Materials	Consistent exterior wall construction materials of stone and stucco on all sides of the homes	Front façade of traditional brick, stone and vinyl siding; remaining sides exclusively vinyl siding
Exterior Colors	Limited color palette with a color range from cream to brown	Colors unknown
Angular Shapes	Incorporates angular wall and roof shapes (i.e., other than 90 degree angles)	Incorporates square, 90 degree angles

Feature	**Plaintiffs' Existing Homes**	**Defendants' Planned Home**
Location on Lots	Designed to accommodate and respect the existing topography of the Subdivision	No emphasis on location on lots or accommodation or respect for existing topography. All generic designs offered for all lots, with each home to face street at same setback
Basement Foundation	Absence of exposed concrete foundation.	Approximately 3 feet of exposed concrete foundation
Windows	High end Pella wood windows, casement style, color coated to be compatible with the exterior color	Low grade white vinyl windows, single and double hung style, with traditional rectangular grills
Front Door	Oversized wood front doors	Painted metal front door

Feature	**Plaintiffs' Existing Homes**	**Defendants' Planned Home**
Architectural Style Features	Devoid of any traditional, revivalist details	Front façade incorporates numerous traditional, revivalist details; for example, brick or stone arches and keystones, revivalist vinyl shutters, colonial revivalist columns, arched decorative caps on louvers, steep pitch nestled roof line

(Ex. P-11.)[17]

Testimony elicited and evidence submitted at the hearings in this matter further define the contrasting architectural styles:

- Arthur Merdinian (Bank's expert) opined that the existing houses are of a "contemporary …, craftsman …, and prairie style … with little basis in history or current local architectural styles." (Ex. Merdinian 3.) By contrast, the McKelvey houses exhibit none of those qualities (Prelim. Tr. 275-76); according

[17] McKelvey has taken issue with this chart before, arguing that it is not reliable because it was prepared by the Homeowners' counsel instead of by Mr. Bolazina, the Homeowners' architectural expert. Mr. Bolazina was abundantly clear, however, that while he did not personally type in the contents of this chart, it consisted solely of his own ideas and opinions. (Prelim. Tr. 134-35, 160-61.)

to Mr. Merdinian, McKelvey's houses are a "traditional" style of house "which is currently being built in the City of Des Peres and the surrounding subdivisions." (Ex. Merdinian 3.)

- Dennis Bolazina (Homeowners' architectural expert) testified that the Homeowners' homes "are a design that architects would call a pure design using elements, using materials just as they are and not embellishing them with revivalist ornament and detail." (Prelim. Tr. at 118-19.) In contrast, McKelvey's houses were a "traditional design that would be borrowing the historical, revivalist elements." (Id. at 119.)

- Jim Brennan (McKelvey's President) answered "Yes" when asked whether he "would agree … that the existing homes are more contemporary in appearance than the homes that exist in the McKelvey portfolio …?" (Prelim. Tr. at 414; see also Perm. Tr. 644.)

- John Dulle (Bank's President) was asked whether he "knew that McKelvey home would have some materials that were different from the current homes and have some architectural designs that were different from the current homes …?" Mr. Dulle responded, "I did know that." (Perm. Tr. 387.)

- Gregg Lemley (Homeowner) described the Homeowners' homes as "modern contemporary style, California style, prairie prayer [sic] style," whereas McKelvey's houses were "St. Louis traditional." (Prelim. Tran. at 37, 43-44.)

- Katherine Lemley (Homeowner) described the Homeowners' homes as having "a very clean look. When you are dealing with stucco, you have a very

clean look to the home. There are no historical references on the house." By contrast, she described McKelvey's houses as "standard, typical St. Louis subdivision type home, off-the-shelf home …." (Perm. Tr. 235, 283.)

- Jacqueline Ori (Homeowner) testified that the Homeowners' homes were "custom and unique in design," whereas McKelvey's houses were "like cookie cutter homes." (Prelim. Tr. at 105-06.)

- Bonnie Choi (Homeowner) testified regarding the different building materials used: the Homeowners' homes used "stone and also stucco," whereas McKelvey's houses were to use "stone and bricks and vinyl siding." (Prelim. Tr. at 238-39.)

Additionally, while the Declaration is clear in what it requires (i.e., uniform and harmonious design, exterior materials and appearance), looking to the intention behind the Declaration further supports the Homeowners' position. See Blackburn v. Richardson, 849 S.W.2d 281, 286-87 (Mo. App. 1993) (in construing restrictive covenants, "courts should give effect to the intent of the parties as expressed in the plain language of the covenant[s]"; determining the intent of the parties "includes an inquiry into the purpose which the parties sought to accomplish by the restrictive covenant"). The intention of the Developer who recorded the Declaration is clearly evidenced by both (i) the architectural design, color, height, quality of exterior materials, detail, location and construction standards, including green standards, of existing homes in the Subdivision; and (ii) the marketing materials and other representations provided to the Homeowners by the Developer. (Prelim. Tr. 44; Perm. Tr. 85; 227-28; see also Marketing Materials

appended to Ex. P-1.) Without exception, the Homeowners testified that the intention of uniformity in these elements was shared with them and they relied upon it in their decisions to invest in the Subdivision. (Prelim. Tr. 29-35 (G. Lemley), 87-90 (J. Ori), 232, 235-36 (B. Choi); Perm. Tr. 226-32 (K. Lemley).) Moreover, the Bank has known this intention since 2006 when the Bank consented and subordinated its deed of trust to the Declaration. (A60; Prelim. Tr. 336.)

B. The Trial Court Erred in Failing to Grant Injunctive Relief.

Injunctive relief is appropriate to remedy a violation of a recorded indenture, such as Defendants' violation of the Declaration here. In Connelly v. Schafer, 837 S.W.2d 344 (Mo. App. 1992), for example, the court of appeals held that "[e]quity will enforce a covenant against all subsequent purchasers with notice" and thus enforced a subdivision restrictive covenant requiring wooden shingles, which meant that the defendants had to replace their asphalt roof with a wooden one. Another court enforced restrictive covenants to require the removal of a fence because it violated the subdivision's "indentures requiring improvements to be in harmony with other structures and the landscaping in the subdivision," terms much like the architectural requirements in dispute here. Wallace v. Grasso, 119 S.W.3d 567, 574 (Mo. App. 2003).

Numerous additional cases have granted injunctive relief to remedy violations of restrictive covenants. See Bennett, 748 S.W.2d at 780-81 (directing trial court to enjoin defendant to modify house that was not in "harmony" with other houses in subdivision, as required by the recorded indenture, or to tear down the non-compliant building); Marose, 697 S.W.2d 289 (affirming injunction against the construction of structures that

were "not consistent and in harmony with the actual construction in [the subdivision]"); Melson, 595 S.W.2d at 404 (affirming injunction requiring defendants to remove fence that violated recorded indenture); Rhodes v. Tanner, 591 S.W.2d 90, 91-92 (Mo. App. 1979) (affirming injunction that required the defendants to remove obstructions they had constructed on roads within a subdivision in violation of a restrictive covenant); Perry v. Spavale, 828 S.W.2d 709, 710 (Mo. App. 1992) (affirming injunction that prohibited the construction of a radio transmission tower in violation of a restrictive covenant); Blackburn, 849 S.W.2d at 288-89 (affirming injunction that prohibited the building of a house in violation of a restrictive covenant); K's Merchandise Mart, Inc. v. McLane, 62 S.W.3d 416, 417 (Mo. App. 2001) (affirming injunction that prohibited operation of an amusement center on property in violation of a restrictive covenant); Maryland Estates Homeowners' Ass'n v. Puckett, 936 S.W.2d 218, 219 (Mo. App. 1996) (affirming injunction that prohibited parking a commercial truck in a driveway in violation of a restrictive covenant). Accordingly, the Homeowners are entitled to injunctive relief to enforce the terms of the Declaration.

Viewed in the abstract, razing the Lot 13 House may seem like a drastic remedy. But viewed in the greater context of this litigation, Defendants assumed the risk of such relief and proceeded despite that risk (likely in the hopes of garnering the court's sympathies). Indeed, McKelvey only began construction of the Lot 13 House in August 2011, well over a year *after* this lawsuit had been filed. (L.F. 521.) As an email from Jon Haupt to Jim Brennan, McKelvey's president, indicates, McKelvey considered beginning construction in the Subdivision in order to force the Homeowners to seek an injunction.

(L.F. 744.) McKelvey's decision to build was thus less about meeting the needs of its customers and more about advancing McKelvey's litigation strategy. Because McKelvey assumed the risk of having to raze the Lot 13 House, it should not now be heard that such relief would be inequitable. Moreover, the Komloses (for whom the house was built) were aware of this litigation, agreed to abide by any injunctive relief entered herein and have also assumed the risk of injunctive relief. (Ex. P-50.)

Additionally, this litigation involves more than the Lot 13 House. The Homeowners' declaratory judgment count encompasses construction within the Subdivision as a whole. (L.F. 909-11.) Even putting aside the Lot 13 House issues, the Homeowners are requesting relief regarding construction standards going forward. (Id.) If allowed to proceed, Defendants will make the Subdivision unrecognizable as it would then consist of 13 traditional-style homes, with the Homeowners' five unique, contemporary-style homes sticking out like a sore thumb. This is not why the Homeowners collectively invested millions of dollars in the Subdivision.

V. THE TRIAL COURT ERRED IN DETERMINING THAT THE BANK WAS ENTITLED TO REIMBURSEMENT FOR CERTAIN ALLEGED MAINTENANCE COSTS BECAUSE THE BANK HAD NO LEGAL OR FACTUAL BASIS TO OBTAIN SUCH RELIEF IN THAT THE BANK NEVER ASSERTED A CLAIM FOR SUCH RELIEF, FAILED TO PRESENT ANY COMPETENT EVIDENCE TO ESTABLISH A RIGHT TO THIS RELIEF, AND FAILED TO COMPLY WITH THE PROCEDURES OF THE DECLARATION.

After the trial court had heard four days of evidence on the Homeowners' claims for declaratory and injunctive relief, but before the Court issued its decision, the Bank filed a motion against the Homeowners for reimbursement of certain costs it allegedly incurred in maintaining the Subdivision. (L.F. 1328.) On November 20, 2012 (i.e., before the trial court ruled on the Homeowners' declaratory and injunctive claims), the trial court granted the Bank's motion for reimbursement of costs against the Homeowners without requiring or allowing any evidence on this issue,. (L.F. 1375.) The trial court ordered this relief in its final judgment, again without requiring the Bank to provide any evidentiary support. (A30.)

The trial court erred in ordering this relief because: (1) the Bank never requested it in its pleadings; (2) the Bank presented no competent evidence to support a right to it; and (3) it is not otherwise justified by the Declaration. The trial court's order is akin to the grant of a summary judgment since it was granted based on the Bank's motion; such orders are reviewed *de novo*. ITT Commercial Fin. Corp., 854 S.W.2d at 376.

The Bank never requested reimbursement of any purported maintenance costs in any of its counterclaims, including its latest amended counterclaims. (L.F. 1003.) The Bank, of course, requested other types of money damages for other issues, but never reimbursement for purported maintenance costs. (See id.) Missouri law is clear that the trial court cannot award relief that is not sought by the pleadings. Norman v. Wright, 100 S.W.3d 783, 786 (Mo. Banc 2003) ("The relief awarded in a judgment is limited to that sought by the pleadings"); In re Marriage of M.A. & M.S., 149 S.W.3d 562, 570 (Mo. App. 2004) ("A judgment is void to the extent it grants relief beyond what is requested in the pleadings").

Even had the Bank sought such relief in its pleadings, the trial court still erred because it did not require the Bank to provide any competent evidence to support its claim to this relief. See State ex rel. Nixon v. McIntyre, 234 S.W.3d 474, 477 (Mo. App. 2007) (reversing summary judgment in favor of the plaintiff because the plaintiff failed to provide competent evidence to the trial court in support of the motion). The Bank presented no competent evidence to support its motion—no testimony, no affidavits, not even a verified motion. (L.F. 1328.) Rather, the Bank attached invoices from third parties to its motion and baldly asserted that these invoices represented amounts paid by the Bank for maintaining the Subdivision. These out-of-court statements are nothing but hearsay and do not represent competent evidence. In the absence of competent evidence, the trial court had no basis upon which to award relief to the Bank.

The trial court further erred in awarding this relief to the Bank because the Bank based its right to this relief, in part, on the Declaration. (L.F. 1329.) That is, the Bank

asserted that because the ASC HOA had the authority to expend amounts for the maintenance and then assess the Homeowners for these amounts, the Bank was entitled to direct reimbursement.[18] (Id.) The Bank's position, and the trial court's order, however, ignore the clear requirements of the Declaration for expending such amounts and then seeking reimbursement through assessments to the lot owners. Among other things, the Declaration requires that a budget be created for expenses (A40 §4.1); that an assessment issue for those expenses (A46 §7.1); and, finally, that the matter be referred to certain dispute resolution measures should a dispute arise (A54 §11.3). None of that happened for the costs at issue. Accordingly, this Court should reverse that portion of the trial court's final judgment which ordered the Homeowners to reimburse the Bank for certain expenses.

[18] The Bank's position in its motion for reimbursement shows its true colors. While the Bank has maintained that the ASC HOA is an "independent" association, the Bank's motion makes clear that the Bank and the ASC HOA are one and the same.

VI. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF DEFENDANTS ON THE HOMEOWNERS' CLAIMS FOR DAMAGES BECAUSE THE HOMEOWNERS WERE ENTITLED TO DAMAGES IN THAT DEFENDANTS BREACHED THE DECLARATION AND THEIR DUTIES TO THE HOMEOWNERS.

In addition to asserting a count for declaratory and injunctive relief (Count I), the Homeowners asserted claims against Defendants for breach of fiduciary duty (Count II), civil conspiracy (Count III), tortious interference (Count IV) and nuisance (Count V). (L.F. 901.) The Homeowners acknowledge that unless Defendants violated the Declaration, the Homeowners' damages claims fail (as they are all based upon such violations). The Homeowners presume the trial court entered judgment against them on their damages claims on this basis because the hearing on their petition for a permanent injunction did not extend to the their damage claims and there was no motion for judgment directed against the their damage claims pending at the time the trial court entered its final judgment. (Perm. Tr. 2-3; A29-31.)

The trial court's decision on the Homeowners' damage claims is akin to a judgment on the pleadings, which requires an appellate court to "review the allegations of Appellants' petition to determine whether the facts pleaded therein are insufficient as a matter of law." State ex rel. Nixon v. American Tobacco Co., 34 S.W.3d 122, 134 (Mo. banc 2000). Should this court reverse the trial court's Permanent Injunction Order, then a factual dispute would exist as to the Homeowners' damage claims and the allegations setting forth those claims would be sufficient, in which case a judgment on those claims,

without an evidentiary hearing, would be erroneous. If this Court reverses judgment on the Homeowners' claims for declaratory and injunctive relief, it should likewise reverse the judgment against the Homeowners on their damage claims.

CONCLUSION

For the reasons stated, the Homeowners request that this Court:

A. Reverse the partial summary judgment regarding the authority of the ASC HOA to govern the Subdivision;

B. Reverse the ruling of the trial court with respect to the validity of the Bank's executives serving as board members of the ASC HOA;

C. Reverse the trial court's denial of injunctive relief to the Homeowners and grant of declaratory judgment to the Bank;

D. Reverse the trial court's judgment against the Homeowners requiring them to reimburse the Bank for certain alleged maintenance costs; and

E. Reverse the trial court's judgment against the Homeowners on their damages claims against Defendants.

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CERTIFICATE OF COMPLIANCE

The undersigned herby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this brief complies with Rule 55.03 and the length limitations contained in Rule 84.06(b) in that there are 17,088 words in the brief (except the cover, signature block, certificate of service, certificate of compliance, and appendix) according to the word count of the Microsoft Word word-processing system used to prepare the brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of March, 2015, the foregoing brief was filed electronically with the Clerk of the Court and served by operation of the Court's electronic filing system upon the following:

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