IN THE SUPREME COURT OF MISSOURI

Number SC 91138

DeBALIVIERE PLACE ASSOCIATION,

Respondent,

v.

STEVEN VEAL,

Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
Cause Number 22054-02475
HONORABLE ROBERT H. DIERKER, JR.
DIVISION 18

BRIEF
OF AMICUS CURIAE COMMUNITY ASSOCIATIONS INSTITUTE

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The Community Associations Institute submits this brief as *amicus curiae* in support of affirming the judgment of the trial court in this matter.

I. INTRODUCTION.

Amicus Curiae Community Associations Institute ("CAI") is a national, nonprofit research and education organization formed in 1973 by the Urban Land Institute and the National Association of Home Builders to provide effective and objective guidance for the creation and operation of condominiums, cooperatives, and homeowner associations.

Nationally, members of CAI include a broad spectrum of parties, including homeowner and condominium associations, managers, attorneys, accountants, lenders, and related professionals and service providers. CAI has nearly 60 chapters throughout the United States, including one in Missouri.

CAI estimates that approximately 62 million Americans live in 24.8 million housing units within 309,600 community associations; *i.e.* nearly one out of every five Americans lives in a community association.[1] Based

[1] Community Associations Institute, Industry Data: National Statistics, http://www.caionline.org/info/research/Pages/default.aspx (last visited December 10, 2010).

on national statistics, over one million Missourians reside in thousands of communities with some form of an owners association.[2]

A Zogby International poll of association members indicates that 71% of residents report a very good overall experience with their community association, 70% of residents believe the restrictions and rules protect and enhance property values, and 82% of residents believe the services provided by their association are a "great" or "good" return on investment.[3]

II. CAI STATEMENT OF INTEREST.

Common-interest communities are property developments in which a developer has subjected real property to deed restrictions creating a common development plan with a community association.

There are three basic forms of common interest community in Missouri and across the country: subdivisions (sometimes referred to as "planned communities"), condominiums, and cooperatives. These forms differ in how ownership of the property is split between the individual owner and the association. Otherwise, all forms of common interest communities share substantial similarities in how they function, with responsibilities for

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[2] US Census Bureau, Missouri http://www.quickfacts.census.gov/qfd/states/2900.html

[3] Community Associations Institute, Industry Data: 2009 National Zogby International, http://www.caionline.org/info/research/Pages/default.aspx (last visited December 10, 2010).

maintenance and insurance of common ground, budgeting, preservation of architectural design, enforcement of restrictions, collection of assessments, and other matters.

The community association presents a unique form of self-governance where common interests -- responsibility for maintenance of the property, expenses, compliance with restrictions, and other matters -- are shared among the owners and between each owner and the community association for the benefit of the entire community as a whole.

An association is characterized by mandatory membership, the power to tax and the duty to provide common services for the benefit of the entire community; thus, the owner "looks to the association for collective action to protect his interest in the common elements."[4]

The St. Louis area has "private places" dating back to the late 19th Century in the city of St. Louis and new "master plan" communities such as New Town in St. Charles. They range in size from three-unit condominiums to approximately 1,500 housing units at WingHaven in O'Fallon, Missouri and 1,425 units at Brentwood Forest Condominium.

This case is one of substantial import involving the respective rights and obligations of the association and the individual owner or member. CAI submits this brief in keeping with its longstanding interest in promoting

[4] Terra Du Lac Ass'n v. Terre Du Lac, Inc., 737 S.W.2d 206, 216 (Mo. App. E.D. 1987).

understanding regarding the operation and governance of community associations.

III. SUMMARY OF ISSUES.

After careful review of the issues, CAI believes that the trial court correctly found that DeBaliviere Place Association ("DPA") validly exists and has the authority to operate and collect assessments under its governing documents despite a period of time in which it was administratively dissolved as a nonprofit corporation.

A reversal of the trial court's order would elevate technical form over the recorded governing documents that establish the community association. Such a result would create uncertainty and risk for communities and their residents throughout Missouri and the country.

IV. ARGUMENT.

The drafter of the governing documents cannot be expected to anticipate every change of circumstances or administrative details that may affect the community decades after its initial creation. Here, the board failed to file an annual registration report, resulting in administrative dissolution of DPA's nonprofit corporate status by the Missouri Secretary of State. This was not discovered for more than ten years, after the period in which reinstatement was available.

The Appellant would like this Court to extinguish DPA as the homeowners association of DeBaliviere Place based on the administrative dissolution as a nonprofit corporation by the Secretary of State.[5] While respect must be given to the technical requirements for an entity to maintain its status as a nonprofit corporation, this Court must also recognize an important distinction between corporations and community associations that may also be incorporated.

Unlike corporations, which derive their existence and authority exclusively from their articles of incorporation, community associations are created through recorded governing documents with covenants that run with the land and bind current and future homeowners. Secondarily, the community association *may* be organized as a nonprofit corporation, but such status is not a condition of its existence and authority to carry out its responsibilities under the governing documents.

Appellant disregards the legal significance of the recorded governing documents. Homeowners deserve protection of their reasonable expectations that when they purchase a home in a community with an association providing services to preserve the community and protect property values. An administrative misstep in failing to file an annual report should not destroy those expectations.

[5] Appellant's Substitute Brief at 19.

Appellant cites few cases to support its proposition that an association is extinguished due to administrative dissolution. What is the effect of these rulings? Can a homeowners association "go out of business" because it lost its corporate status? How would the common services be provided and funded if the association cannot act? To whom would the owners look to protect their common interests under the recorded governing documents?

None of Appellant's cases considers the ramifications of not having an association at all. They overlook the significance of the recorded governing documents, the common development plan, and the necessity of a common vehicle to deliver common services. They ignore implied authority and equitable remedies that are essential to protect the expectations of all the owners.

A. The Role of Community Associations. Community associations are a form of private governance with broad powers to provide maintenance and insurance for common property, to enforce restrictions on use and architectural covenants, and to charge and collect assessments, all for the mutual benefit of all the owners and the best interests of the community as a whole. They maintain private streets and recreation facilities that relieve local governments of these burdens.

These types of communities are substantially similar. Each is created by recorded documents with a common development plan and characteristics:

- Automatic membership.
- Property to be maintained or insured other than the individual units.
- Mandatory assessments.

Specifically, DPA is authorized to maintain and insure the common property, enforce restrictions on use and the architectural covenants, make improvements on the common property, provide security services, provide social services and events, and collect assessments and pay for the common expenses.[6]

These characteristics are vital because the common development scheme and the common property feature mutual benefits and burdens for all owners. Thus, a common vehicle is necessary to care for the common property, and all owners have the burden of funding the costs because all owners benefit from the right to use the common property and services.

As one nationally recognized commentator observes, "The most practical reasons from an owner's perspective are shared costs, pooled

[6] LEGAL FILE at page 48, Declaration of Covenants and Restrictions for DeBaliviere Place, Article III, Section 2 (hereafter, "Declaration").

resources, economies of scale, and a legally recognized structure." [7]

A community association is "appropriate whenever there is a sharing of facilities and services coupled with the obligation to pay for those services…." [8] The benefits of a community association include:

- Owning and maintaining common property, including infrastructure and open space, and
- In its governing role, preserving and enforcing the land use plan through architectural, environmental, design, occupancy, and other restrictions. [9]

The need for a community association is particularly true at DeBaliviere Place, with its wide diversity of condominiums, apartment units, and single-family homes. The association is "an integrating factor that pulls the entire project together on issues of a community-wide nature. The word *community* in this context is defined broadly to signify sharing a common interest, whether that interest is infrastructure, maintenance, or something else." [10]

Recognizing that the association is created and operates under recorded governing documents that bind all the homeowners, the

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[7] Wayne S. Hyatt, Condominium and Homeowner Association Practice: Community Association Law, 29 (ALI-ABA 3rd Ed. 2000) (1981) (hereafter, referred to as "Hyatt").
[8] *Id.* at 30.
[9] *Id.*
[10] *Id.* at 31.

determination of whether to terminate the association should be left to the homeowners by an affirmative action, not solely based on an administrative misstep.

B. Implied Authority. This case involves an owner challenging the existence of an association based on an administrative failure to file an annual report. A number of courts have faced similar circumstances where the governing documents were defective in creating the association, and have found the valid existence of an association by implication.

The fundamental principle of implied authority rests on a common grantor, an overall development scheme, the presence of common property or other common interests, and mutual benefits and burdens for all homeowners. The reasoning is that even if an association were not created under the documents, its existence is necessary to care for common interests.

In a Missouri case, a developer provided a lake at a community, but did not create an association or a duty to maintain the lake. The owners formed a company to maintain the lake, and a substantial number of owners paid assessments to the company for this purpose. The court decided the issue on equitable grounds, finding that the company acted as trustee for all owners and that imposing assessments on all owners was

fair because all benefited from easements to use the lake. The court upheld the board's authority to levy annual assessments.[11]

In Colorado, a subdivision contained a park, but the documents did not require membership or authority to raise funds. The owners amended the documents to require membership and provide a duty to pay assessments. The Supreme Court of Colorado upheld the amendment, finding that the documents created a common interest community by implication with the power to impose assessments to maintain the common ground.[12]

Where deed restrictions did not provide for an association, but one was formed independently and was voluntary, a Michigan court found that it was the developer's intent that an association exist to act on behalf of the owners with respect to common property that provided access rights to a lake that benefited all owners. The court held that all property owners are bound by the mutual benefits and burdens, including the obligation to pay assessments.[13] The court held the association could exercise the same rights as the developer reserved to himself, "although that power was never expressly granted or assigned to the association."[14]

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[11] Weatherby Lake Improvement Co. v. Sherman, 611 S.W.2d 326 (Mo. App. W.D. 1980).
[12] Evergreen Highlands Association v. West, 73 P.3d 1 (Colo. 2003).
[13] Wisniewski v. Kelly, 437 N.W.2d 25 (Mich. Ct. App. 1989).
[14] Hyatt, at 37.

Ownership of property within a community, rather than membership in an association, was the determining factor in a New York case. The obligation to pay does not turn on actual use of services, but rather on the availability of services intended for the benefit of the entire community.[15]

The cases discussed above apply here. The DeBaliviere Place community has a common grantor, an overall development scheme, the presence of common property and other common interests, and mutual benefits and burdens for all owners. The DPA Declaration clearly reflects the developer's intent that DPA exist to protect common interests. Even if an association were not created under the documents, its existence would be implied as necessary to care for common interests. Similarly, DPA's valid existence under the governing documents should be implied even though the board failed to file an annual report relating to DPA's corporate status.

C. The Uniform Acts. Recognizing the increasing importance of common interest communities as a form of home ownership, the National Conference of Commissioners on Uniform State Laws drafted a series of uniform property acts for consideration by states across the country. These include the Uniform Condominium Act[16], the Uniform Planned

[15] Sea Gate Association v. Fleischer, 211 N.Y.S.2d 767, 781 PAGE (NY Supreme Court, Kings County, 1960).
[16] Uniform Condominium Act (1977, rev. 1980)

Community Act[17], and the Model Real Estate Cooperative Act.[18] These are consolidated in an umbrella act, the Uniform Common Interest Ownership Act ("UCIOA"). [19]

Subdivision ordinances of local governments in Missouri typically provide that the governance model be a "trust" and that "trustees" would be the governing body. [20] The better approach, contained in the uniform acts, recognizes that the documents create a membership organization based on ownership of a lot coupled with automatic membership, and that the organization – the homeowners association – could be organized as a profit or nonprofit corporation, or as an unincorporated association.[21]

Even if the association operates as an unincorporated association, or loses its corporate status, it would still be authorized to carry out its responsibilities under the governing documents.[22]

Missouri has no statutory framework for planned communities such as DPA, leaving their homeowners at the mercy of the drafter of the governing documents. By contrast, Missouri's Uniform Condominium Act ("UCA") authorizes a condominium association to exercise powers and

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[17] Uniform Planned Community Act (1980)
[18] Model Real Estate Coop. Act (1981)
[19] Uniform Common Interest Ownership Act (1982, rev. 1994), (hereinafter referred to as "UCIOA")
[20] St. Louis County, Missouri, Subdivision Ordinance §1005.095 (2009)
[21] *UCIOA*, §3-101
[22] *Id.*, §3-102

duties regardless of whether it is incorporated or exists as an unincorporated association.[23] Homeowners in Missouri and across the country should have the same protections whether they live in a planned community or a condominium.

D. Equitable Remedies. Missouri courts have found an equitable duty to pay assessments to fund necessary projects or services, despite noncompliance with particular provisions in the governing documents. In addition to *Lake Weatherby*, *supra,* other Missouri cases have been decided on equitable grounds.

In a Missouri Supreme Court case, an additional assessment was upheld to dredge the lake in a rural subdivision in which the lake was a primary asset of the community.[24] In addition, the Missouri Court of Appeals has upheld the authority of Parkview, a St. Louis subdivision that voted to impose an assessment to use a private security patrol due to crime in the area.[25]

In *Lake Tishomingo* and *Colvin*, the court noted the support of a large majority of the owners for the projects, indicating the owners believed that the projects were necessary to preserve the developments. Clearly expressing its equitable powers, the court in *Colvin* stated, “in view of such

[23] Missouri UCA, Section 448.3-102.1.
[24] Lake Tishomingo Property Owners Association v. Cronin, 679 S.W.2d 852 (Mo banc 1984).
[25] Colvin v. Carr, 799 S.W.2d 153 (Mo. App. E.D. 1990).

support, it is unfair that the few lot owners who are unwilling to pay the increased assessments should be given a free ride by the paying lot owners." [26]

Another recent case, although not addressing an issue of the association's validity, upheld a special assessment to repair roads and storm drains.[27] Relying on *Lake Tishomingo*, the court used its equitable powers to hold that all owners are obligated to pay for care of common property when a substantial majority of the owners paid, notwithstanding the fact that less than a majority of all owners approved the special assessment and that it project was not an "emergency."

The Restatement (Third) of Property – Servitudes (2000) supports equitable remedies. Section 6.3 of the Restatement provides:

> (1) If creation of an association has not otherwise been provided for in a common-interest community, and has not been expressly excluded by the declaration, the developer, or the owners of a majority of the lots or units not owned by the developer, may create an association to manage the common property and enforce the servitudes contained in the declaration. All members of the common-interest community are automatically members of the association, which is governed by the provisions of this Chapter.
>
> (2) If necessary for the management of common property, a court on petition of owners of less than a majority of the lots or units, may authorize creation of an association.
>
> (3) If necessary to protect the public from the burden of maintaining property or providing services intended to be financed by the property owners subject to the servitudes, a court may

[26] *Id*. at 158
[27] Lake Wauwanoka, Inc. v. Anton, 277 S.W.3d 298 (Mo. App. E.D. 2009).

> authorize the creation of an association on petition of a governmental body that is a beneficiary of the servitude, or that may become responsible in the event the property owners fail to comply with the servitude.[28]

In recommending this approach, the Restatement emphasizes that an association is usually desirable, if not absolutely necessary, to provide a collective vehicle for the management of commonly held property.[29] This ensures the stabilization of values, neighborhood services and recreational activities for the community of members. The most likely reason for the absence of an association is the developer's oversight or desire to reduce expenses. Even if an association has been expressly excluded by the governing documents, or less than a majority of the owners petition, a court may authorize creation of an association where necessary to maintain common property, or avoid having this become a burden of public government. "The judicial power to authorize creation of an association is that of a court of equity with the attendant flexibility and discretion to fashion remedies to correct mistakes and oversights and to protect the public interest."[30]

V. CONCLUSION.

[28] Restatement (Third) of Property- Servitudes §6.3 (2000)
[29] *Id.* at 85.
[30] *Id.*

The trial court correctly ruled that DeBaliviere Place Association validly exists with authority to impose and collect assessments.

A community association derives its existence and authority from its recorded governing documents, and should be authorized to carry out its responsibilities regardless of whether it happens to be incorporated or organized as an unincorporated association. This Court should not disregard the significance of the recorded governing documents and produce unintended consequences that would defeat the expectations of the homeowners.

If the trial court's order were reversed, the result would have detrimental effects on numerous communities in Missouri and the country with associations created and existing under recorded governing documents. A technical misstep could extinguish the association without an affirmative action by the affected homeowners as members of the association.

For all these reasons, this Court should affirm the judgment of the trial court to protect the reasonable expectations of homeowners that DPA would continue to exist and provide services under the recorded governing documents despite a technical failure to file an annual report.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this brief of *Amicus Curiae* was prepared in the format of Microsoft Word, using Arial typeface in font size of 12. This brief contains approximately ____ words. The accompanying disk, containing a copy of *Amicus Curiae's* Brief, has been scanned and found to be free of virus. The name, address, bar and telephone number of counsel for *Amicus Curiae* are stated herein and the brief has been signed by the attorney of record.

_____
Anthony J. Soukenik

CERTIFICATE OF SERVICE

A copy of the foregoing *Amicus Curiae* Brief, with a copy of the same brief on a disk, scanned and determined to be virus-free, were mailed, and a PDF copy of this Brief was e-mailed, on this _____ day of _____, 20__ to Elkin L. Kistner, Bick & Kistner, P.C., 1600 S. Hanley, Suite 101, St. Louis, MO 63144, attorney for Appellant, and Ira Berkowitz and Marvin J. Nodiff, 500 N. Skinker, St. Louis, MO 63130, attorneys for Respondent.

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