THE SUPREME COURT OF MISSOURI

NO. SC97349

TRUSTEES OF CLAYTON TERRACE SUBDIVISION,

Plaintiff/Respondent/Cross-Appellant,

vs.

6 CLAYTON TERRACE, LLC, et al.,

Defendants/Appellants/Cross-Respondents.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 34
Cause No. 14SL-CC02852
HONORABLE DALE HOOD

SUBSTITUTE REPLY BRIEF FOR APPELLANT/CROSS-RESPONDENT 6 CLAYTON TERRACE, LLC

BERGER, COHEN & BRANDT, L.C.

/s/ Steven M. Cohen
Steven M. Cohen, MBE #33794
8000 Maryland Ave., Suite 1500
Clayton, Missouri 63105
(314) 721-7272
(314) 721-1668; Facsimile
scohen@bcblawlc.com
Attorneys for Appellant,
6 Clayton Terrace, LLC

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STATEMENT OF FACTS

Appellant, 6 Clayton Terrace, LLC, hereby incorporates the Statement of Facts set forth in 6 Clayton Terrace, LLC's Brief. However, in accordance with Mo. R. Civ. P. 84.04(f), 6 Clayton Terrace, LLC includes the following additional facts in order to correct certain assertions set forth in the Trustees' Statement of Facts:

Stahr owns property located at 3 Clayton Terrace, the legal description of which states that her property contains two parcels, including parts of lot 3, 4, and 5 of Clayton Terrace. [Tr. 65-66; Exhibit 7]. Stahr's predecessors therefore acquired portions of lots 4 and 5 [Tr. 66; Exhibit 7].

The current legal description for the property located at 1 Clayton Terrace includes lot 1 and parts of lots 3 and 4 of Clayton Terrace [Tr. 66; Exhibit 8].

The legal description for 6 Clayton Terrace consists of two parcels which include a portion, but not all of, lot 6 and part of lot 4 of Clayton Terrace. [Tr. 67; Exhibit 9].

There are currently two houses located on what was originally platted as lot 3. [Tr. 48-49; Exhibit 100].

ARGUMENT

APPELLANT 6 CLAYTON TERRACE, LLC'S REPLY TO RESPONDENT THE TRUSTEES' RESPONSE TO 6 CLAYTON TERRACE, LLC'S BRIEF

In their Brief, the Trustees seek to recast this dispute as an attempt by 6 Clayton Terrace, LLC to "circumvent the indentures by subdividing the Property…" (Resp. Br. 34). In reality, and as the Trustees are fully aware, no version of the Original Indentures or Amended Indentures contains any provision prohibiting the subdivision of lots. The Original Indentures, moreover, do not even contain the One Residence Per Lot Provision, which the Trustees now seek to repurpose as a restriction barring the subdivision of lots.

Knowing this, the Trustees request that this Court (1) uphold the validity of the One Residence Per Lot Provision, despite a lack of unanimous approval, and (2) broadly construe such provision to prohibit the subdivision of lots, all in an effort to create restrictive language that does not exist. To be successful, the Trustees must first convince this Court to abandon near century-long precedent and liberally construe indenture language beyond its plain and ordinary meaning such that "amend[] and extend[] […] the foregoing restrictions"[1] suddenly means "create new restrictive burdens," thereby permitting the less-than-unanimous approval of the One Residence Per Lot Provision under Missouri law. *See infra*, Part I. Even if successful, the Trustees must still convince the Court to again abandon precedent and liberally construe the One Residence Per Lot

[1] As will be discussed more fully herein, "the foregoing restrictions" set forth in the Original Indentures clearly and unambiguously refers to eight specific restrictions set forth therein.

Provision beyond its plain language to impliedly prohibit the subdividing of lots. *See infra*, Part II.

Both requests, however, would require this Court to dramatically shift Missouri's law away from protecting real estate ownership rights, to permit the creation of new burdens without express unanimous consent, as well as to permit the imposition of new burdens by implication. Missouri, however, has long held that indentures cannot be extended by implication. *Gardner v. Maffitt*, 74 S.W.2d 604, 607 (Mo. 1934) (citing *Zinn v. Sidler*, 187 S.W. 1172 (Mo. 1916)). The Trustees would have this Court extend the Original Indentures by implication not just once, but **twice**, requiring a quantum shift in Missouri law. The Trustees' arguments thus fail as a matter of existing law and any attempt to thwart precedent on policy grounds is unwarranted. Missouri's precedent is just, practical, and paramount to protecting property rights and should be preserved.

Because Missouri has long rejected the Trustees' approach, the Trustees largely must rely on the opinions of foreign jurisdictions which are not controlling. This Court, moreover, has no need to venture beyond Missouri law because the gravamen of this dispute is not a question of first impression in Missouri. Numerous Missouri Courts of Appeal have previously addressed the issues now before this Court and have properly invalidated new restrictive burdens like the One Residence Per Lot Provision and similarly have refused to extend such provisions by implication beyond plain meaning. In short, this Court should reject the Trustees' demand to cast aside longstanding precedent, and instead, continue to require the drafting of legal documents, including subdivision

indentures, that clearly and unambiguously delineate legal rights and obligations, thereby preserving individual ownership rights in and to real property.

I. THE TRIAL COURT ERRED IN HOLDING THAT THE ONE RESIDENCE PER LOT PROVISION CONTAINED IN THE AMENDED INDENTURES IS VALID AND ENFORCEABLE.

(REPLYING TO THE TRUSTEES' SECTION I.)

It is undisputed that the One Residence Per Lot Provision was created without unanimous consent. The Judgment states that "[n]one of the Amended Indentures were voted on and approved by the unanimous consent of the then current lot owners of the Subdivision." [L.F. 00517, ¶ 9]. The Trustees do not, and cannot, dispute this fact, nor can they dispute the stipulated fact that the Original Indentures did not contain the One Residence Per Lot Provision. [L.F. 00517, ¶ 9; JSF ¶ 11]. Rather, the provision first appeared as a purported amendment in the First Revised Indentures without unanimous lot-owner approval.[2] [Exs. JB-A(E), L.F. 336 ¶ 10].

Because the One Residence Per Lot Provision created a new burden not encompassed within the plain language of the Original Indentures, its enactment required unanimous approval under Missouri's longstanding precedent strictly construing restrictions on the fee in favor of free and untrammeled use of property.

A. The Court should Reject the Trustees' Argument that *Hazelbaker* is Inapplicable Because such Contention is Unsupported and Unworkable under Missouri Law.

(REPLYING TO THE TRUSTEES' SECTION I.A)

[2] Each recorded Amended Indenture evidences, on its face, that none of the purported Amended Indentures received the approval of all lot owners necessary to give effect and validity to the One Residence Per Lot Provision.

Missouri precedent holds that unless otherwise permitted in a set of original indentures, unanimous consent is required for the imposition of **new** burdens on real estate. This approach is founded upon Missouri's longstanding "principle of law" refusing to "extend[] by implication […] anything not clearly expressed," which is reflected in Missouri's lengthy record favoring the "free and untrammeled use of real property" and disfavoring restrictive covenants. *See Steve Vogli & Co. v. Lane*, 405 S.W.2d 885, 888 (Mo. 1966) (per curiam); *Van Deusen v. Ruth*, 125 S.W.2d 1, 3 (Mo. 1939) (per curiam); *Gardner*, 74 S.W.2d at 607; *Matthews Real Estate Co. v. National Printing & Engraving Co.*, 48 S.W.2d 911, 913 (Mo. 1932) (per curiam); *Mo. Province Educ. Inst. v. Schlect*, 15 S.W.2d 770, 773-74 (Mo. 1929) (per curiam); *Charlot v. Regents Mercantile Corp.*, 251 S.W. 421, 423 (Mo. App. E.D. 1923); *Conrad v. Boogher*, 214 S.W. 211, 215 (Mo. App. E.D. 1919); *Zinn v. Sidler*, 187 S.W. 1172, 1174 (Mo. 1916); *Scharer v. Pantler*, 105 S.W. 668, 669 (Mo. App. E.D. 1907) [collectively, "Missouri Indenture Precedent"].

In other words, these cases, among others, collectively demonstrate that Missouri law has consistently held that:

- free and untrammeled use of real property is a paramount principle;
- restrictive covenants are disfavored and approached with strict, not liberal, construction;
- indentures cannot be extended by implication to include things not clearly expressed; and

- because of these principles, attempts to add new burdens on land through an amended indenture require unanimous approval unless a lesser approval standard is specifically authorized.

See id.

Throughout Part I of their Brief, the Trustees ignore the plain language of the Original Indentures, which read:

> "All lots in this Subdivision are sold subject to **the following restrictions**, to wit: This subdivision **shall be restricted** to[:]
>
> [1] residences of not less than one and one half stories above any basement and
> [2] no flat roofs will be allowed, and
> [3] the cost of each residence shall not be less than Five thousand (5000) dollars, and
> [4] no buildings or other structures shall be erected closer to any drive, Avenue or Road than 60 feet, except that open porches or steps may extend not more than 8 feet beyond the said building lines, and
> [5] no building or other structure shall be erected closer than 10 feet to any side or rear lot line.
> [6] No Flat or apartment building shall be erected upon any lot in this Subdivision, and
> [7] no structure erected upon any lot in this subdivision shall be used at any time for the purpose of any trade, manufacture, or business of any ascription.
> [8] No land or any interest therein in said subdivision shall by any person or corporation be sold, resold, conveyed, leased, rented to or in any way occupied or acquired by others than those wholly of the Caucasian Race, except that the foregoing does not apply to bona-fide servants employed and living with families of the Caucasian Race residing in said subdivision.
>
> The **foregoing restrictions** shall be in force and binding upon the owners in this Subdivision [for twenty-five years] **unless amended or extended by two-thirds** of the lot owners in this subdivision and publicly recorded."

[Ex. JT-1, JBA(D)] (emphasis and formatting added.) These eight restrictions set forth in the Original Indentures thus only restricted the size, roof style, costs, set-back lines, building style, residential use, and race of owners or occupants within the Subdivision. By its plain language, the Original Indentures allowed only **these eight specific** restrictions to be "amended or extended" by two-thirds approval.

The Trustees bear the burden of establishing the validity of the One Residence Per Lot Provision. *Lake Arrowhead Property Owners Ass'n v. Bagwell*, 100 S.W.3d 840, 844 (Mo. App. W.D. 2003). To determine whether the One Residence Per Lot Provision is valid, Missouri courts first interpret the terms of the Original Indentures using their ordinary and popular meaning, and, if the language is plain, no construction is necessary. *Barry Harbor Homes Ass'n v.* Ortega, 105 S.W.3d 903, 906 (Mo. App. W.D. 2003) (citing *Lake St. Louis Cmty. Ass'n v. Leidy*, 672 S.W.2d 381, 382 (Mo. App. E.D. 1984)). Even if the terms are open to construction, Missouri courts strictly, not liberally, construe the terms and refuse to extend them by implication beyond their plain and ordinary meaning. *Van Deusen*, 125 S.W.2d at 3. As such, all doubt will be resolved in favor of the free use of land. *Mo. Province Educ. Inst.*, 15 S.W.2d at 774.

Based on the plain language of the Original Indentures, the only restrictions permitted to be amended by a two-thirds vote were those matters specifically contained in the original eight restrictions. Clearly, the number of residences permitted to be erected on each lot was not contained therein, nor did the Original Indentures restrict the right to subdivide any given lot. The subsequently enacted One Residence Per Lot Provision provided that "[o]nly one residence shall be erected on each lot." [Exs. JB-A(E), L.F. 336

¶ 10]. The plain language of this provision, as compared to the plain language of the Original Indentures, demonstrates that The One Residence Per Lot Provision was not a mere amendment of an existing restriction, but rather, the creation of a completely new restrictive burden. *See Gardner*, 74 S.W.2d at 607 ("[b]ut one building shall be erected or placed upon said lot" provision considered a restriction upon the use of land). This provision constitutes a new burden not encompassed within the eight restrictions of the Original Indentures, and Missouri courts clearly hold that terms like "amend" and "extend" as used in the Original Indentures do **not** permit the creation new burdens. *See Hazelbaker v. County of St. Charles*, 235 S.W.3d 598, 603 (Mo. App. E.D. 2007); *Harris v. Smith*, 250 S.W.3d 804, 810 (Mo. App. S.D. 2008); *Jones v. Ladriere*, 108 S.W.3d 736, 739 (Mo. App. E.D. 2003); *Bumm v. Olde Ivy Development, LLC*, 142 S.W.3d 895, 903 (Mo. App. S.D. 2004); *Webb v. Mullikin*, 142 S.W.3d 822, 827-28 (Mo. App. E.D. 2004). Thus, based on the plain language of the Original Indentures, and longstanding precedent, the One Residence Per Lot Provision required, but did not receive, unanimous approval.

The Trustees' claim that "Missouri has effectively held that no language is sufficient to add a burden in the absence of unanimous consent" is not only erroneous, but entirely misses the point. (Resp. Br. 27). Missouri courts have always held that courts will look to the plain language of restrictive covenants and, in the face of ambiguity, will strictly construe terms with doubts being resolved in favor of the free use of the land. *See* Missouri Indenture Precedent, *supra*, p. 10. Thus, Missouri courts properly hold that the drafting of subdivision indentures requires clear and unambiguous delineation of legal

rights and obligations as a protection of ownership rights. If the original covenantor wanted to permit the creation of new burdens with only a two-thirds approval, the Original Indentures could have so provided.

1. Unanimous approval was required because the One Residence Per Lot Provision was not in any way contemplated by the plain language of the Original Indentures and *Van Deusen*'s application of longstanding principles of law warrants retroactive application.[3]

(REPLYING TO THE TRUSTEES' SECTION I.A.1)

The Trustees now attempt to essentially rewrite the Original Indentures by asking the Court, in 2019, to abandon near century-long principles of law governing the interpretation of indentures. The Trustees largely focus on *Van Deusen*'s date of decision, and inapplicable issues of retrospective versus prospective application, in a bid to somehow convince this Court to exclude the otherwise void One Residence Per Lot Provision from the inevitable application of Missouri law. The Trustees do so with conclusory arguments and references related to reliance without any legal citation or evidentiary support.

The Trustees argue *Van Deusen*'s date of decision in 1939 excludes the application of *Van Deusen* to the Original Indentures and subsequent Amendments. (Resp. Br. 22). However, the *Van Deusen* decision—which the Trustees concede implied

[3] In Respondent's Brief, the Trustees' heading for Part I.A.1 does not accurately portray the contents of the arguments, which largely focus on *Van Deusen*'s date of decision and prospective versus retrospective application of precedent, not equitable theories of reliance. To the extent the Trustees attempt to argue reliance on any Amended Indenture, such arguments are unsupported. There is no record evidence whatsoever that the homeowners so relied.

a rule of unanimity—was not a departure from prior law but rather simply reflects the application of longstanding Missouri law. *Van Deusen*, 125 S.W.2d at 3; (Resp. Br. 22).

In *Van Deusen*, a majority of lot owners attempted to amend a subdivision's 1925 original covenants from permitting apartment and commercial buildings on frontage lots to restricting such buildings. The lot owners attempted to rely on modification language that said the original covenants could be "modified, amended, released, or extinguished […] by a vote of the owners of 75% of the subdivision frontage." *Id.* at 2. The lot owners affected by the change filed suit in equity to cancel the amendment, arguing it imposed new burdens. *Id.* This Court agreed, holding "[t]he words 'modify' and 'amended' […] cannot be given a meaning which would authorize new burdens to be added." *Id.* The Court noted strict construction "**has been** the policy of the law," refused to employ a liberal construction, and invalidated the amendment, explaining:

> "[r]estrictions, being in derogation of the fee conveyed, will not be extended by implication to include anything not clearly expressed. To uphold the so called modification agreement in this case we would be compelled to **construe the clause under discussion most liberally** in order to authorize new restrictions to be fostered upon the subdivision. This **would mean overturning the above principle of law**."

Id. at 3 (citing *Gardner*, 74 S.W.2d at 607) (emphasis added).

Missouri courts addressing analogous issues since *Van Deusen* have similarly invalidated attempts to create new burdens with less-than-unanimous approval unless expressly permitted under the modification language of the original indentures. *See Harris v. Smith*, 250 S.W.3d 804, 810 (Mo. App. S.D. 2008); *Hazelbaker*, 235 S.W.3d at 602; *Jones v. Ladriere*, 108 S.W.3d 736, 739 (Mo. App. E.D. 2003); *Bumm v. Olde Ivy*

Development, LLC, 142 S.W.3d 895, 903 (Mo. App. S.D. 2004); *Webb v. Mullikin*, 142 S.W.3d 822, 827-28 (Mo. App. E.D. 2004). The language of the Original Indentures in the instant case, even more so than in *Van Deusen* and its progeny, clearly and unambiguously restrict the imposition of additional burdens without unanimous consent. The Original indentures provide that only "the foregoing [eight] restrictions" can be amended or extended by a two-thirds vote, and thus do not permit the amendment or enactment of new or additional restrictions.

The Trustees' purely speculative claims that the original covenantor "could not have predicted that in order to amend the Original Indentures, that unanimity would be required" and that "even the most diligent person [could not] anticipate the One Residence Per Lot Provision could be invalid" are entirely speculative and therefore lack merit. (Resp. Br. 22).[4] The principles cited by the *Van Deusen* Court, and which led to the unanimous approval rule, predate the date of the Original Indentures. Because "persons are conclusively presumed to know the law," the Trustees' focus on *Van Deusen*'s date of decision is nothing more than a red herring. *Mo. Highway and Transp. Comm'n v. Meyers*, 785 S.W.2d 70, 75 (Mo. 1990).

Because *Van Deusen* did not represent a change or departure from prior law, the Trustees' reliance on *Sumners* for a prospective-only application of *Van Deusen* is also misplaced. (Resp. Br. 23). In *Sumners*, this Court held that a recently-decided source-of-

[4] On the other hand, under the Trustees' logic, even the most "diligent person" would not read and interpret the plain language of the One Residence Per Lot Provision as a prohibition on subdivision of lots. *See* Part II, *infra.*

funds rule in divorce cases should be applied retrospectively, not prospectively. *Sumners v. Sumners*, 701 S.W.2d 720, 723-25 (Mo. banc 1985) (relying, in part, on United States Supreme Court precedent). In fact, this Court held that the **general rule is retrospective application**. *Id.* at 723. To fit within an exception to this general rule, the Trustees must satisfy the *Sumners* Court's three factor test. However, the Trustees do not, and cannot, satisfy this test and thus a prospective-only application of *Van Deusen* is unwarranted. *See id.* at 724.

Van Deusen did not "establish a new principle of law by overruling clear past precedent." *Id.* On the contrary, as discussed above, the *Van Deusen* Court refused to overturn established principles of Missouri law. *Van Deusen*, 125 S.W.2d at 3. The Trustees fail to explain, or provide any legal citation, regarding the state of the decisional law prior to *Van Deusen*. Contrary to the Trustees' suggestion, *Van Deusen* did not establish new law but rather applied longstanding principles of law to the facts of that case. *See id.* The Trustees speculate that "the covenantor and the original purchasers of the Clayton Terrace lots **relied on the two-thirds amendment procedure** in the Original Indentures." (Resp. Br. 23) (emphasis added).[5] But *Summers* requires reliance "**on the state of the decisional law** as it existed prior to the change" and the Trustees do not, and cannot, establish a state of law that was overruled by *Van Deusen*, much less that the

[5] There is no evidence in the record whatsoever that the covenantor or the original purchasers so relied.

Trustees relied on such law.[6] *Sumners*, 701 S.W.2d at 723 (emphasis added). The Trustees' inability to meet this element of the *Sumners* test is fatal to their argument advocating for prospective-only application of *Van Deusen.* As such, *Van Deusen* should be applied under the general rule of retroactivity.[7]

2. There exists no evidence that Subdivision residents ever 'ratified' the One Residence Per Lot Provision.

(REPLYING TO THE TRUSTEES' SECTION I.A.2.)

The Trustees claim, without ever having pleaded the theory of ratification, and without any evidentiary support whatsoever, that the otherwise void One Residence Per Lot Provision has somehow been ratified by subdivision property owners, including 6 Clayton Terrace, LLC.

As an initial matter, the Trustees should not be permitted to raise ratification on appeal where they failed to raise it at the trial court level. Missouri Supreme Court Rule 55.08 requires that a party plead all applicable affirmative defense and avoidances in response to a preceding pleading. Mo. Sup. Ct. R. 55.08. Ratification is considered an affirmative defense. *Murphy v. Jackson Nat'l Life Ins. Co.*, 83 S.W.3d 663, 669 (Mo. App. S.D. 2002) (citing *Guirl v. Guirl*, 708 S.W.2d 239, 243 (Mo. App. E.D. 1986)).

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[6] The Trustees also fail to produce any evidence to demonstrate the Trustees have relied on the Amended Indentures or on so-called "protections" the One Residence Per Lot Provision provided to "the character of the neighborhood." (Resp. Br. 23).

[7] Conversely, if this Court ultimately accepts the Trustees' argument to abandon precedent and adopt a new approach, such a ruling **would** fit within the *Sumners* exception and should **not** be applied retroactively to the facts of this case. *See* Part V, *infra.*

Affirmative defenses and avoidances may not be raised for the first time on appeal. *Id.* (citing *Lamont v. Lamont*, 922 S.W.2d 81, 85 n.1 (Mo. App. W.D. 1996)). Here, the Trustees did not plead ratification in response to 6 Clayton Terrace, LLC's properly asserted affirmative defenses concerning the invalidity of the One Residence Per Lot Provision and Notice of Sale and Right of First Refusal Provision, or to Ms. Huey's Counterclaims or affirmative defenses (amended or otherwise) regarding the invalidity of the Sale Restriction. [L.F. 86-90; 100-101; ¶M, 105-106 ¶14]. Their failure to affirmatively plead ratification before the Trial Court therefore bars the Trustees from now asserting ratification on appeal. *Id.*

In contract law, ratification is a "knowing" act that conforms an otherwise voidable contract into a valid and enforceable one. *Murphy*, 83 S.W.3d at 669 (citing *Springfield Land and Development Co. v. Bass*, 48 S.W.3d 620, 628 (Mo. App. S.D. 2001)). For ratification to occur, an individual must confirm or adopt the agreement with full knowledge of its contents **and all material facts** at the time he is charged with having accepted the transaction as his own. *Id*. (emphasis added). The burden of proof of ratification rests with the party claiming ratification. *Id.* (citing *Niehaus v. Mitchell*, 417 S.W.2d 509 (Mo. App. E.D. 1967)).

The Trustees' contention that the Subdivision property owners, including 6 Clayton Terrace, LLC, somehow "ratified" the otherwise void One Residence per Lot Restriction is entirely unsupported. Indeed, the Trustees fail to point to any specific record evidence to demonstrate a single instance where one property owner, let alone the entire subdivision, knowingly "ratified" any specific restriction. Instead, the Trustees'

argument apparently relies entirely upon the unsupported proposition that simply purchasing a property in the Subdivision automatically results in a "ratification" of all otherwise void or voidable restrictions.

The Trustees tellingly fail to cite any Missouri authority that could support their argument in the context of subdivision indentures. Indeed, without direct evidence of a "knowing" adoption of the One Residence Per Lot Provision, the act of simply acquiring a property in the Subdivision does not evidence an acceptance of the One Residence Per Lot Provision with "knowledge of all material facts" to such a degree as to satisfy the evidentiary burden for ratification. That is, a potential buyer may or may not have had actual knowledge of the restriction(s), and moreover, may have either agreed or disagreed with any particular provision of the restrictions at the time of purchase. Because the Trustees introduced no such evidence at trial, the record is devoid of evidence that could support the Trustees' purported ratification argument.

Similarly, the Trustees argue, without evidentiary support, that all property owners in the Subdivision benefitted from the One Residence Per Lot Provision, purportedly through "increased property value from the stable character of the subdivision." (Resp. Br. 25). The record is devoid of any evidence concerning the effect of the One Residence Per Lot Provision on the fair market value of the affected real estate, and therefore, the Trustees again fail to meet their burden of establishing that any property owner "knowingly" accepted a purported benefit of such provision in the form of higher real estate values.

Subdivision restrictions, moreover, concern contractual rights in and to real property, and therefore, any purported ratification would be required to be in writing such to satisfy the Missouri statute of frauds:

> "[n]o action shall be brought … to charge any person … upon any contract made for the sale of lands, tenements, hereditaments, or an interest in or concerning them, or any lease thereof, for a longer time than one year, **or upon any agreement that is not to be performed within one year from the making thereof**, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized...".

Mo. Rev. Stat. § 432.010 (emphasis added).

To the extent that the Trustees' now argue that the otherwise invalid One Residence Per Lot Provision was somehow ratified by all subdivision lot owners, the purported ratification would be required to be in writing, as an agreement not to be performed within one year, in order to satisfy the statute of frauds. Otherwise, potential buyers or other interested parties could not determine from the written recorded documents whether otherwise void restrictions were somehow subsequently ratified by other property owners.

In short, the doctrine of ratification requires evidence of a "knowing" ratification by all property owners. Because the Trustees did not raise the theory of ratification at trial, and failed to introduce any evidence of a purported ratification of the One Residence Per Lot Provision, the doctrine of ratification has no application to the facts of this case.

B. Missouri's Ninety Year Precedent Should Not Be Abandoned.

(REPLYING TO THE TRUSTEES' SECTION I.B.)

The Trustees attempt to reframe the governing law in this case from principles repeatedly espoused by this Court to a purported "*Hazelbaker* Standard." (Resp. Br. 26). While *Hazelbaker* is directly applicable to this case, the standard stems from decisions by this Court and numerous Court of Appeals decisions. *See* Part I.A., *supra*. This Court should not abandon its longstanding precedent of strict interpretation of Subdivision Indentures nor impose arbitrary time limitations that could erode protections for a homeowner's free and untrammeled use of real property.

While the Trustees' arguments under Part I.B overlap, 6 Clayton Terrace, LLC will address them in turn, using the Trustees' organizational structure, for the Court's convenience.

1. Missouri's strict interpretation of subdivision indentures is paramount to protecting free and untrammeled use of real property.

(REPLYING TO THE TRUSTEES' SECTION I.B.1.)

As discussed above, because the One Residence Per Lot Provision imposed a new burden not included within the Original Indentures, the two-thirds "amend[] or extend[]" approval procedure did not apply. This is sound precedent that has produced consistent results promoting clarity in drafting. *See Harris*, 250 S.W.3d at 810; *Hazelbaker*, 235 S.W.3d at 602; *Jones*, 108 S.W.3d at 739; *Bumm*, 142 S.W.3d at 903; *Webb*, 142 S.W.3d at 827-28.

The Trustees argue that Missouri's longstanding precedent should be abandoned because it is "nearly impossible" to amend indentures since "almost all new amendments add some kind of burden to one's use of the land." (Resp. Br. 27).[8] Contrary to the Trustees' claims, not all amendments add new burdens to the use of land. An "amendment" may instead involve termination of existing restrictions, an imposition of new restrictions, or both, without violating Missouri law. That is, courts allow amendments with less-than-unanimous approval when the respective amendment does not create a new restriction but rather extinguishes an existing restriction. *See e.g.*, *Arbors at Sugar Creek Homowners Ass'n v. Jefferson Bank & Trust Co.*, 464 S.W.3d 177, 186-87 (Mo. banc 2015). Indeed, one of the few cases cited by the Trustees in Part I of their Brief actually demonstrates this point. *See Windemere Homeowners Ass'n v. McCue*, 990 P.2d 769, 773 (Mont. 1999) (amendments validly approved with less-than-unanimous support because the amendments, unlike the One Residence Per Lot Provision in the instant case, "[did] **not** constitute a prohibition on a use not previously restricted").

The approval requirements for extinguishing an existing restriction and creating a new restriction are not the same. Where majority lot owners attempt to restrict a homeowner's use of his land in a way the owner did not agree to upon purchase, such restriction should require unanimous approval, unless the modification procedures explicitly included the creation of new burdens. *See Harris*, 250 S.W.3d at 810; *Hazelbaker*, 235 S.W.3d at 602; *Jones*, 108 S.W.3d at 739; *Bumm*, 142 S.W.3d at 903;

[8] The Trustees cite no legal authority in support of this claim.

Webb, 142 S.W.3d at 827-28. Missouri courts have properly drawn this line to protect ownership rights and it remains, contrary to the Trustees' claims, entirely possible to "amend subdivision indentures in accordance with law." (Resp. Br. 27).

The Trustees' statement that "few, if any subdivisions in Missouri require 100% approval to amend their indentures," even if factually correct, is irrelevant. (Resp. Br. 27). Subdivision grantors and associations can enact whatever voting standard they deem appropriate for modifying or extinguishing **existing** restrictions, but to **create new** burdens with anything less than unanimity requires an explicit statement in the indentures. To permit otherwise would create a grave potential for abuse. For example, ownership factions could monopolize land ownership in an effort to disrupt minority homeowners' property rights, as occurred in *Van Deusen* where "[t]he evidence showed that [the company], owner of over ten thousand front feet of property, was the prime mover in obtaining signatures to the modification agreement." *Van Deusen*, 125 S.W.2d at 16.

In other words, the Trustees' complaints about "difficiult[ies]" and "practical problems" ignore the very policy concerns underlying Missouri's longstanding precedent, specifically Missouri's paramount protection of individual property ownership rights. It **should be difficult** to trammel on a homeowner's free use of land. Therefore, this Court should not abandon longstanding precedent that protects such rights.[9]

[9] Even if these principles were abandoned in general, the plain language of the Original Indentures should govern. To construe the language of the Original Indentures to permit the imposition of a completely new burden upon a two-thirds vote of the subdivision would be an impermissible extension by implication.

2. Any purported "practical problems" resulting from a unanimous consent requirement are outweighed by the risk of harm to a homeowner's free and untrammeled use of property.

(REPLYING TO THE TRUSTEES' SECTION I.B.2)

The Missouri rule regarding unanimous approval promotes the concise drafting of legal documents, including subdivision indentures, that clearly and unambiguously delineate legal terms and provisions. This ensures, from a practical standpoint, that interested parties may rely on a strict interpretation of indentures. The Trustees argue, without a single reference to the record or legal authority, that policy considerations should force this Court to abandon precedent and make a major change in law at the expense of longstanding property law principles.

The Trustees complain that the unanimous approval rule is impractical because it encourages "developers seeking a quick profit" to file a declaratory judgment action to invalidate enacted restrictions. (Resp. Br. 29). This argument is illogical because, if restrictions are not properly enacted, filing a declaratory judgment action is the exact remedy afforded to any aggrieved party by Missouri law. Mo. Sup. Ct. R. 87.02. Moreover, while a party seeking a declaratory judgment may be a "developer," it is more likely to be a homeowner, who feels that his property rights have been trammeled upon by the enactment of new restrictive burdens on his property with less than unanimous approval. Protecting such an individual's rights is the precise reason for requiring unanimity.

The Trustees complain that the unanimous approval rule has a detrimental effect on the "housing market," and that people should be able to rely on the One Residence Per

Lot Provision because "it has been a matter of public record for 85 years." (Resp. Br. 30). This argument misdirects the issue. While it may be true that the One Residence Per Lot Restriction has been a matter of public record for approximately 85 years, the unanimous approval rule applies equally to a long recorded invalid covenant to one that was only recently passed and recorded. The fact that the One Residence Per Lot Restriction was recorded 85 years ago is irrelevant. An additional restriction is either valid or it is not. An invalid restriction cannot and should not somehow become valid simply because it has been recorded for a particular period of time.

Indeed, the Trustees' position is more detrimental to public policy than the policy reflected in Missouri's longstanding precedent. Accepting the Trustees' demand for a policy permitting the liberal construction of indentures would undermine clarity in drafting and, worse, result in the erosion of property owners' rights in a manner not foreseeable or contemplated at the time of purchase. The Trustees would have this Court tilt the balance of power away from a homeowner's property rights to the will of the masses. The potential for abuse looms large. Under the policy shift advocated by the Trustees, the deciding group of homeowners could choose to burden one particular homeowner who would be powerless to protect his property rights.[10] Surrendering the sanctity of property rights to majority rule is not policy Missouri should adopt.

[10] For example, a vocal group of neighbors could suddenly impose new burdens prohibiting swimming pools, tennis courts, dogs, cats, fences, barns, garages, patios, artificial lawns, swing sets, herbicide-treated mulch, or flowers in landscaping beds—despite the owner's expectations for such use of his land at time of purchase.

Instead, Missouri law should continue to protect and defend free and untrammeled use of property while limiting restrictions upon private property. Missouri appropriately recognizes the dangers of less-than-unanimous approval mechanisms. Missouri appropriately recognizes that unanimous approval is the default rule and that an exception to the rule should be applied only when express language in the indentures permits less-than-unanimous approval for the creation of new restrictive burdens. This policy is sound, creates consistency and clarity, and ensures organizational stability and effective decision-making by prospective purchasers:

> "It is only by such construction that such titles can be made certain, so that the use of the lands conveyed in fee shall not depend upon the diverse opinions of judges as to the *minds* of the parties to the grant, but restrictions thereon shall appear plainly *written* in the grant."

Conrad, 214 S.W. at 215 (emphasis in original).

Under Missouri's approach, unless indentures specifically state otherwise, a buyer can safely assume that the use of his or her property cannot be abridged without his or her consent. Under the Trustees' approach, by contrast, the best an owner can hope for is that the use of his or her property will not be abridged without the consent of some percentage of his or her neighbors.

3. Missouri courts have correctly interpreted language such as "amend" to not encompass the creation of new burdens that trammel on a homeowner's right to free use of property.

(REPLYING TO THE TRUSTEES' SECTION I.B.3.)

As already mentioned, under Missouri law, the first step in reviewing restrictive covenants is to look to the plain language of the terms. When the plain language of the

terms clearly does not permit the creation of new burdens, a detailed factual analysis of cases is unnecessary. Here, the Original Indentures **only** permitted eight specific restrictions to be "amended or extended" by a two-thirds vote and did **not** expressly permit the creation of new burdens by a two-thirds vote. The plain language of the Original Indentures is, alone, fatal to the Trustees' arguments.

Nonetheless, the Trustees rely heavily on authority from three other jurisdictions for the proposition that Missouri should interpret amendment language more broadly. (Resp. Br. 31). The Trustees' argument relies on two **appellate** cases from Texas and Illinois and one case from Montana, all of which are distinguishable. Moreover, out-of-state decisions, especially out-of-state appellate decisions, do not constitute controlling precedent in Missouri courts. *See Estate of Bean v. Hazel*, 972 S.W.2d 290, 292 (Mo. 1998) (directing that "[e]quivocal precedent from other jurisdictions is not a compelling reason for overturning precedent of our own courts…").

The Trustees' reliance on *Windemere*, a case from Montana, is readily distinguishable because the disputed amendments in that case, unlike here, "[did] not constitute a prohibition on a use not previously restricted." *Windemere*, 990 P.2d at 773. The Trustees' reliance on *Zito v. Gerken*, 587 N.E.2d 1048 (Ill. App. 1992) is misplaced and fails to recognize that the Illinois Supreme Court, like Missouri, strictly construes restrictive covenants "in favor of the full and unlimited legitimate use of property and, where there is any doubt, the matter must be resolved in favor of natural rights and against restrictions." *Watts v. Fritz*, 194 N.E.2d 276, 278 (Ill. 1963). As such, Illinois courts have "declined to read a restriction on subdivision into a covenant, based on the

reasoning that a developer who intended to prohibit subdivision of the original lots would have expressly included such a restriction." *Sadler v. Creekmur*, 821 N.E.2d 340, 347 (Ill. App. 2004) (citing *Watts*, 194 N.E.2d at 276).

The Trustees also rely on *Sunday Canyon Property Owners Ass'n v. Annett*, an appellate case from Texas. 978 S.W.2d 654 (Tex. App. 1998). The Trustees fail to reference any decisional precedent from Texas's highest court. In any event, the Texas appellate court in *Sunday Canyon* held that the creation of a homeowners association was not a new burden but rather a modification of existing restrictions—which were not recited in the opinion—such that unanimous consent was not required. In the instant case, the One Residence Per Lot Provision is not an amendment to one of the eight Original Indentures but instead is a **new** burden and thus requires unanimous consent. Regardless, the policies underlying the Texas appellate decision are distinguishable from the policies underlying Missouri Supreme Court indenture precedent. *Cf. Sunday Canyon*, 978 S.W.2d at 658 (favoring "right […] to contract" with no deference to strict construction) *with Steve Vogli*, 405 S.W.2d at 889 (favoring "free and untrammeled use of real property" with deference to strict construction).

Importantly, as previously discussed, Missouri courts have directly addressed the issues before this Court and rejected the Trustees' arguments, so a review of out-of-state decisions is unnecessary. *See Penzel Constr. Co. v. Jackson R-2 Sch. Dist.*, 544 S.W.3d 214, 234 (Mo. App. E.D. 2017) (court reviewed out-of-state decisions only because the case presented an issue of first impression, in that "no reported Missouri case ha[d] expressly accepted or rejected either approach."). Should this Court nonetheless choose

to review out-of-state decisions, a number of states follow Missouri's approach in strictly construing the plain terms of restrictive covenants.[11] Likewise, states such as Nebraska, Nevada, and arguably Illinois and Washington all follow Missouri's approach and invalidate less-than-unanimous attempts to create new burdens. *See Boyles v. Hausmann*, 517 N.W.2d 610, 617 (Neb. 1994) ("[t]he law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants"); *Caughlin Ranch Homeowners Ass'n v. Caughlin Club*, 849 P.2d 310, 312 (Nev. 1993); *Lakeland Property Owners Ass'n v. Larson*, 459 N.E.2d 1164, 1169-71 (Ill. App. 1984); *Meresse v. Stelma*, 999 P.2d 1267, 1273-74 (Wash. App. 2000).

4. Allowing procedurally defective and invalid restrictive covenants to become valid after some arbitrary period of time is against public policy.

(REPLYING TO THE TRUSTEES' SECTION I.B.4.)

Finally, in Part I, the Trustees erroneously argue that the principles of *Van Deusen* should be set aside as against public policy, or conversely, that over some arbitrary period of time, a procedurally defective and invalid restrictive covenant should somehow become valid. In sole support, the Trustees provide a footnote reference to codified amendment procedures for condominium properties. (Resp. Br. 33). The Trustees cherry pick subsection 2 of this statute but fail to recognize that subsection 4 promotes the concept of unanimous approval: "**Except to the extent expressly permitted** […] **no**

[11] *See, e.g., Yogman v. Parrott*, 937 P.2d 1019, 1023 (Or. 1997); *Watts v. Fritz*, 194 N.E.2d 276, 278 (Ill. 1963); *Boyles v. Hausmann*, 517 N.W.2d 610, 617 (Neb. 1994)

amendment may create or increase special declarant rights, increase the number of units, **or change** the boundaries of any unit, the allocated interests of a unit, or **the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.**" Mo. Rev. Stat. § 448.2-117(4).

In short, the Trustees' position in Part I fails as a matter of law and is not saved by policy arguments. Missouri should not abandon longstanding and appropriately-decided precedent that protects the free and untrammeled use of property. Because the plain language of the Original Indentures did not permit the creation of new burdens, which the One Residence Per Lot Provision did, with less-than-unanimous approval, Missouri's default rule requiring unanimity applies. Because the provision did not receive unanimous approval, the trial court erred by not holding the One Residence Per Lot Provision invalid and unenforceable.

II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON COUNT II OF THE TRUSTEES' FIRST AMENDED PETITION AGAINST DEFENDANT 6 CLAYTON TERRACE, LLC BECAUSE SUCH HOLDING MISAPPLIED THE LAW AND WAS AGAINST THE WEIGHT OF THE EVIDENCE, IN THAT THE ONE RESIDENCE PER LOT PROVISION DOES NOT PROHIBIT THE SUBDIVISION OF THE PROPERTY OR THE CONSTRUCTION OF A RESIDENCE ON A SUBDIVIDED LOT.

(REPLYING TO THE TRUSTEES' PART II.)

As set forth above, the One Residence Per Lot Provision is void under Missouri law because such provision imposed an additional burden without receiving the consent of all lot owners. On this ground alone, the Trustees' argument supporting the Trial Court's Judgment on Count II fails. Assuming, arguendo, that the One Residence Per Lot provision hypothetically received unanimous approval, which it did not, or that this Court

reverses longstanding Missouri precedent requiring unanimous consent, the Trial Court's Judgment with respect to Count II of the Trustees' Petition would still constitute error as the One Residence Per Lot Provision, by its plain language, simply does not prohibit the subdivision of lots. *See*, *Hazelbaker*, 235 S.W.3d at 602. Under longstanding precedent favoring the free and untrammeled use of real property and prohibiting the extension of restrictions by implication, the One Residence Per Lot Provision simply cannot be extended by implication to bar the subdivision of lots. *Id*.

A. The Indentures Do Not Evidence an Intent to Prohibit the Subdivision of a Property or Otherwise Bar the Construction of a Residence on a Subdivided Lot.

(*REPLYING TO THE TRUSTEES' SECTION II.C*)

As discussed in Part I, *supra*, under Missouri law, "restrictions upon the use of real property, being in derogation of the fee, are not favored." *Bumm*, 142 S.W.3d at 899 (citing *Vinyard v. St. Louis County*, 399 S.W.2d 99, 105 (Mo. 1966) (per curiam)). The terms of subdivision restrictions are given their ordinary and popular meaning, and, if the language is plain, no construction is necessary. *Barry Harbor Homes Ass'n*, 105 S.W.3d at 906 (citing *Lake St. Louis Cmty. Ass'n*, 672 S.W.2d at 382). When the meaning of the terms is open to construction, they are strictly construed and may not be extended by implication beyond their plain language. *Id*. (emphasis added). As such, when reviewing restrictive covenants, "any reasonable doubt will be resolved in favor of the free use of land." *Id. See also Blevins v. Barry-Lawrence County Ass'n For Retarded Citizens*, 707 S.W.2d 407, 408 (Mo. banc 1986) (any doubt regarding the meaning of the terms of a restrictive covenant is resolved in favor of the free use of property).

In their Brief, the Trustees essentially ask this Court to overturn these fundamental legal principles applicable to Missouri real estate ownership. Contrary to the Trustees' contention, however, neither the Original Indentures, nor the First Amended Indentures, or any subsequent amendment for that matter, express "an intent to prevent subdivision…". (Resp. Br. 35). The One Residence Per Lot Provision simply provides that, "[o]nly one residence shall be erected on each lot". [Exs. JB-A(E), L.F. 336 ¶ 10]. The term "lot" is not defined, nor do the Original Indentures or Amended Indentures limit the total number of lots in the Subdivision. As such, it cannot be argued in good faith that this provision expressly prohibits the subdivision of lots, or, by further extension, the redevelopment of a subdivided lot. Because this provision is plain and unambiguous on its face, moreover, no judicial construction is appropriate or necessary. *Barry Harbor Homes Ass'n.*, 105 S.W.3d at 907. Finally, to the extent there is any doubt regarding the application of this provision, such doubt should be resolved in favor of the free use of the land. *Id*. In short, properly interpreted, the One Residence Per Lot Provision cannot bar subdivision of lots.

The Trustees argue that strictly interpreting the One Residence Per Lot Provision would somehow defeat the purpose of the provision to limit "the number of residences that may be constructed in the community…" and to "retain as much green space as possible." (Resp. Br. 36). The Trustees' argument, however, is wholly unsupported. First, the actual terms of the Original Indentures and the First Revised Indentures themselves make no mention of "green space." [Exs. JT-1, JB A(E)]. The record, moreover, is devoid of any extrinsic or parol evidence concerning the intent of the original grantors,

nor would such evidence be appropriate unless the indentures were first found to be ambiguous, which they are not. *Barry Harbor Homes Ass'n.*, 105 S.W.3d at 907; *Bumm*, 142 S.W.3d at 900 ("[i]f the covenants upon which Plaintiffs rely are unambiguous, we must enforce them as written… [i]f the covenants are ambiguous, on the other hand, we attempt to determine what purpose the parties intended the covenants to serve at the time they were adopted…").[12]

The Original Indentures and First Revised Indentures, moreover, do not contain any other terms or provisions that would even suggest an intent to "retain green space" as claimed by the Trustees. Tellingly, the Trustees do not point to any other provision in the indentures to support their argument, because none exist. Indeed, nothing in the indentures would prevent a property owner from razing his or her lot, clearing all plant growth, constructing a substantially larger residence within the set-backs, and covering the remaining portions of the lot with gravel. [Exs. JB-A (D)-(I)]. As such, the Trustees' contention regarding a purported intent to preserve green space is at best wishful fiction.

The Trustees further claim that the only "possible purpose" of the One Residence Per Lot Provision is to preserve the "desired aesthetic and residential nature of the subdivision" by prohibiting the subdivision of lots, and that any other interpretation of this provision would render the provision "meaningless." (Resp. Br. 36). The Trustees' contention is illogical and unsupported. Contrary to the Trustees' assertion, an obvious

[12] Moreover, even if the indentures herein were ambiguous, which they are not, even testimony from an original developer in attempting to establish the intent of parties to a covenant would not be not binding as a matter of law. *Blevins*, 707 S.W.2d at 408.

purpose of the One Residence Per Lot Provision, given the historical time frame involved, would have been to bar the erection of separate dwellings, for example, for carriage houses, servants' quarters, or additional separate housing for extended family. As such, the Trustees' contention that a plain language interpretation of this provision would render the provision meaningless lacks merit.

1. The restrictions in *Berkley* are distinguishable from the Original Indentures and First Amended Indentures at issue herein.

The Missouri decision cited by the Trustees, *Berkley v. Conway Partnership*, 708 S.W.2d 225 (Mo. App. E.D. 1986), is readily distinguishable from the immediate case, and in no way deviates from Missouri's longstanding policy favoring the protection of property ownership rights. Tellingly, in their Brief, the Trustees omit reference to portions of the *Berkley* opinion critical to understanding the court's holding in that case. That is, while the restrictions at issue in *Berkley* include a restriction similar to the One Residence Per Lot Provision at issue in the immediate case, the *Berkley* Court's holding prohibiting subdivision ultimately turned on a **different** subdivision provision, "paragraph five of article six", which provided:

> "No residence, shall be erected, altered, placed or permitted to remain on lots 4, 7, 8, 9, 10 which contains less than 26,000 cubic feet; and on lots 1, 2, 3, 5, 6, 11, 12 which contains less than 28,000 cubic feet. The number of cubic feet shall be the cubical contents of the structure starting from the bottom of the footing of the foundation, and shall include the cubical contents of the basement, first floor, second floor and roof, exclusive of garages or screened or open porches."

Id. at 228. The *Berkley* Court held that "[t]he set specification of cubic feet for each residence of each of the twelve lots reflects the developer's intention that these be the

sole lots established by his original subdivision." *Id.* In light of the restrictions in *Berkley* governing house size on specific lots, subdivision of any existing lot was, for all practical purposes, impossible.

The Original Indentures and Amended Indentures at issue in the immediate case, unlike in *Berkley*, lack any analogous restriction specifying required cubic feet for each residence specific each of the then-existing lots in the Subdivision. [Exs. JB-A(D)-(I)]. Unlike in *Berkley*, and ignoring the One Residence Per Lot Provision for the sake of argument, nothing set forth in the Original Indentures or the Amended Indentures would operate to bar the construction of additional residential structures after the subdivision of a lot.

Finally, unlike in *Berkley*, in the instant case, through various transfers of portions of the original lots in the Subdivision, the number and boundaries of the original lots in Clayton Terrace **have been** altered on many occasions over time. For instance, Stahr, one of the named Plaintiff Trustees, owns property located at 3 Clayton Terrace. [TR 65-66]. The legal description of 3 Clayton Terrace is not limited to lot 3 Clayton Terrace, but instead, the description contains two separate parcels, including parts of lots 3, 4, and 5 Clayton Terrace. [TR 65-66; Exhibit 7]. Furthermore, the current legal description for the property located at 1 Clayton Terrace includes lot 1 and part of lots 3 and 4 of Clayton Terrace. [TR 66, Ex. 8]. The legal description for 6 Clayton Terrace, the property that is the subject of this dispute, prior to its subdivision in 2014, consisted of two parcels including a portion of, but not all of, lot 6 and part of lot 4 of Clayton Terrace. [Tr. 67; Ex. 9]. Perhaps most importantly, the Trustees admitted at trial that, due to various

modifications of the property lines over the years, there are currently **two houses** on what was originally platted as lot 3 Clayton Terrace. [Tr. 48-49; Ex. 100].

While all of these transfers and alterations of the original boundaries of the lots took place through deeds with metes and bounds descriptions, as opposed to subdivision, this is a distinction without a difference. Unlike the instant case, the *Berkley* Court essentially held, based on the plain language of the indentures, that the evident intent of the indentures was that the original platted lots were to remain in their original form. No such intent is conveyed by terms of the indentures in the immediate case, as confirmed by the conduct of the Subdivision property owners over time.

2. The Original Indentures evidence an intent to permit, not restrict, subdivision of lots.

The Trustees' entire argument concerning a purported implied intent to prohibit subdivision ignores that, contrary to evidencing an intent to restrict the subdivision of lots, the original grantors expressed an intent to do the opposite. That is, the Original Indentures, and several versions of the Amended Indentures, included a restriction which directly evidences an intent to permit the original lots to be altered through subdivision. Specifically, the Original Indentures, and each of the first three Amended Indentures, expressly provide that "[n]o **land or any interest therein** in said subdivision shall by any person or corporation be sold, resold, conveyed, leased, rented to or in any way occupied or acquired by others than those wholly of the Caucasian Race…". [L.F. 0035; Ex. JT-1] (emphasis added). This provision referring to the sale and/or conveyance of "land" in the Subdivision also appears in each version of the Amended Indentures until removed in

1972, which was no doubt done to remove the abhorrent race-based prohibitions on ownership. [Exs. JB-A(D)-(F)].

While no Missouri Court has apparently discussed the use of the term "land" verses "lot" to determine whether such a provision evidences an intent to permit subdivision, the Illinois Supreme Court has held that a substantially similar provision indeed evidenced "the expectation of the developer that the lots may be subdivided." *See Watts*, 194 N.E.2d at 279. In *Watts*, plaintiff Watts filed suit to enjoin the proposed subdivision of a neighboring lot. In reviewing the claims, the Illinois Supreme Court noted that Illinois, when reviewing subdivision restrictions (like Missouri) requires that "[a]ll doubts must be resolved in favor of natural rights, and against restrictions thereon." *Id*. (citations omitted). The Court also noted that the original grantor, in order to bar subdivision of lots, "could and would expressly have provided that there was to be no splitting or subdividing of the original platted lots if none was to be done." *Id*. at 279. The relevant restrictions, however, included no such provision.

Because the subdivision restrictions lacked any express prohibition against subdivision of the original lots, the plaintiffs in *Watts* instead argued that a separate provision requiring minimum building standards and uniform set back lines barred the subdivision of lots. *Id*. at 279. The Illinois Supreme Court rejected the plaintiffs' argument, pointing to a separate provision of the restrictions which evidenced an intent to permit subdivision. Specifically, the Court found that a restriction which provided that "[i]t is an express condition of this conveyance that no part of the real estate herein described shall ever be conveyed or leased to any person who is not a Caucasian…",

evidenced an intent to permit subdivision. *Id*. The Court specifically held that this restriction "expresses the expectation of the developer that the lots may be subdivided" and further that it "is not plausible that [the developer] meant to limit only one dwelling or house to a lot when it was so subdivided." *Id*.

The immediate case is directly analogous to *Watts* because, by specifically using the term "land" in the Subdivision, rather than "Lots", the original grantor anticipated that "land" (not lots) could be transferred to certain qualifying individuals, which would also, logically and necessarily, lead to the subdivision of then-existing lots.[13]

In short, contrary to the Trustees' contention, the Original Indentures and several iterations of the Amended Indentures express an intent to permit subdivision. As such, there exists no basis to extend the indentures by implication to bar subdivision.

B. The Subdivision Indentures are not Ambiguous.

(*REPLYING TO THE TRUSTEES' SECTION II.D.*)

[13] While out-of-state decisions, such as those relied upon by the Trustees, are not binding upon this Court, should this Court nonetheless review out-of-state decisions, a number of courts follow Missouri's approach in strictly construing provisions similar to the One Residence Per Lot Provision and holding that such provisions do not bar the subdivision of lots. *See e.g.*, *Sadler*, 821 N.E.2d at 348 (restriction prohibiting the construction of more than one single-family dwelling per lot does not restrict subdivision of existing lots); *Paquette v. Coble*, 653 N.E.2d 1262, 1265 (Ill. App. 3d 1995) (restriction prohibiting the construction of more than "one residence per lot" on any lot smaller than 2.25 acres did not prohibit subdivision); *Turnley v. Garfinkel*, 362 S.W.2d 921 (Tenn. 1962); *McTighe v. Burke*, 448 A.2d 645 (Pa. Super. Ct. 1982); *Brown v. Wehner*, 610 S.W.2d 168 (Tex. App. 1980); *Sharp v. deVarga*, 2010 Tex. App. LEXIS 91, 2010 WL 45871 (Tex. App. Jan. 8, 2010); *Craver v. Raymond*, 725 S.E.2d 474, 2012 N.C. App. LEXIS 570, 2012 WL 1514898 (N.C. App. May 1, 2012); *Leahy v. Polarstar Dev., LLC*, 195 P.3d 919, 922 (Or. App. 2008).

Without specifically requesting that this Court find the One Residence Per Lot Provision ambiguous, the Trustees argue that, if the Court finds such provision ambiguous, then "there is nothing more probative of intent than the fact that, for over 85 years, not a single resident of Clayton Terrace subdivided his property for the purpose of constructing an additional residence." [Resp. Br. 41]. The Trustees' argument defies logic. The fact that the record contains no instance where a property owner attempted to subdivide their property is purely random and therefore irrelevant to the Court's interpretation of the indentures. In any event, the fact that the parties disagree concerning the interpretation of the One Residence Per Lot Provision does not render the provision somehow ambiguous. *See Barry Harbor Homes Ass'n*, 105 S.W.3d at 908. This provision is plain on its face and should be interpreted accordingly.

Even if the Court were to somehow make a finding of ambiguity in this case, the "established principle of contract law [is] that any ambiguity in a written instrument should be construed against the party which drafted the ambiguous language." *Id.* (quoting *Disabled Veterans Trust v. Porterfield Constr., Inc.*, 996 S.W.2d 548, 552 (Mo. App. W.D. 1999)). And "[d]oubts arising as to the intention of the parties must be resolved in favor of the free and untrammeled use of the land." *Gardner*, 74 S.W.2d at 607. In this case, any purported ambiguity would therefore necessarily be construed against the Trustees, especially where the Trustees seek to extend the Indentures by implication. *See id.*

In short, under longstanding Missouri precedent, the plain language of the One Residence Per Lot Provision should not be extended by implication to bar the subdivision

of lots. To do so, would open a veritable Pandora's Box, permitting subdivisions to impose a variety of otherwise new burdens through an overly liberal construction of existing restrictions. There is no need for this Court to overturn decades of consistent precedent favoring ownership rights in favor of any lessened standard regarding the implementation or interpretation of subdivision restrictions. The One Residence Per Lot Provision is limited in scope by the plain language of such provision, and nothing in the remaining restrictions suggest any broader application of this provision than suggested by the plain language.

III. THE TRIAL COURT ERRED AND MISAPPLIED THE LAW IN ORDERING 6 CLAYTON TERRACE, LLC TO PAY PLAINTIFFS' ATTORNEY'S FEES, AS THERE EXISTS NO APPLICABLE CONTRACT, STATUTE, OR EXCEPTION UNDER THE AMERICAN RULE THAT WOULD PERMIT PLAINTIFFS TO RECOVER ATTORNEY'S FEES FROM 6 CLAYTON TERRACE, LLC.

(REPLYING TO THE TRUSTEES' SECTION III.)

As set forth in 6 Clayton Terrace, LLC's initial Brief, the Trial Court's award of attorney's fees in the Trustees' favor and against 6 Clayton Terrace, LLC was highly unusual in several respects. Acknowledging the lack of any contractual provision or statute that would permit a fee award, the Trustees instead argue that the Trial Court's fee award is appropriate under the narrow "special circumstances" exception to the American Rule. As a general proposition, however, an application of the "special circumstances" exception to the facts of this case would essentially amount to the exception swallowing the (American) rule as the record is devoid of any evidence of misconduct by 6 Clayton

Terrace, LLC that could possibly justify any application of the "special circumstances" exception.

First, as set forth hereinabove and in the Judgment, the One Residence Per Lot Provision is invalid for lack of unanimous approval. Nothing in the Amended Indentures, moreover, prevents the subdivision of a lot, and as such, 6 Clayton Terrace, LLC's conduct in acquiring the Property, and following the ordinances and procedures of the City of Frontenac to subdivide the Property, simply cannot be equated to misconduct. It should be noted, moreover, that in the dozens of subdivision indenture cases cited by the Trustees, not a single case involved an award of attorney's fees arising from a dispute concerning the meaning or implication of subdivision restriction.

The Trustees' defense of the Trial Court's award seems to rest almost entirely upon the Trial Court's unsupported finding that 6 Clayton Terrace, LLC somehow acted in "bad faith in concealing their intentions and attempts to subdivide the Property." [LF 521]. None of the purported examples of "bad faith" cited by the Trustees in their Brief, however, can fairly be characterized as "misconduct". Instead, the Trustees' argument that "the LLC engaged in intentional and egregious misconduct" and that "the record is replete with evidence of surreptitious behavior" is simply absurd. (Resp. Br. 44).

First, Mr. McGowan, accused of misconduct by the Trustees, is not connected with the LLC other than as a tenant and potential future purchaser of the subject property. Second, the simple act of performing due diligence by reviewing indentures, reviewing the Frontenac ordinances and surveying the property cannot be considered nefarious, but rather, normal prudent conduct on the part of a person contemplating the purchase and

subsequent subdivision of real estate. Third, there is no case, statute or other authority that imposes a duty on a prospective purchaser to notify anyone in advance of his intended use of the property.

The Trustees fail to identify the basis of such purported duty, because there is none, and moreover, ignore that 6 Clayton Terrace, LLC followed the procedures required under the ordinances of the City of Frontenac to subdivide the Property, including all applicable public notice provisions. In fact, numerous members of the Subdivision appeared at the City of Frontenac meetings to object to 6 Clayton Terrace, LLC's application to subdivide Lot 6. [Tr. 49-50]. The Trustee's admit, moreover, that they were fully aware of 6 Clayton Terrace, LLC's request to subdivide Lot 6 at least two (2) months prior to the City of Frontenac granting the subdivision [Tr. 49-50]. In short, the record is devoid of any facts that could suggest that "exceptional circumstances" would permit an award of fees in the Trustees' favor, and the Trial Court therefore erred in penalizing 6 Clayton Terrace, LLC for simply pursuing its lawful ownership rights in connection with the Property.

IV. THE TRIAL COURT ABUSED ITS DISCRETION AND/OR ERRED IN ORDERING 6 CLAYTON TERRACE, LLC TO PAY ALL OF PLAINTIFFS' ATTORNEY'S FEES AND COSTS INCURRED IN THIS DISPUTE, WITHOUT ANY APPORTIONMENT OF FEES PERTAINING TO COUNT II OF THE PETITION, BECAUSE ONLY ONE CLAIM OF PLAINTIFFS' FIRST AMENDED PETITION WAS DIRECTED AT 6 CLAYTON TERRACE, LLC, AND BECAUSE THE TRIAL COURT FOUND PLAINTIFFS LIABLE WITH RESPECT TO HUEY'S COUNTERCLAIM FOR ABUSE OF PROCESS IN ASSERTING COUNT I OF THE PETITION.

(REPLYING TO THE TRUSTEES' SECTION IV.)

The Court should overturn the Trial Court's award of fees in the Trustees' favor because, under the circumstances of this case, such award is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock one's sense of justice. *Aubuchon v. Hale*, 453 S.W.3d 318, 325 (Mo. App. E.D. 2014). In their Brief, the Trustees largely gloss over the glaring irregularities with the Trial Court's fee award, including the fact that the Court awarded the Trustees all of their fees incurred in this dispute, despite entering judgment **against** the Trustees with respect to Count I of Huey's Counterclaim, and despite finding that the Trustees committed an abuse of process. To award fees incurred by a party in connection with a claim that the same court found amounted to an abuse of process presents the very definition of an abuse of discretion by the Trial Court.

The Trustees cite *Mohamed Alhalabi v. Mo. Dept. of Natural Res*., 300 S.W.3d 518, 531 (Mo. App. E.D. 2009) and *Williams v. Fin. Plaza, Inc*., 78 S.W.3d 175, 185 (Mo. App. W.D. 2002), in support of their contention that the Trial Court properly ordered 6 Clayton Terrace, LLC to pay all of the Trustees' legal fees. Neither case is relevant or supports the Trustees' argument, because neither case involves a case with multiple parties and claims. That is, nothing in either case can support the Trial Court's irrational and erroneous award of attorney's fees against 6 Clayton Terrace, LLC where such fees were incurred by the Trustees in unsuccessfully litigating claims by or against Defendant Huey (Petition, Count I, Huey Counterclaim).

In short, the record is devoid of any "exceptional circumstances" that could support the Trial Court's fee award against 6 Clayton Terrace, LLC. The Court should

therefore set aside the Trial Court's erroneous award of attorney's fees and costs in favor of the Trustees.

V. IN THE EVENT THIS COURT REVERSES MISSOURI PRECEDENT, THE COURT'S DECISION SHOULD NOT BE RETROACTIVELY APPLIED TO AFFECT 6 CLAYTON TERRACE LLC'S OWNERSHIP RIGHTS.

As set forth above, nothing raised by the Trustees in their Brief warrants the reversal of longstanding Missouri law and policy favoring ownership rights in real property. In the event this Court adopts the Trustees' policy arguments in favor of an abandonment of *Van Deusen* and its progeny, alters Missouri's longstanding requirement of strict interpretation of restrictive covenants, or accepts any of the Trustees' demands for abandonment of Missouri precedent, however, such holding(s) should only be applied prospectively in accordance with *Sumners* in order to avoid substantial injustice and unfairness to 6 Clayton Terrace, LLC, which purchased the Property in reliance upon the plain language of the Indentures, including the One Residence Per Lot Provision. *See Sumners*, 701 S.W.2d at 723-24.

The state of the decisional law at the time of 6 Clayton Terrace, LLC's purchase clearly required a plain language interpretation of restrictive covenants and upheld longstanding principles favoring the free use of land. The plain language of the Original Indentures did not permit the creation of new burdens with less-than-unanimous approval and contained no language restricting the subdivision of lots. Moreover, the plain language of the Amended Indentures did not restrict the subdivision of lots. As such, if this Court accepts the Trustees' arguments and thereby reverses longstanding precedent

such to "establish a new principle of law," a prospective-only application of such change would be appropriate. *See Sumners*, 701 S.W.2d at 724. Otherwise, 6 Clayton Terrace, LLC, and potentially countless other owners of real property, would be retroactively deprived of their ownership rights as they existed prior to this Court's ultimate decision.

CONCLUSION

For the foregoing reasons, Appellant, 6 Clayton Terrace, LLC, hereby requests that this Court reverse the Trial Court's Judgment as to Counts I and II of Plaintiffs' Petition, declare that the One Residence Per Lot Provision is void and unenforceable, reverse that portion of the Trial Court's Judgment awarding fees to Huey and against 6 Clayton Terrace, LLC on Huey's claim for abuse of process and direct the Trial Court to enter judgment accordingly.

Respectfully submitted,

BERGER, COHEN & BRANDT, L.C.

/s/ Steven M. Cohen

Steven M. Cohen, MBE #33794
8000 Maryland Ave., Suite 1500
Clayton, Missouri 63105
(314) 721-7272
(314) 721-1668; Facsimile
scohen@bcblawlc.com
Attorneys for Appellant/Respondent,
6 Clayton Terrace, LLC

CERTIFICATE OF SERVICE

Signature above is also certification that the foregoing was filed electronically on February 19, 2019, with the Clerk of Court to be served by operation of the Court's electronic filing system upon counsel of record.

CERTIFICATE OF COMPLIANCE PURSUANT

TO MISSOURI SUPREME COURT RULE 84.06(c)

COMES NOW Steven M. Cohen, counsel for Appellant 6 Clayton Terrace, LLC, and pursuant to Missouri Supreme Court Rule 84.06(c), hereby states as follows:

1. To the best of my knowledge, information and belief, Appellant's claims, defenses, requests, demands, objections, contentions and arguments, as set forth in Appellant's Reply Brief were formed after reasonable inquiry under the circumstances. Moreover:

(a) Appellant's claims, defenses, requests, demands, objections, contentions and arguments, as set forth in Appellant's Reply Brief are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b) Appellant's claims, defenses, requests, demands, objections, contentions and arguments, as set forth in Appellant's Reply Brief are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of the new law;

(c) The allegations and other factual contentions in Appellant's Reply Brief have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(d) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

2. Appellant's Reply Brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).

3. Appellant's Brief contains 12,813 words.

BERGER, COHEN & BRANDT, L.C.

/s/ Steven M. Cohen

Steven M. Cohen, MBE #33794
8000 Maryland Ave., Suite 1500
Clayton, Missouri 63105
(314) 721-7272
(314) 721-1668; Facsimile
scohen@bcblawlc.com
Attorneys for Appellant/Respondent,
6 Clayton Terrace, LLC