IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

MILLSTONE PROPERTY OWNERS ASSOCIATION, Respondent/Plaintiff, vs. NITHYANANDA DHYANAPEETAM OF ST. LOUIS, Appellant/Defendant, FOGARTY FARMS LLC, Respondent/Third Party Defendant.	)	Appeal No. ED110871 Jefferson County 17JE-AC02497

Appeal From the Circuit Court of the County of Jefferson
Twenty-Third Judicial Circuit
State of Missouri
Honorable Victor J. Melenbrink, Judge

APPELLANT
NITHYANANDA DHYANAPEETAM OF ST. LOUIS
BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASE LAW

STATUTES and RULES **PAGE**

JURISDICTIONAL STATEMENT

The action before the court is one involving the question of whether intent exists to transfer and receive developer rights; and if so, were those rights abandoned. The Court erroneously found that intent to transfer and receive existed between the original developer Essex Development and Ananda. This case is not within the exclusive jurisdiction of the Missouri Supreme Court, and jurisdiction is proper in the Missouri Court of Appeals, Eastern District, under the general appellate jurisdiction of this Court. Mo. Const., Art. V §3.

STATEMENT OF FACTS

The parties entered into a joint stipulation of facts and submitted joint exhibits. Those items, as well as defense exhibits, will be referenced as such and provided to the court[1].

Ananda was a properly created Missouri corporation, with the purpose of acquiring and owning property. In 2007, Ananda purchased all of Millstone Phase 1, including the disputed lots, from Essex Development. Exhibit J1. Nithyananda (hereinafter "Appellant") is a properly created Missouri corporation, with the purpose of providing Hindu teachings to the public and the faithful. Exhibit J2. Ananda acquired Millstone Subdivision in its entirety. Exhibit J1. In 2007, Ananda constructed a warehouse to house religious statues (Deities), and on December 25, 2008, Ananda deeded lots 13, 14, and 21 to Appellant, with improvements; these parcels are at the center of this dispute. Exhibits J3, J4. Eventually the remaining lots in Millstone were deeded to Respondent Fogarty, while Appellant maintained ownership of lots 13, 14, and 21. J5.

Ananda properly acquired a building permit regarding the construction of a building, that ultimately became the temple located on lot 14. Exhibit J3. The records reflect that the building was completed in 2007, at that time Ananda owned all of Millstone Phase 1. Exhibit J3.

The Hindu faith has more than one billion followers and is widely practiced in the United States and abroad. The individuals that organized the creation of the temple also

[1] Joint Exhibits will be designated by a "J" followed by the exhibit number, while defense exhibits will be referenced as "D" followed by the exhibit number.

arranged for Swamiji[2] to come to the Temple and perform prana pratishtha, thus energizing the deities; a rare and sacred event. Exhibit D2. Those practicing the Hindu faith believe that the deities, having been touched by the divine, are alive. T.R. 541, lines 16-25. Once they, the deities, become energized by Swamiji, they must be appropriately cared for by performing puja daily. T.R. 492, lines 14-22. The deities have been placed on sacred hallowed ground and cannot be relocated. T.R. 543, lines 16-24. It is necessary for the proper care of the deities that the faithful have access to them so that the puja can properly be performed. T.R. 492, lines 14-22.

Ananda sought approval from Jefferson County Planning and Zoning to rezone the property in question; if approved, the rezoning would have allowed a retreat, meditation, and educational center. Exhibit J6[3]. The proposal was met with much hostility by a group called Byrnesville Concerned Citizens, for which Respondent Fogarty acted as an organizer and spokesperson. T.R. 153, lines 1-18. After the proposal was rejected by the County, Ananda sold all but three lots of Millstone Phase 1 to Respondent Fogarty. Exhibit J5. Despite being well aware of the intended purpose and use of the property, Respondent Fogarty now seeks to limit Appellant's religious rituals and access to the property.

As inconvenient of a fact as it may be, Appellant owned the property first, and it did not intend to receive the developer rights, and/or enforce the restrictions. See Exhibit J1. Similarly, Respondent Fogarty has shown no intent to actually develop the land for single

[2] Supreme Pontiff of Hinduism Jagatguru Mahasanndhanam His Divine Holiness Bhagavan Nithyananda Paramashivam (referred to as Swamiji).
[3] This Exhibit was originally identified as trial Exhibit J20; however, due to its voluminous size, only portions relevant to this point on appeal are included with this Brief.

family dwellings, and has instead used the property to throw elaborate commercial events. See T.R., lines 3-4; See T.R. 270, lines 12-25; T.R. 271, lines 1-2. Water and sewer have not been installed on the property, Respondent Fogarty has not advertised the lots for sale, and he transferred the common ground to himself. See T.R. 197, line 25; T.R. 198, lines 1-11; See T.R. 363, lines 13-21. Respondent Fogarty also installed a giant gated monument to himself restricting access to the property. Exhibit J7. Respondent Fogarty argued the gate was installed for safety; however, the name of the platted subdivision is "Millstone", but the name etched in stone reads "Fogarty Farms". Exhibit J7.

During trial, the Court heard extensive testimony regarding the Respondent Fogarty's use of the property as a commercial event space. Respondent Fogarty has regularly hosted huge corporate events on the property including stages, fireworks, bands, monster trucks, and drones. See Exhibit D1. Respondent Fogarty amended many of the original restrictions including, the prohibition on hunting. See T.R. 281, lines 3-19. The lot sizes average 4 acres, which under the indentures (and according to Respondent Fogarty), are to be used strictly for single family dwellings. See T.R. 282, lines 5-19. Hunting is certainly an odd activity to allow if Respondent Fogarty had any intent of acting as a developer and actually developing property into single family residences. See T.R. 282, lines 5-19.

Both parties in this case intended to use the land in ways inconsistent with the original developer's vision. Both parties have used the property for their own benefit. Neither Ananda nor Respondent Fogarty have ever intended to develop the property for single family dwellings. However, because Respondent Fogarty wants to use the property

for his exclusive benefit, he is seeking to remove the sacred Deities and eject the Appellant from its property.

POINTS RELIED ON
I

THE TRIAL COURT ERRED IN HOLDING ANANDA INTENDED TO RECEIVE AND DID RECIEVE DEVELOPER RIGHTS FOR MILLSTONE SUBDIVISION FROM ITS PREDECESSOR IN TITLE ESSEX DEVELOPMENT BECAUSE SUCH DETERMINATION IS AGAINST THE WEIGHT OF THE EVIDENCE AND MISAPPLIES THE LAW, IN THAT NITHYANANDA WAS NOT GRANTED DEVELOPER RIGHTS FROM ITS PREDECESSORS IN TITLE.

Dierberg v. Wills, 700 S.W.2d 461, 465 (Mo. App. 1985)

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. Banc. 1976)

Scott v Ranch Roy-L, Inc., 242 S.W.3d 401, (Mo. App. 2007)

POINT RELIED ON

II

THE TRIAL COURT ERRED IN HOLDING THAT DEVELOPER RIGHTS WERE NOT ABANDONED BECAUSE SUCH DETERMINATION MISAPPLIES THE LAW AND IS AGAINST THE WEIGHT OF THE EVIDENCE, IN THAT PARTIES HAVE ENGAGED IN VIOLATIONS OF THE RESTRICTIONS WHICH ARE SO GENERAL AS TO INDICATE AN INTENTION OR PURPOSE TO ABANDON THE PLAN OR SCHEME INTENDED TO BE MAINTAINED BY THE RESTRICTIONS.

Dierberg v. Wills, 700 S.W.2d 461, 465 (Mo. App. 1985)

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. Banc. 1976)

Scott v Ranch Roy-L, Inc., 242 S.W.3d 401, (Mo. App. 2007)

United C.O.D v. State, 150 S.W.3d 311, 313 (Mo. App. 2004)

POINT RELIED ON

III

THE TRIAL COURT ERRED IN HOLDING THAT RESPONDENT IS ENTITLED TO ATTORNEY FEES AND BACK DUE ASSESSMENTS BECAUSE SUCH A DETERMINATION IS AGAINST THE WEIGHT OF THE EVIDENCE AND MISAPPLIES THE LAW, IN THAT THE DEVELOPER RIGHTS WERE NOT PROPERLY TRANSFERRED AND/OR ABANDONED

Dash v. Barnaby, 604 S.W.3d 326, 330 (Mo. App. 2020)

Trustee of Clayton Terrance Subdivision v. 6 Clayton Terrace LLC, 585 S.W.3d 269 (Mo. Banc 2019)

Scott v Ranch Roy-L, Inc., 242 S.W.3d 401, (Mo. App. 2007)

ARGUMENT

POINT RELIED ON

I

THE TRIAL COURT ERRED IN HOLDING ANANDA INTENDED TO RECEIVE AND DID RECIEVE DEVELOPER RIGHTS FOR MILLSTONE SUBDIVISION FROM ITS PREDECESSOR IN TITLE ESSEX DEVELOPMENT BECAUSE SUCH DETERMINATION IS AGAINST THE WEIGHT OF THE EVIDENCE AND MISAPPLIES THE LAW, IN THAT NITHYANANDA WAS NOT GRANTED DEVELOPER RIGHTS FROM ITS PREDECESSORS IN TITLE.

STANDARD OF REVIEW

"A decree or judgment of the trial court will be sustained "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law or unless it erroneously applies the law". *Dierberg v. Wills*, 700 S.W.2d 461, 465 (Mo. App. 1985), citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. Banc. 1976).

A. Ananda did not intend to receive developer rights from its predecessor in title.

Ananda cannot transfer what it never received. While a document exists transferring developer rights from Ananda to Fogarty Farms in 2015, no such documents exist between Ananda and its predecessor in title, Essex Development. Essex Development conveyed title to Ananda in 2007, but did not assign developer rights. The facts of this case demonstrate that Ananda did not have intent to receive developer rights from Essex Development, therefore, the developer rights did not transfer, and there is a break in the chain of title. Respondent Fogarty could not receive what Ananda did not own.

Scott v Ranch Roy-L, Inc., 242 S.W.3d 401, (Mo. App. 2007) directs the court to consider the intent of the parties. "The intent to assign an interest is key and an assignment is accomplished where the circumstances show an intention on one side to assign and on the other side to receive". *Id.* at 406.

The factual background of *Scott* is important to understand. In *Scott,* Roy Longstreet and his two sons created a planned residential community which granted certain powers to the developer who was defined as Roy Longstreet. *Id.* at 403. That same year (1966), they incorporated the Association, every lot owner became a member, and the bylaws named Roy Longstreet the developer. *Id.* In 1972, Roy and his sons incorporated "Ranch Roy-L", all of whom were also among the original incorporators of the Association. *Id.* at 404.

The Court examines two factors to determine intent, the written instruments and the behaviors of the parties. Ideally, the transfer of developer rights would be memorialized in a document stating explicitly that the rights are being transferred from one person or entity to another person or entity; and then that document would be recorded. In both *Scott* and the case at bar, no such document exists; therefore, the Court had to look at other written instruments to help determine intent.

In *Scott*, the transfer of developer rights was between Roy Longstreet, the individual, and Ranch Roy-L, the corporation, of which Roy the individual was also a member. Stated plainly, while the entities were different, the same humans comprised them. The Court held that this gave the habendum clause in the Warranty Deed special meaning. The clause stated:

> To have and to hold the premises aforesaid, with all and singular the rights, privileges, appurtenances and immunities thereto belonging or in anywise appertaining onto the said party of the second party [Ranch Roy-L], and unto their heirs and assigns forever.

Id.

The Court stated:

> Although we found that such a conveyance would seem to convey only superficially Roy Longstreet's rights as the developer of the Subdivision, because such rights are personal and do not run with the land, the conveyance does serve as evidence of Roy Longstreet's intent to convey his right as Developer to Ranch Roy-L.

Id. at 406. Roy the individual person was conveying his rights that were personal to him and as the named developer, to himself as a member of the corporation. This is not the case in the matter before this Court.

In this case, the language of the habendum clause is more limited and at best only superficially coveys any rights. It merely reads "to have and to hold the same, together with all rights and appurtenances to the said party(ies), of the second part, and to the heirs and assigns of such party(ies) forever". Exhibit J1. As noted in *Scott*, developer rights are personal and do not run with the land. *Id*. Unlike the *Scott* case, Essex Development and Ananda are in no way related or involve the same members. No testimony exists regarding Essex Development's intent to transfer, therefore no such intent to transfer or receive can be ascertained from this Deed transaction.

The second factor that needs to be examined to determine intent is the events and circumstances surrounding the transaction. *Scott* directs the Court to look at the behavior of the parties after the transfer to ascertain intent. In the Scott case, the Grantee clearly

believed it had received, and behaved as though it had received, the developer rights. Grantee exercised developer rights such as conveying common property to the Association, maintaining common properties, sending representatives to act and vote on its behalf, subdividing lots, incurring expenses and carrying out obligations as a developer would. *Id*. Ranch Roy-L was treated by the Association as a developer, it was referred to as such in the Association's minutes, and voted in the capacity as the developer. *Id*.

To the contrary, Ananda took no developer actions after acquiring the property from Essex Development. In fact, Ananda did exactly the opposite. Ananda acted as if no restrictive covenants existed, and Appellant relied on the inaction of Ananda in expanding the non-conforming use. In 2007, Ananda constructed a "utility building" that ultimately became (and is referred to) as the "temple", which in and of itself is inconsistent with the restricted use of "single family dwelling". Exhibit J3. During trial, Respondent Fogarty acknowledged the building was clearly in violation of the restrictions, which existed prior to the transfer of developer rights from Ananda to Respondent Fogarty.

> Q: Is it the association's position that the defendant, Nithyananda, is in violation of any of the restrictions? T.R. 183, lines 2-5.
>
> A: Yes. T.R. 183, line 6
>
> Q: What violations of the restrictions have occurred? T.R. 183, lines 7-9
>
> A: The violation of the single-family use, as well as the violation of the – the mowing T.R. 183, lines 9-10.
>
> Q: How has their use of any of their lots violated the residential use requirement? T.R. 183, lines 12-14.
>
> A: Basically, the use of the building that they refer to as a temple is – is not residential use. T.R. 183, lines 15-17.

After constructing the building, that cannot be used as a single-family dwelling, Ananda subdivided out three lots, 13, 14, and 21. Ananda then transferred these lots by general warranty deed to Nithyananda Dhyanapeetam on December 15, 2008. Exhibit J4. Appellant and Ananda undertook steps to turn the warehouse into a temple. The first step was to have deities built, shipped, and blessed. This is a detailed process that takes years to complete[4]. After the Deities were constructed, Swamiji traveled to perform the sacred rituals to energize the Deities. The testimony of Sanhya Bail explains the elaborate process of bringing the Deities to the property.

> Q: Do you know what year the process started in gathering the stones? T.R. 532, lines 14-15.
>
> A: I would say 2006. T.R. 532, line 16
>
> Q: So these – these Deities, do you know when they arrived in St. Louis? T.R. 532, lines 20-22.
>
> A: Somewhere in 2007, I would say. T.R. 532, line 25.
>
> Q: Early 2007? Late 2007? T.R. 533, line 1
>
> A: Summer to Fall. T.R. 533, line 2.
>
> Q: And once the deities arrive, what happened? T.R. 533, lines 3-4.
>
> A: These are the processes of energizing the deities. Literally, bringing this life force cosmic energy and installing it into this stone, so it becomes a life. It's like giving birth. T.R. 533, lines 13-17.

[4] The deities housed in the Temple in this case, are referred to as "mula" deities which refers to the large deities, as opposed to the "bhiga murti" deities which refers to the small deities often found in an individual dwelling. See T.R. 529, lines 3-9.

Q. Okay. And so is it fair to say that the Hindu religion believes upon Prana Pratishtha[5] that the deities are sacred? T.R. 533, lines 18-20

A: Yes. T.R. 533, line 21.

Not only did Ananda actively participate in the construction of the temple, which was in conflict with the indentures; it engaged in the difficult and expensive process of building and transporting the Deities. The organization never would have brought the Deities to this location, if there was any possibility that the Deities would not be used for public worship, further demonstrating it lacked intent to receive developer rights. None of the evidence presented at trial demonstrated that Ananda intended to act as a developer, and therefore, it could not have intended to receive the restrictions. All of the evidence in the record demonstrates the intent of Ananda to use the land unencumbered.

If Ananda was acting as a developer, it would have been required to raise an objection to the construction of the building. Since Ananda was responsible for constructing the building, objection to the use of the building would have been illogical. Further, Respondent Fogarty, who was well aware of the planned use of the subject property, did not attempt to object to the construction or use of the structure. Clearly, Respondent Fogarty knew how to object to the land use as he formally opposed Ananda's application for re-zoning and proposed development. It is undeniable that Respondent Fogarty was aware of the current use and planned future use of the parcels, and that at no time was that use intended to be for single family dwellings. Respondent Fogarty testified to his knowledge of both the actual and intended use of the property.

[5] The Prana Pratishtha will be discussed in detail under Point II.

> Q: So after the presentation was delivered at the Baptist Church, what were the next steps that you took in relation to the Ananda development plan. T.R. 152, line 25; T.R. 153, lines 1 – 3.
>
> A: Well, myself, my wife, along with some other – several other concerned neighbors – direct neighbors to the property kind of formed I believe what we called the Byrnesville Concerned Citizens group. And then we kind of put together a kind of more formal presentation, if you will, for when this went before the Planning and Zoning. T.R. 153, lines 4-10.
>
> Q: And did you ultimately attend a Jefferson County Planning and Zoning meeting in that capacity? T.R. 153, lines 11-13.
>
> A: Yes. T.R. 153, line 14
>
> Q: And did you voice the concerns that you talked about today at the Planning and Zoning meeting? T.R. 153, lines 15-17
>
> A: Yes, we did. T.R. 153, line 18

Additionally, Ananda submitted an application to the Planning and Zoning Commission which would develop the site into a meditation and educational center. Exhibit J6. This was a detailed and advanced site plan. Sanhya Bail explained the actions.

> Q: Okay. And tell me what your vision is eventually for that -that parcel of land and that space. T.R.512, lines 2-4.
>
> A: So the vision for this particular parcel of land is basically to house a full-fledged functioning temple, along with an education center, along with residences. Maybe possibly a school at some point and, you know – basically a full community. T.R., lines 5-10.

While, the trial court held "the totality of circumstances demonstrate an intention to transfer developer rights on the parts of both Essex and Ananda", L.F D104 p.3, not one shred of evidence exists in the record that Essex Development intended to transfer developer rights to Ananda. No representative from Essex Development testified at trial. No written document exists, recorded or otherwise, indicating the transfer. There was no

testimony from a representative of Ananda that they bargained for or intended to receive developer rights. Examination of the documentation as well as the behavior of the parties following the transfer does not indicate Essex Development had an intent to grant nor that Ananda had an intention to receive developer rights. Ananda's actions, words, and behaviors all indicated that Appellant intended to create a mixed-use development. Therefore, Ananda never owned the developer rights to grant to Respondent Fogarty.

POINT RELIED ON

II

THE TRIAL COURT ERRED IN HOLDING THAT DEVELOPER RIGHTS WERE NOT ABANDONED BECAUSE SUCH DETERMINATION MISAPPLIES THE LAW AND IS AGAINST THE WEIGHT OF THE EVIDENCE, IN THAT PARTIES HAVE ENGAGED IN VIOLATIONS OF THE RESTRICTIONS WHICH ARE SO GENERAL AS TO INDICATE AN INTENTION OR PURPOSE TO ABANDON THE PLAN OR SCHEME INTENDED TO BE MAINTAINED BY THE RESTRICTIONS.

STANDARD OF REVIEW

"A decree or judgment of the trial court will be sustained "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law or unless it erroneously applies the law". *Dierberg,* 700 S.W.2d at 465, citing *Murphy,* 536 S.W.2d at 32.

ARGUMENT

The law favors the free and untrammeled use of real property, but valid restrictions thereon cannot be and are not disregarded by the courts. *Dierberg*, 700 S.W.2d at 466, citing *Lake Saint Louis Community Association v. Kamper*, 503 S.W.2d 447, 449 (Mo App.

1973). The right to enforce a valid restrictive covenant may, however, be waived by conscious acquiescence in persistent, obvious and widespread violations thereof. *Id.*

> If restrictions apply to an entire area and redound to the benefit of all property owners in the restricted area, then waiver or abandonment occurs only when violations of the restrictions are so general as to indicate an intention or purpose to abandon the plan or scheme intended to be maintained by the restrictions.

Dierberg, 700 S.W.2d at 466, citing *Eichelsbach v. Harding,* 309 S.W.2d 681, 686 (Mo. App. 1958).

While Point Relied On I focuses on the lack of intent to transfer of developer rights between Ananda from Essex Development, Point II focuses on the abandonment of the restrictions by both Ananda and Respondent Fogarty. Ananda and Respondent Fogarty both took actions to abandon/waive the restrictive covenants to the point they were unenforceable.

A. Ananda's violations of the indentures demonstrated an intentional and purposeful plan to abandoned the restrictive covenants.

Upon purchasing the property in question, Ananda quickly designed a plan to transform the parcel from a platted subdivision to a religious and educational center. The recorded restrictions were completely disregarded by Ananda. Unlike in *Scott*, Ananda did not behave like a developer. Ananda did not form an Association, it did not levy assessments against Nithyananda, it did not maintain the grass, or the roads, and it did not enforce any restrictions for a period of almost eight (8) years. Respondent Fogarty testified to the actions he took regarding the formation of the Association.

> Q: When Fogarty Farms acquired lots, was there an association formed in accordance with the restrictions at that time? T.R. 160, lines 24-25; T.R. 161, line 1.
>
> A: Not at the time we purchased. No, Sir. T.R. 161, line 2.
>
> Q: What actions did you take? T.R. 161, line 6
>
> A: So we – we formed the association. We filled out the documents that were required by the State, and then we elected a board of directors. T.R. 161, lines 7-9.
>
> Q: When did that election occur? T.R. 161, line 10
>
> A: Approximately 2016. T.R. 161, line 11.

Although Ananda did not create an Association, Ananda was not content to sit on its laurels. Prior to the transfer of lots 13, 14, and 21 from Ananda to Appellant, Ananda actively participated in the creation and transportation of religious statutes (Deities).

The acquisition of Deities is a huge undertaking that would have never occurred if Ananda had not intended to abandon the restrictive covenants or believed that they could ever be enforced. Sanhya Bail testified to the effort put into the creation and transportation of the Deities.

> Q: Can you – do you know the date that the preparation to make the deities began or the year?
>
> A: So the preparation for these mula murtis, these huge, several-ton deities, it's quite an involved preparation. It starts from identifying the stones. These granite stones, like there is a male stone, and a female stone. You have to find the right combination. Then once that's done – like literally there will be people who go look for these stones. T.R. 530, lines 18-25. Then once that stone is finalized, the carving of them by very skilled artisans will – through precision may carve the deities and they even ask for our scriptures, the Agamas, the dimensions. It's like completely symmetric. It's exquisite the way the – the stones are carved, and this takes time. T.R. 531, line 1-7.

Q: They're carved? T.R. 531, line 15

A: Yes, the stones are carved. Then the carvings are placed outside, and they actually go through several seasons of whatever weather to make sure they're worthy of worship. Sometimes they don't always make it through the different elements. Then once they go through that, and it's identified which temple or center or where are they going around the world, they'll – you have…T.R. 531, lines 16 – 24… to ship them. And shipping is not a joke. Like it's – they're heavy structures. You cannot even get one scratch on them because it would just be like the end of that possibility for that Deity. And so we have to ship them all the way- these are made in India – ship them all the way from India on a boat. They are crated and then they come to a port, and then we have to transport them. And then – that's all just to get them to the place of worship. T.R. 531, lines 1-9.

After the arrival of the Deities, Ananda and Appellant prepared for their blessing. The energizing of the Deities is what transforms them from stone to a sacred living being, this process is called the pratishtha. The pratishtha makes both the deities and land sacred. Sanhya Bail explains the importance of the Pratishta.

Q: Okay. And so is it fair to say that the Hindu religion believes upon Prana Pratishta that the Deities are sacred? T.R 533, lines 18-20

A: Yes. T.R 533, line 21

There are two types of pratishtha: prana and mantra. In the case at bar, the deities were energized through both Prana and Mantra Pratishtha. As explained by Ms. Bail in her testimony, Prana pratishtha is very rare:

A: So enlightenment just by the touch can transmit this energy and infuse it into that stone. T.R. 534, lines 24-25

Q: And what is that word? T.R. 535, line 2

A: That's prana Pratishtha. T.R. 535, line 3

A: Which is very rare because there are not many enlightened masters in the world, so it's an extremely rare happening. T.R. 535, lines 5-7.

In addition to placing and blessing the Deities, Ananda and Appellant also performed acts to make the land itself sacred.

> Q: Is there anything you do to the physical land before the prana 20Pratishtha to prepare? T.R. 539, lines 22 -23.
>
> A: There's a Bhoomi puja that's done. That's basically requesting the blessings of Mother Earth. T.R. 539, lines 24 -25. T.R. 540, line 1.
>
> Q: What specifically happened when you did it? T.R. 540, lines 13 -14.
>
> A: There's like installation of different elements and that kind of moves the energy. T.R. 540, lines 15-17.
>
> A: There's, like, nine gems put and then also, like copper. Some elements that basically – it's all about this energy, this energy circuit. T.R. 540, line 25; T.R. 541, lines 1-3.
>
> Q: Okay. And so those -those elements were put into the land at the parcel we're discussing? T.R. 541, lines 4-5.
>
> A: That's my understanding. T.R. 541, line 6.

Ananda spent thousands upon thousands of dollars to build, transport, and bless the Deities; and took additional action to bless the real property, also making it sacred. These blessings took place in the form of a large religious ceremony. Prior to his acquisition of the property, Respondent Fogarty testified that he was aware the property was being used by Ananda and Appellant in ways that were inconsistent with the restrictions,

> Q: Is the performance of religious ceremonies in that building a violation of the residential use requirement? T.R. 183, lines 18-20.
>
> A: Yes. T.R. 183, line 21
>
> Q: You referenced a time – an instance when the road was blocked. Do you remember that? T.R. 188, lines 17 -18.

A: Yes. T.R. 188, line 19.

Q: Can you tell me when that occurred? T.R. 188, line 20.

A: I believe it was 2008, 2009. It – it was part of the big installation of the – they had a big event where they built tents, and they had a significant amount of people. T.R. 188, lines 21-24.

Q: How many people would you estimate were there? T.R. 188, line 25; T.R. 189, line 1.

A: I couldn't speak to the people because it was all tented. But I would say – I would estimate that there was between 70, you know between 50, 75 cars maybe – maybe sometimes a hundred. They were parked on both sides of the street pretty much the full length of the T. T.R. 189, lines 2-7.

Once the Pratishtha and the Bhoomi puja are performed, the Deities cannot be moved as Hinduism teaches that the deities are energized beings, and they reside on the sacred land. The Deities are akin to a Catholic relic, and these Deities were physically touched by Swamiji. This is a very rare occurrence, and is similar to having an item touched by Jesus. Once the Deities are blessed, they cannot be moved. Sanhya Bail explains the significance of their placement.

Q: And let's talk about moving the deities. Can they be moved? T.R. 541, lines 12 -13

A: No. T.R. 541, line 14.

Q: And why can't they be moved? T.R. 541, line 15.

A: Basically once that installation happens, these are not even- they're like living beings, and they've been installed in that particular point, that land. And moving them is considered extremely beyond inauspicious. It's just like if you want to talk about karma, it's like, really bad to move the – the deities, given that you brought them here, you invoked them here, you invited them here, and you took the responsibility to maintain them and make them available for public worship. T.R. 541, line 16 -25; T.R. 542, line 1.

> Q: Are you aware in your role in the church of any large Deities that have ever been moved? T.R. 542, lines 2-4.
>
> A: No. T.R. 542, line 5.
>
> Q: So it's fair to say according to the scriptures, in your opinion, that it would be a bad thing to move the deities? T.R. 543, lines 16-18.
>
> A: Yes. T.R. 543, line 17.
>
> Q: Interpret that scripture for us. T.R. 543, lines 20-21
>
> A: I mean, another way to say, it's like all hell would break loose. It's literally the worst thing that could happen. T.R. 544, lines 22-24.

While the restrictions state "All lots in this subdivision shall be restricted to single family residential usage only and not more than one main building shall be erected on any one lot in the subdivision", everything Ananda did demonstrated a conscious design to disregard this restriction. Exhibit J8**.** The construction of the deities is a multi-step process that took several years to complete. Further, they weigh thousands of pounds and were transported from India. In violation of the covenants, Appellant obtained permits and constructed a building to house the deities. It planned an elaborate celebration to energize the deities, in which its religious leader, Swamiji, also traveled from India to perform the blessing. See Exhibit D2.

Appellant engaged in a detailed planning, including a submission of an application to Jefferson County for re-zoning. The plans submitted reflected a meditation center, educational center, dormitory housing, communal housing, and townhomes – all of which surrounded the deities. For more than seven years, Appellant did nothing to enforce or abide by the restrictions. Clearly, if it received the restrictions from Essex Development,

Appellant's actions demonstrated abandonment. If in fact Appellant had intended to receive developer rights, every subsequent action was consistent with abandonment. Appellant regularly held religious gatherings, as described by Respondent Fogarty, at the temple until the onset of litigation.

B. Respondent Fogarty also abandoned the restrictions

Respondent Fogarty's amendments to the restrictions, and failure to enforce the restrictions, are so widespread as to render the restrictions themselves unrecognizable. *Dierberg,* 700 S.W.2d at 467, holds that "such a radical and fundamental change in the character of the subdivision as to defeat the purpose of the restriction relegating the use of the lots to residential purposes only". Respondent Fogarty has been using the subject property exclusively for his own private and commercial benefit.

The most notable is the amendment in Section VI paragraph Q, which removes the prohibition on hunting. Exhibit J9. The lots in the subdivision average approximately 4 acres, and further, it is not a wooded area in its natural state. Much testimony was heard regarding the enforcement of the "single family dwelling" restriction. Hunting is not an activity that is compatible with subdivision living: as stray bullets and residential houses make strange bedfellows. Respondent Fogarty testified to the change in restrictions.

> A: "Hunting. To prevent the safety of all residents of the subdivision, no hunting or shooting except as may be required by government authority to control wild life population shall be permitted in the subdivision." T.R. 281, lines 3-7.
>
> Q. Okay. And then can you read me paragraph 4 on the exhibit -- the amended? T.R. 281, lines 8-9.

A. "Hunting. Hunting shall be allowed in the subdivision on an owner's own lot, lots – in parentheses -- with the board's approval – prior approval, provided however all hunting shall be in compliance with all local, state, and federal ordinances, laws, and regulations." T.R. 281, lines 10 -15.

Q. Why did you decide to change that? T.R. 281, line 16

A. We just wanted to provide the lot owners the ability to hunt on their own property if they deemed to do so. T.R. 281, lines 17-19.

Q: Is it prudent to hung on four acres with other residents around if you're using this for single-family dwellings? T.R. 282, lines 5-7.

A: I personally don't hunt. And I wouldn't want to speculate what is prudent or not. T.R. 282, lines 8-9.

Q: Are you aware that Hindus are vegan? T.R. 182, line 17.

A: I am aware of that. T.R. 182, line 18.

Respondent Fogarty's use of the property for commercial activity, which is directly in conflict with Section VI paragraph E, is flagrant and further demonstrates his intent to abandon the restrictions and use the property in ways inconsistent with the restrictions. A ten (10) minute video was introduced at trial. See Exhibit D1. This video depicts Respondent Fogarty throwing a large party for his company. Hundreds of people were in attendance, and from the stage he announces that it is a company event. He used footage from the video on his corporate website. He had monster trucks come out and crush cars, and in the video remarks that they put on the largest firework display in the area. See Exhibit D1.

Respondent Fogarty's improper use of the property was not an isolated event, this was merely the event that Respondent was so flagrant about, that he posted it on his social media websites associated with his business. These are large corporate events, held on

restricted property, for the financial and personal benefit of Respondent Fogarty. This and other events like it are not akin to backyard BBQs. There events are designed to financially benefit Respondent. The video depicts hundreds of people in attendance at this event. Exhibit D1. After viewing the footage captured from Respondent Fogarty's business' social media sites, and properly introduced into evidence, Respondent Fogarty admitted that his use of the property was also inconsistent with the restrictive covenants.

> Q: All right. Is that an accurate representation of your 2018 fall party? T.R. 267, lines 19 -20
>
> A: 2018 or 2016? T.R. 267, line 21
>
> Q: That's 2018. T.R. 267, line 22
>
> A: 2018. Yes. T.R. 267, line 23
>
> Q: Was your 2016 party similar? T.R. 267, line 24.
>
> A: It was probably, I would say, scaled back from that. T.R. 267, line 25; T.R. 268, line 1.
>
> Q: If I told you it's your Instagram page, would you have any evidence there to refute that? T.R. 170, lines 9-10.
>
> A: No. T.R. 170, line 11.
>
> Q: Is that Big Foot[6] From that party running over cars on your Instagram page? T.R. 170, lines 12 -13.
>
> A: Yes. T.R. 170, line 14.
>
> Q: Okay. So you took drone footage T.R. 170, line 15.
>
> A: Yes. T.R. 170, line 17

[6] Big Foot is akin to a monster truck, that drives over and crushes cars.

Q: And did you upload that to your commercial enterprise page? T.R. 170, lines 18-19

A: Me, personally, no. T.R. 170, line 20

Q: Who did? T.R. 170, line 21

A: Someone that works for me. T.R. 170, line 22.

Additionally, Respondent Fogarty has taken no steps to develop the property. There are no sewer or water services thus, making it impossible for the Appellant to use its property as a single-family dwelling. See T.R. 363, lines 13-21. It is clear from Respondent Fogarty's actions that he has no intention to use the property as the original restrictions require, but instead wants to use the property for his private and commercial benefit, while preventing Appellant from using its property as a place of worship.

"The law does not favor restrictive covenants, and thus they will be strictly construed in favor of free use of land". *Dierberg,* 700 S.W.2d at 468. Conversely, when reviewing a restriction that restricts the free practice of religion, it must be scrutinized using the highest standard.

The free practice of religion is a fundamental right, protected by the U.S. and Missouri Constitutions, and the First Amendment. "As for fundamental rights, those requiring strict scrutiny are the rights to interstate travel, to vote, free speech, and other rights explicitly guaranteed by the Constitution". *United C.O.D v.* State, 150 S.W.3d 311, 313 (Mo. App. 2004). *Citing In re Marriage of Woodson,* 92 S.W.3d 780, 784 (Mo. Banc 2003). The Missouri Constitution states in pertinent part "That all men and women have a natural and indefeasible right to worship Almighty God according to the dictates of their

own consciences". Missouri Constitution Art. I §5. The First Amendment of the United States Constitution reads in pertinent part "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof". Respondent Fogarty wants to disregard portions of the restrictions that do not serve him, while weaponizing certain restrictions to try and restrict Appellant's practice of its religion.

Lastly, and what demonstrates Respondent Fogarty's intent more than any one specific restriction, was the erection of the large monument surrounding the coded gate. The name of the subdivision is Millstone Crossing. Respondent Fogarty, built a monument costing in excess of thirty thousand dollars ($30,000.00), and attempted to assess the cost to the Appellant. T.R. 290, lines 4-25; T.R. 291, lines 3-8. The name etched in stone on the monument reads "Fogarty Farms" and not the name of the subdivision, Millstone. Exhibit J7.

Despite entering a judgment for Respondent in regards to the developer rights, the trial court made the following observations in its final judgment:

> The Court would emphasize its opinion, however, that NDSTL[7]'s assertion with regard to developer rights was generally reasonable. While the Court is confident in its ultimate conclusion that Fogarty Farms LLC possesses the developer rights, NDSTL's claim was non-frivolous in light of the conduct of Association and Fogarty Farms LLC. While NDSTL has failed in some respects to meet its obligations under the restrictions and covenants, in many respects Fogarty Farms has not acted in a manner consistent with reasonable expectations for a developer. The Court finds credible the evidence presented during the trial that Fogarty Farms has been, at best, dilatory in moving forward with development of the subdivision. While reasons might exist for such delays, the Court finds particularly galling the decision of Fogarty Farms LLC to install a gate to the subdivision with the name "Fogarty Farms" rather than the actual name of the subdivision. In many respects, Fogarty

[7] NDSTL is the trial court's abbreviation for Nithyananda.

> Farms LLC has treated the subdivision more like a backyard recreational area than a subdivision in the midst of development. NDSTL can hardly be blamed for asserting that Fogarty Farms LLC did not possess developer rights given its apparent disinterest in acting like a developer.

L.F. D104 p.9

POINT RELIED ON

III

THE TRIAL COURT ERRED IN HOLDING THAT RESPONDENT IS ENTITLED TO ATTORNEY FEES AND BACK DUE ASSESSMENTS BECAUSE SUCH A DETERMINATION IS AGAINST THE WEIGHT OF THE EVIDENCE AND MISAPPLIES THE LAW, IN THAT THE DEVELOPER RIGHTS WERE NOT PROPERLY TRANSFERRED AND/OR ABANDONED

A. Attorney Fees and Enforcement of the Restrictions are Contingent on the Validity of the Restrictions

"Missouri courts apply the American Rule when considering whether to award attorney fees". *Dash v. Barnaby*, 604 S.W.3d 326, 330 (Mo. App. 2020). *Citing, Trustee of Clayton Terrance Subdivision v. 6 Clayton Terrace LLC,* 585 S.W.3d 269 (Mo. Banc 2019). "Each litigant bears his own attorney fees unless there is statutory authorization or a contractual agreement" *Id.*

In this case, the restrictive covenants reflect the contractual relationship between the parties. Article VII "Enforcement of the Restrictions" allows "the party enforcing these Restrictions shall be entitled to recover their expenses in doing so, including without limitation, reasonable attorneys' fees and cost of litigation including expert witness fees". Exhibit J8.

If successful on either Point Relied on I or II, the contractual relationship between the parties and the basis for the award of attorney fees in the amount of Fifty Thousand

Dollars ($50,000.00) would be void. Further, the authority to enforce the restrictions would also be void and the judgment award of Thirteen Thousand Nine Hundred Thirteen Dollars and Fifty Cents ($13,913.50) should be vacated.

B. Assessments are Contingent on the Validity of the Restrictions

The authority to collect assessments and enforce restrictions is granted to the developer through the restrictive covenants. Section V states:

> The Board of Directors of the Association shall have the power to levy assessments on all lots of the Subdivision to provide funds for the purpose of maintaining the Subdivision streets, sewers, common area, and carrying out their duties under these Restrictions including the enforcement thereof.

In this case, without the authorization from the restrictive covenants, Respondent Fogarty has no standing to collect assessments. Therefore, if this Court should find for Appellant on Point I or II of this appeal, the judgment awarding Fourteen Thousand Two Hundred and Eighty-Seven Dollars and Fifty Cents ($14,287.50) in back due assessments should be vacated.

CONCLUSION

In conclusion, Appellants pray that the Court enter a judgment finding that Essex Development did not intend to transfer developer rights to Ananda, and that Ananda did not intend to receive them. In the alternative, Appellant pray this Court enter a judgment rendering the restrictive covenants abandoned.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATION AND CERTIFICATE OF SERVICE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2016 and contains no more than 7146 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (less than the 31,000 limit in the rules). The font is Times New Roman, proportional spacing, 13-point type. An electronic copy of the full text of this brief has been served on each party separately represented by counsel via the court's electronic filing system this 16th day of June, 2023.

Respectfully submitted,

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