COLORADO COURT OF APPEALS 2 East 14th Avenue, Third Floor Denver, CO 80203 El Paso County District Court Honorable Larry E. Schwartz Case No. 2008CV2923, Division 5 Ctrm. 501 **Appellants:** WOODMEN HILLS COVENANT MANAGEMENT BOARD and WOODMEN HILLS METROPOLITAN DISTRICT v. **Appellees:** CHARLES WARNE, BRIDGET WARNE, BRANDON CUFFE, NORMAN VILLANUEVA, NANCY VILLANUEVA, HOWARD SURBER, LUANA SURBER, TRAVIS R. HELTON, and KAREN E. HELTON	**COURT USE ONLY**
Attorney for Appellees: M. Jacqueline Gaithe, PC M. Jacqueline Gaithe (#34348) P.O. Box 62783 Colorado Springs, CO 80962-2783 Phone: (719) 635-2595 E-mail: jackie@mjglaw.net	Case Number: 2009CA1987
ANSWER BRIEF	

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1. Whether the Homeowners, who initiated this declaratory relief action regarding a Declaration and its application to these Homeowners, should be required to join all property owners in Woodmen Hills Filing 8 and a portion of 9.

2. Whether the Declarant of the Declaration had the right and power to assign covenant enforcement powers to the WHMD and WHCMB and whether the WHMD can charge fees to property owners regarding enforcement of the Declaration.

STATEMENT OF THE CASE

The underlying district court action arose out of a controversy between Plaintiffs and Defendants in that action concerning covenants, amended covenants, and assignments of rights regarding covenant enforcement.

A number of lot owners in Woodmen Hills Filings 8 and a portion of 9 ("Homeowners") brought suit against Woodmen Hills Metropolitan District ("WHMD") and the Woodmen Hills Covenant Management Board ("WHCMB") (R. at 1-8) after WHMD and WHCMB began to attempt covenant enforcement against these Homeowners without the legal authority to do so. These attempts included letters that threatened suit if these Homeowners did not "comply". (R. at 4, lines 21-24 - Complaint and R. at 12, lines 9-14 - Amended Complaint).

WHMD and WHCMB told these Homeowners that their authority lay in the assignments of right to enforce covenants that they solicited from builders, developers and declarants under the relative declarations of covenants. R. at 278-

282 - DR Horton Assigment; R. at 283-286 - Falcon Assignment; R. at 287-292 - Elite Assignment; and R. at 293-296 - Richmond Assignment). One of these declarants was D.R. Horton. (R. at 278-282). At the time D.R. Horton was solicited by WHMD and WHCMB, it no longer held any right, title or interest in any of the lots in Filing 8 or the relative portion of Filing 9. D.R. Horton sold its last lot in August 2006 (R. at 262, lines 25-27 - Response in Opposition to MSJ). D.R. Horton was solicited more than a year later. (R. at 263, lines 8-12 -Response in Opposition to MSJ). D.R. Horton advised WHMD and/or WHCMB that it no longer had any interest to assign. (R. at 276 - Lapin Letter and R. at 277 – Rechlitz Letter). WHMD and/or WHCMB continued to pursue an assignment. (R. at 276). Eventually, D.R. Horton signed the assignment, but in the nature of a quit claim deed, because of its belief that it no longer had such a right to assign. (R. at 278-282; and R. at 263, lines 13-17). The Homeowners believed from the beginning that these assignments were invalid, making WHMD and WHCMB's attempts to enforce covenants and charge covenant management fees unlawful.

WHMD and WHCMB answered the Complaint filed by some of the Homeowners and then filed a motion seeking an order to cause the Homeowners to join of all lot owners in Filings 8 and a portion of 9. (R. at 62-65 – Motion to Join All Owners). The trial court found that the other lot owners were not indispensible

parties as the Homeowners only sought a declaratory judgment as to their particular rights and responsibilities under the Declaration, and not to the rights and responsibilities of other lot owners. (R. at 140, lines 11-13 - Order). The trial court went on to state that WHMD and/or WHCMB had a significant interest in the rights and responsibilities of the other lot owners (R. at 140, lines 13-19 - Order) and that if WHMD and/or WHCMB felt the need, then they could join the other lot owners. (R. at 140, lines 17-19 - Order). WHMD did not enjoin any of the lot owners, but rather, began suing the other lot owners in county court on the Declaration. (R. at 121-125 – Exh. C to Motion to Consolidate). One set of these lot owners were Travis and Karen Helton. (R. at 121-125 and 126). Travis and Karen Helton filed a motion to consolidate the county court case filed against them by WHMD and/or WHCMB with the district court case filed by the Homeowners. (R. at 97-99; 100-108; 109-120; 121-125; and 126-137). The courts granted the motion to consolidate the Helton county court matter with the Homeowners district court matter. (R. at 138-139-Order FINAL). Travis and Karen Helton will, for purposes of designation in this Answer Brief, be referred to hereinafter collectively with the original plaintiffs in the district court matter, Case No. 08CV2983 as the "Homeowners". WHMD and WHCMB continued to bring suit against other lot

owners in county court under different case numbers, rather than join them in the district court matter.

WHMD and WHCMB filed a motion for summary judgment (R. at 191); the Homeowners answered and filed a cross-motion for summary judgment (R. at 260). The court granted the Homeowners' cross-motion for summary judgment. (R. at 406). Homeowners then filed motions for clarification of the summary judgment order regarding damages and for pre- and post-judgment interest (R. at 438-445 and 543), as well as a bill of costs (R. at 409-412).

WHMD and WHCMB went on to file a notice of appeal. (R. at 505-510). The Court of Appeals issued an Order to Show Cause directed at WHMD and WHCMB. Prior to a ruling on the Order to Show Cause, WHMD and WHCMB filed a second notice of appeal. (R. at 533-538). The first appeal was dismissed by the Court of Appeals. The parties are now before the Court of Appeals on the second appeal.

FACTUAL BACKGROUND

(See R. at 260-275 – Homeowners' Response in Opposition to Def MSJ – Final –Undisputed Facts, Paragraph 6 (Pages 2 through 4) and R. at 2(lines 10-34); 3(lines 1-33); and 4 (lines 4-14 and 19-20))

A certain Declaration of Covenants, Conditions and Restrictions for Woodmen Hills Filing No. 8 and a Portion of Filing No. 9 (the "Declaration") was executed on or about October 24, 2000 and was duly recorded in the real property

records of El Paso County, Colorado, at Reception Number 200136133 on or about November 9, 2000. The Declaration did not provide for any "payment by the Owners of any assessments or other amounts nor does the Declaration provide for a homeowners association to collect or expend funds for such matters." (R. at 2, lines 10-18).

For these and other reasons, an Amendment to Declaration of Covenants, Conditions and Restrictions for Woodmen Hills Filing No. 8 and a Portion of Filing No. 9 (the "Amended Declaration") was executed by the Declarant, Melody Homes, Inc., on or about February 12, 2003 and duly recorded in the real property records of El Paso County, Colorado, at Reception Number 203034235 on or about February 18, 2003. The Amended Declaration essentially stripped the Declaration of any enforcement mechanisms and completely deleted any and all references to a Design Review Committee and Design Standards. The Amended Declaration was in place at the time, or shortly after the Homeowners purchased real property in Woodmen Hills Filing Number 8. (R. at 2, lines 19-28).

At some point after the Warnes, Mr. Cuffe, the Villanuevas and the Surbers purchased in Woodmen Hills Filing Number 8, a neighborhood meeting was called by the Declarant, D.R. Horton. At that meeting, the Owners in Woodmen Hills Filing Number 8 and a Portion of Number 9 (the "Owners") were advised that there

was no homeowners association and it would be up to them to decide whether to proceed with putting one in place. The Owners chose not to establish or elect a homeowners association. The Owners were led to believe that there would also be no covenant enforcement. (R. at 2, lines 29-34).

The former Declarant, Melody Homes, Inc. d/b/a D.R.Horton - Melody Series ("Declarant Horton") sold or transferred ownership of the last property in Woodmen Hills Filing Number 9 in or about September, 2003. Declarant Horton sold or transferred ownership of the last property in Woodmen Hills Filing Number 8 in or about April, 2006. With the April 2006 sale or transfer, Declarant Horton no longer had any legal right, title, interest, power or claim in or to the properties and covenants or covenant enforcement associated with Woodmen Hills Filing Number 8 and a Portion of Number 9. The Woodmen Hills Metropolitan District and/or the Woodmen Hills Covenant Management Board initiated dialogue with a representative of the former declarant, Declarant Horton, in late Summer 2007 in an effort to get Declarant Horton to enter into a purported assignment of right to enforce covenants. (R. at 3, lines 1-11).

Declarant Horton entered into a certain assignment with Woodmen Hills Metropolitan District after a long dispute over Declarant Horton's ability, or lack thereof, to do so. This Contract and Assignment of Right to Enforce Covenants

was signed on or about August 14, 2007 ("First Assignment"), but was not recorded in the real property records of El Paso County, Colorado until November 13, 2007 at Reception Number 207145595. This First Assignment occurred more than a year after Declarant Horton had sold or transferred its last property in Woodmen Hills Filing Number 8 and nearly four years after Declarant Horton had sold or transferred its last property in Woodmen Hills Filing Number 9. At the time of the assignment, Declarant Horton had no right, title, interest, power or claim as to the properties or covenants affecting the properties associated with Woodmen Hills Filing Number 8 and a Portion of Number 9 and could not assign any right to enforce covenants in either of those Filings. (R. at 3, lines 12-24).

On or about October 18, 2007, the Woodmen Hills Metropolitan District assigned its purported interest from the First Assignment to the Woodmen Hills Covenant Management Board in a Contract and Assignment of Right to Enforce Covenants ("Second Assignment"). This Second Assignment was not recorded in the real property records of El Paso County, Colorado until November 14, 2007 at Reception Number 207146008. (R. at 3, lines 26-30).

Subsequent to these "assignments," WHCMB began attempts to enforce covenants. WHCMB also initiated a "covenant fee" of $6.50 on a monthly basis to fund covenant enforcement by way of assessment on the Woodmen Hills Filing

Number 8 and a Portion of Number 9 residents' monthly water bills. (R. at 3, line 33; R. at 4, line 3).

Property Owners in Woodmen Hills Filing 8 and the Portion of Filing 9 began receiving alleged covenant violation notices from WHCMB in or about January 2008. The Homeowners maintain that WHCMB does not have any authority to attempt enforcement of any covenant or covenants. The Declaration and/or the Amended Declaration set forth no mechanism for covenant enforcement and any attempts by WHCMB are outside the scope of any authority contained in or contemplated by these documents. Likewise, the WHCMB does not have any authority to assess a monthly "covenant fee" for covenant enforcement against the Homeowners, particularly where the governing documents made no provision for any assessments regarding covenant enforcement. (R. at 4, lines 4-14). WHCMB, admittedly, states that it has no authority to assess fines or penalties for alleged covenant violations. (R. at 4, lines 19-20).

SUMMARY OF THE ARGUMENT

The trial court correctly held that the Homeowners were not required by rule or statute to join all property owners in the declaratory judgment action for a couple of reasons. First, because the declaratory relief sought in this action was only directed at the Homeowner's rights, responsibilities, etc. (and not all lot

owners) under the Declaration of Covenants as they pertained to WHMD and WHCMB, the other lot owners were not necessary parties as contemplated by C.R.C.P. 19 and 57 and C.R.S. 13-51-115. Second, the trial court provided the WHMC and WHCMB with the opportunity to join the other lot owners if these entities wanted the declaratory judgment to apply to these additional lot owners, rather than just the Homeowners who initiated the action.

The Trial court correctly granted the Homeowners' cross-motion for summary judgment for a number of reasons. First, Declarant Horton no longer had any rights, title or interest in covenant enforcement in Filing 8 or the relevant portion of Filing 9 because it had sold its last lot in these filings prior to executing the alleged assignment. Second, because it no longer held such an interest, it did not have anything to assign, making the assignment invalid. Third, because Declarant Horton had no right or interest in covenant enforcement and the assignment was invalid, WHMD and/or WHCMB have no authority, statutory or otherwise, to assess a covenant fee against the Homeowners.

STANDARD OF REVIEW

Where the issue involves a matter of law, the standard of review is de novo. *In re Estate of Sheridan*, 117 P.3d 39, 41 (Colo. Ct. App. 2004).

ARGUMENT

1. The trial court was correct in finding that the Homeowners did not need to join all lot owners in the declaratory relief action, but rather placed this burden on WHCMB and/or WHMD.

Homeowners filed a complaint for declaratory and injunctive relief, seeking a declaratory judgment regarding the rights, obligations and status of the parties to this action only. The complaint did not seek to affect the rights of others. The complaint was amended to add additional Homeowners as plaintiffs to the action after WHMD and WHCMB brought suit against other lot owners in Woodmen Hills Filing 8 and a portion of 9. Homeowners' claims for relief in the complaint were addressed solely toward the WHMD and WHCMB. Therefore, joinder of other lot owners was not necessary for the Homeowners.

The relief sought in the complaint for declaratory and other relief is quite specific:

WHEREFORE, Plaintiffs Charles Warne, Bridget Warne, Brandon Cuffe, Norman Villanueva, Nancy Villanueva, Howard Surber, Luana Surber, Travis R. Helton and Karen E. Helton pray for judgment as follows pursuant to C.R.C.P. 57 and C.R.S. §§ 13-51-101, et seq., a finding and Order of the Court:

A. That because Melody Homes, Inc. d/b/a D. R. Horton – Melody series no longer has any legal right, title, interest, power or claim in or to the properties, covenants or covenant enforcement affecting the properties associated with Woodmen Hills Filing Number 8 and a Portion of Number 9, the First Assignment is void, voidable or invalid, and therefore, unenforceable;

B. That because the First Assignment is void, voidable or invalid, the Second Assignment is void, voidable, or invalid, and therefore, unenforceable;

C. *That the Amended Covenants are the controlling document for the Owners in Woodmen Hills Filing Number 8 and a Portion of Filing Number 9;*

D. *That the Amended Covenants have no mechanism for covenant enforcement or assessment of fees against Owners for covenant enforcement;*

E. *That Melody Homes, Inc. d/b/a D. R. Horton – Melody Series no longer has any legal right, title, interest, power or claim in or to the properties, covenants or covenant enforcement affecting the properties associated with Woodmen Hills Filing Number 8 and a Portion of Number 9 and as such cannot make any assignments of any right, title, interest, power or claim in or to properties, covenants or covenant enforcement associated with Woodmen Hills Filing Number 8 and a Portion of Filing Number 9 to third-parties;*

F. *For Charles Warne's, Bridget Warne's, Brandon Cuffe's, Norman Villanueva's, Nancy Villanueva's, Howard Surber's, Luana Surber's, Travis R. Helton's and Karen E. Helton's costs incurred in this action pursuant to C.R.S. § 13-51-114; and*

G. *For such other and further relief as this Court deems just and proper.*

R. at 180-181; R. at 185-186. (Emphasis added.)

a. Other lot owners were not necessary or indispensible parties.

Mere interest in the subject matter of litigation, even if the interest is substantial, is insufficient to make a party indispensable. *Williamson v. Downs, 829 P.2d 498, 500 (Colo. App. 1992)*. The most important factor in determining whether a party is indispensable is injury to an absent party. *Dunne v. Shenandoah Homeowner's Ass'n, Inc.,* 12 P.3d 340, 344 (Colo. App. 2000).

b. Because WHCMB and WHMD were the parties seeking relief that may forever alter/affect the property rights and interests of other property owners in Woodmen Hills Filing Number 8 and

> a Portion of 9, it is they who should have been compelled to join indispensible parties, if at all.

WHCMB and WHMD are the parties to this action who raised the issue of the validity of the 2003 Amended Declaration. Any court decision regarding the validity of the 2003 Amended Declaration would have permanently affected the property rights and interests of other lot owners in WH Filing 8 and 9. (R. at 33, lines 1-8). Therefore, WHCMB and/or WHMD should have been the parties required to join other lot owners in WH Filing 8 and 9, if at all.

In *Good v. Bear Canyon Ranch Assn., Inc.*, 160 P.3d 251 (Colo. App. 2007), the party who challenged the validity of the amendment to the covenants was the party charged with joining other property owners. Likewise, in *Dunne v. Shenandoah Homeowners Association, Inc*., 12 P.3d 340 (Colo. App. 2000), the party challenging the revocation was the party charged with joining other property owners. In the present action, it is WHMD and WHCMB who are challenging the validity of the amendment to the covenants; not the Homeowners to this action.

A large majority of the current lot owners in WH Filing 8 and 9 bought after the recordation of the 2003 Amended Declaration. They bought with the knowledge of the 2003 Amended Declaration and with the understanding that the neighborhood lacked any mechanism for covenant enforcement, essentially making

this a covenant-free neighborhood. Indeed, most purchased in this neighborhood for this very reason. (R. at 93, lines 28-35; R. at 94, lines 1-10).

Because WHMD and WHCMB are questioning the validity of the 2003 Amended Covenants, it is they who sought to permanently affect the property rights and interests of all lot owners in these filings. (R. at 93, lines 13-17). Therefore, if joinder was (or is) to occur, then WHMD and/or WHCMB must be the parties compelled to join the other lot owners.

WHCMB and WHMD seek to unilaterally impose covenant enforcement on all lot owners in WH Filing 8 and 9. (R. at 31, lines 25-32; R. at 32, lines 1-20). Several other suits against other lot owners in WH Filing 8 and 9 were brought by WHCMB and/or WHMD during the pendency of Case No. 08CV2923. These suits sought the same or similar relief to that sought in Case No. 08CV2923 by WHCMB and WHMD. Rather than the multiplicity of suits, it would have been just as easy for WHCMB and/or WHMD to have joined the lot owners in Case No. 08CV2923. (R. at 93, lines 28-35; R. at 94, lines 1-10).

Because multiplicity of suits is one factor to consider in joinder of indispensible parties, it may in this instance be appropriate for the Court to compel WHMC and WHCMB to join lot owners in WH Filing 8 and 9 to this action since they are the parties bringing multiple suits. (R. at 94, lines 11-14).

Homeowners did not seek anything other than what was there when they purchased lots in WH Filing 8 and 9. The 2003 Amended Covenants would remain "as is". The legal determination sought by Homeowners did not alter, amend or revoke the 2003 Amended Covenants. (R. at 180-181; R. at 185-186). Therefore, the legal determination sought by the Homeowners did not change the current property rights and interests of other lot owners in WH Filing 8 and 9. (R. at 94, lines 23-27).

Conversely, it was the relief sought by WHCMB and WHMD that would have changed the property rights and interests of all lot owners in WH Filing 8 and 9 when they challenging the validity of the Amended Covenants, sought to enforce covenants without proper authority to do so, and assessed a covenant enforcement fee against lot owners. (R. at 31, lines 25-32; R. 33, lines 1-20).

2. The trial court was correct in granting summary judgment in favor of the Homeowners because the Declarant no longer had the power or right to assign enforcement to the WHMD and WHCMB since the Declarant no longer had a power or right to enforce the Declaration at the time it executed the assignments to WHMD and WHCMB; therefore, the trial court was also correct in ruling that WHMD did not have the power or authority to assess a covenant fee.

    a. The Declarant did not have a right or power to enforce the Declaration at the time of the assignment to WHMD and WHCMB.

The Declaration at Article VI. Declarant's Rights and Reservations, Section I. states that period of Declarant control ends 120 days after the date upon which one hundred percent (100%) of the Lots have been conveyed to Owners other than the Declarant. (R. at 213, lines 37-40). The D.R. Horton/Melody Assignment was executed after the period of Declarant control had expired as the D.R. Horton/Melody Assignment was executed more than a year after Declarant sold or transferred the last property in Filing No. 8 and nearly four years after Declarant had sold or transferred its last property in the affected portion of Filing No. 9.

A Contract and Assignment of Right to Enforce Covenants was executed October 18, 2007 and recorded in the real property records of El Paso County, Colorado on November 14, 2007 at Reception Number 207146008 (the "Covenant Management Board Assignment" or "Covenant Management Board Contract"). Both the D.R. Horton/Melody Assignment and the Covenant Management Board Assignment were executed well after the period of Declarant control had expired.

Even by the definition asserted by WHMD and/or WHCMB as to what a master association is, D.R. Horton could not be a "master association or similar body" as it no longer had any right, title, or interest to the property in these filings. (R. at 276 and R. at 277).

WHMD and/or WHCMB argue that Melody Homes, Inc. had extensive powers under the Declaration which would allow them to assign covenant enforcement rights. However, they fail to point to any provision of the Declaration giving Melody Homes such broad powers indefinitely. Rather, they refer the Court to a provision of the Declaration that states how long the provisions of the Declaration are to be in force. Nowhere in that provision does it state that the Declarant has infinite power to assign its rights, if any, to third parties. Based on the interpretation of this provision of the Declaration offered by WHMD and/or WHCMB, any lot owner could assign covenant enforcement to a third party. Moreover, in Miller v. Curry, 2009 Colo. App. LEXIS 3 (January 8, 2009), the Colorado Court of Appeals held that a provision similar to this was null and void in that it did not set forth a specified time in which Declarant could perform certain acts under the Declaration that affected real property. See Miller v. Curry, 2009 Colo. App. LEXIS 3 (January 8, 2009).[1]

WHMD and/or WHCMB further argue that the Declarant is a Person as defined in the Declarations entitled to enforce provisions of the Declaration. (R. at 203, lines 1-2). For that to be true, Declarant would have to be a lot owner or it

[1] Appellants may try to argue that this case is inapplicable because the property in this litigation was subject to CCIOA and Woodmen Hills Filing No. 8 and Filing No. 9 are not subject to CCIOA. However, Homeowners will

would have to have control over the filings indefinitely. Neither is the case here. Further, the WHMD and WHCMB cannot be a Person as defined in the Declarations because they are not entitled to enforce the provisions of the Declaration since the Assignment is not valid or enforceable as to the right to enforce covenant enforcement. (R. at 203, lines 1-2).

D.R. Horton believed that 120 days after the date of sale of the last lot in filings 8 and 9, it no longer retained any rights to assign away covenant enforcement to third parties. It resisted executing an assignment of such alleged rights to Woodmen Hills Metropolitan District as evidenced by letters sent to Geoffrey L. Lindquist, Esq. of Susemihl, McDermott, & Cowan, P.C. ("Susemihl McDermott") by in house counsel for D.R. Horton on February 27, 2007 (R. at 276) and D.R. Horton's privately retained outside counsel on June 6, 2007. (R. at 277). In these letters, D. R. Horton states:

> Our records indicate that we closed on the last property in the Woodmen Hills subdivision on August 1, 2006. According to the terms of the Declaration, 120 days after the last closing we are no longer the Declarant and are unable to assign the declarant's rights to anyone.

(R. at 276).

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point out to this Court that the Appellants have relied on certain provisions of CCIOA to advance their arguments. Additionally, this opinion is not the final version and is subject to revision upon final publication.

> Whether or not D.R. Horton has any enforcement rights over the covenants in Woodmen Hills may be questionable. Even if such enforcement rights were deemed to exist . . . . any such enforcement rights may be null and void once D.R. Horton has conveyed all of the property that is subject to such covenants . . . . Hence, D.R. Horton is unwilling to assign to the Metropolitan District the enforcement rights that are requested in your letter.

(R. at 277).

It is clear from these two letters to WHMD that D.R. Horton did not believe it had any rights to assign with respect to covenant enforcement and that it would not sign an assignment offered and drafted by or on behalf of WHMD. Homeowners maintain that the D.R. Horton Assignment is void and unenforceable for the very same reasons articulated in the aforementioned letters. (R. at 276; R. at 277).

Although for many months D.R. Horton resisted WHMD's continued efforts to secure an assignment, it did eventually agree to a very limited assignment. The D.R. Horton Assignment is clear that it is in the nature of a quitclaim, refusing to warrant any rights to covenant enforcement. Indeed, the D. R. Horton Assignment states in pertinent part as follows:

> THE ASSIGNEE ACCEPTS SUCH ASSIGNMENT UNDERSTANDING THAT SUCH ASSIGNMENT IS IN THE NATURE OF A QUITCLAIM; SPECIFICALLY SUCH ASSIGNMENT IS ONLY INTENDED TO PASS ANY TITLE, INTEREST, RIGHT, POWER OR CLAIM WHICH ASSIGNOR MAYH HAVE TO ENFORCE SUCH COVENANTS. THE ASSIGNOR EXPRESSLY DISCLAIMS ANY AND ALL WARANTIES AND REPRESENTATIONS, WHETHER EXPRESS OR IMPLIED, REGARDING THE VALIDITY

OFANY TITLE, INTEREST, RIGHT, POWER, OR CLAIM WHICH ASSIGNOR MAY HAVE TO ENFORCE SUCH COVENANTS. ACCORDINGLY, SUCH ASSIGNMENT TRANSFERS ONLY THE TITLE, INTEREST, RIGHT, POWER, OR CLAIM ASSIGNOR MAY HAVE, IF ANY, TO ENFORCE SUCH COVENANTS.

(R. at 278-279) (Emphasis not added).

Additionally, pursuant to the Covenants at Article VII, Paragraph 6, only while the Declarant still owns a lot, may it, or its authorized agent, enforce the provisions of the covenants, provided such enforcement is preceded by notice and hearing. (R. 216, lines 17-20). It states in pertinent part as follows:

6. Enforcement of Self-Help. During such time as Declarant owns any Lot, Declarant, or any authorized agent of it, may enforce, by self-help, any of the provisions, covenants, conditions, restrictions, and equitable servitudes contained in this Declaration, provided such self-help is preceded by notice and hearing.

R. 216, lines 17-20 (Emphasis added.)

This provision, therefore, also contemplates that after Declarant sold its last lot, it no longer had the right to covenant enforcement. If it no longer had such right, then it could not assign away that right.

It is clear from the D.R. Horton Assignment that D. R. Horton did not believe it had any rights to assign. This assignment is in stark contrast to the other assignments the Woodmen Hills Metropolitan District obtained from other builders in Woodmen Hills. The D. R. Horton Assignment continually uses the word "may" when referring to any rights of assignment, while the other assignments

from other builders speaks in the affirmative as though they knew they had rights to assign. (R. at 283-286; 287-292; and 293-296).

WHMD and/or WHCMB spend an inordinate amount of time on the legislative history of Senate Bill 04-211. While it is interesting, it is not the law; nor is it binding upon the Court.

The Declaration contains no enforcement section whatsoever. (R. at 220 222). There is, in essence, no method of enforcement. The Declaration is silent regarding fines to be assessed for alleged "covenant violations". It is also silent on the formation of a homeowner's association and the assessment of homeowner's dues for covenant enforcement. Basically, the Declaration does not contemplate enforcement of the covenants in any traditional sense.

The Declaration contains two small sections referencing covenant enforcement. One of those sections states that covenant enforcement can be sought by any Person entitled to enforce the provisions of the Declaration. (R. at 216, lines 12-16). Homeowners maintain that after Declarant sold its last lot, the only Persons entitled to attempt covenant enforcement would be the lot owners. The other section references self-help as the mechanism for any covenant enforcement. (R. at 216, lines 17-20). Self-help is defined as redressing or preventing wrongs by

one's own action without recourse to legal proceedings. *Self-help* is a term in the law that describes corrective or preventive measures taken by a private citizen.

Basically, the Declarations contain guidelines for the homeowners to live by. (R. at 304-306). There are no teeth to the Declarations, making them virtually unenforceable. One could compare this to being stopped by a police officer for exceeding a posted speed limit. Unless there is a statutory provision on the books for what the punishment is for speeding, the officer can only, at best, issue the motorist a warning citation. There would be no method of enforcement by way of fine or court appearance. The Declarations for Woodmen Hills Filing No. 8 and a Portion of No. 9 contain no provision for enforcement.

The plain language of a restrictive covenant must be interpreted considering its underlying purpose. *Dunne v. Shenandoah Homeowners Ass'n*, 12 P.3d 340, 345 (Colo. Ct. App. 2000) (citing to *Tucker v. Wolfe*, 968 P.2d 179 (Colo. App. 1998)). And, any doubt relative to the meaning and application of the covenant must be resolved in favor of the unrestricted use of property. *Id*. (citing to *Nelson v. Farr*, 143 Colo. 423, 354 P.2d 163 (1960).

Indeed, the General Assembly has mandated in § 38-34-103, C.R.S. 1999, that all restrictions relative to the use or occupancy of real property must be strictly construed. *See Double D Manor, Inc. v. Evergreen Meadows Homeowners' Ass'n*,

773 P.2d 1046 (Colo. 1989). D.R. Horton, through sworn testimony, is the only entity or party to the original Covenants and Amendment to Covenants who can state what the underlying purpose of these documents were. Therefore, a material question of fact remains, making summary judgment on behalf of WHMD and/or WHCMB' inappropriate.

Additionally, D.R. Horton's representatives explained to the lot owners in these filings that there was no covenant enforcement and if covenant enforcement was to be had, it would come only by a vote of the lot owners in these filings. (R. at 297-303; R. at 304-306).

After the period of Declarant Control had expired, the lot owners in these filings held a meeting and decided not to form a homeowner's association and not to actively attempt any enforcement of the provisions of the Declaration. (R. at 297-303; R. at 304-306). At that time, the lot owners in these filings learned of WHMD's covert attempts to secure covenant enforcement in these filings. (R. at 297-303).

If WHMD and/or WHCMB believed the D.R. Horton Assignment to be valid and enforceable, it is puzzling to say in the least why the WHMD and/or WHCMB kept their movement to secure the right to enforce covenants from the lot owners in Woodmen Hills Filing No. 8 and Filing No. 9. These lot owners were

not informed of any of the meetings or other activities that the WHMD was engaged in to attempt covenant enforcement. (R. at 304-306). Indeed, WHMD sent letters out in March 2007 to all lot owners, except those in Filings 8 and the applicable portion of 9 advising that covenant enforcement efforts had been ceased. (R. at 307; R. at 304-306). Although the same letter as the one sent to Rusty Green on March 16, 2007 was sent to D.R. Horton on the same date, it along with a cover letter from a covenant management company was never provided to Woodmen Hills Filing No. 8 and 9 lot owners. (R. at 309; R. at 304-306).

Homeowners have submitted numerous documents to the Court indicating D.R. Horton's interpretation and intent -- 120 days after D.R. Horton sold the last lot in these filings, its authority to assign covenant enforcement was gone. (R. at 364, 365, 366, 368, and 369-373).

These documents make it clear that D.R. Horton intended that its period of declarant control expired 120 days after it sold the last lot in these filings. Indeed, the red-lined Contract and Assignment drafted by counsel for D.R. Horton and at D.R. Horton's request removes all absolutes from the Contract and Assignment, using language such as "may have" and "may be" rather than "have" and "is". (R. at 369-373, Recital B, and Paragraphs 1-3). It states as follows:

> THE ASSIGNOR [D.R. HORTON] EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES AND REPRESENTATIONS, WHETHER EXPRESS OR IMPLIED, REGARDING THE VALIDITY OF ANY TITLE, INTEREST, RIGHT, POWER, OR CLAIM WHICH ASSIGNOR MAY HAVE TO ENFORCE SUCH COVENANTS. ACCORDINGLY, THIS ASSIGNMENT TRANSFERS ONLY THE TITLE, INTEREST, RIGHT POWER OR CLAIM ASSIGNOR MAY HAVE, IF ANY, TO ENFORCE SUCH COVENANTS.

(R. at 369-370, Paragraph 3.) (All capitals emphasis included in original document; underlined emphasis added by Homeowners).

Homeowners also redirect the Court to their legal argument set forth in their Response to Motion for Summary Judgment and Homeowners Cross-Motion for Summary Judgment pertaining to covenant enforcement and that covenants are to be interpreted considering their underlying purpose. See Plaintiff's Response and Cross-Motion at Section D: "The Declaration Contains No Provision for Enforcement, Formation of HOA, Dues Assessment" (R. at 269, lines 25-31; R. at 270, lines 1-30; and R. at 270, lines 1-13); see also Wilson v. Goldman, 699 P.2d 420 (Colo. App. 1985) (where the Court opined that restrictive covenants must be construed as a whole, giving effect to all provisions contained therein).

It is clear from the D.R. Horton Assignment that D. R. Horton did not believe it had any rights to assign. This assignment is in stark contrast to the other assignments the Woodmen Hills Metropolitan District obtained from other builders in Woodmen Hills. The D. R. Horton Assignment continually uses the word

"may" when referring to any rights of assignment, while the other assignments from other builders speaks in the affirmative as though they knew they had rights to assign. (R. at 278-282 - DR Horton Assigment; R. at 283-286 - Falcon Assignment; R. at 287-292 - Elite Assignment; and R. at 293-296 - Richmond Assignment).

b. The Declarant did not have the power or right to assign covenant enforcement over to WHMD and/or WHCMB.

Because D.R. Horton's period of Declarant control had expired and it acknowledged it no longer had a legal right, title, interest, power or claim regarding the Declaration, it did not have the power to assign any rights, title, interest, power or claim to the WHMD. When it did finally execute an assignment at the behest of WHMD, it was in the nature of a quit claim, expressly disclaiming any warranties regarding its rights, if any, to enforce covenants in Woodmen Hills Filing No. 8 and a portion of Filing No. 9. Therefore, the Assignment contained no assignment of any valid, legally enforceable rights of covenant enforcement and as such WHMD has no right to attempt covenant enforcement.

c. WHMD does not have the power or authority to assess a covenant fee against the Homeowners.

Pursuant to C.R. S. § 32-1-1001(I)(j)(I), the WHMD would only be entitled

to assess a covenant fee if it were legally authorized to provide covenant enforcement. The D.R. Horton Assignment assigned no rights of covenant enforcement to WHMD. Therefore, WHMD WHMD does not have the legal authority to provide covenant enforcement or contract for same with WHCMB and, consequently, may not assess a covenant fee against the lot owners of Woodmen Hills Filing No. 8 and Filing No. 9.

Further, any assignment of right to enforce covenants only has the same level of authority as the underlying document, here the Declaration. In the Declaration, no Person is given any right to fine for covenant violations or to assess a covenant fee.

CONCLUSION

Because WHMD and/or WHCMB sought to affect the rights of all property owners in the trial court, if any joinder was to occur it should have been their burden, not the Homeowners.

Because D.R. Horton no longer had a legal right, title, interest, power or claim regarding the Declaration at the time of the execution of the Assignment, it did not have the power to assign any rights, title, interest, power or claim to the WHMD. Therefore, the Assignment contained no assignment of any valid, legally enforceable rights of covenant enforcement and as such WHMD has no right to

attempt covenant enforcement against the Homeowners or to assess a covenant enforcement fee.

For the reasons set forth herein, Appellees request that the Court of Appeals affirm the Orders of the trial court, granting summary judgment in favor of Plaintiffs/Homeowners and denying WHMD and/or WHCMBs' Motion for Joinder.

Respectfully submitted this 26th day of February 2010.

M. JACQUELINE GAITHE, PC

M. Jacqueline Gaithe

By: _____
M. Jacqueline Gaithe, #34348

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February 2010, a true and correct copy of the foregoing **ANSWER BRIEF** was filed and served electronically via Lexis-Nexis File & Serve addressed to the following:

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