DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 S. Tejon, P.O. Box 2980 Colorado Springs, CO 80901-2980 Phone: (719) 448-7650	
Plaintiffs: CHARLES WARNE, BRIDGET WARNE, BRANDON CUFFE, NORMAN VILLANUEVA, NANCY VILLANUEVA, HOWARD SURBER, and LUANA SURBER **Defendants / Third Party Plaintiffs:** WOODMEN HILLS COVENANT MANAGEMENT BOARD, a Colorado nonprofit corporation and WOODMEN HILLS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado **and** **Third Party Defendants:** TRAVIS R. HELTON and KAREN E. HELTON	**▲COURT USE ONLY▲** _____ Case Number: 2008CV2923 Division: 5
Attorneys for Defendants: SUSEMIHL, McDERMOTT & COWAN, P.C. Jason W. Downie, Reg # 27256 Geoffrey L. Lindquist, Reg # 38290 660 Southpointe Court, Suite 210 Colorado Springs, CO 80906 Phone Number: (719) 579-6500 Fax Number: (719) 579-9339 E-mail: jdownie@smmclaw.com	

DEFENDANTS WOODMEN HILLS COVENANT MANAGEMENT BOARD AND WOODMEN HILLS METROPOLITAN DISTRICT'S MOTION FOR SUMMARY JUDGMENT

DEFENDANTS Woodmen Hills Covenant Management Board (the "WHCMB") and Woodmen Hills Metropolitan District (the "WHMD"), by and through their counsel, Susemihl, McDermott & Cowan, P.C., by Jason W. Downie and Geoffrey L. Lindquist, submits their Motion for Summary Judgment:

STATEMENT OF UNDISPUTED FACTS

A Declaration of Covenants, Conditions and Restrictions for Woodmen Hills Filing No. 8 and a Portion of Filing No. 9 was executed October 24, 2000 and recorded in the real property records of El Paso County, Colorado on November 9, 2000 at Reception Number 200136133 (the "Declaration"). A copy of the Declaration is attached as Exhibit A.

An Amendment to Declaration of Covenants, Conditions and Restrictions for Woodmen Hills Filing No. 8 and a Portion of Filing No. 9 was executed February 12, 2003 and recorded in the real property records of El Paso County, Colorado on February 18, 2003 at Reception Number 203034235 (the "Amendment to Declaration"). A copy of the Amendment to Declaration is attached as Exhibit B.

A Contract and Assignment of Right to Enforce Covenants was executed August 14, 2007 and recorded in the real property records of El Paso County, Colorado on November 13, 2007 at Reception Number 207145595 (the "D.R. Horton / Melody Contract"). A copy of the D.R. Horton / Melody Contract is attached as Exhibit C.

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 Contract"). A copy of the Covenant Management Board Contract is attached as Exhibit D.

The Declaration, Amendment to Declaration, D.R. Horton / Melody Contract and Covenant Management Board Contract burden the following real property:

> LOTS 298 THROUGH 303, AND LOTS 362-498 INCLUSIVE, WOODMEN HILLS FILING NO. 8, EL PASO COUNTY, COLORADO,
>
> and
>
> LOTS 503 THROUGH 544, INCLUSIVE, WOODMEN HILLS FILING NO. 9, EL PASO COUNTY, COLORADO.

Thus the Declaration covers 185 lots.

STATEMENT OF LAW

A party is entitled to entry of summary judgment in his favor when there is no genuine issue as to any material fact and he is entitled to judgment as a matter of law. *Colo. R. Civ. P. Rule 56(c).* Further, a party opposing summary judgment must support their opposition with admissible evidence, not mere conjecture. Colo. R. Civ. P. 56(e) states:

> When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the opposing party's pleadings, but the opposing party's response by affidavits or

otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial.

Summary judgment is proper when "as a matter of law, based on undisputed facts, one party cannot prevail." *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 238 (Colo. 1984)(quoting *Ginter v. Palmer & Co.,* 585 P.2d 583, 584 (Colo. 1978).
The construction to be given to covenant documents is a question of law.

MOTION

Defendants ask this Honorable Court to enter Summary Judgment in their favor for the following:

On Plaintiffs' Declaratory Judgment Claim:

A. That the D.R. Horton / Melody Contract is valid and enforceable.
B. That the Covenant Management Board Contract is valid and enforceable.
C. That the Amendment to the Declaration is void, voidable or invalid.[1]
D. That the Declaration has a mechanism for enforcement.
E. That WHCMB and WHMD have authority to enforce the Declaration, may enforce the Declaration through the judicial process and may recover attorney fees and costs pursuant to the Declaration.
F. That the WHMD has the power and authority to assess a covenant fee pursuant to Colo. Rev. Stat. § 32-1-1001(1)(j)(I).
G. That the Declarant of the Declaration had a legal right, title, interest, power or claim regarding the Declaration and had the power to assign that right, title interest, power or claim to the WHMD.

On Plaintiffs' Injunctive Relief Claim: Plaintiffs' Injunctive Relief Claim shall be denied and summary judgment granted to Defendants.

ARGUMENT

The D.R. Horton / Melody Contract is valid and enforceable

The WHMD recently decided to assist in providing covenant enforcement services for the residential lots within its boundaries. A number of homeowners encouraged the WHMD to attempt to clean up the Woodmen Hills neighborhood via covenant enforcement. The Woodmen Hills community has various sets of declarations from different developers and builders. The most simple and most cost effective way to accomplish this task was to contract and assign the declarants' covenant enforcement rights to the WHMD, which in turn, contracted and assigned those rights to a new nonprofit corporation controlled by Woodmen Hills homeowners, the

[1] Defendants would like to point out that the validity or lack thereof of the Amendment to the Declaration shall not affect their power to enforce the Declaration.

WHCMB. Covenant enforcement is being provided to protect and enhance the quality, value, aesthetic, desirability and attractiveness of Woodmen Hills, which benefits the WHMD, the property owners within the district, and is part of the general plan or scheme as envisioned by the Declaration.

The mechanism for which these rights were contracted and assigned is provided in Title 32 of the Colorado Revised Statutes, which states:

> (8)(a) The board of **a metropolitan district has the power to furnish covenant enforcement** and design review services within the district **if**: (I) **The governing body of the applicable master association or similar body and the metropolitan district have entered into a contract to define the duties and responsibilities of each of the contracting parties**, including the covenants that may be enforced by the district, and the covenant enforcement services of the district do not exceed the enforcement powers granted by the declaration, rules and regulations, or any similar document containing the covenants to be enforced; or (II) The declaration, rules and regulations, or any similar document containing the covenants to be enforced for the area within the metropolitan district name the metropolitan district as the enforcement or design review entity.

Colo. Rev. Stat. § 32-1-1004(8)(a) (emphasis added). Admittedly, the Declaration does not name the WHMD as an enforcement of design entity. Thus, the D.R. Horton / Melody Contract is based on Colo. Rev. Stat. § 32-1-1004(8)(a)(I).

WHMD and WHCMB argue that the declarant, Melody Homes, Inc. d/b/a D.R. Horton – Melody Series was a "master association or similar body" pursuant to Subsection 8(a)(I) with the power to assign its rights regarding the Declaration to third parties, including the WHMD. No case law exists to state what the legislature meant a "master association or similar body" would mean in Title 32, nor is the phrase defined in Title 32.

The phrase "master association or similar body" only appears in Title 32. However, the term "master association" appears in the Colorado Common Interest Ownership Act, codified in Colo. Rev. Stat. § 38-33.3-101 *et seq* ("CCIOA").[2] In CCIOA, a "master association" is defined as "an organization that is authorized to exercise some or all of the powers of one or more associations on behalf of one or more common interest communities or for the benefit of the unit owners of one or more common interest communities." Colo. Rev. Stat. § 38-33.3-103(20).

In CCIOA, the creation of a master association is set forth as a special power reserved for the declarant. *See* Colo. Rev. Stat. § 38-33.3-103(20). WHCMB and WHMD argue that because, according to Colorado law, a declarant has the sole power to create a master association, then the declarant must also be considered to be a "master association or similar body" that has the power and authority to contract for covenant enforcement with a metropolitan district pursuant to Colo. Rev. Stat. § 32-1-1004(8)(a)(I). Logically, it does not make sense to say that an inferior body would have the power to contract with a metropolitan district for

[2] Defendants point out that the declarant of the Declaration, Melody Homes, specifically opted out of CCIOA. See, Declaration, Article I, Section 4.

covenant enforcement, but the declarant of the declaration would not.

The Plaintiffs will argue that the Declarant's powers lapsed after it sold its last lot to individual homeowners. However, a plain reading of the Declaration will show that only certain Declarant rights lapse. Section 1 of Article VI states, "Declarant shall have, retain and reserve certain rights as hereinafter **set forth in this Article VI** from the date hereof until 120 days after the date upon which one hundred percent (100%) of the Lots have been conveyed to Owners other than the Declarant" (emphasis added). The rights set forth in Sections 2 through 6 of Article VI include: (1) Declarant's Rights to Complete Development of the Property; (2) Declarant's Rights to Grant and Create Easements; (3) Declarants Rights to Convey Additional Property to the District; (4) Withdrawal of Property; and (5) Expansion of Permitted Property Uses. These five rights are the rights that lapsed when the Declarant sold its last lots to individuals. Nothing in the Declaration states that all of Declarants rights lapse at a certain point in time. In fact, the contrary is true, as explained below, the Declarant's powers to enforce the Declaration exist until expiration of the Declaration. Hence, at the time of the D.R. Horton Contract, the Declarant still had extensive powers regarding the Declaration, including those regarding enforcement.

Melody Homes, Inc. had extensive powers under the Declaration, which included the power to assign its rights to third parties. In fact, the original Declarant, Melody Homes, Inc., already had assigned its rights to D.R. Horton when D.R. Horton took over Melody Homes and created the legal entity "Melody Homes, Inc. d/b/a D.R. Horton – Melody Series."

Article I, §3 of the Declaration states in pertinent part as follows:

> "[t]he provisions of this Declaration are intended to and shall run with the land and, **until their expiration in accordance with the terms hereof**, shall bind, be a charge upon and inure to the benefit of: (a) the property (as hereinafter defined); (b) **Declarant and its successors and assigns**; (c) all Person's acquiring any right, title, or interest in the Property, or any improvement thereon, and their heirs, personal representatives, successors or assigns."

(emphasis added). The Declaration does not expire until the earlier of (i) 2050 or (ii) the time when 75% of the owners vote by written ballot to terminate the declaration and enter into, and record, a "Termination Agreement." It is undisputed that no such vote has taken place and no such Termination Agreement has been entered into and recorded. See, Article VII §1 of the Declaration. Accordingly, the covenants "inure to the benefit of the Declarant and its successors and assigns, including the WHMD and the WHCMB, and may be enforced by the same until the earlier of 2050 or the time when a valid Termination Agreement is recorded. Clearly, the Decalarant's rights to enforce the covenants are not tied to its ownership of property, as it is listed as a mutually exclusive party to which the provisions of the Declaration bind, charge, and inure to the benefit of until their expiration.

Furthermore, the Declaration in § 5 of Article 9, unequivocally states:

> **Any violation** of any provision, covenant, condition restriction, and equitable

> servitude contained in this Declaration, whether by act or omission is hereby declared to be a nuisance and **may be enjoined or abated, whether or not the relief sought is for negative or affirmative action**, **by any Person entitled to enforce the provision of this Declaration.**

(emphasis added). The term "Person" is broadly defined in the Declaration as a natural person, a corporation, a partnership, a limited liability company, or any other entity permitted to hold title to real property pursuant to Colorado law. Since the Declarant fits squarely within the definition of "Person" and since Article I, §3 expressly states the covenants inure to the benefit of the Declarant until expiration,

Because of the Melody Homes, Inc.'s extensive powers over all lots located within the property and the reasons set forth above, the Melody Homes, Inc. is a "similar body" contemplated by the legislature under C.R.S. § 32-1-1004(8)(a)(I) and had the power to contract and assign its right to enforce the Declaration. The Colorado Legislature obviously intended that Title 32 Metropolitan Districts have the power to enforce covenants.

The Legislative History of Senate Bill 04-221

C.R.S. § 32-1-1004(8)(a)(I) is the codification of SB04-221 sponsored by Colorado State Senator Taylor. In the Senate Committee on Local Government hearing held on April 13, 2004, the Committee heard the comments of Senator Taylor and testimony from Ken Marchetti. *Senate Committee on Local Government; Hearings on SB04-221*, Sixty-fourth General Assembly, State of Colorado (2004) (statements of Senator Taylor and Ken Marchetti). It was explained that the Metropolitan District is usually the most active and primary service provider in the subject area. *Id.* Moreover, Metropolitan Districts typically provide multiple services, but there was no current authorization for covenant enforcement and design review services, hence the need for SB04-221. *Id.* It was explained that many property owners live in areas with "inactive covenants," either (i) because an association of property owners has fallen into disrepair; (ii) there is no property owners association in existence; or (iii) because of apathy with absentee owners in resort type communities who only use the property during a portion of the year. *Id.* Accordingly, SB04-221 was a mechanism to allow Metropolitan District's the authority to perform covenant enforcement and design review functions through contractual agreement. *Id.* There was even discussion that in many instances an "association" may not exist, so any language requiring an "existing" association should be stricken. *Id.*

In the House Committee on Local Government, it was discussed how this might create competition with management associations and other associations, but more particularly that it may involve covenant enforcement were they are not currently being enforced. *House Committee on Local Government; Hearings on SB04-221*, Sixty-fourth General Assembly, State of Colorado (2004) (statements of Senator Taylor and Evan Goulding). Evan Goulding, with the Special District Association explained again that the Metropolitan District is the most identifiable entity and the most logical to provide covenant enforcement and design review services in order to keep up property values. *Id.* Mr. Goulding explained the need for a contract and that the Metropolitan District could not exceed the enforcement powers contained in the declaration. *Id.* It was discussed that this is not forced upon property owners; that the property

owners have acquiesced through the election of Metropolitan District Board members who make decisions for them on a variety of issues as is the case in any representative government. *Id.* (statements of Rep. Weisman, Rep. White, and Evan Goulding).

The current situation regarding the subject properties is exactly the reason SB 04-221 was passed - property owners bought into a covenant controlled community and a non-existent home owners association in the traditional sense. As mentioned above, the Melody Homes, Inc. is a "similar body" contemplated by the legislature under C.R.S. § 32-1-1004(8)(a)(I) and had the power to contract and assign its right to enforce the Declaration.

The Covenant Management Board Contract is valid and enforceable

For the foregoing reasons set forth above, the Covenant Management Board Contract is also valid and enforceable.

The Amendment to the Declaration is void, voidable or invalid

First of all, Defendants would like to point out that the validity or lack of validity of the Amendment to the Declaration has no bearing on whether the Declaration can be enforced by the WHMD or WHCMB. The Amendment to the Declaration removed all provisions regarding a Design Review Committee and Design Standards. *See* Amendment to the Declaration. More importantly, however, the Amendment to the Declaration states, "[e]xcept as amended hereby, the Declaration shall be and remain in full force and effect without modification." *See* Amendment to the Declaration, p.3.

Regardless, the Amendment to Declaration is likely invalid because the Declarant, Melody Homes, did not have the power to amend the declaration as it did.

Section 2 of Article VII of the Declaration provides for the unilateral amendments to the Declaration under certain circumstances. These circumstances are listed more fully in Section 2 of Article VII, but include items such as: (1) to comply with the requirements of various federal programs such as HUD, Fannie Mae, VA, etc.; (2) to make technical amendments for the purposes of correcting spelling, grammar…; and (3) correct any errors or omissions contained in the legal description of the Property (Property is defined in the Declaration). The Amendment to Declaration is not based on any of these circumstances.

An amendment to delete significant portions of the Declaration based on the Declarant's unilateral power to amend under Section 2 of Article VII is invalid because it was not based on one of the circumstances listed in that section of the Declaration. *See Dunne v. Shenandoah Homeowner's Ass'n, Inc.* 12 P.3d 340 (Colo. Ct. App. 2000) (regarding invalid unilateral revocation by developer).

The proper course of action for the Declarant to take to amend the Declaration would have been to follow the procedures in Article VII, Section 3 of the Declaration. This section requires certification executed by seventy-five percent of the Owners who own lots burdened by the Declaration. This was not done. Hence, the Amendment to the Declaration is invalid.

The Declaration has a mechanism for enforcement

Some declarations and sets of covenants contain a section labeled "Enforcement" that outlines who can enforce violations against Owners. Unfortunately, the Declaration does not contain such a provision. However, this does not mean that the Declaration is unenforceable or invalid.

Article I, Section 3 of the Declaration states that the "provisions of the Declaration shall run with the land and … shall bind, be a charge upon and inure to the mutual benefit of: (a) the property …; (b) Declarant and its successors and assigns; and (c) all Persons having or acquiring any right, title or interest…." Pursuant to this section of the Declaration, the Declarant and the Owners may enforce portions of the Declaration.

The operative language in this phrase relating to the legal enforceability of the Declaration is "… shall bind, be a charge upon and inure to the mutual benefit of…" To determine the meaning of the phrase, we look to Black's Law Dictionary. The dictionary defines a 'bind' as a verb meaning to impose one or more legal duties on. BLACK'S LAW DICTIONARY 69 (2nd pocket ed. 2001). Secondly, the dictionary defines 'charge' as an encumbrance, lien or claim. BLACK'S LAW DICTIONARY 94 (2nd pocket ed. 2001). Third, it defines 'inure' as a verb meaning to take effect or to come into use. BLACK'S LAW DICTIONARY 370 (2nd pocket ed. 2001). Finally, it defines the word 'benefit' as an advantage or privilege. BLACK'S LAW DICTIONARY 65 (2nd pocket ed. 2001).

Taken together, the terms of the Declaration may be seen as covenants, conditions and restrictions that impose legal duties and are encumbrances, liens or claims. These legal duties / claims result and take effect as advantages or privileges for the (1) property, (2) the Declarant, and (3) the property owners. To state that these legal claims cannot be enforce by the named beneficiaries is inconsistent with the plain language of the provision. This language, a combination of legal terms of art, gives the Declarant, among others, the legal power and authority to enforce the Declaration.

Further, the enforceability of the Declaration does not require a homeowner's association to enforce the covenants. As stated above, the Declarant, and its successors and assigns still have the right to enforce provisions of the Declaration. The Declarant's rights are just as viable as an Owner who decides to enforce the Declaration against his neighbor. Neither situation requires a homeowner's association to enforce the covenants.

WHCMB and WHMD have authority to enforce the Declaration, may enforce the Declaration through the judicial process and may recover attorney fees and costs pursuant to the Declaration.

For the foregoing reasons set forth above, the WHCMB and WHMD have authority to enforce the Declaration. Pursuant to the terms of the Declaration, and the powers granted to a

Metropolitan District under Title 32 of the Colo. Rev. Stat. and the powers granted to a nonprofit corporation under Title 7 of the Colo. Rev. Stat., the WHCMB and WHMD may enforce the Declaration through the judicial process and may recover attorney fees and costs for successful enforcement of the Declaration.

The WHMD has the power and authority to assess a covenant fee pursuant to Colo. Rev. Stat. § 32-1-1001(1)(j)(I)

The WHMD has the power, under Colo. Rev. Stat. § 32-1-1001(1)(j)(I), to "fix and from time to time to increase or decrease fees, rates, tolls, penalties, or charges for services, programs, or facilities furnished by the special district." One of the District's services or programs it is now providing is covenant enforcement through the WHCMB. Colorado law does not require homeowners' permission to charge the fees. The homeowners' recourse is through the District's Board of Director elections.

Further, Article V, Section 2 of the Declaration states:

> [t]he Owners further recognize and understand that the Property is within the boundaries of the District which supplies various municipal and recreational services to the property and that the Owner's Lots are subject to the ordinances, regulations, and various fees and charges now in force or which might be adopted by the District.

As set forth above, not only does the WHMD have the power to fix rates or fees upon homeowners within the District, but the Declaration solidifies this point. Title 32 districts have the express authority to provide covenant enforcement as set forth in C.R.S. § 32-1-1-1004(8) and the ability to establish charges for services provided by the district pursuant to C. R.S. § 32-1-1001(1)(j)(I). Plaintiff's position that a metropolitan district cannot charge for services expressly authorized by statute is unreasonable.

The Declarant of the Declaration had a legal right, title, interest, power or claim regarding the Declaration and had the power to assign that right, title interest, power or claim to the WHMD

Again, pursuant to the foregoing arguments, the Declarant of the Declaration had a legal right, title, interest, power or claim regarding the Declaration and had the power to assign that right, title, interest, power or claim to the WHMD.

WHEREFORE, based on the foregoing, the Defendants, WHMD and WHCMB request this Honorable Court enter summary judgment in their favor.

Dated this 16th day of March, 2009.

SUSEMIHL, MCDERMOTT & COWAN, P.C.

Original signature on file at offices of Susemihl, McDermott & Cowan, P.C.

By:_____/s/_____
Jason W. Downie, #27256
Geoffrey L. Lindquist, #38290

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2009, a copy of the foregoing **DEFENDANTS WOODMEN HILLS COVENANT MANAGEMENT BOARD AND WOODMEN HILLS METROPOLITAN DISTRICT'S MOTION FOR SUMMARY JUDGMENT** was served via Lexis/Nexis File & Serve to the following:

M. Jacqueline Gaithe, PC
M. Jacqueline Gaithe
111 South Tejon Street, Suite 202
Colorado Springs, CO 80903

Original signature on file at the offices of Susemihl, McDermott & Cowan, P.C.

_____/s/_____
Geoffrey L. Lindquist