

DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 S. Tejon, P.O. Box 2980 Colorado Springs, CO 80901-2980 Phone: (719) 448-7650	EFILED Document CO El Paso County District Court 4th JD Filing Date: Jul 7 2008 6:44PM MDT Filing ID: 20540548 Review Clerk: Donna Maes
Plaintiffs: CHARLES WARNE, BRIDGET WARNE, BRANDON CUFFE, NORMAN VILLANUEVA, NANCY VILLANUEVA, HOWARD SURBER, and LUANA SURBER Defendants: 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	<p style="text-align: center;"><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></p> <hr style="width: 20%; margin: auto;"/> Case Number: 2008CV2923 Division: 5
Attorneys for Defendants: SUSEMIHL, McDERMOTT & COWAN, P.C. Gary R. Cowan, Reg. # 2507 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: gcowan@smmclaw.com	
DEFENDANTS WOODMEN HILLS COVENANT MANAGEMENT BOARD AND WOODMEN HILLS METROPOLITAN DISTRICT ANSWER AND COUNTERCLAIMS	

DEFENDANTS Woodmen Hills Covenant Management Board and Woodmen Hills Metropolitan District, by and through their counsel, Susemihl, McDermott & Cowan, P.C., by Gary R. Cowan and Geoffrey L. Lindquist, answers Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief as follows:

JURISDICTION AND VENUE

1. Defendants admit the allegations contained in paragraph 1 of Plaintiffs' Complaint.
2. Defendants admit the allegations contained in paragraph 2 of Plaintiffs' Complaint.

3. Defendants admit the allegations contained in paragraph 3 of Plaintiffs' Complaint.

4. Defendants admit the allegations contained in paragraph 4 of Plaintiffs' Complaint.

5. Defendants admit the allegations contained in paragraph 5 of Plaintiffs' Complaint.

6. Defendants admit the allegations contained in paragraph 6 of Plaintiffs' Complaint.

7. Defendants admit the allegations contained in paragraph 7 of Plaintiffs' Complaint.

GENERAL ALLEGATIONS

8. Defendants are without sufficient information or belief to admit or deny the allegations contained in paragraph 8 of Plaintiffs' Complaint and therefore deny same.

9. Defendants are without sufficient information or belief to admit or deny the allegations contained in paragraph 9 of Plaintiffs' Complaint and therefore deny same.

10. Defendants are without sufficient information or belief to admit or deny the allegations contained in paragraph 10 of Plaintiffs' Complaint and therefore deny same.

11. Defendants are without sufficient information or belief to admit or deny the allegations contained in paragraph 11 of Plaintiffs' Complaint and therefore deny same.

12. Defendants admit the allegation contained in paragraph 12 of Plaintiffs' Complaint.

13. Defendants admit that the allegation contained in paragraph 13 of Plaintiffs' Complaint is an accurate quote of the Amended Covenants but deny any inference as to what the Covenants did or did not provide as they speak for themselves.

14. Defendants admit that the Amended Covenants was executed and duly recorded, but deny the other allegations contained in paragraph 14 of Plaintiffs' Complaint.

15. Defendant deny any and all allegations and statements in paragraph 15 of Plaintiffs' Complaint.

16. Defendants are without sufficient information or belief to admit or deny the allegations contained in paragraph 16 of Plaintiffs' complaint and therefore deny same.

17. Defendants are without sufficient information or belief to admit or deny the allegations contained in paragraph 17 of Plaintiffs' complaint and therefore deny same.

18. Defendants deny each and every allegation and statement contained in paragraph 18 of Plaintiffs' Complaint.

19. Defendants deny each and every allegation and statement contained in paragraph 23 of Plaintiffs' Complaint.

20. Defendants admit that representatives of Melody Homes, Inc. d/b/a D.R. Horton – Melody Series were contacted, but deny each remaining allegation contained in Paragraph 20 of Plaintiffs' Complaint.

21. Defendants admit that an assignment was executed on or about August 14, 2007, and that the assignment was recorded November 13, 2007, but deny each remaining allegations contained in paragraph 21 of Plaintiffs' Complaint.

22. Defendants are without sufficient information or belief to admit or deny the allegations contained in paragraph 22 of Plaintiffs' Complaint and therefore deny same.

23. Defendants deny each and every allegation and statement contained in paragraph 23 of Plaintiffs' Complaint.

24. Defendants deny each and every allegation and statement contained in paragraph 24 of Plaintiffs' Complaint.

25. Defendants admit the Woodmen Hills Metropolitan District assigned its interest on October 18, 2007 to the Woodmen Hills Covenants Management Board and that the assignment was recorded November 14, 2007 but deny each remaining allegation set forth in paragraph 25 of Plaintiffs' Complaint.

26. Defendants deny each and every allegation and statement contained in paragraph 26 of Plaintiffs' Complaint.

27. Defendants admit that WHCMB began to enforce the Covenants. Defendants deny each remaining allegation contained in paragraph 27 of the Plaintiffs' Complaint.

28. Defendants admit that notices of covenant violations began going out in January, 2008. Defendants deny the remaining allegations and statements contained in paragraph 28 of the Complaint.

29. Defendants deny each and every allegation contained in paragraph 29 of Plaintiffs' Complaint. The Woodmen Hills Metropolitan District has the authority to assess a monthly covenant fee under Colo. Rev. Stat. § 32-1-1001(1)(j)(I).

30. Defendants admit the allegations contained in paragraph 30 of Plaintiffs' Complaint.

31. Defendants deny the allegations contained in Paragraph 31 of Plaintiffs' Complaint.

32. Defendants admit the allegations set forth in paragraph 32 of Plaintiffs' Complaint.

FIRST CLAIM FOR RELIEF

Declaratory Judgment

33. With regard to the allegations contained in paragraph 33 of the Plaintiffs' Complaint, the Defendants reassert their responses to the paragraphs mentioned therein as if set forth verbatim.

34. Defendants admit the allegations contained in paragraph 34 of Plaintiffs' Complaint.

35. Defendants admit the allegations contained in paragraph 35 of Plaintiffs' Complaint.

36. Defendants deny each and every allegation contained in Paragraph 36 of Plaintiffs' Complaint.

37. Paragraph 37 of Plaintiffs' Complaint does not contain an allegation to which Defendants may admit or deny. However, to the extent that Paragraph 37 does contain any allegations toward Defendants, Defendants deny the same.

38. Paragraph 38 of Plaintiffs' Complaint does not contain an allegation to which Defendants may admit or deny. However, to the extent that Paragraph 38 does contain any allegations toward Defendants, Defendants deny the same.

39. Paragraph 39 of Plaintiffs' Complaint does not contain an allegation to which Defendants may admit or deny. However, to the extent that Paragraph 39 does contain any allegations toward Defendants, Defendants deny the same.

40. Paragraph 40 of Plaintiffs' Complaint does not contain an allegation to which Defendants may admit or deny. However, to the extent that Paragraph 40 does contain any allegations toward Defendants, Defendants deny the same. Additionally, Defendants request the Court to enter a declaratory judgment determining:

A. That the First Assignment is valid and enforceable.

B. That the Second Assignment is valid and enforceable.

- C. That the Amended Covenants are void, voidable or invalid because at the time the Amended Covenants were recorded, the Declarant, Melody Homes, did not have the power to unilaterally amend the Covenants except (1) to comply with the requirements of various federal programs such as the Veterans Administration; (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.
- D. That the Covenants have a mechanism for covenant enforcement because the provisions of the Covenants shall run with the land, be a charge upon and inure to the mutual benefit of (1) the property; (2) Declarant and its successors and assigns; and (3) all homeowners.
- E. That the WHCMB and the WHMD have the authority to enforce the Covenants and may enforce the Covenants through judicial process and may recover attorney fees and costs pursuant to the Covenants.
- F. That the Woodmen Hills Metropolitan District has the power to assess a covenant fee under Colo. Rev. Stat. § 32-1-1001(1)(j)(I).
- G. That the Declarant of the Covenants had a legal right, title, interest, power or claim regarding the Covenants and had the power to assign that right, title, interest, power or claim to the Woodmen Hills Metropolitan District.

WHEREFORE, Defendants request this Honorable Court to enter a declaratory judgment consistent with the paragraph 40 of Defendants' Answer and Counterclaims. Additionally, Defendants request their costs incurred in this action pursuant to Colo. Rev. Stat. § 13-51-14 and for other and further relief as this Court deems just.

SECOND CLAIM FOR RELIEF

Injunctive Relief

41. With regard to the allegations contained in paragraph 41 of the Plaintiffs' Complaint, the Defendants reassert their responses to the paragraphs mentioned therein as if set forth verbatim.

42. Defendants deny each and every allegation contained in paragraph 42 of Plaintiffs' Complaint.

43. Defendants deny each and every allegation contained in paragraph 43 of Plaintiffs' Complaint.

44. Defendants deny each and every allegation contained in paragraph 44 of Plaintiffs' Complaint.

45. Defendants deny each and every allegation contained in paragraph 45 of Plaintiffs' Complaint.

46. Defendants deny each and every allegation contained in paragraph 46 of Plaintiffs' Complaint.

47. Paragraph 47 of Plaintiffs' Complaint does not contain an allegation to which Defendants may admit or deny. However, to the extent that Paragraph 47 does contain any allegations toward Defendants, Defendants deny the same.

48. Paragraph 48 of Plaintiffs' Complaint does not contain an allegation to which Defendants may admit or deny. However, to the extent that Paragraph 48 does contain any allegations toward Defendants, Defendants deny the same.

WHEREFORE, Defendants request this Honorable Court to deny Plaintiffs' request for an injunction against Defendants and for an Order: (1) allowing Defendants to enforce the Covenants against Plaintiffs; (2) allowing Woodmen Hills Metropolitan District to charge a covenant fee against Plaintiffs; (3) for costs incurred in this action by Defendants including reasonable attorneys' fees; and (4) for such other and further relief as this Court deems just.

GENERAL DENIAL

49. Any assertion in any paragraph of the Complaint not specifically admitted herein is hereby denied.

AFFIRMATIVE DEFENSES

Plaintiffs failed to state a claim or cause of action upon which relief can be granted.

Plaintiffs have failed to mitigate their damages, if any, as required by law.

Plaintiffs' claims re barred as they were not brought within the the applicable statute of limitations.

Plaintiffs' claims are barred by the applicable doctrines of waiver, estoppel and laches.

Defendants reserve the right to amend and/or supplement their affirmative defenses as the discovery process continues.

The Woodmen Hills Metropolitan District has the authority to assess a monthly covenant fee under Colo. Rev. Stat. § 32-1-1001(1)(j)(I).

At the time the Assignments were executed, Melody Homes, Inc. d/b/a D.R. Horton – Melody Series was a “governing body of the applicable master association or similar body” for purposes of Colo. Rev. Stat. § 32-1-1004(8)(a)(I).

COUNTERCLAIMS

GENERAL ALLEGATIONS

1. Plaintiffs Charles and Bridget Warne own and reside at the real property known as 11917 Lyne Court, Peyton, CO 80831, and legally described as LOT 486 WOODMEN HILLS FILING NO. 8 (the “Warne Lot”).

2. Plaintiff Brandon Cuffe owns and resides at the real property known as 12089 Comeapart Road, Peyton, CO 80831, and legally described as LOT 485 WOODMEN HILLS FILING NO. 8 (the “Cuffe Lot”).

3. Plaintiffs Norman and Nancy Villanueva own and reside at the real property known as 7907 Tompkins Road, Peyton, CO 80831, and legally described as LOT 380 WOODMEN HILLS FILING NO. 8 (the “Villanueva Lot”).

4. Plaintiffs Howard and Luana Surber own and reside at the real property known as 7919 Tompkins Road, Peyton, CO 80831, and legally described as LOT 381 WOODMEN HILLS FILING NO. 8 (the “Surber Lot”).

5. The Covenants, recorded in the real property records of El Paso County, Colorado at Reception Number 200136133, encumber the Warne Lot, the Cuffe Lot, the Surber Lot and the Villanueva Lot. The Amendment to the Covenants, recorded in the real property records of El Paso County, Colorado at Reception Number 203034235, encumber the Warne Lot, the Cuffe Lot, the Villanueva Lot and the Surber Lot, to the extent that the Amendment to the Covenants is valid.

6. The Covenants were recorded in furtherance of a general plan for the development of Woodmen Hills in order to enhance the quality, value, aesthetic, desirability and attractiveness of Woodmen Hills and to define certain duties, powers, and rights of lot owners within Woodmen Hills.

7. The Covenants, among other things, state “[a]ll unsightly conditions, structures, facilities, equipment, objects and conditions shall be enclosed within a structure, including snow removal equipment and garden maintenance equipment, except when in actual use.” Covenants, Article III, Section 11 (No Unsightliness).

8. The Covenants, among other things, state

[n]o refuse, garbage, trash, lumber, grass, shrub, tree clippings, plant waste, compost, metal, bulk materials, scrap, refuse or debris of any kind

shall be kept, stored, or allowed to accumulate on any Lot except within an enclosed structure appropriately screened from view, except that any contained containing such materials may be placed outside at such times as may be necessary to permit garbage or trash pick-up. Burning of trash is prohibited. The Declarant, as long as the Declarant has the right to appoint the Design Review Committee, then after that date the Design Review Committee, reserves the right to select a company to be the exclusive supplier of trash pickup for the Properties.

Covenants, Article III, Section 13 (Restrictions on Garbage and Trash).¹

9. The Covenants, among other things, state “[n]o maintenance, servicing, repair, dismantling or repairing of any type of vehicle, boat, machine or device may be carried on except within a completely enclosed structure which screens the sight and sound of such activity from the street and from other Lots.” Covenants, Article III, Section 26.

10. The Covenants, among other things, state:

[n]o boat, jet ski, camper (on or off supporting vehicles), trailer, tractor, industrial or commercial vehicle or truck (both cabs and trailers), towed trailer unit, motorcycle, disabled, junk, or abandoned vehicles, motor home, mobile home, recreational vehicle, or any other vehicle, the primary purpose of which is recreational, sporting or commercial use, shall be parked or stored in, on or about any Lot or street within the Property except within the attached garage or unless such vehicles are concealed from view and approved by the Design Review Committee. For the purposes of this covenant, a one (1) ton or smaller vehicle commonly known as a pickup truck shall not be deemed a commercial vehicle or truck; provided, however, that any such vehicle must be parked in the driveway, or garage, of a Lot.

Covenants, Article III, Section 28 (Trailers, Campers and Junk Vehicles)²

11. Upon information and belief, significant violations of the Covenants exist and existed on the Warne Lot at the time Plaintiffs’ Complaint was filed, including:

A. An RV is parked/stored in the backyard of the Warne Lot in violation of Covenants, Article III, Section 28 (Trailers, Campers and Junk Vehicles).

B. A Trailer is parked/stored in the backyard of the Warne Lot in

¹ The Amendment to the Covenants, to the extent that it is valid, states “in Section 13 of Article III, the last sentence is deleted therefrom and the following sentence is substituted in its place: ‘The Declarant, as long as the Declarant owns any Lot, reserves the right to select a company to be the exclusive supplier of trash pickup for the Property.’”

² The Amendment to the Covenants, to the extent it is valid, states, “[i]n Section 28 of Article III, the phrase ‘and approved by the Design Review Committee’ is deleted therefrom.”

violation of Covenants, Article III, Section 28 (Trailers, Campers and Junk Vehicles).

C. A red vehicle is parked/stored in the backyard of the Warne Lot in violation of Covenants, Article III, Section 28 (Trailers, Campers and Junk Vehicles).

D. Two Jeeps and two partial Jeep engines are parked/stored in the backyard of the Warne Lot in violation of Covenants, Article III, Section 28 (Trailers, Campers and Junk Vehicles) and Covenants Article III, Section 26 (Vehicle Repairs).

E. A shed and seven (7) bikes are stored in the driveway in violation of Covenants Article III, Section 11 (No Unsightliness).

12. Upon information and belief, significant violations of the Covenants exist and existed on the Cuffe Lot at the time Plaintiffs' Complaint was filed, including:

A. An RV is parked/stored in the side yard of the Cuffe Lot in violation of Covenants, Article III, Section 28 (Trailers, Campers and Junk Vehicles).

B. Pile of wood stored next to the garage on the Cuffe Lot in violation of Covenants, Article III, Section 13 (Restrictions on Garbage and Trash) and Covenants, Article III, Section 11 (Unsightliness).

13. Upon information and belief, significant violations of the Covenants exist and existed on the Surber Lot at the time Plaintiffs' Complaint was filed, including:

A. Dying shrubs in yard of the Surber Lot in violation of Covenants, Section 13 (Restrictions on Garbage and Trash) and Covenants, Article III, Section 11 (Unsightliness).

B. RV parked/stored in backyard of Surber Lot in violation of Covenants, Article III, Section 28 (Trailers, Campers and Junk Vehicles).

C. Truck parked/stored in backyard of the Surber Lot in violation of Covenants, Article III, Section 28 (Trailers, Campers and Junk Vehicles).

D. Holiday light decorations are still up on the Surber Lot in violation of Covenants, Article III, Section 11 (Unsightliness).

14. The Woodmen Hills Covenant Management Board, through a third party management company, Colorado Management and Associates, Inc., contacted Plaintiffs Charles and Bridget Warne, Brandon Cuffe, and Howard and Luana Surber multiple times and urged

them to comply with the Covenants and cure the multiple violations set forth in paragraphs 11-13 above.

15. Counsel for the Woodmen Hills Covenant Management Board contacted Charles and Bridget Warne, Brandon Cuffe and Howard and Luana Surber and asked for their compliance with the Covenants.

16. Despite repeated efforts to gain Plaintiffs' cooperation with the Covenants and curing the violations set forth in paragraphs 11-13 above, Plaintiffs Warne, Cuffe, and Surber have refused to comply with the Covenants.

17. Woodmen Hills Metropolitan District and Woodmen Hills Covenant Management Board have no adequate remedy at law, and further have the right pursuant to the Covenants to enforce the Covenants by a suit in equity and therefore are entitled injunctive relief.

FIRST COUNTERCLAIM

Injunctive Relief against Plaintiffs Charles and Bridget Warne

18. Defendants incorporate the general allegations of the Counterclaims as if more fully set forth herein.

19. Charles and Bridget Warne's actions constitute a violation of the Covenants and the Woodmen Hills Covenant Management Board is entitled to an issuance of a permanent injunction against the Warnes to comply with the Covenants regarding the violations set forth in paragraph 11 above.

SECOND COUNTERCLAIM

Injunctive Relief against Plaintiff Brandon Cuffe

20. Defendants incorporate the general allegations of the Counterclaims as if more fully set forth herein.

21. Brandon Cuffe's actions constitute a violation of the Covenants and the Woodmen Hills Covenant Management Board is entitled to an issuance of a permanent injunction against Mr. Cuffe to comply with the Covenants regarding the violations set forth in paragraph 12 above.

THIRD COUNTERCLAIM

Injunctive Relief against Plaintiffs Howard and Luana Surber

22. Defendants incorporate the general allegations of the Counterclaims as if more fully set forth herein.

23. Howard and Luana Surber's actions constitute a violation of the Covenants and the Woodmen Hills Covenant Management Board is entitled to an issuance of a permanent injunction against the Surbers to comply with the Covenants regarding the violations set forth in paragraph 13 above.

FIFTH COUNTERCLAIM
Recovery of Costs and Fees

24. Defendants incorporate the general allegations as if more fully set forth herein.

25. Woodmen Hills Metropolitan District and Woodmen Hills Covenant Management Board have incurred costs and attorneys' fees in connection with their action to enforce the Covenants.

26. If the Woodmen Hills Metropolitan District and the Woodmen Hills Covenant Management Board are successful in enforcing the Covenants against the Warnes, Surbers and Mr. Cuffe, the Woodmen Hills Metropolitan District and the Woodmen Hills Covenant Management Board are entitled to recover their attorneys' fees and costs pursuant to Covenants, Article VII, Section 9 (Costs and Attorneys' Fees).

WHEREFORE, Defendants Woodmen Hills Metropolitan District and Woodmen Hills Covenant Management Board pray this Honorable Court to grant judgment on their behalf and against Plaintiffs Charles and Bridget Warne, Brandon Cuffe, and Howard and Luana Surber, as follows:

- (i) for a permanent injunction prohibiting the violations of the Covenants as set forth above;
- (ii) for award of costs, expert witness fees and reasonable attorneys' fees; and
- (iii) for such other and further relief as the Court deems just and proper under the circumstances.

Dated this 7th day of July, 2008.

SUSEMIHL, MCDERMOTT & COWAN, P.C.

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

By: _____ /s/_____
Gary R. Cowan, #2507
Geoffrey L. Lindquist, #38290

