

CAUSE NO. 2019-33333

TANGLEWOOD HOMES ASSOCIATION, INC.,	§	
	§	IN THE DISTRICT COURT
<i>Plaintiff,</i>	§	
	§	
<i>versus</i>	§	133 <sup>rd</sup> JUDICIAL DISTRICT
	§	
WMJK, LTD.,	§	
	§	HARRIS COUNTY, TEXAS
<i>Defendant.</i>	§	

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TANGLEWOOD HOMES ASSOCIATION, INC.'S  
MOTION FOR SUMMARY JUDGMENT

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The plaintiff, Tanglewood Homes Association, Inc. (THA), moves for summary judgment as follows:

INTRODUCTION

This motion seeks a summary judgment declaring the applicability of restrictive covenants adopted on two separate occasions—in 2002 and December 2018 (the Restrictive Covenants)—to property owned by the defendant at 1661 Tanglewood Boulevard.

Notably, the defendant is the successor-in-interest to Tanglewood's developer, William Farrington, and his company, Tanglewood Corporation. Farrington and Tanglewood Corporation created Tanglewood and the restrictive covenants that preserve its residential character. Now, however, Farrington's grandchildren want to cash out and, in doing so, are willing to destroy the neighborhood by erecting a massive tower in the heart of Tanglewood.

According to a brochure for the proposed development, the entrance to Tanglewood would suffer the following (before and after) transformation:



Summary judgment is appropriate because the Restrictive Covenants clearly apply to 1661 Tanglewood Boulevard and because WMJK's excuses for avoiding those clear restrictions are insupportable. Ultimately, the Restrictive Covenants are clear and unambiguous and support the requested relief as a matter of law.

Accordingly, there is no reason for discovery or protracted litigation, and this Court should grant summary judgment declaring that the defendant's property at 1661 Tanglewood Boulevard is encumbered by the Restrictive Covenants, including the restrictions prohibiting construction of any improvements within Tanglewood (1) without THA's prior written approval of all architectural plans and construction documents, (2) that are more than 38 feet in height, (3) that are not of a residential character, (4) that allow the property to be subdivided, and (5) that do not comply with all applicable standards set out in the Tanglewood Policy Manual.

THA notes that, although this motion does not address all of the grounds for relief set out in THA's original petition, the relief requested would effectively resolve this matter. As a result, if summary judgment is granted at this time, THA will waive its alternative grounds for relief so that

final summary judgment can be entered as soon as this Court sets THA's right to attorneys' fees and costs pursuant to Tex. Civ. P. & Rem. Code § 37.009.<sup>1</sup>

## INDISPUTABLE FACTS

### *The Defendant*

1. The defendant's property at 1661 Tanglewood Boulevard was constructed by Tanglewood Corporation at the outset of Tanglewood's development. The building, which at least externally has remained unchanged, was built as a model for the architectural style of the homes to be built in the neighborhood. Exhibit A (Tower Declaration) at Exhibit A-1 at 48.

2. In 1998, Tanglewood Corporation, owned by the Farrington family, transferred the property at 1661 Tanglewood Boulevard to the defendant WMJK, also owned by the family. Exhibit A-2.

### *Original Restrictive Covenants*

3. To preserve the residential character of the neighborhood, Tanglewood Corporation filed restrictive covenants along with the plats for each of Tanglewood's 23 sections. *E.g.*, Exhibits A-3 through A-6.

4. In particular, Tanglewood Corporation filed restrictive covenants governing Tanglewood Section 5, the plat of which encompasses 1661 Tanglewood Blvd. Later, after all of the Section 5 homes were sold, Tanglewood Corporation filed the plat for Tanglewood Section 7, which also encompasses 1661 Tanglewood Boulevard. The related Section 7 restrictive covenants state that 1661 Tanglewood Boulevard is exempt from the Section 7 residential use restrictions, but they fail to mention the Section 5 restrictions. Exhibits A-3 to A-6.

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<sup>1</sup> THA reserves its other grounds for relief and its claim to attorneys' fees in the event of an adverse ruling on appeal or otherwise.

5. This motion does not address the Section 5 and 7 restrictions, and therefore the facts stated immediately above are provided solely as background.

*Tanglewood Homes Association (THA)*

6. Originally, Tanglewood Corporation managed enforcement of the original restrictive covenants, particularly in regards to preapproval of architectural plans. As a result, Tanglewood Corporation was in charge of approving the architectural plans for the existing building at 1661 Tanglewood Blvd, which was built in 1951. Exhibit A-1 at 48.

7. In 1966, Tanglewood Corporation transferred control of the original restrictive covenants to the plaintiff, THA. Exhibit A-7. The transfer documents expressly included all property encompassed within Tanglewood. The transfer document—drafted, executed, and filed by Tanglewood Corporation—states that it relates to “each of the lots comprising the various Sections of said Tanglewood Addition....” Exhibit A-7 at 1 (emphasis added). The defendant’s property at 1661 Tanglewood Boulevard is one of the lots covered by the transfer. The transfer was recorded as public record. Exhibit A-7.

*The 2002 Restrictive Covenants*

8. In 2002, THA proposed amendments to the restrictive covenants for all 23 Tanglewood sections. The 2002 Restrictive Covenants were adopted and approved by the then-required minimum 75% of Tanglewood’s owners following the procedures set forth in then-applicable provisions of the Texas Property Code, sections 204.005 and 204.008, and were recorded with the Harris County Clerk under file number W325707. Exhibit B (Boyd Declaration) at ¶ 4; Exhibit A-8.

9. WMJK received notice of THA’s petition to amend Tanglewood’s Restrictive Covenants and the adoption of the 2002 Restrictive Covenants. Exhibit B at ¶¶ 4-5.

10. In fact, WMJK's President, Kendall Miller, was a member of THA's Board of Directors during the period when the Board approved the draft restrictive covenants and circulated them to property owners requesting their affirmative vote. Exhibit B at ¶ 5; Exhibit B-7.

11. WMJK's President, Kendall Miller, also signed votes *in favor* of the 2002 Restrictive Covenants for two properties personally owned by him, although he did not record a vote as to 1661 Tanglewood Boulevard. Exhibit B at ¶¶ 6-7. Mr. Miller's parents, also affiliated with WMJK at the time, voted in favor of the amendments for another Tanglewood lot owned by them. *Id.*

12. The 2002 Restrictive Covenants expressly state that they "*amend the Restrictions applicable to all sections of Tanglewood...*" Exhibit A-8 at 6 (emphasis added).

13. The 2002 Restrictive Covenants incorporate and apply the Tanglewood Policy Manual to all of Tanglewood with no carve out for 1661 Tanglewood Boulevard. The Tanglewood Policy Manual had previously been "adopted per the Texas Property Code and recorded under Clerk's File No. V372037 of the Official Public Records of Harris County, Texas." Exhibit A-8 at ¶ 14.

14. The Tanglewood Policy Manual includes a number of relevant requirements applicable to all Tanglewood property, including the defendant's property at 1661 Tanglewood Boulevard. *See* Exhibit A-9. In particular, the Tanglewood Policy Manual declares that, "Tanglewood properties may only be used for single-family residential purposes," limits building heights to 38 feet, and requires preapproval of all construction documents by the THA before commencing construction. *Id.* at 21(1), 10(B)(1), 3.

#### *2018 Restrictive Covenants*

15. In 2018, pursuant to then-applicable provisions of the Texas Property Code, Chapter 209, Tanglewood again amended the Restrictive Covenants applicable to all Tanglewood Sections. Exhibit B at ¶ 8; Exhibit A-10.

16. The 2018 Restrictive Covenants state expressly that (1) “Tanglewood is a restricted residential subdivision” and (2) that the amendments are “applicable to all sections of Tanglewood,” with no carve out for 1661 Tanglewood Boulevard. Exhibit A-10 at 2.

17. The 2018 amendments to Tanglewood’s Restrictive Covenants were approved by then-required minimum 67% of Tanglewood’s property owners and were filed with the Harris County Clerk on December 18, 2018 under file no. RP-2018-564761. Exhibit B at ¶ 8; 12; Exhibit A-10.

18. WMJK received notice of THA’s petition to amend the restrictive covenants and the adoption of the 2018 Restrictive Covenants. Exhibit B at ¶¶ 9-10.

19. WMJK’s President and registered agent, Kendall Miller, voted in favor of one of the 2018 amendment that states as follows:

The following paragraphs are hereby added to the Restrictions *applicable to all sections of Tanglewood* to read as follows:

*Only one (1) residential dwelling may be constructed on a lot.*

Exhibit B at ¶¶ 10-12 (emphasis added). Kendall Miller’s affirmative vote was made expressly as to the property at 1661 Tanglewood Boulevard. Exhibit B at ¶ 11; Exhibit B-4.

20. The 2018 Restrictive Covenants repeatedly state that they are “*applicable to all sections of Tanglewood.*” Exhibit A-10 at 2. There is no carve out for WMJK’s property at 1661 Tanglewood Boulevard.

21. The 2018 Restrictive Covenants, including the provision specifically approved by WMJK’s President, restricts all Tanglewood lots to one residential dwelling. Exhibit A-10 at 3.

22. Subsequent to the approval and recordation of the 2018 Restrictive Covenants, Tanglewood homes in close proximity to 1661 Tanglewood Boulevard have been purchased in reliance on the 2018 Restriction Covenants and the other covenants limiting Tanglewood to single family homes. *See* Exhibit C (Deluca Declaration) at ¶¶ 5-6.

## ARGUMENT

### 1. *The 2002 Restrictive Covenants bind the property at 1661 Tanglewood Boulevard.*

Without doubt, as written, the 2002 Restrictive Covenants apply to, and control, the defendant's property at 1661 Tanglewood Boulevard.

#### *A. Restrictive covenants are interpreted as contractual agreements.*

Restrictive covenants are interpreted under the same rules of construction as for contracts. *See Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998).

In addition, in 2015, Texas adopted a new Property Code provision (section 202.003) that reverses the common law rule disapproving of restrictions on land use. Pursuant to section 202.003, restrictive covenants are to be liberally construed to further their purposes. Apart from the liberal construction, courts are directed to “examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument.” *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) (citations omitted). The courts are also instructed to consider “the covenants as a whole in light of the circumstances present when the parties entered the agreement,” avoiding any “construction that nullifies a restrictive covenant provision.” *Pilarcik*, 966 S.W.2d at 478-79.

#### *B. The 2002 Restrictive Covenants are clear and unambiguous.*

By any measure, the 2002 Restrictive Covenants are unambiguous.

They state repeatedly that they apply to all Tanglewood Sections and to all property within Tanglewood. There are no carve outs for any property.

WMJK's property is therefore encumbered by the 2002 Restrictive Covenants.

*C. WMJK had notice of the 2002 Restrictive Covenants.*

WMJK had actual knowledge of the 2002 Restrictive Covenants. Exhibit B at ¶¶ 4-6.

WMJK's President, Kendall Miller was a member of the THA Board when THA approved and circulated notice and ballots for the 2002 Restrictive Covenants to homeowners encouraging their approval. Exhibit B at ¶ 5.

Moreover, Kendall Miller and his parents voted in favor of the restrictions. Exhibit B at ¶ 6; Exhibits B-1 to B-3.

WMJK also had constructive knowledge of the restrictions because they were filed of record with the Harris County Clerk. Exhibit B at ¶ 8; Exhibit A-8; Tex. Prop. Code § 13.002 ("An instrument that is properly recorded in the proper county is: (1) notice to all persons of the existence of the instrument, and (2) subject to inspection by the public.")

*D. WMJK cannot now contest the 2002 Restrictive Covenants.*

Although WMJK now posits some technical errors in the adoption of the 2002 Restrictive Covenants, any such arguments are barred by limitations.

The Texas Supreme Court has definitively stated that a challenge to an encumbrance on real property must be made within the limitations period assessed from the date the property owner had actual or constructive notice of the encumbrance. *Ford v. Exxon Mobil Chem. Corp.*, 235 S.W.3d 615, 616 (Tex. 2007).

The 2002 Restrictive Covenants clearly and unambiguously apply to 1661 Tanglewood Boulevard, and therefore, the constitute encumbrances on that property. *Levine v. Turner*, 264 S.W.2d 478, 479 (Tex. Civ. App.—El Paso 1954, *writ dismissed*); *State v. Tigner*, 827 S.W.2d 611, 613 (Tex. App.—Houston [14th Dist.] 1992, *writ denied*).

It has been 17 years since WMJK acquired actual notice of the 2002 Restrictive Covenants, as evidenced by its President's and other members' votes on the restrictions, and by virtue of Kendall



Miller's service on the THA Board when the restrictions were approved by the Board and circulated to owners for their approval. WMJK had constructive notice as evidenced by the public filing of the 2002 Restrictive Covenants.

THA believes that the appropriate statute of limitations is four years, but the issue is moot because the longest civil limitations period in Texas is ten years, and WMJK has waited more than 17 years to challenge the 2002 Restrictive Covenants.

2. *The 2018 Restrictive Covenants bind the property at 1661 Tanglewood Boulevard.*

In a similar manner, the 2018 Restrictive Covenants apply to, and control, the defendant's property at 1661 Tanglewood Boulevard.

A. *The 2018 Restrictive Covenants are clear and unambiguous.*

The 2018 Restrictive Covenants are clear and unambiguous. For example, Section 2 of the 2018 Restrictive Covenants states as follows:

The following paragraphs are hereby added to the Restrictions *applicable to all sections of Tanglewood* to read as follows:

*Only one (1) residential dwelling may be constructed on a lot.*

Exhibit A-10 at 3 (emphasis added). WMJK's President voted in favor of this provision specifically as to 1661 Tanglewood Boulevard. Exhibit B at ¶¶ 10-11; Exhibit B-4.

B. *WMJK had notice of the 2018 Restrictive Covenants.*

WMJK had actual knowledge of the 2018 Restrictive Covenants, as evidenced by its vote in their favor. *Id.* at ¶¶ 9-11.

WMJK also had constructive knowledge of the restrictions because they were filed of record with the Harris County Clerk. Exhibit B at ¶ 9; Exhibit A-10.

*C. WMJK cannot contest the 2018 Restrictive Covenants.*

Although any complaint that WMJK might have against the 2018 Restrictive Covenants is not time-barred, WMJK's proffered objections are nonetheless unavailing because (1) WMJK's proposed objection relies on section 204 of the Texas Property Code, which was no longer in effect in 2018; (2) WMJK waived any objections it might have had, and (3) WMJK ratified the 2018 Restrictive Covenants.

*(1) The 2018 Restrictive Covenants were adopted pursuant to Section 209 of the Texas Property Code.*

The 2018 Restrictive Covenants were expressly adopted pursuant to section 209 of the Texas Property Code. Exhibit A-10 at 2.<sup>2</sup>

In its request for declaratory relief, however, WMJK posits section 204 (not section 209) of the Texas Property Code as a basis for rejection of the 2018 Restrictive Covenants. WMJK's technical argument fails at the outset, however, because, section 204 was not applicable (and was not used by THA) in 2018. As explained by WMJK's own counsel, "Effective September 1, 2011, the Texas Legislature pre-empted the amendment process in certain Restrictions by TEX. PROP. CODE Sec. 209.0041 .... In summary, for most modern residential neighborhoods, a new, statutory amendment process is the ONLY permitted procedure." Exhibit A-11 -- R. Wilson, *Restrictive Covenants: Modifying and Updating* 4 (2014) at 4 (emphasis in original); see also *id.* at 10 ("The author reads this as a statutory amendment process pre-empting Restriction amendment procedure and establishing a new, exclusive, and more liberal procedure. ... [T]he use of 'only' indicates that the legislature is dictating a new, mandatory amendment process."); 11 ("Only the procedural process in Ch. 209 is legally required (or

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<sup>2</sup> THA notes that ¶ 77 of its First Amended Original Petition contained a typographical error referring to Section 204.005 of the Texas Property Code, which should be Section 209.

permitted.”). In particular, Chapter 204—which bases WMJK’s proffered objection—“has been pre-empted by Tex. Prop. Code Sec. 209.0041, and is no longer a modification procedure.” *Id.* at 11.

Unlike Chapter 204, which excludes commercial structures within a residential neighborhood, Chapter 209 applies generally to neighborhoods that “limit a majority of the land ... to residential use for single-family homes.” *See id.* at 24.

(2) *WMJK has waived any objections to the 2018 Restrictive Covenants.*

In addition, by voting in favor of the 2018 Restrictive Covenants, WMJK waived any objection to the 2018 Restrictive Covenants. The affirmative vote constitutes the intentional relinquishment of a known right through conduct intentionally inconsistent with claiming that right. *See Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co., Inc.*, 416 S.W.2d 396, 401 (Tex.1967).

(3) *WMJK ratified the 2018 Restrictive Covenants.*

Finally, WMJK’s affirmative vote in favor of the 2018 Restrictive Covenants ratified those covenants. “The elements of ratification are: (1) approval by act, word, or conduct; (2) with full knowledge of the facts of the earlier act; and (3) with the intention of giving validity to the earlier act.” *Motel Enterprises, Inc. v. Nobani*, 784 S.W.2d 545, 547 (Tex. App.—Houston [1st Dist.] 1990, *no writ*) (citation omitted).

REQUEST FOR RELIEF

Therefore, pursuant to the Texas Declaratory Judgment Act, Texas Civil Practice and Remedies Code, Chapter 37, THA requests a declaratory judgment that the defendant’s property located at 1661 Tanglewood Boulevard is encumbered by the following restrictive covenants:

- the Restrictive Covenants in the 2002 amendments, including, without limitation, the restriction requiring preapproval of construction plans to ensure compliance with architectural restrictions, and
- the Restrictive Covenants in the 2018 amendments, including, without limitation, the express restriction prohibiting multi-family buildings and non-residential uses.

Pursuant to the same statute, THA requests a declaratory judgment that any improvements at 1661 Tanglewood Boulevard:

- require THA's prior written approval of all architectural plans and construction documents before the commencement of construction,
- are limited to 38 feet in height,
- must be of a residential character,
- cannot require further subdivision of the property, and
- must comply with all applicable standards set out in the Tanglewood Policy Manual.

Again: If summary judgment is granted in this manner, THA will waive its alternative grounds for relief so that final summary judgment can be entered as soon as this Court sets THA's right to attorneys' fees and costs pursuant to Tex. Civ. P. & Rem. Code § 37.009.

PRAYER

THA requests all relief to which it is justly entitled.

Dated: July 24, 2019.

Respectfully submitted,

By: /s/ Mark Maney

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CERTIFICATE OF SERVICE

A copy of the foregoing instrument was served on counsel of record on this date.

By: /s/ Andrew Tower

Unofficial Copy Office of Marilyn Burgess District Clerk