CAUSE NO. 2019-33333

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

TANGLEWOOD HOMES ASSOCIATION, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The plaintiff, Tanglewood Homes Association, Inc. (THA), replies in support of its motion for summary judgment as follows:

INTRODUCTION

WMJK's opposition to summary judgment relies almost entirely on misstatements of the summary judgment record and the relevant law. In this reply, THA seeks solely to correct the most egregious errors.[1]

1. WMJK is not the victim here, and THA is not the party that wants to change the status quo.

WMJK tries mightily to recast itself as the victim. In addition to rebranding itself as the Miller Family rather than what it is, the corporate successor to the multi-million-dollar company that

[1] To reduce repetition, THA also incorporates its briefing on WMJK's motions for continuance and for abatement. Because of those motions, much of WMJK's opposition to summary judgment occurs indirectly.

developed the 1,144 homes in Tanglewood, WMJK falsely asserts that it simply wants to keep things the way they have been for 75 years and that THA is taking a boldly new posture.

The claim is patently false. This action was engendered when THA learned from marketing brochures that WMJK was planning on tearing down every tree, shrub, and building at 1661 Tanglewood Boulevard to build a 20-story high-rise that WMJK now claims a right to build without regard to setbacks, architectural approval or any limits other than the structure cannot omit noxious fumes or loud noises. In other words, WMJK concedes it probably cannot build a refinery, but anything else is fair game.

If WMJK had not publicized its plan to destroy Tanglewood's residential character, THA would not be in court. If WMJK had continued the *status quo* of operating its business out of the residential-style building, THA would not be in court. If WMJK had not claimed a right to destroy the value of its neighbors' million-dollar homes by placing those homes on the precipice of a massive excavation project and then in a perpetual shadow with no privacy, THA would not be here. Indeed, WMJK has already damaged the value of its neighbors' homes by simply declaring its plans and its claimed right to do whatever it wants on its property. The neighboring homes are now under a cloud that damages their value.

THA is not seeking to change WMJK's current use at 1661 Tanglewood Boulevard. Indeed, as a matter of law, the 2002 and 2018 amendments do not prevent WMJK from continuing using its building as it has for 75 years. Such use is grandfathered. *See Snook v. City of Missouri City*, 2003 WL 25258302, at *1 (S.D. Tex. Aug. 27, 2003).

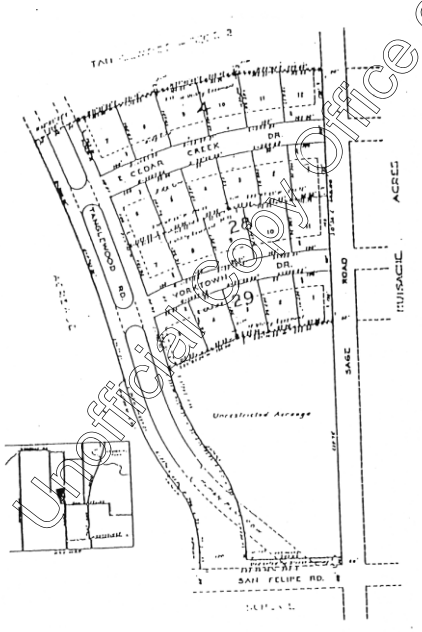
THA is seeking to preserve the *status quo*. It is WMJK that seeks to destroy it.

2. THA is not avoiding inconvenient facts, WMJK is.

WMJK stridently decries THA's purported omission of any mention of the Section 7 restrictions that contain a carve out for 1661 Tanglewood Boulevard. WMJK claims the omission telling, shocking, and willful. *See* Opposition at 2, 7, and 9.

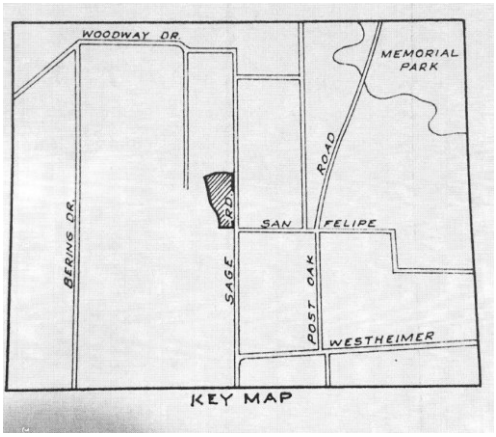
WMJK might have a point if its claim was true, but it is not. THA's motion squarely states that the "Section 7 restrictive covenants state that 1661 Tanglewood Boulevard is exempt from the Section 7 residential use restrictions …." Motion at 3. THA also attached the complete Section 5 and Section 7 plats and restrictions as exhibits A-3 to A-6 to its motion.

Displaying a hypocrisy that is at least telling, if not shocking, at the same time it falsely accuses THA of omitting mention of a key fact, WMJK fails entirely to mention the inconvenient fact (for WMJK) that the year before WMJK's predecessor, Tanglewood Corp., platted Section 7, it platted 1661 Tanglewood Boulevard as part of Section 5. Inclusion of 1661 Tanglewood Boulevard in Section 5 is clear from the plat filed by Tanglewood Corporation in 1950:

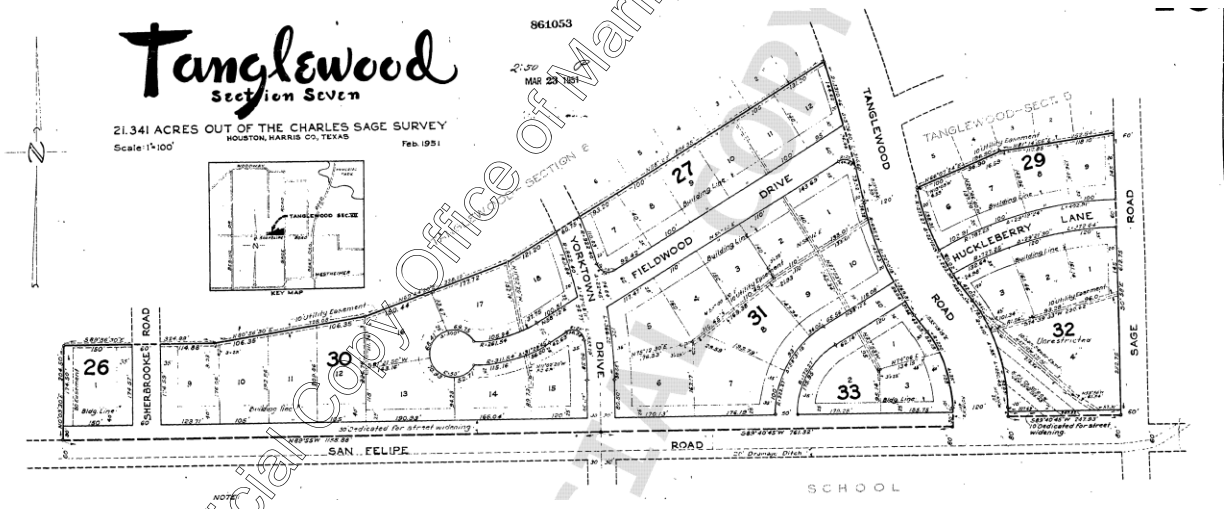


Motion at exhibit A-3.

Inclusion of 1661 Tanglewood Boulevard in Section 5 is particularly clear from the key map included in the bottom left of the Section 5 plat (Exhibit A-3) filed by Tanglewood Corporation in 1950 (as blown up below):



The Section 7 plat, filed by Tanglewood Corp. in 1951, overlaps the Section 5 plat:



After selling all of the Section 5 lots with property rights that allow them to enforce the Section 5 restrictions,[2] Tanglewood Corp. reduced the size of its holdings at 1661 Tanglewood Boulevard to

[2] *See* Exhibit D (Supplemental Tower Declaration) at D-1

allow for more homes to be built and added the single sentence carve out so emphasized by WMJK. Thus, as of 1951, there were two contradictory plats on file that included WMJK's property.

Section 5 homeowners (including all who have purchased a home in Section 5 since 1950) would have had no way of knowing that WMJK's predecessor had tried after-the-fact to remove itself from the residential restrictions because the later-filed Section 7 restrictions are not in the chain of title of any of the Section 5 homes. Moreover, Tanglewood Corporation could not unilaterally amend the Section 5 restrictions by the later filing of an overlapping Section 7 plat and restrictions. The Section 5 homeowners and THA have the express right to enforce the Section 5 restrictions against WMJK. Exhibit A-4 at 4.

Thus, again: WMJK has it backwards. It was THA and the Tanglewood homeowners who were surprised by WMJK's position on the restrictions.

3. The 2002 and 2018 amendments unambiguously remove WMJK's purported carve out.

THA did not move for summary judgment on the original Section 5 restrictions because THA believed that WMJK would utilize the obvious contradiction between Section 5 and Section 7 to manufacture an ambiguity. Apparently, THA underestimated WMJK's creativity.

In any event, whatever ambiguity might have existed from the 1950's to 2002, that ambiguity was removed by the 2002 amendments. While one of the two set of restrictions covering 1661 Tanglewood Boulevard contained a carve out, the 2002 amendments clearly and unambiguously removed that carve out. Pre-2002, WMJK might have argued that the Section 7 carve out trumped the earlier Section 5 restrictions, but the 2002 amendments unambiguously removed that carve out. The 2018 amendments additionally confirm that removal.

The 2002 amendments specifically reference the Section 7 restrictions. Motion at exhibit A-8 at 2-3. Then, following that specific reference, the 2002 amendments state, "these amendments shall be binding *on all properties in all sections of Tanglewood*." *Id.* at 6 (emphasis added).

The 2018 amendments do the same. They expressly apply to "all sections of Tanglewood, with the exception of Section 10 and Section 19…." Exhibit A-10 at 2. Note: The 2018 amendments clearly can carve out property when they want, but they do not carve out 1661 Tanglewood Boulevard.

WMJK argues that the earlier, but allegedly more specific, exclusion in Section 7 overrides the general language of the amendments ("these amendments shall be binding on all properties in all sections of Tanglewood"), but again, WMJK has it backwards. The amendments exclude certain sections from the general rules when they want—hence the "all sections of Tanglewood with the exception of …" language in the 2018 amendments. *Id.* There is no ambiguity in altering language from "all property but x and y" to "all property but y."

Giving WMJK the benefit of the doubt, WMJK might have a point if the amendments were adopted at the same time as the Section 7 restrictions, because then the inconsistency (between "all property" and "all property but 1661 Tanglewood") would lack explanation, but the 2002 amendments are exactly what they say they are, amendments. The Webster definition of "amendment" is to alter or to amend. The Webster definition of "amend" is to change or modify. Thus, the 2002 amendments on their face declared their intention of altering the restrictions. As to Section 7, the restrictions went from all property but 1661 Tanglewood Boulevard to all property in Tanglewood. The change or amendment was obvious and unambiguous.

Professor Williston concurs. A later amendment to a contract controls and impliedly repudiates all inconsistent provisions in the original. 29 WILLISTON ON CONTRACTS § 73:17 (4th ed. 2019). That is the very nature of an amendment.

The interpretative rule proposed by WMJK—that if an amendment contradicts and earlier writing, the earlier writing controls—would be absurd. Parties amend contracts to make changes. By their very nature, amendments will contradict earlier writings. Otherwise, why would the parties amend? The rule is, and always has been, logical—if the parties amend, the amendment controls.

Nor can WMJK claim that the Section 7 language that, "no other restrictions herein set forth shall affect this lot" somehow controls future amendments. The phrase "herein set forth" refers to the document that contains the phrase. The amendments, adopted decades later, do not fall within the "herein set forth" exclusion as a matter of law. *See* B. Garner, GARNER ON LANGUAGE AND WRITING 181 and 181 n.6 (2009).

WMJK's conceit that it could rely on the original 1950's restrictions in the face of comprehensive amendments in 2002 and 2018 is insupportable under Texas law. As explained lengthily in the motion for summary judgment, Texas law dictates that the intent of the parties is determinable entirely by the written expression of the parties' intent, not their subjective belief.

WMJK simply does not demonstrate any manner in which the 2002 and 2018 amendments are ambiguous in any respect.

4. WMJK cannot manufacture an ambiguity through parol evidence.

If a contractual document is unambiguous within its four corners, parol evidence cannot be considered. Restrictive covenants are to be interpreted "within the four corners of the instrument." *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986) (deed); *see also Vance v. Popkowski*, 534 S.W.3d 474,

478 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (restrictive covenant). "When a restrictive covenant is unambiguous, we construe it according to the plain meaning of its express wording and enforce it as written." *Vance*, 534 S.W.3d at 478 (citations omitted).

The four corners rule requires this Court to ascertain the intent of the parties solely from the language in the instrument. *Concord Oil Company v. Pennzoil Exploration and Production Company,* 966 S.W.2d 451, 465 (Tex. 1998). The intent that governs is not the intent that the parties meant but failed to express but, rather, the intent that is expressed in the written terms themselves. *Luckel v. White,* 819 S.W.2d 459, 461 (Tex. 1991); *Concord Oil Co. v. Pennzoil Expl. & Prod. Co.*, 966 S.W.2d 451, 454 (Tex. 1998) ("We recognized that the intent of the parties must be determined from what they expressed in the instrument, read as a whole, and that the actual, subjective intent of the parties will not always be given effect even if we were able to discern that subjective intent.").

WMJK tries to avoid this rule by citing a narrow exception that if a latent ambiguity arises, then parol evidence might be admissible, but there is no latent ambiguity here. Latent ambiguities arise in the context of mutual mistake, fraud, or accident. *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.,* 907 S.W.2d 517, 520 (Tex.1995). For example, "if a contract called for goods to be delivered to 'the green house on Pecan Street,' and there were in fact two green houses on the street, it would be latently ambiguous." *Id.* at 431 n.4. Here, all WMJK says is we did not think of the implications of the comprehensive amendments, but there has been no mutual mistake or material change in the underlying facts since 2002.

5. WMJK has not supported its purported defenses.

WMJK claims it could raise a number of defenses, but in most instances, it does not even try to do so. In the few cases it does try, it fails.

A. The common law rules are irrelevant.

Although WMJK spends a lot of time explaining why THA could not have amended the restrictions under the common law, THA has never claimed such a right. THA amended pursuant to the Texas Property Code. WMJK's discourse on the common law is irrelevant.

B. Waiver is a non-issue.

Yes: WMJK has maintained its office at 1661 Tanglewood Boulevard for 75 years. It can continue to do so. That use is grandfathered. *Snook v. City of Missouri City*, 2003 WL 25258302, at *1.

But, WMJK continues to imply that using the structure as an office means that WMJK can then use the property for any commercial purpose. The claim is unsupported and erroneous. The Texas Supreme Court has definitively rejected WMJK's contention:

> Pickett's argument, followed to its logical conclusion, would require us to hold, as an example, that use of residential property for the purpose of giving piano lessons for hire, if continued for a sufficient time, would give rise to the right of the owner of that property to convert it to a service station or other equally undesirable use. We find a more reasonable interpretation of the applicable law to be that in order to support a waiver of residential restrictions *the proposed use must not be substantially different in its effect on the neighborhood from any prior violation*.

Sharpstown Civic Ass'n, Inc. v. Pickett, 679 S.W.2d 956, 958 (Tex. 1984) (emphasis added).

Moreover, THA's requested declaratory relief in this case is narrow. THA seeks solely a declaration that 1661 Tanglewood Boulevard is covered by the 2002 and 2018 amendments, including that WMJK must seek preauthorization for any changes to the property. That relief does not depend on this Court establishing the existence of, much less the scope of, any waiver of past restrictions.

This Court can enter judgment stating that enforcement of the 2002 and 2018 amendments are subject to any waiver defense.

C. WMJK cannot challenge the 2002 amendments.

It has been 17 years since adoption of the 2002 amendments, amendments that WMJK's President voted for.

Never in those 17 years did WMJK raise any objection. Nor did WMJK ever state its current position that it is unencumbered by any deed restrictions.

Therefore, any challenge WMJK could have made is time-barred. Nonetheless, WMJK claims it can challenge the 2002 amendments because it could not have known how THA would interpret the restrictions. In support, WMJK cites *Vann v. Homeowners Ass'n for Woodland Park of Georgetown, Inc.*, 2018 WL 4140443, at *1 (Tex. App.—Austin Aug. 30, 2018, no pet.). But, in *Vann*, the court held that the defendant could not have anticipated the homeowners' association's claim because the restriction did not unambiguously apply. In fact, the court concluded that the homeowners' association was misapplying the restrictions.

If the amendments are unambiguous, the Texas Supreme Court has 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). Of course: "A valid restriction upon the use of real estate is an encumbrance." *Jordan v. Hood*, 610 S.W.2d 215, 217 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) (citations omitted).

Thus, the limitations issue is the same as the core issue—if the 2002 amendments are unambiguous, they have encumbered WMJK's property for 17 years. No challenge can be now be made.

D. WMJK has not challenged the 2018 amendments.

WMJK's sole challenge to the 2018 amendments is that THA somehow did not establish that membership in THA is mandatory in the sense that it can charge a mandatory fee, a prerequisite to application of Section 209 of the Texas Property Code. In fact, WMJK acknowledges THA's right to amend Tanglewood's restrictions if THA can charge a mandatory fee. Opposition at 18.

Notably, WMJK never contests the fact that THA membership is mandatory. Instead, WMJK says nothing more than THA should have proven this fact and did not.

Of course, WMJK could have contested this fact if it wanted. WMJK is a member of THA, and WMJK's owners own property individually in Tanglewood and therefore are also members. The reason WMJK did not file any summary judgment evidence to contest this point is manifest—membership in THA is mandatory, and WMJK knows it.

WMJK's purported authority for its claim that it was THA's responsibility to prove this point, as opposed to WMJK's responsibility to prove its defense, is inapposite. The opinions state that the party raising an argument must support it with evidence. Here, that is WMJK.

In the alternative, attached hereto is the definitive proof. The requirement to pay dues is mandated in the deeds for Tanglewood's lots. Attached as exhibit D are the original deed for all of the Section 5 lots and one Section 7 lot sold by Tanglewood Corporation, WMJK's predecessor. All of those deeds state, "The property herein conveyed is hereby subjected to an annual maintenance charge …." The deeds go on to describe that failure to make such a payment creates a right to a lien,

etc. The key power indicating a mandatory membership association is "the power to 'levy and collect assessments' on the property owners and to impose a lien for a property owner's failure to pay those assessments." *Western Hills Harbor Owners Ass'n v. Baker*, 516 S.W.3d 215, 224 (Tex. App.—El Paso 2017, no pet.). Accordingly, THA properly applied Chapter 209 with regard to the 2018 amendments.

The public records presented in exhibit D are uncontestable. Moreover, WMJK knew these records existed since they were drafted and filed by WMJK's predecessor, which explains WMJK's careful argument. In any event, THA hereby moves for leave to submit Exhibit D and its attachments. This Court should grant leave because (1) the evidence is public record and (2) because THA is countering WMJK's false argument that THA is not a mandatory association. *See Lawler v. Dallas Statler-Hilton Joint Venture*, 793 S.W.3d 27, 29-30 (Tex. App. Dallas 1990, writ denied).[3]

E. WMJK has failed to even explain its remaining defenses.

In a last-ditch effort to avoid summary judgment, WMJK claims that it has a litany of defenses that it could raise if it got some discovery. The purported defenses range from unexplained constitutional challenges to restatements of WMJK's claim that discovery might uncover an ambiguity.

As set out further in THA's opposition to WMJK's motion for a continuance, WMJK must do more than merely claim a need for discovery, it must prove and explain it.

[3] "The proper scope for a trial court's review of evidence for a summary judgment encompasses *all evidence on file at the time of the hearing or filed after the hearing and before judgment with the permission of the court*." *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 503 (Tex. App.—Houston [1st Dist.] 1995, *no writ*) (emphasis added); TRCP 166a(c): "The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, *and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court*, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response." (emphasis added).

For example, nothing would have prevented WMJK from bringing an actual constitutional challenge. If the Texas Property Code violates the US or Texas constitution by allowing amendments to restrictive covenants as it does, such a violation would not depend on any discovery.

WMJK's failure to articulate a constitutional challenge is entirely WMJK's fault. THA's motion for summary judgment was filed on July 24, 2019. WMJK had almost 7 full weeks to formulate a response. Instead, it has filed a series of documents trying to put off a decision. The gambit fails.

This Court should enter summary judgment declaring that the 2002 and 2018 amendments apply to WMJK's property subject to existing waivers.

Dated: September 9, 2019.

Respectfully submitted,

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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*