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IN THE FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS

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Clerk

GARDEN OAKS MAINTENANCE ORGANIZATION,
***Appellant*,**

v.

PETER S. CHANG AND KATHERINE M. CHANG,
***Appellees*.**

Appeal from the 269th District Court, Harris County, Texas
Hon. Dan Hinde, Presiding

BRIEF OF APPELLANT

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Oral Argument Requested

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Hon. Dan Hinde
Presiding Judge, 269th District Court

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STATEMENT OF THE CASE

Nature of the case:	This case involves a homeowner's breach of deed restrictions and the homeowner's declaratory-judgment counterclaim that the homeowner's association lacked authority to enforce those restrictions because it was not legally formed. [CR 4–8, 13–15]
Course of Proceedings:	This case was tried to a jury.
Trial court:	Hon. Dan Hinde 269th District Court
Disposition below:	The jury found for the Changs, the Defendants, on their affirmative defenses. [6 RR 105–06] The trial court issued its judgment for the Changs on their affirmative defenses and granted the Changs's declaratory-judgment counterclaim. [CR 337–38]

STATEMENT REGARDING ORAL ARGUMENT

This appeal deals with issues of statutory construction and requires an understanding of the procedural history of the case and an understanding of the arguments raised by trial counsel on issues not directly relevant to this appeal. Appellant, therefore, believes oral argument would be helpful to aid the Court in clarifying some of these issues and respectfully requests oral argument.

ISSUES PRESENTED

(1) The trial court erred by failing to dismiss the Changs's declaratory-judgment counterclaim based on GOMO's "lack of authority," which merely repeated their affirmative defense of "lack of authority."

(2) Additionally, the trial court's declarations are erroneous because they are based on (a) a mistaken shift of the burden of proof and (b) an incorrect reading of the Property Code.

STATEMENT OF THE CASE

The Garden Oaks subdivision, a neighborhood located in Houston, is governed by a set of deed restrictions. [7 RR PX1] The deed restrictions, written in 1939, however, provided for an organization to enforce those restrictions that eventually went out of existence, leaving no homeowner's association to enforce the restrictions. [*Id.*]

The residents of Garden Oaks eventually realized this deficiency. After several attempts, they finally formed the Garden Oaks Maintenance Organization—GOMO—using the statutory procedures available in Section 204.006 of the Property Code. [7 RR PX 10, 8 RR DX 4, 4 RR 119]

A. The Changs.

A few years after GOMO was formed, a couple, the Changs, purchased a home in the neighborhood. The Changs wanted to build a new home on a lot they purchased in Garden Oaks. [5 RR 211]

But the Changs also wanted to build a four-car garage, which was problematic because the deed restrictions only permit a two-car garage. [7 RR PX1] The Changs submitted their proposal for the new house to GOMO and attempted to get around this restriction not once, but four times. [4 RR 30, 31, 44–48] Each plan was rejected until GOMO settled on a compromise with the Changs, which allowed the Changs to build a two-car detached garage and convert the

proposed two-car attached garage to an attached studio. [4 RR 48] The Changs built the house as approved. [5 RR 173] All seemed well.

Unfortunately, the Changs's compliance with the restrictions did not last long. A few months after building the house, the Changs converted the attached studio into an attached garage. [*Id.*] The Changs ended up with exactly the plan that GOMO rejected—two two-car garages. [*See id.*]

B. Litigation against the Changs.

GOMO filed a lawsuit to accomplish the reason they were formed, to enforce the deed restrictions. [CR 4–8] The Changs responded and, predictably, denied that they violated the restrictions. [2 Supp. CR __, Appendix A][1] They also raised a list of affirmative defenses, including:

a. Lack of Standing;

b. Failure to Provide Proper Notice;

c. Unclean Hands;

d. Abandonment of Restrictive Covenant(s);

e. Waiver of Restrictive Covenant(s);

f. Lack of Authority;

[2 Supp. CR __, Appendix A]

[1] The Second Supplemental Clerk's Record was requested on October 21, 2016. It has not been filed with the Court as of the time this brief was filed.

The Changs also requested attorney's fees but failed to cite a law entitling them to fees:

E. ATTORNEY FEES

9. Defendant is entitled to recover reasonable and necessary attorney fees pursuant to

[2 Supp. CR __, Appendix C][2]

About fifteen months later, the Changs amended their answer and included a counterclaim for declaratory relief—a claim for which they could recover attorney's fees. [CR 11–17] It made their attorney's fees request much simpler:

E. ATTORNEY FEES

24. Plaintiff is entitled to recover reasonable and necessary attorney fees that are equitable and just under Texas Civil Practice & Remedies Code section 37.009 because this is a suit for declaratory relief.

[CR 17]

But that declaratory-judgment counterclaim was eerily similar to their affirmative defense. The Changs continued to raise their affirmative defenses of "[l]ack of standing" and "[l]ack of authority"[3] in addition to the declaratory-judgment counterclaim for "[l]ack of authority." [*Compare* CR 10 *to* CR 13]

---

[2] The Original Answer's request for attorney's fees is produced in full; the Changs did not complete the sentence "pursuant to."

[3] Because the Changs did not provide any explanation on how these defenses were different and treated them as the same, this brief refers to both defenses as the Changs's "affirmative defense."

As the litigation progressed, the Changs continued to treat their affirmative defenses and declaratory-judgment counterclaim as if they involved the same issue and entitled them to the same relief. They moved for summary judgment and included one section that argued that GOMO did not have authority to enforce the deed restrictions. [2 Supp CR ___, Appendix C] That section did not distinguish between the Changs's affirmative defense or their declaratory-judgment counterclaim. [*See id.*] In fact, that section explicitly addressed both together. [*Id.*]

Lack of Authority (Aff. Def. / Counterclaim)

[*Id.*]

C. Trial.

The trial court repeatedly dragged its feet on addressing the Changs's declaratory-judgment counterclaim. GOMO first argued that the counterclaim was impermissible because the Changs did not join all the Garden Oaks homeowners. [CR 66–67] The trial court denied GOMO's motion to abate to add those homeowners and noted that it could raise this defense at trial. [CR 70–71] Before trial, GOMO raised its defense again—and the trial court said it would address that defense at a later time during trial. [2 RR 12] After GOMO closed at trial, the trial court again heard arguments on the Changs's declaratory-judgment counterclaim and, again, delayed ruling until after trial and requested that the parties provide additional briefing. [5 RR 278]

The next day, before the Changs presented their case, GOMO requested that the trial court exclude the Changs's declaratory-judgment counterclaim. [6 RR 6] The trial court refused to do so, stating—despite its repeated refusal to rule on the issue—that the deadline for such a dispositive motion had "long-since passed." [*Id.*]

After trial, the jury found that the Changs failed to comply with the deed restrictions by building the two two-car garages. [6 RR 105] But, after hearing evidence of other houses with larger than two-car carports, the jury found that the deed restriction had been waived and that GOMO acted unreasonably in enforcing the two-car garage requirement against the Changs. [6 RR 105–06]

D. Post-Trial

The parties submitted briefs on the lack of authority declaratory-judgment counterclaim and affirmative defense. [CR 269–91, 299–309] The trial court issued a lengthy order explaining its final judgment in which it granted the Changs's declaratory-judgment counterclaim and issued the following declarations:

> The Court further ***RENDERS*** judgment declaring that:
>
> 1. "The Notice of Formation of Petition Committee filed on July 23, 2001 under Harris County Clerk's File No. V191699 (and the amendment attached thereto) is invalid, ineffective, and of no force and effect with respect to Defendants Peter S. Chang and Katherine M. Chang."

2. "The Petition to Amend Restrictions filed on June 3, 2002, under Harris County Clerk's File No. V842579 is ineffective and of no force and effect with respect to Defendants Peter S. Chang or Katherine M. Chang";

3. "The By-Laws of Garden Oaks Maintenance Organization have no force and effect against Defendants Peter S. Chang or Katherine M. Chang"; and

4. "Garden Oaks Maintenance Organization has no authority or standing to pursue any legal action against Defendants Peter S. Chang or Katherine M. Chang for violations of any alleged deed restrictions in the Garden Oaks Section Three."

[CR 338]

The trial court's order mainly describes the law correctly but does not follow its explanation of the law. For example, GOMO argued that the Changs's declaratory-judgment counterclaim was impermissible and should be dismissed because "[a]ll the claims that are raised in the Changs' declaratory action had been previously raised as defenses . . . ." [CR 300] The trial court correctly noted that a declaratory-judgment counterclaim is impermissible if it merely repeats a defendant's affirmative defenses but that a declaratory-judgment claim "that seeks interpretation of deed restrictions" is proper. [CR 323–24] Relying on its authority to interpret deed restrictions, the trial court then granted the Changs's declaratory-judgment. [CR 324] The problem is that the trial court did not interpret anything—it did not even point to a provision in the deed restrictions that it claims to interpret. [*Id.*]

Similarly, the trial court did not follow its own statement of the law later in the order when it discusses GOMO's formation under the Property Code. The trial court correctly noted that the Changs "had the burden to prove" that GOMO did not satisfy those statutory requirements. [CR 328] GOMO argued that the Changs "were unable to prove that GOMO did not meet" the requirements under Section 204.006 to qualify for the procedure to create a homeowner's association. [CR 304] The trial court stated that "[i]t is mathematically possible" that Garden Oaks qualified to use the Section 204.006 procedure "[b]ut it is also mathematically possible that" it did not. [CR 329] It would seem that the trial court would then rule for GOMO because the Changs did not meet their burden of proof. Rather than finding that the Changs did not meet their burden of proof, the trial court flipped that burden on its head and granted the Changs declaratory-relief.

GOMO appeals the trial court's final judgment issuing the declarations.

SUMMARY OF THE ARGUMENT

The trial court erred in granting the Changs's declaratory-judgment counterclaim. The trial court never should have reached the merits of the counterclaim because the Changs's declaratory-judgment counterclaim that GOMO lacked authority to enforce the deed restrictions merely repeated their affirmative defense on the same issue.

Even reaching the merits, the trial court still erred in issuing the declarations. The trial court—after correctly stating that the Changs had the burden of proof—ruled for the Changs because it could not determine whether GOMO qualified for the statutory procedure to create a homeowner's association. That decision flips the burden of proof on its head; if it could not determine whether GOMO qualified for the statutory procedure or not, the trial court should have denied the Changs's declaratory-judgment counterclaim.

STANDARD OF REVIEW

In reviewing a declaratory judgment, the appellate court uses the same standards as in reviewing other judgments and decrees and refers to the procedure that resolved "the issue at trial to determine the applicable standard of review on appeal." *Farmers Ins. Exch. v. Rodriguez*, 366 S.W.3d 216, 222 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). The Changs's motion for declaratory judgment sought interpretation of provisions of the Property Code. A court's judgment on a declaratory-judgment motion based on statutory interpretation is reviewed de novo. *City of Houston v. Hildebrandt*, 265 S.W.3d 22, 25 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). Any other questions of law are also reviewed de novo. *Wooley v. Schaffer*, 447 S.W.3d 71, 75 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

ARGUMENT

The trial court's order issuing the declarations should be reversed because (1) the Changs's declaratory-judgment counterclaim is barred because it impermissibly repeats its affirmative defenses and (2) the trial court's declarations are erroneous on their merits.

I. The Court should reverse declarations 2–4, which merely restate defenses.

A. The Declaratory Judgments Act is not available to settle disputes already pending before a court and, therefore, a declaratory-judgment counterclaim must not merely repeat the defendant's affirmative defenses.

Because a declaratory-judgment action is "not available to settle disputes already pending before a court," a defendant's counterclaim requesting declaratory relief must not be a "mirror image" of its defenses. *BHP Petroleum Co. Inc. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990); *see In re BP Oil Supply Co.*, 317 S.W.3d 915, 922 (Tex. App.—Houston [14th Dist.] 2010, no pet.). A declaratory-judgment counterclaim, therefore, must "state a claim for affirmative relief" that "alleges a cause of action independent of the plaintiff's claim." *Nat'l Enter., Inc. v. E.N.E. Props.*, 167 S.W.3d 39, 43–44 (Tex. App.—Waco 2005, no pet.). A declaratory-judgment counterclaim that is "identical" to a defendant's affirmative defenses is barred by the mirror-image rule. *Compass Bank v. MFP Fin. Servs., Inc.*, 152 S.W.3d 844, 860 n.8 (Tex. App.—Dallas 2005, pet. denied).

The main purpose of the mirror-image rule is to prevent a defendant from "tack[ing]" a declaratory-judgment counterclaim "onto a standard suit" in an attempt to recover attorney's fees. *BP Oil Supply*, 317 S.W.3d at 922; *City of Houston v. Texan Land & Cattle Co.*, 138 S.W.3d 382, 392 (Tex. App.—Houston [14th Dist.] 2004, no pet.). But when a claim for declaratory relief duplicates a party's affirmative defenses, it should be "dismissed by the trial court because it [is] moot." *Kenneth Leventhal & Co. v. Reeves*, 978 S.W.2d 253, 259 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *see Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 624 (Tex. 2011) (reversing declaratory judgment because declaratory judgment duplicated issues already before trial court); *City of Justin v. Rimrock Enterprises, Inc.*, 466 S.W.3d 269, 289 (Tex. App.—Fort Worth 2015, pet. denied) (reversing declaratory relief because declaratory-judgment action duplicated issues already before trial court).

B. Homeowners cannot seek declaratory relief when that relief repeats their affirmative defense.

Three cases illustrate the mirror-image rule in the context of property owners and prohibit a homeowner from "tack[ing] on" a declaratory-judgment counterclaim while simultaneously raising an affirmative defense of lack of authority or standing.

In *Anderson v. New Property Owners' Association of Newport, Inc.*, a homeowner's association sued a homeowner for violating the neighborhood's deed restrictions. 122 S.W.3d 378, 383 (Tex. App.—Texarkana 2003, pet. denied). The homeowner answered the lawsuit and, as a defense to the homeowner's association's lawsuit, challenged the homeowner's association's "standing and capacity." *Id.* at 383. The homeowner also sought declaratory relief involving the same issues. *Id.* at 391. The trial court rejected the homeowner's defense and declaratory judgment action. *Id.* at 383.

On appeal, the appellate court reversed part of the trial court's judgment on the homeowner's capacity defense. *Id.* at 390. The homeowner then sought to recover attorney's fees under the declaratory-judgment statute. *Id.* But the appellate court noted that the homeowner's declaratory-judgment counterclaim "involves the same parties and the same issues" as its affirmative defenses. *Id.* at 391. The mirror-image rule, therefore, prevented the homeowner from asserting the declaratory-judgment counterclaim. *Id.*

Similarly, in *Tanglewood Homes v. Feldman*, a homeowner sued a homeowner's association for its refusal to approve the homeowner's request to expand their home and sought damages, injunctive relief to prevent the homeowner's association from refusing to approve their expansion request, and declaratory relief stating that their plans were in compliance with the deed

restrictions. 436 S.W.3d 48, 55, 57, 59 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Although *Tanglewood* did not discuss the mirror-image rule in determining whether the trial court should have issued the declarations—the parties, in challenging those declarations, did not appear to argue that the mirror-image rule prevented the trial court from doing so—it held that the homeowner could not recover attorney's fees under the Declaratory Judgment Act because the homeowner only brought the declaratory-judgment action for the purpose of attaining attorney's fees, in violation of the mirror-image rule. *Id.* at 69–70.

Justice Busby[4] also reasoned that the declaratory-judgment action duplicated issues already before the trial court and was, therefore, improper. *Id.* at 70–71. Justice Busby reasoned that the trial court, in deciding the damages issue, had to decide whether the homeowner violated the deed restrictions. *Id.* And, responding to the homeowner's argument that the declarations "deal with future rights," Justice Busby noted that any injunctive relief the trial court would have granted would have accomplished the same purpose—the homeowner having its expansion project approved—as the declaratory relief. *Id.* at 71.

[4] The panel in *Tanglewood* consisted of Chief Justice Kem Frost, who did not join this section of the opinion, and now-Supreme Court Justice Jeff Brown, who did not vote on this case because he was appointed to the Texas Supreme Court after oral argument but before the disposition of the case.

Finally, *City of Houston v. Texas Land and Cattle, Co.* held that a property owner's declaratory-judgment counterclaim was improper because it duplicated the issues that would be determined in its affirmative defense. 138 S.W.3d 382, 392 (Tex. App.—Houston [14th Dist.] no pet.). The property owner responded to an inverse condemnation claim by seeking declaratory relief to declare the rights and duties of the parties with respect to street access. *Id.* But because the trial court would decide that issue in the inverse condemnation claim, the property owner's counterclaim was improper under the mirror-image rule and the property owner could not recover attorney's fees under the declaratory-judgment claim. *Id.*

C. The Changs's declaratory-judgment counterclaim merely repeats their affirmative defenses.

This case is no different from *Anderson*, *Tanglewood*, or *Texas Land and Cattle*. Just like in each of those cases, the Changs did not request any additional relief in their declaratory-judgment action. Indeed, the trial court would have had to determine the same issue—whether GOMO was properly formed—in deciding the Changs's affirmative defense. The repetition of an affirmative defense as a declaratory-judgment counterclaim is improper under the mirror-image rule.

The pleading history makes clear that the Changs merely repeated their affirmative defenses as a declaratory-judgment action in an attempt to recover attorney's fees. The Changs's original answer asserts eleven affirmative defenses,

including "[l]ack of standing" and "[l]ack of authority." [2 Supp. CR __, Appendix A] But the Changs's general denial would not have entitled them to recover attorney's fees.[5]

But the Changs pursued a new strategy: to recast their affirmative defenses as a declaratory-judgment counterclaim. The titles in their amended answers make the mirroring evident; the Changs asserted affirmative defenses of "[l]ack of authority" and "[l]ack of standing"[6] without any explanation of how those defenses applied to their case. [CR 10] The Changs—not even bothering to change the

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[5] In a fittingly ironic oversight, that answer requests attorney's fees "pursuant to" and never finishes that sentence. [2 Supp. CR __, Appendix A]

[6] The Changs's answer does not contain any analysis on these issues. The Changs, instead, list eleven different affirmative defenses including, in relevant part:

a. Lack of Standing;

b. Failure to Provide Proper Notice;

c. Unclean Hands;

d. Abandonment of Restrictive Covenant(s);

e. Waiver of Restrictive Covenant(s);

f. Lack of Authority;

[CR 10]

The Changs's failure to provide any separate analysis for their affirmative defense of lack of standing and lack of authority in their answer further illustrates that the affirmative defense was the same as the Changs's counterclaim. If the two claims were different, the Changs would have explained why the grounds for the affirmative defense differed from the grounds for the declaratory judgment.

name of their affirmative defenses in their request for declaratory relief—asserted a declaratory-judgment counterclaim for "[l]ack of authority."[7] [CR 13]

In addition to labeling their the affirmative defenses and their declaratory-judgment counterclaim as "lack of authority" in their answer, the Changs continued to treat their affirmative defenses and their declaratory-judgment action as the same claim in its other pretrial filings. For example, in their summary-judgment motion, the Changs address their "lack of authority" affirmative defense in the same section—with the same authority and evidence—as its "lack of authority" declaratory-judgment counterclaim, without distinguishing between the two. [2 Supp. CR ___, Appendix C] The heading for that section makes clear that they address both together:

Lack of Authority (Aff. Def. / Counterclaim)

[*Id.*]

The Changs never argued that their affirmative defenses or their counterclaim rely on different legal or factual arguments nor did they request different relief under either the defenses or the counterclaim. The pleading history is clear: the Changs did not request separate declaratory relief but merely repeated their affirmative defenses in their declaratory-judgment counterclaim.

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[7] The Changs also repeated their affirmative defenses of arbitrary and capricious enforcement and failure to provide notice in their declaratory-judgment action. For purposes of this appeal, however, GOMO does not challenge the trial court's rulings on those declaratory-judgment counterclaims.

Like the homeowner's claim in *Anderson*, the Changs's claim sought a declaratory judgment that GOMO lacked standing or capacity to enforce the deed restrictions. And like in *Anderson*, the Changs's counterclaim and affirmative defense involved the "same issues"—whether GOMO was properly formed—and "same parties"—the Changs and GOMO. The same result—dismissal of the declaratory-judgment counterclaim—should control. And similar to the property owner's declaratory-judgment counterclaim in *Texas Land and Cattle* that raised an issue that the trial court would have decided in determining the plaintiff's case in chief or the homeowner's declaratory-judgment action in *Tanglewood* that Justice Busby reasoned improperly duplicated other claims because it required determination of the same issues, the Changs's declaratory-judgment counterclaim required the same determination—whether GOMO was properly formed—as their affirmative defense. And the Changs's declaratory-judgment counterclaim should be subject to the same result and be dismissed under the mirror-image rule.

It is true that the Changs did not recover attorney's fees on their declaratory-judgment counterclaim. But this procedural history makes the Changs's motivation for repeating their affirmative defense as a declaratory-judgment counterclaim clear: they wanted to recover attorney's fees. Although the Changs originally could not cite any statutory provision entitling them to attorney's fees, after asserting the declaratory-judgment counterclaim, the Changs argued that they

were entitled "to recover reasonable and necessary attorney fees that are equitable and just under Texas Civil Practice & Remedies Code 37.009 because this is a suit for declaratory relief." [CR 17] In other words, the Changs had no reason to assert the declaratory-judgment action—they made the same argument verbatim in their affirmative defenses—except to recover attorney's fees. This is exactly the gamesmanship that the mirror-image rule seeks to prohibit.

At the trial court, the Changs cited *Indian Beach* to support their argument that they were actually seeking future relief to be freed from GOMO's restrictions. *See Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682, 697 (Tex. App.—Houston [1st Dist.] 2007, no pet.). That argument is flawed.

In *Indian Beach*, the homeowners association sued the homeowner and alleged that the homeowner "violated the deed restrictions by building [a chain-link] fence without the approval of the Architectural Control Committee." *Indian Beach*, 222 S.W.3d at 690. The homeowner's answer asserted that he did not violate either the deed restriction requiring pre-approval of his plans or the deed restriction containing a setback provision. *Id.* The homeowner also sought a declaratory judgment that his fence was in compliance with the deed restrictions "applicable" to his home generally. *Id.* *Indian Beach* held that the declaratory-judgment action was proper because it involved (1) "interpretation of deed restrictions" and (2) interpretation of the deed restrictions generally (not only those

that the homeowner's association alleged the homeowner violated), which affected the homeowner's obligations "in the future." *Id.* at 702.

Neither reason applies to the Changs's claim. First, the Changs did not request an interpretation of the deed restrictions. As the trial judge correctly noted, "a request that seeks interpretation of deed restrictions," is a proper inquiry for a declaratory-judgment counterclaim. [CR 324] But the trial court did not interpret anything. Nothing in its order interprets a provision of the homeowners restrictions. Nor did the Changs request the trial court to interpret any provision of the restrictions. The first *Indian Beach* rationale does not apply.

The second *Indian Beach* rationale does not fare any better. Unlike the homeowners in *Indian Beach*, who were sued for violating one part of the deed restrictions but requested a declaratory-judgment that their fence was in compliance with the deed restrictions generally, the Changs's declaratory-judgment counterclaim does not request any additional relief than its affirmative defense and repeats its affirmative defenses for reasons discussed earlier.

D. Because the declarations repeat the Changs's affirmative defenses, they should be reversed.

This court should reverse the trial court's judgment by deleting its declaratory-judgment findings relating to GOMO's authority, namely, declarations two through four. [CR 338]

The trial court's reasoning began by stating the law correctly. As it correctly noted, a declaratory-judgment action is proper when the defendant "seeks interpretation of deed restrictions . . . ." [CR 324] But that is not what the Changs sought. The trial court, by granting the Changs's counterclaim, did not interpret anything. Nothing in the final judgment clarifies any provision of the deed restrictions. Nothing whatsoever has been interpreted.

Instead, the trial court fell right into the Changs's trap. It decided the issue of GOMO's formation twice. First, it absolved the Changs of liability in the plaintiff's case under the affirmative defense. That should have been the end of the judgment. Instead, the trial court—again—decided that the Changs should win and granted a declaratory judgment saying the same thing—that the Changs win. The trial court later seemed to recognize that error—it refused to grant the Changs attorney's fees under the Declaratory Judgment Act—but that last-minute attempt to undo a wrong does not make its consideration of the declaratory-judgment counterclaim proper.

Because the Changs's declaratory-judgment counterclaim based on "lack of authority" repeats their affirmative defense of "lack of authority," GOMO requests that this court reverse the trial court's judgment by deleting its declaratory-judgment findings relating to GOMO's authority (declarations two through four).

II. Additionally, the declarations are erroneous on the merits.

The trial court erred by flipping the burden of proof on the Changs's declaratory-judgment claims. Because the Changs asserted the declaratory-judgment claims, they bore the burden of proof on those claims—as the trial court correctly noted. [CR 328] In other words, the Changs had the burden to provide evidence to support "their argument that GOMO did not satisfy statutory requirements" when it was formed. [*Id.*]

The trial court did not hold the Changs to that burden. After noting the appropriate standard of review, the trial court next recognized that it could not tell if GOMO met the statutory requirements, stating it was "mathematically possible" that GOMO qualified for the statutory procedure to create a property owner's association "[b]ut it is also mathematically possible" that it did not. [*Id.*]

The trial court was correct up to this point. Following its own reasoning—and Texas law—the next logical step is to deny the Changs's counterclaim: the evidence did not support a decision one way or the other and, therefore, the party with the burden of proof should lose on its claim.

Inexplicably, the trial court completely reversed course. Instead the trial court found that *GOMO* loses because the trial court could not tell whether GOMO qualified for the statutory procedures to create a homeowners association. So much for the Changs having the burden of proof.

A. The trial court erred in using its uncertainty as a reason to grant relief.

The Property Code provides a procedure for creating a property owner's association "[i]f existing restrictions applicable to a subdivision do not provide for a property owners' association and require approval of more than 60 percent of the owners to add to or modify the original dedicating instrument." Tex. Prop. Code Ann. § 204.006(b).[8] For GOMO to be eligible for the statutory procedure under

---

[8] The petition that created GOMO also met Section 204.006's requirement that the petition have a "sole purpose of creating and operating a property owners' association with mandatory membership, mandatory regular or special assessments, and equivalent voting rights." Tex. Prop. Code Ann. § 204.006. The trial court stated that the petition that created GOMO had two purposes: (1) "to form GOMO" and (2) "to create 'Transfer Assessments' that GOMO could collect from a buyer after the sale of a Garden Oaks lot." [CR 330] According to the trial court, because of that second purpose, the petition did not seek to modify the deed restrictions "for the sole purpose of creating and operating a property owners' association." [*Id.*]

But the trial court ignored the remaining text of Section 204.006. That Section allows a petition to provide for creation and operation of a property owners' association with "mandatory regular and special assessments . . . ." Tex. Prop. Code Ann. § 204.006(a). The petition forming GOMO complied with the statute by creating GOMO and establishing a procedure for "special assessments"—the transfer assessments the trial court refers to. That petition contains no purpose that Section 204.006 does not allow.

The trial court relied on *Gillebaard v. Bayview*, 263 S.W.3d 342 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) to reach its conclusion that the petition had more than one purpose. But *Gillebaard* is not applicable; in that case, the petition modified the deed restrictions to require that all property in the subdivision be used for single-family residential purposes. *Id.* at 345. A new restriction on the use of property is not applicable to a restriction—specifically allowed under Section 204.006—to create "mandatory regular or special assessments."

Section 204.006, therefore, Garden Oaks' restrictions had to have required approval of more than 60% of the property owners.[9]

The Garden Oaks restrictions provided for a procedure to "release all of the lots" or "any lot or building" from a restriction. [CR 328, 7 RR PX1] That procedure required "the owners of the legal title to the lots . . . having more than fifty per cent of the front footage of the lots" to vote to approve the modification to the deed restrictions. [*Id.*] The problem is that the statute imposes its requirements in terms of number of land owners, while the deed restrictions provide for a procedure based on the amount of land owned. The trial court had to compare apples to oranges.[10]

The trial court noted that the Changs did not provide any evidence to allow the trial court to determine whether 50% of the frontage is less than 60% of the property owners. Because the Changs sought a declaratory judgment that GOMO was not properly formed, they had the burden to prove that GOMO did not meet the statutory requirements under Section 204.006. *See Saba Zi Expl., L.P. v.*

---

9 The trial court, correctly, noted that the Changs did not meet their burden in showing that the Garden Oaks restrictions do not provide for a property owners' association. [CR 327–28] This finding is consistent with the restrictions themselves and the testimony at trial. [7 RR PX1, 4 RR 124]

10 For example, if 25% of the "front footage of the lots shown on plat of record" was common space and did not have a vote, and all of the other lots were divided equally, to reach 50% of the front footage of the lots to modify the restrictions, 80% of the homeowners would have to approve the modification. We, of course, do not know if this hypothetical is the actual case in Garden Oaks or not because the Changs did not present any evidence on the lot sizes in Garden Oaks.

Vaughn, 448 S.W.3d 123, 129 & n. 11 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (holding that party asserting counterclaim has burden of proof and discussing cases in which defendant had burden of proof on declaratory-judgment counterclaim). The absence of any evidence from which the trial court could determine whether the requirement that 50% of the frontage was greater than or less than 60% of the property owners demonstrates that the Changs did not meet their burden of proof.

The trial court, therefore, should have denied the Changs's declaratory-judgment counterclaim. Instead, it flipped the burden of proof on its head. The trial court said that, because it could not tell whether the restrictions required approval of more than 60% of the homeowners, it granted the Changs's declaratory-judgment counterclaim. The trial court should have done the opposite: the Changs failed to meet their burden of proof and so their declaratory-judgment counterclaim should have been denied.

The Changs also did not satisfy their burden of proof to support the trial court's finding that "GOMO's bylaws are not effective as a source of authority to enforce the deed restrictions." [CR 332] The trial court reached this conclusion because no evidence was presented "that GOMO filed its bylaws in the real property records of Harris County," which the trial court stated was necessary for the bylaws to be a source of authority for GOMO to enforce the deed restrictions. [CR 332]

But, again, the Changs did not present evidence to support this finding. At trial, the only witness to discuss whether the bylaws were filed with the real property records stated that he did not "have personal knowledge of" and was "not sure" whether the bylaws were filed or not. [4 RR 122, 131] This does not constitute proof that the bylaws were not filed.

The Changs did not uphold their burden of proof and, therefore, their declaratory-judgment counterclaim should have been denied. The trial court erred in flipping the burden and issuing the declarations.

B. If the restrictions do not provide for modifications, the trial court further erred in finding that GOMO did not comply with Section 204.006.

GOMO believes that the restrictions create a modification procedure, as discussed in the previous section. But whether the restrictions provide for modification or not, GOMO was eligible for creation under the procedures in Section 204.006.

Section 204.006 does not state how to form a property owner's association if the restrictions do not provide for a modification procedure. Under Section 204.006, if the deed restrictions provide for an amendment procedure requiring less than 60% of the homeowners to vote to amend the restrictions, the homeowners can modify the deed restrictions through the procedure set up in the restrictions. *See* Tex. Prop. Code Ann. § 204.006. If the deed restrictions require more than

60% of the homeowners to approve a modification, the procedure in Section 204.006 applies. *Id.* But Section 204.006 does not state what to do if the restrictions do not provide for a modification procedure.

Two reasons compel a reading that Section 204 allows a neighborhood without a modification procedure in its deed restrictions to use the Section 204.006 procedure to create a property owner's association. First, the default rule under that Chapter states the Chapter applies when restrictions do not provide for modification; Section 204.003(d) states that if the restrictions "do[] not provide for modification or amendment of restrictions," the restrictions may be amended under Section 204. Tex. Prop. Code Ann. § 204.003(d).

This general rule was included to give effect to the Legislature's policy that property owner's associations would be formed in the "large number of . . . communities"—especially "[i]n Houston"—that "are subjected to restrictive covenants which are extremely difficult, if not impossible, to amend or modify." House Land & Res. Mgmt. Comm., Bill Analysis, Tex. H.B. 2152, 74th Leg., R.S. (1995). To address this concern, the Legislature created Section 204 to "provide a less burdensome procedure for . . . modifying residential real estate restrictions by approval and circulation of a petition by a property owners' association . . . ." *Id.*

Section 204.006, therefore, should be read in context of the Legislature's favorable view of property owner's associations and its larger aim, codified in

Section 204.003, to allow easier modification of deed restrictions. Looking against this backdrop, Section 204.006 allows a neighborhood without a modification procedure in its deed restrictions to create a property owner's association under that Section's procedures.

Second, if deed restrictions do not have a modification procedure, the common law creates an implied term of the restrictions that it takes 100% of the homeowners to modify the deed restrictions, thereby satisfying Section 204.006's requirement that over 60% of the homeowners must be required to approve the modification. *See Indian Beach*, 222 S.W.3d at 697; *Truong v. City of Houston*, 99 S.W.3d 204, 214 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Farmer v. Thompson*, 289 S.W.2d 351, 355 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.). Statutes are to be read in the context of the background common law rule at the time the statute is passed. Tex. Gov't Code § 311.023(4) ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the . . . common law or former statutory provisions, including laws on the same or similar subjects."); *see Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 229 (Tex. 2010) (construing statute in light of common law); *cf.* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012) ("A statute will be construed to alter the common law only when that disposition is clear.").

Texas common law provides a default rule that, if the restrictions do not provide a modification procedure, all of the homeowners have to agree to modify the restrictions. *Indian Beach*, 222 S.W.3d at 697; *Truong*, 99 S.W.3d at 214; *Farmer*, 289 S.W.2d at 355. If the restrictions are read as not having a modification procedure, therefore, they must be read in conjunction with that common law rule and be read to require 100% of the homeowners to approve the modification. With that reading of the restrictions, Garden Oaks would qualify for the Section 204.006 procedure because the deed restrictions require the approval of 100%—more than 60%—of the homeowners.

Whether the restrictions provide a modification procedure or not, the result is the same: Garden Oaks qualifies to use Section 204.006 to create a property owner's association. The trial court's conclusion to the contrary is, therefore, legally incorrect.

C. GOMO has authority to enforce the deed restrictions under Section 202.004.

Regardless of whether GOMO was properly formed under Section 204, GOMO had authority and standing to enforce the deed restrictions under Section 202 of the Property Code. Section 202.004 allows a homeowner's association—as defined under that Section—to bring a lawsuit to enforce the deed restrictions as the representative of other homeowners.

GOMO meets the statutory definition of a property owner's association. Section 202.001 defines a property owner's association as:

> [A]n incorporated or unincorporated association owned by or whose members consist primarily of the owners of the property covered by the dedicatory instrument and through which the owners, or the board of directors or similar governing body, manage or regulate the residential subdivision, planned unit development, condominium or townhouse regime, or similar planned development.

Tex. Prop. Code Ann. § 202.001(2).

GOMO meets each of these requirements. GOMO is a nonprofit association. [7 RR Plaintiff's Ex. 10] Its members consist of the property owners in Garden Oaks. [*Id.*] And the property owners manage or regulate the subdivision through GOMO. [*Id.*] GOMO, therefore, meets Section 202.001's definition of a property owner's association.

A property owner's association, as defined under Section 202.001, can "sue in its representative capacity to enforce deed restrictions" under Section 202.004 of the Property Code. *Anderson v. New Prop. Owners' Ass'n of Newport, Inc.*, 122 S.W.3d 378, 388 (Tex. App.—Texarkana 2003, pet. denied); *see* Tex. Prop. Code Ann. § 202.004(b) ("A property owners' association or other representative designated by an owner of real property may initiate, defend, or intervene in litigation . . . affecting the enforcement of a restrictive covenant . . . ."); *Musgrave v. Brookhaven Lake Prop. Owners Ass'n*, 990 S.W.2d 386, 394 (Tex. App.—Texarkana 1999, pet. denied) ("The Property Code confers *capacity* to sue on a

property owners' association on behalf of its members."). Thus, "even if a homeowners' association did not exist, any one or any combination of the homeowners in the development could have sued . . . to enforce the restrictive covenants." *Shah v. Anderson*, No. 05-99-00392-CV, 2000 WL 146715, at *3 (Tex. App.—Dallas Feb. 11, 2000, no pet.) (mem. op., not designated for publication). Thus, because "the homeowners are the real parties in interest," the homeowners can "simply us[e] the association as their representative to bring suit." *Id.*

Even taking the Changs's argument at its best—that GOMO was not properly formed under Section 204—GOMO still had "standing" and "authority" to sue the Changs as a representative of the Garden Oaks' homeowners to enforce the deed restrictions under Section 202.

CONCLUSION & PRAYER FOR RELIEF

The Changs's declaratory-judgment counterclaim was improper for several reasons. The declaratory-judgment counterclaim was a mirror image—down to the exact wording—of the Changs's affirmative defense. It should never have been allowed to move forward. And the trial court was wrong on the merits—it unexplainably shifted the burden of proof to GOMO and applied the Property Code incorrectly. For these reasons, GOMO respectfully requests that this court **REVERSE** the trial court's declarations 2–4 and **RENDER** judgment removing those declarations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2016, a true and correct copy of the foregoing Brief of Appellant was served on all counsel of record via efiling, as follows:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4 because it contains 6,381 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(2)(B).

2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

Dated: November 7, 2016.

/s/ David M. Gunn
David M. Gunn
Counsel for Appellant

No. 14-16-00537-CV

IN THE FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS

GARDEN OAKS MAINTENANCE ORGANIZATION,
***Appellant*,**
v.
PETER S. CHANG AND KATHERINE M. CHANG,
***Appellees*.**

Appeal from the 269th District Court, Harris County, Texas
Hon. Dan Hinde, Presiding

APPENDIX TO BRIEF OF APPELLANT

TAB

A	Changs's Original Answer [2 Supp. CR __]
B	Changs's Amended Answer and Declaratory-Judgment Counterclaim [CR 9-20]
C	Changs's Motion for Summary Judgment [2 Supp. CR __]
D	Order on Changs's Motion for Declaratory Relief and for Final Judgment [CR 319-36]
E	Trial Court's Final Judgment [CR 337-38]

Filed 13 January 29 P5:17
Chris Daniel - District Clerk
Harris County
ED101J017297982
By: Wanda Chambers

TAB A

CAUSE NO. 2012-72213

GARDEN OAKS MAINTENANCE ORGANIZATION	§	IN THE DISTRICT COURT
	§	
	§	
V.	§	OF HARRIS COUNTY, TEXAS
	§	
PETER S. CHANG, ET AL	§	269TH JUDICIAL DISTRICT

DEFENDANT'S ORIGINAL ANSWER, PLEA TO THE JURISDICTION & REQUEST FOR DISCLOSURE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendants **PETER S. CHANG** and **KATHERINE M. CHANG,** and file this original answer to Plaintiff **GARDEN OAKS MAINTENANCE ORGANIZATION**'s live pleading.

A. GENERAL DENIAL

1. Defendant generally denies the allegations in Plaintiff's live pleading.

B. PLEA TO THE JURISDICTION

2. Defendant asks the court to dismiss Plaintiff's suit because of lack of standing, and thus lack of jurisdiction.

C. VERIFIED PLEAS

3. Defendants deny Plaintiff's allegation that all conditions precedent have been performed or have occurred. Specifically, Plaintiff has not complied with the notice provisions of Tex. Prop. Code § 209.
4. Defendant denies that Plaintiff has standing to sue Defendants.
5. Defendant denies that Plaintiff has the legal capacity to sue Defendants.
6. Defendant denies that Plaintiff has the legal or contractual authority to sue Defendants.

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7. Defendant denies plaintiff's allegation that plaintiff gave notice and proof of plaintiff's claim.

D. AFFIRMATIVE DEFENSES

8. Defendants assert the following affirmative defenses:

   a. Lack of Standing;

   b. Failure to Provide Proper Notice;

   c. Unclean Hands;

   d. Abandonment of Restrictive Covenant(s);

   e. Waiver of Restrictive Covenant(s);

   f. Lack of Authority;

   g. Restrictive Covenants are Vague and Ambiguous;

   h. Violations (if any) are Not Substantial;

   i. Restrictive Covenants are Not Enforceable / Have no Force and Effect;

   j. Plaintiff's enforcement of the Association's Restrictive Covenants is arbitrary, capricious and/or discriminatory;

   k. Defendant further pleads that statutory damages under § 202.004(c), to the extent even applicable, are limited in amount. *See* Tex. Prac. Rem. Code § 41.001, *et seq.*; Tex. Const. Art. I, §13, 15, 19.

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E. ATTORNEY FEES

9. Defendant is entitled to recover reasonable and necessary attorney fees pursuant to

F. REQUEST FOR DISCLOSURE

10. Under Texas Rule of Civil Procedure 194, Defendant requests that Plaintiff disclose, within 30 days of the service of this request, the information or material described in Rule 194.2.

G. JURY DEMAND

11. Defendant demands a jury trial and tenders the appropriate fee with the answer.

H. PRAYER

12. For these reasons, Defendant asks the court to dismiss this suit or render judgment that Plaintiff take nothing, assess costs against Plaintiff, and award all other relief to which Defendant is entitled.

Respectfully submitted,

LAMBRIGHT & ASSOCIATES

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ATTORNEYS FOR PETER S. CHANG AND KATHERINE M. CHANG

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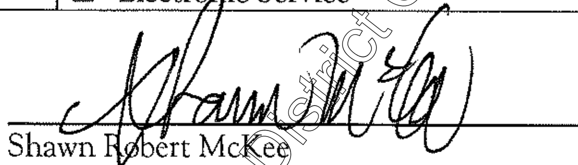
CERTIFICATE OF SERVICE

I hereby certify that on January 29th 2013, a true and correct copy of the foregoing instrument was served upon the following in accordance with Rule 21a of the Texas Rules of Civil Procedure:

W. Austin Barsalou 4635 Southwest Freeway, Suite 580 Houston, TX 77027 (713) 650-8745 (fax)	☐ Courier ☑ CMRRR ☑ Regular Mail ☐ Facsimile ☐ Electronic Service



Shawn Robert McKee

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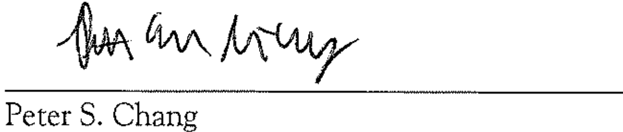
VERIFICATION

STATE OF TEXAS §
§
HARRIS COUNTY §

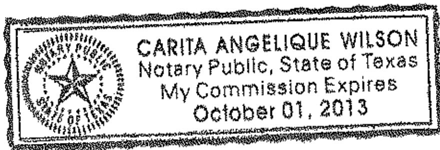
Before me, the undersigned notary, on this day personally appeared Peter S. Chang, the affiant, a person whose identity is known to me. After I administered an oath to affiant, affiant testified:

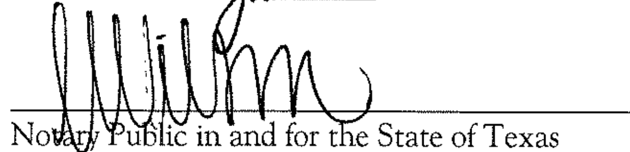
"My name is Peter S. Chang. I am capable of making this verification. I have read Defendant's Original Answer, Section C, Verified Pleas. The facts stated in it are within my personal knowledge and are true and correct."



Peter S. Chang

Sworn to and subscribed before me by Peter S. Chang on Jan 29, 2013.





Notary Public in and for the State of Texas

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By: Shanelle Taylor

TAB B

CAUSE NO. 2012-72213

GARDEN OAKS MAINTENANCE ORGANIZATION	§	IN THE DISTRICT COURT
	§	
	§	
V.	§	OF HARRIS COUNTY, TEXAS
	§	
PETER S. CHANG, ET AL	§	269TH JUDICIAL DISTRICT

DEFENDANT'S 1st AMENDED ANSWER AND COUNTERCLAIM AND PLEA TO THE JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendants **PETER S. CHANG** and **KATHERINE M. CHANG,** and file this 1st amended answer, counterclaim and plead to the jurisdiction to Plaintiff **GARDEN OAKS MAINTENANCE ORGANIZATION**'s live pleading.

A. GENERAL DENIAL

1. Defendant generally denies the allegations in Plaintiff's live pleading.

B. PLEA TO THE JURISDICTION

2. Defendant asks the court to dismiss Plaintiff's suit because of lack of standing, and thus lack of jurisdiction.

C. VERIFIED PLEAS

3. Defendants deny Plaintiff's allegation that all conditions precedent have been performed or have occurred. Specifically:

   a. Plaintiff has not complied with the notice provisions of Tex. Prop. Code § 209.006

   b. Plaintiff has not complied with the notice provisions of Tex. Prop. Code § 209.008

4. Defendant denies that Plaintiff has standing to sue Defendants.

5. Defendant denies that Plaintiff has the legal capacity to sue Defendants.

6. Defendant denies that Plaintiff has the legal or contractual authority to sue Defendants.

7. Defendant denies plaintiff's allegation that plaintiff gave notice and proof of plaintiff's claim.

D. AFFIRMATIVE DEFENSES

8. Defendants assert the following affirmative defenses:

   a. Lack of Standing;

   b. Failure to Provide Proper Notice;

   c. Unclean Hands;

   d. Abandonment of Restrictive Covenant(s);

   e. Waiver of Restrictive Covenant(s);

   f. Lack of Authority;

   g. Restrictive Covenants are Vague and Ambiguous;

   h. Violations (if any) are Not Substantial;

   i. Restrictive Covenants are Not Enforceable / Have no Force and Effect;

   j. Plaintiff's enforcement of the Association's Restrictive Covenants is arbitrary, capricious and/or discriminatory;

   k. Defendant further pleads that statutory damages under § 202.004(c), to the extent even applicable, are limited in amount. *See* Tex. Prac. Rem. Code § 41.001, *et seq.*; Tex. Const. Art. I, §13, 15, 19.

E. COUNTERCLAIMS

9. Counter-Plaintiffs are **PETER S. CHANG** and **KATHERINE CHANG**. Counter-Defendant is **GARDEN OAKS MAINTENANCE ORGANIZATION.**

Claim for Declaratory Relief

10. The purpose of the Declaratory Judgment Act is to settle and to provide relief from uncertainty and insecurity surrounding the rights, status, and other legal relations of parties.[1] Texas courts have held that it shall be liberally construed and administered.[2]

11. Nor is the Declaratory Judgments Act limited to strict declarations regarding rights under written instruments and statutes. The Declaratory Judgment Act applies wherever a justiciable controversy exists as provided above, provided that declaratory relief can serve to settle all or part of the dispute and end all or a part of the controversy.

12. The burden of proof in declaratory judgment actions rests with the party seeking affirmative relief. If this party is the Defendant, the court will ignore the formal position of the parties.[3]

13. Declaratory relief is appropriate to interpret a written document or agreement. The Tex. Civ. Prac. & Rem Code § 37.004 reads, in part:

> *Sec. 37.004. SUBJECT MATTER OF RELIEF.*
>
> *(a) A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.*
>
> *(b) A contract may be construed either before or after there has been a breach.*

---

[1]*See Bright v. Addison*, 171 S.W.3d 588, 606 (Tex. App.—Dallas 2005, pet. denied) (declaratory judgment clarified parties' rights under agreements); *Bexar Metro. Water v. City of Bulverde*, 156 S.W.3d 79, 88–89 (Tex. App.—Austin 2005, pet. denied) (declaratory judgments are intended to determine rights of parties when controversy has arisen, before any wrong has actually been committed, and are preventative in nature).

[2] Tex. Civ. Prac. & Rem. Code § 37.002(b).

[3] *Pace Corp. v. Jackson*, 155 Tex. 179, 284 S.W.2d 340, 350 (1955); *Ross v. American Radiator & Standard San. Corp*, 507 S.W.2d 806, 810 (Civ. App.—Dallas 1974, ref. n.r.e.).

Failure to Provide Proper Notice

14. Tex. Prop. Code § 209.006[4] reads:

> *Sec. 209.006. NOTICE REQUIRED BEFORE ENFORCEMENT ACTION.*
>
> *(a) Before a property owners' association may suspend an owner's right to use a common area, file a suit against an owner other than a suit to collect a regular or special assessment or foreclose under an association's lien, charge an owner for property damage, or levy a fine for a violation of the restrictions or bylaws or rules of the association, the association or its agent must give written notice to the owner by certified mail, return receipt requested.*
>
> *(b) The notice must:*
>
> > *(1) describe the violation or property damage that is the basis for the suspension action, charge, or fine and state any amount due the association from the owner; and*
> >
> > *(2) inform the owner that the owner:*
> >
> > > *(A) is entitled to a reasonable period to cure the violation and avoid the fine or suspension unless the owner was given notice and a reasonable opportunity to cure a similar violation within the preceding six months; and*
> > >
> > > *(B) may request a hearing under Section 209.007 on or before the 30th day after the date the owner receives the notice.*

15. In the present case, Plaintiff's pre-suit correspondence to Defendants (and Plaintiff's Original Petition) alleged that Defendants had built a "four car garage", a statement which is patently false. Defendants sought clarification on this point via requests for Admissions, and Plaintiffs confirmed that it had filed a lawsuit based on Defendants' alleged "four car garage". It was not until January, 2013 that Plaintiff modified its petition to allege that Defendants had built "two two-car garages". No certified, written pre-suit

---

[4] Unless otherwise noted, all statute text quoted or referenced within this brief is the text as it appeared in September, 2010, when the Plaintiff's Original Petition was filed.
Source: http://www.statutes.legis.state.tx.us/statutesbydate.aspx

notice was provided to Defendants which accurately "describe[s] the violation" as required by § 209.006(b)(1).

16. Consequently, Defendants seek a declaration from this Court that Plaintiff's suit is moot and must be dismissed because Plaintiffs have failed to meet the mandatory pre-suit requirements of 209.006(a).

Lack of Authority

17. Plaintiff purports to have authority to enforce the covenants, conditions and restrictions for the Garden Oaks subdivision. Plaintiff alleges that this authority stems from the alleged "amendment" of the existing Garden Oaks CCRS filed for record in 2002, ostensibly pursuant to § 201 and § 204 of the Texas Property Code. However, Plaintiff has not met the requirements of those sections. Specifically, § 204.006(a)(1) of the Property Code requires that "a petition committee [must be] formed as prescribed by Section 201.005". However, Section 201.005(f) of the Texas Property Code provides that:

> (f) After August 31, 1989, only one committee in a subdivision may file to operate under this chapter at one time. [...] A committee that does not effect a successful petition within the time provided by this chapter is dissolved by operation of law. Except as provided by Section 201.006(c), **a new committee for that subdivision may not be validly created under this chapter before the fifth anniversary of the date of dissolution of the previous committee**. A petition circulated by a dissolved committee is ineffective for any of the purposes of this chapter. (emphasis added)

18. It is undisputed that a petition committee was formed on May, 2000 to attempt to effect the same changes which Plaintiff purports to have made effective in 2002. The 2000 attempt was unsuccessful, and the committee was dissolved by operation of law.

However, the second petition committee that filed the alleged "amendment" relied upon by Plaintiff was formed in July 2001, only one (1) month after the previous committee had been dissolved. The statute expressly provides that any committee formed before the fifth anniversary of the dissolution of the prior committee is not valid, and any petitions or documents purported to be created by said committee are "ineffective."

19. When asked for the source of the Plaintiff's alleged ability to enforce deed restrictions, Plaintiff's corporate representative and board president testified as follows[5]:

66
12 Q. But where does the organization get the
13 authority? [to enforce deed restrictions]

22 [...] we have the authority that's both given by the
23 property code and by the approval of the folks who live
24 in the neighborhood to use their money for that
25 mechanism.

67
1 Q. Okay. So it's not in the documents on file
2 with the real property records of Harris County is what
3 you're telling me? There is no document that says here
4 is something that vests in GOMO the authority to enforce
5 deed restrictions. Is that true or not true?
6 A. No, that's not true.
7 Q. What document --
8 A. The, the notice of formation that we filed and
9 the subsequent amendment that is recorded is what gives
10 us the ability to do that.
11 Q. Where in that document does it say you have the
12 authority to enforce deed restrictions?
13 A. I -- which document, the amendment?
14 Q. Whatever document you're referring to that
15 gives you -- you said that gives you authority.
16 A. Exhibit A, Section 6 of the amendment gives us
17 the ability to implement bylaws. The organization is
18 authorized to adopt bylaws to implement the operation of

[5] Deposition of Tim Weltin, (Pages 66:12 to 67:25)

19 the organization.
20 Q. Bylaws I get. That's the organizational --
21 that's a hierarchy thing. Where is deed restriction
22 enforcement?
23 A. That's defined in our bylaws. So this, this
24 incorporates our bylaws in this amendment and our bylaws
25 allow for the enforcement of deed restrictions.

20. So, according to Plaintiff's own sworn testimony, the Plaintiff's authority comes from (1) the Petition / Amendment, and/or from (2) the By-Laws. However, for the reasons stated above, the Petition and its Amendment are invalid and unenforceable, and pursuant to Plaintiff's own management certificate, Plaintiff's By-Laws are not on file with the Real Property Records of Harris County, thus rendering them "of no force and effect". Texas Property Code § 202.006 provides that:

> Sec. 202.006. PUBLIC RECORDS. (a) A property owners' association shall file all dedicatory instruments in the real property records of each county in which the property to which the dedicatory instruments relate is located. (b)A dedicatory instrument has no effect until the instrument is filed in accordance with this section.

21. For these reasons, Defendants seek a declaration by this Court that (1) the 2002 petition was invalid and ineffective; (2) the 2002 Amendment was invalid and ineffective; (3) Plaintiff has no authority or standing to pursue any legal action against Defendants; (4) the By-Laws of "Garden Oaks Maintenance Organization" have no force and effect; and (4) Plaintiff's suit must be dismissed for lack of standing and lack of authority.

Arbitrary & Capricious Enforcement

22. Notwithstanding Plaintiff's lack of authority and standing, to the extent that this Court finds that Plaintiff does have the ability to enforce deed restrictions, Plaintiff's enforcement of same against Defendants has been arbitrary and capricious. Plaintiff's

representative has testified, under oath, that Plaintiff (1) made no specific deed enforcement inspections of Defendants' home or street prior to the construction of Defendants' home;[6] (2) that Plaintiff made no specific deed enforcement inspections of Defendants' home or street subsequent to filing this suit, until required to do so by this Court[7]; and (3) that Plaintiff singled out Defendants for "unique" enforcement and suit from among the fifteen (15) similar violations on Defendants' street, alone.[8]

23. For these reasons, Defendants seek a declaration by this Court that Plaintiff's enforcement was arbitrary, capricious and/or discriminatory as a matter of law, and thus ineffective with regards to Defendants.

---

[6] Tim Weltin, (Pages 102:25 to 103:5)

102
25 Prior to filing a lawsuit against my clients no
103
1 one on behalf of Garden Oaks Maintenance Organization
2 drove up and down his block of Sue Barnett and made a
3 count of the number of violations of homes with more
4 than two cars of garages, did they?
5 A. No one made that specific mission, no.

[7] Tim Weltin, (Page 103:6 to 103:13)
103
6 Q. And, in fact, no one since has gone back and
7 made any attempt whatsoever to verify the number of more
8 than two-car garages on Mr. Chang's block out of the 25
9 houses, have they?
10 A. We did in response to discovery in this lawsuit

[8] Tim Weltin, (Pages 103:25 to 104:5)
103
25 out of the 15 people in violation of the deed
104
1 restriction you're suing my client for on his block he's
2 the only one that Garden Oaks Maintenance Association is
3 suing for this violation, correct?
4 A. His specific history is unique and we are
5 engaged in litigation based on his unique circumstances.

E. ATTORNEY FEES

24. Plaintiff is entitled to recover reasonable and necessary attorney fees that are equitable and just under Texas Civil Practice & Remedies Code section 37.009 because this is a suit for declaratory relief.

F. REQUEST FOR DISCLOSURE

25. Under Texas Rule of Civil Procedure 194, Defendant requests that Plaintiff disclose, within 30 days of the service of this request, the information or material described in Rule 194.2.

G. JURY DEMAND

26. Defendant demands a jury trial and tenders the appropriate fee with the answer.

H. PRAYER

27. For these reasons, Defendant asks the court to dismiss this suit or render judgment that Plaintiff take nothing, assess costs against Plaintiff, and award all other relief to which Defendant is entitled.

Respectfully submitted,

LAMBRIGHT & ASSOCIATES

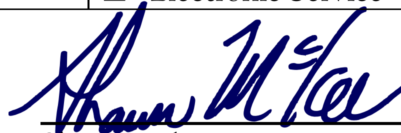
Casey Jon Lambright
State Bar No. 00794136
Andrew Mihalick
State Bar No. 24046439
Shawn Robert McKee
State Bar No. 24049403
2603 Augusta, Suite 1100
Houston, Texas 77057
(713) 840-1515
(713) 840-1521 (FAX)

ATTORNEYS FOR PETER S. CHANG AND KATHERINE M. CHANG

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2014, a true and correct copy of the foregoing instrument was served upon the following in accordance with Rule 21a of the Texas Rules of Civil Procedure:

W. Austin Barsalou 4635 Southwest Freeway, Suite 580 Houston, TX 77027 (713) 650-8745 (fax)	☐ Courier ✓ CMRRR ✓ Regular Mail ☐ Facsimile ☐ Electronic Service



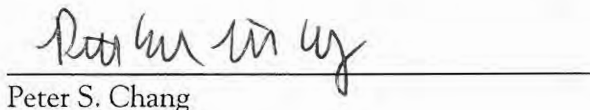
Shawn Robert McKee

<u>**VERIFICATION**</u>

STATE OF TEXAS §
§
HARRIS COUNTY §

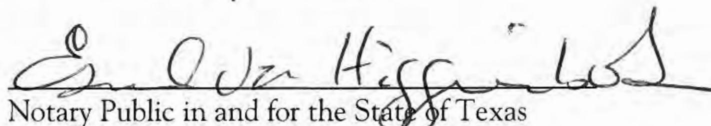
Before me, the undersigned notary, on this day personally appeared Peter S. Chang, the affiant, a person whose identity is known to me. After I administered an oath to affiant, affiant testified:

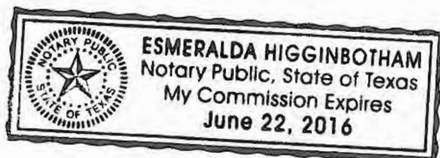
"My name is Peter S. Chang. I am capable of making this verification. I have read Defendant's 1st Amended Answer, Section C, Verified Pleas. The facts stated in it are within my personal knowledge and are true and correct."



Peter S. Chang

Sworn to and subscribed before me by Peter S. Chang on April 18, 2014.





Notary Public in and for the State of Texas

My commission expires: 06/22/2016

10/3/2014 4:30:22 PM
Chris Daniel - District Clerk Harris County
Envelope No. 2720110
By: GAYLE FULLER
Filed: 10/3/2014 4:30:22 PM

TAB C

CAUSE NO. 2012-72213

GARDEN OAKS MAINTENANCE ORGANIZATION	§ §	IN THE DISTRICT COURT
	§	
V.	§	OF HARRIS COUNTY, TEXAS
	§	
PETER S. CHANG, ET AL	§	269TH JUDICIAL DISTRICT

EMERGENCY MOTION FOR LEAVE OF SPECIAL SETTING AND DEFENDANTS' HYBRID MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **PETER S. CHANG AND KATHERINE M. CHANG**, Defendants, and file this Hybrid Motion for Summary Judgment, and would respectfully show unto the Court the following:

I. INTRODUCTION

1. Defendants **PETER S. CHANG AND KATHERINE M. CHANG,** individuals residing in Houston, Harris County, Texas, and owners of the property made the basis of this suit, located at 1326 Sue Barnett Dr., Houston, TX 77018 ("the Property").
2. Defendants attach Affidavits to this motion as Exhibits "A" and "L" to establish facts not apparent from the record and incorporate them by reference.

II. FACTS

3. Defendants built the home at 1326 Sue Barnett in 2008. The home is over six thousand square feet, and boasts a detached out-building with an automatic rolling door installed on its southern-most wall.
4. On the Western most wall of Defendants' home is another automatic rolling door, which opens to an interior room within the footprint of the home as approved by the Association.

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5. Plaintiffs have based their suit on the proposition that the addition of this second automatic rolling door "detracts from the appearance of the Subdivision and lowers property values in the Subdivision." However, Defendants' home expressly complies with the requirements of the Covenants, as written.

6. Attached hereto as Exhibit "B" are a series of pictures of Defendants' home, as seen from the street. From no vantage point on the street is the Western facing automatically rolling door even visible. Further, Plaintiff's argument regarding property values is utterly specious. Attached hereto as Exhibit "C" is a print-out from the Harris County Appraisal District website of every home within Garden Oaks, Section 3. Defendant's home (highlighted) has been appraised as the most valuable home in the subdivision, by a substantial amount.

III. ARGUMENTS & AUTHORITIES

Summary Judgment Evidence

7. This Hybrid Motion for Summary Judgment depends upon the following proof:

Exhibit A	Affidavit of Shawn R. McKee
Exhibit B	Pictures of 1326 Sue Barnett[1]
Exhibit C	HCAD Printout (Garden Oaks Sec. 3)[2]
Exhibit D	Covenants, Conditions and Restrictions of Sec. 3[3]
Exhibit E	Deposition of Tim Weltin (excerpts)
Exhibit F	Section 3 Map with Photographs[4]
Exhibit G	Deed Letter[5]
Exhibit H	Plaintiff's Responses to Requests for Admissions
Exhibit I	Amendment to Deed Restrictions[6]
Exhibit J	Management Certificate[7]
Exhibit K	Plaintiff's Responses to Interrogatories
Exhibit L	Attorney Fee Affidavit

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---

[1] Admitted into evidence as Exhibit 3A-3L to the Deposition of Tim Weltin. (*See Exhibit* "E")
[2] Attached to and proven up by Exhibit "A".
[3] Produced by Plaintiff in response to Requests for Production.
[4] Admitted into evidence as Exhibits 11 – 21, 24-29 to the Deposition of Tim Weltin. (*See Exhibit* "E")
[5] Produced by Plaintiff in response to Requests for Production.
[6] Produced by Plaintiff in response to Requests for Production.
[7] Produced by Plaintiff in response to Requests for Production.

IV. TRADITIONAL SUMMARY JUDGMENT

8. Defendants seek an order from this Court granting Defendants' declaratory relief, and granting summary judgment against Plaintiff on Defendant's affirmative defenses as described herein below.

9. When a defendant moves for summary judgment on its counterclaim, it is in the same position as a plaintiff moving for summary judgment on the plaintiff's claim.[8] Thus, a defendant is entitled to summary judgment if it proves all essential elements of its claim as a matter of law[9]. Defendant must show there are no genuine issues of material fact.[10]

10. A Defendant who moves for summary judgment on an affirmative defense is entitled to summary judgment if it proves all essential elements of its defense as a matter of law[11]. Defendant must show there are no genuine issues of material fact[12].

Waiver (Aff. Def.)

11. Even assuming Plaintiff has the authority to enforce deed restrictions, and that the deed restrictions were written differently to prevent rolling doors integrated into a single family dwelling, Plaintiff has waived its right to enforce any restrictions against Defendants regarding garages.

12. The Covenants, Conditions and Restrictions for Garden Oaks, Section 3 read, in part[13]:

> *(b) All lots in the tract shall be known and described as residential lots, and no structure shall be erected on any residential building plot other than one detached single-family dwelling not to exceed two stories in height and a one or two car garage. (c) No structure shall be moved*

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[8] *See Texas Commerce Bank v. Correa*, 28 S.W.3d 723, 726 (Tex. App.—Corpus Christi 2000, pet. denied).
[9] *Id.*; *see MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986)
[10] Tex. R. Civ. P. 166a(c); *MMP, Ltd.*, 710 S.W.2d at 60.
[11] *Long Distance Int'l, Inc. v. Teléfonos de México, S.A.*, 49 S.W.3d 347, 350-51 (Tex. 2001); *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *Johnson & Johnson Med., Inc. v. Sanchez*, 924 S.W.2d 925, 927 (Tex. 1996)
[12] Tex. R. Civ. P. 166a(c)
[13] *See* Exhibit "D", Covenants, Conditions and Restrictions of Garden Oaks, Section 3, p. 3, lines 20-25.

onto any lot. (d) No trailer, basement, tent, shack, garage, barn or other outbuilding erected in the tract shall at any time be used as a residence, nor shall any residence of a temporary character be permitted.

13. Because the Covenants do not specifically define "garage" or expressly prohibit multiple garages, or garages integrated into a single family dwelling, Plaintiff has created its own *ad hoc* definition and enforcement scheme for the subdivision. Unfortunately, Plaintiff's application of its own restrictions is protean, at best.

14. At deposition, Plaintiff initially interpreted this section to mean that no homes within Section Three (3) of the Association may have any capacity to house more than two cars[14].

Tim Weltin, (Page 14:16 to 14:21)

14
16 Q. Okay. So is it my understanding of what you're
17 saying is that there -- it is a violation of Garden Oaks
18 Section 3 restrictions to have a structure or structures
19 on a particular property in Garden Oaks Section 3
20 capable of housing four cars?
21 A. It is.

15. However, later in the same deposition, when discussing the corporate representative's own garage, Plaintiff's representative expressly contradicted his prior statement with regards to garage capacity[15]:

Tim Weltin, (Pages 141:24 to 145:11)

141
24 Q. Well, without looking at the design based on
25 your definition if somebody had a garage that is wide

142
1 enough for two cars to pull in --
2 A. Right.
3 Q. -- but it's deep enough for two cars to pull

[14] Exhibit "E", Deposition of Tim Weltin, (Pages 14:16 to 14:21)
[15] Exhibit "E", Deposition of Tim Weltin, (Pages 141:24 to 145:11)

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4 in, so four cars could fit inside of that structure --
5 A. Yeah.
6 Q. -- that is in violation of the deed
7 restrictions, isn't it?
8 A. It's a two-car garage -- a garage is a garage
9 by definition of how many cars that you can pull into
10 it. If there were a garage that had a work space
11 attached to it that you could then turn another car and
12 fit it in there, by your definition that would be a
13 three-car garage. It's not. It's a two-car garage
14 because you can actually pull two cars into it. That's
15 the classic definition of a garage space. Again, I'd
16 have to see these set of plans, but just because there
17 is additional space within a garage for other uses
18 doesn't make it -- doesn't change whether or not it's --
19 same way with if it were a narrowly built garage that
20 was very, very deep and it was one car that could go in
21 at a time, but you could park several in a row, that
22 still would be a one-car garage because that's the
23 definition of a garage.
24 Q. Where are you drawing this, quote, classical
25 definition or definition of garage? What dictionary,

143

1 what Thesaurus, what Google maps, where are we getting
2 that definition from?
3 A. We often look up in the dictionary the plain
4 language definitions with regard to when things are to
5 be defined. So we could look it up now, I guess. I
6 don't know. I mean I -- I think there is a common sense
7 definition of what a garage is, but we do actually
8 consult a dictionary on occasion.
9 Q. I thought a garage was a building capable of
10 holding a certain number of vehicles, however many
11 vehicles it can hold, that would -- how big of a garage
12 it is. That was kind of what I got from you earlier.
13 If it's, if it's wide enough where you can --
14 A. If you're going to park --
15 Q. -- roll in two cars?
16 A. If you can pull in two cars, it would be a
17 two-car garage. If you can pull in three, I mean
18 it's --
19 Q. But width alone isn't the only thing that
20 measures it. If you can pull forward so you have two
21 rows of two cars, that's a four-car garage, isn't it?

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22 A. No. Again, garages can be designed so that
23 there is additional capacity. It would not be a
24 three-car garage if you could pull in a car and then
25 turn in front so that you have perpendicular cars

144

1 parked.
2 Q. Well, what if it was straight, you just pulled
3 straight, two rows of two cars. Let's talk about this
4 theoretically and generally. Let's draw it out. You
5 have -- if I was any good at drawing, I would have done
6 something else for a living. That isn't obviously going
7 to work. All right. Let's start with a document I have
8 labeled Exhibit 31. This is going to be example number
9 one.
10 (Chang Exhibit No. 31 marked.)
11 Q. (BY MR. LAMBRIGHT) Now I have a depth arrow on
12 the side of the box. Do you see that, sir?
13 A. Yes.
14 Q. Okay. How deep can a garage be to still
15 constitute only a -- or does depth factor in? That's a
16 better question. Does depth factor into how many cars
17 capacity a garage is?
18 A. In our neighborhood the majority of our lots --
19 if you have a detached garage, you have to have a
20 hundred foot setback, which puts your garage toward the
21 back of the lot and then you've got issues with depth
22 beyond that depending on your lot size. So it hasn't
23 come up very often in our neighborhood.
24 Q. Well, on Sue Barnett these lots are --
25 A. They are deeper.

145

1 Q. -- 300, 400 feet deep in some instances.
2 A. They are deeper.
3 Q. So you could have -- the depth of a garage
4 could be a hundred feet deep in some instances on a few
5 lots?
6 A. Sure. So if you, if you then had a build out
7 space behind that for your workshop or whatever you're
8 doing and you could pull into those two slots, you could
9 pull six cars or eight cars because you've built an
10 incredibly deep garage. It would be a two-car garage
11 with extra capacity.

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16. So, according to Plaintiff, a garage with the Association is in violation of the Covenants if it can hold more than two cars… except when it isn't. According to Plaintiff's gossamer definition of the "classically defined garage", the determining factor is width, not capacity, which the testimony of Plaintiff's president, Tim Weltin when speaking about his own garage[16]:

Tim Weltin, (Pages 40:23 to 41:3)

40
23 A. No, it's one structure. I mean it's got a --
24 it's got this little thing -- I guess -- I mean the way
25 the garage actually exists is that it's got parking
41
1 spaces and then it's got a little tiny workshop area on
2 one side and a little tiny workshop slash fitness room
3 on the other side, so it's a garage.

17. "A party asserting waiver of a restrictive covenant or deed restriction must prove either that the party seeking enforcement of the covenant or restriction has acquiesced in such substantial violations to amount to abandonment of the covenant or restriction".[17] In the present case, eight homes located **on Defendants' street alone** have garages that exceed the Association's alleged maximum two-car capacity or "two-door" definition.[18] These houses include the five of the six houses directly across the street from Defendants as well as Defendant's three Eastern-most neighbors.[19]

18. Any reasonable person driving on Sue Barnett Dr. would reasonably believe, from simple visual evidence, that the Association either (1) expressly permits garages exceeding a two car

[16] Exhibit "E", Deposition of Tim Weltin, (Pages 40:23 to 41:3)
[17] *Loch 'N' Green Vill. Section Two Homeowners Ass'n v. Murtaugh*, 2013 Tex. App. LEXIS 6613 (Tex. App. Fort Worth May 30, 2013)
[18] *See* Exhibit "F", Section 3 Map with Photographs
[19] *See* Exhibit "F", Section 3 Map with Photographs

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capacity; or (2) has waived or abandoned any restriction it may have had regarding garage capacity and openings.

19. Further, it is clear from the testimony of Plaintiff that the Association is basing its enforcement not on the Covenants, but on a non-existent "Classically Defined" definition of garage which is not described, defined or delineated in any document on file with the Harris County Real Property records. Thus, pursuant to § 202.006 of the Texas Property Code, such a definition and/or enforcement rubric "has no effect".

20. For these reasons, this Court should grant Defendants' motion for summary judgment on the basis of waiver / abandonment.

Failure to Provide Proper Notice (Aff. Def. / Counterclaim)

21. Tex. Prop. Code § 209.006[20] reads:

> *Sec. 209.006. NOTICE REQUIRED BEFORE ENFORCEMENT ACTION.*
>
> *(a) Before a property owners' association may suspend an owner's right to use a common area, file a suit against an owner other than a suit to collect a regular or special assessment or foreclose under an association's lien, charge an owner for property damage, or levy a fine for a violation of the restrictions or bylaws or rules of the association, the association or its agent must give written notice to the owner by certified mail, return receipt requested.*
>
> *(b) The notice must:*
>
> *(1) describe the violation or property damage that is the basis for the suspension action, charge, or fine and state any amount due the association from the owner; and*
>
> *(2) inform the owner that the owner:*
>
> *(A) is entitled to a reasonable period to cure the violation and avoid the fine or suspension unless the owner was given notice and a reasonable opportunity to cure a similar violation within the preceding six months;*

[20] Unless otherwise noted, all statute text quoted or referenced within this brief is the text as it appeared in September, 2010, when the Plaintiff's Original Petition was filed.
Source: http://www.statutes.legis.state.tx.us/statutesbydate.aspx

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> *and*
> *(B) may request a hearing under Section 209.007 on or before the 30th day after the date the owner receives the notice.*

22. In the present case, Plaintiff's pre-suit correspondence to Defendants (and Plaintiff's Original Petition) alleged that Defendants had built a "four car garage", a statement which is patently false.[21] Defendants sought clarification on this point via requests for Admissions, and Plaintiffs confirmed that it had filed a lawsuit based on Defendants' alleged "four car garage".[22] It was not until January, 2013 that Plaintiff modified its petition to allege that Defendants had built "two two-car garages".[23] No certified, written pre-suit notice was provided to Defendants which accurately "describe[s] the violation" as required by § 209.006(b)(1).

23. Consequently, this Court should grant Defendants' motion for summary judgment on its affirmative defense for failure to provide proper notice under Tex. Prop. Code § 209.006(a), and Defendants seek a declaration by this Court that Plaintiff has failed to provide such requisite notice.

Lack of Authority (Aff. Def. / Counterclaim)

24. Plaintiff purports to have authority to enforce the covenants, conditions and restrictions for the Garden Oaks subdivision. Plaintiff alleges that this authority stems from the alleged "amendment" of the existing Garden Oaks CCRS filed for record in 2002[24]

25. When asked for the source of the Plaintiff's alleged ability to enforce deed restrictions, Plaintiff's corporate representative and board president testified as follows[25]:

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[21] See Exhibit "G", Deed Letter
[22] See Exhibit "H", Plaintiff's First Amended Responses to RFA #240, 241, 247, 248 and 249.
[23] See Plaintiff's 1st Amended Petition, on file with this Court.
[24] See Exhibit "I", Amendment to Covenants.

66
12 Q. But where does the organization get the
13 authority? [to enforce deed restrictions]

22 […] we have the authority that's both given by the
23 property code and by the approval of the folks who live
24 in the neighborhood to use their money for that
25 mechanism.

67
1 Q. Okay. So it's not in the documents on file
2 with the real property records of Harris County is what
3 you're telling me? There is no document that says here
4 is something that vests in GOMO the authority to enforce
5 deed restrictions. Is that true or not true?
6 A. No, that's not true.
7 Q. What document --
8 A. The, the notice of formation that we filed and
9 the subsequent amendment that is recorded is what gives
10 us the ability to do that.
11 Q. Where in that document does it say you have the
12 authority to enforce deed restrictions?
13 A. I -- which document, the amendment?
14 Q. Whatever document you're referring to that
15 gives you -- you said that gives you authority.
16 A. Exhibit A, Section 6 of the amendment gives us
17 the ability to implement bylaws. The organization is
18 authorized to adopt bylaws to implement the operation of
19 the organization.
20 Q. Bylaws I get. That's the organizational --
21 that's a hierarchy thing. Where is deed restriction
22 enforcement?
23 A. That's defined in our bylaws. So this, this
24 incorporates our bylaws in this amendment and our bylaws
25 allow for the enforcement of deed restrictions.

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26. So, according to Plaintiff's own sworn testimony, the Plaintiff's authority comes from (1) the Amendment, and/or from (2) the By-Laws. However the Amendment does not contain any

[25] See Exhibit "E" Deposition of Tim Weltin, (Pages 66:12 to 67:25)

language or purport to transfer any deed authority to Plaintiff[26], and pursuant to Plaintiff's own management certificate[27], Plaintiff's By-Laws are not on file with the Real Property Records of Harris County, thus rendering them "of no force and effect". Texas Property Code § 202.006 provides that:

> Sec. 202.006. PUBLIC RECORDS. (a) A property owners' association shall file all dedicatory instruments in the real property records of each county in which the property to which the dedicatory instruments relate is located. (b)A dedicatory instrument has no effect until the instrument is filed in accordance with this section.

27. For these reasons, Defendants seek a declaration by this Court that (1) Plaintiff has no authority or standing to pursue any legal action against Defendants; (2) the By-Laws of "Garden Oaks Maintenance Organization" have no force and effect; and (3) Plaintiff's suit must be dismissed for lack of standing and lack of authority. Defendants further seek an order granting their motion for summary judgment on their affirmative defenses of lack of authority and lack of standing.

Arbitrary & Capricious Enforcement (Aff. Def. / Counterclaim)

28. Notwithstanding Plaintiff's lack of authority and standing, to the extent that this Court finds that Plaintiff does have the ability to enforce deed restrictions, Plaintiff's enforcement of same against Defendants has been arbitrary and capricious. Plaintiff's representative has testified, under oath, that Plaintiff (1) made no specific deed enforcement inspections of Defendants' home or street prior to the construction of Defendants' home;[28] (2) that Plaintiff made no

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[26] *See Exhibit "I", Amendment:* "Existing Restrictions. This Amendment creates a property owners association and imposes Transfer Assessments on the Parcels, but does not otherwise amend, modify, terminate, or change the use restrictions applicable to any Parcel by reason of the following restrictions recorded in the Harris County Real Property Records."

[27] Exhibit "J", Management Certificate

[28] See Exhibit "E", Deposition of Tim Weltin, (Pages 102:25 to 103:5)

specific deed enforcement inspections of Defendants' home or street subsequent to filing this suit, until required to do so by this Court[29]; and (3) that Plaintiff singled out Defendants for "unique" enforcement and suit from among the fifteen (15) similar violations on Defendants' street, alone.[30]

29. Further Plaintiff, in response to interrogatories, has further admitted that the Association does not perform routine deed inspections of the Association at all[31]:

> The Association does not perform inspections *per se*. Each of the board members generally keys an eye on his section of the subdivision, but does not perform routine inspections. […]

30. Enforcement of restrictions by An Association which lacks authority is arbitrary and capricious as a matter of law.[32]

102
25 Prior to filing a lawsuit against my clients no
103
1 one on behalf of Garden Oaks Maintenance Organization
2 drove up and down his block of Sue Barnett and made a
3 count of the number of violations of homes with more
4 than two cars of garages, did they?
5 A. No one made that specific mission, no.

[29] See Exhibit "E", Deposition of Tim Weltin, (Page 103:6 to 103:13)
103
6 Q. And, in fact, no one since has gone back and
7 made any attempt whatsoever to verify the number of more
8 than two-car garages on Mr. Chang's block out of the 25
9 houses, have they?
10 A. We did in response to discovery in this lawsuit

[30] See Exhibit "E", Deposition of Tim Weltin, (Pages 103:25 to 104:5)
103
25 out of the 15 people in violation of the deed
104
1 restriction you're suing my client for on his block he's
2 the only one that Garden Oaks Maintenance Association is
3 suing for this violation, correct?
4 A. His specific history is unique and we are
5 engaged in litigation based on his unique circumstances.

[31] *See* Exhibit "K", Plaintiff's Responses to Defendants' 2nd Set of Interrogatories

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31. For these reasons, Defendants seek a declaration by this Court that Plaintiff's enforcement was arbitrary, capricious and/or discriminatory as a matter of law, and thus ineffective with regards to Defendants. Defendants further seek an order granting their summary judgment on the basis of arbitrary and capricious enforcement of the deed restrictions.

V. NO-EVIDENCE SUMMARY JUDGMENT

Breach of Contract

32. A court may grant a no-evidence motion for summary judgment if the movant can show that adequate time for discovery has passed and the nonmovants have no evidence to support one or more essential elements of their claims or defenses. Tex. R. Civ. P. 166a(i).

33. An adequate time for discovery has passed. This case was filed in 2012 and has been set for trial no fewer than three (3) times.

34. Defendants are entitled to summary judgment because Plaintiff cannot demonstrate any evidence to support its breach of contract claim.

35. To prevail on its breach of contract action, Plaintiff has the burden to prove the following elements: (1) there is a valid, enforceable contract; (2) Plaintiff is a proper party to sue for breach of contract; (3) Plaintiff performed, tendered performance of, or was excused from performing its contractual obligations; (4) Defendants breached the contract; and (5) Defendants' breach caused Plaintiff injury.[33]

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[32] *See Anderson v. The New Property Owners' Association of Newport Inc.*, 122 S.W.3d 378, 388-89 (Tex. App.-Texarkana 2003).

[33] *B&W Sup. v. Beckman*, 305 S.W. 3d 10, 16 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (setting forth elements 1, 3-5); *Mandell v. Hamman Oil & Ref. Co.*, 822 S.W. 2d 153, 161 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (setting forth element 2).

36. Defendants are entitled to a no-evidence summary judgment that Plaintiff take nothing by way of its breach of contract claim because Plaintiff has no competent evidence to support the following elements:

    (1) there is a valid, enforceable contract;

    (2) Plaintiff is a proper party to sue for breach of contract;

    (3) Plaintiff performed, tendered performance of, or was excused from performing its contractual obligations;

    (4) Defendants breached the contract; and

    (5) Defendants breach caused Plaintiff injury.

37. Specifically, no contract exists between Garden Oaks Maintenance Organization (the Plaintiff) and Defendants, Plaintiff lacks the authority to enforce the deed restrictions (and is thus not a property party to sue for breach of contract); Plaintiff failed to provide proper notice of Defendants' alleged violation; Defendants' had no obligation to Plaintiff that could be breached; and even assuming *arguendo* that Defendants had violated the deed restrictions, Plaintiff was in no way damaged by the construction of Defendant's home, which, being the nicest home in the subdivision, has only increased property values. Further, Plaintiffs have no evidence that Defendant actually utilize both spaces to store vehicles, or that either space is configured in such a manner as to allow the storage of vehicles.

38. Therefore, Defendants are entitled to summary judgment that Plaintiff takes nothing by way of its breach of contract claim as a matter of law.

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VI. ATTORNEY FEES

39. Plaintiff is entitled to recover reasonable and necessary attorney fees that are equitable and just under Texas Civil Practice & Remedies Code section 37.009 because this is a suit for declaratory relief.[34]

VII. MOTION FOR LEAVE FOR SPECIAL SETTING

40. Given that this Court's Summary Judgment deadline is October 24, 2014 (21 days from this date), Defendants request that the Court sign an order allowing Defendants to set the Summary Judgment hearing on a Friday prior to the beginning of this case's November 17, 2014 trial docket. In the alternative, Defendants asks that this Court sign an order allowing Defendants" Motion for Summary Judgment to be set for submission on any Monday after October 24, 2014.

VIII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants **PETER S. CHANG AND KATHERINE M. CHANG**, respectfully request this Court sign grant this Hybrid Motion for Summary Judgment, granting Defendants:

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[34] *See* Exhibit "L": Attorney Fee Affidavit.

Respectfully submitted,

Lambright & Associates

Casey Jon Lambright
State Bar No. 00794136
Andrew Mihalick
State Bar No. 24046439
Shawn Robert McKee
State Bar No. 24049403
2603 Augusta, Suite 1100
Houston, Texas 77057
(713) 840-1515
(713) 840-1521 (FAX)

ATTORNEYS FOR PETER S. CHANG AND KATHERINE M. CHANG

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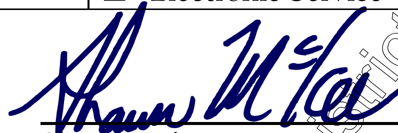
CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2014, a true and correct copy of the foregoing instrument was served upon the following in accordance with Rule 21a of the Texas Rules of Civil Procedure:

W. Austin Barsalou 4635 Southwest Freeway, Suite 580 Houston, TX 77027 (713) 650-8745 (fax)	☐ Courier ☒ CMRRR ☐ Regular Mail ☒ Facsimile ☐ Electronic Service



Shawn Robert McKee

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FILED
Chris Daniel
District Clerk
JUN 10 2016
Time: 1281
Harris County, Texas
By ______
Deputy

TAB D

P-18
EJUDZ

NO. 2012-72213

GARDEN OAKS MAINTENANCE ORGANIZATION,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
VS.	§	HARRIS COUNTY, TEXAS
	§	
PETER S. CHANG and KATHERINE M. CHANG,	§	
	§	
Defendants.	§	269TH JUDICIAL DISTRICT

ORDER ON DEFENDANTS' MOTION FOR DECLARATORY RELIEF AND FOR FINAL JUDGMENT

This suit started over a garage. It has now mushroomed into a contest questioning whether Plaintiff Garden Oaks Maintenance Organization ("GOMO") can exercise any of the powers or authority of a property owners association, such as collecting assessments and enforcing deed restrictions, in the Garden Oaks subdivision.

GOMO sued Defendants Peter S. Chang and Katherine M. Chang alleging they violated a deed restriction concerning construction of garages on lots in Section 3 of the Garden Oaks subdivision. The Changs raised several defenses, including waiver, abandonment, and unreasonable enforcement of the deed restriction in question, and they counterclaimed for declaratory judgment. The Parties tried their dispute to a jury, which found that the Changs had failed to comply the deed restriction, but also that:

(1) the failure to comply was excused by abandonment;

(2) the deed restriction was waived; and

(3) GOMO's exercise of authority to enforce the deed restriction was unreasonable.

The Changs now move for judgment on the verdict as well as for declaratory relief.

RECORDER'S MEMORANDUM
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at the time of imaging

The Court heard oral argument on the Changs' motion on April 7, 2016. Given the breadth and complexity of the issues presented, the Court took the motions under advisement. After considering the pending motions and responsive briefing, the evidence presented, the arguments of counsel, and the applicable law, the Court concludes that it should grant judgment on the verdict and for declaratory relief, but that it should deny judgment for attorneys' fees.

I. BACKGROUND

In 1939, the Garden Oaks Co. filed a set of deed restrictions for the Garden Oaks subdivision ("1939 Deed Restrictions") in the Harris County property records. Those deed restrictions authorize enforcement by an entity called "Garden Oaks Co." It is undisputed that Garden Oaks Co. no longer exists and did not exist at the time that the present dispute arose.

One of the restrictive covenants found in the 1939 Deed Restrictions regulated the number and size of garages: "[N]o structure shall be erected on any residential building plot other than one detached single family dwelling not to exceed two stories in height **and a one or two car garage**."[1] 1939 Deed Restrictions, lines 20-22, located in Volume 1110, p. 450 of the Real Property Records of Harris County (Plaintiff's Exhibit 1) (emphasis added) The Changs built a new home on a lot located at 1326 Sue Barnett Drive, Houston, Texas 77018, which is located in Section 3 of Garden Oaks. The new home had a detached garage, but also had a second garage built into the main residential structure. GOMO sued the Changs to enforce the deed restriction relating to garages, arguing that the Changs violated the restriction by having two, two-car garages on their lot.

The Changs raised several defenses to GOMO's claim that they violated the 1939 Deed Restrictions, including waiver, abandonment, and unreasonable enforcement. But they also

[1] At trial, the Court interpreted this restriction "to provide that a property owner may not erect more than a single one- or two-car garage." (Charge of the Court at 4)

raised defenses that bring into question GOMO's authority to enforce the 1939 Deed Restrictions. Specifically, they challenged GOMO's standing, legal capacity to sue them, and legal or contractual authority to sue them. (Defendants' 1st Amended Answer and Counterclaim at 1-2). Additionally, the Changs counterclaimed for declaratory relief, challenging GOMO's standing and the effectiveness of:

(1) the procedures undertaken in 2001 and 2002 to authorize GOMO to enforce the 1939 Deed Restrictions,

(2) the 2002 amendment of the deed restrictions, and

(3) GOMO's By-Laws.

(Defendants' 1st Amended Answer and Counterclaim ¶¶ 16, 21, 23) Now that the jury has returned a verdict on GOMO's claim and the Changs' waiver, abandonment, and unreasonable-enforcement defenses, the Changs move for judgment on those verdicts and for declaratory relief.

II. THE CHANGS' MOTION FOR JUDGMENT ON GOMO'S CLAIMS AND THE CHANGS' DEFENSES

As an initial matter, the Changs ask the Court to enter judgment in their favor on GOMO's claim and their defenses. The Court previously denied GOMO's motion for judgment notwithstanding the verdict. The Court is persuaded that it should enter judgment in favor of the Changs on GOMO's claim and on the Changs' defenses. Therefore, the Court concludes that it should grant the Changs' motion on those matters and will enter a judgment that GOMO take nothing on its claims against the Changs.

III. THE CHANGS' REQUEST FOR DECLARATORY RELIEF

In addition to judgment against GOMO on their affirmative defenses, the Changs also seek declaratory relief. Specifically, the Changs ask the Court for a judgment declaring:

(1) "The Notice of Formation of Petition Committee filed on July 23, 2001 under Harris County Clerk's File No. V191699 (and the amendment attached thereto) is invalid and ineffective, and of no force and effect";

(2) "The Petition to Amend Restrictions filed on June 3, 2002, under Harris County Clerk's File No. V842579 is invalid and ineffective, and of no force and effect";

(3) "Plaintiff has no authority or standing to pursue any legal action against Defendants for violations of any alleged deed restrictions in the Garden Oaks subdivision"; and

(4) "The By-Laws of 'Garden Oaks Maintenance Organization' have no force and effect."

(Brief and Motion for Declaratory Relief and for Final Judgment at 11-12)

In response, GOMO argues that the Court should not grant declaratory relief because the declarations that the Changs seek simply restate their defenses and because the Changs failed to join the other property owners in Garden Oaks. Alternatively, GOMO argues that if the Court grants declaratory relief, the declarations should only apply to Section 3 of Garden Oaks. The Court will first address GOMO's complaint that the Changs failed to join the other homeowners in Garden Oaks.

A. GOMO's Arguments Against Awarding Declaratory Relief Go to the Scope of Declaratory Relief and Do Not Require Denying Declaratory Relief Altogether

1) Because the Changs did not join the other homeowners, the Court will limit any declaratory relief to them

GOMO argues that the Court should not grant *any* declaratory relief to the Changs because they failed to join the other property owners in Garden Oaks Section 3. The Texas Uniform Declaratory Judgments Act requires that "all persons who have or claim any interest that would be affected by the declaration must be made parties." TEX. CIV. PRAC. & REM. CODE § 37.006(a). It goes on to clarify that "[a] declaration does not prejudice the rights of a person not a party to the proceeding." ID. GOMO essentially argues that the declarations that the

Changs seek would affect the interests of the remaining property owners in Section 3 and that, because the Changs did not join them, the Court cannot grant declaratory relief.

But the case law does not go this far. If the declaratory judgment actually rendered does not prejudice the unjoined owners, then the failure to join them is harmless. ***Elgohary v. Lakes on Eldridge N. Comm'y Ass'n, Inc.***, 2015 WL 9241704, at *7 (Tex. App.—Houston [1st Dist.] Dec. 17, 2015, no pet.). A declaratory judgment that only applies to a particular owner does not require joinder of the other homeowners. ***In re Corcoran***, 401 S.W.3d 136, 139 (Tex. App.—Houston [14th Dist.] 2011, orig. proceeding) (holding that the trial court abused its discretion when it abated the case for failure to join the other homeowners in an action challenging the authority of a property owners' association to override a decision of an architectural control committee).

At this stage, to the extent that the Changs' grounds for the requested declaratory relief are persuasive, the Court can fashion the declaratory judgment to apply only between the Changs and GOMO. As a result, the Court is not persuaded that the Changs' failure to join any other Section 3 property owners bars them completely from obtaining a declaratory judgment.[2]

2) The declarations that the Changs request do not simply restate their defenses

In addition to challenging the Changs' failure to join the other Section 3 property owners, GOMO also argues that the Court should not grant declaratory relief because the requested declarations simply restate defenses that the Changs already pleaded. It is improper to render a declaratory judgment that "simply repeats the factual findings of the jury and does not 'declare rights, status, [or] other legal relations,' as required by the Declaratory Judgments Act." ***Indian***

[2] GOMO also argues that the Court should limit any declaratory relief to Garden Oaks Section 3. Because the Court has determined that it should limit any declaratory relief it awards to the Changs, this argument is moot.

Beach Prop. Owners' Ass'n v. Linden, 222 S.W.3d 682, 700 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (quoting TEX. CIV. PRAC. & REM. CODE § 37.003(a)). But a request for declaratory relief that seeks interpretation of deed restrictions that would effectively define the future obligations between the property owners' association and the property owner states a claim for affirmative relief and is a proper subject for a declaratory judgment. ***Id.*** at 702.

Each of the declarations that the Changs request the Court to make satisfy these rules. Each one seeks declaratory relief affecting the relative obligations—if any—between the Changs and GOMO in the future. As a result, the Court is not persuaded by GOMO's argument that the requested declaratory relief simply restates defensive matters already before the Court.

B. The Procedure for Appointing a New Property Owners Association to Enforce Deed Restrictions under TEX. PROP. CODE § 204.006 Does Not Apply to Garden Oaks Section 3

Having addressed GOMO's arguments ***against*** entering any declaratory relief, the Court now turns to the Changs arguments ***for*** entering declaratory relief. Specifically, the Changs ask the Court to declare the following:

(1) "The Notice of Formation of Petition Committee filed on July 23, 2001 under Harris County Clerk's File No. V191699 (and the amendment attached thereto) is invalid and ineffective, and of no force and effect."

(2) "The Petition to Amend Restrictions filed on June 3, 2002, under Harris County Clerk's File No. V842579 is invalid and ineffective, and of no force and effect";

(3) "Plaintiff has no authority or standing to pursue any legal action against Defendants for violations of any alleged deed restrictions in the Garden Oaks subdivision"; and

(4) "The By-Laws of 'Garden Oaks Maintenance Organization' have no force and effect."

In essence, the Changs seek declarations that GOMO lacks authority to ever enforce the 1939 Deed Restrictions against the Changs because the steps taken to empower GOMO to act as a property owners association were inadequate.

The 1939 Deed Restrictions empower "Garden Oaks Co." to enforce the deed restrictions. GOMO is not Garden Oaks Co. So, the original terms of the 1939 Deed Restrictions do not empower GOMO to enforce the restrictions.

But Chapter 204 of the Texas Property Code provides a procedure under which property owners can amend deed restrictions to appoint a property owners' association to enforce the deed restrictions. Residents of Garden Oaks invoked this statutory procedure in 2001 and again in 2002 in two efforts to designate GOMO as a property owners' association with power to enforce the neighborhoods' deed restrictions. But the Changs argue that they failed.

Generally speaking, the statutory procedure for empowering a property owners' association to enforce deed restrictions requires owners to form a petition committee, which then can circulate a petition amongst the property owners to amend the deed restrictions. ***See*** TEX. PROP. CODE §§ 201.004-.005, 204.006. If a certain threshold of property owners consents, then the deed restrictions are amended once the petition committee files the petition and amendments in the county property records. ***See*** ID. §§ 201.006, 204.006(a)(2). But the Changs argue that the statutory procedure for empowering a property owners' association to enforce deed restriction does not apply here because Garden Oaks Section 3 and the 1939 Deed Restrictions do not qualify for the statutory amendment procedure. They go on to assert that even if the statutory procedure does apply, it was not followed. To evaluate these arguments, the Court must look at the efforts taken to amend the 1939 Deed Restrictions to empower GOMO.

1) The 2001 petition effort

In 2001, David Bell, Steve Satterwhite, and Shellye Arnold ("the 2001 Petition Committee") filed a Notice of Formation of Petition Committee ("2001 Formation Notice") in the Harris County Property Records. According to the Notice, the Committee was created "pursuant to the provision of Sections 201.005 and 204.006 of the Texas Property Code."

Section 201.005 sets up the general procedure for forming a committee to extend, modify, add to, or create deed restrictions. But § 204.006 establishes a specific procedure that may be used for petitioning to amend deed restrictions to create a property owners' association:

> (a) If existing restrictions applicable to a subdivision do not provide for a property owners' association and require approval of more than 60 percent of the owners to add to or modify the original dedicating instrument, a petition to add to or modify the existing restrictions for the sole purpose of creating and operating a property owners' association with mandatory membership, mandatory regular or special assessments, and equivalent voting rights for each of the owners in the subdivision is effective if:
>
> > (1) a petition committee has been formed as prescribed by Section 201.005;
> >
> > (2) the petition is approved by the owners, excluding lienholders, contract purchasers, and the owners of mineral interests, of at least 60 percent of the real property in the subdivision; and
> >
> > (3) the procedure employed in the circulation and approval of the petition to add to or amend the existing restrictions for the specified purpose complies with the requirements of this chapter.
>
> (b) If the circulated petition is not approved by the required percentage of owners within one year of the creation of the petition committee, the petition is void and another petition committee may be formed.
>
> (c) If the petition is approved, the petition is binding on all properties in the subdivision or section, as applicable.

While the 2001 Formation Notice invokes § 204.006, the Changs argue that that section does not apply because the 1939 Deed Restrictions do not meet the requirements for invoking the statute. The Court agrees.

2) Garden Oaks Section 3 does not qualify for the § 204.006 procedure

Chapter 204 applies to property owners' associations in subdivisions in cities with a population over 100,000.[3] The Court takes judicial notice that Garden Oaks Section 3 is located

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[3] TEX. PROP. CODE § 201.001(a)(1). It also applies to unincorporated parts of counties with populations over 3.3 million. ID. § 201.001(a)(2)(A).

in Houston and that the population of Houston exceeds 100,000. But by its terms, § 204.006 only applies if the deed restrictions to be amended meet two conditions: (1) "existing restrictions applicable to a subdivision do not provide for a property owners' association," and (2) the existing restrictions "require approval of more than 60 percent of the owners to add to or modify the original dedicating instrument." ID. § 204.006(a). The 1939 Deed Restrictions do not satisfy the second of these requirements.

First, it is not clear whether the 1939 Deed Restrictions provide for a property owners' association. The 1939 Deed Restrictions do empower an entity to enforce the deed restrictions—namely, the Garden Oaks Co. Under Chapter 202 of the Property Code, a property owners' association is

> an incorporated or unincorporated association owned by or whose members consist primarily of the owners of the property covered by the dedicatory instrument and through which the owners, or the board of directors or similar governing body, manage or regulate the residential subdivision, planned unit development, condominium or townhouse regime, or similar planned development.
>
> ID. § 202.001(2).

Additionally, § 204.004(a) mandates that a property owners' association "must be nonprofit." ID. § 204.004(a). But the evidence is not clear whether the Garden Oaks Co. met all of the requirements of Chapters 202 or 204 to qualify as a property owners' association. For example, there is no evidence whether Garden Oaks Co. was incorporated or was an unincorporated association, who owned it, or whether its members consisted primarily of the property owners in Section 3. ***See*** ID. Moreover, there is no evidence that Garden Oaks Co. held nonprofit status. ***See*** ID. § 204.004(b). On the other hand, the 1939 Deed Restrictions do authorize the Garden Oaks Co. to enforce the deed restrictions, a power only individual property owners or a property owners' association can exercise under current law. ***See*** ID. §§ 202.004(b), 204.010(a)(4), (11).

As the Parties seeking affirmative relief in the form of declaratory judgment, the Changs bore the burden of proof on their argument that GOMO did not satisfy statutory requirements—meaning that they had the burden to prove that the existing restrictions provided for a property owners' association. The Court concludes that they have not done so.

But § 204.006(a) also mandates that the existing restrictions must "require approval of more than 60 percent of the owners to add to or modify the original dedicating instrument." The 1939 Deed Restrictions set up a procedure for ***releasing*** the restrictive covenants, but do not explicitly provide a procedure for adding to or otherwise modifying them:

> All of the restrictions and covenants herein set forth shall continue and be binding upon the Company and upon its successors and assigns for a period of twenty-five (25) years from the date this instrument is filed for record in the office of the County Clerk of Harris County, Texas, and shall automatically be extended thereafter for successive periods of fifteen (15) years; provided, however, that ***the owners of the legal title to the lots*** as shown by the records of Harris County, ***having more than fifty per cent of the front footage of the lots*** shown on plat of record ***may release all of the lots hereby restricted from any one or more of said restrictions and covenants, and may release any lot or building site shown on said plat from any restriction or covenant*** created by deed from the Company at the end of the first twenty-five (25) year period or at the end of any fifteen (15) year period thereafter, by executing and acknowledging an appropriate agreement or agreements in writing for such purpose and filing the same for record in the manner then required for the recording of land instruments, at least two (2) years prior to the expiration of the first twenty-five (25) year period, or at least two (2) years before the expiration of any fifteen (15) year period thereafter.
>
> 1939 Deed Restrictions, lines 1-15, located in Volume 1110, p. 452 of the Real Property Records of Harris County (Plaintiff's Exhibit 1) (emphasis added)

This provision only permits ***releasing*** lots from the restrictions; it does not provide for otherwise modifying or adding to the restrictions. But even if this clause constitutes a procedure "to add to or modify" deed restrictions, it does not by its terms require approval of more than 60% of the owners.

The statutory qualification speaks in terms of the number of lot owners required to approve an amendment: "60 percent of the owners." But the 1939 Deed Restrictions do not set

a threshold for releasing the deed restrictions based on the number of owners. Instead, they measure approval based on the cumulative front footage of the lots: "the owners of the legal title to the lots . . . having more than fifty per cent of the front footage of the lots." Some lots may have more front footage than others. It is mathematically possible that it would take more than 60% of lot owners to own more than 50% of the front footage. But it is also mathematically possible that less than 60% of the lot owners could own more than 50% of the front footage. The point is that the 1939 Deed Restrictions simply do not base approval for releasing deed restrictions on the percentage of owners at all. So, they cannot be read to require more than 60% of lot owners to approve releasing lots from the deed restrictions. In sum, the 1939 Deed Restrictions do not meet the statutory prerequisites for using the procedures in § 204.006.

As a result, § 204.006 does not apply to Garden Oaks Section 3. GOMO cannot rely on § 204.006 as the statutory procedure for empowering it to act as a property owners' association to enforce the 1939 Deed Restrictions.

C. Even if § 204.006 Applies, the 2001 Petition Committee Did Not Comply With It

In addition to arguing that § 204.006 does not apply, the Changs also assert that the formation of GOMO did not comply with that statute. The procedure set out in § 204.006 only applies to "a petition to add to or modify the existing restrictions ***for the sole purpose of creating and operating a property owners' association*** with mandatory membership, mandatory regular or special assessments, and equivalent voting rights for each of the owners in the subdivision." TEX. PROP. CODE § 204.006(a) (emphasis added). "[T]he phrase 'for the sole purpose of creating and operating a property owners' association' in section 204.006(a) means for the sole purpose of creating the association and establishing the terms under which it will operate, *e.g.*, the association's powers and duties." ***Gillebaard v. Bayview Acres Ass'n, Inc.***, 263 S.W.3d 342,

351 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). The Changs argue that the petition that the second committee filed to establish GOMO's authority to enforce deed restrictions does not satisfy this requirement because it was not circulated for the sole purpose of creating and operating GOMO. The Court agrees.

1) The 2002 Petition had more than one purpose

As a source of its authority to enforce the 1939 Deed Restrictions, GOMO relies on the Petition to Amend Restrictions to Create a Homeowners Association and Certificate of Compliance with Texas Property Code, Section 204 ("2002 Petition"), which the 2001 Petition Committee filed in the Harris County Real Property Records in June 2002. When a petition committee or property owners' association relies on the procedures in Chapter 204 to amend deed restrictions or form a property owners' association, the amendments are invalid and unenforceable if the petition committee or property owners' association did not comply with § 204.006(a). ***Gillebaard***, 263 S.W.3d at 353. It is reversible error to declare amendments valid if § 204.006(a) was not followed. ***Id.*** at 352.

The 2002 Petition attached the proposed amendments as Exhibit A ("2002 Amendments"). According to that Exhibit, the Petition not only sought to amend the 1939 Deed Restrictions to form GOMO, but also to create "Transfer Assessments" that GOMO could collect from a buyer after the sale of a Garden Oaks lot. The original 1939 Deed Restrictions did not provide for transfer assessments, so the proposed amendment created a new deed restriction. So, the 2002 Petition had two purposes: (1) to form GOMO, and (2) to impose Transfer Assessments. As a result, the 2002 Petition did not seek to add to or modify the existing restrictions for the ***sole purpose*** of creating and operating a property owners' association. Thus, the 2002 Petition and 2002 Amendment did not comply with § 204.006. Therefore, the 2002

Petition and 2002 Amendments were not validly adopted, and GOMO lacks authority to enforce deed restrictions against the Changs.

D. Under § 201.005, the Work of the 2001 Committee Was Invalid

Because § 204.006 does not apply, the only statutory procedure that the 2001 Committee and GOMO could rely on to amend the 1939 Deed Restrictions to authorize GOMO to enforce the deed restrictions is § 201.005. In addition to § 204.006, the 2001 Formation Notice invoked § 201.005. But at the hearing on the competing motions for judgment, counsel for GOMO represented to the Court that GOMO relied solely on § 204.006. Even if GOMO still relies on § 201.005, however, the activity of the 2001 Committee was not permitted by § 201.005.

The 2001 Petition Committee was the *second* committee to attempt to form a property owners' association. The Changs argue that it lacked authority because it was formed too soon after the first committee. To analyze this argument, the Court must look to the history of the first petition committee.

In May 2000, three property owners ("2000 Petition Committee") filed their own Notice of Formation of Petition Committee ("2000 Formation Notice") in the real property records of Harris County. (Defendants' Exhibit 4) The 2000 Petition Committee circulated a petition to amend the 1939 Deed Restrictions to form a property owners' association under §§ 201.005 and 204.006. Under both Chapters 201 and 204, the 2000 Petition Committee had one year after its creation to file the proposed petition to amend deed restrictions. ***See*** TEX. PROP. CODE §§ 201.006(b); 204.006(b). The 2000 Petition Committee did not file its petition within one year of the committee's formation. Therefore, the 2000 Petition Committee dissolved by operation of law in May 2001. ***See*** ID. § 201.005(f).

Of course, GOMO was not formed by the 2000 Petition Committee's petition; it traces its existence to the petition circulated by the 2001 Petition Committee, which was formed when that

group filed the 2001 Formation Notice in July 2001—about two months after the 2000 Petition Committee dissolved. The Changs argue that the law required five years to pass before another petition committee could validly form. Under § 201.005(f), "a new committee for that subdivision may not be validly created under this chapter before the fifth anniversary of the date of dissolution of the previous committee." Because the 2001 Petition Committee formed less than five years after the previous committee dissolved, the 2001 Petition Committee was not validly created, and its actions were ineffective.

E. GOMO's By-Laws Are Not Effective As a Source of Authority to Enforce Deed Restrictions

Finally, the Changs argue that, to the extent that GOMO relies on its bylaws for the authority to enforce deed restrictions, it cannot do so because GOMO has not filed its bylaws in the real property records of Harris County. GOMO responds that "this issue is not relevant because GOMO has the legal authority to enforce the deed restrictions under § 202.004(b)." (Plaintiff's Response to Defendant's Brief and Motion for Declaratory Relief and for Final Judgment at 8) GOMO fails to state clearly that it does not rely on its bylaws as authority to enforce the 1939 Deed Restrictions.

The bylaws of a property owners' association are a "dedicatory instrument" under Chapter 202. ***See*** TEX. PROP. CODE § 202.001(1). Property owners' associations must file all dedicatory instruments in the county real property records. "A dedicatory instrument has no effect until the instrument is filed in accordance with this section." TEX. PROP. CODE § 202.006(b). There is no evidence that GOMO has filed its bylaws in the real property records of Harris County. Thus, the Court concludes that, to the extent that GOMO relies on its bylaws as authority to enforce the 1939 Deed Restrictions, they have no effect with respect to the Changs.

F. Summary of Conclusions

In sum, the Court concludes that Garden Oaks Section 3 does not qualify for the procedure in § 204.006. Even if it did, the 2001 Petition Committee did not comply with that section. So, GOMO must rely on § 201.005 as authority for the procedure used to authorize it to act as a property owners association. But the 2001 Petition Committee was not validly formed under § 201.005 because it formed less than five years after the 2000 Petition Committee dissolved by operation of law. Therefore, the 2001 Petition Committee and the 2002 Petition and Amendments were invalid under both §§201.005 or 204.006. As a result, GOMO lacks authority to pursue legal action against the Changs for alleged violations of deed restrictions governing Garden Oaks Section Three.

Therefore, the Court concludes that the Changs should recover in part on their request for declaratory relief. But, as discussed earlier, the Court will fashion such declaratory relief to apply only between the Changs and GOMO. Specifically, the Court concludes that it should grant the following declarations:

(1) "The Notice of Formation of Petition Committee filed on July 23, 2001 under Harris County Clerk's File No. V191699 (and the amendment attached thereto) is invalid, ineffective, and of no force and effect with respect to Defendants Peter S. Chang and Katherine M. Chang."

(2) "The Petition to Amend Restrictions filed on June 3, 2002, under Harris County Clerk's File No. V842579 is ineffective and of no force and effect with respect to Defendants Peter S. Chang or Katherine M. Chang";

(3) "The By-Laws of Garden Oaks Maintenance Organization have no force and effect against Defendants Peter S. Chang or Katherine M. Chang"; and

(4) "Garden Oaks Maintenance Organization has no authority or standing to pursue any legal action against Defendants Peter S. Chang or Katherine M. Chang for violations of any alleged deed restrictions in the Garden Oaks Section Three."

Having concluded that the Changs have established a right to declaratory relief, the Court turns to their request for attorneys' fees.

IV. ATTORNEYS' FEES

The Changs ask the Court to award them the attorneys' fees that the jury found in their favor. At trial, the Court asked the jury, "What is a reasonable fee for the necessary services of Mr. and Mrs. Chang's attorneys in this case, stated in dollars and cents?" The jury answered, "$80,000.00," for representation in the trial court. The Changs argue that the Court should award them these fees under TEX. PROP. CODE § 5.006 and TEX. CIV. PRAC. & REM. CODE § 37.009. GOMO opposes.

A. The Changs Cannot Recover Attorneys' Fees Under TEX. PROP. CODE § 5.006

As an initial matter, GOMO argues that the Court should not award attorneys' fees to the Changs under TEX. PROP. CODE § 5.006 because (1) the Changs did not seek their fees under that statute in their pleadings and (2) the statute only authorizes awarding attorneys' fees to parties who successfully ***enforce*** deed restrictions. The Court agrees.

While the Changs did plead for an award of attorneys' fees, they sought them under the Declaratory Judgments Act, not § 5.006. Additionally, "[o]nly a party who successfully prosecutes a claim ***alleging*** breach of restrictive covenants is entitled to recover attorneys' fees" under § 5.006(a). ***Pebble Beach Prop. Owners' Ass'n v. Sherer***, 2 S.W.3d 283, 291-92 (Tex. App.—San Antonio 1999, pet. denied) (emphasis added). ***See Tanglewood Homes Ass'n, Inc. v. Feldman***, 436 S.W.3d 48, 73 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); ***Indian Beach Prop. Owners' Ass'n v. Linden***, 222 S.W.3d 682, 707 n.1 (Tex. App.—Houston [1st Dist.] 2007, no pet.). The Changs did not claim that GOMO breached a deed restriction. Therefore, the Court concludes that the Changs cannot recover attorneys' fees under § 5.006.

B. The Changs Cannot Recover Attorneys' Fees Under the Declaratory Judgments Act

They cannot recover attorneys' fees under the Declaratory Judgment Act, either. GOMO argues that the Court should not award the Changs attorneys' fees under the Declaratory Judgment Act because (1) they are seeking to bootstrap attorneys' fees onto their defenses and (2) they did not segregate their fees for recoverable claims from the fees incurred on claims for which they cannot recover fees. The Court agrees.

At trial, the Changs' evidence of attorneys' fees consisted of attorney-fee invoices and the testimony of their attorney, Casey Lambright. Mr. Lambright repeatedly testified that the fees he and his firm incurred were for defending the Changs. Moreover, Mr. Lambright did not give testimony segregating the fees incurred on the Changs' claims for declaratory relief from those incurred defending against GOMO's claims. The Court concludes that, based on the evidence presented at trial, the attorneys' fees that the Changs incurred were for defending against GOMO's claims and that the Changs did not segregate those fees from the fees incurred in seeking declaratory relief.

Therefore, for the reasons articulated by GOMO in opposition to the Changs' request for an award of attorneys' fees, the Court concludes that the Changs' request for attorneys' fees should be denied.

V. CONCLUSION AND ORDER

Thus, based on the arguments raised by the Parties and as explained above, the Court concludes that GOMO should take nothing on its claims against the Changs and that the Court should render judgment stating the following declarations:

(1) "The Notice of Formation of Petition Committee filed on July 23, 2001 under Harris County Clerk's File No. V191699 (and the amendment attached thereto) is invalid, ineffective, and of no force and effect with respect to Defendants Peter S. Chang and Katherine M. Chang."

(2) "The Petition to Amend Restrictions filed on June 3, 2002, under Harris County Clerk's File No. V842579 is ineffective and of no force and effect with respect to Defendants Peter S. Chang or Katherine M. Chang";

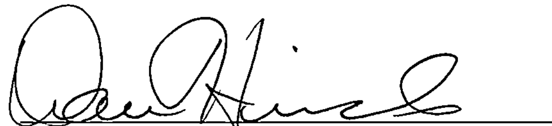
(3) "The By-Laws of Garden Oaks Maintenance Organization have no force and effect against Defendants Peter S. Chang or Katherine M. Chang"; and

(4) "Garden Oaks Maintenance Organization has no authority or standing to pursue any legal action against Defendants Peter S. Chang or Katherine M. Chang for violations of any alleged deed restrictions in the Garden Oaks Section Three."

Therefore, Defendants' Motion for Declaratory Relief and for Final Judgment is ***GRANTED in part*** and ***DENIED in part***.

The Court will render final judgment in a separate document.

SIGNED at Houston, Texas on this 8th day of June, 2016.



Hon. Dan Hinde
Judge, 269th Judicial District Court

FILED
Chris Daniel
District Clerk
JUN 10 2016
Time: 12:21
Harris County, Texas
By
Deputy

TAB E

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9B

NO. 2012-72213

GARDEN OAKS MAINTENANCE ORGANIZATION,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
VS.	§	HARRIS COUNTY, TEXAS
PETER S. CHANG and KATHERINE M. CHANG,	§	
Defendants.	§	269TH JUDICIAL DISTRICT

FINAL JUDGMENT

On January 25, 2016, the Court called this case for trial. Plaintiff and Counter-Defendant Garden Oaks Maintenance Organization appeared through its counsel of record and announced ready for trial. Defendants and Counter-Plaintiffs Peter S. Chang and Katherine M. Chang appeared with their counsel of record and announced ready for trial.

The Court impaneled and swore in a jury, which heard evidence and the arguments of counsel. The jury reached a verdict, which the Court accepted, filed, and entered of record. The Plaintiff Garden Oaks Maintenance Organization moved for judgment notwithstanding the verdict and to disregard jury findings. Defendants Peter S. Chang and Katherine M. Chang moved for judgment on the verdict and for declaratory relief. The Court held oral argument on the Parties' postverdict motions. By separate orders, the Court ruled on those motions.

After considering the jury's verdict, the Court's ruling on the postverdict motions, the pleadings, the evidence, the arguments of counsel, and the applicable law, the Court renders judgment for Defendants and Counter-Plaintiffs Peter S. Chang and Katherine M. Chang.

The Court ***ORDERS***, ***ADJUDGES***, and ***DECREES*** that:

1. Defendants Peter S. Chang and Katherine M. Chang's failure to comply with the deed restriction concerning the size and number of garages is excused by abandonment;

RECORDER'S MEMORANDUM
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at the time of imaging

2. The deed restriction concerning the size and number of garages has been waived;
3. Garden Oaks Maintenance Organization's exercise of authority to enforce the deed restriction concerning the size and number of garages was unreasonable;
4. Plaintiff Garden Oaks Maintenance Organization should take nothing on its claims against Defendants Peter S. Chang and Katherine M. Chang;
5. Defendants Peter S. Chang and Katherine M. Chang should recover on their claim for declaratory relief; and
6. Defendants Peter S. Chang and Katherine M. Chang should take nothing on their claim for attorneys' fees.

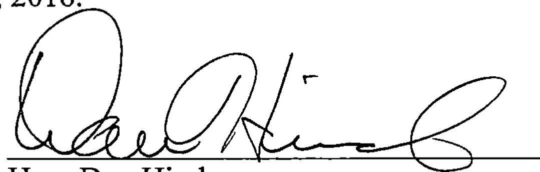
The Court further ***RENDERS*** judgment declaring that:

1. "The Notice of Formation of Petition Committee filed on July 23, 2001 under Harris County Clerk's File No. V191699 (and the amendment attached thereto) is invalid, ineffective, and of no force and effect with respect to Defendants Peter S. Chang and Katherine M. Chang."
2. "The Petition to Amend Restrictions filed on June 3, 2002, under Harris County Clerk's File No. V842579 is ineffective and of no force and effect with respect to Defendants Peter S. Chang or Katherine M. Chang";
3. "The By-Laws of Garden Oaks Maintenance Organization have no force and effect against Defendants Peter S. Chang or Katherine M. Chang"; and
4. "Garden Oaks Maintenance Organization has no authority or standing to pursue any legal action against Defendants Peter S. Chang or Katherine M. Chang for violations of any alleged deed restrictions in the Garden Oaks Section Three."

The Court further ***ORDERS*** that all costs of court are taxed against Plaintiff Garden Oaks Maintenance Organization.

All other relief not expressly granted in this Judgment is denied. This Judgment disposes of all claims and parties, is final, and is appealable.

SIGNED at Houston, Texas this 8th day of June, 2016.



Hon. Dan Hinde
Judge, 269th Judicial District Court