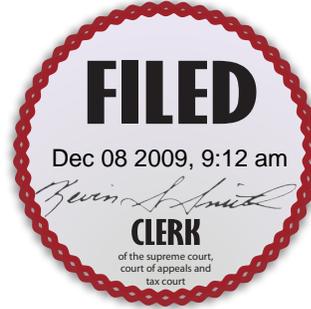


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RIVERS EDGE HOMEOWNERS)
ASSOCIATION, INC., et al.,)
)
Appellants-Defendants,)
)
vs.)
)
JOHN M. CALLIS, et al.,)
)
Appellees-Plaintiffs.)

No. 10A01-0904-CV-160

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Larry R. Blanton, Judge Pro Tempore
Cause No. 10D01-0708-PL-142

December 8, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellants-Defendants, River's Edge Homeowners Association, Inc., *et al* (the Association), appeals the trial court's grant of summary judgment in favor of Appellees-Plaintiffs, John M. Callis, *et al.* (the Appellees), with respect to the voting rights of the property owners at River's Edge.

We affirm.

ISSUES

The Association raises one issue on appeal, which we restate as follows:

Whether the trial court properly interpreted the amendments to the homeowners' voting rights as included in the December 27, 2006 amendments to the restrictive covenants.

In their brief, the Appellees raise one issue on appeal, which we restate as follows:

Whether the Association waived its appeal when it failed to file an adequate Appellant's Appendix in accordance with Indiana Appellate Rule 50(A).

FACTS AND PROCEDURAL HISTORY

The Association governs the River's Edge development, situated along the Ohio River in Clark County, Indiana. River's Edge is a single development consisting of two distinct subdivisions, each governed by separate but similar restrictive covenants. The upper portion of the development is a residential subdivision of "stick-built" houses, located on higher ground outside of the floodplain. (Appellees' App. p. 31). The lower part of the development is referred to as the "Campground" and is comprised of mobile homes and other movable structures along the edge and within the floodplain of the Ohio River. (Appellees'

App. p. 31). All lot owners within River's Edge are required to pay an assessment to the Association to ensure the maintenance and upkeep of the private roads serving the development.

Because the Campground is located within the Ohio River floodplain, in March of 2002, a Master Agreement of Restrictive Covenants for Flood Management (Master Agreement) was adopted, requiring that all Campground structures be evacuated and moved to a "staging area" during times of flooding. (Appellants' App. p. 173). Initially, the staging area was leased but as the lease expiration date approached in 2006, thirty-one lot owners living in the Campground purchased two lots in the higher, residential subdivision to serve as the staging area. As a result of this purchase, each lot owner of the Campground acquired a 1/31 interest in the staging area. In addition, the acquisition required the creation of two classes of members within River's Edge, one for the Campground lot owners who had an ownership interest in the staging area, and another for all other lot owners who did not have an interest in the staging area.

On December 27, 2006, the Association called a special meeting. At the meeting, the restrictive covenants of both the Campground and residential subdivision were amended to establish the two membership classes. Prior to the special meeting, both the Campground lot owners and residential lot owners within River's Edge could "cast only one vote in total, no matter how many lots they own[ed]." (Appellants' App. p. 157). After the amendments proposed at the special meeting were accepted, the restrictive covenants for both the Campground and the residential subdivision now bear the following identical language:

Every owner shall have the same rights, privileges, duties, liabilities, limitations and restrictions as the other Members of the Corporation. All Members shall abide by the Articles, the By-Laws, the rules and regulations and all covenants, restrictions and other provisions contained in the Declaration. All members shall be entitled to one (1) vote for each Lot owned, provided, however, each Lot represented shall have only one (1) vote as the Owners of such Lot may determine in accordance with the By-Laws.

(Appellants' App. pp. 187-88; 198).

On May 23, 2007, the Association called a special membership meeting. During this meeting, the assembled lot owners voted and agreed to split the Association into two entities: one entity would govern the residential subdivision, while a second entity would govern the Campground. However, multiple lot owners were not allowed to cast a vote for each lot they owned. Rather, each owner was allowed one vote, regardless of the number of lots owned.

On June 19, 2007, Appellees, who represent owners of lots in the residential subdivision—with some owners also owning multiple lots in both sections of River's Edge—filed a Complaint for declaratory judgment and injunction seeking a court order declaring the May 23, 2007 meeting of the Association to be invalid because Appellees were not allowed their full voting rights at the meeting.¹ On July 2, 2007, during a conference conducted by the trial court, the parties agreed to a preliminary injunction maintaining the status quo. On February 27, 2008, Appellees filed their Motion for Summary Judgment or, alternatively, for Partial Summary Judgment, together with their memorandum of law and designation of evidence. On April 4, 2008, the Association filed its response. On June 23, 2008, the trial

¹ While the Complaint advances several other reasons to declare the May 23, 2007 meeting invalid, the deprivation of voting rights is the only issue on appeal.

court conducted a hearing on Appellees' motion for summary judgment and granted partial summary judgment in favor of Appellees on October 6, 2008. On October 31, 2008, the Association filed its motion to correct error and request for a hearing. On January 26, 2009, the trial court held a hearing on the Association's motion. As the trial court failed to enter judgment on the motion, it was deemed denied on March 12, 2009. On March 23, 2009, the Association filed a motion for entry of final appealable judgment which was not objected to by Appellees and was granted by the trial court.

The Association now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

This cause comes to us as an appeal to the trial court's grant of summary judgment with regard to the voting rights in the housing association. However, because Appellees raise a procedural issue, we will analyze their claim first prior to turning to the merits of this appeal.

I. Sufficiency of Appellants' Appendix

When reviewing the appeal of a trial court's summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. *Hendrick Cty. Bd. of Com'rs v. Rieth-Riley Const. Co., Inc.*, 868 N.E.2d 844, 848-49 (Ind. Ct. App. 2007). In doing so, we consider all of the *designated evidence* in the light most favorable to the non-moving party. *Id.* (emphasis added).

As our review of a trial court's ruling on summary judgment is limited to the evidence designated by the parties, it is incumbent upon the parties to present us with a complete

appellate appendix. Indiana Appellate Rule 50(A)(2)(b) specifies that a civil appendix on appeal necessarily includes “any written opinion, memorandum of decision, . . . relating to the issues raised on appeal[.]” Here, Appellants’ Appendix contains, pertinent to this appeal, Plaintiffs’ Motion for Summary Judgment and the Association’s response thereto, a reference on the title page referring to Plaintiffs’ Designation of Evidence and Defendants’ Designation of Evidence. The Association did not include the parties’ respective memoranda supporting their motion. More importantly, however, while the Appendix does contain Plaintiffs’ Designation of Evidence, not all the designated evidence is included. In particular, Exhibits E, F, and L-R are missing from the Appendix. In similar vein, while the Association included Defendants’ Exhibit B as designated evidence in the Appendix, the Association failed to include the list enumerating the Designation of Evidence or any other exhibits listed thereon.²

We remind the Association that it is the Appellants’ duty to present an adequate record on appeal to permit a fair and intelligent review. *See Rausch v. Reinhold*, 716 N.E.2d 993, 1002 (Ind. Ct. App. 1999), *trans. denied*. Even though Appellees submitted a Supplemental Appendix, they failed to completely rectify Appellants’ numerous omissions and merely included the documents pertaining to their Designation of Evidence. We caution the parties that “[a]ny party’s failure to include any item in an Appendix shall not waive any issue or argument.” Ind. Appellate Rule 49(B). Thus, we will review the Association’s claims in light of the documents presented to us.

² We assume that because the Association included an Exhibit B, at the very least an Exhibit A must exist.

II. *Summary Judgment*

A. *Standard of Review*

This cause comes before this court as an appeal from a grant of summary judgment. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. *First Farmers Bank & Trust Co. v. Whorley*, 891 N.E.2d 604, 607 (Ind. Ct. App. 2008), *trans. denied*. Thus, on appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. *Id.* at 607-08. In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party. *Id.* at 608.

The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's ruling was improper. *Id.* When the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff's cause of action or that the defendant has a factually unchallenged affirmative defense that bars the plaintiff's claim. *Id.* Accordingly, the grant of summary judgment must be reversed if the record discloses an incorrect application of the law to the facts. *Id.*

We observe that, in the present case, the trial court entered detailed and helpful findings of fact and conclusions of law in support of its judgment. Special findings are not required in summary judgment proceedings and are not binding on appeal.

AutoXchange.com, Inc. v. Dreyer and Reinbold, Inc., 816 N.E.2d 40, 48 (Ind. Ct. App. 2004).

However, such findings offer this court valuable insight into the trial court's rationale for its judgment and facilitate appellate review. *Id.*

B. Analysis

The Association now contends that the trial court erred when granting Appellees' motion for summary judgment. In essence, the Association claims the trial court's interpretation of the Members' voting rights provision, as amended in the restrictive covenants, is erroneous: whereas the trial court declared that the one-vote-per-lot rule is applicable to all home owners in River's Edge, the Association asserts that the one-vote-per-lot is more restrictive and is merely applicable to the thirty-one Class B Members when voting on staging area issues.

Restrictive covenants maintain or enhance the value of land by controlling the nature and use of lands subject to a covenant's provisions. *Grandview Lot Owners Ass'n, Inc. v. Harmon*, 754 N.E.2d 554, 557 (Ind. Ct. App. 2007). As a general proposition, restrictive covenants are disfavored in the law and will be strictly construed by the courts. *Id.* Because covenants are a form of express contract, the same rules of construction apply to restrictive covenants as apply to contracts. *Renfro v. McGuyer*, 799 N.E.2d 544, 547 (Ind. Ct. App. 2003), *trans. denied*.

Generally, the construction of a written contract is a question of law for the trial court for which summary judgment is particularly appropriate. *City of Lawrenceburg v. Milestone Contractors, L.P.*, 809 N.E.2d 879, 883 (Ind. Ct. App. 2004), *trans. denied*. However, if the

terms of a written contract are ambiguous, it is the responsibility of the trier of fact to ascertain the facts necessary to construe the contract. *Id.* Consequently, when summary judgment is granted based upon the construction of a written contract, the trial court has either determined as a matter of law that the contract is not ambiguous or uncertain, or that the contract ambiguity, if one exists, can be resolved without the aid of a factual determination. *Id.*

In ascertaining a contract's clarity, or lack thereof, we consider the whole document, not just the disputed language. *Id.* Construction of contract language that would render any words, phrases, or terms ineffective or meaningless should be avoided. *Id.* Courts should presume that all provisions included in a contract are there for a purpose and, if possible, should reconcile seemingly conflicting provisions to give effect to all provisions. *Id.* Furthermore, in its interpretation of the contract, the court should attempt to determine the parties' intent when entering a contract from their expressions within the four corners of the written document. *Id.*

The Association was originally created in 1989 as a condominium complex, governed by a code of by-laws and declaration of restrictive covenants, which entitled each owner to "cast one vote for each [c]ondominium [u]nit he own[ed]." (Appellants' App. p. 65). During the following years, the nature of the development gradually changed. In 1992 and 1993, the development became more residential and added the Campground. The restrictive covenants and by-laws were adjusted to reflect this new situation, declaring the voting rights for both

the residential development and the Campground to be a “one-vote-per-owner” even if multiple lots are owned. (Appellants’ App. pp. 94, 111).

On March 18, 2002, the Association adopted the Master Agreement which created a staging area for the Campground’s manufactured homes in case of flood. On August 25, 2002, the Association amended the Campground restrictions to define the Campground by recorded plat, instead of by lot numbers. Four years later, on December 27, 2006, the Association again amended the restrictive covenants of both the residential development and the Campground. With respect to the voting rights, the restrictive covenant pertaining to the residential development reads:

SECTION 1. MEMBERSHIP: Every Owner of a Lot in the Community shall be a member (“Member”) of the Association; membership shall be appurtenant to and may not be separated from ownership of a Lot. However, there shall be two (2) classes of membership, as follows:

(a) **Class “A” Members.** Every Person who is an Owner of a Lot and who has not contributed toward the purchase of the Staging Area shall be a Class “A” Member of the Association.

(b) **Class “B” Members.** Every Person who is an Owner of a Lot and who has contributed toward the purchase of the Staging Area shall be a Class “B” Member of the Association.

Every owner shall pay an Assessment to the Association according to the type of membership of the Member in the Association as set forth in this Declaration, as amended. Class “A” Members shall have no rights or privileges, and no duties, obligations, or liabilities, in regards to the access, use, enjoyment, and maintenance of the Staging Area owned and maintained by the Class “B” Members. Rather, the Class “B” Members shall have the exclusive rights to possess, manage, control, and maintain the Staging Area.

Every owner shall have the same rights, privileges, duties, liabilities, limitations and restrictions as the other Members of the Corporation. All Members shall abide by the Articles, the By-Laws, the rules and regulations

and all covenants, restrictions and other provisions contained in the Declaration. *All Members shall be entitled to one (1) vote for each Lot owned, provided, however, each Lot represented shall have only one (1) vote as the Owners of such Lot may determine in accordance with the By-Laws.*

(Appellants' App. pp. 187-88) (emphasis added).

In this regard, the restrictive covenant for the Campground reads as follows:

SECTION 1. MEMBERSHIP: Every Owner of a Lot in the Community shall be a member ("Member") of the Association; membership shall be appurtenant to and may not be separated from ownership of a Lot. However, there shall be two (2) classes of membership, as follows:

(a) **Class "A" Members.** Every Person who is an Owner of a Lot and who has not contributed toward the purchase of the Staging Area shall be a Class "A" Member of the Association.

(b) **Class "B" Members.** Every Person who is an Owner of a Lot and who has contributed toward the purchase of the Staging Area shall be a Class "B" Member of the Association. . . .

In addition to the rights, benefits, and obligations of being a member of the Association, Class "B" Members shall also have an exclusive proportionate beneficial interest in the Staging Area, as further set forth below.

While the Association owns the Staging Area, the Association shall be deemed to hold title to the Staging Area in trust for the benefit of the Class "B" Members only. The beneficial interest in and to the Staging Area for the Class "B" Members is directly proportional to the number of Class "B" Members of the Association. Thus, since there are thirty-one (31) Class "B" Members of the Association, each Class "B" Member shall have a 1/31 beneficial interest in the Staging Area. The proportionate beneficial interest of each Class "B" Member shall be appurtenant to the Lot owned by such Class "B" Member. The conveyance or other transfer of the fee simple interest in any Lot owned by a Class "B" Member shall also convey or transfer the beneficial interest of the Class "B" Member to the Staging Area.

Class "A" Members and Class "B" Members shall be levied and shall pay an Assessment to the Association according to the type of membership of the Member in the Association as set forth in this Declaration, as amended. Class "A" Members shall have no rights or privileges, and no duties,

obligations, or liabilities, in regards to the access, use, enjoyment, and maintenance of the Staging Area owned and maintained by the Class “B” Members. Rather, the Class “B” Members shall have the exclusive right to possess, manage, control, and maintain the Staging Area. While the directors of the Association shall manage the Staging Area Assessments, all Staging Area Assessments shall be held by the Association for the benefit of the Class “B” Members and the Staging Area. Only Class “B” Members shall be entitled to (i) vote upon any matter regarding the Staging Area and (ii) any income, revenue, or proceeds resulting from or associated with the Staging Area. Except for the sale of all or any part of the Staging Area, any action with respect to the ownership or leasing of the Staging Area must be consented to by a Majority of the Class “B” Members (rather than a majority of any quorum).

Notwithstanding anything to the contrary contained herein or in the deed to the Staging Area, so long as [] any federal, state or local governmental authority having jurisdiction over the Community requires that the Association maintain a staging area, neither the Class “B” Members nor the Association shall have any authority to sell the entire Staging Area and the Association and the Class “B” Members shall be and remain obligated to hold so much of the Staging Area as is necessary to comply with the applicable federal, state or local requirements.

Other than with respect to the Staging Area, all Members shall have the same rights, privileges, duties, liabilities, limitation and restrictions as the other Members of the Corporation. All Members shall abide by the Articles, the By-Laws, the rules and regulations and all covenants, restrictions and other provisions contained in the Declaration. *All members shall be entitled to one (1) vote for each Lot owned, provided, however, each Lot represented shall have only one (1) vote as the Owners of such Lot may determine in accordance with the By-Laws.*

(Appellants’ App. pp. 197-98) (emphasis added).

Both parties now disagree to the extent the change in voting rights is applicable. The Association argues that the one-vote-per-lot rule is merely applicable to Class B Members when dealing with staging area issues, while the Appellees, supported by the trial court,

claim that the language in the amendments abrogated the previous one-vote-per-owner rule in favor of the one-vote-per-lot rule applicable to all Members. We agree with Appellees.

First, focusing on the definition of ‘Member,’ as used in the Association’s documents we have before us, we note that the term is defined separately with respect to the residential subdivision and the Campground. The restrictive covenants enacted in 1992 with respect to the residential subdivision declare that “every owner of a lot” is a member of the Association. (Appellants’ App. p. 94). With regard to the Campground, the August 25, 2002 amendment noted that “Member” refers to “anyone owning a lot.” (Appellants’ App. p. 144). Both documents instill voting rights in their members in accordance with the one-vote-per-owner rule, regardless of the number of lots the owner owns. Moreover, the December 26, 2007 amendments to the restrictive covenants expressly stipulate in their respective Membership sections that “[e]very Owner of a Lot in the Community shall be a member (“Member”) of the Association.” (Appellants’ App. pp. 187, 197).

The parties do not dispute that two classes of Members were created by the December 27, 2006 amendments: the Members who did not contribute towards the purchase of the staging area, *i.e.*, Class A Members and the thirty-one Members who have an ownership rights in the Staging Area, *i.e.*, Class B Members. Reading both amendments together, it is clear that the amendments treat Class A Members different from Class B Members when the access, use, enjoyment, and maintenance of the staging area is involved. Specifically, the Class A Members have no voting rights with respect to the staging area, whereas the Class B Members have exclusive authority with respect to staging area decisions.

After the respective amendments describe the two Classes of Members, and their corresponding responsibilities with regard to the staging area, both amendments turn their attention to the voting rights. The voting rights are included in a new paragraph which does not reference the separate Classes, but rather speaks in general, all-encompassing terms. In particular, the language used focuses on “every owner,” and “all Members.”

The Association now contends that only Class B Members have the exclusive right to cast a vote for each lot owned when dealing with staging area issues because the disputed voting rights provision is located under the subheading ‘Class B Members.’ However, merely because the one-vote-per-lot language appears in the text under the subheading does not necessarily mean that the language falls under the legal purview of the subheading. As pointed out previously, it is several paragraphs underneath the subheading that the voting rights provision is referenced, and the language is included in a separate paragraph which clearly uses language distinct from its previous paragraphs by referring to *all* owners and *all* Members instead of membership classifications.

Additionally, the Association argues that abrogating the original one-vote-per-owner rule does not fulfill the purpose of the staging area amendments. The staging area is a requirement instituted by the Master Agreement and is aimed at instituting a procedure to evacuate the mobile homes of the Campground in case of flooding. The Agreement applies equally to both the residential subdivision and the Campground. It states that “[o]wners of all the lots and lands comprising the development known as the River’s Edge [is] to adopt and impose the terms, conditions, restrictions and covenants of this Master Agreement upon

each such tract of land currently in non-compliance.” (Appellants’ Appendix p. 173). As such, Class A Members are just as liable for Master Agreement violations as are Class B Members and thus should be afforded the same voting rights. This outcome is supported by the language included in the December 27, 2006 amendments. The amendments clearly indicate that “[o]ther than with respect to the Staging Area, all Members shall have the same rights, privileges, duties, liabilities, limitations and restrictions as other members.” (Appellants’ App. p. 198).

Mindful of the basic premise of contract interpretation that “[w]ords and phrases shall be taken in their plain, or ordinary and usual sense,” we conclude that the December 27, 2006 amendments are unambiguous as they instill a one-vote-per-lot rule on all Members of the Association, thereby abrogating the previous one-vote-per-owner rule. *See Briles v. Wausau Ins. Companies*, 858 N.E.2d 208, 213 (Ind. Ct. App. 2006). The amendments include the voting change in a separate and distinct paragraph which—unlike the paragraphs preceding it—is silent with regard to the two Classes of Members but rather uses the all-encompassing terms of “every” owner and “all” members. The Association has not advanced any plausible explanation as to why the modifiers “every” and “all” should only be applicable to the Class B Members when dealing with staging area issues. Therefore, we affirm the trial court’s grant of summary judgment in favor of Appellees.

CONCLUSION

Based on the foregoing, we find that (1) the Association did not waive its appeal when it failed to file an Appellant’s Appendix in accordance Indiana Appellate Rule 50(A) and (2)

the trial court properly interpreted the Amendments to abrogate the original voting rights and to create one-vote-per-lot for all Members of the Association.

Affirmed.

BAKER, C.J., and FRIEDLANDER, J., concur.