IN THE CIRCUIT COURT OF SALINE COUNTY, ARKANSAS
CIVIL DIVISION

GENE E. GARNER — PLAINTIFF

vs. CASE NO. 63CV-19-116-3

BOARD OF DIRECTORS -
HOT SPRINGS VILLAGE PROPERTY OWNERS
ASSOCIATION and
HOT SPRINGS VILLAGE PROPERTY OWNERS
ASSOCIATION — DEFENDANTS

POST-HEARING BRIEF

This brief provides a synopsis of the New Covenants adopted by the Board on April 18, 2018 (Exhibit "G" to the Amended Complaint) as opposed to what would be considered "amendments" or "additions" to the Protective Covenants, which were originally filed in 1970 and most recently amended on May 21, 2014 (Exhibit "E" to the Amended Complaint). It is Plaintiff's position that the Protective Covenants are entirely new covenants and restrictions and so change the character and nature of Hot Springs Village as developed in 1970, that they are invalid for failure to obtain owner approval, failure to file with the real property records of Garland and Saline Counties and failure to

have the required acknowledged signatures in order to be valid. *See* Ark. Code Ann. §§ 14-15-404 and 18-12-103.

The key question is whether these new covenants can be classified as "amendments" or "additions" or whether they are newly imposed restrictions. In other words, are they something more than simple additions and something beyond what is allowed under the terms of the Protective Covenants as most recently amended in May 2014. The New Covenants are an outright revocation (or at best, revocation by implication) of the existing covenants, thus the amendment language relied upon by the Board no longer exists. In any event, there was never a right to impose new covenants and restrictions – merely the right to amend and "add" to the existing covenants. The Court is asked to consider these new covenants – not as mere "additions," but as entirely new covenants in which case owner approval under Ark. Code Ann. § 18-12-103 is triggered.

The Restatement (Third) Property, Servitudes § 6.21 provides that:

> A developer may not exercise a power to amend or modify the declaration in a way that would materially change the character of the development or burdens on existing community members unless the declaration fairly apprises purchasers that the power could be used for the kind of change proposed.

As described in more detail below, the covenants at issue do materially change the character of the development and they do materially burden the existing community owners. Moreover, the words "amend, revoke and add to" do not fairly apprise owners that these types of new covenants would be imposed.

Never before have owners been required to obtain a permit to perform things such as remove trees or install and/or change landscaping, all of which they were otherwise allowed to perform without restriction. They must now. Never before were owners required to install irrigation systems for their landscaping. They are with the passage of the New Protective Covenants. Never before were owners required to remove "damaged" landscaping. They are now. Never before were owners required to submit plans for landscaping and only allowed to install certain types of landscaping materials and species. They must now. Never before were structures, such as homes and outbuildings, restricted to a certain size and material. They are now. Never before were things such as carports prohibited. They are now. These are just a small sample of restrictions that did not exist previously but do now.

Of course, owners are on notice that Protective Covenants may be amended here and there. However, there was no warning that they would be subject to a bait and switch and complete overhaul of the restrictions under which they originally agreed to be bound. If allowed to stand, Protective Covenants would be unstable as they could be completely overhauled and replaced on a whim by virtue of language that merely allows amendment. There is nothing within the words, "amend, revoke or add to" that would apprise an owner in Hot Springs Village that the 3-page Protective Covenants would be scrapped in favor of a 120-page quasi-city code. Covenants and restrictions must be strictly construed, and, in this case, there is no power to impose entirely new covenants and restrictions. Had the developer intended to have that right, it would have plainly said so in the Original Covenants. *See Vera Lee Angel Revocable Trust v. Jim O'Bryant and Kay O'Bryant Joint Revocable Trust, 2018 Ark. 38, 537 S.W.3d 254.* In sum, Plaintiff is asking this Court for a finding that the new covenants (a) exceed the Board's authority to

"amend, revoke and add" to the covenants[1]; (b) require affected owner approval pursuant to Ark. Code Ann. § 18-12-103 and (c) must be filed with the Garland and Saline County real property records pursuant to Ark. Code Ann. § 18-12-103 as well as §14-15-404(a)(1) (that a recording effecting real estate must be acknowledged in order to be effective before filing).

ORIGINAL PROTECTIVE COVENANTS

The Original Protective Covenants contained common restrictions found in subdivisions. They provided for setbacks for side yards (¶8), setbacks for lakes, water courses (¶9), length of time to complete construction of buildings (¶11), electrical wiring and plumbing (¶12), prohibition of sewage disposal and water supply (¶13 and 14), use of outbuildings as rental units or on otherwise undeveloped lots and allowing for residences to be built on more than one lot (¶15); prohibition of fences at intersections to avoid sight obstruction (¶17); prohibition of signs (¶18); allowance for model houses (¶19); businesses in residential areas (¶20), prohibition of obstructions in easements (¶21); no

1 Not only do the Protective Covenants have no provision for a complete revocation and imposition of new covenants, but the power was also limited by the Assignment and Assumption Agreement from the Developer (Exhibit "D" to Amended Complaint), which provided that the Board could not make any modifications to restrictions that impacted the Developer's lots. There are no provisions within the New Protective Covenants exempting the Developer's lots.

obnoxious or offensive activity on lots (¶22); prohibition against livestock, poultry, and pets (¶23); Garbage and refuse disposal on lots (¶24); prohibition against oil and mining operations (¶25); storage of building materials on lots for no more than three months (¶26); storage of derelict vehicles on lots (¶27); parking or storage of busses, trucks, RVs, motor homes, campers, and trailers on a lot (¶27); and prohibition of parking or storage of commercial vehicles (¶29). Finally, the Original Protective Covenants contain a paragraph on "Overlay Zones," the issue before the court in *Garner I.* These are the only restrictions contained in the Protective Covenants on file with the Garland County and Saline County Real Property Records.

NEW COVENANTS AND RESTRICTIONS

The new covenants and restrictions are too numerous to place in one brief without making it cumbersome to read. The table of contents is attached as Exhibit "A" and the portions in yellow "highlights" contain the newly created covenants. Of the 104 restriction categories, only 24 were contained in the Original Protective Covenants. The sheer volume of material reveals that the covenants are not mere "additions," but are wholly new covenants and restrictions.

The following represent just a few of the more egregious examples of what the Board calls "additions" to show that the document is in truth a collection of new covenants.

Section 5: Permits – The new covenants contain restrictions throughout that require an owner to obtain a permit for a host of purposes. (*See* Section 5 "Permits and Submittal Requirements," pp. 20-21 of the New Protective Covenants). These "permits" are required in order to host an event, engage in new construction (requiring "level 2" approval), interior and exterior building alterations (including roofing, siding, windows, doors, porches . . .), signage, landscapes, and special permits are required for items ranging from seawalls to swimming pools, electrical, plumbing, heating, sprinkler systems, tree removal and conducting a garage or yard sale. Not only did the Original Protective Covenants not require a permit for any of the above actions, permits were not even mentioned.

A word search can be performed on the original Protective Covenants as amended through 2014 and the word "permit" will not appear anywhere in that document. Simply, permits were not required. The permit process not only applies to new construction, but applies to "alterations," changes in existing

landscaping and even to conduct a simple yard sale. In fact, Section 5.9.1(f) provides that previously developed residential properties must obtain a permit in order to make any landscape modification of the front yard or yards facing golf courses or lakes. So, any claim that the previously developed properties are "grandfathered in" is untrue. In fact, as noted in Section 5.2, in order to obtain a permit, a plan in accordance with Section 5.9 is required. Section 5.9 lays out a detailed and burdensome plan that must be submitted to the Board – *See* Section 5.9.2. None of these items were restricted in any way, shape or form in the Original Protective Covenants and permits certainly were not required. In fact, landscaping was not even restricted or controlled – now, not only is it restricted and controlled, a permit and a plan are required in order to install landscaping. This change alone fundamentally alters the character of the community and should not be seen as mere "additions" to existing covenants.

Section 6: Maintenance and Storage – Other than the storage of vehicles, found in Section 6.5, albeit in a much shorter format, the Covenants and Restrictions contained in Section 6 are entirely new. They provide that violations will be enforced by the police department (6.1.1); they restrict what can be placed in

the yards (6.6.2) (playground equipment, swimming pools, firewood, gazebos, etc.)(p.28); that structures must be free of rot, cracks and water damage (6.2.1), that driveways must be maintained and unbroken (6.6.2), that walkways must be provided and maintained (6.6.3); sprinkler systems must have adequate protection (6.6.4) and seawalls must be free from cracks (6.2.6). (p. 26). This section also contains various rules regarding storage of vehicles. (6.5.1) (p. 27), it defines the types of "non-family vehicles" and provides that they may only be parked in a driveway for up to 72 hours in any 30-day period for the "sole purpose of loading, unloading, cleaning, or servicing the vehicle."

6.5.1(b) provides that vehicles must "be in working condition and display a valid license plate." 6.5.2 further provides that family vehicles "must be stored within garages, carports, or driveways."

None of these restrictions were contained in the Original Protective Covenants. In fact, the original restrictions did not even mention seawalls, gazebos, swimming pools, firewood or playground equipment.

Section 7: Zoning and Zoning Translation – This section has previously been detailed in other briefs, but bears reiterating that the section creating new "zones" along with a rezoning procedure is completely new to Hot Springs

Village and is not a simple addition, but a fundamental change to the community as a whole.

Section 8: Site Development – this section most certainly applies to the thousands of existing owners who have undeveloped lots. As noted in the Findings of Fact and Conclusions of Law attached to Defendants' Motion and Second Motion for Judgment on the Pleadings, there are thousands of unimproved lots – lots owned but with no structure. These lots would certainly not be "grandfathered" in and these owners are now under new site development restrictions that were not previously in existence. The size, layout and orientation of the homes to be constructed on those lots depends on which zone the lot falls under. "Zones" did not exist in the original Protective Covenants.

Section 9: Site and Building Standards – This section is also virtually entirely new and contains never before imposed restrictions on building size, height, orientation (the direction the building is placed on the property), condition of docks and the frontage of homes and buildings. An example of a new covenant affecting current owners can be found on page 50, Section 9.7.4 (g) which provides that any modifications, changes, etc. to existing docks requires

conformance with the new "code." Page 52 provides schematics and layouts for frontage of buildings and again contains restrictions that were not only absent from the Original Protective Covenants, but in no way could be assumed that the developer intended much less considered restrictions of this nature. By way of example, if an owner has a yard defined as a "Pedestrian Forecourt," the restrictions provide that "Metal fencing is permitted at outdoor seating areas only; masonry walls permitted along the frontage façade line," the area is to "2,000 square feet, max" and the must be "6 shrubs per 500 sf. Min. in T4; 50% min. organic surface." (New Protective Covenants, pp. 53). There are further detailed restrictions on Pages 53-55 of the New Protective Covenants for various types of homes and yard frontages. Page 55 provides a detailed list of "required" sizes and materials for arcades, galleries, canopies & marquees, awnings enclosed porches, open porches and stoops. Section 9.9 (p. 56) and 9.10 (p. 57) contain new restrictions on shop fronts and fencing and walls, respectively. Section 9.11 (p. 59) provides new restrictions on mailboxes (never before restricted) and Section 9.12 outright prohibits above-ground swimming pools and further restricts in-ground pools. These were also never before restricted. Section 9 continues with detailed new restrictions on "accessory

dwelling units," "solar energy systems," "storm shelters and safe rooms," "propane tanks," "emergency generators," "satellite dishes," and "radio antennae." In other words, the entire section is new and certainly more than mere "additions."

Section 10: Parking – Section 10 provides perhaps the most clear and, next to landscaping, egregious example of the new covenants and restrictions imposed on the owners. In Section 10.1.1 (p. 63), the size of driveways is limited to 12' unless it accesses multiple garage doors, then owners can have a maximum width of 20'. Carports and covered parking are absolutely prohibited by Section 10.1.2 (p. 63). Testimony, if allowed, will no doubt reveal that there are dozens if not hundreds of homes in Hot Springs Village with carports or covered parking. Section 10.1.3 contains detailed new restrictions on the size, orientation (placement and direction-facing) of garages broken down by whether they are "type 1," "type 2," type 3" or "type 4" garages. These restrictions include size limitations and whether the "vehicular traffic" must be "parallel with the front property line."

10.2 and 10.3 provide for parking location and access limitations depending on whether the lot is within a T4 or T5 zone. (p. 65). Section 10.4 (p.

66) provides that single family homes (in T2 or T3) must have a minimum of 2 spaces per unit within a garage (meaning an owner must build a two-car garage) and single family homes in T4 and T5 zones must have 2 on-site or off-site spaces at a minimum. Parking Lot Designs are restricted under Section 10.5 (p. 66). Not only are the zones T1-4 newly created, but the restrictions described above are entirely new.

This section is only vaguely related to Section 29 of the Original Protective Covenants, which contained restrictions on the "parking or storing of commercial vehicles on residential property." Chapter 10 is entirely new as it controls the size of driveways, garages, carports, their layout, location and access. Section 29 of the Old Covenants merely limited the type of vehicle that may be parked or stored on or near residential property. There certainly was never a requirement that one build a garage or a ban on carports prior to the introduction of the New Protective Covenants.

Section 11: Use – provides for restrictions on the use of each property, including restrictions on home-based businesses – broken down into "Type A" an "Type B" home occupations (pp. 68-69). There was no such thing as a "Type A" or "Type B" home in the Old Protective Covenants.

Section 13: Landscape – Section 13 on Landscaping provides another example (along with Sections 5 and 10) of the most egregious and substantial new covenants to Hot Springs Village. (pp. 81-93). The Original Protective Covenants do not contain any restriction regarding landscaping. In fact, there is not one single covenant of the 32-paragraph Original Protective Covenants that could be stretched to include restrictions on landscaping. All owners, existing and prospective, are now under extensive landscaping regulations that include a five-page chart listing the types of required large trees, medium trees, small trees, shrubs, ground cover, grasses and invasive species allowed. (pp. 89-93).

Section 13.8 provides an explanation as to how to apply this chart to homes depending on which zone applies to the home. Again, zones did not previously exist. Section 13.8.2 provides that any "invasive species in Table 13.4-7 are prohibited and must be removed." Meaning, owners are required to remove certain landscaping if it meets the definition from the list. 13.8.4 states that "artificial plants or trees do not satisfy the requirements of this chapter." (p. 88). Meaning, artificial trees appear to be prohibited. These

restrictions are not additions and cannot be argued that they are anything other than new covenants and restrictions.

Section 13.1.2 (p. 81) refers to the Section 5 (previously discussed herein) and its Landscape plan Requirement (§ 5.9, p. 23). As previously noted, this Landscape Plan applies even to already existing properties – providing that a Landscape Plan is required for any modifications to "previously developed residential properties . . . ." Section 13.1.3 not only requires a permit (never before required) to remove a tree but provides that unpermitted tree removal is "subject to a fine." (p. 81). Section 13.1.4 requires "some method of irrigation in landscaped areas." (p. 81). Section 13.1.4 further spells out the requirements for the irrigation system including who is required to remove and install RPZ valves. All new and not previously restricted in any way, shape or form.

Section 13.1.5 provides that landscaping must be planted in areas designated as "planting beds." (p. 81). 13.1.6 provides that damaged and dying landscaping "must" be removed and replaced by the current owner of the property. 13.1.7 provides that landscaping material "must" be selected in accordance with the previously mentioned chart found in Section 13.8. The

section continues with detailed restrictions on site development, parking lots, tree preservation and street tree requirements. (pp. 82-85).

SUMMARY

The Board has posed these New Protective Covenants as nothing more than "additions" to the original Protective Covenants in place since 1970. These new covenants are something akin to a ransom note containing words and letters cut out from magazines and newspapers. Words and letters were cut out from the original 3-page protective covenants to create this new document. Much like the ransom note, the words and letters can barely be used to determine the source of the original document they came from – that is because the character of those words has completely changed and has taken on new meaning. This case is about more than just a page count, but the jump from 3 pages to 120 pages illustrates the significant change to the existing owners. That is to say, these are not simple additions here and there, but a complete overhaul of the restrictions and in-turn the community that has been in place for fifty years.

These New Covenants reflect a fundamental misunderstanding behind the purpose of covenants and restrictions and why the law requires them to be

filed in order to put owners on notice and to bind their respective properties. The Original Protective Covenants provided the basic "meat and potatoes" procedures for building a house and the basic rules once an owner moves in. The new rules create "processes," "building standards," and "architectural standards," that did not previously exist. In fact, most of the new rules and procedures do not even appear in the Original Protective Covenants. These are not changes within the structure of the Original Protective Covenants. The words "add to" indicates that covenants may be modified here and there over time. The changes here are not simple modifications or additions to existing covenants. They, as noted by the Restatement previously cited, "materially change the character of the development or burdens on existing community members." The permit process and landscaping requirements alone demonstrate that fact. These provisions certainly place new burdens that materially change the character of the development and there cannot be an argument that a current owner was aware that such changes would be forced on them due to three simple words, "amend, revoke, add."

As previously noted in his Response to the Motion for Judgment on the Pleadings, in *Couch v. Southern Methodist University,* 10 S.W.2d 973, 974

(Tex.Comm'n App.1928, judgmt. adopted); the Texas Appellate Court noted that the right to amend restrictions imply only those changes contemplating a correction, improvement, or reformation of the agreement rather than a complete destruction of it. This holding is in line with the previously cited Restatement of Property (Third).

The Board spins Plaintiff's position as standing in the way of progress or wishing to continue with stagnant development. However, the argument that an owner purchases property subject to the terms and conditions of the Declaration and Protective Covenants cuts both ways. The members of the Board and other owners that may desire a revised development plan for the community likewise purchased lots within Hot Springs Village under the terms of the Declaration and Protective Covenants in place since 1970 and as imagined and created by the original developer. They are likewise bound by those terms and they had a choice to purchase their lots subject to the rules. They cannot and should not be allowed to completely change the character and design of the village and impact thousands of owners at a whim because they like the idea of a Comprehensive Master Plan better. At least not without owner approval. For these reasons, the Protective Covenants violate Ark. Code

Ann. §§ 14-15-404 and 18-12-103 and should be declared invalid. At the very least, Defendants' Motion for Judgment on the Pleadings should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a copy of the foregoing pleading has been served upon the following, by United States Mail, with sufficient postage and by electronic mail to this 3rd day of February, 2020.

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HOT SPRINGS VILLAGE
PROTECTIVE COVENANTS

[ADOPTED: APRIL 18, 2018]

AMENDED: OCTOBER 17 2018, MARCH 20, 2019

Highlighted Area = Newly Created Covenant

EXHIBIT
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