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May 31, 2018

Via U.S. Mail and
E-mail (melissa.kahren@swiftcurrie.com)

Melissa Kahren
Swift, Currie, McGhee & Hiers, LLP
1355 Peachtree St. NE
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Atlanta, GA 30309

RE: ***Russell & Ellen McGonagil vs. Daniel F. Benner, Denise Benner, Ridenour Homeowners & Recreation Association.***

Dear Ms. Kahren:

Please accept this letter in response to yours of May 1, 2018, wherein you assert that the McGonagils do not have viable claims against the HOA and that above-referenced lawsuit constitutes frivolous litigation. Please be advised that we disagree with your assertion and show that the Declaration applicable to this community is starkly different from those referenced in the case law upon which you rely.

We have taken time to review the law and the applicable Declaration with our clients, and it is clear that the Declaration establishes certain obligations, rather than just rights, of the HOA which the McGonagils have a right to enforce. For example, contrary to your statement that the HOA has a "right, but not a duty, to abate violations and/or to exercise other remedies as set forth in the Declaration," the portion of § 3.01 of the Declaration which even your letter quotes speaks specifically to the HOA's duty to exercise its rights to enforce the Declaration:

> The Association shall have no power or duty to do or perform any act or thing **other than those acts and things which will promote in some way the common good and general welfare of the people of the Development**. To the extent, and only to the extent, necessary to carry out such purpose, the Association . . . **shall have the power *and duty* to exercise all of the rights, powers and privileges and to perform all of the duties and obligations of the Association as set forth in this Declaration.**

Declaration, § 3.01 (emphasis added).

The term "duty" is defined by Black's Law Dictionary (10th ed., 2014) as "A legal obligation that is owed or due to another and that needs to be satisfied; that which one is bound to do, and for which somebody else has a corresponding right." Stated differently, § 3.01 both grants the HOA the power to do things which will promote the common good and general welfare of the people of the Development, and further creates the legal obligation to perform such functions. To the extent necessary to promote the common good and general welfare of the community, the HOA has the "duty to exercise all of the rights, powers and privileges and to perform all of the duties and obligations of the Association as set forth in this Declaration." Therefore, under the express terms of § 3.01, the HOA has the legal obligation to enforce the terms of the Declaration, and to exercise the powers granted to the HOA to enforce such obligations, in order to promote the common good. There can be no doubt that the common good is promoted by the enforcement of the maintenance obligations set forth within the Declaration, and therefore it is the McGonagils' contention that it has become necessary for the HOA to address the Benners' longstanding violations of the Declaration in order to prevent the continued blight to the neighborhood and depreciation of its property value.

While it is true that Article 8 which you refer to as the "Enforcement Clause," refers to rights and not duties, § 3.01 imposes on the HOA the *duty* to exercise all of the rights set forth in the Declaration, including those described in Article 8, to the extent necessary to promote the common good and general welfare of the neighborhood. It is this contractually defined duty that differentiates the Declaration from the covenant described in *Rymer v. Polo Golf & Country Club Homeowners Ass'n, Inc.*, which gave the homeowners' association the right to enforce its covenants, but not the duty to do so. *See Rymer,* 335 Ga. App. 167, 174, 780 S.E.2d 95, 101 (2015). Without a contractually defined duty, the court declined to substitute its own judgment for that of the homeowners' association. *Id.* But where, as here, the declaration defines the HOA's duties, the court's responsibility is simply to "apply the normal rules of contract construction to determine the meaning of the terms therein." *See Marino v. Clary Lakes Homeowners Ass'n, Inc.*, 331 Ga. App. 204, 208, 770 S.E.2d 289, 293 (2015). In this instance, the Declaration itself does not merely create a right, it also creates a duty—or legal obligation—to enforce such rights where necessary.

Despite your letter's assertion that no viable claims of negligent maintenance may lie against the HOA, the McGonagils have not asserted a negligent maintenance claim, nor any other negligence claims. The breach of contract claims in this lawsuit rely solely on the duties that the Declaration imposes on the HOA. Therefore, unlike *Vernon Bowdish,* this case does not involve the "difference between the judgment and actions taken by the board of directors of the homeowners' association and the judgment of plaintiff[s]." *See Vernon Bowdish Builder, Inc. v. Spalding Lake Homeowners Ass'n, Inc.*, 196 Ga. App. 370, 371, 396 S.E.2d 24, 25 (1990). The McGonagils seek only to have the terms of the Declaration enforced, as detailed in the Complaint. The HOA has acknowledged that the Benners are not in compliance with the terms of the

Declaration based upon the several violation notices that have been issued. However, the HOA has failed to fulfill its legal obligation to exercise its enforcement powers to compel compliance.

Additionally, the Declaration expressly confers on the McGonagils the right to enforce its terms through a lawsuit seeking injunctive relief or damages. Section 8.01 states that the "Declaration and the Restrictions contained herein shall inure to the benefit of and shall be enforceable by . . . each Owner, his legal representatives, heirs, successors, and assigns." Further, § 8.03 states that "[n]othing contained in this Declaration shall be deemed to affect or limit the rights of the Declarant, the Association, or any Owner to enforce the Restrictions by appropriate judicial proceedings or to recover damages." Specifically, this section provides that "any beneficiary hereof shall be entitled to relief by way of injunction or specific performance, as well as any other relief available at law or in equity, to enforce the provisions hereof." Declaration § 8.03.

If your interpretation of Georgia law were correct, then any action or inaction on the part of the HOA would be a matter of its judgment not subject to judicial review, making the Declaration essentially unenforceable by any Owner. Yet Georgia courts will not read the Declaration in a way that renders entire sections meaningless, while your interpretation of Georgia law would deprive Sections 3 and 8 of the Declaration of any legal meaning. *See Deep Six, Inc. v. Abernathy*, 246 Ga. App. 71, 74, 538 S.E.2d 886, 888 (2000) (Georgia courts "should avoid any construction that renders portions of the contract language meaningless"). Rather, the cases cited in your letter involve the Court of Appeals' application of specific claims to specific contract terms that differ measurably from those in the Declaration at issue here, as shown above. Because the case law upon which you rely is not relevant to this dispute, our clients are not inclined to dismiss its action against the HOA at this time.

Nonetheless, the McGonagils' ultimate goal is to have the property next to their home rehabilitated sufficiently to amend the blight to the neighborhood and avoid further damage to their property value. Additionally, they want to repair the retaining wall between the two homes, and are willing to pay half of the cost of such repairs. This lawsuit was filed because they have been unable, despite years of diligent efforts, to effectuate these goals outside of the legal system. However, if the HOA is willing to undertake appropriate measures as authorized by the Declaration to either exercise its right to perform the needed repairs and maintenance, or take other actions to ensure that such repairs are performed to 1657 Carlson Lane as required by the Declaration, then the McGonagils are more than willing to resolve this case by means other than this litigation. The HOA has powers that are not available to the McGonagils to enforce the Declaration—and it also has the obligation to do so for the common good of the neighborhood.

Please feel free to give me a call to discuss finding a mutually agreeable solution to these issues.

Sincerely,

Mary Ellen Lighthiser

cc: Mr. and Mrs. Russ McGonagil

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