

NO. 53193

HUNTER FAMILY REAL ESTATE	§	IN THE DISTRICT COURT
II, LTD., AND EM JOINT VENTURE,	§	
<i>Plaintiffs,</i>	§	
	§	
V.	§	33rd DISTRICT
	§	
WINDERMERE OAKS PROPERTY	§	
OWNERS' ASSOCIATION, INC.,	§	
<i>Defendant.</i>	§	OF BURNET COUNTY, TEXAS

**PLAINTIFFS' THIRD AMENDED PETITION**

NOW COMES Hunter Family Real Estate II, Ltd. and EM Joint Venture, hereinafter called Plaintiffs, files this Third Amended Petition against Windermere Oaks Property Owners' Association, Inc., hereinafter referred to as Defendant, and shows unto the Court the following:

**SUMMARY OF THE CASE**

Windermere Oaks Property Owners' Association, Inc. ("HOA"), is a Texas nonprofit corporation and the governing body over the Windermere Oaks subdivision, whose lot owners are members of the HOA. The HOA has an Architectural Control Committee ("ACC") composed of members appointed by the HOA's board of directors. In 2021, the ACC was composed of property owners Mark Carpenter, Paul Hischar, Danny Flunker, and Micki Bertino.

Plaintiffs are developers and homebuilders who build new homes in this and other subdivisions. They submitted to the ACC for its review and approval several sets of architectural building plans (the "Plans") relating to several different lots in the subdivision. The ACC, however, derelict in its duties, failed to approve or deny the Plans within the 45-day period required by the restrictive covenants governing the subdivision. That resulted in the plans' automatic approval per the restrictive covenants. The HOA

later refused to recognize those approvals, exposing Plaintiffs to significant risk should they proceed to build.

Thereafter, the ACC rejected still other submitted plans, acting arbitrarily and capriciously to further harm Plaintiffs. Plaintiffs suffered substantial damages – damages which ultimately must be paid by the property owners in the community. One of the projects wrongfully denied for approval resulted in a construction delay of over 16 months. Other projects were delayed for over nine months. These delays resulted in material and labor price increases and lower sales prices per square foot. The wrongful actions by the ACC, approved by the HOA’s Board of Directors, resulted in Plaintiffs sustaining losses resulting from lower sales prices per square foot, higher material and labor costs, and damages to Plaintiffs’ liquidity.

The ACC had bad motives. Its newsletter, distributed by its member Mark Carpenter on August 15, 2022, stated that the Plaintiffs are “not good for the community” owing to how they exercise their right to vote on community issues. The newsletter blamed the prior ACC for causing this Lawsuit – yet Mr. Carpenter was a member of the ACC weeks before the first of the five Projects were submitted to the ACC. Worse, the ACC’s improper denials and stonewalling demanded that “Unapproved modifications must be removed immediately.” That would have required brand-new, completed construction to be demolished. The ACC also warned that Plaintiffs would be fined if they started other new construction. On March 31 2021, ACC denied the building application for 330 Kendall Drive on the purported basis that two *different* projects commenced during COVID took extra time to build. That, of course, was a mere pretext: the real motive for denial was revenge. Further, delays on the applicant’s other projects does not

constitute grounds for rejection or delay in the approval of the application under the restrictions.

Ultimately, the HOA, which had the power to remedy things, stood by the ACC's improper denials.

## I. PARTIES AND SERVICE

1. Plaintiff Hunter Family Real Estate II, Ltd. ("HFRE") is a Texas limited partnership whose address is 5160 Tennyson Pkwy South Suite 100, Plano, TX 75024.

2. Plaintiff EM Joint Venture ("EMJV") is a Texas joint venture whose address is 202 Top O The Lake Drive, Lakeway TX 78734.

3. Defendant Windermere Oaks Property Owners' Association, Inc. ("HOA"), is a Texas nonprofit corporation which may be served on its registered agent, CT Corporation System, 1999 Bryan Street Suite 900, Dallas, TX 75201-3136.

4. The subject matter in controversy is within the jurisdictional limits of this court.

5. Per **Tex. R. Civ. P. 47**, this suit seeks monetary relief over \$1,000,000.

6. Venue in Burnet County is proper under § 15.002 of the Texas Civil Practice and Remedies Code because the events or omissions giving rise to the claim occurred in Burnet County.

## II. FACTS

7. Plaintiff HFRE owns the lot at **330 Kendall Drive** Spicewood, TX 78669, which lies in the Windermere Oaks subdivision. HFRE purchased 330 Kendall Drive on September 4, 2015.

8. Plaintiff EMJV owns **415 Bedford Drive**, which it bought on March 7, 2017.

9. Plaintiff HFRE owns **132 Bedford Drive**, Spicewood TX 78669, which it bought on August 20, 2015.

10. Plaintiff HFRE owns **112 Kendall Road**, Spicewood, TX 78669, which it bought on March 28, 2016.

11. Plaintiff HFRE owns **300 Bedford Drive**, Spicewood, TX 78669, which it bought on February 3, 2017.

12. The defendant HOA is the governing body over the Windermere Oaks subdivision, whose lot owners are members of the HOA.

13. Lots in the subdivision are subject to restrictive covenants recorded in 1997 entitled “Second Amendment and Restatement of Restrictive Covenants.” (Vol. 754, Page 501 of the official records of Burnet County, Texas) (“Restrictions”). The Restrictions establish the private contractual relationship between and among the property owners and the HOA.

14. The Restrictions create a regime of architectural control spearheaded by an architectural control committee (“ACC”), which is empowered to review building plans. The ACC must (1) accept, (2) reject, or (3) accept subject to changes within 45 days of submission. If it fails to do one of those things, the plans are deemed accepted. Restrictions ¶ 4.

15. Not later than February 1, 2021, HFRE submitted architectural plans for **330 Kendall Rd.** to the ACC. The ACC accepted the format and transmission method. It was not until March 31, 2021 – some 58 days – that the ACC sent a purported rejection of the submission.

16. In the purported rejection, the ACC gave as the rationale for denial the allegation that *other* homes being built by HFRE’s general partner, Chris Elder, had not

yet been completed. The letter also afforded HFRE 10 days to contest the denial. HFRE did so timely. It never received any response. Later, HFRE received yet another purported denial based on a different rationale.

17. On October 5, 2021, HFRE made a demand on the HOA to acknowledge deemed approval of HFRE's plans. As of February 25, 2022, the HOA did not respond.

18. Not later than November 14, 2021, Plaintiff EMJV submitted plans to the ACC for **415 Bedford Drive**. The ACC never responded.

19. On September 7, 2021, HFRE electronically transmitted to the ACC a complete architectural submission for **132 Bedford Drive**. On September 13, 2021, the HOA acknowledged receipt and the running of the deadline for ACC action. On October 1, 2021, the HOA demanded hard copies, a request which was complied with. The HOA did not issue its denial until November 23, 2021. HFRE triggered the appeal allowed by Texas Property Code Chapter 209, and then the HOA never set any appeal hearing.

20. In early 2021, HFRE submitted complete architectural plans for **112 Kendall**. The ACC denied the application on March 7, 2022 by demanding that HFRE violate the express setback requirements of the restrictive covenants. Other demands resulted from erroneous reading of the plans and or else demanded requirements not mentioned in the restrictive covenants. On May 12, 2022, HFRE submitted through its counsel to the HOA's counsel a submission with revisions, for which receipt was confirmed. The ACC did not approve or deny the submission within 45 days thereafter.

21. On May 21, 2022, HFRE submitted complete plans for **300 Bedford Drive**. The ACC did not approve or deny within 45 days (July 5, 2022).

### III. CLAIMS FOR RELIEF

22. The foregoing allegations are incorporated herein by reference.

## **A. BREACH OF RESTRICTIVE COVENANT**

23. Restrictive covenants are enforced like contracts with the caveat that restrictions on the free use of land are disfavored, and all doubts will be construed in favor of the grantee's free and unrestricted use of land. *See generally Tarr v. Timberwood Park Owners' Assoc., Inc.*, 556 S.W.3d 276 (Tex. 2018).

24. HFRE and EMJV complied with all their obligations surrounding the submission of its architectural plans to the ACC for review. The ACC did not timely accept, reject, or accept with conditions.

25. The HOA and its ACC have refused to comply with the provision of the Restrictions that approval is deemed; the HOA's communications to HFRE and EMJV show that the HOA does not accept the deemed approval. Furthermore, nothing in the restrictive covenants authorizes the ACC to deny approval for a project based on the purported incompleteness of other, unrelated projects. The foregoing refusals to adhere to and comply with the Restrictions resulted in and constitute breaches of the Restrictions.

26. HFRE and EMJV have suffered damages of at least \$1,294,774. resulting from the delays in the ability to commence construction in the form of project cost escalation, such as materials and labor cost increases and transactions costs associated with renewed bidding and contracting.

27. HFRE seeks specific performance of the Restrictions such that the HOA perform all acts necessary to give effect to the deemed approval of its building plans.

## **B. SUIT FOR DECLARATORY RELIEF**

### ***1. Suit to Declare Rights***

28. HFRE and EMJV submitted building plans which the ACC did not accept, reject, or accept with conditions within 45 days. The court should declare that the deemed

approval clause is enforceable and that Plaintiffs' building plans are now deemed approved.

***2. Suit by HFRE to declare the ACC's discretionary acts arbitrary, capricious, or discriminatory.***

29. In the alternative to the foregoing, the court should declare that the ACC and HOA exercised their discretionary authority in a manner which is arbitrary, capricious, or discriminatory.

30. Texas Property Code section 202.004(a) provides:

An exercise of discretionary authority by a property owners' association or other representative designated by an owner of real property concerning a restrictive covenant is presumed reasonable unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory.

31. The court should determine by a preponderance of the evidence under the foregoing statute and then declare that the ACC's rejection of HFRE's and EMJV's plans was arbitrary, capricious, or discriminatory. *Cf. Meyers v. 8007 Burnet Holdings, LLC*, 600 S.W.3d 412, 430 (Tex. App. – El Paso 2020, pet. denied) (in a case transferred from Austin, holding that under Austin appellate district law, statute giving court the power to decide means what it says, disallowing jury trial).

#### **IV. ATTORNEY'S FEES**

32. Plaintiffs ask the court to award such attorney's fees as the court determines reasonable and necessary under Texas Property Code § 5.006, for breach of restrictive covenant.

33. Plaintiffs ask the court to award attorney's fees under ¶ 14 of the Restrictions, relating to the enforcement of, or breaches of, the Restrictions.

34. In the alternative to the foregoing, Plaintiffs ask the court to award such attorney's fees as the court determines reasonable and necessary, equitable and just, under Texas Civil Practice and Remedies Code § 37.009. *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

#### V. CONDITIONS PRECEDENT

35. All conditions precedent to Plaintiffs' claims for relief have been performed or have occurred.

#### VI. PRAYER

**WHEREFORE, PREMISES CONSIDERED**, Plaintiffs Hunter Family Real Estate, Ltd., and EM Joint Venture pray that the Defendant Windermere Oaks Property Owners' Association, Inc., be cited to appear and answer herein. Further, that upon a final hearing of the cause, judgment be entered for Plaintiffs against Defendant for breach of restrictive covenant; declaratory judgment as set forth herein; costs of court; attorney's fees; and all other relief to which Plaintiffs deem themselves entitled.

Respectfully submitted,  
/s/ J. Patrick Sutton  
J. Patrick Sutton  
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Austin, Texas 78703  
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#### CERTIFICATE OF SERVICE

I certify that on July 24, 2023, a copy of this pleading was served on **Mark Rabe**, [mrabe@rmwbh.com](mailto:mrabe@rmwbh.com), and **Connor Ballinger**, [lbballinger@rmwbh.com](mailto:lbballinger@rmwbh.com).

/s/ J. Patrick Sutton  
J. Patrick Sutton



### Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Meghan Alexander on behalf of David Gottfried  
Bar No. 8231200  
meghan@galfaustin.com  
Envelope ID: 77821658  
Filing Code Description: No Fee Documents  
Filing Description: Plaintiffs Third Amended Petition  
Status as of 7/25/2023 7:56 AM CST

Associated Case Party: HUNTER FAMILY REAL ESTATE II, LTD.

Name	BarNumber	Email	TimestampSubmitted	Status
Meghan Alexander	24053960	meghan@galfaustin.com	7/24/2023 3:12:30 PM	SENT
David M. Gottfried	8231200	david@galfaustin.com	7/24/2023 3:12:30 PM	SENT
Tara Gillespie	24098880	tara@galfaustin.com	7/24/2023 3:12:30 PM	SENT
J. PATRICK SUTTON		jpatrickstuton@jpatrickstutonlaw.com	7/24/2023 3:12:30 PM	SENT

Associated Case Party: WINDERMERE OAKS PROPERTY OWNERS' ASSOCIATION, INC.

Name	BarNumber	Email	TimestampSubmitted	Status
Mark Rabe		mrabe@rmwbh.com	7/24/2023 3:12:30 PM	SENT
Stefanie Martinez		smartinez@rmwbh.com	7/24/2023 3:12:30 PM	SENT
Justin Spears		jspears@rmwbh.com	7/24/2023 3:12:30 PM	SENT