2018 IL App (5th) 160293-U

NO. 5-16-0293

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE BRIARS PROPERTY OWNERS ASSOCIATION, INC., JOHN BEVENUE, KAREN BEVENUE, CHRIS DUGAN, MARILOU DUGAN, RUSTY WAGNER, and SANDY WAGNER,	)	Appeal from the Circuit Court of St. Clair County.
Plaintiffs-Appellants,	)	
v.	)	No. 13-MR-174
BRUCE ADDISON, KAY ADDISON, DON DINTELMAN, MARY DINTELMAN, FELIX ERLENBUSCH, SUE ERLENBUSCH, BUD HANEY, CLARICE HANEY, DAVID NESTER, BETH NESTER, JIM PORTER, LISA PORTER, K.T. TOENJES, CHRIS TOENJES, TOM VERNIER, and JUDY VERNIER,	)	Honorable Christopher T. Kolker, Judge, presiding.
Defendants-Appellees.	)	

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Barberis and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Where genuine issues of material fact exist, we reverse the trial court's entry of summary judgment.

¶ 2 BACKGROUND

¶ 3 Ralph J. Weilbacher Jr. (Weilbacher) developed a subdivision in Millstadt, called the Briars. Before any lots were sold, he recorded a final plat. The final plat referenced "restrictive covenants" that were to be recorded contemporaneously with the plat. On the same date that Weilbacher recorded his final plat, he also recorded "The Briars Subdivision Restrictions." Approximately 29 months later, Weilbacher recorded another document entitled "The Briars Restrictions," in which he acknowleged that the earlier restrictions were inadequate and needed to be supplemented. A few days later, all Briars lot owners convened a meeting at which they voted to incorporate a not-for-profit homeowner's association. At this same meeting, the homeowners also voted and approved bylaws for the homeowner's association. A local attorney prepared the incorporation documents and filed them on behalf of the homeowner's association with the Illinois Secretary of State. In late February 2002, the Secretary of State approved the articles of incorporation.

¶ 4 The Briars Property Owners Association, Inc., filed this case against several lot owners for nonpayment of special assessments and annual dues. The lot owners ultimately filed a motion for summary judgment in which they argued that Weilbacher did not have any authority to amend or supplement the original restrictions; that the original restrictions did not set forth a procedure by which a homeowner's association could be formed; that the supplemental restrictions were invalid; that the homeowner's association formed pursuant to the amended restrictions was invalid; and that the

corporation was a nullity because it lacked bylaws since the bylaws were adopted prior to the incorporation date. The court agreed and granted judgment for all of the defendants.

¶ 5 For the reasons that follow, we find that there are genuine issues of material fact that should have precluded entry of summary judgment, and we reverse the order of the trial court.

¶ 6 FACTS

¶ 7 Weilbacher filed the final plat for the Briars subdivision on June 3, 1999. The Briars consisted of 46 lots. Some of the lots had direct lake access, while all other lots had lake access via a common area. The plat contained the following two statements addressing the issue of responsibility for maintenance of common areas, easements, and improvements:

> COMMON AREAS SHALL BE MAINTAINED BY THE LOT OWNER OF HOMEOWNER'S ASSOCIATION.
>
> ALL EASEMENTS SHALL BE MAINTAINED BY THE LOT OWNER OF HOMEOWNER'S ASSOCIATION. ALL IMPROVEMENTS LOCATED OUTSIDE OF R[ight].O[f].W[ay]. SHALL BE THE RESPONSIBILITY OF THE HOMEOWNER'S ASSOCIATION OR THE LOT OWNER.

The final plat also referenced "restrictions" filed contemporaneously with the plat.

¶ 8 The two pages of restrictions were filed with the final plat on June 3, 1999. At the bottom of the second page, there were blank signature lines to be signed by the future seller and buyers. Paragraphs 17 and 19 reference the "Landowners Association," with paragraph 17 obligating the association to prevent the earthen dam from deteriorating, and paragraph 19 obligating each prospective seller to pay a $50 fee by January 1 of each

year for the association's upkeep of the entrance, dam, and common areas. Paragraph 35 states that the developer reserves the right to amend or alter restrictions as needed on a per lot basis.

¶ 9 All of the named defendants, with the exception of Jim and Lisa Porter, took title to their lots subject to and with notice of the 1999 restrictions.

¶ 10 As time passed, and lots were sold and developed by the owners, Weilbacher determined that amendments were necessary to the subdivision restrictions. On November 28, 2001, the new Briars Restrictions were recorded in the St. Clair County Recorder's Office. The preliminary statement of the new restrictions indicates that the 1999 restrictions were inadequate and required supplementation.

¶ 11 Several paragraphs in the 2001 restrictions reference each lot owner's responsibility for common area maintenance. Paragraph 23 references the lake and dam area of the subdivision and requires the developer to maintain both the lake and the dam until the homeowner's association is established, after which time the association is to take on that responsibility with expenses equally shared by the lot owners. Paragraphs 30 and 31 reference the anticipated homeowner's association and state that the association will be responsible for the maintenance issues of "Runoff," and "Grade and Seed."

¶ 12 Paragraph 33 of the 2001 restrictions outlined the plans for a homeowner's association. Creation of the association was mandatory. The owners of each lot would receive one vote. Additionally, the restrictions indicated that future assessments would be determined by the seven-member board of directors within six months after the

association assumed its duties. Each lot owner would be given 60 days to pay the assessment or risk having a statement of lien filed with the St. Clair County Recorder of Deeds, a lawsuit filed against the lot owner, and a foreclosure upon the lien.

¶ 13 The new restrictions were signed by Weilbacher as well as most of the then-current lot owners. Of the named defendants in this suit, only Bud and Clarice Haney did not sign the 2001 restrictions. The Addison, Dintelman, Erlenbusch, Nester, Toenjes, and Vernier defendants all voluntarily signed the 2001 restrictions. Jim and Lisa Porter purchased their lot in 2003 and did not sign the restrictions, but took title to their lot subject to and with notice of the 2001 restrictions.

¶ 14 On December 2, 2001, the Briars lot owners held a meeting to vote on the organization and planned incorporation of the association. The vote to incorporate was unanimous. That same night, the lot owners adopted bylaws for the unincorporated association.

¶ 15 Article VIII of the bylaws addressed the issue of dues and assessments. The dues were to be assessed annually for the general maintenance fund. Any needed additional assessments would be set by the board of directors, and followed with a vote of all association members at a subsequent meeting. To pass the assessment, a majority of the members would need to vote in favor.

¶ 16 The unincorporated association filed its incorporation papers with the Illinois Secretary of State. On February 22, 2002, the Briars Property Owners Association, Inc.

(Association), officially became incorporated when the Secretary of State filed its articles of incorporation.

¶ 17 The board of directors held its first meeting on April 9, 2002. The plaintiffs allege that at this meeting the board "adopted, ratified the adoption of and/or adopted by ratification the 2001 bylaws." The corporate book is not included in the record.

¶ 18 Thereafter, dues were assessed each year, and special assessments were passed in 2004 (tennis courts—$185), 2010 (lighting—$450), and 2012 (lake repair—$500). By 2013, the annual dues had increased to $350. The defendants were in varying compliance with the dues and assessments. The Addison, Dintelman, Nester, and Toenjes defendants paid all annual dues from 2002 through 2012 and paid the tennis courts and lighting assessments. The Porter defendants bought their lot later, and paid all annual dues from 2004 through 2012 and paid the tennis courts and lighting assessments. The Erlenbusch defendants paid all annual dues through 2012 and paid the tennis courts, lighting, and lake assessments. None of the defendants paid the 2013 annual dues. The Haney defendants did not pay any annual dues and did not pay any special assessments.[1]

¶ 19 The Association filed its petition against the defendants on May 15, 2013. The complaint consisted of one declaratory judgment count against each couple and one count against all defendants collectively for a finding of implied restrictive covenants. In the

[1]Throughout the record, there are allegations that the Haneys never paid fees or assessments. However, there is a conflict in the factual evidence on this issue. In an affidavit filed by Marilou Dugan, the current president of the Association, she states that the Haneys "paid annual dues and contributed to the special assessments." Thus, the record is unclear as to whether the Haneys paid nothing, paid all, or made partial payments.

declaratory judgment counts, the Association alleged that each couple was in violation of the 2001 restrictions in that each had not paid the annual assessment(s) and/or the special assessment(s), and asked the court to order each couple to comply with the restrictions and to enter judgment in the Association's favor for the amount owed. In count IX, the Association asked the court to declare that the 2001 restrictions constituted implied restrictive covenants that would be applicable to the lot owners and enforceable by the Association.

¶ 20 Several of the defendants filed motions to dismiss. On August 26, 2013, the court dismissed the petition with leave to refile stating that the issue raised in the motions was whether there is a written document signed by all of the defendants and all other lot owners that formed the basis upon which the Association could seek relief. The court noted that no one appeared to have signed the 1999 restrictions but that all signed the 2001 restrictions (signatures of the Haneys are not on the copy in the record on appeal). The court concluded that in filing an amended petition, the Association should address the undated signature sheet included with the recorded 2001 restrictions as well as provide additional allegations about when the Association came into existence and how the Association is empowered to file the complaint against the named defendants.

¶ 21 As the case proceeded, the Association filed its first amended petition on September 30, 2013; a second amended petition on December 6, 2013; and a third amended petition on April 17, 2014.

¶ 22 The defendants filed two separate motions for summary judgment against the third amended petition. The Porters filed a motion for summary judgment in July 2015. The remaining defendants filed a separate motion for summary judgment in March 2016. From the record on appeal, we find no record that Bud and Clarice Haney filed their own motion for summary judgment or adopted one of the other two motions. The Porters adopted the motion for summary judgment filed by the other defendants. After the motions were filed, the Association filed its fourth amended petition. Although the motions for summary judgment were filed and asked for judgment on the third amended petition, all parties agreed to construe the summary judgment motions as if they had been filed against the fourth amended petition.

¶ 23 In response to these motions for summary judgment, the Association filed a lengthy response with multiple attachments, including affidavits of Ralph Weilbacher, Maureen Donaho, and Rusty Wagner.

¶ 24 Ralph Weilbacher's affidavit, dated May 6, 2016, includes information about the final plat, the restrictions, and the marketing of the subdivision.

¶ 25 Weilbacher asserts that he advised the firm that prepared the final plat to include certain statements on the plat: that easements were to be maintained by the homeowner's association; that improvements outside of the right-of-way would be the responsibility of the homeowner's association or the lot owner; and that common areas would be maintained by the lot owners of the homeowner's association.

¶ 26 Weilbacher also states that he created the 1999 restrictions. He explains that the lack of signatures on the 1999 restrictions was because he had not sold any lots when the document was recorded. Weilbacher states that it was always his intention to develop the restricted common interest subdivision as follows:

> "to have and be governed by a homeowner's association in which membership was mandatory so that the cost of maintenance, property taxes, insurance and utilities related to the common areas, including but not limited to the subdivision's entrance, earthen dam, lake access common area, lake, tennis courts and lighting, could be and would be shared equally between the lot owners for the mutual benefit and property value of each of the lot owners."

¶ 27 Weilbacher's marketing materials for the Briars informed each potential buyer that ownership of a lot would require membership in a homeowner's association and payment of related dues and/or special assessments. Additionally, Weilbacher personally informed each potential buyer of these requirements.

¶ 28 Finally, Weilbacher explained the purpose of the 2001 amendments to the restrictions:

> "I *** exercised my retained right to amend the Briars Subdivision Restrictions in order to preserve the nature and character of 'The Briars' Subdivision and fulfill my original intent and purpose of establishing a mandatory membership homeowners association as a mechanism to maintain the quality, consistency, character and nature of 'The Briars' subdivision, including but not limited to assessing homeowners association dues or other special assessment necessary to maintain the appearance, quality and integrity of the common areas such as lighting, the tennis court, the common area lake access lot and the lake, as well as the architectural integrity of the subdivision as a common interest subdivision while imposing a minimal financial burden upon each of the lot owners of the subdivision."

¶ 29 Maureen Donaho works for Illinois Title and Escrow and at the request of the Association performed a title search on the lots owned by each set of defendants. Bruce

and Kay Addison purchased their lot on June 14, 1999. Tom and Judy Vernier purchased their lot on June 22, 1999. David and Elizabeth Nester purchased their lot on June 22, 1999. Clarice Haney, as trustee, purchased her lot on June 23, 1999. Kenneth and Christine Toenjes purchased their lot on September 13, 1999. Felix and Sue Erlenbusch purchased their lot on April 11, 2000. Don and Mary Dintelman purchased their lot on April 13, 2000. The title chain for all of these lot owners contained the 1999 restrictions at the time of purchase. On and after November 28, 2001, the title chain for all of these lot owners contained the amended restrictions. Jim and Lisa Porter purchased their lot on September 25, 2003. The title chain for the Porters contained both the 1999 restrictions and the 2001 amended restrictions at the time of purchase.

¶ 30 Rusty Wagner is a lot owner in the Briars. He participated in the organizational committee for the Association. Rusty stated that all lot owners were present at the December 2, 2001, meeting regarding the formation of the Association. Furthermore, the vote to incorporate was unanimous.

¶ 31 On May 31, 2016, the court granted the motions for summary judgment, and on June 28, 2016, the court entered a second order granting summary judgment that clarified the first order.

¶ 32 The court entered judgment for the defendants on several different bases. The court stated that generally a restriction cannot be imposed on lot owners without consent. The court noted that here, all lot owners did not sign the 2001 restrictions. On this basis, the court held that summary judgment was appropriate because the Association's petition

was fatally flawed as it was based on the invalid 2001 restrictions. The court held that if the Association was alternatively pursuing its cause of action on the basis of the 1999 restrictions, then summary judgment for the defendants was also proper. The court stated that the 1999 restrictions did not contain the restriction that the Association sought to enforce—the requirement that the lot owners pay all dues (other than $50 annually) and special assessments. The court also found fault with the 1999 restrictions because the copy filed with the St. Clair County Recorder of Deeds did not contain any buyer signatures and also did not contain a reference to the recorded plat. Additionally, the court stated that paragraph 35 of the 1999 restrictions, in which Weilbacher reserved his right to amend the restrictions, did not authorize Weilbacher to amend the restrictions as to all lots. Turning away from the restrictions, the court also concluded that summary judgment was appropriate because the Association and its bylaws are both legal nullities. The court found that the Association is a nullity because it failed to hold a meeting of the lot owners to obtain unanimous authorization to incorporate (as required by the 2001 restrictions) and because the articles of incorporation did not contain a statement that the unanimous vote "had been obtained." The court found that the bylaws are a nullity because they were adopted prior to incorporation. The court held that the Association is flawed because it lacked bylaws and thus lacked standing to file a cause of action against the lot owners.

¶ 33 Jim and Lisa Porter filed a motion to clarify the court's order granting summary judgment. In the motion, they noted that the court did not grant judgment for Jim and

Lisa Porter and/or for Bud and Clarice Haney. They asked the court to correct this clerical error. On June 28, 2016, the court reissued its order granting summary judgment in favor of all of the defendants.

¶ 34 LAW AND ANALYSIS

¶ 35 On appeal, the Association asks this court to reverse the court's entry of summary judgment.

¶ 36 "Summary judgment is a drastic remedy that should be granted only where the movant's right to it is clear and free of doubt." *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 357, 726 N.E.2d 1171, 1176 (2000). A party is entitled to summary judgment as a matter of law when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." 735 ILCS 5/2-1005(c) (West 2012); *Myers v. Health Specialists, S.C.*, 225 Ill. App. 3d 68, 72, 587 N.E.2d 494, 497 (1992). In determining whether to grant or deny a request for summary judgment, the trial court strictly construes all evidence in the record against the moving party and liberally in favor of the opponent. *Purtill v. Hess*, 111 Ill. 2d 220, 240, 489 N.E.2d 867, 871 (1986); *Koziol v. Hayden*, 309 Ill. App. 3d 472, 476, 723 N.E.2d 321, 323 (1999). In considering a summary judgment motion, the court need only decide if a question of fact exists. *Koziol*, 309 Ill. App. 3d at 476. If reasonable people could draw different inferences or conclusions from the undisputed material facts or if a material fact remains in dispute, then summary judgment

is inappropriate. *Id.* On appeal, we review summary judgment orders *de novo*. *Myers*, 225 Ill. App. 3d at 72.

¶ 37 1. Unanimous Consent to the 2001 Restrictions

¶ 38 Here, the court's order began with a conclusion that Illinois generally disallows the imposition of subdivision restrictions unless all lot owners consent. The court based this conclusion on the case of *Exchange National Bank of Chicago v. City of Des Plaines*, 32 Ill. App. 3d 722, 336 N.E.2d 8 (1975). The court also found support for this pronouncement in paragraph 35 of the 2001 restrictions, which states that "[t]his restriction Indenture and every term contained herein *** may be modified, amended or eliminated by affirmative vote of one hundred percent (100%) of the total lots entitled to vote."

¶ 39 First, we conclude that paragraph 35 of the 2001 restrictions does not mandate 100% consent of the lot owners in order to enact the 2001 restrictions. That paragraph clearly only applies to future amendments or revocations. It is nonsensical to declare that an amendment policy within the 2001 amended restrictions is applicable to the passage of those very restrictions.

¶ 40 We are also not persuaded that *Exchange National Bank of Chicago v. City of Des Plaines* stands for the proposition that restrictions mandate unanimous support of the lot owners. In *Exchange National Bank of Chicago*, the court was not asked to review a covenant reserved to the developer. In fact, the developer was not a party to the case. At issue was whether a majority of the lot owners could agree to modify the single family

restriction of the subdivision in order to allow construction of a church. *Exchange National Bank of Chicago*, 32 Ill. App. 3d 722, 724. The appellate court was presented with the question—whether the original single family restrictive covenant was revoked by the majority of the lot owners who agreed to allow the construction of the church. *Id.* The original plat contained no reference to a method of revoking or modifying the single family restriction. *Id.* at 732. Therefore, the court held that the agreement of the majority of the lot owners was insufficient to revoke the restriction. *Id.* In reaching this conclusion, the appellate court found "persuasive authority" that a revocation of a restriction would require unanimous support of the lot owners when the original plat contained no reference to protocol for future amendment or revocation. The court cited section 270 of *Covenants, Conditions, & Restrictions*, American Jurisprudence Second (20 Am. Jur. 2d *Covenants, Conditions, & Restrictions* § 270), as "persuasive authority." Upon review of this section, we conclude that section 270 is not on point as it deals with the *laches* defense to enforcement of restrictive covenants and therefore provides no persuasive authority for the appellate court's holding.

¶ 41 Overall, *Exchange National Bank of Chicago* is factually and legally distinguishable from the facts of this case and the court's reliance on the case is misplaced. Here, Weilbacher amended the restrictions; he did not attempt to revoke the restrictions as the majority of the lot owners did in *Exchange National Bank of Chicago*. In finding that *Exchange National Bank of Chicago* supported entry of summary judgment, the court stated that there was no difference between an amendment of a

restriction and a revocation of a restriction. However, the court provided no authority for this conclusion during the hearing or in its orders. Moreover, we do not agree with the court's statement. The two terms have different meanings by definition. A revocation indicates a complete repeal of a restriction—"[a]n annulment, cancellation, or reversal ***." *Revocation*, Black's Law Dictionary (10th ed. 2014). In contrast, an amendment signifies a modification of the restriction—"[a] formal and usu[ually] minor revision or addition proposed or made to a[n] *** instrument." *Amendment*, Black's Law Dictionary (10th ed. 2014).

¶ 42 2. Amendment to the 1999 Restrictions

¶ 43 The court concluded that paragraph 35 of the 1999 restrictions only allowed Weilbacher to amend the restrictions to individual lots and not to all of the lots. Paragraph 35 of the 1999 restrictions states: "Developer reserves the right to amend or alter restrictions as needed on a per lot basis." The court cited no authority for this holding. On appeal, the defendants argue that this type of reservation of the right to amend is a personal covenant of the developer and intended to "protect the saleability of lots," citing *Fairways of County Lakes Townhouse Ass'n v. Shenandoah Development Corp*. in support.

¶ 44 Initially, we review the basic tenets of restrictive covenants which support Weilbacher's retained right to amend the 1999 restrictions.

¶ 45 The ability to revoke or amend a restriction is generally based upon the original restrictions. Annotation, *Validity, Construction, and Effect of Contractual Provision*

Regarding Future Revocation or Modification of Covenant Restricting Use of Real Property, 4 A.L.R. 3d 570, § 2 (1965). At the time Weilbacher filed the 1999 restrictions, he was the sole owner of all of the lots and common areas of the Briars.

> "Contractual provisions relating to revocation or modification of covenants restricting the use of real property frequently give the power to amend or terminate the restrictions to the original owner or subdivider of a tract, occasionally with the 'consent' of the owner of the particular lots as to which the restrictions are to be revoked or altered." *Id.* § 4[a].

In cases where the developer has retained the right to amend restrictions, those powers "are personal covenants which can be exercised only by the one who imposed the restrictions, particularly where the power can be exercised without the consent of the property owner." *Fairways of County Lakes Townhouse Ass'n v. Shenandoah Development Corp.*, 113 Ill. App. 3d 932, 936, 447 N.E.2d 1367, 1370 (1983) (citing *Orchard Brook Home Ass'n v. Joseph Keim Land Development Corp.*, 66 Ill. App. 3d 227, 231, 382 N.E.2d 818, 821 (1978); *Fox Lake Hills Property Owners Ass'n v. Fox Lake Hills, Inc.*, 120 Ill. App. 2d 139, 145, 256 N.E.2d 496, 400 (1970)); see also *Lehmann v. Revell*, 354 Ill. 262, 188 N.E. 531 (1933) (where an amendment was upheld because it was in compliance with the original restriction that required a majority vote of the lakefront property owners). Section 225 of *Covenants, Conditions, & Restrictions*, American Jurisprudence Second, also explains the retained right to amend as follows:

> "After any of a subdivision's lots has been sold, the developer's power to amend the deed restrictions may nonetheless continue if the dedicating instrument grants the developer the right to amend the restrictions ***. *** Where a grantor does reserve such right to alter, modify, or change restrictive covenants, he or she may amend the covenants without the consent of the grantee." 20 Am. Jur. 2d *Covenants, Conditions, & Restrictions* § 225 (2017).

¶ 46 We also find that the legal authority cited by the defendants is distinguishable. In *Fairways of County Lakes Townhouse Ass'n*, the original developer owned land that was in two separate parcels. *Fairways of County Lakes Townhouse Ass'n*, 113 Ill. App. 3d at 932. The restrictions that applied to the Fairways parcel granted the developer the right to add additional portions of the proposed development area to the premises or to the common area. *Id.* at 934. Years later, and without the developer adding additional portions of land to the Fairways parcel, the developer sold parcel two to another developer, who in turn sold parcel two again. *Id.* This third developer attempted to connect the two parcels by recording a supplemental declaration. *Id.* The appellate court concluded that the original reservation of the right to add property to parcel one was a personal covenant and did not extend to subsequent purchasers of parcel two. *Id.* at 936. Nothing in *Fairways of County Lakes Townhouse Ass'n* references saleability of lots and/or this type of reservation of a right to amend. If anything, *Fairways of County Lakes Townhouse Ass'n* supports Weilbacher's amendment as his retained personal covenant.

¶ 47 In his affidavit, Weilbacher asserted under oath that he retained the right to amend the original restrictions in part for the purpose of establishing the mandatory homeowner's association. His goal was to have the homeowner's association serve as the entity to assess and determine the appropriate annual dues and additional assessments necessary to maintain the appearance, quality, and integrity of the common areas. Although we agree that paragraph 35 of the 1999 restrictions was inexpertly worded, we find that the statements Weilbacher made in his affidavit about the meaning and intent of

the paragraph and his retained rights to amend sufficiently raise an issue of material fact. Furthermore, whether or not Weilbacher retained the right to amend the 1999 restrictions, when a homeowner's association is not originally provided for in the recorded restrictions, "the developer, or the owners of a majority of the lots or units not owned by the developer, may create an association to manage the common property and enforce the servitudes contained in the declaration." Restatement (Third) of Property § 6.3 (2000).

¶ 48 3. Validity of the 1999 Restrictions

¶ 49 The court also concluded that if the Association's request for declaratory judgment was based on the 1999 restrictions, then summary judgment was proper. The court based this conclusion on three separate grounds. First, the court noted that the 1999 restrictions did not contain a restriction allowing Weilbacher or an association to increase annual dues and/or establish special assessments. Second, the court found that the unsigned signature blocks on the 1999 recorded restrictions invalidated the restrictions. Third, the court found that the 1999 restrictions were invalid because the restrictions did not contain any reference to the recorded plat. Therefore, the court concluded that the Association had no foundation to mandate that the defendants pay increased dues and assessments.

¶ 50 As we have already concluded that an issue of material fact remains regarding Weilbacher's retained right to amend, we will not address the court's conclusion that the 1999 restrictions, standing alone, do not contain authority to increase annual dues and/or establish special assessments. However, we agree that looking at the 1999 restrictions in isolation, there is no authority for an increase in annual dues or mandated assessments.

¶ 51 We find fault with the court's conclusion that the blank signature blocks invalidated the 1999 restrictions. First, the restrictions imposed upon a new subdivision—a common-interest community—are found in a recorded document containing the servitudes "that create and govern the common-interest community." Restatement (Third) of Property § 6.2(5) (2000). The obligation that creates the common-interest community is typically created by an express provision in a declaration. *Id.* § 6.2 cmt. a. The term "declaration" means the recorded documents containing the servitudes, and is typically in a document "that is recorded before any lots or units are sold." *Id.* § 6.2 cmt. e. Furthermore, "[w]hen the first lot or unit is sold subject to those servitudes, they become effective as to all the property described in the declaration." *Id.* If the prospective buyer reviews the restrictions and does not agree with any or all of them, the prospective buyer does not have to buy the lot. And, if the prospective buyer purchases the lot, ownership of the lot is subject to the recorded servitudes or restrictions. In short, the creation of the subdivision and filing of the restrictions does not require the approval (or signature) of potential future owners. Furthermore, Weilbacher explained why the signature lines were not signed in his affidavit. The 1999 restrictions were not signed by anyone when recorded, because on the date of recordation no lots had yet been sold—thus, there were no owners to sign the 1999 restrictions. The issue of the lack of signatures is simply irrelevant and does not invalidate the restrictions.

¶ 52 We also find fault with the court's conclusion that Weilbacher's failure to reference the plat on the face of the 1999 restrictions invalidates the restrictions. The

court cited no authority for this conclusion. While it is true that the restrictions do not make reference to the plat, we cannot solely look at recorded restrictions. The restrictions are labeled "The Briars Subdivision Restrictions" and are filed immediately following the formal plat in the St. Clair County recordation system. Additionally, a simple review of the recorded plat establishes that the plat referenced the 1999 restrictions as being filed contemporaneously and indicates that the restrictions are "attached." Furthermore, both documents were part of the title chain for each lot. Accordingly, we do not find that the 1999 restrictions were invalid on this basis.

¶ 53 4. Validity of the Corporation

¶ 54 The court next concluded that the Briars Property Owners Association, Inc., is a legal nullity. The court's theory is that because the incorporated association is a legal nullity, the Association has no standing to file suit against the defendants. The court held that the association lacked legal authorization to incorporate. The court also found that incorporation was invalid because the Association did not include a statement on the face of the incorporation documents that it had obtained a unanimous vote to incorporate.

¶ 55 We first look at the court's conclusion that the association did not have legal authorization to incorporate. Section 102.35(a) of the General Not for Profit Corporation Act of 1986 (Act) states:

> "When an unincorporated association or society *** authorizes the incorporation of the association or society by the same procedure and affirmative vote of its voting members or delegates as its constitution, bylaws, or other fundamental agreement requires for an amendment to its fundamental agreement *** then following the filing of articles of incorporation under Section 102.10 setting forth those facts and that the required vote has been obtained and upon the filing of the

> articles of incorporation, the association or society shall become a corporation and the members of the association or society shall become members of the corporation in accordance with provisions in the articles to that effect." 805 ILCS 105/102.35(a) (West 2002).

¶ 56 Although the court previously held in its order that the 2001 restrictions were invalid, for its analysis of this issue, the court cited to paragraph 35 of the 2001 restrictions which requires a 100% vote requirement for modification or revocation of any of the restrictions. The court then concluded that the unincorporated association failed to comply with this 100% requirement and therefore lacked the authorization to incorporate. However, the court's conclusion that the vote to incorporate was not unanimous is without factual basis in the record. In Rusty Wagner's sworn affidavit, filed in opposition to the motions for summary judgment, he states that all lot owners as of the date of the December 2, 2001, meeting were present and voted unanimously to incorporate. Clearly this sworn testimony raises a factual question.

¶ 57 The court also took issue with the fact that the Association failed to include a statement on the face of the articles of incorporation that the lot owners unanimously voted to incorporate. While we agree that section 102.35(a) of the Act states that the articles should set forth the fact that the required vote was achieved, we do not find that this "failing" invalidates the corporation. In Illinois, the Secretary of State provides forms on its website, including articles of incorporation. Here, the Association used the form with the following printed preamble, "Pursuant to the provisions of 'The General Not For Profit Corporation Act of 1986,' the undersigned Incorporator(s) hereby adopt the following Articles of Incorporation." We conclude that the language of the preamble is

sufficiently inclusive of the statutory filing requirements. More specifically, the incorporators' statement within the preamble that they were acting pursuant to the provisions of the Act establishes sufficient compliance. Furthermore, the Illinois Secretary of State found no flaws in the proposed articles and declared the Association incorporated on February 26, 2002. We conclude that the incorporators sufficiently complied with section 102.35(a) of the Act in filing its incorporation documents and that the court erred in concluding that this "failing" invalidated the corporation.

¶ 58 5. The Validity of the Bylaws

¶ 59 We next address the validity of the bylaws. The court ruled that the bylaws were invalid because they were adopted before the incorporation date. First, we note that the fact that the bylaws were adopted by the then-unincorporated Association does not automatically render the bylaws invalid. Section 102.20(a) of the Act sets forth the rules regarding the organization of the corporation, including bylaws, and states:

> "After filing the articles of incorporation, the first meeting of the board of directors shall be held at the call of a majority of the incorporators or of the directors for the purpose of:
>
> (1) Adopting bylaws;
> (2) Electing officers; and
> (3) Such other purposes as may come before the meeting.
>
> In lieu of a meeting, director action may be taken by consent in writing ***." 805 ILCS 105/102.20(a) (West 2002).

In her affidavit, Marilou Dugan, current president of the Association, asserts that the board of directors has consistently held meetings since the Association's formation. In its fourth amended petition, the Association alleges that at the first board of directors meeting on April 9, 2002, the board "adopted, ratified the adoption of and/or adopted by

ratification the 2001 Bylaws." The defendants do not contradict this statement, but simply argue that the bylaws are invalid because they were prematurely adopted. While the record does not contain any sort of confirmation of the adoption or ratification, we find that this also raises a factual issue and that summary judgment is inappropriate.

¶ 60 CONCLUSION

¶ 61 Summary judgments are not commonly granted. Additionally, all evidence must be liberally construed in favor of the opponent. *Purtill*, 111 Ill. 2d at 240. From a review of the original plat and the 1999 restrictions, both of which contain references to a homeowner's association, Weilbacher intended that a homeowner's association would assume the management and maintenance of the Briars. Furthermore, it is only common sense that given the common areas, including the lake and tennis courts, the association fees could not remain at the $50 amount listed in the 1999 restrictions.

¶ 62 We have thoroughly reviewed the record in this case and conclude that there are genuine issues of material fact precluding summary judgment. In addition, we have found legal support for Weilbacher's retained right to amend the restrictions and conclude that the cases cited by the court and the defendants in opposition are distinguishable. For the foregoing reasons, we reverse the judgment of the St. Clair County circuit court and remand for further proceedings.

¶ 63 Reversed and remanded.