DISTRICT COURT, EL PASO COUNTY, COLORADO
Court Address: 270 South Tejon Street
Colorado Springs, CO 80903

Plaintiff(s): CHARLES WARNE, an individual; BRIDGET WARNE, an individual; BRANDON CUFFE, an individual; NORMAN VILLANUEVA, an individual; NANCY VILLANUEVA, an individual; HOWARD SURBER, an individual; and LUANA SURBER, an individual,

v.

Defendant(s) / Third Party Plaintiff(s): WOODMEN HILLS COVENANT MANAGEMENT BOARD, a Colorado non-profit corporation; and WOODMEN HILLS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision; and

Defendant(s): Melody Homes, Inc. d/b/a D.R. Horton – Melody Series.

v.

Third Party Defendants(s) / Counterclaim Plaintiff(s): TRAVIS R. HELTON and KAREN E. HELTON.

Attorney for Plaintiffs and Third Party Defendants:
M. Jacqueline Gaithe, PC
M. Jacqueline Gaithe (#34348)
111 South Tejon Street, Suite 202
Colorado Springs, CO 80903
Phone: (719) 635-2595
Facsimile: (719) 578-8836
E-mail: jackie@mjglaw.net

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Case Number:08CV2923

Div. No.: 5 Ctrm:

RESPONSE IN OPPOSITION TO DEFENDANTS WOODMEN HILLS COVENANT MANAGEMENT BOARD AND WOODMEN HILLS METROPOLITAN DISTRICT'S MOTION FOR SUMMARY JUDGMENT AND IN THE ALTERNATIVE, PLAINTIFFS CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs/Counterclaim Defendants Charles Warne and Bridget Warne, Brandon Cuffe, Norman Villanueva and Nancy Villanueva, Howard Surber and Luana Surber, and third Party

Defendants/Counterclaim Plaintiffs Travis R. Helton and Karen E. Helton (collectively hereinafter referred to as "Plaintiffs"), by and through their attorney, M. Jacqueline Gaithe of M. Jacqueline Gaithe, PC, respectfully submit their Response in Opposition to Defendants Woodmen Hills Covenant Management Board and Woodmen Hills Metropolitan District's Motion for Summary Judgment, and for their response state as follows:

I. INTRODUCTION

As set forth in more detail below, there are numerous factual issues that must be resolved in this case.

Defendants are not entitled to the declaratory and other relief sought in their motion for summary judgment. A number of issues of material fact are in dispute, namely what right, if any, D.R. Horton had to assign covenant enforcement to Woodmen Hills Metropolitan District. This particular assignment and its validity, or lack thereof, is at the heart of the controversy in this matter. Accordingly, Plaintiff is not entitled to partial summary judgment.

1. Plaintiffs generally agree with the first two paragraphs of Defendants' Statement of Undisputed Facts as presented by Defendants in their motion for summary judgment. However, Plaintiffs take exception to all or portions of the third, fourth and fifth paragraphs of Defendants Statement of Undisputed Facts.

2. Additionally, the alleged undisputed facts are stated blanketly without any individual references to the underlying pleadings in which these statements are allegedly based. It would be unduly burdensome for Plaintiffs to review all pleadings and documents referenced to determine whether each and every alleged "undisputed fact" were indeed such. Further, no documents or alleged "undisputed facts" are supported by sworn testimony or affidavit.

3. It is disputed that the D.R. Horton/Melody Contract and Covenant Management Board Contract burden lots 298 through 303, and lots 362-498 inclusive, of Woodmen Hills Filing No. 8 in El Paso County, Colorado and lots 503 through 544, inclusive, of Woodmen Hills Filing No. 9 in El Paso County, Colorado.

4. It is disputed as to what rights, if any, D.R. Horton had to assign or convey with respect to covenant enforcement in Woodmen Hills filing No. 8 and a portion of Filing No. 9.

5. It is disputed what the intentions of D.R. Horton were with respect to covenant enforcement in Woodmen Hills and the alleged assignment of covenant enforcement rights to Woodmen Hills Metropolitan District.

6. Plaintiffs, therefore, offer instead the following undisputed facts:

   a. A Declaration of Covenants, Conditions and Restrictions for Woodmen

Hills Filing No. 8 and a Portion of Filing No. 9 was executed October 24, 2000 and recorded in the real property records of El Paso County, Colorado on November 9, 2000 at Reception Number 200136133 (the "Declaration" or "Covenants").

b. The Declaration does not provide for any payment by the Owners of any assessments or other amounts nor does the Declaration provide for a homeowners association to collect or expend funds for such matters.

c. An Amendment to Declaration of Covenants, Conditions and Restrictions for Woodmen Hills Filing No. 8 and a Portion of Filing No. 9 was executed February 12, 2003 and recorded in the real property records of El Paso County, Colorado on February 18, 2003 at Reception Number 203034235 (the "Amendment to Declaration" or "Amendment to Covenants").

d. In the Amendment to Declaration, Article IV - Architectural Approval was deleted in its entirety.

e. Neither the Declaration nor the Amendment to Declaration contain an Enforcement section. Nor do either contain provisions for the organization of a governing body such as a homeowner's association, a provision for homeowner's dues for covenant enforcement, or a provision for fines in the event there was a "covenant violation."

f. The Declarant under the Declaration and the Amendment to Declaration was Melody Homes, Inc.

g. The Amendment to Declaration was in place at the time several of the Plaintiffs purchased real property in Woodmen Hills Filing No. 8 and a Portion of Filing No. 9.

h. The real property records of El Paso County, Colorado indicate that the Declarant sold or transferred the last property in Fling No. 9 to an individual or individuals in September 2003.

i. The real property records of El Paso County, Colorado indicate that the Declarant sold or transferred the last property in the affected portion of Filing No. 8 to an individual or individuals in April 2006.

j. A Contract and Assignment of Right to Enforce Covenants was executed August 14, 2007 and recorded in the real property records of El Paso County, Colorado on November 13, 2007 at Reception Number 207145595 (the "D.R. Horton / Melody Assignment" or "D.R. Horton Contract" or "D.R. Horton

Assignment"). It is not disputed that this assignment was executed. However, what rights, if any, D.R. Horton had to convey/assign is a disputed issue of material fact in this matter.

k. The Declaration at Article VI. Declarant's Rights and Reservations, Section I. states that period of Declarant control ends 120 days after the date upon which one hundred percent (100%) of the Lots have been conveyed to Owners other than the Declarant.

l. The D.R. Horton/Melody Assignment was executed after the period of Declarant control had expired as the D.R. Horton/Melody Assignment was executed more than a year after Declarant sold or transferred the last property in Filing No. 8 and nearly four years after Declarant had sold or transferred its last property in the affected portion of Filing No. 9.

m. A Contract and Assignment of Right to Enforce Covenants was executed October 18, 2007 and recorded in the real property records of El Paso County, Colorado on November 14, 2007 at Reception Number 207146008 (the "Covenant Management Board Assignment" or "Covenant Management Board Contract").

n. Both the D.R. Horton/Melody Assignment and the Covenant Management Board Assignment were executed well after the period of Declarant control had expired.

o. The Declaration and Amendment to Declaration burden the following real property:

LOTS 298 THROUGH 303, AND LOTS 362-498 INCLUSIVE, WOODMEN HILLS FILING NO. 8, EL PASO COUNTY, COLORADO,

and

LOTS 503 THROUGH 544, INCLUSIVE, WOODMEN HILLS FILING NO. 9, EL PASO COUNTY, COLORADO.

II. STANDARD OF REVIEW

Summary judgment is a drastic remedy and should be granted only upon a clear showing that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); Alexander v. McClellan, 39 P.3d 1265 (Colo. App. 2001). The moving party has the burden of establishing that no triable issue exists, and all doubts must be

resolved in favor of the nonmoving party. Smith v. Boyett, 908 P.2d 508 (Colo.1995). The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn from the facts. Gifford v. City of Colorado Springs, 815 P.2d 1008 (Colo. App.1991). Even if it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate. Siepierski v. Catholic Health Initiative Mtn. Region, 37 P.3d 537, 539 (Colo. App. 2001) (Emphasis added); Abrahamsen v. Mountain States Telephone & Telegraph Co., 177 Colo. 422, 428, 494 P.2d 1287, 1290 (1972).

Defendants argue in their Statement of Law that the construction to be given to covenant documents is a question of law. However, this statement is not supported by any legal authority whatsoever. The legal reality is that what rights, if any, D.R. Horton had to assign covenant rights is at best a mixed question of law and fact, not suitable for disposition on a motion for summary judgment.

In Dunne v. Shenandoah Homeowners Ass'n, 12 P.3d 340, 345 (Colo. Ct. App. 2000), the appellees argued that the trial court erred in failing to grant their motion for summary judgment on the various affirmative and equitable defenses raised to the plaintiff's complaint. Appellees rely upon affidavits indicating that numerous owners, including plaintiff, have violated a number of the covenants. In essence they assert that the 1984 covenants were ignored and abandoned. The record reflects, however, that the trial court denied this motion on the basis that there were material issues of disputed fact. The same is true in the present matter that material issues of disputed fact remain, thus this court must deny Defendants' Motion for Summary Judgment.

Further, because the Covenants and Assignments are subject to more than one meaning, they are ambiguous and therefore, the intent of the parties must be considered in this action. Said intent is a question of fact that must be resolved with sworn testimony at trial and/or further discovery. A contract is ambiguous when it is reasonably susceptible to more than one meaning. KN Energy, Inc. v. Great W. Sugar Co., 698 P.2d 769, 777 (Colo. 1985). "[W]ritten documents containing ambiguities or unclear language must be construed in accordance with the intent of the parties, and relevant extraneous evidence may be considered to resolve the factual question of the parties' intent." (quoting Chambliss/Jenkins Assocs. v. Forster, 650 P.2d 1315, 1318 (Colo. App. 1982) Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911-912 (Colo. 1996). The Covenants and Assignments at issue in this litigation are susceptible to more than one meaning. Indeed, the WHMD and WHCMB have one meaning they are asking the Court to adopt and the Plaintiffs to this action have another meaning they are asking the Court to adopt. Because the Covenants and Assignments are ambiguous, the parties' intent must be considered and such intent is a question of fact. The parties' intent is disputed. Therefore, summary judgment in favor of Defendants is inappropriate and their motion for summary judgment must be denied.

III. Legal Argument

A. The D.R. Horton Contract is Neither Valid Nor Enforceable

Defendants' argument that covenant enforcement is being provided as part of the general plan or scheme as envisioned by the Declaration. This is mere conjecture on Defendants part. Defendants do not know what D.R. Horton, as developer and Declarant, envisioned for Woodmen Hills Filing No. 8 and No. 9. This is a disputed question of fact for the Court to decide after hearing sworn testimony at trial and through documents being admitted into evidence at trial. KN Energy, Inc., 698 P.2d at 777 and Dorman, 914 P.2d at 911-912. Further, Defendants are silent as to the filings of the homeowners who encouraged WHMD to attempt covenant enforcement. It is Plaintiffs' position that none of these alleged homeowners own lots in the affected filings as a good majority of the lot owners in Filing No. 8 and No 9 share these Plaintiffs' views about covenant enforcement and the issues in controversy in this litigation. See Exhibit 7 --Affidavit of Charles Warne ("Warne Affidavit"), attached hereto and incorporated as if fully set forth herein.

Defendants' argument that they have authority pursuant to C.R.S. 32-1-1004(8)(a) is misplaced. If this statute is even applicable, the WHMD may only furnish covenant enforcement and design review services if the governing body of the master association or similar body and the metro district have entered into a contract to define the duties and responsibilities of each of the contracting parties. See C.R.S. 32-1-1004(8)(a). And then, said enforcement cannot be overreaching to include powers not granted in the Covenants. C.R.S. 32-1-1004(8)(a)(I).

The Covenants and Amendment to Covenants do not include a mechanism for assessing covenant enforcement fees, a mechanism for assessing fines for alleged "covenant violations", or a means for establishing a homeowner's association/governing body. See generally Covenants and Amended Covenants attached to Defendants' Motion for Summary Judgment. Moreover, the Amendment to Covenants removed the architectural review and design review committees. This stripped significant powers from the Covenants. Lot owners were advised by representatives of D.R. Horton that if they wanted covenant enforcement, it would be up to them to form a homeowners association or use self-help means. See Covenants, Amendment to Covenants, and Warne Affidavit; see also Affidavit of Tracy Al Ring ("Ring Affidavit") attached hereto as Exhibit 8 and incorporated as if fully set forth herein. Defendants' actions to date have been overreaching and outside the scope of the Covenants and the Amendment to Covenants.

First, there is no governing body of the master association or similar body for Woodmen Hills Filing No. 8 and the portion of No. 9 affected by this litigation. Once the last lot in these filings was sold, D.R. Horton's period of Declarant Control expired. Upon its expiration, the only possible governing body that could enter into a contract with the WHMD as contemplated by C.R.S. 32-1-1004(8)(a) would be a homeowner's association formed by the lot owners of these filings. The homeowners of these lots held a meeting regarding covenant enforcement and the formation of a homeowner's association. They decided not to pursue any means of covenant enforcement and chose not to form a homeowner's association. See Warne and Ring Affidavits. It should be further noted that neither the Declaration nor the Amendment to Declaration contain any provision for the formation of a homeowner's association for covenant enforcement in these filings.

Even by the definition asserted by Defendants as to what a master association is, D.R. Horton could not be a "master association or similar body" as it no longer had any right, title, or interest to the property in these filings. See Letter from D.R. Horton in-house counsel to Geoffrey L. Lindquist, Esq. dated February 27, 2007 attached hereto as Exhibit 1 and incorporated as if fully set forth herein and Letter from Rechlitz Law Firm, P.C. on behalf of D. R. Horton to Geoffrey L. Lindquist, Esq. dated June 6, 2007 attached hereto as Exhibit 2 and incorporated as if fully set forth herein.

Defendants argue that Melody Homes, Inc. had extensive powers under the Declaration which would allow them to assign covenant enforcement rights. However, they fail to point to any provision of the Declaration giving Melody Homes such broad powers indefinitely. Rather, they refer the Court to a provision of the Declaration that states how long the provisions of the Declaration are to be in force. Nowhere in that provision does it state that the Declarant has infinite power to assign its rights, if any, to third parties. Based on the interpretation of this provision of the Declaration offered by Defendants, any lot owner could assign covenant enforcement to a third party. Moreover, in Miller v. Curry, 2009 Colo. App. LEXIS 3 (January 8, 2009), the Colorado Court of Appeals held that a provision similar to this was null and void in that it did not set forth a specified time in which Declarant could perform certain acts under the Declaration that affected real property. See Miller v. Curry, 2009 Colo. App. LEXIS 3 (January 8, 2009).[1]

Defendants further argue that the Declarant is a Person as defined in the Declarations entitled to enforce provisions of the Declaration. For that to be true, Declarant would have to be a lot owner or it would have to have control over the filings indefinitely. Neither is the case here. Further, the WHMD and WHCMB cannot be a Person as defined in the Declarations because they are not entitled to enforce the provisions of the Declaration since the Assignment is not valid or enforceable as to the right to enforce covenant enforcement.

D.R. Horton believed that 120 days after the date of sale of the last lot in filings 8 and 9, it no longer retained any rights to assign away covenant enforcement to third parties. It resisted executing an assignment of such alleged rights to Woodmen Hills Metropolitan District. This belief and resistance is evidenced by letters sent to Geoffrey L. Lindquist, Esq. of Susemihl, McDermott, & Cowan, P.C. ("Susemihl McDermott")[2] by in house counsel for D.R. Horton on

[1] Defendants may try to argue that this case is inapplicable because the property in this litigation was subject to CCIOA and Woodmen Hills Filing No. 8 and Filing No. 9 are not subject to CCIOA. However, Plaintiffs will point out to this Court that the Defendants have relied on certain provisions of CCIOA to advance their arguments for granting their motion for summary judgment. Additionally, this opinion is not the final version and is subject to revision upon final publication.

[2] Mr. Lindquist and his firm, Susemihl McDermott, represent the Defendants in this action.

February 27, 2007 and D.R. Horton's privately retained outside counsel on June 6, 2007. These letters are attached hereto as Exhibits 1 and 2, respectively.[3] In these letters, D. R. Horton states:

> Our records indicate that we closed on the last property in the Woodmen Hills subdivision on August 1, 2006. According to the terms of the Declaration, 120 days after the last closing we are no longer the Declarant and are unable to assign the declarant's rights to anyone.

See Letter from D.R. Horton to Geoffrey L. Lindquist, Esq. dated February 27, 2007 (Exhibit 1 attached hereto) (Emphasis added).

> Whether or not D.R. Horton has any enforcement rights over the covenants in Woodmen Hills may be questionable. Even if such enforcement rights were deemed to exist . . . . any such enforcement rights may be null and void once D.R. Horton has conveyed all of the property that is subject to such covenants . . . . Hence, D.R. Horton is unwilling to assign to the Metropolitan District the enforcement rights that are requested in your letter.

See Letter from Rechlitz Law Firm, P.C. on behalf of D. R. Horton to Geoffrey L. Lindquist, Esq. dated June 6, 2007 (Exhibit 2 attached hereto).

It is clear from these two written communications to the Woodmen Hills Metropolitan District that D.R. Horton did not believe it had any rights to assign with respect to covenant enforcement and that it would not sign an assignment offered and drafted by or on behalf of Woodmen Hills Metropolitan District. Plaintiffs maintain that the D.R. Horton Assignment is void and unenforceable for the very same reasons articulated in Exhibits 1 and 2 to this Response.

Although for many months D.R. Horton resisted Woodmen Hills Metropolitan District's continued efforts to secure an assignment, it did eventually agree to a very limited assignment. The D.R. Horton Assignment is clear that it is in the nature of a quitclaim, refusing to warrant any rights to covenant enforcement. Indeed, the D. R. Horton Assignment states in pertinent part as follows:

THE ASSIGNEE ACCEPTS SUCH ASSIGNMENT UNDERSTANDING THAT SUCH ASSIGNMENT IS IN THE NATURE OF A QUITCLAIM; SPECIFICALLY SUCH ASSIGNMENT IS ONLY INTENDED TO PASS ANY TITLE, INTEREST, RIGHT, POWER OR CLAIM WHICH ASSIGNOR MAYH HAVE TO ENFORCE SUCH COVENANTS. THE ASSIGNOR EXPRESSLY DISCLAIMS ANY AND ALL WARANTIES AND REPRESENTATIONS, WHETHER EXPRESS OR IMPLIED, REGARDING THE VALIDITY OFANY TITLE, INTEREST, RIGHT, POWER, OR CLAIM WHICH ASSIGNOR MAY

[3] These letters were disclosed and provided by counsel for Defendants.

HAVE TO ENFORCE SUCH COVENANTS. ACCORDINGLY, SUCH ASSIGNMENT TRANSFERS ONLY THE TITLE, INTEREST, RIGHT, POWER, OR CLAIM ASSIGNOR MAY HAVE, IF ANY, TO ENFORCE SUCH COVENANTS.

See Contract and Assignment of Right to Enforce Covenants ("D.R. Horton Assignment" or "D.R. Horton/Melody Contract") at Paragraph 3 attached hereto as Exhibit 3 (Emphasis not added).

Additionally, pursuant to the Covenants at Article VII, Paragraph 6, the Declarant while it still owns a lot, or its authorized agent, may enforce the provisions of the covenants, provided such enforcement is preceded by notice and hearing. This provision also contemplates that after Declarant sold its last lot, it no longer had the right to covenant enforcement. If it no longer had such right, then it could not assign away that right.

It is clear from the D.R. Horton Assignment that D. R. Horton did not believe it had any rights to assign. This assignment is in stark contrast to the other assignments the Woodmen Hills Metropolitan District obtained from other builders in Woodmen Hills. The D. R. Horton Assignment continually uses the word "may" when referring to any rights of assignment, while the other assignments from other builders speaks in the affirmative as though they knew they had rights to assign. See generally Contract and Assignment of Right to Enforce Covenants dated May 14, 2007 by and between Falcon Properties and Investments, LLP and the Woodmen Hills Metropolitan District attached hereto as Exhibit 4 and incorporated as if fully set forth herein; Contract and Assignment of Right to Enforce Covenants dated July 24, 2007 by and between Elite Properties of America, Inc. and Woodmen Hills Metropolitan District attached hereto as Exhibit 5 and incorporated as if fully set forth herein; and Contract and Assignment of Right to Enforce Covenants dated August 31, 2007 by and between Richmond American Homes of Colorado, Inc. and Woodmen Hills Metropolitan District attached hereto as Exhibit 6 and incorporated as if fully set forth herein.

Defendants spend an inordinate amount of time on the legislative history of Senate Bill 04-211. While it is interesting, it is not the law; nor is it binding upon the Court. A motion for summary judgment must be based in the law and not legislative history.

The letters from counsel for D.R. Horton to counsel for WHMD certainly create an issue of material fact with respect to what rights to covenant enforcement, if any, were assignable and/or assigned. Where the written instrument is ambiguous and the intent of the parties is unclear on the face of the document, one must look outside the four corners of the document to determine the intent of the parties in construction of the ambiguous document. Such analysis and determination of the intent of the parties is a question of fact to be resolved through sworn testimony and evidence at trial and not subject to disposition on a motion for summary judgment. KN Energy, Inc., 698 P.2d at 777 and Dorman, 914 P.2d at 911-912.

This issue of material fact requires additional discovery and further analysis. The parties and the Court need additional sworn testimony, further discovery and evidence put on at trial in order to resolve this issue of material fact. It would be premature at this juncture to rule in favor of Defendants on their motion for summary judgment when such a material issue of fact remains unresolved.

B. The Covenant Management Board Contract is Neither Valid Nor Enforceable

Because the underlying D.R. Horton Assignment assigned no covenant enforcement rights to WHMD, neither did the assignment from WHMD to WHCMB assign any covenant enforcement rights. Therefore, the Covenant Management Board Contract is not valid in that it does not assign any rights to covenant enforcement. It is, therefore, unenforceable.

C. The Amendment to the Declaration is Valid and Applicable to Woodmen Hills Filing No. 8 and a Portion of No. 9

Defendants argue that the Amendment to the Declaration is void, voidable or invalid. They rely on the proposition that the Declarant could not unilaterally amend the Declaration while it was the Declarant.[4] It is impossible to argue on the one hand that Declarant has no authority to amend the Declarations but on the other hand it has full authority to assign covenant enforcement after the period of Declarant Control has expired.

Moreover, Woodmen Hills Metropolitan District and/or Woodmen Hills Covenant Management Board lack standing to make such an argument. The only parties who have standing to raise such an issue are lot owners or the homeowner's association on behalf of the lot owners. See Covenants. WHMD and WHCMB are not lot owners; nor are they a homeowner's association formed pursuant to the Declarations. Therefore they do not have standing to raise this issue and their argument must be summarily dismissed by this Court.

D. The Declaration Contains No Provision for Enforcement, Formation of HOA, Dues Assessment

The Declaration contains no enforcement section whatsoever. There is, in essence, no method of enforcement. The Declaration is silent when it comes to fines to be assessed for alleged "covenant violations". It is also silent with respect to the formation of a homeowner's association and the assessment of homeowner's dues for covenant enforcement. Basically, the Declaration does not contemplate enforcement of the covenants in any traditional sense.

[4] The Amendment to the Declaration was drafted and executed while Declarant still owned numerous lots in filings 8 and 9.

The Declaration contains two small sections referencing covenant enforcement. One of those sections states that covenant enforcement can be sought by any Person entitled to enforce the provisions of the Declaration. Plaintiffs maintain that after Declarant sold its last lot, the only Persons entitled to attempt covenant enforcement would be the lot owners. The other section references self-help as the mechanism for any covenant enforcement. Self-help is defined as redressing or preventing wrongs by one's own action without recourse to legal proceedings. CITE *Self-help* is a term in the law that describes corrective or preventive measures taken by a private citizen.

Basically, the Declarations contain guidelines for the homeowners to live by. See Ring Affidavit. There are no teeth to the Declarations, making them virtually unenforceable. One could compare this to being stopped by a police officer for exceeding a posted speed limit. Unless there is a statutory provision on the books for what the punishment is for speeding, the officer can only, at best, issue the motorist a warning citation. There would be no method of enforcement by way of fine or court appearance. The Declarations for Woodmen Hills Filing No. 8 and a Portion of No. 9 contain no provision for enforcement.

The plain language of a restrictive covenant must be interpreted considering its underlying purpose. Dunne v. Shenandoah Homeowners Ass'n, 12 P.3d 340, 345 (Colo. Ct. App. 2000) (citing to Tucker v. Wolfe, 968 P.2d 179 (Colo. App. 1998)). And, any doubt relative to the meaning and application of the covenant must be resolved in favor of the unrestricted use of property. Id. (citing to Nelson v. Farr, 143 Colo. 423, 354 P.2d 163 (1960). Indeed, the General Assembly has mandated in § 38-34-103, C.R.S. 1999, that all restrictions relative to the use or occupancy of real property must be strictly construed. See Double D Manor, Inc. v. Evergreen Meadows Homeowners' Ass'n, 773 P.2d 1046 (Colo. 1989). D.R. Horton, through sworn testimony, is the only entity or party to the original Covenants and Amendment to Covenants who can state what the underlying purpose of these documents were. Therefore, a material question of fact remains, making summary judgment on behalf of Defendants' inappropriate.

Additionally, D.R. Horton's representatives explained to the lot owners in these filings by that there was no covenant enforcement and if covenant enforcement was to be had, it would come only by a vote of the lot owners in these filings. See Warne Affidavit (Exhibit 7) and Ring Affidavit (Exhibit 8).

After the period of Declarant Control had expired, the lot owners in these filings held a meeting and decided not to form a homeowner's association and not to actively attempt any enforcement of the provisions of the Declaration. See Warne Affidavit and Ring Affidavit (Exhibits 7 and 8). At that time, the lot owners in these filings learned of WHMD's covert attempts to secure covenant enforcement in these filings. See Warne Affidavit (Exhibit 7).

If Defendants believed the D.R. Horton Assignment to be valid and enforceable, it is puzzling to say in the least why the Defendants kept their movement to secure the right to

enforce covenants from the lot owners in Woodmen Hills Filing No. 8 and Filing No. 9. These lot owners were not informed of any of the meetings or other activities that the WHMD was engaged in to attempt covenant enforcement. See Ring Affidavit (Exhibit 8). Indeed, WHMD sent letters out in March 2007 to all lot owners, except those in Filings 8 and the applicable portion of 9 advising that covenant enforcement efforts had been ceased. See cover letter from a covenant management company dated March 26, 2007 and attached letter to Rusty Green dated March 16, 2007 attached hereto as Exhibit 9 and incorporated as if fully set forth herein; see also Ring Affidavit (Exhibit 8). Although the same letter as the one sent to Rusty Green on March 16, 2007 was sent to D.R. Horton on the same date, it along with a cover letter from a covenant management company was never provided to Woodmen Hills Filing No. 8 and 9 lot owners. See Letter from Geoffrey L. Lindquist to Juli E. Lapin, Division Counsel for D.R. Horton dated March 16,2007, attached hereto as Exhibit 10 and incorporated as if fully set forth herein; see also Ring Affidavit (Exhibit 8).

E. WHCMB and WHMD have no authority whatsoever to enforce the Declaration, Amendments to Declaration, may not enforce them through judicial process, and may not recover attorney fees and costs pursuant to the Declaration

Because the D.R. Horton Assignment assigned no right to covenant enforcement to Woodmen Hills Metropolitan District as outlined in the previous sections of Plaintiffs' Legal Argument, the WHMD and/or WHCMB have no authority to enforce the Declarations and may not enforce them through judicial process.

Further, WHMD and/or WHCMB would have to be a party bound by the Declarations who have prevailed in a legal action pertaining to the Declarations in order for the attorneys' fees and costs provision of the Declarations to apply in this action. For the reasons stated in the previous sections of Plaintiffs' Legal Argument, they are not parties to the Declaration and cannot be prevailing parties as contemplated by the Declaration. Therefore, they are not entitled to recover attorney fees and costs pursuant to the Declaration.

F. WHMD does not have the power or authority to assess a covenant fee

Pursuant to C.R. S 32-1-1001(I)(j)(I), the WHMD would only be entitled to assess a covenant fee if it were legally authorized to provide covenant enforcement. As outlined in the previous sections of Plaintiffs' Legal Argument, WHMD does not have the legal authority to provide covenant enforcement or contract for same with WHCMB. The D.R. Horton Assignment assigned no rights to covenant enforcement to WHMD. Therefore, WHMD may not assess a covenant fee against the lot owners of Woodmen Hills Filing No. 8 and Filing No. 9.

G. At the time of the Assignment, Declarant of the Declaration no longer had a legal right, title, interest, power or claim regarding the Declaration; nor did

it have the power to assign any rights, title, interest, power or claim to the WHMD

Because D.R. Horton's period of Declarant control had expired and it acknowledged it no longer had a legal right, title, interest, power or claim regarding the Declaration, it did not have the power to assign any rights, title, interest, power or claim to the WHMD. When it did finally execute an assignment at the behest of WHMD, it was in the nature of a quit claim, expressly disclaiming any warranties regarding its rights, if any, to enforce covenants in Woodmen Hills Filing No. 8 and a portion of Filing No. 9. Therefore, the Assignment contained no assignment of any valid, legally enforceable rights of covenant enforcement and as such WHMD has no right to attempt covenant enforcement.

H. Issues of Material Fact Preclude the Entry of Summary Judgment

Summary judgment is not proper in this case because, *inter alia*, the following issues of fact must be resolved at a trial of this matter:

a. What rights of covenant enforcement, if any, did D.R. Horton have to assign to WHMD?

b. What rights of covenant enforcement, if any, were assigned to WHMD?

c. What mechanism of covenant enforcement, if any, exists pursuant to the Declaration and Amendment to Declaration?

d. What is the time frame in which D.R. Horton, as Declarant, had to assign rights to covenant enforcement to third parties?

e. What was D.R. Horton's intent for the covenants for these filings?

f. To the extent some provisions of the covenants are contradictory with one another, which shall prevail?

These disputed and/or unresolved issues of material fact preclude summary judgment in this matter.

IV. CONCLUSION

D.R. Horton no longer had a legal right, title, interest, power or claim regarding the Declaration. Nor did it have the power to assign any rights, title, interest, power or claim to the WHMD. D. R. Horton's period of Declarant Control had long since expired when the

Assignment was executed. D.R. Horton made it clear to counsel for WHMD that it no longer had any right to assign covenant enforcement. When it did finally execute an assignment, it was in the nature of a quit claim, expressly disclaiming any warranties regarding its rights, if any, to enforce covenants in Woodmen Hills Filing No. 8 and a portion of Filing No. 9. Therefore, the Assignment contained no assignment of any valid, legally enforceable rights of covenant enforcement and as such WHMD has no right to attempt covenant enforcement. Further, Defendants have not met their burden as to the legal standard for summary judgment on legal issues/arguments they have raised in their motion for summary judgment. Finally, there are numerous issues of material fact that remain disputed and must be resolved at trial. For the reasons set forth herein, Plaintiffs request that the Court deny Defendants' Motion for Summary Judgment.

PLAINTIFFS' REQUEST FOR ALTERNATIVE RELIEF – CROSS MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS WOODMEN HILLS METROPOLITAN DISTRICT AND WOODMEN HILLS COVENANT MANAGEMENT BOARD

Plaintiffs have argued in the preceding sections that there are numerous issues of material fact that must be resolved, making summary judgment on behalf of Defendants inappropriate. However, in the event the Court finds there is no issue of material fact, Plaintiffs request that summary judgment be issued in their favor as follows:

A. That the First Assignment is void, voidable or invalid;

B. That the Second Assignment is void, voidable, or invalid;

C. That the Amended Covenants are the controlling document for the Owners in Woodmen Hills Filing Number 8 and a Portion of Filing Number 9;

D. That the Amended Covenants have no mechanism for covenant enforcement or assessment of fees against Owners for covenant enforcement;

E. That Woodmen Hills Covenant Management Board, its successors or assigns, and/or the Woodmen Hills Metropolitan District, its successors or assigns, have no authority to attempt enforcement of the Covenants and no authority to assess penalties/fines for alleged covenant violations;

F. That Woodmen Hills Covenant Management Board, its successors or assigns, and/or the Woodmen Hills Metropolitan District, its successors or assigns, have no authority to cause an assessed "covenant fee" for covenant enforcement be charged to Owners in Woodmen Hills Filing Number 8 and a Portion of Filing Number 9 and as such a refund of all

paid "covenant fees" plus interest shall be made to the Warnes, Mr. Cuffe, the Villanuevas, the Surbers and the Heltons;

G. That Declarant or Declarant Horton no longer has any legal right, title, interest, power or claim in or to the properties, covenants or covenant enforcement affecting the properties associated with Woodmen Hills Filing Number 8 and a Portion of Number 9 and as such cannot make any assignments of any right, title, interest, power or claim in or to properties, covenants or covenant enforcement associated with Woodmen Hills Filing Number 8 and a Portion of Filing Number 9 to third-parties;

H. For Charles Warne's, Bridget Warne's, Brandon Cuffe's, Norman Villanueva's, Nancy Villanueva's, Howard Surber's and Luana Surber's , and Travis and Karen Helton's costs incurred in this action pursuant to C.R.S. § 13-51-114; and

I. For such other and further relief as this Court deems just and proper.

In support of this request for alternative relief, Plaintiffs submit to the Court that if there is no issue of material fact to resolve, and the only issues to resolve are legal, then they have met their burden with respect to legal arguments pertinent to this matter and summary judgment in Plaintiffs' favor is appropriate. See Sections I through IV contained within this pleading. For these reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' cross-motion for summary judgment.

Respectfully submitted this 3rd day of April 2009.

M. JACQUELINE GAITHE, PC

Original signature on file at the office of M. Jacqueline Gaithe, PC

By: */S/ M. Jacqueline Gaithe*
M. Jacqueline Gaithe, #34348

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April 2009, a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO DEFENDANTS WOODMEN HILLS COVENANT MANAGEMENT BOARD AND WOODMEN HILLS METROPOLITAN DISTRICT'S MOTION FOR SUMMARY JUDGMENT AND IN THE ALTERNATIVE, PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT was served electronically via Lexis-Nexis File & Serve addressed to the following:

Jason W. Downie, Esq.

Geoffrey L. Lindquist, Esq.
Susemihl, McDermott & Cowan, P.C.
660 Southpointe Court, Suite 210
Colorado Springs, CO 80906

/s/ J. Gaithe
Original signature on file at the office of M. Jacqueline Gaithe, PC