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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2025-CA-0578-MR

CRAIG ROBERTS AND
VICTORIA ROBERTS — APPELLANTS

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE JERRY CROSBY, II, JUDGE
ACTION NO. 22-CI-00466

BALLARD WOODS HOMEOWNERS
ASSOCIATION, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON, CHIEF JUDGE; CETRULO AND KAREM, JUDGES.

CETRULO, JUDGE: Craig and Victoria Roberts (together, the "Roberts") appeal an Oldham Circuit Court order granting summary judgment in favor of their Homeowners' Association ("HOA") for violating the HOA's restrictive covenants by constructing an outbuilding that does not conform with the architectural style of their primary residence. Finding no reversible error, we affirm.

## BACKGROUND

In 2003, Walter Schumm ("Developer") developed Ballard Woods Subdivision ("Ballard Woods" or "Subdivision") in Oldham County, Kentucky. Developer recorded the Declaration of Restrictions ("2003 Declarations") for the Subdivision that, in relevant part, (1) required homeowners to obtain pre-approval for all "improvements, structures, or other appurtenances" from himself as the subdivision's initial developer; (2) created an HOA to manage the subdivision and subsequently subsume the authority granted to him; and (3) allowed for a 51% majority of the subdivision's homeowners to alter or abolish any amendments to the restrictive covenants. In 2006, the Roberts purchased a home in Ballard Woods subject to those restrictive covenants within the 2003 Declarations.

In 2016, Developer, in his capacity as initial developer and President of the HOA, assigned his powers, duties and authority to the HOA Board of Directors ("HOA Board"). A written instrument documenting this assignment ("2016 Assignment") is not in the record.

In February 2021, at the annual HOA meeting, a majority of Ballard Woods homeowners voted in favor of adopting the Amended Declaration of Restrictions ("2021 Amendments").[1] These 2021 Amendments are in the record.

[1] Appellants assert the vote was 59-5 in favor, but appellees' brief states the vote was 62-5. Regardless, there is a clear majority greater than 51%.

The 2021 Amendments stated Developer "transferred" responsibility for the management of the HOA in June 2016. The stated intent of the 2021 Amendments was to ensure that all new subdivision improvements were "in harmony," and that the subdivision maintained a consistent character and design. Those 2021 Amendments replaced the term "Developer" with "the Board" and explicitly reserved the HOA Board's right to pre-approve appurtenances:

> No improvements, structures, or other appurtenances shall be placed, constructed or permitted to remain upon any lot in the Subdivision Property until the plans (including all elevations) and specifications (including exterior building materials) shall have been first submitted to and approved by the Board. The Board reserves the right to approve or disapprove, in its sole discretion, the architectural design of any building or structure. The term "appurtenances" shall mean anything placed, constructed, or permitted to remain upon any such lot.

Additionally, the 2021 Amendments required all exterior structures to conform with the architectural style of the primary residence ("Style Conformity Amendment") and be pre-approved by the HOA Board.

In May 2022, Victoria Roberts ("Victoria") emailed Aaron High, the HOA President ("High"), informing him of her plan to install a fiberglass pool later that month. High responded and informed Victoria that she needed to get HOA approval prior to installing the pool. After multiple emails back and forth, Victoria then informed High she was also installing a shed. High repeatedly requested full plans and renderings and cautioned her from proceeding with either

the pool or shed prior to HOA Board approval. Nine days after Victoria's initial email, the HOA Board approved the pool but not the shed. The president informed Victoria that while her shed may be consistent with other sheds in the subdivision, those other structures were constructed prior to the 2021 Amendments, and since the adoption of the 2021 Amendments, the HOA had not approved any structures of that kind. High informed Victoria "any new structures must conform to the architectural style of the primary residence[.]" As her current plan did not, it was not approved. She was advised that once she had "a new style" for the shed, she should email the HOA for approval. Regardless, the Roberts installed both the pool and shed, the latter without any style alterations.

In June 2022, the HOA sent a letter to the Roberts informing them that the shed violated the 2021 Amendments. The next month, in July, the HOA sent the Roberts a letter suggesting ways in which their current shed could be brought into compliance. The Roberts refused to make changes to the shed, and the HOA filed a complaint with the Oldham Circuit Court that October.

Litigation ensued for the next two years, and in October 2024, the HOA moved for summary judgment.[2] The HOA argued new structures in the Subdivision had always needed approval before construction. As the Roberts did not receive

[2] This motion was the HOA's second attempt at summary judgment as the court denied the first.

such approval, their shed violated the Style Conformity Amendment, and their non-conforming shed was not permitted.

Conversely, the Roberts argued the HOA could not enforce the Style Conformity Amendment because the subdivision already had many outbuildings that did not meet that style requirement at the time the subdivision voted to adopt the 2021 Amendments, *i.e.*, that the restrictive covenant was waived because the subdivision was fundamentally changed through numerous instances of non-conforming outbuildings. Also, the Roberts asserted the HOA did not have standing to bring the suit as it could not show proof of the assignment from Developer to the HOA.

In March 2025, the circuit court granted the HOA's motion for summary judgment. Relevantly, this order granting summary judgment stated:

> This Court finds regardless of whether there existed a fundamental change in the character of the neighborhood prior to the [2021 Amendments], . . . [the Style Conformity Amendment] requires [the Roberts's home] to conform to the architectural style of the main residence. There is no question that the building constructed by [the Roberts] in spite of the objection and disapproval of the [HOA] does not conform to this requirement.
>
> While there may be evidence of prior approval or acquiescence by the [HOA or Developer] which did not fit the fundamental character of the neighborhood, there is no evidence in the record that the [HOA] has waived enforcement of the [2021 Amendments] through arbitrary enforcement since the Amendment adding the requirement of architectural conformity. [The Roberts], in their argument, have relied, almost exclusively, upon actions or acquiescence of the [HOA or Developer] prior to the [2021

> Amendments]. **If the [2021 Amendments are] enforceable, then any activity prior to [their] establishment is irrelevant and immaterial to this discussion because the property owners voted to reset the playing field for approval of outbuildings by virtue of the additional requirement**.
>
> As the Court perceives, the question is not whether the outbuilding meets the character of the neighborhood or whether the character of the neighborhood has been so fundamentally changed that the pre-2021 Declaration is unenforceable. Rather, the question is whether the [2021 Amendments are] enforceable and, if so, whether the [Roberts] acted outside of the restrictions when they erected, without approval of the [HOA], a structure which did not conform to the current restrictions requiring architectural conformity to the primary residence.
>
> The Court finds that the [Style Conformity Amendment] is enforceable, there being no valid argument otherwise, and that the [Roberts] violated the Declaration by constructing an outbuilding which does not have architectural conformity to the primary residence.
>
> As to the issue of standing, [Roberts] state the developer did not turn over the approval of design of outbuildings to the HOA. However, language contained in the 2016 Bylaws refute this contention, stating the HOA was granted such authority.
>
> [The HOA is] entitled to Summary Judgment. Per their prayer for relief, [the HOA] shall have a Permanent Injunction against [the Roberts]. [The Roberts] have 90 (ninety) days from finality of this Order to bring the outbuilding into compliance with the [2021 Amendments]. The [HOA] has leave of Court to seek the demolition of the non-conforming building, should [the Roberts] fail to comply.

(Emphasis added.)

In May 2025, the circuit court entered its final order imposing $28,368.67 in fees, costs, and fines against the Roberts. The Roberts appealed.

## STANDARD OF REVIEW

The standard of review upon appeal of an order granting summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing Kentucky Rule of Civil Procedure 56.03). Upon a motion for summary judgment, all facts and inferences in the record are viewed in a light most favorable to the non-moving party and "all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). Summary judgment should only be granted if it appears "impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor[,]" but "impossible" is used "in a practical sense, not in an absolute sense." *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citations omitted). "The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists and then the burden shifts to the party opposing summary judgment to produce at least some affirmative evidence showing that there is a genuine issue of material fact requiring trial." *First Fed. Sav. Bank v. McCubbins*, 217 S.W.3d 201, 203 (Ky. 2006) (citations omitted). A

summary judgment looks only to questions of law, and we review *de novo*. *Brown v. Griffin*, 505 S.W.3d 777, 781 (Ky. App. 2016) (citation omitted).

**ANALYSIS**

On appeal, the Roberts argue the circuit court should have considered the character of the subdivision prior to the adoption of the 2021 Amendments, and such review would have established that the HOA waived its right to adopt and enforce the Style Conformity Amendment. The Roberts assert the HOA could not properly adopt the Style Conformity Amendment because at the time of its adoption, the subdivision contained numerous outbuildings violating that amendment, thereby making the amendment's goal of conformity impossible. Therefore, the Roberts assert, the fundamental change in the character of the neighborhood made that restrictive covenant – the Style Conformity Amendment – unenforceable. However, we do not agree.

The Roberts are correct that waiver can occur if a restrictive covenant is arbitrarily enforced and that arbitrary enforcement results in "a fundamental change in the character of a neighborhood[.]" *Hensley v. Gadd*, 560 S.W.3d 516, 526 (Ky. 2018) (quoting *Colliver v. Stonewall Equestrian Ests. Ass'n, Inc*., 139 S.W.3d 521, 525 (Ky. App. 2003)). Stated another way, "[a] waiver of restrictive covenants occurs when '"[a] change in the character of the neighborhood which was intended to be created by restrictions . . . generally . . . prevent[s] their

enforcement in equity, where it is no longer possible to accomplish the purpose intended by such covenant."'" *Id.* (quoting *Logan v. Logan*, 409 S.W.2d 531, 534 (Ky. 1966)). The Roberts focus solely on the *intent* of the covenant and not the waiver application *as a whole*.

Restrictive covenant waiver comes into question when restrictive covenants are duly adopted, *then* arbitrarily enforced, and *then* that arbitrary enforcement creates a fundamental change in the character of the neighborhood. *Id.* (citations omitted). That is not the situation before us. Using the facts before us, waiver could be argued if – *after* the Style Conformity Amendment was adopted – the HOA arbitrarily enforced that amendment, and *then* that arbitrary enforcement changed the fundamental character of the subdivision. Instead, the Roberts argue the amendment was waived *before* it was adopted. Applying waiver in such a way exceeds our caselaw.

The Roberts cite *Hensley* for the principle that an HOA may not adopt a restrictive covenant when its non-compliance is already present. *Id.* at 526. However, we disagree with that interpretation of *Hensley*. In *Hensley*, the community's restrictive covenants required the homes to be used for residential purposes only, not business. *Id.* at 519. A homeowner (and the original community developer) in a deed-restricted community alleged violation of the community's restrictive covenants by a neighbor who was advertising his

properties for short-term recreational residential use. *Id.* The circuit court held the short-term rental use constituted a business in violation of the restrictive covenants, and the developer had not waived enforcement of the restrictions by failing to contest other homeowners' operation of businesses out of their residences. *Id.* at 520. This Court disagreed, but ultimately our Supreme Court affirmed the circuit court and held the short-term rental business use of the property violated the restrictive covenants. *Id.* at 526. The *Hensley* Court determined that while some homeowners in the community operated businesses out of their homes and the developer did not challenge those homeowners for violation of the restrictive covenants, the developer did not waive his right to enforce the covenants because those other business uses did not impact the character of the neighborhood. *Id.*

The principle as stated in *Hensley* bears repeating: when a neighborhood's character changes in spite of and contrary to an adopted restrictive covenant, that is when waiver occurs. The failure to enforce the restrictive covenant negates its original purpose. There is nothing in *Hensley* that states restrictive covenants cannot be *adopted* or amended if the community already contains violations of that covenant. In fact, *Hensley* does not discuss *adoption* of restrictive covenants. Instead, *Hensley* found a community could *disallow* some residential businesses while *allowing* others if those businesses did not change the character of the neighborhood. *Id.*

Further, the Roberts's request would limit the ability of a homeowners' association to alter or amend its own restrictive covenants. For instance, following the Roberts's logic, a homeowners' association, like the one herein, could not, by majority vote, create a change within the community if that circumstance already existed. Such a restriction would interfere with the right to contract. Our role is not to limit contracts, but rather, to enforce an unambiguous written instrument according to its plain terms. *Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC*, 540 S.W.3d 770, 783-84 (Ky. 2017) (citations omitted).

Under these circumstances, whether or not the subdivision contained non-conforming outbuildings prior to the 2021 Amendments is immaterial. As this is summary judgment review, we must view the facts in a light most favorable to the Roberts. We must assume the subdivision *did* contain numerous outbuildings that violated the Style Conformity Amendment prior to the 2021 Amendments. The Roberts would have us believe that this "fact" would prevent the HOA members from adopting the amendment because the amendment's uniformity goal would be impossible to achieve. However, we must construe restrictive covenants "according to their plain language on a case-by-case basis according to the particular terms of the instrument and the facts of the case." *RAZ, Inc. v. Mercer Cnty. Fiscal Court*, 706 S.W.3d 17, 21 (Ky. 2024) (internal quotation marks and citation omitted).

Based on the plain language of the amendments, the goal of the 2021 Amendments was a *renewed sense of stylistic harmony*. That goal was passed by majority community vote. That goal remained achievable despite the existence of non-conforming outbuildings; the community voted to limit new structures to stylistic conformity with the primary residence. Such was within the right of HOA members to adopt community goals and was achieved pursuant to their founding documents, declarations, and amendments.

The Roberts admit their shed does not have HOA approval, and they do not argue their shed is stylistically consistent with their primary residence. Further, when the Roberts bought their home, the subdivision's restrictive covenants required homeowners to obtain pre-approval for all outbuildings from Developer. The subdivision's 2003 Declarations allowed for a 51% majority of the subdivision's homeowners to alter or abolish any amendments to the restrictive covenants. The 2021 Amendments – adopted by a majority vote – replaced the term "Developer" with "the Board," explicitly reserved the HOA Board's right to pre-approve appurtenances, and added the Style Conformity Amendment.

We agree with the circuit court's conclusions that the 2021 Amendments were properly adopted and enforceable.[3] Even viewing the facts in a

[3] Additionally, the Roberts argue the HOA lacked standing as there is no written instrument documenting the assignment from Developer to the HOA. Under these circumstances, that factual void does not present an issue of material fact. Developer signed the 2003 Declarations

light most favorable to the Roberts, they nonetheless did not meet their burden of establishing at least some affirmative evidence showing that there is a genuine issue of material fact or that the circuit court erred as matter of law. As such, summary judgment was appropriate.

## CONCLUSION

Accordingly, we AFFIRM the Oldham Circuit Court.

ALL CONCUR.

| BRIEFS FOR APPELLANTS: | BRIEF FOR APPELLEE: |
|---|---|
| Sean P. Paris<br>La Grange, Kentucky | Jonathan Dyar<br>Louisville, Kentucky |

and explicitly indicated his intent to assign authority to the HOA; the 2021 Amendments acknowledge that transfer, and there is no argument the HOA is exceeding those clearly enumerated powers and authority.