In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00174-CV

CITY OF MANSFIELD AND THE MANSFIELD PARK FACILITIES DEVELOPMENT CORPORATION, Appellants

V.

JOSH AND KELLI SAVERING, CHATTANYA CHAVDA, PANNABEN NANCHA, PAUL ARSENEAU, ALLISON BLACKSTEIN, AND JACK A. MUHLBEIER, Appellees

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On Appeal from the 348th District Court
Tarrant County, Texas
Trial Court No. 348-270155-14

Before Sudderth, C.J.; Gabriel and Kerr, JJ.
Memorandum Opinion by Justice Gabriel

MEMORANDUM OPINION

In this appeal, we are asked to determine whether several homeowners were entitled to a declaratory judgment regarding fee-simple title to undeveloped lots in the homeowners' housing development and regarding compliance with a floodplain ordinance. Our decision regarding fee-simple title is complicated by this court's prior en banc opinion that held, in the context of the homeowners' request for a preliminary injunction, that the homeowners had shown a probable right to relief on their trespass claim. But we are not precluded from again considering fee-simple title based on different claims, new arguments, an expanded record, and different governing standards presented in this appeal. As such, even if title passed to the original homeowners' association under the terms of the dedicatory instrument (the subject of our prior preliminary-injunction opinion), there is no evidence that the original homeowners' association conveyed title to the subsequent homeowners' association, which was formed after the original homeowners' association became a terminated entity. Additionally, the homeowners do not have standing to seek to enforce the floodplain ordinance through a claim for declaratory relief and, in any event, have failed to conclusively establish noncompliance. We conclude that the homeowners did not conclusively establish their right to declaratory relief and, therefore, that the trial court erred by granting their summary-judgment motion.

I. BACKGROUND

Although we have recounted some of the facts surrounding this property dispute in our prior opinions, the record has been further developed since the temporary-injunction fight. Thus, in the interest of clarity and completeness, we find it necessary to once again recount the underlying facts, including those facts developed for the summary-judgment proceeding, and the parties' positions in the trial court.

A. THE DOCUMENTS

In 1994, the Arbors of Creekwood Partners Joint Venture Phase II (the Developer) filed a final plat in Tarrant County, creating a planned housing development—The Arbors of Creekwood – Gated Community (the Development)—on a tract of land located in appellant City of Mansfield. The northern and western borders of the Development (more specifically, Lots 52 through 54 and Lots 57 through 71) abut Walnut Creek. The southern and eastern borders are gated, restricting public access into the development.

On November 6, 1995, the Developer filed in Tarrant County a plat revision, which had been approved by the City in September 1995,[1] that divided the lots into either "R1" or "R2" lots. Lots 52 through 54 and Lots 57 through 71—the lots

[1]At the approval hearing before the City's planning and zoning commission, the Developer's managing partner, Bobby McCaslin, told the commissioners that the reason for the revised plat was to divide the lots, reserving the lots abutting Walnut Creek for the City's future linear park on the creek.

abutting Walnut Creek—were designated as R2 lots. All R2 lots are in the floodplain. The revised plat also showed a lake that the Developer had constructed on portions of Lots 64-R1 through 71-R1 and a jogging path that the Developer had placed on the R2 lots to the west and north of the lake. Residents of the Development could access the path via a sidewalk between two homes that "ties into the rest of the walking path." McCaslin stated that he had "deliberately connected" the path to a public access point "outside of the gated portion of the subdivision" because the path "was intended to be for public use." The boundary line for the R2 lots abutting the lake was to the north of the lake; thus, the lake was not included within the boundaries of these R2 lots. The lake and the jogging path are also located in the floodplain.

McCaslin had instructed his surveyor that the revised plat "should carry a restriction reserving the R2 lots for public, recreational uses." This purpose is reflected on the face of the revised plat in the "CONDITIONS OF APPROVAL," which also address the formation of a homeowners' association and the lot owners' responsibilities for private common areas and facilities:

> 1. Lots 52-R2 through 54-R2 [and] Lots 57-R2 through 71-R2, Block 5 shown [on the revised plat] are intended for public recreation use and shall not be converted to other uses. No building permits will be issued for any of said lots unless it is for construction related to public recreation use.
>
> 2. The landowners and any subsequent owners of lots shown [on the revised plat] (the "Lot Owners"), jointly and severally, shall be responsible and liable for the construction, operation and maintenance of any private common areas or facilities in the addition created [in the revised plat] (the "Addition"), including but not limited to private

> streets, private street lights, private entrance gates or structures, private walls and fences, private pedestrian access, private storm drain and systems, private lake, private open space and landscaping, and emergency access.
>
> 3. A Homeowners Association (the "HOA") shall be established by the subdivider or developer to operate and/or maintain the aforementioned private common areas or facilities.

On December 6, 1995, McCaslin, as the managing partner of the Developer, executed a declaration of covenants, conditions, and restrictions (the Declaration) for the Development. The Declaration was indexed in Tarrant County's property records on December 11, 1995, which became the Declaration's effective date under the Declaration's express terms. The Declaration reflected that McCaslin was "the owner of all that certain real property situated in . . . Mansfield . . ., as more particularly described on Exhibit 'A' attached hereto and incorporated herein by reference for all purposes (the 'Property')." The Property was described on Exhibit A as

> Lots 48, 49, 50, and 51, 52-R1 through 54-R1, 55, 56-R1 through 71-R1, Block 5, Lots 10 through 27, Block 6 of Arbors of Creekwood Phase Two and Five,[2] Arbors of Creekwood, an addition to the City of Mansfield, Tarrant County, Texas, according to the Plats recorded [in] Tarrant County, Texas and any additional lots and blocks so designated as the [Development] in the future by proper plat dedication.

In short, the R2 lots were not included in the definition of the Property.

The Developer also declared that it intended to create a nonprofit, incorporated homeowners' association "to have and to exercise the rights and duties, and to perform on behalf of, and as agent for, the Owners," who were defined as

[2]The R2 lots at issue are located in Phase Five.

record owners of a fee or undivided fee interest in any lot in the Development. Membership in the association, once created, would be mandatory based on the fact that the Development contained private streets.

The Declaration provided that this future homeowners' association would hold fee-simple title to the private streets in the Development "and [to] all other Common Properties, and all portions of the Property which are not within any of the Lots as shown on the Plat, all of which have been or will be dedicated to the Association as shown on and pursuant to, the Plat." "Common Properties" had a six-part definition in the Declaration, only two of which are relevant here:

> (ii) Any and all greenbelt areas, bicycle and/or jogging paths, landscape easements, floodways, creeks, drainage ways, open spaces, pedestrian access easement or other similar areas as shown on the Plat . . . of the [Development], whether within or surrounding or along the boundaries of the Property, including portions thereof lying within or beneath a portion of the Lake, along its North boundary between the jogging path and the water's edge, a distance of 5' into the water.
>
> (iii) Any other property or improvements for which [the Developer] and/or the Association have or may hereafter become obligated to maintain, to improve, or to preserve[.]

The future HOA would be responsible for maintaining the Common Properties as defined in the Declaration, including "any creeks, flood plains, lake, drainage ways and/or common amenities located within or upon the Common Properties."

On December 15, 1995, articles of incorporation were filed with the Texas Secretary of State creating the "Arbors of Creekwood – Gated Community Homeowners Association, Inc." (the Arbors HOA) to "define and enforce the

[Declaration] of the [Development] in Mansfield, Tarrant County, Texas, and carry out the duties authorized therein." The management of the Arbors HOA was vested in its board of directors, of which McCaslin was the only member. The articles provided that upon "dissolution, [the Arbors HOA's] assets will be distributed to the state government for a public purpose, or to an organization exempt from taxes under Internal Revenue Code Section 501(c)(3) to be used to accomplish the general purposes for which the Corporation was organized." The articles further provided that property could not be distributed in a contrary way upon dissolution.

On December 22, 1995, McCaslin, acting as the Developer's managing partner, executed a warranty deed donating and granting to the Communities Foundation of Texas, Inc. (the Foundation) Lots 57-R2 through 70-R2 "subject to any and all restrictions, covenants, conditions and easements, if any." But, again, the warranty deed specified that any use of the deeded lots was "restricted to be used only for purposes of parks and recreation." The deed was indexed in the Tarrant County property records on January 23, 1996.

In 1997, the Arbors HOA forfeited its right to do business and became a terminated entity. *See* Tex. Bus. Orgs. Code Ann. § 11.001(4). On May 22, 1998, articles of incorporation were filed creating the "Estates of Creekwood Homeowners Association, Inc." (the Estates HOA) for "promoting the well-being of the community, enforcing the community deed restrictions, maintaining all common areas, collecting assessments, and any other purposes which the board of directors

and officers deem proper." The articles listed three initial directors; all three were lot owners in the Development. In its bylaws, the Estates HOA empowered the board of directors to enforce the prior Declaration adopted for the Development.

On December 22, 2000, the Developer donated Lots 52-R2, 53-R2, and 71-R2 by warranty deeds to the Foundation "only for purposes of parks and recreation."[3] The deeds were indexed on January 2, 2001.

B. THE DISPUTE

In January 2012, the City began planning for a "possible future trail connection" to the jogging path. The plan was to build a pedestrian bridge from the linear park system on one side of Walnut Creek that would connect to the jogging path on the R2 lots at Lot 65-R2, which was on the opposite side of Walnut Creek. Because Walnut Creek and the R2 lots lie in a floodplain, any construction was governed by a floodplain ordinance, which required a "floodplain development permit" and a hydrology study. *See* Mansfield, Tex., Code of Ordinances ch. 151, §§ 151.09, 151.44 (2013). In July 2012, the City paid for a floodplain study for the proposed expansion of the linear park at Walnut Creek. The study revealed that the proposed improvements, including the pedestrian bridge, would not increase the 100-year floodplain elevations.

On December 11, 2012, the Foundation conveyed the R2 lots to appellee Mansfield Park Facilities Development Corporation (Park Development) in a deed

[3]The record indicates that Lot 54-R2 was privately owned.

without warranty. The deed was recorded in Tarrant County on December 27, 2012. The City obtained a building permit on April 4, 2013. Construction on the bridge began in 2013 and opened on January 25, 2014. Some owners of R1 lots noticed a precipitous increase in people using the jogging path and trespassing on the R1 lots. The City erected signs on the R2 lots pointing to the "public" jogging path and directing users to "respect private property."

Four days before the bridge opened, some of the R1 lot owners[4] filed suit against the City, the City's manager, the City's director of parks and recreation, the Estates HOA's board of directors and officers, and Park Development. Against the City and Park Development, the R1 Owners sought a declaration that the Estates HOA owned the R2 lots as Common Properties; sought to quiet title to the R2 lots in the Estates HOA; and raised claims for trespass to try title, trespass, and inverse condemnation. The R1 Owners raised a claim against Park Development for breach of the Declaration based on the construction of the pedestrian bridge. The R1 Owners also sought temporary and permanent injunctive relief, barring use of and eventually removing the pedestrian bridge, based on their alleged probable right to relief. They argued that because the Declaration classified the R2 lots as Common Properties, fee-simple title to those lots had been conveyed to the future homeowners' association through the Declaration.

[4]The R1 lot owners remaining in the case are appellees Josh and Kelli Savering, Chattanya Chavda, Pannaben Nancha, Paul Arseneau, Allison Blackstein, and Jack A. Muhlbeier. We will refer to these parties collectively as "the R1 Owners."

C. THE INJUNCTION

The trial court held a hearing on the R1 Owners' request for a temporary injunction. On January 15, 2015, the trial court denied temporary injunctive relief. The R1 Owners appealed the denial and argued that they had established a probable right to relief on their claims for trespass and breach of the Declaration. *Savering v. City of Mansfield*, 505 S.W.3d 33, 39 (Tex. App.—Fort Worth 2016, pet. denied) (en banc op. on reconsideration) (4–3 decision). We concluded that the definition of Common Properties in the Declaration encompassed the R2 lots; thus, the Declaration transferred fee-simple title to the R2 lots to the Arbors HOA.[5] *Id.* at 42–46. The City and Park Development (collectively, the City Defendants) appealed our decision; the Texas Supreme Court denied the City Defendants' petition for review after having requested full briefing. *See* Tex. R. App. P. 55.1, 56.1(b)(1). Our mandate issued on February 1, 2018. Two weeks later, the trial court granted the R1 Owners a temporary injunction barring any public use of the pedestrian bridge to access the R2 lots.

D. THE SUMMARY JUDGMENT

The R1 Owners amended their petition and sought declarations that (1) the Estates HOA held title to the R2 lots through the Declaration and (2) the City Defendants failed, as required under the floodplain ordinance, to apply for and secure

[5]Before our opinion issued, the Estates HOA enacted an Amended Declaration, but it included the same disputed language regarding Common Properties.

the required permit or to obtain a hydrology study before building the pedestrian bridge. The R1 Owners also raised claims against the City Defendants for trespass and inverse condemnation.

The City Defendants filed a traditional and no-evidence motion for summary judgment arguing as they had at the preliminary-injunction stage that the Declaration did not pass title to the R2 lots to the future homeowners' association and that such lots had expressly been designated for public-recreation use in the revised plat. Alternatively, they again asserted that because the Arbors HOA did not exist when the Declaration was filed, title could not have passed to a nonexistent entity. The City Defendants then argued for the first time that the Estates HOA was created years after the Declaration and months after the Arbors HOA became a terminated entity but that there was no evidence of a chain of title from the Arbors HOA to the Estates HOA. The City Defendants recognized that we had held in the injunction appeal that the Declaration had included the R2 lots in the Common Properties definition, but they argued that this prior decision did not control as law of the case because the facts and issues had substantially changed since the injunction appeal. These arguments, the City Defendants urged, showed that they were entitled to judgment as a matter of law on the R1 Owners' declaratory-relief claim based on title to the R2 lots.

The City Defendants argued that the trespass claim was also subject to summary dismissal based on the R1 Owners' or the Estates HOA's lack of a lawful right to possess the R2 lots. Regarding the floodplain ordinance, the City Defendants

alleged that they had complied with the ordinance and that even had they not, the R1 Owners did not have a private cause of action to enforce the ordinance. The City Defendants also raised their right to judgment as a matter of law on the R1 Owner's inverse-condemnation claim.

The R1 Owners moved for partial summary judgment on their declaratory-judgment claims against the City Defendants seeking an ownership interest in the R2 lots primarily based on the preclusive effect of this court's prior preliminary-injunction opinion, which had held that the Declaration had transferred title to the R2 lots away from the Developer. They further argued that they were entitled to judgment as a matter of law on their declaratory-judgment claim directed to the City Defendants' alleged noncompliance with the floodplain ordinance.[6]

Even though these summary-judgment arguments facially raised legal—not factual—issues, the parties submitted copious amounts of summary-judgment evidence. To support their summary-judgment motion and in response to the City Defendants' motion, the R1 Owners attached more than 900 pages of documents, spanning exhibits A though MMMM; the City Defendants relied on almost 300 pages of evidence, found in 18 exhibits. The City Defendants objected to 45 of the R1 Owners' exhibits. The trial court sustained the objections directed to 25 of the exhibits and overruled the remainder. The R1 Owners objected to five of the City Defendants' summary-judgment exhibits. The trial court sustained the R1 Owners'

[6]The R1 Owners also sought summary judgment on their trespass claim.

objections to portions of McCaslin's affidavit (exhibit 18), to the minutes of a 1995 meeting of the planning and zoning commission (exhibit 4), to the articles of incorporation for the Estates HOA and for the Arbors HOA (exhibit 8, part of exhibit 14, and exhibit 15), and to the evidence that the Arbors HOA had forfeited its charter with the State of Texas (the remainder of exhibit 14).

The trial court then denied the City Defendants' traditional and no-evidence motion in a general denial order.[7] The trial court granted the R1 Owners' motion for partial summary judgment but limited its judgment to four of the R1 Owners' requested declarations:

> 1. The Developer did not hold title to lots 52-R2 through 71-R2 after December 12, 1995;[8] thus, the Developer's attempts to convey some or all of the R2 lots after that date were invalid (the first title declaration);
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> 2. The Estates HOA's Common Properties include the 52-R2 through 71-R2 lots (the second title declaration);
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> 3. The floodplain ordinance required the City Defendants to apply for and obtain a floodplain development permit before building in Walnut Creek's floodplain; and
>
> 4. The floodplain ordinance required the City Defendants to obtain a hydrology study before building in Walnut Creek's floodplain.

The trial court denied the motion regarding the R1 Owners' other requested declarations; thus, the trial court did not declare that the City Defendants had failed to

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[7]In the trial judge's letter ruling instructing the parties to prepare the order, the judge noted that the summary-judgment filings were "voluminous."

[8]The Arbors HOA's articles of incorporation were executed on December 12, 1995.

comply with the application, permitting, and hydrology-study requirements of the floodplain ordinance before building the pedestrian bridge in the floodplain.

E. THE FINAL JUDGMENT

The R1 Owners nonsuited all their remaining claims, including trespass against the City Defendants, and the parties agreed that the only remaining issue was the R1 Owners' claim for attorney's fees under the Uniform Declaratory Judgments Act (UDJA). *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.009. The trial court issued a letter ruling awarding the R1 Owners attorney's fees against Park Development. The trial court based this award on fees incurred "after issuance of the Court of Appeals' mandate through the issuance of [the fee] ruling" and that were incurred regarding the title declarations but not regarding the ordinance declarations. This time limitation was founded on the trial court's opinion that the "legal issues which effectively controlled the case were clearly resolved by the Court of Appeals in its *en banc* opinion."

The trial court signed a final judgment that granted the R1 Owners summary judgment on their UDJA claims, recognized that the R1 Owners had nonsuited their remaining claims, and awarded the R1 Owners attorney's fees against Park Development as stated in its prior letter ruling. The City Defendants filed a motion to modify the judgment and an alternative motion for new trial, which the trial court denied.

II. PROPRIETY OF SUMMARY JUDGMENT

A. STANDARD OF REVIEW

We review the trial court's summary declaratory judgment de novo, considering the evidence presented in the light most favorable to the City Defendants, indulging every reasonable inference in their favor, and resolving any doubts in their favor. *See Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 449 (Tex. 2015) (op. on reh'g); *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 37.010. To prevail, the R1 Owners bore the burden to prove that no genuine issues of material fact exist and that it was entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c). Because the R1 Owners sought judgment as a matter of law on their UDJA claims, they must have conclusively proved that no genuine issue of material fact existed and that they were entitled to the requested declarations as a matter of law. *See Aery v. Hoskins, Inc.*, 493 S.W.3d 684, 691 (Tex. App.—San Antonio 2016, pet. denied); *Affordable Motor Co. v. LNA, LLC*, 351 S.W.3d 515, 519 (Tex. App.—Dallas 2011, pet. denied) (citing *MMP, Ltd. v.* Jones, 710 S.W.2d 59, 60 (Tex. 1986) (per curiam)). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

Because the R1 Owners and the City Defendants filed competing summary-judgment motions on the R1 Owners' UDJA claims, we would generally determine all presented issues relevant to each cross-motion. *See Merriman v. XTO Energy, Inc.*,

407 S.W.3d 244, 248 (Tex. 2013). But the City Defendants have not argued on appeal that the trial court erred by denying their motion for summary judgment; they solely argue that the trial court erred by granting the R1 Owners' motion. As such, we will not consider the possible propriety of summary judgment in the City Defendants' favor and will instead focus on the R1 Owners' successful motion. *See Henderson v. Nitschke*, 470 S.W.2d 410, 414–15 (Tex. App.—Eastland 1971, writ ref'd n.r.e.) (citing *Gulf, Colo. & Santa Fe Ry. Co. v. McBride*, 322 S.W.2d 492, 496 (Tex. 1958)); *see also Res. Sav. Ass'n v. Neary*, 782 S.W.2d 897, 903 (Tex. App.—Dallas 1989, writ denied). *See generally* Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 60 S. Tex. L. Rev. 1, 116 (2019) ("If the appellant complains only that the trial court erred in granting the other side's motion for summary judgment and fails to complain that the court denied its own motions, it fails to preserve error on this issue and, if the appellate court reverses, it cannot render but can only remand the entire case."). But we note that the City Defendants incorporated their summary-judgment arguments and evidence into their response to the R1 Owners' motion.

B. SCOPE OF REVIEW

In this appeal, we must also determine the scope of our review, which is limited to the record upon which the trial court's judgment was based. *See* Tex. R. Civ. P. 166a(c); *Young v. Gumfory*, 322 S.W.3d 731, 738 (Tex. App.—Dallas 2010, no pet.). We note that although the parties introduced many exhibits at the prior temporary-injunction hearing, those exhibits are not considered summary-judgment evidence in

our review unless they were incorporated into the summary-judgment pleadings. *See Holbrook v. Guynes*, 827 S.W.2d 487, 488 (Tex. App.—Houston [1st Dist.] 1992), *aff'd sub nom. Guynes v. Galveston Cty.*, 861 S.W.2d 861 (Tex. 1993).

The R1 Owners argue that because the trial court sustained their objections to portions of the City Defendants' summary-judgment evidence, we may not consider (1) McCaslin's affidavit, (2) the 1995 minutes from the planning-and-zoning meeting, (3) the articles of incorporation for the Arbors HOA, (4) the articles of incorporation for the Estates HOA, or (5) the evidence showing the forfeiture of the Arbors HOA's charter. *See, e.g.*, *Sauls v. Munir Bata, LLC*, Nos. 02-14-00208-CV, 02-14-00214-CV, 2015 WL 3905671, at *5 (Tex. App.—Fort Worth June 11, 2015, no pet.) (mem. op.) ("Under a summary-judgment review, we may not consider struck portions of the record because such evidence is not a part of the summary-judgment record."). The City Defendants do not argue that the trial court abused its discretion by sustaining the R1 Owners' objections; however, based on the state of the record, some of these facts were part of the summary-judgment record at the time the trial court ruled on the motions and are appropriately part of our summary-judgment review.

First, the trial court excluded only portions of McCaslin's affidavit. We will not consider any excluded portion in our review. Accordingly, we will consider only paragraph 1, paragraph 2, the first four sentences of paragraph 3, the first and third sentences of paragraph 4, and the first four sentences of paragraph 5.

Second, the R1 Owners' objections to the 1995 meeting minutes—the City Defendants' summary-judgment exhibit 4—were sustained, and the City Defendants raise no valid argument why the minutes may nevertheless be considered.[9] We will not consider the 1995 minutes in our review.

Third, the trial court sustained the R1 Owners' objections to the City Defendants' summary-judgment exhibits consisting of the Arbors HOA's and the Estates HOA's articles of incorporation. However, the R1 Owners attached the Arbors HOA's articles of incorporation as an exhibit to their own summary-judgment motion. The City Defendants did not object to this exhibit; thus, the articles were part of the summary-judgment record considered by the trial court. *Cf. Am. Bd. of Obstetrics & Gynecology, Inc. v. Yoonessi*, 286 S.W.3d 624, 627 (Tex. App.—Dallas 2009, pet. denied) ("The evidence provided in ABOG's response to Yoonessi's motion was proper summary judgment evidence upon which both parties could rely and the trial court could consider in making its summary judgment ruling."). Fourth, the R1 Owners similarly attached the Estates HOA's articles of incorporation to its summary-judgment motion; thus, these articles were part of the record that we may consider.

[9]The City Defendants argue only that because the R1 Owners did not object to the minutes, which were attached as "Exhibit 1 to the City's motion for summary judgment," the minutes are part of the summary-judgment record "for all purposes." This is incorrect. The minutes were attached as exhibit 4 to the City Defendants' motion, and the R1 Owners' objections to exhibit 4 were sustained "on all points."

Fifth, the trial court sustained the R1 Owners' objections to the Texas Secretary of State's certification that the Arbors HOA had forfeited its charter. In the R1 Owners' live summary-judgment pleadings, however, they clearly and unequivocally recognized that the Arbors HOA "terminated in 1997." Whether or not the certificate of forfeiture was attached as a summary-judgment exhibit, the fact that the Arbors HOA was a terminated entity at the time the Estates HOA was formed was not a disputed fact. As such, we may consider that the Arbors HOA was a terminated entity when the Estates HOA was created based on the R1 Owners' judicial admission and failure to dispute this fact. *See Philips v. McNease*, 467 S.W.3d 688, 697 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (determining plaintiff had judicially admitted in petition the existence of document, which defendant was entitled to rely on in her summary-judgment motion); *Fischer v. Eagle Equity, Inc.*, No. 05-09-01067-CV, 2011 WL 955593, at *2 (Tex. App.—Dallas Mar. 21, 2011, no pet.) (mem. op.) (holding even if contract not attached to summary-judgment motion, plaintiff's "own pleadings establish that the services sued upon were rendered pursuant to a contract" with defendant); *cf. Britton v. Gomez*, No. 02-15-00355-CV, 2016 WL 3659001, at *2 (Tex. App.—Fort Worth July 7, 2016, no pet.) (mem. op.) (recognizing summary judgment on limitations defense could be based on plaintiff's judicial admission in pleading regarding date of accident leading to suit). *See generally Hous. First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983) ("Assertions of fact, not pled in the alternative, in the live pleadings of a party are regarded as formal judicial admissions.

Any fact admitted is conclusively established in the case without introduction of the pleadings or presentation of other evidence.").

C. THE TITLE DECLARATIONS

The trial court granted summary judgment and entered the first title declaration (the Developer did not hold title to the R2 lots after the Declaration was filed and indexed) and the second title declaration (the Estates HOA's Common Properties include the R2 lots). In the context of the R1 Owners' trespass claim, we previously held that the R1 Owners had "established a probable right to relief" because the Declaration unambiguously conveyed the R2 lots to the Arbors HOA[10] as Common Properties. *Savering*, 505 S.W.3d at 43–44, 48. The R1 Owners argue that our prior holding triggers the law-of-the-case doctrine, barring any contrary determination in the context of the first title declaration.

1. The Law of the Case

The law-of-the-case doctrine, which has been categorized as "amorphous" by the Supreme Court, provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); *see also City of Hous. v. Jackson*, 192 S.W.3d 764, 769 (Tex. 2006). The doctrine "only applies to claims fully litigated and determined in a prior interlocutory appeal; it does not apply to claims that have

[10]Throughout our preliminary-injunction opinion, we consistently referred only to "the HOA," but we initially defined "the HOA" as "The Arbors of Creekwood–Gated Community Homeowners Association, Inc." *Savering*, 505 S.W.3d at 37.

not been fully litigated and determined." *Harding Co. v. Sendero Res., Inc.*, 365 S.W.3d 732, 749 (Tex. App.—Texarkana 2012, pet. denied) (op. on reh'g) (citing *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003)). But its application is flexible—the law of the case directs the exercise of our discretion in the interest of consistency but does not limit our power. *See Arizona*, 460 U.S. at 618; *Messenger v. Anderson*, 225 U.S. 436, 444 (1912); *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *City of Hous. v. Precast Structures, Inc.*, 60 S.W.3d 331, 337 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (op. on reh'g). In short, a "decision to revisit the conclusion is left to the discretion of the court under the particular circumstances of each case." *Jackson*, 192 S.W.3d at 769. The doctrine does not prevent us from considering legal questions that are properly before us for the first time, and it will not apply if "the later stage of litigation presents different parties, different issues, or more fully developed facts." *Id.*; *Rodgers v. Comm'n for Lawyer Discipline*, 151 S.W.3d 602, 609 (Tex. App.—Fort Worth 2004, pet. denied) (citing *Briscoe*, 102 S.W.3d at 716).

Our prior preliminary-injunction holding was founded on the basis of the R1 Owners' probable right to relief on their trespass claim.[11] We did not address the R1 Owners' UDJA claim regarding title to the R2 lots. At the time of the preliminary-

[11]The R1 Owners seem to suggest that we can view the Supreme Court's denial of the City Defendants' petition for review after full briefing as a decision on the merits for purposes of the law-of-the-case doctrine. But this assertion is incorrect: "[D]eclining to review a case is not evidence that the Court agrees with the law as decided by the court of appeals." *Loram Maint. of Way, Inc. v. Ianni*, 210 S.W.3d 593, 596 (Tex. 2006).

injunction hearing, the record was not developed, and the question before us and the trial court was whether the R1 Owners had a probable right to relief based on an alleged trespass; we did not (and, indeed, could not) determine that the R1 Owners had conclusively established their right to trespass relief. After our prior opinion, the parties engaged in extensive discovery and protracted summary-judgment proceedings. As such, the trial court's inquiry shifted from a probable right to relief regarding trespass to a genuine issue of material fact regarding the requested title declarations.

The Texas Supreme Court has refused to foreclose a subsequent consideration of standing based on a prior standing holding in a temporary-injunction appeal "[b]ecause the issue of whether the Robinsons proved standing as a matter of law presents a substantially different question than the one presented regarding the temporary injunction," which was merely whether the Robinsons' trial court pleadings and arguments supported their claim of standing. *Lance v. Robinson*, 543 S.W.3d 723, 745 n.14 (Tex. 2018). As in *Lance*, the underlying merits of the R1 Owners' UDJA claim is a substantially different question than the one at the temporary-injunction stage—whether the R1 Owners' pleadings and arguments demonstrated a probable right to trespass relief. The expanded record we are now presented with, the parties' newly raised arguments on summary judgment, the R1 Owners' focus on their amended UDJA claim and not on their later-nonsuited trespass claim, the summary-judgment standard under which the trial court entered its order, and our standard of

review on summary judgment (de novo) versus for injunctive relief (clear abuse of discretion) establish that we should not rigidly apply the law-of-the-case doctrine here. *See, e.g.*, *Hudson*, 711 S.W.2d at 630 ("[W]hen in the second trial or proceeding, one or both of the parties amend their pleadings, it may be that the issues or facts have sufficiently changed so that the law of the case no longer applies."); *Farmers Grp. Ins., Inc. v. Poteet*, 434 S.W.3d 316, 329 (Tex. App.—Fort Worth 2014, pet. denied) (recognizing law of the case may be inapplicable if "scope of review" is different in subsequent appeal).

We again emphasize that our prior determination of the effect of the Declaration and the revised plat on title to the R2 lots was made in the context of the R1 Owners' right to a preliminary injunction to preserve the status quo pending a merits determination. As such, we were not asked to finally determine the underlying legal issue of actual fee-simple title based on the Declaration and the revised plat, which affects the first title declaration. As the City Defendants pointed out in the trial court, the definition of Common Properties is arguably based on the physical characteristics of the property, which was delved into during discovery. To the extent our prior holdings attempted to fully and finally determine the merits of the R1 Owners' arguments regarding the effect of the Declaration and revised plat on title to the R2 lots, those holdings were not made in the context of the R1 Owners' UDJA

claim and do not trigger the law-of-the-case doctrine.[12] *See Dall./Fort Worth Int'l Airport Bd. v. Ass'n of Taxicab Operators, USA*, 335 S.W.3d 361, 364–65 (Tex. App.—Dallas 2010, no pet.). Indeed, "a temporary injunction hearing is not a substitute for a trial on the merits, nor does it serve the same purpose." *Id.*; *see also Anderson v. Tall Timbers Corp.*, 347 S.W.2d 592, 593–94 (Tex. 1961). Even if the only issues presented are questions of law, those questions may not be finally determined in a temporary-injunction proceeding. *See Dall./Fort Worth Int'l Airport Bd.*, 335 S.W.3d at 366 (citing *Transport Co. of Tex. v. Robertson Transports, Inc.*, 261 S.W.2d 549, 553 (Tex. 1953)); *cf. Sw. Weather Research, Inc. v. Jones*, 327 S.W.2d 417, 421–22 (Tex. 1959) (recognizing temporary injunction only preserves status quo and does not determine legal questions before they can be "fully considered"). To establish a probable right to relief, as we concluded occurred, the R1 Owners were required only to raise a bona fide issue regarding their right to relief—to adduce evidence that tended to support their right to recover on the merits. *See 183/620 Grp. Jt. Venture v. SPF Jt. Venture*, 765 S.W.2d 901, 904 (Tex. App.—Austin 1989, writ dism'd w.o.j.). Thus, "a finding

[12]We previously made many statements that understandably were interpreted as holdings finally determining the underlying merits of the parties' trespass dispute. A few examples: (1) "We conclude that the [Developer] intended to convey the Common Properties to the [Arbors] HOA by dedication in the Declaration"; (2) "[T]he R2 lots are included within the definition of Common Properties"; and (3) "[T]he [Developer] unambiguously intended to convey the R2 lots to the [Arbors] HOA by dedication in the Declaration." *Savering*, 505 S.W.3d at 44, 46, 48. But all of these statements were made in the context of our ultimate holding that the R1 Owners had established only a probable right to relief on their trespass claim. *Id.* at 48. It is through this lens that our prior statements must be viewed.

of [a] probable right to recover has no precedential effect on the case at the trial stage." *Intercont'l Terminals Co. v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 897 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

But our law-of-the-case conclusion turns on a different issue that implicates the second title declaration: The parties did not raise or address during the preliminary-injunction stage that there were two HOAs, one of which had ceased to operate months before the other was created.[13] This argument was raised to the trial court on summary judgment and is again addressed on appeal. Because this legal question is properly before us for the first time in the context of the R1 Owners' summary-judgment motion, we may consider its effect on the conveyance of title to the R2 lots to the Estates HOA. Accordingly, we first address this legal question as it is not foreclosed by the law-of-the-case doctrine. *See Jackson*, 192 S.W.3d at 769. Again, our question is whether the R1 Owners conclusively established a transfer of title to the Estates HOA such that the trial court did not err by declaring that the Estates HOA's Common Properties included the R2 lots.

2. The Second Title Declaration

Once the Arbors HOA terminated in 1997, it continued to exist for three years "for purposes of . . . holding title to and liquidating property that remained with the

[13]We did address whether the Arbors HOA had received title to the R2 lots through the Declaration even though the Arbors HOA did not exist when the Declaration was executed, filed, and indexed; however, we were not asked to determine the title effects of the Arbors HOA's later termination. *Savering*, 505 S.W.3d at 46.

terminated filing entity at the time of termination." Tex. Bus. Orgs. Code Ann. § 11.356(a)(3); *see Graywest, LLC v. Neely*, No. 2-06-197-CV, 2007 WL 614036, at *3 (Tex. App.—Fort Worth Mar. 1, 2007, no pet.) (mem. op.) (discussing continued corporate existence of terminated entity under Section 11.356's predecessor statute). The Arbors HOA also may be reinstated by filing a required report and fee, but no party argues that the Arbors HOA has ever been reinstated. *See* Tex. Bus. Orgs. Code Ann. § 22.365.

The Arbors HOA's articles of incorporation provided that when dissolved, "all of its assets will be distributed to the State of Texas or an organization exempt from taxes under the Internal Revenue Code Section 501(c)(3) for one or more purposes exempt under the Texas franchise tax." The articles further provided that the Arbors HOA was not allowed to distribute its assets on dissolution in any other manner. The articles track the dissolution-distribution provision in the Business Organizations Code governing nonprofit, incorporated entities. *See id.* § 22.304(a)(2); *see also id.* §§ 11.001(4), 11.413.[14]

The City Defendants argue that because any property held by the Arbors HOA could be distributed only under the terms of the articles of incorporation, the property

[14]As the City Defendants point out, the Business Organizations Code went into effect in 2006; however, the prior law that was in effect at the time the Arbors and Estates HOAs were created was substantively the same. *See Lord, Lewis & Coleman, LLC v. Bellaco, LLC*, No. 12-18-00126-CV, 2019 WL 1142451, at *2 n.3 (Tex. App.—Tyler Mar. 12, 2019, pet. denied) (mem. op.), *petition for cert. filed*, No. 19-1406 (U.S. June 15, 2020).

could not have been automatically conveyed to the Estates HOA, which was not incorporated until several months after the Arbors HOA terminated. Indeed, the R1 Owners do not dispute that there was no explicit property transfer from the Arbors HOA to the Estates HOA. The City Defendants, therefore, argue that title to the R2 lots was never conveyed to the Estates HOA. This argument assumes that the Declaration transferred title to the R2 lots to the Arbors HOA; thus, it does not implicate the first title declaration.

We agree with the City Defendants that the R1 Owners did not conclusively establish that the R2 lots, even if conveyed to the Arbors HOA in the Declaration, were subsequently conveyed to the Estates HOA. There is no summary-judgment evidence that the Arbors HOA distributed its assets as provided in the articles of incorporation. And as the City Defendants point out, neither the Arbors HOA's articles of incorporation nor the Business Organizations Code provides for automatic transfer upon termination. The R1 Owners argue that there was an implied transfer of title to the Estates HOA because it was a qualifying nonprofit that accomplishes the general purposes for which the Arbors HOA was organized. That may be true, but there is no evidence that the Arbors HOA actually transferred title to the R2 lots as Common Properties or that a Tarrant County district court distributed the Arbors HOA's remaining property to a qualifying organization under a plan of distribution. *See id.* § 22.304(b). We cannot assume that either of these events occurred. And in the context of the R1 Owners' UDJA claim, the trial court arguably did not have the

power to determine fee-simple title had been conveyed, automatically or otherwise, from the Arbors HOA to the Estates HOA. *See, e.g.*, *Coinmach Corp. v. Aspenwood Apt. Corp.*, 417 S.W.3d 909, 926 (Tex. 2013) (holding dispute involving a claim of superior title that goes beyond construction of a written agreement—requiring "determination of the parties' possessory rights to the property"—must be brought as a trespass-to-try-title action).

The R1 Owners argue that the City Defendants judicially admitted that the property had been transferred to the Estates HOA by admitting in the trial court that the R1 Owners had brought suit against the appropriate parties, including the Estates HOA. This judicial-admission argument appears to be based on the City Defendants' initial response to a request for disclosure that the parties were named correctly "[t]o the City's knowledge." But this disclosure was made during the preliminary-injunction stage and before the R1 Owners amended their petition multiple times, before discovery was completed, and before the City Defendants clearly raised the issue in their summary-judgment pleadings.[15] The City Defendants' arguments were

[15]In their response to the R1 Owners' live summary-judgment motion, the City Defendants clearly raised the effect of the Arbors HOA's forfeiture:

> [T]he dissolution of the original HOA – the entity that [the R1 Owners] claim held title pursuant to the Declaration filed in 1995 – undermines their entire case.
>
> [The R1 Owners] do not plead (and have never pleaded) how or if the current HOA obtained title. . . .

not set in amber at the time of the preliminary-injunction hearing. We, therefore, disagree with the R1 Owners that the City Defendants judicially admitted that the Arbors HOA transferred fee-simple title to the Estates HOA.

The R1 Owners also assert that the City Defendants waived any argument regarding which HOA owns the R2 lots because they did not "challenge all bases" upon which the trial court could have granted the R1 Owners' motion. The R1 Owners contend that the City Defendants have not challenged two of their arguments that title to the R2 lots was implicitly or equitably conveyed to the Estates HOA from the Arbors HOA:

> (1) The *cy pres* doctrine operated to transfer title to the Estates HOA because the purposes of the Arbors HOA—to hold title to the R2 lots as Common Properties and to enforce the Declaration—could no longer "be achieved due to the [charter] forfeiture."

> [The R1 Owners] have never alleged (even though they have had four years and at least nine amendments of their pleadings to do so), nor do they provide any evidence showing, a conveyance to the HOA as it is currently incorporated. As a result, even if the Court agrees with [the R1 Owners] that the Declaration signed in 1995 conveyed title of the R2 lots to the original HOA, the [R1 Owners'] declaratory judgment claim asking the Court to declare that the *current* HOA owns those lots must fail. In other words, [the R1 Owners] fail to allege or prove . . . the transfer of title to the current HOA from the original HOA.

These arguments sufficiently raised the issue. *See, e.g.*, Tex. R. Civ. P. 166a(c); *Dear v. City of Irving*, 902 S.W.2d 731, 734 (Tex. App.—Austin 1995, writ denied). Indeed, the R1 Owners responded to the City Defendants' arguments founded on the forfeiture of the Arbors HOA's charter.

> (2) the Arbors HOA membership held title to the Arbors HOA's assets, and that membership voted "to effect the conveyance" to the Estates HOA when they approved the Amended Declaration for the Estates HOA in 2016.

But the City Defendants raise a general summary-judgment appellate issue: "Did the trial court err in granting [the R1 Owners'] motion for summary judgment?" They then argue in their brief that the summary-judgment record did not support any conveyance of title to the Estates HOA for several reasons. We conclude that these appellate arguments fairly include the assertion that none of the R1 Owners' theories of an effective title transfer to the Estates HOA had merit; thus, the City Defendants have sufficiently challenged all grounds upon which the trial court's summary declaratory judgment could have been based. *See Knopf v. Gray*, 545 S.W.3d 542, 546 n.5 (Tex. 2018) (per curiam); *see also* Tex. R. App. P. 38.1(f).

Because the application of the *cy pres* doctrine or an alleged effective conveyance by the Arbors HOA's members in the Amended Declaration could have supported the trial court's declaration that the Estates HOA held title to the R2 lots even though the Arbors HOA did not expressly convey title, we turn to those arguments. The *cy pres* doctrine, as argued by the R1 owners, provides that a trial court may, in equity, "effectuate the general charitable purpose of a donor when his particular intention can no longer be carried out, whereupon the court can direct the gift to be used in a similar charitable manner as near the donor's intent as possible." *Baywood Country Club v. Estep*, 929 S.W.2d 532, 537 n.5 (Tex. App.—Houston [1st Dist.] 1996, writ denied). The R1 Owners asserted that because the Arbors HOA is a

terminated entity, it was no longer able to achieve its purposes as stated in the Declaration; thus, the R1 Owners requested that the trial court "direct the property to be held by the Estates [HOA]." But the *cy pres* doctrine is applied in the context of failed charitable gifts to dissolved charitable corporations and, thus, is inapplicable here. *See id.* at 537–38. Further, the trial court would not be able to award title based on this equitable doctrine in the context of the R1 Owners' UDJA claim. *See Coinmach*, 417 S.W.3d at 926. The R1 Owners did not conclusively establish the application of the *cy pres* doctrine to effect an equitable transfer of title to the Estates HOA.

The R1 Owners next contended that the members of the Arbors HOA (as "effective shareholders") transferred title to the R2 lots to the Estates HOA when those same members "vote[d] to effect the conveyance" through the Amended Declaration in 2016. First, the Arbors HOA, as a nonprofit corporation, does not have shareholders who would have been entitled to a distribution of property. *See* Tex. Bus. Orgs. Code Ann. § 22.001(5). Second, the Arbors HOA and the Estates HOA could amend their governing declaration only if 80% of the members "duly executed and acknowledged" the amendment and if the secretary filed a written instrument in Tarrant County that confirmed the vote adopting the amendment. The Amended Declaration was executed solely by the Estates HOA's president, and the summary-judgment record does not indicate that 80% of the members approved the amendment or that the secretary confirmed the vote. Based on these apparent defects

in the effectiveness of the Amended Declaration, the R1 Owners failed to conclusively establish that the Estates HOA received title in the Amended Declaration under this theory.

Accordingly, we conclude that the R1 Owners failed to conclusively establish that the Estates HOA held title to the R2 lots under either the Declaration or the Amended Declaration even if that title had been conveyed to the Arbors HOA in the Declaration. We therefore sustain the City Defendants' third issue.[16] Because this holding assumes that title passed to the Arbors HOA through the Declaration, we need not address the City Defendants' second issue directed to the trial court's first title declaration.[17] *See* Tex. R. App. P. 47.1.

D. THE ORDINANCE DECLARATIONS

To qualify for participation in the National Flood Insurance Program, the City passed an ordinance governing construction in its floodplains and requiring both a permit and a hydrology study:

> A floodplain development permit shall be required to ensure conformance with the provisions of this ordinance.
>
> . . . .

[16]The City Defendants set forth six numbered issues in the "Issues Presented" section of their brief but they do not use that same numbering in the argument portion. We use the numbering reflected in the Issues Presented section.

[17]We do not hold that the R1 Owners conclusively established that the Developer conveyed title to the Arbors HOA in the Declaration. We hold only that the R1 Owners did not conclusively establish that the Estates HOA, the only HOA currently claiming title, received title from the Arbors HOA.

> . . . Encroachments [in the floodplain] are prohibited, including . . . new construction . . . unless it has been demonstrated through hydrologic and hydraulic analyses . . . that the proposed encroachment would not result in any increase in flood levels within the community during the occurrence of the base flood discharge.

Mansfield, Tex., Code of Ordinances ch. 151, §§ 151.09, 151.44; *see* Tex. Water Code Ann. §§ 16.3145, 16.315. The trial court declared that the ordinance required the City Defendants to obtain a floodplain building permit and to conduct a hydrology study before building in the floodplain. In their fourth and fifth issues, the City Defendants argue that the R1 Owners did not conclusively establish their right to these declarations because they did not have a private cause of action to enforce the ordinance and because the City Defendants actually complied. The City Defendants do not argue that the ordinance declarations were incorrect legal interpretations of the ordinance's language.

The City Defendants' argument that there is no private cause of action to enforce the ordinance is one of standing. The R1 Owners asserted that because the UDJA allows a declaration on a question of construction or validity of an ordinance that affects the litigants' rights, the trial court was authorized to issue declarations regarding the proper construction of the floodplain ordinance. *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.004(a). The R1 Owners did not challenge the validity of the ordinance but rather asserted that they sought proper construction of the ordinance and enforcement of it against the City Defendants. But enforcement is a right given

to the political subdivision through an action for injunctive relief and civil and criminal penalties. *See* Tex. Water Code Ann. § 16.323(a); *see also id.* §§ 16.322–.3221. The R1 Owners do not have a right to enforce the ordinance through a UDJA claim. *Cf. Schmitz v. Denton Cty. Cowboy Church*, 550 S.W.3d 342, 359–60 (Tex. App.—Fort Worth 2018, pet. denied) (op. on reh'g) (holding private-citizen landowners could not seek to enforce zoning ordinance against alleged violator via a UDJA claim).

The R1 Owners counter that because the UDJA empowers parties to have "any question" regarding construction of a city ordinance determined, they may seek to interpret and enforce the floodplain ordinance. *City of Austin v. Pendergrass*, 18 S.W.3d 261, 264 (Tex. App.—Austin 2000, no pet.). But in the R1 Owners' supporting authority—*Pendergrass*—city workers argued that the city's interpretation of an hourly-wage ordinance was incorrect, resulting in less pay than the city workers believed the ordinance dictated. *Id.* at 263–64. In other words, the parties had competing interpretations of the ordinance, and the appellate court determined that a UDJA claim was the appropriate vehicle for the city workers to resolve the interpretation dispute. *Id.* at 264. Here, however, there are no competing interpretations. All parties agree that the permitting and hydrology-study provisions apply to the construction of the pedestrian bridge under the plain language of the ordinance. The dispute is whether the City Defendants sufficiently complied with the ordinance, which the R1 Owners do not have the right to enforce through a UDJA claim.

Further, we note that the trial court did not declare that the City Defendants had violated the ordinance; it declared only that the ordinance required a floodplain permit and a study before construction. To that end, the R1 Owners did not conclusively establish that the City Defendants did not comply with the ordinance. The City Defendants proffered summary-judgment evidence raising a fact issue on their substantial compliance. This competing evidence precluded summary judgment on the R1 Owners' UDJA claim to the extent they sought a noncompliance declaration. Accordingly, the R1 Owners did not conclusively establish their right to the ordinance declarations to the extent those declarations constituted attempted enforcement of the ordinance. We sustain issues four and five.

III. ATTORNEY'S FEES

In its final judgment, the trial court awarded the R1 Owners attorney's fees referable to "work performed following the issuance of the [preliminary-injunction] mandate of the Court of Appeals germane to the issues involved in [the R1 Owners'] request for a declaratory judgment relating to the ownership of certain real property." The City Defendants contend in their sixth issue that because the summary judgment was in error, the fee award cannot stand. Because we have concluded that the R1 Owners did not conclusively establish their right to relief on their UDJA claims, we are empowered to reverse the fee award. *See Kachina Pipeline*, 471 S.W.3d at 455. Because the summary declaratory judgment should not have been entered based on the record, an award in favor of the R1 Owners may no longer be equitable and just.

See id.; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 37.009. We sustain issue six. We conclude that the appropriate disposition is to remand the issue to determine the appropriate award of costs and fees, if any. *See Kachina Pipeline*, 471 S.W.3d at 455; *Lemus v. Aguilar*, 491 S.W.3d 51, 61–62 (Tex. App.—San Antonio 2016, no pet.) (op. on reh'g).

IV. CONCLUSION

Although we previously determined in the context of a preliminary injunction that the R1 Owners had shown a probable right to relief on their trespass claim against the City Defendants, that determination does not preclude us under the law-of-the-case doctrine from determining whether the R1 Owners conclusively established their right to relief under the UDJA. Not only were different standards and claims involved in our prior preliminary-injunction decision, but the record and the parties' arguments are now more developed on summary judgment. However, we need only address the second title declaration, which we conclude the R1 Owners failed to conclusively establish—there is no evidence that the Arbors HOA conveyed title (to the extent it held title through the Declaration) to the Estates HOA. Similarly, the R1 Owners did not have standing to enforce the floodplain ordinance through a UDJA claim and did not conclusively establish that the City Defendants failed to comply with the floodplain ordinance. Accordingly, the trial court's ordinance declarations were in error to the extent that they attempted to enforce the ordinance. Thus, the summary declaratory judgment in favor of the R1 Owners was

in error. We sustain the City Defendants' first issue. And because we must reverse the summary judgment and remand for further proceedings based on the City Defendants' failure to challenge the denial of their summary-judgment motion, we also remand the issue of attorney's fees. We reverse the trial court's final judgment and remand to that court for further proceedings. *See* Tex. R. App. P. 43.2(d), 43.3.

/s/ Lee Gabriel

Lee Gabriel
Justice

Delivered: July 16, 2020