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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Wachter Development, Inc. Plaintiff and Appellee, -vs- Kevin and Andrea Martin, Defendants and Appellants	Supreme Court Case No. 20180379 Civil No. 08-2017-CV-00804

BRIEF OF APPELLANTS

Appeal from the District Court's Memorandum Opinion and grant of Partial Summary Judgment dated January 11, 2018, the District Court's Memorandum Opinion and grant of Partial Summary Judgment dated June 11, 2018 and the final Judgment of the District Court dated October 16, 2018

In and for the County of Burleigh, State of North Dakota

South Central Judicial District

Honorable Cynthia Feland, Judge of the District Court, Presiding

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STATEMENT OF THE ISSUES

[¶1] Whether the lower court erred in Its determination that the restrictive covenants bind the Appellants despite the acquisition of their equitable interest in the realty prior to the recording of such covenants?

[¶2] Whether the lower court erred in Its determination that the restrictive covenants herein are not unconscionable, either procedurally or substantively, in light of the selective enforcement of the same and the application of the restrictive covenants to the Appellants as noted above.

STATEMENT OF THE CASE

[¶3] On February 14, 2017, the Appellee issued the underlying Complaint in this action, alleging that the construction of a dog kennel/run by the Appellants on their own property was in violation of restrictive covenants attached to said property. ROA #2. On March 9, 2017, the Appellants sought dismissal of the action, contending that the Appellee had not acted in a timely manner in filing the action after issuing a Notice of Claim of Breach on October 10, 2016 and then filing the Complaint more than sixty (60) days after said Notice in accordance with the provisions of the restrictive covenants and that, as such, any right to proceed against the Appellants for the alleged breach had lapsed. ROA #14 and #15. For purposes of clarification for the Court, all of the documents issued under the noted dates were filed with the Clerk of District Court in and for Burleigh County on March 17, 2017.

[¶4] The Motion to Dismiss was subsequently denied by the Court on May 17, 2017, ROA #43. The Appellants then interposed an Answer and Counterclaim to the Complaint herein, contending that the restrictive covenants at issue were inapplicable to them due to the acquisition of their equitable interest in the property prior to the recording of the restrictive covenants, and that the dog kennel/run constructed on their property was neither specifically prohibited by the restrictive covenants nor a "fence" as per the restrictive covenants. Further, the Appellants Counterclaimed contending that restrictive covenants filed after they became equitable owners of the property in question were procedurally and substantially unconscionable, and thus invalid.

[¶5] On August 2, 2017, the Appellee moved for summary judgment in the instant case, contending that the property at issue was subject to the restrictive covenants, despite

the Appellants acquiring their equitable interest in the property prior to the recording of such restrictive covenants, as the entity they entered into their lot sale contract earnest money contract, K & L Homes (ROA #47), was itself subsequently bound by the restrictive covenants which were recorded April 18, 2013 (ROA #4), amended July 19, 2013 (ROA #5), and ultimately obtained the property by warranty deed from the Appellee on August 1, 2013. (ROA #23). The Appellee further took the position that any disparate treatment of other property owners vis-à-vis fences, structures or other areas of selective enforcement noted by the Appellants "...are private contractual rights. As a result, the constitutional guarantees of equal protection and due process have no application in this context." (Page 16, Appellee's brief in support of summary judgment). The motion for and brief in support of summary judgment appear at ROA #63 and #64, respectively.

[¶6] The lower court issued a Memorandum Opinion partially granting Appellee's motion for summary judgment, dated January 11, 2018, (ROA #124), concluding that the doctrine of equitable conversion on the property in question did not apply in the instant case, and that the restrictive covenants, even though recorded subsequent to the lot sale contract earnest money contract with K & L Homes (ROA #47). The lower court left the remaining issues of whether the dog kennel/run constituted a "fence" under the restrictive covenants, the selective enforcement of the restrictive covenants, and the unconscionability of the restrictive covenants for determination after a trial on their merits.

[¶7] On April 27, 2018, the Appellee renewed its motion for summary judgment, contending that since the lower court had determined the restrictive covenants were

applicable to the property in question that the determination of the Architectural Review Committee (hereinafter ARC) of Appellee controlled—at its sole discretion—that the dog kennel/run was a "fence" as prohibited by the restrictive covenants, and further that the unfettered discretion of the ARC allowed them to enforce the restrictive covenants as it would, thereby defeating any claim of selective enforcement, and that the restrictive covenants, enforced in the fashion as contended by Appellee were neither contrary to public policy nor unconscionable. ROA #138.

[¶8] The lower court issued its second Memorandum Opinion on June 11, 2018, at ROA #175, wherein it reversed its previous determination to allow the "definitional issue" to proceed to a hearing on its merits, concluding instead at paragraphs 4 and 5 that the dog kennel/run is a fence and subject to the terms of the restrictive covenants, based upon an apparent review or re-review of photographs presented to the lower court during the course of the litigation. The lower court specifically left for final determination at trial the issues of selective enforcement of the restrictive covenants and the unconscionability of said covenants.

[¶9] Trial herein took place before the Hon. Cynthia Feland, Judge of the District Court in and for Burleigh County on June 11 and 12, 2018. While both parties submitted proposed Findings of Fact, Conclusions of Law and Orders for Judgment—the Appellee on July 13, 2018 at ROA #205 and the Appellants on July 17, 2018 at ROA #215, ultimately the lower court in its Order for Judgment executed on October 15, 2018 and filed on October 16, 2018 at ROA #247 did not specify which of the two (2) proposed sets of Findings et al. were to be used, simply ordering that "Judgment may be entered

pursuant to the "Findings of Fact, Conclusions of Law and Order for Judgment." ROA #247.

[¶10] For the sake of clarity, and hopefully simplicity, counsel for the Appellant is going to assume for purposes of the instant appeal that the lower court was referencing the proposed Findings et al. submitted by counsel for the Appellee at ROA #205.

[¶11] Subsequent to the submission of Findings et al. by both of the parties, counsel for the Appellants entered a Notice of Substitution of Attorneys on September 19, 2018, indicating that the undersigned was taking over representation of the Appellants from Attorney Michael A. Mulloy, ND Bar ID #07239. ROA #233. Counsel for the Appellants, Robert Wade Martin, ND Bar ID #04636, then sought a stay of that portion of the lower court's judgment involving the destruction or removal of the dog kennel/run at issue by way of notice, motion and brief as they appear at ROA #234, 235 and 236, respectively. The lower court denied the same from the bench on October 15, 2018. A Motion for Stay Pending Appeal pursuant to Rule 8 of the North Dakota Rules of Appellate Procedure was then made to this Court on October 18, 2018 at Docket Entry #4 and denied by this Court on October 19, 2018 at Docket Entry #7.

[¶12] A timely Request for Transcripts dated September 19, 2018 and Notice of Appeal, dated October 16, 2018, were filed with the Clerk of the District Court in and for Burleigh County and the Clerk of the North Dakota Supreme Court, respectively. (ROA #237 and Docket Entry #1).

[¶13] A Motion for Enlargement of Time, dated February 21st, 2019, was submitted by counsel for the Appellants to the Clerk of the Supreme Court and docketed on February 21st, 2019, at Docket Entry #15, seeking until March 25, 2019, for the preparation and

filing of Appellants' Brief and Appendix. The Chief Justice granted said Motion on February 22, 2019 at Docket Entry #17.

[¶14] Finally, an additional Motion for Enlargement of time, dated March 25, 2019, was submitted by counsel for Appellants to the Clerk of the Supreme Court, docketed on March 23, 2019, at Docket Entry #18, seeking until March 29, 2019, for the preparation and filing of Appellants' Brief and Appendix. The Chief Justice granted said Motion on March 26, 2019 at Docket Entry #19.

STATEMENT OF FACTS

[¶15] The Appellants were seeking to build their dream home, after many years of hard work to reach this point in their lives. They entered into a Lot Sale and Earnest Money Contract with K & L Homes on July 11, 2012, which provided that in exchange for the earnest money in the amount of one thousand dollars ($1,000.00) to be applied to the total lot price of seventy-five thousand dollars ($75,000.00), they would receive a general warranty deed for the purchased realty on October 31, 2012. ROA #47. The earnest money check for $1,000.00 was presented by the Appellant and deposited in the K & L Homes account on July 19, 2012. ROA #48. The Lot Sale Contract also indicated that the Appellants agreed to execute a Custom Home Sale Contract with K & L Homes, which was subsequently signed by Appellant Kevin Martin and K & L Homes on August 19, 2013. **Neither contract mentioned, in any way, shape or form, any restrictive covenants running with the realty under consideration.** ROA #47 and #49, respectively.

[¶16] The document containing the restrictive covenants at issue in the instant case was recorded by the Appellee with the Burleigh County Recorder's Office as Document No. 784998 on April 8, 2013. ROA #4. The initial recording of this document was subsequently amended by the Appellee and re-recorded with the Burleigh County Recorder's Office as Document No. 791505 on July 18, 2013. ROA #5. This document is hereinafter referred to as the "Declaration."

[¶17] On August 19, 2013, the Appellants entered into Custom Home Sale Contract with K & L Homes wherein the sum of sixty thousand eight hundred dollars ($60,800.00) as earnest money for the construction of their new home. Again, this contract made no

mention of covenants, restrictive or otherwise. ROA #49. According to the sworn testimony of the Appellants, they were—at this time—wholly unaware that the Declaration had been recorded—rather, re-recorded—against their property approximately one (1) month previously. It was not until a walk-through of the home under construction on or about November 19, 2013 that the Appellants were made aware by K & L Homes of the existence of the Declaration and the restrictive covenants therein. ROA #82. By this time, the Appellants had expended a total cash investment of sixty-one thousand eight hundred dollars ($61,800.00) and the structure of the home was on the ground—after countless hours of planning and paid time off on the design and finishes for the home.

[¶18] The Appellants, upon become aware of the restrictive covenant in the Declaration vis-à-vis the erection of a "fence" on the subject property, attempted to negotiate a variance of the restrictive covenant to allow for a fence around the subject property or, in the alternative, a dog kennel/run to accommodate their family dogs. This was undertaken despite the belief of the Appellants that the Declaration did not apply to them, given the acquisition of their equitable interest in the subject property predating the recording of the Declaration. ROA #82, paragraphs 9 through 15.

[¶19] The request to build a fence around the entire property was denied by Appellee on December 12, 2013, but no mention was made of the alternative proposed solution of a dog kennel/run proposed by the Appellant. Likewise, the Appellants' request to meet with the Architectural Review Committee (hereinafter ARC) of the Appellee was met with silence. ROA #82, paragraphs 16 and 18.

[¶20] The ARC is made up of Chad Wachter, and his parents Lance and Gail Wachter, none of whom live in Promontory Point V where the Subject Property is located. (ROA# 141 at pp. 21-22, 46). The ARC does not regularly meet in person, no minutes of the ARC meetings are kept, and most decisions by the ARC are made by Chad Wachter and Lance Wachter. (*Id* at pp. 48-50). Gail Wachter only participates when there is a disagreement between Chad Wachter and Lance Wachter, which there has never been one. *Id.* This process therefore allows ad hoc decisions to be made on an informal basis by father and son who wish to continue to control the development of Promontory V even though they do not reside in the development. Without resolution of regarding the applicability of the Declaration to the property of the Appellants, or a meeting with the ARC, K & L Homes conveyed title to the subject property via warranty deed on March 13, 2014.

[¶21] Difficulties and disputes arose between K & L Homes and the Appellants as to the habitability of their home, to the point of actual litigation initiated in early 2015 regarding failure of performance issues, defects and infestation of rodents. The dream house of the Appellants had become a nightmare. This is further discussed below in the arguments and authorities section regarding the selective enforcement of the restrictive covenants at issue in the instant appeal. *See Andrea Martin et al. v. K & L Homes, 08-2015-CV-00881.*

[¶22] The dog kennel/run was subsequently erected by the Appellants on or about July 14, 2016, and on July 15, 2016 an email was received by the Appellants informing them of a complaint regarding the dog kennel/run and that removal was required. ROA #82, paragraph 21.

[¶23] In the email exchange denying the Appellants the opportunity to meet with the ARC, it was noted by the Appellants that fully fenced yards existed in of Promontory III and another fenced yard located at 3216 Chisolm Trail, which yard did not have a pool which has been the distinction proffered by the Appellee throughout for their position that the only fencing allowed would be by city ordinance. ROA #82, paragraph 18. The lower court, however, limited the scope of the issues on the case below to only "fences" and only those in Promontory V and Promontory IV, over the objection of trial counsel.

[¶24] Finally, at trial below, evidence was adduced and admitted regarding other non-conforming fences in the area which bear clearly on the issue of selective enforcement of the restrictive covenants and waiver of enforcement by the ARC, both of which play into the argument urged by Appellants that the application of the restrictive covenants to them is unconscionable.

ARGUMENT AND AUTHORITIES

[¶25] The lower court erred in its determination that the restrictive covenants bind the Appellants despite the acquisition of their equitable interest in the realty prior to the recording of such covenants.

[¶26] At the outset, and as the point is intertwined throughout the issues raised by Appellants, we first must look to the assertion put forth by counsel for the Appellees that the matters at issue "...are private contractual rights. As a result, the constitutional guarantees of equal protection and due process have no application in this context." (Page 16, Appellee's brief in support of summary judgment). ROA # 63. Appellants contend that the case of *Shelley v. Kraemer,* 334 U.S. 1 (1948) has settled that restrictive covenants are subject to the guarantees of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. In essence, restrictive covenants could not be enforced in state court, which was the only means of such enforcement, without running afoul of the prohibitions of the Fourteenth Amendment in both the Equal Protection Clause and in the Due Process Clause. The resort to the state courts to enforce restrictive covenants clearly provides the necessary state action to invoke the constitutional protections of the Amendment. Granted, we are not dealing with a racially-motivated restrictive covenant in the instant case, but to take such a position regarding these issues would appear to be a canard that has long-since been cooked.

[¶27] Section 47-19-19 of the North Dakota Century Code provides a brief but poignant starting place for the analysis regarding the error of the lower court in determining that the property of the Appellants was subject to the restrictive covenants contained in the Declaration. That section provides, *in to* "[e]ffect of recording. The record of any instrument shall be notice of the contents of the instrument, as it appears of record, as to

all persons." The Lot Sale and Earnest Money Contract with K & L Homes on July 11, 2012, almost a full year before the final recording of the amended *Declaration* on July 18, 2013 and many months prior to the initial recording of the *Declaration* on April 8, 2013. The statute provides the notice of contents is provided by the act of recording—in neither instance was the recording and re-recording of the *Declaration* prior to the contract of the Appellants with K & L Homes on July 11, 2012. Notice is not retroactive.

[¶28] When the Appellants entered into the lot contract and put earnest money down, they became the equitable owners of the property and thus notice needed to be given to them regarding the recordation of the *Declaration.* Under the doctrine of equitable conversion, "once parties have executed a binding contract for the sale of land, equitable title vests in the purchaser and vendor holds legal title only as security for payment of the purchase price." *United Bank of Bismarck v. Trout,* 480 N.W.2d 742, 748 (N.D. 1992). Equity regards the realty as "converted" into personalty and the purchase money as "converted" into realty. *Clapp v. Tower,* 11 N.D. 556, 93 N.W. 862, 863 (1903). A purchaser acquires the equitable interest at the moment the contract is created and is thereafter **treated as the owner of the land**. *Lach v. Desert Bank, 746* P.2d 802, 805 (Utah 1987) (emphasis added).

[¶29] This Court has said a landowner may sell land subject to restrictive covenants, provided the covenants are not contrary to public policy. *Allen v. Minot Amusement Corp.,* 312 N.W.2d 698, 702 (N.D. 1981). Restrictive covenants are not favored, but "they will be given... [full] effect **when clearly established**." *Id* (emphasis added). The enforceability of restrictive covenants is based upon the equitable principal of

notice, whereby a person who takes land with notice of a restriction upon it will not be permitted to act in violation of the restriction. *Wheeler v. Southport Seven Planned Unit Development,* 2012 ND 201¶ 9, 821 N.W.2d 746 (citations omitted); *see also Cavaliere v. Skelton,* 40 S.W.3d 844, 847 (Ark. App. 2001). Further, a plaintiff seeking to enforce a restriction must show that the lot was purchased with actual or constructive knowledge of the restriction. *Village of Wadsworth v. Kerton,* 726 N.E.2d 156 (Ill. App. 2000). Actual or constructive knowledge of the restrictive covenants contained in the *Declaration* was not—could not—be provided to the Appellants at the time of the Lot Sale and Earnest Money Contract with K & L Homes on July 11, 2012 by the subsequent *Declaration.*

[¶30] Appellee admitted that it did not have any conversations with the Appellants nor did it obtain their consent regarding the recordation of the Declaration. *See* Ex. A to Affidavit of Michael A. Mulloy at p. 27, ROA #86. The Appellee took the position that it is of "no consequence" that the Lot Contract was entered into prior to the *Declaration* being recorded, maintaining that "K&L could not have conveyed to the [Appellants] any interest greater than possessed by K&L." *Brief* at ¶33, ROA #64. In support of this argument, an undated Real Estate Contract that was allegedly executed on April 19, 2012 was submitted. *See* ROA # 68. This contract provides that K&L Homes would take property, including the property at issue, subject to "covenants." *Id.* However, by its own admission, the *Declaration* was not recorded until after K.&L Homes entered into the Real Estate Contract with the Appellee. At the time of that contract—yet again—no restrictive covenants as contained in the *Declaration* were in existence.

[¶31] K&L Homes did not transfer a greater interest to the Appellants than what it possessed. When equitable ownership was transferred from Appellee to K&L Homes, **the *Declaration* was not recorded**. When equitable ownership passed to the Appellants, they had to be treated as if they were the owners of the property. Accordingly, the Appellee could not record the *Declaration* without their notice and consent. To view the situation otherwise invokes echoes of a contract of adhesion where bargaining positions are so unequal and disparate in leverage that unconscionability comes into play.

[¶32] The lower Court erred in Its determination that the restrictive covenants herein are not unconscionable, either procedurally or substantively, in light of the selective enforcement of the same and the application of the restrictive covenants to the Appellants as noted above.

[¶33] The interpretation of a restrictive covenant is generally covered by rules for interpretation of a contract. *Hill v. Lindner,* 2009 ND 132, 769 N.W.2d 427 (citations omitted). Unconscionability is a doctrine which allows courts to deny enforcement of a contract because of procedural abuses arising out of the contract's formation and substantive abuses relating to the terms of the contract. *Weber v. Weber,* 1999 ND 11, 589 N.W.2d 358. In assessing whether a contractual provision is unconscionable, this Court has summarized:

> The court is to look at the contract from the perspective of the time it was entered into, without the benefit of hindsight. The determination to be made is whether, under the circumstances presented in the particular commercial setting, the terms of the agreement are so one-sided as to be unconscionable. The principle underlying the Code's unconscionability provisions is the prevention of oppression and unfair surprise.

Construction Assocs., Inc. v. *Fargo Water Equip. Co.,* 446 N.W.2d 237, 241 (N.D. 1989) (citations omitted).

[¶34] While the determination of whether a contract is unconscionable is a

question of law for the trial court, this Court has recognized that the determination of unconscionability is dependent upon the factual circumstances of the case. *Knutson v. Knutson,* 2002 ND 29, 639 N.W.2d 495. Because the determination of unconscionability is fact specific, courts must "consider such claims on a case-by-case basis," *Forsythe v. BancBoston Mortgage Corp.,* 135 F.3d 1069, 1074 (6th Cir. 1997) and assess the totality of the circumstances. A two-pronged framework must be employed: procedural unconscionability, which encompasses factors relating to unfair surprise, oppression, and inequality of bargaining power, and substantive unconscionability, which focuses upon the harshness or one-sidedness of the contractual provision in question. *Construction Assocs.,* 446 N.W.2d at 241. A party alleging unconscionability must demonstrate some quantum of both procedural and substantive unconscionability, and courts are to balance the various factors, viewed in totality, to determine whether the particular contractual provision or contract is "so one-sided as to be unconscionable." *Strand v. U.S. Bank National Association ND,* 2005 ND 68, 693 N.W.2d 918.

[¶35] In this case, the Declaration is procedurally unconscionable in that there were no negotiations whatsoever between the Appellants and Appellee regarding the *Declaration.* The *Declaration* is further substantively unconscionable in that Appellee is the "judge, jury, and executioner" and also has the right to amend the *Declaration* at any time, without any notice to a homeowner subject to the *Declaration*, thus potentially depriving a homeowner of property rights. Specifically, the *Declaration* provides that Wachter has the following authority and power:

> a. To amend the *Declaration* without any prior written consent of the Appellants or any land owner, regardless of whether Appellee

still has any ownership interest in the development, thus depriving the Appellants the full use and enjoyment of their property. *See* ROA# 5 at p. 2.

b. To change the development plan of the subdivision while depriving the Appellants and other landowners from objecting to such development. *See* ROA ID# 4 at p. 2.

c. To waive the application of the *Declaration* to one lot owner but adamantly enforce same or similar provisions against another. See ROA. ID# 4 at Pg. 7.

d. To exclusively interpret or construe the terms of the *Declaration* and become the final arbiters and enforcers. *See* ROA. ID# 4 at p. 7.

[¶36] The right to enforce a restriction or reservation may be lost by waiver or acquiescence. *Allen,* 312 N.W.2d at 702 (N.D. 1981) *(citing Meierhenry v. Smith,* 302 N.W.2d 365 (Neb. 1981); *Pool v. Denbeck,* 241 N.W.2d 503 (Neb. 1976); and 20 Am. Jur.2d *Covenants, Conditions, Etc.,* § 273, page 832)). Additionally, restrictive covenants can only be enforced when there is "reasonable employment of such restrictions." *Friedburg v. Building Committee,* 239 S.E.2d 106 (Va. 1977). Whether or not there has been acquiescence or waiver of a restriction depends upon the circumstances of each particular case. *Id.* In *Pool,* the Supreme Court of Nebraska held:

> The criteria for determining [whether acquiescence or waiver occurred] includes whether those seeking to enforce the covenants had notice of the violation and the period of time in which no action was taken; the extent and kind of violation; the proximity of the violations to those who complain of them; any affirmative approval of the same; whether such violations are temporary or permanent in nature; and the amount of investment involved.

Pool, 241 N.W.2d at 507 (Neb. 1976); *see also Vaughn* v. *Eggleston,* 334 N.W.2d 870 (S.D. 1983) (South Dakota Supreme Court adopting the same criteria). Based upon these principles and the evidence presented, Appellee has selectively enforced the

fencing restriction against the Appellants.

[¶37] In its *Renewed Motion for Summary Judgment*, Appellee argued that "(the term 'fence' is generally defined and understood to be 'a barrier intended to prevent escape or intrusion or to make a boundary; especially a barrier made of posts and wire or boards.'" ROA. ID#166 (citation omitted). In its *Memorandum Opinion and Order Partially Granting Plaintiff's Renewed Motion for Summary Judgment*, the lower court, in finding that the Appellants' structure constituted a fence in violation of the *Declaration*, adopted Appellee's advocated definition of a "fence." ROA ID#175. The lower court found that the structure at issue was made out of typical fencing materials, that it serves as a boundary, that it is not moveable or portable, and that it "is not the size of the fence that is determinative, but rather that it does constitute a fence." Id.

[¶38] The lower court was presented with photographic evidence of alleged violations of the no fence restriction set forth in the *Declaration. See* Exhibits. G (ROA. ID#183) and E (ROA. ID#202). The photographs clearly depict violations of the no fence restriction based upon the definition of "fence" advocated for by Appellee and adopted by the lower court. As ROA ID#183 and ROA ID#202 set forth, the structures on a number of properties in Promontory Point V are made of typical fencing materials (board, wires, posts), the structures serve as boundaries, most if not all of the structures are no more or less moveable than the Appellants' structure as testified to by Mr. Martin, who is a structural engineer, and that the structures vary in size. All of the structures set forth in Exhibits E (ROA. ID#202), and G (ROA. ID#183) constitute a fence under the *Declaration* and the homeowners who have committed the violations, of which Appellee had knowledge, have not faced action by the ARC or Appellee for the removal of such structures.

[¶39] While the Court has established that the right to enforce a restriction or reservation may be lost by waiver or acquiescence of violation of the same restriction *(see Allen,* 312 N.W.2d at 702 (N.D. 1981)), it has not established any criteria for determining whether waiver or acquiescence has occurred and thus this is a matter of first impression. Whether or not there has been acquiescence or waiver of a restriction depends upon the circumstances of each particular case and it is well settled that in most jurisdictions that the right to enforce restrictive covenants may be lost by waiver or acquiescence of violation of the same. *Friedburg v. Building Committee,* 239 S.E.2d 106 (Va. 1977); *See also* 20 Am.Jr.2d, *Covenants, Conditions, Etc., §* 273, p. 832. In this matter, the Court should adopt the criteria set forth in *Pool* and *Vaughn* to determine whether there has been waiver or acquiescence which criteria, again includes:

> Whether those seeking to enforce the covenants had notice of the violation and the period of time in which no action was taken; the extent and kind of violation; the proximity of the violations to those who complain of them; any affirmative approval of the same; whether such violations are temporary or permanent in nature; and the amount of investment involved.

Pool, 241 N.W.2d at 507 (Neb. 1976); *Vaughn,* 334 N.W.2d at 873 (S.D. 1983)

[¶40] In *Hoff v. Ajlouny,* the Nebraska Supreme Court found that when reviewing the criteria established in *Pool,* a court must look to see whether there are other covenant violations and determine whether there is acquiescence of a restriction based upon those previous violations. 703 N.W.2d 645, 651 (Neb. App. 2005). When applying the criteria established in *Pool* and *Vaughn* against the other fencing

violations in Promontory Point V, it becomes clear that there has been selective enforcement against the Martins.

[¶41] The unclear terms of what is and is not stated in the *Declaration* has resulted in unfair surprise further supporting procedural unconscionability. The Appellants have testified they never would have knowingly agreed to the unfair treatment so vigorously defended by Appellee. The *Declaration* has resulted in unfair surprise in the inferences required by the homeowner to prevent catastrophic spending and to meet the expectations of the ARC when denied any opportunity for discussion, despite the notion that the *Declaration* speaks for itself. For example, the *Declaration* states no fences. Ex. P-4 at p. 5. (ROA. ID#184). However, in another section it states fences are to be kept in good repair. Ex. P-4 at p. 6 (ROA. ID#184)

[¶42] The definition of fence seemed to further expand in response to questions relating to Exhibits E (ROA. ID#202) and G (ROA. ID#183) in that fences are allowed if they are used for gardening. When questioned, Chad Wachter testified that the *Declaration* is silent on this issue as well. From this, the Appellants are to infer that even though dogs are expressly allowed, and even though fences may or may not be allowed, that this means dog kennels are not allowed although the term "dog kennel" never appears in the *Declaration.*

[¶43] As it relates to substantive unconscionability, as noted by the lower court many times over at trial, the *Declaration* speaks for itself. Reading the *Declaration* on its face, it is clear that there is one-sidedness to the *Declaration* that benefits Appellee and the ARC:

- Appellee has the absolute right and ability to amend and change the development plan without notice, in the sole discretion of the developer. Ex.

> P-4 (ROA. ID#184). Additionally, every person who purchases a lot within Promontory Point V waives any and all objection to such development, including commercial aspects thereof, and consents to such development as well as all amendments and changes thereto. *Id.*

[¶44] In addition, all of the terms of the *Declaration* can further be amended at any time by Appellee without prior written consent of anyone, regardless of whether or not Appellee still has any ownership interest in any of the property subject to the *Declaration*. Ex. P-4 at ¶3 (ROA. ID#184).

[¶45] The Court must consider the issue of whether Appellee has an obligation to enforce the *Declaration.* In its previous briefs filed with the lower court, Appellee argues that the ARC is not required to enforce alleged violations of the *Declaration* and has unilateral authority to do so. In addition, Appellee has argued that even if It has an obligation to enforce the *Declaration,* and has failed in such enforcement, such failure does not preclude enforcement of the fencing restrictions pursuant to the no waiver provision set forth at Paragraph 7 of the *Declaration.* Ex. P-4 at p. 7 (ROA# 184). Despite these arguments, other courts have imposed an obligation to enforce declarations. Furthermore. even if there is a question as it relates to a duty to enforce. Appellee has admitted that it has an obligation to enforce the *Declaration.*

[¶46] Gail Wachter, a member of the ARC, testified at trial that the ARC has an obligation to enforce the *Declaration.* Chad Wachter, also a member of the ARC, testified both at his deposition and at trial, that the ARC had an obligation to enforce the *Declaration.* In his deposition testimony, Chad Wachter testified:

> Q Mr. Wachter, other functions of the [ARC], are you -- is the [ARC] tasked with enforcing the *[Declaration]?*
>
> A Yes, I believe we are.
>
> Q Mr. Wachter, are you [Wachter] tasked with enforcing the *[Declaration]?*

A Yes.

ROA# 141 at pp. 77, 121. It was clear at Chad Wachter's deposition and at trial that Appellee and the ARC admitted that they are responsible for enforcing the *Declaration* and the Court should find as such.

[¶47] Even though Wachter has admitted it has an obligation to enforce the *Declaration*—and case law supports this proposition, it attempts to hide behind the no waiver provision in the *Declaration* which provides:

> **NO WAIVER:** A waiver of a breach of any of the foregoing conditions or restrictions shall not be construed as a waiver of any succeeding breach or violation thereof or any other restriction or obligation.

Ex. P-4 at pp. 7, ROA #4. At trial, Chad Wachter was questioned as to whether or not the no waiver provision allowed the ARC to selectively enforce the *Declaration* as it saw fit. While Chad Wachter did not admit that this amounted to selective enforcement, the old saying goes that if it looks like a duck, walks like a duck, and quacks like a duck, then it is a duck—yet another canard well-cooked. The evidence clearly shows that hiding behind the no waiver provision amounts to selective enforcement.

[¶48] The failure of an association, such as the ARC here, to take appropriate action to enforce restrictive covenants may subject it to liability. In *Johnson* v. *Pointe Cmty. Ass'n, Inc.*, the Court of Appeals for Arizona held that the homeowner's association had to enforce requirements set forth in its declarations. 73 P.3d 616,620 (Ariz. App. 2003). In so holding, the Arizona Court of Appeals stated, "Even when a declaration authorizes the exercise of discretion in complying with its provisions, the association still must comply with the declaration's requirements, and association

members are entitled to judicial recourse to ensure such compliance." *Id* at 621. In addition, the Arizona Court of Appeals held that "[b]ecause of the considerable power in managing and regulating a common interest development, the governing board of an owners' association must guard against the potential abuses of that power." *Id (citing Nahrstedtv v. Lakeside Village Condo. Ass'n,* 878 P.2d 1275, 281-82 (Cal. 4th 1994)). without question that Wachter has a duty to enforce.

[¶49] As noted in Exhibits E (ROA. ID#202), and G (ROA. ID#183), and based upon the definition of a fence as advocated by Wachter and adopted by the Court, the structures set forth in those exhibits constitute a fence in violation of the *Declaration.* As noted by the Court in its *Memorandum Opinion and Order Partially Granting Plaintiff's Renewed Motion for Summary Judgment* the structure at issue was a fence because it was made out of typical fencing materials, that it served as a boundary, that it is not moveable or portable, and that it "is not the size of the fence that is determinative, but rather that it does constitute a fence." ROA ID#175. All of the structures presented in Exhibits E (ROA. ID#202), and G (ROA. ID#183) are structures made out of typical fencing materials (board, wires, posts), the structures serve as boundaries, most if not all of the structures are not moveable, and the structures vary in size.

[¶50] The Appellant's dog run/kennel is made of the same fencing materials as a number of other fences in Promontory Point V, both around and not around pools. The dog run/kennel and the surrounding landscaping was professionally installed. Ms. Martin testified that the design of the dog run/kennel, and the expensive materials and landscaping used, was with the harmony of the subdivision in mind. The dog run/kennel is no greater extent a violation than any others allowed to

languish without enforcement. Further it is not a one of a kind structure where it appears an oddity. Chad Wachter testified that it is similar to other fences in Promontory Point V, and that it would not reduce property value.

[¶51] There is nothing provided by written record or testimony that Appellee or the ARC affirmatively approved the structures set forth in Exhibits E (ROA ID#202), and G (ROA ID#183). However, Appellee and the ARC's failure to investigate or take action as it relates to the *Declaration* violations amounts to passive approval of the same and abandonment of the fencing restriction.

[¶52] There is no dispute that the dog run/kennel is in harmony with other fences that are installed in Promontory Point V around pools and Chad Wachter himself admitted that the fence is similar to other fences around pools and is attractive and does not devalue other properties in Promontory Point V. ROA ID# 141 at pgs. 112 and 114.

[¶53] Based upon the foregoing, Appellee has selectively enforced the declaration against the Appellants, and because of the selective enforcement, has waived its right to enforce the fencing restriction against the Appellants. To reach this conclusion, this Court should adopt the criteria set forth in in P*ool* and *Vaughn* to find that such waiver has occurred.

[¶54] Appellee has argued that the "doctrine of unconscionability applies in the context of contracts, and has no application to restrictive covenants that run with the land." ROA ID# 139 at paragraph 27. While the Court has not yet determined whether the doctrine of unconscionability applies to restrictive covenants which run with the land, as the *Declaration* does here, other jurisdictions have so found. *See*

Nickerson v. Green Valley Recreation, Inc., 265 P. 3d 1108 (Ariz. Ct. App. 2011).

[¶55] In *Nickerson,* two nonprofit corporations merged to form Green Valley Recreation, Inc. ("GVR"). *Id* at 1112. The primary purpose of GVR was to serve its members' recreational needs, operate and maintain recreational and social facilities, and sponsor cultural and civic activities in Green Valley, Arizona. *Id.* There are two means by which homeowners become members of the GVR: (1) Own homes in subdivisions whose declarations of covenants, conditions and restrictions ("CC & Rs") require all homeowners in the development to be GVR members; and (2) Private membership agreements. *Id.* In 2000, GVR's board of governors amended its bylaws to impose on all members a "new member capital fee." *Id* at 1113. In January 2009 the Plaintiffs sued GVR alleging, in part, that the CC & Rs were unconscionable. *Id.*

[¶56] On appeal, the Court of Appeals found that the CC & Rs were servitudes running with the land, similar to the *Declaration* at issue here. *Id* at 1113-117. The Court of Appeals further evaluated whether the CC & Rs was unconscionable. As it related to unconscionability, the Court of Appeals stated:

> The plaintiffs next argue the contracts [which include the CC & Rs] between the parties are unconscionable and therefore void. The determination of whether a contract is unconscionable is to be made by the trial court as a matter of law. *Maxwell v. Fidelity Financial Services, Inc.,* 184 Ariz. 82, 87, 907 P.2d 51, 56 (Ariz. 1995). We review questions of contract interpretation and unconscionability *de novo. Samaritan Health Sys. v. Superior Court,* 194 Ariz. 284, 114, 981 P.2d 584, 588 (App.1998); *Nelson v. Rice,* 198 Ariz. 563, 13, 12 P.3d 238, 242-43 (App.2000).
>
> Our supreme court has recognized two types of unconscionability: procedural and substantive. *See Maxwell,* 184 Ariz. at 84, 89-90, 907 P.2d at 53, 58-59 (unconscionability examined at time of contract formation); *see also Nelson,* 198 Ariz. 563, 13, 12 P.3d at 242-43 ("'Unconscionability includes both procedural unconscionability, i.e., something wrong in the bargaining

process, and substantive unconscionability, i.e., the contract terms per se.'"), *quoting Phx. Baptist Hosp. & Med. Ctr., Inc.* v. *Aiken,* 179 Ariz. 289,293, 877 P.2d 1345, 1349 (App.1994)...

"Procedural or process unconscionability is concerned with 'unfair surprise,' fine print clauses, mistakes or ignorance of important facts or other things that mean bargaining did not proceed as it should." *Maxwell,* 184 Ariz. at 88-89, 907 P.2d at 57-58, *quoting* 2 Dan B. Dobbs, *Law of Remedies§* 10.7, at 706 (2d ed. 1993). Additionally, the ability of a party to alter the printed terms of a contract is a relevant factor in determining procedural unconscionability. *See id.* at 89, 907 P.2d at 58. The plaintiffs contend the MDR is procedurally unconscionable because the burden placed on real property, including payment of the new- member fee, provides no benefit to subsequent property owners. But that argument relates more to substantive unconscionability, which we discuss below, because it focuses on the terms of the contract, not the parties' bargaining posture or process. *See Nelson,* 198 Ariz.563,114, 12 P.3d at 242-43.

[¶57] *Nickerson,* 265 P.3d at 1117-118. *Nickerson* stands for the proposition that the unconscionability doctrine in its common form is applicable to covenants running with the land. Restrictive covenants are a "contract between the subdivision's property owners as a whole and individual lot owners." *Ahwatukee Custom Estates Mgmt. Ass'n. Inc.* v. *Turner,* 2 P.3d 1276, 1279 (Ariz. App. 2001); *see also Powell* v. *Washburn,* 125 P.3d 373 (Ariz. 2006). Further, interpretation of a restrictive covenant is governed by rules for contract interpretation. *Wheeler* v. *Southport Seven Planned Unit Development,* 2012 ND 201, 113, 821 N.W.2d 746.

[¶58] In this case, the *Declaration* is procedurally unconscionable in that there were no negotiations whatsoever between the Appellants and Appellee regarding the *Declaration.* This is of no surprise as restrictive covenants, similar to adhesion contracts, are very likely always procedurally unconscionable, thus the Court's requirement of both procedural and substantive elements to determine unconscionability.

[¶59] The unclear terms of what is and is not stated in the *Declaration* has resulted in unfair surprise further supporting procedural unconscionability. The Appellants have testified they never would have knowingly agreed to the unfair treatment so vigorously defended by Appellee. The *Declaration* has resulted in unfair surprise in the inferences required by the homeowner to prevent catastrophic spending and to meet the expectations of the ARC when denied any opportunity for discussion, despite the notion that the *Declaration* speaks for itself.

[¶60] As it relates to substantive unconscionability, as noted by the lower court many times over at trial herein, the *Declaration* speaks for itself. Reading the *Declaration* on its face, it is clear that there is one-sidedness to the *Declaration* that benefits Appellee and the ARC:

> Appellee has the absolute right and ability to amend and change the development plan without notice, in the sole discretion of the developer. Ex. P-4 at ¶ 1 (ROA. ID#184). Additionally, every person who purchases a lot within Promontory Point V waives any and all objection to such development, including commercial aspects thereof, and consents to such development as well as all amendments and changes thereto. *Id.*

[¶61] In addition, all of the terms of the *Declaration* can further be amended at any time by Appellee without prior written consent of anyone, regardless of whether or not Appellee still has any ownership interest in any of the property subject to the *Declaration.* Ex. P-4 at 13 (ROA. ID#184).

> The ARC is made up of Lance and Gail Wachter, husband and wife, and their son, Chad Wachter. Ex. P-4 ¶2 (ROA. ID#184). Evidence was presented that the ARC is an ad hoc committee in that no meetings are held, no minutes are kept, members act on their own fruition. Gail Wachter has never been involved other than one drive through inspection of Promontory Point V approximately nine (9) months ago, none of the members live in Promontory Point V, and some home owners and developers are allowed to meet with the ARC while others, such as the Appellants, are not afforded the same opportunity.

[¶62] Furthermore, substantive unconscionability is apparent based upon the

harshness and selectivity in the enforcement of the no fence restriction against the Appellants by Appellee and the ARC. As noted above, even though there are other numerous violations, Appellee has aggressively pursued a course of action against the Appellants while turning a blind eye to numerous other violations, all of which a representative from Appellee would notice by simply driving through Promontory Point V as members of the ARC have testified that they have done. Notwithstanding the violations being in plain view, it is even more detrimental to the ARC and the Appellee that they have had actual knowledge of violations for months in Promontory Point V, but have done nothing about it.

CONCLUSION

[¶63] Based upon the above and foregoing, the doctrine of equitable conversion would operate to transfer the property at issue to the Appellants free of the subsequently recorded restrictive covenants contained in the *Declaration.* The same doctrine, applied to the initial agreement between K & L Homes and the Appellee would result in the transfer of the equitable interest prior to the recording of the *Declaration* which, in turn, was passed to the Appellants "covenant free". The lower court erred in determining otherwise.

[¶64] In the alternative, the *Declaration* is both procedurally and substantively unconscionable. Because the *Declaration is* unconscionable this Court should reverse the enforcement of the fencing restriction against the Appellants. *See Weber v. Weber,* 1999 ND 11, 589 N.W.2d 358.

Respectfully submitted this 28th day of March, 2019.

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CERTIFICATE OF SERVICE

[¶65] The undersigned hereby certifies that true and correct copies of the above and foregoing document were, on the 28th day of March, 2019, emailed to:

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