COMMONWEALTH OF KENTUCKY
SCOTT CIRCUIT COURT
DIVISION TWO
CIVIL ACTION NO. 11-CI-970

VICKIE BASILE, et al. PLAINTIFFS

v.

ORDER AND PARTIAL FINAL JUDGMENT REGARDING:

(i) PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT FILED JULY 12, 2012;

(ii) DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT FILED ON JULY 26, 2012; and

(iii) DEFENDANT'S MOTION FOR ORDER REQUIRING PLAINTIFFS TO DEPOSIT ASSOCIATION DUES AND ASSESSMENTS INTO ESCROW

CANEWOOD GOLF VILLAS
HOMEOWNERS ASSOCIATION, INC. DEFENDANT

*** *** *** ***

This matter came before the Court on April 15, 2014 for a supplemental hearing on (i) Plaintiffs'[1] Motion for Declaratory Judgment filed on July 12, 2014; and (ii) Defendant Canewood Golf Villas Homeowners Association, Inc.'s ("Defendant" or the "Fourth Association") Cross-Motion for Summary Judgment filed on July 26, 2012.[2] By implication, both the Plaintiffs' Motion and Defendant's Cross-Motion implicate, and by adjudication thereof, also resolve, (iii) the Fourth Association's Motion for Order Requiring Plaintiffs to Deposit Dues and Assessments into Escrow, and the Plaintiffs' Response filed on May 25, 2012.

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[1] As used herein, the term "Plaintiffs" refers to Plaintiffs Vicki L. Basile, Ethyle Noel, Lois Wise, Bonnie Orthmeyer, and Bruce and Cary Williams. Plaintiffs Danny and Pam Ankeny's (the "Ankenys") lot was foreclosed on during this case, and, further, the Ankenys have abandoned any interest in this lawsuit.

[2] By Amended Complaint deemed filed by Order dated August 21, 2013, the Fourth Association's Board Members, Bobby Sallee, Pat Clapham, and Linda Lee Cassinelli were added as Defendants. Because they were not parties to the case at the time the pending dispositive motions were filed, the Defendant's Motion was not filed on their behalf. The Court deems the Fourth Association's Motion as if it were filed on these Defendants' behalf as well.

Having reviewed the record, hearing arguments of counsel, and being otherwise sufficiently and duly advised, it is hereby ORDERED, DECREED and ADJUDGED as follows:

1. Plaintiffs' Motion for Declaratory Judgment filed on July 12, 2014 is GRANTED for the reasons set forth herein.

2. The Fourth Association's Cross-Motion for Summary Judgment filed on July 26, 2012 is DENIED for the reasons set forth herein.

3. The Fourth Association's Motion for Order Requiring Plaintiffs to Deposit Dues and Assessments into Escrow is DENIED for the reasons set forth herein.

I. Overview of Case and the "Development"

4. This case concerns Plaintiffs' claims that Defendant Canewood Golf Villas Homeowners Association, Inc. has no right, responsibility or jurisdiction over their townhomes or lots located in the "Villas of Canewood Townhomes," a 77 unit townhome development adjacent to the Canewood Golf Course and Canewood Subdivision, located in Georgetown, Scott County, Kentucky.

5. Plaintiffs own the following townhomes, and each townhome's "lot" number is provided:

Plaintiff	Address	Lot Number
Vickie Basile	139 Mission Path	33
Ethyle Noel	145 Mission Path	36
Lois Wise	151 Stonewall Path	26
Bonnie Orthmeyer	143 Stonewall Path	22
Cary and Bruce Williams	153 Stonewall Path	27

6. The legal issue at the heart of the pending Motions is whether restrictions, covenants, or conditions are or are not in the chain of title of any of the Plaintiffs' townhomes

and thus whether Plaintiffs' properties are or are not subject to any restrictions, covenants, or conditions (nor to the Restrictions the Fourth Association claims to have jurisdiction over).

7. If there are no restrictions, covenants, or conditions in the chain of title to Plaintiffs' lots, then (a) the Plaintiffs' lots are not subject to such restrictions (specifically, the Second Declaration discussed herein), (b) the Plaintiffs have no obligation to pay dues and no obligation to deposit the alleged dues into escrow, and (c) the liens filed by the Defendant on the Plaintiffs' lots slandered title to such lots and the Defendant is liable to Plaintiffs.

8. The initial developer, Canewood, Inc. acquired the overall tract of land in Scott County on which the Development was built in the 1990s.

9. Canewood, Inc. then platted off different parts of that tract for different purposes.

10. Concerning the land in question, Canewood, Inc. designed "Canewood Unit 2, Lot 4" as a proposed townhome development.

11. To this end, Canewood, Inc. filed a development plan, which was approved, and then began platting out specific sections, each of which would be further subdivided into lots for individual resale and building.

12. Thus, initially, all of "Canewood Unit 2, Lot 4" was owned by Canewood, Inc.

13. The Development is a part of the overall "Canewood" project.

II. The First Association and First Declaration (Lots 1-8)

14. Instead of subjecting the entire proposed Development (*i.e.*, all of Canewood Unit 2, Lot 4) to a set of restrictive covenants, Canewood, Inc. elected to place restrictions on *only* the first parcel it developed, being Canewood, Unit 2, Lot 4, ***Lots 1-8***.

15. This first parcel (Canewood, Unit 2, Lot 4, ***Lots 1-8***) was platted by Canewood, Inc. by that Final Record Plat filed of record on August 22, 2001, at Plat Cabinet 7, Slide 42.

16. Nearly contemporaneously, Canewood, Inc. filed that certain "Declaration of Covenants, Conditions, Easements And Restrictions For Lots 1 Through 8, Inclusive, Unit 2-Lot 4, Canewood Subdivision, The Townhomes of Stonewood At Canewood" of record in September 2001, at Miscellaneous Book 18, Page 298 (the "First Declaration").

17. The First Declaration indicated that it was for "The Townhomes of Stonewood at Canewood" and created certain rights, responsibilities and duties for "The Townhomes of Stonewood at Canewood Homeowners Association, Inc." (the "First Association").

18. It is undisputed that the First Declaration *only* concerned ***Lots 1-8*** in the Development.[3]

III. The Second Association and Second Declaration (Lots 9-17)

19. Subsequently, in June 2003, Canewood, Inc. prepared to develop the next nine (9) lots, being Canewood, Unit 2, Lot 4, ***Lots 9-17***, and filed that certain Final Record Plat of record on July 14, 2003, at Plat Cabinet 7, Slide 4375.

20. However, unlike lots 1-8, Canewood, Inc. did not file any restrictive covenants on that parcel.

21. Rather, Canewood, Inc. conveyed those nine (9) lots to the Villas of Canewood, LLP.

22. Villas of Canewood, LLP was a Kentucky limited partnership between Canewood, Inc. and another developer, Butch Schneider, and his development company, Schneider Designs (collectively, the "Schneiders").

23. The Schneiders were the managing partner of Canewood, LLP.

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[3] The Court notes the error in the First Declaration, at pg. 16, referring to the "Glenbrooke Townhome Development," which is a townhome development located in Lexington, Kentucky. While in and of itself, this error is not dispositive, this error is indicative of why the Court concludes, as set forth herein, why there are no restrictions in the Plaintiffs' chain of title and why Plaintiffs are not subject to the Fourth Association or any restrictions.

24. On July 25, 2003, Villas of Canewood, LLP filed that certain "Declaration of Covenants, Conditions, Easements And Restrictions For The Villas of Canewood" of record at Miscellaneous Book 21, Page 113 (the "Second Declaration") on ***Lots 9-17***.

25. The Second Declaration indicated that it was for "The Villas of Canewood" and created certain rights, responsibilities and duties for "The Villas of Canewood Homeowners Association, Inc." (the "Second Association").

26. Critically, the Second Declaration *only* concerned ***Lots 9-17*** in the Development.

27. Unlike the First Declaration, however, the Second Declaration stated at Article XIII, "Section 2 "Submission" that:

> The Owners of Record of The Villas of Canewood Townhomes will execute a Declaration of Submission to these Covenants, Conditions, Easements and Restrictions for the Villas of Canewood Townhomes, at such time as the Final Record Plat is recorded in the Scott County Clerk's Office.

28. This provision in the Restrictions for ***Lots 9-17*** forms the basis of the Fourth Association's claim that there are restrictions in the Plaintiffs' lots chain of title.

29. The Court notes that the Ankenys owned (before being foreclosed on) Lot 13, which was in this second section of development and thus was subject to the Second Declaration.

30. As set forth herein, the Fourth Association's argument is without any factual or legal support and thus judgment in favor of Plaintiffs and against the Fourth Association is appropriate.

31. In the Second Declaration, the "Owners of Record" is defined as "Villas of Canewood, LLP."

32. Further, the Court concludes that this term reflects Villas of Canewood, LLP's intent to submit additional parcels into the Second Declaration.

33. The Court, however, rejects Defendants' assertion that this term requires owners of lots outside of Lots 9-17 to submit their lots to the Second Declaration, because that document does not identify what property, lots, or sections of development are required to do so, and thus it does not give adequate notice to purchasers of other Lots (such as of Lots 18-77) that they are somehow subjected to the Second Declaration.

34. Perhaps the Developer intended to require this – and if so, the Developer should have filed restrictions, or something other documents with express reference, to this Second Declaration.

35. However, there is no genuine issue of material fact that no such document or restrictions were ever recorded on Lots 18-77.

36. Further, There is no genuine issue of material fact of fact that Villas of Canewood, LLP never executed any such "Declaration of Submission" or filed anything of record in the chain of title of the remainder of Canewood Unit 2, Lot 4 submitting any additional property into or subject to the Second Declaration.

37. In other words, none of the remaining lots in Canewood Unit 2, Lot 4 (i.e., ***Lots 18-77***) were ever submitted into or subjected to the Second Declaration, and none of ***Lots 18-77*** have anything in their chain of title regarding the Second Declaration.

IV. Lots 18-77 Are Subsequently Platted (Plat Cabinet 8, Slide 36, Plat Cabinet 8, Slide 306, and Plat Cabinet 9, Slide 239), But No Restrictions Are Filed of Record on Those Sections or Lots.

38. Over the next several years, Canewood, Inc. parceled off the remainder of Development for construction and sale of individual lots/townhomes, as follows:

- ***Lots 18-28*** were created by Final Record Plat filed on November 6, 2003, at Plat Cabinet 8, Slide 36.
- ***Lots 29-46*** were created by Final Record Plat filed on May 3, 2005, at Plat Cabinet 8, Slide 306.

- ***Lots 47-77*** were created by Final Record Plat filed on March 1, 2007, at Plat Cabinet 9, Slide 239.

39. Canewood, Inc. sold those parcels, as a whole, to Villas of Canewood, LLP, who in turn encumbered those lots with Mortgages to various entities.

40. Eventually, the Schneiders went into bankruptcy, and Villas of Canewood, LLP became defunct.

41. As a result, by 2009, Canewood, LLC (the successor in interest to Canewood, Inc.), the Don Poole Estate Trust (one of the members in Canewood, LLC), and the Schneiders' lender, Community Trust Bank, took many of the lots back in lieu of foreclosure.

42. By that time in 2009, many of the lots had been sold to purchasers, including the Plaintiffs' lots and townhomes.

43. There is no genuine issue of material fact that, unlike the first two sections of development ***(Lots 1-8*** in 2001 and ***Lots 9-17*** in 2003), no other restrictions were ever filed on ***Lots 18-77*** depicted on **Plat Cabinet 8, Slide 36, Plat Cabinet 8, Slide 306, and Plat Cabinet 9, Slide 239).**

44. As a result, the First Declaration concerned *only* the First Association and *only* Lots 1-8; and the Second Declaration concerned *only* the Second Association and *only* Lots 9-17.

45. There were no other restrictions filed of record on any other parcel, or any other lot, in the Development.

46. Edwin M. Gibson, the individual who assisted the owners in forming the Fourth Association and in holding meetings with regard to forming it, and who is the property manager for the Fourth Association, acknowledged to Plaintiffs' prior counsel in an email dated August 22, 2011:

> To provide you with a brief history, this was a Butch Schneider development. As you have no doubt discovered, *he did not annex subsequent sections of the development as he continued to build and sell townhomes*. I have no knowledge for his reasons for failing to do so, but the consequence is that he left the community with common property, and without an association to provide for its continued maintenance.

47. Thus, as a factual matter, the property management company even acknowledged that Schneider failed to "annex" (*i.e.*, "submit") the "subsequent sections" (i.e., ***Lots 18-77***) in or subject to the Second Declaration or any other set of restrictions.

V. Plaintiffs' Lots (Lots 22, 26, 27, 36 and 33) are part of the Property depicted on Plat Cabinet 8, Slide 36 and Plat Cabinet 8, Slide 306.

48. Subsequently, Plaintiffs acquired their lots/townhomes as follows:

- Bonnie Orthmeyer purchased 143 Stonewall Path, being Lot 22, as shown on the Final Record Plat of Canewood, Unit 2, Lot 4, lots 18-28 of record in Plat Cabinet 8, Slide 36.
- Lois Wise purchased 151 Stonewall Path, being Lot 26, as shown on the Final Record Plat of Canewood, Unit 2, Lot 4, lots 18-28 of record in Plat Cabinet 8, Slide 36.
- Bruce and Cary Williams purchased 153 Stonewall Path, being Lot 27, as shown on the Final Record Plat of Canewood, Unit 2, Lot 4, lots 18-28 of record in Plat Cabinet 8, Slide 36.
- Ethyl Noel purchased 145 Mission Path on August 14, 2003, by Deed filed of record in Deed Book 284, Page 556. This is Lot 36, as shown on the Final Record Plat of Canewood, Unit 2, Lot 4, lots 29-46 of record in Plat Cabinet 8, Slide 306.
- Vickie Basile purchased 139 Mission Path, being Lot 33, as shown on the Final Record Plat of Canewood, Unit 2, Lot 4, lots 29-46 of record in Plat Cabinet 8, Slide 306.

49. There is no genuine issue of material fact that Plaintiffs' Lots (***Lots 22, 26, 27, 36 and 33***) are not subject to the First Declaration, which only concerns ***Lots 1-8***.

50. There is no genuine issue of material fact that Plaintiffs' Lots (***Lots 22, 26, 27, 36 and 33***) are not subject to the Second Declaration, which only concerns ***Lots 9-17***.

51. Notwithstanding, the Defendants argue that the Plats for Plaintiffs' Lots (***Lots 22, 26, 27, 36 and 33***), specifically being plats recorded at Plat Cabinet 8, Slide 36 and Plat Cabinet 8, Slide 306, contain notes that the townhomes "would be subject to a homeowners association."

52. Contrary to Defendants' characterization, the applicable Note on Plat Cabinet 8, Slide 36 actually states:

> Note:
> All exterior areas of Unit 2, Lot 4, Lots 18-28 (townhouses) shall be available to the homeowners association for reasonable and necessary repairs and maintenance. These exterior areas include the paved private access easement (Mission & Stonewall Path). The homeowners association agreement defines the responsibility of each lot owner.

53. Also contrary to Defendants' characterization, the applicable Note on Plat Cabinet 8, Slide 306 actually states:

> Note:
> All exterior areas of Unit 2, Lot 4, Lots 29-46 (townhouses) shall be available to the homeowners association for reasonable and necessary repairs and maintenance. These exterior areas include the paved private access easement (Mission & Stonewall Path). The homeowners association agreement defines the responsibility of each lot owner.

54. However, Defendants have been unable to point the Court to which "homeowners association" these Plats allegedly refer.

55. Instead, both of these Plats (Plat Cabinet 8, Slide 36 and on Plat Cabinet 8, Slide 306) actually make reference to a *different* "homeowners association", the Canewood Homeowner's Association, under the "Landscape Easement Description" as follows:

> I hereby grant a 20 foot landscape easement in favor of Canewood Homeowners Association to construct and maintain the screening section along Canewood Golf Course as shown here.

56. Moreover, Defendants have been unable to point the Court to the alleged "homeowner association agreement" that is in the chain of title to these platted sections (Plat

Cabinet 8, Slide 36 and on Plat Cabinet 8, Slide 306) or for Plaintiffs' Lots (Lots 22, 26, 27, 36 or 33).

VI. Plaintiffs' Expert, Rand Marshall, Opined that There are no Restrictions in the Chain of Title to Plaintiffs' Lots, and Defendants Have Not Presented Any Countervailing Evidence or Expert Opinion Regarding Same.

57. Plaintiffs have submitted the expert report of Rand Marshall, a real estate closing and title attorney in Georgetown, Scott County, Kentucky.

58. Mr. Marshall performed a title search on each of the Plaintiffs' Lots, and to determine what, if any, restrictions were recorded in the Scott County Clerk's Office in the chains of title to Plaintiffs' lots.

59. The Defendants have not challenged Mr. Marshall's expertise regarding real estate and title opinion, and accordingly, the Court concludes as a matter of law that Mr. Marshall is qualified to offer an expert opinion on whether any restrictions were recorded in the Scott County Clerk's Office in the chains of title to Plaintiffs' lots.

60. Further, Defendants have not submitted any expert report into the record of this matter or any countervailing evidence to rebut Mr. Marshall's expert opinion.

61. With respect to Plaintiffs' lots, Mr. Marshall concluded that the "***plat [for each Plaintiff's lot] contains no reference to covenants, conditions or restrictions which apply to this [each Plaintiff's property]. Additionally, no restrictions are recorded in the Scott County Clerk's Office which appear in the chain of title to this property.***"

62. Accordingly, the Court concludes as a matter of law that the Plat Notes relied on by Defendants do not contain reference to any covenants, conditions or restrictions which apply to the Plaintiffs' lots and thus the Plat Notes relied on by Defendants do not place such restrictions in Plaintiffs' lots chain of title.

63. Mr. Marshall further concluded:

> With respect to all of these [Plaintiffs'] properties, no restrictions appear in the deed to the current owners nor in the any of the deeds to their predecessors in title. Additionally, no restrictions or references thereto appear on any of the preliminary nor final plats for any of these properties. **In fact, my examination reveals that no restrictions appear in the chain of title for any of these properties.**

64. Mr. Marshall examined whether the First Declaration (recorded at Miscellaneous Book 18, Page 298) or Second Declaration (recorded at Miscellaneous Book 21, Page 113) applies to the Plaintiffs' properties, and he concluded: "*...these restrictions do not, in fact, apply to any of the five (5) properties.*"

65. Mr. Marshall found that the First Declaration (recorded at Miscellaneous Book 18, Page 298) applies to only "lots one (1) through eight (8), Unit 2, Lot 4, Canewood."

66. And, Mr. Marshall found that Second Declaration (recorded at Miscellaneous Book 21, Page 113) applies to only "lots nine (9) through seventeen (17), Unit 2, Lot 4 Canewood." *Id.* at 4.

VII. Applying Kentucky Law, Because the Second Declaration is NOT in the Plaintiffs' Lots' Chain of Title, and Because There Are NO Restrictions in the Plaintiffs' Lots' Chain of Title, the Plaintiffs' Lots are Not Subject to Any Restrictions.

67. In part, Plaintiffs have relied on the cases of *Black v. Birner*, 179 S.W.3d 873 (Ky.App. 2005), and *Oliver v. Schultz*, 885 S.W 2d 699 (Ky.1994), as well as the Restatement (Third) of Property § 2.1 (2000).

68. A restrictive covenant may be created in a variety of ways, including by express agreement, implication, and estoppel. *Black v. Birner*, 179 S.W.3d 873 (Ky.App. 2005); Restatement (Third) of Property § 2.1 (2000).

69. Restrictive covenants, properly recorded to give notice, may operate to bind subsequent purchasers of the burdened real property.

70. To bind subsequent purchasers of real property in this Commonwealth, **subsequent purchasers must have notice of the restrictive covenant that can be found by performing a title search for the burdened property**.

71. In *Oliver v. Schultz*, 885 S.W 2d 699 (Ky.1994), the Supreme Court held that a subsequent purchaser was bound by a restrictive covenant if it was (i) reduced to writing and (ii) recorded (iii) so as to place a reasonable attorney performing a title search on notice.

72. Hence, the Court concludes that an unwritten and unrecorded restriction upon real property will not bind a subsequent purchaser and is only enforceable between the original contracting parties. *See Oliver*, 885 S.W. 2d 699; RESTATEMENT (THIRD) OF PROPERTY SERVITUDES § 7.14 (2000).

73. In *Oliver*, a common grantor placed restrictive covenants on four of nine parcels in a subdivision created from a single unrestricted tract.

74. No subdivision plat was recorded.

75. As a result, no restrictive covenant appeared in the chain of title to five of the nine tracts and no restriction was recorded regarding the five tracts deriving from the larger tract.

76. The Court concluded it necessary to address the law in regard to restrictive covenants in view of confusion in the law as expressed in the concurring opinion in *Bishop v. Rueff*, 619 S.W.2d 718 (Ky.App.1981).

77. Ultimately, the *Oliver* Court concluded that a restriction placed in a collateral chain of title cannot bind a subsequent grantee without actual notice of the restriction unless it is

included in a subsequent recorded subdivision plat or deed of restrictions. *Oliver*, 885 S.W.2d at 701. *See also* RESTATEMENT (THIRD) OF PROPERTY SERVITUDES § 7.14 (2000).

78. As a result, the Court held that the restrictive covenant, which appeared collaterally in the chain of title but not in any of the deeds to the tract in question, was not enforceable against landowner.

79. Because of *Oliver*, the RESTATEMENT (THIRD) OF PROPERTY SERVITUDES § 7.14 (2000) now recognizes that: "Kentucky has recently moved from following the majority to a modified-minority-rule position."

80. This case is similar to *Oliver*.

81. As in *Oliver*, a common grantor, Canewood, Inc., started from a single, unrestricted tract, Canewood, Unit 2, Lot 4.

82. Canewood and Villas of Canewood, LLP, placed restrictive covenants on sections of development (Lots 1-8 and Lots 9-17) of five total sections (the other three being Lots 18-28, Lots 29-46, and Lots 47-77).

83. Plats were only filed for each parcel – no subdivision plat was ever filed for the entire tract, Canewood, Unit 2, Lot 4.

84. As a result, no restrictive covenant appears in the chain of title to the entire tract, Canewood, Unit 2, Lot 4.

85. While restrictions were recorded in the chain of title on the first two sections of development (Lots 1-8 (the First Declaration) and Lots 9-17 (the Second Declaration)), no restrictions were ever recorded on the other three sections (Lots 18-28, Lots 29-46, and Lots 47-77).

86. Mr. Marshall has opined, and Defendants have not introduced any countervailing expert opinion or evidence, that there is nothing in the recorded plat (Lots 18-28, Lots 29-46, and Lots 47-77) or deed of restrictions for Lots 1-8 and Lots 9-17, that would put Plaintiffs or their predecessors in title on notice of some purported restriction on the Plaintiffs' Lots (***Lots 22, 26, 27, 36 and 33***).

87. In other words, the Court concludes there is nothing in the chain of title of Plaintiffs' Lots (***Lots 22, 26, 27, 36 and 33***) that would place a reasonable attorney performing a title search on notice.

88. Therefore, pursuant to *Oliver*, because the Second Declaration is in a ***collateral*** chain of title to Plaintiffs' lots, and is not in the Plaintiffs' Lots' actual chain of title, the Second Declaration and the restrictions therein are not applicable to the Plaintiffs' Lots (***Lots 22, 26, 27, 36 and 33***) and thus are not binding on Plaintiffs either.

89. Because the Second Declaration is not binding on Plaintiffs or their Lots, there is no obligation to pay dues, and certainly thus no obligation to deposit the alleged dues into escrow either.

90. As in *Oliver*, the restrictive covenant (the Second Declaration) at issue appears *only* collaterally in the chain of title, but not in any of the deeds or plats to Plaintiffs' Lots in question, and thus the Second Declaration is not enforceable against Plaintiffs.

91. Based upon the foregoing, the Court concludes as a matter of law that at the time each Plaintiff purchased his/her respective Lot, no document had been recorded in the Scott County Clerk's Office in the chain of title of Plaintiffs' Lots (Lots 22, 26, 27, 36 and 33) that referenced, submitted or subjected those Lots in or to any restrictions, much less in or to the Second Declaration.

VIII. The Non-Party Owners' Submission of their Lots Into the Second Declaration Does Not and Cannot Bind Plaintiffs To Do the Same.

92. Having concluded as a matter of law that the Plaintiffs' Lots are not subject to the Declaration or any other restrictions, because there are none in their chains of title, the Court must next address the Fourth Association's contention that a restriction can somehow be placed upon the Plaintiffs' Lots by virtue of the fact that 2/3rds of the other townhome owners elected to submit their lots in and to the Second Declaration regime.

93. Defendants have cited no authority whatsoever that would allow a group of owners to get together, to submit their property into a regime, and thereby force an unwilling owner to join that regime, and, in light of the law cited above, this is not the law of Kentucky.

94. Because of the lack of any authority whatsoever on this issue, the Court finds such argument without merit.

IX. Under *Puckett v. Battlefield Estate Homeowners Association, Inc.*, 2011 WL 1196806 (Ky. 2011), the Defendant Fourth Association has no standing to enforce the Second Declaration.

95. Additionally, the Plaintiffs argue that even if the Court were to conclude that some restrictive covenant (such as (i) the "language" in the Second Declaration that the Developer could submit additional property into the Second Declaration, discussed above or (ii) the Plat Notes discussed above) is in the Plaintiffs' Lots chains of title, that the Fourth Association has no standing to enforce the Second Declaration pursuant to *Puckett v. Battlefield Estate Homeowners Association, Inc.*, 2011 WL 1196806 (Ky. 2011) (unpublished disposition).

96. Notwithstanding the Court's analysis and conclusions above, the Court believes that addressing this issue is appropriate.

97. *Puckett* involved the Battlefield Estates, a development in Madison County.

98. Citing to *Colliver v. Stonewall Equestrian Estates Ass'n, Inc.*, 139 S.W.3d 521, 523 (Ky.App.2003), the Court of Appeals in *Battlefield* held:

a. that the initial Battlefield townhouse association was administratively dissolved by the Kentucky Secretary of State; and

b. that although the townhouse Declaration of Restrictions provided that the townhouse owner's association established by Fritz, the developer, may enforce the restrictions and covenants, the homeowner's association referred to in the Declaration of Restrictions was the *initial* Battlefield townhouse association.

99. Thus, the Court of Appeals recognized that while the townhouse Declaration of Restrictions gives the *initial* Battlefield townhouse association, the developer, and any other unit owner the authority to enforce the Declaration of Restrictions on the townhouses, *it did not give any authority to the new association*.

100. On this basis, the Court of Appeals reversed.

101. The Court of Appeals further held that there was not enough evidence to render the new association with standing, finding that there was absolutely "*no evidence in the record that the members of the New Association adopted the Declaration of Restrictions*" for the townhouses.

102. Accordingly, the Court of Appeals held that the new association did not have standing to enforce the townhouse Declaration of Restrictions against Puckett.

103. Like *Battlefield*, the Court concludes that the Defendant Fourth Association herein does not have standing to enforce the Second Declaration as against the Plaintiffs (or any other Lots in the Canewood Townhomes).

104. First, First Declaration (i) was filed of record in September 2001; (ii) unequivocally indicated that it was for "The Townhomes of Stonewood at Canewood;" and (iii) created certain rights, responsibilities and duties for "The Townhomes of Stonewood at Canewood Homeowners Association, Inc." (the "First Association").

105. The First Association *only* concerned Lots 1-8, and was administratively dissolved by the Kentucky Secretary of State.

106. Similarly, the Second Declaration at issue (i) was filed of record on July 25, 2003, (ii) indicated that it was for "The Villas of Canewood" and (iii) created certain rights, responsibilities and duties for "The Villas of Canewood Homeowners Association, Inc." (the "Second Association");

107. The Second Association *only* concerned Lots 9-17 in the Development, and was also administratively dissolved by the Kentucky Secretary of State.

108. There is no genuine issue of material fact that the association referred to in the First Declaration was the First Association, not the Defendant Fourth Association herein.

109. Similarly, there is no genuine issue of material fact that the association referred to in the Second Declaration was the Second Association, not the Defendant Fourth Association herein.

110. In accordance with the Court of Appeals' holding in *Battlefield*, while the First and Second Declarations may have created certain rights to the First and Second Associations, *it did not give any authority to any other entity, such as the Defendant Fourth Association*.

111. Next, despite having nearly two years since the parties' Motions for Declaratory Judgment and Summary Judgment were filed, Defendants have introduced no evidence in the

record that the Bylaws were actually approved and adopted by a majority of the owners of Lots 1-8, the owners of Lots 9-17, or even the owners of Lots 1-77.

112. Moreover, the Fourth Association's purported Bylaws do not adopt the Declaration of Restrictions (it merely references who the purported members are under Article II, Section 16).

113. Thus, as in *Battlefield*, the Fourth Association's purported Bylaws do not give the new association the authority to enforce the townhouse Declaration of Restrictions.

114. Furthermore, the Bylaws somehow purport to make every owner of any Lot in the Developer a member of this Fourth Association, which is clearly contrary to KRS 273 (concerning non-profit, non-stock corporations).

115. The Fourth Association, which was not even a legal entity at the time the Plaintiffs purchased their Lots, cannot prospectively be incorporated and then attempt to make lot owners a member of it. There is simply no authority under Kentucky law for this.

116. Finally, in this regard, there is absolutely no evidence in this case that the Plaintiffs ever adopted the Second Declaration for their Lots.

117. While other owners may have agreed to submit their properties into the common property regime under the Second Declaration, Plaintiffs did not adopt the Second Declaration as applicable to their lots.

118. Under the unequivocal holding in *Battlefield*, when there is "*no evidence in the record that the members of the New Association adopted the Declaration of Restrictions*" for the Lots in question, the declaration in question (the Second Declaration) is not applicable to the Lots in question (the Plaintiffs' Lots).

119. Consequently, for the same reasons articulated by the Court of Appeals in *Battlefield*, the Fourth Association herein simply does not have standing to enforce the Second Declaration against Plaintiffs.

X. Conclusion

120. Based upon the findings of fact and conclusions of law set forth herein, the Court concludes as a matter of law that there are no restrictions in the Plaintiffs' Lots' chains of title, and thus, those Lots are not subject to the Second Declaration.

121. The Court concludes that the Plat Notes relied upon by Defendant do not create an issue of fact with respect to whether there is some restriction in the chain of title.

122. Accordingly, declaratory judgment in favor of Plaintiffs Vicki L. Basile, Ethyle Noel, Lois Wise, Bonnie Orthmeyer, and Bruce and Cary Williams is appropriate that when Plaintiffs took title to their respective Lots, they took them free and clear of any restrictions, that Plaintiffs' Lots (***Lots 22, 26, 27, 36 and 33***) are not subject to the Second Declaration, and that Plaintiffs have no obligations to the Defendant Association (such as paying or escrowing dues).

123. The Defendant Fourth Association is directed to immediately release the liens filed on any of the Plaintiffs' Lots within ten (10) days of entry of this Order.

124. Pursuant to CR 54.02, and there being no just cause for delay, this Order and the matters adjudicated herein, as FINAL and APPEALABLE.

125. The Court retains jurisdiction with respect to Plaintiffs' claims for damages as alleged in the Amended Complaint deemed filed by Order dated August 21, 2013.

This 12th day of August, 2014.

Robert Johnson, Judge
Scott Circuit Court

CLERK'S CERTIFICATE OF SERVICE

I certify that on this 18 day of Aug, 2014, a true and accurate copy of the foregoing was mailed via prepaid, first-class U.S. Mail to the following:

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