FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISION
CIVIL ACTION NO. 17-CI-640
Consolidated with
CIVIL ACTION NO. 17-CI-00986

WHITAKER BANK, INC. — PLAINTIFF

v.

ANDOVER GOLF AND COUNTRY CLUB, INC.; COMMONWEALTH OF KENTUCKY, COUNTY OF FAYETTE; THE RANGE, INC.; COMMUNITY TRUST BANK, INC.; and GREAT AMERICA FINANCIAL SERVICES CORPORATION — DEFENDANTS

AND

FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISON
CIVIL ACTION NO. 17-CI-01360

BALL HOMES, LLC and LOCHMERE DEVELOPMENT CORPORATION — PLAINTIFF
WHITAKER BANK, INC.

v.

WHITAKER BANK, INC. and ANDOVER GOLF AND COUNTRY CLUB, INC. — DEFENDANTS

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On Motion to enter a Temporary Injunction and the Court being sufficiently advised;

FINDINGS OF FACT

1. Andover Subdivision is a multi-unit subdivision primarily developed by Ball Homes, Inc. and Lochmere Development Corporation in the late 1980's and early 1990's (VR 7/17/17 11:22:30-11:24:08; 1:38:40-11:39:30).

2. Portions of the Andover Subdivision were developed by third parties.

3. Ball Homes, LLC is the successor by merger to Ball Homes, Inc.

4. Troy Thompson, a principal of Lochmere Development Corporation, is the assignee of Lochmere Development Corporation.

5. This matter came before the Court, Wednesday, May 17, 2017 for a hearing on the Motion of Ball Homes, LLC, Lochmere Development Corporation and Troy Thompson (Ball, Lochmere, and Troy Thompson or "Movants") for Temporary Injunction (the "Motion"). The Motion requests the Court grant a temporary injunction:

> [R]equiring and directing Whitaker Bank, Inc., and Andover Golf and Country Club ("AGCC") and/or their successors and assigns to maintain the golf course at issue in reasonable and proper condition such that it shall be operated as a golf course by Whitaker, AGCC and/or their successors, assigns and therefore and [sic] purchaser, and not fall into disrepair or deviate from the condition that a golf course should be maintained [sic].

In which Intervening Plaintiffs, Andover Forest Homeowners Association, Inc., Andover Neighborhood Association, Inc. The Golf Townhomes at Andover Homeowners Associations, Inc., The Golf Townhomes at Andover Homeowners Association, Inc., Phase II, The Golf Townhomes of Andover, Estate Section, Homeowners Association, Inc., The Villas at Andover Homeowners Association, Inc., Andover Estates Homeowners Association, Inc., The Reserve at Andover Residential Homeowners Association, Inc. and Brighton East Homeowners Association, Inc., and their members, (the "Associations"), joined insofar as said Motion sought injunctive relief against Whitaker Bank.

6. On May 17, 2017, the Court, after conducting a question and answer session with Counsel for the parties and the representative of Movant (Troy Thompson) for over an hour, then heard extensive testimony of Troy Thompson, Lou Gorrell and Danny McQueen on behalf of Movants. The various HOA's presented proof in support of the motion by stipulation of various

Andover residents and/or members of Andover Golf and Country Club (to be submitted following the hearing) and by calling the Defendant Whitaker Bank representative, Thomas P. Hinkebine, President, on cross-examination.

7. At some point in time, Ball Homes, Inc. and Lochmere Development Corporation Created a marketing brochure for The Village of Andover. **[Andover Exhibit 1]**.

8. The marketing brochure primarily contained information about the amenities at the golf course that would be available and limited to individuals who actually became members of the Andover Golf and Country Club, rather than all homeowners in the Andover Subdivision.

9. The conceptual plan was created by the developers after the construction of the golf course, which had been completed in 1990.

10. Movants began by presenting their verified motion for temporary injunction in case # 640, and further submitted the affidavit of Troy Thompson in case # 1360 and the affidavit of Danny McQueen in case # 1360, in support of Movants' motion.

11. Andover Golf and Country Club was developed in the late 1980's and early 1990's by Lochmere Development Corporation and Ball Homes, LLC. A Lease, Construction, and Purchase Agreement ("Agreement") was executed and in place by July 11, 1988, leasing a portion of the Andover Development to Corman-McQueen, Inc. **[Andover Exhibit 3]**.

12. Paragraph 2 of the Lease states that the lease "shall conclude 5 years after the date on which Corman-McQueen opens its golf course for use on a green-fees paying basis".

13. Paragraph 4 of the Lease states as follows:

> "Corman-McQueen shall construct and operate on the leased property a golf course and country club, as more fully described herein. The property and facilities shall be operated under the name "Andover Golf and Country Club" shall be continuously operated, and shall be used for no other purpose."

14. Paragraph 15 of the Lease states as follows:

> "Upon termination of the lease, or at an earlier date selected by Corman-McQueen, Corman-McQueen shall purchase the leased property, for the purchase price of $5,000 per acre. Ball & Lochmere shall in exchange for payment deliver a Deed of General warranty for the leased property, subject to liens, and encumbrances created by Corman-McQueen; subject to easements and restrictions of record; and subject to a certain flowage easement with Kentucky American Water Company and other covenants and restrictions appropriate to continue in effect the provisions of this Agreement. Rent shall be apportioned to the date of closing. Transfer taxes shall be paid by Ball & Lochmere; recording fees shall be paid by Corman-McQueen."

15. Paragraph 19 of the Lease states as follows:

> Utilization of the golf course by members of the public, residents of the Andover development and members of the Andover Golf and Country Club, shall be on terms and conditions determined by Corman-McQueen, except that each resident of the Andover development may use the golf course once per month for payment of customary greens fees only.
>
> Andover Golf and Country Club memberships shall consist of two types: full memberships, which may be issued by Corman-McQueen in its sole discretion; and social memberships, which shall be limited to 400 in number and shall be issued by Corman-McQueen only to lot owners in the Andover development, for the first ten years of the club's operation. Social memberships enjoy access to all club facilities equal to full memberships except for utilization of the golf course. Social memberships may be limited to use of the golf course once per month, for payment of customary greens fees only. Dues for social memberships shall have no initiation fee, and the annual family fee for first year of operation shall not exceed $250, and thereafter shall be set comparably to dues for similar facilities at Hartland and Palomar subdivisions. Increases in social membership dues of more than ten percent in any year (for the first ten years) are subject to the approval of Ball & Lochmere.
>
> Corman-McQueen may issue regulations for the use of all golf and country club facilities.
>
> Ball & Lochmere shall have no interest in or entitlement to proceeds from the sale of memberships. However, if Corman-McQueen becomes in default of the leasing and development provisions of this

> Agreement, and pursuant thereto Ball & Lochmere recover possession and exclusive ownership of the leased property and improvements, as set forth in paragraph 21 herein, Ball & Lochmere may at their sole option elect to continue operation of the club facilities, in which event Ball & Lochmere shall be entitled to receive from Corman-McQueen the unearned portion of all paid memberships."

16. The golf course opened in 1990. (VR 05/17/2017 11:31:28-11:31:32).

17. On December 9, 1988, Ball Homes, Inc. Lochmere Development Corporation, and Corman-McQueen entered into the First Amendment to Golf Course Lease Construction and Purchase Agreement. **[Andover Exhibit 4]**.

18. On December 9, 1988, Ball Homes, Inc., Lochmere Development Corporation, and Corman-McQueen Golf, Inc. entered into a Memorandum of Lease and Purchase Agreement. ("Memorandum of Lease"). **[Andover Exhibit 5]**.

19. The Memorandum of Lease was recorded on December 12, 1988, and is of record in Deed Book 1498, Page 225, of the Fayette County Clerk's office.

20. Paragraph 16 of that same Agreement or controlling document gives Ball and Lochmere, the developers, a right of first refusal for a period of thirty years from the date of closing "to purchase the leased property and improvements, at the price of and according to the same terms and conditions of any bona fide purchase offer."

21. A subsequent Amendment to Golf Course Lease, Construction and Purchase Agreement Dated July 24, 1990 provides:

> 1. Survival of Covenants. Corman-McQueen, Ball & Lochmere and Hacker Thompson acknowledge and agree that the items contained in paragraphs 4, 7, 8, 13, 14, 16, 19, 20 and all of the paragraphs 5 and 6 except for date deadlines shall survive the closing.

22. AGCC joined in the Amendment for the specific purpose of acknowledging the survival of

the covenants and the restrictions that are stated in the Amendment document dated and executed the same day as the Memorandum that was executed and recorded in the Fayette County Clerk's office.

23. As a result of the Memorandum of Agreement, all future interest holders of any interest in the Property were put on constructive (if not actual) notice of the Agreement and any potential amendments, including the Amendment to the Agreement (dated July 24, 1990).

24. While the Property was subsequently sold by Ball and Thompson to an entity owned or controlled by Danny McQueen, that entity subsequently transferred title to the AGCC.

25. While the Property was subsequently transferred by Deed, the Memorandum of the Agreement was never released.

26. Whitaker Bank loaned money to Andover Golf and Country Club, LLC (AGCC) in 2007 and received a mortgage pledging the property in question as security. As a result of the Agreement (dated July 11, 1988), and Amendment to the Agreement (dated July 24, 1990) and a Memorandum of the Agreement filed of record on December 12, 1988, Movants allege that there are certain restrictive covenants requiring the property to be perpetually used and operated and maintained as a golf course with certain required amenities, and the property upon sale (by presentation of a bona fide purchase offer) is subject to Movants' right of first refusal. Plaintiff Whitaker Bank ("the Bank") claims to hold a mortgage or mortgages on the property, the Bank is now seeking via case #986 a declaratory judgment holding that its interest arising from a mere subsequent mortgage is not subject to those certain restrictive covenants of record requiring the property to be perpetually maintained and operated and used as a golf course with certain amenities and that it may be sold free of any right of first refusal held by Movants. See, Complaint, case #986, filed March 15, 2017.

27. Whitaker Bank, Inc. acquired its mortgage against the property on August 13, 2007 (Exhibit B to Whitaker Bank, Inc.'s Complaint in 17-CI-00640).

28. Whitaker Bank, Inc.'s title policy does not contain an exception for the Memorandum of Lease. (VR 5/17/17 9:19:40-9:20:48).

29. Whitaker obtained possession, custody and control of the golf course and property by no later than February 4, 2017, which appears to have been through or with the cooperation of its customer, AGCC, or at least without objection from AGCC.

30. The Whitaker mortgage makes clear that it obtained at the least an equitable interest in the Property by the mortgage in 2007. The paragraph on the top of page 2 of the Mortgage and Security Agreement (Book 6165, page 397 at 398) provides that "Borrower does hereby mortgage, grant, and convey to Lender the following described property located in the County of Fayette.

31. No evidence was presented that Whitaker Bank, Inc. had actual notice of the Lease prior to its loan to Andover Golf and Country Club, Inc.

32. Troy Thompson testified that he informed Elmer Whitaker of the alleged golf course restriction in 2010, three (3) years after the Whitaker Bank, Inc. mortgage. (VR 5/17/2017 11:36:50-11:38:27).

33. The property was in fact sold at judicial sale on April 24, 2017 pursuant to Court Order, with Whitaker Bank being the highest and best bidder ("Successful Bidder") which bid $2,950,000.00. Therefore, Whitaker Bank obtained legal title at least by April 24, 2017, in addition to the equitable title it held from the date of mortgage.

34. Upon its dissolution, Lochmere assigned certain rights to Troy Thompson.

35. Paragraph 16 of that "Agreement" or controlling document gives Ball and Lochmere, the

Developers, a right of first refusal for a period of thirty years from the date of closing "to purchase the leased property and improvements, at the price of and according to the same terms and conditions of any bona fide purchase offer." *Id.*

36. Moreover, the restrictive covenants (deed of restrictions) put to record in 1989 and 1990 Applicable to the homes that are adjacent to the golf course are recorded in the County Clerk's office.

37. These covenants make clear that homeowners whose property abuts the golf course are Prohibited from putting up fences, and subject to other restrictions of their property, to allow for the continued operation of the golf course.

38. For example, the Deeds of Restrictions provide:

> Golf Course Lots . . . No Owner of a lot abutting the golf course shall construct any hedge, fence, wall or barrier of any nature within twenty (20) feet of any border which abuts the golf course . . . During the entire course of construction or any other use of a lot abutting the golf course, the owner shall provide a method (accepted in writing by the developers) to prevent siltage from running onto the golf course.

39. The Bank's primary contention appears to be an assertion that the restrictive covenant was not properly recorded and therefore does not run with the land or that it simply did not take its mortgage subject to such restriction.

The "Lease Agreement" provides in part as follows:

> This Memorandum of Lease and Purchase Agreement is executed for the purpose of giving of the existence of the Lease and the terms thereof. Reference is made to the Lease for the full description of the rights and duties of Ball & Lochmere and Corman-McQueen, and this Memorandum of Lease shall in no way affect the terms and conditions of the lease or the interpretation of rights and duties of the parties thereunder.

40. See Exhibit 8 & 9 (certified copy), p. 1 – 2. Therefore, a recorded document exists which

Incorporates the Agreement terms by reference. Moreover, the Memorandum itself makes clear that the Agreement shall terminate only after "a date to be determined by reference to the Lease." There is and has been no termination of the Agreement. The Court's duty is not to make a final judgment on the merits at this point, but rather, to evaluate the merits of the case to determine whether the Movants have shown a substantial likelihood of success on the merits.

41. Troy Thompson testifies that owners of the golf course lots enjoy views of open space. (VR 5/17/2017 11:35:45-11:36:10) and that was a significant reason for the purchase.

42. Whitaker Bank, Inc. is currently mowing and watering the golf course but not up to Standards to which it had been maintained.

43. Whitaker Bank, Inc. has expended in excess of $100,000.00 to maintain and secure the property. (VR 5/17/2017 2:27:00-2:29:18)

44. It would cost between $600,000.00 and $650,000.00 for a full golf season to maintain the golf course at the level it had previously been maintained. (VR 5/17/2017 1:41:30-1:42:10).

45. The Andover Golf and Country Club closed its operations and surrendered the property to Whitaker Bank, Inc. in February 2017. (VR 5/17/2017 2:20:25-2:21:31).

46. Whitaker Bank, Inc. did not influence the decision to be close made by Andover Golf and Country Club, and were surprised by that decision. (VR 5/17/2017 2:20:25-2:21:31).

47. The mutuality of obligations (restrictions on homeowner lots and restriction on the Property as a golf course) was evident to homeowners purchasing lots and properties.

48. Further, by Stipulation, carious owners of properties immediately adjacent to or near to the Property have testified that the Golf Course was in operation on the Property when they purchased their properties, and that they had an expectation that the Property would only be used as a Golf Course.

49. The Property has been operated as a golf and country club continuously from approximately 1990 until February 2017.

50. As a result of the foregoing facts and the Agreement, as amended. Movants allege that the Property is subject to (1) an express restrictive covenant requiring the property to be perpetually used and operated and maintained as a golf course with certain required amenities, and (2) a right of first refusal upon the presentation of a bona fide purchase offer.

51. Movants and the Association also claim that the Property is subject to an implied servitude or common scheme of development requiring the property to be perpetually used and operated and maintained as a golf course with certain required amenities.

52. Andover Golf and country Club has no current interest in the property by reason of the foreclosure sale in 17-CI-00640.

53. The golf course could be maintained as a lower-end golf course for between $400,000.00 and $450,000.00 per year. (VR 5/17/2017 1:46:50-1:47:35).

54. Residents in the Andover Subdivision are not required to be either golf members or social members of Andover Golf and Country Club. **[Andover Exhibit 1, 10, and 11]**.

55. The current maintenance being performed by Whitaker Bank, Inc. is helping to preserve the possibility of returning the property to a golf course. (VR 5/17/2017 1:38:20-1:38:40).

CONCLUSIONS OF LAW

1. Under Civil Rule 65.04 (1):

> A temporary injunction may be granted during the pendency of an action on motion if it is clearly shown by verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or the acts of the adverse party will tend to

render such final judgment ineffectual.

2. Kentucky Courts, in interpreting Civil Rule 65.04, have held:

> [A]pplications for temporary injunctive relief should be viewed on three levels. First, the trial court should determine whether plaintiff has complied with CR 65.04 by showing irreparable injury. This is a mandatory prerequisite to the issuance of any injunction. Secondly, the trial court should weigh the various equities involved. Although not an exclusive list, the court should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo. Finally, the complaint should be evaluated to see whether a substantial question has been presented. If the party requesting the relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded. However, the overall merits of the case are not to be addressed in CR 65.04 motions.
> Maupin v. Stansbury, 575 S.W. 2d 695, 699 (Ky App. 1978).

3. Here, Movants and the Associations meet the above three-part analysis, and a Temporary injunction is therefore granted as explained below.

I. Irreparable Harm

4. In order to obtain injunctive relief, the movant must show that its "rights will suffer immediate and irreparable injury" in the absence of such relief. Maupin, 575 S. W. 2d at 698.

5. Irreparable harm exists where the injury to the plaintiff is intangible and cannot be quantified or measured. Courts have recognized irreparable harm and granted injunctive relief in like circumstances.

6. In *Hellerstein v. Desert Lifestyles, LLC,* 2015 WL 6962862 (D. Nev. 2015), homeowners and their HOA brought an action and motion for preliminary injunction in federal court against the owner of the community golf course.

7. Like Ball and Lochmere here, the Plaintiffs in *Hellerstein* contended that the Defendant was obligated to operate the golf course under a restrictive covenant.

8. The Court granted the preliminary injunction requiring the Defendant to "maintain" the Golf Course in the condition it would have been had it been continuously watered and maintained as of September 1, 2015 (the status quo date)."

9. The Court found the possibility of irreparable harm existed on several grounds, explaining:

> First, Plaintiffs have established that they have suffered, and are likely to continue to suffer, irreparable harm with respect to the views from their homes and the enjoyment of the use of their homes related to these views. Nevada law provides that "[a] view is a unique asset for which a monetary value is very difficult to determine." Leonard v. Stoebling, 728 P. 2d 1358, 1363 (Nev. 1986) (quoting Glover v. Santangelo, 690 P. 2d 1083, 1086 (Or. Ct. App. 1984). **** Second, Plaintiffs have suffered irreparable harm from the physical damage to the Golf Course itself as a result of Defendants' intentional act of not watering or maintaining the course since September 1, 2015. Under Nevada law, "[a]ny act which destroys or results in a substantial change in property, either physically or in the character in which it has been held or enjoyed, does irreparable injury which justifies injunctive relief." Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc., 492 P. 2d 123, 125 (Nev. 1972). Here, Defendants' actions rendered the grass on the Gold Course largely dead or dying, and incapable of restoration simply by watering and other routine maintenance. Defendants have committed acts-and unless enjoined are likely to continue committing acts-that have caused substantial physical change to the Golf Course and have destroyed the property's character as a golf course. Plaintiffs purchased their homes in reliance upon the fact that the owner of the Golf Course would maintain and operate it as a golf course, as required by the Golf Course Agreement (which Plaintiffs have the authority to Enforce). These changes to the Golf Course have thus substantially Impaired Plaintiffs' use and enjoyment of their homes and caused an associated drop in the values of Plaintiffs' homes, neither of which are quantifiable. Id at *10 (emphasis added).

10. Other Courts have confirmed that irreparable harm exists where there is injury to a party's recreational or aesthetic interests, in addition to the unquantifiable loss in property value existing here.

11. In *Sierra Club v. United States Army Corps of Engineers,* 645 F. 3d 978 (8th Cir. 2011), the Court affirmed a preliminary injunction granted to an environmental organization and hunting club.

12. The injunction had enjoined construction of a coal-fired power plant.

13. The Court held that the Plaintiffs' loss of use of the property at issue constituted irreparable harm because the members of the organization and club would likely be harmed with respect to their recreational, aesthetic, educational, and ecological interests. Id. At 994-95. See also *Alliance for the Wild Rockies v. Cottrell,* 632 F. 2d 1127 (9th Cir. 2011) (Loss of use and enjoyment of forest constituted irreparable harm).

14. Movants and the Association are entitled to enforce the express restrictions in the Agreement and the implied servitudes and common scheme of development with restrictions that are reciprocal and/or relate to the golf course usage.

15. Mr. Thompson's testimony was thorough, gave the historical matters that assisted the Court, was unrebutted by the Bank and is therefore adopted by the Court.

16. Mrs. Gorrell, a resident on one of the fairways, testified at the hearing and other owners testified by stipulation to the rapid decline in the condition of the course and the lack of golf course level maintenance being conducted.

17. That testimony was unrebutted by the Bank and is adopted by the Court.

18. Mr. McQueen's testimony regarding the maintenance of golf courses was very persuasive and unrebutted by the Bank, and is adopted by the Court.

19. The Court finds that the status quo of the Property and the matters before the Court are an operating golf course in very good condition.

20. As a result, the lack of proper maintenance since the Bank has taken possession, custody and control must be reversed.

21. Therefore, the Court finds that irreparable harm exists based on the loss of "views" as well as the loss of use of the course and amenities, the loss of recreational and aesthetic values and unquantifiable loss in property values, as well as the very real and evolving potential that the bulk of this property turns into a nuisance for some 1500 plus property owners based upon a failure to properly maintain it by AGCC and Whitaker and successors and assigns.

II. Likelihood of Success on the Merits

22. It is important to note that Movants do not need to prove their case on the merits in order to secure a temporary injunction.

23. The Movants must simply show a likelihood of success on the merits of the underlying dispute – enforcement of the restrictive covenant requiring the property to be used continuously as a golf course.

24. "[A] Court construes restrictive covenants according to their plain language. Parties are bound by the clear meaning of the language used, the same as any other contract." *Gadd v. Hensley,* 2015-CA-1948 (Ky. Ct. App. March 24, 2017) (not to be published).

25. In particular: "It is not necessary that such an intention appear from the express language of the instrument creating it, but it may be implied where it appears that it was imposed as part of a general building plan or scheme for the improvement of several contiguous lots." *Bagby v. Stewart's Ex'r,* 265 S. W. 2d 75, 76 (Ky. 1954) (emphasis added).

26. The Bank's position hinges on effort to ignore and/or its assertion that no restrictive covenant "exists" of record.

27. The restrictions are 'of record' and do put the world on notice and the Bank has failed to rebut this simple and controlling fact.

28. Movants have shown a substantial likelihood of prevailing on this issue.

29. The Bank wants this Court to hold that in a golf course community that was designed, developed and approved for contraction and existed and operated for over 25 years based upon an integral and interwoven golf course can cease to be a golf course at the whim of a party who holds an interest in the Property, and ignore the express restrictive covenants and implied servitudes and common scheme of development.

30. The Agreement and Amendment clearly contain both a restrictive covenant and a right of first refusal.

31. The Memorandum adequately provided the "whole world" with notice of the restrictive covenant, which was incorporated therein by reference. See *e.g., Ashland, Inc. v. Realty Farm Development Co.,* 485 S. W. 2d 891, 894 (Ky. App. 1972) ("where a subsequent lessee has notice of a restrictive covenant in a prior lease he is bound thereby because a party with knowledge of the just rights of another should not be permitted to defeat them").

32. In *Triple Crown Subdivision Homeowners' Association, Inc. v. Oberst,* 279 S. W. 3d 138 (Ky. 2009), a developer issued a deed for resale of real property acquired by the developer after the filing of the declaration of covenants, conditions and restrictions.

33. The Court held that the deed "incorporated by reference the declaration," thus rendering the declarations enforceable.

34. The Court held: "Although amending the declaration to include an additional legal description for after-acquired property would have made it easier for a title examiner, the absence thereof does not obscure or defeat the obvious intent of the developer." *Id.* at 141.35.

35. In *Oliver v. Schultz,* 885 S.W. 2d 699 (Ky. 1994), the Court held that, while restrictive covenants re to be enforced under Kentucky law "only when the restriction is placed in a recorded instrument," such restrictions are enforceable where reflected in "a subdivision plat, a deed of restrictions or some other instrument of record . . . that would plan an ordinary and reasonably prudent attorney performing a title search on notice of the restrictions in question." *Id.* at 701 (emphasis added).

36. This is consistent with general "black letter" law. See, e.g., 20 Am.Jur. 2d § 152 ("Covenants and restrictions as to the use of property may be affected by a separate instrument [other than the deed] if consideration and the other essentials of a contract are present"). See also *Mitchell v. First Nat'l Bank,* 263 S.W. 15, 16 (Ky. 1924) ("if a person has knowledge of such facts as would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry, and he fails to do so, he is chargeable with the knowledge which by ordinary diligence he would have acquired"); *Sentry Safety Control corp. v. Broadway & 4th Ave. Realty Co.,* 124 S.W. 2d 1051 (Ky. 1939) (accord).

37. Here, the Memorandum alone was sufficient to place an ordinary and reasonably prudent attorney performing a title search on notice of the restrictions in question and is even more evident when combined with the obvious and outward use of the property for decades and the restrictions of record applicable to the "Golf Course Lots".

38. The Court understands that the Bank's closing file was subpoenaed, and the Bank refused to produce the title opinion and notes, or to allow those to be produced by its closing attorney.

39. In *Hellerstein,* supra at *8, the Court noted: "Desert Lifestyles, as the undisputed holder of equitable and legal title to the golf Course, is the Golf Course Owner as defined by the Agreement. Desert Lifestyles is thus bound by the plain terms of the agreement to operate and maintain the golf course property solely as a 27-hole golf course." (emphasis added).

40. This is directly on point to the instant case.

41. Here, the Bank is now the undisputed holder of equitable and legal title to the property, having purchased it at judicial sale on April 24, 2017.

42. The Bank has been and remains bound by the restrictive covenants to the same degree that AGCC was bound.

43. Moreover, the case of *Skyline Woods Homeowners Association, Inc. v. Broekmeier*, 276 Neb. 792 (2008) is directly on point.

44. In that case, the Court evaluated whether an implied restrictive covenant existed requiring property to be used a golf course.

45. The Court stated:

> We first consider whether the district court was correct in concluding that an implied covenant restricts Liberty's land to usage as a golf course and that Liberty and the Broekemeiers had constructive notice of such covenant. It is possible for a restrictive covenant to arise by implication from the conduct of parties or from the language used in deeds, plats, maps, or general building development plans. Such an implied restrictive covenant has been defined as "a covenant which equity raises and fastens upon the title of a lot or lots carved out of a tract that will prevent their use in a manner detrimental to the enjoyment and value of neighboring lots sold with express restrictions in their conveyance."

In order for implied restrictive covenants to exist, there must be a common grantor of land who has a common plan of development for the land. If there is a common plan of development that places restrictions on property use, then such restrictions may be enforced in equity. "A court's primary interest in equity is to give effect to the actual intent of the grantor ... by looking not only to language in deeds, but variously to matters extrinsic to related written documents, including conduct, conversation, and correspondence."

To enforce an implied restrictive covenant against a subsequent owner of the land, the subsequent purchaser must have actual or constructive knowledge of the implied restrictive covenant. However, it should be noted that because implied ***806** restrictive covenants mandate relaxation of the writing requirement, courts are generally reluctant and cautious to conclude implied restrictive covenants exist.

In *Wessel v. Hillsdale Estates, Inc.,* we were faced with express protective covenants by the developer to preserve land for a park for the surrounding homeowners' enjoyment, but the covenants failed to specify how much land would be set aside for that purpose. However, the original plat and brochures used by the developer to sell the lots designated a particular 4.35 – acre lot as " 'Community Unit Area,' " and several covenants made reference to the variety of uses of the park. We concluded that the protective covenants, read in their entirety, implied an amount of land "sufficient" for a park and recreational area with the variety of uses ****388** referred to in the covenants. While we did not compel the developer to use the entirety of the 4.35 acres for recreation purposes, we stated that it would be absurd to conclude that the 50-by 80-foot parcel the developer had proposed to set aside would be sufficient.

Instead, we concluded that the amount of land used to build the park and recreation area had to be in accordance with the buyer's expectations, stating:

"A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchases; and whether it was in pursuance of a general building plan for the development of the property."

> We ultimately held that 2.35 acres of the lot had to be used for the Conceived park and recreation area.

46. Like the Court in *Broekemeier*, when reading the Agreement in its entirety, as Amended, the Deeds of Restrictions on neighboring properties, and the owners expectations and historical use of Property, an implied covenant requiring the Property to be for a Golf Course exists.

47. Thus, Movants have shown a substantial likelihood of success on the merits for both express restrictive and implied servitude/common scheme of development, and therefore, the property must be maintained and used as a golf course.

48. Under Maupin, "the overall merits of the case are not to be addressed" at this point.

III. Equities of the Situation

49. It should also be noted that this Bank continued to loan AGCC money even after its bankruptcy in 2009.

50. Whitaker Bank took its interest with notice of the historical and mandated use, the restrictive covenant and of the financial condition of the debtor.

51. The Bank has now been able to credit bid the property through a foreclosure action and extinguish the interest of AGCC.

52. The Bank has assigned its successful bid to a new entity recently formed called AGCC, LLC.

53. The public interest and equities of the situation requires issuance of a temporary injunction.

54. The public has an interest in seeing that any successor to AGCC follow restrictive covenants which are of record.

55. That is the point of placing the restrictions in a recorded instrument, which was done here through the Memorandum of Lease.

56. The public also has an interest in preserving property values and greenspace existing within the community rather than allowing it to fall into disrepair.

57. There is absolutely no harm to the Bank from issuance of a temporary injunction because preserving the golf course will protect the Bank's investment and maintenance as a golf course is the status quo for more than 25 years.

58. The equities are therefore in favor of injunctive relief.

V. TEMPORARY INJUNCTION

WHEREFORE, the Court now enters this TEMPORARY INJUNCTION: Requiring and directing Whitaker Bank, Inc., and/or their successors and assigns, including AGCC, LLC, to maintain the golf course at issue in a reasonable and proper condition such that it shall be operated as a golf course by Whitaker, and/or their successors, assigns and purchaser, and not allow the course to fall into disrepair or deviate from the condition that a golf course should be maintained.

The Court orders Movant to post bond in the amount of $1,000,000.00. The Court is merely ordering Whitaker to continue what it had full knowledge and contractual obligations to do and what obligations Whitaker (and its successors) acquired through full knowledge of the obligations related to the property that it has purchased. This TEMPORARY INJUNCTION shall be effective upon posting of the bond with the clerk and shall continue until modified or dissolved by the Court pursuant to the Civil Rules of Procedure.

The Court has fixed the amount of the bond based on the testimony of Danny McQueen as the preeminent golf course designer and builder in Central Kentucky for years. Specifically,

the cost to maintain the course for a year and the cost to get it in proper condition for this golf season.

Dated this 6 day of June, 2017. Time 8:10

/s/ JAMES D. ISHMAEL, JR.
A TRUE COPY
ATTEST: VINCENT RIGGS, CLERK
FAYETTE CIRCUIT COURT
BY _____ DEPUTY

HON. JAMES D. ISHMAEL, JR.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Order has been served upon the following parties, via First Class Mail, this ____ day of June, 2017:

JUN 06 2017

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VINCENT RIGGS, C.F.C.C
BY: _____, D.C.