

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 DIVISION  
CIVIL ACTION NO. 17-CI-01360

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

PLAINTIFFS

v.

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

DEFENDANTS

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**OPINION**

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This matter is before the Court on Motion of the several "Neighborhood Homeowners' Associations" (hereinafter "Associations") for a Declaratory Judgment that the original developers of Andover Forest Subdivision, namely Ball Homes' Inc. and the original developers of Andover Hills Subdivision, namely Lochmere Development Corporation, respectively (hereinafter

“Developers”) do not have any legal right, obligation standing or duty to enforce the purported use restriction in the “Lease Agreement” entered into on July 11, 1988.

The Court conducted a hearing on the pending Motion on August 7, 2017 and has considered the oral arguments of Counsel, the excellent Briefs of Counsel for all parties and the tendered supplemental Briefs and proposed Findings of Fact and Conclusions of Law. The issue is now ripe for consideration and adjudication by the Court.

### **FINDING OF FACT**

1. Andover Golf and Country Club (“AGCC”) was developed in the late 1980’s and early 1990’s by Lochmere Development Corporation and Ball Homes, LLC.

2. The real property generally in issue for the instant motion is the Andover Golf “Course Property,” the driving range, the Andover clubhouse, parking lot, swimming pool and pool house (collectively, the “Andover Golf Course Property or AGCC).”

3. A Lease, Construction and Purchase Agreement (“Agreement”) was executed and in place by July 11, 1988 concerning the Andover Golf Course Property.

4. The Agreement, dated July 11, 1988, expressly provides as follows in Numerical Paragraph 4:

4. Use. 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.

5. A memorandum of the Agreement was recorded on December 12, 1988 in the Fayette County Clerk’s Office.

6. A subsequent Amendment to the 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.

7. AGCC joined in the July 24, 1990 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.

8. As a result of the foregoing facts and the text of the Agreement, as amended, the Associations allege that the Andover Golf Course Property is subject to an express restrictive covenant for the benefit of the neighboring real properties, being the Andover neighborhood. This Order does not adjudicate that issue and preserves it for final adjudication on the merits.

9. The Developers owned the various real properties benefited by the express restrictive covenant on the Andover Golf Course Property at the time that the Agreement was executed.

10. The Developers have subsequently developed and sold each of those real Properties.

11. Ball Homes developed Brighton Place (Andover Forest) and created the Andover Forest Homeowners Association, Inc. for the express purpose of protecting the homeowners' interests in their properties by enforcing the regime of restrictive covenants, maintaining common areas, and otherwise providing local governance on behalf of the homeowners.

12. By 1996, according to Ball Homes' statements during the August 7<sup>th</sup> hearing, it had transferred ownership of all common areas in Andover Forest to Andover Forest HOA, and transferred control of that Association to all of the owners in Andover Forest.

13. In fact, all of Ball Homes' rights as a developer of Andover Forest, "automatically" passed to Andover Forest HOA upon the sale of 100% of the lots in Andover Forest pursuant to the Andover Forest Declaration and Kentucky common law as discussed more fully below.

14. Specifically, Article II, Section 3(b) of the Andover Forest Declaration provides that "All rights" of Ball Homes as developer "shall *automatically* pass to the Association when Class B membership ceases."<sup>1</sup>

15. Ball Homes Class B membership ceased by 1996.

16. Ball Homes has had no developer rights regarding the Andover development, and (until March of 2017) Ball Homes has not taken any action, effort or steps to be involved in the Andover neighborhood or golf course since then.

17. Similarly, Lochmere Development/Thompson developed Andover Hills Neighborhood and created the Andover Hills Neighborhood Association, Inc. for the express purpose of protecting the homeowners' interests in their properties by enforcing the regime of restrictive covenants, maintaining common areas, and otherwise providing local governance on behalf of the homeowners.

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<sup>1</sup> See Association's Motion at Exhibit C, pp. 6-7.

18. By approximately 1996 also, Lochmere had transferred ownership of all common areas in Andover Hills to Andover NA, and on January 1, 2001, by written Assignment executed by Troy Thompson on its behalf, Lochmere assigned and transferred control of that Association to all of the owners in the Andover Hills neighborhoods.<sup>2</sup>

19. The Assignment specifically states that Lochmere assigned to Andover NA all of Lochmere's "rights, duties, and obligations under the Deed of Restriction and Common Area Maintenance Responsibilities."<sup>3</sup>

20. Thus, all of Lochmere's rights as a developer of Andover Hills, including its rights under the Lease Agreement, were transferred pursuant to that Assignment and Kentucky common law as discussed more fully below.

21. Lochmere/Thompson has had no developer rights regarding Andover development, and (until March of 2017) neither Lochmere nor Thompson has taken any action, effort or steps to be involved in the Andover neighborhood or golf course since then.

22. Accordingly, the Developers no longer own any of the real properties benefited by the express restrictive covenant on the Andover Golf Course Property.

23. The Developers long ago transferred control of those Associations to the owners, as they were required to do under the governing documents and Kentucky law.

24. The Associations and their members are the owners of the real properties benefited by the express restrictive covenant on the Andover Golf Course Property.

25. The Associations are run by volunteer homeowners who are elected by vote of the homeowners.

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<sup>2</sup> See Association's Motion at Exhibit D, pp. 1-2.

<sup>3</sup> See Association's Motion at Exhibit D, pp. 1-2.

26. The Developers argue that the restriction (§ 4 of Lease) is not part of the “Declaration of Covenants” for the several subdivisions wherein the rights of the “Developers” automatically pass to the Associations and are therefore retained by the Developers. The Court finds this is a strained construction of the documents. The spirit and totality of the circumstances of this entire development and the construction of and maintenance of the Andover Golf and Country Club demonstrate that upon the sale of the last lot of the entire development, it was the intent of all parties that the Developers would phase out and the Associations would assume the rights and responsibilities to protect the homeowners through the several Associations from that time forward.<sup>1</sup> The Court cannot accept the Developers argument that because the “Lease Agreement” which contains the restriction at issue, i.e., Paragraph 4 and the “Declaration of Covenants” are separate documents that somehow the Developers maintain rights or responsibilities which they have not exercised or sought to exercise for twenty (20) to thirty (30) years.

27. Andover Golf and Country Club also filed a Motion to declare that Troy Thompson or any Developer no longer had a “Right of First Refusal” for the golf course. Thompson conceded this Motion.

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<sup>1</sup> See Findings of Fact No. 14 to wit: “**All**” rights of the Developers shall pass automatically to the several Associations when Class B membership ceases; i.e., when lots are sold.

## **CONCLUSIONS OF LAW**

The issue framed by this pending Motion is whether Paragraph 4 of the Lease Agreement dated July 11, 1988 gives any Developer the right or duty to enforce the restriction that the property and golf course ... "shall be continuously operated, and shall be used for no other purpose." The Lease Agreement was signed by Developers Ball Homes, Inc., Lochmere Development Corporation and Corman-McQueen Golf, Inc. This restriction in Paragraph 4 survived the closing of the golf course by that Amendment to the original Lease Agreement dated July 24, 1990.

No Developer has sought to interfere, participate in or join the operation or maintenance of the golf course for some twenty (20) years to thirty (30) years. Where were they when the golf course filed bankruptcy in 2009? Where were they when the golf course borrowed some three million dollars (\$3,000,000.00) in 2007? Troy Thompson told the Court that he is involved in this case because he was an original Developer who made promises to the original homeowners that there would be a golf course on the property and he feels he owes it to the current property owners to honor that commitment.

The current property owners are represented in the case by their several Homeowners Associations. The homeowners can speak through their Associations. Some individual homeowners have made their positions known to the Court by separate filings in the Record and some homeowners have intervened in the case through Counsel. The legal issue of whether the Lease Agreement creates an express restrictive covenant that Whitaker or some entity owner has an obligation to maintain a golf course is not adjudicated in this Opinion but is reserved for another day.

1. The Lease Agreement created a restrictive covenant that benefits the homeowners who are the entity entitled to seek enforcement, through their Associations or otherwise. The issue of enforcement, as aforesaid, is not adjudicated in this Opinion but is reserved for further proceedings.

2. As intended, the purported express restrictive covenant now benefits the homeowners by protecting their property values and providing them with recreational, aesthetic enjoyment and other benefits.

3. Therefore, the benefit of the purported express restrictive covenant created by the Agreement is appurtenant to the neighboring real properties, being the Andover neighborhood.

4. There is no genuine issue of material fact that the Developers do not own any of the real properties benefited by the express restrictive covenant created by the Agreement.

5. There is no genuine issue of material fact that the Developers do not hold the benefit of the express restrictive covenant created by the Lease Agreement in gross.

6. There is no genuine issue of material fact that the Developers do not hold the benefit of the express restrictive covenant created by the Lease Agreement as a personal right.

7. Further, the Developers do not have a legitimate interest in seeking the enforcement of the express restrictive covenant nor do they have a legal duty or obligation to do so.

8. The Developers therefore do not have standing to enforce the purported express restrictive covenant created by the Lease Agreement.

Based on the foregoing Findings of Fact and Conclusions of Law, the Court invites Counsel to tender an appropriate Judgment consistent with this Opinion of the Court.



Dated this the 22 day of September, 2017.

/s/ JAMES D. ISHMAEL, JR.  
A TRUE COPY  
ATTEST VINCENT RIGGS, CLERK  
FAYETTE CIRCUIT COURT  
BY [Signature] 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 22 day of September, 2017.

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