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September 7, 2006

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Re: T & R Land Company v. Wootten
C.A. No. 887-K
Date Submitted: June 8, 2006

Dear Counsel:

The Declaration of Restrictions (the "Declaration") for Old Mill Acres, Section II, a residential development in Kent County, Delaware (the "Development"), requires each lot owner to obtain the approval of the Development's developer, Plaintiff T & R Land Company, a Delaware general partnership ("T & R"), before erecting any "building, structure, driveway, or addition." Defendant Irene Wootten (the "Defendant"), together with her late

husband, placed a 12-foot by 24-foot shed on their lot in the Development. They did not, however, obtain approval for that act. T & R then filed this action, seeking a mandatory injunction requiring removal of the shed. This letter opinion comes after trial.

I.

The Declaration, which binds the Defendant's lot, is the starting point for the Court's work.

Paragraph 1 of the Declaration provides:

> 1. No building, structure, driveway, or addition, shall hereafter be erected, altered or placed on any lot either permanent or temporary, unless two (2) sets of plans showing all four (4) elevations together with a description of the exterior materials and their color, together with a site plan showing the proposed location of the building, structure, driveway, or addition, and also together with name of builder, shall be delivered to T & R Land Company not less than thirty (30) days prior to commencing the construction of such a building, structure, driveway, or addition for the inspection and approval of the plans, specifications, and builder by T & R Land Company who shall in all instances inspect and approve the Plans, specifications, and builders before the construction of any building, structure, driveway, or addition shall be started. T & R Land Company shall have the right to refuse the approval of plans, specifications, and builder which are not, in its sole judgment, desirable for aesthetic or other reasons, and in so passing upon such plans, specifications, and builders it may consider, to the extent or alteration, the harmony thereof with the surroundings and upon the outlook from and enjoyment of adjacent or neighboring properties.

> T&R Land Company shall approve or disapprove said plans within thirty (30) days of its receipt of same. Prior to construction, each lot owner shall prepare a grading plan in conformity with all applicable soil and erosion control laws, regulations, ordinances and standards, and file one copy of same with T & R Land Company. The lot owner shall be solely responsible for the implementation of same.

Paragraph 13 of the Declaration provides:

> 13. In the case of any violation or attempted violation of any of the covenants herein, it shall be lawful for any owner of any lot subject to these restrictive covenants to prosecute any proceeding at law or equity to prevent such violation or to recover damages or other dues for such violation. In the alternate, violation of any of the covenants herein will give T & R Land Company, in addition all other remedies, the right after reasonable notice to enter upon the land upon or as to which the violation exists, and to abate and remove at the expense of the owner thereof any erection, thing or condition that may be or exist thereon contrary to the intent and meaning of the provisions hereof and T & R Land Company shall not thereby be guilty of any manner of trespass for such entry, abatement, or removal.

By Paragraph 16 of the Declaration, "T & R Land Company reserves the right to assign any or all of its rights, duties or option hereunder to a property owner's association, or to any other person, firm or corporation."

On or about May 17, 2004, the Defendant installed on her lot a shed that she believed was appropriate for her lot in terms of style, color, and location. It was placed to the side of her dwelling and is highly visible because of the "openness of

her lot,"[1] the lot's proximity to the Development's entrance, and the lot's unusual configuration (shallow and wide). It reasonably matches the color of her dwelling.

The Defendant's shed is not the only shed in the Development, but it is approximately 75% larger than the next largest shed.[2] Of the six other sheds in the Development,[3] three were approved in writing by T & R; two were not approved; T & R's representative remembers approving the other shed, but he was unable to find typical documentation evidencing such approval. T & R was not asked to approve, and did not approve, Defendant's shed.[4]

T & R no longer owns any lots or other interest in the Development.[5] It did not assign any of its rights to enforce the Declaration, including responsibility for considering applications to erect structures, to any homeowner's association or other entity. The Development does not have a formal homeowner's association; a

[1] The Defendant's parcel is adjacent to the Development's open space and, thus, is not shielded from view by any other improvements.
[2] There is a detached garage that is considerably larger (30 feet x 32 feet) than the Defendant's shed. T & R approved placement of the garage.
[3] The Development consists of 77 lots.
[4] In her Answer and in the Pretrial Order, the Defendant asserted that installation of the shed had been duly approved by Cliff Short, who serves a president of the informal homeowner's association. She has now abandoned that argument, conceding that Mr. Short had neither actual nor apparent authority to approve placement of the shed. Def.'s Ans. Mem. at 5.
[5] The Development has been "built out" for some time.

voluntary collection of homeowners maintains the entrance, but it has not exercised any other powers commonly granted to such organizations.

II.

T & R's theory of its case is straightforward: the Declaration prohibits the erection of any structure without its prior approval; Defendant's shed is a structure; no approval was given; the shed, therefore, must be removed.

The Defendant, in response, has raised several contentions:[6] (1) the Declaration does not apply to sheds; (2) her shed is "aesthetically pleasing" and in "harmony" with the surroundings; (3) that other sheds, placed without T & R's approval, remain demonstrates that the pertinent provisions of the Declaration have been waived; and (4) because T & R no longer owns any lot or other property in the Development, it lacks standing to enforce the Declaration.[7]

III.

> The term "standing" refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance. Standing is a threshold question that must be answered by a court

[6] The Defendant has not argued that the standards governing T & R's discretion in reviewing plans is so vague as to make the restrictive covenant unenforceable.

[7] This argument was prompted by the Court's questions at trial as to whether T & R's disposition of all of its lots (and the absence of any other ongoing development work in the area) left it without an enforceable interest.

> affirmatively to ensure that the litigation before the tribunal is a "case or controversy" that is appropriate for the exercise of the court's judicial powers.[8]

T & R, as the plaintiff, has the burden of establishing standing and must satisfy a two-prong test: (1) that it sustained an "injury-in-fact" and (2) that the interests that it advances are within the "zone of interests to be protected."[9] An "injury-in-fact" is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[10] The question, presented here, is whether T & R has demonstrated an "injury-in-fact" resulting from the Defendant's placement of the shed.

T & R argues that it has standing for three reasons: (1) the Declaration authorizes it to pursue enforcement of the requirements of the Declaration; (2) the prior approval requirement, a review function assigned to T & R, necessarily allows T & R to enforce the requirement; and (3) T & R has a "continuing interest in this development and its aesthetic appearance."[11] Each of these grounds fails.

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[8] *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003) (citation omitted).
[9] *Id*.
[10] *Id*., quoting *Society Hill Towers Ass'n v. Rendell*, 210 F.3d 168, 175 (3d Cir. 2000).
[11] Pl.'s Reply Mem. at 2.

First, T & R is granted the authority to enforce the Declaration by its terms. Homeowners may also enforce the Declaration, but their rights do not necessarily deprive T & R of the ability to enforce the restriction. That conclusion, however, does not resolve the issue. Merely having the paper authority to enforce a restrictive covenant does not equate to suffering an "injury-in-fact" if the restriction is violated. A plaintiff in T & R's position must show why the failure to comply with the restrictive covenant affects it. T & R has not done so. Second, even though the prior approval function has not been reassigned from T & R, T & R has no demonstrable interest in exercising that power or, more specifically, securing compliance with it because it has not shown that construction in the Development without its prior approval in any way affects it. Third, generalized references to a "continuing interest" in the Development and to "aesthetic appearance," without more, do not establish standing. Aesthetic considerations can, of course, establish standing, but only for those whose interests (such as, for example, homeowners in the Development) are concretely and particularly related to the challenged conduct.[12] T & R has not shown that the appearance of the

[12] *Dover Historical Soc'y*, 838 A.2d at 1114.

Development matters—any longer—to it.[13] In sum, the Defendant's placement of her shed caused no cognizable "injury-in-fact" to T & R.[14] T & R thus lacks standing to pursue this action which must, therefore, be dismissed.[15]

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[13] If, for example, T & R were developing a nearby subdivision—something which it has not alleged—then the appearance of the Development might provide it with a sufficient interest in maintaining the Development's "aesthetics." T & R may—commendably—continue to have concerns that the Development which it established should evolve in an appropriate fashion, but those subjective concerns are not tangible enough to demonstrate an "injury-in-fact" and, therefore, standing.

[14] T & R also argues that anyone "in the chain of assignments" can enforce the Declaration. This argument, however, fails to distinguish between contractual authorization, which establishes rights between and among private parties, and whether a court will accord standing to that party. Once a party in the "chain of assignments" no longer has an interest in the subdivision at issue, it becomes nothing more than a "intermeddler," *see Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991), because it has no cognizable interest in any dispute over whether the restrictive covenant has been violated and will not be affected by the outcome. T & R relies upon *Brandywine Hills Cmty. Ass'n v. T. Bruce Wilmoth Constr. Co.*, 1995 WL 767336 (Del. Ch. Dec. 21, 1995), which quotes *Jackson v. Richards*, 27 A.2d 857, 859 (Del. Ch. 1942) for the following proposition: "Where, under a general plan of development, the owner of property divides it into building lots and places upon them uniform restrictions, any subsequent owner of any of these lots may enforce the restrictions against any other grantee or present owner." T & R reads the language regarding "any subsequent owner" for the proposition that anyone who has ever owned (and, presumably, even those who once owned but have not owned for a long time) a parcel in a subdivision has the right to seek judicial enforcement of restrictive covenants intended to benefit the subdivision. The operative word, however, is "owner"; in order to bring an action within the ambit of the quoted language, one must be an "owner." This analysis, of course, does not control the question of whether a representative association, such as a homeowner's association, may bring an action. T & R does not assert that it is acting in any representative or fiduciary capacity.

[15] This result is consistent with guidance provided by other authorities. *See, e.g., McLeod v. Baptiste*, 433 S.E.2d 834 (S. Car. 1993) ("grantor lacks standing to enforce a covenant against a remote grantee when the grantor no longer owns real property which would benefit from the enforcement of that restrictive covenant."); 20 Am. Jur. 2d Covenants, § 244 ("where a person no longer has any land in the vicinity which might be affected by the disregard of a covenant, he or she cannot enforce the restriction. Accordingly, where the original owners and subdividers

IV.

For the foregoing reasons, the above-entitled action must be dismissed because of T & R's failure to demonstrate standing.[16]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

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part with title to all lots in the subdivision, they lose the right to enforce the restrictions.") (citations omitted).

[16] The outcome here is unfortunate. T & R acted in good faith; the Defendant, at least as a preliminary matter, violated the Declaration by placing the shed without seeking prior approval. The claims and defenses of the parties should be resolved on their merits. The other residents of the Development likely have relied upon the Declaration and T & R's good offices to assure the appropriate evolution of the community. Of course, if one of the nearby homeowners had joined with T & R in this effort, the result likely would have been different. There are, however, times when the benefit of a set of restrictive covenants may be lost because of drafting or procedural shortcomings. *See, e.g.*, *Dawejko v. Grunewald*, 1988 WL 140225 (Del. Ch. Dec. 27, 1988). In addition, it should be noted that the Court has not considered whether the architectural review procedures of the Declaration were personal to T & R (arguably only to protect its interests during the development phase) and, thus, either cannot be assigned or lapsed once T & R no longer held an interest in the Development.