CAUSE NO. DC-11-10333-J

JOHN AND CATHY WALKINSHAW, ET AL.	§	IN THE DISTRICT COURT
Plaintiffs,	§	
v.	§	191ST JUDICIAL DISTRICT
DOUBLE DIAMOND-DELAWARE, INC., ET AL.	§	
Defendants.	§	DALLAS COUNTY, TEXAS

PLAINTIFFS' MOTION FOR PARTIAL AND NO-EVIDENCE SUMMARY JUDGMENT

Plaintiffs file this Motion for Partial Summary Judgment and No-Evidence Summary Judgment requesting the Court enter summary judgment on portions of Plaintiffs' declaratory judgment and injunctive relief claims, and in support thereof respectfully show the Court the following:

I.

SUMMARY OF MOTION

The Double Diamond Defendants ("Double Diamond") are in the business of generating land sales and making profits. This case is about Double Diamond's efforts to finance the cost of doing business by illegally using the White Bluff non-profit Property Owners' Association ("WBPOA") as its piggy bank, using POA assessments to pay for property that looks pretty and drives lot sales, but which is not owned or controlled by the POA, and from which the POA derives zero financial benefit. Plaintiffs are property owners at Double Diamond's White Bluff development in Whitney, Texas, who, as a condition of their property ownership, are required to become members of the WBPOA. They are required to pay mandatory WBPOA fees at the risk of losing their lots in foreclosure. All of the Defendants, including White Bluff's developer

Mike Ward and his cronies, have used and abused the WBPOA assessment and foreclosure power to force Plaintiffs to subsidize the developer's for-profit operations without regard to whether the Plaintiffs want to or are able to pay. Plaintiffs and other property owners pay *millions of dollars* each year to the WBPOA for the upkeep of property they do not own or control. Through this lawsuit, Plaintiffs seek a judicial declaration that the portion of the mandatory assessments attributable to (i) the "food and beverage" program; and (ii) golf course maintenance are illegal and improper. Plaintiffs also seek injunctive relief to prohibit such assessments in the future. Plaintiffs are entitled to such relief now, in summary judgment.

Defendants oppose the relief sought because it will undercut the millions of dollars in subsidies that have paid for the maintenance and upkeep of Double Diamond's assets. Rather than defending this assessment scheme on the merits, Defendants obscure and confuse the issues by claiming there is no "real" controversy; or this is an issue of contract between Double Diamond and the Plaintiffs or the WBPOA; or that the Court should decline to interfere with the workings of a POA. The legality of these assessments has been the subject of litigation for some time. There is a live and actual controversy which should now be fully and finally decided.

The issue before the Court at this juncture is simple and straightforward: the WBPOA cannot assess and collect fees that are not used for the care and maintenance of association property; the WBPOA cannot assess and collect fees that inure to the benefit of private persons by going directly to support Double Diamond's assets and operations – here, the golf courses, the restaurants, and other Developer-owned, run, and controlled "amenities."

The WBPOA cannot assess and collect these fees based on (i) restrictive covenant law; (ii) Texas law governing property owners' associations and non-profits; and (iii) the WBPOA's own governing documents. In fact, if the WBPOA continues to assess and collect these fees for

Double Diamond's benefit, Double Diamond ruins the WBPOA's non-profit status altogether, and the WBPOA then loses all power to collect any assessments at all. Moreover, the golf course maintenance and food and beverage obligations are not provided for in the governing documents of the development. Defendants have no evidence that these obligations are uniformly applied or that they specifically bind property owners and their assigns. These assessments are improper restrictions on the Plaintiffs' right to enjoy their property.

In short, these disputed assessments are improper and illegal, as are the WBPOA's actions. The assessments should be so declared and enjoined.

II.

SUMMARY JUDGMENT EVIDENCE

Attached to this Motion, and fully incorporated herein for all purposes, is the following summary judgment evidence:

Exhibit A - Relevant excerpts of the Reporter's Record for Defendants' interlocutory appeal of the Temporary Injunction entered by the Court, referenced as "(*volume* RR *page*)."

Exhibit B - Relevant excerpts of the Clerk's Record for Defendants' interlocutory appeal of the Temporary Injunction entered by the Court, referenced as "(*volume* CR *page*)."

Exhibit C - Relevant excerpts of the Supplemental Clerk's Record for Defendants' interlocutory appeal of the Temporary Injunction entered by the Court "(*volume* SCR *page*)."

Exhibit D - The Declarations, Covenants and Restrictions of White Bluff obtained from Hill County records.

Exhibit E - Affidavit of Elizabeth Lemoine, including documents produced by Defendants:

1. January 2004 letter announcing food and beverage program
2. Plaintiffs' Original Petition in *Double Diamond v. Saturn*

3. 2010 Amended Bylaws of the WBPOA
4. 2010 Annual Meeting Minutes of the WBPOA
5. White Bluff real estate listings from online searches
6. Final Judgment of trial court in *Double Diamond v. Saturn*
7. Exhibit to deposition of Mike Ward
8. Secretary of State documents regarding WBPOA
9. 1997 Golf Course Maintenance Agreement

Exhibit F - Records affidavit of Huselton Morgan & Maultsby, PC

1. Memo regarding White Bluff Club Corp.

III.

BACKGROUND FACTS

A. Double Diamond Develops White Bluff and Creates the Mandatory WBPOA.

The Court, through both the Temporary Injunction hearing in this matter and prior briefing in this case, is well-acquainted with the facts. Plaintiffs are property owners at White Bluff, a sub-development at Lake Whitney, Texas, which was developed by Defendant Double Diamond, Inc in the early 1990s.[1] Double Diamond is owned by Defendant Mike Ward, who served for 20 years as the President of the WBPOA and has always served as Chairman.[2] (2 RR 68; 3 RR 11). The other individual Defendants in this case are current or former WBPOA board members for the relevant time period. (*e.g.,* 3 RR 198; *see also* Ex. E-4).

When White Bluff began, governing documents, including Declarations, Articles of Incorporation and By-Laws, were prepared and filed. (Ex. D at 489-494; Ex. E-8). Those governing documents create the WBPOA, a Texas non-profit corporation. The documents also create an obligation for all property owners to join the WBPOA and pay annual *maintenance* fees to the WBPOA. (*E.g.,* Ex. D at 491, 493). While this may be common to planned

[1] *See, e.g., Double Diamond, Inc. v. Van Tyne*, 109 S.W.3d 848, 851 (Tex. App. – Dallas 2003, no pet.) (describing the White Bluff resort and Double Diamond's involvement).
[2] Ward is a 93% owner. Defendants Curran and Gracy are also owners through their interest in the Double Diamond Employee Stock Option Plan (ESOP).

communities, where the WBPOA differs is in how much it assesses, and on what it spends that assessment money.

B. The WBPOA Board, Controlled by Ward, Uses its Mandatory Assessment Power to Bill and Collect Money Spent to Subsidize non-WBPOA Assets.

Each year, the WBPOA board votes on and passes budgets for the upkeep of the resort. The budgets are prepared by Double Diamond, and expenditures in the budgets are funded through assessment revenue.[3] (3 RR 20, 24, 35-36, 47; 6 RR 78). Budgeted expenditures include the maintenance of assets the WBPOA does not own or control, such as the two 18-hole golf courses. (2 RR 32, 40; 6 RR 78, 75). These assets are owned and run by Double Diamond, and Double Diamond receives 100% of the revenue generated by them. (2 RR 32, 40, 42). Not only does the WBPOA pay the $1.5 million + maintenance fees each year for these non-owned assets, but also it has paid for capital improvements on these assets, such as replacement of greens. (6 RR 84). The WBPOA does not own one blade of grass on those greens. These Double Diamond-owned amenities are open to the public, and revenue derived from public use and golf tournaments does not go to the WBPOA, nor is it used to contribute to upkeep of the courses. (2 RR 40; 4 RR 22, 23). Yet, if WBPOA members do not pay these assessments, they risk losing their land via foreclosure. (3 RR 15, 83; *see also* 1 CR 55-79).

In 2004, the WBPOA board passed another money-making scheme for Double Diamond and Ward – the "food and beverage" program. (3 RR 21-22; Ex. E-1). This program is another mandatory assessment billed and collected by the WBPOA, but the money is handed over directly to Double Diamond and never accounted for on the WBPOA's books and records. (3 RR 22, 57, 89). Double Diamond funnels these fees through the WBPOA so they can force property

[3] While not subject of this Motion, the WBPOA Board has always rubber stamped Double Diamond's budgets and engaged Double Diamond companies and Double Diamond employees to execute maintenance and provide other services. The Board members have breached their fiduciary duties to Plaintiffs and the WBPOA. Plaintiffs reserve their right to pursue this claim in subsequent pleadings or at trial.

owners to pay, because those who do not will lose their property through foreclosure. *See, e.g.,* Tex. Prop. Code §209.0092; *see also* 3 RR 15, 83; 1 CR 55-79. The stated purpose of the program is to "support the hospitality operations" at White Bluff. (Ex. E-1). In reality, the "program" hands over to Double Diamond close to $1 million per year. (6 RR 83). This permits "hospitality" to stay open at a markedly decreased cost to Double Diamond, who touts these "amenities" in support of its true purpose – to dupe more people into buying land at White Bluff. (Ex. F-1).

The WBPOA and Double Diamond have attempted to justify the program by arguing that if hospitality is not supported, it risks being shut down (Ex. E-1); and that in exchange for the fee, property owners receive "credits" for their cheeseburgers or spa services. (3 RR 21-22). This is small consolation; it certainly does not legitimize the program. The "program" was unilaterally adopted in 2004 without any property owner vote or input. (Ex. E-1, 3 RR 21, 55). The "program" is not disclosed in governing documents or sales agreements. (*E.g.,* Ex. D, 6 RR 166-177). Property owners acquire this land without knowledge of the obligation to support Double Diamond's operations. (*Id.*). The "program" is not voluntary, making the "credits" of no value. (*E.g.,* 3 RR 70). The program is simply improper.

Because both the food and beverage program and the golf course maintenance fees are illegal, so too are any contracts between the WBPOA and Double Diamond that would allegedly place a continuing obligation on the WBPOA to levy and collect money to spend on these Double Diamond-owned assets.

C. Plaintiffs Are Unable to Obtain Extra-Judicial Relief.

When Plaintiffs have tried to pursue relief without Court intervention -- such as voting for different Board directors or selling their properties -- they have been stymied at every turn.

At least one has been sued for speaking out. (Ex. E-2). In 2010, fearing that a property owner may have enough proxy votes to unseat the current board, the WBPOA board of directors unilaterally amended the by-laws to require a 2/3 as opposed to simple majority vote to remove directors. (Ex. E-3, E-4).

Selling property is also not a realistic option. There is simply no secondary market for White Bluff lots. A simple web search shows that lots are for sale for $2,000-$3,000; many Plaintiffs paid $10,000 and more for theirs. (*Compare* Ex. E-5 *with* 6 RR 170, 174). The *only* way these Plaintiffs can obtain effective relief from this illegal scheme is through the Court.

IV.

ARGUMENT & AUTHORITIES

A. Summary Judgment for Declaratory Judgment and Injunctive Relief Actions

Plaintiffs move for both traditional and no-evidence summary judgment on their claims for declaratory and injunctive relief.

When moving for "traditional" summary judgment under Rule 166a(c), the movant must conclusively prove all of the elements of its cause of action or defense as a matter of law. Tex. R. Civ. P. 166a(c); *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). Plaintiffs move for traditional summary judgment on their claims for declaratory and injunctive relief. Specifically, the WBPOA assessments for golf course maintenance and the food and beverage program are illegal because they are an improper restriction on property ownership and violate the WBPOA's non-profit status.

A non-movant under Rule 166a(i) must produce summary judgment evidence raising a genuine issue of material fact, which exists if more than a scintilla of evidence establishing the existence of the challenged element is produced. Tex. R. Civ. P. 166a(i); *Ford Motor Co. v.*

Ridgway, 135 S.W.3d 598, 600 (Tex. 2004). Plaintiffs alternatively move for no-evidence summary judgment on their claim for declaratory relief. Specifically, Defendants, as the creators and enforcers of the restrictive covenants at White Bluff, have no evidence that these covenants legally and properly permit assessments that are used for the maintenance of non-POA property, including the golf course maintenance and food and beverage fees.

A declaratory judgment is appropriate if a justiciable controversy exists as to the rights and status of the parties, and the controversy will be resolved by the declaration sought. *WesternGeco, L.L.C. v. Input/Output, Inc.*, 246 S.W.3d 776, 781 (Tex. App.--Hous. [14th Dist.] 2008, no pet.). For a justiciable controversy to exist, there must be a real and substantial controversy involving a genuine conflict of tangible interests and not merely a theoretical dispute. *Id.*

Injunctive relief is appropriate upon a showing of (1) the existence of a wrongful act, (2) the existence of imminent harm, (3), the existence of irreparable injury, and (4) the absence of an adequate remedy at law. *Indian Beach Property Owners Ass'n v. Linden*, 222 S.W.3d 682, 690 (Tex. App. – Houston [1st Dist.] 2007, no pet.). Injunctive relief is an equitable remedy; therefore, the trial court weighs the respective conveniences and hardships of the parties and balances the equities. *Id.*

Here, Plaintiffs dispute the billing and collection of WBPOA assessments that are spent on golf course maintenance or the "food and beverage" program. These assessments are improper as a matter of law. Furthermore, Defendants have no evidence that these obligations are properly set forth in the covenants, restrictions, or other applicable, publicly available governing documents. This is a real and substantial controversy, given that over 1,000 property owners at White Bluff challenge the propriety of these assessments through this lawsuit, in addition to over

100 more in another suit. Indeed, the food and beverage program has previously been subject of another independent lawsuit, *Double Diamond, Inc. v. Saturn*, in which the jury found the assessments improper and rendered a plaintiff's verdict for the property owner. (SCR 145-148; Ex. E-6).[4]

The challenged assessments are improper because they violate restrictive covenant common law in two ways: (i) they are not proper covenants that run with the land; and (ii) they are not authorized by the WBPOA governing documents. The assessments are also improper because they jeopardize the WBPOA's non-profit status and illegally cause the WBPOA to not function as a proper non-profit, which it is required to be by both its own governing documents and Texas law. Therefore, Plaintiffs are entitled to declaratory relief.

Further, Plaintiffs are entitled to a permanent injunction to stop future billing of these improper fees, because Defendants have no legal basis upon which to continue to assess them.

B. Plaintiffs are Entitled to a Summary Judgment Declaratory Judgment that the Disputed Assessments are Illegal or Improper.

1. The Disputed Assessments are Improper Restrictive Covenants.

a. Restrictive Covenants that Run With the Land Must Touch and Concern the Land and Will not Be Upheld If They are not Uniformly Applied.

A property owner like Double Diamond may subdivide property into lots and create a subdivision in which all property owners agree to the same or similar restrictive covenants designated to further the owner's general plan or scheme of development. *Baywood Estates Property Owners Ass'n, Inc. v . Caolo*, No. 12-12-00063, 2012 WL 4479124 (Tex App. – Tyler Sept. 28, 2012, no pet. h.). A restrictive covenant is a negative covenant that limits permissible

[4] This case resulted in a judgment in favor of Saturn that the food and beverage program was void *ab initio*. However, that judgment was reversed on appeal due to a jury charge error, and therefore the issue was not ultimately resolved. *Double Diamond, Inc. v. Saturn*, 339 S.W. 3d 337 (Tex. App. – Dallas 2011, pet. denied).

uses of land, usually in a deed or lease. 5A Tex. Prac., Land Titles and Title Examination Appendix 3B (3d ed.), citing Black's Law Dictionary, 8th ed. (2004). While covenants restricting the free use of land are not favored, they will still be enforced when confined to a lawful purpose and clearly worded. *City of Pasadena v. Gennedy*, 125 S.W.3d 687, 693 (Tex. App. – Houston [1st Dist.] 2003, pet. denied) (citing *Wilmoth v. Wilcox*, 734 S.W.3d 656, 657 (Tex. 1987)). Any doubts about the meaning of a covenant should be resolved against the party seeking to enforce it and in favor of the unrestricted use of land.[5] *Wilmoth,* 734 S.W.2d at 657.

Texas has long recognized the use of restrictive covenants that run with the land in the development of real estate subdivisions. *Raman Chandler Properties, L.C. v. Caldwell's Creek Homeowners Ass'n, Inc.*, 178 S.W.3d 384, 391 (Tex. App. – Ft. Worth 2005, pet. denied); *Baywood Estates*, 2012 WL 4479124, at *4 (citing *Hooper v. Lottman*, 171 S.W. 270 (Tex. Civ. App. – El Paso 1914, no writ)). A covenant "runs with the land" when it touches and concerns the land; relates to a thing in existence or specifically binds the parties and their assigns; is intended by the original parties to run with the land; and when the successor to the burden has notice.[6] *Id.* A neighborhood scheme of restrictions, to be effective and enforceable, must apply to all lots of like character within the subdivision. *Id.* at *5. If the restrictions upon all lots similarly located are not alike, or some lots are not subject to the restrictions while others are, then a burden would be carried by some owners without a corresponding benefit. *Id.*

[5] It is on this point that Plaintiffs move alternatively for a no-evidence summary judgment; that is, Defendants have no evidence that the golf course maintenance fees and food and beverage fees are permitted by the restrictive covenants of White Bluff.

[6] If a covenant does not "run with the land," it is considered to be more of a personal promise, which would not bind assigns. This is not how Defendants treat these assessments; they are billed to *all* property owners, without regard for when and from whom the property was purchased, and Double Diamond even represented to property owners that these obligations would run with the land. (3 RR 66-67).

b. White Bluff's Declarations and By-Laws Include Some Proper Restrictive Covenants, Like WBPOA Membership.

Here, through the declarations and by-laws, Double Diamond has created certain restrictive covenants governing White Bluff. Some of these restrictions – such as mandatory membership in the WBPOA – are typical in planned developments. *See, e.g., Inwood North Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987). Mandatory membership in the WBPOA would be considered a proper restrictive covenant running with the land because: it touches and concerns the land, meaning it equally benefits and burdens the property of each landowner; it relates to a thing in existence or specifically binds the parties and their assigns; it is intended by the original parties to run with the land; and, through the publicly filed Declarations, the successor to the burden has notice of the membership obligation.[7] *Musgrave v. Brookhaven Lake Property Owners Ass'n*, 990 S.W.2d 386, (Tex. App. – Texarkana 1999, pet. denied).

c. The Golf Course Maintenance and Food and Beverage Program Fees are Improper Restrictive Covenants Because they Are Not Allowed by the Governing Documents; There is No Evidence Assigns Have Notice; and They are Not Uniformly Applied.[8]

What Plaintiffs challenge is the propriety of extending the WBPOA membership and assessment covenants to cover the golf course maintenance and food and beverage fees. These assessments are not provided for in the Declarations; in fact, to the contrary, the Declarations limit the obligations of the WBPOA to the care and maintenance of "association property." (Ex. D at 491). Further, these obligations do not constitute covenants that run with the land because they are not uniformly applied and do not "touch and concern" the land.

[7] The mandatory membership requirement is in the Declarations and therefore allows subsequent purchasers to take the land with notice of the WBPOA membership requirement. (Ex. D at 491).

[8] A determination of this issue is particularly timely in light of a recent Attorney General inquiry made by Senator Hegar, who inquired about whether covenants run with the land when landowners are required to pay membership fees to a recreational club when there is no associated ownership interest in the club. In response, the Attorney General analyzed restrictive covenant common law and ultimately concluded, "the question is one for the court to determine in the exercise of its best judgment based upon the facts of each case."

Article II of the WBPOA Declaration sets forth the Purpose and Powers of the WBPOA:

Section 1. To provide for the acquisition, construction, management, maintenance and care of the ***Association Property***.

Section 2. To provide for and assist in the maintenance, preservation, and architectural control of the ***Property***[9] and to promote the health, safety and welfare of the Owners and residents of the ***Property***.

Section 3. To operate and or maintain central water and sewer systems for the use and benefit of the Owners and residents of the Property.

Section 4. To borrow money (if necessary) and to acquire (by gift, purchase or otherwise), own, hold, improve, build upon, operate, maintain, convey, sell, lease, transfer, dedicate for public use or otherwise dispose of real or personal property in connection with the affairs of the Association, subject to the terms and provisions of, and limitations and prohibitions within, the applicable Texas non-profit corporation laws.

Section 5. To cause the ***Common Properties***[10] to be maintained in accordance with any applicable terms and conditions of the Declaration.[11]

Section 6. To fix, levy, collect and enforce payment by any lawful means, ***all charges, fees or assessments provided for by the terms of the Covenants***[12] and to pay all expenses in connection therewith and all office and other expenses incident to the conduct of the business of the Association, including any licenses, taxes or governmental charges which may be levied or imposed against the ***Common Area or any other property owned by the Association.***

Section 8. [Deleted.][13]

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[9] "Property" is defined as "the land and premises located in Hill County, State of Texas, known as the 'White Bluff subdivision,' as described hereinabove and any additions and contiguous subdivisions thereto as may hereafter be brought within the jurisdiction of the Association by its Board of Directors." It is undisputed that the golf courses and hospitality amenities supported by the food and beverage program are not within the "jurisdiction of the Association." The Association does not own these assets; it does not manage them; it has no control over them or their use; and it receives none of the revenue they generate. (2 RR 32-33; 3 RR 91; 6 RR 83-84; Ex. E-9, E-7).

[10] "Common Properties" is not a defined term. Words and phrases used in a restrictive covenant will be accorded their ordinary and commonly accepted meaning. *Curb v. Benson*, 564 S.W.2d 432 (Tex. Civ. App. - Austin 1978, writ ref'd n.r.e.). The everyday meaning of "common property" is "property held by two or more persons in common with each other." Black's Law Dictionary 6th Ed. The golf courses are not held by two or more persons in common, nor are the other amenities that receive the F&B money. Therefore, the golf courses and Double Diamond owned amenities are not "common properties." Nor are they "common areas" under the definition of that term within the Declaration.

[11] June 15, 1999 Corrected Third Amendment to Declaration. (Ex. D at 480).

[12] The Covenants permit the WBPOA to "collect maintenance fees, late charges, interest (at the highest permitted lawful rate) and all other costs and expenses permitted by law;" (*see* Covenants and Restrictions for White Bluff Twenty Section 1(2)(iv)); collect fines for violations of the covenants (Section III(2)); and late fees (section III(4)).

[13] December 12, 1996 Second Amendment to Declaration. (Ex. D at 487).

> Section 9. Insofar as permitted by law, to do any other thing that, in the opinion of the Board of Directors of the Association, will promote the common benefit and enjoyment of the Owners and residents of the Property; provided, however, that ***no part of the net earnings of the Association shall inure to the benefit of or be distributable to any Member, director or officer of the Association, or any private individual*** (except that reasonable compensation may be paid for service rendered to or for the Association related or pertaining to one or more of its purposes). . .

Article III, Section 2 contains specific limitations with respect to the WBPOA's ability to assess annual maintenance fees:

> Annual maintenance fees, payable to the Association, shall be based on the number of lots owned by an Owner as follows:
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> | | | |
> |---|---|---|
> | (a) | One lot | - $120.00 |
> | (b) | Two lots | - $180.00 |
> | (c) | Three lots | - $220.00 |
> | (d) | Four lots | -$280.00 |
> | (e) | Five lots | -$300.00 |
> | (f) | Six or more lots | -$300.00 plus $1.00 for additional lot |
>
> The Association is hereby given the right to increase or decrease the maintenance fees described in sub-paragraphs (a) through (e) above and/or to allocate to homeowners and non-homeowners any increase (or decrease) in such maintenance fees in a fair and equitable manner; provided, that such increase or decrease (1) is approved by both the Board of Directors of the Association and the Declarant, and (2) is deemed reasonably necessary by the Board of Directors of the Association and the Declarant **to adequately maintain the Property and/or to perform the Association's functions**. In the event the Board of Directors of the Association and the Declarant can not reach an agreement on any proposed increase in maintenance fees, the Board of Directors of the Association is authorized to increase the maintenance fees to conform to the then current Consumer Price Index as established the U.S. Department of Labor. Neither the Association nor the Board of Directors shall have the right or power to increase or decrease the fees described subparagraph (f) above.[14]

None of these provisions require the WBPOA to maintain the golf courses, nor do these provisions give the WBPOA the power to levy the food and beverage assessments. Because the

[14] Declaration and Fifth Amendment to Declaration (Ex. D at 484, 493).

Declarations do not give this authority or obligation to the WBPOA, the property owners cannot be burdened with this responsibility. Nowhere in the Declarations – or any other document filed as a matter of record – does the golf course or food and beverage obligation appear. Further, Defendants have no evidence that either the golf course maintenance fee or the food and beverage fee are covenants that run with the land because they have no evidence that (a) the covenants are recorded such that subsequent purchasers take with notice; (b) the covenants are uniformly applied; or (c) the covenants touch and concern the land.[15] Plaintiffs are therefore entitled to a declaratory judgment that these assessments are improper restrictive covenants as a matter of law.

American Golf Corp v. Colburn, 65 S.W.3d 277 (Tex. App—Houston [14th Dist.], 2001, no pet) is instructive. In this case, the Fourteenth Court of Appeals struck down a "club dues" assessment similar to White Bluff's "food and beverage" program. American Golf operated the Lake Houston Golf and Country Club at the Walden on Lake Houston development. By virtue of property ownership, every property owner was an athletic and social member of the club, and the club was permitted to impose and collect dues. When American Golf imposed a "minimum dining fee" on members, the Colburns sought a declaratory judgment. In construing the covenant, the appellate court agreed with trial court that "[t]he only charges that may be levied under the Declaration in this case are 'dues.' The fees charged in this case are not 'dues' within the meaning of paragraph 4(a). Instead, the charges are for food and drink." *Id.* at 280. Under the analysis in *Colburn* the golf course assessments and food and beverage assessments are improper because they are not maintenance fees authorized by the WBPOA Declaration. They

[15] In fact, the golf course maintenance obligation was imposed by Double Diamond as part of a self-dealing contract with the WBPOA. It was not intended to be a restrictive covenant on property ownership. (Ex. E-9).

do not go to maintain Association property. Therefore they cannot be levied against Plaintiffs as a mandatory assessment.

In addition to not being properly disclosed so that subsequent purchasers have notice of the obligation, the food and beverage program is separately improper because it is not a covenant that is uniformly applicable. As of 2011, the WBPOA made certain property owners exempt from it. (3 RR 22). Once the burden is not uniformly applied, it does not "touch and concern the land" and is not a proper restrictive covenant. *Inwood North Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987) (citing 5 R. Powell, The Law of Real Property §673[2] at 60-46 (15th ed. 1986) (a covenant to pay for the maintenance of subdivision facilities both benefits and burdens the property of *each individual landowner*, thus, it runs with the land)).

d. Defendants Cannot Rely on the Bylaws to Justify these Improper Assessments

Not surprisingly, after a lawsuit was brought against Ward and his entities in federal court in 2010, the Ward-controlled WBPOA Board changed the Bylaws to add a new purpose: "to fund the maintenance of the golf courses." (Ex. E-3). This Bylaw amendment ostensibly was pursued to cure the fact that this obligation is absent from the WBPOA's governing documents. But the change to the Bylaws is unavailing and has zero effect – all it did was create a conflict between the Declaration and the Bylaws. Pursuant to the Bylaws, when a conflict between those governing documents exists, the Declaration controls. (6 RR 100).

2. The WBPOA is Required by its Own Governing Documents and Texas Law to Function as a Non-Profit but Does Not Because the Disputed Assessments Violate the Prohibition Against Private Inurement.

Plaintiffs are also entitled to declaratory judgment that the food and beverage and golf course maintenance assessments are improper because those assessments cause the WBPOA *not*

to function as a non-profit corporation, as it is required to be by its own governing documents and Texas law.

The WBPOA is, and must be, a non-profit. (*See, e.g.,* Ex. D at 9, 27, 36, 45, 56, 65, 76, 83, 90, 97, 106, 113, 122, 129, 138, 145, 154, 161, 168, 179, 190, 197, 205, 218, 224, 233, 245, 251, 257, 265, 271, 277, 285, 293, 299, 308, 318, 330, 340, 350, 358, 372, 380, 396, 404, 424, 432, 471, 489; Ex. E-3). All of the governing documents refer to the WBPOA as a Texas non-profit corporation (*Id.*), and the WBPOA is registered with the Texas Secretary of State as a non-profit corporation. (Ex. E-8). By definition, a non-profit corporation is a corporation where ***no part of the income*** is "distributable to a member, director, or officer of the corporation." TEX. BUS. ORG. CODE § 22.001(5). By law, dividends are prohibited and "***no part of the income of a [non-profit] corporation may be distributed to***, the corporation's members, directors, or officers." TEX. BUS. ORG. CODE § 22.053. By the WBPOA Declaration, "no part of the net earnings of the WBPOA may inure to the benefit of or be distributable to any Member, director or officer of the Association, or any private individual. . ." (Ex. D at 491). Further, an examination of the WBPOA's Articles of Incorporation specifically state that the WBPOA "does not contemplate pecuniary gain or profit to the Members." (Ex. E-8). The Articles further state that a stated purpose of the WBPOA is to maintain the "common properties," but the definition of "common properties" *does not include* the golf courses. (*Id.*). The WBPOA was clearly intended to be a non-profit, as it is required to be under the law. TEX. PROP. CODE. § 204.004. It was also never intended to pay for Double Diamond's assets, as set forth in the WBPOA's Articles of Incorporation and Declaration.

The WBPOA is also obligated to avoid private inurement as a matter of federal and state tax law. The WBPOA is organized as a property owners' association under Section 528 of the

Internal Revenue Code. (6 RR 86). Under the Internal Revenue Code, a property owners' association qualifies as a tax-exempt nonprofit association only if it meets the following requirements, among others:

> (1) it engages in residential real estate management;
>
> . . .
>
> (2) 90 percent or more of the expenditures of the organization is made for the purpose of acquiring, constructing, managing, maintaining, and caring for the property nominally held by the organization;
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> . . .
>
> (3) *net earnings of the organization do not inure to the benefit of any member of the organization or individual*, other than by acquiring, constructing, or providing management, maintenance, and care of the *organization's property* or by a rebate of excess membership dues, fees, or assessments. . . .

26 U.S.C. § 528 (c)(1)(D) (emphasis added).

The language of the Texas Tax Code mirrors Section 528 of the federal tax code. TEX. TAX CODE §23.18(d). A violation of the private inurement prohibition destroys the entity's nonprofit status: "An organization is not a homeowners association if any part of its net earnings inures (other than as a direct result of its engaging in one or more exempt functions) to the benefit of any private person." 26 C.F.R. §1-528-7.[16]

Here, it is undisputed that the food and beverage and golf course maintenance assessments are distributed to and inure to the benefit of Mike Ward and his Double Diamond companies. (2 RR 28, 32; 3 RR 91-93; 6 RR 83-84, Ex. E-7). Specifically, the money collected for those purposes from WBPOA members is directed to Double Diamond through its subsidiary, White Bluff Club Corp. (*Id.*). The purpose of this money is to subsidize hospitality

[16] The regulation goes on to state, "in determining whether an organization is in violation of this section, the principles used in making similar determinations under Section 501(c) will be applied."

and to pay for the millions of dollars in golf course maintenance Double Diamond would otherwise have to pay out of its own pocket. (*Id.; see also* Ex. E-1, E-4).

The assessments also violate the 90% rule. Under IRC §528 and the Texas Tax Code, in order to qualify as a nonprofit homeowners' association, as the WBPOA must, ninety (90) percent or more of its expenditures for the taxable year must be for the acquisition, construction, management, maintenance, and care of ***association property***. 26 U.S.C. § 528(c)(1)(C); TEX. TAX CODE § 23.19(d)(4). The regulations are clear: to qualify as a homeowners' association, "90% or more of [the association's] expenditures are qualifying expenditures. . . ." A "qualified expenditure" is defined as "expenditures by an organization for the acquisition, construction, management, maintenance, and care of the organization's association property." 26 C.F.R. § 1.528–6. "Association property" is defined as "real and personal property owned by the organization or owned as tenants in common by the members of the organization." 26 C.F.R. § 1.528-3. Specifically excluded from "association property" are "facilities or areas set aside for the use of nonmembers or in fact used primarily by nonmembers." *Id.* Further, "no private shareholder or individual can profit from the association's net earnings except by acquiring, building, managing, or caring for association property or by a rebate of excess membership dues, fees, or assessments." 26 C.F.R. § 1.528–7.

The WBPOA violates these requirements by spending millions of dollars per year –in fact roughly 50% of its income – on the maintenance of Double Diamond assets, which are not "association property." (2 RR 33; 3 RR 90-93; 6 RR 75, 83-84; Ex. E-7). It is important to note that in making this claim, Plaintiffs are not seeking "enforcement" of the tax codes but cite them to demonstrate the WBPOA is acting in direct contravention of them and in violation of its non-

profit status. The assessments Plaintiffs seek to have declared improper are in fact improper because the manner in which they are spent jeopardizes the WBPOA's very existence.

This is an important point. If the WBPOA is not functioning legally as a non-profit, then the WBPOA is not functioning as a non-profit at all. It is violating its own Articles, Declaration and Bylaws. And worse, if the WBPOA is not functioning legally as a non-profit, then the WBPOA has no power whatsoever to assess ***any fees***. So all of the assessments, disputed or not, legal or not, for POA property or not, are void *ab initio.* In other words, the WBPOA's violation of its status and prohibitions against private inurement and expenditures are more than a matter of tax returns, they threaten the very existence of the WBPOA at all, and its ability to function in any way whatsoever. The WBPOA has zero power to assess if it is not a non-profit. TEX. PROP. CODE. § 204.004. Likewise, it loses its foreclosure power. *Id.; see also* TEX. PROP. CODE CH. 209.[17]

Defendants have contended in the past that no "net earnings" are distributed in violation of the private inurement prohibition because the WBPOA always operates at a loss. Defendants have also argued the illegal assessments are not "earnings." They are incorrect on both accounts. In the non-profit context, the term "net earnings" has consistently been held to mean more than the net profits of an organization as shown on its books, and more than the difference between gross receipts and disbursements in dollars. *Northwestern Municipal Ass'n. Inc. v. United States*, 99 F.2d 460 (8th Cir. 1938); *Coastal Club Inc. v. C.I.R.*, 43 T.C. 783, 821-22 (Tax Ct. 1965). For example, in a church where all of the income is derived from donations, courts have found private inurement. *Northwestern Municipal Ass'n. Inc. v. United States*, 99 F.2d 460 (8th Cir.

[17] This makes sense; property owners' associations are not meant to be developers' private piggy banks, as Ward has treated the WBPOA. They are not meant to be vehicles for a developer to make a profit, or shift his costs of doing business to the property owners.

1938). Courts have also held "net" is different in the private inurement context: "**Taking a slice off the top should be no less prohibited than a slice out of net.**" *Id.* (Emphasis added). Moreover, it is Defendants' own creative accounting that gives rise to their "net" claim. If the approximately $1 million in food and beverage assessments were actually recorded on the WBPOA's income statement, the WBPOA would not operate at a loss, and Defendants' own claim of no "net" would be defeated on its face. (6 RR 76).

Similarly unavailing is the claim that neither White Bluff Club Corp., the direct recipient of the F&B and golf course maintenance assessments, nor any other Corporate Defendants (other than Double Diamond), are "members" of the WBPOA, so the transfer of monies to these third parties does not violate the governing documents or nonprofit law. The Bylaws and the Declaration specifically prohibit any part of the net earnings/income of the WBPOA from inuring ***to the benefit of*** any member, director, or officer. (Bylaws Art 6, 6 RR 89; *see also* 26 U.S.C. §528). Income/earnings inure ***to the benefit of*** any "private shareholder or individual" who has a personal and private interest in the organization receiving the payment. 26 C.F.R. § 1.528–7. Ward, both a member and director of the WBPOA, is the 93% owner of White Bluff Club Corp.'s parent, Double Diamond. (2 RR 69; SCR 230-31). All other corporate Defendants are also subsidiaries of Double Diamond. (*E.g.,* 6 RR 83). Each therefore receives benefit when Double Diamond gets to raid the coffers of POA assessments. Indeed, the whole *raison d'être* for these assessments is to generate revenues and land sales to beef up Double Diamond's bottom line, which makes Ward more money. (Ex. F-1).

In addition, it is ludicrous to assert that there is no "harm," or that this is a matter solely for IRS enforcement, or that the WBPOA can simply re-file its returns and pay taxes. This would

be akin to a thief arguing he shouldn't be liable to his victim for using the victim's ATM card because "that's for the DA to handle," or the victim should just get reimbursed by the bank.

For all these reasons, the golf course maintenance and the food and beverage assessments should be declared improper, and any contract between the WBPOA and Double Diamond calling for this assessment revenue should be deemed illegal and void as a matter of law. *Denson v. Dallas County Credit Union*, 262 S.W.3d 846, 852 (Tex. App.--Dallas 2008, no pet.) ("A contract to do a thing which cannot be performed without violation of the law violates public policy and is void.") (citing *Villaneuva v. Gonzalez*, 123 S.W.3d 461, 464 (Tex. App. – San Antonio 2003, no pet.)).

C. Plaintiffs are Entitled to an Injunction Prohibiting Future Improper Assessments

As stated *supra*, a party is entitled to injunctive relief when he establishes (1) the existence of a wrongful act, (2) the existence of imminent harm, (3), the existence of irreparable injury, and (4) the absence of an adequate remedy at law. *Indian Beach Property Owners Ass'n v. Linden*, 222 S.W.3d 682, 690 (Tex. App. – Houston [1st Dist.] 2007, no pet.). When the basis of the suit is enforcement of deed restrictions (or here, a finding that the deed restrictions do not permit Defendants' conduct), the elements differ slightly. *Jim Rutherford Investments, Inc. v. Terramar Beach Cmty. Ass'n*, 25 S.W.3d 845, 849 (Tex. App.--Hous. [14th Dist.] 2000, pet. denied). When a movant seeks an injunction to enforce a covenant, he is not required to show irreparable injury or that actual damages will be suffered but that the defendant intends to do an act that would breach the restrictive covenant. *Quinn v. Harris*, 03-98-00117-CV, 1999 WL 125470, at *9 (Tex. App.--Austin Mar. 11, 1999, pet. denied); *Guajardo v. Neece,* 758 S.W.2d 696, 698 (Tex.App.-Fort Worth 1988, no writ).

By establishing their entitlement to a declaration that the golf course maintenance and food and beverage fees are improper, Plaintiffs have established a "wrongful act." The imminent harm is the continuing imposition of illegal assessments, imposition of late fees, adverse credit reporting, and ultimately foreclosure for failure to pay these fees, if Defendants are not enjoined. (*E.g.* SCR 222-223, 231; 3 RR 12-14, 64-65). The equities weigh in favor of protecting Plaintiff property owners against further assessment of fees that are declared to be illegal and improper. Injunctive relief to prevent further actions by Defendants to assess, bill or collect these improper assessments is warranted. *See, e.g., Dynamic Pub. & Distrib. L.L.C. v. Unitec Indus. Ctr. Prop. Owners Ass'n, Inc*., 167 S.W.3d 341, 349 (Tex. App.--San Antonio 2005, no pet.) (affirming permanent injunction prohibiting tenant to operate an adult bookstore, as doing so violated the restrictive covenant in property deed).

V.

CONCLUSION

Plaintiffs are entitled to quiet, undisturbed enjoyment of their land, subject to valid restrictive covenants. The golf course maintenance and food and beverage assessments are not among them, and should be declared illegal and improper. These obligations are improper restrictive covenants because they are not uniformly applied and do not touch and concern the land. Also, these assessments cause the WBPOA *not* to function as a non-profit, as it is required to by Texas law and its own governing documents. As a result, the WBPOA loses all power to assess anything to anyone. Because the assessments are invalid, so too are any contracts that purport to require payment of them.

Because Plaintiffs have established their right to declaratory relief, the equities weigh in favor of entering an injunction to prohibit Defendants from billing, assessing or collecting money

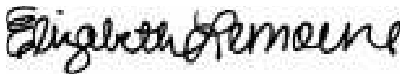
that would go towards golf course maintenance or support of "hospitality operations" in the future.

VI.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray the Court set this matter for hearing, and upon final hearing, grant Plaintiffs' Motion for Partial Summary Judgment against Defendants in its entirety, including entering summary judgment in favor of Plaintiffs on their claims for declaratory and injunctive relief. Alternatively, Plaintiffs pray for a no-evidence summary judgment on their claims for declaratory relief. Plaintiffs also seek such other and further relief to which they may be entitled.

Respectfully Submitted,



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I hereby certify that a copy of the foregoing pleading was served on the following counsel for Defendants on December 20, 2012 via electric service/Case File Express in accordance with the Texas Rules of Civil Procedure:

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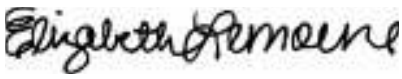

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