COUNTY COURT, COUNTY OF LAKE, STATE OF COLORADO Court Address: 505 Harrison Avenue Leadville, CO 80461 Phone Number: 719-486-0334 **Plaintiff: EMPIRE LODGE HOMEOWNERS ASSOCIATION** **v.** **Defendant(s): UTE C HERZFELD and HELMUT MAYER**	DATE FILED: August 8, 2022 3:14 PM CASE NUMBER: 2021C30072 □ COURT USE ONLY □ Case Number: 2021CV30072 Div.: Ctrm:

ORDER FOR JUDGMENT

The Court enters the following Findings of Fact, Conclusions of Law, Orders and Judgments:

The Court heard testimony from six witnesses three on each side and received 46 (1,2,4,5,6,7,8 were stipulated 3, 9-34, 36, 37, 40-49 were admitted) exhibits from the Plaintiff and six (B3, C-emails, C-plans, C-county plans, F1 [3 photos], F2 [11 photos]) exhibits from the Defendant over the course of a one-day trial. Plaintiffs assert at trial that the Defendants violated their obligations to the HOA in three ways: (1) removal of trees without prior approval; (2) construction of an accessory structure had commenced and was in process without approval and (3) modification of grade and construction of a retaining wall which blocked access to the neighboring lot without prior approval. Defendants filed a document titled counterclaim which held no independent claims and only defenses. The Court first reviews the facts and then concludes with the Court's specific orders.

1. Jurisdiction and venue are proper before this Court as the subject matter before the Court involves property within Lake County and this action is to enforce HOA covenants that have previously been recorded in Lake County.

2. This Court does not have jurisdiction to evaluate and does not evaluate the purported easement across Defendants property as set forth in C.R.S. 13-6-105(1)(e).

3. Plaintiff, Empire Lodge Homeowners Association, is a Colorado nonprofit corporation, with a principal office address of 585 Empire Valley Drive, Leadville CO 80461. Amended and Restated Articles of Incorporation of Empire Lodge Homeowners Association were filed September 20, 2011.

4. The Association is and was bound by Covenants. The Covenants in effect during the period at issue, Amended and Restated Declaration of Restrictive and Protective Covenants for Beaver Lakes Estates and Beaver Lakes Estates Filing #2, and Full Amended and Restated Declaration of Restrictive and Protective Covenants for Beaver Lakes Estates and Beaver Lakes Estates Filing #2.

5. Amended and Restated Bylaws of Empire Lodge Homeowners Association were established March 16, 2011.

6. Ute C. Herzfeld and Helmut Mayer are the record title owners of the property located at 1298 Empire Valley Drive, Leadville, CO, also known as Lot 35 Beaver Lakes Estates Filing #2, Including, Undivided Share In Common Area, Lake County, Colorado, which is located within the Empire Lodge Homeowners Association and subject to the Declaration and other governing documents of Empire Lodge.

7. The Association has complied with the requirements of C.R.S. 38-33.3-209.5(2) & (5) as copies of both the covenant and collection policies are filed with the Lake County Clerk and Recorder and are available to homeowner and association members.

8. The Association has complied with the requirements of C.R.S. 38-33.3-401 and is registered with DORA.

9. This lawsuit involves a community of 260 single-family homes community in a covenant-controlled community.

10. This community is located within unincorporated Lake County, Colorado. Each home sits on multiple acres which vary between lots. The community is under two separate Water Augmentation orders from the Courts. The Association, due to those orders, is required to monitor and submit meter readings showing use twice a year.

11. The Association has a seven-member Board of Directors made up of owners volunteering their time. The Association has a separate architectural committee who review proposals submitted by homeowners. This committee is required to be at least three members; it was 5 when Defendants submitted their plans.

12. Ute and Helmut purchased Lot 35 in July of 2008. They then submitted to build their home in June of 2010 and received approval to build the home. However, in July of 2012 they painted their home in a color that was not approved by the Association; the HOA received complaints from neighbors; the HOA attempted to get Defendants to correct the situation without success.

13. On August 25, 2020, after preliminary conversations with Marty Stevenson, Ute Herzfeld submitted plans to build an accessory structure. Marty

requested additional information from Defendant Herzfeld om August 26, 2020; Defendants submitted revised plans on or about September 15, 2020. The Association denied the submission on September 18, 2020.

14. Defendant Herzfeld submitted revised plans for an accessory structure September 29, 2020. Apparently, the new plans failed to address concerns raised by the Association regarding illegibility, plumbing, and color; hence the plans were again denied October 13, 2020.

15. Even though the Association had denied the plans of the Defendants and no new submissions had been received, Defendants began work on their property in November of 2020. The Association received a complaint regarding the fact that Defendants had taken down trees without prior approval, and had begun work to dig out the foundation for the accessory structure and had used the dirt and rock they had dug up to block their neighbors' access by creating a retaining wall on Defendants' property.

16. Plaintiff sent violation notices to the Defendants for the violations. The first ones sent incorrectly said they were fine notices but those were withdrawn and replaced with warning notices.

17. Defendant Herzfeld asked for a dispute hearing which was scheduled and held.

18. Following the dispute hearing on December 26, 2020, the Association reviewed plans for three items.

19. Defendant Herzfeld sent an email to the Association claiming that there was no easement so the Association could allow the grade change. The Association

checked with Lake County and advised that there was an easement so they could not allow the grade change which blocked the neighbor's access.

20. Defendants submitted plans to the Association on February 7, 2021 for a retaining wall that had been added below their deck, the accessary structure, and the modification to the access point of the neighbor. The Association reviewed all three sets and approved the retaining wall that had been added below their deck and denied the plans for the accessory structure and the modification to the access point of the neighbor on February 15, 2021.

21. Defendants continued to work on their structure removing trees and digging out the foundation for the accessory structure. They then were sent notice of continuing violations and told to cease and desist.

22. Defendants then requested another meeting with the Board but refused all proposed dates.

23. The Association sent notice of continued violations April 15, 2021, and reminded the Defendants that they had no authority for the work on the accessory building and they needed to remove the obstruction to the neighbor's access to their property'

24. The Association through counsel advised Defendants of the violations and that they needed to address multiple issues to bring their property into compliance.

25. The Defendants ignored all these notifications and continued working on their project. The Defendants poured cement, installed pipes and removed trees

26. The Association sent continued violation notices to Defendants for the work without approval.

27. Defendants requested another dispute hearing which the Association granted. The HOA contended that the Defendants provided no information to address the plumbing and no information or solutions to address the color concerns; the result was a continued denial.

28. Defendants presented testimony that work was done on the driveway to address erosion.

29. Additionally, Defendant testified that they believed that the easement had been abandoned by the neighbor.

30. The son of the Defendants testified that the work on the driveway was minimal and solely for the purpose of ensuring erosion control.

31. Defendant showed emails back and forth between the ACC and herself complaining about the legibility of the documents she submitted and requesting what she provided to the county.

32. Defendant showed her submissions on graph paper emailed to the Association.

33. Defendant produced for the Court what had been provided to Lake County.

34. Defendant introduced photos of homes; two of another residence, and one that was their home.

35. Defendant introduced 11 pictures of rocks on the neighbor's property that Herzfeld thought were moved by Marty Stevenson.

36. The Association presented evidence that suggested the Defendant's photos did not show the home to be as orange as it is.

37. The Association introduced evidence that Marty Stevenson did not move the rocks on the property of the neighbors; that the Defendants should have had pre-approval. Since no neighbor complained and the Association acts when complaints are made; the Association took no action.

38. Both Bob Dixon and Marty Stevenson testified that the changes to the driveway access to the neighbors was made in November of 2020.

CCIOA Sets Forth the Authority and Standards Under Which an HOA can Regulate Homeowner Modifications and Improvements

39. A homeowners' association owes a fiduciary duty to homeowners. See Woodward v. Bd. of Dirs. of Tamarron Ass'n of Condo. Owners, Inc., 155 P.3d 621, 624 (Colo. App. 2007) (stating that a homeowners' association has a fiduciary duty to homeowners to enforce 16 restrictive covenants). "This duty has been imposed in recognition of the power held by homeowner associations, the quasi- governmental functions they serve, and the impact on value and enjoyment that can result from the failure to enforce covenants." Colo. Homes, Ltd. v. Loerch-Wilson, 43 P.3d 718, 722 (Colo. App. 2001).

40. Under C.R.S. § 38-33.3-302(3)(b), decisions concerning the approval or denial of a unit owner's application for architectural or landscaping changes shall be made in accordance with standards and procedures set forth in the declaration or in duly adopted rules and regulations or bylaws of the association, and shall not be made arbitrarily or capriciously.

A decision by a homeowners' association, through its architectural control committee, approving or disapproving plans "'must be reasonable and made in good faith.'" Woodward , 155 P.3d at 624 (quoting Rhue v. Cheyenne Homes, Inc. , 168 Colo. 6, 9, 449 P.2d 361, 363 (1969)). Whether the homeowners' association acted reasonably or arbitrarily is a factual question. Id. at 625. The Declaration for this community has been modified multiple times. However, it has always had specific requirements for written pre-approval of any modification to the property. The Declaration in place when the work started had been in place since 2012. Article 7 of the Declaration required any alteration to a residence or a Lot must be pre-approved.

Governing Documents authorize Association to require pre-approval

41. The Declaration for this community has been modified multiple times. However, it has always had specific requirements for written pre-approval of any modification to the property. The Declaration in place when the work started had been in place since 2012. Article 7 of the Declaration requires any alteration to the residence or a Lot must be pre-approved.

42. Section 7.4 provides: "Alterations. Painting an improvement constitutes an alteration (unless similar to the existing color). Alterations to the exterior of a residence or other improvement on a platted Lot, are subject to approval by the ACC. Alterations must comply with Lake County Building and Zoning regulations.

43. Section 7.5 provides: “Outbuildings and Temporary Structures. An "outbuilding" shall mean an enclosed or covered structure not directly attached to the dwelling it serves. No outbuilding or temporary structure, including sheds, shacks, barns, or detached garages or carports, shall be allowed on any Lot *unless approved in writing by the Architectural Control Committee.* Further, no outbuilding or temporary structure shall be used on any Lot at any time for residential purposes, either temporarily or permanently.
44. Section 7.6 provides: “Fences. All fences, walls or other barriers shall require approval by the ACC. No fence, wall, hedge, barrier or other improvements shall be erected or maintained along, on, across, or within the areas reserved for easements and rights of way.”
45. Section 7.8 provides in part: “Lot Owner Responsibility. It is the responsibility of the Lot Owner to apply directly in writing, upon the form provided by the ACC, submitting plans and specifications for any building or improvement. Owners will not commence construction or installation of an improvement until they have submitted improvement plans and specifications and received written approval from the Committee. Owners shall comply with any request by the Association for additional information relating to an improvement prior to the Committee's approval of a request.”
46. Section 7.10 provides: “Notice to Adjacent Lot Owners. Owners shall be required to provide adjacent Lot Owners notice of any major architectural requests, as further set forth in the Rules and Regulations, for consideration

by the ACC. An adjacent Lot Owner's disapproval would not be the sole basis for denying any architectural request for an improvement or alteration, but would be factored into the decision made by the Section."

47. Section 7.11 provides in part: "Approval of Plans. No buildings, outbuildings, fences or other improvements shall be erected or maintained on any platted Lot at Beaver Lakes Estates Community, nor shall any improvement or alteration be commenced until plans and specifications showing color, location, landscaping and other pertinent information have been submitted to and approved in writing by the ACC."
48. The documents clearly authorize the Association to require pre-approval prior to the tree removal, the driveway modification, and the construction of the accessory building and it is clear from the documents that each submission was denied within thirty days of submission.
49. Section 6.18 of the governing documents clearly require that no trees are to be removed until there is an approved plan.
50. There is no documentation shown to the court where the Association approved the driveway modification, or the accessory building. Thus, the removal of trees was a violation as was the modification blocking the access of the driveway, as was the construction work done on the accessory building. All were violations of the covenants.
51. The Colorado Supreme Court held that covenants which require approval before erection of a home is enforceable. Rhue v. Cheyenne Homes, Inc., 449 P.2d at 363.

52. The court in Buick v. Highland Meadow Estates at Castle Peak Ranch, Inc., 21 P.3d 860 (Colo. 2001) found that "[t]he covenants grant the Committee broad latitude in making aesthetic decisions with respect to every type of improvement on the property..."

Standard of Review – Business Judgment Rule

53. Defendants, in attempting to argue that they don't need approval, have argued that they believe the Association acted arbitrarily and capriciously in their denial and so they have approval anyway. However, they have produced no evidence to support the claim.

54. The business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." 18B Am. Jur. 2d Corporations § 1450 (2018). Where a corporation's decision falls within the business judgment rule, the court will not interfere with that decision or substitute its judgment for that of the board of directors. Id.

55. The Colorado Supreme Court has required deferential review of honest and good faith business judgments for over a century. In 1908, the Colorado Supreme Court stated that "[t]he courts shall not, as a general rule, at the suit of a stockholder, or any number of stockholders, interfere with the internal affairs and management of a corporation." Horst v. Traudt, 448, 96 P. 259, 260 (Colo. 1908); Greenfield v. Hamilton Oil Corp., 760 P.2d 664, 667 (Colo. App. 1988); see also Mountain States Packing Co. v. Curtis, 281 P. 737, 740 (Colo. 1929); Rifkin v. Steele Platt, 824 P.2d 32, 35 (Colo. App. 1991); Polk v.

Hergert Land & Cattle Co., 5 P.3d 402, 405 (Colo. App. 2000).

56. "Courts developed the business judgment rule to protect corporate management from liability to shareholders for mistakes in business judgment." 5 Fletcher Cyc. Corp. § 2104 (2018). The rule shields honest business decisions from dissatisfied shareholders. See id.; see also 3A Fletcher Cyc. Corp. § 1037.

57. The business judgment rule has been relied upon multiple times in Colorado concerning the decisions of homeowners' associations with respect to enforcement of their protective covenants. In Rywalt v. Writer Corp., 526 P.2d 316, 317 (Colo. App. 1974), the Court stated: "Courts will not, at the instance of stockholders or otherwise, interfere with or regulate the conduct of the directors in the reasonable and honest exercise of their judgment and duties" absent evidence that the "directors acted in bad faith or in fraud of the rights of the members." Id.; see also Rhue v. Cheyenne Homes, Inc., 449 P.2d 361, 363 (Colo. 1969); Norris v. Phillips, 626 P.2d 717, 719 (Colo. App. 1980); Woodmor Improv. Ass'n v. Brenner, 919 P.2d 928, 931 (Colo. App. 1996); and Snowmass Am. Corp. v. Schoenheit, 524 P.2d 645, 648 (Colo. App. 1974).

58. The Association's good faith can be inferred from the fact that the Association has adopted dispute resolution processes in order to attempt to work with owners. The Association's good faith can be seen in the numerous meetings and emails with the Defendants seeking information to review the application.

59. While Defendants assert that the Association kept changing the issue, the

documents show the same issues from the first email to the last denial. The Association first had difficulties with the format and the legibility of the documents being presented. While it is true that Defendant did cure one concern which was an issue with location, which arose from the fact Defendants submitted plans that showed the location in two different areas, once Defendants cured that then location was no longer a concern. However, Defendants never submitted documentation to the Association that addressed the water and plumbing concerns. And Defendants refused to accept and address the color concerns.

60. Defendant's assertions that because she painted her home one color she can paint the accessory building the same color, ignores the fact that the Defendant did not have approval to paint the home the color it was painted. There is no bad faith on the part of the Association refusing to allow a continued situation with the home violation by extending that to another building.

61. Defendants assertions that water is not the responsibility of the Association is incorrect and the fact that the Association is bound to comply with water augmentation plans demonstrates that fact.

62. The Association has shown no bad faith on the Association's part for the refusal of the driveway modification. The driveway modification occurred in November of 2022 and it blocked the easement of the neighbor. The neighbor verified that the easement was still there, and the county verified the easement was still there (Exhibit 12), and the Association notified Defendants

of this. The Association acted in complete conformity with their governing documents, which required neighbor approval which the defendants did not get, and with all the information they had obtained emails from neighbor and recorded easement from Lake County Clerk and Recorder. Their denial was appropriate and not arbitrary or capricious.

Selective Enforcement

63. Defendants have alleged that there is selective enforcement by the Association. The burden is on the Defendants to establish that there were homeowners who submitted plans to have accessory buildings with plumbing. There was no such proof. All Defendants provided to the court was that there were 28 applications and only one denial. But the one denial was the only homeowner requesting plumbing in an accessory building. Testimony from Marty Stevenson advised the Court that no other home had ever submitted to install water in an accessory building and that he had checked the Defendants well permit to see if that was even allowed, and it was not. Further, the Defendants alleged that another home in the community is the same color, yet the photos show that is not accurate. Further, Defendants had no testimony that the house was the same. Plaintiff presented testimony that the homes were not the same. Defendants' home was orange in color as shown by Exhibit 49 and it had trim, blueish or purple, where the compared home presented by Defendants was honey gold with brown trim.
64. Selective enforcement is an intentional act. With there being no home the same as Defendants and no other home with an accessory building with

plumbing, the claim fails. People v. Kurz, 847 P.2d 194, 196 (Colo.App.1992) held in a selective prosecution case that "[a] district attorney has wide discretion in determining who to prosecute for criminal activity and on what charge." "[T]he fact that some people escape prosecution under a statute is not a denial of equal protection unless selective enforcement of the statute is intentional or purposeful" as cited in J.S. v. Chambers, 226 P.3d 1193, (Colo. App. 2009). With no demonstrative evidence of any homes the same colors and no other requests for additional water usage as Defendants were making, there is no proof of selective enforcement as alleged by Defendants.

Driveway Maintainance and Easement Blockage

65. With respect to the work on the driveway, Defendant claims that the easement that had been previously established, had been abandoned by the neighbor. If the easement is intact, the work on the driveway would fall under the restrictions set forth under the HOA regulation. Here, there is a dispute as to whether there currently exists an enforceable easement. That issue is beyond the jurisdiction of this Court; hence the Court has no authority to make that determination.

66. Additionally, the testimony presented about the level of grading to the driveway was disputed and the court was unable to conclusively determine whether the modification was simply to mitigate and repair an existing hazard or was an intrusion or modification that required the approval of the Asssociation.

Defendant's Other Claims for Relief

67. Defendant asserted in her opening and her counterclaim that the action on the part of the Association to remove her from the board was the basis for all this, but there is no such proof.

68. The Association's Bylaws (Exhibit 6) provides that owners in violation of the covenants are not eligible to be board members, Article 5, Section 5.2 (e). Since Defendants are clearly in violation of the covenants, there is no violation by Plaintiff complying with the governing documents and determining that Defendant Herzfeld was no longer qualified to be a board member. In fact, they would have violated the governing documents if they had failed to remove her from the Board of Directors.

69. Defendants assert a conflict on the part of one witness but their allegations do not support any actual claim and fall short of a valid defense. They claimed that Marty Stevenson placed boulders, which he denied, but stated that they did not object to the boulders. As testimony from Eric Flora showed, the Association completed enforcement when there were complaints issued. The Defendants advised they had no complaints, and there was no conflict even if Marty had placed the boulders. The fact that Marty Stevenson did snow removal did not have any relevance to the denials here. The accessory building was denied because of plumbing, colors and legibility. The driveway was denied due to an easement established by the clerk and recorder. The fact that Marty did plow snow was irrelevant to the denials.

Association's Right to attorney fees

70. The Plaintiff is entitled to attorney fees pursuant to C R.S. § 38-33.3-315(4) and C.R.S. § 38-33.3-123 and the Declaration at Article 9, Sections 9.1 and 9.2.

Based upon the Court's careful consideration of the evidence and the foregoing conclusions, the Court enters the following Orders and Judgments:

(1) Defendants shall stop all work on the Accessory Building until they receive approval from the Association;

(2) Defendants shall submit additional colors and information about water and plumbing as requested by the Committee regarding the Accessory Building within ten (10) days of the date of this order.

(3) Should any submission be denied, Defendants are to return the areas to the condition it existed in prior to all of Defendants unapproved modifications.

(4) Should the Committee request additional documents, Defendants are to submit all additional documents within ten (10) days of the date of this order or return the property to the prior original condition;

(5) Should the building or driveway be approved with conditions or modifications, Defendants must fully comply with the conditions and modifications within thirty (30) days of the date of this order;

(6) If Defendants fail to comply with provisions 1 through 5 above within the time frames as specified, the Association shall be entitled to enter onto the Defendants' property, with the assistance of the Lake County Sheriff and/or the Leadville Police to have the property returned to

(a) the original condition prior to the unapproved modifications. Defendants shall be charged the costs of such action and remedies, which amounts shall be paid in full by the Defendants within thirty (30) days of notice of such costs to be sent, via regular mail, to Defendants at the property address.

(b) If such amount is not paid in full when due, Plaintiff shall be entitled to record a lien against Defendants' property, to include such amount, and apply to this Court for modification of its judgment to include all costs incurred by the Plaintiff in removal, as well as all costs and attorney fees incurred by the Plaintiff in attempting to obtain compliance as well as to collect such amount from the Defendants;

(7) For reasonable attorney fees pursuant to C.R.S. § 38-33.3-123 and the Declaration at Sections 9.1 and 9.2; and

(8) For court costs; and

(9) For interest charges to continue upon the entry of judgment at the rate of 12% per annum, as provided under Article 5, Section 5.8 of the Declaration.

Dated: August 8, 2022.

By the Court

BY THE COURT:

Jonathan Shamis
County Court Judge

LAKE COUNTY COMBINED COURTS LEADVILLE, COLORADO

Jonathan Shamis, County Court Judge