

NOTICE OF RULE

TUGWELL, WILLIAM T IV - ET AL

Vs.

**LAKE AT BELLE TERRE HOME OWNERS
ASSOCIATION INC - ET AL**



**Case: 000000130608
Division: E
21st Judicial District Court
Parish of Livingston
State of Louisiana**

This is your notice that a rule for DECLINATORY EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION has been set in the above captioned matter on September 6, 2011 at 9:00 AM before the Honorable BRENDA BEDSOLE RICKS.

Done on August 2, 2011.

G. WHITEHEAD

Deputy Clerk of Court

**JEFFREY K. CODY ATTORNEY
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WILLIAM H. TUGWELL, IV, KARRI
TUGWELL, HUDSON TABOR, V,
MARGA TABOR, MARY PIKE, MIKE
DEMAREE, MICHAEL PENDARVIS
AND CHERISH PENDARVIS

NO. 130608

DIVISION: E

21ST JUDICIAL DISTRICT COURT

FILED COURT
CLERK OF LIVINGSTON
PARISH OF LIVINGSTON
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VERSUS

PARISH OF LIVINGSTON

THE LAKE AT BELLE TERRE
HOMEOWNERS ASSOCIATION, INC.
AND JEFF ZETTLEMOYER

STATE OF LOUISIANA

**DECLINATORY EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION,
ANSWER, AND RECONVENTIONAL DEMAND SEEKING DECLARATORY
JUDGMENT, PERMANENT INJUNCTION, AND TO RECOVER UNPAID
ASSESSMENTS, LATE FEES, ASSOCIATED COSTS, AND FINES**

NOW INTO COURT, through undersigned counsel, come Defendants, THE LAKE AT BELLE TERRE HOME OWNERS ASSOCIATION, INC. (the "Association") and JEFF ZETTLEMOYER ("Zettlemoyer"), who, in response to the *Petition for Declaratory Judgment* filed by Plaintiffs, WILLIAMH. TUGWELL, IV, KARRI TUGWELL, HUDSON TABOR, V, MARGA TABOR, MARY PIKE¹, MIKE DEMAREE, MICHAEL PENDARVIS AND CHERISH PENDARVIS, assert the following:

**DECLINATORY EXCEPTION OF
LACK OF SUBJECT MATTER JURISDICTION**

A.

Whereas Plaintiffs have prayed for an order declaring that the increase in the annual assessment from \$50 to \$150 is illegal, invalid, and unenforceable based on the purported failure to adhere to the process established by the community documents and/or the Louisiana Homeowners Association Act, La. R.S. 9:1141.1, *et seq.*, that request for relief is moot since, on November 3, 2010, a sufficient number of the eligible homeowners affirmatively voted to ratify all prior acts of the Association, including the prior increase in the annual assessment. (*See* Exhibit "A" attached.) Also, at that same meeting, a sufficient number of the eligible homeowners affirmatively voted to maintain the annual assessment at \$150. *Id.*

¹ Mary Pike's claims were voluntarily dismissed without prejudice by Judgment signed by this Court on November 8, 2010. Therefore, any references to "Plaintiffs" hereafter should be understood not to include Ms. Pike.

B.

To the extent Plaintiffs pray for an order requiring the Association to refund to them the amount of the purportedly illegal increase in the annual assessment, that request is also moot for the same reason explained above. Furthermore, Plaintiffs are not entitled to the return of any late fees that were previously paid since, on November 3, 2010, a sufficient number of the eligible homeowners affirmatively voted to ratify all prior acts of the Association, including the establishment of a late fee. *Id.*

C.

Whereas Plaintiffs additionally pray for an order declaring that the restrictions (all of which are listed at Paragraph 20 of their Petition) are illegal, invalid, and unenforceable due to the Association's purported failure to adhere to the process established by the community documents and/or the Louisiana Homeowners Association Act, that request for relief is moot since, on November 3, 2010, a sufficient number of the eligible homeowners affirmatively voted to ratify all prior acts of the Association, including those restrictions. *Id.*

D.

Whereas Plaintiffs pray for an order declaring that the Board of Directors for the Association (the "old board") was improperly constituted based on the purported failure to adhere to the process established by the community documents and/or the Louisiana Homeowners Association Act, that request for relief is moot since, on November 3, 2010, a sufficient number of the eligible homeowners affirmatively voted to ratify the old board's election or appointment. Moreover, an election was held on November 3, 2010, for the purpose of electing new board members (the "new board"); thus, a declaratory judgment concerning the legitimacy of the old board would serve no practical benefit. Inasmuch as Plaintiffs request an order vacating the seats of the old board and requiring a new election (which is a request for injunctive relief that is not in conformance with the Louisiana Code of Civil Procedure), that request also would serve no practical benefit since the old board's term expired and a new board was elected.

E.

Whereas Plaintiffs pray for an order barring former President Jeff Zettlemyer from the old board (which is a request for injunctive relief that is not in conformance with the Louisiana Code of Civil Procedure), that request is moot and would serve no practical benefit since Zettlemyer's term expired on November 3, 2010, and he is no longer serving on the board as a director, officer or otherwise.

F.

Whereas Plaintiffs pray for an order from this Court directing the officers of the Association to allow Plaintiffs to examine the books and records of the Association (which is a request for mandamus relief and not a declaratory judgment), this request is moot because pursuant to La. R.S. 12:223 the Association is already under a ministerial, nondiscretionary duty to allow Plaintiffs to examine its books and records, the Association has no record of ever denying Plaintiffs or anyone else an opportunity to examine its books and records, and the Association is willing to permit Plaintiffs an opportunity to examine its books and records without the necessity of an order from this Court.

G.

Therefore, Defendants are entitled to an order sustaining their declinatory exception of lack of subject matter jurisdiction and dismissing Plaintiffs' claims. In accordance with Rule 9.8(a) of the Louisiana Uniform Rules of Court, the Association asserts that it does anticipate offering testimony and evidence at the hearing on the instant exception.

AND NOW, IN ANSWER TO THE ALLEGATIONS IN PLAINTIFFS' LAWSUIT, DEFENDANTS STATE AS FOLLOWS:

ANSWER

1.

The allegations of Paragraph 1 do not require an answer, but to the extent that they might, they are admitted; however, while Jeff Zettlemyer was President of the Association at the time the lawsuit was filed, his term expired on November 3, 2010.

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S/V [Signature] M.
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2.

The allegations of Paragraph 2 do not require an answer, but to the extent that they might, they are admitted.

3.

The allegations of Paragraph 3 are admitted.

4.

The allegations of Paragraph 4 are admitted.

5.

The allegations of Paragraph 5 are denied as written to the extent that the Restrictions and By-laws would constitute the best evidence of their contents. Also, Paragraph 5 improperly sets forth a legal conclusion concerning the scope of the By-laws relative to increasing assessments.

6.

The allegations of Paragraph 6 are denied to the extent that the Articles of Incorporation referenced therein would constitute the best evidence of their contents.

7.

The allegations of Paragraphs 7 are denied as written and/or present facts that are moot.

8.

The allegations of Paragraph 8 are denied as written and/or present facts that are moot.

9.

The allegations of Paragraph 9 are denied as written and/or present facts that are moot.

10.

The allegations of Paragraph 10 are denied as written and/or present facts that are moot.

11.

The allegations of Paragraph 11 are denied as written and/or present facts that are moot.

12.

The allegations of Paragraph 12 are denied as written and/or present facts that are moot.

13.

The allegations of Paragraph 13 are denied as written and/or present facts that are moot.

14.

The allegations of Paragraph 14 are denied as written and/or present facts that are moot.

15.

The allegations of Paragraph 15 are denied for lack of sufficient information to justify a belief therein.

16.

The allegations of Paragraph 16 are denied for lack of sufficient information to justify a belief therein.

17.

The allegations of Paragraph 17 are admitted. Also, Mary Pike has dismissed her claims against Defendants since the filing of this lawsuit. See *Partial Judgment of Dismissal*, November 8, 2010, in the court record.

18.

The allegations of Paragraph 18 are admitted.

19.

The allegations of Paragraph 19 are admitted.

20.

The allegations of Paragraph 20 are denied to the extent that they characterize the restrictions as “illegal, invalid, or unenforceable.” Also, the restrictions listed in Paragraph 20 are all new restrictions and not modifications of existing restrictions.

21.

The allegations of Paragraph 21 concerning the nature of Plaintiffs' dispute do not appear to require an answer; however, to the extent an answer may be required, the allegations of Paragraph 21 are denied for lack of sufficient information to justify a belief therein.

22.

The allegations of Paragraph 22 are denied for lack of sufficient information to justify a belief therein.

23.

The allegations of Paragraph 23 are admitted, except the use of the word "purported".

24.

The allegations of Paragraph 24 are denied to the extent an answer is required.

25.

The allegations of Paragraph 25 are specifically denied.

26.

The allegations of Paragraph 26 do not require any answer; however, the requested relief clearly exceeds Plaintiffs' request for declaratory judgment and instead seeks a prohibitory and mandatory injunction.

27.

The allegations of Paragraph 27 are denied to the extent they mischaracterize the actions of former President Zettlemoyer. Also, the relief sought by Plaintiffs clearly exceeds their request for declaratory judgment and is more akin to a prohibitory injunction.

28.

The allegations of Paragraph 28 are denied to the extent they mischaracterize the assessment of \$150 as illegal. Also, the relief sought by Plaintiffs clearly exceeds their request for declaratory judgment and is more akin to a mandatory injunction.

29.

The allegations of Paragraph 29 are denied for lack of sufficient information to justify a belief therein. Moreover, inasmuch as the Association is compelled by law to permit the review of its books and records, the appropriate manner of remedy would be to request the issuance of a writ of mandamus, not a declaratory judgment.

NOW COMES THE LAKE AT BELLE TERRE HOME OWNERS ASSOCIATION, INC.
AS DEFENDANT/PLAINTIFF-IN-RECONVENTION AND ASSERTS THE FOLLOWING
CAUSES OF ACTION AGAINST THE PLAINTIFFS/DEFENDANTS-IN-RECONVENTION:

**RECONVENTIONAL DEMAND SEEKING DECLARATORY JUDGMENT,
PERMANENT INJUNCTION, AND TO RECOVER UNPAID ASSESSMENTS, LATE
FEES, ASSOCIATED COSTS, AND FINES**

DECLARATORY JUDGMENT

A) THE ASSESSMENTS ARE LEGAL, VALID AND ENFORCEABLE.

I.

Plaintiffs/Defendants-in-Reconvention are all members of the Association by virtue of
owning lots in The Lakes at Belle Terre Subdivision.

II.

Each of the lots owned by Plaintiffs/Defendants-in-Reconvention are subject to Restrictive
Covenants, one of which requires the payment of annual assessments.

III.

La. R.S. 9:1141.4 states,

“The existence, validity, or extent of a building restriction affecting any association property
shall be liberally construed to give effect to its purpose and intent.”

IV.

La. La. R.S. 9:1141.8 provides,

“The community documents of residential planned communities shall have the force of law
between the homeowners association and the individual lot owners and as between individual
lot owners. The remedies for breach of any obligation imposed on lot owners or the
association shall include damages, injunctions, or such other remedies as are provided by
law.”

V.

The Association’s community documents provide a method for increasing the annual
assessment. In particular, the Restrictive Covenants state,

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“The owner of each lot, upon which a house has been built, completed, and transferred to an owner who occupies the house as his residence, shall be assessed an Annual Assessment for membership in the Association, which shall be initially fixed at Fifty and no/100 (\$50.00) Dollars per year. **The assessment may be increased from time to time as provided in the By-Laws.** The assessment shall be effective upon the recording of this instrument. The assessment shall be collected in advance and prorated for the remainder of the current calendar year. Thereafter, the assessment shall become due and payable in advance on January 1 of each year.” (Emphasis added.)

VI.

Though the By-laws may not contain an express provision for the increase of annual assessments, they do provide the following at Section 3 “Voting”, Subsection A:

“A. On demand of any Member, the vote for directors, or on any question before a meeting, shall be by ballot. **All questions shall be decided by a majority vote of the votes cast except as otherwise provided by the Articles or By-laws.**” (Emphasis added.)

Thus, the By-laws clearly state that *all questions* are to be decided by a majority of the votes cast, and nowhere within the community documents does it specify a different number of votes that is necessary in order to increase annual assessments.

VII.

Moreover, the Articles of Incorporation state at Paragraph 10 thereof that, “[i]n order to be eligible to vote, a member shall be required to pay such annual assessments and/or membership dues *as established in the By-laws of the corporation or which may be fixed, from time to time, by the Board of Directors.*” (Emphasis added.) Thus, it is specifically noted in the community documents that the annual assessment either may be set pursuant to the By-laws (*i.e.*, by a majority of the votes cast) or may be fixed by the Board of Directors.

VIII.

On Wednesday, November 3, 2010, subsequent to the filing of Plaintiffs’ *Petition for Declaratory Judgment*, the Association held its annual meeting. In the weeks just prior to that meeting a proxy was circulated among the homeowners. The proxy advised homeowners of the instant lawsuit filed by Plaintiffs and permitted them, by their signature, to ratify the previous acts of the Board, Officers and representatives for 2008, 2009 and 2010. The proxy also permitted Cheryl

Hensley, Carol Harrison or Kevin Dees to vote their lot for the election of any Officers or Directors at the November 3, 2010 meeting.

IX.

A motion was made at the annual meeting held on November 3, 2010 to accept all previous acts of the Association retroactive to 2008, the motion was seconded and unanimously approved by the homeowners, either by ballot or by proxy. (See Exhibit "A" attached.) Those previous acts that were ratified by this affirmative vote included the prior increase of the annual assessment to \$150. At the same meeting, the homeowners also affirmatively voted to maintain the annual assessment at \$150. *Id.*

X.

Both the vote to ratify the prior acts and to maintain the annual assessment passed by at least a majority of the votes cast.

XI.

Therefore, the prior increase in the annual assessment to \$150 is legal, valid and enforceable. The Association seeks a declaratory judgment from the Court to this effect.

B) THE RESTRICTIONS REFERENCED AT PARAGRAPH 20 OF THE PETITION FOR DECLARATORY JUDGMENT OF PLAINTIFFS/DEFENDANTS-IN-RECONVENTION ARE LEGAL, VALID AND ENFORCEABLE.

XII.

The previous acts of the Association that were ratified by an affirmative vote at the annual meeting held on November 3, 2010, also included the restrictions described at Paragraph 20 of Plaintiffs/Defendants-in-Reconvention's *Petition for Declaratory Judgment*.

XIII.

The establishment of new restrictions is subject to the By-laws' general requirement that all questions are to be decided *by majority of the votes cast*. Alternatively, if the community documents are deemed to be silent respecting the establishment of new restrictions, the provisions of La. R.S. 9:1141.6 are applicable, and, therefore, an agreement (or vote) of *at least three-fourths of the eligible homeowners* would then be necessary to establish new restrictions.

XIV.

In either case, since at least three-fourths of the eligible homeowners affirmatively voted at the annual meeting on November 3, 2010, by ballot or by proxy, to ratify the previous acts of the Association, including the establishment of the new restrictions listed at Paragraph 20 of Plaintiffs/Defendants-in-Reconvention's Petition for Declaratory Judgment, the vote was proper to make the new restrictions legal, valid, and enforceable.

XV.

Therefore, the new restrictions listed at Paragraph 20 of Plaintiffs/Defendants-in-Reconvention's *Petition for Declaratory Judgment* are legal, valid and enforceable. The Association seeks a declaratory judgment from the Court to this effect.

C) THE STATEMENTS OF PLAINTIFFS/DEFENDANTS-IN-RECONVENTION ARE OF NO EFFECT AND PLAINTIFFS/DEFENDANTS-IN-RECONVENTION CONTINUE TO BE BOUND BY THE RESTRICTIONS PASSED AND/OR RATIFIED ON NOVEMBER 3, 2010.

XVI.

On November 22, 2010, two acts pertaining to the new restrictions were recorded by the Association in the public records for Livingston Parish, thereby providing notice to subsequent homeowners and other third parties of restrictions passed and/or ratified on November 3, 2010.

XVII.

Each of the Plaintiffs/Defendants-in-Reconvention named below (on the dates also noted below) recorded statements in the public records of Livingston Parish in an apparent attempt to become exempt from the restrictions passed and/or ratified on November 3, 2010, pursuant to La. R.S. 9:1141.6(D):

- a) Hudson Tabor, V and Marga Tabor (December 8, 2010);
- b) Michael O. Demaree (December 13, 2010);
- c) William H. Tugwell, IV and Karri Tugwell (December 14, 2010); and
- d) Michael Pendarvis and Cherish Pendarvis (December 20, 2010).

XVIII.

The statements recorded by the Plaintiffs/Defendants-in-Reconvention contain the following language,

“These purported amendments and new restrictions have not been done in accordance with the terms of the original Restrictive Covenants. Further, upon information and belief, these amended restrictions and new restrictive covenants were not done in accordance with the terms of Louisiana R.S. 9:1141.6B.”

XIX.

The Louisiana Homeowners Association Act states that it “shall not be construed to affect the validity or superiority of any provision of a community document.” La. R.S. 9:1141.3(A). Also, the provisions of La. R.S. 9:1141.6 setting forth the number of votes necessary to establish new restrictions or to make existing restrictions more onerous apply only “in the absence of a provision for the establishment, amendment, or termination of such building restrictions in the community documents.” La. R.S. 9:1141.6(B). The community documents provide the number of votes necessary on all questions. Therefore, the provisions of La. R.S. 9:1141.6 are inapplicable.

XX.

However, should this Court find that the provisions of La. R.S. 9:1141.6 are indeed applicable to the Association, the restrictions passed and/or ratified on November 3, 2010 became effective as to the Plaintiffs/Defendants-in-Reconvention (as *current* owners) on November 3, 2010 and as to all *subsequent* owners on November 22, 2010. *See* La. R.S. 9:1141.6(C).

XXI.

Pursuant to La. R.S. 9:1141.6(D)(1), the statements by the Plaintiffs/Defendants-in-Reconvention declining to be covered by the new and increased restrictions were required to be filed with the Association and the clerk of court within 30 days of the establishment of such building restrictions. Since the Plaintiffs/Defendants-in-Reconvention are current owners, La. R.S. 9:1141.6(D)(1) required them to file their statements by December 3, 2010.

XXII.

The statements by the Plaintiffs/Defendants-in-Reconvention were not mailed to the Association until December 22, 2010. Also, the statements appear on their face not to have been recorded in the clerk of court's conveyance records until between the dates of December 8 - 20, 2010.

XXIII.

Since the statements by the Plaintiffs/Defendants-in-Reconvention were not filed with the Association and recorded in the clerk of court's office until *after* December 3, 2010, they are untimely under La. R.S. 9:1141.6(D)(1) and, therefore, are of no effect, and Plaintiffs/Defendants-in-Reconvention continue to be bound by the restrictions passed and/or ratified on November 3, 2010. The Association seeks a declaratory judgment from the Court to this effect.

XXIV.

The above-stated facts establish a real and actual controversy existing between the Association and the Plaintiffs/Defendants-in-Reconvention concerning the enforceability of its restrictions.

XXV.

Therefore, the Association seeks a declaratory judgment or decree from this Honorable Court, pursuant to Louisiana Code of Civil Procedure Article 1871, *et seq.*, declaring that: 1) the prior increase in the annual assessment to \$150 is legal, valid and enforceable; 2) the new restrictions listed at Paragraph 20 of Plaintiffs/Defendants-in-Reconvention's Petition for Declaratory Judgment are also legal, valid and enforceable; and 3) the statements filed by the Plaintiffs/Defendants-in-Reconvention are of no effect as to the Association, either because La. R.S. 9:1141.6 is inapplicable due to the Association's existing mechanism for the establishment of new restrictions set forth in its By-Laws, or alternatively, because the statements were filed untimely pursuant to La. R.S. 9:1141.6(D)(1), and Plaintiffs/Defendants-in-Reconvention continue to be bound by the restrictions passed and/or ratified on November 3, 2010.

PERMANENT INJUNCTION

XXVI.

The Plaintiffs/Defendants-in-Reconvention, WILLIAM H. TUGWELL, IV, KARRI TUGWELL (the "Tugwells"), are in violation of the community documents due to the following acts:

- A) On April 24, 2009, the Tugwells were provided notice of a violation of the following restriction: "Trailers/boats that are in the front of the lot and/or are visible from the road will be fined \$10/day for every day after 7 days." The Tugwells have continued from time to time since that date to be in violation of this restriction by maintaining a boat and/or trailer in the front of the lot and/or visible from the road in excess of 7 days. Upon information and belief, the Tugwells are currently in violation of this restriction. The Tugwells have incurred a fine of \$10/day past the seventh day in each instance where they have maintained this violation. The fine for this violation, as calculated through June 30, 2011, is \$9,020.00.
- B) At some point the Tugwells began raising chickens on their lot. On January 12, 2011, the Tugwells were provided notice of a violation of the following restriction: "No animals, livestock or poultry of any kind shall be raised, bred or kept on any lot, provided, however that dogs, cats or other household pets are permitted, provided further that such permissible animals are not kept, bred or maintained for commercial purposes, or in such numbers or conditions as may be offensive to other property owners in the subdivision." The Tugwells were advised to remove the violation within 10 days of the January 12, 2011 letter, or else they would be required to pay fines. The Tugwells have never removed the violation. The Tugwells have incurred a fine of \$10/day for each day past January 22, 2011, in which they continue the violation. Upon information and belief, the Tugwells are still in violation

of this restriction. The fine for this violation, as calculated through June 30, 2011, is \$1,600.00.

XXVII.

In addition to being prohibited by the restrictions, it is feared that the foregoing violations of the restrictions by the Tugwells, if allowed to continue, will cause irreparable harm to the property under the care of the Association in the form of diminishing property values and, as to the raising of chickens, will cause increased health risks through improper sanitation and/or the propagation of chicken-borne diseases.

XXVIII.

Therefore, after all due proceedings are had in this matter, the Association seeks a judgment from this Court issuing a permanent injunction against the Tugwells, thereby prohibiting them from continuing to maintain the above-referenced violations on their lot.

UNPAID ASSESSMENTS, LATE FEES, ASSOCIATED COSTS, AND FINES

XXIX.

As admitted at Paragraphs 15, 16, and 19 of their Petition for Declaratory Judgment, none of the Plaintiffs/Defendants-in-Reconvention have yet paid the 2010 assessment. In addition, the Tugwells have never paid the 2009 assessment. Moreover, none of Plaintiffs/Defendants-in-Reconvention have paid the 2011 assessment. Therefore, Plaintiffs/Defendants-in-Reconvention are in violation of the restrictive covenants and, as of June 30, 2011, they owe the following assessments, late fees, and associated costs:

a) William H. Tugwell, IV and Karri Tugwell for Lot 31:

HOA Dues 2009	\$150.00
Late fee (12 Mar 2009).....	\$10.00
Late fee (11 Apr 2009).....	\$10.00
HOA Dues 2010	\$150.00
Late fee (12 Mar 2010).....	\$10.00
Late fee (11 Apr 2010).....	\$10.00
Lien filed.....	\$37.00
HOA Dues 2011	\$150.00
Late fee (12 Mar 2011).....	\$30.00
Late fee (11 Apr 2011).....	\$10.00
Additional Late Fee (\$1.00 per day).....	\$80.00

Lien Cancellation.....	\$38.00
Notary Service.....	\$10.00
TOTAL.....	\$695.00

b) Hudson Tabor, V and Marga Tabor for Lot 37:

HOA Dues 2010	\$150.00
Late fee (12 Mar 2010).....	\$10.00
Late fee (11 Apr 2010).....	\$10.00
HOA Dues 2011	\$150.00
Late fee (12 Mar 2011).....	\$30.00
Late fee (11 Apr 2011).....	\$10.00
<u>Additional Late Fee (\$1.00 per day).....</u>	<u>\$80.00</u>
TOTAL.....	\$440.00

c) Mike Demaree for Lot 38:

HOA Dues 2011	\$150.00
Late fee (12 Mar 2011).....	\$30.00
Late fee (11 Apr 2011).....	\$10.00
<u>Additional Late Fee (\$1.00 per day).....</u>	<u>\$80.00</u>
TOTAL.....	\$270.00

d) Michael Pendarvis and Cherish Pendarvis for Lot 39:

HOA Dues 2010	\$150.00
Late fee (12 Mar 2010).....	\$10.00
Late fee (11 Apr 2010).....	\$10.00
HOA Dues 2011	\$150.00
Late fee (12 Mar 2011).....	\$30.00
Late fee (11 Apr 2011).....	\$10.00
<u>Additional Late Fee (\$1.00 per day).....</u>	<u>\$80.00</u>
TOTAL.....	\$440.00

XXX.

The Association seeks a judgment of this Court against Plaintiffs/Defendants-in-Reconvention awarding to it the above-stated sums, representing past due and unpaid assessments, late fees, and associated costs owed by the Plaintiffs/Defendants-in-Reconvention, together with legal interest from the date of judicial demand.

XXXI.

The Association additionally seeks a judgment of this Court against the Tugwells awarding to it the past due and unpaid fines associated with their violations of the Restrictive Covenants, together with legal interest from the date of judicial demand, for:

- 1) maintaining a boat and/or trailer in visible sight on their property in excess of 7 days, the

fine for which, as calculated through June 30, 2011, is **\$9,020.00**; and

2) raising chickens on their property, the fine for which, as calculated through June 30, 2011, is **\$1,600.00**.

XXXII.

Moreover, as provided for in the Restrictive Covenants and as authorized by La. R.S. 9:1145, *et seq.*, the Association hereby seeks, and is entitled to, all court costs and reasonable attorney's fees incurred in this proceeding.

WHEREFORE, Defendants, THE LAKE AT BELLE TERRE HOME OWNERS ASSOCIATION, INC. and JEFF ZETTLEMOYER pray as follows:

- I. That the declinatory exception of lack of subject matter jurisdiction be served on Plaintiffs, through their counsel of record, and that they be made to appear on a date and time to be selected by this Court and show cause, if any can be shown, why the exception should not be sustained and their lawsuit dismissed, with prejudice and at their cost;
- II. That the answer be deemed good and sufficient and, after all due proceedings are had, that there be judgment entered in favor of Defendants, dismissing Plaintiffs' lawsuit, with prejudice and at their cost;
- III. That the reconventional demand be served on Plaintiffs/Defendants-in-Reconvention, through their counsel of record, and, after all due proceedings are had, that there be judgment entered in favor of The Lake at Belle Terre Home Owners Association, Inc. as Defendant/Plaintiff-in-Reconvention and against Plaintiffs/Defendants-in-Reconvention awarding to Defendants/Plaintiffs-in-Reconvention the following relief:
 - A) A declaration that: 1) the prior increase in the annual assessment to \$150 is legal, valid and enforceable; 2) the new restrictions listed at Paragraph 20 of Plaintiffs/Defendants-in-Reconvention's Petition for Declaratory Judgment are also legal, valid and enforceable; and 3) the statements filed by the Plaintiffs/Defendants-in-Reconvention are of no effect as to the Association, either because La. R.S. 9:1141.6 is inapplicable due to the Association's existing mechanism for the establishment of new restrictions set forth in its By-Laws, or alternatively, because the statements were filed untimely pursuant to La. R.S. 9:1141.6(D)(1), and Plaintiffs/Defendants-in-Reconvention continue to be bound by the restrictions passed and/or ratified on November 3, 2010;
 - B) Issuance of a permanent injunction prohibiting Plaintiffs/Defendants-in-Reconvention, William H. Tugwell, IV and Karri Tugwell, from maintaining a boat and/or trailer in the front of their lot and/or visible from the road in excess of 7 days and prohibiting them from raising chickens on their property; and,

C) A judgment awarding to the Association as Defendant/Plaintiff-in-Reconvention: 1) all past due and unpaid assessments, late fees, and associated costs owed to it by the Plaintiffs/Defendants-in-Reconvention in relation to their failure to pay annual assessments, together with legal interest from the date of judicial demand; 2) all past due and unpaid fines owed by the Tugwells for violating the restrictions, together with legal interest from the date of judicial demand; and 3) all court costs and reasonable attorney's fees incurred in this proceeding; and,

IV. For all other general and equitable relief as may be awarded in the premises.

Respectfully Submitted:

SHOWS, CALI, BERTHELOT & WALSH, L.L.P.

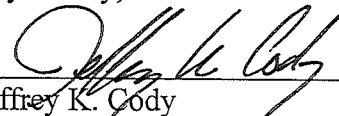


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to all counsel of record via facsimile and/or by depositing same in the U.S. Mail postage prepaid and properly addressed.

Baton Rouge, Louisiana, this 20th day of July, 2011.



Jeffrey K. Cody

WILLIAM H. TUGWELL, IV, KARRI
TUGWELL, HUDSON TABOR, V,
MARGA TABOR, MARY PIKE, MIKE
DEMAREE, MICHAEL PNDARVIS
AND CHERISH PNDARVIS

NO. 130608

DIVISION: E

21ST JUDICIAL DISTRICT COURT

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THE LAKE AT BELLE TERRE
HOMEOWNERS ASSOCIATION, INC.
AND JEFF ZETTLEMOYER

STATE OF LOUISIANA

ORDER

Considering the foregoing Declinatory Exception of Lack of Subject Matter Jurisdiction;

IT IS ORDERED that Plaintiffs appear on the 6th day of September, 2011 at 9:00
o'clock Am. and show cause, if any can be shown, why Defendants' Declinatory Exception of Lack
of Subject Matter Jurisdiction should not be sustained, thereby dismissing Plaintiffs' lawsuit, with
prejudice and at Plaintiffs' cost.

Livingston, Louisiana, on this 27 day of July, 2011.

S/BRENDA BEDSOLE RICKS

HONORABLE BRENDA B. RICKS
DISTRICT JUDGE, 21ST J.D.C.

**Please serve the Exception, Answer, and
Reconventional Demand and Memorandum in Support
upon Plaintiffs/Defendants-in-Reconvention**

Through their counsel of record,
Mr. Thomas D. Fazio
McCollister, McCleary & Fazio
A Professional Law Corporation
Post Office Box 40686
Baton Rouge, LA 70835

WILLIAM H. TUGWELL, IV, KARRI
TUGWELL, HUDSON TABOR, V,
MARGA TABOR, MARY PIKE, MIKE
DEMAREE, MICHAEL PNDARVIS
AND CHERISH PNDARVIS

NO. 130608

DIVISION: E

21ST JUDICIAL DISTRICT COURT

VERSUS

PARISH OF LIVINGSTON

THE LAKE AT BELLE TERRE
HOMEOWNERS ASSOCIATION, INC.
AND JEFF ZETTLEMOYER

STATE OF LOUISIANA

FILED
CLERK OF COURT
PARISH OF LIVINGSTON
2011 JUL 21 AM 10:10
DEPUTY CLERK

**MEMORANDUM IN SUPPORT OF
DECLINATORY EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION**

MAY IT PLEASE THE COURT:

I. FACTUAL BACKGROUND

On May 16, 2001, Restrictive Covenants (sometimes referred to as just “restrictions”) were established and placed upon the 112 lots that comprise the Lakes at Belle Terre subdivision in Livingston Parish and were duly recorded as COB 784, Page 860, Entry No. 466912 of the official records of Livingston Parish. The Lake at Belle Terre Home Owners Association, Inc. (the “Association”), was formed on May 17, 2001, pursuant to its Articles of Incorporation filed with the Secretary of State. The Association prepared and adopted By-laws on that same date. (The Restrictive Covenants, Articles of Incorporation, and By-laws may all be collectively referenced hereinbelow as the “community documents.”¹)

Plaintiffs², William H. Tugwell, IV, Karri Tugwell, Hudson Tabor, V, Marga Tabor, Mike Demaree, Michael Pendarvis and Cherish Pendarvis, are all homeowners domiciled in the Lakes at Belle Terre subdivision. As homeowners Plaintiffs are considered members of the Association and are subject to the community documents and amendments thereto. On or about October 18, 2010, Plaintiffs filed the instant action against the Association seeking a declaration that: (1) the increase in

¹This reference is also appropriate in light of the following definition found at La. R.S. 9:1141.2: “community documents’ means the articles of incorporation, bylaws, plat, declarations, covenants, conditions, restrictions, rules, and regulations, or other written instruments, including any amendments thereto, by which the association has the authority to exercise any of its powers to manage, maintain, or otherwise affect the association property or which otherwise govern the use of association property.”

²Mary Pike’s claims were voluntarily dismissed without prejudice by order dated November 8, 2010.

the annual assessment from \$50 to \$150 is illegal, invalid, and unenforceable based on the purported failure to adhere to the process established by the community documents; (2) that the amendments to the Restrictions of the subdivision (all of which are listed at Paragraph 20 of their Petition) are illegal, invalid, and unenforceable based upon the purported failure to adhere to the process established by the community documents; and (3) that the Board of Directors for the Association (the "Old Board") was improperly constituted based on the purported failure to adhere to the process established by the community documents. In addition to seeking a declaratory judgment adopting the above findings, Plaintiffs ask for a remedy in the form of injunctive relief by requesting that this Court issue an order: (1) vacating all seats on the Old Board; (2) barring former President Jeff Zettlemoyer from serving as Director or Officer for the Association; (3) refunding to Plaintiffs the difference between the prior assessment of \$50 and the increased assessment of \$150 (*i.e.*, \$100), as well as any late fees that were applied to Plaintiffs. Plaintiffs also ask for a remedy in the form of mandamus relief by requesting this Court to issue an order instructing the Association to allow Plaintiffs to view the books and records of the Association, which is already required by La. R.S. 12:223.

For the reasons explained more fully hereinbelow, the lawsuit filed by Plaintiffs is moot, and, therefore, this Honorable Court lacks subject matter jurisdiction over these proceedings. Accordingly, the exception should be sustained and Plaintiffs' lawsuit dismissed.

II. LAW AND ARGUMENT

DECLINATORY EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION

La. C.C.P. art. 925(A)(6) recognizes an exception based on lack of jurisdiction over the subject matter of an action. "Jurisdiction over the subject matter is the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based upon the object of the demand, the amount in dispute, or the value of the right asserted." La. C.C.P. art. 2. The exception of lack of subject matter jurisdiction is properly raised in this matter because the claims urged by Plaintiffs have become moot since the filing of their lawsuit. "If the case is moot, then there is no subject matter on which the judgment of the court can operate." McPherson v. Foster, 2003-2696

(La.App. 1 Cir. 10/29/04), 889 So.2d 282, at 289, citing Cat's Meow, Inc. v. New Orleans, Department of Finance, 98-0601 (La. 10/20/98), 720 So.2d 1186, at 1193. "That is, jurisdiction, once established, may abate if the cause of action becomes moot." *Id.*

While Plaintiffs seek a declaratory judgment from this Court, "[t]he court may refuse to render a declaratory judgment or decree where such judgment or decree, if rendered, would not terminate the uncertainty or controversy giving rise to the proceeding." La. C.C.P. 1876.

"It is well settled that courts will not decide abstract, hypothetical or **moot** controversies, or render advisory opinions with respect to such controversies. In order to avoid deciding abstract, hypothetical or moot questions, courts require cases submitted for adjudication be justiciable, ripe for decision and not brought prematurely." Louisiana Associated General Contractors, Inc. v. State, Division of Administration, 95-2105 (La. 3/8/96), 669 So.2d 1185, at 1193. (Emphasis added.)

"A 'justiciable controversy' is defined as an 'existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract [or moot], and a dispute which involves the legal relations of the parties who have real adverse interest, and upon which the judgment of the court may effectively operate through a degree of conclusive character.'" *Id.*, quoting St. Charles Parish School Board v. GAF Corporation, et al., 512 So.2d 1165, at 1171 (1987). The questions presented in the Plaintiffs' lawsuit are moot for the following reasons.

The community documents for the Association provide a method for increasing the annual assessment. In particular, the Restrictive Covenants state:

"The owner of each lot, upon which a house has been built, completed, and transferred to an owner who occupies the house as his residence, shall be assessed an Annual Assessment for membership in the Association, which shall be initially fixed at Fifty and no/100 (\$50.00) Dollars per year. **The assessment may be increased from time to time as provided in the By-Laws.** The assessment shall be effective upon the recording of this instrument. The assessment shall be collected in advance and prorated for the remainder of the current calendar year. Thereafter, the assessment shall become due and payable in advance on January 1 of each year." (Emphasis added.)

Though the By-laws may not contain an express provision for the increase of annual assessments, they do provide the following at Section 3 "Voting", at Subsection A:

"A. On demand of any Member, the vote for directors, or on any

question before a meeting, shall be by ballot. **All questions shall be decided by a majority vote of the votes cast except as otherwise provided by the Articles or By-laws.**" (Emphasis added.)

Thus, the By-laws are clear in stating that *all questions* are to be decided by a majority of the votes cast, and nowhere within the community documents does it specify a different number of votes that is necessary in order to increase annual assessments. Therefore, a majority of the votes cast will suffice in order to increase the Association's annual assessments.

On Wednesday, November 3, 2010, and subsequent to the filing of Plaintiffs' lawsuit, the Association held its annual meeting. Prior to that meeting a proxy³ was circulated among the homeowners. The proxy advised homeowners of the instant lawsuit filed by Plaintiffs and permitted them, by their signature, to ratify the prior acts of the Board, Officers and representatives for 2008, 2009 and 2010 and to ratify the election or appointment of the old board. The proxy also permitted Cheryl Hensley, Carol Harrison or Kevin Dees to vote their lot for the election of any Officers or Directors at the November 3, 2010 meeting.

The minutes from the annual meeting on November 3, 2010 indicate that there were 89 eligible household voters and that a sufficient number of the eligible homeowners affirmatively voted, by ballot or by proxy, to ratify the prior increase in the annual assessment to \$150, the new restrictions, and the old board's election or appointment. (*See* Exhibit "A" attached). Also, an election was held on November 3, 2010, for the purpose of electing a new board. *Id.* Furthermore, former President Jeff Zettlemyer's term expired on November 3, 2010, and he is no longer serving on the board as a director, officer or otherwise.

All of the relief sought by the Plaintiffs pertains to matters that no longer present a justiciable controversy that this Court must resolve. Indeed, notwithstanding any allegations of impropriety and/or the failure to comply strictly with the community documents in the old board's enactment or implementation of either the increase in the annual assessment to \$150 or the amendments to the

³ The Association's By-laws, state at Section 4 Quorum, "[e]xcept as provided in the next section hereof, Members, together holding a majority of the outstanding votes entitled to vote thereat, who are present in person or represented by proxy at any meeting, constitute a quorum for the transaction of business." (Emphasis mine.)

Restrictive Covenants, the affirmative vote of a sufficient number of the eligible homeowners on November 3, 2010 has expressly ratified those prior acts. Plaintiffs have not challenged within this proceeding the legitimacy or effect of the said ratification.

“[A] corporation may . . . be bound by the act of a corporate official, even though the act of the official was without formal authority, in those circumstances where it is shown that the corporation ratified the act.” Walker v. Nobile, 606 So.2d 7, at 8 (La.App. 5 Cir. 1992); “Such ratification may be express or implied, provided the action is not prohibited by the corporation charter, by statute, or is not contrary to public policy.” *Id.* In this case, the increase in the assessment was authorized by the community documents even absent a vote of the homeowners.⁴ Nevertheless, those acts were subsequently ratified by affirmative vote of a majority of the eligible homeowners on November 3, 2010. “The actions of the official which are ratified by the corporation are . . . given retroactive effect.” *Id.* Therefore, despite Plaintiffs’ allegations that the increase in the assessment and new restrictions were enacted without authority, the subsequent ratification by the homeowners has clearly authorized those acts retroactive to the date they were first enacted.

Accordingly, Plaintiffs’ request for an order from this Honorable Court declaring that the increase in the annual assessment to \$150 and the new restrictions are illegal, invalid, and unenforceable must be considered moot since no practical relief would flow from such a ruling. Additionally, since on November 3, 2010, a new board was elected by vote of a majority of the eligible homeowners and the term of Jeff Zettlemyer, the former President, ended and he is no longer on the board, Plaintiffs’ claims that the old board and, in particular, Jeff Zettlemyer, should be removed must also be considered moot. Finally, inasmuch as Plaintiffs seek an order from this Court instructing the Association to permit them to view its records and books, that request for relief is also moot since La. R.S. 12:223 already requires that they have such access, the Association has no record of ever denying Plaintiffs or anyone else an opportunity to examine its books and records, and

⁴ The Articles of Incorporation of the Lake at Belle Terre Home Owners Association, Inc. provide as follows: “In order to be eligible to vote, a member shall be required to pay annual assessments and/or membership dues as established in the By-Laws of the corporation or which may be fixed, from time to time, by the Board of Directors.” (Emphasis added.)

the Association is willing to permit Plaintiffs an opportunity to examine its books and records without the necessity of an order from this Court.

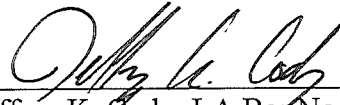
Defendants reserve the right to introduce witness testimony and evidence in support of their exception at the hearing to be held in this matter.

III. CONCLUSION

For the foregoing reasons, Defendants' Declinatory Exception of Lack of Subject Matter Jurisdiction should be sustained, thereby dismissing Plaintiffs' lawsuit, with prejudice and at Plaintiffs' cost.

Respectfully Submitted:

SHOWS, CALI, BERTHELOT & WALSH, L.L.P.

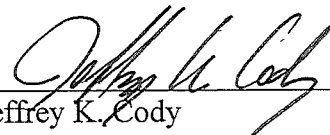


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to all counsel of record via facsimile and/or by depositing same in the U.S. Mail postage prepaid and properly addressed.

Baton Rouge, Louisiana, this 20th day of July, 2011.



Jeffrey K. Cody

Lakes at Belle Terre Home Owner's Association

Minutes of Annual Meeting
November 3, 2010

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1. 2010 President's Report

Jeff Zettlemyer gave information about the lake cleaning project, neighborhood watch signs that were placed, fire hydrants being painted, past due assessments being collected by legal action and the purchase of general liability insurance for the homeowner's association.

2. 2009 Treasurer's Report

Carol Harrison gave an accounting for all 2009 expenses including sign placement, utilities, landscaping, lawn maintenance for vacant houses, postage, light pole and fire hydrant painting, filing fees, and attorney fees, which included a retainer for Robert Harrison, Attorney at Law.

3. The minutes of the previous (2009) annual meeting were read. Motion was made to accept. The motion was seconded and approved.

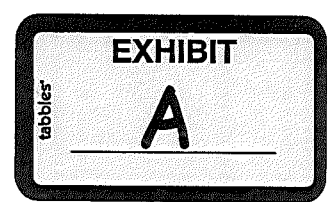
4. The discussion of New Business included the posting of board meeting minutes on the association website. Nominations were made for Tracy McRae, Carol Harrison and David Strong to serve as directors on the board. The nominations were seconded and appointments were unanimously approved. Association resident Jeff Cody (attorney) was introduced to the homeowners; and, it was announced that Jeff has offered his legal services at a reduced rate to represent the association in the Tugwell litigation. Upkeep of the cul de sac landscaping was discussed and it was requested that landscaping the cul de sacs be kept on the "to do" list as a priority.

5. 2010 ballot items were discussed including the amount of dues for the upcoming year, the lake curfew, right of way accesses to the lake and restrictions regarding parking on servitudes and green spaces.

6. A motion was made to accept all previous ACTS OF THE H.O.A. retroactive to 2008. Motion was seconded and unanimously approved.

Ballot Results This Year

89 eligible household voters
65 proxies were received
24 that signed proxies turned in ballots
41 voted by proxy only



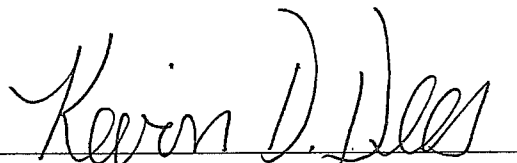
1. For dues to remain at \$150 (or reduced to \$100)	PASSED	\$100 18 votes	\$150 57 votes	
2. To set a lake curfew at 11pm (unless accompanied by adult)	PASSED	For 74 votes	Against 2 votes	Abstain 2 votes
3. For board to clear all lake accesses.	PASSED	For 69 votes	Against 2 votes	Abstain 7 votes
4. That parking not be allowed in yards or cul de sacs	PASSED	For 66 votes	Against 4 votes	Abstain 2 votes

Board Members 2010

Kevin Dees
Cheryl Hensley
Carol Harrison
Tracy McRae
David Strong

Officers 2010

Kevin Dees	President
Cheryl Hensley	Vice President
David Strong	Treasurer
Denise Sharon	Secretary


Kevin Dees, Secretary