STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

McFARLAND REAL ESTATE, LLC,

Plaintiff/Counter-Defendant,

vs.

ANDERSON WOODS CONDOMINIUM ASSOCIATION,

Defendant/Counter-Plaintiff.
_____/

Case No. 17-06819-CBB

HON. CHRISTOPHER P. YATES

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND VERDICT

Robert Frost's *Mending Wall* poem mentions that "'[g]ood fences make good neighbours.'" But what about a good sewerage system? This case, which essentially involves a dispute about the assessment of $500 per year, illustrates that a good sewerage system promotes neighborly behavior only if each lot owner is willing to pay a fair share of the system's costs. Plaintiff McFarland Real Estate, LLC ("McFarland") owns two lots that render McFarland a member of Defendant Anderson Woods Condominium Association ("Anderson Woods"). McFarland has built a house on lot 39 and availed itself of a connection to the sewerage system for that lot. In contrast, McFarland has left lot 38 undeveloped, and therefore does not use the sewerage system for that lot. Anderson Woods has assessed an annual fee of $500 for each of the two lots, which McFarland paid for several years but ultimately refused to pay for the undeveloped property comprising lot 38. Believe it or not, this case requires the Court to resolve the $500-per-year dispute about the propriety of the assessment for lot 38. Because the Court finds that Anderson Woods has the right to impose an annual assessment for each of McFarland's two lots, the Court shall render a verdict in favor of Anderson Woods.

I. Findings of Fact

Pursuant to MCR 2.517(A)(1), in an action tried without a jury, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." The Court must render "[b]rief, definite, and pertinent findings and conclusions on the contested matters" that may take the form of "a written opinion." See MCR 2.517(A)(2) & (3). Accordingly, the Court shall begin with findings of fact, followed by conclusions of law, and ultimately the verdict.

The basic facts are not in dispute. David and Jenna McFarland bought lot 39, built a house on that lot, and moved into their new home in April of 2014. Lot 39 is connected to the sewerage system, and the McFarlands have paid the $500 annual fee for sewerage services for lot 39 without any complaints. On September 12, 2014, the McFarlands bought lot 38, which was vacant, through a land contract. See Trial Exhibit A. The recording of a warranty deed on May 12, 2015, gave the McFarlands legal title to lot 38, see Trial Exhibit C, and the McFarlands eventually transferred title to the limited liability company that is the plaintiff in this lawsuit. Despite the title transfers, lot 38 was never developed, so it still stands vacant and does not use the sewerage system.

With respect to undeveloped lot 38, Defendant Anderson Woods assessed a prorated "Septic Fee" of $150.68 for the period from September 12, 2014, through December 31, 2014, as well as an annual "Sewer Assessment" of $500 for 2015. See Trial Exhibit 18. Plaintiff McFarland paid that amount in its entirety on December 20, 2014, as part of a check for $2,160.61 from David and Jenna McFarland. See id. Then, on January 1, 2016, Anderson Woods billed McFarland $500 for the 2016 "Sewer Assessment" for lot 38, and McFarland promptly paid that charge. Id. On January 1, 2017, Anderson Woods billed McFarland $500 for the 2017 "Sewer Assessment" for lot 38. See id. But in response, McFarland refused to pay the $500 sewerage assessment for 2017. See id.

Plaintiff McFarland's refusal to pay Defendant Anderson Woods's 2017 sewerage assessment for undeveloped lot 38 was the culmination of a growing feud between the parties. On October 3, 2014, David McFarland wrote: "I am happy to pay the dues for two lots, but I think it would make sense to adjust the dues payable by residents to be determined by total lot square footage, not by how many lots are owned." See Trial Exhibit B. After that request was rejected, see id., the McFarlands became embroiled in disputes with Anderson Woods in 2015 that required the attention of the board of directors of Anderson Woods. See Trial Exhibit D. Finally, on December 15, 2015, McFarland asked the board of directors to "review the $500 Sewer Assessment for 38." See Trial Exhibit 10. On December 21, 2015, David McFarland was told that "the decision has been made that the charge will remain in place, as originally designed and approved." See id. One year later, on December 19, 2016, David McFarland sent an e-mail requesting that "the $500.00 sewer assessment be removed from our lot 38 statement" and that "any previous $500.00 payments made be credited to our account and applied to the dues due on that lot." See Trial Exhibit 11. On January 16, 2017, McFarland was advised that "the decision has been made that the charge will remain in place, as originally designed and approved." See Trial Exhibit 12. An exchange of legal arguments ensued, see Trial Exhibit 13 & Trial Exhibit 14, but the parties could not resolve their disagreement. Therefore, on July 31, 2017, McFarland filed a complaint against Anderson Woods, which responded with counterclaims.

On October 18, 2017, the Court met with the parties and their counsel in an effort to resolve the dispute, but discussions broke off quickly without a resolution. Thus, the Court suggested that the matter be resolved by a prompt bench trial followed by findings of fact, conclusions of law, and a verdict. The parties agreed to that approach, so the Court conducted a bench trial on December 5, 2017. Now the Court must resolve the dispute based upon the record developed at that trial.

II. Conclusions of Law

Although Plaintiff McFarland has presented five separate claims and Defendant Anderson Woods has advanced two separate counterclaims, all of the claims turn almost entirely upon whether Anderson Woods has the ability to impose a $500 annual sewerage assessment on lot 38 despite the fact that lot 38 is vacant and, therefore, not using the sewerage system. Both sides have framed this dispute as essentially a matter of contract interpretation, so the Court shall follow their lead by using principles of contract interpretation to resolve the fundamental question at the heart of this case. If the controlling documents unambiguously resolve the propriety of the annual sewerage assessment, the Court shall complete its analysis by simply applying the language of those documents as written. See Rory v Continental Ins Co, 473 Mich 457, 468 (2005). But if the controlling documents in this case are ambiguous because their "'provisions are capable of conflicting interpretations[,]'" Klapp v United Ins Group Agency, Inc, 468 Mich 459, 467 (2003), then the Court may consider "'other and extrinsic facts in connection with what is written[.]'" Id. at 469. With these principles in mind, the Court shall turn to the language of the controlling documents.

The condominium bylaws, which provide the starting point for the Court's analysis, empower Defendant Anderson Woods's board of directors "[t]o levy and collect assessments against and from the Members of the [condominium] Association and to use the proceeds therefrom for the purposes of the Association[.]" See Trial Exhibit 1 (Bylaws, § 3(b)). The 2005 amendment to the master deed also expressly authorized the board of directors "to obligate all co owners to participate in a special assessment district or districts and to consider and act upon all other community water and sewer issues on behalf of the Association and all co-owners." See Trial Exhibit 2 (Amendment to Master Deed, § 5). Beyond that, the 2005 amendment explained in clear terms the obligations of co-owners

with respect to the water and sewer systems:

> [E]ach Owner will pay such special assessments as may be levied against his unit by any such special assessment district and shall take the necessary steps as required by the state, county and township agencies and by the Association, acting through its Board of Directors, to connect, at his own expense, his water intake and sewage discharge facilities to such community water supply system and/or community sewage disposal system within ninety (90) days following the completion of said system or systems.

See Trial Exhibit 2 (Amendment to Master Deed, § 5). Thus, the board of directors had the power to levy special assessments for the sewage discharge systems, and the co-owners had the obligation to connect their "sewage discharge facilities" to the "community sewage disposal system." Id.

In the fullness of time, Defendant Anderson Woods's board of directors established a special assessment district for the sewerage system servicing lots 35 through 42 and the pool clubhouse for the development. A subsequent combination of lots effectively eliminated lot 42, and the expenses for the sewerage system each year amounted to approximately $4,000, so the board of directors chose to levy a $500 annual sewerage assessment upon each of the remaining seven lots, *i.e.*, lots 35-41, and the pool clubhouse to raise the $4,000 needed each year for sewerage services. The documents that set up that special assessment district for the sewerage system contain language that presupposes that each lot will be connected to the sewerage system. Of course, Plaintiff McFarland chose not to develop lot 38 and avail itself of the sewerage system, so the documents do not clearly indicate how lot 38 should be treated for sewerage assessments. For example, a "Restrictive Covenant Running With the Land" provides that "Units 35-42 in Anderson Woods will be served by a privately owned common sewerage system," see Trial Exhibit 7 (restrictive covenant at 1), but that document further states: "the owners of units utilizing the Sewerage System have individual responsibilities for paying a proportionate share of the costs of the Sewerage System[.]" Id. (restrictive covenant at 2).

The 2007 amendment to the master deed added language addressing the sewerage system that illustrates the lack of consideration of undeveloped lots not connected to the sewerage system. See Trial Exhibit 6. For example, Amendment 5 – which amended section 3(b) of the Anderson Woods bylaws – decreed that "the Association shall separately assess the owners of Units 35-42 for the costs associated with maintaining the shared drain field system servicing those Units." See Trial Exhibit 6 (Amendment to Master Deed at 6). Confusingly, Amendment 2 referred variously to "co-owners using the sewerage system," "units utilizing the sewerage system," and "the Co-Owners with units serviced by the sewerage system." See id. (Amendment to Master Deed at 3). In sum, none of the controlling documents unambiguously addresses how co-owners with undeveloped lots in Units 35 through 42 should be treated for purposes of sewerage assessments.

In light of the ambiguity concerning the treatment of undeveloped lots, such as lot 38 owned by Plaintiff McFarland, the Court "'can look to such extrinsic evidence as the parties' conduct, the statements of its representatives, and past practice to aid in interpretation.'" Klapp, 468 Mich at 470. The most valuable evidence in that regard comes from the time period before the parties realized that they disagreed. Indeed, as our Supreme Court has explained: "'The practical interpretation given to contracts by the parties to them, while engaged in their performance and before any controversy has arisen concerning them, is one of the best indications of their true intent.'" Id. at 479. In 2014, David McFarland stated: "I am happy to pay the dues for two lots, but I think it would make sense to adjust the dues payable by residents to be determined by total lot square footage, not by how many lots are owned." See Trial Exhibit B. That suggestion, which made no mention of the sewerage levy for an undeveloped lot, was rejected by Defendant Anderson Woods. Id. Then McFarland paid the prorated sewerage assessment for 2014, the full $500 sewerage assessment for 2015, and the $500

sewerage assessment for 2016 in timely fashion. See Trial Exhibit 18. Although McFarland made an issue of the sewerage assessment in an e-mail sent on December 15, 2015, see Trial Exhibit 10, McFarland did not lodge that complaint until months after he became embroiled in other disputes with Anderson Woods. See Trial Exhibit D. Moreover, when McFarland's e-mail on December 15, 2015, was met with a request that McFarland "[p]lease process payment for both sewer assessments as invoiced[,]" see Trial Exhibit 10, McFarland promptly remitted payment as instructed. See Trial Exhibit 18. Thus, the parties' performance provides strong support for the propriety of the sewerage assessments. Moreover, recognizing the authority afforded to Anderson Woods under its bylaws to "assess the owners of Units 35-42 for the costs associated with maintaining the shared drain field system servicing those Units[,]" see Trial Exhibit 6 (Amendment to Master Deed at 6), the Court is convinced that Anderson Woods may levy an annual $500 assessment for lot 38 despite the fact that lot 38 is undeveloped and, therefore, not using the sewerage system.[1]

The Court's ruling that Defendant Anderson Woods properly levied a $500 annual sewerage assessment upon lot 38 necessitates a verdict in favor of AndersonWoods on each of the five counts in Plaintiff McFarland's complaint. That is, the lien recorded against lot 38 by Anderson Woods is valid, at least insofar as it reflects the unpaid $500 sewerage assessment for 2017, so the quiet-title claim in Count One and the slander-of-title claim in Count Two fail. Similarly, McFarland has no basis for the declaratory relief it seeks in Count Three concerning the invalidity of the $500 annual

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[1] If the board of directors of a condominium association has the authority to address a request from an owner of a condominium unit, the Court's inquiry "is whether the board properly applied the 'rule of reason' in denying the request." Bruce A Cohan, MD, PC v Riverside Park Place Condo Ass'n, 123 Mich App 743, 746 (1983). "Under the 'rule of reason,' a condominium association's board must demonstrate that it acted reasonably in denying a unit owner's special request." Id. The board of directors of Defendant Anderson Woods manifestly met that standard in denying Plaintiff McFarland's special request to exempt lot 38 from annual sewerage assessments.

sewerage assessment for lot 38. Likewise, the Court must reject McFarland's claim in Count Four that Anderson Woods breached the restrictive covenant introduced as Trial Exhibit 7 by levying the $500 annual sewerage assessment upon lot 38. Finally, the Court must deny McFarland's request in Count Five to enforce the terms and provisions of the condominium-association documents in a manner that precludes Anderson Woods from imposing the $500 sewerage assessment on lot 38.

The counterclaims advanced by Defendant Anderson Woods are not quite so easily resolved as the claims by Plaintiff McFarland.[2] The first counterclaim alleges that McFarland committed a breach of contract by refusing to pay the $500 sewerage assessment for lot 38 for 2017. The Court shall render a verdict for Anderson Woods and against McFarland on that $500 claim. But Anderson Woods's prayer for relief seeks "$1,070.00, exclusive of interest after June 5, 2017, costs, attorney fees and future assessments."[3] The Court shall take up the request by Anderson Woods for damages, costs, and attorney fees in excess of $500 at a post-trial hearing. The second counterclaim demands judicial foreclosure and sale of lot 38, but the parties agreed on the record during the bench trial to work out the case as a matter of money damages, rather than foreclosure, upon the rendering of the Court's verdict. Accordingly, the Court shall not include in its verdict any pronouncement regarding the request by Anderson Woods for judicial foreclosure.

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[2] Defendant Anderson Woods has also named Lake Michigan Credit Union as a third-party defendant because it "may claim a right and/or an interest in [lot 38] pursuant to a mortgage recorded with the Kent County Register of Deeds on January 24, 2017," see Anderson Woods Condominium Association's Counterclaim and Third-Party Complaint, ¶ 25, but the Court need not concern itself with that third-party claim because of a "Stipulation and Order Regarding Priority of Mortgage" that was entered on December 1, 2017.

[3] The first counterclaim also hints at declaratory relief by demanding, in the prayer for relief, "future assessments." Of course, the Court cannot award damages in the form of future assessments on an *ex ante* basis, but the Court can award declaratory relief to Defendant Anderson Woods with respect to future assessments.

III. Verdict

Based upon the findings of fact and conclusions of law rendered by the Court, the Court shall enter a verdict in favor of Defendant Anderson Woods and against Plaintiff McFarland on each and every one of the five claims set forth in McFarland's complaint. In addition, the Court shall render a verdict in favor of Anderson Woods and against Plaintiff McFarland in the amount of $500 on the first counterclaim, and the Court shall schedule a post-trial hearing to consider Anderson Woods's demand for relief beyond $500 on its first counterclaim. Finally, the Court shall not render a verdict on Anderson Woods's second counterclaim for judicial foreclosure because the parties agreed during the bench trial to resolve that matter in the first instance with the payment of money damages, rather than through judicial foreclosure.

IT IS SO ORDERED.

Dated: December 28, 2017

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge