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MEMORANDUM

TO: University Heights Subdivision No. 1
FROM: Scott A. Pummell
SUBJECT: Amending the subdivision's indenture
DATE: April 19, 2021

Questions have been raised regarding the ability of University Heights Subdivision No. 1 (the "Subdivision") lot owners to amend the Subdivision's governing Declaration of Trust and Agreements (the "Indenture"). The original Indenture included express authority and a procedure for amendment. Section 6 stated:

[I]f, at any time after January 1, 1910, a majority of owners of lots in University Heights (estimated by the frontage or said lots and also by the assessed value of said lots) shall agree that further limitations and restrictions on the use of lots in University Heights are desirable to maintain said tract as a first-class residence quarter. Said majority of lot owners may petition the Circuit Court of said locality for a decree that such further limitations and restrictions be imposed as though recited herein, and if the said court upon hearing (after such notice to all other lot owners as may be practicable) shall adjudge that said limitation, prayed are reasonable and just, then it is hereby authorized by decree to make the same a part of the terms of the instrument upon the due record of said decree in the office of the Recorder of Deeds of said locality.

Indenture, Section 6.

This amendment **procedure** was struck down by the Missouri Supreme Court in 1932. *In re Buckles*, 53 S.W.2d 1055, 1057 (Mo. 1932). University Heights lot owners had petitioned the court to enter a decree reciting an amendment to the Indenture which imposed further restrictions and limitations on lot owners, as required under Section 6. *Id.* at 1055. After the Circuit Court entered an order approving the decree, other lot owners appealed. *Id.* The Supreme Court ruled that the Circuit Court did not have jurisdiction to entertain such a proceeding. As the court "does not have jurisdiction of the subject-matter, such power and authority cannot be conferred upon the court by the private agreement of individuals". *Id.* The court said lot owners "may perhaps, by agreement, provide a mode of procedure or arbitration for imposing new or additional restrictions, or the modification of existing restrictions, upon property within the given area, and to enforce the



observance of such restrictions or prevent a violation thereof have recourse to the remedies, process, and forms of action afforded by the courts; but it is not within the contracting parties to invest a court with any jurisdiction or power not conferred upon it by law, nor can the court be utilized as private umpire or arbitrator”. *Id.* Further, the court “has no right, power, or authority to act in such capacity”. *Id.* Based on this holding, the court invalidated the amendment to the Indenture that was at issue in the suit.

A subsequent lawsuit apparently revived lot owners’ ability to amend the Indenture. Lot owners in 2001 sought a revision of the Indenture to allow for amendments, specifically so that the property owners would be able to increase assessments. *See Biggs v. Scott*, St. Louis County Circuit Court Cause No. 01CC-003742 (November 5, 2001) (attached as Exhibit A). The court’s finding of facts noted that Section 6 of the Trust “has been declared to be inoperative by the Supreme Court of Missouri”. *Id.* However, the court stated that the “intention of the Trust was that it could be amended by a majority of the lot owners in the subdivision”. *Id.* The Court also found that “the inability to amend the Trust causes significant problems, including, the necessity of petitioning the Court to exercise its equitable powers in order to raise assessments, and such problems are frustrating the purposes of the Trust”. *Id.* The court held that the “purpose of the Trust is being thwarted” by these issues and that the court had “the power to do that which is necessary to preserve the Trust from destruction and to fulfill its purposes by modifying and changing its terms in order to preserve the Trust”. *Id.*

The court declared that “the clause in Section 6 of the Trust Agreement requiring Court approval for amendments to the Trust Agreement be stricken, and **future amendments to the Trust will become effective upon approval by a majority of the residents of University Heights Subdivision**”. *Id.* (emphasis added).

Missouri law on adding new restrictions and burdens to real property

Some states have adopted statutes which require unanimous approval for the addition of new restrictions or burdens upon real property. Missouri does not have such a statute. Nonetheless, Missouri courts have generally held that restrictive covenants “may be amended at any time **with unanimous consent**, if there is no contrary contractual provision.” *Hazelbaker v. County of St. Charles*, 235 S.W.3d 598, 601 (Mo. App. E.D. 2007) (emphasis added).

The question of whether an indenture may be amended to add new burdens without unanimous consent generally rests on the language of the indenture. Missouri courts have required unanimous approval of lot owners where they are attempting to add a new burden or restriction **unless** the indenture’s amendment provision expressly references burdens and restrictions. Even if an indenture includes the power for its parties to alter or amend the agreement, that authority does not necessarily authorize the imposition of new burdens.

For example, Missouri courts have held that new restrictions could not be added even in indentures that included general language allowing for amendments, such as the authority to: “alter or amend all or in part”; “amend, change or revoke”; “amend or repeal”; “amend or add to”; “modify, amend, release, or extinguish”. General language that does not specifically reference the imposition of new burdens “does not give owners the power to add new burdens to the Restrictions by majority vote” *Hazelbaker*, 602. “[R]ather it merely authorizes changes to existing burdens” by majority or whatever standard is expressed in the written instrument. *Id.*

Questions as to the Indenture's procedure for amendments

Section 6 of the Indenture initially addressed amendments to allow for “further limitations and restrictions”. Such language, if it were still included in the Indenture, likely would have allowed for the amendment of the Indenture to add new burdens or restrictions.

However, the Supreme Court in *Buckles* seemingly struck from the Indenture the procedure for amendments provided for in Section 6. While the Circuit Court in *Biggs* provided a new procedure for amendments, the *Biggs* decision did not address whether it was adopting the language of Section 6 that was in place prior to the *Buckles* decision. Rather, the *Biggs*' holding stated that “the clause in Section 6 of the Trust Agreement requiring Court approval for amendments to the Trust Agreement be stricken, and future amendments to the Trust will become effective upon approval by a majority of the residents of the University Heights Subdivision”.

The language adopted by the *Biggs* court for amendments does not reference burdens or restrictions as the types of amendments that may be approved by majority vote. Consequently, it is unclear if the holding of *Hazelbaker* and related cases would apply to the Subdivision's Indenture or whether unanimous approval is necessary for the imposition of new burdens or restrictions in the Subdivision.