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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

THE GROVES OF HIDDEN CREEK CONDOMINIUM II ASS'N, an )  
Illinois Not-For-Profit Corporation, )  
 )  
Plaintiff-Appellant, )

v. )

THE GROVES OF HIDDEN CREEK COMMUNITY ASS'N, an Illinois )  
Not-For-Profit Corporation; THE GROVES OF HIDDEN CREEK )  
CONDOMINIUM I ASS'N a/k/a THE GROVES OF HIDDEN CREEK, )  
CONDOMINIUM UNIT NUMBER ONE, an Illinois Not-For-Profit )  
Corporation; LaSALLE NATIONAL BANK, TRUST #44398, dated )  
07-11-72; HAMILTON PARTNERS LIMITED PARTNERSHIP, an )  
Illinois Not-For-Profit Corporation; FIRST NATIONAL BANK OF )  
CHICAGO, N.A., and all UNKNOWN OWNERS and NON-RECORD )  
CLAIMANTS, )  
 )  
Defendants-Appellees. )

) Appeal from  
) the Circuit Court  
) of Cook County  
)  
) 11 CH 24563

THE GROVES OF HIDDEN CREEK COMMUNITY ASS'N, an Illinois )  
Not-For-Profit Corporation; THE GROVES OF HIDDEN CREEK )  
CONDOMINIUM I ASS'N, an Illinois Not-For-Profit Corporation, )  
 )  
Counter-Plaintiffs-Appellees, )

) Honorable  
) Kathleen G. Kennedy,  
) Judge Presiding

v. )

THE GROVES OF HIDDEN CREEK CONDOMINIUM II ASS'N, an )  
Illinois Not-for Profit Corporation, LaSALLE NATIONAL BANK, )  
TRUST #44398, dated 07-11-72; HAMILTON PARTNERS LIMITED )  
PARTNERSHIP, an Illinois Not-For-Profit Corporation; FIRST )  
NATIONAL BANK OF CHICAGO, N.A., and all UNKNOWN OWNERS, )  
and NON-RECORD CLAIMANTS, )  
 )  
Counter-Defendants-Appellants. )

JUSTICE McBRIDE delivered the judgment of the court.  
Justices Stuart Palmer and Bill Taylor concurred in the judgment.

**O R D E R**

*Held:* Where appellant failed to show that disputed facts were material, that appellee knowingly relinquished right to dispute liability, and that a different result was most equitable, the circuit court's rejection of waiver and equity arguments and resolution of crossmotions for summary judgment in favor of appellee was affirmed.

¶ 1 The primary parties are three related residential condominium associations which disagree as to which one owns and is therefore responsible for maintaining an aging pond that needs expensive repairs. Two of the condominium associations allied against the third association and prevailed on crossmotions for summary judgment on a complaint and counterclaim regarding ownership of the pond and liability for remediating the erosion of the shoreline. The circuit court also issued a judge's deed conveying fee simple title of the pond to the third association. The new title holder appeals, contending a material fact persists or, in the alternative, the undisputed facts indicate title should have been vested in one of the other condominium associations.

¶ 2 The condominium property was developed in the 1970's by Kennedy Brothers, Inc., in Palatine, Illinois, near the intersection of Dundee Road/Illinois Route 53 and Baldwin Road. It is commonly known as either Groves of Hidden Creek or Hidden Creek Condominiums (Groves of Hidden Creek). The developer created a master or umbrella association called Groves of Hidden Creek Community Association to own and maintain certain common areas of the planned community (as provided by section 18.5 of the Illinois Condominium Property Act, 765 ILCS 605/18.5 (West 2010)) and through a trust, recorded a declaration of easements, restrictions and covenants for this entity dated August 23, 1974, and at least one fee simple deed that was dated

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June 10, 1977. This original declaration charges the master association with maintaining walks, roads, streets, paths, playgrounds, landscaping, recreational facilities, open spaces, and parking areas, but it does not include more specific terms like "waterway," "pond," or "lake." The parties agree that this deed and/or other deeds recorded by the developer gave the master association the title to entry monuments, a long, curving street known as Hidden Creek Circle, a clubhouse, and a playground.

¶ 3 The developer, through a trust, subsequently created two condominium associations (pursuant to section 18.3 of the Illinois Condominium Property Act, 765 ILCS 605/18.3 (West 2010)). One of those associations is Groves of Hidden Creek Condominium I Association, Inc., or Condo I, which was the subject of a declaration of easements, restrictions, and covenants the developer recorded on August 26, 1974. The record on appeal does not disclose specifics about Condo I's holdings, but it does suggest Condo I consists of least 40 multi-unit residential buildings, some ponds, and various waterways that are part of the water drainage system for not only the condominiums but also some neighboring properties.

¶ 4 The other association is Groves of Hidden Creek Condominium II Association, Inc., or Condo II, which was the subject of a declaration of easements, restrictions and covenants recorded on June 11, 1976, and a fee simple deed recorded on June 10, 1977. Condo II consists of 19 buildings that originally contained 136 residential units.

¶ 5 The pond is known as Shadow Lake. We do not know the length of its shorelines or its water capacity, but the record indicates Shadow Lake is roughly C-shaped, with very wide ends and a narrow middle and that it is large enough to be bordered by 13 of Condo II's multiunit buildings. The curved street known as Hidden Creek Circle (which is undisputedly owned by the

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master association) surrounds Shadow Lake, all of the Condo II buildings, and the master association's clubhouse. Fanning out from Hidden Creek Circle, like the short spokes of a wheel, are the streets of Condo I.

¶ 6 Shadow Lake is the drainage point for (1) neighboring properties that are west of Hidden Creek Condominiums, (2) the western part of Condo I, and (3) all of Condo II. These waters drain eastward into Shadow Lake, then eastward to waterways within the eastern borders of Condo I, and then further eastward, in the direction of and past Dundee Road/Illinois Route 53, which is an Illinois highway. Since its inception, Condo I has paid for the maintenance and repair of all the waterways and ponds that are completely within the borders of Condo I's property. For at least the past 15 years, the master association's annual budget has included a line item for maintenance of the community playground and Shadow Lake, due to the belief that both areas were common areas owned by the master association. About 70% of those maintenance funds were contributed by Condo I and about 30% by Condo II, based on the allocation dictated by section 4.06 of the master association's declaration.

¶ 7 In 2011, a building inspector for the Village of Palatine determined that Shadow Lake's banks were eroding to such an extent that they violated local maintenance codes. The master association commissioned a study of the pond by engineers who specialize in water resources and wetlands. The engineers attributed the shoreline erosion to the age of the thin steel sheeting in the sheet pile sea wall and possibly to insufficient embedment of the wall. They determined that some sections of the deteriorating shoreline were a threat to the public and needed immediate repair. They estimated that, depending upon the type and quality of new sea wall and the extent of repairs that must be done to the connected drainage system, it will cost between \$569,558 and \$1,536,200,

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to rehabilitate Shadow Lake.

¶ 8 These daunting estimated costs led to scrutiny of the condominium declarations and title documents, and it then became apparent that none of the three related condominium associations owned Shadow Lake. The developer had conveyed all of the developed property except for Shadow Lake to one of those three entities.

¶ 9 In mid 2011, Condo II filed a complaint for declaratory judgment and injunctive relief against Condo I and the master association, contending that the master association should be declared the rightful owner of the pond, meaning the repair costs would be split 70/30 between Condo I and Condo II. Condo I and the master association filed a counterclaim seeking a declaratory judgment that title vest with Condo II, meaning Condo II would bear 100% of the repair costs. The three parties also named as defendants (1) the trust through which the developer had held the property, LaSalle National Bank, Trust #44398, dated 07-11-72, and (2) two mortgage lenders, Hamilton Partners Limited Partnership and First National Bank of Chicago. With permission of the circuit court, the Village of Palatine intervened to ensure prompt correction of the code violations, either through injunctive relief or appointment of a receiver.

¶ 10 In mid 2013, the three condominium associations submitted a joint statement of undisputed facts and crossmotions for summary judgment which were supported by affidavits from some of the members of their three boards of directors. The parties also gave oral argument. After taking the matter under advisement, the judge ruled in favor of Condo I and the master association and against Condo II on the crossmotions. Condo II has appealed.

¶ 11 The condominium form of property ownership provides for the separate ownership of individual units with an additional undivided percentage ownership in areas that are used in

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common by all the unit owners, such as the land, foundations, walls, roofs, halls, stairs, entrances, recreational areas, parking lots, and gardens. *Board of Directors of 175 East Delaware Place Homeowners Ass'n v. Hinojosa*, 287 Ill. App. 3d 886, 889, 679 N.E.2d 407, 409 (1997); *Anderson v. Council of Unit Owners of the Gables on Tuckerman Condominium*, 404 Md. 560, 576, 948 A.2d 11, 21 (2008). "Common elements can be further subdivided into limited common elements, which are allocated for the exclusive use of one or more, but fewer than all, owners, such as, for example, designated parking spaces, balconies, terraces or patios, as well as general common elements, such as grounds and roads." *Anderson*, 404 Md. at 576, 948 A.2d at 21.

¶ 12 A condominium comes into being when the developer records a declaration. *Directors of 175 East Delaware Place*, 287 Ill. App. 3d at 889, 679 N.E.2d at 409.

"The [Condominium Property] Act defines the declaration as 'the instrument by which the property is submitted to the provisions of [the] Act.' 765 ILCS 605/2(a) (West 1994) [(hereinafter the Act)]. Its primary function is to provide a constitution for the condominium –to guide the condominium development through the years. The declaration contains the property's legal description, defines the units and common elements, provides the percentage of ownership interests, establishes the rights and obligations of owners, and contains restrictions on the use of the property." *Directors of 175 East Delaware Place*, 287 Ill. App. 3d at 889, 679 N.E.2d at 409.

See also Tiffany Real Property § 483.27, Condominiums-Master deed or declaration (2013) (a master deed or declaration describes the land and each unit, states the percentage of ownership in the common elements allocated to each unit, and contains other provisions that control the project

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and its use). A developer's recorded declaration is valid and binding on the lots it concerns. *Board of Managers of Hidden Lake Townhome Owners Ass'n v. Green Trails Improvement Ass'n*, 404 Ill. App. 3d 184, 192, 934 N.E.2d 636, 643 (2010).

¶ 13 Condominium declarations are interpreted according to the usual rules of contract interpretation, generally with a view toward enforcing the reasonable intent of the declarant. 15 Am Jur 2d Condominiums & Cooperative Apartments § 38 (2014). The intent is to be ascertained from the writing alone, if possible. 15 Am Jur 2d Condominiums & Cooperative Apartments § 38 (2014)

¶ 14 Paragraph 1.04 of the declaration recorded to create the Hidden Creek Condominium master association defines the "Community Area" (the property) of the master association as:

"That portion of the Premises legally described on Exhibit 'D' attached hereto, together with all easements, rights, and appurtenances belonging thereto and all fixtures improves, structures and property thereon intended for the mutual use, benefit or enjoyment of the Members, and which lands are to be conveyed to the [master] Association by the Trustee prior to the sale or rental of all dwelling units planned by Developer for this development, and such additions thereto as may be brought within the jurisdiction of or conveyed to the [master] Association for the common use and enjoyment of the Members pursuant to Article V hereof."

¶ 15 Paragraph 7.05 of the same declaration provides in part:

"Trustee may retain title to the Community Area until such time as Developer has completed such improvements thereon as it elects to make and until such time as in the opinion of the Developer, the [master] Association is able to maintain the same,

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but covenants, for itself, its successors and assigns, that it shall convey and quitclaim to the [master] Association, the Community Area not less than the date specified in paragraph 1.04 hereof."

¶ 16 As we indicated above, the developer, through its trustee, LaSalle National Bank, which is a defendant to the current action, was the declarant and titleholder to all of the real property that is now known as Groves of Hidden Creek Condominiums. However, the trustee did not deed Shadow Lake to any of the three condominium associations, the trustee has taken no further action with the property, and there is no current trust beneficiary who could instruct the trustee to deed Shadow Lake. The developer used general terms to convey certain residential units and common elements to Condo I and Condo II, and relied on attached legal descriptions to indicate the specific boundaries. For instance, the initial paragraph of the declaration recorded to create Condo II states, "The Condominium Association consists of nineteen (19) buildings containing a total of one hundred and thirty-six (136) residential units located in unincorporated Palatine, Illinois. The legal description of the property is attached to this document in exhibit 'B', and made a part of it." Further, "All Units in the Buildings located on the Parcel are delineated on the surveys attached hereto as Exhibit 'E' and made a part of this Declaration," and "the Common Elements shall consist of all the portions of the Property except the Units." The circuit court also considered the parties' joint statement of undisputed facts, including the following statements:

"19. Throughout the property comprising Condo I are [a waterway that receives drainage from Shadow Lake,] multiple other ponds and waterways that are completely within the property of Condo I. The Developer conveyed title to said ponds and waterways to Condo I.

20. Since its inception, Condo I has paid for the maintenance and repair of all such ponds and waterways completely within the property of Condo I."

¶ 17 The declaratory judgment statute authorizes Illinois circuit courts, in cases of actual controversy, to make binding declarations of rights flowing from governmental regulations or written documents such as deeds, wills, or contracts. 735 ILCS 5/2-701 (West 2010). The court may, in its discretion, grant consequential relief that is necessary and proper to determine the controversy before it. *Mayfair Construction Co. v. Waveland Associates Phase I Limited Partnership*, 249 Ill. App. 3d 188, 204, 619 N.E.2d 144, 154 (1993). For instance, in *Mayfair Construction*, the court declared that a contract to build Chicago apartment buildings required the general contractor and property owner to initially submit their disputes to the project architect before litigating them in the circuit court, that the defendant had not done so, and, consequently, the defendant was barred from asserting defenses and affirmative defenses to the plaintiff's lawsuit. *Mayfair Construction*, 249 Ill. App. 3d at 204, 619 N.E.2d at 154. Similarly, here the court declared the parties rights under the condominium declarations and consequently issued a judge's deed that resolved the controversy over ownership to Shadow Lake.

¶ 18 On appeal, appellant Condo II first contends that a material question of fact should have prevented the judge from granting summary judgment in favor of Condo I and the master association (but there was no material question to preclude summary judgment in favor of Condo II). The contention relies on the judge's written remarks about only one of several arguments for summary judgment. The parties agreed that the developer's failure to transfer title for Shadow Lake was inadvertent and could be rectified through the summary judgment process. The main argument advanced by Condo I and the master association was that the developer's intent to

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convey Shadow Lake to Condo II only was apparent from (1) the fact that the developer conveyed all the ponds and waterways within the boundaries of Condo I to Condo I only and (2) the fact that Shadow Lake was and is within the boundaries of Condo II only. These facts were established by a combination of the parties' joint statement of undisputed facts, which we quoted above, and various exhibits. Exhibits which indicated Shadow Lake was surrounded by Condo II property were a surveyor's map, photographs included in the engineering study, a Cook County cadastral/tax assessment map, and an aerial photograph of the entire development. Thus, the main argument asked the judge to consider the developer's actions in the 1970's in order to deduce the developer's intent for title to Shadow Lake. The judge found this argument persuasive and granted summary judgment on these undisputed facts.

¶ 19 Condo I and the master association also offered an equitable argument based on the parties' recent conduct, but the judge said she was unwilling to consider this particular argument as appropriate grounds for summary judgment, because the underlying facts were in dispute. Condo I and the master association argued that equity compelled the judge to require Condo II to pay for the maintenance of the waterways within the boundaries of Condo II, "particularly in light of the fact that Condo II members are the only people who receive a direct benefit from the Pond (such as increased property values)." This argument about who currently benefits from Shadow Lake -- 30 or 40 years after the developer completed the project -- was supported by the affidavit of a member of the board of directors of Condo I. This director swore:

"5. Condo I members derive no direct benefit from Shadow Lake.

6. Condo I members do not have access to Shadow Lake.

7. \*\*\* [M]embers of Condo II often market their units for sale as being 'lake front

property.' "

¶ 20 Condo II responded that the affidavit was self-serving, conclusory, and should be stricken, but if the judge decided to consider it, the judge should also consider Condo II's counteraffidavit from a member of its board of directors. The counteraffidavit indicated in part:

"5. Some of the Condo II buildings surround Shadow Lake. However, all members of the Hidden Creek Community Association have the ability to enjoy the benefits of Shadow Lake like line fishing from the bank, walk[ing] around Shadow Lake[,] and \*\*\* sit[ting] on the Community Association benches which overlook Shadow Lake."

¶ 21 Continuing, Condo II downplayed the relevance of either affidavit and suggested that the argument was merely a distraction from the real issue, stating: "Condo I argues that it does not gain a direct benefit from Shadow Lake. While this fact is disputed, it is *not* a material question of fact related to the issue in this case." (Emphasis in original). "Instead, what is material is the fact that the [master association] has been treating Shadow Lake as its own and maintaining it for years [with contributions from Condo I and Condo II], *which is not in dispute*." (Emphasis in original.) "Based on the parties' actions, the only equitable declaration for this court to make is that Shadow Lake shall be owned and maintained by the [master association]."

¶ 22 Thus, while the main argument was about the developer's actions in the 1970's, the secondary argument was about the parties' subsequent use and maintenance of Shadow Lake.

Based on the written and oral presentations, the judge concluded:

"All three associations agree that the court may exercise its equitable powers and declare ownership of and responsibility for the Pond, naming either the [master

association] or Condo II. However, in the current posture of this case, the court may not resolve questions of fact as to who actually benefits from the Pond. Therefore, the court did not consider some facts set forth in affidavits attached to the pending motions and responses.

\* \* \*

The associations make compelling arguments for their positions. \*\*\* [T]he court is persuaded by the arguments of Condo I and the [master association] that the Developer intended for title to vest with the Association having the water completely within its property. Thus, title to the Pond should vest with Condo II Association. There is insufficient basis to conclude that the Developer intended the Pond to be for the benefit of the entire planned community [and to vest title with the master association]."

¶ 23 Condo II now argues reversal is warranted because the judge initially remarked that it was improper to delve into the fact dispute regarding who now benefits from the pond, and, yet, the judge's concluding remark indicates she did take the "benefit[s]" into consideration. Condo II is relying on the principles that when crossmotions for summary judgment are filed, the parties are agreeing that no issue of material fact exists; however, if the parties are incorrect and the court identifies a question of fact that needs to be resolved, it is improper for the court to grant either motion. *Andrews v. Cramer*, 256 Ill. App. 3d 766, 769, 629 N.E.2d 133, 135 (1993) (the mere filing of crossmotions for summary judgment does not establish that there is no issue of material fact and does not obligate the court to render summary judgment); 735 ILCS 5/2-1005(c) (West 2012) (summary judgment is appropriate where the pleadings, depositions, and admissions on file,

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together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law); *Wojdyla v. City of Park Ridge*, 148 Ill.2d 417, 421, 592 N.E.2d 1098, 1100 (1992) (where the matter before the trial court can be decided as a question of law, the case is a proper one for summary judgment). When the entry of summary judgment is appealed, a reviewing court considers the issues *de novo* (*Andrews*, 256 Ill. App. 3d at 769, 629 N.E.2d at 135) and will reverse a trial court's grant of summary judgment if it determines that a genuine issue of material fact does exist (*Andrews*, 256 Ill. App. 3d at 769, 629 N.E.2d 629 at 135).

¶ 24 We reject Condo II's main argument, in part because it does not distinguish between the arguments about the developer's intent in the 1970's as to who would receive title to Shadow Lake when the real estate development was complete and the parties' subsequent use and maintenance of the property since the late 1990's. Condo I and the master association argued that the judge could discern the developer's apparent intent from the developer's undisputed actions and this is the argument that should have and did carry the day. See *e.g.*, *Board of Managers of Hidden Lake Townhome Owners Ass'n*, 404 Ill. App. 3d at 190, 934 N.E.2d at 641 (in construing a contract, "a court's primary objective is to give effect to the intent of the parties when they entered into the agreement"); *First National Bank of Chicago v. Canton Council of Campfire Girls, Inc.*, 85 Ill. 2d 507, 426 N.E.2d 1198 (1981) (when construing a trust, the court's primary concern is to discover the settlor's intent, and "intent is determined as of the time the time the instrument was executed"); *Estate of Herwig*, 237 Ill. App. 3d 737, 742, 604 N.E.2d 1164, 1168 (1992) (generally, a court should construe a grantor's intention from the language of the deed itself, however, in construing a written instrument, the court may place itself in the contracting parties' position in order to

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understand their intent); *Board of Education of City of Rockford v. City of Rockford*, 372 Ill. 442, 450, 24 N.E.2d 366, 371 (1939) (when a deed is uncertain, the intention of the contracting parties may be ascertained by considering the circumstances when the deed was executed).

¶ 25 The other argument based in equity that title to Shadow Lake should vest in the unit owners who currently benefit from proximity to the pond was an argument that the judge was unwilling to rule upon because those facts are disputed. As the appellant, Condo II needed to demonstrate to this court that the fact dispute identified by the judge was a fact dispute that was material to the parties' claims and should have precluded the resolution of those claims by the entry of summary judgment. *Coleman v. Windy City Balloon Port, Ltd.*, 160 Ill App. 3d 408, 416, 513 N.E.2d 506, 11 (1987) (a fact is material when the success of the action is dependent upon the existence of the fact and it is the appellant who must demonstrate the materiality of facts claimed to be an issue); *First of America Bank, N.A. v. Netsch*, 166 Ill. 2d 165, 178, 651 N.E.2d 1105, 1111 (1995) ("An issue of fact is not material, even if disputed, unless it has legal probative force as to the controlling issue."); *Lindenmier v. City of Rockford*, 156 Ill. App. 3d 76, 88, 508 N.E.2d 1201, 1209 (1987) (a fact is material when the success of the claim is dependent upon the existence of that fact). Condo II might have met this burden by explaining to this court how the unresolved facts are material to specific allegations appearing in the complaint or counterclaim. Instead, Condo II tries to get by with simply combining the judge's remarks about the argument which she found persuasive and the arguments which the judge was unwilling to resolve in a summary judgment proceeding. It was also ineffective for Condo II to incorrectly state, "as noted in the trial court's ruling," that "[w]hether the members of Condo I, Condo II and the [master association] received a benefit from the Pond is a *material* question of fact to this case." (Emphasis added.) There is no such statement

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in the order on appeal. The judge noted in her written ruling that there is a dispute as to who currently benefits from access to the pond but by ruling on other grounds the judge was indicating that dispute was immaterial to the proceedings.

¶ 26 In its reply brief, Condo II argues for the first time that it was improper for the judge to infer from the developer's other actions in the 1970's that the developer intended to convey title to Shadow Lake to Condo II only. The appropriate time for Condo II to make this argument for the first time was in the trial court, in Condo II's response brief in opposition to the summary judgment arguments brought by Condo I and the master association. Raising this argument now, so late in the proceedings, means that the other condominium associations did not have an opportunity to address it in either the trial court or their appellate response brief and the trial judge did not have an opportunity to consider it. It is not appropriate for this court of review to address the merits of this brand new argument. Supreme Court Rule 341(e)(7) provides that, "[p]oints not argued are waived and shall not be raised in the reply brief [for the first time] \* \* \*." 188 Ill.2d R. 341(e)(7); *Board of Managers of Hidden Lake Townhome Owners Ass'n*, 404 Ill. App. 3d at 194, 934 N.E.2d at 644 (issues not raised in the trial court are forfeited and may not be raised for the first time on appeal); *Lustig v. Horn*, 315 Ill. App. 3d 319, 329, 732 N.E.2d 613, 621 (2000) (same). We find the argument has been waived and will not be considered.

¶ 27 In our opinion, the three condominium declarations the developer recorded to create Hidden Creek Condominiums are a set of documents that must be read together in order to give effect to the developer's intent for the real property and its use by the purchasers of the individual residential units. *Board of Managers of Hidden Lake Townhome Owners Ass'n*, 404 Ill. App. 3d at 190, 934 N.D.2d at 641 (contracts are interpreted as a whole); *Mayfair Construction*, 249 Ill.

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App. 3d at 200, 619 N.E.2d at 788 (contracts are to be interpreted as a whole, without giving undue emphasis to some particular word or clause, in order to give effect to the parties' intent). The condominium declarations and amendments that were made part of the record clearly indicate the developer intended to convey title to all of the land and improvements (improvements such as the dwelling units, parking areas, and landscaping) once the improvements were complete and the parties have agreed that the developer's failure to convey title to Shadow Lake was an inadvertent omission. The documents are not ambiguous or uncertain – they plainly indicate the developer's intent to convey all of the residential development. We also know from the declaration documents and the parties' joint statement of undisputed facts that the developer conveyed (1) certain improvements to the master association, such as the clubhouse and the arterial street known as Hidden Creek Circle, but not Shadow Lake; (2) certain residential units and common elements to Condo I, including all the units and waterways within the boundaries of Condo I; and (3) certain residential units and common elements to Condo II, without specifying ownership of Shadow Lake which is completely within the boundaries of Condo II. It is apparent from this set of facts that the developer did not intend to retain ownership of Shadow Lake and intended to convey Shadow Lake to Condo II rather than to the master association or to Condo I.

¶ 28 Condo II's second main argument for reversal is that the master association waived the right to disclaim ownership interest in the pond because it has been acting like the owner for the last 15 years by budgeting for "Playground/Lake Maintenance" and collecting the maintenance funds from Condo I and Condo II due to the provision in section 4.06 of the condominium declaration that allows the master association to make assessments against the two other condominium associations. Condo II contends the judge ignored the undisputed purpose of the

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assessments and the actions of the master association, and that this was error because these facts were central to the dispute about title. Condo II argues we should now enter summary judgment in favor of Condo II.

¶ 29 We find that the master association did not waive its right to deny ownership of Shadow Lake. The record indicates that the master association was collecting maintenance funds and performing minor maintenance to Shadow Lake for approximately 15 years because the parties incorrectly assumed that the master association was the title holder of that property. Waiver consists of either express or implied voluntary and intentional relinquishment of a known and existing right. *Midway Park Saver v. Sarco Putty Co.*, 2012 IL App (1st) 110849, ¶ 20, 976 N.E.2d 1063. Once the parties realized the pond would need costly repairs, Condo I and the master association researched their liability for Shadow Lake, discovered that none of the three associations was the legal owner, and allied against Condo II's insistence that the master association take responsibility for the repairs. The fact that the master association historically paid for minor maintenance while it was ignorant of its true obligations is not indicative of waiver. As soon as the master association knew it did not hold title, the master association asserted its right as a non-owner to refuse to pay for repairs to Shadow Lake and it opposed Condo II's declaratory judgment action to vest title in the master association. The master association's conduct during the years that all the parties were ignorant of the title problem could not be construed as the voluntarily and intentional relinquishment of its right to dispute ownership of the pond. Accordingly, we find the judge properly rejected Condo II's waiver argument and that the facts do not warrant that we now enter summary judgment for Condo II.

¶ 30 We also find no merit in Condo II's contention that the judge's ruling has unfairly burdened

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Condo II with the ownership and liability for Shadow Lake and given little benefit to Condo I and the master association, and that the only equitable ruling would be to cause Condo I and Condo II to share the costs by vesting title in the master association. Condo II also contends the master association's voluntary assertion of ownership rights for a while and undertaking of liability for all common facilities at the developed property are facts that weigh in favor of vesting title to Shadow Lake in the master association. However, as we just pointed out above, the master association acted like the owner of Shadow Lake for about 15 years out of ignorance. Moreover, it is undisputed that Condo I has always paid 100% of the maintenance costs for waterways within the borders of Condo I and it is undisputed that Shadow Lake is entirely within the borders of Condo II, which are indications that Condo II should be vested with ownership of the waterway within the borders of Condo II so that Condo II pays 100% of the related maintenance costs. In addition, the 70/30 cost splitting that Condo II contends is most equitable would actually result in a very lopsided split of costs because it would mean Condo I would continue to pay 100% of the maintenance costs of the waterways within its borders and 70% of the maintenance costs of the waterways within the borders of Condo II while Condo II paid 30% of the maintenance costs of the waterways within the borders of Condo II. Accordingly, the result reached by the trial judge – Condo I pays 100% of the maintenance costs of certain waterways, Condo II pays 100% of the maintenance costs of other waterways, and the two associations split the costs of maintaining common areas -- seems more equitable than the one now argued by Condo II.

¶ 31 Condo II contends the lopsided split it proposes is consistent with the court's analysis in *Beloit Foundry Company v. Ryan*, 28 Ill. 2d 379, 192 N.E.2d 384 (1963), but it is not. In *Beloit Foundry*, the defendants mistakenly believed they owned the land adjacent to their concrete

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building and they erected a building addition in that area which encroached toward a right-of-way easement. *Beloit Foundry*, 28 Ill. 2d at 391, 192 N.E.2d 384. Some years later, the adjoining owners sued for the removal of the building addition, but put on evidence that despite the building addition, the plaintiffs were regularly using the easement. *Beloit Foundry*, 28 Ill. 2d at 392, 192 N.E.2d at 392. The court concluded that the encroaching concrete addition did not "deny or materially interfere with this use by the adjoining owners," however "the removal thereof would cast a definite hardship on the defendants." *Beloit Foundry*, 28 Ill. 2d at 392, 192 N.E.2d at 392. Recognizing that forcing the removal of the concrete addition would result in "little benefit" to the plaintiff but "great hardship" to the defendants, the trial court declined to order its removal and the appellate court agreed that it would have been inequitable to impose such a burden on the defendants. *Beloit Foundry*, 28 Ill. 2d at 392, 192 N.E.2d at 392. We fail to see how this case supports Condo II's appeal. The court's analysis does not suggest that it is fair to allow Condo II to pay only 30% of the maintenance costs of some waterways while requiring Condo I to pay the other 70% in addition to 100% of the maintenance costs of other waterways.

¶ 32 Having considered the record and arguments *de novo*, we find that there was no issue of material fact to preclude the entry of summary judgment for Condo I and the master association based on the developer's undisputed actions in the 1970's. We also find that Condo I and the master association were entitled to judgment as a matter of law as to the complaint and counterclaim. Accordingly, we affirm the trial judge's ruling on the crossmotions. The judge's deed of Shadow Lake to Condo II was properly granted.

¶ 33 Affirmed.