



JUDICIAL ARBITER GROUP, INC. 1601 Blake Street, Suite 400 Denver, CO 80202 303-572-1919	
<b>FULLER LAND INVESTMENTS, INC., as successor by merger to BARTLEY/SHOOK LAND INVESTMENTS, INC.</b>  <b>CLAIMANT,</b>  <b>V.</b>  <b>TODD CREEK RIVERSIDE HOMEOWNERS ASSOCIATION, INC.</b>  <b>RESPONDENT.</b>	
	JAG Case No. 2019- 1824A
<b>ARBITRATION AWARD</b>	

THIS MATTER came before the Arbitrator for a one-day Arbitration hearing on January 28, 2020. The Arbitrator, having reviewed and considered the testimony of Gene Osborne, Kim Harrison, Angela Elliott, Forrest Hancock, and Julie Ernster, the admitted exhibits, and the arguments of counsel enters the following Findings of Fact, Conclusions of Law and AWARD:

### **I. BACKGROUND**

This matter involves a relatively small dispute over who is responsible for the payment of certain costs and expenses that arose in connection with the development of a subdivision that is part of a very large (seven square mile, twenty-one subdivision) residential common interest planned community to the west of Brighton, Colorado.

## **II. AMENDED ARBITRATION DEMAND**

On August 30, 2018, Claimant Fuller (Fuller), as successor by merger to Bartley/Shook Land Investments, Inc. (BSLI) filed an Amended Demand for Arbitration. The Amended Demand alleges that BLSI arranged for certain parties to advance funds to Respondent Todd Creek Riverside Homeowners Association, Inc. (the HOA) that constituted loans under Section 4.9 of the Declaration of Covenants, Conditions and Restrictions of the Todd Creek Riverside subdivision (the Declaration). The Amended Demand further alleges that the HOA's understanding that the advances constituted loans was reflected in the parties' course of conduct under which the HOA repaid certain of the funds loaned by BSLI, and that the remaining amount due to BSLI totals \$88,460.72.

The HOA denies that the funds advanced constitute loans under Section 4.9 of the Declaration or that it otherwise borrowed funds from Fuller or the subdivision's landowner-developers.

## **III. FINDINGS OF FACT**

The Todd Creek Riverside subdivision was platted in 2006. The HOA was incorporated in 2008.

The development subsequently went through a period of quiescence during the "great recession" when the builder who owned 86 lots failed. Liberty Savings (Liberty) then foreclosed and work on the development started up again in 2011-2012.

On or about February 13, 2012, Teleos Management (Teleos) and the HOA entered into a management services agreement under which Teleos agreed to manage the HOA. Gene Osborne testified regarding the reasons Teleos was hired. Mr. Osborne is very familiar with the development of the Todd Creek Riverside subdivision as he wore many hats in connection with its development, including President or Vice President of landowner-developer Colorado Property Investments, Inc. (CPI); President or Manager of BSLI; President of Fuller Land Investments; and Manager of Todd Creek Farms, LLC. Mr. Osborne was also on the HOA board from its inception until November 1, 2017. The role of each of these entities, to the extent it is relevant for purposes of this Arbitration, is set forth below.

Mr. Osborne testified they always try to hire an HOA manager as soon as they can because of the inherent conflict between developers and homeowners. That is, developers always want to transfer costs to homeowners and homeowners always want to pay as little of those costs as possible. This conflict is magnified because the developer serves on the HOA board until the period of declarant control is terminated.

On February 28, 2012, landowner-developer Liberty Savings (Liberty) and landowner-developer CPI executed the Riverside Development and Property Management Agreement. The Agreement memorializes Liberty and CPI's intent to develop and sell certain properties

they owned as one development and to have CPI provide development and property management and marketing services to Liberty. The Agreement further provides that their specifically identified properties shall be subject to and part of a homeowners association and shall share HOA costs and expenses until the HOA's assessments are sufficient to cover all such costs and expenses.

On June 29, 2012, the Declaration was executed. The Declaration identifies BSLI as the Declarant.

As the development progressed, there were certain common elements that the developer created that Fuller asserts the HOA ultimately became responsible for maintaining. These common elements include, but are not limited to Teleos' management fees, costs associated with maintaining open spaces called outlots and the electrical bills incurred in connection with the operation of street lights.

In 2012 and 2013, there was only one lot in the community. Funds were nonetheless needed to pay Teleos' management fees, legal fees associated with organizing the HOA and drafting the Declaration and covenants, the trash bills, the electrical bills, postage and certain costs associated with mowing, trimming and prairie dog remediation on the outlots. At that time, no one involved in the project had any money, except Liberty and Todd Creek Farms (TCF), so they advanced funds to pay these expenses.

Funds were advanced in this manner in 2012, 2013, 2014, and part of 2015. There were ten lots in the community in 2014. By 2015, that number increased to fifteen. The HOA became self-funding in mid-2015.

The first homeowner board member, Mr. Hillman, was elected on October 25, 2016, and took office on January 1, 2017. Payments to Liberty totaling \$7,000.00 for the amounts allegedly owed by the HOA for the funds that had been advanced were subsequently made by the HOA between roughly April and October of 2017. These payments were approved by the two developer members of the board (one of whom was Mr. Osborne), over the objection of the single homeowner member of the board.

On November 1, 2017, the declarant control period terminated. The developer board members were then replaced by two additional homeowners. The HOA then voted to end making these payments.

BSLI eventually merged with Claimant Fuller Land Investments, Inc. (Fuller). On December 1, 2014, BSLI/Fuller assigned its rights as Declarant under the Declaration to ELG Investors, LLC.

On August 30, 2018, Fuller, as successor by merger to BSLI filed its Amended Demand for Arbitration. More than fifteen month later, the parties set the matter for hearing.

On January 27, 2020, ELG Investors assigned the portion of the Declarant's right to reimbursement to Fuller.

#### IV. ARGUMENT

Fuller argues that these loans were made pursuant to Section 4.9 of the Declaration. It provides, in pertinent part:

The Declarant may, but shall not be required to, cover any costs of the Association by payment of any amount(s), which shall constitute loans from the Declarant to the Association, with such loan(s) to be repaid by the Association to the Declarant, without interest, as may be determined by such Declarant, provided, however, that any such loans which have not been repaid to the Declarant shall constitute advances against amounts then or thereafter due from the Declarant.

Declaration, Section 4.9.

Fuller further contends that the February 28, 2012 Riverside Development and Property Management Agreement memorializes the intent to loan funds to the HOA. Exhibit 8. Fuller argues that this Agreement calls out the intent to loan funds to the HOA until its assessments are sufficient to cover its costs and expenses, and that the payments made by the HOA, *see* Exhibit 1, demonstrates that the HOA understood the funds advanced were loans.

Exhibit 2 breaks down the basis for Fuller's original \$88,460.72 demand which includes payments made, among other things: (1) to keep the streetlights on; (2) to pay the trash hauling bills; (3) to pay for Teleos/Ms. Elliot to manage the HOA; and (4) to pay for putting in the "cluster mailboxes" as required by the post office. Fuller has since discovered some payments that were not credited and taken some attorney fees out of this amount. Fuller now seeks \$61,310.22 from the HOA.

The HOA argues that Fuller's reliance on Section 4.9 of the Declaration is misplaced because Section 4.9 only applies to the "Declarant," a defined term that refers to BSLI. The HOA emphasizes that Fuller is not claiming that these "loans" were made by BSLI, but rather by the landowner-developers, Liberty and CPI, somehow on behalf of BSLI and for this reason, Fuller is not entitled to recover any payments under Section 4.9 of the Declaration.

The HOA further asserts that the February 28, 2012 Riverside Development and Property Management Agreement is between these two landowner-developers, and was created to benefit the developers, not the HOA. To that end, it points to Section 1.8 which provides, in pertinent part:

Therefore, the parties hereby agree that they shall use their reasonable good faith efforts to agree upon the form and substance of a separate agreement (the

“Interim Funding Agreement”) pursuant to which they shall agree, among other matters, to pay their respective Prorata Share of Project-Wide Improvement Prorata Share, as applicable, of the excess costs and expenses of the HOA that have been approved in writing by Liberty (the “HOA Costs”) until such time as the HOA’s assessments are sufficient to cover all such costs and expenses.

Riverside Development and Property Management Agreement, Section 1.8.

The HOA argues it had no contractual relationship with the landowner-developers, Liberty and CPI, which is why it properly stopped making payments on these purported loans once the HOA board transitioned from being developer controlled to homeowner controlled on November 1, 2017. It emphasizes that Fuller has not produced any note between the HOA and BSLI or any other type of agreement signed on behalf of the HOA evidencing a loan made by BSLI to the HOA. It notes that Fuller has also not produced any loan documents between Liberty/CPI/TCF and BSLI/Fuller/ELG, and that it has never received a demand for payment from BSLI, Fuller or ELG.

## **V. ANALYSIS AND AWARD**

Section 4.9 of the Declaration expressly refers to loans from “the Declarant” to the Association. The Arbitrator finds that “the Declarant” is a specifically defined term that means BSLI (and later Fuller, then ELG). The Arbitrator holds that because neither Liberty nor TCF was the Declarant, Fuller is not entitled to recover the \$61,310.22 that it seeks pursuant to Section 4.9 of the Declaration.

Further, the Arbitrator is unpersuaded by Fuller’s argument that Liberty and TCF advanced these funds to the Declarant BSLI/Fuller to advance to the HOA or that they somehow advanced these funds as loans on BSLI/Fuller’s behalf in manner that somehow legally binds the HOA. There are no promissory notes between Liberty or TCF and BSLI/Fuller or demands for payment from BSLI/Fuller or other persuasive evidence that Liberty and TCF lent these funds to BSLI or on its behalf. The Arbitrator finds that Mr. Osborne truly believed that the HOA would have to repay Liberty and TCF these funds, but this is simply not what the Declaration or any other document requires.

Additionally, the Arbitrator is unpersuaded by Fuller’s argument that the HOA’s understanding that the advances constituted loans was reflected in the parties’ course of conduct because the HOA repaid roughly \$7000.00 to TCF between roughly April and October of 2017. The Arbitrator finds these payments were made after they were approved by the two developer members of the HOA’s board, over the objection of the single homeowner member of the board, Mr. Hillman. Once the homeowners had control of the board, on November 1, 2017, they promptly stopped making these payments.

For these reasons, the Arbitrator enters an Award in favor of the HOA and against Fuller in connection with Fuller's claims.

DATED: March 4, 2020.

JUDICIAL ARBITER GROUP, INC.



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**The Hon. Maria E. Berkenkotter (ret.)  
Arbitrator**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4<sup>th</sup> day of March, 2020, a true and correct copy of the foregoing *Arbitration Award* was served, via File & ServeXpress, on the following:

All Counsel of Record.

Original Signature on File  
Jackie Burt, Administrative Clerk  
Judicial Arbitrator Group, Inc.