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IN THE

Supreme Court of the State of Delaware

ALAPOCAS MAINTENANCE CORPORATION and ALAPOCAS MAINTENANCE CORPORATION BOARD OF DIRECTORS, Defendants Below, Appellants, v. WILMINGTON FRIENDS SCHOOL, INC., Plaintiff Below, Appellee.	**No. 294, 2022** COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 2021-0655-SG

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

The AMC demonstrated in its Opening Brief that the Letter Opinion should be reversed for multiple independent reasons.[1] First, the AMC explained that the Court erred in limiting the enforceability of harmony criteria in deed restrictions to communities with distinctive architectural styles. Second, it established that the Court erred in finding that the AMC Board acted arbitrarily in denying the Lower School Proposal given the procedural posture and absence of supporting allegations by WFS in the Complaint. Finally, the AMC showed that the Court erred in failing to consider the outlook criteria also relied on by the AMC Board.

WFS fails to meaningfully tackle any of this in its Answering Brief. Instead, WFS constructs a series of strawman arguments that elide the specific arguments advanced by the AMC. For example, WFS:

- dismisses as "exemplary" the key second "objectively incongruous" category of cases where harmony determinations have been upheld (AB 19-20), but disregards that (i) the AMC quoted the very standard it is accused of ignoring, (ii) the "objectively incongruous" cases satisfy that standard, and (iii) the Letter Opinion eschewed this category of cases in limiting the enforceability of harmony determinations to communities with distinctive architectural styles (OB 17-20, 33);

- conflates "coherent visual style" with the "distinctive architectural style" featured in *Dolan v. Villages of Clearwater Homeowner's Association*, 2005 WL 2810724 (Del. Ch. Oct. 21, 2005) (AB 16-17), and rather than confront the AMC's actual "objectively incongruous" argument (OB 18-

[1] Capitalized terms are defined in the Opening Brief ("OB"). "AB" refers to WFS's Answering Brief.

23, 33-34) responds from the incorrect premise that the sole basis of the AMC's denial determination was to maintain open space (AB 17-18);

- highlights the "present clear, precise, and fixed standards of application" language from *Lawhon v. Winding Ridge Homeowners Association*, 2008 WL 5459246, at *5 (Del. Ch. Dec. 31, 2008) (AB 4, 16-17), but ignores *Lawhon*'s (i) actual holding sustaining the enforceability of harmony criteria there and (ii) broader recognition that such provisions are "regularly enforce[ed]" (OB 17, 20);

- sidesteps the factual nature of the Court's finding that the AMC Board applied harmony in an arbitrary manner (AB 21-26), and offers no response to the AMC's point that the Complaint lacks any supporting allegations (OB 28-29, 31 n.7); and

- argues that the "AMC did not meaningfully advance an outlook argument" below (AB 29), but does not dispute that outlook was relied on by the AMC and never addressed in the Letter Opinion (OB 40-41).

In separately recycling its argument that only Paragraph 3 of the Deed Restrictions applies to WFS and "the AMC Board had no basis to deny the proposal" thereunder, AB 30, WFS fails to grapple with the limitless and illusory construction it champions. Among other things, WFS fails to acknowledge that its interpretation would give it unchecked authority under the Deed Restrictions to pursue any and all development on the Upper School campus. As explained below, WFS's position fatally fails to give meaning to the plain language of the Deed Restrictions.

* * *

At bottom, the dueling positions before this Court could not be more distinct. While WFS advocates a limitless and illusory interpretation, the AMC's position both heeds the plain language of the Deed Restrictions and provides for the

possibility of judicial review in the event of perceived overreach. The Opinion and Final Judgment should be reversed.

ARGUMENT[2]

I. THE COURT OF CHANCERY ERRED IN CONCLUDING THAT THE HARMONY CRITERIA IN PARAGRAPH 5 OF THE DEED RESTRICTIONS RELIED ON BY THE AMC BOARD IS UNENFORCEABLE AS APPLIED TO WFS.

A. The Enforceability of Harmony Criteria in Deed Restrictions Is Not Limited to Communities With Distinctive Architectural Styles.

1. Harmony Denials Are Upheld Where a Proposal Is Objectively Incongruous With Its Surroundings.

The AMC noted in its Opening Brief that Delaware courts "'regularly enforce architectural review provisions designed to ensure the overall harmony of appearance within a community.'" OB 17 (citation omitted). It next explained that harmony provisions have been upheld where a neighborhood "'possesses a sufficiently coherent visual style [to enable] fair and even-handed application' and there is 'a reasoned, non-arbitrary basis for the reviewing authority to assess whether a proposal would disrupt the visual harmony of the affected community.'" OB 17 (quoting *BBD Beach, LLC v. Bayberry Dunes Ass'n*, 2022 WL 763466, at *6 (Del. Ch. Mar. 10, 2022) (Master's Report)).[3] The AMC then highlighted the two distinct situations where harmony determinations have been upheld under the foregoing

[2] While WFS's Answering Brief includes many misstatements, the AMC only addresses the most salient ones herein given space constraints.

[3] Pointing to this very language, WFS curiously accuses the AMC of "misstat[ing] the law." AB 19-20. WFS ignores, however, the AMC's quotation to this precise passage. OB 17.

standard: (i) where, as in *Dolan*, "'the community has distinctive characteristics of a common scheme, such as a 'Key West' architectural style'" and (ii) "'where the proposed building is obviously incongruous with the rest of the common interest community, in a manner that can be objectively assessed and applied.'" OB 18 (quoting *BBD Beach*, 2022 WL 763466, at *6).[4] Under either situation, the requirement that a neighborhood have a "coherent visual style" is met. OB 18-19, 33.

The AMC's harmony determination denying the Lower School Proposal falls within the second category. OB 19-22, 25-26. The Letter Opinion, however, centered on the first and devoted almost its entire analysis to distinguishing *Dolan*. Opinion at 6-8. Indeed, the Court expressly held that *Dolan* was "strictly cabined by [its] facts" and further stated that "absent the unusual situation of a coherent development regime as in *Dolan* which in context can provide objective criteria, an appeal to harmony is simply an appeal to an aesthetic sensibility." *Id.* at 6, 10 n.30. Despite the AMC highlighting both statements, OB 18-19, WFS failed to acknowledge *either* in asserting that the "AMC has cited no express statement by the Court of Chancery limiting enforcement of deed restrictions to distinctive

[4] WFS dismisses this language as "exemplary." AB 19. Regardless of its label, it was error for the Court to disregard precedent upholding harmony criteria under such circumstances.

architectural styles." AB 19. WFS similarly ignored that in narrowly focusing on whether Alapocas had a distinctive architectural style, the Court failed to consider whether the Lower School Proposal was objectively incongruous with the neighborhood. This unduly narrow approach was legal error, and nothing in WFS's Answering Brief demonstrates otherwise.[5]

2. *Christine Manor* Showcases the AMC's Proper Application of Harmony Criteria.

Christine Manor Civic Association v. Gullo, 2007 WL 3301024 (Del. Ch. Nov. 2, 2007) illustrates why the AMC's application of harmony criteria was proper. Here, as in *Christine Manor*, the vast size of the Lower School Proposal meant that it was "not a reasonable structure for a residential neighborhood." *Id.* at *2; *see also* OB 20-21, 25. WFS chides the AMC for purportedly ignoring "the reasons underlying the decision to deny the garage in *Christine Manor*," but the first reason underlying the denial determination was the garage being "[t]oo big to be in harmony with surroundings." 2007 WL 3301024, at *2. The AMC has always stressed that the Lower School Proposal would be just that. OB 20-21, 25-26; A229-30; A295-98; A391:5-18.

[5] That the AMC cited *Dolan* below for different propositions, A293-94, A370, A375, changes nothing, and WFS's characterization of the AMC's *Dolan* reliance as "heav[y]," AB 18, overstates things, especially relative to the AMC's reliance on *Christine Manor*, *Alliegro*, and *Lawhon*. A293-98; A387:24-A390:12.

Nor did *Christine Manor* turn on the mere ability to compare the garage to other garages in the neighborhood. AB 21.[6] And narrowly construing it as such would impair associations from addressing novel structures like an oversized gardening shed or large floodlight if there were no other sheds or floodlights to compare them to. WFS separately ignores that focusing on the inability to compare the Lower School Proposal with other similar structures would create the illogical result where Alapocas' sole non-residential property is subjected to less oversight than residences. OB 20 n.2, 38-39.

WFS also focuses on the fact that the Upper School campus is not a residential property. AB 20-21. As explained in the Opening Brief, however, *Christine Manor*'s holding is not limited to residential lots. OB 20 n.2. In short, harmony is upheld where, as here, a proposal is objectively incongruous with the neighborhood because it is "out of keeping with the neighborhood," "inconsistent with the values

[6] WFS stresses that *Christine Manor* "concluded" that the garage's "'deviation from all other ancillary structures in the subdivision are not in doubt.'" AB 21 (citation omitted). That statement was made in a footnote discussing how the garage had already been built, rather than in the court's analysis. *See* 2007 WL 3301024, at *2 n.11 ("Many restrictive covenants cases involve prospective projects. In those cases, the final appearance requires a degree of speculation. In this instance, however, Mr. Gullo built the offending garage. Its appearance and its deviation from all other ancillary structures in the subdivision are not in doubt."). *Christine Manor*'s actual holding, *infra* 7-8, was much broader.

the [restrictions] seek[] to preserve," and "not a reasonable structure for a residential neighborhood." *Christine Manor*, 2007 WL 3301024, at *2.[7]

3. WFS's Cited Background Principles Do Not Alter the Legal Analysis.

AMC has never disputed that, as a general matter, deed restrictions must present "fixed standards" to be enforceable. AB 16. But WFS overstates this requirement in the context of harmony criteria, which, again, has been regularly upheld, including in the very *Lawhon* case WFS relies on for the cited proposition. *See Lawhon*, 2008 WL 5459246, at *5, *7 (noting that deed restrictions must "present clear, precise, and fixed standards of application," but nevertheless upholding as "valid and enforceable" harmony criteria similar to that at issue here); *see also Wild Quail Golf & Country Club Homeowners' Ass'n v. Babbitt*, 2022 WL 211648, at *3 (Del. Ch. Jan. 11, 2022) (Master's Report) ("In the Summary Judgment Report, I held that the Restrictions [including similar harmony criteria] offer clear, precise, and fixed standards for the [HOA] to apply."). Consequently,

[7] The Opening Brief noted that *Christine Manor* is supported by other cases in Delaware and beyond. OB 21-22 & n.4. With the exception of *Alliegro v. Home Owners of Edgewood Hills, Inc.*, 122 A.2d 910 (Del. Ch. 1956), WFS does not even attempt to address that precedent. Regarding *Alliegro*, AB 20 n.2, WFS ignores that *Alliegro* blessed harmony criteria, recognizing that "the type of covenant here under consideration … is valid." 122 A.2d at 913. And in assessing whether the association acted "fairly and reasonably," *Alliegro* expressly noted the impact of the "modest size" on the "surroundings" as a reason why the home was inharmonious. *Id.* So too here.

while deed restrictions must "present clear, precise, and fixed standards of application," *Lawhon*, 2008 WL 5459246, at *5, WFS ignores that Delaware courts bless harmony criteria under the two situations discussed above. *Supra* 4-6. WFS's position that the "AMC has not, and cannot, demonstrate that it sought to enforce sufficiently fixed objective standards on WFS," AB 16; *see also* AB 18, 21, accordingly rings hollow.[8]

WFS relatedly argues that the "AMC still has not identified the 'sufficiently coherent visual style' it seeks to enforce." AB 16. But WFS elides the AMC's focus on the oversized nature of the Lower School Proposal, which renders it objectively incongruous with its surroundings and the broader neighborhood, OB 33, and satisfies the coherent visual style requirement. *Supra* 5.[9] More fundamentally, WFS conflates "coherent visual style" with *Dolan*'s distinctive architectural style analysis. Again, the latter is just one type of situation where Delaware courts find a coherent visual style. *Supra* 4-6; OB 33.

WFS also identifies various questions not answered by the Deed Restrictions or the AMC Board's January denial letter. AB 17-18. But WFS had notice that the

[8] Nor, *a fortiori*, was the AMC's related assertion at argument "circular." AB 16 n.1.

[9] The AMC also highlighted that even under the framework employed by the Court, the entire Alapocas neighborhood is typified by a coherent visual style of green, open space. OB 34.

Deed Restrictions allowed denial based on harmony criteria, A31, and Delaware does not require the level of specificity contemplated by the questions in either deed restrictions or denial letters. OB 22 n.3.[10] As such, the lack of answers to the questions cited by WFS is legally irrelevant.[11]

B. The AMC Board Relied on More Than Mere Open Space.

As detailed in the Opening Brief, the AMC Board's January denial letter belies, or at a minimum raises factual questions concerning, a finding of arbitrariness by, *inter alia*, "focusing on the size and density of the Lower School Proposal relative to that of the existing Upper School campus and the neighborhood at large." OB 25; *see also* OB 24-27. Instead of responding to this point, WFS repeatedly embraces the assertion in the Letter Opinion that the "AMC confirmed at argument that its focus in its denial was on a loss of open space." AB 12 (citing Opinion at 3). In doing so, however, WFS fails to acknowledge the AMC's explanation that the AMC "tied" the loss of "green, open space" to "its primary concern that the scope of the Proposal is simply too large and transformative." OB 27-28 n.6; *see also*

[10] WFS references this footnote, AB 18, but disregards its substance, including that neither *Christine Manor* nor *Alliegro* specified what size structure would have been permissible. OB 22 n.3.

[11] Even assuming *arguendo* that such answers were relevant, it is unclear how the AMC could have provided them given that it was circumscribed by the Complaint's allegations at this stage.

A391:13-18; A394:18-23.[12] And while WFS pitches the AMC's denial as imposing "'open space is better' aesthetics on WFS," AB 17 (quoting Opinion at 9), it ignores the AMC's discussion of why the January denial letter raises a factual issue regarding this statement, and why the conflation of "harmony" and "aesthetics" contravenes Delaware law. OB 24-26. Simply put, the oversized nature of the Lower School Proposal is such that, at a minimum, there is a factual question whether the Proposal would be objectively incongruous with its surroundings and the broader neighborhood.[13]

C. The Court's Arbitrariness Finding Was Procedurally Improper.

The Court found that the AMC Board's denial determination was arbitrary despite the absence of any WFS allegations to that effect. OB 28-29, 31 n.7. WFS recognizes that "the Court focused its analysis on whether the AMC Board had arbitrarily applied the 'harmony' provision of Paragraph 5," AB 12, but offers no

[12] WFS itself recognized this below, observing that the AMC's considerations included "*buildings* and vehicle traffic that *are out of scale and character of the neighborhood*." A256 (emphasis added). And at least one of WFS's citations for its assertion that the AMC is relying on mere open space similarly recognizes that this concern is interwoven with the "vastness" of the Lower School Proposal. A346:14-20 (cited at AB 10, 17, 28).

[13] WFS separately invokes the concluding sentence of the AMC Board's January denial letter. AB 25 (quoting A38). But as the AMC explained below, "that sentence was merely an effort to appeal to WFS's Quaker values." A209.

response to its lack of allegations that, *inter alia*, "the AMC Board's denial determination was arbitrary." OB 29.

Given the factual nature of such determinations, harmony cases are typically decided on a developed factual record. OB 29-32. Yet WFS all but ignores this reality and the ample precedent supporting it.[14] WFS also disregards that, notwithstanding that factual inferences should be drawn against the non-moving party on motions for judgment on the pleadings, the Court improperly placed the burden on the AMC to show that its actions were non-arbitrary. OB 28-29.

WFS rests its procedural argument on the notion that the AMC "initially sought to proceed on the basis of early dispositive motions" and "continually urged the Court of Chancery to make … determinations as a matter of law." AB 22. Although immaterial, WFS's unsupported assertion that the AMC first suggested motion practice is inaccurate. Regardless, WFS provides no support for its

[14] WFS does briefly attempt to distinguish *Civic Association of Surrey Park v. Riegel*, 2022 WL 1597452 (Del. Ch. May 19, 2022) (Master's Report), arguing that the AMC had not attempted to enforce a sufficient coherent visual style. AB 24 n.5. Again, that argument fails. *Supra* 9. More telling, however, is that WFS runs from this key case relied on by the Court, Opinion at 8-9, likely recognizing that *Riegel*'s *post-trial* ruling is of limited relevance. Indeed, the Master's earlier decision denying dismissal noted that "enforceability of deed restrictions is a fact-intensive inquiry best resolved on a more developed record" and rejected the suggestion that "the restrictions at issue [we]re *per se* or *de facto* unenforceable." *Civic Ass'n of Surrey Park v. Riegel*, C.A. No. 2019-0961-SEM, at 12-14 & n.51 (Del. Ch. Aug. 21, 2020) (attached as Ex. C).

suggestion that moving for judgment on the pleadings somehow "concedes" that judgment on the pleadings can be granted to the other party. AB 23-24. And while WFS notionally attempts to distinguish *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199 (Del. 1993) because the parties did not cross-move there, AB 24 n.4, *Desert Equities*' holding is not limited to situations where only one party moves. Indeed, in analyzing cross-motions under Rule 12(c), "the mere presence of cross-dispositive motions 'does not act *per se* as a concession that there is an absence of factual issues.'" *Intermec IP Corp. v. TransCore, LP*, 2021 WL 3620435, at *8 (Del. Super. Ct. Aug. 16, 2021) (citation omitted).[15]

The AMC cross-moved for judgment on the pleadings given the manner WFS pled its Complaint, and in particular because "[a]t most, WFS alleged that the AMC Board's denial was unreasonable because [Paragraph 5 of the Deed Restrictions] lacked any objective criteria." OB 31 n.7; *see also* OB 13.[16] WFS's failure to grapple with this explanation speaks volumes. And while WFS argues that the AMC is now "revers[ing] course" by identifying factual issues that preclude granting judgment on the pleadings against it, the very citations WFS highlights confirm the

[15] Superior Court Rule 12(c) is substantively identical to its Chancery counterpart.

[16] The AMC did not "entirely ignore[]" WFS's February 11 letter, AB 23 n.3, but referenced it in discussing the allegations contained in the pleadings. OB 11-12, 31 n.7. WFS moreover fails to explain what in this letter might change the AMC's pleading analysis.

AMC's consistent reliance on the lack of allegations in the Complaint as the basis for its cross-motion. AB 22-23 (highlighting the AMC's arguments below, including that "given the harmony requirement is not *per se* unenforceable under Delaware law, we would suggest that the as-applied challenge raises a legal question"). There is no inconsistency arguing that insufficiencies in WFS's allegations permitted the Court to enter judgment on the pleadings against WFS while also maintaining that, at a minimum, factual issues preclude judgment on the pleadings in WFS's favor.

WFS also criticizes the AMC for focusing on the insufficiency of the pleadings without having moved to dismiss under Rule 12(b)(6). AB 23-24 n.3. WFS offers no support for its suggestion that doing so is improper, and, in fact, the opposite is true. *See* 5C Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 1367 (3d ed.) ("The Rule 12(c) motion may be employed by the defendant as a vehicle for raising several of the defenses enumerated in Rule 12(b) after the close of the pleadings.")[17]; Ct. Ch. R. 12(h)(2) ("A defense of failure to state a claim upon which relief can be granted … may be made … by motion for judgment on the pleadings ....").

[17] "Since our Court of Chancery [R]ule [12(c)] is modeled after the federal rule, we look to federal decisional law in construing the Court of Chancery rule." *Desert Equities*, 624 A.2d at 1205 n.8.

Finally, WFS contends that the AMC "do[es] not raise any factual issues" and "has not identified any disputed material fact." AB 24, 25. But the AMC identified three fact-based findings made by the Court, all of which it would have disputed had WFS alleged them. For example, WFS criticizes the AMC for "never argu[ing] nor attempt[ing] to show that it sought to enforce a coherent visual style as the law would require," AB 26, but WFS did not allege a lack of a coherent visual style.[18] Similarly, regarding the AMC's argument that the Court made an unsupported factual finding that "no other Alapocas property is subject to use restriction simply because such use would decrease open space," OB 26, 33, WFS points to the Deed Restrictions' setback and side yard restrictions and posits that "[t]here is nothing more to enforce under a 'harmony' restriction with respect to the residences in Alapocas." AB 25-26.[19] But that is not alleged, and the AMC would have disputed any such allegation given that "other properties in the neighborhood have similarly had proposals denied as inharmonious for being oversized." OB 33. Finally, as there were no specific allegations about the AMC Board's motivations in denying the Lower School Proposal, the AMC could not respond that it did not "*simply* want[] to maintain the

[18] Regardless, this criticism fails as a matter of fact and law. *Supra* 9.

[19] WFS relatedly states that the AMC "fails to identify how this was meaningful to the Court of Chancery's analysis." AB 25. Because both the Court and WFS dismiss *Christine Manor* and *Alliegro* as addressing purely residential structures, Opinion at 7 n.23; AB 21, that residential proposals in Alapocas have been denied as oversized under the same harmony criteria supports the proper application of that criteria here.

green and pleasant aspect of much of the Property *as an amenity of Alapocas*," or was motivated by "more" than its "aesthetic sensibilities," Opinion at 6 (emphasis added), much less provide additional reasons for its denial determination beyond those in the January denial letter, OB 32-33.[20]

D. Policy Considerations Likewise Support Reversal.

The AMC acknowledged policy considerations favoring the free use of land. OB 34. But it also highlighted considerations that counter the "limited view … of private deed restrictions" championed by WFS. AB 27. WFS ignores nearly all of the countervailing considerations, including that deed restrictions provide benefits that may outweigh "the potentially negative consequences of restrictive covenants for individual landowners." OB 35-36 (citation omitted).

While WFS attacks the AMC's observation that unreasonable determinations "can always be challenged in court," AB 27, WFS does not attempt to distinguish the cases cited by the AMC for this proposition, OB 36-37. Instead, WFS offers the unsupported assertion that "many such challenges involve a single homeowner

[20] WFS states that the AMC did not acknowledge certain undisputed facts, but does not explain the relevance of such facts. AB 24-25. Regardless, the AMC in fact acknowledged some of the cited facts. *Compare id.* (asserting the AMC did not acknowledge that it has "allowed expansions of WFS" three times and that "WFS tried to keep the proposed new Lower School 'harmonious'") with OB 27 (discussing the prior expansion requests); OB 23 ("the AMC Board did not rely on the architectural style of the Lower School Proposal as the basis for its denial determination").

seeking to overcome an insured and better-equipped homeowner's association." AB 27. But this is precisely why 10 *Del. C.* § 348(e) provides for prevailing parties in certain circumstances to recover their attorneys' fees.

In short, the more fulsome considerations discussed at pages 34-39 of the Opening Brief likewise support reversal.

II. THE COURT OF CHANCERY ERRED IN FAILING TO CONSIDER THE ADDITIONALLY ENFORCEABLE OUTLOOK CRITERIA IN PARAGRAPH 5 OF THE DEED RESTRICTIONS THAT WAS ALSO RELIED ON BY THE AMC BOARD.

While outlook was not the focus of the AMC's argument, it unquestionably was an additional basis for the AMC Board's denial determination and raised below. A228-29, A291, A296 n.18. WFS acknowledged this at argument, A334:8-11, and does not dispute that the AMC "never indicated that [it] had abandoned outlook as an additional basis for its determination." OB 41. Nor does WFS dispute that the Court failed to consider the AMC's reliance on outlook in the Letter Opinion.

Instead, WFS argues that the AMC limited its argument to "open space," but, again, the AMC's argument was not that narrow. Section I.B. WFS's cited support for this proposition separately confirms that open space was discussed in the "harmony," not "outlook," context. AB 28 (citing A346, A381-82). WFS is therefore incorrect in asserting that the "AMC apparently contends that open space can be enforced either through an outlook provision or a harmony provision," and that raising outlook "demonstrates the infirmities in its harmony position." AB 29.

Regarding the merits, the AMC's Opening Brief acknowledged that some Delaware cases have found outlook to be unenforceable. OB 41. WFS, in contrast, ignores the cases the AMC cited holding the opposite. OB 41-43. Those cases show that outlook can be enforceable and that, at a minimum, the reasonableness of the AMC Board's reliance on outlook presents another factual issue for remand.

III. PARAGRAPH 5 OF THE DEED RESTRICTIONS APPLIES TO WFS.

Eschewing that its interpretation of the Deed Restrictions "is limitless," OB 39, WFS doubles down in renewing its argument that Paragraph 5 does not apply to the "Friends School Tract." This issue was heavily briefed below, A161-66; A216-28; A242-52; A275-89, and the Court at argument likened WFS's interpretation to "a classic Hobson's choice." A332:10-11. Indeed, the Court recognized that according to WFS, "[a]ll [the AMC] get[s] to do is approve. They don't get to deny. And that's an odd thing to write into a deed restriction." A332:11-13.

"Interpreting deed restrictions is a matter of contract interpretation and provisions are construed by determining original intent from the plain and ordinary meaning of the words." *Wild Quail Golf & Country Club Homeowners' Ass'n v. Babbitt*, 2021 WL 2324660, at *3 (Del. Ch. June 3, 2021) (Master's Report).[21] Paragraph 5's plain language makes clear that the paragraph applies to *all* buildings and structures covered by the Deed Restrictions, including those on the Friends School Tract. Specifically, Paragraph 5 provides that "[*n*]*o* building … or other structure, shall be commenced, erected or maintained, nor shall any addition to or change or alteration therein be made" unless approved by the AMC Board. A31 (emphasis added). That unqualified statement is not limited to residential structures;

[21] The AMC relatedly agrees with the general background principles cited by WFS at AB 31.

Paragraph 5 does not say, for example, that "no *residential* building … or other structure" shall be built unless approved. WFS offers no answer for this plain language argument.

Other paragraphs in the Deed Restrictions bolster the AMC's reading of Paragraph 5. Importantly, several paragraphs confirm that the drafters knew how to exclude particular paragraphs from applying to WFS. Paragraph 9, for instance, expressly "[e]xcept[s] the land included in the Friends School Tract." A32. And Paragraphs 7 and 8 expressly refer to "residences." A31-32.[22] WFS does not address any of these paragraphs, and the three it does do not support WFS's counter-textual interpretation.

Paragraph 11: Paragraph 11 provides that "[i]f, and when, the land known as Friends School Tract shall no longer be used for school purposes and shall be used for residential purposes, said land shall be subject to *all* the limitations, reservations, restrictions and conditions herein contained." A32 (emphasis added). WFS concedes that, at a minimum, Paragraph 3 presently applies to it. AB 31. It is likewise clear that other paragraphs (including Paragraphs 7, 8, and 9) do not. Paragraph 11's purpose, by its plain language, is to ensure that while some

[22] Paragraph 7 ("Open side yards extending the full depth of the lot shall be left on both sides of *every residence*.…") (emphasis added); Paragraph 8 ("No garage *other than a garage which is an integral part of a residence* shall be erected on any lot or within the boundaries of the land hereby conveyed ….") (emphasis added).

paragraphs (including Paragraphs 3 and 5) apply to the Friends School Tract while it is used as a school, *all* will apply if the Tract subsequently becomes residential. Because Paragraph 11 does not specify which paragraphs apply to the Friends School Tract while it remains a school, it does not undermine Paragraph 5's applicability to WFS.

Paragraph 1: Paragraph 1 provides that "[t]he lots, *except as hereinafter provided*, shall be used for private residential purpose only." A30 (emphasis added). Its qualifying language confirms that at least some non-residential use is permitted under the Deed Restrictions. The reach of each paragraph that follows is determined by the plain language of that paragraph. WFS's suggestion that Paragraph 1 impacts the broader reach of the Deed Restrictions is also refuted by the Restrictions' preamble, which provides that the Restrictions apply to all of Alapocas (including the Friends School Tract). A30 ("The lands and premises herein described, known as Alapocas, are conveyed subject to the following limitations, reservations, restrictions and conditions ….").

Paragraph 3: Nor does Paragraph 3 and its approval and recording requirements for non-residential buildings mean that Paragraph 5 does not also apply to WFS. WFS's position notwithstanding, AB 33, some conflict between two provisions is required to enforce a specific provision to the exclusion of a general one. *See DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 962 (Del. 2005)

(affirming application of specific provision where the specific and general provisions "were in conflict"); *see also* A327:15-329:13 (addressing this same argument below).[23] There is no conflict between Paragraphs 3 and 5 (and WFS has pointed to none). Rather, these paragraphs complement each other and serve different purposes. Paragraph 3 provides an extra set of requirements for non-residential buildings, granting the AMC approval over their location and design and, crucially, creating a recording requirement to publicly memorialize any such approvals. A30. Paragraph 5, in turn, supplies the criteria by which the AMC is to review all buildings (and other structures), both residential and non-residential. A31. For non-residential buildings, it therefore supplies the criteria by which the AMC Board evaluates whether such a building's design should be approved under Paragraph 3.[24] Because Paragraphs 3 and 5 each have distinct purposes, applying Paragraph 5's standards to WFS does not render Paragraph 3 "superfluous." AB 33.

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[23] WFS's cited authority at AB 33 is in accord. *See Golden Rule Fin. Corp. v. S'holder Representative Servs. LLC*, 2021 WL 305741, at *7 (Del. Ch. Jan. 29, 2021) (reasoning that a general provision "does not impliedly create a caveat" to a more specific provision), *aff'd*, 267 A.3d 382, 2021 WL 5754886 (Del. Dec. 3, 2021) (TABLE); *Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 255-56 (Del. 2017) (similar).

[24] WFS argues that Paragraph 5 cannot provide the criteria for the "design" requirement in Paragraph 3 because "there is no textual link between Paragraph 3 and Paragraph 5." AB 34. Paragraphs 3 and 5, however, clearly work together regardless of an express "textual link." While Paragraph 5 does not use the word "design," the criteria therein implicates aspects of design, including the "materials of which [a building] is to be built." A31. And even if Paragraph 5 does not supply

Finally, WFS invokes the AMC's three prior approvals. AB 34-35.[25] But that the prior approvals "followed the procedure contemplated by Paragraph 3" to memorialize and record them, AB 34, is entirely consistent with the AMC's position that WFS is subject to Paragraph 3's recording requirement. *Supra* 22. It does not follow that WFS expansions were *only* subject to review under Paragraph 3, particularly given that the AMC contests as "factually inaccurate" "WFS's claim that the AMC Board only applied Paragraph 3 in evaluating the three prior proposals." A219 (citing A54-55 ¶ 21).

WFS separately fails to address the AMC's argument below that the parties' past practices are of limited relevance given the plain language of the Deed Restrictions. A220. Nor does WFS address that unlike the three prior declarations which state that the AMC "approves of the erection and maintenance, use and design" of the prior proposals, AB 34-35, the operative "request for approval" drafted by WFS for the Lower School Proposal asked the AMC to "agree[] that all of the terms of the conditions of the Deed [Restrictions] have been fulfilled and satisfied in all respects." A69 ¶ 2. And while WFS states that "none [of the prior approvals] contained Paragraph 5 language," AB 35, "maintenance" and "erection"

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the "design" criteria of Paragraph 3, WFS offers no reason why non-residential properties should not have to seek approval under two separate provisions (or how doing so would create any conflict).

[25] In doing so, WFS avoids addressing the proposals' material differences. OB 27.

are used in Paragraph 5 as well as Paragraph 3. A30-31. The prior approvals do not alter Paragraph 5's application to WFS under any fair reading of the Deed Restrictions.

CONCLUSION

The AMC respectfully requests that the Order and Final Judgment be reversed and remanded for further proceedings.

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