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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

ROBERT FERWERDA, Plaintiff, Cross-defendant and Appellant, v. DAVID BORDON et al., Defendants, Cross-defendants and Respondents; JAMES WARE et al., Cross-complainants, Cross-defendants and Respondents.	C062389 (Super. Ct. Nos. SCV19417, TCV949, TCV1156)

Superior Court of Placer County, Nos. SCV19417, TCV949, and TCV1156, Scott Snowden, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.). Reversed in part and affirmed in part.

Thomas & Associates and Michael W. Thomas, for Plaintiff, Cross-defendant, and Appellant.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part C of the Factual and Procedural Background and parts III, IV, V, and VI of the Discussion.

Law Offices of Samuel G. Grader and Christian B. Green; Porter & Simon and James E. Simon; Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Judith M. Tishkoff, and Matthew B. Stucky for Defendant, Cross-defendant, and Respondent Bear Creek Planning Committee.

Porter Scott, Timothy M. Blaine and John F. Doyle for Defendants, Cross-defendants, and Respondents David Bordon, Richard E. Irving, Peter M. Turner, Irene Wertheim, Ronald Scoglio, Carole Lynn Keller, and Bear Creek Valley Board.

Louis A. Basile, A Professional Corporation and Louis A. Basile for Cross-complainants, Cross-defendants, Respondents James Ware and Cindy Ware.

This appeal follows a trial by reference[1] of three consolidated cases. The trial court entered judgment against plaintiff Robert Ferwerda, who had been trying to build a home on his vacant lot. He had sued the Bear Creek Planning Committee (the committee) and the individuals who comprised the Bear Creek Valley Board (the board) who he contended inappropriately blocked construction on his lot. He had also sued his next-door neighbors, James and Cindy Ware (the Wares),

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[1] A trial by reference is a proceeding under Code of Civil Procedure section 638, subdivision (a), which provides that a referee may be appointed by agreement of the parties to "hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision." That "statement of decision . . . is the equivalent of a statement of decision rendered by a superior court under Code of Civil Procedure section 632." (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513.) As such, a referee's statement of decision is subject to appellate review using the same rules that apply to a trial court's statement of decision. (*Ibid.*) For simplicity, here we refer to the referee as the trial court.

contending they had violated the covenants, conditions, and restrictions (CC&R's) in building and remodeling their house. Ferwerda appeals from a judgment entered in favor of the committee, the board, and the Wares, which included awards of attorney fees to the committee and the Wares. We affirm the judgment as to the committee and the Wares, except as it relates to the attorney fees. As to those orders, we reverse. Finally, as to the board, we dismiss as moot the appeal relating to it.

FACTUAL AND PROCEDURAL BACKGROUND

A

Introduction

Robert Ferwerda owns lot No. 134 in Alpine Meadows Estates Subdivision Unit No. 4 (subdivision No. 4). Since 2001, he has been trying to obtain approval to build a house on his lot. This litigation surrounds events related to securing that approval, interpretation of the CC&R's and related restrictions on the lots in subdivision No. 4, and the resolution of the three cases consolidated in the trial court.

B

The CC&R's, The Green Book, And The 2002 Architectural Review Manual

The CC&R's that govern subdivision No. 4 were recorded in 1964 and establish "a general plan for the improvement and development" of the property. The guiding principle is "that it is to the best interest of the area that it be developed into an attractive ski area, alpine in character and appearance, with as little damage to the natural beauty of the land and trees as is

possible." To that end, the CC&R's contain several restrictions on the subdivision. Among other things, owners are not permitted to cut down trees over five inches in diameter on their lot without approval from the committee. More generally, owners are required to receive approval from the committee before constructing or excavating on their lot. The owners' plans and specifications and the committee's approval must be "in accordance with the procedures and standards set forth in the Bear Creek Planning Committee Restrictions." The "Bear Creek Planning Committee Restrictions" were incorporated into the CC&R's as exhibit A in 1964.

The committee incorporated in 1978. The articles of incorporation describe the committee's primary purpose as "promoting the social welfare of the community of Alpine Meadows, California and for the mutual benefit of all property owners in that community through supervision and enforcement of the [CC&R's]." Among its powers and duties as articulated in its bylaws is "[t]o review and approve or disapprove plans and specifications for improvements in the Bear Creek Valley pursuant to the CC&R's," "conduct, manage and control the affairs of the corporation and to make such rules and regulations thereof as they may deem appropriate," and "maintain, issue, and revise at its discretion" a procedures, regulations, and standards manual.

In 1990, the committee published the so-called green book that contains procedures, regulations, and standards. The green book notes the observance of objective criteria for plan

approval and of subjective criteria guided by a proposed plan's "harmony with the environment in which the structure is placed and harmony with its surroundings." The restriction on tree removal is continued. It recommends use of fire-retardant composition shingles. Finally, it includes the following attorney fees provision: "In the event that it is necessary for the Committee to initiate litigation to enforce the provisions of these Provisions, Regulations, and Standards, then the Committee shall be entitled to recover its reasonable attorneys' fees and costs."

The green book was revised in 2002 and that revision became known as the 2002 architectural review manual. The manual states, among other things, "[t]he design of each structure must bear a harmonious relationship to the land and its neighbor" and live trees cannot be removed without board approval. Similar to the green book, it contains the following attorney fees provision: "In the event that it is necessary for the [committee] to enforce the provisions of the [2002 architectural review manual] by obtaining legal advice to clarify issues, initiate litigation, filing and/or preparing legal documents or filing and preparing a Cease and Desist Order, then [the committee] shall be entitled to recover its reasonable attorney fees and costs from the Performance Deposit or other means as may be deemed necessary. Legal expenses above the performance deposit may be recovered by fines assessed."

C

Ferwerda's Activities And Resulting Litigation

In 1998, Ferwerda purchased the lot in subdivision No. 4. In November 2001, he submitted his building plans to the committee for preliminary approval. Committee member Donald Priest reviewed Ferwerda's plans. He was concerned with the proposed home's location and configuration on the lot. "What struck [him] . . . was the location of [the] large residence and the long ridge line with respect to [Ferwerda's] neighbors, and in particular the creation of a rather unique alley space between [Ferwerda] and the Wares" that was roughly 17.5 feet wide and up to 70 feet long and had an urban instead of alpine feel. He then looked for a comparable situation in the "valley" but could not find one. Thereafter, Priest made his recommendation to the committee to deny the proposed home, and the committee so voted in December 2001.

Ferwerda appealed the committee's decision to the board, which in March 2002 affirmed the committee's decision on its de novo review.

In November 2004, the committee filed the first of the three consolidated cases, alleging Ferwerda had begun building a home on his lot even though the committee had rejected his plans. The complaint requested, among other things, a temporary restraining order and a preliminary and permanent injunction.

Ferwerda filed a cross-complaint, alleging, among other things, the committee had unreasonably and improperly denied his applications to develop his lot by applying invalid guidelines

that had not been properly adopted by the owners of subdivision No. 4. The cross-complaint was for breach of fiduciary duties, declaratory relief, and injunctive relief. Ferwerda later amended his cross-complaint to add the Wares, who he contended had not complied with the CC&R's in building and remodeling their home.

Sometime in 2006, Ferwerda submitted essentially the same plans for his lot he had submitted previously to the committee. The committee denied approval of the proposed home, citing among other things, the alley space problem.

The Wares filed a cross-complaint alleging that Ferwerda had violated the CC&R's in the summer of 2006 by cutting down trees on his lot without the approval of the committee. They requested injunctive relief requiring Ferwerda to replant similar trees and/or forfeit his property to the other owners in subdivision No. 4.

In 2006, Ferwerda submitted to the committee a set of building plans similar to the ones he had submitted in 2001. The committee denied the plans because the proposed home was too close to the Wares' lot. Ferwerda appealed the committee's decision to the board. After a de novo review, the board affirmed the denial in May 2006.

The second case that was consolidated was filed by Ferwerda in May 2006 against each board member individually. He claimed the board's affirmance was "arbitrary, capricious, unreasonable, and lacking in substantial evidence."

In summer 2006, Ferwerda again cut down trees without committee approval and excavated portions of his lot.

The third case that was consolidated was filed by the committee in September 2006. It sought to enjoin Ferwerda from removing trees and excavating his property.

The parties stipulated to a trial by reference. Following an 18-day trial, the court issued its statement of decision.

As to Ferwerda's claims, the court found the following: The committee did not act arbitrarily, capriciously, or with bias when rejecting Ferwerda's construction proposal. Since the committee's actions were reasonable, the issue of whether the board acted properly was moot. The committee had the authority to adopt the green book and other architectural standards. The Wares' home did not violate the CC&R's. As to the committee's claims, the court found the following: The committee had the power to adopt and modify the architectural review standards beyond those set forth in the CC&R's. The court also made permanent the preliminary injunction preventing Ferwerda from excavating on his property or removing trees without committee approval. As to the Wares' claims, the court found Ferwerda was required to replant the trees he had removed if, by June 2010, he had not received approval from the committee for constructing a home on his property. Finally, the court ordered Ferwerda to pay $194,313.51 in attorney fees to the committee and $219,239.06 in attorney fees to the Wares.

Ferwerda appeals from the resulting judgment. He contends: (1) the committee did not have the authority to adopt standards

beyond those in the CC&R's; (2) the court erred in awarding attorney fees; (3) the court applied the wrong legal standard when it determined the committee acted reasonably in denying his building plans in 2001; (4) the court erred in imposing a permanent injunction prohibiting him from "any further construction, excavation or alteration to his property without committee approval" and requiring him to replant trees if by June 2010 he had not received approval from the committee for constructing a home on his property; (5) the court's conclusion the Wares had complied with the CC&R's was not supported by substantial evidence; and (6) the board acted arbitrarily and capriciously in affirming the committee's rejection of his plans, and the board was not properly composed. As we explain, as to the committee and the Wares, we reject Ferwerda's contentions except as they relate to the attorney fee awards. As to those awards, we reverse. As to his contentions pertaining to the board, we dismiss as moot the appeal pertaining to it.

DISCUSSION

I

The Committee Has The Power To Adopt Standards Beyond Those Set Forth In The CC&R's

Section 6 of the CC&R's states the committee may act on applications, "all in accordance with the procedures and standards set forth in the Bear Creek Planning Committee Restrictions, a copy of which is attached hereto as Exhibit A and by this reference is made a part hereof. Except as to set-

backs (Paragraph 13 hereof), *in the event of a conflict between the standards required by said Committee and those contained herein, the standards of said Committee shall govern*." (Italics added.)

The trial court found this italicized language "empowers the [committee] to adopt new conditions on an ongoing basis." As we explain below on our de novo review (*Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1121), the trial court was correct to the extent this language allows the committee to adopt new design standards related to the improvement or development of lots in subdivision No. 4.

The interpretation of CC&R's is governed by the rules for interpreting contracts. (*Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, 575.) It is a long-standing rule that "[a]ll parts of a [contract] must be applied so as to give effect and meaning to every part, if possible . . . . (*Burnett v. Piercy* (1906) 149 Cal. 178, 189; see Civ. Code, § 1641 ["[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"].)

The plain language of section 6 of the CC&R's contemplates the committee may adopt standards beyond those contained in exhibit A as it existed when the CC&R's were adopted. This is evidenced by the acknowledgment in section 6 that if there is a conflict between the standards set forth in that section and the "standards required by [the] [c]ommittee," the standards of the committee govern. If the committee had no power to adopt

standards beyond those in the CC&R's, there would be no need for this language. We must read the CC&R's as a whole and adopt the construction that gives effect to every part of the CC&R's. (*Ezer v. Fuchsloch* (1979) 99 Cal.App.3d 849, 861 ["[a] cardinal principle of document construction is that document must be 'construed as a whole' so as 'to give effect to every part thereof . . . .'"].)

The question then becomes what is meant by "standards" as that term is used in the CC&R's. That term is used in section 6 in reference to the "procedures and standards set forth in the Bear Creek Planning Committee Restrictions" that are attached to the CC&R's. In those restrictions, there is a "standards" section. The first paragraph entitled, "GENERAL" explains in part that "[t]he design of each structure must bear a harmonious relationship to the land and its neighbors, in terms of lot coverage, mass and degree of individual expression." The remaining 13 paragraphs (with the exception of the last one, which addresses variances) detail architectural design standards, i.e., standards for such things as floor space, decks, roofs, exterior walls, windows, colors and finishes, and parking places. In the context of the CC&R's, then, the term "standards" refers to architectural design standards.

Ferwerda offers no interpretation of this language in section 6 of the CC&R's. Instead, he points to case law and testimony from the committee's expert witness, which he claims negate our interpretation of the CC&R's. Neither help him.

The cases relied on by Ferwerda, *Werner v. Graham* (1919) 181 Cal. 174 and *Riley v. Bear Creek Planning Committee* (1976) 17 Cal.3d 500, are distinguishable.

In *Werner*, a developer subdivided a tract and recorded a map of the tract that "showed no building lines or anything else to indicate any purpose of restricting in any way . . . ." (*Werner v. Graham*, *supra*, 181 Cal. at p. 177.) He then sold the lots. (*Id.* at pp. 177-178.) The early deeds contained "restrictive provisions" that were "so uniform and consistent in character as to indicate unmistakably that [the developer] had in mind a general and common plan which he was following." (*Id.* at p. 179.) The developer told the purchasers, "he was exacting the same restrictive provisions from all purchasers." (*Id.* at pp. 178-179.) The developer later quitclaimed the property eventually purchased by the plaintiff, but the deed to this property contained no restrictions. (*Id.* at p. 179.) The court held restrictions placed in the earlier deeds to the other property were not binding on the plaintiff. (*Id.* at pp. 184-186.)

In *Riley*, the developer sold a property via a deed that contained no restrictions. (*Riley v. Bear Creek Planning Committee*, *supra*, 17 Cal.3d at pp. 503-504.) Nine months later, the developer recorded a document purporting to impose uniform restrictions on a number of lots, including the one in dispute. (*Id.* at p. 504.) The court held these restrictions did not apply to the lot sold earlier. (*Id.* at pp. 506-507.)

Both of these cases are distinguishable because the CC&R's here specifically acknowledge the possibility of a conflict between the standards set forth therein and the "standards required by [the] [c]ommittee" and assert that if such a conflict arises, the standards required by the committee govern. Ferwerda signed that he "read and approved" the CC&R's.

The expert testimony to which Ferwerda points also does not help him. That testimony consisted of the opinion of the committee's expert that section 6 does not expressly authorize the committee to create new or different standards than those attached in exhibit A (as other CC&R's he had worked on did) but that by implication, the committee had such authority. This testimony undercuts Ferwerda's position because it supports a reading of section 6 (if only by implication) that gives the committee such authority.

Based on the plain language of section 6 of the CC&R's, we hold the committee had the power to adopt standards beyond those set forth in the CC&R's, which are reflected in the green book and the 2002 architectural review manual.

II

The Trial Court Erred In Awarding Attorney Fees To The Committee And To The Wares

Ferwerda contends the court erred in requiring him to pay the committee's and the Wares' attorney fees. In his view, the green book and 2002 architectural review manual cannot be the basis for authorizing the attorney fees because they are

unrecorded and were enacted by an unelected committee without approval of the property owners.

The committee and the Wares take the position adopted by the trial court, i.e., the attorney fees were permissible because the green book and 2002 architectural review manual provide for the recovery of attorney fees for a prevailing party such as themselves. And, in any event, Ferwerda asked for attorney fees if he prevailed and since he lost in the trial court, he was liable for the other sides' attorney fees.

A prevailing party is entitled to attorney fees when authorized by statute or contract. (Code Civ. Proc., §§ 1032, 1033.5, subd. (a)(10).) Here, the CC&R's contain no attorney fees provision. Rather, the green book and the 2002 architectural review manual provide for recovery of attorney fees by the committee. In reviewing these publications in part I of the Discussion, we explained that the CC&R's give the committee power to adopt new design standards relating to the improvement or development of lots in subdivision No. 4. The question is whether that power allows the committee to adopt attorney fees provisions not contained in the CC&R's.

The committee contends it had such broad power because the CC&R's and its own bylaws give it the authority to "expand upon and describe the provisions of the CC&Rs" and "[s]o long as such rules and guidelines are reasonable and do not conflict with the CC&R's, they will be held to be enforceable." In support, they cite *MaJor v. Miraverde Homeowners Assn.* (1992) 7 Cal.App.4th 618 and *Rancho Santa Fe Assn. v. Dolan-King* (2004) 115

Cal.App.4th 28 (*Rancho Santa Fe*). Neither case helps the committee.

In *MaJor*, the court addressed whether the homeowners' association was authorized to discriminate between resident members and nonresident members in the use and enjoyment of common areas. (*MaJor v. Miraverde Homeowners Assn.*, *supra*, 7 Cal.App.4th at p. 625.) The CC&R's granted every member a right and easement of enjoyment in and to the common areas within the property, subject only to the right of the association to establish uniform rules and regulations pertaining to a member's use of the common areas and recreational facilities. (*Ibid.*) Nonresident members asserted the association acted without authority in restricting the use of common areas by nonresident members. (*Ibid.*) The court agreed, explaining as follows: "an association may not exceed the authority granted to it by the CC&R's. Where the association exceeds its scope of authority, any rule or decision resulting from such an ultra vires act is invalid whether or not it is a 'reasonable' response to a particular circumstance. Where a circumstance arises which is not adequately covered by the CC&R's, the remedy is to amend the CC&R's. The courts have held homeowners are subject to any reasonable amendment of the CC&R's properly adopted." (*Id.* at p. 628.)

In *Rancho Santa Fe*, the court addressed whether a homeowners' association could apply a regulation adopted subsequent to the enactment of land use covenants that clarified the terms of one of those covenants permitting a homeowner to

undertake "minor" (as opposed to "major") construction without the art jury's approval. (*Rancho Santa Fe*, *supra*, 115 Cal.App.4th at p. 40.) In holding the association could, the court explained the governing documents granted to the association power to adopt regulations and further explained an association operating under a land use covenant had the "well-accepted power" to clarify and define the covenant's terms, so long as it did so reasonably. (*Id.* at p. 41.)

These cases do not support the authority of the committee to enact the attorney fees provisions here. In *MaJor*, the court limited the association's authority to that granted to it in the CC&R's. It is not enough, as the committee argues, that the attorney fee provisions are reasonable. *MaJor* rejected this argument, noting that if a circumstance arises that is not adequately covered by the CC&R's, the remedy is to amend the CC&R's, regardless of whether the association's actions are reasonable. (*MaJor v. Miraverde Homeowners Assn.*, *supra*, 7 Cal.App.4th at p. 628.) Here, the CC&R's are silent on attorney fees. It is a situation, therefore, "not adequately covered by the CC&R's," requiring amendment of the CC&R's to insert such a provision. (*Ibid.*) Similarly, in *Rancho Santa Fe*, the court's holding that the regulation was enforceable turned on the fact the governing documents granted the association power to adopt regulations and the fact the at-issue regulation served only to reasonably clarify terms already in the land use covenant. (*Rancho Santa Fe*, *supra*, 115 Cal.App.4th at p. 41.) Here, the attorney fees provisions do not seek to clarify existing

language in the CC&R's. Rather, they are an attempt by the committee to insert a new provision that binds homeowners without their approval.

Undaunted, the committee continues to argue that the CC&R's, the green book, and the 2002 architectural review manual "must be construed together as one contract, as the rules and standards in the Greenbook and [2002 architectural review manual] give effect to the CC&Rs." In support, it cites *Huntington Landmark Adult Community Assn. v. Ross* (1989) 213 Cal.App.3d 1012.) There, the defendants challenged an attorney fee award, contending there was no provision for attorney fees in the CC&R's. (*Id.* at p. 1023.) The court held the defendants were "mistaken" because the supplemental declaration of easements, covenants, conditions and restrictions contained an attorney fees provision. (*Ibid.*) *Huntington* is unhelpful here. To the extent the green book and 2002 architectural review manual deal with topics already covered by the CC&R's and simply serve to reasonably clarify their meaning (see *Rancho Santa Fe*, *supra*, 115 Cal.App.4th at p. 41) or to the extent they adopt new or different standards (which as we have explained in part I of the Discussion the CC&R's give the committee the power to do), those documents are a legitimate exercise of the committee's power granted to it under the CC&R's. They therefore bind the homeowners whether we view them as separate or supplemental to the CC&R's. The same reasoning does not apply to the attorney fee provisions. Nothing in the CC&R's gives the committee the power to insert into the green book and the 2002 architectural

review manual an attorney fee provision that was never in the CC&R's or contemplated therein. *Huntington* simply does not cover this situation.

We turn then to the other basis on which the committee and the Wares seek to uphold the attorney fee awards: Ferwerda asked for attorney fees if he prevailed and since he lost in the trial court, he was liable for the other sides' attorney fees. The problem with this argument is that it relies on an incomplete statement of the law.

Pursuant to Civil Code section 1717, "a prevailing party is entitled to attorney fees only if it can prove it would have been liable for attorney fees had the opponent prevailed." (*M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 467.) In *Perez*, we disapproved dictum in our earlier opinion in *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, which said, "Where a party claims a contract allows fees and prevails, it gets fees. Where it claims a contract allows fees and loses, it must pay fees." (*International Billing Services*, at p. 1190.) We explained in *Perez*: "The fallacy of the rule stated in *International Billing Services* is the assumption that if the party who claims that a contract allows fees prevails in the underlying litigation, it gets attorney fees. In truth, the party must still prove that the contract allows attorney fees. The mere allegation is not enough." (*M. Perez*, at p. 468.) The same applies for a losing plaintiff. For a losing plaintiff to be required to pay attorney fees, the plaintiff's "bare *allegation* that []he is

entitled to receive attorney's fees [is] not . . . sufficient"; he also had to have established the attorney fees clauses "actually entitled" him to recover fees. (*Leach v. Home Savings & Loan Assn.* (1986) 185 Cal.App.3d 1295, 1307.) Here, Ferwerda never so established, and as we have explained, he could not so establish because the attorney fees provisions in the green book and the 2002 architectural manual did not legitimately serve to add an attorney fees provision to the CC&R's.[2] Therefore, the committee and the Wares could not claim the right to attorney fees simply because Ferwerda had asked for those fees in his complaint.[3]

In sum, there was no basis, either contractual or statutory on which to award attorney fees to the committee or the Wares.[4] The fee awards must be reversed.

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[2] Ferwerda also claimed attorney fees under the private attorney general fee statute (Code Civ. Proc., § 1021.5) in his first amended cross-complaint. The provisions of Civil Code section 1717 are distinct from and have no application to the private attorney general fee statute. Section 1717's right to attorney fees is based on the notion of reciprocal *contractual* attorney fees.

[3] We note also the attorney fees provisions in the green book and 2002 architectural review manual were unilateral, in favor of the committee. "Section 1717 of the Civil Code, however, which governs enforcement of contractual attorney fees provisions, provides that any contractual attorney fees provision must be applied *mutually* and equally to all parties to the contract, even if it is written otherwise." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1106.)

[4] The above analysis applies to the Wares' claims of attorney fees as well. The Wares' argument that they are entitled to attorney fees is based on the attorney fee provision in the

III

The Trial Court Applied The Correct Legal Standard In Finding The Denial Of Ferwerda's Building Plan In 2001 Was Proper

Ferwerda contends the trial court applied the wrong legal standard when it determined the committee did not act unreasonably or arbitrarily in denying his building plans in 2001. According to Ferwerda, the applicable legal standard was "whether the [committee], in rejecting [his] proposed plans, was protecting an existing and definable uniform neighborhood scheme where no similar structures or relationships had been approved in the past. Where there is a cacophony or hodgepodge of housing stock, diverse architectural styles, and home siting, a review committee rejection of plans for a home that is not out of keeping with the nature and siting of homes throughout the community is arbitrary and capricious." Ferwerda draws this language from *Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965 (*Dolan-King*).

Dolan-King supports our conclusion the trial court applied the correct legal standard, which included (but was not limited to) the principles to which Ferwerda refers. In *Dolan-King* the covenants empowered the association's art jury and board to decide on a property owner's application for home improvements based on both objective and subjective criteria. (*Dolan-King*,

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green book, which they claim Ferwerda relied upon throughout the litigation here. Whether that is true is irrelevant. Because we hold the committee had no power to insert the attorney fee provision into the green book, the Wares cannot rely on that provision to claim they are entitled to attorney fees.

supra, 81 Cal.App.4th at pp. 970-971.) The art jury rejected the plaintiff's proposed fence designs because the designs were inconsistent with the residential design guidelines, the desired rural community character, and the existing neighborhood character. (*Id.* at p. 972.) It rejected the proposed room addition structures because the windows and wall thicknesses were not in keeping with one of the covenants that required "'a uniform and reasonably high standard of artistic result and attractiveness in exterior and physical appearance of said property and improvements.'" (*Id.* at pp. 970, fn. 1, 972.) The board upheld the art jury's decisions. (*Id.* at p. 972.) The trial court reversed, making factual conclusions opposite to the art jury and board. (*Id.* at p. 973.) The appellate court reversed the trial court, holding "the court failed to apply the proper deferential standard to test the Board's exercise of discretion." (*Id.* at p. 979.) That standard required upholding decisions made by the governing board of a homeowner's association "'so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy.'" (*Id.* at p. 979, quoting *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 374.) The appellate court rejected the plaintiff's argument that the jury and board had acted arbitrarily because several commercial buildings and homes in the community had architectural designs similar to what she was proposing. (*Dolan-King*, at pp. 980, 983.) "[T]he mere existence of varying

fence styles within Rancho Santa Fe does not establish arbitrary action under the Covenant." (*Id.* at p. 983.) But the court did add that if fences and walls within Dolan-King's immediate neighborhood (in the covenant's jurisdiction) lacked consistency, Dolan-King's proposed fence design would not be inappropriate because it would not be out of harmony with them, quoting from a Montana state court decision that found a committee's disapproval of the property owner's plans unenforceable where the development contained a "cacophony" of house styles. (*Ibid.*)

Here, the trial court applied the correct standard enunciated in *Dolan-King*, taking into account whether Ferwerda was subjected to arbitrary treatment because there allegedly existed a cacophony of house styles. The trial court upheld the decision of the committee because it applied the standards set forth in the CC&R's, which reasonably allow for rejection of a homeowner's application based on the proposed structure's effect on neighboring or adjacent properties. Committee member Donald Priest, who reviewed Ferwerda's proposal, was concerned with the proposed home's location and configuration on the lot, specifically with the creation of a unique alleyway space that was urban and not alpine. He could not find a comparable situation in the "valley." Thereafter, Priest made his recommendation to the committee to deny the proposed home. The trial court noted this evidence undercut Ferwerda's argument that he was subjected to arbitrary treatment because the committee had allegedly approved homes with the same "concerning

characteristics" as his.[5] On this record, the court applied the correct standard when it upheld the committee's 2001 denial of Ferwerda's building plan.

IV

The Trial Court Did Not Abuse Its Discretion In Granting A Permanent Injunction Against Ferwerda

Ferwerda challenges in a number of ways the court's imposition of a permanent injunction prohibiting him from "any further construction, excavation or alteration to his property without committee approval" and requiring him to replant trees if by June 2010 he had not received approval from the committee for constructing a home on his property. He contends the committee was without power to prosecute its claim against him. He contends the CC&R's tree removal restrictions are against public policy. Finally, he contends an injunction that requires him to replant the trees is not the proper remedy. We take each of these arguments in turn, rejecting them on the merits.

A

The Committee Had The Power To Prosecute Its Claims Against Ferwerda

Ferwerda contends the committee was without power to prosecute its claim of injunctive relief against him because the

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[5] Ferwerda now claims the committee and the trial court ignored that "1/2 of the complained of 'alleyway effect' was created by [the committee]'s approval of a long side set-back encroachment by [the Wares] right on [Ferwerda]'s property line." Ferwerda's argument is nonsensical because there would be no alleyway effect until Ferwerda submitted his proposal.

committee did not have power under the CC&R's to bring an enforcement action and the committee did not "follow[] its own standards and procedures." These claims lack merit.

In making his claim the CC&R's limit who can bring an enforcement action, Ferwerda fails to cite any portion of the CC&R's that contain such a restriction; rather he simply cites to the entire CC&R's. This is not enough to carry his burden as appellant to show error by specific citation to the record. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1265–1266.)

Regardless, the CC&R's imply this power and the committee's articles of incorporation make it explicit. Specifically, the CC&R's state that no building shall be erected or excavation commenced without approval of the committee. And article II of the committee's articles of incorporation states, "[the committee] is formed for the primary purpose of promoting the social welfare of the community of Alpine Meadows . . . and enforcement of the conditions and restrictive covenants applicable to the property in that community."

As to Ferwerda's claim the committee failed to "follow[] its own standards and procedures," there are two problems with this argument. One, he cites not to the committee's "own" standards and procedures, but to those of the board. And two, these standards and procedures are now obsolete. Since February 1999, the board's standards and procedures to which Ferwerda points have been abandoned and enforcement action has again been vested with the committee.

B

The Tree Removal Restrictions In The CC&R's Do Not Violate Public Policy

Ferwerda contends the CC&R's prohibition on excavation on his lot and the removal of a tree over five inches in diameter without committee approval contravene public policy, specifically Public Resources Code section 4291[6] and Placer County Code section 9.32.150,[7] which he claims establish "a clear and important public policy for the creation of defensible space and supersedes restrictions contained in the CC&Rs regarding tree removal." There are at least three problems with this argument.

One, Public Resources Code section 4291 does not apply to Ferwerda. That code section applies to a person who "owns, leases, controls, operates, or maintains *a building or structure* in, upon, or adjoining a mountainous area, forest-covered lands,

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[6] Public Resources Code section 4291, subdivision (a)(1) reads in pertinent part: a "person who owns, leases, controls, operates, or maintains a building or structure in, upon, or adjoining a mountainous area, forest-covered lands, brush-covered lands, grass-covered lands, or land that is covered with flammable material, shall at all times do all of the following: [¶] (1) Maintain defensible space of 100 feet from each side and from the front and rear of the structure . . . ."

[7] Placer County Code section 9.32.150 reads in pertinent part: "It shall be the duty of every owner . . . in control of any unimproved parcel of land . . . to abate therefrom . . . all combustible material and hazardous vegetation, that constitutes a fire hazard and public nuisance which may endanger or damage neighboring property or forestland."

brush-covered lands, grass-covered lands, or land that is covered with flammable material . . . ." (Italics added.) Ferwerda did not have a building or structure on his lot; he wanted to build one.

Two, Placer County Code section 9.32.150 was enacted in 2007, which was after Ferwerda cut down the trees in 2004 and 2006. Further, while that code section extends the principle of creating a defensible space to a vacant lot, Ferwerda's evidence did not support the proposition his actions were designed "to abate therefrom . . . all combustible material and hazardous vegetation, that constitutes a fire hazard and public nuisance which may endanger or damage neighboring property or forestland." He presented no evidence he was attempting to remove all combustible material from his lot, and it was unclear the defensible space was to protect his neighbor's property or forestland. Moreover, the trees that were removed were ones he had previously cited as preventing him from moving the location of his house on his lot.

Three, to the extent both code sections can be read as evincing a general policy to create defensible space, the CC&R's do not prevent a homeowner from so doing. They simply require the homeowner to get approval from the committee before excavating on the lot and removing trees of a certain size.

On this record, there is no merit to Ferwerda's public policy argument.

C

The Trial Court Did Not Abuse Its Discretion By Granting The Permanent Injunction That Required Ferwerda To Replant Trees If He Has Not Secured A Building Permit

"'The trial court's decision to grant a permanent injunction rests within its sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion.'" (*Thompson v. 10,000 RV Sales, Inc.* (2005) 130 Cal.App.4th 950, 964.) Ferwerda argues abuse of discretion because there was no evidence he had future plans to remove additional trees, there was evidence other lots had been cleared of trees so he was singled out for "disparate treatment," and the court's order mandating him to replant trees is "disfavored." None of these arguments has merit.

While Ferwerda testified there were nearby properties on which there had been "extensive tree removal," Ferwerda fails to note the problem with his conduct was not simply tree removal, but tree removal without committee approval. Further, while Ferwerda testified he had no plans to remove other trees "at this time," and the committee could not say for "certain one way or another whether Mr. Ferwerda plan[ned] to remove any[]more trees," the evidence showed that since the time of the preliminary injunction, Ferwerda still had plans to build on the lot and his plans had yet to be approved. Even by the time of trial, Ferwerda did not understand that regardless of his interpretation of the "public policy statutes," as he termed them, he still had to seek committee approval for removal of

trees. Finally, the court was measured in crafting a remedy, noting that "most of what Mr. Ferwerda did on his land would have occurred had he obtained [committee] approval for a house" and therefore the court did not want to require him to "engage in activities and undertake expenses which would be pointless and wasted by the time he is permitted to build his house." Thus, the injunction was conditional and required replanting of trees only if Ferwerda did not secure a building permit for his home. On this record, Ferwerda has failed to carry his burden to establish the court abused its discretion in granting the permanent injunction.

V

There Was Substantial Evidence

The Wares Complied With The CC&R's

Ferwerda contends the trial court's conclusion the Wares complied with the CC&R's was not supported by substantial evidence. According to him, the undisputed evidence showed violations with regard to the Wares' roof composition, the roof angles, house color, and utilities. He is wrong.

A

Roof Composition

Ferwerda contends the CC&R's prohibit installing asphalt shingles, and it was undisputed the Wares had installed asphalt shingles on at least two occasions.

Ferwerda misreads the CC&R's. While they state the roofing materials "shall be wooden shingles, wooden shakes, built up roofs with rock, gravel, or sod, or precolored metal," they also

state as "[n]ew building materials . . . become available," "other materials not listed above[] will be given special consideration by the Committee . . . ." The green book recommended using fire-retardant composition shingles. The trial court found the Wares applied to the committee to reroof their house with a new product, i.e., a fire-retardant composition shingle that was mandated by the state to replace wooden shingles and shake.

B

Roof Angles

Ferwerda claims the CC&R's prohibit more than 30 percent of any roof from being flat and that over 37 percent of the Wares' roof is flat.

While true the CC&R's place a 30 percent limit on how much surface area of the roof can be flat, the trial court found the Wares presented evidence they obtained a variance (which is allowed under the "Bear Creek Planning Committee Restrictions") from the committee that was approved by Placer County.

C

House Color

Ferwerda claims the color of the Wares' house, which he describes as red, contravenes the CC&R's, which restrict the use of exterior colors and finishes to "colors found in the immediate surroundings."

The factual premise of Ferwerda's claim is incorrect. The evidence to which Ferwerda himself points explains the house is

"stained [a] redwood color." Based on this evidence, the trial court found "the Wares' residence is not red."

D

Utilities

Ferwerda claims the Wares' home remodel violates the CC&R's because the plans the committee approved included the "undergrounding of utilities," but "[n]o revision of the undergrounding of utilities was ever submitted to the [committee] for approval and no revision of the undergrounding requirement was ever approved by the [committee]." At trial, Cindy Ware admitted some of these utilities had not been moved underground.

The problem with Ferwerda's cursory argument is that it ignores the Wares' evidence, which the court specifically credited in finding no violation of the CC&R's, that they moved preexisting above-ground wiring toward the street so that it was within the "PUC easement," it did not violate Ferwerda's air space, and it was done in accordance with a proper application and approval to the committee.

VI

The Trial Court Correctly Found

Ferwerda's Claims Regarding The Board Were Moot

In the trial court, as he does here, Ferwerda claimed the board was not properly composed and acted "arbitrarily and capriciously" in affirming the committee's rejection of his preliminary house plans. The trial court found these claims moot because it was not "meaningful" to review the board's

composition and actions since the court had found the committee's actions proper and all the board did was validate those actions. We agree.

A court must decide only "'actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132.) "An appeal will be dismissed when the question sought to be litigated has become moot." (*McKenna v. McCardle* (1950) 97 Cal.App.2d 304, 305.)

Ferwerda's claims against the board present such a situation. Since we have found no error in the committee's actions and all the board did was review the committee's actions, any review of the board's actions or its composition would be meaningless. We therefore decline to address Ferwerda's arguments regarding the board.

DISPOSITION

The orders for attorney fees are reversed. In all other respects, the judgment as to the committee and Wares is affirmed. The appeal as to the board is dismissed. The board is entitled to its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).) Ferwerda, the committee, and the Wares shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

The stay issued by this court on December 29, 2010, is vacated upon finality of this opinion.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.