IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

WILLIAM E. HOLMAN, JOELLE N. HOLMAN, EDWARD R. EBEL, MICHELE D. EBEL, THE IPPOLITO TRUST, J. DAVID JOHNSON, DOROTHY S. JOHNSON, TIANHUA WU, LANFENG YAN, BRIAN S. BACKER, JENNA BACKER, ANDY KHOO, et. al.,	**Civil Action No.: 2019-CV-315899**
Plaintiffs,	
vs.	
GLEN ABBEY HOMEOWNERS ASSOCIATION, INC.	
Defendant.	

ORDER GRANTING DEFENDANT JUDGMENT ON THE PLEADINGS ON THE COMPLAINT, AS AMENDED, AND ON COUNTS 1, 2 AND 3 OF DEFENDANT'S COUNTERCLAIMS

This matter came before the Court on the Defendant's motion for judgment on the pleadings on all claims in the Plaintiffs' Complaint, as amended and on Counts 1, 2, and 3 of the Defendant's counterclaims. Having considered said Motion, the Briefs of the parties, the undisputed allegations and documents in the verified pleadings, and the arguments of counsel, the Court finds and rules as follows:

The substantive issues for the Court to decide on this motion are as follows:

1) whether the purported covenant amendment at issue is an improper "non-uniform" amendment and/or whether it otherwise improperly shift the burdens and expenses of the subject covenants to the Defendant Association without its consent;

2) whether the purported covenant amendment at issue received a sufficient number of votes in order to be validly adopted;

3) whether the purported termination of the subject covenants at issue received a sufficient number of votes in order to be validly adopted;

4) Whether Section 3.3.8 E(1) of the Alpharetta Development Ordinance prohibits the Defendant Association from charging expenses for lake maintenance to the Plaintiffs.

UNDISPUTED FACTS OF RECORD

For the purposes of this Motion, the undisputed relevant facts are as follows:

The Glen Abbey subdivision consists of approximately 535 single-family residential Lots and common area which are subject to the terms of that certain Declaration of Covenants and Restrictions for Glen Abbey which was recorded on August 5, 1997 in Deed Book 22924, page 134 et. seq. of the Fulton County Land Records, as subsequently amended and recorded (the "**Glen Abbey Declaration**"). In accordance therewith, Each owner of a lot is a mandatory member of the Defendant Glen Abbey Homeowners Association, Inc.

The Glen Abbey subdivision contains a "Lake" that is the subject of this lawsuit. The entire Lake and the dam that impounds it lies upon portions of 16 individual lots in Phases IV and VII of the subdivision and a portion of a certain common area owned by the Association that is known as and designated as a

"Recreation Area" on the subdivision's Plats. Each of these 16 "Lake Lots" and the "Recreation Area" are also governed by an additional set of covenants known as the Declaration of Covenants, Conditions, Restrictions, and Easements For Glen Abbey Lake Property recorded on March 22, 1999 in Deed Book 22924, Pages 134 et. seq. of the Fulton County Land Records (the "**Lake Declaration**"). The Lake Declaration only governs the 16 Lake Lots, their respective owners, the Recreation Area, and its owner the Association and only concerns the Lake and dam.

Each of the Plaintiffs owns a "Lake Lot" that is governed by both the Glen Abbey Declaration and the Lake Declaration. Each of the Plaintiffs is a member of the Defendant Association. There is no dispute that the Lake Declaration only applies to the 16 Lake Lots and the Recreation Area, and that it does not apply to any of the other over 500 lots in Glen Abbey that are subject to the Glen Abbey Declaration.

Article V, B of the **Glen Abbey Declaration** sets forth the respective maintenance obligations of the over 500 lot owners in the subdivision and the Association concerning lots and common areas, including the Recreation Area. Sub-section 3 thereof specifically addresses maintenance of the Lake, contemplates that the Lake Declaration would exist at some point in the future, and states that the Lake Declaration will require the owners of Lake Lots (which includes the Plaintiffs) to each *share* in Lake maintenance and the allocation of Lake expenses

with each other and the Association. Article V, B, Section 3 of the **Glen Abbey Declaration** also specifically states that, "***The Association shall have no liability or duty whatsoever with respect to the Lake, except to the extent that a portion of the Lake exists on a portion of the Common Area and then only to the extent*** *provided by a separate declaration addressing the lake.*[Emphasis Supplied]." That section goes on to state that, *"If the Declarant, the Association and such* ***Owners*** *do not maintain the Lake in accordance with the terms of such recorded document, the Association shall have the right, but not the obligation, to provide any maintain [sic] or repair required of the Lake in accordance with such recorded document, and the additional costs and expenses so incurred by the Association,* ***beyond its pro rata contribution*** *required under such recorded document, shall become part of the assessments for which such Owners are personally liable hereunder and shall constitute a lien against such Owners' Lots* [Emphasis Supplied]"

Article III, Section 2 of the **Lake Declaration** expressly obligates the Association and each owner of a Lake Lot to maintain and repair the Lake and Dam and then expressly states that the Association and each owner of a Lake Lot is "*responsible for an* ***equal share*** *of all costs incurred in connection with the maintenance and repair of the Lake or the Dam. . .*[emphasis supplied]" Article III, Section 3 of the Lake Declaration then expressly provides that each Owner of a

Lake Lot shall be responsible for "*his **share** of the cost of such maintenance and repair* [emphasis supplied]."

Article VI, Section 2 of the **Lake Declaration** concerns its duration and renewal and states in relevant part as follows:

> Section 2. Duration. The provisions of this Declaration shall run with and shall bind the take Property and shall remain in effect for a period of twenty (20) years after the date this Declaration is recorded, after which time this Declaration shall be automatically extended for successive periods of twenty (20) years unless such extension is disapproved in writing by greater than a majority of the Owners of the Lake Lots and the Association. . .

Article VI, Section 3 of the **Lake Declaration** concerns how it can be amended and states in relevant part as follows:

> Section 3. Amendment. . . In addition to the above, this Declaration may be amended upon the affirmative vote or written consent, or any combination thereof, of a majority of the Owners of the Lake Lots and the Association, and, until Sellout, with the written consent of the Declarant. A meeting may be called (but shall not be required to be called) to consider and vote upon any such amendment.

For the purpose of this motion, the Court accepts as true the allegation in the Complaint, as amended, that a majority of the Owners of Lake Lots, [thirteen (13) of the sixteen (16)], executed the document titled "First Amendment to the Lake CCRs" which was then recorded in the Fulton County Deed Records on May 22, 2018 at Dee Book 58798 Page 224 (the "Lake Amendment"). The Court also accepts as true Plaintiffs' allegation in the Amended Complaint that, twelve (12) Owners of Lake Lots executed a document titled "Disapproval of Automatic

Extension of the Declaration of Covenants, Conditions, Restrictions and Easements for Glen Abbey Lake Property," which was recorded in the Fulton County Land Records on March 8, 2019 in Deed Book 59778 page 483 *et seq*. and purports to extinguish the Lake Declaration by disapproving its renewal (the "Lake Cancellation").

On its face, the Lake Amendment purports to remove the pre-existing covenants that obligate each of the 16 Lake Lot Owners (including the Plaintiffs) to share in maintaining the Lake and the expenses of such with the Association and to reallocate all maintenance and expense obligations to the Association alone. On its face, the "Cancellation" purports to disapprove renewal of the Lake Declaration rendering it no longer in effect as of March 22, 2019. There is no dispute that the Association did not consent to the Lake Amendment or the Cancellation and that it did not otherwise approve either of them.

CONCLUSIONS OF LAW

The fundamental dispute between the parties is whether the Lake Amendment and/or the Lake Cancellation were properly adopted by the Plaintiffs without the approval of the Defendant Association and whether the Lake Declaration, as originally recorded, is still in full force and effect.

Plaintiffs argue that the language in Article VI, Section 3 Lake Declaration stating that it can be amended by "*a majority of the Owners of the Lake Lots and*

the Association" means that the approval of 9 of the 17 property owners (16 Lake Lots + the Association = 17) is sufficient to amend it regardless of whether the Association consents or otherwise approves. Plaintiffs make the same argument regarding the identical phrase in the "Duration" section (Article VI, Section 2), albeit that 10 of 17 must approve since that section requires "*greater than a majority of the Owners of the Lake Lots and the Association.*" Plaintiffs argue that the amendment and renewal provisions treat the owners of the 16 Lake Lots and the Association (the owner of the "Recreation Area") as a single collective body of 17 property owners, and that a majority (or more) of 17 is sufficient to amend or "cancel" the Lake Declaration.

The Defendant Association argues that this interpretation is belied by the Lake Declaration and the Glen Abbey Declaration which, when read together, show that the fundamental purpose of the Lake Declaration was to create a cost-sharing regime between the Association and the Owners of the Lake Lots. And, that the 16 Lake Lots and the Recreation Area, and their owners, treated as separate and categorically distinct classes of property and property owners that are parties to the Lake Declaration. The Association argues that the correct interpretation is that the amendment and duration provisions require majority approval by the owners of the 16 Lake Lots, and then the separate approval of the Association. The Association also argues that even if Plaintiffs' interpretation of

the amendment section of the Lake Declaration is correct, the Lake Amendment at issue still required the Association's approval since it is a "non-uniform" amendment and it shifts the burdens of Lake maintenance and expenses from being equally shared by all 17 property owners to the Association alone.

For the reasons that follow, the Court finds that even if the allegations in their Complaint are accepted as true, the Defendant Association is entitled to judgment on the pleadings as a matter of law on all claims set forth in the amended complaint and on Counts 1, 2 and 3 of the Association's counterclaims.

I. The Purported Lake Amendment Is An Improper "Non-Uniform" Amendment.

Article III, Section 2 of the **Original Lake Declaration** was titled "Maintenance by Lake Lot Owners and Association" and stated that "*the Owners of the Lake Lots and the Association shall . . . be responsible for and shall perform all maintenance and repair of the Lake and the Dam which may be reasonably necessary and for the costs of such maintenance and repair. Each Owner of a Lake Lot and the Association, as the Owner of the Recreation Area, shall be responsible for an equal share of all costs incurred in connection with the maintenance and repair of the Lake and Dam . . .*" Article III, Section 3 stated that "*each Owner of a Lake Lot and the Association shall receive an invoice from*

the Association for his share of the cost of such maintenance or repair. . . and such invoice shall be paid within 10 days of the receipt of such invoice." These sections clearly obligate the 16 individual owners of the Lake Lots and the Association to share in maintaining and repairing thee Lake and Dam and also to equally share the costs of such maintenance and repair with each other.

The purported Lake Amendment deletes Article III, sections 2 and 3 in their entirety and replaces them with new sections that completely remove all obligations of the Lake Lot Owners to maintain and repair the Lake and Dam and to share in the costs. The purported new Article III, Section 2 states:

> Section 2. Maintenance by Association. Consistent with City of Alpharetta Ordinance Section 3.3.8, after the recording of this Amendment, the Association shall thereafter *have the right to, be responsible for, and shall perform* ***all*** *maintenance and repair of the Lake or the Dam* which may reasonably be necessary. The Association shall have the right, to the extent provided now or in the future under the Glen Abbey Declaration as amended, to assess the Association's full membership for the costs of all such maintenance and repair . . . [Emphasis Supplied].

By purporting to change the lake maintenance obligation from the 16 Lake Lot Owners plus the Association to just the Association, the Amendment is clearly non-uniform with regard to maintenance responsibility and clearly shifts that burden from all 17 owners to just the Association. In the same way, by purporting to change the lake expense allocation from being equally shared by all 17 property owners (16 Owners plus the Association), to just the Association, the Amendment is non-uniform and also unfairly shifts the assessment burdens. Under the

Original Lake Declaration, the Owners of the 16 Lake Lots paid 16/17^{ths} of Lake Expenses and the Association paid 1/17th. [1] Per the purported Lake Amendment, the Owners of the 16 Lake Lots are no longer responsible for 16/17^{ths} of the Lake Expenses and the Association is responsible for 100% of the Lake expenses.[2]

Therefore, the Lake Amendment is clearly non-uniform and it shifts the burden of Lake maintenance and expenses from being shared by the owners of all 16 Lake Lots plus the Association, to the Association alone without its consent. In Licker v. Harkleroad, 252 Ga. App. 872, 876, 558 S.E.2d 31, 34–35 (2001), the Georgia Court of Appeals invalidated a similar "non-uniform/burden-shifting" amendment and stated:

> "Amendments that do not apply uniformly to similar lots or units ... are not effective *without the approval of members whose interests would be adversely affected unless the declaration fairly apprises purchasers that such amendments may be made."* (Emphasis supplied.) Restatement (Third) of Property (Servitudes) § 6.10(2) (2000). The comments to this section explain that courts commonly protect the reliance interests of community members and disfavor nonuniform amendments which shift the benefits and burdens of community restrictions without the consent of those affected. Id. at comment f. That comment notes two exceptions to the rule disfavoring nonuniform amendments: (1) a change in conditions rendering the restrictions unreasonable, or (2) the declaration expressly puts purchasers on notice that such amendments may be made. Id. The trial court noted that the parties did not raise a change of conditions or introduce evidence on that issue. And, the Declaration

[1] Pursuant to the Glen Abbey Declaration, this 1/17th share of Lake expenses is considered part of the common expenses of the Association that is paid with the general assessments it levies on the 500+ owners in the entire subdivision, including the Plaintiffs.

[2] Which it would pay for from the general assessments levied on all of the 500+ owners in the subdivision.

> did not fairly put the purchasers on notice that individual lots could be removed from the effect of the restrictive covenants . . . in this case the drafters of the Declaration intended the covenants and restrictions to apply to all properties within the subdivision. The selective removal of restrictions abrogated this intent. While the Declaration contemplated future amendments, construing the scope of amendments to include nonuniform application would only frustrate the express purpose of community

The amendment section of the Lake Declaration simply concerns amendments generally and does not give any indication that an amendment shifting the entire responsibility for lake maintenance and expenses to the Association could be adopted by approval of a simple majority of the 16 Lake Lot Owners without the Association's consent. Plaintiffs have presented no argument that there has been a "change in conditions." Therefore, even if the Plaintiff's interpretation of the amendment section of the Lake Declaration is correct the Lake Amendment is invalid and not enforceable since it purports to shift the burdens of Lake maintenance and expenses from being shared by the Owners of the 16 Lake Lots and the Association equally, to the Association alone.

Accordingly, Defendant's motion is GRANTED with regard to the Lake Amendment which the Court finds to be invalid and otherwise unenforceable as a matter of law.

II. By Its Own Terms, Any Amendment Or Cancellation Of The Lake Declaration Requires The Separate Approval Of The Association

In addition to prohibiting non-uniform/burden-shifting amendments, Licker v. Harkleroad, 252 Ga. App. 872 (2001), stands for proposition that the particular words and phrases within a declaration of covenants must be interpreted in conjunction with the entire document and in light of the fundamental purpose the declaration is intended to serve. Therefore, regardless of whether the Lake Amendment or the Lake Cancellation can be viewed as non-uniform or not, the identical phrase "*majority of the Owners of the Lake Lots and the Association*" found in both the duration (Article VI, Section 2) and amendment (Article VI, Section 3) sections of the Lake Declaration must still be interpreted in light of the fundamental purpose that lake expenses be allocated in 17 equal shares. When so interpreted, it is clear that both sections require a majority (or more than a majority) of the owners of the Lake lots and the separate approval of the Association before and Amendment, or non-renewal, of the Lake Declaration can be validly adopted.[3]

As discussed below, the rules of contract interpretation require the Court to interpret these identical phrases consistently, in accordance with the entire Lake

[3] Plaintiffs reliance on the related case of Brockway v. Harkleroad, 273 Ga. App. 339, 342, 615 S.E.2d 182, 185 (2005), which upheld an amendment to a declaration of covenants shortening its term and causing it to expire before the original term had run, is misplaced. Brockway does not address how the phrase "*majority of the owners of the Lake Lots and the Association*," must be interpreted and did not concern a vote to terminate covenants pursuant to a provision allowing for termination (like the Lake Declaration). The amendment provision at issue in Brockway had already been interpreted in Licker, supra, and was no longer at issue. Therefore, in Brockway did not interpret the language of the amendment provision and only held that the amendment was permissible because it applied uniformly and did not shift any burdens. Brockway is inapposite because the relevant issue herein is how to interpret the phrase "*majority of the Owners of the Lake Lots and the Association*" in both the amendment and duration sections of the Lake Declaration.

Declaration and the Glen Abbey Declaration, and in accordance with the "fundamental purpose" of the Lake Declaration.

Throughout the Lake Declaration, the "Lake Lots" and the individual "Lake Lot Owners" (and their predecessors the "Record Owners") are treated as a distinct category of property and ownership from the "Recreation Area" and the "Association" (and its predecessor, the "Declarant"). This separate categorization of the Lake Lots and Lake Lot Owners as one group of lots and their owners, and then the Recreation Area and the Association as a separate category of property and its owner, is pervasive throughout the Lake Declaration beginning with the preamble "Background Statement." It is evidenced by the phrase "Owners of the Lake Lots and the Association" that is used throughout the Lake Declaration, including the amendment and renewal sections.

That this phrase is employed to treat the "Owners of the Lake Lots" and the "Association" as 2 distinct classes of property owners is clear from the fact that the Lake Declaration employs a different phase ("owners of the Lake Property" or its equivalent) when they should all be treated as 17 members of one comprehensive group of property owners. Article I of the Lake Declaration defines "Lake Property" as a comprehensive term that includes both the 16 Lake Lots and the Recreation Area (i.e. 17 parcels). The "Now Therefore" clause in the Lake Declaration uses the phrase "each and every Owner of all or any portion of the

Lake Property" to refer to the 17 property owners collectively. Article II, section 2 uses the phrase "Owners thereof" where "thereof" refers to the "Lake Property" in the preceding sentence. Article IV, Section 2 (use restrictions) refers to the "Owners of the Lake Property" collectively as a group of 17, without distinction. Most importantly, in Article III, Section 3, after referring to each "*Owner of a Lake Lot and the Association*" separately it goes on to state that "***Each Owner of the Lake Property*** agrees to pay the Association their respective proportionate share of lake expenses when due. . . [emphasis supplied]" [4]

Therefore, when the Lake Declaration intends to treat the Lake Lot Owners and the Association as a single group consisting of the owners of 17 parcels, it refers to them as the "Owners of the Lake Property" or a substantially equivalent phrase. By contrast, when the Lake Declaration uses the distinct phrase "Owners of the Lake Lots and the Association," it can only be interpreted as treating the 16 Lake Lot Owners and the Association itself as two distinct groups. Because the Lake Declaration utilizes different phrases to refer to the same 17 parcel owners, it must be interpreted as treating them differently in those instances. See, Tyson v. McPhail Properties, 223 Ga.App. 683, 689(6), 478 S.E.2d 467 (1996) (concluding that contract "would not have used two different terms in two sequential

[4] Article III, Section 3 of the Lake Declaration is clear that the Lake Assessments, while issued by the Association, are to be assessed against all 17 properties, including the Recreation Area owned by Association. In other words, the Association assesses itself. The Lake Assessments for Lake expenses are to be held in a separate "Lake Account" by the Association that must be separate from its general funds. Hence why the Association assesses itself for Lake expenses.

paragraphs to describe the same thing").; Garrett v. S. Health Corp. of Ellijay, 320 Ga. App. 176, 183–84, 739 S.E.2d 661, 667–68 (2013).

As a result, the phrases requiring approval of "greater than a *majority of the Owners of the Lake Lots and the Association*" (Art. VI, Section 2) and a "*majority of the Owners of the Lake Lots and the Association*" (Art. VI, Section 3) can only mean the approval of a majority (or more) of the 16 Lake Lot Owners and the additional separate approval of the Association. Had the Lake Declaration intended the Association to be treated as a single vote/consent within a group of 17, then it would have simply stated "majority of the Owners of the Lake Property." It does not.

A) The Intent of the Lake Declaration Must Be Determined By Reading It and the Glenn Abbey Declarations Together In Their Entirety

Article V, B Section 3 of the Glen Abbey Declaration anticipated that the Lake Declaration would be created to separately govern, *in addition* to the Glen Abbey Declaration, the 16 Lake Lots and the Recreation Area with regard to the Lake that spans all 17 parcels. In its preamble, the Lake Declaration expressly references the Glen Abbey Declaration by recording book and page and also incorporates the capitalized terms defined in the Glen Abbey Declaration into the Lake Declaration. Article V, B Section 3 of the Glen Abbey Declaration specifically addresses the Lake and its maintenance, expressly contemplates the creation of the Lake Declaration and that it would provide for the shared

maintenance and expense liability for the lake amongst the Association and the owners of the 16 Lake Lots. Therefore, the Lake Declaration incorporates the Glen Abbey Declaration and must be interpreted in conjunction with it. See, Bowman v. Walnut Mountain Prop. Owners Ass'n, Inc., 251 Ga. App. 91, 92–93, 95 (2001), (incorporation by reference); Anderson v. Commonwealth Land Title Ins. Co., 284 Ga. App. 572, 576, 644 S.E.2d 414, 417 (2007), (incorporation by reference); Crabapple Lake Parc Cmty. Ass'n, Inc. v. Circeo, 325 Ga. App. 101, 107, 751 S.E.2d 866, 871 (2013), cert. denied (May 19, 2014), ("Applying this rule, we conclude that the specific restriction [in the Declaration] of use of the lake to Lake Lot owners controls over the general grant of access to the Common Property to all members of the association. Thus, the word "access," as found in the name of the easement on the Crabapple II ***plat***, does not indicate that all members of the association had a right to access the lake and dam area using the Circeo and Lacey easement [emphasis supplied]."

"It is well settled that courts construe 'contracts so as to give them the meaning which will best carry out the intent of the parties. In doing this[,] [courts] must look at the instrument as a whole and consider it in light of all the surrounding circumstances. Thus, the favored construction will be that which gives meaning and effect to all the terms of the contract over that which nullifies and renders meaningless a part of the document.'" Primary Investments, LLC v. Wee

Tender Care III, Inc., 323 Ga. App. 196, 198, 746 S.E.2d 823, 826 (2013). The rules of contract interpretation require ". . . courts to give meaning to every term within the contract, rather than construe any term as meaningless." Waverly Hall Baptist Church, Inc. v. Branham, 276 Ga. App. 818, 824–25, 625 S.E.2d 23, 30 (2005); And, '. . . [i]f possible, every word ... is to be given effect." Scalia and Garner, supra, at 174. See *Chaudhuri v. Fannin Regional Hosp.,* 317 Ga.App. 184, 189(3), 730 S.E.2d 425 (2012)." Estate of Pitts v. City of Atlanta, 323 Ga. App. 70, 82, 746 S.E.2d 698, 706 (2013). "First, 'covenants are to be interpreted so as to give a reasonable, lawful and effective meaning to all manifestations of intention by the parties rather than an interpretation which leaves a part of such manifestations unreasonable or of no effect' . . . Second, the intent underlying all such covenants is to provide restrictions that will 'inure to the benefit of all property owners affected.' . . . 'If the manifest intent of the parties can be ascertained from the covenants as a whole, no ambiguity exists, and there is no need for judicial construction.' (citation and punctuation omitted)." S-D RIRA, LLC v. Outback Prop. Owners' Ass'n, Inc., 330 Ga. App. 442, 452-53, 765 S.E.2d 498, 507 (2014), reconsideration denied (Dec. 16, 2014), cert. denied (May 11, 2015). Therefore, the Lake Declaration must be interpreted by reading it and the Glen Abbey Declaration together in their entirety.

III. The "Fundamental Purpose" of the Lake Declaration Is for the 16 Lake Lot Owners and the Association to Equally Share Burdens and Expenses

As admitted by Plaintiffs' on page 7 of their opposition brief ". . . Article III, Section 2 [of the original Lake Declaration] provided that the maintenance of the lake and dam and the costs of such maintenance shall be the responsibility of the Owners of Lake Lots and the Association with such costs split into equal shares." See also Complaint and Amended Complaint P. 29. The Preamble, Article II, Article III, Section 2, Article III, and Section 3 of the Original **Lake Declaration** each show that its purpose was to provide for lake maintenance and that the expenses of same would be equally shared between the owners of the 17 properties on which the lake exists (i.e. the owners of the 16 Lake Lots and the Association). Further, Article V, B, Section 3 of the **Glenn Abbey Declaration** states "***The Association shall have no liability or duty whatsoever with respect to the Lake, except to the extent that a portion of the Lake exists on a portion of the Common Area and then only to the extent provided by a separate declaration addressing the lake*** [emphasis supplied]."

Based both on its own clear terms, and when also read together with the Glen Abbey Declaration, it is clear that the fundamental purpose of the Lake Declaration, as originally drafted, was for the 16 Lake Lot Owners and the Association to share Lake maintenance and expenses in 17 equal shares. The Court makes this determination as a specific finding of fact. "Therefore, any doubt concerning the construction of the restrictive covenants, in this case, will be

resolved in favor of upholding the intent to create [an equal cost and maintenance sharing arrangement applicable to all Lake Lots and the Recreation Area]." Licker, supra, 875. This means that the Duration (Article VI, Section 2) and Amendment (Article VI, Section 3) sections of the Lake Declaration must both be interpreted in light of the fundamental purpose that lake maintenance and expenses be allocated in 17 equal shares.[5]

In light of this fundamental maintenance and expense sharing purpose, consistent reference to the "Lake Lots" and "Owners of the Lake Lots" as distinct from the "Recreation Area" and its owner the "Association", and use of the distinct phrase "Owners of the Lake Property" when referring to all 17 property owners as a single group, shows that the Lake Declaration intends to treat the "Association" as a distinct class on equal footing with the 16 Owners of the Lake Lots. In other

---

[5]Licker v. Harkleroad, 252 Ga. App. 872, 875-76 (2001); Hortman v. Childress, 162 Ga. App. 536, 537, 292 S.E.2d 200, 202 (1982) ("Another rule of construction is to consider the background of the contract and the circumstances under which it was entered into, particularly the purpose for the particular language to be construed"); Hanson v. Stern, 102 Ga. App. 341, 343, 116 S.E.2d 237, 239 (1960), ("The main purpose of the instrument will be given effect"); Wright v. Piedmont Eng'g & Const. Corp., 106 Ga. App. 401, 405, 126 S.E.2d 865, 868 (1962); 11 Williston on Contracts § 32:9 (4th ed.), § 32:9.Effectuation of the parties' apparent purpose; the main purpose doctrine. ("Where the purpose of the contract would be defeated by one interpretation but would be given effect by another interpretation, the meaning ascribed to the clause will be that which gives effect to the main apparent purpose of the contract. 3 Williston on Contracts (1936) ¶619, pg. 1781 et seq., and Hanson v. Stern, supra."); The law prefers an interpretation which gives effect to all parts of the contract rather than one which leaves part of the contract ineffective or meaningless.[1] However, when this is not possible, the court will seek to interpret the contract in a way that will at least effectuate the principal or main apparent purpose of the parties.[2] Furthermore, if part of the contract is irreconcilable with the main purpose of the contract, that part will be given no effect in order that the main purpose of the contract can be achieved.").

words, an amendment to the Lake Declaration requires the approval of a "*majority of the Owners of the Lake Lots" (i.e. 9 of the 16) "and*" the separate approval of *"the Association."* The same is true of the identical language in the duration section.

To interpret the Amendment provision as allowing a simple majority of the 17 parties to the Lake Declaration to re-allocate the maintenance and/or expense obligations would render the Lake Declaration entirely meaningless, absurd, and a fools-errand. Such an interpretation would destroy the fundamental expense-sharing purpose that it was created to serve in the first place and allow the Lake Lot Owners to create their own "windfall' benefit. This is exactly what the Plaintiffs claim to have done. Therefore, at a minimum, the only reasonable interpretation of the amendment section of the Lake Declaration is that they require approval by the required "*majority of the Owners of the Lake Lots" (i.e. 9 of the 16) "and*" the separate approval of *"the Association."* Since the Association did not consent to the Lake Amendment at issue, in this case, it was not validly adopted.

Finally, since it contains the identical phrase Article VI, Section 2 of the Lake Declaration must be interpreted to require that any "Cancellation" be approved by more than a "*majority of the Owners of the Lake Lots" (i.e. 9 of the 16) "and*" the separate approval of *"the Association."* "As a general rule, words

used in one sense in one part of a contract are deemed to have been used in the same sense in another part of the instrument. *Tudor v. American Employers Ins. Co.*, 121 Ga.App. 240, 243–244(2), 173 S.E.2d 403 (1970)." Rainbow USA, Inc. v. Cumberland Mall, LLC, 301 Ga. App. 642, 647, 688 S.E.2d 631, 635 (2009); See also, Tyson v. McPhail Properties, 223 Ga.App. 683, 689(6), 478 S.E.2d 467 (1996) (concluding that contract "would not have used two different terms in two sequential paragraphs to describe the same thing").; Garrett v. S. Health Corp. of Ellijay, 320 Ga. App. 176, 183–84, 739 S.E.2d 661, 667–68 (2013). Because the Association did not approve the "Cancellation" at issue, it was not validly adopted and the Lake Declaration has renewed, in its original form, for another 20 years. Accordingly, Defendant's motion for judgment on the pleadings is granted in this regard.

III. Section 3.3.8 E(1) of the Alpharetta Development Ordinance Is Inapplicable

Plaintiffs incorrectly argue that Section 3.3.8 E(1) of the Alpharetta Development Ordinance prohibits the Association from charging expenses for lake maintenance to them. Even assuming the section applies to the Lake and Dam, it only concerns who is obligated to the city to perform actual Lake maintenance. It does not purport to abrogate existing contractual obligations and does not prohibit a homeowners association from assessing maintenance expenses to the owners of

the lots on which a lake (or other stormwater facility) is located. The Ordinance does not address cost allocation, and nothing therein prohibits the Association from allocating expenses to property owners.

Further, the Ordinance does not even apply to the Lake and Dam at issue or to the proposed "maintenance" work identified by the City as alleged in the Amended Complaint. Plaintiffs incorrectly assume the Ordinance employs the term "development" to refer to a particular location when that term simply delineates certain activities as is evident from the definitions section of the Ordinance. These definitions show that Section 3.3.8 E(1) does not refer to a specific location that might be commonly referred to as a "development," but to certain types of activities. In other words, "existing . . . development," as used in 3.3.8 E(1) means, "existing" "*land change, including, but not limited to, clearing, digging, grubbing, stripping, removal of vegetation, dredging, grading, excavating, transporting and filling of land, construction, paving, and any other installation of impervious cover.*" Further, "new development" as used in 3.3.8 E(1) means "*those actions or activities which comprise, facilitate or result in*" "*land change, including, but not limited to, clearing, digging, grubbing, stripping, removal of vegetation, dredging, grading, excavating, transporting and filling of land, construction, paving, and any other installation of impervious cover*" "*on a previously undeveloped site.*" There is no dispute that no existing clearing, digging, grubbing

etc. or similar activity or other land change has occurred at any other time relevant to the amended complaint.

Finally, Section 3.3.1 C states that the requirements of the Ordinance do not include "*ordinary maintenance activities, remodeling of existing buildings, resurfacing of paved areas, and exterior changes or improvements which do not materially increase or concentrate stormwater runoff, or cause additional nonpoint source pollution.*" Plaintiffs admit in Paragraphs 39-42 of the Amended Complaint that the underlying issues with the Lake involve maintenance and they do not contend that any of the proposed work would "*concentrate stormwater runoff. . . .*" Therefore, the Ordinance does not apply to the Glen Abbey Lake.

As a result of the foregoing it is hereby **ORDERED** that Defendants are awarded **JUDGMENT** on the pleadings as a matter of law on all claims set forth in the Plaintiff's Complaint and Amended Complaint and on Counts 1, 2 and 3 only of the Defendant's Counterclaims, and it is further **ORDERED** as follows:

1) The document titled "FIRST AMENDMENT TO DECLARATION OF COVENANTS AND EASEMENTS FOR GLEN ABBEY LAKE PROPERTY" recorded in the Fulton County Land Records on May 22, 2018 in Deed Book 58798 Page 224 *et seq.* is invalid and otherwise unenforceable and is hereby cancelled of record;

2) The document titled "CORRECTED FIRST AMENDMENT TO DECLARATION OF COVENANTS AND EASEMENTS FOR GLEN ABBEY LAKE PROPERTY" recorded in the Fulton County Land Records on January 2, 2019 in Deed Book 59579 page 92 *et seq*. is invalid and otherwise unenforceable and is hereby cancelled of record;

3) The document titled "CORRECTED FIRST AMENDMENT TO DECLARATION OF COVENANTS AND EASEMENTS FOR GLEN ABBEY LAKE PROPERTY" recorded in the Fulton County Land Records on January 23, 2019 in Deed Book 59638, Page 10 *et seq*. is invalid and otherwise unenforceable and is hereby cancelled of record;

4) The document titled "DISAPPROVAL OF AUTOMATIC EXTENSION OF THE DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR GLEN ABBEY LAKE PROPERTY," which was recorded in the Fulton County Land records on March 8, 2019 in Deed Book 59778 page 483 *et seq*. is invalid and otherwise unenforceable and is hereby cancelled of record;

5) The document titled DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR GLEN ABBEY LAKE PROPERTY recorded in the Fulton County Land records on March 22, 1999 in Deed Book 26312 page 1 *et seq*. is valid and remains in full force and effect;

6) Defendant may record a copy of this order in the land records of Fulton County and index the same to the above documents or a reasonable notice containing the substance of this Order after approval by this Court.

It is **SO ORDERED**, this the 8th day of October 2019.

THOMAS A. COX, JR, JUDGE
SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT