2022 IL App (2d) 210433-U
Nos. 2-21-0433 & 2-21-0631 cons.
Order filed May 17, 2022



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| COUNTRYSIDE LAKE ASSOCIATION, An Illinois Not-For-Profit Corporation, | ) | Appeal from the Circuit Court of Lake County. |
| Plaintiff and Counterdefendant-Appellee, | ) | |
| v. | ) | No. 18-CH-1297 |
| RICHARD HAHN and LAURA HAHN, | ) | |
| Defendants and Counterplaintiffs-Appellants. | ) | Honorable Daniel L. Jasica, Judge, Presiding. |

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JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

**ORDER**

¶ 1 *Held*: The Appellate Court affirmed the trial court's judgment, which ordered the removal of defendants' fence, because (1) the court's finding that the defendants built the fence in violation of the homeowners' association's declaration was not against the manifest weight of the evidence, (2) the declaration's fence provision was enforceable and reasonably applied against defendants, (3) the court correctly applied the law in granting injunctive relief, (4) the court properly concluded that the defendants' counterclaim raised no actual controversy, and (5) the court did not abuse its discretion in awarding attorney fees to the homeowners' association.

¶ 2 After Richard and Laura Hahn constructed a fence on their property, the Countryside Lake Association (CLA) filed suit, seeking the fence's removal on the basis that the Hahns erected it in

violation of a restrictive covenant in CLA's governing documents. Following a bench trial, the court entered judgment in favor of CLA and ordered the Hahns to remove the fence. The court also awarded attorney fees to CLA. The Hahns appeal. We affirm.

¶ 3 I. BACKGROUND

¶ 4 CLA is a homeowners' association in Mundelein consisting of approximately 350 members. Since 2007, the Hahns have owned a single-family residence in Mundelein that abuts Countryside Lake (Lake), a private lake maintained by CLA. The Hahns were members of both CLA and the Countryside Homeowners' Association (CHA), a sub-association of CLA comprised of approximately 150 homes. As members of both CLA and CHA, the Hahns were subject to the declarations, rules, and regulations of both associations, including the "Amended and Restated Agreement Creating Countryside Lake Association" (CLA Agreement) and the "Amended Declaration of Covenants, Easements and Restrictions for Countryside Homeowners' Association" (CHA Declaration).

¶ 5 The CHA Declaration provided that the "easements, restrictions, covenants and conditions" therein had the "purpose of enhancing and protecting the value, desirability and attractiveness of the subject property." The CHA Declaration granted the CLA Board of Directors (Board) the right to enforce the provisions of the CHA Declaration, providing that:

> "In the event of any default or violation by any Owner *** under the provisions of the Declaration, By-Laws or rules or regulations of the Board, the Board or its agents shall have all of the rights and remedies which may be provided for in the Declaration, By-Laws or said rules and regulations, or which may be available in law or in equity *** or for such damages or injunction for specific performance, or for judgment for payment of money

> and collection thereof *** or for any combination of remedies *** upon 30 days prior written notice to such Owner, if the default is not remedied in such time.
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> ***
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> All expenses of the Board in connection with any such actions or proceedings, including court costs and attorney's fees and other fees and expenses and all damages *** shall be charged to and assessed against such defaulting Owner. *** In the event of any such default by any Owner, the Board *** shall have the authority to correct such default, and to do whatever may be necessary for such purpose, and all expenses in connection therewith shall be charged to and assessed against such defaulting Owner."

The CHA Declaration further provided that "[n]o covenants, restrictions, conditions, obligations or provisions contained in this Declaration or the By-Laws shall be deemed to be abrogated or waived by reason of any failure to enforce same irrespective of the number of violations or breaches which may have occurred."

¶ 6 Article VII, Section 3 of the CHA Declaration provided:

> "All plans for construction of private roads, and driveways and all building plans for any building, wall, or structure to be erected upon any Unit and the proposed locations thereof upon any unit and any changes after approval thereof *** shall require the approval in writing of the Board of Directors. Before commencement of construction of any road, driveway, building, fence, wall or other structure whatsoever ***, the person or persons desiring to erect, construct or modify the same, shall submit to the Board of Directors *** two complete sets of building plans and specifications for the building, fence, wall or other structure, as applicable. No structure of any kind, the plans, elevations, and specifications of which have not received the written approval of the Board of Directors and which does

> not comply fully with such approved plans and specifications shall be erected, constructed or placed or maintained upon any Unit. Approval of such plans and specifications shall be evidenced by written endorsement on such plans and specifications, a copy of which will be delivered to the owner or owners of the Unit upon which respective building, road, driveway or other structure is contemplated prior to the beginning of such construction. No changes or deviations in or from such plans and specifications as approved shall be made without the prior written consent of the Board of Directors."

¶ 7 The CLA Agreement separately governed the CLA and provided its members with certain rights pertaining to the "Shore Area," which was defined as "the strip of land 100 feet in width that is contiguous to and surrounding the Lake Area." "Lake Area," in turn, was defined as "Countryside Lake, a body of water encompassing approximately 140 acres." As is relevant here, the CLA Agreement gave members the right to "travel by foot over, across and along the Shore Area." To permit this, the CLA Agreement prohibited the construction of any "residence or other dwelling *** within seventy-five (75) feet of said Shore Area" (the 75-foot Setback). The CLA Agreement also gave the Board the authority to establish and enforce "rules and regulations relating to erosion control, drainage, and other activities relating to the Lake Area and Shore Area deemed necessary by the Board to protect the aesthetic qualities of the [L]ake and to control the use and enjoyment of the Lake Area and Shore Area, provided that [CLA] shall pay the taxes levied on the Lake Area and Shore Area."

¶ 8 The instant case arose out of the Hahns' construction of a decorative metal fence on their property in March of 2018. On November 20, 2018, CLA filed a two-count complaint. Count I alleged breach of contract, asserting that the Hahns constructed a fence that was not approved by the Board, in violation of the CHA Declaration. CLA sought an injunction requiring the removal

of the fence. Count II sought a declaratory judgment that the fence was built in violation of the CHA Declaration. CLA also sought attorney fees and court costs incurred in connection with the litigation.

¶ 9 On April 4, 2019, the Hahns filed their answer, affirmative defenses, and counterclaim. The Hahns asserted three affirmative defenses, including, as is pertinent here, that CLA waived its ability to enforce the CHA Declaration because CLA arbitrarily applied the CHA Declaration against CLA members and failed to respond to emails in which the Hahns relayed their intent to begin building the fence. The Hahns also filed a counterclaim seeking a declaratory judgment that CLA could not claim an easement on the part of their property located in the Lake Area and Shore Area because CLA failed to pay the real property taxes on that portion of their property.

¶ 10 In April 2021, a bench trial was held, and the following pertinent evidence was adduced. In 2017, the Lake was in poor condition. A foul smell emanated from the Lake, dead fish had to be removed from it, and dead snails washed onto the shore. Algae and E. coli were present in the Lake, causing the CLA to close it on several occasions. To protect their dogs by preventing them from going into the Lake, the Hahns, in September 2017, submitted a proposal to Terry Caldwell, the chairman of the Board's architectural committee, for the construction of a pool and fence in their back yard. An included survey showed a line labelled "proposed fence" that enclosed the back portion of the Hahns' residence. The fence would span most of the width of the property and extend west toward the Lake. The entire western side of the fence would be situated within the 100-foot Shore Area, and part of the pool would be situated only 64 feet from the edge of the Shore Area. The Hahns also included a rendering of the fence, which showed that they intended to build a decorative metal fence.

¶ 11 The Board reviewed the Hahns' proposal at a meeting on September 12, 2017, and voted to reject it. First, the pool was within the required 75-foot Setback from the Shore Area. Second, while a decorative metal fence would be permitted around the pool, it was not permitted around the entire property. June Johnson, a Board member present at the September 12 meeting, testified that the Board generally disfavors perimeter fences along the Lake because it wants to maintain the "natural beauty of the [L]ake." Johnson explained that the Board has a strong desire to maintain the natural aesthetic of the Lake and the area surrounding it because "that is what the [CLA] members want." She noted that those aesthetic concerns are stronger for properties located on the Lake because the "natural beauty of the [L]ake is essential to the [CLA]." Johnson testified that when owners are permitted to build perimeter fences, the Board "prefer[s] split rail fences because then it doesn't distract or detract from the naturalness of the [L]ake." Johnson explained that a decorative fence is allowed in the area around a pool, but for "safety reasons only."

¶ 12 On September 14, 2017, Caldwell mailed a letter to Richard on the Board's behalf explaining the Board's reasons for denying the proposal. The letter provided:

> "[T]he [Board] denied your pool plans as submitted. *** [T]he location of the pool must be a minimum of 75 feet from the 100 foot shore line mark. The fence as presented was also denied because of its location. A perimeter fence does not comply with the original covenants providing an easement around the [L]ake for all CLA residents. The style of fence is acceptable for around the pool only as required by Lake County. Any additional fencing should be split rail fence. Even a split rail fence cannot extend to the [L]ake shore per the original covenants of the CLA."

¶ 13 On October 1, 2017, Richard submitted a second proposal to the Board via email. The email stated that he and Laura had "revised the pool plans per your letter [of] September 14, 2017,"

and that "[f]ence drawings will be completed following the pool approval." An updated survey showed the pool relocated so that it was fully outside the 75-foot Setback. No label for a "proposed fence" appeared on the survey, but a solid line appeared on the western side of the property. The line was situated inside the 100-foot Shore Area.

¶ 14 On October 10, 2017, the Board held another meeting. The Hahns were not present, but their attorney attended on their behalf. The Board voted to approve the Hahns' resubmitted plans. The meeting minutes stated that the Hahns "resubmitted their pool plans with the requested adjustments made. [CLA President Sean] Parmley moved to approve the plans. [Sarah] Roy 2nd the motion. The motion was approved." Five Board members signed the plans, and a stamp on the plans read, "Approved Countryside Lake Assn subject to owner obtaining all required Lake County building and zoning permits. Date 10-10-17." Caldwell then called Richard and left a voicemail informing him that the plans had been approved, though he did not mention a fence. On October 11, 2017, Caldwell sent a letter to Richard that read, "This letter is to inform you that your plans for an in ground pool as resubmitted is approved by the [Board]."

¶ 15 Board members June Johnson, Sarah Roy, Leslie Jezuit, and Sean Parmley testified that they approved only pool plans, not fence plans. Roy explained that the Hahns' second proposal was a "resubmittal of a pool, not a pool and fence." She noted that there was no indication that a fence appeared on the survey, and no line was labeled as a proposed "fence." Roy thus testified that when the Board discussed the proposal, "we were just discussing the pool." Johnson testified that the Hahns' attorney said nothing about a fence at the October 10 meeting. Caldwell testified that, although he believed that the survey in the resubmitted proposal depicted the location of a proposed fence, only a split rail fence could be approved at that location. Caldwell testified that,

nevertheless, the Board considered the revised submission only as a pool proposal, not a fence proposal, because Richard's email stated that fence drawings were forthcoming.

¶ 16 Richard and Laura testified, however, that they believed the Board had approved their plans for both a pool and a decorative metal fence in the locations shown on the survey. Richard testified that he and Laura submitted "pool and fence plans," that he "never deviated on what type of fence [he] was going to build," and that he "never said anything other than the fence that [he] supplied in the drawings." Richard and Laura both acknowledged that the Board rejected their September 2017 proposal because the fence's material and location did not comply with CLA and CHA covenants. They also conceded that no one explicitly told them that their proposed fence had been approved. Moreover, they acknowledged that, although they said they would forward fence drawings once the pool was approved, they never did so. Richard explained that his reason for not forwarding fence drawings was that he "never got a reply back from them saying please do this, please do that." Similarly, Laura testified that "the entire plan was approved" and that there "were no caveats whatsoever."

¶ 17 Although the Hahns purportedly believed that their plans were approved, their attorney sent a letter to CLA's attorney on October 31, 2017, seeking the Board's reconsideration of the Hahns' initial September 2017 proposal. On November 7, 2017, CLA's attorney asked why the October 10, 2017, approval of their plans had not "closed the matter." The Hahns' attorney responded that the "plans have been approved," but "[t]he issue is the location of the previously approved pool and fence."

¶ 18 On February 1, 2018, the Hahns' attorney emailed a draft complaint and "settlement proposal" to CLA's attorney. The settlement proposal included a survey showing the pool positioned as it was in the September 2017 submission, *i.e.*, partially within the 75-foot Setback,

and showing the western edge of the fence directly against the Lake shoreline. On February 20, 2018, Richard sent an email to Caldwell, stating "we are still trying to come to some final determination with our pool and fence." On February 20, 2018, CLA's attorney informed the Hahns' attorney that the Board denied the settlement proposal.

¶ 19 Laura testified that, after the settlement proposal was rejected, she and Richard opted to build a pool and fence "where it was approved originally" because they "assumed [that] not hearing anything back *** was in essence an approval to go ahead."

¶ 20 On February 27, 2018, Richard emailed Caldwell and Parmley, stating: "Just wanted to let you know that we are starting construction per the approved stamped drawings. We will be doing the project in 2 phases—first the fence then the pool." Richard testified that he sent the email "to make crystal clear that we weren't doing something that wasn't in line with what the Board had approved." Richard testified that he "got no response back." Caldwell testified that he was "sure" he received the email, but that he did not specifically recall it. Caldwell explained that, to the extent that the Hahns wanted to build a fence that would not conform with the plans approved by the Board, "[w]e can't assume until they build it that there's a violation [of the CHA Declaration]. There is no violation until they build it." Caldwell testified that the Board did not inform the Hahns at that time that building a decorative metal fence would constitute a violation because the Board "felt [that it] previously communicated that to them."

¶ 21 On February 28, 2018, the Hahns' fence contractor applied for a building permit from Lake County to construct the fence. The application included the approved survey that was stamped and signed by the Board, but the previously-unmarked line on the western edge of the property had been marked as a fence with "X"s. The application also included a survey showing a proposed location for the fence. The line on the western edge of the property was in a different spot from

both the September 2017 and October 2017 proposals, as it was positioned to avoid the Shore Area entirely. The building permit was secured on March 6, 2018.

¶ 22 On March 10, 2018, Richard sent another email to Parmley, noting that "construction starts next week on our pool/fence project." Parmley testified that, from Richard's emails, he believed that the Hahns were planning to build a non-split rail perimeter fence. Parmley testified that he delegated to CLA's lawyer the responsibility of responding because he "felt uncomfortable" about doing so and felt that "the lawyers should take a look at it." Caldwell testified that when Parmley received Richard's email, Caldwell believed that Richard would start pool construction, then get approval of a split rail fence. On March 13, 2018, the Board held a meeting, and the minutes reflected that the "Hahn's [*sic*] plan to move forward with plan approved on 10/10/17."

¶ 23 Richard testified that construction of their decorative metal fence started March 12 or March 13, 2018. Roy testified that she observed the construction and sent an email to the Board "saying that the fence was being built and that we didn't approve." The fence was completed a few days later. Laura testified that the fence was "absolutely outside of the 100-foot shoreline easement" and that "this is the fence we intend to accept and live with."

¶ 24 On March 20, 2018, Caldwell sent Richard a letter on behalf of the Board that read, "Thank you for confirming that the work will fall within the parameters approved by the Board, including the precise locations. Regarding the fence, and as you are aware, the type of fence will need to be a split rail fence."

¶ 25 On May 18, 2018, the Board issued a Notice of Violation and Hearing, which stated, "The recent approval for a fence was based on a decorative fence around the pool however [*sic*] it was specified in the approval letter that only a split rail fence was approved for the balance of your fencing request." A hearing before the Board was held on June 12, 2018, and the Board determined

that a violation had occurred. The Board's attorney sent the Hahns a letter stating that, to remedy the violation, they could (1) maintain landscaping that would completely screen the fence, (2) change the fence to a material accepted by the Board, or (3) remove the fence. Johnson testified that the Hahns did not agree to any of the proposed remedies and that the Board voted to approve filing a lawsuit.

¶ 26 Richard testified that he understood that whatever fence he and Laura built had to be approved by the Board. Laura conceded that the Board "told us it was not permissible" to build a non-split rail fence anywhere except around their pool. Laura and Richard both acknowledged that they nevertheless built a decorative metal perimeter fence. Laura testified that they did so "because [the Board] signed off on our plans that depicted nothing other than our original fence. There was no other fence offered, they signed off on our original fence plans." Richard noted that they have not yet constructed a pool, and whether they will build one "depends on how [the litigation] goes."

¶ 27 The Hahns also introduced evidence of purported exceptions to the split rail perimeter fencing requirement. The Hahns introduced a video of a property "[a]cross the street" from their home that had a fence that "is the exact style and color and height" as the Hahns' fence. In another video, a property had a non-split rail fence that was only slightly different from the Hahns'. Laura testified that that fence enclosed the property's pool and a substantial amount of the acreage of the property; Laura acknowledged, however, that it was not a lakefront property. Two other properties had chicken wire installed to contain the respective owners' pets. Caldwell testified that the wiring on one property was used to contain the owners' pet dogs, but that wiring was put up inside of a split rail fence. Johnson, who did not own a lakefront property, testified that her next-door neighbor used chicken wire to contain the owners' pet chickens. Johnson testified that "the [B]oard has not discussed that at all" because no one had ever raised the issue.

¶ 28 The parties also presented evidence regarding CLA's responsibility, under the CLA Agreement, to pay taxes levied on the Lake Area and Shore Area as a prerequisite to regulating those areas. Johnson testified that, although CLA owns portions of the Lake Area and Shore Area, there are individual owners who own other portions. Johnson testified that, for the areas CLA owns, CLA is assessed for the property and pays its taxes "like everybody else." She explained that CLA does not receive property tax bills for the parts of the Lake Area or Shore Area that individual homeowners own, as those bills go directly to the individual property owners. Johnson testified that the Hahns have never requested reimbursement from CLA for paying taxes on the portion of their property in the Lake Area and Shore Area. Similarly, Richard testified that, although he expected CLA to pay the taxes for the parts of his property in those areas, he had not submitted his tax bills for reimbursement and had, instead, paid the bills without objection.

¶ 29 On July 7, 2021, the court entered judgment for CLA. The court found, *inter alia*, that "the Hahns could not have reasonably believed that a decorative metal backyard perimeter fence *** had been authorized by the Board," because the Board consistently communicated its position that only split rail perimeter fencing was acceptable. The court also found that the Board did not arbitrarily impose the fence-approval provision or waive its rights, because (1) there was no competent evidence to establish that CLA approved anything other than split rail fences on waterfront lots, (2) the existence of any such fence did not mean that CLA relinquished its ability to enforce the fence requirement in this instance, (3) the CHA Declaration contained an anti-waiver provision, and (4) CLA had explicitly informed the Hahns that only split rail perimeter fencing was appropriate. The court also rejected the Hahns' counterclaim that CLA's failure to pay its share of the Hahns' property taxes prevented CLA from regulating their property in the Lake Area and Shore Area. The court reasoned that there was no actual controversy regarding the regulation

or use of those areas because the Hahns did not construct anything in either area. Finally, the court concluded that injunctive relief was proper. The court noted that, because the Hahns knew they needed to obtain Board approval before constructing their fence under the CHA Declaration, but proceeded anyway, CLA did not need to show irreparable harm, and the court did not need to balance the equities. The court issued a permanent injunction requiring the Hahns to remove their fence. The court awarded CLA $65,760.60 in attorney fees and $388.07 in costs on September 30, 2021, after CLA filed a petition for attorney fees. The Hahns appeal.[1]

¶ 30 II. ARGUMENT

¶ 31 A. Whether the Court's Findings Were Against the Manifest Weight of the Evidence

¶ 32 The Hahns first argue that the trial court's issuance of an injunction requiring them to remove their fence was improper because the court's finding that they violated the CHA Declaration was against the manifest weight of the evidence. Specifically, the Hahns assert that

[1] The Hahns initially filed a "Notice of Interlocutory Appeal" on August 4, 2021, erroneously citing Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2017) as the basis for this court's jurisdiction. See *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 222 (2000) ("a permanent injunction is a final order, appealable only pursuant to Supreme Court Rules 301 or 304"). On October 28, 2021, the Hahns then filed a notice of appeal from the trial court's order granting CLA's petition for fees. On November 1, 2021, on our own motion, we consolidated both appeals for briefing and decision, striking the parties' initial briefs and ordering new briefing. We explained that the August 4, 2021, notice of appeal was premature and that the matter had been improperly briefed as an interlocutory appeal.

the evidence established that the Board approved their plan to build a decorative metal fence. CLA responds that the Board only approved pool plans.

¶ 33 "We review grants of injunctive relief under the abuse-of-discretion standard, and the trial court's findings will not be reversed unless they are against the manifest weight of the evidence." *Victor Township Drainage Dist. 1 v. Lundeen Family Farm Partnership*, 2014 IL App (2d) 140009, ¶ 50. Findings are against the manifest weight of the evidence when they "appear to be unreasonable, arbitrary, or not based on evidence, or when an opposite conclusion is apparent." *Vaughn v. City of Carbondale*, 2016 IL 119181, ¶ 23.

¶ 34 The evidence showed that, in September 2017, the Hahns submitted an initial proposal for a pool and decorative metal fence that enclosed their property. The fence was marked as a "proposed fence." The Board rejected the proposal, in part because, although a decorative metal fence was permitted around the pool, only split rail fencing was permitted elsewhere to maintain the natural aesthetic of the Lake. The Board conveyed this in a letter to the Hahns, and the Hahns acknowledged that the Board had informed them of the fencing material requirement. In October 2017, the Hahns emailed revised "pool plans," noting that "[f]ence drawings will be completed following the pool approval." The included survey showed a line on the western side of the property that was unmarked and, unlike the initial proposal, had no label denoting it as a "proposed fence." The minutes to the Board's October 10, 2017, meeting, during which the Board considered and approved the plans, noted only that the Hahns "resubmitted their pool plans." Caldwell sent a letter to the Hahns explaining that their "plans for an in ground pool" were approved, and Caldwell's voicemail informing the Hahns of the Board's decision included no mention of a fence. Moreover, four out of five Board members testified that they only approved pool plans. The fifth Board member, Caldwell, testified that, although he believed the Hahns' submission included a

proposal for the location of a fence, only split rail fencing could be approved beyond the vicinity of the pool. Caldwell further testified that the Board ultimately considered the revised submission only as a proposed pool plan because the Hahns' email stated that fence drawings were forthcoming. The Hahns, in turn, acknowledged that they knew that they needed Board approval to build a fence, and they conceded that the Board had informed them that a non-split rail fence was "not permissible" anywhere except around their pool. The evidence showed that the Hahns nevertheless built a decorative metal perimeter fence. Based upon the foregoing, we hold that the trial court reasonably concluded that the Board only approved the Hahns' pool plans, not plans for a decorative metal perimeter fence. Therefore, the trial court's finding that the Hahns violated the CHA Declaration was not against the manifest weight of the evidence.

¶ 35 The Hahns also argue that CLA waived any objection to the construction of their fence, and the trial court's finding to the contrary was against the manifest weight of the evidence. Specifically, the Hahns contend that after the Board rejected their "settlement proposal," they emailed the Board twice and stated their intention to begin constructing their fence. According to the Hahns, although the Board knew that they intended to build a metal perimeter fence, the Board never objected to its construction. This argument is unavailing.

¶ 36 Waiver is the intentional relinquishment of a known right. *Hahn v. County of Kane*, 2013 IL App (2d) 120660, ¶ 11. There was no evidence that CLA intentionally relinquished its rights under the CHA Declaration or CLA Agreement. Instead, the evidence showed that the Board explicitly informed the Hahns that any fencing that was not constructed around the pool needed to be split rail fencing. No evidence suggested that the Board ever deviated from that position or that the Board communicated anything different to the Hahns. While the Hahns highlight that CLA did not respond to their emails stating their intent to begin building, " '[i]t has generally been held that

no waiver is occasioned by *** mere silent acquiescence.' " *Spencer v. Riordan*, 240 Ill. App. 3d 938, 946 (1992) (quoting *Village of Lake Bluff v. Dalitsch*, 415 Ill. 476, 483 (1953)). " '[A] person is not estopped by his silence when there is no positive duty or opportunity to speak *** .' " *Spencer*, 240 Ill. App. 3d at 946 (quoting *Merchants National Bank of Aurora v. Frazier*, 329 Ill. App. 191, 206 (1946)). Here, it is undisputed that, when the Board rejected the Hahns' September 2017 proposal, it informed them of the split rail fencing requirement for perimeter fences. It is further undisputed that the Hahns were aware of that requirement. Thus, after the Board approved the Hahns' October 2017 pool plan, the Board did not need to reinform them that only split rail perimeter fencing was permissible. The Hahns' emails imposed no duty upon CLA to reassert its position to avoid waiving its right to enforce the CHA Declaration. See *Spencer*, 240 Ill. App. 3d at 946 (plaintiff's silence was not waiver of his partnership interest because he had no duty to inform partners that he did not consent to the building of a sea wall or a change in his partnership share). Accordingly, we determine that the court's findings that the Hahns violated the CHA Declaration and that CLA did not waive its objection to the construction of the Hahns' fence were not against the manifest weight of the evidence.

¶ 37 B. Whether CLA Could Regulate the Hahns' Fence Under the CHA Declaration

¶ 38 Next, the Hahns argue that the trial court erred in granting an injunction because the CHA Declaration's fence-approval requirement is unenforceable. Specifically, they argue that the CHA Declaration is unclear and indefinite, in that it contains no guidance as to the types of fences that are permissible. Therefore, the Hahns argue, the Board's regulation of the types of fences that were permissible on their property was arbitrary and unreasonable. CLA responds that the CHA Declaration is enforceable because (1) the CHA Declaration clearly grants the Board the express authority to approve the construction of fences, (2) the Board is in the best position to enforce that

provision in accordance with the CHA Declaration's purpose, and (3) the Board acted reasonably here.

¶ 39 The interpretation of restrictive covenants in a declaration is a matter of law, subject to *de novo* review. *Standlee v. Bostedt*, 2019 IL App (2d) 180325, ¶¶ 55, 57. "The rules of construction for contracts govern our interpretation of the covenants contained in the declaration." *Forest Glen Community Homeowners Ass'n v. Bishof*, 321 Ill. App. 3d 298, 303 (2001). The paramount rule of contract interpretation is to give effect to the intent of the parties, and that "intent should be derived from the language of the document, read as a whole and construed in connection with the circumstances surrounding its execution." *Standlee*, 2019 IL App (2d) 180325, ¶ 55. "Generally, restrictive covenants affecting land rights will be enforced according to their plain and unambiguous language." *Neufairfield Homeowners' Ass'n v. Wagner*, 2015 IL App (3d) 140775, ¶ 16; see also *Fick v. Weedon*, 244 Ill. App. 3d 413, 417 (1993) ("Restrictions should be given the effect which the express language of the covenant authorizes."). "If the trial court turned to parol evidence to ascertain the parties' intent, we defer to its credibility and factual determinations unless they were against the manifest weight of the evidence." *Standlee*, 2019 IL App (2d) 180325, ¶ 57. Although restrictive covenants are not favored and will be enforced only where the covenant is reasonable, clear, and definite, the rule of strict construction in favor of the free use of property will not be applied to defeat the obvious purpose of a restriction, even if not precisely expressed. *Standlee*, 2019 IL (2d) 180325, ¶ 56; *Amoco Realty Co. v. Montalbano*, 133 Ill. App. 3d 327, 331 (1985).

¶ 40 The Hahns rely on *Westfield Homes, Inc. v. Herrick*, 229 Ill. App. 3d 445 (1992), and *Hartman v. Wells*, 257 Ill. 167 (1912), to argue that, because the CHA Declaration is silent as to

what types of fences are permissible, the Board has no authority to regulate the type of fence they could construct on their property. However, their reliance on these cases is misplaced.

¶ 41 In *Westfield Homes, Inc.*, the covenant of a homeowners' association provided that no structure could be built without the approval of the association's architectural review committee, and the covenant explicitly set forth several structures that were prohibited from being constructed in the community. *Westfield Homes, Inc.*, 229 Ill. App. 3d at 449-50. The covenant noted that its restrictions were "for the purpose of enhancing and protecting the value of" the community. *Westfield Homes, Inc.*, 229 Ill App. 3d at 452. The defendants constructed an above-ground pool and belatedly submitted a request to approve its construction. *Westfield Homes, Inc.*, 229 Ill. App. 3d at 448. Although above-ground pools did not appear on the covenant's list of prohibited structures, the review committee rejected the defendants' request outright, and the association sued the defendants seeking the pool's removal. *Westfield Homes, Inc.*, 229 Ill. App. 3d at 448-50. We affirmed the trial court's judgment in favor of the defendants and held that the association's blanket denial of above-ground pools was unreasonable under the circumstances. *Westfield Homes, Inc.*, 229 Ill. App. 3d at 448, 453. We explained that, although a restrictive covenant requiring homeowners to obtain approval from the association before constructing a structure was enforceable, the association's exercise of its review power must be reasonable and not arbitrary. *Westfield Homes, Inc.*, 229 Ill. App. 3d at 451. We concluded that the association's blanket denial of above-ground pools was unreasonable under the circumstances because such pools did not appear on the list of prohibited structures. *Westfield Homes, Inc.*, 229 Ill. App. 3d at 453. We explained that, to use its review authority reasonably in a way that comported with the covenant's purpose of enhancing the value of the community, the association could have imposed reasonable

conditions, such as requiring fencing around the pool area, which would address concerns about noise, visibility, and safety. *Westfield Homes, Inc.*, 229 Ill. App. 3d at 453-54.

¶ 42 *Westfield Homes, Inc.* is distinguishable, as CLA employs no blanket prohibition of fences—even decorative metal fences—in the community. Instead, the evidence showed that CLA merely imposes the type of reasonable restriction endorsed by *Westfield Homes, Inc.* CLA regulates where certain types of fences may be built to promote the CHA Declaration's "purpose of enhancing and protecting the value, desirability and attractiveness of the subject property."

¶ 43 *Hartman* also does not aid the Hahns. In *Hartman*, two purchasers of adjoining lots in a subdivision entered into an agreement in which a set-back prohibited the construction of porches or other extensions of their homes across a lot line. *Hartman*, 257 Ill. at 168-69. When one owner built a porch on his lot that encroached into the set-back, the other owner sued, seeking the removal of the porch. *Hartman*, 257 Ill. at 169-70. The trial court granted an injunction ceasing construction of the porch, but not requiring its removal from the set-back. *Hartman*, 257 Ill. at 170-71. On appeal, our supreme court upheld the agreement, reversed the trial court's failure to order the porch's removal, and remanded for the court to enter an order to remove the porch. *Hartman*, 257 Ill. at 172, 174. The court noted that "[r]estrictions against the use of property held in fee, if it is true, are not favored and doubts will, in general, be resolved against them." *Hartman*, 257 Ill. at 172. The court qualified, however, that "where the intention of the parties is clearly manifested in the creation of the restrictions, they will be enforced in a court of equity." *Hartman*, 257 Ill. at 172. The court concluded that, under the agreement, the encroaching builder was "bound to know" of the setback's existence such that it could be enforced against him. *Hartman*, 257 Ill. at 172.

¶ 44 Like *Hartman*, and contrary to the Hahns' claim, the CHA Declaration clearly delineated the requirement that any fence needed to be approved by the Board before it could be built. The

Hahns acknowledged that they understood that requirement and nevertheless built a fence that they had been told "was not permissible." Accordingly, their reliance on *Hartman* is misplaced.

¶ 45 Here, the plain language of Article VII, Section 3 of the CHA Declaration provides that, before a fence may be constructed, the Board must approve the plans and specifications for it and that, absent the Board's approval, no such fence may be constructed. We hold that this provision is clear and unambiguous, and therefore, enforceable. See *Amoco Realty Co.*, 133 Ill. App. 3d at 333 (restrictive covenant enforceable where language was clear).

¶ 46 We also reject the Hahns' argument that CLA arbitrarily enforced the fence restriction against them. "A homeowner's association has the authority to interpret the covenants, conditions and restrictions in its declaration." *Neufairfield*, 2015 IL App (3d) 140775, ¶ 19. "[T]he law is settled that a declaration's restrictions on the use of property carry a strong presumption of validity and will be upheld unless the party challenging them proves that they are wholly arbitrary in their application, violate public policy, or abrogate some fundamental constitutional right." *Scott v. York Woods Community Ass'n*, 329 Ill. App. 3d 492, 500-01 (2002). "[W]hen an individual challenges a decision made by the association, a court will generally defer to the association's decision, so long as the association acted reasonably." *Standlee*, 2019 IL App (2d) 180325, ¶ 54. The trial court's findings as to the materiality of past violations of a restrictive covenant will be overturned on appeal only if the findings are against the manifest weight of the evidence. *Pettey v. First National Bank of Geneva*, 225 Ill. App. 3d 539, 549 (1992).

¶ 47 The evidence established that the Board preferred split rail perimeter fencing because it believes such fencing preserves the natural aesthetic of the Lake, thereby promoting the CHA Declaration's "purpose of enhancing and protecting the value, desirability and attractiveness of the subject property." Thus, the Board's preference for split rail perimeter fencing reflected a logical

value judgment, not an arbitrary or capricious decision. See *Amoco Realty Co.*, 133 Ill App. 3d at 330, 332-33 (committee's disapproval of stone columns was reasonable because its determination that the columns' placement delineated a boundary, which was prohibited by declaration, was a well-reasoned value judgment, not a decision based on arbitrary whims). To the extent that the Hahns assert that the Board arbitrarily exercised its authority because other properties were allowed to utilize non-split rail fencing, the trial court found otherwise, and that finding was not against the manifest weight of the evidence. The evidence established that, unlike the Hahns' property, the properties containing other types of fencing were not lakefront properties, and Johnson testified that the Board's aesthetic concerns were stronger for properties located on the Lake. As to the properties that installed chicken wire, Caldwell testified that one property, in fact, had a split rail fence, and the chicken wire was behind that fence. As to the other property, which installed the wire fencing to contain pet chickens, Johnson testified that the Board had not considered the issue because no one had raised any complaints. Thus, the Board had not explicitly approved the chicken wire on that property. Based upon the foregoing, we hold that the CHA Declaration's fence approval provision was enforceable, and CLA reasonably enforced it against the Hahns.

¶ 48 C. Whether the Trial Court Misapplied the Law in Granting Injunctive Relief

¶ 49 Next, the Hahns argue that the trial court misapplied the law in entering an injunction because (1) there was no great necessity justifying the removal of their fence and (2) the court failed to balance the equities. CLA responds that the trial court properly applied the law in granting injunctive relief.

¶ 50 "A mandatory injunction is an extraordinary remedial process which is not a matter of right, but may be granted only upon the exercise of sound judicial discretion in cases of great

necessity." *Taubert v. Fluegel*, 122 Ill. App. 2d 298, 302 (1970). The law is clear that there are "three traditional elements necessary to secure a permanent injunction." *County of Kendall v. Rosenwinkel*, 353 Ill. App. 3d 529, 539 (2004). To be entitled to a permanent injunction, a plaintiff must establish that he or she (1) possesses a certain and clearly ascertainable right, (2) will suffer irreparable harm if no relief is granted, and (3) that there is no adequate remedy at law. *Rosenwinkel*, 353 Ill. App. 3d at 538. A court considering injunctive relief should also balance the equities. *Rosenwinkel*, 353 Ill. App. 3d at 538.

¶ 51 However, "[t]hese elements may be supplanted in certain circumstances, such as *** when a violation of a covenant alone is cause to enjoin the prohibited activity." *Standlee*, 2019 IL App (2d) 180325, ¶ 51. This is because "[r]estrictive covenants concerning the use of land are in a somewhat different category and unless against public policy, or the principles of waiver [or] estoppel operate, their violation will generally be enjoined by a court of equity." *Cordogan v. Union Nat. Bank of Elgin*, 64 Ill. App. 3d 248, 253 (1978). As such, "[t]he breach of a covenant is sufficient reason to enjoin its violation and a complainant need not show substantial comparative injury." *Forest Glen Community Homeowners Ass'n v. Nolan*, 104 Ill. App. 3d 108, 112 (1982). Additionally, "[c]ourts are not required to balance the equities" where a defendant violated a covenant "with prior knowledge and direct notice of the restrictions." *Forest Glen Community Homeowners Ass'n*, 104 Ill. App. 3d at 113.

¶ 52 In arguing that there was no great necessity justifying the removal of their fence, the Hahns assert that "CLA introduced no evidence that it has suffered any harm of any kind" and that the fact that CLA objects to their fence "really does not prove any injury." However, the Hahns cite no authority that provides a standard by which this Court might assess when a plaintiff has failed to show a great necessity in a case such as this, which involves the violation of a restrictive

covenant concerning the use of land. Because restrictive covenants pertaining to land use are recognized as being in a "different category" such that "their violation will generally be enjoined," we do not find the Hahns' unsupported argument to be persuasive. *Cordogan*, 64 Ill. App. 3d at 253.

¶ 53 Instead, we find *Taubert v. Fluegel*, 122 Ill. App. 2d 298, 302 (1970), instructive. In *Taubert*, the restrictions of a subdivision provided that "no residence could be built within eight feet of the side lot lines." *Taubert*, 122 Ill. App. 2d at 302. The defendant constructed a house on her lot, and a portion of the house extended across the side building line and onto the plaintiffs' lot by 4.6 feet. *Taubert*, 122 Ill. App. 2d at 300. Plaintiffs sought a mandatory inunction to compel the defendant to remove the encroaching portion of her house. *Taubert*, 122 Ill. App. 2d at 300. The trial court entered the requested injunction, and defendant appealed, arguing, in part, that the issuance of a mandatory injunction was "unwarranted" because the encroachment of her house "caused little if any damages to plaintiffs' property and the damage to defendant's property would be serious and substantial if the injunction be sustained." *Taubert*, 122 Ill. App. 2d at 302. The court rejected the defendant's argument. While acknowledging that a mandatory injunction is an "extraordinary remedial process" and granted only "in cases of great necessity," the court concluded that "[w]here the owner of property is chargeable with notice of restrictions imposed upon the use of such property or has actual notice of such restrictions, courts of equity will enforce such restrictions." *Taubert*, 122 Ill. App. 2d at 302. The court reasoned that the "award of relief by injunction does not depend upon proof of substantial damage resulting from the violation." *Taubert*, 122 Ill. App. 2d at 302.

¶ 54 Here, like *Taubert*, the Hahns' violation of the CHA Declaration, alone, warranted injunctive relief. "The person in whose favor a restrictive covenant runs is *prima facie* entitled to

its enforcement since the mere breach of the covenant is sufficient ground to enjoin its violation." *Amoco Realty Co.*, 133 Ill. App. 3d at 332. Thus, because the need for an injunction was met through the Hahns' violation, the traditional elements necessary for injunctive relief were supplanted. *Standlee*, 2019 IL App (2d) 180325, ¶ 51. Accordingly, just as the trial court concluded, CLA was not required to establish irreparable injury. Moreover, the evidence established that, after the Board rejected the Hahns' September 2017 pool and fence proposal, the Board informed the Hahns that any fencing that was not used to enclose their pool needed to be split rail fencing. Despite that notice, the Hahns built a decorative metal perimeter fence without Board approval, in violation of the CHA Declaration. Under that circumstance, the court was not required to balance the equities. *Forest Glen Community Homeowners Ass'n*, 104 Ill. App. 3d at 113. We thus hold that the trial court properly applied the law in granting a permanent injunction to CLA requiring the Hahns to remove their fence.

¶ 55 D. Whether the Trial Court Properly Entered Judgment for CLA on the Counterclaim

¶ 56 Next, the Hahns argue that the court erroneously entered judgment in favor of CLA on their counterclaim because the court improperly found that the counterclaim presented no actual controversy.

¶ 57 "The essential requirements for asserting a declaratory judgment action are (1) a plaintiff with a legal tangible interest, (2) a defendant with an opposing interest, and (3) an actual controversy between the parties involving those interests." *Cahokia Unit School District No. 187 v. Pritzker*, 2021 IL 126212, ¶ 36. The standing requirement in a declaratory judgment action is established by showing that an "actual controversy" exists between adverse parties and that the plaintiff is interested in the controversy. *Cahokia Unit School District No. 187*, 2021 IL 126212, ¶ 36. Thus, "[w]hen determining the ripeness of a declaratory action, the court must first

determine whether the complaint states an actual legal controversy between the parties." *Shipp v. County of Kankakee*, 345 Ill. App. 3d 250, 254-55 (2003). In the declaratory judgment context, an "actual controversy" means " 'a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof.' " *Cahokia Unit School District No. 187*, 2021 IL 126212, ¶ 36 (quoting *The Carle Foundation v. Cunningham Township*, 2017 IL 120427, ¶ 26). As such, "a party must demonstrate 'that the underlying facts and issues of the case are not moot or premature, so as to require the court to pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events.' " *AEH Construction, Inc. v. Department of Labor*, 318 Ill. App. 3d 1158, 1161 (2001) (quoting *Underground Contractors Ass'n v. City of Chicago*, 66 Ill. 2d 371, 375 (1977)). To have a legal, tangible interest, the party must possess "some personal claim, status, or right which is capable of being affected by the grant of such relief." *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 493 (1988).

¶ 58 The Hahns' counterclaim asserted that, as a precondition to the creation of an easement on the Lake Area and Shore Area that would allow the Board to regulate the use of those areas, the CLA Agreement required CLA to pay the taxes levied on those areas. The Hahns claimed that CLA did not pay the taxes for the portion of their property within the Lake Area and Shore Area. Therefore, CLA could not "restrict [their] ability to build an in-ground pool and fence on their property," because no easement existed. Thus, the Hahns sought a declaratory judgment that no easement existed in the Lake Area and Shore Area.

¶ 59 In dismissing the Hahns' counterclaim, the trial court found that no actual controversy existed, because "[n]o activity has taken place, nor is there any activity currently proposed to take place, within the Lake Area or Shore Area on the Hahn Property." We hold that the trial court

properly dismissed the Hahns' counterclaim. The Hahns have not constructed, nor does the record reflect that they currently plan to construct, a fence or pool in the Shore Area or Lake Area. The evidence established that the Hahns' fence has been completed, and Laura testified that it is "absolutely outside of the 100-foot shoreline easement." She further testified that "this is the fence we intend to accept and live with." In turn, Richard testified that no pool has been built yet, and whether they intend to build one "depends on how [the litigation] goes." Because no structure has been constructed in the Lake Area or Shore Area, CLA is not currently exercising any right or imposing any restriction upon the Hahns under the easement. Thus, the Hahns' counterclaim seeking a declaration that no easement existed there, such that CLA could not regulate what they could build on their property, failed to allege an actual, legal controversy. Instead, the Hahns seek a declaration of rights dependent upon events that have not happened and that may not happen. Accordingly, the Hahns' counterclaim requested an impermissible advisory opinion, and the trial court properly entered judgment in favor of CLA. See *AEH Construction, Inc.*, 318 Ill. App. 3d at 1162-63 (no actual controversy where plaintiff sought declaration that it did not violate Prevailing Wage Act, because plaintiff had not yet been placed on debarment list).

¶ 60 E. Whether the Trial Court Abused its Discretion in Awarding Attorney Fees

¶ 61 Finally, the Hahns argue that the trial court abused its discretion in awarding attorney fees to CLA. Specifically, they argue that the CHA Declaration permitted CLA to recover only those fees it incurred in enforcing the CHA Declaration's provisions, not those fees incurred in litigating its declaratory judgment action or defending against the Hahns' counterclaim. CLA responds that the CHA Declaration authorized CLA to recover all attorney fees that it incurred.

¶ 62 "The general rule in Illinois provides that apart from statute or agreement of the parties, a successful party is not entitled to recover attorney fees." *Amoco Realty Co.*, 133 Ill. App. 3d at

334. "Provisions in contracts for awards of attorney fees and costs are an exception to this rule." *Amoco Realty Co.*, 133 Ill. App. 3d at 334.

¶ 63 The CHA Declaration provided that, in the event of a default or violation by any owner under the CHA Declaration, the Board:

> "shall have all of the rights and remedies which may be provided for in the Declaration, By-Laws or said rules and regulations, or which may be available in law or in equity *** or for such damages or injunction for specific performance, or for judgment for payment of money and collection thereof *** or for any combination of remedies.
>
> ***
>
> All expenses of the Board in connection with any such actions or proceedings, including court costs and attorney's fees and other fees and expenses and all damages *** shall be charged to and assessed against such defaulting Owner. *** In the event of any such default by any Owner, the Board *** shall have the authority to correct such default, and to do whatever may be necessary for such purpose, and all expenses in connection therewith shall be charged to and assessed against such defaulting Owner."

¶ 64 The Hahns' arguments are unavailing. Nothing in the CHA Declaration limits CLA's recovery of attorney fees and costs to enforcement actions. See *Arrington v. Walter E. Heller International Corp.*, 30 Ill App. 3d 631, 642-43 (1975) (landlord could not recover attorney fees incurred in declaratory judgment action, because lease explicitly limited recovery to fees incurred in "enforcing" the lease, and a declaratory judgment action does not involve the enforcement of any obligation). Similarly, nothing in the CHA Declaration prohibits the recovery of fees incurred in defending against a defaulting owner's counterclaim. See *North Spaulding Condominium Ass'n v. Cavanaugh*, 2017 IL App (1st) 160870, ¶ 42 (association could recover attorney fees incurred

in defending against condominium unit owners' counterclaim under exception to general rule that attorney fees are not recoverable because statute provided that "[a]ny" attorney fees incurred by an association "arising out of a default" by a unit owner was recoverable). Instead, the CHA Declaration broadly permits CLA to recover attorney fees. By its plain language, the CHA Declaration entitles CLA to charge against a defaulting owner "[*a*]*ll*" expenses and attorney fees incurred "*in connection with any*" action or proceeding "available in law or in equity" to correct such default. Here, because CLA alleged, and the trial court concluded, that the Hahns were in violation of the CHA Declaration, we hold that the CHA Declaration permitted CLA to recover the attorney fees it incurred in bringing its declaratory judgment action and defending against the Hahns' counterclaim.

¶ 65 III. CONCLUSION

¶ 66 For the foregoing reasons, we affirm the judgment of the circuit court of Lake County.

¶ 67 Affirmed.