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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOLEEN BELL et al., Plaintiffs and Appellants, v. MY VARNA LLC, Defendant and Respondent.	B281719 (Los Angeles County Super. Ct. No. BC611199)

APPEAL from a judgment of the Superior Court of Los Angeles County. David Sotelo, Judge. Reversed.

Kulik Gottesman Siegel & Ware, Leonard Siegel and Thomas M. Ware II, for Plaintiffs and Appellants.

Gaines & Stacey, Fred Gaines and Alicia B. Bartley, for Defendant and Respondent.

Plaintiffs Joleen Bell, Joachim Svare, Christopher Wegener, and Dean and Nanci Zellman as co-trustees of the Dean R. Zellman and Nanci B. Zellman Revocable Trust ("plaintiffs") filed suit against My Varna LLC ("My Varna") due to My Varna's construction of a two-story house in the plaintiffs' residential subdivision. Plaintiffs asserted the house under construction violated covenants contained in a 1946 Declaration of Restrictions ("Declaration"). My Varna sought summary judgment, arguing either the Declaration was invalid and unenforceable as a matter of law, or the property conformed to the Declaration's requirements. Plaintiffs opposed the motion.

The trial court issued a tentative ruling denying the motion. At the subsequent hearing, My Varna raised an argument not presented in the summary judgment papers. It asserted an architectural approval provision of the Declaration limited enforcement of the restrictions to suits filed before the completion of construction. My Varna argued the evidence conclusively established plaintiffs had not filed suit before construction of the My Varna home was complete. Plaintiffs objected to My Varna raising a new issue at the hearing and disputed My Varna's interpretation of the Declaration.

The trial court granted the summary judgment motion. We reverse the judgment. We conclude the trial court erred in granting summary judgment on a ground not raised in the motion or separate statement of undisputed facts, without first providing plaintiffs an opportunity to fully respond. The record does not establish plaintiffs could not have shown a triable issue of fact. We further find the architectural approval provision does not affect plaintiffs' ability to enforce other provisions of the Declaration and summary judgment was not warranted.

FACTUAL AND PROCEDURAL BACKGROUND

In 2015, My Varna began construction on a house on Varna Avenue in Sherman Oaks. The previous house that existed on the site was demolished. My Varna sought and received a building permit for a "proposed 2 story house."

The Declaration of Restrictions

The property is subject to a Declaration of Restrictions which was recorded in 1946. Section A1 of the Declaration provides that the lots in the tract "shall be used for no purpose other than the erection and construction of a detached, single family dwelling and private garage for not more than 3 cars upon each such lot, which structures shall not exceed one and one-half stories in height . . . ."

Section C, titled "Architectural Approval," states:

"No building, structure, fence, porte-cochere, porch or hedge shall be erected, placed or altered on any building plot in this subdivision until the building plans, specifications, and plot plan showing the location of such building have been approved in writing as to conformity and harmony of external design with existing structures in the subdivision, and as to location of the building with respect to topography and finished ground elevation, by a committee composed of Louis Greenspan, M.J. Bristol and B.J. Fried, or by a representative designated by a majority of the members of said committee. In the event of the death or resignation of any member of said committee, the remaining member, or members, shall have full authority to approve or disprove such design and location, or to designate a representative with like authority. In the event said committee, or its designated representative, fails to approve or disapprove such design and location within 30 days after said plans and

specifications have been submitted to to [*sic*] it or, in any event, if no suit to enjoin the erection of such building or the making of such alterations have been commenced prior to the completion thereof, such approval will not be required and this Covenant will be deemed to have been fully complied with. . . . The power and duties of such committee, and of its designated representative, shall cease on and after November 1, 1951. Thereafter the approval described in this Covenant shall not be required unless, prior to said date and effective thereon, a written instrument shall be executed by the then record owners of a majority of the lots in the subdivision . . . ." No written instrument was executed continuing the powers and duties of the committee beyond November 1, 1951.

The Declaration provides the covenants in the instrument are to run with the land. Further it states that, with one exception not relevant here, "all the covenants hereof shall be binding and all parties and all persons claiming under them until November 1, 1971, at which time said Covenants shall be automatically extended for successive periods of 10 years unless by vote of a majority of the then owners of the lots it is agreed to change said covenants in whole or in part."

The initial whereas clauses of the Declaration indicate the declarants desired to subject the property to the conditions, restrictions, and charges in the instrument "for the benefit of said property and its present and subsequent owners." Another whereas clause states "the power to enforce said conditions, restrictions, and charges is to reside in the person owning any real property situated in said tract[.]"

As to enforcement, a provision near the end of the Declaration provides: "If the parties hereto, or any of them, or their heirs or assigns, shall violate or attempt to violate any of the Covenants herein, it shall be lawful for any other person or persons owning any real property situated in said development or subdivision to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any covenant and either to prevent him or them from so doing or to recover damages or other dues for such violation."

The Dispute

In April 2015, two neighbors wrote a letter to My Varna demanding that it cease and desist regarding the "oversized building" adjacent to their home. In June 2015, plaintiffs' counsel, on behalf of two neighbors and a preservation group, wrote to Los Angeles city officials requesting that all permits issued in connection with the developer's application for the My Varna property be set aside. Among the complaints about the project was a claim that the proposed building violated the Declaration's restriction that structures not exceed one and one-half stories.

In July 2015, neighbors began challenging the project with the Los Angeles Department of Building and Safety on numerous grounds, including an alleged violation of the Declaration's restriction requiring only one and one-half story residences. Some of the plaintiffs testified at a public hearing on the matter in January 2016.[1]

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[1] The South Valley Area Planning Commission denied the group's administrative appeal in August 2016. In response to My Varna's separate statement of undisputed facts, plaintiffs

On February 19, 2016, the Los Angeles Department of Building and Safety issued a certificate of occupancy for the house. On February 22, 2016, plaintiffs filed the instant action. The complaint alleged My Varna violated the Declaration by constructing on the property a two-story mansion with an attached garage. The complaint further asserted the violations impaired the plaintiffs' use and enjoyment of their adjacent properties. Plaintiffs sought injunctive relief, including an order requiring My Varna to tear down the existing structure on the property.

Summary Judgment Motion

In September 2016, My Varna moved for summary judgment. My Varna argued the Declaration is an unenforceable restrictive covenant that cannot be enforced as an equitable servitude because it does not include an express intent that the restrictions be binding on all purchasers and their successors. My Varna also asserted the issues in the complaint fall within the scope of the architectural approval committee provision. Since the committee's authority expired in 1951, My Varna argued any restrictions relating to conformity and harmony of design are no longer enforceable.

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asserted: "Two pending lawsuits exist challenging the validity of LADBS building permits since January 2015. The lawsuits are *Seidman, et al. v. City of Los Angeles, et al.* LASC Case Nos. BS157151 (*Seidman I*) and BS165162 (*Seidman II*), which have been consolidated." My Varna responded: "Plaintiffs' other lawsuits challenging the City's denial of the appeal [of the department of Building and Safety's ruling upholding the building permits] are not relevant for purposes of this motion."

Alternatively, My Varna contended the "one and one-half story in height" restriction is ambiguous as a matter of law because there is no definition of the height of a story, either in the Declaration or the City of Los Angeles Municipal Code. According to My Varna's survey of other homes on the same street, the average structure height is 17 feet, and the challenged house is 25 feet and 6 inches, one and one-half times the average. On this basis, My Varna argued the home is, in fact, one and one-half stories in height and comparable to other two-level homes in the tract.

My Varna additionally argued plaintiffs waived the right to enforce the Declaration's restrictions by failing to object to similar violations by others. My Varna identified nine other two-story homes in the tract and 10 homes with attached garages.

Plaintiffs opposed the motion. They challenged the legal arguments that the Declaration is an unenforceable restrictive covenant and unenforceable as an equitable servitude. They further asserted the "one and one-half story in height" restriction is not ambiguous, making reference to the 1946 Los Angeles Municipal Code. That Code defined "half story" as "a story with at least two (2) of its opposite sides situated in a sloping roof, the floor area of which does not exceed two-thirds (2/3) the floor area of the story immediately below it. . . ." Plaintiffs offered evidence that My Varna's home is two stories in height, including the application for building permits. Plaintiffs also offered evidence showing they had objected to My Varna's new construction and they had objected to other projects in the tract.

Prior to the hearing on the motion, the trial court issued a tentative ruling denying the motion on the ground that there were triable issues of fact and rejecting My Varna's legal

arguments. At the hearing on the motion, My Varna's counsel raised a new argument relating to the architectural approval provision. My Varna's counsel prefaced the argument as follows: "There is one more argument that, we apologize, was not thoroughly briefed or thoroughly specified in the brief." Plaintiffs' counsel objected. The trial court allowed My Varna to present the argument.

My Varna argued that under the Declaration, if an owner does not bring a lawsuit prior to the completion of construction, "architectural approval is not required and the covenant is deemed fully complied with." Counsel then argued the plaintiffs' suit was filed three days after the certificate of occupancy was issued. Counsel asserted: "We can argue that construction was completed before then, but the absolute end date would be when the certificate of occupancy was issued."

Plaintiffs' counsel argued other portions of the Declaration made clear that owners had the right to enforce the Covenants beyond the architectural approval provision, which expired in 1951. Counsel further continued to object to My Varna raising a new argument at the hearing.

The trial court granted My Varna's motion. In a written ruling, the court concluded the architectural approval provision "indicates unambiguously that if a noncompliant structure is erected or altered and no lawsuit to enjoin the noncompliant structure has been filed before it has been completed, the structure will be deemed to comply with the restrictions." The court found this interpretation was supported by authority holding courts should avoid the interpretation of a contract that will lead to a harsh or unjust result. In the court's view, ordering My Varna to demolish the completed structure, "especially after

undisputedly spending $1 million to do so, would be harsh, unjust, or inequitable." The court concluded there was no dispute that a certificate of occupancy was issued before plaintiffs filed suit and there was further no dispute that the certificate of occupancy could have been issued only after the structure was completed.

In response to My Varna's proposed judgment, plaintiffs objected to language stating the trial court found there were no triable issues of fact. Plaintiffs asserted they did not concede there was no dispute that their suit was filed only after a certificate of occupancy was issued. Plaintiffs noted: "The court and parties are aware that Defendant attempted to relate the instant case to the case *Lisa Seidman, et al v. City of Los Angeles, et al*. . . . which was filed on August 12, 2015, and is pending in the Norwalk Courthouse. Defendant is a real party in interest in this . . . case. The August 12, 2015 date is well before the February 19, 2016 date that Defendant's rely [*sic*] on for Defendant's project." Plaintiffs further indicated they did not concede that the certificate of occupancy could only have been issued after My Varna's structure was complete. The court entered the proposed judgment as drafted. Plaintiffs' appeal followed.

DISCUSSION

I. The Trial Court Erred in Granting Summary Judgment Based on a Ground Belatedly Raised Only at the Hearing on Summary Judgment

Plaintiffs contend the trial court erred in granting summary judgment on a ground not raised in My Varna's

summary judgment motion or separate statement of undisputed facts. We agree.[2]

When seeking summary judgment, the moving party has the initial burden of making a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) If the moving party meets this burden, the opposing party then has the burden to make a prima facing showing of the existence of a triable issue of material fact. (*Ibid.*) The moving party must submit with the motion a separate statement "setting forth plainly and concisely all material facts that the moving party contends are undisputed." (Code Civ. Proc., § 437c, subd. (b)(1).) The opposing party must likewise file a separate statement responding to each material fact the moving party contends is undisputed, and setting forth any other material facts the opposing party contends are disputed. (§ 437c, subd. (b)(3).)

"In determining the propriety of a summary judgment, the trial court is limited to facts shown by the evidentiary materials submitted, as well as those admitted and uncontested in the pleadings." (*Committee To Save The Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1261; § 437c, subd. (c) [the motion should be granted if all

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[2] The court's review of a trial court ruling on summary judgment is generally de novo. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) However, we review certain rulings made in connection with the ruling on the motion, such as the trial court's decision to consider evidence not referenced in the moving party's separate statement of undisputed facts, for abuse of discretion. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.)

papers submitted show there is no triable issue of fact; the court is to consider all evidence "set forth in the papers"].)

The moving party's duty "necessarily encompasses a pleading requirement compelling the moving papers to set forth with specificity (1) the issues tendered by the complaint or answer which are pertinent to the summary judgment motion and (2) each of the grounds of law upon which the moving party is relying in asserting that the action has no merit or there is no defense to the action." (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 67 (*Juge*).) In *Juge*, the court held that while the trial court may recognize the legal significance of an undisputed material fact, if the moving party has overlooked that significance and failed to cite the applicable ground of law as a basis for summary judgment, the court may deny the motion. (*Id.* at p. 68.) Similarly, the court need not decide a summary judgment motion based on facts not included in the separate statement of undisputed facts. (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 929; *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 30–32.)

On the other hand, the trial court is not precluded from granting a motion simply because the moving party did not raise a dispositive legal ground established by undisputed material facts presented in the papers. (*Juge, supra,* 12 Cal.App.4th at p. 69.) "[T]he trial court has the inherent power to grant summary judgment on a ground not explicitly tendered by the moving party when the parties' separate statements of material facts and the evidence in support thereof demonstrate the absence of a triable issue of material fact put in issue by the pleadings and negate the opponent's claim as a matter of law." (*Id.* at pp. 70–71.)

But there are limits to this discretion. "[W]hen the trial court grants a summary judgment motion on a ground of law not explicitly tendered by the moving party, due process of law requires that the party opposing the motion must be provided an opportunity to respond to the ground of law identified by the court and must be given a chance to show there is a triable issue of fact material to said ground of law. . . . Moreover, if the dispositive ground of law was not asserted in the trial court by the moving party and the record fails to establish that the opposing party could not have shown a triable issue of material fact had the ground of law been asserted by the moving party, a reviewing court ordinarily cannot determine if the trial court's decision was correct." (*Juge, supra*, 12 Cal.App.4th at pp. 70-71.)

Here, My Varna did not raise the lawsuit portion of the architectural approval provision ("architectural approval covenant" or "Section C.1") as a basis for summary judgment in its moving papers. Instead, it argued the entire architectural approval covenant expired in 1951 and was unenforceable. Plaintiffs had no notice My Varna would also be arguing that, instead of being expired and of no effect, one phrase in Section C.1 was dispositive and prevented plaintiffs from enforcing the Declaration. Further, although the moving papers and evidence established when a certificate of occupancy was issued, they did not set forth as an undisputed material fact the date the construction was actually completed. Nor did My Varna advance an argument in the moving papers that, as a matter of law, the issuance of certificate of occupancy marked a point at which construction was necessarily complete.

My Varna did raise these issues at the hearing. But at that point plaintiffs had no opportunity to marshal opposing evidence to show a triable issue of material fact relevant to the architectural approval covenant argument. In its moving papers, My Varna argued only that the architectural approval covenant had expired and was unenforceable. As explained in *Folberg v. Clara G. R. Kinney Co.* (1980) 104 Cal.App.3d 136, 141 (*Folberg*), a party opposing a motion for summary judgment cannot be required to marshal facts in opposition to the motion which refute claims wholly unrelated to the issues raised by the moving papers. Further, we cannot affirm the grant of summary judgment based on the lawsuit portion of the architectural approval covenant because the record does not establish plaintiffs could not have shown a triable issue of fact had My Varna asserted this ground in its moving papers. (*Id.* at p. 141; *Juge*, *supra*, 12 Cal.App.4th at pp. 70–71.)

My Varna argued plaintiffs could not enforce the Declaration unless a suit to enjoin the building was filed before the "construction" was complete. Even if this was a proper interpretation of the instrument, there were at least two factual questions on which plaintiffs may have been able to raise triable issues of material fact. First, as plaintiffs pointed out in their objections to the proposed judgment, there was evidence in the record that another suit had been filed related to the My Varna construction, well before it could be said construction was complete. There was no opportunity for My Varna to present any evidence or argument as to whether that suit would qualify as one to "enjoin the erection of such building" within the meaning of the architectural approval covenant.

Second, My Varna's separate statement of undisputed fact did not establish the date the My Varna home was actually completed. Instead, it was undisputed only that a certificate of occupancy was issued several days before plaintiffs filed the instant lawsuit. Yet, as plaintiffs argue on appeal, the issuance of a certificate of occupancy does not necessarily mean a building, or all construction on a building, is complete.

At the hearing on the summary judgment motion in the trial court, My Varna advanced the argument that the issuance of a certificate of occupancy necessarily established construction was complete, without citing to any legal authority.[3] On appeal, My Varna relies on section 91.109 of the Los Angeles Municipal Code to support its argument.[4] The section indicates no structure may be used or occupied until a certificate of occupancy is issued, and the certificate issues only after "all required public improvements have been completed." (Los Angeles Mun. Code, §§ 91.109.1, 91.109.3.) Another provision allows for the issuance of a temporary certificate of occupancy "if the Superintendent of Building finds that no substantial hazard will result from the

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[3] At oral argument, My Varna's counsel argued the issue was not whether "construction" was complete, but whether the building was "erected." However, at the trial court hearing on the summary judgment motion, My Varna's counsel expressly argued the Declaration prohibited suit after "construction" was complete, and plaintiffs' suit was barred because the home was "completely constructed" before they filed the action.

[4] We granted My Varna's request that we take judicial notice of section 91.109 of the Los Angeles Municipal Code. These provisions were not provided to the trial court.

occupancy of any building . . . before the same is completed . . . ."[5] (Los Angeles Mun. Code, § 91.109.5.)

These provisions do not conclusively establish the "completion" of a structure, as that term is used in the Declaration, is a necessary prerequisite to the issuance of a certificate of occupancy. They further do not establish that, as a matter of law, the My Varna home must have been complete when the certificate of occupancy issued. (See e.g., *Picerne Construction Corp. v. Castellino Villas* (2016) 244 Cal.App.4th 1201, 1216 [substantial evidence supported trial court finding that even though city had issued certificates of occupancy for apartment buildings, roof and stairway work continued in the buildings for several months].)

At most, evidence of the issuance of the certificate of occupancy would have shifted the burden to plaintiffs to show they could raise a triable issue of material fact on the date of completion. Because the issue was not raised in My Varna's

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[5] Los Angeles Municipal Code section 91.109.1 provides that "every building or structure and every trailer park shall conform to the construction requirements for the subgroup occupancy to be housed therein, or for the use to which the building or structure or trailer park is to be put . . . . No building or structure or portion thereof . . . shall be used or occupied until a Certificate of Occupancy has been issued thereof." Section 91.109.3 states: "When required by Section 91.109.1, after the receipt and approval of the final inspection report from each of the divisions of the department, and after the city engineer has reported that all required public improvements have been completed, the Superintendent of Building shall issue a Certificate of Occupancy, without charge, to the owner of the building."

moving papers, plaintiffs were deprived of the opportunity to marshal or present opposing evidence.

"Where a remedy as drastic as summary judgment is involved, due process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail." (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, supra,* 102 Cal.App.4th at p. 316.) The separate statements of material facts and the evidence in support of the motion and opposition did not demonstrate the absence of triable issue of fact and negate plaintiffs' claims as a matter of law with respect to the lawsuit portion of Section C.1. The trial court erred in granting summary judgment on a ground raised for the first time at the hearing, without first providing plaintiffs the chance to show there was a triable issue of fact.

II. The Architectural Approval Covenant Does Not Prevent Plaintiffs From Enforcing the Declaration

Moreover, we conclude the architectural approval covenant does not impair plaintiffs' ability to enforce Section A.1 of the Declaration. The interpretation of a declaration of conditions, covenants, and restrictions is a question of law we review de novo. (*Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1121.)

Courts generally treat recorded declarations of covenants, conditions, and restrictions as contracts and interpret them according to the rules governing the interpretation of contracts. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 239–240; *Christian v. Flora* (2008) 164 Cal.App.4th 539, 551.) " 'The court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the

circumstances under which the agreement was made (Civ. Code, §§ 1636, 1644, 1647).' [Citation.] 'The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.' (Civ. Code, § 1641.) ' "A court must view the language in light of the instrument as a whole and not use a 'disjointed, single-paragraph, strict construction approach' [citation]." ' [Citation.] An interpretation that leaves part of a contract as surplusage is to be avoided. [Citation.]" (*Rice v. Downs* (2016) 248 Cal.App.4th 175, 185–186.)

The mutual intention of the parties is inferred, " 'if possible, solely from the written provisions of the contract. ([Civ. Code] § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' (*id.,* § 1644), controls judicial interpretation. (*Id.,* § 1638.)' " (*Ameron Internat. Corp. v. Insurance Co. of State of Pennsylvania* (2010) 50 Cal.4th 1370, 1378.)

"It is a general rule that restrictive covenants are construed strictly against the person seeking to enforce them, and any doubt will be resolved in favor of the free use of land. But it is also true that the 'intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation.' [Citations.] The intention of the parties is to be determined from the document as a whole, and if possible still give effect to every part." (*White v. Dorfman* (1981) 116 Cal.App.3d 892, 897.)

The Declaration sets forth specific restrictions regarding, among other things, permissible story height of homes in the tract, use of outbuildings, setbacks, and vehicular access for certain lots. Section C.1 required that, for a limited time period, plans for externally visible building or alteration projects be submitted to a committee for approval "as to conformity and harmony of external design with existing structures in the subdivision, and as to location of the building with respect to topography and finished ground elevation." If the committee failed to act on the request for approval within 30 days of submission, or "in any event, if no suit to enjoin the erection of such building or the making of such alterations have been commenced prior to the completion thereof, *such approval will not be required and this Covenant will be deemed to have been fully complied with*." (Italics added.)

The plain language of the provision indicates that the absence of suit prior to completion of building or alterations served only to eliminate the need to comply with the architectural approval covenant. If, for example, a homeowner in the tract erected a fence inconsistent in design with the rest of the homes in the tract, and no suit was brought before the fence was completed, that homeowner could not then be sued for *failure to first seek the approval of the architectural committee*. The absence of a suit before completion of the fence would mean approval of the architectural committee was no longer required and the architectural approval covenant was deemed to have been fully complied with.

Nothing in section C.1 indicates that the absence of a suit to enjoin building or alterations before completion eliminates the need to comply with any *other* covenant in the Declaration.

Section C.1 refers to "this Covenant," not the Declaration as a whole, or any other covenant in the document. The Declaration describes each section as a different covenant. Thus, when Section C.1 states "in any event, if no suit to enjoin the erection of such building . . . have been commenced prior to the completion thereof, such approval will not be required and *this Covenant* will be deemed to have been fully complied with," the language refers only to compliance with Section C.1, not the entire Declaration. Indeed, throughout Section C.1, "this Covenant" clearly applies only to Section C regarding architectural approval. For example, the provision states no member of the architectural committee was entitled to compensation for services performed "pursuant to this Covenant." Similarly, a subsequent sentence provides that after November 1, 1951, "the approval described in this Covenant shall not be required . . . ."

In addition, applying the language of section C.1 to the other covenants in the Declaration is inconsistent with the document as a whole. By its terms, the architectural approval committee's authority expired on November 1, 1951. This fact was undisputed. Yet, the Declaration as a whole reflects an intent to have ongoing effect, binding all subsequent owners. The Declaration states the covenants are to run with the land, binding all parties and all persons claiming under them until November 1, 1971, with automatic 10-year extensions unless a majority of owners of the lots vote otherwise. Notably, the provision authorizing any person owning property in the development to prosecute proceedings against another person violating any covenant does not excuse compliance with the Declaration if a suit is not brought before the violation or attempted violation is complete. Section C.1 did not reserve for

the architectural approval committee the exclusive authority to enforce restrictions set forth in other sections of the Declaration.

In sum, Section C.1, by its own plain language, only concerns the architectural approval committee. The terms of the section indicate the absence of suit to challenge certain building or alterations only affects whether a person may be deemed to have violated the provision requiring the approval of the committee. The failure of a party to bring suit before the completion of a challenged building or alteration does not excuse compliance with the Declaration as a whole. While some building projects may have come within the scope of both Section A.1 and Section C.1 while the architectural approval committee was in effect, there is no basis in the Declaration's language to conclude that Section A.1's restrictions were dependent on Section C.1.

My Varna argues that failing to apply the lawsuit provision of Section C.1 to the Declaration as a whole results in a harsh, unjust, and inequitable result because plaintiffs could wait until a non-conforming project was completed to begin legal proceedings. This argument is misplaced. Where the language of a contract is clear and unambiguous, the court must give effect to the parties' intentions. The architectural approval covenant's provision regarding the absence of a lawsuit only excuses compliance with Section C.1. There is no basis to read Section C.1 as applying to the Declaration as a whole. To the extent My Varna seeks to argue enforcement of the covenants in the Declaration is harsh or unjust, it must do so on other grounds that do not require an insupportable interpretation of the instrument. My Varna was not entitled to summary judgment based on the provisions of Section C.1.

III. The One and One-Half Story Requirement is Not Ambiguous and Unenforceable as a Matter of Law

My Varna argues this court should affirm the order granting summary judgment because the term "one and one-half stories in height" is vague and ambiguous as a matter of law. We reject this argument.

That Section A.1 refers to one and one-half stories *in height*, does not render the document so ambiguous as to be unenforceable as a matter of law. Indeed, this argument was rejected in *King v. Kugler* (1961) 197 Cal.App.2d 651, regarding a declaration prohibiting dwellings more than one story in height. The court found nothing ambiguous about the term "height" in this context and rejected the argument that the grantor should have inserted "a limit in feet and inches or other language from which the intended maximum height could have been inferred exactly." (*Id.* at pp. 655–656.)

We do not find persuasive the out-of-state contrary authorities My Varna cites. For example, in *Allen v. Reed* (Colo.Ct.App. 2006) 155 P.3d 443, the challenged covenant combined concepts of measurable height and story restrictions, without indicating the permissible height of a story. The covenant limited homes to a "height" of one story, but also allowed that a house could be constructed "on multiple levels, provided the highest level does not exceed one story in height above finished grade." (*Id.* at p. 445.) The court concluded the covenant's purpose was to establish restrictions on the height of affected houses, but it failed to provide definitions that would indicate when the height of a building exceeded one story. (*Ibid.*) The court found the covenant too uncertain to be enforced and,

without any analysis, rejected *King* and other contrary authorities.

Similarly, in *Hiner v. Hoffman* (Haw. 1999) 977 P.2d 878, the court held a restrictive covenant prohibiting dwellings over two stories in height was ambiguous, when the terms " 'two stories in height' " were read together "and in light of the undisputed purpose of limiting the actual height of homes." (*Id.* at p. 880.) Given the purpose of the covenant, the court found it ambiguous and unenforceable because it failed to provide a definition or dimensions of a "story." (*Id.* at p. 881.)

In contrast, here plaintiffs have argued Section A.1 concerned the design of the home rather than an absolute height in terms of feet. Neither party offered evidence regarding the original purpose of the one and one-half story restriction in the Declaration so as to create ambiguity. Nor do competing restrictions in the covenant itself create uncertainty that cannot be resolved under contract interpretation principles. (See also *Holmesley v. Walk* (Ark.Ct.App. 2001) 39 S.W.3d 463, 466 [maximum height restrictions commonly expressed in terms of stories; nothing vague or ambiguous in use of story in covenant]; *McDonough v. W.W. Snow Const. Co., Inc.* (Vt. 1973) 306 A.2d 119, 121, 123 [covenant restricting houses to one story in height clear on its face].)

My Varna also argues the Declaration's failure to define the term "one and one half stories" renders the covenant ambiguous and unenforceable. Yet, even if the term "one and one-half stories" is ambiguous, we disagree that it necessarily renders the Declaration unenforceable. "Restrictions on the use of land will not be read into a restrictive covenant by implication, but if the parties have expressed their intention to limit the use, that

intention should be carried out, for the primary object in construing restrictive covenants, as in construing all contracts, should be to effectuate the legitimate desires of the covenanting parties." (*Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442, 444–445.)

The trial court may properly consider extrinsic evidence as an aid in interpreting contract terms when " 'the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.' " (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1356; *Greater Middleton Assn. v. Holmes Lumber Co.* (1990) 222 Cal.App.3d 980, 989.) Extrinsic evidence is also admissible to explain a specialized meaning for contracts in specialized or technical contexts. (*Asso. Lathing Etc. v. Louis C. Dunn, Inc.* (1955) 135 Cal.App.2d 40, 47 [parol evidence admissible to determine meaning of "building into concrete" in contract relating to building industry, a specialized business].) In addition, " '[u]sage or custom may be looked to, both to explain the meaning of language and to imply terms, where no contrary intent appears from the terms of the contract.' [Citation.]" (*Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1114.)

Plaintiffs' evidence regarding the definition of "half story" in the municipal code in effect at the time the Declaration was recorded was admissible extrinsic evidence that aided in a plausible interpretation of the document. Plaintiffs also offered an expert declaration from an architect defining a half story as "in essence an attic space within a shaped roof that sits on top of

the floor below."[6] On the other hand, My Varna referred to the current municipal code, which defines "story" but not "half story," to support the argument that the term is ambiguous. My Varna also pointed to the height of other homes in the tract as evidence that the average one-story home is 17 feet and its home is one and one-half times that average. There was thus competing extrinsic evidence regarding the meaning of the term "one and one-half stories in height."

As noted above, the interpretation of a restrictive covenant is governed by contract principles, " 'under which courts try "to effectuate the legitimate desires of the covenanting parties." [Citation.]' [Citation.]" (*Richeson v. Helal* (2007) 158 Cal.App.4th 268, 276.) To the extent the Declaration is ambiguous, the parties proffered relevant, but competing, extrinsic evidence, raising a triable issue of material fact. "A trial court's threshold determination as to whether there is an ambiguity permitting the admission of parol evidence is also a question of law subject to independent review. [Citation.] If parol evidence is admissible, and the competent parol evidence is in conflict, the construction of the contract becomes a question of

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[6] The trial court sustained objections to plaintiffs' evidence offered in opposition to the summary judgment motion on the ground that the evidence was irrelevant. My Varna contends the ruling was proper because plaintiffs' evidence did not concern the ground upon which the court granted the motion—that the architectural approval provision prevented plaintiffs from enforcing the Declaration. In light of our conclusion that the architectural approval provision cannot properly be interpreted as excusing My Varna's compliance with the entire Declaration, we must also conclude the trial court erred in sustaining My Varna's objections to plaintiffs' evidence.

fact." (*Fischer v. First Internat. Bank* (2003) 109 Cal.App.4th 1433, 1443.)

IV. My Varna's Other Arguments Did Not Entitle it to Summary Judgment

On appeal, we affirm the judgment if correct on any legal theory addressed in the trial court, therefore we briefly consider My Varna's other arguments in support of the motion for summary judgment. (*Angelica Textile Services, Inc. v. Park* (2013) 220 Cal.App.4th 495, 508–509; *California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22; *Folberg, supra,* 104 Cal.App.3d at p. 144.) My Varna argued 1) the Declaration is an unenforceable restrictive covenant under *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345 (*Citizens*) and cannot be enforced as an equitable servitude; 2) My Varna's home is one and one-half stories in height; 3) plaintiffs waived enforcement of the Declaration's restrictions on homes exceeding one and one-half stories or houses with attached garages by failing to object to other non-compliant homes.

The Declaration was not unenforceable under *Citizens for Covenant Compliance.* In *Citizens*, the California Supreme Court set forth the following rule: "if a declaration establishing a common plan for the ownership of property in a subdivision and containing restrictions upon the use of the property as part of the common plan is recorded before the execution of the contract of sale, describes the property it is to govern, and states that it is to bind all purchasers and their successors, subsequent purchasers who have constructive notice of the recorded declaration are deemed to intend and agree to be bound by, and to accept the benefits of, the common plan; the restrictions, therefore, are not

unenforceable merely because they are not *additionally* cited in a deed or other document at the time of the sale." (*Citizens, supra*, 12 Cal.4th at p. 349.) The court explained this rule applies to covenants, conditions, and restrictions whether they are covenants that run with the land or equitable servitudes. (*Id*. at p. 355.)

My Varna argued that under this rule, the Declaration is unenforceable because it contains no express intent that restrictions on the external design of homes bind "all purchasers and their successors." My Varna further asserts the limited lifespan of the architectural committee further indicates restrictions relating to the external design of homes in the subdivision were not intended to bind anyone other than the initial developers.

My Varna's interpretation of the Declaration is not supported by its express language. By its own terms, the express purpose of the document is to "subject said property to the following conditions, restrictions, and charges for the benefit of said property and its present *and subsequent owners*." The Declaration further indicates the affected property is to be held *and conveyed* upon and subject to the conditions and restrictions set forth. The Declaration states the covenants are to run with the land and were binding on all parties until November 1971, and after that for 10-year successive periods absent a vote otherwise by a majority of the "then owners." There is no evidence such a vote ever took place.

This language is sufficient to come within the *Citizens* rule that the declaration state it is to bind all purchasers and their successors. As we have explained above, given the language in the Declaration as a whole, it is not logical to interpret the

architectural approval provision as eliminating the need for compliance with the Declaration's other provisions after the architectural approval committee's term expired.

Plaintiffs further demonstrated there is a triable issue of fact as to whether My Varna's home is in fact one and one-half stories. My Varna proffered evidence that the house is no more than one and one-half times taller than the average house height. Yet, plaintiffs offered evidence that My Varna repeatedly described the house in plans as a two-story structure. There was further evidence that the second story was not a one-half story as defined by the 1946 Los Angeles municipal code. Summary judgment on this ground was not warranted.

Finally, triable issues of material fact prevented the entry of summary judgment on the ground plaintiffs waived any right to enforce Section A.1 of the Declaration. "Waiver of the right to enforce a covenant may occur where substantially all of the landowners have acquiesced in a violation so as to indicate an abandonment." (*Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1189.) My Varna offered evidence of nine homes existing in the tract which had two levels and 10 homes with attached garages. However, plaintiffs offered evidence indicating that, as to the story restriction, some of the identified homes were one and one-half stories within the meaning of the 1946 Los Angeles Municipal Code. Further, the Declaration identifies 138 lots in the tract. My Varna did not establish that the set of nine homes, or the set of 10 homes, represented a sufficient number of waivers so that the general purpose of the plan has been undermined. (*Id.* at p. 1190.)

My Varna did not establish it was entitled to judgment as a matter of law.[7]

DISPOSITION

The trial court judgment is reversed. Plaintiffs shall recover their costs on appeal.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.

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[7] We need not consider plaintiffs' additional argument that the trial court abused its discretion in denying plaintiffs' request for a continuance of the summary judgment hearing.