

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
12th Division**

**SUSAN TERRY BORNE, ELIZABETH TERRY FOTI,
MARY CATHERINE DRENNAN, LEONARD JOHN
DRENNAN III, MARGARET YATSEVITCH AND
MICHAEL YATSEVITCH, as and on behalf of
the Heirs of ADOLPHINE FLETCHER TERRY
and MARY FLETCHER DRENNAN**

PLAINTIFFS

Vs. Case No: 60CV-21-6690

**CITY OF LITTLE ROCK, ARKANSAS and the
ARKANSAS MUSEUM OF FINE ARTS F/K/A
THE ARKANSAS ARTS CENTER**

DEFENDANTS

**BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT
AS TO THE ISSUE OF REVERSION OF THE PROPERTY
AND
AS TO THE ISSUE OF LIABILITY OF THE DEFENDANTS
TO THE PLAINTIFFS FOR DAMAGES**

Standard of Review

A party is entitled to summary judgment if “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law” on the issue set forth in

the party's motion. Ark. R. Civ. P. 56(c)(2) (2011). The burden of proving that there is no genuine issue of material fact is upon the moving party. *Ryder v. State Farm Mut. Auto. Ins. Co.*, 371 Ark. 508, 268 S.W.3d 298 (2007); *Windsong Enterprises, Inc. v. Upton*, 366 Ark. 23, 233 S.W.3d 145 (2006).

Rule 56 allows a party to request a summary judgment upon some, but not all, of the issues involved in the case. This motion relates only to the following issues:

1. the reversion of the Terry Property from the City of Little Rock, to the heirs of Mrs. Adolphine Fletcher Terry and Mrs. Mary Fletcher Drennan; and
2. a summary judgment in favor of the Plaintiffs against the Defendants City of Little Rock and the Arkansas Museum of Fine Arts, on the Defendants' liability to the Plaintiffs for costs of restoration, with the amount of such judgment to be determined at trial.

Due to the various portions of the property that are discussed herein, the entire real estate and the structures on it will be referred to herein as "the Property" or "the Terry Property." There is a large Greek Revival mansion on the Property that will be referred to as "the House," or the "Terry House." There is also a separate building that will be referred to as "the Carriage House."

Plaintiffs' Brief and Argument

In the long history of real estate transactions, restrictions in deeds of conveyance on the future use of property and the reversion of property for failure to comply with such restrictions have been common. As a consequence, the law regarding such transactions developed very early and has been applied relatively consistently by the courts through the years. See generally, *Pettit v. Stuttgart Normal Institute*, 67 Ark. 430, 55 S.W. 485; *St. Louis, S.W. Ry. Co. v. Curtis*, 113 Ark. 92, 167 S.W. 489, and *Johnson v. Lane*, 199 Ark. 740, 135 S.W.2d 853.

In the case of *Williams v. Kirby School Dist. No. 32*, 207 Ark. 458. 181 S.W.2d 488 (1944), the Arkansas Supreme Court explained the basic legal principles underlying the right of reversion in real estate:

The text writer in Volume 26, *Corpus Juris Secundum*, Deeds, § 110, page 400, says: 'A base fee, a fee simple determinable, or a fee simple subject to a conditional limitation is a fee with a limitation annexed that upon the happening of some future event or contingency, the estate will automatically terminate and pass by way of possibility of reverter to the grantor, * * * may be created by deed. * * * Such a fee is created by a deed in fee so long as it is used for a specified purpose with a provision that it shall revert to the grantor if such use is discontinued,' and in support of the text, there is cited the case of *Johnson v. Lane*, 199 Ark. 740, 135 S.W.2d 853, and in that case we held (Quoting Headnote 1 from the South Western Reporter): 'Where deed conveyed land to a religious organization as a gift for location of a school and provided that if use of land for school purposes ceased the land should revert to grantor, the deed conveyed a 'determinable, base or qualified fee' and land reverted *eo instanti* to grantor when it had ceased to be used for school purposes, and it was not necessary for grantor to re-enter in order to regain title.'

In *St. Louis—San Francisco Railway Company v. White*, 199 Ark. 56, 132 S.W.2d 807, 809, we quoted with approval from *Tiffany on Real Property*, Third Edition, Vol. 1, § 220, as follows: ‘When land is granted for certain purposes, as for a schoolhouse, a church, a public building, or the like, and it is evidently the grantor's intention that it shall be used for such purpose only, and that, on the cessation of such use, the estate shall end, without any reentry by the grantor, an estate of the kind now under consideration (determinable fee) is created.’ 207 Ark. at 462-463

It is undisputed that, on the 19th day of August, 1964, the said Adolphine Fletcher Terry and Mary Fletcher Drennan executed a Deed (“the Deed”, attached to this Motion as “**Exhibit No. 1**”) granting and transferring the Property to the City of Little Rock for the use and benefit of the Arkansas Art Center and its successors (now the Arkansas Museum of Fine Arts, or “the Museum”). The conveyance was subject to the reservation of a life estate in favor of both Adolphine Fletcher Terry and Mary Fletcher Drennan, and also subject to certain conditions set forth in the Deed and that are set forth in the Statement of Facts contained in the Motion. Two of those conditions are the focus of this lawsuit and will be discussed herein.

First, we review the rules of construction and interpretation of Deeds.

Rules of Construction of Deeds

A deed is a contract. *Schnitt v. McKellar*, 244 Ark. 377, 427 S.W.2d 202 (1968); *Black v. Been*, 230 Ark. 526, 323 S.W.2d 545 (1959); *Davis v. Collins*, 219 Ark. 948, 245 S.W.2d 571 (1952); *Jackson v. Lady*, 140 Ark. 512, 216

S.W. 505 (1919). As such, it is to be interpreted by the courts according to the rules of interpretation of contracts. See, *Deltic Timber Corp. v. Newland*, 2010 Ark. App. 276, 374 S.W.3d 261, which instructed:

When interpreting a deed, the court gives primary consideration to the intent of the grantor. *Bishop v. City of Fayetteville*, 81 Ark.App. 1, 97 S.W.3d 913 (2003). When the court is called upon to construe a deed, it will examine the deed from its four corners for the purpose of ascertaining that intent from the language employed. *Id.* The court will not resort to rules of construction when a deed is clear and contains no ambiguities, but only when the language of the deed is ambiguous, uncertain, or doubtful. *Id.* When a deed is ambiguous, the court must put itself as nearly as possible in the position of the parties to the deed, particularly the grantor, and interpret the language in the light of attendant circumstances. *Id.*
2010 Ark. App. 276 at page 7-8

In the case of *Bishop v. City of Fayetteville*, 81 Ark. App. 1, 97 S.W.3d 913 (2003), the Court of Appeals further elaborated:

It is only in case of an ambiguity that a deed is construed most strongly against the party who prepared it, see *Gibson v. Pickett*, 256 Ark. 1035, 512 S.W.2d 532 (1974), or against the grantor. *Goodwin v. Lofton*, 10 Ark.App. 205, 662 S.W.2d 215 (1984).

Even then, the rule is one of last resort to be applied only when all other rules for construing an ambiguous deed fail to lead to a satisfactory clarification of the instrument and is particularly subservient to the paramount rule that the intention of the parties must be given effect, insofar as it may be ascertained, and to the rule that every part of a deed should be harmonized and reconciled so that all may stand together and none be rejected. *Gibson v. Pickett, supra.* In arriving at the intention of the parties, the courts may consider and accord considerable weight to the construction of an ambiguous deed by the parties themselves, evidenced by subsequent statements, acts, and conduct. *Wynn v. Sklar & Phillips Oil Co.*, 254 Ark. 332, 493 S.W.2d 439 (1973). Courts may also acquaint

themselves with and consider circumstances existing at the time of the execution of a contract and the situation of the parties who made it. *Id.* 81 Ark. App. 1 at pages 8-9.

Thus, in interpreting the conditions that were placed in the Terry-Drennan sisters' Deed to the City, the Court must give primary consideration to the intent of the grantors, and in doing so, may acquaint itself with and consider circumstances existing at the time of the execution of a contract and the situation of the parties who made it.

The first condition in the Deed that will be addressed is that the Grantees should maintain the Property in its present condition.

***The City and the Museum Have Violated the Condition That
They Shall, As Nearly As Possible, Keep And Maintain
The Said Lands In Their Present Condition
(Condition No. 1)***

The key wording in the Deed's condition regarding maintenance of the Property ("Condition No. 1) is:

The Grantee shall, as nearly as possible, keep and maintain the said lands in their present condition, preserving, as far as possible, the trees thereon, and maintaining the home-place thereon in its present general architectural form;

This provision is somewhat awkwardly worded in that it addresses three separate subjects: (i) the "lands"; (ii) the trees on the land; and (iii) the home-place on the land. The intent of Mrs. Terry and Mrs. Drennan in using these words in the manner in which they appear can be ascertained from considering each of those

words in light of the contents and appearance of the Property that is the subject of the Deed.

The “Lands” Include the Houses on the Property

A question arising from the wording of Condition No. 1 is whether the requirement to “keep and maintain the said lands in their present condition” applies only to the ground, or also to the Terry House and the Carriage House?

Based upon the terminology used, the circumstances surrounding the Terry Property, and the rules of interpretation of contracts, Condition No. 1 includes not only the land, but the structures on the land. This result is arrived at for the following reasons.

First, the word “lands” used in Condition No.1 is defined by law to refer to the real property and all structures that are built on and permanently attached to the land. See, *Bemis v. First Nat. Bank*, 63 Ark. 625, 40 S.W. 127 (1897) (“At common law, real estate or property comprehended everything included in the terms “lands,” “tenements,” and “hereditaments”; that is, the surface of the earth, and everything attached thereto.” “... [A] building and things fastened for use in it are *prima facie* real estate, because they answer the general definition of the common law,”); *Williams v. Kirby School Dist. No. 32*, 207 Ark. 458, 181 S.W.2d 488 (1944) (“the school building, when placed upon the land, became a part of the realty, and therefore reverted with the land to S. S. Gray, under the

reverter clause,”...)). The word “lands” in the Deed refers to, not only the ground, but to the objects that have been permanently affixed to the lands, including the houses on the land.

Further, in view of the historic setting and use of the Property, this is also the most reasonable interpretation of the word “lands” in the Deed’s condition. The Property is unusual and unique in many ways. It covers approximately 2.5 acres, occupying the entire Block 61 of the Original City of Little Rock. The Property is an island of green space in an urban surrounding, with gardens, trees, a gazebo, a patio and a carriage house, all surrounded by a substantial iron fence, with the magnificent mansion (or “home-place” as described in the Deed) at the far south end of the Property majestically facing north overlooking the large lawn/tree area.

The Terry House is a prime example of Antebellum southern Greek Revival architecture, is on the National Register of Historic Places, and has been described as one of the most important homes in Arkansas, architecturally and historically.¹ A photograph of the Mansion and the front grounds is included as Figure No. 1.

¹ The Encyclopedia of Arkansas describes the House, in part, in the following way: “The Pike-Fletcher-Terry House, located at 411 East 7th Street in the MacArthur Park Historic District of Little Rock (Pulaski County), has been widely recognized as an architectural landmark since its construction in 1840. It has housed several prominent Arkansas families and served as a school and museum. It also was the meeting place for the Women’s Emergency Committee to Open Our Schools (WEC) during the aftermath of the desegregation of Little Rock Central High School in 1957.”



Figure 1

Mrs. Terry and Mrs. Drennan realized the significance of the Property to the State of Arkansas, as did Mrs. Jeannette Rockefeller and then-Arkansas Art Center Executive Director Townsend Wolfe, who together developed the idea of its use as an extension of the Arkansas Arts Center in the early 1960s. As the pleadings and exhibits show, the donation of the Property to the City in 1964 was a noteworthy event, following which the Board of Trustees of the Arkansas Art Center, adopted a Resolution stating that “it deems the contemplated gift to be not only a gracious and generous creation of a memorial to preserve for Little Rock and Arkansas a

unique and invaluable historic site, but a dedication to the future cultural, artistic and educational progress of our community... .” (3rd Am. Compl. ¶ 29; Exhibit 3 to 3rd Am. Compl.) The Deed was accepted by the City of Little Rock by Resolution No. 3,218 of the Board of Directors dated October 5, 1964, with a “deep sense of appreciation and gratitude for their gift.” (3rd Am. Complaint, ¶ 30; Ex. 4 to 3rd Am. Compl.)

It was the Terry-Drennan sisters’ desire and intent by inserting this condition into the Deed that the entire Property – not just the earth – be maintained in good condition. It would be highly illogical to require that only the grounds be maintained in good condition, but to allow the magnificent house on the grounds to deteriorate.

The home-place is mentioned again in Condition No. 1, but in a different context. This part of Condition No. 1 relates to maintaining the home-place in its “present general *architectural* form.” (Italics added) While the first part of Condition No. 1 related to keeping and preserving the “condition” of the lands, the subsequent phrase specifically relates to the “architectural form” of the home-place. The two phrases can and should be harmonized and reconciled to give meaning and effect to all of the words.

As mentioned above, the House is of the Greek Revival style, a distinctive architectural design. The Terry-Drennan sisters obviously wanted that style to not

be changed, and they also wanted the general “condition” of the house to be maintained. Those are two separate preservation issues, and it is completely understandable that they would be addressed separately in the restrictions contained in the Deed. No other reading of Condition No. 1 is as logical or consistent with the circumstances of the Property or the transaction.

The phrase in Condition No. 1 regarding the trees on the Property also supports this interpretation of that Condition. That phrase states:

“ ... keep and maintain the said lands in their present condition, preserving, as far as possible, the trees thereon,”

The reason that the trees were singled out for mention – separate from the house-place – was the distinctive assortment and types of trees that were and continue to be on the property, and of which the Terry-Drennen sisters were understandably proud and desirous of preservation.

Evidence of the quantity and diversity of the trees on the Property is a “Terry House Grounds Study” (a copy of which is contained in the Exhibits to this Motion as **Exhibit No. 6**), conducted in 1984 by the City of Little Rock Parks Department (which has, for years, been responsible for maintenance of the Property’s grounds). That Grounds Study shows the trees on the Property during various ownerships and phases: the Albert Pike Residence period (c. 1850), the

Arkansas Female College period (c. 1880), the David D. Terry Residence Period (c. 1930), a Master Plan (dated July 1984) and a Site Plan (c.1984).

Further, the grounds, trees and other vegetation on the Property were sufficiently extraordinary and enticing to lead the Little Rock Garden Club, founded in 1923, to garden at the Terry Mansion grounds as volunteers. The Club adopted the Decorative Arts Museum as an official club project in 1997. Members changed out the flower beds seasonally, maintained the planting beds, and took care of general garden maintenance. The grounds received the City Beautiful Award in 1997.

Adolphine Fletcher Terry was an early member of the Garden Club, and hosted club meetings at the Terry House. The Garden Club continued to hold meetings and special events at the Decorative Arts Museum, and to maintain the gardens on the grounds until the City locked the gates to the House and Property.

In the early 2000s, the LR Garden Club produced a brochure entitled “The Arboretum at the Pike-Fletcher-Terry House” that is a “tree guide” to all trees on the Property, containing their names, species and characteristics. The Club also tagged the trees with weatherproof labels containing their species, and those labels remain on the trees today.

Thus, the Terry-Drennan sisters considered the variety and appearance of the trees on the Property to be sufficiently significant to mention separately from the

grounds and the house, as a feature to be maintained. As the Arkansas Supreme Court said in *Wynn v. Sklar & Phillips Oil Co.*, 254 Ark. 332, 493 S.W.2d 439 (1973), “Courts may also acquaint themselves with and consider circumstances existing at the time of the execution of a contract and the situation of the parties who made it.” 254 Ark. at 341. In considering the circumstances existing at the time of the execution of the Deed from the Terry-Drennan sisters, and the condition and use of the Property, it is logical to interpret Condition No. 1 to include all of the property and its structures as being subject to the general requirement of being maintained in good condition, but to consider the trees to have an additional condition of being “preserved” (relating to the trees), and the Terry House to have an additional condition of being “maintained in its present general *architectural* form.”

**The City And Museum Violated Condition No. 1 By Failing To
Maintain The Lands In Their Present Condition**

Although Condition No. 1 requires the City and the Museum to keep and maintain the said lands (including the buildings thereon) in their present condition, neither did so. The discovery that has been conducted of officials from the City and the Museum demonstrate a mutual “finger-pointing” of responsibility for such maintenance toward each other, with virtually no maintenance being done by either.

**Deposition of Bruce T. Moore
Little Rock City Manager**

The deposition of former long-time City Manager Bruce T. Moore was taken by counsel for the Plaintiffs on March 16, 2023, and relevant excerpts from that deposition are included in the Exhibits to this Brief as **Exhibit No. 2**. Some of the following excerpts from that deposition are illustrative of the lack of agreement between the City and the Museum as to which entity was responsible for maintenance of the Property and the House, and how each considered the other to be obligated to perform that maintenance. As a result of that lack of agreement, no maintenance of any significance was done on the property after the initial renovations to convert the House to a museum were completed in the mid-1980s.

Moore Deposition, Exhibit 2, page 48: (Questioning by Mr. Mays):

19 Q What, in your experience, has been the practice, if
20 any, of who would pay for, whether the city or the arts center
21 who would pay for any necessary repairs to the Terry House?

22 MR. TULL: Object to the form.

23 A The city was not responsible for repairs to the Terry
24 Mansion.

25 Q The city was not responsible for repairs to the mansion?

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1 A Correct.

2 Q And what do you base that on?

3 A We never have been. I mean, I sign all the bills and our

4 invoices. Now, subsequently as I said, we are now doing, you
5 know, if something comes up, we're taking care -- we're
6 maintaining the grounds -- we have maintained the grounds, but
7 I wanted to be sure if there were any issues that needed
8 immediate attention that we would deal with those in a one-time
9 capital.² But before then, we -- *I can't remember the city*
10 *being responsible for any repairs at the Terry Mansion.*

11 Q And we're speaking of -- between the city and the arts
12 center, we're speaking of who would be responsible?

13 A *Well, we were not.*

14 Q Okay, you --

15 A *The city did not.*

16 Q *The city did not consider themselves responsible for*
17 *repairs and maintenance?*

18 A *Correct.*

19 Q Does that mean thereby that the city considered the arts
20 center to be responsible for that?

21 A I wouldn't -- I can't project that, but we were not.

22 Q Who else would be?

23 A Again, I don't know what the agreement -- I don't know
24 what the arts center and the -- *I don't know what agreement*
25 *they had regarding the Decorative Arts Museum, but the city was*

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² The "one-time capital" outlay mentioned by Mr. Moore was a \$500,000.00 appropriation made by the Little Rock Board of Directors in 2021 for any emergency repairs necessary for the Property, arising from the need to repair a chimney on the House that was broken and threatened to fall on the roof. Some \$450,000.00 of that appropriation is unspent.

1. *not.* I can plainly say that.

(Italics added)

Contrast that with the testimony of Laine Harber, Chief Financial Officer of the Museum/Art Center since April of 2010 (Harber Depo., p. 18), whose deposition was taken on May 9, 2023. (Mr. Harber's Deposition excerpts are included in the Exhibits to this Motion as **Exhibit 3.**)

Harber Depo., Exhibit 3, p. 126 (Examination by Mr. Mays):

15 Q. Okay. What monies did they spend - - did the museum spend
16 on the Terry Property for capital improvements, that you are
17 aware of?

19 A I
20 will tell you, in - - in the spirit of keeping with the
21 maintenance aspect of what the museum felt it should do, we - -
22 we took care of things that we needed to do to keep the doors
23 open. *Capital expenditures were not budgeted for by the*
24 *museum*, so that - - our budget - - the museum budget still had
25 to cover it. We would often - - *if there was something*

(page 127)

1 *significant, we would go ask the city to help because we were*
2 *always under - - operating under the assumption that the city,*

3 *similar to the Art Center, the museum building itself, the city*
4 *owned that and was responsible for those things. ... (Italics Added)*
6 ... But we did
7 smaller things all the time. Like if a - - if an HVAC unit
8 needed to be replaced. There were, I mean, there were lots of
9 repairs - - plumbing, minor cosmetic things, but *we never had*
10 *funding to do capital improvements to any significant extent.*

(page 130)

2 Q. What do you consider basic maintenance?

3 A. Utilities, if there was a leak - - I'm trying to think. I
4 mean, pipes would freeze. We would address that. We would get
5 the plumber out there. The city always took care of the - - the
6 grounds, the - - the physical grounds. And if there was a - - a
7 tree limb fell or something, the city, you know, they were
8 responsive to that. Because I think they consider that to be
9 part of the parks department, maybe. I don't know, but the city
10 was responsive to the physical grounds when - - they - - they
11 cut the grass. We did not do any landscape work there. But we
12 kept the, you know, the elevator in service, security, termite
13 and pest inspection, and utilities. The - - the security system

14 was, you know, we had - - we had network connectivity. That was
15 all expenses that we continued to pay for.

(Italics added)

This confusion between the City and the Museum as to which entity was responsible for maintaining the Terry Property resulted in the Property's deterioration to its present condition as demonstrated by the photographs of the Terry House attached to each version of the Complaint, or that were exhibits to the Deposition of Laine Harber. Some of those photographs are included in the Exhibits to this Motion as **Exhibits 7-A – 7-I**.

Tommy Jameson, a Little Rock architect who, early in his career, worked with the architectural firm of Witsell Evans Rasco (“WER”), has, throughout his career, been involved in the renovation, study and inspection of the Terry House and property. While with WER, Mr. Jameson was the Project Architect for renovation of the Terry House during the mid-1980s to convert it to the Decorative Arts Museum. In 2017, he was requested by Todd Herman, the then- Director of the Museum, to conduct an analysis of the condition of the Terry property, and determine the cost of renovating the property to good condition. In 2022, he was requested by City Director Bruce Moore to update the 2017 analysis. Mr. Jameson's 2022 analysis is included in the Exhibits to this Motion as **Exhibit 5**,

and provides a reliable and relatively current description of the deteriorated condition of the houses on the Property.

Both Mr. Moore and Mr. Harber expressed confidence and trust in Mr. Jameson's knowledge and expertise, and agreed that Mr. Jameson's estimates were reliable.

Moore Deposition, Exhibit 2, Page 44 (Examination by Mr. Mays):

12 Q And why did you ask him [Jameson] to do that [the 2022 Analysis]?

13 A I knew he had done one before, and I've worked with Tommy
14 a lot from a historic preservation standpoint. And I basically
15 just said, can you update -- in fact, I think I even said -- it
16 says take a fresh look at the house, because he had done it in
17 2017, so -- and I wanted to have a true number, you know, an
18 updated number.

19 Q Sure. I'm not questioning the wisdom of it. I'm asking
20 you why. What motivated you to ask for it?

21 A In visiting again with the family and Director Peck and
22 other board members that were interested in preserving the
23 house, I felt it was important to have a good number to know
24 what we should be shooting for.

25 Q Yeah, it's important to have an up-to-dated figure to work

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1 with; is it not?

2 A Correct.

3 Q Have you gone through the estimate and analyzed it?

4 A I have not. I wouldn't say I'm an expert in this field.

5 I trust Jamie -- Tommy, and I looked at it and obviously read

6 it and I think shared it with the family.

7 Q Have you any reason to question any of the entries or any

8 of the estimates that he made in that?

9 A I don't.

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24 Q Are you in agreement with his estimate?

25 A Yes, yes. Well, agreement, I'm not an expert --

(Page 48)

1 Q No.

2 A -- in that arena, but --

3 Q Do you agree that the repairs are necessary?

4 A Yes.

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14 Q The estimate, the Jameson estimate ...

15 ...The 2021 estimate, it
16 was done two years ago obviously. There have been inflation or
17 increases in costs for everything including repairs and
18 including construction and that sort of thing. Not only would
19 an engineer need to look at it, but you would also have to
20 consider the increase cost of doing that sort of thing, would
21 you not?

22 MR. TULL: Object to form.

23 A Correct.

24 Q Okay.

...

25 A And just to add to that, you know, I said 1.2, but I also

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1 said in my mind that it would probably be closer to 1.5 that we
2 would need to --

3 Q Are you aware that there has been mold detected in the
4 house?

5 A I'm not aware of that.

6 Q You're not aware of that? Have you seen the report of the
7 mold inspector that was done and I think I gave a copy to the
8 city attorneys office, in fact, I'm pretty sure I did of that
9 report. Have you seen that?

10 A I have not.

11 Q You have not, okay. So assuming there's a serious mold
12 problem, that would have to be addressed no matter how the
13 house ends up, would it not?

14 A Correct.

Mr. Harber's testimony regarding Exhibit 14 to his deposition (the Jameson June 2, 2021 analysis of the cost of restoration of the Terry House and Carriage House) was:

(Harber Depo., Exhibit 3, p. 133) (Examination by Mr. Mays):

15 Q. I noticed that the this is - - this is a - - basically a
16 proposal by - -or at least an assessment by Mr. Jameson, the
17 architect - -

18 A. Mm-hm.

19 Q. - - of what the problems were at the Terry House and what
20 it might - - an estimate of the cost to repair it; is that
21 right?

22 A. That's correct.

23 Q. Okay. It's dated September the 30th of 2017; is that
24 right?

25 A. That's what the date is.

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1 Q. It's addressed to Mr. Todd Herman, which you said, at the
2 time, was the director of the museum.

3 A. Mm-hm.

4 Q. Do you - - you said you really don't remember the detail.

5 How did he - - why did - - why - -

6 A. Well - -

7 Q. Why was he - -

8 A. Because we were - - this was all happening in the same time
9 frame that we were trying to get a formalized maintenance
10 agreement with the city, to - - to - - to formally document what
11 the city was responsible for in taking care of the museum,
12 because it is - - it's a city building. And we were also trying
13 to get the city to take ownership of the house. And from a
14 capital improvement standpoint, we always believed that - - that
15 the city was responsible for the capital improvement side of
16 things, based on - - going back to the deed where it says the
17 grantee is responsible for this, this, and this. That - - that
18 is always how we operated. So I do know, and again, I don't
19 know how formal, but I know this was shared with - - with the
20 city. And there were discussions about would the city make
21 these improvements to the house.

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4 Q. Did you discuss this [the Jameson cost analysis] with him? Todd?

5 A. Yeah. I mean, not in detail. I mean, the - - the end

6 result was, yeah, you got close to a million dollars.

7 Q. You're referring to Mr. Pagan?

8 A. No, Todd Herman. It's - - I mean, I knew the result of
9 this report. And I know that this report was done to - - to go
10 to the city and see what they'd be willing to do.

11 Q. Did the museum agree with the findings of Mr. Jamison?

12 MR. SHANNON: Object to the form.

13 THE WITNESS: (Continuing)

14 A. I don't - - I don't know. I don't know of any reason to -
15 - that we would have disputed it.

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9 Q. All right. I want endure - - cause you to endure any more
10 of that. Would you agree that the house is in bad repair?

11 MR. SHANNON: Object to the form.

12 THE WITNESS: (Continuing)

13 A. What I know is that that - - *the report that was done in*
14 *2017 identified a lot of things that needed to be addressed and*
15 *I know, since - -the museum hasn't done anything since turning*
16 *the keys over so, unfortunately, I'm sure that means it's gotten*
17 *even worse, since we were doing the very basic things - -*

18 Q. Yeah.

19 A. - - that we were doing.

(Italics added)

Thus, the then- City Manager of Little Rock, who managed and oversaw the City's financial arrangements and agreements with the Museum, and the Chief Financial Officer of the Museum – both of whom were serving from the early 2000s to the time of disclaimer of the property by the Museum, as will be discussed herein – agree that the City and the Museum both failed to maintain the Property, and that neither had any reason to question Architect Jameson's estimate of restoration costs, dated June 24, 2021, of \$1.2 million. Jameson's 2021 Repair/Cost Analysis is included in the Exhibits to this Motion for Summary Judgment as **Exhibit 5**.

From this evidence, it is undisputed that the City and the Museum agree that (i) the Property was not maintained by either the City nor the Museum in accordance with the provisions of Condition No. 1; (ii) that repairs and restoration need to be done on the buildings on the Property; and (iii) that the estimate of the costs of such repairs and restoration provided by Tommy Jameson in his 2021 Analysis was reasonable and acceptable to them. The photographs of the Terry Property included in Exhibits 7-A to 7-I of the Exhibits to this Motion for Summary Judgment provide visual evidence of the deteriorated condition of the Terry House and the Carriage House.

Further, if that were not sufficient to establish that the Terry Property has deteriorated from lack of maintenance, **Exhibit 8** in the Exhibits to this Motion are a group of electronic mail messages dated 2020, between various Museum and City officials and employees discussing the deteriorated condition of the Terry House, due to “lack of maintenance and care,” and discussing the possible future use of the Property by the Museum or the City.

Based on this undisputed evidence, the Plaintiffs should be granted Partial Summary Judgment against the Defendants City and Museum for (i) the reversion of the Property due to their breach of Condition No. 1; and (ii) liability of the City and the Museum, jointly and severally, for the costs of repairs and restoration in an amount to be determined at the jury trial in this matter.

**The City and the Museum Have Ceased Using the Property
Exclusively For The Advancement Of The Cultural, Artistic,
Or Educational Interests Of The Community
(Condition No. 2)**

The issue of whether the City and the Museum have violated the condition in the Terry-Drennan Deed (**Exhibit 1**) to the City for the use and benefit of the Arkansas Art Center)(referred to herein as “Condition No. 2”) is somewhat more straightforward. Condition No. 2 reads in its entirety:

Grantee shall use the said property exclusively for the advancement of the cultural, artistic, or educational interests of the community. This use may include, among other purposes, the display of the lands and the buildings to the public with or without the payment of a fee

therefor. If a fee is charged, however, then the proceeds therefrom shall be used first to keep and maintain the said property and then for the further uses and purposes herein expressed. The uses of the lands and buildings may also include the holding of meetings and use of office space related to the cultural, artistic, or educational life of the community.

The principal requirement contained in that Condition is in the first sentence:

“Grantee shall use the said property exclusively for the advancement of the cultural, artistic, or educational interests of the community.” The remainder of the Condition explains how that might be done. There is no dispute that this Condition has been violated. Mr. Harber testified regarding the Museum’s last use of the Property as follows:

Harber Depo., Exhibit 3, p. 130 (Examination by Mr. Mays):

16 Q. Since the Terry House Property was closed by the Museum in
17 two - - 2003, what use, if any, has the museum or the foundation
18 made of the Terry Property?

19 A. The foundation didn't. I mean, the foundation really,
20 again, isn't involved in any sort of operations. But my
21 understanding, from looking at old reports, is that there was, I
22 believe, it started to be called the Terry House Community
23 Gallery. And it was open for maybe smaller art shows of maybe

24 local or regional artists. And I think that - - a little bit of
25 that was happening. And then there were event rentals. I mean

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1 that's - - that's really - - that's really all. I can't
2 remember when the comm - - the community gallery went away. I'd
3 say shortly - - soon after I started in 2010. Maybe when Todd
4 Herman became director in 2011 or so. I - - I just - - I don't
5 remember.

6 Q. The house has not - - has the house been open to the
7 general public since it was closed in 2003?

8 A. I believe so, with the - - with this community gallery.

9 Q. How long did that last?

10 A. I - - I really don't know.

11 Q. It wasn't long?

12 A. I mean, I'm sure we could look it up, but - - well, I don't
13 know what happened immediately after it closed in 2003. When I
14 started in 2010, there were still some of these community
15 gallery things happening over there.

16 Q. Is there anything - - was there anything actively going on?

17 Or was it - - was the museum using the art - - the Terry

18 Property in the last five years?

19 A. In the last five years?

20 Q. Or in - - yeah, let's just use that time frame.

21 A. We were - - the last thing that we had in there, we - - we

22 actually officed - - we had two employees that were office

23 there. Our theater costume shop - - our two employees, they

24 operated there because there wasn't room for them in the old

25 museum. And until we moved to Riverdale, they were still

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1 officing out of there. But that was basically it. There'd be

2 an occasional - - sometimes our drawing - - our art school

3 drawing professor would take a class over there. And they would

4 do, you know, some outdoor drawing and stuff. But it was - - we

5 were not actively - -

6 Q. I was talking about open to the public.

7 A. Open to the public?

8 Q. For how long?

9 A. My guess - - let's - - let's just assume that - - that the

10 community gallery piece went away - - let's just say 2012, which

11 is roughly when Todd Herman came in. I mean, that's - - I don't

12 know of any - - other than event rentals, which that's not

13 public, because those are private events. I can't think of

14 anything.

On the same subject of whether the Property has not been used for the cultural, artistic, or educational interests of the community, City Manager Bruce Moore testified:

Moore Depo., Exhibit 2, p. 56 (Examination by Mr. Mays):

9. Q [W]hat is the current use of this property, the Terry

10 property?

11 A It's vacant. I mean, no use.

12 Q I'm sorry?

13 A No use. I mean, I don't think anybody is utilizing it.

14 Q There isn't any use at all is there?

15 A Correct.

16 Q The building is actually locked; is it not?

17 A It should be.

18 Q It's intended to be, right, which is as you would expect.
19 How long has it been in that -- locked permanently?
20 A I can't say right off hand. It's been a few years though.
21 Q A few years?
22 A Yes.
23 Q So at the current time and for the last several years,
24 there has -- the property has not been used for cultural,
25 artistic, or educational interest of the community?

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1 A Correct.

From this evidence, it is undisputed that the City and the Museum have not used the Property for cultural, artistic, or educational interest of the community since approximately 2016, as required by Condition No. 2 of the Deed, although, as will be discussed herein, from 2003 until 2021 the Museum and the City represented to the Plaintiffs, as heirs of Mrs. Terry and Mrs. Drennan, that they were considering other uses for the Property.

Mrs. Susan Terry Bornè testified about her and her family's frequent contacts with officials of the Museum about the Museum's plans to continue to use the Terry Property after it closed the Decorative Arts Museum in 2003³:

Bornè Depo., Exhibit 4, p. 88 (Examination by Mr. Tull):

10 Q After 2003, when the collection was moved and the

³ Mrs. Bornè's deposition is included in the Exhibits to this Motion for Summary Judgment as **Exhibit No. 7**

11 -- you had the community gallery and the rental, did you
12 or your family, to your knowledge, continue to express
13 your displeasure or concern with how the house was being
14 used to either the museum or to the City?

15 A Yes.

16 Q And who would you have talked to during that time
17 period from 2003 through some period when the gallery
18 closed?

19 A We talked to every Executive Director. We talked
20 to different representatives with the city: Stodola.
21 As I said, I did not talk to Mayor Scott. We talked to
22 individuals associated with the house. You may have
23 known Jeane Hamilton. She was sort of a private citizen
24 champion of the Arkansas Art Center, and we always
25 talked to her. My father always talked to John Pagan,

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1 who worked for the Arkansas Art Center, and he lived in
2 the carriage house with his wife and sort of oversaw --
3 just keeping his eye on the place. He and my father
4 were very close and my dad always talked to him. I
5 could -- I could name numerous people that we've talked
6 to over the years.

7 Q Is it fair to say that after 2003, when the
8 collection was moved out and the -- because I understand
9 your testimony, the museum was minimally using the house
10 under the deed. Did you have consistent conversations
11 complaining about the use of the house with either the

12 museum or the -- or City officials?
13 A I would say consistent in that I started looking
14 back through our records and it tallied up to more than
15 100 between 2003 and today,

In addition, the electronic mail messages of Victoria Ramirez, Executive Director of the Museum, with Laine Harber and Scott Carter (City of Little Rock) dated October 21-22, 2020, included in **Exhibit 8** in the Exhibits to this Motion for Summary Judgment, show that even in late 2020, the Museum was contemplating continued use of the Terry Property, although it was, at the same time, not maintaining the Property.

Based on this undisputed evidence, the Plaintiffs should be granted Partial Summary Judgment against the Defendants City and Museum for: (i) reversion of the Property to the Plaintiffs due to the City's and Museum's breach of Condition No. 2; (ii) a determination of liability of the City and the Museum, jointly and severally, to the Plaintiffs for the costs of repairs and restoration in an amount to be determined at the jury trial in this matter.

**The Museum Did Not Disclaim
Interest In The Property Until 2021**

The Plaintiffs were advised by officials of the Museum and the Museum Foundation in July 2021, that the Museum no longer wanted possession of the

Property, contrary to the Defendant's allegations that the Plaintiffs knew or should have known that the City and the Museum had abandoned the Property earlier. Mr. Harber testified on this subject as follows:

Harber Depo., Exhibit 3, Page 113 (Examination by Mr. Mays):

11 Q. Were you in a meeting that occurred in - - I think it was

12 July - -

13 A. July of 21? Yes.

14 Q. - - 21. It was Warren Stephens and - -

15 A. I was.

16 Q. Did Mr. Terry - - Mr. Stephens say that the - - tell him - -

17 tell the Terry sisters that the foundation or the museum was not

18 going to have any further use of the - - or words to that

19 effect, for the Terry Property?

20 A. I don't remember the exact words, but *I think that was the*

21 *moment when it became clear that the museum wasn't - -*

22 Q. Okay.

23 A. - - *didn't have interest in using it.* (Italics added)

24 Q. The keys had been turned over to the city; have they not?

25 A. Yes.

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1 Q. You no longer have access to the keys or the property?

2 A. No.

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9 Q. The meeting that - - the meeting was held that you've
10 testified was basically the termination of - - or notice of
11 termination of the relationship of the museum with the Terry
12 Property, that was the one that occurred with - - where my
13 clients were there and Mr. Stephens was there and you were there
14 and - - John Tull.

15 A. John Tull, Victoria Ramirez. I was actually called into it
16 at the last minute, and I remember, it was when I didn't realize
17 I was going to be there. And I didn't either. But that's what
18 I recall - - So basically, the presidents of both boards. And I
19 believe, I mean, there was - - there was a lot of discussion,
20 but, I mean, to me, that was when - - *that was kind of the first*
21 *time it was really, I think, clear that the museum wasn't going*
22 *to - - or had didn't have - - did not have interest in utilizing*
23 *the house.* (Italics added)

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16 Q. You've testified that, in your opinion, that was where it

17 was made clear to the heirs or to the representatives heirs,
18 that the museum is no longer going to have any - - no longer
19 going to support the Terry House.

20 A. Well, part of that was informed by what some of the
21 documents said, is that no one - - I mean, that's - - that was
22 established. And I don't know what the documents were, but it
23 referred to that meeting as been being the first time that the
24 family knew - -

25 Q. Would have been a complaint.

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1 A. Yeah. So that's - - so that may have informed my memory of
2 that meeting. But it - - it makes sense. I mean, I think we
3 left - - I mean, I think we left that meeting, knowing, I mean,
4 that I think everybody knew that the museum was not - -

5 Q. Was any written notice given to the heirs, that you know
6 of?

7 A. Not that I know of.

The testimony of Mr. Moore and Mr. Harber supports the testimony of one of the Plaintiffs, Susan Terry Borné, a granddaughter of Adolphine Fletcher Terry, who, on behalf of the Terry-Drennan heirs, attended the meeting in July 2021,

between the representatives of those heirs, the Museum and the Foundation. When asked in her deposition when she first became aware that the museum no longer had an interest in the Property she responded:

Borné Depo., Exhibit 4, p. 93 (Examination by Mr. Tull):

- 6 Q. When did you become aware that the museum ceased
7. using the Terry House altogether?
8. A. At that meeting that you and I both attended with
9. Mr. Stephens.

Based on this undisputed evidence, the Plaintiffs should be granted Partial Summary Judgment against the Defendants City and Museum for reversion of the Property to the Plaintiffs due to the City's and Museum's breach of Condition No. 2 – failure to comply with the condition to “use the said property exclusively for the advancement of the cultural, artistic, or educational interests of the community.”

CONCLUSION

Based on the undisputed evidence discussed in this Brief and contained in the Exhibits to the Brief, as well as those attached to the Complaints filed herein, which are also not disputed, the requirements of Rule 56 – that there exist no genuine issue as to any material fact, and that the moving party is shown to be

entitled to a judgment as a matter of law on the issues specifically set forth in the motion – have been met by the Plaintiffs.

As to Condition No. 1 in the Deed – that the Grantee shall, as nearly as possible, keep and maintain the said lands in their present condition, preserving, as far as possible, the trees thereon, and maintaining the home-place thereon in its present general architectural form – the Court should find that the Defendants have violated that Condition, and grant a partial summary judgment to the Plaintiffs providing: (i) that fee title to the Property has reverted to the Plaintiffs, free and clear of any right, claim or title of the Defendants; and (ii) that the Plaintiffs are entitled to a judgment against the Defendants, jointly and severally, for repairs and restoration of the Property to a usable condition in an amount to be determined by jury at the trial of this case.

As to Condition No. 2 in the Deed – that the Grantee shall use the said property exclusively for the advancement of the cultural, artistic, or educational interests of the community – the Court should find that (i) the Defendants have violated that condition, and grant a partial summary judgment to the Plaintiffs providing that fee title to the Property has reverted to the Plaintiffs, free and clear of any right, claim or title of the Defendants; and (ii) that the Plaintiffs are entitled to a judgment against the Defendants, jointly and severally, for repairs and

restoration of the Property to a usable condition in an amount to be determined by jury at the trial of this case.

The Court should also find that, by virtue of having violated the conditions contained in the Deed referred to herein, the Plaintiffs should be awarded an attorney fee; that counsel for the Plaintiffs should be permitted to file a Motion for Attorney Fee within a reasonable period after the entry of the Partial Summary Judgment containing information from which the Court can determine an appropriate fee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the date set forth below, I filed the foregoing document with the Clerk of the Court via the E-flex filing system, which shall send notification of the filing to all parties of record and their counsel.

Dated: July 31, 2024.

/s/ Richard H. Mays

Richard H. Mays