

No. 41062-1-II

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

NORM and JANET BRUNS, husband and wife,
Appellants/Cross Respondents,

vs.

THE WILLIAM M. AND WILHELMA COFER LIVING
TRUST,
Respondent/Cross Appellant

Appeal from the Kitsap County Superior Court
State of Washington

RESPONDENT/CROSS APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

A. Case Summary

The Appellants (“Brunses”) and the Respondents (“Cofers”) are next door neighbors. The Brunses moved to the neighborhood first and when they built their home, the lot next door was vacant and covered with thick brush and woods. The Cofers bought the next door lot, and built a home. The result was that the Brunses’ bedroom window now faced a house instead of the woods.

The Cofers’ house was typical of the other homes in the neighborhood, and included a detached garage with second story. The unique factor of the Cofers’ house was that they included an accessory dwelling unit (“ADU”) in the second story of their detached garage. The ADU was built after approval of the City of Bainbridge Island and the Architectural Control Committee for the neighborhood. The Cofers were in their 70’s, and envisioned having their older son move in with them or perhaps a caregiver, to look after them as they aged. Another possible use was to rent the ADU as affordable housing; a resource sorely lacking on Bainbridge Island.

After construction was completed, the Brunses sued the Cofers, alleging that the ADU violated the Covenants for the neighborhood. They

demanded that the ADU be torn down, sought damages and other relief. The exterior of the ADU faces the Brunses bedroom window.

The trial court ruled on summary judgment that the ADU violates the Covenants. Before trial, the Cofers voluntarily decommissioned the ADU. At trial, the Court determined that while an injunction should issue, the Cofers had already taken steps necessary to cure all Covenant violations.

Despite their success, the Brunses appeal. They raise unsubstantiated fears about use of the Cofer property in the future and continue in their efforts to police the activity that occurs in the neighborhood.

The Cofers cross appeal the decision that the ADU violates the Covenants. The Covenants do not define the terms 'ADU' or 'single family dwelling'. The creators of the Covenants said they chose to rely on City zoning definitions instead. The City zoning includes an ADU as part of a single family dwelling. Under these definitions, the ADU should be allowed.

B. Standard of Review

The Cofers submit that the appropriate standard of review for each of the issues raised by the Brunses is abuse of discretion. The standard of review for issue 1 raised on cross appeal by the Cofers is de novo review.

The standard of review for issues 2 and 3 on cross appeal is abuse of discretion. These standards of review will be addressed separately with regard to each of the issues discussed in this brief.

II. ASSIGNMENTS OF ERROR

A. Response to Appellants' Assignments of Error

Error 1: Conclusion of Law 18 (App C, p. 11)¹. The trial court did not abuse its discretion and thus did not err (a) in concluding that the Cofers had remedied existing violations of the Covenants and (b) in using its equitable powers to fashion appropriate injunctive relief.

Error 2: Conclusion of Law 19 (App C, p. 11). The trial court did not abuse its discretion and thus did not err (a) in concluding that any violation of the Covenants had been effectively removed and (b) in concluding that separation of the garage from the main house was a decisional factor in designing the injunction.

Error 3: Conclusion of Law 20 (App C, p.11). The trial court did not abuse its discretion and thus did not err in concluding (a) that the parameters or design of a building connection were not before it for decision and (b) that once the garage was connected to the main house, there was still just one dwelling on site.

¹ The Cofers will utilize the Brunses' Appendices to Appellants' Opening Brief in this Response Brief.

Error 4: Conclusion of Law 21 (App C, p. 12). The trial court did not abuse its discretion and thus did not err in fashioning the appropriate equitable relief.

Error 5: The Court's Judgment (App D) correctly implements Conclusions of Law 18-21 (App C, pp. 11-12)

Error 6: No additional injunctive terms were required as the existing violation was cured and the Covenants govern future conduct.

Error 7: Conclusion of Law 27 (App C, p. 12). The trial court did not abuse its discretion and thus did not err in concluding that it had resolved only those claims with respect to existing violations of the Covenants.

Error 8: The Court's Judgment (App D) correctly implements Conclusion of Law 27 (App C, p. 12).

Error 9: Conclusion of Law 22 (App C, p. 12). The trial court did not abuse its discretion and thus did not err by concluding that the Brunses failed to prove unjust enrichment.

Error 10: Conclusion of Law 23 (App C, p. 12). The trial court did not abuse its discretion and thus did not err by concluding that the Brunses failed to establish any monetary damages.

Error 11: Conclusion of Law 24 (App C, p. 12). The trial court did not abuse its discretion and thus did not err by concluding that the Brunses failed to establish any monetary damages.

Error 12: Finding of Fact 23 (App C, p. 7). The trial court did not abuse its discretion and thus did not err by finding that the Brunses failed to establish any monetary damages.

Error 13: Conclusion of Law 25 (App C, p. 12). The trial court did not abuse its discretion and thus did not err by concluding that the Brunses were not entitled to an award of sanctions on any of their three asserted grounds.

Error 14: Conclusion of Law 26 (App C, p. 12). The trial court did not abuse its discretion and thus did not err by concluding that the Brunses were not entitled to an award of attorney fees and costs.

Error 15: Finding of Fact 21 (App C, p. 7). The trial court did not abuse its discretion and thus did not err by finding that the Cofers have an agreement to pay for legal fees with their counsel.

B. Response to Appellants' Issues Pertaining to Assignments of Error

Issue 1. Does the argument regarding the possibility of an apartment ask the Court of Appeals to rule on an issue not raised at trial? (Errors 1 through 5)

Issue 2. Do the terms of the Injunction appropriately recognize the existence and then voluntary cure of Covenant violations, and address the complaints raised by Bruns in this lawsuit? (Errors 1, 2, and 4 through 8)

Issue 3. Did the Court properly deny the request for monetary damages when the Brunses failed to convince the Court that monetary damages existed? (Errors 9 through 12)

Issue 4. Did the Court properly deny the sanctions and attorney fees/costs requested by the Brunses? (Errors 13 through 15)

C. Cross Appellant's Assignments of Error

Error 1: Finding of Fact 3 (App C, p. 2). The Court erred in failing to find that the ADU was distinct from the garage below it.

Error 2: Finding of Fact 11 (App C, p. 5). The Court erred in finding that other violations of Covenants were anecdotal and therefore not to be considered in support of the Cofers' claims and affirmative defenses.

Error 3: Finding of Fact 12 (App C, p. 5). The Court erred in finding that the Covenants have been followed in the neighborhood.

Error 4: Finding of Fact 13 (App C, p. 5). The Court erred in finding that the Growth Management Act had to override the Covenants in order for an ADU to exist in the neighborhood.

Error 5: Finding of Fact 18 (App C, p. 6). The Court erred in failing to find that the Brunses took contradictory positions regarding the applicability and enforcement of the Covenants.

Error 6: Finding of Fact 19 (App C, p. 6). The Court erred in finding that the Brunses' violations of the Covenants were minor and therefore not to be considered in support of the Cofers' claims and affirmative defenses.

Error 7: Finding of Fact 23 (App C, p. 7). The Court erred in finding that the Cofers had a single-family home and a separate garage with an ADU.

Error 8: Conclusion of Law 1 (App C, p. 8). The Court erred in concluding that the ADU violated paragraph 1 of the Covenants.

Error 9: Conclusion of Law 2 (App C, p. 8). The Court erred in concluding that the ADU violated paragraph 7 of the Covenants.

Error 10: Conclusion of Law 3 (App C, p. 9). The Court erred in concluding that the ADU violated paragraph 3 of the Covenants.

Error 11: Conclusion of Law 13 (App C, p. 10). The Court erred in concluding that the Brunses were not estopped from enforcing the Covenants.

Error 12: Conclusion of Law 14 (App C, p. 10). The Court erred in concluding that the Brunses own violations of the Covenants did not amount to unclean hands which barred their lawsuit.

Error 13: Conclusion of Law 17 (App C, p. 10). The Court erred in concluding that the Cofers had unclean hands that prevented enforcement of the Covenants against the Brunses.

Error 14: Conclusion of Law 26 (App C, 12). The Court erred in concluding that the Cofers would bear their own attorney fees and costs.

D. Cross Appellant's Issues Pertaining to Assignments of Error

Issue 1. Is an ADU part of, not separate from, a single family dwelling? (Errors 1, 4, 7, and 8 through 10)

Issue 2. Should Covenant violations by the Brunses and other neighbors, and contradictory positions by the Brunses regarding applicability and enforcement of the Covenants, bar injunctive relief? (Errors 2, 3, 5, 6, and 11 through 13)

Issue 3. Should the Cofers be awarded their attorney fees and costs incurred in defending this action? (Error 14)

III. COUNTERSTATEMENT OF THE CASE

William and Wilhelma Cofer (the "Cofers") are the trustees of the William M. and Wilhelma Cofer Living Trust, the owner of the home that is the subject this lawsuit. The plaintiffs Brunses are the next door neighbors.

The Cofers have lived in the Bainbridge Landing neighborhood since approximately 2003. RP 479 (3-17-2010). They originally lived at Lot 11 which is next door to the subject home located at Lot 10. The Cofers bought Lot 10 when it was just an empty lot, with the idea of constructing a new residence. RP 190 (3-16-10). The Cofers constructed

the new home at Lot 10 in 2005-2006, and moved into their home in July 2006.

The Bainbridge Landing neighborhood was formed by John G. Tawresey, Alice B. Tawresey, Dorothy Cave Nystrom, Helen M. Dimock, David C. Peterson and Susan Peterson pursuant to a written dedication dated April 4, 1979. (App A, p.1). Coincident with the creation of Bainbridge Landing, a document entitled Bainbridge Landing Protective Covenants (the "Covenants") was executed on January 28, 1979. (App B).

The Covenants have both building restrictions and use restrictions.

Paragraph 1 of the Covenants provides:

No lot shall be used except for residential purposes. (*the use restriction*). No building shall be erected or permitted on any lot other than one detached single family dwelling and private garage for not more than three cars. (*the building restriction*) [parenthesized comments by counsel] (App B, p.1).

Pursuant to the Covenants, an Architectural Control Committee ("ACC") was created and no building was to be erected, placed or altered on any lot until the construction plans and specifications, and a plan showing the location of the structure had been approved by the ACC. (paragraph 2 of the Covenants, App B, p. 1). The ACC, in making a decision, was obligated to consider (1) the quality of the architectural design; (2) harmony of materials with existing structures and/or surroundings; (3)

conformity with lot topography; (4) removal of existing trees and vegetation. John and Alice Tawresey were designated pursuant to paragraph 15 of the Covenants to serve as the sole members of the ACC. (App B, p.2)

Pursuant to paragraph 16 of the Covenants: "The Architectural Control Committee's approval or disapproval as required in these covenants shall be in writing. In the event the committee or its designated representative fails to approve or disprove (SIC) within 30 days after plans and specifications have been submitted to it, or in any event if no suit to enjoin the construction has been commenced prior to the completion thereof, approval will not be required and the related covenants shall be deemed to have been fully complied with." (App B, p. 3)

When constructed the Cofer residence was a three-bedroom home with an office, a TV room, a great room, three bathrooms, a front porch, and a covered deck in the back. In addition there was a two-car garage with a habitable area in the separate finished space above the two-car garage. RP 354 (3-16-10), Ex. 58.

The Cofers' plans for construction included creation of an ADU in the habitable area on the second story above their garage. EX 15. Prior to construction the Cofers provided the ACC with their construction plans and requested approval by the ACC. RP 361 (3-16-10). Pursuant to a

written letter dated April 11, 2005, the ACC approved the plans for the new home, indicated that the plans complied with all guidelines of the plat, stated that the home would be an asset to the subdivision, and cleared the process for construction. RP 361 through 362 (3-16-10), EX 32. In the April 11, 2005 letter, the ACC required the Cofers to “submit your choice of roofing material (color and type) and your exterior paint color to us for approval prior to applying it.” In reliance on this approval, the Cofers commenced and completed construction. The Cofers made a written submission regarding the roof material to the ACC in December of 2005, delivered to the Tawreseys along with a Christmas card. RP 362 (3-16-10); RP 466 through 467 (3-17-10).

Janet Bruns visited the Cofers' new home during construction on occasions and was given tours of the property including the ADU. RP 218 through 229 (3-16-10). During these visits, Mr. Cofer openly discussed their plans for the ADU. The Bruns never voiced any concern or objected to these plans during the course of construction. RP 363-364 (3-10-16).

The Cofers' goals for the ADU were first to provide a room for their older son, or perhaps a caregiver, as the Cofers were in their 70's and expected the need for living assistance. RP 427 (3-17-10). As a third option, the ADU was a potential source of affordable housing, something missing on Bainbridge Island. RP 427 through 428 (3-17-10). This type

of residential use comports with the Covenants and the nature of the neighborhood. The Bainbridge Landing neighborhood is located in downtown Winslow, a very densely populated and growing residential/commercial area by Bainbridge Island standards. RP 373-374 (3-16-10), EX 60. The neighborhood is within a five minute walk to the ferry boat to Seattle. Only a few hundred yards away from Hyak Place, construction was recently completed on the Harbor Square Condominiums. RP 390 through 392, 499 (3-17-10). The Harbor Square Condominiums contain 180 condos and town homes, and 15,000 square feet of commercial space. To the north is the Vineyard Lane condominium development. To the south are another group of townhomes. The City of Winslow is the designated area for residential and commercial growth on Bainbridge Island. RP 305 through 308 (3-16-10).

Since the creation of the ACC and the Covenants, there have been numerous activities that violate the Covenants. RP 367 through 372 (3-16-10). The Brunses themselves built an outbuilding and arbor without ACC approval. RP 469 (3-17-10). The Brunses put a green metal roof on their house (the only one in the neighborhood) without ACC approval. RP 444, 468 through 469 (3-17-10). Chickens were raised on one lot, a horse trailer is stored on another lot. RP 324 (3-16-10). One house was painted bright pink. EX 57. Neighbors used their homes for business purposes.

RP 372 (3-16-10). There are sheds that have been built in backyards without submittal to ACC, there are roofing materials changed or placed on roofs that were not submitted to the ACC for approval, and there have been decks built on houses that were not submitted for approval by the ACC. No one has brought suit to enjoin these activities.

After construction was complete on the Cofer residence, the Bruns filed this lawsuit and demanded injunctive relief first against use of the ADU alleging a violation of the Covenants, and second for an injunctive order requiring the Cofers to tear down the already constructed residence. CP 5 through 11. The Bruns also sought monetary damages, sanctions and attorney fees against the Cofers.

On December 11, 2009 the Court entered an Order Granting Plaintiffs' Motion for Partial Summary Judgment. (App C, p. 15-16). That Order ruled that the ADU violated Covenants 1, 3 and 7. The Order did not require the Cofers to take any specific action at that time. Nevertheless, the Cofers voluntarily took action in December and January to alter their residence in order to satisfy any potential injunctive relief the Court may have required after the March 2010 trial. The Cofers:

- Terminated the tenancy of the tenant at the ADU as of 1/31/10
- Removed the mail box and house number assigned to the ADU
- Removed the stove and refrigerator from the ADU

- Terminated the 220 electric service to the ADU, certified by the Washington state electrical inspector
- Decommissioned the ADU, certified by the City of Bainbridge Island, so that it was no longer a separate dwelling, but simply habitable space
- Stopped using the former ADU area as living space while the building was detached. RP 206 through 207, 213 (3-16-10), RP 392 through 398 (3-17-10), EX 39.

All of the utility services for the main home already serviced the detached garage building; there were no separate ADU systems for water, sewer, and electricity. RP 421 (3-17-10).

Pre-trial, the Cofers also hired an architect to create plans for a connecting addition to their home, to create one single family dwelling with an attached garage. RP 399 through 401 (3-17-10), EX 50, 51. Both the City of Bainbridge Island and the Architectural Control Committee issued written approvals of the modification plans pre-trial.

These action steps and plans were all provided to Bruns pre-trial and there was extensive testimony regarding these steps during trial.

Following the trial, the Cofers have completed the addition and connected the two structures, such that there is now one single family

residence with an attached garage. The living space on the second story above the garage remains just that, living space.

IV. ARGUMENT

A. APPEAL

The standard of review for grant or denial of an injunction is abuse of discretion. *Rabon v. City of Seattle*, 135 Wn. 2d 278, 284, 957 P.2d 621, 623 (1998). Discretion is abused if the decision is based upon untenable grounds, or the decision is manifestly unreasonable or arbitrary. *Id.* Since injunctions are within the equitable powers of the court, these criteria must be examined in light of equity, including the balancing of the relative interests of the parties and the interests of the public, if appropriate. *Id.* In this case the Court did not abuse its discretion in fashioning the relief provided to the Brunses by the Injunction and Judgment.

1. The argument regarding the possibility of an apartment asks the Court of Appeals to rule on a speculative issue not raised at trial

There has never been an “apartment” at the Cofers’ property. The Cofers obtained approval from the City of Bainbridge Island and the ACC to construct an ADU. The Brunses Amended Complaint asked the Court for equitable relief and damages resulting from the Cofers’ construction of an accessory dwelling unit, not an apartment. CP 5.

After filing their Complaint, however, the Brunses have done everything they can to avoid using the term “ADU”. They have referred to the ADU as an “apartment”, a “multi-family dwelling”, and “living space above the garage”. Their avoidance of ADU speaks volumes, and is a key factor in both the appeal and cross appeal. Their avoidance of an ADU, and their appeal using the term apartment, is geared to evade the hard facts that the Covenants do not prohibit ADUs and that the Covenants do not contain definitions of key terms such as single family dwelling, ADU or multi family dwelling. Instead, the drafters of the Covenants specifically chose to rely on the definitions within the City zoning code to define terms in the Covenants. RP 433 through 434 (3-17-10). The City of Bainbridge Island the Municipal Code specifically defines an ADU as contained within a single family dwelling, and that the existence of an ADU does not equate to a multi-family dwelling. EX 53, p.1-2. The only “apartments” that exist in this case are those apartments/townhomes surrounding the neighborhood on three sides. EX 60.

Nevertheless, the Brunses succeeded in achieving the result they asked for in their Amended Complaint. The Court ruled first on summary judgment, and then again at trial, that the ADU violated the Covenants. (App C, p. 8-9 and 16). Despite this success, however, the Brunses are not satisfied. The Brunses now appeal because they feel the Court did not

provide them with a “lasting assurance there would be no apartment next door.” RP 416 (3-17-10), Ex. 73. This concern was not before the Court for decision, however, and there is no basis for appeal.

The Cofers use the word “concern” to describe the Brunses’ position because their concerns are not even viable claims that qualify for judicial relief. Instead, the Brunses worry about speculative issues. The Court addressed this directly with counsel during closing arguments. The Judge recognized the argument by the Brunses that they “shouldn’t have to worry about the future”. RP 605 (3-18-10). The Court correctly stated at the time that she did not have the ability or authority through an injunction to stop the Brunses from worrying about the future. RP 605 (3-18-10). The ADU had been decommissioned and was barred by the Court’s Judgment. The result was that the Cofers had simply habitable space in the second story above their garage. The off chance that a future owner might be tempted to use the habitable space in violation of the Covenants does not mean that a current violation exists which can be remedied by an injunction. RP 608 (3-18-10).

An injunction is an extraordinary equitable remedy designed to prevent serious harm. Its purpose is not to protect a plaintiff from mere speculative injury. *Kucera v. State, Dept. of Transp.*, 140 Wn. 2d 200, 221, 995 P.2d 63, 74 (2000). These worries of the Brunses about what

might or might not happen down the road of life were not tried to the Court and do not satisfy the burden of establishing actual and substantial harm. No evidence was presented on the topic and no relief was sought in the Complaint other than the demands made with respect to the ADU. The Brunses' concerns about the future are simply too vague and infinitesimal. An analogous situation: Covenant 14 prohibits shrubs which obstruct sight lines between 2 and 6 feet on corner lots. (App B, p. 2). A Court cannot issue an injunction against planting shrubs on corner lots. The possibility that some future owner may not trim the shrub to the required height does not require removal of the shrub altogether. If the shrub grows too high and actually violates the Covenant, injunctive relief is appropriate. Until then, any such claim for relief is purely a "concern" and far too speculative for judicial action.

The Court did not abuse its discretion in crafting the Injunction and Judgment. The worries of the Brunses about future behavior of neighbors is speculative at best, and the decision of the Court with respect to this issue should be affirmed.

2. The terms of the Injunction appropriately recognize the voluntary cure of existing Covenant violations, and address the complaints raised by Brunses in this lawsuit.

An injunction is distinctly an equitable remedy and is “frequently termed ‘the strong arm of equity,’ or a ‘transcendent or extraordinary remedy,’ and is a remedy which should not be lightly indulged in, but should be used sparingly and only in a clear and plain case.” *Kucera v. State, Dept. of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000), (quoting 42 Am.Jur.2d *Injunctions* § 2, at 728 (1969) (footnotes omitted)). An injunction is an extraordinary equitable remedy designed to prevent serious harm; its purpose is not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury. *Kucera v. State, Dept. of Transp.*, 140 Wn.2d at 221.

The granting or withholding of an injunction is addressed to the sound discretion of the trial court to be exercised according to the circumstances of the particular case. *Holmes Harbor Water Co. v. Page*, 8 Wn.App. 600, 603, 508 P.2d 628 (1973). *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775, 784 (1971), teaches as follows:

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

To obtain injunctive relief the plaintiff must establish:

- (1) That he or she has a clear legal or equitable right,
- (2) That he or she has a well-grounded fear of immediate invasion of that right by one against whom the injunction is sought, and
- (3) That the acts complained of are either resulting in or will result in actual and substantial injury to the plaintiff.

Hendricks v. Lake, 12 Wn.App. 15, 19, 528 P.2d 491 (1974)
(injunction dismissed against one defendant where no evidence showed any direct or indirect violation or threat to violate covenant).

In the present case, the Court faced a fact specific situation and correctly determined that the Cofers had cured any concerns under elements (2) and (3) above, because prior to the trial they voluntarily decommissioned the ADU and started the process of joining the detached garage to the main house. RP 213 through 214 (3-16-10) As such the Brunses had no well grounded fears of invasion of their rights, and there was no actual or substantial injury occurring.

An ADU is habitable space that has facilities for eating, sleeping, and sanitation. RP 301 through 302 (3-16-10). Typically sleeping can occur in almost any room. Thus it is the sanitation and/or eating facilities that determine whether or not a structure is an ADU. RP 301 through 302 (3-16-10). Typically in a decommissioning of an ADU, people remove

the kitchen, and specifically within the kitchen, the cooking range. The range is what really differentiates an ADU from, say, a guest house or studio. RP 302. A guest house is habitable space, but it does not provide for independent living. RP 315 (3-16-10). On Bainbridge Island there are many accessory buildings; often they have a bathroom, sinks, or art studios, or things where they want a sink or bathrooms associated with them. RP 302. But the key is that they don't have facilities for cooking which is a range and associated 220 volt electrical line. RP 302.

Prior to the trial, the Cofers voluntarily decommissioned their ADU in an effort to comply with the Court's December 2010 Summary Judgment Order. RP 303 (3-16-10). This effectively removed any existing violations of the Covenants and cured any potential for harm. With the addition between the main house and the detached garage, the home is now a single family dwelling with an attached garage. RP 299 (3-16-10).

The Judgment issued by the Court was the result of a reasoned process. In pre-trial hearings, the Court questioned counsel about the equitable nature of the case and the importance of considering the plans the Cofers made to change the structure. RP 70 (3-8-10). The Court recognized that plans and developments of property are 'evolving creatures' and that living conditions do not 'remain static'. RP 82 (3-15-

10). The Court was asked by the Brunses to find that the ADU violated Covenants 1, 3 and 7. The Court found that with the changes made by the Cofers, those Covenants were no longer violated. The Court added the protection that an ADU was not permitted in the future, and that the Court required continued absence of the 220 electrical line, stove and refrigerator in the future so long as the garage was detached. (App D, p. 2).

Because the Cofers testified to their intent to adjoin the garage to the main house, the Court addressed that plan in the Judgment as well. The Court found this plan would create a single family residence with attached garage. (App D, p. 2). The parameters or design of the connection were not before the Court for decision; no claim had been made by the Brunses that the connection violated the Covenants. (App D, p.2). The Court appropriately required that the Cofers comply with City and ACC standards in adjoining the buildings.

As discussed above, any demands for additional requirements/limitations in the injunction are speculative and not based on actual or substantial threatened harm. Further, there is no basis in the Covenants to govern the adjoined structure. The Covenants do not, for example, limit the number of beds, microwaves, sinks, or shelves in a single family house. The Court addressed this issue with counsel when

issuing the oral decision following trial, stating that once adjoined there was no longer a separate self contained residence. RP 16 (4-5-10). The Court appropriately refused to restrict the use of the Cofer property further by placing use limitations on the residence beyond what was already required by the Covenants. RP 16-17 (4-5-10).

In the Amended Complaint the Brunses also asked for an injunction against current and future violations with respect to the Cofers' non-residential use of the lot (emphasis added). CP 10. There was no evidence adduced at trial that the use of the ADU was non-residential. Yet the Court still determined that injunctive relief was required and denied a motion for directed verdict on this issue. RP 279 through 287 (3-16-10).

Covenants providing for consent before construction or remodeling will be upheld so long as the authority to consent is exercised reasonably and in good faith. However, a consent to construction covenant cannot operate to place restrictions on a lot which are more burdensome than those imposed by the specific covenants. *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997), citing *Bass v. Helseth*, 116 Cal.App.2d 75, 253 P.2d 525, 36 A.L.R.2d 853 (1953) (specific setback requirements); *Seabreak Homeowners Ass'n, Inc. v. Gresser*, 517 A.2d 263 (Ct. Ch.1986) (same), *aff'd*, 538 A.2d 1113 (1988); *Davis v. Huey*, 620 S.W.2d 561 (Tex.1981).

Covenant 1 states that no lot shall be used except for residential purposes. (App B, p. 1). The Cofers' intended use complies with this Covenant because the ADU would be used for residential purposes; namely living area. By the plain language of the Covenants, the use is proper. It will not be used to operate a child care facility, nursing home, rock crushing commercial enterprise, or the other uses that Washington Courts addressing this issue have reviewed and found to be non-residential. See *Metzner v. Wojdyla*, 125 Wn.2d 445, 886 P.2d 154 (1994)(interpreting language restricting the use of the property to "residential use only," held a family day care was incompatible with residential use restriction); *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 854 P.2d 1072 (1993)(adult family home is inconsistent with "single family" residence restriction); *Hagemann v. Worth*, 56 Wn.App. 85, 782 P.2d 1072 (1989)(foster home for elderly was a business and in violation of restrictive covenant prohibiting businesses within residential subdivision). On the contrary, because using the property for living purposes is by its very nature "residential", there is no Washington authority to support the claims asserted by the Brunses.

The recent case of *Ross v. Bennett* is particularly instructive. In that case the plaintiff sued a homeowner to prevent rental use of a home. The Court reasoned:

On its face, the CPE Covenant does not prohibit the short-term rental of Bennett's house to a single family who resides in the home. The CPE Covenant merely restricts use of the property to residential purposes. Renting the Bennett home to people who use it for the purposes of eating, sleeping, and other residential purposes is consistent with the plain language of the CPE Covenant. The transitory or temporary nature of such use by vacation renters does not defeat the residential status. This is consistent both with the evidence of context and with preserving the free use of the land.

Ross v. Bennett, 148 Wn.App. 40, 203 P.3d 383, *rev. denied*, 166 Wn.2d 1012, 210 P.3d 1018 (2009). Just as in *Ross*, the Cofers' use of the ADU is for residential purposes, and this use is not prohibited by the Covenants.

The Covenants themselves also provide for rental of properties which is consistent with the idea of rentals being residential use. Covenant 8 references the ability of homeowners to place signs advertising property for rent within the neighborhood. (App B, p. 2).

The structure itself complied with the Covenants as a single family dwelling and private garage for not more than three cars. *Double D. Manor Inc. v. Evergreen Meadows Homeowners' Assn.*, 773 P.2c 1046 (1989 Colo.) (term "single family dwelling" in restrictive covenant describes only the type of structure permitted on property and not type of use that could be made of property.); *Blevins v. Barry-Lawrence County Asso. For Retarded Citizens*, 707 SW2d 407 (1986 Mo.) (Restrictions in

covenant prohibiting any building other than single family dwelling applied only to structures and not to use of property.)

The Court did not err in crafting injunctive relief that recognized what steps had already occurred pre-trial, and the construction efforts to occur post-trial, and by incorporating those facts into the relief afforded.

3. The Court properly denied the request for monetary damages because the Brunses failed to convince the Court that monetary damages existed

A. No Breach of Contract or Unjust Enrichment Damages

The Brunses bore the burden of proving that the Cofers (1) breached a contract, (2) that the Brunses incurred actual economic damages as a result of the Cofers' breach, and (3) the amount of those damages. The purpose of awarding damages for breach of contract is neither to penalize the defendant nor merely to return to the plaintiff that which he has expended in reliance on the contract. *Lincor Contractors, Ltd. v. Hyskell*, 39 Wn. App. 317, 320, 692 P.2d 903, 906 (1984). It is, rather, to place the plaintiff, as nearly as possible, in the position he would be in had the contract been performed. *Id.* Damages must be proved with reasonable certainty or supported by competent evidence in the record. *Iverson v. Marine Bancorporation*, 86 Wn.2d 562, 565, 546 P.2d 454 (1976).

The Brunses outlined their breach of contract claim in their trial brief. CP 713-715. Yet at trial, the Brunses offered no evidence that they had suffered actual economic damages as a result of the actions of the Cofers. Instead, they pled breach of contract and unjust enrichment and claimed the right to the net rents earned by the Cofers as their damages. The Court reviewed this testimony and denied the claim, both in her oral decision and in the Findings of Fact and Conclusions of Law. RP 11-13 (4-5-10), App C, pp. 7, 12. Contrary to the Brunses' appeal claiming the Court ignored the breach of contract claim, the Court stated that she had examined the "claim by the Brunses that there should be monetary relief for the violations". RP 11-13 (4-5-10). The Court reasoned that it made no sense to pay money to the Brunses as part of the relief in this case. RP 11-13(4-5-10).

The suggestion that the Court's Findings of Fact and Conclusions of Law do not comply with CR 52 do not bear out. CR 52 requires the entry of written Findings and Conclusions, but does not require a specific form. In both the Findings and the Conclusions in this case the Court states that it considered the issues of breach of contract, unjust enrichment and monetary damages. (App C, p. 7, 12). CR 52. Further, a trial court is not required to enter negative findings of fact or findings that certain facts

have not been established; it is to enter only those factual findings it determines have been established by evidence. *General Industries, Inc. v. Eriksson*, 2 Wn.App. 228, 467 P.2d 321 (1970). To that extent, since monetary damages were not established, it was not even required to go as far as the Court did in this case.

Even if the Brunses had established monetary damages in the form of payment of the net rents earned, they were still subject to the affirmative defense of failure to mitigate those damages. The Brunses commenced this lawsuit in July 2006. They never sought a temporary injunction against rental of the ADU, nor even requested informally that the ADU remain empty pending the outcome of the litigation. The ADU was rented twice during the pendency of the suit – each time the Brunses were aware of the rental and voiced no complaint. This is because there was no actual economic harm to them from the ongoing rentals.

The claim of unjust enrichment was correctly denied by the Court. Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it. *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258 (2008.); *See Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn.App. 151, 160, 810 P.2d 12 (1991) (“Unjust enrichment occurs when one

retains money or benefits which in justice and equity belong to another.”). Enrichment alone will not trigger the doctrine; the enrichment must be unjust under the circumstances and as between the two parties to the transaction. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576, 161 P.3d 473, 482 (2007). Three elements must be established for unjust enrichment: (1) there must be a benefit conferred on one party by another; (2) the party receiving the benefit must have an appreciation or knowledge of the benefit; and (3) the receiving party must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value.

First, by the plain letter of the law unjust enrichment cannot exist because the Brunses allege that a contract does in fact exist – the Covenants. They are not entitled to have both unjust enrichment damages and breach of contract damages. Second, there was no benefit conferred upon the Cofers by the Brunses with respect to the ADU and its rental. Quite to the contrary, the Brunses’ lawsuit interfered with, and lead to the ultimate termination of, the ADU and cost the Cofers significant sums of money to remedy the alleged violations. Further, if the Court had found that disgorgement of the rent was an appropriate remedy, the Brunses were not entitled to receive that rent as unjust enrichment damages.

The Brunses' citation to *Lake Limerick Country Club v. Hunt Mfg. Homes*, 120 Wn.App. 246, 84 P.3d 295 (2004) does not support their claim. In Lake Limerick an unjust enrichment occurred when a land owner retained the benefit of owning land without paying dues owing on the land. In the present case there are no dues or other monies owing to anyone in the neighborhood that relate to use of the ADU. Instead, the Brunses hope to extract money to punish the Cofers for renting the ADU during the pendency of the trial. Punitive damages are clearly not appropriate.

B. No Right to Obtain Both Monetary Damages and Injunctive Relief

It was also proper to deny monetary damages to the Brunses under the plain terms of Covenant 18 even though the Court did not use that Covenant as a basis for its decision. Covenant No. 18 provides:

Enforcement shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenant either to restrain violations or to recover damages. (App B, p. 3)

The word "or" is a conjunction that is used to indicate an alternative. (Coffee or tea, sink or swim). The word "either" is an adjective meaning one or the other of two choices. (Take either the high or low road). When used together they are an exclusive disjunction, which means as between two things there must be a choice; one or the other but

not both. Webster's dictionary defines an exclusive disjunction as an unavoidable choice or exclusive division between two alternatives. (She wanted to paint either a landscape or a self-portrait; she wanted to paint one or the other, but not both.) Covenant 18 provides an exclusive disjunction with respect to remedies available after enforcement proceedings. Under Covenant 18 the Brunses were not permitted to an award of both damages and an injunction. By the plain language of the Covenant they may have either one or the other.

It is a principle of remedial law that a party may not have two different remedies that are "inconsistent" with each other. Remedies are "inconsistent" when they would allow a double recovery for the same cause of action. We assume that the plaintiff has a cause of action upon which he might obtain more than one remedy, and we say, "You may have either one, but not both; you must elect between them." *Bremerton Central Lions Club, Inc. v. Manke Lumber Co.*, 25 Wn.App. 1, 604 P.2d 1325 (1979). For instance, if one party to a contract has breached in some way that causes a substantial failure of performance, the other party may recover damages or he may have rescission, but he may not have both damages and rescission for the same breach. *Wilkinson v. Smith*, 31 Wn.App. 1, 639 P.2d 768 (1982) (purchaser may not rescind and also recover damages for lost profits and mental distress). Under modern

pleading a party may pray in the alternative for inconsistent remedies; he simply cannot be awarded both remedies. *Kofmehl v. Steelman*, 63 Wn.App. 133, 816 P.2d 1258 (1991).

During trial the Cofers made a motion for directed verdict seeking to dismiss the damages claims of the Bruns because the plain language of the Covenants provide an either/or situation with respect to relief available to the Bruns. RP 279 through 287 (3-16-10). The Court denied the motion for directed verdict, ruling that the Covenant does not force an aggrieved party to elect a remedy, whether it's an injunction or an award of damages. RP 285 through 286 (3-16-10). Per the Court, the Covenant is not an either/or type of provision.

The Cofers respectfully submit on appeal that damages were properly denied for the above reasons and that the Court's decision should be affirmed.

4. The Court properly denied the sanctions and attorney fees/costs requested by the Brunses

The Brunses did not plead the right to sanctions or attorney fees or costs in their Amended Complaint. CP 10. At best, they sought "such other relief which the Court deems just and equitable", which would be a stretch to include sanctions. The first time they alleged such claims under CR 11 and RCW 4.84.185 was in their trial brief. CP 727. They did not

move to amend their complaint at trial to include these claims and the Cofers were not aware of such claims until they were raised at trial. RP 235 (3-16-10).

The Court of Appeals reviews challenges regarding sanction awards under the Rule 11 and RCW 4.84.185 for abuse of discretion. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn.App. 409, 157 P.3d 431(2007) *Zink v. City of Mesa*, 137 Wn.App. 271, 152 P.3d 1044, review denied 162 Wn.2d 1014, 178 P.3d 1033 (2007). CR 11 is not a fee shifting mechanism but, rather, is a deterrent to frivolous pleadings. *Id.* To avoid the 20/20 hindsight view, the trial court must conclude that the claim clearly has no chance of success before it may impose sanctions for filing of claim. *Wood v. Battle Ground School Dist.*, 107 Wn.App. 550, 27 P.3d 1208 (2001). Even the decision of whether to award attorney fees for frivolous claims (the Cofers had no frivolous claims) is within the trial court's discretion, which will not be disturbed absent a clear showing of abuse. *Timson v. Pierce County Fire Dist. No. 15*, 136 Wn.App. 376, 149 P.3d 427, as amended (2006).

The Brunses' appeal is that the Court did not give sufficient explanation to the Brunses for denying their sanctions request. The Brunses cannot, however, transform a Court's duty to explain an award of sanctions into a requirement that a Court explain why it did not award

sanctions. *See North Coast Elec. Co. v. Selig*, 136 Wn.App. 636, 151 P.3d 211 (2007) (where trial court failed to specify why defendant's counterclaims were baseless.) As stated above, a trial court is not required to enter negative findings of fact or findings that certain facts have not been established; it is to enter only those factual findings it determines have been established by evidence. General Industries, Inc. v. Eriksson, 2 Wn.App. 228, 467 P.2d 321 (1970). The Court in the present case clearly reviewed the sanctions issue, discussed it in her oral opinion, and presented Findings and Conclusions on the issue. RP 14 (4-5-10), App C. p. 12.

The final paragraph of the Bruns argument regarding sanctions (p. 34) goes to the heart of their sanctions request. The Brunses have alleged that they paid attorney fees to prosecute their case, and they are concerned that the Cofers did not suffer the same financial burden to defend the lawsuit. The Cofers have a letter agreement to pay for their attorney fees and costs. RP 229 (3-16-10), EX 22. The Cofers agree they have an obligation to pay those fees, and they have already paid costs for the lawsuit. RP 230 (3-16-10). The fact that they are being represented by a relative has nothing to do with whether a sanction award should have been made. Mr. Bruns is an attorney and could have represented himself and his wife rather than paying someone else to do it. RP 141-142 (3-15-10).

He is also employed by the firm that he asked to represent him in this case. RP 142 (3-15-10). In any event, as stated above sanctions are not meant to be fee shifting mechanisms.

The Court correctly denied the Brunses' request for attorney fees, costs and sanctions and this decision should be affirmed on appeal.

B. CROSS APPEAL

1. An ADU is part of, not separate from, a single family dwelling

The Court ruled on summary judgment that Covenants 1 and 3 barred the ADU. (App C, p. 16). Summary judgment orders are reviewed de novo and all facts and inferences are viewed in a light most favorable to the nonmoving party. *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 137 Wn. App. 352, 358, 153 P.3d 877, 881 (2007) aff'd, 164 Wn. 2d 411, 191 P.3d 866 (2008). The order is an error because the only definitions of the key terms "ADU" and "single family dwelling" are found in the City zoning code, and those definitions state that an ADU is part of, not independent from a single family dwelling.

The Cofers constructed a single family dwelling pursuant to building plans that were approved by the ACC and the City of Bainbridge Island. RP 361 (3-16-10). When creating the plans, the Cofers reviewed

the Covenants and the City Codes. RP 424 through 425 (3-17-10), EX 52-

54. The Covenants state at paragraph 1:

No building shall be erected or permitted on any lot other than one detached single family dwelling and private garage for not more than three cars.

The term “single family dwelling” is not defined in the Covenants. The term “ADU” is not used in the Covenants at all.

The City Code does define the terms “family”, “dwelling”, “single-family dwelling”, “multifamily dwelling” and “ADU” as:

18.06.350 Family.

“Family” means one or more persons who live in one dwelling unit and maintain one household. Any number of such persons, related by kinship, constitutes a family. However, not more than five such persons, when not related by kinship, constitutes a family.

18.06.310 Dwelling.

“Dwelling or dwelling unit” means a building or portion of a building that provides independent living facilities with provisions for sleeping, eating and sanitation; provided a recreational vehicle or bus is not a dwelling or dwelling unit.

18.06.330 Dwelling, single-family.

“Dwelling, single-family” means a detached structure containing one dwelling unit and having a permanent foundation.

18.06.320 Dwelling, multifamily.

“Dwelling, multifamily” means a structure or portion of a structure containing two or more dwelling units or more than one dwelling unit on one lot.

18.06.010 Accessory dwelling units.

“Accessory dwelling unit” means separate living quarters contained within or detached from a single family residence on a single lot, contains less than 800 SF of floor area excluding accessory buildings and shares a single driveway with the primary residence; provided no mobile home or recreational vehicle shall be an accessory dwelling unit.
EX 53

The Covenants do not contain contradictory definitions, and cannot be expanded to include restrictions other than those specifically set out in the Covenants themselves.

The planning department for the City of Bainbridge Island applies the Code by holding that ADUs are part of a single family dwelling and are permitted to be attached or detached from the main house. RP 292-293 (3-16-10). An ADU does not create a multi family dwelling. RP 293 (3-16-10). The City Code describes the use and requirements for ADUs, and specifically indicates that a purpose is “...to provide a potential source of affordable housing units in single-family neighborhoods....” Ex. 52 and 53.

The Cofers reviewed and relied upon these City Codes and definitions in making their construction decisions because the Covenants

do not contain any definitions for their terms. RP 424-426 (3-17-10), Ex. 52 and 53.

The prior owners and developers of the Bainbridge Landing neighborhood are John and Alice Tawresey RP 429 (3-17-10). Alice Tawresey was the Mayor of Bainbridge Island from 1978 to 1990. RP 462 (3-10-17). The Tawreseys are responsible for the creation of the Covenants, and they imposed the Covenants on the property. The context within which the Covenants were prepared is important. The Tawreseys asked their engineers to draft the Covenants because they believed the City of Bainbridge Island required Covenants as part of the platting process. RP 433-434 (3-17-10). The Covenants were drafted to incorporate the City of Bainbridge Island zoning requirements. RP 434 (3-17-10). There was no effort to vary from or alter what the zoning code provided. RP 434 (3-17-10). The term single family dwelling used in the Covenants was plucked from the Bainbridge Island zoning code by the Tawreseys when drafting because the area is zoned single family. RP 464 (3-17-10). No definitions of terms were put in the Covenants because the City already had a zoning code with definitions for the terms used in the Covenants. RP 470 (3-17-10).

The Covenants contain both building and use restrictions. The restriction in paragraph 1 states “No building shall be erected or permitted

on any lot other than one detached single family dwelling and private garage for not more than three cars.” This is not a use limitation, but a structural limitation describing how the homes must be constructed. As described above, the Cofers received approval from the ACC and the City of Bainbridge Island for the structure itself and thus the home complied with the Covenants as a single family dwelling and private garage for not more than three cars. See also *Double D. Manor Inc. v. Evergreen Meadows Homeowners’ Assn.*, 773 P.2c 1046 (1989 Colo.) (term “single family dwelling” in restrictive covenant describes only the type of structure permitted on property and not type of use that could be made of property.); *Blevins v. Barry-Lawrence County Asso. For Retarded Citizens*, 707 SW2d 407 (1986 Mo.) (Restrictions in covenant prohibiting any building other than single family dwelling applied only to structures and not to use of property.)²

Washington case law uniformly holds that covenants will not be extended beyond the clear meaning of the language used in the covenant. *Jones v. Williams*, 56 Wash. 588, 591, 106 P. 166 (1910); *Miller v. American Unitarian Ass’n*, 100 Wash. 555, 559, 171 P. 520 (1918) ("[T]here must be shown to be a clear and plain violation of [a restrictive covenant] to justify the interposition of a court of equity to restrain.")

² The Brunses did not assert that using the ADU was other than residential use, and thus

(quoting *McDonald v. Spang*, 55 Misc. 332, 105 N.Y.S. 617 (1907)); *Granger v. Boulls*, 21 Wn.2d 597, 599, 152 P.2d 325, 155 A.L.R. 523 (1944) (" [r]estriction [will not] be enlarged or extended by construction, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen' " (quoting 18 C.J. § 450, at 386)); *Gwinn v. Cleaver*, 56 Wn.2d 612, 615, 354 P.2d 913 (1960) ("Imposed restrictions will not be aided or extended by judicial construction, and doubts will be resolved in favor of the unrestricted use of property."); *Burton v. Douglas County*, 65 Wn.2d 619, 622, 399 P.2d 68 (1965) ("Restrictions, being in derogation of the common-law right to use land for all lawful purposes, will not be extended by implication to include any use not clearly expressed. Doubts must be resolved in favor of the free use of land.") (citations omitted); *Weld v. Bjork*, 75 Wn.2d 410, 411, 451 P.2d 675 (1969) (it is well settled in Washington that restrictions on the use of land are construed strictly against grantor and will not be extended beyond clear meaning of the language used.).

The Court erred as a matter of law when it failed to utilize the City code definitions to apply the Covenants. The Court also erred when it determined that using the City definitions would abrogate, rather than define, the terms of the Covenants. A word is abrogated if it is abolished

this issue is not addressed in the appeal.

or treated as non-existent. The City Codes do not abolish the terms single family dwelling or ADU; the Code defines those terms. The Judgment of the Court should be reversed on appeal.

2. Covenant violations by the Brunses and other neighbors, and contradictory statements by the Brunses regarding enforcement, bar injunctive relief

The Cofers have equitable defenses that prevent enforcement of the Covenants via injunction. A number of equitable defenses are available to preclude enforcement of a covenant: merger, release, unclean hands, acquiescence, abandonment, laches, estoppel and changed neighborhood conditions. *Mountain Park Homeowners Association, Inc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

The court may consider a number of factors when considering injunctive relief, including any misconduct by the plaintiff. *Wimberly v. Caravello*, 136 Wn. App. 327, 340, 149 P.3d 402 (2006). A court of equity will not intervene on behalf of a party whose conduct has been unconscientious, unjust, or marked by lack of good faith. *Portion Pack, Inc. v. Bond*, 44 Wn. 2d 161, 265 P.2d 1045 (1954). If the plaintiff is in violation of a covenant, the equitable defense of unclean hands to prevent enforcement may apply. See *Reading v. Keller*, 67 Wn. 2d 86, 406 P.2d 634 (1965).

The doctrine of equitable estoppel provides that one should not be permitted to deny what he has once solemnly acknowledged, and is defined as having three elements: (1) an admission, statement or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement or act; and (3) injury from such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. *Arnold v. Melani*, 75 Wn.2d 143,147 (1968); *Kessinger v. Anderson*, 31 Wn.2d 157, 196 P.2d 289 (1948); *Thomas v. Harlan*, 27 Wn.2d 512, 178 P.2d 965, 170 A.L.R. 1138 (1947). The right to enforce a restrictive covenant may be lost by waiver or acquiescence. *Ronberg v. Smith*, 132 Wash. 345, 232 P. 283 (1925); *Ames Lake Community Club v. State*, 69 Wn.2d 769 (1966); 20 Am.Jur 2d §239. It is contrary to equity and to good conscience to enforce rights under restrictive covenants where the homeowner has been led to believe, by word or conduct, that there are no objections to the contemplated action. 20 Am.Jur 2d §239. In both *Ames* and *Ronberg*, the Supreme Court determined that where a plaintiff in a breach of covenant action either acquiesced to the home owner's project, or delayed in bringing any enforcement action, thereby allowing the home owner to detrimentally change position or expend funds and effort, the plaintiff's action was barred by estoppel.

The Brunses have placed a green metal roof on their home. RP 173 (3-15-10). Theirs is the only green metal roof in the neighborhood and this roof does not comply with the Covenants. RP 444, 468-469, 470-472 (3-17-10), EX 30. Its bright green color starkly contrasts with other roofs in the neighborhood and is not in harmony with the materials of existing structures. (App B, p. 1). The Brunses have built a spa and sauna outbuilding and an arbor on their property and did not ask for ACC approval as required by the Covenants. RP 104, 137 (3-15-10), RP 469 (3-17-10), EX 28-29. That outbuilding has its own concrete slab, electricity, gutters and plumbing. RP 166 (3-15-10), EX 29. These actions violate both Covenant 1 and Covenant 2. (App B, p. 1).

There have been modifications to homes in the neighborhood that were not submitted to the ACC for approval as required by the Covenants. RP 468 (3-17-10). Neighbors have painted their homes and put on new roofs without seeking ACC approval. RP 349 through 350 (3-16-10). In deciding to forego ACC approval, the neighbors were following the neighborhood pattern of what others had done in the past by ignoring the Covenants. RP 350 (3-16-10). One neighbor has even painted their house pink (while the other house colors are generally muted tones) and this color really stands out. RP 350 (3-16-10), Ex. 57.

Covenant 3 provides in relevant part: “No trailers or mobile homes shall be permitted on any lot.” (App B, p.1) The Burkes, a neighbor on lot 8, keep a horse trailer at their property. RP 320 (3-16-10). The Brunses have no complaint with this trailer. RP 322 (3-16-10).

Covenant 10 provides in relevant part: “No animals, livestock or poultry of any kind shall be raised, bred or kept on any lot...” (App B, p. 2). Neighbors keep chickens on their lot. RP 324 (3-16-10).

The Brunses have also taken inconsistent positions with respect to the presence of an ADU in the neighborhood. For the Brunses, the key complaint is that the Cofers’ ADU is right next door, and that the Cofers chose to rent the ADU. Beyond those factors, they have stated they have no concerns about the existence of an ADU. A non-party neighbor testified that he expressed his concerns to Mr. Brunses about the lawsuit against the Cofers, and that he would like some day to have an ADU possibly in his yard, or build a room over his garage, for his parents or in-laws to stay for some length of time. RP 344 through 345 (3-16-10). The neighbor indicated that he saw the potential for an ADU when he bought his home and thought that was a great thing. RP 347 (3-16-10). Mr. Brunses responded that he didn't see that that would ever be a problem, and that was different than the disagreement he had with the Cofers. Mr. Brunses told the neighbor that building an ADU specifically wasn't an issue.

RP 344 through 347 (3-16-10). Renting the ADU to a third party (rather than family or guest use) was the problem. RP 347 (3-16-10).

The Cofers asked the Trial Court to level the playing field with respect to allegations of Covenant violations in the neighborhood. It is inequitable to permit selective enforcement, especially when the Brunses themselves have violated the Covenants.

The court may consider a number of factors when considering injunctive relief, including any misconduct by the plaintiff. *Wimberly v. Caravello*, 136 Wn. App. 327, 340, 149 P.3d 402 (2006). A court of equity will not intervene on behalf of a party whose conduct has been unconscientious, unjust, or marked by lack of good faith. *Portion Pack, Inc. v. Bond*, 44 Wn. 2d 161, 265 P.2d 1045 (1954). If the plaintiff is in violation of a covenant, the equitable defense of unclean hands to prevent enforcement may apply. See *Reading v. Keller*, 67 Wn. 2d 86, 406 P.2d 634 (1965). The evidence in this case is that the Brunses have unclean hands because they have existing violations of the covenants at their own home. They have a detached structure that is neither a garage nor a home, and they have roofing material that is starkly different than the roofs of the other homes in the neighborhood.

Acquiescence arises when the plaintiff has previously failed to enforce a covenant against other persons within the neighborhood and now

seeks to enforce the covenants against the defendant. In *Ronberg v. Smith*, 132 Wash. 345, 232 P. 283 (1925), and *Tindolph v. Shoenfeld Bros.*, 157 Wash. 605, 289 P.530 (1930), the courts stated that they will require “due diligence” by a plaintiff and even “a slight degree of acquiescence” will defeat an application for injunctive relief. This is because in equity a court cannot assist a plaintiff to preserve a covenant when the plaintiff has already acquiesced in alterations or activities that violate the covenants. The Brunses have acquiesced in violations on a number of occasions prior to attempting to enforce restrictions against the Cofers.

In *St. Luke's Evangelical v. Hale* the court recognized the defense of estoppel as well as acquiescence. See also *Granger v. Boulls*, 21 Wn.2d 597, 152 P.2d 325 (1944). Estoppel arises where a person claiming the benefit of a covenant has acted so as to indicate that there is no restriction or that he or she does not intend to enforce it, and the owner of the burdened land acts in reliance upon this conduct to his or her detriment. In such a case, equity will estop the former person from enforcing his/her rights. See *Arnold v. Melani*, 75 Wn.2d 143, 437 P.2d 908 (1968). The Brunses represented to the Cofers and to other neighbors either that there were no enforceable restrictions preventing the ADU or that they did not intend to enforce it uniformly.

Under these facts, the Court erred in enforcing the Covenants against the Cofers, and the Judgment should be reversed on appeal.

3. The Cofers should be awarded their attorney fees and costs incurred in defending this action

In this action, the Brunses sought injunctive and other relief, originally requesting that the subject building be torn down, and in part claiming that the Cofers failed to obtain approval for the roof material and paint color of the subject property, and therefore breached the Covenants. CP 9-10. This claim as to the roof and paint color was not well grounded in fact, and no good faith argument could be made to support such a claim. Instead, the claim was interposed for improper purposes, and to harass or cause unnecessary delay and needlessly increase the cost of this litigation, and further was frivolous and advanced without reasonable cause. Under Civil Rule 11 and RCW 4.84.185, the Brunses should have been sanctioned by the Court for pleading these claims. CR 11 is meant to prevent two types of filings: baseless filings and filings made for an improper purpose. *MacDonald v. Korum Ford*, 80 Wn.App. 877, 883, 912 P.2d 1052 (1996). A filing is 'baseless' when it is not well grounded in fact. Id.

The Brunses filed their claim with respect to the roof and paint color before knowing one way or another what the facts were. They made

one or two telephone calls to the ACC, and while still waiting for an answer to their questions, they filed suit without adequate basis or investigation. RP 264 through 265, 273 (3-16-10). Thereafter, they pursued the claim from the filing date of July 24, 2006 (CP 8) for nearly a full year of litigation. They only removed their claim regarding roof and paint color after the Cofers were forced to file a motion for summary judgment on the issue. CP 303. Thereafter, without any explanation for their actions, the Brunses notified the Cofers by a footnote in the Brunses' summary judgment response that they "elected not to pursue" the claims regarding the roof and paint color. CP 368. This election occurred on June 11, 2007. CP 366.

Compounding the sanctionable conduct, it was revealed at trial that the Brunses were not even really concerned with the paint color or the roof, or whether the ACC had approved. They admitted that they sued the Cofers and made those complaints to prevent the Cofers from having defenses of waiver or selective enforcement with respect to application of the Covenants. RP 150 through 152 (3-15-10). Making false claims to create a defense in a lawsuit is sanctionable conduct.

The Court erred in not sanctioning the Brunses under CR 11 and RCW 4.84.185 for their failure to investigate before making those

allegations. RP 131 through 133 (3-15-10). The Cofers are entitled to appropriate sanctions, and their reasonable expenses incurred because of the filing of this complaint, including reasonable attorneys' fees, under CR 11, RCW 4.84.185 and the equitable powers of the Court. The decision of the Court should be reversed on this issue.

**V. REQUEST FOR ATTORNEY FEES AND EXPENSES
INCURRED DURING APPEAL RAP 18.1**

The Cofers request that this Court award them their attorney fees and costs incurred in this appeal.

VI. CONCLUSION

The Bruns had lived next door to an empty lot for 14 years. RP 270 (3-16-10). The Brunses' goal was that no one could live in the second story of the Cofers' detached garage. RP 117 (3-15-10). They abhorred seeing the Cofer house from their bedroom window when previously they had faced an unbuilt lot in its natural heavily wooded state. RP 113 through 115, 142 through 143 (3-15-10). After four years of litigation, the Brunses succeeded; the Court prohibited the ADU and the Cofers voluntarily decommissioned its use. The Brunses are not entitled to further relief.

The Court erred, however, in concluding that the ADU violated the Covenants. Covenants, in derogation of the free use of land, cannot be

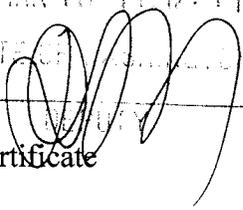
expanded beyond their terms. The definitions of the Code should have been applied, as the drafters had planned, and the ADU should be permitted to exist. The Court also erred in allowing the Brunses to prosecute this case when they themselves had violated the Covenants. There must be equity and a level playing field when it comes to Covenant enforcement. The Court also erred in refusing to sanction the Brunses for their frivolous claims.

DATED this 17 day of MARCH, 2011.

LASHER HOLZAPFEL
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CERTIFICATE OF SERVICE

I certify that a copy of the document on which this certificate appears was made on the 17 day of March, 2011 by delivering via U.S. mail, first class postage prepaid a true copy thereof to the offices of all attorneys/parties of record and leaving it with the clerk therein, or with a person apparently in charge thereof.

DATED this 17 day of March, 2011.



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Cross Appellant

APPENDIX 1

707 S.W.2d 407
Supreme Court of Missouri,
En Banc.

Jess BLEVINS and Nedra Blevins, Respondents,
v.
BARRY-LAWRENCE COUNTY ASSOCIATION
FOR RETARDED CITIZENS, Appellant.

No. 67337. March 25, 1986.

Homeowners brought action to enjoin use of property subject to restrictive covenant as group home for retarded individuals. The Circuit Court, Barry County, at Cassville, William H. Pinnell, J., granted injunction, and owner of the property appealed. The Supreme Court, Welliver, J., held that: (1) group home was residential purpose within language of covenant, and (2) restriction to single or double family dwellings applied only to types of structures and not to use of property.

Reversed.

Rendlen, J., concurred in result.

West Headnotes (3)

1 Covenants Nature and Operation in General
Evidence Deeds

In discerning intent of parties to restrictive covenant, testimony of original land developer is neither binding as a matter of law nor usually admissible.

12 Cases that cite this headnote

2 Covenants Nature and Operation in General
Operation of nonprofit group home for eight retarded adults and two houseparents was for "residential purpose" as required in restrictive covenant.

11 Cases that cite this headnote

3 Covenants Nature and Operation in General
Covenants Buildings in General

Phrase "single or double family dwellings" in restrictive covenant applied only to nature of structures and not to use of property.

12 Cases that cite this headnote

Attorneys and Law Firms

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James J. Randall, Monett, for respondents.
Thomas P. O'Donnell, Kansas City, for amicus curiae Mo. Developmental Disabilities Protection and Advocacy Services.
John Ashcroft, Atty. Gen., Joann Leykam, Asst. Atty. Gen., Jefferson City, for amicus curiae Mo. Dept. of Mental Health.

Opinion

WELLIVER, Judge.

This is an appeal from a circuit court judgment enjoining appellant, Barry-Lawrence County Association for Retarded Citizens, from using its property as a group home for retarded individuals. Respondents, Jess and Nedra Blevins, brought this equitable action alleging that said use violates a restrictive covenant on the lot. We transferred the cause prior to opinion of the court of appeals. Rule 83.06. We reverse.

Appellant owns Lot 23 and the residence thereon in the Wildwood Estates Subdivision of Cassville, Missouri, and it plans on establishing a group home for eight unrelated mentally retarded persons. Respondents own Lot 24, which is across the street from appellant's property. The subdivision is protected by restrictive covenants, which provide in relevant part:

1. The aforesaid real property shall be used for residential purposes only. No buildings shall be erected, altered, placed or permitted to remain on said real property other than single or double family dwellings not to exceed two and one-half stories in height and private garages for not more than two cars. No detached structures shall be permitted.

*408 Respondents argue that appellant's intended use of its property will contravene this covenant. Appellant responds by alleging (1) that its intended use does not violate the

covenant; (2) that awarding an equitable injunction would violate public policy, as illustrated by the recently enacted § 89.020, RSMo Supp. 1985 which forbids either zoning ordinances or restrictive covenants from excluding group homes for mentally retarded individuals; and (3) that § 89.020 must be given retroactive effect and, therefore, the provision of the restrictive covenant is void.

At the outset, this Court shares the observation of the trial court that the briefing and argument in this case were "excellent," and we greatly appreciate the thorough manner in which counsel have presented this Court with an exhaustive analysis of the case law in other jurisdictions.

1 It is a well-established rule that restrictive covenants are not favorites of the law, and when interpreting such covenants, courts should give effect to the intent of the parties as expressed in the plain language of the covenant; but, when there is any ambiguity or substantial doubt as to the meaning, restrictive covenants will be read narrowly in favor of the free use of property. *Shepherd v. State*, 427 S.W.2d 382, 386-87 (Mo.1968); *St. Louis Union Trust Co. v. Tipton Electric*, 636 S.W.2d 357, 359 (Mo.App.1982); *Udo Siebel-Spath v. Construction Enterprises*, 633 S.W.2d 86, 88 (Mo.App.1982). See generally 20 Am.Jur.2d Covenants § 185-187 (1965). It might be noted that respondent attempted to establish the intent of the parties to the covenant by offering the testimony of one of the original developers. Such evidence, however, is neither binding as a matter of law nor usually admissible. See *Shepherd v. State, supra*, at 386-87. See also 20 Am.Jur.2d Covenants § 322-24 (1965).

2 The initial question is whether the group home for eight unrelated persons and two house parents violates the restriction against any use other than for "residential purposes only." In *Shepherd v. State*, 427 S.W.2d 382 (Mo.1968), this Court interpreted the phrase "residential purposes" in a restrictive covenant. This Court quoted with approval the following definition of "residential purposes":

Giving the words their plain and ordinary meaning, we would say that ... it is, one in which people reside or dwell, or which they make their homes, as distinguished from one which is used for commercial or business purposes.

Shepherd v. State, supra, at 388. Cf. *Cole v. Cummings*, 691 S.W.2d 11, 14 (Tex.App.1985). Apartment buildings, therefore, were permitted under the covenant.

It is beyond doubt that the operation of the group home in question has all the characteristics of a residential as opposed to a commercial use. The home is owned and run by a non-profit organization, and the underlying theory behind establishing such a home is that it serves as a surrogate family arrangement. There is no commercial enterprise, and the home is neither a boarding house nor an institutional facility. The trial court found the following facts relative to the operation of the home:

[Appellant] operates a number of "group homes" in which mentally retarded adults live in a residential setting with "house parents", often a husband and wife, who provide supervision and care for the retarded adults.

.....

The group home as contemplated to be operated by in Wildwood Estates by defendant is designed to allow the residents to develop their social, emotional and intellectual skills by living in a stable family-type environment. The house parents and residents function in an integrated family-style unit instead of as independent individuals who share only a place to sleep and eat. Residents are involved in performing simpl[e] household duties and participate in discussing, and if possible, resolving problems existing in the home and in making decisions as to the nature of group activities. Although ultimate decisions are left to house parents and/or the defendants board. The entire *409 group often attends church, goes shopping and travels about the community in a body.

... [F]ormal training for the retarded residents does not take place in the group home, but rather is conducted at an activity center or sheltered workshop during the workweek. Within the group home, the house parents encourage the development of social skills and simple homemaking skills by the individual living there. The primary purpose of a residential group home is to provide a living situation as normal as possible for developmentally disabled residents of the community and is ordinarily not a temporary living arrangement but, depending upon the individual, a resident may remain in the group home months, years or for their entire lifetime.

The trial court also found that prospective occupants of group homes are carefully screened and are admitted, at first, only on a trial basis. We believe that these findings of fact clearly indicate that appellant's intended use of Lot 23 as a group home is a residential purpose under the restrictive covenant.

Faced with a similar factual situation, a substantial number of courts have held that the operation of a group home is a residential purpose within the meaning of a covenant with such a restriction. *See e.g., Linn County v. City of Hiawatha*, 311 N.W.2d 95 (Iowa 1981); *Clark v. Manuel*, 463 So.2d 1276, 1279 (La.1985); *Concord Estates v. Special Children's Foundation, Inc.*, 459 So.2d 1242, 1244 (La.App.1984); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21 (Minn.1981); *Knudson v. Trainor*, 216 Neb. 653, 345 N.W.2d 4, 6 (1984); *Berger v. State*, 71 N.J. 206, 364 A.2d 993 (1976); *J.T. Hobby & Son, Inc. v. Family Homes, Etc.*, 302 N.C. 64, 274 S.E.2d 174, 179 (1981); *Beres v. Hope Homes, Inc.*, 6 Ohio App.3d 71, 453 N.E.2d 1119 (1982); *Crowley v. Knapp*, 94 Wis.2d 421, 288 N.W.2d 815 (1980). *See generally* Annot., Restrictive Covenant Limiting Land Use to "Private Residence" or "Private Residential Purposes": Interpretations and Application, 43 A.L.R.4th 71 (1986); Annot., Use of Property for Multiple Dwellings as Violating Restrictive Covenant Permitting Property to be used for Residential Purposes Only, 99 A.L.R.3d 985 (1980). In *Jackson v. Williams*, 714 P.2d 1017 (Okla.1985), for example, an injunction was sought against a non-profit organization attempting to establish a group home for five mentally handicapped women. The homeowners claimed that the group home violated a restrictive covenant, which provided in part:

All lots in the tract shall be known and described as residential lots. * * * No structure shall be erected, altered, placed or permitted to remain on any building plot other than one detached single-family dwelling.

Jackson v. Williams, supra, at 1021. The court held that the covenant established both a use and structural restriction. "The first sentence ... requires the lots to be residential; the rest of the covenant requires that any structure be a single-family dwelling." *Id.* at 1021. Next, the court gave the following explanation for its holding that the group home is a residential use:

It is the purpose and method of operation which serves to distinguish the proposed residential use of the home from that

normally incident to a purely commercial operation. Financial gain is clearly not the motivation of the Association in the operation of the home.

The five women are to function as a single housekeeping unit by sharing in the preparation of meals, performing housekeeping duties and planning recreational activities. Most of the women have outside employment. The housekeeper will provide supervision and guidance similar to that of the head of any household. The day-to-day activities occurring at the home, as viewed from the outside, will not make it appear unlike the rest of the neighborhood. The essential purpose of the group home is to create a normal family atmosphere dissimilar from that found in traditional institutional care for the mentally handicapped. *410 The operation of a group home is thus distinguishable from a use that is commercial-i.e., a boarding house that provides food and lodging only-or is institutional in character. Furthermore, no educational training would be provided at the home nor would there be medical or nursing care administered to the residents. In virtually all respects, save for the mental capacity of those who would live in the home, the on-the-premises operations would be much like a typical suburban household. *Jackson v. Williams, supra*, at 1022.

3 The remaining question is whether appellant's intended use of the property violates the second sentence of the restrictive covenant, which prohibits erecting, altering, placing or permitting any *building* "other than single or double family dwellings not to exceed two and one-half stories in height and private garages for not more than two cars." Respondents argue that this restriction is a restriction on the use of the property; and, if a restriction on use, appellant's group home is neither a single nor a double family dwelling.¹

By its plain terms, however, this restriction applies only to structures and not to the use of the property. The language, therefore, is substantially different than the covenant being construed in *London v. Handicapped Facilities Board of St. Charles County*, 637 S.W.2d 212, 214 (Mo.App.1982), where the court enjoined a group home under a restriction prohibiting "[n]o more than one family shall live in any residence ..." The restriction more closely resembles the covenant in *Jackson v. Williams*, where the court held that the group home did not violate the second sentence of the restriction which permitted only single-family dwellings:

The term "family" was, in fact, used without a definition and hence did not necessarily exclude from its meaning a group of unrelated persons living together in a home. This phrase was intended to describe the character of the structure rather than limit the use of the property to single-family residence. When, as here, the restrictive covenant under consideration prohibits occupancy of more than one family unit but does not address itself to the composition of the family, a court is loathe to restrict a family unit to that composed of persons who are related, one to another, by consanguinity or affinity.

Jackson v. Williams, *supra*, at 1023. Similarly, in *J.T. Hobby & Son, Inc. v. Family Homes, etc.*, 302 N.C. 64, 274 S.E.2d 174, 181 (1981), the court held that a "provision in a restrictive covenant as to the character of the structure which may be located upon a lot does

not by itself constitute a restriction of the premises to a particular use." A number of other jurisdictions have reached a similar conclusion.² See e.g., *411 *Clark v. Manuel*, 463 So.2d 1276, 1279 (La.1985); *Leland Acres Home Owner Ass'n v. R.T. Partnership*, 308 N.W.2d 648 (1981); *Costley v. Caromin House, Inc.* 313 N.W.2d 21, 26 (Minn.1981); *Knudtson v. Trainor*, 216 Neb. 653, 345 N.W.2d 4 (1984); *Collins v. City of El Campo*, 684 S.W.2d 756, 761 (Tex.App.1984). Cf. *Sissel v. Smith*, 242 Ga. 595, 250 S.E.2d 463, 464 (1978).

The record indicates that appellant does not intend to alter the structure of the residence on its lot. We hold, therefore, that appellant's intended use of its property does not violate the terms of the restrictive covenant. The trial court judgment granting the injunction is reversed.

HIGGINS, C.J., and BILLINGS, BLACKMAR, DONNELLY and ROBERTSON, JJ., concur.

RENDLEN, J., concurs in result.

Footnotes

1 The trial court order enjoined appellant from "causing or allowing in excess of two individuals not related by blood, marriage or adoption" to use the residence. This would seem inconsistent with respondents' argument that this second clause in the covenant is a use restriction because double family dwellings are permitted.

2 We need not reach the issue of whether the group home would satisfy a single or double family use restriction. However, it might be noted that a number of jurisdictions, whether interpreting a restrictive covenant or a zoning ordinance, hold that certain group homes may be a "family" unless an explicit definition contained in the covenant or ordinance dictates otherwise. See e.g., *City of Santa Barbara v. Adamson*, 27 Cal.3d 123, 164 Cal.Rptr. 539, 610 P.2d 436 (1980) (a restrictive definition would violate state constitution); *Oliver v. Zoning Comm'n of Town of Chester*, 31 Conn.Sup. 197, 326 A.2d 841, 845 (1974); *Douglas County Resources, Inc. v. Daniel*, 247 Ga. 785, 280 S.E.2d 734 (1981) (broad definition in ordinance); *Linn County v. City of Hiawatha*, 311 N.W.2d 95 (Iowa 1981); *Malcolm v. Shamie*, 95 Mich.App. 132, 290 N.W.2d 101 (1980); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 25-26 (Minn.1981); *State ex rel. Region II Child & Family Services, Inc. v. District Court*, 187 Mont. 126, 609 P.2d 245 (1980); *Knudtson v. Trainor*, 216 Neb. 653, 345 N.W.2d 4 (1984) (adopting trial court opinion which quoted with approval a broad definition of "family"); *State v. Baker*, 81 N.J. 99, 405 A.2d 368 (1974) (restrictive definition would violate state constitution); *Saunders v. Clark County Zoning Dept.* 66 Ohio St.2d 259, 421 N.E.2d 152, 155 (1981); *Gregory v. State, Dept. of Mental Health*, 495 A.2d 997 (R.I.1985); *Mongony v. Bevilacqua*, 432 A.2d 661 (R.I.1981); *Collins v. City of El Campo*, 684 S.W.2d 756, 760 (Tex.App.1984); *Crowley v. Knapp*, 94 Wis.2d 421, 288 N.W.2d 815 (1980). See also *Craig v. Bossenbery*, 134 Mich.App. 543, 351 N.W.2d 596 (1984) (covenant not enforceable as a matter of public policy); *Crane Neck Ass'n v. New York City/Long Island County Services Group*, 61 N.Y.2d 154, 472 N.Y.S.2d 901, 460 N.E.2d 1336 (1984) (covenant not enforceable as a matter of public policy). But cf. *Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning and Zoning Comm'n*, 252 Ga. 484, 314 S.E.2d 218 (1984) (explicit definition of "family" controlling); *Omega Corp. of Chesterfield v. Malloy*, 228 Va. 12, 319 S.E.2d 728 (1984) (court held that home was not a family because of the type of supervision by counselors who were government employees). See generally Brussach, Group Homes, Families, and Meaning in the Law of Subdivision Covenants, 16 Ga.L.Rev. 33 (1981); Guernsey, The Mentally Retarded & Private Restrictive Covenants, 25 William & Mary L.Rev. 421 (1984); Scott, A. Psycho-social Analysis of the Concept of Family as Used in Zoning Laws, 88 Dick.L.Rev. 368 (1983); N. Williams, American Land Planning Law ch. 52, at Supp. 85 (1974 and Cum. Supp. 1985) (collecting cases); Annot., Community Residence For Mentally Disabled Persons as Violation of Restrictive Covenants, 41 A.L.R.4th 1276 (1985); Annot., What Constitutes a "Family" Within Meaning of Zoning Regulation or Restrictive Covenant, 71 A.L.R.3d 693 (1976). Recently, the United States Supreme Court held that the application of a particular

ordinance to prohibit a group home for mentally disabled persons was unconstitutional. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). See generally Connor, Zoning Discrimination Affecting Retarded Persons, 29 Wash.U.J.Urb. & Contemp.Law 67 (1985).