IN THE SUPREME COURT OF THE
STATE OF FLORIDA

TOM WOOD and PEGGY WOOD, his wife,

Petitioners,

v.

RAYMOND G. DOZIER, JR., and CAROLYN S. DOZIER, his wife,

Respondents.

Case No. 63,879

BRIEF OF AMICI CURIAE

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT	8
I. THE COURT SHOULD DECLINE DISCRETIONARY REVIEW	8
II. THE AVONDALE RULE SHOULD BE REAFFIRMED AS A PRINCIPLE OF CONTINUING VITALITY AND THE DISTRICT COURT DECISION SHOULD BE APPROVED	11
A. This Court Should Not Now Retreat To Pre-Avondale Principles	12
B. Acopian and Carlson Did Not Criticize Or Reject Avondale	16
C. The Restrictive Covenant Has Not Outlived Its Usefulness	18
D. Enforcement Of The Covenant In This Case Is Not Inequitable	19
E. Other Jurisdictions Follow The Avondale Rule	23
F. The Avondale Rule Does Not Lead To Absurd Results	26
III. THE DOCTRINE OF UNCLEAN HANDS DOES NOT PRECLUDE THE DOZIERS FROM ENFORCING THE RESTRICTION	28
IV. THE "PARTIAL RELEASE" GRANTED BY THE TRIAL COURT IS NOT PROPER	29
CONCLUSION	33
CERTIFICATE OF SERVICE	34

TABLE OF CITATIONS

	Page
Acopian v. Haley, 387 So.2d 999, 1001 (Fla. 5th DCA 1980), pet. for rev. denied, 392 So.2d 1375 (Fla. 1981)	3,8,10, 11,14,15,16, 17,18,19,21
Allen v. Avondale Co., 135 Fla. 6, 185 So. 137 (1938)	8,9,10,11, 12,14,15,16, 17,18,19,20, 23,24,25,26, 27,33
Askew v. Sonson, 409 So.2d 7, 15 (Fla. 1981)	9
Atla-Cliff Co. v. Spurway, 113 Fla. 633, 152 So. 731, 732 (1933)	9
Baker v. Field, 163 So.2d 42, 44-45 (Fla. 2d DCA 1964)	14,21
Barton v. Moline Properties, Inc., 121 Fla. 683, 164 So. 551, 556 (1935)	3,10,12,13, 14,15,19
Batman v. Creighton, 101 So.2d 587, 593-94 (Fla. 2d DCA), cert. denied, 106 So.2d 199 (Fla. 1958)	19,21
Borgman v. Markland, 318 Mich. 676, 29 N.W.2d 121 (1947)	31
Carlson v. Kantor, 391 So.2d 342 (Fla. 4th DCA 1980)	10,12,14,15, 16,17,18,
Crissman v. Dedakis, 330 So.2d 103, 105 (Fla. 1st DCA 1976)	14,20
Crowl v. McDuffie, 134 So.2d 542 (Fla. 1st DCA 1961)	28,29
Cushing v. Lilly, 315 Mich. 307, 24 N.W.2d 94 (1946)	30,31

Dozier v. Wood,
431 So.2d 184 (Fla. 1st DCA 1983) 1

Forman v. Florida Land Holding Corp.,
102 So.2d 596, 598 (Fla. 1958) 9

Lebo v. Johnson,
349 S.W.2d 744 (Tex. Civ. App. 1961) 23,24

Moore v. Stevens,
90 Fla. 879, 106 So. 901, 904 (1925) 22

Morris v. Nease,
238 S.E.2d 844 (W.Va. 1977) 31

Murphy v. Davis,
305 S.W.2d 218, 226 (Tex. Ct. App. 1957) 23-24

Novack v. Novack,
195 So.2d 199, 200 (Fla. 1967) 8

Old Plantation Corp. v. Maule Industries,
68 So.2d 180, 183 (Fla. 1953) 9

Ortiz v. Jeter,
479 S.W.2d 752, 758 (Tex. Ct. App. 1972) 23

Osius v. Barton,
109 Fla. 556, 147 So. 862 (1933) 10,12,13,14

Pancho Realty Co. v. Hoboken Land & Improvement Co.,
25 A.2d 862 (N.J. Misc. 1942) 24,25

Pilafian v. Cherry,
355 So.2d 847 (Fla. 3d DCA 1978) 28,29

Rice v. Brehm,
287 N.Y.S. 648 (N.Y. App. Div. 1935) 25

Rick v. West,
228 N.Y.S. 195 (N.Y. App. Div. 1962) 25

Scaling v. Sutton,
167 S.W.2d 275, 280 (Tex. Ct. App. 1942) 24

Staninger v. Jacksonville Expressway Authority,
182 So.2d 483, 495 (Fla. 1st DCA 1966) 20

Stein v. Darby,
134 So.2d 232, 237 (Fla. 1961) 8

Stephl v. Moore,
94 Fla. 313, 114 So. 455, 456 (1927) 22

Tolar v. Meyer,
96 So.2d 554, 556 (Fla. 3d DCA 1957) 20

Van Sant v. Rose,
103 N.E. 194 (Ill. 1913) 24

Vetzel v. Brown,
86 So.2d 138, 140 (Fla. 1956) 14,15

Wahrendorff v. Moore,
93 So.2d 720, 722 (Fla. 1957) 20

Walker v. Sanderson,
204 N.E.2d 108 (Mass. 1965) 24

Waller v. First Savings & Trust Co.,
103 Fla. 1025, 138 So. 780, 783 (1931) 9

Welitoff v. Kohl,
147 A. 390, 392 (N.J. 1929) 25

Wolff v. Fallon,
269 P.2d 630 (Cal. 1st DCA 1954),
aff'd, 284 P.2d 802 (Cal. 1955) 26,31,32

Zirin v. Charles Pfizer & Co.,
128 So.2d 594, 597 (Fla. 1961) 8

OTHER AUTHORITIES

Article II, section 7, Florida Constitution 10-11

Article V, section 3(b)(4), Florida Constitution 1,8

Fla.R.App.P. 9.210(c) 2

Fla.R.App.P. 9.220 1

Section 161.053(1), Fla. Stat. (1981) 11

INTRODUCTION

This cause is before the Court for review of the decision in Dozier v. Wood, 431 So.2d 184 (Fla. 1st DCA 1983)[A 1], which the First District Court of Appeal certified on rehearing as one that passes upon a question of great public importance [A 7]. Jurisdiction is predicated on article V, section 3(b)(4) of the Florida Constitution.

The Petitioners here are the Woods, who were Defendants in the trial court and appellees in the district court. The Respondents here, the Doziers, were plaintiffs in the trial court and appellants below. Like the Petitioners and Respondents, Amici are owners of lots in the residential subdivision that is the subject of this controversy. The same Amici participated in the district court and have been granted leave to appear here in support of Respondents by this Court's order of August 5, 1983.

For ease of reference, Amici have included pertinent portions of the record, including the final orders of both lower courts and the transcript of the testimony, in an Appendix which accompanies this brief. See Fla.R.App.P. 9.220. Accordingly, all record references will be to the Appendix and will be signified by the symbol: [A ___].

STATEMENT OF THE CASE AND FACTS

In accordance with Rule 9.210(c), Amici will not reiterate the facts in this brief, but will rely upon the statement in the district court's opinion. Because the elaborate recitation of facts contained in the Woods' Initial Brief is a selective interpretation that tends to convey some incomplete or inaccurate impressions, however, Amici must clarify certain points.

The Woods make much of the fact that the Doziers' two-story house contains complete living units both upstairs and downstairs that "may be used for two separate residences," and that the Doziers have placed three aluminium storage sheds on their double lot. [Petitioners' Brief at 2.] What the Woods neglect to mention, however, is that the Doziers built a complete living unit downstairs solely for their own use, and that it had only been occupied by their daughter and her son for a few months [A 21]. In any event, the existence of two separate living units cannot be deemed a material violation in light of the fact that the restrictive covenant expressly contemplates a garage apartment in addition to the principal residence.

As for the aluminum storage sheds, they are normal appurtenances to the residence. These ten-foot by twenty-foot sheds cannot be used for living quarters [A 28], and can hardly be equated with the quadraplex rental units that the Woods intend to erect. Nor could it fairly be said that the Doziers' storage sheds tend to change the character of the subdivision from residential to commercial.

The Woods make a point of the fact that they have previously violated the restriction by adding a few additional units to the Driftwood Motel in 1976 and 1977 [Petitioners' Brief at 3]. In stating that "[t]hese additions. . .occurred after the purchase of property by the Respondents Dozier in 1976" [Id.], the Woods are apparently trying to suggest that they can meet the requirements of the very rule they challenge by relying on their own changes made since they acquired the Driftwood Motel. The complete answer to this implication is that changed conditions brought about by the party seeking relief from the residential restriction cannot be considered--[1] i.e., the Woods cannot "boot-strap" their own violations as the basis for removing the restriction.[2] It is also noteworthy that the units previously constructed by the Woods were merely added onto the existing structure, and at least one resident testified that there "hasn't been any appreciable change." [A 35.] The proposed units, by contrast, involve the construction on separate lots of detached "free standing" buildings [A 60], which would block the view of the ocean by some residents [A 38, 52].

The Woods further state that their purchase of the two vacant lots in 1981 for the purpose of constructing additional

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[1]Barton v. Moline Properties, Inc., 121 Fla. 683, 164 So. 551, 556 (1935); Acopian v. Haley, 387 So.2d 999, 1001 (Fla. 5th DCA 1980), pet. for rev. denied, 392 So.2d 1375 (Fla. 1981).

[2]As for the original building of the Driftwood in the early 1950's, one witness testified that a lawyer was consulted about trying to stop the construction, but by the time he responded the lawyer indicated that it was too late to do anything [A 39].

rental units was "based on a rezoning of the beach side of Highway 98 for commercial purposes and based on the changed condition of the surrounding property and neighborhood." [Petitioners' Brief at 3.] Aside from the fact that there was no testimony to establish the Woods' alleged reliance on the rezoning in purchasing the new lots,[3] the Woods neglect to mention that any such reliance would have been totally unfounded because the zoning ordinance expressly provided for existing plat restrictions to govern over the more lenient zoning code--a provision that the zoning board has in fact applied with respect to the neighboring subdivision, Unit 4[A 85].[4] Just as the Woods' deed to the new lots was made subject to the plat restriction [A 11, 30-31], so was the new zoning ordinance on which they purportedly relied.

With respect to the "changed condition of the surrounding property and neighborhood," it must be observed that the most

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[3]The Petitioners' Brief makes reference to the testimony of Ernest Wysong, the former chairman of the Planning and Zoning Board for Mexico Beach, who explained why the beach side of Highway 98 in Unit 3 was rezoned commercial while the rest of Unit 3 remained residential. Significantly, Wysong testified that the zoning board's action was based on the assumption that the increased values of the beach property would make it an ideal place to develop "looking down the highway twenty years" with the trend "towards townhouses or multi-family dwellings" [A 72, 76]. Moreover, he "felt it was zoned commercial because we had actually no district [classification] that would correspond to what was required in Unit 3"; the board intended to include "multi-family dwellings, houses, etcetera," but not "bars and night clubs, etcetera." [A 76.]

[4]At the final hearing in the trial court, Tom Woods testified that he was not aware of the plat restrictions when he purchased the two vacant lots in 1981, although the deed expressly provided that the conveyance was subject to restrictions and restrictive covenants shown on the recorded plat [A 11, 30-31].

serious of the alleged nonconforming uses relied upon by the Woods, including the "television repair business" and the "commercial warehouse business" referred to on page 5 of their brief, are located outside of Unit 3, and thus are not subject to the restrictive covenant [A 24-25, 72]. While there is a Methodist Church and a combination apartment/real estate office in Unit 3, it is significant that both are located at intersections on the extreme outside perimeter of the subdivision--[5] not "embedded" in the heart of the neighborhood like the two lots on which the Woods plan to expand their motel business. [6]

The only other non-residential uses of property in Unit 3 cited by the Woods are manifestly inconsequential. The fact that at one time a resident used his beach house to show a line of hospital equipment while entertaining his customers [A 51] is clearly insufficient to constitute an abandonment of the residential restriction and general acquiescence in commercial use. Although Mrs. Wood stated that there was an insurance office in the Sandman, a single-story building containing four apartments, the Doziers were not aware of it because the sign in front advertises apartments [A 67, 26].

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[5]On the plat appearing at A 10, the Methodist Church is located on Lot 6 of Block 5, at the upper left-hand corner of the subdivision, and is colored yellow [A 24]; Mrs. Thompson's combination apartment/real estate office, which was originally a duplex, is situated on Lot 1 of Block 1, at the far right-hand side, and is colored green [A 23, 64, 74-76].

[6]On the plat [A 10], the Woods' proposed construction of the new quadraplexes would be on Lots 1 and 2 of Block 7 [A 11], at the middle of the beachfront row and colored pink.

Contrary to the assertion at page 5 of the Woods' Initial Brief, Mr. Dozier did not admit "that he was informed when he purchased his residential lot that there were commercial type structures in the subdivision." What Mr. Dozier said was that he was informed of the Driftwood Motel and was aware of the Sandman Apartments, but that in his understanding "[a]partments are family dwellings or residential buildings." [A 23.] Similarly, as to the presence of some duplexes and mobile homes in the area, the record makes clear that these were understood or perceived by the Doziers and other lots owners as being "residences" within the meaning of the restrictive covenant and the applicable zoning regulations, even though they may have been objectionable to the existing residents' tastes [A 28, 36, 47-48].

When the evidence is thus viewed in its entirety rather than selectively, the facts clearly support the trial court's conclusion that the subdivision "has not disregarded the plat restrictions to the extent to allow commercial developments." [A 8.] The Woods manifestly failed to sustain their burden of proving a "radical change in the neighborhood" or such acquiescense by the lot owners in violations of the residential restriction as would entitle the Woods to expand the size of their motel business from 11 to 23 units.

It is uncontroverted that each of the present lot owners who resides in Unit 3 and who testified at the hearing (other than the Woods) declared that they purchased the property in reliance on the residential restriction, and that they felt

the proposed construction would have a detrimental effect [A 16, 18, 33-34, 36, 37-39, 45-46, 49-50, 52]. Confirming their apprehensions, an expert real estate appraiser of the same area testified that he had inspected the property in Unit 3 and concluded "that these improvements would constitute some sort of economic obsolescence which would mean that the value of property which was improved for primarily residential occupancy purposes, single family residential purposes would be devalued from the improvements." [A 57.] He also stated: "It appears that the area around this subdivision is primarily residential and or almost completely residential aside from this [Driftwood] motel." [A 59.] Finally, as the district court concluded, "it is clear that all of the material changes which occurred, occurred prior to 1975, the year the Woods bought the motel." [A 6.] Thus, the material facts are not seriously disputed.

ARGUMENT

I. THE COURT SHOULD DECLINE DISCRETIONARY REVIEW

Although the certificate of the district court designating its decision as one that passes upon a question of great public importance provides a predicate for jurisdiction in this Court under article V, section 3(b)(4) of the Florida Constitution, that jurisdiction is discretionary. E.g., Zirin v. Charles Pfizer & Co., 128 So.2d 594, 597 (Fla. 1961). The Court may decline to accept the case if it determines that review of the district court decision is unwarranted or that the certified question is not fraught with great public importance. Novack v. Novack, 195 So.2d 199, 200 (Fla. 1967); Stein v. Darby, 134 So.2d 232, 237 (Fla. 1961).

Amici submit that the Court should decline review in this instance because, as hereinafter demonstrated, the district court properly applied the rule of Allen v. Avondale Co., 135 Fla. 6, 185 So. 137 (1938), to a case (a) which is clearly within that rule, (b) which suggests no great public interest in revisiting that rule, and (c) which on its facts should not be decided differently even if that rule were now abrogated. Since Avondale was never cited to the trial court,[7] it is impossible to deter-

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[7]Although the same principle was argued by citation to Acopian v. Haley, 387 So.2d 999 (Fla. 5th DCA 1980), pet. for rev. denied, 392 So.2d 1375 (Fla. 1981), in the Doziers' Amended Motion For Rehearing and supporting memorandum, the trial court refused even to hear or consider argument on the merits of the rehearing motion [A 89-93].

mine what effect that principle might have had on the balancing of equities even if the trial court had consciously and deliberately rejected the Avondale rule as controlling in itself.

The Avondale rule requires that one who purchases a lot in a restricted residential subdivision and who seeks to cancel or prevent enforcement of the restriction based on a change of conditions in the neighborhood must be deemed to have taken the property with notice of changes that occurred prior to the purchase, and therefore is entitled to rely only on subsequent changes in seeking relief from the covenant. 185 So. at 138. While urging that this rule should be abrogated, the Woods candidly concede that Florida courts have consistently adhered to Avondale for nearly half a century. [Petitioners' Brief at 12.]

This Court has given a broad application to the principle of stare decisis, see Old Plantation Corp. v. Maule Industries, 68 So.2d 180, 183 (Fla. 1953), particularly where the judicial precedent has been left undisturbed for so long as to become a rule of property. E.g., Askew v. Sonson, 409 So.2d 7, 15 (Fla. 1981); Alta-Cliff Co. v. Spurway, 113 Fla. 633, 152 So. 731, 732 (1933)(on Petition For Rehearing). While reexamination of an established rule may be warranted "in light of demonstrably unequitable consequences which have never before been considered or taken into account," Waller v. First Savings & Trust Co., 103 Fla. 1025, 138 So. 780, 783 (1931), prior decisions are generally adhered to "unless for some compelling reason it becomes appropriate to recede therefrom." Forman v. Florida Land Holding Corp., 102 So.2d 596, 598 (Fla. 1958).

The present case poses no "demonstrably unequitable consequences" that differ significantly from those presented in other cases where Avondale has been unhesitatingly applied, so there is no need to reexamine the rule in the context of this proceeding. Certainly, the Woods have not shown any "compelling reason" that would constitute a basis for receding from Avondale.

Finally, to the extent that there may be a public interest in the controversy, that interest dictates that the Avondale rule be left intact, because its abrogation will only hasten the demise of Florida's most valuable natural resource. The property at issue here is among the last remaining stretches of breachfront property that has not undergone extensive commercial development. The same kind of property was involved in Acopian v. Haley, 387 So.2d 999 (Fla. 5th DCA 1980), pet. for rev. denied, 392 So.2d 1375 (Fla. 1981) (acknowledging Avondale but noting that its logic had been questioned, 387 So.2d at 1001 and n.1), and in Carlson v. Kantor, 391 So.2d 342 (Fla. 4th DCA 1980), which the Woods contend departed from Avondale.[8]

The public policy on this issue is of such importance that it has been elevated to the status of organic law. Article II, section 7 of the Florida Constitution declares: "It shall be the policy of this state to conserve and protect its natural

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[8]Perhaps not surprisingly, a residential restriction on property in a subdivision located on or near the beach was also at issue in Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933) and Barton v. Moline Properties, Inc., 121 Fla. 683, 164 So. 551 (1935), the two pre-Avondale cases from which the Woods' proposed alternative rule originated.

resources and scenic beauty." The Florida Legislature has enacted law recognizing "that the beaches of this state...represent one of Florida's most valuable natural resources and that it is in the public interest to preserve and protect them from imprudent construction...." §161.053(1), Fla. Stat. (1981). Within the past two years, the Governor of Florida has campaigned extensively for the much-publicized "Save Our Coasts" program, which addresses the same problem.

In a smaller but no less significant way, the Avondale rule furthers this public policy. By ensuring the vitality of privately-enforced restrictions on residential beachfront property, the principle operates to retard the massive commercial development that threatens to make a Miami Beach of Florida's entire coastline. Avondale is no less valid today than it was when decided. Indeed, if there is a public interest in this controversy, it dictates the necessity of preserving the Avondale rule now more than ever. That end can best be served if the Court declines review and allows the district court decision to stand undisturbed.

II. THE AVONDALE RULE SHOULD BE REAFFIRMED AS A PRINCIPLE OF CONTINUING VITALITY AND THE DISTRICT COURT DECISION SHOULD BE APPROVED

In support of their position that this Court should overrule Avondale and adopt a rule allowing them to rely on prior changes in Unit 3, the Woods contend (A) that the Avondale rule has been criticized by two district courts in Acopian and

Carlson; (B) that the more sound rule is founded upon the theory of "discharge of contractual obligation by a frustration of the contractual object," as enunciated in Osius v. Barton, 109 Fla. 556, 1447 So. 862 (1933) and Barton v. Moline Properties, Inc., 121 Fla. 683, 164 So. 551 (1935); (C) that the restrictive covenant in this case was not limited in duration, and so a reasonable time limitation should be inferred under Barton v. Moline Properties; (D) that the application of Avondale in this case is inequitable because the Woods relied on changes in the conditions and zoning, and because it prevents them from a use that would be in harmony with the neighborhood or at least not inconsistent with other violations in which the residents have acquiesced; (E) that only one other jurisdiction follows the rule of Avondale; and (F) that the strict application of Avondale leads to absurd results. These contentions are demonstrably without merit.

A. This Court Should Not Now Retreat To Pre-Avondale Principles

At the outset, it should be noted that the Woods are not proposing a new rule but are advocating a reversion to pre-Avondale principles. The "frustration of purpose" theory for relief from restrictive covenants was the prevailing concept that emerged out of the decisions in Osius v. Barton and Barton v. Moline Properties, both of which pre-dated Avondale. The principles enunciated in Osius and Moline Properties are of course subject to the qualification imposed by the subsequent decision

of this Court in Avondale--which the Woods concede has been consistently applied by the Florida courts since 1938. Aside from that limitation, however, the facts of those two cases were radically different from the circumstances presented here.

Both Osius and Moline Properties involved the same subdivision in Miami Beach. In both cases, the parties seeking relief had purchased the property when Miami Beach was a small residential village of less than 1000 population, but had seen their lots become surrounded by commerical development. For example, the property adjacent to the disputed lot in Moline Properties was occupied by a casino, which included a cabaret, restaurant, and roadhouse. 164 So. at 554. In short, the situation was similar to the "last vacant lot on Miami Beach" hypothetical that the Woods pose at pages 18-19 of their Initial Brief.

When the Court first addressed the problem in Osius, it upheld the right of the lot owner to seek relief from the residential restriction on the ground that where there had been an "entire change in the circumstances" or a "radical" change in the character of the neighborhood, the restriction would no longer serve a useful purpose, and thus it would be "oppressive and unreasonable" to enforce it. 147 So. at 865, 868. Significantly, however, the Court observed:

> The natural desire of householders to secure desirable home surroundings because of the growth of cities and the more crowded conditions of modern life, has led to a demand for land limited to development purposes. This natural desire has been so exploited by realtors and land companies, that restricted residential property is now becoming the rule

> rather than the exception in our cities. The legal machinery to achieve this end has been found in the main not in the ancient rules of easements or covenants, but in the activities of courts of equity in preventing fraud and unfair dealing by those who take land with notice of a restriction upon its use, so that in equity and good conscience they should not be permitted to act in violation of the terms of such restrictions.

147 So. at 867-68 (emphasis added).

In Moline Properties, the Court reached the same result on essentially similar reasoning, concluding that "because of subsequent developments and happenings in the locality over which appellee had no control,...such restrictive covenants must be construed as having run for the reasonable length of time contemplated for their enforcement." 164 So. at 556. On rehearing, however, the Court determined that the principles applied in Osius and Moline Properties should be qualified by the following statement:

> Where, however, it appears that such covenant or restriction is for the exclusive benefit of and that it is still of substantial value to the dominant lot, notwithstanding the changed condition of the neighborhood in which the said lot is situated, a court of equity will restrain its violation.

Id. at 557.

Three years later, the Court added the further qualification in Avondale that the party seeking relief from the covenant could not rely on changes that occurred prior to the purchase of the lot. 185 So. at 138. That rule has been adhered to ever since. Vetzel v. Brown, 86 So.2d 138, 140 (Fla. 1956); Baker v. Field, 163 So.2d 42, 44-45 (Fla. 2d DCA 1964); Acopian; Carlson; cf. Crissiman v. Dedakis, 330 So.2d 103, 105 (Fla. 1st

DCA 1976). The rule proposed by the Woods, which was picked up in Acopian and Carlson, is simply a throwback to Osius and Moline Properties.

Thus, the real issue posed by the certified questions and by the Woods is whether this Court should now retreat to pre-Avondale principles and reject the rule that purchasers take with notice of past changes. Amici urge that Avondale should retain its vitality for the reasons articulated in section I of this brief. To abrogate the rule now would run counter to the public policy of this state and would make easier that which the legislative and executive branches are trying to make more difficult--the commercialization of Florida's coasts. In addition, while the Woods suggest that restrictive covenants are not favored, this Court has observed in passing upon a restriction for residential purposes that "[s]uch restrictions are favored by our public policy today...." Vetzel v. Brown, 86 So.2d 138, 140 (Fla. 1956).

The wisdom of the qualification imposed by this Court in Avondale on the right to obtain equitable relief from a residential restriction has withstood the test of time, and should not be rescinded even if it occasionally yields a harsh result. Contrary to the Woods' contention, the rule does not penalize new purchasers, but merely ensures that any relief they obtain is won by the weight of their own accumulated equities. To ascertain the value of the Avondale rule to landowners throughout Florida, the Court need only look at how it has served the longtime residents of Unit 3 in Mexico Beach in this case as a mechanism for

preserving the character of their neighborhood and the quality of life for which they bargained.

B. Acopian And Carlson Did Not Criticize Or Reject Avondale

The Woods' reliance on Acopian and Carlson as authority for overturning the district court's decision in this case is misplaced for several reasons. First, the court in Acopian clearly acknowledged the correctness of Avondale in ruling that the trial court erred by permitting reliance on pre-acquisition changes. 387 So.2d at 1001. Although noting that the logic of Avondale has been questioned in a continuing legal education publication, Id. at n.1, the court itself did not criticize or question the principle. Moreover, the trial court's failure to apply Avondale was deemed harmless error because many of the changes relied upon did in fact occur after the purchase of the property.

Finally, it should be noted that the Acopian court reversed the trial judge and held the restrictive covenant enforceable, notwithstanding that (a) one residence in the subdivision was also being used as a real estate office without objection by the other residents; (b) there had been material changes in the adjacent subdivisions; (c) the zoning of the subdivision had been changed so as to accommodate the proposed condominium; and (d) the restriction had been in effect since 1944. These circumstances are remarkably similar to those on which the Woods rely in the present case, yet they were insuffi-

cient to prevent enforcement of the residential restriction even though Avondale was not applicable.

While the Woods, and apparently the district court as well, have perceived the Carlson decision as an endorsement of the "frustration of purpose" principle and a rejection of Avondale, Amici do not share that view. The Carlson court did refer to the footnote in Acopian that discusses the questioning of the Avondale rule in the CLE publication. In the next paragraph, however, the Carlson opinion turns to a separate aspect of Acopian--i.e., the effect of changes in the surrounding neighborhood on the subdivision. The court then observes that the trial court had "similarly limited its order" with respect to the plaintiff's proof of deterioration of the housing and commercialization of the surrounding area. In this context, the Carlson court remanded the case so that the trial could could "have the opportunity of weighing all of the equities contained in the record, including the facts under which the plaintiffs purchased the property, the present nature and character of the lots, and all other factors which might bear upon a resolution of this cause...." 391 So.2d at 343.

It is not at all clear that the foregoing directions were intended by the court in Carlson to permit consideration on remand of pre-acquisition changes, as the Woods suppose. The court's focus on "the facts under which the plaintiffs purchased the property" and "the present nature and character of the lots" tends to suggest an examination confined to changes that occurred between the time of purchase and the present, consistent with

Avondale. Although the Carlson court acknowledged the application of Avondale in Acopian and the questioning of the rule in the CLE publication, it did not criticize the rule itself; nor did it purport to render a conflicting decision; nor did it certify the question, as it was obliged to do if it disagreed with Avondale.

Amici respectfully disagree with the district court's characterization of Acopian and Carlson as having "criticized" the Avondale rule. The Acopian court clearly indicated that it would have reversed the trial court for failing to apply the rule had there not been post-acquisition changes to render it inapplicable. The Carlson court noted that the trial court had applied the rule but did not state that it was error to do so. Both courts referred to a non-judicial questioning of the rule, but neither suggested that it agreed with that questioning, and neither directly criticized the rule in the opinion. Consequently, Amici believe that the entire certification of this case may have been predicated on an unfounded assumption or misapprehension by the district court--yet another reason why the proper disposition of this case is a denial of discretionary review.

C. The Restrictive Covenant Has Not Outlived Its Usefulness

As for the contention that the Unit 3 restriction has outlived its utility, Amici do not argue with the general proposition that the duration of restrictive covenants should be given "some reasonable limitation adapted to the nature of the case"

and "the purpose of their imposition." Barton v. Moline Properties, 164 So. at 556. In a case that involved far more commercial intrusion than has occurred in Unit 3, however, a Florida court has enforced a residential restriction that was 45 years old. Batman v. Creighton, 101 So.2d 587, 593-94 (Fla. 2d DCA), cert. denied, 106 So.2d 199 (Fla. 1958). The restriction in this case has been in effect since 1948--four years less than the covenant enforced in Acopian--but the critical fact established by the testimony at trial is that the residents continue to rely on it to preserve the residential character of the subdivision, which remains essentially intact.

D. Enforcement Of The Covenant In This Case Is Not Inequitable

The Woods' contention that application of Avondale in this case would be inequitable is nothing more than an attempt to reargue the facts in a proceeding where the Court's consideration should properly be confined to the legal issue (if, indeed, there is one that merits review). Their repeated recitations about reliance on changes in the neighborhood and in the zoning have been adequately clarified, and thereby refuted, in Amici's statement of the facts and case. Even assuming that the Woods' characterization of the facts were accurate, however, the "changes" on which they purportedly relied would be legally insufficient to warrant relief from the restriction here.

While claiming that they relied on the change in zoning as a basis for buying the lots and making plans for doubling the

number of units, the Woods do not dispute that the ordinance on which they purportedly relied expressly provided that the restrictive covenant would prevail. It is a well-settled rule that a restrictive covenant limiting the use of property to residential purposes takes precedence over a zoning ordinance that permits commercial or other less restricted uses. See, e.g., Wahrendorff v. Moore, 93 So.2d 720, 722 (Fla. 1957); Avondale, 185 So. at 138 (Brown, J., concurring); Tolar v. Meyer, 96 So.2d 554, 556 (Fla. 3d DCA 1957); see also Staninger v. Jacksonville Expressway Authority, 182 So.2d 483, 485 (Fla. 1st DCA 1966).

In addition to the zoning, the Woods assert reliance on the existence of some nonresidential use in areas outside the subdivision. Although it is true that relief may be granted where there is "extensive and uncontroverted evidence of drastic changes in the zoning and uses of the properties, though outside [the subdivision], adjacent to and virtually surrounding [the purchaser's] property," Crissman v. Dedakis, 330 So.2d 103, 104 (Fla. 1st DCA 1976), those circumstances clearly do not exist here. In any event, changes in surrounding neighborhoods would have little impact on the Woods' property, which is insulated in the heart of the residential subdivision.

As for "changes" within the subdivision, the only arguably "commercial" uses are the Methodist Church and a combination apartment/real estate office, both of which are located at intersections on the outer perimeter of Unit 3, and an alleged insurance office located in the Sandman Apartments. The presence of the church in Unit 3 would not warrant relief from the

restriction even if it had been added since the Woods acquired their property. See Baker v. Field, 163 So.2d 42, 44 (Fla. 2d DCA 1964). As previously noted, the use of a real estate office without objection is also insufficient grounds for removing the covenant, Acopian, 387 So.2d at 1002; and it would be difficult to conclude that an insurance office--if one does in fact exist--constitutes any greater violation. In any event, the fact that a few lots at intersections on the perimeter of a subdivision have been converted to nonresidential use does not in itself warrant relief from the restriction so long as the integrity of the restriction has been generally maintained within the subdivision. See Batman v. Creighton, 101 So.2d at 588-89.

Finally, the Woods assert that the presence of some duplexes and multi-family dwellings in Unit 3 constitutes such a violation of the residential restriction that it would be inequitable to deny them the right to double the size of their motel. Whether a single building that contains two, three, or four separate apartments is a "residence" within the meaning of the restriction, however, is a matter of interpretation; a complex of several detached buildings containing 23 units definitely is not. Some lot owners in Unit 3 did not consider these structures as being in violation of the covenant, and given the context they may well have been right.

As this Court recognized in a similar dispute, "[t]he word 'residence' is one of multiple meanings," and the intention of a restrictive covenant limiting the use of land to "residential" must be determined from "the context in which it is used."

Moore v. Stevens, 90 Fla. 879, 106 So. 901, 904 (1925). In Moore, the Court also acknowledged that some business use of a residence will not constitute a violation of such a restrictive covenant where that use does not result in appreciable damage or material injury to the neighborhood. Id. Because it is a common practice for owners of beach houses to rent the units when they are not using them and to subdivide large houses into apartments for summer rentals, the term "residence" as used in this context might very well include the kinds of uses which the Woods contend are nonconforming.

In any event, the law in Florida is long settled that acquiescence in a few violations of a restrictive covenant will not warrant relieving a purchaser from the restriction where those violations do not "materially affect the rights" of the other residents in preserving the general scheme and symmetry of the development. Stephl v. Moore, 94 Fla. 313, 114 So. 455, 456 (1927). The record clearly reflects that the few violations of the restriction asserted by the Woods as a "change of conditions" or an "abandonment" of the covenant are not so extensive or "radical" as to materially alter the essential character of the subdivision. In particular, the expert's testimony was uncontroverted that the area is almost completely residential except for the Driftwood Motel.

Because the Woods cannot rely on their own violations of the covenant as a basis for avoiding the restriction, and because the alleged violations either before or after they purchased do not rise to the level of a legally sufficient change

of conditions or abandonment, their plea for equity is without merit.

E. Other Jurisdictions Follow The Avondale Rule

The Woods' statement that Avondale is followed in only one other jurisdiction is inaccurate. Courts in at least five other jurisdictions have rendered decisions that explicitly or implicitly support the rationale of Avondale.

The most prominent of these jurisdictions is Texas. In the case of Lebo v. Johnson, 349 S.W.2d 744 (Tex. Civ. App. 1961), the court was faced with a situation similar to that of the present case. In Lebo, a suit had been brought to cancel property restrictions on the ground of changed conditions. At the trial level, the plaintiffs had succeeded in cancelling the restrictions and the defendants, surrounding property owners, appealed. The Court of Appeals reversed the judgment, holding that "Appellees cannot claim as changed conditions those that had already taken place at the time they purchased their lots and received the deeds containing a reference to the restriction of residential use only." Lebo, 349 S.W. 2d at 752. The court pointed out that once the restrictions were lifted, in all likelihood the subdivision would gradually be commercialized until it was no longer suitable for residential use. The holding of Lebo, a restatement of the Avondale rule, has been explicitly followed in a number of Texas cases. See, e.g., Ortiz v. Jeter, 479 S.W.2d 752, 758 (Tex. Ct. App. 1972); Murphy v. Davis, 305 S.W.2d

218, 226 (Tex. Ct. App. 1957); Scaling v. Sutton, 167 S.W.2d 275, 280 (Tex. Ct. App. 1942).

The Supreme Court of Massachusetts has implicitly recognized and applied the Avondale rule in the case of Walker v. Sanderson, 204 N.E.2d 108 (Mass. 1965). In that case, the court was faced with a claim that the character of the surrounding neighborhood had so changed that a restrictive covenant should no longer be enforced. The trial judge had found that the purpose of the restriction was to preserve an adjoining lake, not to preserve the residential character of the neighborhood. Since the lake had disappeared, the judge found that the covenant no longer served a purpose and that it would be inequitable to enforce the restriction.

The Supreme Court reversed, finding that the primary aim of the restrictive covenant was to maintain the residential character of the neighborhood. As this residential character had not yet been lost, the covenant was still of value and was entitled to be enforced. As to the claim that it would be harsh and unjust to enforce the covenant, the court replied: "The plaintiff shows no inequity. He bought in 1961 with knowledge of the restriction and of the new road and the loss of the pond." Walker, 204 N.E.2d at 111.

An early Illinois case also implicitly recognized the Avondale rule, Van Sant v. Rose, 103 N.E. 194 (Ill. 1913), as have the courts of New Jersey. In Pancho Realty Co. v. Hoboken Land & Improvement Co., 25 A.2d 862 (N.J. Misc. 1942), the court was asked to enforce a restrictive covenant that did not permit a

property owner to operate a saloon. The property owner claimed that because of the general deterioration of the Hoboken area, especially in his neighborhood, the purpose of the covenant had been defeated. The court did not accept this argument, pointing out "that business change started more than twenty years ago and presumably complainant was aware of its results when it purchased its property, for one contemplating the acquisition of business property does not actually purchase without inquiry or investigation of surrounding business conditions." Pancho, 25 A.2d at 865. The restrictive covenant was therefore enforced. See also, Welitoff v. Kohl, 147 A. 390, 392 (N.J. 1929).

Finally, New York courts have lent implicit support to the Avondale rule. See Rice v. Brehm, 287 N.Y.S. 648 (N.Y. App. Div. 1935); Rick v. West, 228 N.Y.S. 195 (N.Y. App. Div. 1962). In each of these cases, a claim of changed conditions was asserted to defeat certain restrictive covenants. The court in each case found that because the restrictive covenants had been reaffirmed in the deeds to the disputed property, the only changes to be considered were those occurring after the execution of the deed.

Therefore, even though the precise issue of the Avondale rule has not been frequently dealt with, the rationale of the rule has consistently been endorsed by courts of other jurisdictions. All of these decisions are in accord with the basic Florida doctrine regarding the enforcement of restrictive covenants as against a claim that changed conditions make enforcement inequitable. In other states, as in Florida, the

courts have recognized that this defense is unavailing when a purchaser took with notice of both the covenant and the changed conditions in the neighborhood. The rule of Avondale should thus be reaffirmed.

F. The Avondale Rule Does Not Lead To Absurd Results

The Woods' argument that application of Avondale leads to absurd results is easily dispatched. Using the analogy of the "last vacant lot on Miami Beach," the Woods suggest that the Avondale rule should be abrogated because it would prevent the purchaser of the last undeveloped lot from relying on the fact that all the adjoining parcels contained high-rise hotels and condominiums. This analogy must be rejected for several obvious reasons.

First, the Woods' analogy poses the exact opposite of the factual situation presented by this case. Their hypothetical envisions the last conforming lot in a neighborhood of predominantly nonconforming uses, as in Wolff; this case, however, involves an attempt to expand the one significant nonconforming use in a neighborhood where the restriction for residential use has generally been honored and preserved. Second, in the Woods' analogy the neighboring landowners would clearly be estopped from enforcing the covenant by virtue of their own substantial violations of the restriction. Finally, it would be impossible for owners of the neighboring parcels in the Miami Beach hypothetical to assert any reliance on the residential character

of the neighborhood, or to show that their enjoyment of the property for the purposes contemplated by the covenant would be diminished by relieving the last vacant parcel of the restriction.

Avondale has been good law in Florida now for nearly half a century, during which time it has been faithfully applied in a number of cases. Amici submit that no absurd results have emerged in that length of time, and thus there is little to fear in the retention of the rule at this juncture.

III. THE DOCTRINE OF UNCLEAN HANDS DOES NOT PRECLUDE THE DOZIERS FROM ENFORCING THE RESTRICTION

The Woods' contention that the Doziers should not be entitled to enforce the restrictive covenant in this case because they are guilty of "unclean hands" is patently incorrect. To support their contention, the Woods cite Crowl v. McDuffie, 134 So.2d 542 (Fla. 1st DCA 1961) and Pilafian v. Cherry, 355 So.2d 847 (Fla. 3d DCA 1978), and argue that the Doziers have themselves violated the restrictive covenant by building complete living units both upstairs and downstairs in their house and by placing three aluminium storage sheds on their property.

In Pilafian, the court recognized the following limitation on the doctrine of unclean hands:

> Difficulties are found in applying this doctrine when the complainants' breach was not as significant as the violation of the provision by the Defendant. If the violation by the Plaintiff was insignificant, he may still secure equitable relief so long as the Defendant's breach was substantial and defeats the main object of the restriction.

355 So.2d at 850 (emphasis added).

Even assuming that the Doziers have violated the restriction by building a separate downstairs living unit for their own residential use and by placing three storage sheds on their property which cannot be used for a residence, the qualification enunciated in Pilafian refutes the Woods' contention that the doctrine of unclean hands is applicable here. It cannot seriously be asserted that anything the Doziers have done constitutes a violation of the magnitude that the Woods propose.

In any event, a fair reading of Crowl and Pilafian indicates that in both cases the courts relied little if at all on the theory of unclean hands. In Crowl, the court found that a summary decree was warranted because the plaintiffs failed to adduce sufficient evidence to controvert the defendant's allegation that their own garages violated the restrictive covenant. 134 So.2d at 544-45. In Pilafian, the court found that the defendant's dock actually increased the value of the plaintiff's property, and thus the requested injunction "would result in little apparent benefit to Plaintiffs but considerable cost and diminution of property value for the Defendant...." 355 So.2d at 849.

Under these circumstances, the very suggestion that the Doziers should be precluded from enforcing the covenant as against the Woods based on the equitable doctrine of unclean hands is simply preposterous, and should be summarily rejected.

IV. The "Partial Release" Granted By The Trial Court Is Not Proper

The final argument advanced by the Woods suggests that because the trial court would only allow them to build twelve units instead of the planned fourteen, that order should be reinstated as an "apportionment of the equities" that resulted in a "partial release" of the restriction. This contention is obviously transparent--the residential character of Unit 3 will be no less diminished by the reduction of two units when the motel is

still allowed to construct two free-standing buildings that will more than double the number of rental units.

To support their contention that the trial court below properly allowed "partial invalidation" of the restrictive covenant, the Woods cite cases from other jurisdictions. An examination of those decisions, however, reveals that the Woods' reliance is misplaced.

For example, in Cushing v. Lilly, 315 Mich. 307, 24 N.W.2d 94 (1946), the Michigan Supreme Court agreed that it would be inequitable to enforce restrictive covenants against the defendant's property where the defendant's four-acre parcel had been completely cut off from the residential subdivision of which it was originally a part, so that (a) the nearest house in the subdivision was 1200 feet away; (b) the defendant's parcel was no longer connected with the residential subdivision by any street; (c) the defendant's land could not been seen from the nearest house in the subdivision; and (d) the defendant's lots were more suited for use consistent with the surrounding farm land than with the separated residential area across the railroad tracks. 24 N.W.2d at 95-96.

The facts of Cushing are manifestly different from those presented here, where the nonconforming use would be in the midst of the residential subdivision, and would be disharmonious with adjoining or nearby lots. Significantly, the Michigan Supreme Court in Cushing reaffirmed the very principle that precludes the Woods from violating the restrictive covenant here:

> "Relief from very onerous restrictions because of a change in the character of the

> neighborhood will be granted only if it can be done without causing any damage to others who have purchased their property in the restricted area in reliance on the restrictions. "

24 N.W.2d at 96 (emphasis added). The uncontroverted evidence presented below established that the residents of Unit 3 purchased their property in reliance on the restrictive covenant and would be damaged, both financially and in the quality of life, by the Woods' proposed construction of new motel units.

The other cases cited by the Woods are likewise inopposite. In Borgman v. Markland, 318 Mich. 676, 29 N.W.2d 121 (1947), the defendant was permitted to use existing portions of his residence as a showroom in connection with his interior design business. Unlike the present case, the proposed use in Borgman did not entail additional commercial construction, but merely internal adaptation of a room that was "to all appearances simply a specially furnished room in his house." 29 N.W.2d at 122. In addition, the property was already located on a heavily trafficked street, and the court imposed strict limitations on the defendant's use, such as a thirty-minute time limit on certain business parking and a prohibition on advertising. Id. at 123. Similar circumstances distinguish the present case from the decision in Morris v. Nease, 238 S.E.2d 844 (W.Va. 1977), where the conversion of a lot from one nonconforming use to another did not entail any significant increase in commercial traffic.

Wolff v. Fallon, 269 P.2d 630 (Cal. 1st DCA 1954), aff'd, 284 P.2d 802 (Cal. 1955), is clearly distinguishable because the lot in question was located on a street that had

become almost entirely (883 of 963 frontage feet) commercial. 269 P.2d at 632. The differences between the situation in Wolff and the present case are underscored by the conclusions of the trial court in Wolff, affirmed by both appellate courts, that

> plaintiff's lot was not now suitable or desirable for residential use but was essentially business property, that its use for commercial purposes would not detrimentally affect the adjoining property or neighborhood and might be beneficial, and that, by reason of the changed conditions in the neighborhood and present character of the block, enforcement of the restriction would be inequitable and oppressive and would harass plaintiff without benefiting the adjoining owners.

284 P.2d at 803. No such findings were or could have been made in the present case because, like the Woods' "last vacant lot on Miami Beach" analogy, the situation here poses the converse factual situation.

The remainder of the Woods' argument on this issue is a rehash of points previously presented, each of which has been dealt with in earlier segments of this brief.

CONCLUSION

A review of the relevant authorities and of the pertinent policy considerations confirms that the Avondale rule remains a viable qualification on the right to seek relief from restrictive covenants, and that the district court's adherence to the rule provides no cause for the exercise of discretionary jurisdiction by this Court. The Avondale rule has fulfilled its proper role in this case by preventing the Woods from "bootstrapping" their own nonconforming use into a basis for further disrupting the otherwise residential character of Unit 3. The trial court's result was not an apportionment of equities but an invitation to creeping commercialization of the beachfront, which the district court properly rejected.

Accordingly, Amici suggest that this Court should decline to accept this case for review or, in the alternative, should reaffirm Avondale by approving the decision of the district court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief of Amici Curiae has been served by United States mail, postage prepaid to Fred N. Whitten, Esquire, 408 Long Avenue, Port St. Joe, Florida 32456; James B. Fensom, Esquire, Barron, Redding, Boggs, Hughes, Fite & Bassett, P.A., Post Office Box 1638, Panama City, Florida 32401; Bill R. Hutto, Esquire, Post Office Box 2017, Panama City, Florida 32401; William L. Gary, Esquire, Post Office Box 1814, Tallahassee, Florida 32302; and Howard E. Adams, Esquire, Pennington, Wilkinson & Dunlap, Post Office Box 3985, Tallahassee, Florida 32315, this 15th day of August, 1983.

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