IN THE SUPREME COURT
STATE OF FLORIDA

TOM WOOD and wife,
PEGGY WOOD,

Petitioners,

v.

CASE NO. 63,879

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

Respondents.

APPEALED FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENTS

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INTRODUCTION

In this brief, Respondents will refer to the Plaintiffs/Appellants/Respondents as "Respondents" or "DOZIERS" and will refer to the Defendants/Appellees/Petitioners as "Petitioners" or "WOODS".

The following symbols will be used:

"R" - Record on Appeal

"T" - Transcript of Final Hearing and Motion for Rehearing

"I" - Supreme Court Index of Certified Papers

STATEMENT OF THE CASE

This matter came before the trial court on the Plaintiffs' complaint for injunctive relief based on subdivision restrictions, (R-12) temporary injunction, (R-4) and Defendants' Answer and Affirmative Defenses. (R-9, 10). The trial court found the subdivision was not open to commercial development and granted a partial injunction (R-14, 15) and DOZIERS appealed to the First District Court of Appeal seeking an injunction prohibiting the proposed motel expansion and enforcing the residential subdivision restrictions.

The First District Court of Appeal reversed the trial court and found the residential restrictions valid and enforceable. (I-1) The WOODS moved for rehearing or certification. The Motion for Rehearing was denied and two questions of great public interest were certified to this court. (I-7).

STATEMENT OF THE FACTS

A portion of the gulf coast in the eastern Bay County was subdivided and recorded in 1948, being designated as Mexico Beach Unit No. 3 (Plaintiffs' Exhibit No. I). The subdivision restrictions called for residential structures of the following character and density.

> "RESTRICTIONS: All lots shown on this plat are restricted to residences. No house may be erected on any lot shown hereon at cost of less than Three Thousand dollars ($3,000.00). Only one (1) building may be erected on each lot, except a garage apartment may be placed on the rear of any lot. No building may be erected nearer the front or back line of any lot than the set-back line shown on the plat nor within 3 feet of the side line of any lot in Blocks 1, 2, 3, 4, & 5. A perpetual Easement or Right of Way over the rear five (5) feet of all lots in blocks 1, 2, 3, 4, & 5 is reserved for utilities purposes and over a three (3) foot strip along the side lines of all such lots, for access to said five (5) foot strips." (Emphasis Added)

There is no restriction prohibiting renting of the residences or garage apartments (Plaintiffs' Exhibit No. I).

By 1950, several lots had been purchased and single family residences constructed. (T-30) Those purchasing in 1950 relied on the subdivision restrictions. (T-26)

In approximately 1952, the original Driftwood Motel and Efficiency Apartments were constructed in Block 7, Lots 3, 4, and 5 over the objection of property owners in this

subdivision. (T-28 and Plaintiffs' Exhibit No. I) The original "Driftwood" consisted of only 8 efficiency units on 3 lots. (T-49, 52)

In 1966, the Schweikerts purchased property in the subdivision and relied on the residential restrictions in making their decision to purchase. (T-34) In 1970, Don Ramsey purchased a single family residence in the subdivision and relied on the subdivision restrictions. (T-38, 41) Ramsey uses the residence as a summer home and, upon retirement, intends to reside in Mexico Beach on a permanent basis. All residents testifying, except the WOODS, stated that the subdivision restrictions are of continuing benefit.

Tom Neubauer, who was qualified as an expert in appraisals, testifed that the character of the neighborhood is residential and that the proposed doubling in size of the Driftwood Motel would destroy the homogeneous nature of the residential subdivision resulting in a substantial depreciation in the value of the property for residential use. (T-46-48)

Elizabeth Thompson, a registered real estate broker who has resided within the subdivision since 1963, testified that the Sandman Apartments were constructed in the 1950's. (T-66) She further explained that many homes in the subdivision are rented and that some homes contain separate upstairs and downstairs units. (T-62, 63, 68) Thompson testified that she has been selling property in the area since

1963 and that she usually reads the plat restrictions to purchasers. (T-69) The WOODS purchased the original Driftwood in 1975 which at that time consisted of 8 units. (T-49, 52) The WOODS were on constructive notice of the subdivision restrictions at the time of purchase. (Plaintiffs' Exhibit No. I). Shortly after purchasing, the WOODS increased the Driftwood to 12 units by modifying the one story structure into a two story structure. (T-50) No additional lots were purchased by the WOODS until 1981 when two undeveloped lots adjoining the motel were purchased. (T-20)

The WOODS propose to construct 5 structures with 14 separate rental units on Lots 1 and 2 of Block 7. (T-50) The building permit application describes the units as motel units. (Plaintiffs' Exhibit No. IV, T-19) The temporary injunction was granted when construction was commenced on the second structure consisting of two stories and 4 motel units. (R-4) When the complaint was filed, one structure with 2 units was completed. Subsequent to the WOODS purchasing the Driftwood, zoning changes were made; however, the zoning specifically deferred to and preserved existing subdivision restrictions. (T-74, Plaintiffs' Exhibit No. III and VIII) The lots in question, Lots 1 and 2 of Block 7, were purchased after the zoning ordinance was enacted.

The evidence disclosed and the lower court determined that all material violations of the subdivision

restrictions occurred prior to 1960. (T- 64-66, I-2) Since 1960 all new construction has been residential.

ARGUMENT

POINT I

WHETHER THE PRINCIPLE OF LAW ANNOUNCED IN ALLEN V. AVONDALE COMPANY, 135 Fla. 6, 185 SO. 137 (FLA. 1938), HOLDING THAT WHERE THE OWNER OF PROPERTY WHO SEEKS RELIEF FROM THE ENFORCEMENT OF RESTRICTIVE COVENANTS SHALL BE DENIED THE RELIEF SOUGHT WHEN HE IS ON NOTICE THAT ALL MATERIAL CHANGES IN THE NEIGHBORHOOD OCCURRED PRIOR TO HIS PURCHASE OF THE PROPERTY, SHALL HAVE CONTINUING VITALITY.

> "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. Clark on Covenants and Interests Running with Land (1929), p. 148 et seq."

Osius v. Barton, 147 So.2d 862 (Fla. 1933) at 867.

It is well settled in the State of Florida that those purchasing real estate subject to restrictive covenants

are bound by the restrictive covenants and, when attempting to remove the restrictions, cannot rely on changes occuring prior to the date of purchase. Allen v. Avondale Company, 185 So. 137 (Fla. 1938); Hall v. Briny Breezes Club, 179 So.2d 128 (Fla. 3d D.C.A. 1965); Baker v. Field, 163 So.2d 42 (Fla. 2d D.C.A. 1964); Acopian v. Haley, 387 So.2d 999 (Fla. 5th D.C.A. 1980); Carlson v. Kantor, 391 So.2d 342 (Fla. 4th D.C.A. 1980); Osius v. Barton, 147 So.2d 862 (Fla. 1933); Vetzel v. Brown, 86 So.2d 138 (Fla. 1956). This statement of the law is based on contractual and equitable principles.

> "Such a covenant is binding on a purchaser with notice not merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of valid agreement concerning it with which he cannot equitably refuse to perform. The enforcement against a purchaser with notice rests upon the principle that it would be inequitable to permit such an owner, while enjoying the fruits of the and claiming under the grant, part of consideration for which was the benefit promised by the covenant, to destroy such benefit by violating the covenant."
> 20 Am Jur 2d, Covenants, Conditions, Etc., §305.

Hall v. Briny Breezes Club clearly establishes that restrictive covenants may be created that are more restrictive than the actual use of the property at the time of the creation of the restrictive covenants. The covenants, if not contrary to the public policy, are completely enforceable.

The origin of the questioning of this well established principle of law is found in §11.12, Florida Real

Property Practice III, The Florida Bar C.L.E. (2d Ed. 1976). Edward A. Linney and James I. Knudson, authors of the section state as follows:

> "Change occurring before the imposition of the restrictive covenant cannot be relied upon to warrant removal. See Hall v. Briny Breezes Club, 179 So.2d 128 (2d D.C.A. Fla. 1965). Similarly, courts have denied the relief of removal when the conditions changed subsequent to the imposition of the restrictive covenant and before the date the owner seeking removal obtained title to his land. Allen v. Avondale Co., 135 Fla. 6, 185 So. 137 (1938); Baker v. Field, 163 So.2d 42 (2d D.C.A. Fla. 1964). The logic of these two cases is questionable. The focal point in the determination should be whether the intent of the original parties and their purpose in restricting the land have been frustrated by a change in conditions, not who owns the parcel sought to be relieved of the restriction at the time the action for removal is filed. Because of the thrust of these cases, however, it is wise for a purchaser desiring removal of the restriction to require the seller to institute an action for removal and obtain that relief before closing the transaction. If a restrictive covenant does not provide for its duration, the court will imply a reasonable period extending no longer than the intent and purpose can be reasonably carried out by the parties. Barton v. Moline Properties, supra."

Interestingly enough, Linney and Knudson cite no authority for their proposed rule of law. Additionally, the Petitioners have cited no authority other than this brief statement in the 1976 C.L.E. Manual which questions the rule of law. The court in Acopian v. Haley did not criticize this rule of

law. The court simply stated in a footnote that the Avondale principle had been questioned in the C.L.E. Manual. The court in Carlson v. Kantor merely stated that question had been raised in the C.L.E. Manual and in Acopian v. Haley. The First District Court of Appeal has referred to Carlson v. Kantor and Acopian v. Haley in stating that there is some disagreement among the District Courts. None of the District Courts of Appeal have directly criticized or questioned the rule laid down in Avondale 45 years ago. The simple fact is that no prior Florida court has encouraged that the Avondale rule be changed. The Avondale rule is well established in Florida and is equitable. There is no compelling reason to address this rule. While the question has been certified it is not necessary that this court accept the case and render a decision. Art. V, §3(b)(4), Florida Constitution

Stare decisis is the backbone of our judicial system. Only after thorough and extensive consideration should this court change a rule of law affecting property rights that has been relied on, referred to and followed by the courts, the bar and the citizens of the State of Florida. In Re Seaton's Estate, 18 So.2d 20 (Fla. 1944). There must be some compelling reason to change an established principle of law. Morrison v. Thoeleke, 155 So.2d 889 (Fla. 2d D.C.A. 1963). This is especially true when the court is considering long established rules of law by which property is transferred. McGregor v. Provident Trust Co. of Philadelphia, 162

So. 323 (Fla. 1935); In Re Seaton's Estate. Untold numbers of Florida citizens have relied on subdivision restrictions in purchasing their homes. In the resale of restricted property each purchaser is put on notice, and agrees, that he will be bound by the restrictive covenants. Each seller knows that his sale is subject to the restrictions. All owners have the right to enforce the restrictions.

> "The two most thoroughly developed theories are: First that these restrictions are enforced as contracts concerning land; and, second, that they re-enforced substantially as servitudes or easements of land. The theory adopted in this state is that the contract which embodies the restriction may be enforced against both the promisor and those who take from him with notice, thereby including amongst those who may enforce the obligation not only the promisee, but those who take from him and those in the neighborhood who may be considered as beneficiaries of the contract. Mercer v. Keynton (Fla.), supra; Stephl v. Moore (Fla.) supra."

Osius v. Barton at page 868.

Bateman v. Creighton, 101 So.2d 587 (Fla. 2d D.C.A. 1958) contains an extensive discussion of the rights of other owners in a subdivision to enforce the restrictive covenants against subsequent owners.

Petitioners have offered this court no compelling reason to change the Avondale rule. Their authority consists of two District Courts of Appeal of opinions that refer to one-half paragraph in a C.L.E. Manual. The courts of Florida

have addressed the Avondale rule on numerous occassions and have strictly adhered to the Avondale rule.

This Supreme Court in Avondale established a workable principle of law. Simply put, one who purchases restricted property takes his property subject to the restrictions and the existing violations. Allen v. Avondale Co.,; Hall v. Briney Breezes Club, 179 So.2d 128 (Fla. 3d D.C.A. 1965). He has contractually agreed to accept the property and abide by the restrictions. If the potential purchaser is offended by the restrictions he should either decline the purchase or request the owner to bring a declaratory judgment action removing the restrictions. The Avondale rule puts the burden on the owners wishing to have the restrictions removed to proceed against all owners for a full adjudication of each owner's property rights. It discourages speculators from purchasing restricted property in hopes they can avoid the restrictions by relying on existing violations and encouraging other violations. If purchasers in areas of restrictive covenants are allowed to use existing violations in support of efforts to remove the restrictions, it will take only a few years before the cumulative effect of subsequent purchasers will completely negate the intention of the original grantor and eliminate any benefit to the current property owners.

Petitioners have not addressed the contractual agreement that the purchaser enters into with the seller. It

is common for a person moving into a subdivision to purchase more than one lot. The DOZIERS and several of the witnesses testified to owning more than one lot (T-34, Plaintiffs' Exhibit I). Owners such as these rely on restrictive covenants when they sell property in a restricted subdivision. Each conveyance of property is a new agreement not to violate the restrictive covenants. 20 Am Jur 2d, Covenants, Conditions, Etc., §305; Batman v. Creighton, 101 So.2d 587 Fla. 2d D.C.A. 1958). What justification can be given for the purchaser ignoring his agreement? The purchaser under the Avondale rule has three choices; he can either purchase the property and honor the contract, request that the current owners proceed with a declaratory judgment action to have the restrictions removed, or not purchase the property. This is entirely equitable and workable. Petitioners argue that the contractual obligation should be discharged when the original contractual object has been frustrated. (Petitioners' Brief, page 14). Again, Petitioners overlook the fact that each purchaser enters into a contract with the seller and all other owners in the subdivision regardless of the purchase date. Ortega Co. v. Justiss, 175 So.2d 54 (Fla. 1st D.C.A. 1965); Osius v. Barton, 147 So. 862 (Fla. 1933). The purchaser agrees to accept violations and to honor the covenants as originally stated by the grantor. The frustration of the contractual object becomes a means to avoid the contract based on a

change of circumstances after the contract has been entered into. Osius v. Barton, Allen v. Avondale.

In the present case the WOODS ask the court to abandon the Avondale rule. However, the WOODS purchased the property with knowledge of the restrictions and attempt to rely on changed zoning and changed conditions existing at the time of purchase. (T-20) They had actual and constructive notice of the residential nature of the subdivision and the restrictions of record. (T-20) The zoning ordinance specifically defers to subdivisions restrictions. (T-74) The WOODS have violated their covenant with the seller, their neighbors, and the original grantor. They now ask to be rewarded by this court for their intentional violation of the Avondale rule. On the other hand, the Respondents, DOZIERS, purchased property in Mexico Beach Unit 3 in 1976. (R-3) The WOODS purchased the 8 unit motel on three lots in 1975. All material changes existed in the neighborhood at the time both the WOODS purchased their motel and the DOZIERS constructed their single family residence. The DOZIERS, as had many prior purchasers, relied on the residential restrictions.

The subdivision was created in 1948. There are a total of 97 lots. The pertinent part of the deed restriction states:

> "RESTRICTIONS: All lots shown on this plat are restricted to residences. No house may be erected on any lot shown hereon at cost of less than Three Thousand dollars ($3,000.00). Only one (1)

building may be erected on each lot, except a garage apartment may be placed on the rear of any lot."

Excluding the Defendants, each of the witnesses owning property within the subdivision testified that they relied on the subdivision restrictions when purchasing the property. Elizabeth Fensom purchased property within the Unit 3 in 1950 in reliance on the restrictions. (T-26, 27, 28)

"Q. And I believe you live on Lot 10 in Block 8, Mexico Beach, Unit 3; is that right?

A. Right.

Q. How long have you owned that property?

A. Since 1950.

Q. And was . . . when you purchased that lot were you aware of the plat restrictions restricting lots in Mexico Beach, Unit 3 to residences?

A. I was. That's why we built there.

Q. And I believe that your lot is the next closest lot to the East of where the proposed construction for the motel units is; is that correct?

A. That's right.

Q. And do you feel that if Mexico Beach, Unit 3 is allowed to go Commercial and particularly Lots 1 and 2 adjacent to you, do you feel that would have an adverse effect on your property?

A. Yes, I do."

The Schweikerts purchased property in 1966 in Unit 3 after considering other parts of the state and in reliance on the subdivision restrictions. (T-33-36)

"Q. When did you purchase those lots?

A. I believe it was in the latter part of 1966, somewhere in that area.

Q. Was there a house already on the lots when you purchased?

A. Yes.

Q. Were you aware of the plat restrictions restricting the lots in Unit 3, Mexico Beach to residences when you purchased?

A. I was.

Q. Did that have any bearing on your decision to purchase in Unit 3?

A. Yes, it did. I had five children at the time and we had lived in a large city, Orlando, and we felt that this would be a good place to raise our children from the Air Force. I retired from the Air Force in 1965 and this was a consideration.

Q. Do you feel if Unit 3 is allowed to go Commercial it would have any adverse effect on your particular property?

A. I believe so.

Q. For the purpose of which you bought it?
A. Yes.

Q. Tell the judge what effect you think it would have?

A. Well, when I bought the property I was under the impression that it would be residential property only and the people we talked to around there it was the

reason they were buying the property and it was a good place to raise children and to retire. I had been to Miami Beach and I knew what a beach would look like after it was commercialized. I'm familiar with Panama City Beach and I realize what can happen to it and we're interested in making this our home. And so this was one of the prime considerations for my wife buying this piece of property. And if it is allowed to become commercialized, well, then we will lose all of its flavor as far as I'm concerned for a place to live."

Don Ramsey purchased property in Unit 3 in 1970 relying on the residential subdivision restrictions with intentions of one day retiring to the subdivision. (T-38, 39)

"Q. Were you aware at the time that you purchased the home that the lots in Mexico Beach, Unit 3 were restricted to residences?

A. Yes I was.

Q. Did that play any part in your picking this particular house to purchase?

A. It really did. I bought it as a long term, not investment but a place to move later.

Q. To retire?

A. I wanted residental, yes, I did.
Q. Was it pointed out to you at that time you bought it that the lots in Unit 3 were residential?

A. Oh, yes.

Q. Do you feel that if the Unit 3 is allowed to go commercial and in particular the continuation of the construction of the proposed motel unit on Lots 1 and

2, Block 7, do you feel that would have any adverse effect on your property and if so, tell the judge what effect you think it would have.

A. I think from the standpoint of privacy and such and it creates a nuisance in my . . . I like my privacy and I intend to be there the rest of my life as soon as my second child gets out of school next year, we plan on probably moving down, if we can."

Charles Regan testified that he purchased property in Mexico Beach Unit No. 3 in 1973 and would not have purchased it if the property had not been restricted to residential use. (T-22, 23)

"Q. Okay, and when did you buy your lot, please sir?

A. 1973.

Q. Was it a vacant piece of property when you bought it?

A. Yes, sir.

Q. For what purpose did you buy it?

A. To build a house on it.

Q. Have you since built a house on it?

A. Yes.

Q. Were you aware of the plat restrictions of Mexico Bach, Unit 3 restricting the lots to residences when you bought it?

A. Yes, sir.

Q. Did the fact that these lots were restricted in Unit 3 have any effect?

A. That was why I bought It.

Q. If it had not been restricted residential would you have bought in Unit 3?

A. No, sir, I don't think so.

Q. Do you feel that if Unit 3 is allowed to go to commercial it would have any adverse effect on your property, your lot and purposes for which you bought it?

A. Yes, sir.

Q. Tell the judge what effects you think it would have?

A. Well, I bought my place for just the reason that the plat restrictions has got and I think that if . . . it is one of the few places left in Florida you can do a thing like that and that is what makes it so valuable. If you turn around and change it, you know, it is not what I felt like I bought and it just wouldn't be . . . Well, I would just as soon get rid of it.

Q. Just as soon get rid of your house.

A. Yes, sir."

All of the above mentioned property owners testified that the residential value of their property would be decreased by the defendants' proposed construction. (T-23, 27, 35 & 39) Regan testified that the only structure that did not appear residential when he purchased his property in 1973 was the Driftwood Motel. He was not even aware of the Sandman Apartments. (T-24)

A real estate expert, Tom Neubauer, studied the entire subdivision and testified that the single family residences in the subdivision would be devalued by the

proposed construction. (T-46, 47) Concerning the character of the neighborhood, Neubauer stated, "it appears that the area around this subdivision is primarily residential and/or almost completely residential aside from this motel (Driftwood)." (T-48)

The plaintiffs purchased Lots 9, 10, 11 & 12 of Block 3, Unit 3 in 1976 and 1978. (T-34) They relied on the residential restrictions. (T-5) The plaintiffs have expended $40,000.00 to $50,000.00 on their home excluding the lots. The proposed construction is between the plaintiffs' home and the Gulf of Mexico and will have a very detrimental effect on the value, use, and enjoyment of the plaintiffs' property. (T-5, 46, & 47) As in the case with the Schweikerts, the plaintiffs had considered other parts of the state before deciding on Mexico Beach Unit 3. (T-5) In fact, the Respondents owned property in Naples, Florida, and Ft. Myers Beach, Florida, but decided on the residential subdivision in Mexico Beach in 1976. (T-5)

> "Q. Do you feel that if the Unit 3 is allowed to go commercial then, construction continue on the motel units across the street, do you feel it would have any effect on your property?
>
> A. It will have a very detrimental effect on our property and also on our proposed life style. We are retired. We came to Mexico Beach to retire and to retire in an exclusivey residential area. If we had not been assured that these were residential and would remain residential we would have looked somewhere else to do this. At the time we bought these lots we owned some lots in Naples, Florida and

> Fort Myers Beach, Florida and it was strictly residential but we liked this area better because of the family type of residential area that it had."

(T-5)

Elizabeth Thompson, the realtor from whom they purchased the lots assured the plaintiffs that the lots were residential. (T-6)

The Driftwood was constructed in 1952 and consisted of 8 efficiency apartments on three lots with a stove and refrigerator in each unit. (T-28, 65) The Sandman (now renting on a monthly basis with several permanent residents) was constructed in the 1950's as were the Gulfwind Apartments. (T-66) The Gulfwind Apartments consist of 4 units in one residential type structure on one lot. (Plaintiffs' Exhibit No. I) The Sandman consists of 6 units in one building on 4 lots. Several homes have been built in the subdivision since 1960 and many lots have been sold. There have not been any motels or apartments constructed since 1960. (T-66, 67) During this period of over 20 years, everyone, excluding the defendants, has regarded Mexico Beach Unit No. 3 as a residential subdivision. When the City of Mexico Beach enacted its zoning ordinance, it specifically preserved all existing subdivision restrictions. (Plaintiffs' Exhibit No. III) The realtor residing in Mexico Beach informed purchasers of the residential character and the residential restrictions of the subdivision. (T-69) There

have been no "violations" of the subdivision restrictions since the plaintiffs purchased their lot and constructed their home.

The few violations of the subdivision restrictions that exist occurred in the 1950's. For over 20 years, the residents of Mexico Beach, Unit 3 have relied on and honored the subdivision restrictions. Those wishing to expand their motel asked this court to abandon the Avondale rule and allow them to rely on violations more than 20 years old.

The WOODS have created their own predicament. Several options were available to the WOODS. They could have not purchased the property in question, purchased the property for residential purposes, or required the seller to have the restrictions lifted by a declaratory judgment action. Either approach would have prevented this extensive litigation.

POINT II

THE CONTINUING VALIDITY OF SUBDIVISION RESTRICTIONS.

The original suggestion in the C.L.E. Manual is that the change in condition of the property should be considered, not who owns the property. The test in Florida for determining the continuing validity of subdivision restrictions is well settled.

Barton v. Moline Properties states the established law in Florida.

> "The test for determining such equities is ordinarily whether or not the original purpose and intention of the parties to such restrictive covenants can be reasonably carried out, in the light of alleged materially changed conditions which are claimed to have effectually frustrated their object without fault or neglect on the part of him who seeks to be relieved by decree in equity from their further obervance. Trustees of Columbia College v. Thacher, 87 N.Y. 311, 41 Am.Rep. 365; Baily v. DeCrespiginy, L.R. 4 Q.B. 180, 15 Eng. Ruling Cases 799; Osius v. Barton, supra. The doctrine to be applied in such cases is that expressed in the maxim 'lex non cogit ad impossibilia,' and it is particularly in point in cases wherein no specified reasonable term for the duration of restrictive covenants has been definitely set forth in the covenants themselves." . . .

at page 556.

> "We are convinced that the language used in Osius v. Barton, hereinbefore quoted and that used in the original opinion hereinbefore quoted 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.' This, when added to the statements above referred to, enunciates a correct statement of the law in such cases."

at page 557.

The above principle was reaffirmed by the Supreme Court in Wahrendorff v. Moore, 93 So.2d 720 (Fla. 1957).

> "In Dade County v. Thompson, 146 Fla. 66, 200 So. 212, we held in substance that to justify the removal of restrictive covenants such as those before us, it must be alleged and proved that conditions and circumstances existing at the time of the restrictions were placed on the land have changed to the extent that the effect of the covenants has been brought to nought. We there stated that the test to be applied is whether or not the original intent of the parties to the restrictive covenants can be reasonably carried out or whether the changed conditions are such as to make ineffective the original purpose of the restrictions."

at page 722.

This has been most recently reaffirmed by the Florida courts in Acopian v. Haley, 387 So.2d 999 (Fla. 5th D.C.A. 1980).

> "Where no termination date is specified, the test for determining the continued validity of restrictive covenants in the face of a challenge is whether or not the original purpose and intention of the parties to such covenant can be

> can be reasonably carried out, in the light of alleged material changes which are claimed to have effectually frustrated their object without fault or neglect on the part of the one who seeks to be relieved of their observance. Barton v. Moline Properties, Inc., 121 Fla. 683, 164 So. 551 (1935). It is said that this doctrine rests on the principle of contract law known as discharge of contractual obligation by frustration of contractual object. Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933); 88 A.L.R. 394.
>
> Changes take place in Florida every day, and if mere change in neighborhoods alone was sufficient to invalidate restrictive covenants, none would remain. However, not only must there be a showing of material change in the character of the neighborhood of the subject land, the changes must be such as materially affect the restricted land and frustrate the object of the restrictions. Allen v. Avondale Co., supra. Where the restriction is for the benefit of and is still of substantial value to the dominant lot, notwithstanding the changed condition of the neighborhood in which the lot is situated, a court of equity will restrain its violation."

at page 1001.

It is suggested that the following accurately reflects the current rule applied in Florida in determining the continuing validity of subdivision restrictions.

> WHETHER THE INTENT OF THE ORIGINAL GRANTORS OR SUBSEQUENT GRANTORS HAS BEEN COMPLETELY FRUSTRATED AND BROUGHT TO NOUGHT AND WHETHER THE RESTRICTIONS CONTINUE TO BE OF SUBSTANTIAL VALUE TO THE DOMINANT LOT, NOTWITHSTANDING ANY CHANGE IN CONDITIONS IN THE NEIGHBORHOOD IN WHICH THE LOT IS SITUATED OCCURING SINCE THE DATE OF PURCHASE.

The above statement of Florida's current law looks first to the intent of the original and subsequent grantors and second to the continuing value of the restriction in light of changed conditions since the owners date of purchase. Even though conditions change, the restrictions may continue to have benefit.

If this court elects to modify the Avondale rule to allow consideration of changes occuring prior to date of ones purchase, Respondents suggest that the date of purchase and conditions existing at that time should be considered in weighing the equities. For example, the WOODS lived in the subdivision when they purchased the lots in question and had full knowledge of the residential character. There had been no material violations for 20 years. Even if a new test is adopted the WOODS should not be allowed to benefit from violations occuring 20 years prior, especially in light of the fact that all purchasers since 1960 have relied on the restrictions.

POINT III

THE SUBDIVISION RESTRICTIONS ARE OF CONTINUING BENEFIT.

Each resident of the subdivision testifying attested to the residential character of the neighborhood. (T- 3-18, 21-39) Residents purchasing in the 1950's, 1960's, and 1970's all purchased in reliance on the restrictions. Only the motel owners wish the restrictions removed. The Petitioners never testified that the character of the subdivision is commercial. Petitioners only cite minor exceptions. (Petitioners' Brief, page 17)

While Petitioners have complained of triplexes and quadraplexes the record discloses only one quadraplex and no triplexes. (T-68)

The trial court determined that Mexico Beach Unit 3 is not opened to commercial development.

> ". . . has not disregarded the plat restrictions to the extent to allow commercial developments such as motels, stores, service stations, and the like."

(R-14)

In allowing 12 rental units on the two lots the court disregarded the weight of the evidence and the findings of its own order. (R-14) There is only one structure in the unit that contains 4 units per lot. The court's final judgment allows for density far in excess of any structure

currently existing. (Plaintiffs' Exhibit No. I) Of the 97 lots in the subdivision, most have single family residences and, in some cases, one home is located on two lots. There have been no material violations for over 20 years except those occasioned by the WOODS.

POINT IV

EQUITABLE RELIEF

Due to threats of hurricanes and flood insurance requirements, many residents of Mexico Beach Unit No. 3 have elected to build their homes on pilings as the Plaintiffs have done. Do the Petitioners seriously contend that the DOZIERS have waived all rights to object to commercial developement because they closed in one portion of the downstairs area of their home? The downstairs apartment is the equivalent of a garage apartment which is allowed by the restrictions. In all cases cited by the Petitioners in support of their unclean hands argument those seeking relief were found to be in substantial violation. There has been no such finding by the trial judge. In Crowl v. McDuffie, 134 So.2d 542 (Fla. 1st D.C.A. 1961), all ten Plaintiffs had a garage apartment in violation of the subdivision restrictions and the court would not allow the Plaintiffs to enjoin the Defendant who wished also to violate the subdivision restrictions in the placement of his garage. In Pilafian v. Cherry, 355 So.2d 847 (Fla. 3d D.C.A. 1978), the Plaintiffs had a dock and seawall in violation of the restrictions that was similar to the dock and seawall constructed by the Defendant. The court found that the Plaintiffs were in substantial

violation of the identical restriction they wished enforced and denied their request for an injunction because of unclean hands.

The DOZIERS are not attempting to enjoin something that they are guilty of. Obviously, the DOZIERS do not run a commercial development and, if anything, are in only technical violation of the subdivision restrictions. Minor violations will not serve to prohibit the Plaintiffs from proceeding against those that are in substantial violation. Coffman v. James, 177 So.2d 55 (Fla. 1st D.C.A. 1965); Hagan v. Sabal Palms Inc., 186 So.2d 302 (Fla. 2d D.C.A. 1966). If the DOZIERS can be said to have unclean hands, then the WOODS are dirty up to their elbows.

Additionally, the doctrine of unclean hands is an affirmative defense that was not plead. Modern rules of pleading require all affirmative defenses to be raised in the pleadings. Fla. R. Civ. P. 1.110(d). When an affirmative defense is not raised by the answer it is waived. Sonnenblick-Goldman of Miami Corp. v. Feldman, 266 So.2d 48 (Fla. 3d D.C.A. 1972).

The WOODS purchased a small motel in a restricted subdivision and have made every effort to destroy the residential quality of the area. In 1975 when the Driftwood was purchased, it had only 8 efficiency apartments on three lots. (T-49, 50) Since purchasing the motel, the WOODS have expanded by four units and with the purchase of the two lots in question intend to add 14 units. The quiet, relatively

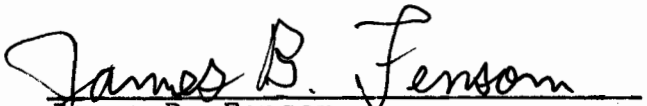
unobtrusive efficiency apartments are expanding into a resort complex. The WOODS, in good faith and prior to their expansion, should have filed an declaratory judgment action against all neighbors offering them the opportunity to respond to the proposed expansion. The WOODS have attempted, by the use of prefabricated buildings, and without notice to the neighborhood, to stealthily continue the expansion of the motel. Now the WOODS ask this court to abandon the Avondale rule and reward them for violating the restrictions at the expense of numerous residents who have purchased in reliance on the restrictions.

CONCLUSION

The Avondale rule has been established in Florida for forty-five years. Each purchaser, regardless of the date of purchase, is bound by the restrictive covenant. Purchasers not wishing to be bound may require the owner to file a declaratory judgment action prior to closing. The Avondale rule is equitable, understandable and workable. Hundreds of thousands, if not millions of Florida property owners have relied on restrictive covenants in purchasing real property. Members of the Bar advise the public in accordance with the established law. There is no compelling reason to abandon the Avondale rule. Equity and stare decisis require this court to answer the first certified question in the negative and affirm the First District Court of Appeal.

RESPECTFULLY SUBMITTED.

BARRON, REDDING, BOGGS, HUGHES,
FITE, BASSETT & FENSOM, P.A.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Respondents has been furnished to William L. Gary, Esq., P. O. Box 1814, Tallahassee, Florida 32302, Howard E. Adams, Esq., P. O. Box 3985, Tallahassee, Florida 32302, and Hume F. Coleman, Esq., P. O. Drawer 810, Tallahasee, Florida 32302, by mail this 15th day of August, 1983.

James B. Fensom

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