IN THE SUPREME COURT OF THE
STATE OF FLORIDA

TOM WOOD, et ux. :

Petitioners, : CASE NO. 63,879

v. :

RAYMOND G. DOZIER, JR., et ux. :

Respondents. :

_____ :

INITIAL BRIEF OF PETITIONER

WILLIAM L. GARY
POST OFFICE BOX 1814
TALLAHASSEE, FLORIDA 32302
904/224-1258

AND

HOWARD E. ADAMS, of
PENNINGTON, WILKINSON & DUNLAP
POST OFFICE BOX 3985
TALLAHASSEE, FLORIDA 32315-0985
904/385-1103

ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Throughout this brief, the following references and citations of page numbers shall mean:

"R" - Record on Appeal in the First District Court

"TR" - Transcript of Final Hearing in Circuit Court

"CP" - Certified Papers of First District Court of Appeal

STATEMENT OF THE CASE AND FACTS

Tom and Peggy Wood, Defendants/Appellees below, purchased the Driftwood Motel and Apartments in August of 1975. (TR-52). This property, with improvements, is located in Unit 3, Block 7 of Mexico Beach, Bay County, Florida. (Note that a revised plat of Unit 3 was offered into evidence as Plaintiffs' Exhibit, but was not identified. TR-51).

Raymond Dozier and wife, Plaintiffs/Appellants below, purchased Lots 9 and 10 of Unit 3, Block 3, Mexico Beach, in 1976 and 1978 respectively. (TR-3,4, Plaintiffs' Composite Exhibit 1). Dozier improved these lots by the construction of a house. (TR-4). The house is a two-story dwelling, with the top floor consisting of a living room, kitchen, dining area, bedroom, office and a small bathroom. The downstairs area consists of two bedrooms, a small kitchen and a bath. The Dozier home may be used for two separate residences. (TR-9,10). Respondents Dozier also constructed three aluminum outbuildings or sheds, each 10x20 feet in size across the rear of Lots 9 and 10 in Unit 3. (TR-8,9). These outbuildings could not be used as a garage apartment. (TR-17). A picture of these outbuildings was introduced as part of the Woods' Composite Exhibit 3. (TR-70,77).

In 1981, the Woods purchased Lots 1 and 2 of Block 7, Unit 3 of Mexico Beach and received a special warranty deed. This deed noted that it was subject to the restrictive covenants of record governing such property. (TR-20). The restrictive covenant states as follows:

> "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..."

(Revised plat, Unit 3, Plaintiffs' Exhibit, TR-51).

The Wood's previously had added efficiency units to the Driftwood Motel after its purchase in 1975. One unit was added in 1976 and two additional units were added in 1977. (TR-52). These additions to the Driftwood Motel property occurred after the purchase of property by the Respondents Dozier in 1976. (TR-3). The Woods' purchase of two additional lots in 1981 for purposes of constructing additional rental apartment units was made 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. (TR-70-73,75-76). The Woods' plan called for the construction of fourteen (14) rental units on the Lots 1 and 2. (TR-50,51, Plaintiffs' Composite Exhibit 4). These plans were modified by the trial judge in his final order allowing only the construction of six (6) rental units maximum per lot and contained in no more than two structures on each lot. (R-14).

After the Woods began construction of the additional rental units, Plaintiffs Dozier filed a Complaint in the Circuit Court of Bay County seeking injunctive relief to restrain the construction of the apartments. (R-1,2). The Complaint alleged no adequate remedy at law and urged the enjoining without notice of

the construction as violative of the restrictive covenants. (R-1).

On March 25, 1982, the trial judge enjoined the construction of the additional rental units. (R-4). The Woods, through their attorney, on April 23, 1982 filed an Answer to the Complaint. The Answer set up the affirmative defenses of radical change in the neighborhood and surrounding property so as to make the covenants no longer valid, a course of conduct by Plaintiffs Dozier in acquiescing in violations of the restrictive covenants and other affirmative defenses. (R-9,10). A final hearing on the matter was held on May 7, 1982 before the Honorable Russell Bower, Circuit Judge for Bay County. (TR-1).

During the course of the final hearing, testimony was adduced from the Plaintiffs and Defendants as well as from five witnesses who are residents of Mexico Beach. Four of these witnesses, Ramsey, Schweikert, Fensom and Reagan, along with others joined in filing a brief as amici curiae in the instant cause.

The testimony of the Plaintiffs, Charles Reagan, Elizabeth Fensom, Donald Ramsey and Norbit Schweikert (erroneously reported in the transcript below as Swicord, TR-34) shows that there had been knowledge of the building of multi-family dwellings and structures on lots within Unit 3 since each witness purchased property in Mexico Beach. (TR-21-24, 30-32, 33-37, 40-43). Testimony by Don Ramsey also revealed a use of his residence at one time for business purposes as a showroom. (TR-40). Further

testimony revealed an insurance office, real estate office and numerous duplexes, triplexes and quadriplexes existing in the neighborhood. (TR-53-58, 62-69). Either existing in Unit 3, which is the subject of the litigation, or adjacent to the Unit of the subdivision in question, are a church (TR-13), property used as a television repair business (TR-13), a commercial warehouse business (TR-14), and a recreational complex (TR-13). While some of the witnesses testified to voicing objections at various times to these covenant violations, no formal action was ever taken to institute suit, and one witness admitted no one enforced the covenants. (TR-13, 28, 31, 36, 42, 43). Respondent Dozier admitted during his testimony that he was informed when he purchased his residential lot that there were commercial type structures in the subdivision. (TR-11). Dozier further admitted that there were numerous apartments, duplexes or other residences containing more than one living quarters. (TR-11-13). Dozier also admitted that there were several mobile homes within Unit 3 and that the Sandman Apartments were also located in Unit 3. (TR-14-16). Dozier also admitted that multi-family dwellings can be put in residential areas and that there were no restrictions on multi-family dwellings. (TR-17). In fact, attorney for Respondents Dozier, below, also seemed confused as to whether or not the covenant restrictions should have been enforced as to multi-family residences rather than one building per lot. The trial judge overruled Respondent Dozier's objections to the taking of testimony concerning multi-family residences and a

change in neighborhood conditions. Plaintiff Dozier apparently has no objection to multi-family residences on such lots. (TR-17, 67-68).

After the taking of testimony and memoranda of law from the parties, the trial court entered its final judgment enjoining the Defendants Woods from erecting more than two buildings on Lots 1 and 2 of Block 7, Unit 3 of Mexico Beach in question. The trial judge made further findings of fact that the structures to be erected would be in harmony with those structures presently existing in the subdivision. (R-14-15). The trial judge denied a motion for rehearing by Plaintiffs Dozier. (R-28).

Plaintiffs Dozier filed their Notice of Appeal of the Final Judgement of the Circuit Court on June 22, 1982. After the filing of briefs by the respective parties, the First District Court of Appeal on April 12, 1983 issued its opinion reversing the Final Judgment of the Circuit Court of Bay County and remanding the case for further proceedings not inconsistent with the opinion as issued. (CP-1).

On Motion for Rehearing filed by Appellees Woods, the First District Court of Appeal entered its Order certifying two questions of great public importance to the Florida Supreme Court pursuant to Article 5, Section 3(b)(4) Florida Constitution. (CP-7). This Appeal timely followed. (CP-8).

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 above question was certified by the First District of Appeal as being of great public importance to the law of the State of Florida. (CP-7). In order to gain the correct framework for consideration of this question, a brief exposition regarding the law of restrictive covenants and their relation to the instant case is necessary.

Generally, Florida law, and that of other jurisdictions, regards restrictive covenants as a burden upon the alienability and unrestricted enjoyment of property, and will not enforce these covenants unless the intention of the parties is clear in the creation of the covenant, the restrictions have a lawful purpose, and the rights created by such covenants have not been relinquished or lost. Moore v. Stephens, 90 Fla. 879, 106 So. 901 (Fla. 1925), 20 Am.Jur. 2d, Covenants, Conditions, etc., Section 182 (1965).

Florida courts of equity, however, will enforce restrictive covenants if it can be shown that the covenants are still of value to the dominant lot notwithstanding changed conditions of

the neighborhood. Barton v. Moline Properties, 121 Fla. 683, 164 So. 551 (1935).

It is a well known proposition of law that restrictive covenants regarding the use of land may be invalidated where there are equitable factors which would prevent their enforcement. Such equitable principles as would preclude the enforcement of restrictive covenants include modifications of restrictive covenants, release or agreement to discharge restrictive covenants, abandonment, waiver, acquiescence or estoppel, change of conditions of the character of a neighborhood in which the property is located or frustration of the scheme of the restrictive covenants. See, generally, 20 Am.Jur. 2d, Covenants, Conditions, etc., Sections 268-287. See also, Restatement Law of Property, Section 554-568 (1944).

In the present case, Plaintiffs alleged as an affirmative defense the change in condition in the neighborhood and surrounding properties so as to make the covenants no longer valid, acquiescence in violation of the covenants, estoppel by continued acquiescence and breach of restrictive covenants, and that the restrictive covenants in question had no express time limit and therefore have expired since a reasonable time for expiration of restrictive covenants will be implied where none is noted in the restrictive covenants. (R-9-10).

Florida law has recognized each of the affirmative and equitable defenses to enforcement of restrictive covenants. See, Osius v. Barton, 147 So. 862 (Fla., 1933); Barton v. Moline

Properties, 164 So. 551 (Fla., 1935); Stephl v. Moore, 114 So. 455 (Fla., 1927); Wahrendorff v. Moore, 93 So.2d 720 (Fla., 1957), (en banc); Moore v. Stevens, 106 So. 901 (Fla., 1925). The Woods, as an affirmative defense, relied heavily on the doctrine of change of conditions which would make it no longer equitable to enforce the restrictive covenants. (TR-52-60, Composite Exhibit 3).

The principles governing change of conditions as an equitable defense to enforcement of restrictive covenants were restated by this Court in Wahrendorff v. Moore, 93 So.2d 720 (Fla., 1957), wherein this Court stated:

> [I]t must be alleged and proved that conditions and circumstances existing at the time restrictions were placed on a land have changed to the extent that the effect of the covenants have been brought to naught....
>
> [T]he 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. (Cite omitted).

Wahrendorff at 722.

This statement by the Court 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 changed conditions are such as to make ineffective the original purpose of the restrictions is, however, modified to the extent of this Court's holding in Allen v. Avondale, 135 Fla. 6, 185 So. 137 (Fla., 1938). In Allen v. Avondale, the Court had before it a restrictive covenant which had been placed on 1,000 lots which

had been subdivided, platted and designated as a residential subdivision known as "Avondale." The restrictive covenant involved stated that the land was to be used only for residential purposes and that not more than one residence and the outbuildings of such a residence should be erected on the lands. George Allen, as Plaintiff, brought suit to cancel and remove the restrictions from the lot on the grounds that the neighborhood had suffered a change in conditions and that the Defendant Avondale Company had acquiesced in such changes. The Court in affirming the ruling of the trial court below, denying removal of the restrictions, held that the chancellor had not committed error:

> The changes shown to have taken place would ordinarily be sufficient to grant relief from enforcing the covenants but it is shown that all these changes took place before appellant purchased his lot; he was therefore on notice of them and all but one were in another subdivision. At the present time, they only have fourteen months to run. (emphasis added)

Allen v. Avondale at 138.

This Court thus announced a rule that where a purchaser acquires title and is on notice of all materially changed conditions in the neighborhood at the time of his purchase, he is not entitled to rely on these materially changed conditions in order to invalidate his deed restrictions.

This rule, while it has no clearly expressed derivation and no citation is given in the Allen v. Avondale case, apparently arises from the concept that courts in Florida view restrictive

covenants as a contractual obligation between the purchaser and others who are parties to the covenant. Osius v. Barton, 147 So. at 865.

In Osius, supra, this Court stated that the general theory behind the right to enforce restrictive covenants is that restrictions are enforced as contracts concerning land. The contract embodying the restriction is to be enforced against the promissor and those who take from him with notice and can be enforced by those in the neighborhood who can be considered beneficiaries of the contract. Osius v. Barton, 147 So. at 868. For a discussion of the contractual theory of restrictive covenants, see, Botts, Removal of Outmoded Restrictions, 8 University of Florida Law Review, 428 (1955).

Founded on this contractual theory, the court must have reasoned that where a purchaser takes title to property with restrictive covenants, on notice that there are materially changed conditions in the neighborhood which might otherwise provide a valid reason to invalidate the restrictive covenants or might form an equitable defense as to enforcement of the restrictive covenants governing such property, he is deemed to have purchased the property with full knowledge and concomitantly made adjustments in the consideration paid for the property recognizing such restrictions and the condition of the neighborhood in which the property is located. No other reasoning appears from the Avondale case so as to imply why such rule of law was developed.

Florida courts, however, have strictly adhered to the rule announced in Avondale. Vetzel v. Brown, 86 So.2d 138 (Fla., 1956), Baker v. Field, 163 So.2d 42 (Fla. 2d DCA, 1964), Acopian v. Haley, 387 So.2d 999 (Fla. 5th DCA 1980), Carlson v. Kantor, 391 So.2d 342 (4th DCA 1980).

The latest known application of the rule announced by this Court in Allen v. Avondale, supra, was in the opinion of the First District Court of Appeal in the instant case. In its opinion (CP-1), the First District traced the rule announced in Allen v. Avondale and stated that the principle enunciated therein had been criticized recently by two of its sister courts. (CP-4, 5).

In the decision of Acopian v. Haley, 387 So.2d 999 (Fla. 5th DCA 1980), the purchasers of beach front lots sought to invalidate a deed restriction providing only one residential dwelling per lot so that a condominium could be built there. The Fifth District recognized the Avondale principle should be applied in Acopian, but held that only harmless error had occurred since evidence adduced at trial showed that many of the changes in the surrounding neighborhood had occurred after appellee had acquired title. 387 So.2d at 1001. (CP-5). The First District Court of Appeal went on to discuss the case of Carlson v. Kantor, 391 So.2d 342 (Fla., 4th DCA 1980), wherein the court remanded the case to the trial level so that a weighing of the equities might be involved including the facts regarding purchase of the

property and other factors which might bear upon a resolution of the cause. Carlson, 391 So.2d at 343 (CP-5).

While both of the sister District Courts of Appeal had questioned the rule of Allen v. Avondale, the First DCA stated it was unable to adopt the solution of either the Fifth or Fourth District Court of Appeal. The Court therefore applied the rule announced in Avondale and reversed the judgment in the case. (CP-6).

The Order on Rehearing certified the question as one of great public importance as to whether or not the rule announced in the Allen v. Avondale should have continuing vitality. (CP-7).

The best argument in favor of overturning the rule announced by this Court in Allen v. Avondale is based along the lines of the contractual theory which this Court apparently follows in the enforcement of restrictive covenants. This Court has stated that the legal maxim which allows the removal of a restrictive covenant as a burden upon the land is "lex non cogit ad impossibilia." Barton v. Moline Properties, 164 So. at 556. Thus, this Court has stated that the equitable doctrine which allows removal of a restriction as to the use of property where by reason of change in the character of the neighborhood it would be inequitable to enforce such a restriction, is founded upon discharge of contractual obligation by a frustration of the contractual object.

As this Court stated:

> The last mentioned principle of law has just been authoritatively restated as a part of the common law in the following language appearing in Volume I, at page 426, Section 288 of the American Law Institute's Restatement of the Law of Contracts: "Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis upon which both parties enter into it, and this object or effect is or surely will be frustrated, the promissor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise until a contrary intention appears."

Osius v. Barton, 147 So. at 867.

Contractual frustration then would seem to form a sound basis for this Court to recede from the rule of Allen v. Avondale. The Fifth District Court of Appeal perhaps stated it best. In questioning the rule of it said:

> [T]he 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 restrictions at the time the action for removal is filed. [Section 11.12, Florida Real Property Practice III, The Florida Bar, CLE (Second Edition 1976)].

Acopian v. Haley, 387 So.2d at 1001, fn. 1.

The Fifth District Court's opinion then, relies on the contractual theory advanced by this Court that the proper test is to determine whether or not the original intent of the covenantor and his grantees has been frustrated by the material change in conditions. This test relies solely on whether or not the frustration in contractual purpose has occurred which this Court has urged as the equitable principle on which restrictive covenants

may be removed. The Fifth District test makes no mention of the seemingly artificial rule of Avondale as to whether or not the person who purchased the property was aware of materially changed conditions at the time of his purchase. Indeed the Acopian court test urged for adoption ignores the date of purchase and looks to the equities involved in each case.

The Petitioner Woods in the present case, purchased the Lots 1 and 2 in question in 1981 for the purpose of constructing additional rental apartment units and said purchase was made based on a rezoning of the beach side of U.S. Highway 98 in Mexico Beach for commercial purposes. The purchase was further based on the changed conditions of all of the surrounding property and neighborhood. (TR-70-73, 75-76). Testimony at trial also showed that zoning officials of the City of Mexico Beach recognized the need for a rezoning of property in light of changes in the neighborhood and in light of the restrictive covenants which were over thirty years old and were outmoded. (TR-71-73).

The restrictive covenants in the present case were placed on the property in 1948 and were without duration. (Plaintiff's Exhibit 1).

Where covenants were placed on property without duration, the Court will infer some reasonable time limitation, as adapted to the nature of the case, to be applied to the restrictive covenants. Barton v. Moline Properties, 164 So. at 556.

The test to be used in determining the continued validity of the restrictive covenants where there are changed conditions according to the Fifth District Court of Appeal in Acopian v. Haley, is whether or not the original purpose and intention of the parties to such covenant can be reasonably carried out in light of alleged material changes which are acclaimed to have effectually frustrated their object without fault or neglect on the part of the one who seeks to be relieved of their observance. Acopian v. Haley, 387 So.2d 999, 1001 (Fla. 5th DCA, 1980).

This contractual interpretation of whether or not restrictive covenants can be carried out in light of changed conditions has been consistently cited in Florida law as controlling where a grantee seeks to prove a change in conditions warrants relief in equity from restrictive covenants. Barton v. Moline Properties, 164 So. at 557; Osius v. Barton, 147 So. at 867; Wahrendorff v. Moore, 93 So.2d at 722; Baker v. Field, 163 So.2d at 44; Crissman v. Dedakis, 330 So.2d 103, 105 (Fla. 1st DCA 1976).

In the present case, the strict application of the Allen v. Avondale rule has led to an inequitable and unjust solution under the opinion of the First District Court of Appeal. If the First District Court's opinion is affirmed, the Woods are to be prevented from a use of their property which the trial judge in his findings of fact felt would be in harmony with the changed conditions of the neighborhood. (R-14). The Court found that the subdivision which is the subject matter of the litigation had acquiesced or disregarded plat restrictions to the extent that

there were existing rental apartments and houses on some lots but there was little commercial development such as motels, stores or service stations. (TR-14-15).

Certainly there was ample testimony in the record to show the changed conditions of the neighborhood and to demonstrate that single family residences were interspersed with many multiple family dwellings and rental apartment units. (TR-52-60).

The testimony of Petitioner Peggy Wood was a virtual list of the significant number of duplexes, triplexes, quadriplexes and commercial establishments now located both within the Unit 3 subdivision and without the Unit 3 subdivision but all within the neighborhood area. Mrs. Wood testified and was unrefuted that Lot 1, Block 1, of Unit 3 contains a duplex with a real estate office on one side and a rental unit on the other. (TR-53). Lot 7, Block 8, of Unit 3 contains a quadriplex apartment and is listed as accommodating fifteen persons. (TR-54, 55).

Mrs. Wood also testified that across the street from Respondent Dozier was located a rental house with an apartment in back along with a shed. This house is located in Unit 3 of Mexico Beach. (TR-58). Her testimony also reflected that the Sandman Apartments in the immediate neighborhood contain four apartments and an insurance office. (TR-56). Also located on Lot 6, Block 4, of Unit 3 was a church. (TR-58). Additionally, the Schweikert home, located on Lot 7 and 8, Block 3, Unit 3 of the subdivision (TR-33) contains two travel trailers, a car on blocks, a shed with wheels, another shed for storage and two boats with

clothes lines attached. (TR-59). The testimony of Elizabeth Thompson, real estate broker in Mexico Beach, further confirms that there are duplexes, multifamily dwellings and apartments in Unit 3 in the surrounding neighborhood. (TR-62-66). A brochure listing rental property handled by Thompson was admitted as Defendant's Exhibit 2. (TR-77). Photographs confirming Mrs. Wood's testimony as to lots and their structures were admitted as Defendant's Composite Exhibit 3. (TR-77).

Thus, the lower Court had ample evidence before it in order to make a finding of acquiescence in enforcement of the covenant restrictions and to find materially changed conditions not only within Unit 3 subdivision itself, but within the neighborhood as well. (R-14-15).

If the rule announced in Allen v. Avondale is to be strictly applied, as it has in the present case, it can lead to some patently absurd results. Assume arguendo that along the Miami Beach area where condominiums, highrise apartment complexes and multi-story hotels are the rule, that a parcel of property remains undeveloped between a condominium and a highrise hotel. The owner of the property has held title since the 1940's during the Florida land sales boom. Assume further that the deed to the property and plat on file with the local government contain a restriction that only single family residences may be erected on such lot. Wishing to take a profit, the party sells the property to a party interested in development. The grantee begins construction on a highrise condominium which would be consistent

with other uses in the neighborhood. Other land owners at that time could then seek to enforce the restrictive covenant limiting the building to a single family residence. Under the rule announced in Allen v. Avondale, the developer, because of his date of purchase, could be enjoined from the building of a highrise condominium even though it would be entirely consistent with those uses of other property in the Miami Beach area. Many other hypotheticals could of course be cited leading to the same absurd results based on the Allen v. Avondale rule.

If the rule announced in Allen v. Avondale is based upon a contractual theory, it would seem that the Court's previous rulings regarding contractual frustration of purpose should be applied to relieve the Woods as a purchaser from restrictive covenants which no longer serve a valid purpose. If, however, the Court wishes to view restrictive covenants as an equitable servitude running with the land, there would seem to be no reason why the Woods as purchasers of restricted lots should not have purchased the same equitable considerations as the prior owner would retain had he wished to develop the lot and had sought to be relieved of the restrictive covenants. For discussion of contractual theories versus equitable theories of restrictive covenants, see Powell on Real Property, ¶670(2) (1949, 1981 Revision).

In addition, note that Florida along with only one other jurisdiction seemingly has applied the Allen v. Avondale rule.

Lebo v. Johnson, 349 SW 2d 744, at 750 (Texas Ct. of Civil Appeals, 1961).

In light of all of the above, the rule announced in Allen v. Avondale, should be reconsidered by this Court under the theories announced by the Fifth District Court of Appeal in Acopian v. Haley, supra, and the Fourth District Court of Appeal in Carlson v. Kantor, supra. As stated there, the true test should be founded on the contractual intent of the original parties in restricting the land and whether or not such purposes of restrictive covenants have been frustrated by a change in conditions. See, Acopian at 1001, footnote 1, Carlson at 343, and see Section 11.12, Florida Real Property Practice, 3rd, The Florida Bar, CLE (Second Edition, 1976).

This Court, in 1938, decided Allen v. Avondale, and it could be possible that that Court denied relief strictly on the equities of the situation. While the rule was announced there that the Appellant Allen took with notice and could not rely on the material changes occurring prior to his purchase, that case could be limited strictly to the facts. The Court could have made its ruling based upon the fact that the relief sought by the Appellant was forthcoming in fourteen months since the restrictive covenants which he sought to invalidate expired by limitations in a little over one year. Also, concurring Justice Brown noted that all of the changes which Allen complained of were wholly outside of the restricted area and had not clearly neutralized

the benefits of the restrictive covenants. Allen v. Avondale, 185 So. at 138.

This Court now, has an opportunity to correct a rule of law which, although applied in good faith by subsequent courts, has led to an inequitable result in the instant case.

The Woods should not be penalized for the date and time in which they purchased property and should be allowed to plead as an equitable defense that the restrictive covenants no longer can serve the contractual purpose for which they were imposed in 1948. Accordingly, based on the foregoing reasoning, this Court should answer the first certified question negatively and should adopt the test expressed by the Fifth District Court of Appeal in Acopian v. Haley, supra. That test would be in line with this court's seeming contractual basis for the enforcement of restricted covenants and would further comport with its reasoning that where there has been a material change in the circumstances of a neighborhood, the granting of the relief from restrictive covenants will be allowed in equity where there has been a frustration of the purpose of the original grantors. This rule could be simply applied and its results would be equitable to owners of property regardless of the date or time in which they purchased the property. The rule would thus depend on the facts, the material changes in the neighborhood relied upon and upon the equities of the particular case which this Court has stated are paramount in a consideration of a controversy over the term of restrictive covenants. Crissman v. Dedakis, 330 2d at 105.

Accordingly, this Court is urged to answer the First Certified Question in the negative and adopt the test as posed by the Second Certified Question of the First District Court of Appeal as posed by the Fifth District Court of Appeal in Acopian v. Haley.

POINT II

IF QUESTION I IS ANSWERED IN THE NEGATIVE, WHETHER THE DECISIVE ISSUE IS, AS SUGGESTED IN ACOPIAN V. HALEY, 387 So.2d 999 (Fla. 5th DCA 1980) WHETHER THE INTENT OF THE ORIGINAL GRANTORS HAS BEEN FRUSTRATED BY SUBSEQUENT CHANGES REGARDLESS OF WHEN SUCH CHANGES OCCURRED?

As argued in Point I of this brief, infra, Petitioners urge this Court to recede from the rule announced in Allen v. Avondale Co., 135 Fla. 6, 185 So. 137 (Fla. 1938).

The latter test is that stated in the Acopian case supra, as outlined in the Second Certified Question of the First District Court of Appeal.

The majority of jurisdictions have adopted a similar rule, that a change in conditions of an area will prevent enforcement of restrictive covenants where the changes make it no longer possible to accomlish the oricinal purpose of the restrictions. 20 Am.Jur. 2d, Covenants, Conditions, etc., Section 281, 54 A.L.R. 812, 4 A.L.R. 2d 1111, 53 A.L.R. 3rd 492, and cases cited therein, Restatement Law of Property, Section 564 (1944).

Accordingly, upon answering the First Certified Question negatively, the Petitioners urge adoption of the test stated in Acopian, supra, and an affirmative answer to the Second Certified Question of the First District Court of Appeal.

POINT III

A. PLAINTIFFS DOZIER IN SEEKING EQUITABLE RELIEF BY ENFORCEMENT OF RESTRICTIVE COVENANTS HAVE FAILED TO ENTER COURT WITH CLEAN HANDS AND SHOULD BE DENIED EQUITABLE RELIEF.

This Court is not restricted in reviewing a case on appeal to a consideration of the certified question presented. Rather, the Court has broad powers to consider the judgment and opinion of a court passing upon a question of great public importance. Zirin v. Pfizer and Co., 128 So.2d 594 (Fla. 1961); State v. Tait, 387 So.2d 338 (Fla. 1980).

Petitioners Wood assert that this Court should consider the equitable doctrines of clean hands and the power of the trial court to fashion judgments in equity in consideration of the present case.

It is an axiom of the law of this state that a party seeking equitable relief must have "clean hands" or the equitable relief will be denied. Roberts v. Roberts, 84 So.2d 717 (Fla. 1956).

In the instant case, the seeking of injunctive relief to enforce restrictive covenants is an equitable action and the Doziers have admitted such by alleging no adequate remedy at law. (R-1-2). As the principal cases in this area have stated, courts of equity may consider the enforcement of restrictive covenants. Barton v. Moline Properties, 121 Fla. 683, 164 So. 551 (1935), Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933).

The doctrine of clean hands has been applied in cases dealing with restrictive covenants and will serve to defeat

claims for enforcement of restrictive covenants. Pilafian v. Cherry, 355 So.2d 847 (Fla. 3rd DCA 1978), Crowl v. McDuffie, 134 So.2d 542 (Fla. 1st DCA 1961).

The two cases cited are of important application in the present case.

In Crowl v. McDuffie, supra, the First District Court affirmed the ruling of the trial court denying an injunction. The plaintiffs had sought an injunction to remove from a restricted lot a detached garage built near the front of the lot in violation of a restrictive covenant. As the only evidence, interrogatories propounded to the plaintiffs revealed that one had built a brick pumphouse, and that eight other plaintiffs all built and maintained garages or carports in violation of the restrictive covenant. Crowl at 543.

The court affirmed the denial of the injunction based on the fact that there was no evidence to indicate that the plaintiffs were acting with clean hands and had not waived any rights to enforce the covenant restriction. Accordingly, the denial of the injunction was affirmed. Crowl at 544-545.

Similarly, in Pilafian, supra, the court found no error in the trial judge's finding denying a mandatory injunction to prevent the construction of a dock on waterfront property in violation of the restrictive covenants. The trial court had found the plaintiff's violation of the covenant substantial and existing when it was sought to enjoin the construction of a dock just as plaintiff had done. The trial court applied the doctrine

of "clean hands" citing the Crowl v. McDuffie decision as applicable. Pilafian, 355 So.2d at 849-850. Thus where a plaintiff has violated the restrictive covenant sought to be enforced later against another, the injunctive relief should be denied.

In the instant case, the decision in Crowl v. McDuffie, is directly applicable. The testimony of the Respondent Dozier, who seeks to enjoin the building of rental units by the Woods, reveals that he is in violation of the restrictive covenant. Plaintiff Dozier admitted to the building of a structure which could contain two separate residences and further admitted to the construction of three aluminum sheds or outbuildings, each 12 x 20 feet in size. (TR-8-10). Dozier further admitted that these buildings could not be construed to be garage apartments which would be in conformity with the restrictive covenants. (TR-17). A picture of these metal outbuildings behind the Dozier house was admitted as a part of Defendants Woods Composite Exhibit 3. (TR-70).

Thus the doctrine of unclean hands is clearly applicable to Dozier and consequently equity will prevent the relief requested to enjoin the building of further structures by the Woods.

Note that the doctrine of clean hands, though not specifically pled as an affirmative defense will be inferred by a court of equity where the evidence clearly shows its application. Brenner v. Smullian, 84 So.2d 44 (Fla. 1956), Dale v. Jennings, 90 Fla. 234, 107 So.175 (Fla. 1925).

Clearly, in the instant case, the doctrine of clean hands must be applied as shown by the evidence, though it was not pled as a specific defense. The Dœziers, seeking to enforce the restrictive covenant, have clearly violated the covenants themselves prior to the violation complained of, and thus should be estopped from the granting of relief. Accordingly, the final judgment of the trial court should be reinstated and affirmed in all respects.

B. THE ORDER OF THE TRIAL COURT GRANTING A PARTIAL INJUNCTION TO THE PLAINTIFFS AND A PARTIAL RELEASE FROM THE RESTRICTIVE COVENANTS TO DEFENDANTS IS AN APPORTIONMENT OF EQUITIES BASED ON THE FACTS AND CIRCUMSTANCES OF THIS CASE AND AS SUCH, SHOULD BE AFFIRMED.

It is an ancient maxim of equitable courts that equality is equity. Mordt v. Robinson, 116 Fla. 544, 156 So. 535 (Fla. 1934). Further, it is stated that a court of conscience may use its discretion in forming equitable decrees which should adopt an appropriate relief for the wrong suffered as may be called for by the circumstances of the particular case. Rennolds v. Rennolds, 312 So.2d 538 (Fla. 2d DCA 1975).

In the instant case, the trial court, in entering its final judgment enjoined the Woods from constructing more than two structures on each of the lots in question in Unit 3 subdivision and also limited these structures to contain no more than six rental units total on each of the lots. The trial judge found that this would allow structures to be erected which were in harmony with what the court has determined existed within the

subdivision at present. (R-14). This order by the trial judge reflects a balancing of equities after a determination from the facts and circumstances of the present case. The trial judge did not totally invalidate the restrictions of the restrictive covenants in the subdivision, nor did he permanently enjoin the erection of any structures by the Woods. Instead, the trial judge exercised a wisdom much like that of Solomon and apportioned the relief among both plaintiffs and defendants. This compromise approach by the trial judge is within the judge's discretion in fashioning equitable relief in an equitable action. Rennolds, 312 So.2d at 542.

This court may also note that in dealing with restrictive covenants, partial relief allowed by a trial judge so as to affirm the removal of restrictive covenants as to part but not all of a parcel of property has been granted. Crissman v. Dedakis, 330 So.2d 103 (Fla. 1st DCA 1976). This Court has also limited equitable relief to only those lots sought to be relieved of the restriction. Barton v. Moline Properties, 164 So. 556, (Fla. 1935), opinion on rehearing, at 557.

Other jurisdictions have also allowed partial invalidations of restrictive covenants. See, Cushing v. Lilly, 24 N.W.2d 94 (Mich. 1946), invalidating restrictions on Lilly's property only where his residence and property were cut off from the rest of the subdivision by railroad right-of-way; Borgman v. Markland, 29 N.W.2d 121 (Mich. 1947) where court affirmed trial judge's order allowing use of home for conduct of painting and interior

decorating business with restrictions imposed on advertising and type of business; Wolff v. Fallon, 269 P.2d 630 (Cal. 1st DCA 1954) affirmed, 284 P.2d 802 (Cal. 1955), affirming trial court judgment invalidating restriction of lot to single family residence but keeping set back line restriction in force; Morris v. Nease, 238 S.E.2d 844 (W.Va. 1977) allowing covenant violations for operation of chiropractic clinic which was similar to prior non-conforming use.

It is unclear from the record and the complaint of the Dɑziers as to exactly what portion of the restrictive covenant they sought to enforce against the Woods. As initially pled in the Complaint, the Dɑziers specifically cited to that portion of the restriction which states: "All lots shown on this plat are restricted to residences." (R-1). However, during the course of the trial, attorney for the Dɑziers, Mr. Hutto, objected to the taking of testimony concerning multi-family dwellings and the fact that such dwellings were rented. Attorney for the Dɑziers admitted that the particular plat restrictions contained no prohibition as to multi-family dwellings nor against the renting of such dwellings and apparently attempted to limit testimony as to the concern with whether or not there was more than one building per lot. (TR-67). This objection was overruled by the court to allow continued testimony regarding the changed conditions of the neighborhood. (TR-68).

Additionally, Respondents Dɑzier were unclear as to their desire to enforce the restrictive covenants. Dɑzier admitted

that multi-family dwellings and rentals were allowed in residential areas. (TR-17). In fact, Dozier felt that apartments were residences, (TR-11) and also felt real estate offices operated from a residence were permissible in violation of restrictive covenants. (TR-12).

Thus, while it is unclear as to what equitable relief and which portions of the restrictive covenants the Plaintiffs Dozier sought to enforce, it is apparent that the trial judge in considering all the facts and circumstances of the case, rendered a final judgment apportioning the equities among the parties. It would appear that the trial court in making its decision followed this court's mandate in Barton v. Moline Properties, Inc., 164 So. 551 (Fla. 1935). There, this Court stated:

> "In cases like this, each particular controversy over the term of duration of restrictive covenants on property rises must be decided on the equities of each particular situation as it is presented."

Barton at 556.

The trial judge in the instant case clearly found changes in the makeup and conditions of the neighborhood which would permit the erection of multi-family dwellings and permit the erection of two structures on each of the Wood's lots. The judge found that such construction, while not commercial, would be in harmony with the type of structures presently existing in the neighborhood. (R-14).

Certainly the trial court had before it ample evidence as to the change in conditions not only within the subdivision itself

but within the entire neighborhood as well. (TR-53-58, 62-69, 13, 14, Wood's Composite Exhibit 3, TR-70, 77).

The trial court in fashioning its equitable remedy followed clear decisions of this Court. Accordingly, the judgment of the trial court should be reinstated based on equitable principles. Where the original intent of the parties to the restrictive covenants can no longer be carried out, equitable relief from the restrictive covenants should be granted. Wahrendorff, supra, at 722.

CONCLUSION

The Certified Questions of the First District Court of Appeal in the present case raise important questions of law in this Court. The contractual theory of the nature of restrictive covenants and equitable considerations which will relieve the enforcement of those restrictions should be carefully considered.

The rule of Allen v. Avondale, supra, has been questioned by three District Courts and appears to lead to inequitable results when strictly applied. Based on contractual theory or equitable considerations, the better test when seeking to invalidate restrictive covenants is whether or not changed conditions have frustrated the original purpose of the restrictive covenants and relief should not depend upon ownership of the property at the date the restrictions are to be removed.

This test, urged in Acopian v. Haley, and certified by the First District Court should be adopted by this Court based on sound equitable principles and as consistent with prevailing precedent.

Accordingly, Petitioners Woods urge this Court to answer the First Certified Question of the First District Court of Appeal in the negative and to answer the Second Certified Question affirmatively. The opinion of the First District Court should be reversed and the opinion of the trial court reinstated.

Respectfully submitted,

WILLIAM L. GARY
Post Office Box 1814
Tallahassee, Florida 32302
(904) 224-1258

and

HOWARD E. ADAMS, of
PENNINGTON, WILKINSON & DUNLAP
Post Office Box 3985
Tallahassee, Florida 32315-0985
(904) 385-1105

ATTORNEYS FOR PETITIONERS

HEA3r
7-20-83

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the foregoing Initial Brief of Petitioners has been furnished this 20th day of July, 1983 by regular U. S. Mail to:

James B. Fenson, Esq.
Post Office Box 1638
Panama City, Florida 32401
Attorney for Respondents

Hume F. Coleman, Esq.
Post Office Drawer 810
Tallahassee, Florida
Attorney for Amicus Curiae

Bill R. Hutto, Esq.
Post Office Box 2017
Panama City, Florida 32401
Attorney for Respondents

Howard E. Alan
Attorney