IN THE SUPREME COURT OF THE
STATE OF FLORIDA

TOM WOOD, et ux,

Petitioners,

vs. CASE NO. 63,879

RAYMOND G. DOZIER, JR., et ux,

Respondents.

REPLY BRIEF OF PETITIONERS

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

ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF CASES AND 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

ARGUMENT

POINT I

THIS COURT SHOULD ACCEPT DISCRETIONARY JURISDICTION OF THIS CASE TO REVIEW THE CERTIFIED QUESTIONS PRESENTED BY THE FIRST DISTRICT COURT OF APPEAL.

The Supreme Court's consideration of Petitioner's appeal in this case is founded upon a certification by the First District Court of Appeal of questions of great public importance pursuant to Article V, Section 3(b)(4), Florida Constitution. Order on Rehearing, (CP-7). That jurisdiction for review of the certified question is discretionary with this Court. As this Court has stated, it need not review every question certified to it by the District Courts of Appeal as being a matter of great public interest. Zirin vs. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961) at 597. Petitioners have founded this appeal in the belief that the Supreme Court should exercise its discretionary review to consider questions of great public importance and questions of law which have been criticized by a majority of the District Courts of Appeal in this State.

The First District Court of Appeal has recognized in its opinion that two sister courts have questioned the rule of law in Allen vs. Avondale, 135 Fla. 6, 185 So. 137 (Fla. 1938). Dozier vs. Wood, 431 So.2d 184 (Fla. 1st DCA 1983) at 186.

The First DCA has certainly questioned this rule by its

certification of two questions of great public importance asking this Court to resolve whether or not the rule of law announced in the Allen vs. Avondale case, supra, should have continuing vitality. Any protestations by Amici and Respondents as to whether or not this question is actually of great public importance has no validity before this Court. Whether or not a question is one of great public importance should have been argued before the First District Court, and it is not proper argument in the Supreme Court. Zirin vs. Pfizer at 596.

It is immaterial whether or not Respondents or Amici believe this case is one of great public importance, but it is certainly within the discretion of this Court to decide whether or not a principle of law which has existed for the past 50 years should now be revised, updated, overruled, or reaffirmed in light of historial and social conditions.

This Court has often recognized that the law is not stagnant, but it is a living and changing body of principles which may need revision from time to time due to social or economic conditions. As this Court stated in Hoffman vs. Jones, 280 So.2d 431 (Fla. 1973):

> We are, therefore, of the opinion that we do have the power and authority to reexamine the position we have taken . . . and to alter the rule we have adopted previously in light of current "social and economic customs" and modern "conceptions of right and justice".

Hoffman vs. Jones at 436.

As this Court also said: "Stare decisis and res adjudicata

are perfectly sound doctrines approved by this Court, but they are governed by well settled principles and when factual situations arise, that to apply them would defeat justice, we will apply a different rule." Beverly Beach Properties vs. Nelson, 68 So.2d 604 (Fla. 1953) at 607.

Respondents and Amici would have this Court reaffirm the rule in Allen vs. Avondale, supra, based on a principle of stare decisis. Amici would also attempt to state that there are no demonstrably inequitable circumstances or consequences which would require a departure from the Allen vs. Avondale rule. Petitioners assert that the questioning of this rule by three District Courts of Appeal and the fact that commentators in the Continuing Legal Education books sanctioned by this Court through its control of The Florida Bar, form a sound basis on which to reexamine a principle of thought which has existed for nearly 50 years.

The facts of this case demonstrate that it may be entirely inequitable to blindly apply the Allen vs. Avondale rule so as to penalize the Woods for their purchase of property and attempted development of that property. The trial transcript is replete with facts which show a quite radically changed neighborhood condition, both within the subdivision in question and within the general neighborhood in question.

There are numerous multi-family dwellings and structures on lots within the subdivision which is in question here,

and each of the witnesses produced by the Respondents and who are now joined as amicus curiae testified that there was knowledge of these buildings and structures when each witness purchased property in Mexico Beach. (TR-10-13, 21-24, 30-32, 33-37, 40-43). Further, an insurance office, a real estate office, and numerous duplexes and quadraplexes exist in the neighborhood. (TR-10-16, 53-58, 62-69). Further, existing in Unit 3 or immediately adjacent to the unit are a church (TR-13), property used as a television repair business (TR-13), a commercial mini-warehouse business (TR-14), and a recreational tennis complex (TR-13).

While Respondents stated that they had on occasion voiced objections to development, no formal action was taken (TR-14).

Petitioners Woods candidly admit altering the Driftwood Motel in 1976 and 1977 to add efficiency units. (TR-52). This admission is not intended to "bootstrap" the argument of Petitioners (Brief of Amici, p. 2), but to further emphasize acquiescence by the Respondents and Amici to numerous violations of restrictive covenants.

Amici and Respondents would attempt to minimize the violation of the restrictive covenants by the Respondents stating the building of storage sheds and two separate living quarters are not "material" violations or are normal appurtenances to the residence. (Brief of Respondents, p. 30, Brief of Amici, p. 2-3). Again, the record is clear

that there are many violations of the restrictive covenants including those of Respondents (TR-8-10, 17), and acquiescence by the parties in the violations.

When taken as a whole, certainly 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 the Unit 3 subdivision, but within the neighborhood as well.

The trial court in issuing its final judgment made an explicit finding of fact that the allowance of the Woods to build two structures on each lot with no more than six rental units total on each of said lots would allow structures to be erected which are in harmony with what the Court has determined exist within the subdivision. (R-14-15).

This finding by the lower court, that these structures would be in harmony with those presently existing obviously demonstrates the changed conditions in the neighborhood which would warrant a relief from restrictive covenants. Wahrendorff vs. Moore, 93 So.2d 720 (Fla. 1957).

To further emphasize that the result reached here is an equitable one and that the facts of this case may indeed be suitable for the granting of equitable relief, the First District Court of Appeal in issuing its opinion found that the result reached by the trial judge was prima facie equitable. Dozier vs. Wood, 431 So.2d at 185. However, the First District Court was compelled to reverse the trial judge

based on the principles of stare decisis and the Allen vs. Avondale principle. Dozier vs. Wood at 186-187.

Thus, the question of whether or not this Court should reconsider the Allen vs. Avondale rule has great support both in the record and in the opinions of the trial court and First District Court of Appeal. The facts of this case lend themselves to either a reexamination of the rule in light of the equities of this case or indeed an examination of the rule as to its continuing vitality in Florida.

POINT II

THE RULE OF ALLEN vs. AVONDALE SHOULD BE ADDRESSED BY THIS COURT TO DETERMINE WHETHER OR NOT IT SHOULD HAVE CONTINUING VITALITY SINCE THE OPINION HAS BEEN CRITICIZED BY THREE DISTRICT COURTS OF APPEAL.

Amici curiae and Respondents take issue with the fact that the First District Court of Appeal incorrectly stated that other courts had questioned the rule of Allen vs. Avondale (Brief of Respondents at 9-10, Brief of Amici at 16-18). However, that argument was again one which should have been made in the First District Court of Appeal or on rehearing wherein Respondents and Amici might have challenged the opinion of the First District Court of Appeal.

It is a fact that the First District Court of Appeal found two sister courts had criticized the principle enunciated in Allen vs. Avondale, supra. See Dozier vs. Wood, 431 So.2d at 186. Secondly, it is obvious from an examination of the cases of Acopian vs. Haley, 387 So.2d 999 (Fla. 5th DCA 1980) and Carlson vs. Kantor, 391 So.2d 342 (Fla. 4th DCA 1980), that those Courts' consideration of the rule of Allen vs. Avondale and the criticism found in the Continuing Legal Education Real Property Practice Manual brings the rule into question even though both courts found methods to dispose of the cases without strictly applying the Allen vs. Avondale rule.

The argument that other courts have not criticized the rule is without merit, and indeed the questioning of the

rule by three District Courts of Appeal forceably lends credence to the argument of Petitioners as advanced in their initial brief, that the rule should be reexamined by this Court in light of the principles of law and reasoning set forth in that brief.

As stated there, the true test should be that concerning 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. The Petitioners Woods should not be penalized by restrictive covenants which are outmoded and have outlived their usefulness because of the fact of the timing of their purchase of the property. The facts show materially changed conditions in the neighborhood, and the true intent of the original parties in restricting the lots to residential use only can no longer be carried out in light of these materially changed conditions. Accordingly, this Court should answer the first certified question of the First District Court of Appeal in the negative, and should adopt the test expressed by the Fifth District Court of Appeal in Acopian vs. Haley, supra, that where the intent of the original grantors has been frustrated by subsequent changes regardless of when such changes occurred, the relief requested from restrictive covenants should be granted.

POINT III

THE RESTRICTIVE COVENANTS IN THE INSTANT CASE HAVE OUTLIVED THEIR USEFULNESS AND THE FACTS OF THIS CASE WARRANT EQUITABLE RELIEF.

Respondents and Amici would attempt to convince this Court that the changed conditions of the neighborhood are not sufficient so as to warrant a relief from the restrictive covenants originally imposed in the subdivision. This argument, however, runs contra to the finding of the trial judge in his final order that the erection of two structures with no more than six rental units would be consistent and harmonious to the present uses in the neighborhood. (R-14-15). It is also contra to the established facts brought forth at trial.

Amici and Respondents make much of the fact that each of the witnesses testifying at trial testified that they have relied on the restrictions to keep the neighborhood residential in character, yet none of them have ever taken any formal action to challenge development of multi-family dwellings or indeed to challenge the building of the Driftwood Motel in its early stages. Witness Elizabeth Fensom stated that she had owned a lot in Mexico Beach, Unit 3 since 1950. Further, she stated that at the time the Driftwood Motel was being built, roughly in 1952, she and her husband had talked to an attorney in Port St. Joe about attempting to stop the building of the motel. However, nothing was done, and no formal action was ever taken to prevent the building of this

structure. (TR-26-28).

Mrs. Fensom admitted that she had never taken any official action, but had registered some complaints about the building of the church or mobile homes being placed on lots in the subdivision. (TR-31-32). None of the other witnesses have ever expressed taking any formal action to object to violations of the restrictive covenants, and indeed one witness stated no one enforced the covenants. (TR-42-43). There has obviously been acquiescence in the construction of numerous multi-family residences, and no objection to the rental of those residences at any time. The virtual laundry list of violations and restrictive covenants expressed by the Petitioners (TR-52-61), confirmation of this by the Respondents (TR-11-15), and also by other witnesses (TR-23-25, 28-31, 41-43, 63-69), evidences a general and complete acquiescence and lack of enforcement in all subdivision covenants and restrictions.

The Respondents admit that they may be in technical violation of the restrictive covenants through the building of aluminum outbuildings and through the building of two separate living quarters in their residence (TR-8-17, Respondents Brief at p. 30). Amici would also assert that since it is a common practice for owners of beachhouses to rent units or to subdivide large houses or even to build mutlti-family dwellings this would constitute a "residence" of the type which are not material violations of the restrictive covenants

and even though non-conforming might be appropriate in the context that the term "residence" is used in the restrictive covenants. (Brief of Amici at 21-22).

Regardless of the assertions of Amici, the Woods seek to do no more than that in which all other parties to this litigation and Amici have already acquiesced. The Petitioners Woods seek to do nothing more than to build two separate structures for rental purposes, each containing three separate living quarters. If multi-family dwellings which are quadraplex in nature can be construed as a residence under the interpretation of this restrictive covenant, then the Petitioners' construction of two triplex units on each of the lots could certainly come within that definition of residence urged by Amici as being within the context of the restrictive covenants. The argument of Amici along the lines that multi-family dwellings are residences within the meaning of the restriction rises to the absurd in an attempt to overcome the fact that there are numerous acquiescences and violations of the covenants by both the Respondents and by Amici parties.

POINT IV

THIS COURT IS EMPOWERED TO REVIEW AN ENTIRE CASE EVEN THOUGH A CERTIFIED QUESTION SPECIFICALLY GRANTS JURISDICTION FOR THE APPEAL, AND THIS COURT SHOULD SEEK TO DO EQUITY AMONG THE PARTIES INVOLVED.

The certification of the question of great public importance below gives this Court authority to review the entire decision and opinion of the lower court and not simply to answer the question on appeal. Zirin vs. Pfizer, 128 So.2d at 594 (Fla. 1961). This Court has within its powers the apportionment of equities to affirm the trial court (R-14-15), which the First District Court of Appeal found an equitable solution to a difficult problem. Dozier vs. Wood, 431 So.2d at 185.

While the First District Court of Appeal was forced to reverse the cause on grounds of the application of the Allen vs. Avondale rule, the trial judge's use of apportionment of equities and his findings of fact support a partial invalidation of restrictive covenants. Amici would attempt to demonstrate that all of the cases cited by the Woods in support of a partial invalidation or allowance of a nonconforming are distinguishable, but each of these cases when viewed on its facts allows either partial invalidation of restrictive covenants or nonconforming uses of the property in violation of restrictive covenants.

Petitioners Woods realize that each case dealing with restrictive covenants must be decided as is equitable from

the nature and the facts of each case. Crissman vs. Dedakis, 330 So.2d 103 (Fla. 1st DCA 1976). Amici and Respondents failed to acknowledge the fact that this Court and the First District Court of Appeal have also allowed partial relief in the removal of restrictive covenants as to part but not all of a parcel of property, and to those lots sought to be relieved of the restrictions yet not relieving other lots in the subdivision of the restrictions. Crissman vs. Dedakis, 330 So.2d 103 (Fla. 1st DCA 1976), Barton vs. Moline Properties, 164 So. 551 (Fla. 1935), Opinion on Rehearing at 557.

The trial court in fashioning its equitable remedy followed clear decisions of this court allowing partial invalidation and based its judgment on equitable principles. Thus the test certified by the First District Court of Appeal and urged for adoption by Petitioners, that 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 regardless of the date of purchase, should be adopted by this Court. Accordingly, the partial relief from the restrictive covenants as granted by the trial court is a proper remedy and one which comports with justice in this case.

CONCLUSION

Petitioners urge this Court to give careful consideration to the continued vitality of the rule of Allen vs. Avondale, supra, which has been questioned by three District Courts of Appeal and appears to lead to an inequitable result when strictly applied in the present factual situation.

Respondents and Amici have urged that the rule should be followed as applied by the First District Court of Appeal based on stare decisis and other grounds. However, the compelling need to occasionally reexamine rules of law due to changes in conditions, social and economic factors, outweigh in the present case the strict application of an ancient rule of law.

The facts in this case show a clear need for the Supreme Court to revisit the rule announced in Allen vs. Avondale, supra, and to determine whether or not the application of such a rule is equitable and just. Florida is a developing state, and lawsuits concerning restrictive covenants may become much more commonplace as the pressure to develop residential areas both for commercial purposes, for multi-family dwellings, and for other intensive uses increases in our state. A clear statement of applicable law in such situations as the present case would undoubtedly serve the best interests of the public and judiciary of this state where rules of law are unclear or questioned as to their continuing validity.

Accordingly, Petitioners 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 of Appeal should be reversed, and the opinion of the trial court reinstated as an equitable and just result.

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
(904) 385-1103

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the foregoing REPLY BRIEF OF PETITIONERS has been furnished this 9th day of September, 1983, by regular U. S. Mail to:

James B. Fensom, Esquire
Post Office Box 1638
Panama City, Florida 32401
ATTORNEY FOR RESPONDENTS

Hume F. Coleman, Esquire
Post Office Drawer 810
Tallahassee, Florida 32302
ATTORNEY FOR AMICUS CURIAE

Bill R. Hutto, Esquire
Post Office Box 2017
Panama City, Florida 32401
ATTORNEY FOR RESPONDENTS

Howard E. Alden
Attorney