

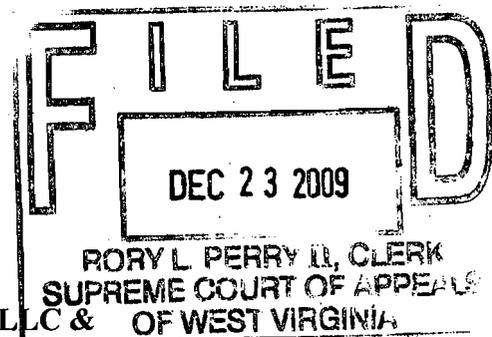
# IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 35308

**JASON FOSTER,**  
**Plaintiff / Appellant,**

v.

**ORCHARD DEVELOPMENT COMPANY, LLC &**  
**PETELER, LLC,**  
**Defendants / Appellees.**



The Honorable David H. Sanders, Judge  
Circuit Court of Berkeley County, West Virginia  
Civil Action No. 08-C-792

## BRIEF OF APPELLANT

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## **KIND OF PROCEEDING AND NATURE OF THE RULING BELOW**

This matter originally came before the Berkeley County Circuit Court upon the Plaintiff's June 5, 2008 Complaint for Preliminary Injunction, Permanent Injunction and Damages. Specifically, the Plaintiff sought a permanent injunction prohibiting Defendants from constructing numerous eight hundred (800) square foot studio town homes in The Gallery Subdivision, in Martinsburg, Berkeley County, West Virginia. Plaintiff alleged that the Defendants' approval and construction of the eight hundred (800) square foot studio town homes violated the One Thousand Seven Hundred (1,700) minimum square footage requirement governing residences in the subdivision as set forth in the applicable restrictive covenants.

The Circuit Court held hearings on June 12 and June 17, 2008 on Plaintiff's request for a preliminary injunction. Based upon the evidence and argument presented during these hearings, the Court denied the Plaintiff's request for a preliminary injunction. Upon the agreement of counsel, the Court established an expedited discovery and briefing schedule. The parties conducted limited discovery and submitted cross-motions for summary judgment in accordance with the Circuit Court's June 26, 2008 Order Denying Preliminary Injunction.

The Circuit Court held a hearing on the parties' cross-motions for summary judgment on September 8, 2008. Based upon the evidence heard at this hearing and the pleadings filed to date, the Circuit Court entered, on September 30, 2008, an Order Denying Plaintiff's Motion for Partial Summary Judgment and Request for Permanent Injunction and Granting Defendant's Motion for Summary Judgment.

It is from this September 30, 2008 Order that Plaintiff now appeals.

## STATEMENT OF FACTS

On June 7, 2004, Defendant Orchard Development Company, LLC, by and through one of its members, Tim Shaw, caused to be recorded in the Berkeley County Courthouse, the Declaration of Covenants, Conditions, and Restrictions for The Gallery Subdivision, and later filed the Declaration of Covenants, Conditions and Restrictions containing additional exhibits on October 15, 2004. Collectively the "CCR" - Exhibits 1 and 2 to Plaintiff's Motion for Partial Summary Judgment. The CCR expressly designates and defines the Design Development Guidelines. CCR, Section 1.13 - Exhibits 1 and 2 to Plaintiff's Motion for Partial Summary Judgment. The Developer drafted the Design Guidelines, which include declarations that the Design Guidelines are expressly adopted by Article XXIV of the CCR, and that authority of design review is grounded in the Design Guidelines by virtue of the CCR. Design Guidelines, "Legal Basis" - Exhibit 3 to Plaintiff's Motion for Summary Judgment. The Design Guidelines are the primary controlling source for construction requirements within The Gallery Subdivision and were created by the Developer with the "intent" of providing consistency in construction and to prevent devaluing of property caused by the unpredictable efforts of another. Design Guidelines, "Intent" - Exhibit 3 to Plaintiff's Motion for Summary Judgment. The Design Guidelines state that all homes or residences must contain a minimum square footage of One Thousand Seven Hundred (1,700) square feet. Design Guidelines, General Rules, Section 1 - Exhibit 3 to Plaintiff's Motion for Partial Summary Judgment. In fact, the minimum square footage requirement is the very first rule contained in the Design Guidelines. The CCR established an Architectural Review Committee to enforce improvements according to the Design Guidelines. CCR, Article XXIV, Sec. 24.4 - Exhibits 1 and 2 to Plaintiff's Motion for Partial Summary Judgment.

The Developer has repeatedly affirmed the validity of the square footage restriction. After recordation of the CCR, the Developer issued a written memo on June 25, 2004, declaring that both the “covenants and design guidelines control the actual requirements” for construction. June 25, 2004 Orchard Development Memo - Exhibit 4 to Plaintiff’s Motion for Partial Summary Judgment. The Developer expressly declared in the memorandum that the Design Guidelines and CCR constitute the “binding documents.” *Id.* The Developer’s principal, Tim Shaw, announced publicly during an open homeowner’s association meeting that the square footage requirement set forth in the Design Guidelines governed construction of residences in The Gallery Subdivision. March 20, 2008 Meeting Minutes - Exhibit 5 to Plaintiff’s Motion for Partial Summary Judgment.

The Developer has since changed its mind concerning the validity of the square footage restriction. In May 2008, Defendant Peteler, L.L.C. began construction on a row of approximately six (6) or seven (7) “villas,” which each comprise a total of approximately Eight Hundred (800) square feet. Defendant Peteler is under contract to complete one hundred (100) of these villas with an option to construct an additional one hundred (100) villas, all of which violate the minimum square footage requirement.

After the Plaintiff filed this lawsuit to permanently enjoin the construction of any unit that did not conform to the minimum square footage requirement, the Developer sought to amend the minimum square footage requirement by passing a corporate resolution (without providing any notice to the Gallery homeowners), purportedly revoking the square footage requirement as to multi-family structures. June 4, 2008, Corporate Resolution - Exhibit 6 to Plaintiff’s Motion for Partial Summary Judgment. The Developer first notified The Gallery residents of its purported amendment more than one (1) month after it took action to purportedly

revoke the minimum square footage requirement. July 16, 2008 Letter - Exhibit 7 to Plaintiff's Motion for Partial Summary Judgment. More than One Hundred and Fifty (150) Gallery residents immediately executed individual objections to the purported corporate resolution. Gallery Homeowner Petitions – Exhibit 8 to Plaintiff's Motion for Partial Summary Judgment.

Although the Developer retained and reserved certain rights in the CCR, it did not reserve the right to unilaterally delete the minimum square footage requirement as a matter of law.

## **ASSIGNMENTS OF ERROR**

- I. THE CIRCUIT COURT ERRED BY DETERMINING THAT THE COVENANTS, CONDITIONS AND RESTRICTIONS AND THE DESIGN GUIDELINES ARE TWO SEPARATE AND DISTINCT DOCUMENTS.**
  
- II. THE CIRCUIT COURT ERRED BY DETERMINING THAT THE DEVELOPER MAY UNILATERALLY AMEND THE MINIMUM SQUARE FOOTAGE REQUIREMENTS.**
  
- III. THE CIRCUIT COURT ERRED BY DETERMINING THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT REGARDING THE UNILATERAL AMENDMENT OF THE MINIMUM SQUARE FOOTAGE REQUIREMENT.**

**POINTS AND AUTHORITIES RELIED UPON**

**Statutes, Rules and Regulations**

W.Va. Code § 36B-1-101 (2008).....20, 24  
W.Va. Code § 36B-1-111 (2008).....20, 24  
W.Va. Code § 36B-1-112 (2008).....21

**Case Citations**

*Allemong v. Frenzel*, 178 W.Va. 601, 363 S.E.2d 487 (1987).....10  
*Allen v. Commercial Cas. Ins. Co.*, 131 N.J.L. 475, 37 A.2d 37 (1944).....25  
*Armstrong v. Stribling*, 192 W.Va. 280, 452 S.E.2d 83 (1994).....13, 26  
*Carr v. Michael Motors, Inc.*, 210 W.Va. 240, 557 S.E.2d 294 (2001).....14  
*Cordle v. General Hugh Mercer Corp.*, 174 W.Va. 325, 325 S.E.2d 11.....25  
*Jubb v. Letterle*, 191 W.Va. 395, 446 S.E.2d 182 (1994).....10  
*Kanawha Banking and Trust Co. v. Gilbert*, 131 W.Va. 88, 46 S.E.2d 225 (1947).....15  
*McIntyre v. Zara*, 183 W.Va. 202, 394 S.E.2d 897 (1990).....14  
*Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000).....21, 25  
*Morris v. Consolidation Coal Co.*, 191 W.Va. 426 446 S.E.2d 648 (1994).....25  
*Nisbet v. Watson*, 162 W.Va. 522, 251 S.E.2d 774 (1979).....21  
*Pocahontas Land Corp. v. Evans*, 175 W.Va. 304, 332 S.E.2d 604 (1985).....15  
*Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*, 63 W.Va. 685, 60 S.E.2d 890  
(1908).....14  
*Slivka v. Camden-Clark Memorial Hosp.*, 215 W.Va. 109, 594 S.E.2d 616 (2004).....9  
*Teays Farms Owners Ass'n. v. Cottrill*, 188 W.Va. 555, 425 S.E.2d 231 (1992).....10  
*United States v. Marietta Mfg. Co.*, 339 F.Supp. 18 (S.D.W.Va. 1972).....20

*Wallace v. St. Clair*, 147 W.Va. 377, 127 S.E.2d 742 (1962).....10  
*Wilkinson v. Duff*, 212 W.Va. 725, 575 S.E.2d 335 (2002).....9  
*Wood v. Acordia of West Virginia, Inc.*, 217 W.Va. 406, 618 S.E.2d 415 (2005).....9

**Secondary Sources**

Black's Law Dictionary, Abridged Seventh Edition (2000).....24

## DISCUSSION OF LAW

The Developer contends that the minimum square footage requirement is not part of the CCR, and that even if it is, the Developer enjoys the ability to unilaterally amend the square footage restriction as it sees fit. For the following reasons, the Developer's assertions fail as a matter of law.

Moreover, even assuming, *arguendo*, that Developer had the ability to amend the square footage restriction, genuine issues of material fact exist regarding the unilateral amendment of the minimum square footage restriction and whether or not Plaintiff was damaged by the amendment after construction began on the studio town homes.

### Standard of Review

"The entry of a summary judgment is reviewed de novo." *Wood v. Acordia of West Virginia, Inc.*, 217 W.Va. 406, 618 S.E.2d 415 (2005). "In the course of reviewing a grant of summary judgment, the Supreme Court construes the facts in a light most favorable to the losing party." *Slivka v. Camden-Clark Memorial Hosp.*, 215 W.Va. 109, 594 S.E.2d 616 (2004). "In reviewing grant of summary judgment, Supreme Court of Appeals will apply the same test that the circuit court should have used initially." *Wilkinson v. Duff*, 212 W.Va. 725, 575 S.E.2d 335 (2002).

**I. THE CIRCUIT COURT ERRED BY DETERMINING THAT THE COVENANTS, CONDITIONS AND RESTRICTIONS AND THE DESIGN GUIDELINES ARE TWO SEPARATE AND DISTINCT DOCUMENTS.**

**A. The Developer intended the Design Guidelines and minimum square footage restrictions to be part of the Declaration of Covenants, Conditions and Restrictions governing The Gallery Subdivision.**

A fundamental rule in interpreting covenants and restrictions is that the intent of the grantor should prevail. The West Virginia Supreme Court of Appeals has previously stated that,

when construing restrictive covenants, it is the original intention of the parties that controls. *Jubb v. Letterle*, 191 W.Va. 395, 446 S.E.2d 182 (1994). That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish. *Wallace v. St. Clair*, 147 W.Va. 377, 390, 127 S.E.2d 742, 751 (1962); Syl. Pt. 2, *Allemon v. Frenzel*, [178] W.Va. [601], 363 S.E.2d 487 (1987); Syl. Pt. 3, *Jubb v. Letterle*, 185 W.Va. 239, 406 S.E.2d 465 (1991); *See also* Syllabus, *Teays Farms Owners Ass'n v. Cottrill*, 188 W.Va. 555, 425 S.E.2d 231 (1992).

In the present case, the unambiguous terms of the Covenants, Conditions and Restrictions and the Design Guidelines, as well as the Developer's repeated actual affirmation of the minimum square footage requirements, make clear that there is no genuine issue of material fact that the Developer intended that the minimum square footage requirement contained in the Design Guidelines was a restrictive covenant governing structures in The Gallery Subdivision.

**1. The Design Guidelines are expressly adopted by the Declaration of Covenants, Conditions, and Restrictions for The Gallery Subdivision.**

The CCR expressly designates, defines and adopts the Design Guidelines in several different provisions of the CCR. In doing so, the Developer expressly informed potential purchasers of property within The Gallery Subdivision that the Design Guidelines are a part of the restrictions governing The Gallery Subdivision.

First, the Design Development Guidelines are defined in Section 1.13 of the CCR, which is the definition section of the CCR. The CCR specifically defines the Design Guidelines as the rules established for the design and construction of improvements in The Gallery Subdivision. CCR, Section 1.13 - Exhibits 1 and 2 to Plaintiff's Motion for Partial Summary Judgment.

Second, Section 19.1 of the CCR informs all Unit Owners of their requirement to comply with the provisions of all "Documents." The term "Documents" is broadly defined in Section

1.16 of the CCR to include the Bylaws, Articles and Rules of the Association, including any exhibit, schedule or certification accompanying a Document. The Design Guidelines expressly referenced in the CCR fall squarely within the defined term “Document.” CCR, Sections 19.1 and 1.16 - Exhibits 1 and 2 to Plaintiff’s Motion for Partial Summary Judgment.

Next, the CCR expressly creates an Architectural Review Committee whose sole mission is to apply the Design Guidelines to the proposed plans in The Gallery Subdivision. CCR, Section 24.4 – Exhibits 1 and 2 to Plaintiff’s Motion for Partial Summary Judgment. How can the Developer legitimately argue that it created a committee to enforce Design Guidelines that it claims are not part of the restrictive covenants? Such a suggestion is absurd and contrary to the unambiguous terms of the CCR.

Finally, the Design Guidelines, drafted by the Developer, expressly provide that authority for the Design Guidelines is grounded in and adopted by the CCR. The Design Guidelines “Legal Basis” Section provides:

Authority for design review is grounded in the governing document for the Gallery Subdivision community, the “Declaration of Covenants, Conditions, and Restrictions for the Gallery Subdivision.

Article XXIV of the Declaration of Covenants, Conditions, and Restrictions for the Gallery Subdivision, hereby adopts these Design Guidelines as the basis for all design review. Should these guidelines be revised, such revisions shall then take precedence over previous Guidelines.

Through the express designation and adoption evidenced above, the CCR specifically adopts the Design Guidelines, thereby making the Design Guidelines a part of the CCR. Because the Design Guidelines are a part of the CCR, the Design Guidelines are subject to the amendment procedures contained within the CCR.

**2. Without the Design Guidelines, the CCR is nothing more than a list of rules and procedures that offer no substantive protections to homeowners and mortgagees.**

The Gallery Subdivision has been touted as the first planned community in Berkeley County. In fact, one of Defendant Orchard Development's members, Jim Seibert, advertises the Gallery Subdivision as a "premier subdivision." One of the most attractive features of a planned, premier community is uniformity of construction and protection of property values. Defendant Orchard Development recognizes these features in the Design Guidelines:

Without controls, the potential for the unpredictable efforts of one owner to devalue those of another is increased. Therefore, these Design Guidelines, pertaining to all site and building development, have been adopted to provide a basis for consistency of development. . .

Design Guidelines - Exhibit 3 to Plaintiff's Motion for Partial Summary Judgment. The Design Guidelines go on to state, with specificity, the requirements for the character and quality of the appearance of all construction and landscaping within The Gallery Subdivision.

The CCR expressly directs the reader to Design Guidelines for all design requirements.

Article XXIV, Section 24.4 states:

Procedures and Guidelines. In its review of all plans for improvements and landscaping submitted by Unit Owners, the Review Committee shall apply the procedures and guidelines set forth in the Design Guidelines.

CCR - Exhibits 1 and 2 to Plaintiff's Motion for Partial Summary Judgment.

Because the Design Guidelines offer the only substantive restrictions on construction and development within The Gallery Subdivision, they are an integral part of the CCR. Without the Design Guidelines, the CCR is merely an extensive list of rules and procedures that grant homeowners and mortgagees no substantive protections. For these reasons, the Design Guidelines can be amended only in accordance with the procedures set forth in the CCR. In essence, the Design Guidelines are specifically designed to enable The Gallery Subdivision to

maintain its premier status by requiring all construction to be uniform and consistent by virtue of minimum square footage and other requirements.

**3. The fact that the Design Guidelines were not recorded is immaterial to the resolution of this matter.**

Defendants have made much of the fact that the Design Guidelines were not recorded. However, as the West Virginia Supreme Court noted in *Armstrong v. Stribling*, 192 W.Va. 280, 452 S.E.2d 83 (1994), recordation of design requirements is not a prerequisite to binding legal effect. In *Armstrong*, the West Virginia Supreme Court of Appeals rejected the Developers argument that only the recorded documents evidenced the intent of the developer with respect to the scope of the restrictive covenants at issue. In *Armstrong*, the developer utilized a third unrecorded plat to depict elements of the subdivision and then denied that it applied to the purchaser.

Similarly, the Developer in the present case, created specific Design Guidelines detailing the type of structures permitted in The Gallery Subdivision. The Developer asks this Court to ignore the specific rules it created by claiming that since the rules were never recorded, they do not apply. The Court's holding in *Armstrong* defeats such an argument.

As discussed, the Design Guidelines were expressly incorporated in the CCR. Indeed, the CCR repeatedly references the Design Guidelines as the authority for construction and design issues. Every single family home in The Gallery Subdivision and every townhome existing prior to the institution of this lawsuit either actually complied or appeared to comply with the minimum square footage guidelines contained in the Design Guidelines. Furthermore, Defendant Orchard Development expressed its intent that the Design Guidelines control construction within The Gallery Subdivision through the express adoption of the Design Guidelines by the CCR's Architectural Review Committee. For these reasons, based on the

authority of *Armstrong*, even though the Design Guidelines were not recorded, they have the same legal effect as if they had been.

Moreover, even though the Design Guidelines are not recorded, the CCR is sufficient to put any reader on inquiry notice because the CCR expressly states that all construction is to be governed by the Design Guidelines:

If one has knowledge or information of facts sufficient to put a prudent man on inquiry, as to the existence of some right or title in conflict with that which he is about to purchase, he is bound to prosecute the same, and to ascertain the extent of such prior right; and, if he wholly neglects to make inquiry, or, having begun it, fails to prosecute it in reasonable manner, the law will charge him with knowledge of all facts that such inquiry would have afforded.

Syllabus Point 4, *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*, 63 W.Va. 685, 60 S.E. 890 (1908).

**B. The Design Guidelines, as a binding document, contain unambiguous language setting forth a One Thousand Seven Hundred (1,700) minimum square footage requirement.**

The Developer seeks to introduce evidence regarding its intentions as to the applicability of the One Thousand Seven Hundred (1,700) square foot minimum requirement contained in the Design Guidelines. In support of the admissibility of this evidence, the Developer cites Syllabus Point 1 of *McIntyre v. Zara*, 183 W.Va. 202, 394 S.E.2d 897 (1990):

The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish.

However, the Circuit Court did not determine that the minimum square footage restriction is ambiguous. In *Carr v. Michael Motors, Inc.*, 210 W.Va. 240, 557 S.E.2d 294 (2001), the West Virginia Supreme Court stated:

We have recognized that 'where the intent of the parties is clearly expressed in definite and unambiguous language on the face of the deed itself, the court is required to give effect to such language and, ordinarily will not resort to parole or extrinsic evidence.' *Pocahontas Land Corp. v. Evans*, 175 W.Va. 304, 308, 332 S.E.2d 604, 609 (1985) (citations omitted). However, when ambiguity is found in a deed we have held that '[t]he polar star that should guide us in the construction of deeds ... is, what was the intention of the party or parties making the instrument, and when this is determined, to give effect thereto, unless to do so would violate some rule of property.'

*Carr* at 245, 299 (some internal citations omitted).

The Developer presumably asserts that the One Thousand Seven Hundred (1,700) square foot minimum building requirement, made applicable to all homes or residences by Orchard's own express terms, is somehow ambiguous. However, the Design Guidelines very clearly state:

The ground floor area of all single-level homes or residences shall contain a minimum area of One Thousand Seven Hundred (1,700) square feet, exclusive of garage and porches, and the entire floor area of all homes or residences of more than (1) level or story shall contain a minimum area of One Thousand Seven Hundred (1,700) square feet, exclusive of garage and porches.

The language is clear -- all homes or residences, regardless of unit type (single family, townhouse, duplex, etc.) must contain a minimum square footage of 1,700 square feet.

In Syllabus Point 1 of *Kanawha Banking and Trust Co. v. Gilbert*, 131 W.Va. 88, 46 S.E.2d 225 (1947), the West Virginia Supreme Court stated:

Extrinsic evidence of statements and declarations of the parties to an unambiguous written contract occurring contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain the terms of such contract, in the absence of a showing of illegality, fraud, duress, mistake or insufficiency of consideration.

The Developer now attempts to use extrinsic evidence and declarations to contradict, detract from, vary, and explain an unambiguous written contract term. Such evidence is clearly inadmissible under the parol evidence rule.

Indeed, the Developer has repeatedly affirmed the validity of the square footage restriction. After recordation of the CCR, the Developer issued a written memo on June 25, 2004, declaring that both the “covenants and design guidelines control the actual requirements” for construction. June 25, 2004 Orchard Development Memo - Exhibit 4 to Plaintiff’s Motion for Partial Summary Judgment. The Developer expressly declared in the memorandum that the Design Guidelines and CCR constitute the “binding documents.” *Id.* The Developer’s principal, Tim Shaw, announced publicly during an open homeowner’s association meeting that the square footage requirement set forth in the Design Guidelines governed construction of residences in The Gallery Subdivision. March 20, 2008 Meeting Minutes - Exhibit 5 to Plaintiff’s Motion for Partial Summary Judgment.

Accordingly, the Design Guidelines, as a binding document, contain an unambiguous minimum square footage restriction that can only amended using the proper procedures set forth in the CCR.

**II. THE CIRCUIT COURT ERRED BY DETERMINING THAT THE DEVELOPER MAY UNILATERALLY AMEND THE MINIMUM SQUARE FOOTAGE REQUIREMENTS.**

**A. The Developer may not unilaterally revoke the minimum square footage requirements.**

Defendant Orchard Development contends that because the development of The Gallery Subdivision is not yet completed, Defendant Orchard Development, as the developer, maintains a degree of control over The Gallery Subdivision. Plaintiff does not disagree with this assertion in its entirety; however, the degree of control over The Gallery Subdivision, and resulting amendment procedures, are subject to the terms in the Documents governing the subdivision and principles of equity and estoppel.

1. **“Development Rights” do not confer the authority upon the Developer to unilaterally amend the Design Guidelines.**

Article VIII, Section 8.1 of the CCR states:

Reservation of Development Rights. The Declarant reserves the following Development Rights which may be exercised individually or in any combination:

- (a) The right by amendment to add real estate to the Common Interest Community.
- (b) The right by amendment to create Units, Common Elements, or Limited Common Elements within the Common Interest Community.
- (c) The right by amendment to subdivide and combine Units or convert Units into Common Elements.
- (d) The right by amendment to withdraw real estate from the Common Interest Community.

CCR, Section 8.1 - Exhibits 1 and 2 to Plaintiff's Motion for Partial Summary Judgment.

Based on the clear and unambiguous language contained in Article VIII, Section 8.1, Defendant Orchard Development's Development Rights do not include the right to unilaterally amend the minimum square footage requirement.

2. **“Special Declarant” Rights do not confer the authority upon the Developer to unilaterally amend the Design Guidelines.**

Defendant Orchard Development's Special Declarant Rights are enumerated in Article VIII, Section 8.4, which states:

Special Declarant Rights. The Declarant reserves the following Special Declarant Rights, to the maximum extent permitted by law, which may be exercised, where applicable, anywhere within the Common Interest Community:

- (a) To complete Improvements indicated on Plats and Plans filed with the Declaration;
- (b) To exercise a Development Right reserved in the Declaration;

- (c) To maintain sales offices, management offices, signs advertising the Common Interest Community, and models;
- (d) To use easements through the Common Elements and roads for the purpose of making Improvements within the Common Interest Community or within real estate which may be added to the Common Interest Community;
- (e) To make the Common Interest Community subject to a Master Association;
- (f) To merge or consolidate a Common Interest Community with another Common Interest Community of the same form of ownership;
- (g) To appoint or remove, an officer of the Association or Mater Association or an Executive Board or Master Executive Board member during a period of Declarant control subject to the provisions of Section 8.10 of this Declaration;

CCR, Section 8.4 - Exhibits 1 and 2 to Plaintiff's Motion for Partial Summary Judgment.

Based on the clear and unambiguous language contained in Article VIII, Section 8.4, Defendant Orchard Development's Special Declarant Rights do not include the right to unilaterally amend the minimum square footage requirement.

**3. Executive Board Powers do not confer authority upon Developer to unilaterally amend the Design Guidelines.**

Defendant Orchard Development contends that it had the authority to amend the Design Guidelines by virtue of the powers granted in Article XXIII of the Covenants and Restrictions. Section 23.3 states, in pertinent part, that the Executive Board shall have...the powers and duties necessary for the administration of the affairs of the association...which shall include...(a) adopt and amend Bylaws, Rules, and regulations." Defendant Orchard Development referenced a "Corporate Resolution" passed on June 4, 2008, which attempted to amend the Design

Guidelines to allow for the Eight Hundred (800) square foot villas at issue in this case. Corporate Resolution - Exhibit 6 to Plaintiff's Motion for Partial Summary Judgment.

On July 28, more than a month after the Resolution was purportedly passed, the Developer held a meeting to discuss the ratification of the "Corporate Resolution." At that point, more than One Hundred and Fifty (150) homeowners objected to this supposed revocation of the minimum square footage requirement through an improper and ineffective Corporate Resolution.

Despite the Developer's assertions, Article XXIII, Section 23.3 of the CCR contains no provision granting power to the Executive Board to unilaterally amend Design Guidelines. In fact, Section 23.3 specifically uses the terminology "administration" and "affairs" when explaining the Executive Board's powers, neither of which relate to the function of Design Guidelines. Therefore, for the following reasons, Defendant Orchard Development lacks the authority to unilaterally amend Design Guidelines pursuant to its Executive Board powers. CCR, Section 23.2 – Exhibits 1 and 2 to Plaintiff's Motion for Partial Summary Judgment.

**4. The Developer did not properly obtain consent of unit owners and mortgagees of The Gallery Subdivision to modify the Design Guidelines.**

As discussed above, the Developer's "Development Rights and "Special Declarant Rights" do not afford the Developer the right to unilaterally revoke or alter the minimum square footage requirements. Rather, such a modification is governed by Section 16.4 which requires written consent of 51% of Eligible Mortgagees and 67% of Unit Owners for any material revision of a "Document." As discussed previously, the Design Guidelines constitute a Document as that term is defined in the CCR. The Developer never gained the written consent of the Mortgagees or Unit Owners as required. Rather, it sought to unilaterally revoke the minimum square footage requirement without notice or consent of The Gallery residents. The

Developer's strategy is understandable considering the overwhelming objection to its plan to change the rules after homeowners have invested hundreds of thousands of dollars in their homes in reliance of the promised character of the community.

**5. A general contract term cannot negate a specific one.**

In the case at bar, Defendant Orchard Development is attempting to eviscerate the effect of a specific term through the use of a generic one. The Design Guidelines are given a specific meaning and definite purpose in the CCR. The generic term "regulations," upon which Defendant Orchard Development relies for its alleged amendment authority, is a vague and undefined word. The law of contracts prefers specific terms over general ones. *United States v. Marietta Mfg. Co.*, 339 F.Supp. 18, 27 (S.D.W.Va.1972) (when interpreting a contract, a court should follow the interpretive philosophy that specific language trumps general text). Therefore, as a matter of law, the grant of authority to amend regulations does not include the ability to amend Design Guidelines.

**6. The unilateral amendment of the Design Guidelines, by statute, is unconscionable and unenforceable.**

Page 1, Paragraph 1 of the CCR states that Orchard Development submits The Gallery Subdivision to the provisions of the Uniform Common Interest Ownership Act, West Virginia Code § 36B-1-101, et seq. See Exhibits 1 and 2 to Plaintiff's Motion for Partial Summary Judgment.

West Virginia Code § 36B-1-111(a) (2008) states:

The court, upon finding as a matter of law that a contract or contract clause was unconscionable at the time the contract was made, may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause in order to avoid an unconscionable result.

West Virginia Code § 36B-1-112 (2008) further states that “[e]very contract of duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.

Any contract term that would allow Defendant Orchard Development the right to unilaterally amend or in any manner alter the Design Guidelines is unconscionable as a matter of law and therefore void because such a term would completely deprive homeowners of any protections whatsoever and render any promises regarding the character of the community illusory.

**B. Defendant Orchard Development drafted the CCR and Design Guidelines; therefore, any ambiguities are construed against the Developer.**

In *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000) (superseded by statute on other grounds), the West Virginia Supreme Court of Appeals stated that the drafter of a contract, particularly an adhesion contract, has a duty of choosing language carefully. Any ambiguous language is strictly construed against the preparer of a contract so long as the construction chosen by the non-drafter is reasonable. *See, e.g., Nisbet v. Watson*, 162 W.Va. 522, 530, 251 S.E.2d 774, 780 (1979). *Mitchell* at Footnote 8.

The CCR and Design Guidelines at issue in the case at bar are analogous to a contract of adhesion; it was not a bargained for exchange but rather a pre-drafted, take it or leave it, contract. Defendant Orchard Development believes that the term “regulation” gives it the right to amend the Design Guidelines. Plaintiff disagrees and his disagreement reflects a reasonable construction of the term as evidenced by the other One Hundred and Fifty (150) homeowners in The Gallery that objected to Defendant Orchard Development’s Corporate Resolution. *See* Exhibit 8 to Plaintiff’s Motion for Partial Summary Judgment.

Defendant Orchard Development drafted the CCR, therefore, by operation of law, Plaintiff’s reasonable construction trumps that of Defendant Orchard Development.

**III. THE CIRCUIT COURT ERRED BY DETERMINING THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT REGARDING THE UNILATERAL AMENDMENT OF THE MINIMUM SQUARE FOOTAGE REQUIREMENT.**

**A. The Architectural Review Committee lacks the authority to unilaterally amend the minimum square footage requirements within the Design Guidelines.**

The Developer contends that the Architectural Review Committee has the authority to unilaterally alter the minimum square footage requirements within the Design Guidelines. However, even if this power were legitimate, which Plaintiff denies, such a change could only be effected if it maintains “maximum real and aesthetic benefits to The Gallery Property.” Design Guidelines, Intent, Paragraph 4 – Exhibit 3 to Plaintiff’s Motion for Partial Summary Judgment.

Based on this authority, the Architectural Review Committee could approve of a change to the Design Guidelines only if the proposed change did not detract from current real and aesthetic benefit of The Gallery Subdivision. On the contrary, the plans as well as the completed villas fall well below the aesthetic benefit of any of the structures currently existing in The Gallery Subdivision. *See* Photographs attached as Exhibit 1 to Plaintiff’s Response to Defendant’s Motion for Summary Judgment. All completed units in The Gallery, with the exception of the villas, at least appear to have a minimum square footage greater than or about equal to 1,700 square feet; accordingly, any unit containing only 800 square feet detracts from the aesthetic benefit of The Gallery.

As noted above, The Gallery Subdivision has been touted as the first planned community in Berkeley County and a premier community. Allowing Defendant Orchard Development to alter the minimum square footage requirements of the Design Guidelines in the manner proposed is completely inconsistent with the intent of The Gallery Subdivision and diametrically opposed to the representations of the character of The Gallery Subdivision made by Defendant Orchard

Development to the public. In short, revoking the minimum square footage requirement will not “maintain real and aesthetic benefits to the Gallery property.” It will do the opposite.

Even if the Developer could, in fact, unilaterally amend the minimum square footage restriction through the Design Guidelines, genuine issues of material fact exist as to whether this amendment maintained the “maximum real and aesthetic benefits to The Gallery Property.” At the hearing held on Plaintiff’s request for a preliminary injunction, Plaintiff testified that the studio town homes adversely affected not only the value of his property but also the use and enjoyment of his property. Further, Plaintiff has offered over One Hundred and Fifty (150) similar objections to the studio town homes, as well as photographs showing completed studio town homes. Exhibit 8 to Plaintiff’s Motion for Partial Summary Judgment; Exhibit 1 to Plaintiff’s Response to Defendant’s Motion for Summary Judgment.

Defendants contend that testimony at the preliminary injunction hearing supports its motion for summary judgment. However, the standard for granting or denying a preliminary injunction is much different than an ultimate determination of the merits. The Circuit Court should have permitted discovery on this issue. Nevertheless, Plaintiff’s testimony, over One Hundred and Fifty (150) objections and the photographs create genuine issues of material fact regarding whether the minimum square footage amendment maintained the “maximum real and aesthetic benefits to The Gallery Property.”

Even if the amendment was proper and did, in fact, maintain “maximum real and aesthetic benefits to The Gallery Property,” genuine issues of material fact exist, or discovery should have been permitted, regarding Plaintiff’s damages based upon the fact that Defendants amended the minimum square footage restriction well after construction began on the studio town homes.

**B. Any interpretation of the Design Guidelines that would allow the Developer to unilaterally amend material provisions of the Design Guidelines is unconscionable and therefore unenforceable.**

The Developer contends that by attempting to keep the Design Guidelines separate from the CCR, it reserved for itself the ability to avoid the rigid force and effect of covenants and restrictions and grant itself flexibility and control over the Design Guidelines to meet changing market demands. According to the Developer, complete unilateral control over the Design guidelines, including material provisions such as minimum square footage requirements, is a sound legal principle. In reality, such unilateral control is the textbook definition of unconscionable.

Black's Law Dictionary defines *unconscionability* as:

1. Extreme unfairness.
2. The principle that a court may refuse to enforce a contract that is unfair or oppressive because of procedural abuses during contract formation or because of overreaching contractual terms, esp. terms that are unreasonably favorable to one party while precluding meaningful choice for the other party. . . .

Black's Law Dictionary, Abridged Seventh Edition, © 2000.

Black's Law Dictionary defines *substantive unconscionability* as, "unconscionability resulting from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances." *Id.*

As confirmed by the Developer, The Gallery Subdivision is subject to the Uniform Common Interest Ownership Act, West Virginia Code § 36B-1-101, et seq. Per W.Va. Code § 36b-1-111(a):

The court, upon finding as a matter of law that a contract or contract clause was unconscionable at the time the contract was made, may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause in order to avoid an unconscionable result.

Even if this Court were to find that the Developer had reserved itself the power to unilaterally amend material provisions of the Design Guidelines, such contract term would be unconscionable as a matter of law and therefore unenforceable.

**C. Any interpretation of the Design Guidelines that would allow the Developer to unilaterally amend material provisions of the Design Guidelines is contrary to public policy and therefore unenforceable.**

The Developer contends that it wanted to maintain control over the Design Guidelines so that it could meet changing market conditions. However, neither the documents at issue in this case nor public policy allows for the unilateral amendment of material contract terms. The homeowners in The Gallery, including the Plaintiff, bought their homes with the expectation that all construction in The Gallery would conform to the common scheme prevalent throughout the entire community. The Developer now contends that it reserved for itself the right to change the character of The Gallery to meet changing market conditions. In other words, the Developer asserts that it may construct smaller and cheaper units during unfavorable market conditions to maximize its profit. Such a contention is void for public policy reasons.

In Syllabus Point 1 of *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000) (superseded by statute on other grounds), the West Virginia Supreme Court stated, “A determination of the existence of public policy in West Virginia is a question of law....” (internal citations omitted). The Court went on to describe the public policy principle:

In deciding whether a public policy violation is imminent, we consider both the facts and the law relevant to our inquiry. Stated otherwise, decision of a public policy issue is a legal query, but such a determination is made on a case-by-case basis: “ ‘ “[i]t is a question of law which the court must decide in light of the particular circumstances of each case.” ’ ” *Morris v. Consolidation Coal Co.*, 191 W.Va. 426, 433 n. 5, 446 S.E.2d 648, 655 n. 5 (1994) (quoting *Cordle v. General Hugh Mercer Corp.*, 174 W.Va. at 325, 325 S.E.2d at 114 (quoting *Allen v. Commercial Cas. Ins. Co.*, 131 N.J.L. 475, 477-78, 37 A.2d 37, 39 (1944) (citations omitted))). Where public policy issues are concerned,

[t]he rule of law, most generally stated, is that 'public policy' is that principle of law which holds that 'no person can lawfully do that which has a tendency to be injurious to the public or against public good ...' even though 'no actual injury' may have resulted therefrom in a particular case 'to the public.' ...

The sources determinative of public policy are, among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government-with us-is factually established.

*Mitchell* at 45, 891.

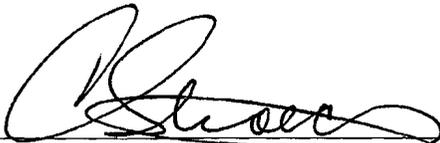
Public policy forbids unfair contracts of adhesion and unconscionable contract terms. Homeowners rely on covenants and restrictions to protect the value of their single-most important investment: their homes. To allow a developer to unilaterally amend covenants and restrictions to suit its own financial needs eviscerates any protection afforded to the homeowners by virtue of the covenants and restrictions. In this matter, the Developer has admittedly attempted to avoid the rigid and inflexible force and effect of covenants and restrictions by creating a separate document of covenants and restrictions which it entitled "Design Guidelines." Followed to its logical end, Orchard's argument foretells of a future where developers supplant covenants and restrictions with design guidelines so that developers would never have to be concerned with homeowners' rights.

Public policy prevents such an unconscionable practice. In *Armstrong v. Stribling*, 192 W.Va. 280, 452 S.E.2d 83 (1994), the West Virginia Supreme Court stated that recordation of design requirements is not a prerequisite to binding legal effect. As noted above, the Design Guidelines were expressly made part of the Covenants and Restrictions and therefore can only be amended by a proper vote. Moreover, even if the Court finds that the Design Guidelines are a

separate instrument, the Developer intended the Design Guidelines to control development within the Gallery. Thus, the Design Guidelines have the same force and effect as Covenants and Restrictions and can only be amended by a proper vote.

**RELIEF PRAYED FOR**

For the reasons set forth herein above, Plaintiff requests that this Court reverse the decision of the Circuit Court and either grant Plaintiff's Motion for Partial Summary Judgment or remand this matter for further proceedings below.



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