NO. 35308

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
At Charleston

JASON FOSTER,

Plaintiff/Appellant,

v.

ORCHARD DEVELOPMENT COMPANY, LLC,
a West Virginia Limited Liability Company,
and
PETELER, LLC,
a West Virginia Limited Liability Company,

Defendants/Appellees.

FILED
JAN 22 2010
RORY L. PERRY, II. CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

From Proceedings in the
Circuit Court of Berkeley County, West Virginia
Civil Action No. 08-C-792
The Honorable David H. Sanders Presiding

BRIEF OF APPELLEE

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KIND OF PROCEEDING AND NATURE OF LOWER COURT RULING

The Plaintiff below and Appellant, Jason Foster ("Appellant"), filed a Complaint for Preliminary Injunction, Permanent Injunction, and Damages in the Circuit Court of Berkeley County, West Virginia on June 5, 2008. His Complaint sought, *inter alia*, to enjoin the Defendant below and Appellee, Peteler, LLC ("Peteler"), from building eight hundred (800) square foot studio town homes on lots in the Gallery Subdivision in the City of Martinsburg District of Berkeley County, West Virginia. Peteler purchased these lots from the Defendant below and Appellee, Orchard Development Company, LLC ("Orchard Development"). Orchard Development filed its Answer and Counter Claim on June 25, 2008.

The Circuit Court held a hearing and took evidence on June 12 and 17, 2008 pursuant to its June 10, 2008 Order Granting Temporary Restraining Order Or, In The Alternative, Scheduling Preliminary Injunction Hearing Date. After hearing the evidence, the Circuit Court denied the Appellant's request for preliminary injunction. The Appellant, Peteler, and Orchard Development agreed that limited discovery was necessary to prepare the legal issues raised in the Appellant's Complaint for the Circuit Court's consideration on cross motions for summary judgment. Accordingly, the Court established an expedited discovery and briefing schedule by its June 26, 2008 Order Denying Preliminary Injunction. Both the Appellant and Orchard Development conducted discovery, then filed motions for summary judgment by August 5, 2008 and response briefs by August 19, 2008. The Appellant did not make any type of formal or informal request for additional discovery pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure along with these motions and briefs.

The Circuit Court held a hearing on the parties' motions for summary judgment on September 8, 2008. Based upon the pleadings, documents, affidavits, testimony, other

evidence, motions, and arguments presented by the Appellant, Orchard Development, and Peteler during these proceedings, the Circuit Court determined 1) that there are no genuine issues of material fact; 2) that the Appellant is not entitled to a permanent injunction; and 3) that Orchard Development and Peteler are entitled to judgment as a matter of law. Accordingly, the Circuit Court entered a detailed Order Denying Plaintiff's Motion for Partial Summary Judgment and Request for Permanent Injunction and Granting Defendant's Motion for Summary Judgment on September 30, 2008. The Appellant now appeals this Order.

STATEMENT OF FACTS

1. Orchard Development is the owner of real estate in the City of Martinsburg District of Berkeley County, West Virginia, known as The Gallery Subdivision ("The Gallery"). Affidavits of G. Timothy Shaw and James M. Seibert, ¶¶4-5.

2. Orchard Development planned and developed The Gallery as a residential housing subdivision with the intention of creating a diverse and harmonious blend of housing alternatives including single family homes, town homes, studio town homes, villas, and duplexes. Affidavits of G. Timothy Shaw and James M. Seibert, ¶6.

3. As one of its initial steps in planning and developing The Gallery, Orchard Development prepared and recorded a document entitled "Declaration of Covenants, Conditions, and Restrictions for the Gallery Subdivision" ("the Covenants") in the Berkeley County Clerk's office in Deed Book 766, at Page 216 on June 7, 2004 and in Deed Book 779, at Page 94 on October 15, 2004. Affidavits of G. Timothy Shaw and James M. Seibert, ¶¶7-8 and Exhibit A.

4. Since 2004, Orchard Development has incrementally developed The Gallery by adding single family home lots and town home lots/units in sections and phases and by selling those lots/units to various builders. Response to Plaintiff's Interrogatory #1 (chart

showing progression of The Gallery through the final plats which have been recorded for each section and phase). Affidavits of G. Timothy Shaw and James M. Seibert, ¶9 and Exhibit B.

5. In order to clarify application of the Covenants to all single family home lots and town home units in The Gallery, Orchard Development recorded a supplemental document entitled "Declaration" in the Berkeley County Clerk's office in Deed Book 809, at Page 22 on September 1, 2005. Affidavits of G. Timothy Shaw, and James M. Seibert, ¶¶10-12 and Exhibit C.

6. Article I, Section 1.5 of the Covenants defines "Association" as "[t]he Gallery Subdivision Unit Owners Association, Inc., a non-profit corporation organized under West Virginia Code §31-1-1, et seq. It is the Association of Unit owners pursuant to §3-101 of the Act." Affidavits of G. Timothy Shaw and James M. Seibert, ¶13 and Exhibit A, Section 1.5.

7. Article VIII, Section 8.10 of the Covenants specifically provides that "there shall be a period of [Orchard Development] control of the Association, during which [Orchard Development], or persons designated by [Orchard Development], may appoint and remove the officers and members of the Executive Board." Affidavits of G. Timothy Shaw and James M. Seibert, ¶14 and Exhibit A, Section 8.10, pg. 9.[1]

8. G. Timothy Shaw ("Mr. Shaw"), a member of Orchard Development, incorporated The Gallery Property Owners Association, Inc. ("the Property Owners Association"), through the West Virginia Secretary of State's office on January 10, 2005. Affidavits of G. Timothy Shaw and James M. Seibert, ¶15 and Exhibit D.

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[1] Thus, the Property Owners Association is initially controlled by Orchard Development and the Property Owners Association's intentions with regard to the Covenants and the Design Guidelines are identical to Orchard Development's.

9. Mr. Shaw, Robert C. Adams ("Mr. Adams"), James M. Seibert ("Mr. Seibert"), and Telena A. Spies ("Ms. Spies") served as the original members of the Executive Board for the Property Owners Association from January 10, 2005 to May 15, 2008. The Appellant and Ralph Hunter, both lot/unit owners in The Gallery, were elected to the Executive Board at the June 12, 2008 Property Owners Association membership meeting. Affidavits of G. Timothy Shaw and James M. Seibert, ¶16 and Exhibit E.

10. Article I, Section 1.32 of the Covenants defines "Review Committee" as "[t]he Gallery Subdivision Architectural and Development Review Committee as set forth in Article XXIV." Affidavits of G. Timothy Shaw and James M. Seibert, ¶17 and Exhibit A, Section 1.32, pg. 4.

11. Article XXIV, Section 24.1 of the Covenants provides that "[t]he Association shall establish The Gallery Subdivision Architectural Review Committee (Review Committee)." Affidavits of G. Timothy Shaw and James M. Seibert, ¶18 and Exhibit A, Section 24.1, pg. 34.

12. Article XXIV, Section 24.2 of the Covenants specifically provides that "more than one-half of the members [of the Review Committee] shall be appointed by [Orchard Development] and the remaining members appointed by the Association. At such time as [Orchard Development's] Development and Special Rights terminate under Article VIII then the Association shall appoint all members of the Architectural Review Committee." Affidavits of G. Timothy Shaw and James M. Seibert, ¶19 and Exhibit A, Section 24.2, pg. 34.[2]

13. The Property Owners Association established a functioning Architectural Review Committee ("the Review Committee") for the Gallery in 2004 as Orchard Development

[2] Thus, the Review Committee is initially controlled by Orchard Development and the Review Committee's intentions with regard to the Covenants and the Design Guidelines are also identical to Orchard Development's.

began to sell lots/units in The Gallery and the builders/owners began to construct single family homes and town homes. Affidavits of G. Timothy Shaw and James M. Seibert, ¶20.

14. Mr. Shaw, Mr. Adams, Mr. Seibert, and Ms. Spies have served as the original members of the Review Committee for the Property Owners Association since 2004. Affidavits of G. Timothy Shaw and James M. Seibert, ¶21 and Exhibit F.

15. Article I, Section 1.13 of the Covenants defines "Design Development Guidelines" as "[t]he design guidelines established by the Unit Owners Association for the design and construction of improvements on individual units." Affidavits of G. Timothy Shaw and James M. Seibert, ¶22 and Exhibit A, Section 1.13, pg. 2.

16. Article XXIV, Section 24.4 of the Covenants provides that "[i]n 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." Affidavits of G. Timothy Shaw and James M. Seibert, ¶23 and Exhibit A, Section 24.4, pg. 34.

17. Article XXIV, Section 24.5 of the Covenants provides that "[n]o unit owner shall construct any improvement or install any landscaping plans on any Unit without first obtaining the written consent of the Review Committee." Affidavits of G. Timothy Shaw and James M. Seibert, ¶24 and Exhibit A, Section 24.5.

18. The Review Committee agreed upon and began using guidelines ("the Design Guidelines") for its consideration of all plans for improvements and landscaping submitted by builders/owners in 2004 as Orchard Development began to sell lots/units in The Gallery and the builders/owners began to construct single family homes and town homes. These Design Guidelines are not recorded in the Berkeley County Clerk's office. Affidavits of G. Timothy Shaw and James M. Seibert, ¶25 and Exhibit G.

19. The "Intent" section of the Design Guidelines specifically states that "[t]he Review Committee reserves the right to revise these Guidelines as changing conditions and priorities dictate, in order to maintain maximum real and aesthetic benefits to The Gallery property." This provision was intended to grant the Review Committee authority and discretion in its interpretation, application, and revision of the Design Guidelines. Supplemental Affidavit of G. Timothy Shaw, ¶6 and Exhibit G, Intent, pg. 1.

20. The "Summary" section of the Design Guidelines specifically identifies the goals, purposes, and intentions of the Design Guidelines as follows:

> [T]he intent of these standards is to provide a basis for harmonious treatment of visible development within this unique environment, so that all who live here can expect to continue to enjoy their surroundings. At the same time, the desire of individuals to develop a living space that contains some personal expression must be considered. Accordingly, these Design Guidelines have been developed with a great deal of attention paid to goals and concepts and less attention to detail, except where such detail is considered essential. *It will be the difficult duty of the Review Committee to interpret these goals and concepts in a consistent manner, always attempting to keep the best interest of The Gallery in mind.*

This provision was also intended to grant the Review Committee authority and discretion in its interpretation, application, and revision of the Design Guidelines. Supplemental Affidavit of G. Timothy Shaw, ¶7 and Exhibit G, Summary, pg. 13 (emphasis added).

21. The "Summary/Legal Basis" section of the Design Guidelines specifically sets forth the legal authority for the Design Guidelines as follows:

> Authority for design review is grounded in the governing document for The Gallery Subdivision community, the "Declaration of Covenants, Conditions, and Restrictions of The Gallery Subdivision." Article XXIV of the Declaration of Covenants, Conditions, and Restrictions of 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.*

This provision was also intended to grant the Review Committee authority and discretion in its interpretation, application, and revision of the Design Guidelines. Supplemental Affidavit of G. Timothy Shaw, ¶8 and Exhibit G, Summary/Legal Basis, pg. 13 (emphasis added).

22. Orchard Development, the Property Owners Association, and the Review Committee never intended for the Design Guidelines to be inflexible or immutable. Rather, each intended for the Review Committee to have the power to revise the Design Guidelines to meet the changing needs of The Gallery as it developed. Affidavits of G. Timothy Shaw and James M. Seibert, ¶27.

23. As the initial builders/owners began building single family homes and town homes in the Gallery, the Review Committee considered a number of revisions to the initial Design Guidelines on a case-by-case basis and adopted revisions to the initial Design Guidelines pursuant to the authority contained in the "Intent" section. The case-by-case consideration of these revisions to the Design Guidelines is set forth in the minutes of the Review Committee. Affidavits of G. Timothy Shaw and James M. Seibert, ¶¶28-30, Exhibits F, G, and H.[3]

24. On January 29, 2008, Peteler contracted with Orchard Development to purchase a total of one hundred (100) studio town home lots in the Gallery – forty-five (45) studio town home lots in Section 1, Phases 10, 11, and 12 of The Gallery and another fifty-five

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[3] On September 21, 2005, the Review Committee considered and approved a revision to Section 7, Paragraph (d) of the Design Guidelines "to allow privacy fencing on the rear of each lot of town homes to a height of no more than 8 [feet]" (a change from the standard height limit of four (4) feet). Affidavit of G. Timothy Shaw, ¶29 and Exhibit H. Affidavit of James M. Seibert, ¶29 and Exhibit H. On April 18, 2006, the Review Committee considered and approved a revision to Section 22 of the Design Guidelines which provided that "[t]ownhouses are only required to have 'brick to grade' on the front elevation" (a change from the previous requirement that "[a]ll foundations must be brick to grade. . . on the front or side foundation of the residence."). Affidavit of G. Timothy Shaw, ¶30 and Exhibit H. Affidavit of James M. Seibert, ¶30 and Exhibit H. These examples of the Review Committee's revisions to the Design Guidelines are not exclusive. They are offered to illustrate Orchard Development's, the Property Owners Association's, and the Review Committee's intention that the Review Committee should have the power to revise the Design Guidelines in order to meet the changing needs of The Gallery as it is developed pursuant to the authority contained in the "Intent" section.

(55) studio town home lots in phases which have yet to be identified and recorded. Affidavits of G. Timothy Shaw and James M. Seibert, ¶32.

25. Peteler purchased seven (7) studio town home lots in The Gallery from Orchard Development by deed dated April 23, 2008, and recorded in the Berkeley County Clerk's office in Deed Book 896, at Page 672. Affidavits of G. Timothy Shaw and James M. Seibert, ¶33 and Exhibit J.

26. On April 30, 2008, the Review Committee considered and approved Peteler's proposal to construct eight hundred (800) square foot studio town homes on O'Flannery Drive in The Gallery (a change from the general seventeen hundred (1700) square foot minimum living area restriction which was only intended for single family detached homes). Affidavits of G. Timothy Shaw and James M. Seibert, ¶31 and Exhibit I.

27. In May, 2008, Peteler began construction of seven (7) studio town homes on the lots it purchased from Orchard Development. These studio town homes have eight hundred (800) square feet of finished living space as approved by the Review Committee on April 30, 2008. Affidavits of G. Timothy Shaw and James M. Seibert, ¶34.

28. The Appellant sent a letter to Orchard Development and Peteler on May 27, 2008, demanding that Peteler cease all construction of its studio town homes and claiming that such construction violates the Covenants and the seventeen hundred (1700) square foot minimum living area restriction contained in the *initial* Design Guidelines. Affidavits of G. Timothy Shaw and James M. Seibert, ¶35 and Exhibit G.[4]

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[4] The *initial* Design Guidelines contained the following provision: "[T]he entire floor area of all homes or residences of more than one (1) level or story shall contain a minimum area of One Thousand Seven Hundred (1,700) square feet, exclusive of garage and porches." Design Guidelines, General Rules, Section 1. In his May 27, 2008 letter, the Appellant failed to acknowledge the revisions to the Design Guidelines made by the Review Committee on April 30, 2008.

29. Orchard Development, the Property Owners Association, and the Review Committee always intended the seventeen hundred (1700) square foot minimum living area restriction contained in the initial Design Guidelines to apply to single family *detached* homes. Orchard Development, the Property Owners Association, and the Review Committee *never* intended the seventeen hundred (1700) square foot minimum living area restriction contained in the initial Design Guidelines to apply to the town homes, studio town homes, villas, duplexes, or other types of multi-family *attached* structures which Orchard Development planned for The Gallery. Affidavits of G. Timothy Shaw and James M. Seibert, ¶36.[5]

30. Article XXIII, Section 23.2 of the Covenants provides that "[t]he Executive Board may act in all instances on behalf of the Association, except as provided in this Declaration, the Bylaws or the Act." This section further provides that "[t]he Executive Board shall have, subject to the limitations contained in this Declaration and the Act, the powers and duties necessary for the administration of the affairs of the Association and of [The Gallery] which shall include, but not be limited to, the following: (a) *adopt and amend* Bylaws, Rules, and *regulations*; . . . (r) exercise any other power that may be exercised in this state by legal entities of the same type as the Association; [and] (s) exercise any other power necessary and proper for the governance and operation of the Association." Affidavits of G. Timothy Shaw and James M. Seibert, ¶37 and Exhibit A, Section 23.2, pp. 32-33 (emphasis added).

31. In order to clarify Orchard Development's original intentions for The Gallery and the minimum living area restrictions under the Design Guidelines, the Executive Board adopted a Consent Resolution on June 4, 2008 which provided as follows:

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[5] Indeed, the Circuit Court recognized, and the Appellant concedes, that most of the town homes constructed in The Gallery prior to the Review Committee's approval of Peteler's studio town homes contained less than seventeen hundred (1700) square feet of living area.

1. The Design Development Guidelines, General Rules, Section 1, Residential Use, shall be, and hereby are, amended to eliminate the following sentence: "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 one (1) level or story shall contain a minimum area of One Thousand Seven Hundred (1,700) square feet, exclusive of garage and porches."

2. The Design Development Guidelines, General Rules, Section 1, Residential Use, shall be, and hereby are, amended to replace the foregoing sentence with the following: "Each structure placed on each individual lot in the Gallery Subdivision, except for approved outbuildings, shall contain the following minimum finished living area, exclusive of garages and porches:

TYPE OF STRUCTURE	MINIMUM FINISHED LIVING AREA (in square feet)
SINGLE FAMILY STRUCTURES	
Single Family Home (one story)	1700 (ground floor area)
Single Family Home (two or more stories)	1700 (total floor area)
MULTI-FAMILY STRUCTURES	
Town Home (three or more stories)	1200 (total floor area for each unit)
Studio Town Home (two stories)	750 (total floor area for each unit)
Villa/Duplex (one story)	750 (ground floor area for each unit)
Villa/Duplex (two or more stories)	750 (total floor area for each unit)

3. These amendments to the Design Development Guidelines for the Gallery Subdivision are intended to preserve the existing minimum area requirements for single family detached homes and add the minimum area requirements for multi-family attached structures which have previously been adopted on a case-by-case basis by the Executive Board of the Gallery Subdivision Unit Owners Association, Inc.

Affidavits of G. Timothy Shaw and James M. Seibert, ¶38 and Exhibit K.[6]

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[6] The Property Owners Association took this action under authority of West Virginia Code §31E-8-821(a). This statute provides that "[u]nless the articles of incorporation or bylaws provide otherwise, action required or permitted by this chapter to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by on or more written consents describing the action taken, signed by each director, and included in the minutes or filed with the corporate records reflecting the action taken." W.Va. Code §31E-8-821(a).

32. The Appellant filed this law suit on June 5, 2008, requesting a preliminary and permanent injunction alleging that Peteler's construction of eight hundred (800) square foot studio town homes in The Gallery allegedly violates the Covenants and the seventeen hundred (1700) square foot minimum living area restriction contained in the initial Design Guidelines. Complaint, ¶¶17-19. Affidavits of G. Timothy Shaw and James M. Seibert, ¶39.

33. Article XXIII, Section 23.2(t) of the Covenants mandates that "[a]ll committees must maintain and publish notice of their actions to Unit Owners and the Executive Board. However, actions taken by a committee may be appealed to the Executive Board by any Unit Owner within forty-five (45) days of publication of such notice, and such committee action must be ratified, modified or rejected by the Executive Board at its next regular meeting." Affidavits of G. Timothy Shaw and James M. Seibert, ¶40 and Exhibit A, Section 23.2(t), pg. 33.

34. The Property Owners Association hired Clagett Management WV VA, LLC ("Clagett Management") as the community manager for The Gallery on September 1, 2004. Clagett Management mailed a notice of all prior Review Committee actions to all lot/unit owners in The Gallery on July 11, 2008. Affidavits of G. Timothy Shaw and James M. Seibert, ¶41 and Exhibit L.

35. The Property Owners Association's July 11, 2008 Notice to all lot/unit owners in The Gallery specifically included notice of the Review Committee's April 30, 2008 approval of Peteler's eight hundred (800) square foot studio town homes. Affidavits of G. Timothy Shaw and James M. Seibert, ¶42 and Exhibit L.

36. Article XXII, Section 22.2 of the Covenants provides that "[w]henever the Documents require that an action be taken after "Notice and Hearing", the following procedure shall be observed: The party proposing to take the action (e.g. the Executive Board, a committee,

an officer, the Manager, etc.) shall give written notice of the proposed action to all Unit Owners or occupants of Units whose interest would be significantly impacted by the proposed action. The notice shall include a general statement of the proposed action and the date, time, and place of the hearing." Affidavits of G. Timothy Shaw and James M. Seibert, ¶43 and Exhibit A, Section 22.2, pg. 31.

37. Clagett Management mailed a notice of the Property Owners Association's July 28, 2008 Executive Board meeting to all lot/unit owners in The Gallery on July 16, 2008. This notice specifically informed all lot/unit owners in The Gallery that the Executive Board would "consider ratification of its June 4, 2008 Consent Resolution [clarifying Orchard Development's original intentions for The Gallery and the current minimum living area restrictions under the Design Guidelines]" during the meeting. This notice also set forth the entire text of the Executive Board's June 4, 2008 Consent Resolution. Affidavits of G. Timothy Shaw and James M. Seibert, ¶44 and Exhibit M.[7]

38. The Executive Board of the Property Owners Association met on July 28, 2008 in accordance with its July 16, 2008 Notice (Exhibit M). Several lot/unit owners from The Gallery attended the meeting pursuant to the Notice they received. During this meeting, the Executive Board ratified its June 4, 2008 Consent Resolution (Exhibit K) and specifically adopted the same resolution in order to clarify Orchard Development's original intentions for The Gallery. In doing so, the Executive Board specifically adopted *revised* minimum living area restrictions under the Design Guidelines as set forth in its June 4, 2008 Consent Resolution (Exhibit K). See ¶31, supra. Affidavits of G. Timothy Shaw and James M. Seibert, ¶45 and Exhibit N.

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[7] Orchard Development does not concede that Article XXII, Section 22.2 of the Covenants applies to this action or mandates notice to all lot/unit owners in The Gallery for this action. It simply gave this notice out of an overabundance of caution in order to ensure notice to all lot/unit owners in The Gallery.

39. On August 7, 2008, the Review Committee also considered and ratified the Executive Board's June 4, 2008 Consent Resolution (Exhibit K). See ¶31, supra. The Review Committee formally adopted the same resolution in order to clarify Orchard Development's original intentions for The Gallery and the revised Design Guidelines. Supplemental Affidavit of G. Timothy Shaw, ¶12 and Exhibit O.

40. During its August 7, 2008 meeting, the Review Committee also formally adopted the revised Design Guidelines as follows:

> Each structure placed on each individual lot in the Gallery Subdivision, except for approved outbuildings, shall contain the following minimum finished living area, exclusive of garages and porches:

TYPE OF STRUCTURE	MINIMUM FINISHED LIVING AREA (in square feet)
SINGLE FAMILY STRUCTURES	
Single Family Home (one story)	1700 (ground floor area)
Single Family Home (two or more stories)	1700 (total floor area)
MULTI-FAMILY STRUCTURES	
Town Home (three or more stories)	1200 (total floor area for each unit)
Studio Town Home (two stories)	750 (total floor area for each unit)
Villa/Duplex (one story)	750 (ground floor area for each unit)
Villa/Duplex (two or more stories)	750 (total floor area for each unit)

See ¶31, supra. This formal adoption of the revised Design Guidelines was intended to ratify and confirm the Review Committee's April 30, 2008 approval of Peteler's eight hundred (800) square foot studio town homes on O'Flannery Drive in The Gallery. Supplemental Affidavit of G. Timothy Shaw, ¶13 and Exhibit O.

41. The "Intent" section of the Design Guidelines states that "these Design Guidelines . . . have been adopted to provide a basis for *consistency of development*, while

respecting the natural setting and allowing creative expression within individual environments." Supplemental Affidavit of G. Timothy Shaw, ¶15 and Exhibit G, Intent, pg. 1 (emphasis added).

42. The "Intent" section of the Design Guidelines also states that "[t]he primary areas of concern addressed by these Guidelines are Site Development and Architectural Appearance, especially as these relate to *harmonious relationships . . . among neighborhood structures*." Supplemental Affidavit of G. Timothy Shaw, ¶16 and Exhibit G, Intent, pg. 1 (emphasis added).

43. The "Intent" section of the Design Guidelines also states that, "[i]n general, the goals are to *minimize harsh contrasts in . . . architectural context*, . . . and to encourage *unassuming architecture* appropriate to this unique environment." Supplemental Affidavit of G. Timothy Shaw, ¶ 17 and Exhibit G, Intent, pg. 1 (emphasis added).

44. The "Intent" section of the Design Guidelines also states that "[t]he Review Committee reserves the right to revise these Guidelines as changing conditions and priorities dictate, in order to *maintain maximum real and aesthetic benefits* to The Gallery property." Supplemental Affidavit of G. Timothy Shaw, ¶18 and Exhibit G, Intent, pg. 1 (emphasis added).

45. As an initial member of the Review Committee, Mr. Shaw participated in the review and approval of all designs for single family homes, town homes, studio town homes, and other structures in The Gallery. Therefore, he is familiar with all designs for single family homes, town homes, studio town homes, and other structures in The Gallery. Supplemental Affidavit of G. Timothy Shaw, ¶¶14 and 19.

46. As an initial member of the Review Committee, Mr. Shaw is also familiar with the consideration the Review Committee has given to the subjective concepts of

"consistency of development", "harmonious relationships among neighborhood structures", "minimizing harsh contrasts in architectural context", "unassuming architecture", and "maximum real and aesthetic benefits to The Gallery property" before approving each design for single family homes, town homes, studio town homes, and other structures in The Gallery. Supplemental Affidavit of G. Timothy Shaw, ¶20.

47. Based upon his experience with the Review Committee, Mr. Shaw confirmed that the Review Committee has given careful and proper consideration to the subjective concepts of "consistency of development", "harmonious relationships among neighborhood structures", "minimizing harsh contrasts in architectural context", "unassuming architecture", and "maximum real and aesthetic benefits to The Gallery property" before approving each design for single family homes, town homes, studio town homes, and other structures in The Gallery. Supplemental Affidavit of G. Timothy Shaw, ¶¶21-24 and Exhibits P, Q and R.

48. Based upon his experience as a member of Orchard Development, the Executive Board, and the Review Committee, Mr. Shaw also confirmed that the photographs attached to his Affidavit as Exhibit P, Exhibit Q and Exhibit R demonstrate the subjective concepts of "consistency of development", "harmonious relationships among neighborhood structures", "minimizing harsh contrasts in architectural context", "unassuming architecture", and "maximum real and aesthetic benefits to The Gallery property" in single family homes, town homes, studio town homes, and other structures in The Gallery as contemplated by the Design Guidelines. Supplemental Affidavit of G. Timothy Shaw, ¶¶22-24 and Exhibits P, Q and R.

49. During the June 12, 2008 preliminary injunction hearing, the Appellant testified about his limited inquiry into The Gallery and the Covenants as follows:

Q: Is the Gallery – does The Gallery have Covenants and Restrictions that are on record?
A: Yes, it does.
Q: Did you review – did you get a copy of those Covenants and Restrictions before you purchased the home?
A: The Covenants and Restrictions were either given to us by our real estate agent prior to closing or at closing. I can't remember exactly when we received them.
Q: Okay. So did you review them entirely before you purchased the home?
A: I did not.
Q: And were you aware at that time of any minimum square footage requirements?
A: I was not aware of any minimum square footage requirement but because all of the homes in the development were of the same size I assumed that a minimum square footage requirement would be contained in the Covenants.

June 12, 2008 Testimony of Appellant/Plaintiff, pg. 34, lines 3-19.

50. During the June 12, 2008 preliminary injunction hearing, the Appellant acknowledged his understanding that Orchard Development has retained control of The Gallery during its build-out as follows:

Q: But you are familiar with the concept of a developer retaining control of a subdivision for a period of time?
A: Absolutely.
Q: So you are not surprised that the developer of The Gallery retained control for a period of time, are you?
A: I am not surprised by that at all.

June 12, 2008 Testimony of Appellant/Plaintiff, pg. 61, lines 6-12.

Q: And it is not important to you in trying to persuade the Court that you acknowledge that declarant who is the developer has control of the association?
A: I have never once alleged that they don't have control.

June 12, 2008 Testimony of Appellant/Plaintiff, pg. 64, lines 14-17.

51. During the June 12, 2008 preliminary injunction hearing, the Appellant also acknowledged his understanding that the Design Guidelines may be amended as follows:

Q: And, the Design Guidelines can be amended?
A: That is also true.
Q: And, all of that would be relevant to your expectations?
A: That is correct.

June 12, 2008 Testimony of Appellant/Plaintiff, pg. 64, line 21 – pg. 65, line 1.

Q: So at least as we are standing here today you acknowledge that you don't have a reasonable expectation to expect that the Design Guidelines could not be changed?
A: I never once said they cannot be changed. As a matter of fact, they can be changed, but they have to go through the proper process.

June 12, 2008 Testimony of Appellant/Plaintiff, pg. 66, lines 11-16.

Q: So before you filed your law suit here, Mr. Foster, you were aware that the Declaration and Covenants could be amended?
A: That is true.
Q: So you didn't have an expectation that these Covenants and Restrictions might never change?
A: That is also true.
Q: And, likewise, you didn't have any expectation that the Design Guidelines might never change?
A: That is also true.

June 12, 2008 Testimony of Appellant/Plaintiff, pg. 68, lines 6-12.

Q: So you certainly understood that the Review Committee could revise the guidelines?
A: If it was "to maintain maximum real and aesthetic benefit to the Gallery property" was my understanding because that is what it says.
Q: That is a "yes" answer to my question?
A: Yes, it is.
Q: And you also understood that the Review Committee was established by the developer?
A: Yes.
Q: So you knew the developer, up to a certain point in time, had control over the revision of the amendments to the guidelines?
A: That is correct.

June 12, 2008 Testimony of Appellant/Plaintiff, pg. 70, line 15 – pg. 71, line 4.

Q: So when you filed your law suit you knew that there could be revisions to the Guidelines?
A: Absolutely.
Q: And you knew that those revisions to the Guidelines would take precedence over any other previous Guidelines?
A: That is correct. I should clarify, any valid revisions.

June 12, 2008 Testimony of Appellant/Plaintiff, pg. 74, line 24 – pg. 75, line 7,

52. During the June 12, 2008 preliminary injunction hearing, the Appellant expressed his concerns about Peteler's studio town homes as follows:

Q: Well, you have stated as I understand your testimony and in your motion and in your petition or your complaint two bases for claiming that there is some irreparable harm to you, one, is you think there will be diminution in the value of your property, and, two, you think that your subdivision won't look as nice with these studio town homes in it, true?
A: That is true.
Q: Those are the only bases that you have for the Court to consider as irreparable harm and the basis for your injunction?
A: That is true.

June 12, 2008 Testimony of Appellant/Plaintiff, pg. 75, line 17 – pg. 76, line 4.

53. During the June 12, 2008 preliminary injunction hearing, the Appellant conceded that Peteler's studio town homes are not visible from his home as follows:

Q: [. . .] So when you drive into your subdivision on Delmar Orchard Road all the way down to Gaudin Drive, you can't see the town houses that you are concerned about in this law suit, true?
A: If that is the entrance I come in.

June 12, 2008 Testimony of Appellant/Plaintiff, pg. 79, line 23 – pg. 80, line 3.

Q: So if you are sitting out on your porch in the evening, you can't see these town houses that concern you?
A: That is correct.
Q: And if your kids are playing in your backyard, you are not able to see anybody who would be living in those town houses?
A: That is correct.

Q: And if you are driving in from Delmar Orchard Road, you don't have to worry about traffic to and from the town houses?
A: If you come from that direction, that is true.

June 12, 2008 Testimony of Appellant/Plaintiff, pg. 80, line 22 – pg. 81, line 8.

54. During the June 12, 2008 preliminary injunction hearing, the Appellant also conceded that he has no background in real estate and no basis beyond "educated assumption" for asserting that Peteler's studio town homes will diminish the value of his own home as follows:

Q: Let's talk about your claim of diminution of value, when did you finish law school?
A: 2007.
Q: And how old are you, sir?
A: Thirty-two.
Q: And what was your occupation before you went to law school?
A: I was a naval officer.
Q: And you never worked as a realtor?
A: I have not.
Q: And you never worked as an appraiser?
A: I have not.
Q: And your practice of law is not specifically focused on real estate matters?
A: Not specifically.
Q: You are not a real estate attorney?
A: That is correct.
Q: And you have described for us to this point in the hearing everything that you have done in terms of research on the issue of whether or not these studio town homes that are being built will somehow impact the value of your property?
A: That is correct?
Q: So you have not gone out and done any specific research on the internet about how these types of structures affect a subdivision?
A: I don't have to him my hand with a hammer to know it is going to hurt.
Q: Is that an assumption you are making?
A: Educated assumption.
Q: Okay, speculation.

A: I wouldn't say speculation.
Q: Well, who is in a better position to speak to the issue of whether or not studio town homes in a subdivision are likely to impact the value, you or someone who works in the real estate industry?
A: Someone who works in the real estate industry.

June 12, 2008 Testimony of Appellant/Plaintiff, pg. 82, line 6 – pg. 83, line 18.

55. During the June 12, 2008 preliminary injunction hearing, Orchard Development presented the expert testimony of Gregory J. Didden. Mr. Didden is a realtor with forty-three (43) years of experience selling real estate in the Eastern Panhandle of West Virginia. He was recognized by the Court as an expert in the Eastern Panhandle real estate market. The Appellant did not object to Mr. Didden's recognition as an expert in this area. June 12, 2008 Testimony of Gregory J. Didden, pg. 119, line 10 – pg. 122 line 17.

56. During his June 12, 2008 expert testimony, Mr. Didden offered expert opinions about the impact of Peteler's studio town homes on The Gallery based upon his general experience with real estate markets and his specific experience with three similar Eastern Panhandle subdivisions containing a blend of town houses, villas, and single family homes (i.e. Cress Creek, Colonial Hills, and Maddox Farms). June 12, 2008 Testimony of Gregory J. Didden, pg. 119, line 10 – pg. 122 line 17. Specifically, Mr. Didden testified about the economic benefit of Peteler's studio town homes as follows:

Q: Mr. Didden, in your 43 years of experience, in your expert opinion, does the construction of town homes or studio town homes necessarily diminish the value of single family homes in a subdivision.
A: My experience has been that it does not necessarily diminish the value.

June 12, 2008 Testimony of Gregory J. Didden, pg. 122, lines 19-24.

Q: [. . .] Now, Mr. Didden, let's take it to the next step. In your experience and in your expert opinion, does the

construction of town homes or villas or other types of blended structures . . . in a subdivision with single family homes increase the value of those single family homes?

A: In some instances it certainly could. As I mentioned before, with proper planning, the more eclectic the community is, particularly where you have got good homeowner features and recreational areas, it brings more vibrancy to the community. It makes it so there is a lot more activities involved. It makes it easier to market. This is particularly important when you get into a down market that we are in right now because a sense of activity is very, very important in sales. In real estate, anybody will tell you perception is extraordinarily important in the marketing of a community. The idea that you have activity which you would have because you had properties that were priced at different levels that appeal to different parts of the marketplace brings a sense of life to a community and that perception is important as you try to sell. It doesn't matter what level you are trying to sell at the perception of activity is extraordinarily important.

June 12, 2008 Testimony of Gregory J. Didden, pg. 124, line 14 – pg. 125, line 12.

Q: Now, based on what you know about The Gallery, a review of the plat, and [the Appellant's] testimony, do you have an opinion about whether or not building 800 square foot studio town homes in The Gallery Subdivision will diminish the value of [the Appellant's] single family home?

A: Well, my opinion would be that I don't see why it should given proper planning and assuming the builder . . . adheres to the standards that would be requisite for this type of quality community. The idea of having them there I should think would enhance value rather than diminish value.

June 12, 2008 Testimony of Gregory J. Didden, pg. 126, lines 7-17.

57. The Appellant did not present any evidence at the June 12 and June 17, 2008 preliminary injunction hearing to contradict Mr. Didden's expert opinions. Subsequently, the Appellant has not presented any affidavits, or other evidence of record, to contradict Mr. Didden's expert opinions.

RESPONSE TO ASSIGNMENTS OF ERROR

I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE COVENANTS AND THE DESIGN GUIDELINES ARE TWO SEPARATE AND DISTINCT DOCUMENTS.

II. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE REVIEW COMMITTEE PROPERLY APPROVED PETELER'S STUDIO TOWN HOMES AND REVISED THE ORIGINAL DESIGN GUIDELINES PURSUANT TO THE AUTHORITY AND DISCRETION ESTABLISHED BY THE DESIGN GUIDELINES.

III. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT REGARDING THE REVIEW COMMITTEE'S APPROVAL OF PETELER'S STUDIO TOWN HOMES AND REVISION OF THE ORIGINAL DESIGN GUIDELINES PURSUANT TO THE AUTHORITY AND DISCRETION ESTABLISHED BY THE DESIGN GUIDELINES.

POINTS AND AUTHORITIES

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STANDARD OF REVIEW

"Upon appeal, the entry of a summary judgment is reviewed by [the West Virginia Supreme Court] *de novo*." *Wood v. Acordia of West Virginia, Inc.*, 217 W.Va. 406, 411, 618 S.E.2d 415, 420 (2005). "In reviewing summary judgment, [the West Virginia Supreme Court] will apply the same test that the circuit court should have used initially, and must determine whether 'it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.'" *Wilkinson v. Duff*, 212 W.Va. 725, 730, 575 S.E.2d 335, 340 (2002) citing *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

"The granting or refusal of an injunction, whether mandatory or preventative, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ." Syllabus Point #2, *Haislop v. Edgell*, 215 W.Va. 88, 593 S.E.2d 839 (2003) citing Syllabus Point #4, *State ex rel. Donley v. Baker*, 112 W.Va. 263, 164 S.E. 154 (1932). "Unless an absolute right to injunctive relief is conferred by statute, the power to grant . . . a temporary or permanent injunction, whether preventative or mandatory in nature, ordinarily rests in the sound discretion of the trial court, according to the facts and the circumstances of the particular case; and its action in the exercise of its discretion will not be disturbed on appeal in the absence of a clear showing of an abuse of such discretion." *Id* at Syllabus Point #1 citing Syllabus Point #11, *Stuart v. Lake Washington Realty*, 141 W.Va. 627, 92 S.E.2d 891 (1956).

DISCUSSION OF LAW

I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE COVENANTS AND THE DESIGN GUIDELINES ARE TWO SEPARATE AND DISTINCT DOCUMENTS.

In this case, the Appellant is attempting enforce the initial Design Guidelines as though they have the same rigid force and effect as the Covenants. The Circuit Court properly rejected this argument because the recorded Covenants and the unrecorded Design Guidelines are, on their face, separate and distinct. The Circuit Court also properly rejected this argument because, to the extent the relationship between the Covenants and the Design Guidelines might be considered ambiguous, there is no genuine issue of material fact regarding Orchard Development's intentions.

A. Orchard Development Intended The Design Guidelines To Be Separate And Distinct From The Covenants.

An examination of both the Covenants and the Design Guidelines reveals that Orchard Development intended each document to be interpreted as separate and distinct from the other. First, in Article 1, Section 1.13, the Covenants specifically define the Design Guidelines as a document established *separately* by the Property Owners Association.[8] There could be no clearer indication that Orchard Development intended the Design Guidelines to be separate and distinct. Second, Orchard Development recorded the Covenants in the Berkeley County land records, but did not observe the same formality with the Design Guidelines. This simple fact cannot be overlooked. If Orchard Development had intended the Design Guidelines to be part of the Covenants, it would not have created two separate documents. Rather, it would have simply incorporated the text of the Design Guidelines, including the seventeen hundred square foot

[8] Covenants, Article I, Section 1.13, Design Development Guidelines. The design guidelines established by the Unit Owners Association for the design and construction of improvements on individual units. Exhibit A.

(1,700 sq. ft.) minimum living area restriction, into the Covenants themselves.[9] Finally, in its Summary section, the Design Guidelines clearly refer to the Covenants as a separate and external document which provides authority for design review.[10] Given these clear indicators, there is no doubt that Orchard Development intended the Covenants and the Design Guidelines to be treated as separate and distinct documents which are independent, yet complimentary, to one another.

B. Orchard Development Intended The Design Guidelines To Be More Flexible And Easier To Amend Than The Covenants.

The separate and distinct nature of the Design Guidelines is crucial because it demonstrates Orchard Development's general intention to make the Design Guidelines more flexible and easier to amend than the Covenants. This intention is underscored by the explicit language of the Covenants and the Design Guidelines themselves which establish a separate, less stringent procedure for revising the Design Guidelines. Article XXIV, Section 24.4 of the Covenants provides that "the Review Committee shall apply the *procedures* and guidelines set forth in the Design Guidelines." Exhibit A (emphasis added). The term "procedures" is used separately from the term "guidelines." It contemplates an independent amendment procedure for

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[9] The Circuit Court properly rejected the Appellant's reliance upon *Armstrong v. Stribling*, 192 W.Va. 280, 452 S.E.2d 83 (1994), for the proposition that "recordation of the design guidelines is not a prerequisite to binding legal effect." The Appellant overstates the holding and importance of *Armstrong*. *Armstrong* is a *per curiam* case which is readily distinguishable from the present case. In *Armstrong*, the plaintiffs were lot owners in a residential subdivision who sought to enforce recorded covenants against the defendants who owned adjoining land and were constructing an apartment building in violation of those recorded covenants. The defendants contended that they were not bound by the covenants because their lots were not included on the plaintiffs' eleven-lot plat which made reference to the recorded covenants. Although the defendants' lots were not included on the eleven-lot recorded plat, the deed by which they took title to their lots explicitly stated that their lots were subject to the covenants recorded with the eleven-lot plat. These circumstances do not exist in the present case. More importantly, the Appellant's reliance upon *Armstrong* misconstrues Orchard Development's argument. Orchard Development does not contend that the initial Design Guidelines are not enforceable because they were not recorded. Rather, Orchard Development contends, and the Circuit Court correctly recognized, that Orchard Development's failure to record the Design Guidelines as part of the Covenants demonstrates that the two are separate and distinct documents.

[10] Design Guidelines, Summary, Legal Basis, ¶1. Authority for design review is grounded in the governing document for The Gallery Subdivision community, the 'Declaration of Covenants, Conditions, and Restrictions of The Gallery Subdivision'. Exhibit G.

the Design Guidelines. Meanwhile, the Design Guidelines contain the following unequivocal statement regarding revision:

> The *Review Committee* reserves the right to *revise* these Guidelines as changing conditions and priorities dictate, in order to maintain maximum real and aesthetic benefits to The Gallery property.

Design Guidelines, Intent, pg. 1, Exhibit G (emphasis added). This language could not be any clearer or more direct. The *Review Committee*, not the Executive Board, the Property Owners Association, or sixty-seven percent (67%) of the votes in the Property Owners Association, has the right to revise the Design Guidelines. It is also highly significant that this provision is contained in the "Intent" section at the beginning of the Design Guidelines. Given the context and the explicit language of the Covenants and the Design Guidelines, there can be no doubt that Orchard Development intended to allow the Review Committee authority to revise the Design Guidelines through a more flexible and less stringent procedure than the Covenants.[11]

C. If There Is Any Ambiguity In The Relationship Between The Covenants And The Design Guidelines, Orchard Development's Intentions Are Controlling.

Orchard Development created and recorded the Covenants for The Gallery at the outset of development before any homes were completed and sold. Likewise, the Review Committee adopted the Design Guidelines and began approving designs for The Gallery before any homes were completed and sold. Therefore, only Orchard Development's intentions with regard to the Covenants and the Design Guidelines are truly at issue in this case.

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[11] The Review Committee's broad power to revise the Design Guidelines is balanced by Article XXIII, Section 23.2(t) of the Covenants which grants any lot/unit owner in The Gallery the right to appeal any decision of the Review Committee to the Executive Board of the Property Owners Association. Article XXIII, Section 23.2(t) ("[A]ctions taken by a committee may be appealed to the Executive Board by any Unit Owner within forty-five (45) days of publication of such notice, and such committee action must be ratified, modified or rejected by the Executive Board at its next regular meeting.") Exhibit A. If the Design Guidelines were intended to be amended under the procedures set forth in the Covenants, this appellate procedure would not be necessary. This is an additional indicator that the Design Guidelines were intended to be more flexible and easier to amend than the Covenants.

> 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.

Syllabus Point #1, *McIntyre v. Zara*, 183 W.Va. 202, 394 S.E.2d 897 (1990) citing *Wallace v. St. Clair*, 147 W.Va. 377, 390, 127 S.E.2d 742, 751-52 (1962) (emphasis added). See also *G Corp, Inc. v. MackJo, Inc.*, 195 W.Va. 752, 757, 466 S.E.2d 820, 825 (1995); *Armstrong v. Stribling*, 192 W.Va. 280, 284, 452 S.E.2d 83, 86 (1994); *Jubb v. Letterle*, 191 W.Va. 395, 398, 446 S.E.2d 182, 185 (1994). In the context of covenants and restrictions for residential housing developments such as The Gallery, the West Virginia Supreme Court has specifically observed that "a court of equity looks to the whole scheme as one intended to confer a benefit upon the property remaining in the hands of the grantor after the sale of each lot." *Wallace v. St. Clair*, supra at 391, 752. Here, Orchard Development is the grantor which intends to retain the benefit of the Covenants and the separate Design Guidelines after it conveys lots/units in The Gallery. This benefit is the flexibility of the Design Guidelines and the control of The Gallery which Orchard Development reserved in order to meet changing market conditions and sell all two thousand (2000) lots/units it has planned for The Gallery. [12] The Circuit Court properly considered these sound legal principles and business context while evaluating the Appellant's oversimplified view of the Covenants and Design Guidelines and resulting request for permanent injunction. After giving consideration to Orchard Development's entire scheme for The Gallery, as created through the recorded Covenants and the separate, unrecorded Design Guidelines, the

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[12] The flexibility created by the recorded Covenants and separate, unrecorded Design Guidelines is crucial to Orchard Development's overall scheme for control and completion of the Gallery. Any developer who undertakes a large residential development which will take years to complete must be able to meet changing market conditions. Given this obvious need for flexibility, Orchard Development's scheme for retaining control of The Gallery during development is not novel. The West Virginia Supreme Court recognized the need for a residential developer to retain control during development as early as 1962 in *Wallace v. St. Clair*, supra.

Circuit Court correctly concluded that these separate and distinct documents provide the Review Committee sufficient flexibility to revise the Design Guidelines and allow Peteler's studio town homes as part of The Gallery.

II. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE REVIEW COMMITTEE PROPERLY APPROVED PETELER'S STUDIO TOWN HOMES AND REVISED THE ORIGINAL DESIGN GUIDELINES PURSUANT TO THE AUTHORITY AND DISCRETION ESTABLISHED BY THE DESIGN GUIDELINES.

In this case, the Appellant is attempting to eliminate the authority and discretion granted to the Review Committee under the Design Guidelines by ignoring the clear distinction between the Covenants and the Design Guidelines. The Circuit Court properly rejected this argument because the Design Guidelines explicitly grant the Review Committee separate authority to revise and the Review Committee legitimately exercised this authority when it approved Peteler's studio town homes.[13] The Circuit Court also properly rejected this argument because, to the extent the amendment provisions found in the Covenants and the Design Guidelines might be considered ambiguous, there is no genuine issue of material fact regarding Orchard Development's intentions.

A. Orchard Development's Overall Scheme For The Gallery, As Established By The Recorded Covenants And The Separate, Unrecorded Design Guidelines, Clearly Demonstrates Its Intention To Grant The Review Committee Separate Authority And Discretion To Revise the Design Guidelines And Approve Peteler's Studio Town Homes.

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[13] The Review Committee met on April 30, 2008, with a quorum and approved Peteler's plans to build eight hundred square foot (800 sq. ft.) town homes in the Gallery as follows:

> Lots on O'Flannery – Addition of Studio Town Houses by Peteler Development Group. Towns are to be 800 sq. ft., 2 story with single car garage. They will be 2 bedroom, 1.5 baths, with brick front. Recommended for approval on motion by Bob Adams, second by Jim Seibert. Approved.

Exhibit G. This approval implicitly revised the Design Guidelines while complying with Article XXIV, Section 24.5 of the Covenants which requires Review Committee approval of all improvements in The Gallery.

Orchard Development established an overall scheme for The Gallery whereby it can legitimately control what is built, how it is built, and when it is built. This scheme is clearly established in the Covenants. Article VIII, Section 8.1 of the Covenants details the development rights reserved to Orchard Development. Exhibit A, Section 8.1, pg. 7. Article VIII, Section 8.10(a) of the Covenants specifically establishes Orchard Development's control over the Property Owners' Association as follows:

> [T]here shall be a period of [Orchard Development] control of the Association, during which the [Orchard Development], or persons designated by [Orchard Development] may appoint and remove the officers and members of the Executive Board.

Exhibit A, Section 8.10(a), pg. 9. This control does not terminate until sixty (60) days after Orchard Development has sold seventy-five percent (75%) of the two thousand (2000) lots it has planned for The Gallery or two (2) years after it stops selling lots in the ordinary course of business.[14] Exhibit A, Section 8.10(b), pg. 9. Meanwhile, Article XXIV, Section 24.2 of the Covenant details Orchard Development's control of the Review Committee as follows:

> The Review Committee shall consist of not more then (sic) five (5) members. One (1) member shall be appointed by [Orchard Development], its successors or assigns. More than one-half the members shall be appointed by [Orchard Development] and the remaining members shall be appointed by the [Property Owners' Association].

Exhibit A, Section 24.2, pg. 34. This control also does not terminate until sixty (60) days after Orchard Development has sold seventy-five percent (75%) of the two thousand (2000) lots it has

[14] Currently, Orchard Development has dedicated four hundred eighty-one (481) lots to The Gallery by recording final plats of those lots in phases and sections. It has sold three hundred seventy-six (376) lots to builders, while retaining one hundred five (105) lots in its own inventory. Three hundred seventy-six (376) lots are only approximately nineteen percent (19%) of the two thousand (2000) lots Orchard Development has planned for The Gallery. Orchard Development continues to actively market and sell lots in The Gallery. Therefore, Orchard Development is several years away from reaching the seventy-five percent (75%), or one thousand five hundred (1500) lot, threshold for relinquishing control of the Executive Board of the Property Owners Association and the Review Committee under the Covenants. See *Orchard Development, LLC's Responses to Plaintiff's First Interrogatories and Requests for Production of Documents* served July 16, 2008 – Interrogatories #1 and #2.

planned for The Gallery or two (2) years after it stops selling lots in the ordinary course of business.[15] Exhibit A, Section 24.2, pg. 34. These portions of the recorded Covenants make clear to any prospective purchaser *who reads the entire document* that Orchard Development will retain control over the Property Owners' Association and the Review Committee, and all of the important decisions these entities are authorized to make, until three-fourths (¾) of The Gallery lots are sold.

Orchard Development's overall scheme for control of The Gallery flows carefully from the recorded Covenants into the separate, unrecorded Design Guidelines. Article XXIV, Section 24.5 of the Covenants provides that "[n]o Unit Owner shall construct any improvement . . . on any Unit without first obtaining the written consent of the Review Committee." Exhibit A, Section 24.5, pg. 34. Thus, it is the Review Committee's approval, not any specific Design Guideline, which is mandated by the Covenants and enforceable by injunction.

Article XXIV, Section 24.4 of the Covenants provides that "the Review Committee shall apply the *procedures* and guidelines set forth in the Design Guidelines." Exhibit A, Section 24.4, pg. 34 (emphasis added). One of these important procedures is found, appropriately, in the "Intent" section at the beginning of the Design Guidelines as follows:

> The Review Committee reserves the right to revise these Guidelines as changing conditions and priorities dictate, in order to maintain maximum real and aesthetic benefits to The Gallery property.

Exhibit G, Intent, pg. 1. Here, Orchard Development's control over the Review Committee is matched with the Review Committee's authority and discretion to revise the Design Guidelines when necessary. This authority and discretion are confirmed in the "Summary" section of the Design Guidelines as follows:

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[15] See footnote #14, supra.

> It will be the difficult duty of the Review Committee to interpret these goals and concepts in a consistent manner, always attempting to keep the best interest of The Gallery community in mind.

Exhibit G, Summary, pg. 13. This authority and discretion are also confirmed in the "Summary/Legal Basis" section of the Design Guidelines as follows:

> Authority for design review is grounded in the governing document for The Gallery Subdivision community, the "Declaration of Covenants, Conditions, and Restrictions of The Gallery Subdivision." Article XXIV of the Declaration of Covenants, Conditions, and Restrictions of 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.*

Exhibit G, Summary/Legal Basis, pg. 13 (emphasis added). Given these provisions authorizing the Review Committee to *revise* the Design Guidelines and recognizing its discretion to *interpret* the Design Guidelines, there can be no doubt that Orchard Development intended the Design Guidelines to provide the Review Committee with separate authority and discretion to approve Peteler's studio town homes and make corresponding revisions to the Design Guidelines. The Circuit Court properly recognized that any contrary interpretation of the Covenants and Design Guidelines would defeat these intentions and render these provisions meaningless.

B. The Appellant's Interpretation Of The Covenants And Design Guidelines Would Defeat Orchard Development's Clear Intentions As The Developer Of The Gallery And The Creator Of Both Documents.

Since he cannot dispute Orchard Development's stated intentions for the Gallery, the Covenants, and the Design Guidelines, the Appellant argues his interpretation of these documents, and Orchard Development's intentions, solely from *selected* portions of the Covenants, Design Guidelines, and other documents. This type of "picking and choosing" from the documents is improper. Well-established West Virginia case law recognizes that "when

confronted with construing a deed, 'the intention of the grantor controls' which requires that 'the whole instrument, *not merely and separately disjointed parts*, is to be considered." *Belcher v. Powers*, 212 W.Va. 418, 424, 573 S.E.2d 12, 18 (2002) citing Syllabus Point #6, in part, *Uhl v. Ohio River R. Co.*, 51 W.Va. 106, 41 S.E. 340 (1902) (emphasis added).

In the most obvious example of "picking and choosing" from the documents, the Appellant states the following as undisputed, material fact:

> After recordation of [the Covenants], [Orchard Development] issued a written memo on June 25, 2004, declaring that both the "covenants and design guidelines control the actual requirements" for construction. [. . .] [Orchard Development] expressly declared in the memorandum that the Design Guidelines and [the Covenants] constitute the "binding documents."

This simply misinterprets the document. Orchard Development's June 25, 2004 Memorandum is a summary of the building requirements for *single family homes* in The Gallery. It is entitled "Brief of building requirements for The Gallery (single family) – June 25, 2004." The language seized upon by the Appellant is actually an important disclaimer at the beginning of the document which, in its proper context, reads:

> This brief is offered as a quick reference only and is not a part of the actual binding documents. The covenants and design guidelines control the actual requirements and should be referred to for the actual requirements.

When read in its proper context, Orchard Development's June 25, 2004 Memorandum actually corroborates its explanation that the seventeen hundred square foot (1,700 sq. ft.) minimum area restriction in the *initial* Design Guidelines was only intended to apply to *single family homes*, not other types of multi-family attached structures like Peteler's studio town homes. Orchard Development's June 25, 2004 Memorandum also clearly warns all unit owners to read *all* of the Covenants and *all* of the Design Guidelines in order to understand the building requirements.

"In construing a deed, will or other written instrument, it is the duty of the court to construe it as a whole, *taking and considering all the parts together*, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principal of law inconsistent therewith." Syllabus Point #2, *Belcher v. Powers*, supra, citing Syllabus Point #1, *Maddy v. Maddy*, 87 W.Va. 581, 105 S.E. 803 (1921) (emphasis added). This is precisely what the Circuit Court did before denying the Appellant's request for permanent injunction. The Circuit Court properly considered the recorded Covenants and the separate, unrecorded Design Guidelines in the business context of Orchard Development's overall scheme for developing The Gallery and correctly determined that Orchard Development intended the Design Guidelines to provide the Review Committee with the authority and discretion to approve Peteler's studio town homes and make corresponding revisions to the Design Guidelines.

C. The Appellant's Interpretation Of The Covenants And Design Guidelines Would Deprive The Review Committee Of The Authority And Discretion Granted It Under The Design Guidelines.

In his Brief, the Appellant asserts that The Covenants "established an Architectural Review Committee to *enforce* improvements according to the Design Guidelines." This interpretation oversimplifies the actual function of the Review Committee and completely eliminates the authority and discretion it was granted to interpret and revise the Design Guidelines. As such, it is another example of the Appellant "picking and choosing" from disjointed parts of the Covenants and Design Guidelines, while completely ignoring others, in order to justify his untenable position.

Article XXIV, Section 24.4 of the Covenants provides that "the Review Committee shall apply the *procedures* and guidelines set forth in the Design Guidelines."

Exhibit A, Section 24.4, pg. 34 (emphasis added). The term "procedures" is used separately from the term "guidelines." It contemplates an independent amendment procedure for the Design Guidelines. Meanwhile, the Design Guidelines contain the following unequivocal statement regarding revision:

> The Review Committee reserves the right to *revise* these Guidelines as changing conditions and priorities dictate, in order to maintain maximum real and aesthetic benefits to The Gallery property.

Exhibit G, Intent, pg. 1 (emphasis added). The Design Guidelines also recognize the Review Committee's discretion as it interprets, applies, enforces, and revises the Design Guidelines as follows:

> It will be the difficulty duty of the Review Committee to *interpret* these goals and concepts in a consistent manner, always attempting to keep the best interest of The Gallery community in mind.

Exhibit G, Summary, pg. 13. Finally, the Review Committee's authority to revise the Design Guidelines is confirmed by the following statement:

> Should these Guidelines be revised, such revisions shall then take precedence over previous Guidelines.

Design Guidelines, Intent/Legal Basis, pg. 13. These important provisions in the Design Guidelines cannot simply be ignored as the Appellant suggests. Why have a Review Committee if it has no discretion? Why create Design Guidelines which contemplate revision and interpretation by the Review Committee if this language is merely surplusage? The Circuit Court correctly recognized that this is clearly *not* what the documents provide and *not* what Orchard Development intended as the developer of the Gallery and the creator of both the Covenants and the Design Guidelines.

Under the overall scheme for the Gallery established by Orchard Development, the Review Committee is charged the multi-faceted function of interpreting, applying, enforcing, and, when it deems necessary, revising the Design Guidelines. This is apparent from the documents themselves. Therefore, in order to give effect to the "entire instrument", as required by *McIntyre v. Zara*, supra, *Wallace v. St. Clair*, supra, and also to construe the "whole instrument, not merely and separately disjointed parts", as required by *Belcher v. Powers*, supra, and *Maddy v. Maddy*, supra, the Circuit Court correctly rejected the Appellant's oversimplified and overly restrictive interpretation of the Design Guidelines vis-à-vis the role of the Review Committee.[16]

D. The Appellant Incorrectly Asserts That Orchard Development Is Estopped From "Unilaterally Removing The Square Footage Restriction" As A Matter Of Law Because Such A Right Was Not Reserved To The Developer.

Throughout his Brief, the Appellant repeatedly asserts that Orchard Development, as the Developer, has unilaterally changed the minimum square footage restrictions for the Gallery without any authority to do so. This assertion ignores an important distinction between the Developer and the Review Committee. Both are defined separately under the Covenants.[17] Article VIII, Section 8.1 of the Covenants details the development rights reserved to Orchard Development as the Declarant/Developer. Meanwhile, Article XXIV, Section 24.2 of the Covenants details Orchard Development's control of the Review Committee. It is the Review

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[16] Allowing the Appellant to enforce the Design Guidelines without deference to the Review Committee's discretion to interpret and authority to revise would essentially render the Review Committee meaningless. The Appellant's interpretation of the Design Guidelines would be tantamount to allowing a resident of Martinsburg to enforce zoning regulations directly by injunction, all the while circumventing the Martinsburg Planning Commission's discretion to grant variances to those regulations.

[17] The Preamble to the Covenants defines the "Declarant" as "Orchard Development Company, LLC." Likewise, Article I, Section 1.12 of the Covenants defines the "Declarant" as Orchard Development Company, LLC." Meanwhile, Article I, Section 1.32 of the Covenants separately defines the "Review Committee" as "The Gallery Subdivision Architectural and Development Review Committee as set forth in Article XXIV."

Committee, not Orchard Development, which approved Peteler's studio town homes and made corresponding revisions to the Design Guidelines. As discussed in detail above, the Review Committee has clear authority and discretion to take these actions. Therefore, the Circuit Court correctly recognized that, even if Orchard Development, as the Declarant/Developer, does not have authority to take such actions under the Article VIII, Section 8.1 of the Covenants, Orchard Development, through the Review Committee, has clear authority and discretion to take such actions under the Covenants and Design Guidelines.

E. The Appellant Incorrectly Asserts That The Design Guidelines Are Subject To The Amendment Procedures Set Forth In The Covenants.

In his Brief, the Appellant asserts that "the Design Guidelines are part of [the Covenants]", then argues that "[b]ecause the Design Guidelines are a part of [the Covenants], the Design Guidelines are subject to the amendment procedures contained within [the Covenants.]" The Circuit Court correctly recognized that this argument fails under basic legal principles of document interpretation. It also ignores the separate and distinct authority to revise found in the "Intent" section of the Design Guidelines.[18] As such, it provides another example of the Appellant "picking and choosing" sections of the documents, then using them out of context to justify his position.

It is a "well recognized and long established principle of interpretation of written instruments that the express mention of one thing implies the exclusion of another, *expressio unius est exlusio alterius*". *Harbert v. County Court of Harrison County*, 129 W.Va. 54, 64, 39

[18] The *Review Committee* reserves the right to *revise* these Guidelines as changing conditions and priorities dictate, in order to maintain maximum real and aesthetic benefits to The Gallery property. Exhibit G, Intent, pg. 1 (emphasis added).

S.E.2d 177, 186 (1946).[19] This basic legal principle defeats the Appellant's arguments regarding amendment. Under the Covenants, the term "Documents" clearly does not include the Design Guidelines. Article I, Section 1.16 of the Covenants specifically defines "Documents" as:

> The *Declaration, Plat and Plans* recorded and filed pursuant to the provisions of the Act, the *Bylaws, Articles and the Rules* of the Association as they be amended from time to time. Any exhibit, schedule, or certification accompanying a Document is part of that Document.

Exhibit A, pg. 2 (emphasis added). Each of the terms included as "Documents" is specifically defined elsewhere in the Covenants (i.e. Declaration, Plat, Plans, Bylaws, Articles, and Rules). "Plat" is defined by Article I, Section 1.29 of the Covenants. "Plans" is defined by Article I, Section 1.28 of the Covenants. "Bylaws" is defined by Article I, Section 1.7 of the Covenants. "Articles" is defined by Article I, Section 1.4 of the Covenants. And, finally, "Rules" is defined by Article I, Section 1.33 of the Covenants. None of these definitions includes the Design Guidelines. Rather, Article I, Section 1.13 specifically and separately defines "Design Development Guidelines" as "[t]he design guidelines established by the Unit Owners Association for the design and construction of improvements on individual units." Exhibit A, pg. 2. Thus, the express mention of the specifically defined terms "Declaration", "Plat", "Plans", "Bylaws", "Articles", and "Rules", along with the exclusion of the specifically defined term "Design Development Guidelines", must imply exclusion of the Design Guidelines from the term "Documents." Otherwise, the term "Design Development Guidelines" would appear explicitly in the Covenants' definition of "Documents."

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[19] "[T]his applicable principle of construction is of ancient origin and extends to all instruments requiring judicial construction, contracts, deeds, statutes, and constitutions." *Harbert v. County Court of Harrison County*, supra.

Likewise, under the Covenants, the amendment procedures which apply to the Declaration, the Plat, and the Plans, do not apply to the Design Guidelines. Article XIV, Section 14.1 of the Covenants sets forth the amendment procedure for the Covenants as follows:

> [T]his *Declaration, including the Plat and Plans*, may be amended only by vote or agreement of Unit Owners of Units to which at least sixty-seven percent (67%) of the votes in the Association are allocated.

Exhibit A, pg. 19 (emphasis added). It is crucial to note that, while this provision specifically makes reference to the "Declaration", as well as "the Plat and Plans", it does not make any reference whatsoever to the "Design Development Guidelines." Each of these terms is specifically defined in the Covenants (see above). Thus, the express mention of the specifically defined terms "Declaration", "Plat", and "Plans", along with the exclusion of the specifically defined term "Design Development Guidelines", must imply exclusion of the Design Guidelines from the Section 14.1 amendment procedure set forth in the Covenants. Otherwise, the term "Design Development Guidelines" would appear explicitly in the Covenants' Section 14.1 amendment procedure.

Exclusion of the Design Guidelines from the amendment procedures set forth in the Covenants stands to reason. Orchard Development intended the Design Guidelines to be separate and distinct from the Covenants in order to provide flexibility and control. The Appellant's interpretation of the term "Documents" and application of the more stringent amendment procedures found in the Covenants would completely undermine this flexibility and control. Moreover, a sixty-seven percent (67%) super majority of all lot/unit owners would be an extremely difficult, if not impossible, burden for Orchard Development to overcome simply to revise the Design Guidelines. In addition to ignoring the separate revision authority found in the "Intent" section of the Design Guidelines, the Appellant's application of the amendment

procedures found in the Covenants would effectively eliminate the control of The Gallery which Orchard Development reserved during the development and build-out stages.[20] Clearly, this is *not* what the documents provide and *not* what Orchard Development intended. The Circuit Court correctly recognize that, if Orchard Development had intended the Design Guidelines to function exactly as the Covenants, it would not have bothered to create a separate, unrecorded document.

F. The Appellant Incorrectly Asserts That Orchard Development Is Estopped From "Unilaterally Removing The Square Footage Restriction" As A Matter Of Law Because This Would Completely Change The Character Of The Community By Devaluing The Property Of Other Unit Owners.

In his Brief, the Appellant claims that Peteler's studio town homes will "completely change the character of the community by devaluing the property of other unit owners." The Circuit Court correctly found that this subjective assertion is not supported in any part of the record. In fact, the only record before the Court demonstrates that the opposite is true. Mr. Shaw's Supplemental Affidavit supports his own subjective belief that the Review Committee carefully and properly considered aesthetics when approving Peteler's studio town homes on April 30, 2008. Supplemental Affidavit of G. Timothy Shaw, ¶22.[21] This stands to reason as Orchard Development owns more lots in The Gallery, and has a considerably larger stake in the value of those lots, than any single homeowner in The Gallery. More importantly, Gregory J. Didden, the only real estate expert to testify in this case, specifically opined during the June 12, 2008 preliminary injunction hearing as follows:

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[20] See Covenants, Article VIII, Section 8.1 which details the development rights reserved to Orchard Development; Covenants, Article VIII, Section 8.10 which details Orchard Development's control of the Property Owners' Association; and Covenants, Article XXIV, Section 24.2 which details Orchard Development's control of the Review Committee. Exhibit A.

[21] "Based upon my experience with the Review Committee, I believe the Review Committee has given careful and proper consideration to the subjective concepts of "consistency of development", "harmonious relationships among neighborhood structures", "minimizing harsh contrasts in architectural context", "unassuming architecture", and "maximum real and aesthetic benefits to The Gallery property" before approving each design for single family homes, town homes, studio town homes, and other structures in The Gallery."

> Q: Now, based on what you know about The Gallery, a review of the plat, and [the Appellant's] testimony, do you have an opinion about whether or not building 800 square foot studio town homes in The Gallery Subdivision will diminish the value of [the Appellant's] single family home?
>
> A: Well, my opinion would be that I don't see why it should given proper planning and assuming the builder . . . adheres to the standards that would be requisite for this type of quality community. *The idea of having them there I should think would enhance value rather than diminish value.*

June 12, 2008 Testimony of Gregory J. Didden, pg. 126, lines 7-17 (emphasis added). In opposition to this testimony, the Appellant admitted that his opinions about diminution in value are merely "educated assumption." June 12, 2008 Testimony of Appellant, pg. 83, lines 10-11. He also admitted that Mr. Didden, as a real estate professional, is in a better position to address the issue of whether Peteler's studio town homes would diminish the value of his single family home. June 12, 2008 Testimony of Appellant, pg. 83, lines 14-18. As the only evidence in the record before the Court demonstrated no diminution of value caused by Peteler's studio town homes, the Court properly dismissed the Appellant's estoppel argument without even considering the complete lack of any substantive law to support this argument. Certainly, the Appellant's subjective, unsupported concerns about the character of The Gallery and property values in The Gallery should not defeat Orchard Development's clear intentions or the Review Committee's clear authority and discretion to revise the Design Guidelines. [22]

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[22] A Maryland case with very similar facts provides persuasive authority on this subject. In *Matthews v. Kernewood*, 184 Md. 297, 40 A.2d 522 (1945), the Court of Appeals of Maryland considered an appeal by homeowners in an "exclusive" subdivision who sought to enjoin a developer from subdividing remaining lots in the subdivision into smaller lots for less expensive houses. The homeowners argued that the proposed resubdivision was not authorized by the recorded Covenants and "would destroy or impair the value of all the lots" in their subdivision. *Id.* at 302, 524. Much like this case, the Court held that the recorded Covenants allowed the developer to amend the covenants and remove the restrictions on lot size and house value. It also observed that "[i]t is evident that the original plan was a subdivision of large lots with expensive houses and that the present change in the plan of lots permits less expensive house." *Id.* at 308, 527. Nevertheless, the Court reasoned that "unless such a resubdivision is made, the property may grow up in grass and weeds and my eventually be sold for taxes, which

G. The Appellant Incorrectly Asserts That Orchard Development Is Estopped From "Unilaterally Removing The Square Footage Restriction" As A Matter Of Law Because Other Gallery Unit Owners Reasonably Relied Upon The Minimum Living Area Restrictions Found In The Initial Design Guidelines.

"A party is not entitled to protection as a *bona fide* purchaser, without notice, unless he looks to every part of the title he is purchasing, neglecting no source of information respecting it which common prudence suggests." Syllabus Point #4, *Belcher v. Powers*, supra, citing Syllabus Point #2, *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*, 63 W.Va. 685, 60 S.E. 890 (1908). "Notice" is defined as "[w]hatever is sufficient to direct the attention of the purchaser to prior rights and equities of third parties, so as to put him on inquiry into ascertaining their nature . . . ." Syllabus Point #1, *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*, supra. Throughout this case, the Appellant has claimed that he will somehow be denied the "benefit of his bargain" if Orchard Development is permitted to "unilaterally" change the Design Guidelines.[23] Despite this contention, the Appellant admitted during his June 12, 2008 testimony that, when he bought his house in The Gallery: 1) he was familiar with the concept of a developer retaining control of a subdivision (pg. 61); 2) he recognized that the Design Guidelines could be changed (pg. 66 and pg. 68); 3) he understood that Orchard Development retained control over revisions to the Design Guidelines (pg. 71); but, nevertheless, 4) he failed to read the "Intent" section of the Design Guidelines which specifically allows revisions (pg. 70); and 5) he failed to determine if any revisions had been made to the Design Guidelines (pg. 72). June 12, 2008 Testimony of Appellant, pp. 61-72. Given the Appellant's admissions, and the applicable West Virginia law regarding a purchaser's duty to investigate his

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would certainly be more detrimental to [the homeowner-appellants] than the plan now proposed." *Id.* at 308, 527. The Maryland Court's holding and reasoning are instructive in the present case.

[23] During his June 12, 2008 testimony, the Appellant testified, "I am losing the benefit of my bargain." June 12, 2008 Testimony of Appellant, pg. 75, line 13.

title, it is clear that the Appellant is not entitled to complain about Orchard Development's control over the Review Committee or the authority and discretion granted the Review Committee to revise the Design Guidelines. Each of these facts was apparent in the plain language of the Covenants and the Design Guidelines if the Appellant had simply conducted a complete investigation.

By arguing that the Review Committee does not have the discretion to allow Peteler's studio town homes or make corresponding revisions to the Design Guidelines, the Appellant is not simply trying to "obtain the benefit of his bargain". He is actually trying to obtain more. By "picking and choosing" the parts of the Covenants and Guidelines he prefers (i.e. the 1,700 sq. ft. minimum living area restriction found in the initial Design Guidelines and the more stringent amendment procedures set forth in the Covenants), while ignoring the remainder of these documents, the Appellant is attempting to wrest control of The Gallery from Orchard Development before he and the other homeowners are entitled to such control (i.e. once seventy-five percent (75%) of the lots are sold). He is also advocating the repeal of the more flexible revision procedures provided by the Design Guidelines. This is certainly *more* than the Appellant bargained for when he purchased his house in the Gallery. Given these circumstances, the Circuit Court properly recognized that the Appellant's estoppel argument cannot be premised upon "picking and choosing" disjointed provisions from the Covenants and Design Guidelines and relying upon assumptions about documents he failed to examine carefully.

H. Orchard Development's Overall Scheme For The Gallery Which Allows It Initial Control Of The Review Committee And Grants The Review Committee Authority and Discretion To Revise The Design Guidelines Is Not Unconscionable.

In his Brief, the Appellant makes the bald assertion that "any contract term that would allow . . . 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." Aside from the general prohibition against "unconscionable agreements or contract terms" found in West Virginia Code §36B-1-111, however, the Appellant offers no authority whatsoever for this assertion. A review of West Virginia authority demonstrates that Orchard Development's overall scheme for The Gallery is not unconscionable.

West Virginia courts apply equitable principles when determining whether the terms of a contract are unconscionable. Syllabus Point #1, *Troy Min. Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 600, 346 S.E.2d 749, 750 (1986). This determination is made by analyzing the terms of the contract itself, the full extent of the circumstances surrounding and accompanying the contract, as well as an evaluation of "the fairness of the contract as a whole." *Id.* at Syllabus Point #3. In this context, West Virginia courts evaluate whether an agreement is unconscionable on the basis of whether it is excessively and unreasonably one-sided. *Orlando v. Finance One of West Virginia, Inc.*, 179 W.Va. 447, 450, 369 S.E.2d 882, 885 (1988). The West Virginia Supreme Court has cautioned that mere inequality of bargaining power alone will not give rise to a finding of unconscionability. There must be "*gross inadequacy* of bargaining power" in addition to "terms unreasonably favorable to the stronger party." *Id.* at 604, 754 quoting Restatement (Second) of Contracts § 234 comment d at 111 (Tent. Draft. No. 5, 1970) (emphasis added).[24] A contract term will not generally be found to be unconscionable when it can be demonstrated that the contract was 1) the product of "common business usage," 2) was of "potential benefit to either party" and 3) was in fact of "actual benefit to parties similarly

[24] West Virginia courts have recognized the presence of "gross inadequacy of bargaining power" in circumstances when "consumers are totally ignorant of the implications of what they are signing" or "where the parties involved in the transaction include a national corporate lender on one side and unsophisticated, uneducated consumers on the other." *Mallory v. Mortgage America, Inc.*, 67 F. Supp.2d 601, 611-12 (S.D.W.Va. 1999) citing *Board of Educ. of Berkeley County v. W. Harley Miller, Inc.*, 160 W.Va. 473, 236 S.E.2d 439, 447 (1977) and *Arnold v. United Co. Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854, 861 (1998). These circumstances do not exist in the present case.

situated." *Mallory v. Mortgage America, Inc.*, 67 F. Supp.2d 601, 603 (S.D.W.Va. 1999) citing *Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co.*, 186 W.Va. 613, 413 S.E.2d 670, 675 (1991).

The Circuit Court correctly recognized that, under these legal principles, Orchard Development's overall scheme for the Gallery is clearly not unconscionable. The Appellant, like all homeowners in the Gallery, chose to buy his house after careful consideration and full disclosure. All of the provisions of the Covenants and Design Guidelines were readily available to him before he purchased his house if he had simply availed himself of the documents. No doubt, the Appellant considered purchasing several other houses in other subdivisions. No one forced the Appellant to purchase a house in The Gallery. He could have easily purchased a house in another subdivision which was subject to an overall scheme of covenants and restrictions more to his liking. Moreover, the overall scheme adopted by Orchard Development for The Gallery is not unusual. It is a product of "common business usage." The Appellant himself recognized this in his June 12, 2008 testimony before the Court.[25] Therefore, the Appellant should not be permitted to abolish Orchard Development's entire plan and overall scheme for development of The Gallery simply by crying "unconscionable" in retrospect.[26]

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[25] During his June 12, 2008 testimony, the Appellant admitted:

> Q: But you are familiar with the concept of a developer retaining control of a subdivision for a period of time.
> A: Absolutely.
> Q: So you are not surprised that the developer of The Gallery retained control for a period of time, are you?
> A: I am not surprised at all.

June 12, 2008 Testimony of Appellant, pp. 61, lines 6-12.

[26] Although he cites no authority for his unconscionability argument, the Appellant does cite *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000), for the proposition that the Covenants and Design Guidelines are "adhesion contracts" which should be strictly construed against Orchard Development. This reliance is misplaced. *Mitchell v. Broadnax* is an insurance case. The adhesion contracts at issue in *Mitchell v. Broadnax* were insurance contracts mandated by West Virginia's compulsory automobile insurance statutes. See W.Va. Code

III. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT REGARDING THE REVIEW COMMITTEE'S APPROVAL OF PETELER'S STUDIO TOWN HOMES AND REVISION OF THE ORIGINAL DESIGN GUIDELINES PURSUANT TO THE AUTHORITY AND DISCRETION ESTABLISHED BY THE DESIGN GUIDELINES.

In this case, the Appellant contends that a jury should determine whether the Review Committee's revisions to the Design Guidelines "maintain maximum real and aesthetic benefits to The Gallery property." He has not identified any other disputed material facts which might warrant a jury trial and defeat summary judgment. The Circuit Court correctly rejected the Appellant's contention recognizing that there is no *genuine* issue of *material* fact for jury determination because it would not be appropriate to allow a jury to substitute its judgment for the Review Committee's discretion.[27]

When considering whether there is a "genuine issue" of "material fact", the West Virginia Supreme Court has held that:

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§17D-2A-3(a) ("Every owner or registrant of a motor vehicle required to be registered and licensed in this state shall maintain security as hereinafter provided . . . ."). There is no West Virginia statute requiring the Appellant to purchase a house in The Gallery. This key distinction defeats the Appellant's argument and the strict construction against Orchard Development he advocates.

[27] The Appellant also contends that the Circuit Court should have allowed discovery on this issue. This is the first time the Appellant has advanced such an argument. He agreed that limited discovery was necessary to present the issues raised in his Complaint for injunction to the Circuit Court on cross motions for summary judgment. Moreover, he did not make any type of formal or informal request for additional discovery pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure along with his motion for summary judgment and response to Orchard Development's motion for summary judgment.

> At a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified 'discoverable' material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

Syllabus Point #1, *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996). Thus, the Appellant did not satisfy any of the requirements for delaying summary judgment under Rule 56(f) of the West Virginia Rules of Civil Procedure.

> Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of litigation under applicable law.

Syllabus Point #3, *Greenfield v. Schmidt Baking Co., Inc.*, 199 W.Va. 447, 485 S.E.2d 391 (1997) citing Syllabus Point #5, *Jividen v. Law,* 194 W.Va. 705, 461 S.E.2d 451 (1995). The Circuit Court correctly recognized that the pertinent question in this case is not whether Peteler's studio town homes "maintain maximum real and aesthetic benefits to The Gallery property" from the Appellant's subjective perspective or even a jury's subjective perspective. Rather, the pertinent question in this case is whether *the Review Committee* gave due consideration to whether Peteler's studio town homes "maintain maximum real and aesthetic benefits to The Gallery property." It is undisputed that the Review Committee gave such due consideration.

The "Intent" section of the Design Guidelines unequivocally grants the Review Committee the authority and discretion to revise the Design Guidelines. Meanwhile, the "Summary" section of the Design Guidelines emphasizes that "[i]t will be the difficult *duty of the Review Committee* to interpret these goals and concepts in a consistent manner, always attempting to keep the best interest of The Gallery community in mind." (emphasis added.) Submitting this subjective standard to a jury, as the Appellant suggests, would invite a jury to substitute its judgment for that of the Review Committee and eliminate the discretion specifically granted to the Review Committee by the "Summary" section of the Design Guidelines. Any time a unit owner in The Gallery disagreed with the Review Committee, he or she could undermine the Review Committee's authority and discretion simply by filing suit and demanding

that a jury's discretion be given preference over the Review Committee's discretion.[28] The Covenants require the Review Committee to give due consideration to "maximum real and aesthetic benefits to The Gallery property" when revising the Design Guidelines. The Covenants do not, however, require the Review Committee to reach the same subjective conclusions as the Appellant or any particular unit owner. Based upon the unrefuted testimony of G. Timothy Shaw and Gregory J. Didden, it is undisputed that the Review Committee gave due consideration to "maximum real and aesthetic benefits to the Gallery property." This is all the Covenants and the Design Guidelines require. Therefore, the Circuit Court correctly found no genuine issue of material fact which presents a jury question and prevents summary judgment.[29]

CONCLUSION

The Circuit Court correctly denied the Appellant summary judgment and correctly granted Orchard Development and Peteler summary judgment pursuant to Rule 56(c) of the West

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[28] By requesting a jury trial on this issue, the Appellant is essentially seeking to circumvent the legitimate review process for Review Committee decisions established by the Covenants. The Review Committee's authority and discretion to revise the Design Guidelines is balanced by Article XXIII, Section 23.2(t) of the Covenants which grants any lot/unit owner in The Gallery the right to appeal any decision of the Review Committee to the Executive Board of the Property Owners Association as follows: "[A]ctions taken by a committee may be appealed to the Executive Board by any Unit Owner within forty-five (45) days of publication of such notice, and such committee action must be ratified, modified or rejected by the Executive Board at its next regular meeting." It is the Executive Board, not a jury, which should consider the Appellant's subjective concerns about whether Peteler's studio town homes provide "maximum real and aesthetic benefits to The Gallery property."

[29] The Circuit Court also properly rejected the Appellant's claim for a jury trial because he is not entitled to a jury trial in this equitable proceeding. "Prior to the introduction of the Rules of Civil Procedure, a right to a jury trial existed in an action at law. In an equitable dispute, however, the right to a jury trial did not exist." *Little v. Little,* 184 W.Va. 360, 362, 400 S.E.2d 604, 606 (1990). The distinction between law and equity was abolished by Rule 2 of the West Virginia Rules of Civil Procedure which provides that "[t]here shall be one form of action to be known as 'civil action.'" Nonetheless, "it has been recognized that the right to a jury trial depends upon whether one had that right prior to the adoption of the Rules." *Warner v. Kittle,* 167 W.Va. 719, 725, 280 S.E.2d 276, 280 (1981). At the outset of these proceedings, the Appellant represented to the Court that:

> We are here, again, early in the process to stop [Peteler's studio town homes] and would first say that we are asking for preliminary and permanent injunctive relief. *If the Court does not agree and does not enjoin the Defendants, then at that time we would be asking for damages in the alternative.*

June 12, 2008 Statement of Appellant's Counsel during Preliminary Injunction Hearing, pg. 23, lines 14-18 (emphasis added). Therefore, at the summary judgment stage, the relief sought by the Appellant was purely equitable in nature and no right to a jury trial attached.

Virginia Rules of Civil Procedure. There are no genuine issues of material fact to be resolved by a jury in this equitable proceeding. The Circuit Court also exercised sound judicial discretion by denying the Appellant's request for permanent injunction given the circumstances of the case, the nature of the controversy, the object of the Appellant's injunction, and the comparative hardship to the respective parties. Certainly, it cannot be said that the Appellants have made a "clear showing of an abuse of [the Circuit Court's] discretion" as required by *Haislop v. Edgell*, supra, and *Stuart v. Lake Washington Realty*, supra.

Generally, the law favors unrestricted use of property by the owner and, thus, restrictive covenants are strictly construed. *Wallace v. St. Clair*, supra, citing *Ballard v. Kitchen*, 128 W.Va. 276, 282, 36 S.E.2d 390, 393 (1945). "If the language of the covenant is ambiguous even when read in light of the context and surrounding circumstances, it should be construed against the grantor or persons seeking to enforce the restriction." *McIntyre v. Zara*, supra, citing *Wallace v. St. Clair*, supra (1962).

In the present case, the scheme developed by Orchard Development for The Gallery through the recorded Covenants and the separate, unrecorded Design Guidelines is not ambiguous, especially when viewed in the context of the surrounding circumstances. All of the undisputed evidence presented to the Circuit Court clearly demonstrated that: 1) Orchard Development only intended the seventeen hundred square foot (1,700 sq. ft.) minimum living area restriction found in the initial Design Guidelines to apply to single family *detached* homes, not town homes, villas, duplexes, or other types of multi-family *attached* structures such as Peteler's eight hundred square foot (800 sq. ft.) studio town homes; 2) Orchard Development always intended the Review Committee to have the flexibility to revise the Design Guidelines in order to consider and approve a diverse blend of housing alternatives including town homes,

villas, duplexes, or other types of multi-family *attached* structures such as Peteler's eight hundred square foot (800 sq. ft.) studio town homes; and 3) the Review Committee properly approved Peteler's eight hundred square foot (800 sq. ft.) studio town homes and thereby revised the Design Guidelines in order to reflect its original intentions with regard to town homes, villas, duplexes, or other types of multi-family *attached* structures.

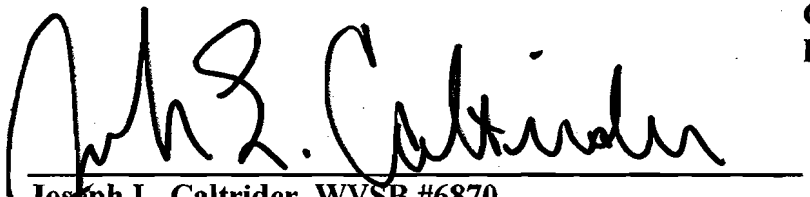
As *McIntyre v. Zara*, supra, and *Wallace v. St. Clair*, supra, demonstrate, Orchard Development's intentions are the key to resolving any questions about the Review Committee's authority to revise the Design Guidelines and approve Peteler's studio town homes. If the Circuit Court had any residual doubt about Orchard Developments intentions, however, it properly resolved those doubts against the Appellant as the party seeking to enforce the restriction. The Circuit Court correctly determined that the *revised* Design Guidelines allow Peteler's studio town homes and moot the Appellant's arguments based upon the *initial* Design Guidelines. It also correctly determined that any application of the general seventeen hundred square foot (1,700) minimum living area restriction found in the *initial* Design Guidelines would render the Design Guidelines immutable, an outcome which is contrary to the plain language of the documents, Orchard Development's intentions, and West Virginia law.

RELIEF REQUESTED

The Appellee, ORCHARD DEVELOPMENT COMPANY, LLC, respectfully requests this Honorable Court to deny the Appellant's appeal and affirm the Berkeley County Circuit Court's September 30, 2008 Order Denying Plaintiff's Motion for Partial Summary Judgment and Request for Permanent Injunction and Granting Defendant's Motion for Summary Judgment.

DATED this 20th day of January, 2010.

APPELLEE
ORCHARD DEVELOPMENT COMPANY, LLC
By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF OF APPELLEE ORCHARD DEVELOPMENT COMPANY, LLC upon all counsel of record by depositing a true and accurate copy in the United States mail, first class, postage pre-paid, in an envelope addressed to:

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Patrick G. Henry, III, Esq.
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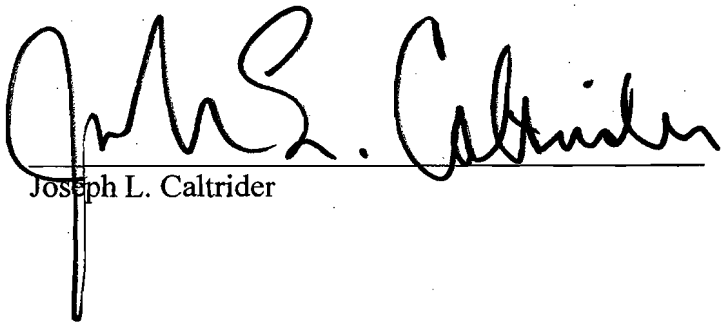
on the 20th day of January, 2010.



Joseph L. Caltrider

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