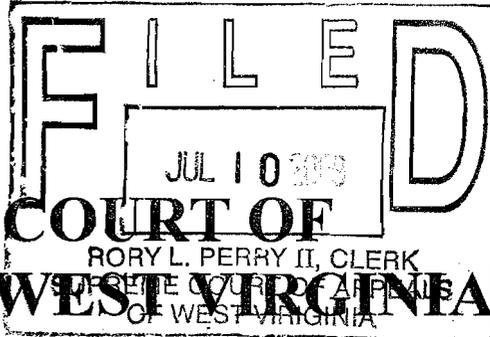


35308



**IN THE CIRCUIT COURT OF
BERKELEY COUNTY, WEST VIRGINIA**

Jason Foster,

Plaintiff,

v.

CIVIL ACTION # 08-C-792

**Orchard Development Company, LLC,
a West Virginia Limited Liability Company, and
Peteler, LLC, a West Virginia Limited Liability
Company,**

Defendants.

BERKELEY COUNTY
 CIRCUIT CLERK
 2008 SEP 30 PM 01:17
 VIRGINIA M. SINE, CLERK

**ORDER DENYING PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT, and
REQUEST FOR PERMANENT INJUNCTION**

- and -

**GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

THIS MATTER originally came before the Court upon the Plaintiff's **June 5, 2008** Complaint for Preliminary Injunction, Permanent Injunction, and Damages. Specifically, the Plaintiff seeks a permanent injunction which prohibits the construction of eight hundred (800) square foot studio town homes in The Gallery Subdivision in Martinsburg, Berkeley County, West Virginia by the Defendant Peteler, LLC as representing a violation of restrictive covenants providing that all residential units in The Gallery should have a minimum living space of seventeen hundred (1,700) square feet.

WHEREUPON the Court held a **June 12 and June 17, 2008** hearing on the Plaintiff's request for preliminary injunction. Based upon the evidence and argument presented during said hearing, the Court denied the Plaintiff's request for preliminary injunction. With the agreement of counsel during said hearing that limited discovery was necessary to prepare the legal issues in this case for the Court's resolution, the Court established an expedited discovery and briefing schedule.

WHEREUPON the parties conducted discovery and submitted cross-motions for summary judgment in accordance with the Court's June 26, 2008 Order Denying Preliminary Injunction.

THIS MATTER now comes before the Court upon the Plaintiff's Motion for Partial Summary Judgment filed August 5, 2008; the Defendant Orchard Development Company LLC's Motion for Summary Judgment filed August 5, 2008; and the rebuttal memoranda filed by both Plaintiff and Defendant Orchard Development Company, LLC on August 20, 2008.

WHEREUPON the Court held a hearing on the parties' cross-motions for summary judgment on September 8, 2008 pursuant to the Court's June 26, 2008 Order Denying Preliminary Injunction.

The Court has considered the pleadings and memoranda of law, affidavits, depositions, and exhibits submitted by the parties; considered all testimony and papers of record, and reviewed pertinent legal authorities. As a result of these deliberations, and in support of this ruling the Court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Defendant, Orchard Development Company, LLC ("**Orchard Development**") is the partial owner of real estate in the City of Martinsburg District of Berkeley County, West Virginia, known as The Gallery Subdivision ("**The Gallery**").
2. Orchard Development took title to this real estate from **C. J. Seibert Orchard Company** by **deeds** recorded in the Berkeley County Clerk's office and dated **January 28, 2003; March 23, 2004, June 7, 2004, and; February 10, 2006.**
3. Orchard Development immediately began developing The Gallery as a residential housing subdivision with a mix of single family homes and smaller townhouses.
4. On **October 15, 2004**, 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.
5. The Covenants document closely tracks the highly legalistic and arcane provisions of the Uniform Common Interest Ownership Act, West Virginia Code §36B-1-101.
6. In addition to the Common Interest Ownership Act language, the Covenants contains

some straightforward rules in **Article X § 10.1** sets forth “**Use and Occupancy Restrictions.**” In sub(a) “**RESIDENTIAL USE**” the very first restriction is that “*All Units shall be used for single-family residences only. No Commercial or retail business shall be permitted on any Unit.*”¹

1

Other *paraphrased* restrictions from Article X:

- b. No subdivision of lots
- c. No litter or trash, keep lawns mowed, no rubbish or open fires, etc.
- d. No noxious, illegal, hazardous, dangerous or offensive uses
- e. No unregistered vehicles
- f. No keeping of animals for commercial purposes or any farm animals or livestock
- g. No on street parking, no RV or motor home, limit to four registered vehicles per unit, etc.
- h. No golf carts, snowmobiles, trial bikes, ATVs etc stored outside garage
- i. No discharge of firearms
- j. No building in a flood plain
- k. No quarrying, mining, dredging
- l. All construction to be in conformance to the **Design Guidelines**, accomplished in a timely manner and kept free of unreasonable trash and protected from erosion
- m. No commercial vehicles, dump trucks, tractors, trailers or camper tops, etc.
- n. No improvements without **Review Committee** approval in compliance with **Design Guidelines** : and specifically 4-foot-wide sidewalks the entire length of each unit with each unit to have a minimum one-car garage, etc.
- o. No messy landscaping, no unauthorized removal of trees, all to comply with **Design Guidelines**
- p. Minimum building set back as required by City of Martinsburg
- q. All utility lines must be buried, no TV antennae, no large satellite dishes, etc
- r. No outdoor lighting not in compliance with Design Guidelines
- s. No mailboxes not in compliance with Design Guidelines
- t. No above ground storage tanks
- u. No signs of any kind without written approval of Architectural Committee
- v. No Yard Art of any kind including statuary, ornaments, bird-feeders or fountains
- w. No private water well or septic system - must connect to city water & sewer
- x. No short-term rentals
- y. No clothes lines
- z. No conversion of garages into living space
- aa. No use of storm water management systems for boating, swimming or pleasure
- bb. **The Review Committee** shall have the right to grant variances temporary and permanent from the covenants, conditions and restrictions - which variance shall not affect applicability to other units.

7. 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. The following chart shows the progression of The Gallery through the final plats which have been recorded for each section and phase:

SECTION	PHASE	TYPE OF HOUSING	LOTS SHOWN	TOTAL LOTS	PLAT BOOK/PAGE	DATE RECORDED
1	1	SFHs	1-37, 39	60	10/141	4/9/04
			79-88, 38		10/142	4/9/04
			90-100		11/104	6/21/05
					11/105	6/21/05
1	2	townhouses	130-139 158-165	18	11/6	10/12/04
1	3	SFHs	40-73	43	11/21	11/19/04
			75-78			
			125-129			
1	4	SFHs	101-124 74, 89	26	11/64	3/11/05
1	5	townhouses	140-157	26	11/82	5/16/05
			166-173			
1	6	SFHs	174-190	31	11/84	5/19/05
			293-306			

The Covenants place no limitations upon the size to residential units or lots.

1	7	SFHs	191-221 278-286	40	11/181 11/182	11/3/05 11/3/05
1	8	SFHs	222-239 268-277 287-292	34	11/191	12/7/05
1	9	SFHs	240-267	28	12/62	3/24/06
1	10	townhouse s	492-536	45	12/154	6/22/06
2	1	townhouse s	392-438	47	12/109	6/12/06
2	3	SFHs	366-390	25	13/40	1/31/07
2	4	SFHs	307-329 334-338 346, 347 365, 391	31	13/21	12/7/06
2	5	SFHs	348-364 330-333 339-345	27	13/26	12/20/06

8. September 1, 2005, Orchard Development recorded a supplemental document entitled “Declaration” in the Berkeley County Clerk’s office in Deed Book 809, at Page 22.

9. This Declaration specifically recited that Orchard Development “has added additional real estate to the property and intends that every lot and townhouse within the property described in the plats of THE GALLERY SUBDIVISION be subjected to the same covenants and restrictions that

have been recorded for the portion of the property that [Orchard Development] has conveyed away.”

10. This Declaration specifically required that:

[A]ll of the property [in all Sections and Phases of the GALLERY SUBDIVISION as shown on the plats of said subdivision as recorded in the office of the Clerk of the County Commission of Berkeley County, West Virginia] shall be held, sold, and conveyed subject to the restrictions, easements, covenants, conditions, and agreements contained in that certain Declaration of Covenants and Restrictions for THE GALLERY SUBDIVISION, which shall constitute covenants running with the land and shall be binding on and inure to the benefit of all parties having any right, title or interest in the property which Declaration has been recorded in the office of the Clerk of the County Commission of Berkeley County, West Virginia in Deed Book No. 779, at page 94 Furthermore, each lot owner and townhouse unit owner, by accepting title to a lot or townhouse unit, covenants and agrees to be bound by said Declaration of Covenants and Restrictions, whether or not the deed expressly states.

11. 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.”

12. 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.”**

13. G. Timothy 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.

14. G. Timothy Shaw, Robert C. Adams, James M. Seibert, and Telena A. Spies served as the original members of the Executive Board for the Property Owners Association from January 10, 2005 to May 15, 2008. Ms. Spies resigned from the Executive Board at its May 15, 2008, meeting. The Plaintiff, Jason Foster, 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. Mr. Shaw and Mr. Adams, both members of Orchard Development, have served as Co-

Chairmen of the Executive Board since January, 2005. Mr. Seibert, a realtor, has served as Secretary of the Executive Board since January, 2005.

15. 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.”

16. Article XXIV, Section 24.1 of the Covenants provides that “[t]he Association shall establish The Gallery Subdivision Architectural Review Committee (Review Committee).”

17. 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.”

18. The Property Owners Association established a functioning Architectural Review Committee (“the Review Committee”) for the Gallery in 2004 as Orchard Development began to sell lots/units in The Gallery and the builders/owners of those lots/units began to construct single family homes and town homes.

19. G. Timothy Shaw, Robert C. Adams, James M. Seibert, and Telena A. Spies have served as the original members of the Review Committee for the Property Owners Association since 2004. Ms. Spies, a realtor, has served as the Chairperson of the Review Committee since 2004. Elaine Bartoldson, a lot/unit owner in The Gallery, was added by appointment in 2007. Ms. Bartoldson currently serves as the Secretary of the Review Committee.

20. 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.”

21. 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.”

22. 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.”

23. The Review Committee agreed upon and began using a set of 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 like the Covenants.

24. 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.

The Design Guidelines states its “**General Rules**” in 24 detailed sections, the very first of which is the central issue in this case.

Section 1. Residential Use. Except as hereafter specifically provided The Galley Subdivision shall be known and designed as single-family residential lots and shall not be used except for residential purposes. The ground floor area of all single-level homes or residences shall contain a minimum area of 1,700 sq. ft., exclusive of garage and porches, and the entire floor area of all homes or residences of more than one level or story shall contain a minimum area of 1,700 sq. ft., exclusive of garages and porches.”²

² The remaining **General Rules** sections, paraphrased and in brief, deal with:

2. No mobile, manufacture, prefabricated or modular homes
3. No construction of anything at all, even a mailbox post, without written approval by “the Developer or the Architectural Review Committee, as controlled by the Declaration of Covenants and Restrictions.”
4. Setback restrictions as the City of Martinsburg requires.
5. Construction and paving of all purchased lots must be accomplished in an expeditious and orderly fashion.
6. Owner’s obligation to maintain easements, bury utilities, have only one small discreet satellite dish.
7. Restrictions regarding fences
8. No exposed storage receptacles
9. No above-ground swimming pools
10. Only licensed contractors may work in the subdivision
11. No short-term rentals

25. 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 community in mind.*

26. 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

-
12. No hanging clothes, sheets, blankets or laundry
 13. No converting of garage into living space - concrete driveways only, etc.
 14. No swimming or boating in storm water management
 15. No obstruction of catch basins
 16. No obstructing landscape at intersections
 17. During any construction debris and erosion shall be kept to minimum
 18. No free-standing flagpoles or signs, except "For Sale" signs
 19. Regulation of yard art and ornamentation
 20. Vegetable gardens only permitted in rear of lot
 21. Restrictions on construction, placement and size of outbuildings
 22. All foundations must be "brick-to-grade" with no concrete or paving showing
 23. No pressure-treated wood on front, all exterior material must be approved by Review Committee.
 24. Specific size and placement of required sidewalks.

Guidelines as the basis for all design review. *Should these Guidelines be revised, such revisions shall then take precedence over previous Guidelines.*

27. By the language of the Design Guidelines, the Property Owners Association, through its Architectural Review Committee was to have the power to revise the Guidelines and to have discretion to interpret their application.

28. It is undisputed that, at or before their real estate closings, all purchasers of residential units in The Gallery were provided copies, by Realtors or closing attorneys, of the Covenants, the Design Guidelines and possibly other documents including plats.

29. As detached single family homes and the smaller town homes began to be built in The Gallery the Review Committee made “on-the-fly” and **unilateral** revisions to the Design Guidelines without formally complying with the procedures prescribed by the Design Guidelines themselves, under the apparent conviction that as they constituted the entire voting majority of the Property Owner’s Association and the Architectural Review Committee there was no need to proceed with such formality.³⁴

30. **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 (55) studio town home lots in phases which have yet to be identified and recorded.

31. **April 23, 2008**, Peteler purchased seven (7) “**studio town home**” lots in The Gallery from Orchard Development, by deed recorded in the Berkeley County Clerk’s office in Deed Book 896, at Page 672.

3

On **September 21, 2005**, the Review Committee approved a **minor 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).

4

On **April 18, 2006**, the Review Committee approved **another minor 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.”).

32. **April 30, 2008**, the Review Committee (Orchard Development) approved the Defendant, Peteler, LLC's ("Peteler"), proposal to construct **eight hundred (800) square foot "studio town homes"** on O'Flannery Drive in the Gallery. These residential units would be significantly smaller than the existing town houses already constructed within The Gallery.

33. **May, 2008**, Peteler began construction of seven (7) studio town homes on the lots it purchased from Orchard Development.

34. **May 27, 2008**, the Plaintiff sent a letter to Orchard Development and Peteler demanding that Peteler cease all construction of its "studio town homes" claiming that such construction violates the Covenants and the minimum living area restriction contained in the Design Guidelines.

35. Orchard Development, as the Property Owners Association, and as the Review Committee has stated in testimony of its officer Timothy Shaw and through affidavits of other officers that were prepared for this litigation, that it had 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 only. Orchard Development / the Property Owners Association / the Review Committee says it 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. It is however undisputed that, as of the inception of this litigation, no other square foot minimum restriction was ever expressed in any document relating to any other type of structure within The Gallery.⁵

36. **June 4, 2008**, anticipating litigation and reacting to the charge that it was violating

⁵

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."

its own Design Guidelines, the Executive Board of the Property Owners Association adopted the following **“Consent Resolution:”**

The undersigned, being all of the Directors of the Executive Board of The Gallery Subdivision Unit Owners Association, Inc., a non-profit corporation organized under W.Va. Code §31E-1-1, et seq., hereby express their unanimous agreement in writing to the following corporate actions and direct that this consent be filed with the minutes of the proceedings of the Board of Directors of the Corporation.

WHEREAS, the Declarant, Orchard Development Company, LLC, originally created lots for single family detached homes and multi-family attached structures (i.e. town homes, villas, duplexes, etc.) in the Gallery Subdivision with the intention that mixed types of housing should exist in the Gallery Subdivision; and

WHEREAS, the Gallery Subdivision currently contains single family detached homes and multi-family attached structures on residential lots; and

WHEREAS, the Declarant initially established Design Development Guidelines for single family detached homes in the Gallery Subdivision; and

WHEREAS, the Executive Board of the Gallery Subdivision Unit Owners Association, Inc., previously approved design standards for multi-family attached structures in the Gallery Subdivision on a case-by-case basis; and

WHEREAS, it is now desirable to clarify the Design Development Guidelines for multi-family attached structures in the Gallery Subdivision;

NOW THEREFORE, it is hereby resolved by the Executive Board of the Gallery Subdivision Unit Owners Association, Inc., as follows:

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.

37. **June 5, 2008**, the Plaintiff filed suit requesting a preliminary and permanent injunction to prohibit the “studio town homes” as a violation of the Covenants and the seventeen hundred (1700) square foot minimum living area restriction contained in the initial Design Guidelines.

38. **July 28, 2008**, the Executive Board of the Property Owners Association met to ratify and adopt the “Consent Resolution” modifying the minimum living area restrictions under the Design Guidelines. **In response to a “notice” given by the Property Owner’s Association approximately one hundred and fifty (150) unit owners replied in writing, all objecting to the proposed modifications.**

39. **August 7, 2008**, the Review Committee considered and ratified the Executive Board’s June 4, 2008 “Consent Resolution.”

40. Orchard Development intended this formal adoption of the revised Design Guidelines

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.

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."

42. That section 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*."

43. Then further 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."

44. Additionally the "Intent" section 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."

45. Review Committee member and officer of Orchard Development, **G. Timothy 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 and testified that the Review Committee gave careful and proper consideration to the subjective concepts, such as the "maximum real and aesthetic benefits to The Gallery property" asserted within the intent section of the Design Guidelines.

46. During the **June 12, 2008** preliminary injunction hearing in this matter, the Plaintiff, **Jason Foster 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 Plaintiff, pg. 34, lines 3-19.

47. During that same hearing Foster 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 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 Plaintiff, pg. 64, lines 14-17.

48. During that same hearing Foster 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 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 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 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 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 Plaintiff, pg. 74, line 24 – pg. 75, line 7.

49. During that same hearing Foster expressed his concerns about the Defendant 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 Plaintiff, pg. 75, line 17 – pg. 76, line 4.

50. During that same hearing Foster conceded that the Defendant 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 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 Plaintiff, pg. 80, line 22 – pg. 81, line 8.

51. During the June 12 hearing the Plaintiff Foster also conceded that he has no background in real estate and no basis beyond "educated assumption" for asserting that the Defendant Peteler's studio town homes will diminish the value of his 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: Any 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 hit 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 Plaintiff, pg. 82, line 6 – pg. 83, line 18.

52. During the June 12, 2008 preliminary injunction hearing, the Defendant 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 and the Plaintiff did not object to Mr. Didden's recognition as an expert in this area.

53. Mr. Didden offered expert testimony about the impact of the Defendant 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*). Specifically, Mr. Didden testified that construction of town homes or studio town homes does not necessarily diminish the value of single family homes in a subdivision. Further, Mr. Didden testified that the construction of these homes "would enhance value rather than diminish value." The Plaintiff presented no testimony at the preliminary injunction hearing to contradict this expert's testimony

CONCLUSIONS OF LAW

1. Rule 56(c) of the West Virginia Rules of Civil Procedure provides that summary judgment shall be granted if:

[T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

W.Va. R. Civ. P. 56(c). Summary judgment is designed “to effect a prompt disposition of controversies on their merits without resort to a lengthy trial if there essentially is no real dispute as to salient facts or if it only involves a question of law.” *Larew v. Monongahela Power Co.*, 199 W.Va. 690, 487 S.E.2d 348 (1997).

In the present case, the material facts are established by the parties’ pleadings; the Covenants; the Design Guidelines; the minutes of the Executive Board of the Property Owners Association meetings; the minutes of the Review Committee meetings; the testimony of the Plaintiff, G. Timothy Shaw, taken during the June 12 and June 17, 2008 preliminary injunction hearing; the testimony of an expert in the Eastern Panhandle real estate market, Gregory J. Didden, taken during the June 12 and June 17, 2008 preliminary injunction hearing; the testimony of the Plaintiff taken during the June 12 and June 17, 2008 preliminary injunction hearing; the parties’ discovery responses; the Affidavit of G. Timothy Shaw with exhibits; the Affidavit of James M. Seibert with exhibits; the Supplemental Affidavit of G. Timothy Shaw with exhibits. These material facts are undisputed by the Plaintiff, who has failed to identify specifically any conflicting portions of the record before the Court in opposition to Orchard Development’s Motion for Summary Judgment. These undisputed, material facts of record before the Court demonstrate that Orchard Development and Peteler are entitled to judgment as a matter of law.

2. The West Virginia Supreme Court has held that:

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). 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.”

Here, Orchard Development is the grantor which intends to retain the benefit of the recorded Covenants and the separate, unrecorded 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.** These legal principles viewed in a business context provide the lens through which the Court evaluates the recorded Covenants and the separate, unrecorded Design Guidelines and the Plaintiff’s request for permanent injunction.

When the Court views the entire scheme for The Gallery created by Orchard Development through the recorded Covenants and the separate, unrecorded Design Guidelines, and against the backdrop of the pattern of development within The Gallery where the living space minimums as expressed in the Design Guidelines have been historically applied only to detached single-family houses, the Court finds that these documents are unambiguous and were intended to provide Orchard Development and the Review Committee with flexibility, enough flexibility to allow Peteler’s eight hundred (800) square foot studio town homes as part of The Gallery.

3. When read together and viewed in the business context, portions of the recorded Covenants and the separate, unrecorded Design Guidelines establish the Review Committee’s authority and discretion to revise the Design Guidelines. 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.

The Design Guidelines further recognize the Review Committee’s discretion as it interprets, applies, enforces, and revises the Design Guidelines as follows:

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. The Review Committee's authority to interpret and revise the Design Guidelines is confirmed by the following statement found in the Design Guidelines:

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

Design Guidelines, Intent/Legal Basis, pg. 13.

4. The fact that the Defendant Orchard Development considered and approved Peteler's proposal to construct eight hundred (800) square foot "studio town homes" on April 30, 2008 is consistent with the Defendant's position that the seventeen hundred (1,700) square foot minimum in the Design Guidelines was always meant to apply only to detached single-family houses rather than the smaller town houses it had been authorizing since the beginning of The Gallery. As the Covenants provide 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,*" this action by Orchard Development / The Review Committee worked an implicit revision of the Design Guidelines.

It is also undisputed that, **after the inception and against the backdrop of this litigation**, the Review Committee did consider and formally revise the Design Guidelines on August 7, 2008 by the adoption of the "Consent Resolution." This explicit adoption of the revised Design Guidelines was intended to ratify and confirm, **after the fact**, 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.

It is also undisputed that Orchard Development, **during the period of developer control**, for all intents and purposes *was and is* the Review Committee, and as such has the discretion to determine what amendments to the Design Guidelines might subjectively effect "maximum real and aesthetic benefits to The Gallery property."

Therefore, the Court concludes that, **even though done in response to this litigation and after the fact**, the Review Committee has at last complied with the "the procedures and guidelines set forth in the Design Guidelines" in retroactively confirming its earlier consent to Peteler's proposed construction of eight hundred (800) square foot studio town homes in The Gallery

5. The Plaintiff's contention that the Review Committee's sole mission is to apply the Design Guidelines" oversimplifies the actual function of the Review Committee and completely

eliminates the Review Committee's authority and discretion to interpret and revise the Design Guidelines.

6. Likewise, because the Court is persuaded that Orchard Development intended the Design guidelines and the Covenants to be separate and distinct written documents, the Court does not agree with the Plaintiff's contention 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.]" Certainly, this argument would eliminate the Review Committee's separate and distinct authority to revise found in the "Intent" section of the Design Guidelines, **and as discussed above this does not seem to be in accord with the Developer's apparent intention to separate the Design Guidelines from the Covenants.**

This argument is also problematic when inspected under mechanical legal principles of document interpretation. The Plaintiff's argument is based upon two provisions found in the Covenants. 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.

Meanwhile, Article XVI, Section 16.4(a) of the Covenants provides:

Document Changes. Notwithstanding any lower requirement permitted by this Declaration or the Act, *no amendment of any material provision of the Documents* by the Association or Unit Owners described in this Subsection 16.4(a) may be effective without the vote of at least sixty-seven percent (67%) of the Unit Owners .

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 exclusio alterius*". *Harbert v. County Court of Harrison County*, 129 W.Va. 54, 64, 39 S.E.2d 177, 186 (1946). Contrary to the Plaintiff's arguments, the term "Documents", as defined in the Covenants, 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.

Each of the terms included as “Documents” is specifically defined elsewhere in the Covenants (i.e. Declaration, Plat, Plans, Bylaws, Articles, and Rules).⁶ None of these definitions includes the Design Guidelines. Rather, Article I, Section 1.13 of the Covenants 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.”

The Court is persuaded that 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,**” intentionally excludes the Design Guidelines from the definition of the term “**Documents.**” Otherwise, the term “Design Development Guidelines” would appear explicitly in the definition of “Documents” set forth in Article I, Section 1.16 of the Covenants. **Thus, the Court is of the opinion** that the express mention of the specifically defined terms “Declaration,” “Plat” and “Plans,” along with the exclusion of the specifically defined term “Design Development Guidelines,” **intentionally excludes the unrecorded Design Guidelines from the Section 14.1 and the Section 16.4 amendment procedures set forth in the Covenants.** Otherwise, the term “Design Development Guidelines” would appear explicitly in Section 14.1 and/or Section 16.4 of the Covenants.

7. The Plaintiff’s contention that Peteler’s studio town homes will “completely change the character of the community by devaluing the property of other unit owners” is a subjective assertion not supported in any part of the record before the Court. Mr. Didden, the only real estate expert to testify in this case, specifically opined during the June 12, 2008 preliminary injunction hearing that the idea of having Peteler’s studio town homes might enhance value rather than diminish

6

“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.

value of lots within the Gallery.⁷

The Plaintiff admitted that his opinions about diminution in value are merely “educated assumption.” June 12, 2008 Testimony of Plaintiff, 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 Plaintiff, pg. 83, lines 14-18. As the only evidence in the record before the Court demonstrates no diminution of value caused by Peteler’s studio town homes, the Court finds no legal or factual basis for the Plaintiff’s estoppel argument. Moreover the Court finds no basis for allowing the Plaintiff’s subjective, unsupported concerns about the character of The Gallery and property values in The Gallery to defeat Orchard Development’s clear intentions, as demonstrated through the historical pattern of development of The Gallery (i.e. the construction within the first six months of eighteen (18) townhouses with less living space than 1,700 sq.ft. - followed in 2005 by twenty-six (26) more, and in 2006 by ninety-two (92) more - all plainly visible and created years before this litigation), or the Review Committee’s clear authority and discretion to revise the Design Guidelines.

8. The Court further rejects the Plaintiff’s contention that a jury should consider whether the Review Committee’s revisions to the Design Guidelines “maintain maximum real and aesthetic benefits to The Gallery property” because there is no genuine issue of material fact for jury determination.⁸

7

As the owner of more lots in The Gallery than any other entity, and with the bulk of The Gallery property yet undeveloped, Orchard Development has a significant stake concerning the maintenance of property values of the residential units.

8

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

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 the litigation under the applicable

The question in this case is not whether Peteler's studio town homes "maintain maximum real and aesthetic benefits to The Gallery property" from the Plaintiff's subjective perspective or even a jury's subjective perspective. Rather, the pertinent question in this case is whether *the Review Committee* gave consideration to whether Peteler's studio town homes "maintain maximum real and aesthetic benefits to The Gallery property." 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."

Submitting this subjective standard 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 authority and discretion granted to the Review Committee by the "Intent" section of the Design Guidelines simply by filing suit and demanding that a jury's discretion be given preference over the Review Committee's discretion. The Guidelines require the Review Committee to give consideration to "maximum real and aesthetic benefits to The Gallery property" when revising the Design Guidelines. The Guidelines do not, however, require the Review Committee to reach the same subjective conclusions as the Plaintiff 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 Design Guidelines require. Therefore, the Court finds no genuine issue of material fact which presents a jury question and prevents summary judgment.

9. The Court rejects the Plaintiff's contention that he has been denied the "benefit of his bargain" by the Review Committee's revision of the Design Guidelines. "A party is not entitled

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).

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*, 212 W.Va. 418, 573 S.E.2d 12 (2002) 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.*, 63 W.Va. 685, 60 S.E. 890 (1908).

The Plaintiff 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; 2) he recognized that the Design Guidelines could be changed; 3) he understood that Orchard Development retained control over revisions to the Design Guidelines; but, nevertheless, 4) he failed to read the “Intent” section of the Design Guidelines which specifically allows revisions; and 5) he failed to determine if any revisions had been made to the Design Guidelines.

In arguing that the Review Committee does not have the discretion to make revisions to the Design Guidelines, the Plaintiff would do more than simply “obtain the benefit of his bargain,” he would obtain more. If the Court were to take this view, the Plaintiff would in effect wrest control of The Gallery from Orchard Development before he and other homeowners are entitled to such control (i.e. once seventy-five percent (75%) of the lots are sold). He is also advocating for the repeal of the more flexible revision procedures provided by the Design Guidelines. This is more than the Plaintiff bargained for when he purchased his house in the Gallery

10. The Court rejects the Plaintiff’s contention 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.” First, there is no privity of contract between the Plaintiff and Orchard Development or Peteler. Second, even if there was privity of contract, this statutory provision does not apply. It specifically provides that:

Whenever it is claimed, or appears to the court, that a contract or any contract clause is or may be unconscionable, the parties, in order to aid the court in making the determination, must be afforded a reasonable opportunity to present evidence as to: 1) the commercial

setting of the negotiations; 2) whether a party has knowingly taken advantage of the inability of the other party reasonably to protect his interests by reason of physical or mental infirmity, illiteracy, inability to understand the language of the agreement, or similar factors; 3) the effect and purpose of the contract or clause; and 4) if a sale, any gross disparity, at the time of contracting, between the amount charged for the property and the value of that property measured by the price at which similar property was readily obtainable in similar transactions.

W. Va. Code §36B-1-111(b).

West Virginia courts look to the full circumstances surrounding and accompanying the contract, as well as “the fairness of the contract as a whole.” Further factors considered are 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).⁹ 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 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).

Under these legal principles, Orchard Development’s overall scheme for the Gallery is not unconscionable. All of the provisions of the Covenants and Design Guidelines were readily available to the Plaintiff before he purchased his house. Moreover, the overall scheme adopted by Orchard Development for The Gallery is not unusual, but rather a common business practice in real estate development. The Plaintiff himself recognized this in his June 12, 2008 testimony before the Court. Therefore, the Plaintiff should not be permitted to abolish Orchard Development’s entire plan and overall scheme for development of The Gallery by making the assertion that they are “unconscionable.”

9

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.” *Troy Min. Corp. v. Itmann Coal Co.*, 176 W. Va. 599, 604, 346 S.E.2d 749, 754 (1986) quoting Restatement (Second) of Contracts § 234 comment d at 111 (Tent. Draft. No. 5, 1970) [emphasis added].

11. The Court further rejects the Plaintiff's reliance upon *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.¹⁰ There is no West Virginia statute requiring the Plaintiff to purchase a house in The Gallery. This distinction defeats the notion that the Covenants are contracts of adhesion and the strict construction against Orchard Development, which the Plaintiff advocates.

12. The Court does not find the provisions of the recorded Covenants and the separate, unrecorded Design Guidelines to be ambiguous when construed together in their business context. Even if there was ambiguity in these documents, however, the Court would reach the same conclusions. Generally, the law favors unrestricted use of property by the owner and, thus, restrictive covenants are strictly construed. *Wallace v. St. Clair*, 147 W. Va. 377, 387, 127 S.E.2d 742, 750 (1962) 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*, 183 W. Va. 202, 205, 394 S.E.2d 897, 900 (1990) citing *Wallace v. St. Clair*, 147 W. Va. 377, 387, 127 S.E.2d 742, 750 (1962).

As *McIntyre v. Zara*, supra, and *Wallace v. St. Clair*, supra, demonstrate, Orchard Development's intentions as they appear from the documents, testimony, and the pattern of mixed development within The Gallery before this litigation, are key to resolving any questions about the Review Committee's authority to revise the Design Guidelines and approve Peteler's studio town homes. Orchard Development created and recorded the Covenants for The Gallery at the outset of development before any lots were sold or homes were built. Likewise, the Review Committee adopted the Design Guidelines and began approving designs for The Gallery before any homes were completed and sold. Orchard Development has retained initial control of the Review Committee.

¹⁰

See W. Va. Code §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 . . .").

Therefore, Orchard Development's intentions with regard to the Covenants and the Design Guidelines are the key to this case.

As the creator of the Covenants and the Design Guidelines, Orchard Development's stated intentions cannot credibly be disputed by the Plaintiff. No one knows Orchard Development's overall intentions for The Gallery, the Covenants, and the Design Guidelines better than its members. **The stated intention that the seventeen hundred (1,700) square footage limitation should apply only to detached single-family homes is amply verified and illustrated by the fact that Orchard Development has built smaller town house phases from the inception of The Gallery - a fact plainly visible to all who would purchase units there.** For this reason, the Plaintiff has not, and cannot, present any affidavits or identify any evidence in the record to create a *genuine* issue of *material* fact with regard to Orchard Development's stated intentions for The Gallery, the Covenants, and the Design Guidelines.

Orchard Development created the Design Guidelines to be separate and distinct from the Covenants in order to provide flexibility and control. The Plaintiff'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 Plaintiff's application of the amendment procedures found in the Covenants would effectively eliminate the control of The Gallery which Orchard Development reserved to itself during the development and build-out stages. Clearly, this was not Orchard Development's intention.

Additionally, the significance of the recorded Covenants and the separate, unrecorded Design Guidelines should not be overlooked in this analysis. Nor should the fact that Orchard Development, from the very beginning of The Gallery, built town house phases whose per-unit living space was not seen as limited by the Design Guidelines. It stands to reason that, if Orchard Development had intended the Design Guidelines to function exactly as the Covenants, it would not have created a separate, unrecorded document. The tardily *revised* Design Guidelines now clearly allow Peteler's studio town homes and moot the Plaintiff's arguments based upon the *initial* Design

Guidelines. Application of the general one thousand seven hundred (1,700) square foot minimum living area restriction found in the *initial* Design Guidelines to enjoin Peteler's approved construction of eight hundred (800) square foot studio town homes in The Gallery under the *revised* Design Guidelines would render the Design Guidelines immutable. Such an outcome would be contrary to Orchard Development's intentions and West Virginia law.

RULINGS

IT IS ACCORDINGLY ORDERED that:

1. The Plaintiff's Motion for Partial Summary Judgment is **DENIED**.
2. The Defendant Orchard Development's Motion for Summary Judgment is **GRANTED**.
3. The Plaintiff's request for a permanent injunction which prohibits construction of eight hundred (800) square foot studio town homes in The Gallery Subdivision in Martinsburg, Berkeley County, West Virginia by the Defendant Peteler, LLC is **DENIED**.

The Court notes the objections of the Plaintiff to any and all adverse rulings.

The Court's Clerk shall enter this Order as of the date written below and transmit an attested copy to the following counsel of record:

Gregory A. Bailey, Esq.
Christopher P. Stroeck, Esq.
Arnold, Cesare & Bailey, PLLC
Post Office Box 69
Shepherdstown, West Virginia 25443

Joseph L. Caltrider, Esq.
Bowles Rice McDavid Graff & Love, LLP
Post Office Drawer 1419
Martinsburg, West Virginia 25402

Patrick G. Henry, III, Esq.
222 West John Street
Martinsburg, West Virginia 25401

Entered: **September 30, 2008**

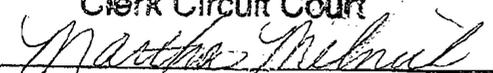


JUDGE OF THE CIRCUIT COURT

A TRUE COPY
ATTEST

Virginia M. Sine
Clerk Circuit Court

30

By: 
Deputy Clerk

BERKELEY COUNTY
CIRCUIT CLERK

2008 SEP 30 PM 4:48

VIRGINIA M. SINE, CLERK