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1)

27714

1)Can the Board enforce CC&R 7 against Asha and Omar?

What is CCC&R 7?

CC&R is an express covenant written and recorded in the declaration that created the Watersedge complex. A covenant is a promise restricting the use of land which runs with the land. Covenants can be either affirmative or negative in nature. Affirmative covenants restrict land use by requiring property owners to use their property for a particular purpose. Negative covenants restrict land use by requiring property owners not to use thier land in a particular way. CC&R 7 is a negative covanant, because it requirest that property owners in the Watersedge community not place any temporary structures on thier property, including tents, shacks, garages, barns or other outbuildings.

When determining whether a covenant is enforceable, courts traditionally firs determined whether the type of covenant seeking to be enfoced was a Real Covenant or Equitable Servitude. Real Covenants were traditionally applied by courts to allow parties to acquire money damages for the breach of a promise restricting the use of land (Spencer's Case). Such covenants were established by showing a writing, an indication that the parties to the covenant intended it to run with the land, the fact that the covenant touched and concerned the land, horizontal and vertical privity (privity of estate) and some form of notice available to future possessors of property (actual,

inquiry or constructive). By contrast, Equitable Servitudes arose in the courts of equity to provide relief to parties when there existed no privity of estate because horizontal privity could not be established. Equitable Servitudes were used by the courts to grant injuntive relief and prevent parties from acting to breach the covenant. (Tulk v. Moxhay). So, the first step courts traditionally follow in determining whether a covenant should be enforced is to determine which form of covenant is present by determining which form of relief is being sought. In the present case, the Home Owner's Association is likely seeking to enforce a Real Covenant because CC&R 7 specifically calls for money damages for violation of its provisions ($20 per day) but may also be seeking to enforce an Equitable Servitude because the HOA is seeking to prevent Asha and Omar from maintaining the modular and pre-manufactured homes on thier property. As this is the case, I will analyze first for the elements of a real covenant because it contains all of the elements of an equitable servitude and includes privity of estate as well.

CC&R7 is a writing because it is expressly recorded in the declaration of the development. Additionally, it provides actual notice becuase it is recorded. It is likely the parties intended that it run with the land and vest in the dominant and servient estates effected byt he covenant because it created not only a common plan for the community but also established a Home Owner's Association in order to oversee the provisions of the declaration and other CC&Rs at attached to the individual properties in Watersedge, rather than to individual property owners.

Additionally, it is likely that this type of covenant touched and concerned the land. To "touch and concern the land" a the burden a covenant emposes on one

property must similary benefit another property. In this case, Watersedge appears to be an Implied Reciprocal Negative Servitude. This is a particular type of covenant which is formed when a single common owner is originally in possession of all plots of land in a residential development. The single homeowner then begins to parse up and sell off individual parcels of land, placing covenants and restrictions on at least some of the properties as he or she does so. These covenants may be implied by law to similarly bind not only the particular homes that have them included in the deed, but all of the other homes in the planned development as well. If this is the case, the covenants create a reciprocal burden and benefit – land owners are all similarly burdened by the land use restrictions of the covenant, but derive a common benefit from the uniformit of the community which may have a positive effect on property values. For a court to recognize the existence of an IRNS, there must be some indication that the original common owner intended the imposition of reciprocal negative servitudes, often indicated by the existance in some form of a common plan for the community. In the present fact pattern, it is indicated that the original developer recorded a declaration imposing the conciditons, covenants and restrictions on all 150 lots. This provides substantial indication of an intended common plan, and provides the final requirement of an IRNS that the subsequent owners of property be put on notice. Because the purpose of an IRNS is to impose common burdens through restrictions on property use on all properties in order to maintain a uniform community that will potentially increase property values because of its stablility and uniformity, this type of covenant would likely touch and concern the land.

The final requirement of a real covenant (although not required for an equitable

servitude) is that it have both horizontal and vertical privity. Vertical privity is privity which exists between subsequent buyers and sellers of land. Because the modern owners of homes in the Watersedge community would have had to purchase them from previous owners or to be the original owners of the plots built in the 1970s themselves, this requirement is likely met. In the United States, it is thought that horizontal privity can be established in one of three ways: instantaneously, at the time of the sale or transfer of property; simultaneously, as in the case of a landlord and tennant who both hold an interest in the same property at the same time; or between two properties that have mutual easements over one another. (an easement is a right to use the land of another for a limited purpose, which is non-revocable and runs with the land). In the present case, CC&R 7 likely meets the requirement of simultaneous privity because the covenants were placed into the deeds of the property at the tiem ofsale through the community declaration.

Therefore, CC&R 7 meets all of the requirements of a Real Covenant or Equitable Servitude under the traditional system. However, modern courts have followed the Restatement of Property in a trend to eliminate the distinction between real covenants and equitable servitudes. This is because the distinction of a horizontal privity requirement that distinguishes the two forms can be manipulated through the use of a straw person. Although owners of neighboring property who do not have instantaneous or simultaneous privity could traditionally not have originally formed an enforceable covenant, parties such as these have gotten around this requirement through the use of a "straw man". To establish horizontal privity such that money damages could be sought for the breach of a covenant later on, parties would transfer

thier property interests temporarily to a third party, who would transfer it back to them with the covnents intact, thus defeating the strict requirements of horizontal privity and making the two forms of covenants essentially the same. Another factor which has led modern courts to amend its analysis of covenants is circular reasoning involved in the touch and concern test, which has given way under the modern approach to a multifactor reasonableness test (davidson). The original touch and cocern test employed circular reasoning because it required in order for a court to enforce a covenant, that the court first find the burden imposed from the covenant on one land parcel resulted in a benefit to another land parcel. However, such a benefit could only be established if the court determined it passed the touch & concern test. This made this tool largely a "fudge factor" which allowed courts to evaluate the reasonableness of enforcing covenants, so it has been replaced in modern courts with a reasonableness test comprised of the following factors (Davidson):

1) What was the intent of the parties? At the time the covenant was formed, the original developer likely intended CC&R 7 to prevent landowners from constructing temporary structures on their property that would negatively effect the uniform appearance or integrity of the planned community development. This intent is maintained by the modern HOA. Additionally, In the present situation, the Homeowner's association has altered the terms of the existing covenant to include a prohibition on the use of both Mobile Homes and modular homes. When power is vested in a homeowner's association to change the terms of covenants in its declaration, such power must be applied in a reasonable manner that will not have the effect of destroying the common plan of the development. (Appell). However, HOA's are vested with broad authority in managing the terms of thier common elements, and the

government is unlikely to interfere with such enforcement if it can be shown to be reasonably calculated for the benefit of the community. (case in which parties were denied rights to hold church sessions in common areas of a condominium complex).

2) How clear were the terms of the covenant? This concept may provide challenges to the HOA in thier attempt to enforce the covenant. Because covenants may create restraints on the alienability of property to individuals who do not wish to be restricted in thier use of land, they may be interpreted narrowly by courts if they are ambiguous or vague. The term in CC&R 7 of "no structure of a temporary character" is ambigous in that it could refer to any number of structures, and it is difficult to determine whether the mobile homes in question would qualify as a temporary structure, when some people choose to live permanently in such dwellings. The facts indicate that mobile homes are built in factories and delivered an placed on the particular site. There is no idication that such dwellings are intended to be temporary in nature, and it does nto appear that they are of the same nature as the rest of the potential temporary buildings in the list provided by the covenant of tents, shacks, garages, barns or outbuildings, as these structures are not naturally intended to include habitable features such as plumbing, lighting, heating, etc. that both mobile homes and manufactured sectional homes include in preparation for permanent occupancy. Therfore, a court may narrowly construe the original CC&R not to apply the the existing use of such structures. However, it is also possible that a court will not narrowly construe the provision, even if it is somewhat ambigous in nature if they conclude that it does not restrain the alienability of property because in an IRNS the appeal of covenants is that they maintain a uniform appearance for the community, and that uniform appearance may raise property values and cause others to desire purchasing

such property. In this case, a court may choose not to narrowly construe the provision because it is to the benefit of the community. Overall, it is likley a court will find the terms of the covenant were ambiguous, but will likley choose not to strictly construe them because of the potential policy benefits of IRNSs.

3) Was the covenant reasonable as to time, area and duration? CC&R 7 appears to be permanent in nature, which could be interpreted as somewhat unreasonable as to time and duration. It does not take into account potential changes in the future of a development, such as the devastating hurricane which occured. However, the declaration of the development does vest power in the HOA to amend and enforce CC&Rs, which makes such covenants somewhat more reasonable in that there is a mechanism whereby they can be changed in response to changed conditions. Additionally, planned developments such as Watersedge that include potentially permanent covenants to maintain the uniformity of developments are somewhat common in modern society. Thier typical application may function to make them more "reasonable" to a court. However, it should also be noted that the original CC&R7 required only that occupants who place temporary structures on thier property pay a daily fee/penalty of 20 for every day they do so. Because it does not require the removal of such structures, this may appear to be more a more reasonable provision if it can shown that the maintenance of such structures is negatively effecting property values in the complex on a daily basis. Overall, it is likely a court will find that covenant is reasonable as to time, place and duration.

4) Does the covenant imply an unreasonable restraint on trade? This is likely not the case, as the covenant involves single family dwellings, although in the Davidson case this was a highly determinative factor because it involved a covenant not to

compete.

5) Does the covenant pose a burden on public interests? This may be the case, as the subsequent regulation enacted by the Coastal Town City Council in question two indicates that sicne the event of the hurricane, the town has developed a significant interest in encouraging its residents to return and rebuild thier homes, and it is often a compelling interest of a municipality to encourage the safe, secure and fair housing of its residents.

6) Have conditions changed since the formation of the covenant that make it no longer reasonable to enforce? As noted above, at the time the original CC&R was formed, there had been no hurricane that desimated the municipality or community of Watersedge. The even to this hurricane may suggest a significant change in conditions which will substantially effect the reasonableness analysis. Especially in light of citizens such as Asha who is a single mother attempting to support her children and who does not have the funds immediately available from her insurance company to rebuild a permanent structure on her property consistent with the HOA requirements. Overall, it is likley that a court will find that the original CC&R 7 does violate both public interests and is unreasonable in light of changed conditions.

In light of this reasonableness analysis, it is likley that although CC&R 7 would satisfy the requirements of a traditional analysis, it would not be enforceable under a modern court's analysis because of of a lack of reasonableness. If, however, the covenant were to be enforced by the court as reasonable, there may be other arguments that could be made by Omar and Asha that the covenant should not be enforced. Omar and Asha will likely argue that the covenant should not be enforced

because of the Doctrine of Changed Conditions (El Di). If conditions surrounding a covenant have changed so dramatically that there is no substantial benefit remaining to enforcing it, it may be voided. In El Di, a small tourist town had enacted a covenant prohibiting the sale of alcohol. However, conditions surrounding the town had changed dramatically over the period of several decades and only certain portions of the township had maintained the restrictions, rendering its enforcement largely pointless. Forcing the remaining portions of the town to comply with the covenant against the sale of alcohol would have no substantial benefit when other portions of the town located only a few streets away were able to sell alcohol. Similarly, in this situation, Asha and Omar will likley argue that because all of the Watersedge residential development was decimated by the hurricane and almost all parcels have been forced to rebuild thier properties, the sense of uniformity in the community has been lost, rendering its enforcement of the original CC&R 7 or the new amendments to the covenant to be of no substantial benefit. It is likely that a court will agree with this argument.

Additionally, Asha and Omar will likely argue and equitable remedy to prevent the HOA from enforcing the covenant, if it is deemed enforceable. Because almost all of the occupants of Watersedge were forced to live in temporary structures, mobile homes ,or manufactured homes during the process of rebuilding thier home, Asha and Omar will likley argue that the HOA should not be able to enforce the covenants now because of the Doctrine of Unclean Hands -- they themselves had to resort to such a system and violated the CC&R 7 in the process, or Aquiesence -- they have not enforced the CC&R before this point, Omar and Asha have reasonably relied upon thier neglect in enforcing it, damage would result from thier being forced to loose thier

structures now (monetary and homelessness) and the only way to prevent injustice is to allow the homes to remain. A court will likely find these arguments compelling.

Finally, because modern courts do not begin thier analysis of the enforceability of covenants by determining what form of remedy is being sought, but rather seek to determine whether the general elements of covenants are present, there still remains the question in the current situation of whether money damages or an injuction would be a more appropriate remedy if the covenant were to be enforced, which, as indicated above, it is not likely to be. In *Walgreen*, judge Posner suggested that the prefered method of damages for covenants should be injunctions. He argued that this method allows the parties to bargain amongst themselves for the actual result desired rather than relying upon the arbitrary money damages set by a court that is necessarily unable to assess the true value of the covenant. By contrast, judge Pollock in Davidson argued that money damages should be the preferred method of recovery, and that injunctions, which effect the personal liberties of the parties, should be reserved for only the most extreme examples. In the present case, the most appropriate damages, if the covenant were determined to be enforceable, would likley be money damages because of the potential injustice of depriving Asha and Omar of thier form of shelter, especially given the public policy interest in providing avialable housing in light of the recent natural disaster.

2) Is the Coastal Town City Council Ordinance a regultory takings that deprives

the HOA and Watersedge community of thier property interest in enforcing thier covenants and land use restrictions?

The Fifth Amendment of the United States Constitution states that the government cannot take private property for public use without just compensation. It has been determined that the 14th Amendment applies this constitutional prohibition to the acts of state governments as well. The Watersedge HOA will likley arge that the CTCC ordinance is a "regulatory taking" that is taking its property right to enforce the uniform nature of its planned community development through the application of CC&Rs by enacting a legislation that makes it recent rstriction on modular or pre-manufactured homes. A regulatory taking occurs when the government enacts a law which has the effect of taking private property rights from the population, without providing just compensation. The policy of the Takings Clause of the 5th Amendment is to prevent the government from forcing individual property owners or entities to bear the costs associated with public burdens that should in the interests of fairness and justice be spread evenly among all of society.

In order to determine if a government regulation is a taking, a court must first consider whether it invovles a permissible applicaiton of general state police powers through zoning legislation. The general standard for permissible zoning regulations set forth in Euclid is that the state can use its police powers to enact zoning regulations so long as they function to promote the general health, welfare, safety or morals of society. If it meets one of these general goals, it will be considered a permissible application of

zoning powers even if it deprives property owners of a significan portion of the total value of thier property. In Euclid, property owners were deprived of a 75% value of thier real estate, but the applicable zoning regulation was determined to be permissible because it promoted an interest in the township avoiding traffic congestion and allocating public utilities and resources in a manner that would benefit the whole of society. The only exception to this rule is that if a zoning law has a potential discriminatory effect on certain members of the population, or may result in the sacrifice of a fundamental liberty, such as a party's freedom of association, freedom of speech or privacy, the standard is heightened to require a showing on the part of the municipality of a substantial and compelling public interest that is served by the legislation. The zoning legislation can then be overturned only if it is determined to be arbitrary or unreasonable in light of this standard. (Township of Delta v. Dinolfo) In the present scenario, the HOA may argue that the law interferes with their fundamental rights of association -- rights to form a community with similar land use preferences and goals, and to enforce those goals within that community. They will also argue that if the zoning is upheld, it may substantially decrease the property value of thier planned community, as it will allow homeowners to live in mobile homes or pre-manufactured homes that do not have a uniform appearance and undermine the nature of the development. However, even if this argument is successful, it is likely that the CTCC will be able to justify its applicaiton of police power in the zoning law by promotion of the substantiall and compelling government interest of promoting a "right of return" to its residents, and ensuring the availability of save, secure housing to such residents upon thier return. Because only one-half of its pre-hurricane residents have returned to the town as of 4 years after the event, those who do return in the future will likley need to

expend extensive time and resources in rebuilding thier dwellings, and that process will promote the health, safety and welfare of the municipality as a whole as it will likely lead to the return of industry and residences that generate property taxes to help the municipality function. For this reason, even if the HOA can make an argument requiring a heightened showing, it is likley that the CTCC will be able to establish a substantial and compelling purpose to thier ordinance such that even an extensive decrease in the property value of the HOA which occurs as a result of the zoning will be considered damnum absque injuria: injury without legal redress. If this is the case, and the zoning constitutes a valid exercise of police powers, a court will determine that it is a not a "taking" under the 5th Amendment, and the HOA will be entitled neither to compensation nor (as arises in takings that are not for the public use) to an injunction against the ordinance.

Could be valid police powers, but still a taking (Loretto) Lucas Right

NO - just because valid police powers does not mean there is no reg. taking (consult the Dictionaries)

However, if the zoning regulation were not considered by a court to be a valid exercise of the state's police powers, the next step for a court in detemining wether the present ordinance fell into either of the two Per Se Takings Tests. The Supreme Court has recognized two specific categories of government actions which result in the determination of per se takings. They are: 1) Those involving permanant physical occupation of property (Loretto); and 2) Those involving the deprivation of all economically viable use of property (Lucas).

Permanent Physical Occupation?

In Loretto, it was determined that a law requiring owners of real estate property to allow cable companies to install cable boxes and wiring on thier property in order to provide

cable services to residents was a permanent physical occupation of property, and that this constituted a per se takings that requried just compensation by the government for the value of the property lost because it resulted necessarily in the inability of property users to make any use of the portion of property (however small) on which such an occupation was positioned, and it resulted in a loss of a right to exclude for the property owner, which was determined to be one of the most essential "sticks in the bundle" of property rights. It is unlikely that a permanent physical occuapation per se taking would be found in this situation because the oridinance does not require the home owner's association to permit any property of outsiders to be placed on thier property permanently. Even if the ordinance forbids covenants which restruct placement of mobile homes or modular homes on the property of those within the planned community, such structures are owned by members of the community and placed on thier individual properties. This does not constitute a sacrifice to Watersedge's right to exclude property by non-association members.

<u>Permanent Deprivation of All Economically Viable Use?</u>

In Lucas, a developer was found to have been deprived of all economically viable use of his coastal property when a land use ordinance was enacted which prohibited building on the land in order to prevent erosion of the coastal property. This standard was expanded upon in Tahoe v. Sierra Preservation when it was determined that the takings that effect economically viable use must be permanent in order to meet the per se test requirements. It is unlikely that this per se rule would apply to the Watersedge community HOA because even if the government ordinance decreases the potential value of property in the community, it would not totally deprive it of value; such property

could still be bought and sold to other residence, even if for a decreased rate to reflect the lack of uniformity in the complex.

Ad Hoc

If the court determines that neither of the per se takings tests apply to the present situation, it would then conduct an ad hoc fact-specific analysis of three factors to determine if a regulatory takings had occured. These factors include:

1) Character of the Governmental Action: The court will likely consider many of the arguments made in the "legitimate exercise of zoning" section above to determine whether the character of the government action suggests a taking. Additionally, they may consider whether any phsycial occupation or lapse of right to exclude that was imposed by the government action but falls short of "permanent" physical occupation or deprivation of "all" economically viable use is significant enough to warrant the finding of a taking. Additionally, the court may consider whether the government has taken its action because of a need a exert it police powers to choose between competing and non-compatible land uses in the community. (Miller v. Schoene). In Schoene, the character of governmental action that was used to destroy red cedar trees which could potentially infect nearby apple orchards with a deadly disease was seen to be a reasonable applicaiton of zoning powers that did not qualify as a taking because the government was forced to choose between competing land uses and had to make a choice for the betterment of society. Similarly, in the present case, the government is being forced to choose between competing land use interests, and will likely be justified in making a choice that supports access to housing for its citizens over those that promote a prettier exclusive complex.

2) Economic Impact of the Regulation of property owners: As noted above, it is unlikely a court will determine that the ordinance at issue poses a total deprivation of all economically viable use to the HOA. Additionally, a court may consider whether the ordinace creates a problem with an existing economic use of the HOA, or with an "opportunity loss" for how the HOA could function in the future. In the present scenario, it likely forms an issue related to the existing economic value that is not severe becasue the property can still be bought and sold for a reasonable rate even if all properties in the complex are not uniform. Additionally, the court may run into the issue of a "denominator problem" or "conceptual severace" which will play a role in thier estimation of the total potential property loss that could be experienced by the HOA as a result of the ordinance. The issue of "conceptual severence" arises when a court must determine how to calculate the total potential loss. If it calculates the total loss by looking at potential value to the total property effected (i.e. in PA Coal, the total amount of coal available for mining under land) then it may find the economic impact to be slight as compared with the total value. However, if it employs conceptual severance to view the loss only in light of the actual property interest at stake (i.e. only the airspace above Penn Station effected by the ordinance in that case, rather than the value of the property as a whole) then it may find the total economic interest at stake to be low.

3) Intereference with Reasonable Investment-Backed Expectation of the owners. The court in Parazzo v. Rhode Island determined that it is not necessary for a party to have known about a related ordinance before purchasing property in order to later challenge it as a takings. This issue in the present case will be whether the ordinance interferes with an expectation on the part of the homeowner's association to promote the uniformity of thier development in the future. It is likley that the court will determine

that the individual owners who purchased property in Watersedge did so with an expectation that uniform regulations and a lack of non-permanent structures would lead to increased returns on thier investment in property in that community. However, as noted in the analysis of the economic discussion above, it is not certain that these interests will be substantially sacrificed by allowing the inclusion of modular homes in the development..

An analysis of the ad hoc test would likely lead a court to determine that the ordinance does not represent a takings of the HOA's property rights because its character is justified and its economic impact is low.

If the court determines from its ad hoc analysis that the qualifications of a takings have not been met, it may finally consider whether the ordinace fits into one of the remaining three special cases for takings?

1)exactions: land use development

2)deprivation of a core property right

3)retrospective deprivation of a vested property interest?)

END OF EXAM