BRIEF IN SUPPORT OF A MANDATORY INJUNCTION AGAINST SPEAKEASY FROM ERECTING A 50-FOOT CELLULAR TOWER ON PROPERTY OWNED BY NORTHERN CENTER OF WORSHIP ADJACENT TO THE VASQUEZ'S PROPERTY

Based on the joint stipulation of facts, plaintiffs Greg and Mary Vasquez submit the following arguments in support of their position that they should be granted permanent injunction to dismantle and demolish the bell tower on the property of defendant Northern Center for Worship (the "Church"), which is adjacent to the plaintiffs' property.

Interpreting the CC&Rs as a contract, and based on the ordinary meaning and intent, the CC&Rs prohibit the construction of the disputed tower

Restrictive covenants such as Covenants, Conditions and Restrictions (CC&Rs) constitute a contract between property owners as a whole and each individual property owner, pursuant to which each owner agrees to refrain from using his or her property in a particular manner. Horton. As such, contract interpretation must be used to determine whether the construction of the disputed tower is prohibited or not.

Ordinary meaning controls the CC&Rs

The controlling rule of contract interpretation requires the ordinary meaning of language be given to words where circumstances do no show a different meaning is applicable. Horton. As an example of interpreting a contract's ordinary meaning, in Horton, "structure" is defined by a dictionary as "something constructed." Thus, the court in Horton held that the disputed roadway is a structure, i.e., something constructed, within the ordinary meaning of the terms of the CC&Rs.

In Exhibit A, provision 4 of the CC&Rs states in part: "No structure shall be erected, altered, placed or permitted to remain on any of the lots other than one detached single-family dwelling not to exceed one story in height." A bell tower reaching 50 feet is clearly prohibited by this provision since the only type of structure permitted is a detached single-family dwelling not exceeding one story in height. The tower is not a single-family dwelling, and it exceeds a typical height of one story. Therefore, under the plain interpretation of the CC&Rs, the construction of the disputed tower was prohibited.

Intent of the CC&Rs taken in their entirety reveal an intent to keep the subdivision as residential only

Furthermore, intent must be determined from specific language used, determined from the contract read in its entirety. Horton. In Horton, the court held that the fact that height of the buildings was limited to two stories was evident of the intent that the lots were to be residential lots. It also furthers the goal of maintaining the subdivision was a "Choice Residential District."

In the present CC&Rs (see Exhibit A), provision 1 states that all the lots in the subdivision plaintiffs live in are to be known and described as "residential lots." Other provisions use home-related language, such as "trailers," "private garage," "guest or servant quarters," "hedge," "fence," and "preserve [the subdivision] as a Choice Residential District." Reading the CC&Rs in its entirety, it is apparent that the intent of the CC&Rs to maintain a residential subdivision

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and not allow commercial uses. Therefore, the disputed tower should be read to be prohibited by the CC&Rs.

The CC&Rs' prohibitions were neither waived nor abandoned because the non-waiver clause is enforceable, the factors relating to prior nonconforming uses goes against the defendant, and there was no abandonment based on fundamental character of the neighborhood

The defense of waiver falls apart because of the proximity of the 50-foot tower, dissimilarity of the tower to prior nonconforming uses, and infrequency of prior nonconforming uses

The defense of waiver by acquiescence is raised when the restrictions sought to be enforced are not universally enforced or when there are frequent violations of the restrictions. Blaire. Three factors are particularly significant to the analysis: 1) the location of objecting landowners relative to where nonconforming use is sought to be enjoined and where nonconforming use has been allowed, 2) similarity of prior nonconforming use to the nonconforming use sought to be enjoined, and 3) frequency of prior nonconforming uses. Blaire.

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In this case, there are several potential violations of the subdivision's CC&Rs prior to the construction of the tower. A church, its sign and cross on the steeple have occupied Lot 9 for 25 years. Five years ago, the Church acquired Lot 7 and built the sanctuary with the same stucco walls and tile roof and covered porches as the other buildings to blend in with the other buildings. The plaintiffs never complained about these improvements.

First factor: Nevertheless, the location of the violating 50-foot tower is close by to the plaintiffs, who live on Lot 2, which shares a boundary line with Lot 7, where the 50-foot tower was built. Failure to sue for prior breaches by others where the breaches were non-injurious to the complainant cannot be treated as an acquiescence sufficient to bar equitable relief against a more serious and damaging violation. Blaire. The plaintiffs may not have minded the other violations as much because the violations were not located so close to them as to decrease the use and enjoyment of their property on Lot 2. Thus, present nonconforming use sought to be enjoined here is significant because of its proximity.

Second factor: Where restrictions are essentially different so that abandonment of one would not induce a reasonable person to assume that the other was also abandoned, acquiescence by the complainant to violations of dissimilar restrictions cannot be a bar to enforcement. Blaire. Even though the Church was also built on Lot 7, it was made to look similar to the other buildings, with the same stucco walls and tile roof. Even if such a building were technically a violation of the CC&Rs, it did not bother the plaintiffs enough to seek an injunction. Such nonconforming use is vastly different from a 50-foot tower that is not only lacking aesthetics, it is a potential health and safety hazard characteristic of a tall structure that may fall on the plaintiffs. Thus, there is almost no similarity between the prior nonconforming use and the nonconforming use sought to be enjoined.

Third factor: The prior nonconforming uses were gradually built over decades. On the other hand, the plaintiffs have moved into Lot 2 nine years ago. Although the joint stipulation of facts do not indicate the dates of the potential violations, there are no more than a dozen violations since at least the last 25 years. On average, about one violation has occurred every two years.

This is infrequent enough that the plaintiffs could not complain of frequent nonconforming use after experiencing 4-5 violations over their nine years on Lot 2.

Thus, all factors taken together, the defendants' waiver argument has no merit.

There is no waiver because non-waiver clauses are enforceable
Under Blaire, Non-waiver clauses are enforceable where unambiguous and not adverse to public policy. Here, the "Anti-waiver Provision" is a simple one-sentence disclaimer saying that failure to enforce the rights does not make it a waiver or consent to further breaches.

The defendants here may argue that application of non-waiver provision would lead to random, arbitrary enforcement of CC&Rs, adverse to public policy. Columbia courts do indeed have the power to decline to enforce restrictive covenants. Blaire. However, court in Blaire held that the non-waiver provision in the CC&Rs was reasonable because there is nothing arbitrary or capricious in homeowners seeking to prevent additional structure erected in violation of the CC&Rs. Blaire. Likewise, the plaintiffs are trying to prevent a 50-foot bell tower on the lot directly next to theirs. There does not seem to be any arbitrary enforcement contrary to public policy.

Therefore, the non-waiver provision in the present CC&R is enforceable to preclude waiver.

There is no abandonment of the CC&Rs making the non-waiver ineffective because there was no change in the fundamental character of the neighborhood to destroy the residential intent of the CC&Rs
On the other hand, a non-waiver provision would be ineffective if a complete abandonment of the entire set of CC&Rs has occurred. Blaire. The test to determine a complete abandonment of deed restrictions, in contrast to a waiver of a particular section of restrictions, is… change in the area… Blaire; see also Lutz ("A court will enforce the terms of restrictive covenants unless the changes in the surrounding areas are so fundamental or radical as to defeat or frustrate the original purposes of the restrictions"). In Blaire, the violations have not destroyed the fundamental character of the neighborhood so as to make it no longer a "Choice Residential District."

Similarly, here, there may have been about a dozen potential violations, but none is so egregious or cumulative so as to change the fundamental character of the neighborhood. For example, the potential violations are two-story buildings, a flagpole, and telephone poles. The subdivision remains a "Choice Residential District" as intended by the CC&Rs. Therefore, there has not been an abandonment of the CC&Rs.

In sum, the CC&R provision were not abandoned nor waived.

Plaintiffs are not barred from injunction relief due to laches because the delay was not unreasonable and because defendants had enough notice to seek declaratory judgment
Courts may provide relief in whole or in part upon a finding of laches. Lutz. To bar a claim based on laches, a court must find more than mere delay in the assertion of the claim. The delay must be unreasonable under the circumstances, including the party's knowledge of his or her

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right and that any change in the circumstances caused by the delay has resulted in prejudice to the other party sufficient to justify denial or relief. Lutz. However, to avoid laches, it is not required to file a suit as the very first course of action.

Here, first, there was not a large delay in assertion of the plaintiffs' claim. Defendant SpeakEasy completed the bell tower on February 13, 2010, and the plaintiffs filed this action on July 27, 2010. It was not unreasonable under the circumstances, provided that suit was filed only about five months after the violation.

Furthermore, in Lutz the defendant in Lutz knew or should have known of the covenant in the deed; nothing prevented him from filing a declaratory judgment seeking a determination of its enforceability. Thus, the court found that a factor against granting laches against the plaintiff in Lutz.

Likewise, defendants SpeakEasy and the Church had notice from the plaintiffs and other neighbors of the subdivisions. There was nothing preventing the defendants from seeking declaratory judgment before building the tower.

Therefore, plaintiffs are not barred from injunction relief due to laches.

The balance of hardships does not dictate that the plaintiffs' sought remedy of removal of the tower be denied because defendants were not innocent, defendants caused irreparable harm, and hardship to defendants is not greatly disproportionate to hardship to plaintiff

The defendants may claim that injunction relief results in damage and hardship. Courts will consider relative hardship by weighing both sides' interests. Lutz. But no court will allow an intentional violator of CC&Rs to rely upon the contention of relative hardship. Lutz. Here, defendants had notice from the plaintiffs and their neighbors about the tower. The Church would object, arguing that it had already expended over $100,000 on the tower. To resolve this, PVHA sets out certain factors that must be present to deny injunction under a balance of hardships, even in absence of laches: 1) Defendant must be innocent. 2) Defendants' acts must not cause irreparable harm to the plaintiff. 3) Hardship to defendant by injunction must be greatly disproportionate to hardship to plaintiff. PVHA v. Walter.

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Whether the defendants were innocent

Where a party has notice before actually violating a restriction that his structure will violate a restriction, and then completes construction, the party may not claim the benefit of relative hardships. But genuine mistake of fact is sufficient to enable arguing balance of hardships. PVHA. In PVHA, the defendant was not an intentional violator. Defendant, his architect, and his contractor all honestly believed his violating construction complied with the CC&Rs and was not an encroachment. Thus, the court was in favor of the defendant.

However, the present case is distinguishable because there was no mistake of fact. The Church and SpeakEasy were aware of the restriction, yet they still built the tower in violation of the CC&Rs. There was no mistaken encroachment.

Thus, the defendants were not innocent.

Whether defendants caused irreparable harm

Injunctions will issue on behalf of a homeowner whose property is irreparably damaged due to a violation of CC&Rs. Irreparable damage occurs when a violation interferes with uses, views, or other quiet enjoyment of the property, or undermines property values, in a manner that cannot easily be ascertained and remedied. PVHA. In PVHA, there was nothing to support plaintiff PVHA's assertions that the setback restrictions are inviolate or that it will be irreparably harmed if defendant's property is allowed to remain. Defendant's encroachment did not impair a view, present a lot owner with an unsightly obstruction inconsistent with the neighborhood, or possibly affect the property values of the subdivision in any way. Moreover, the city allowed it without objection for 16 years.

However, the present case is distinguishable because a 50-foot tower would diminish the use and enjoyment of plaintiffs' Lot 2. The tower is an unsightly obstruction inconsistent with the neighborhood, which only has small residential buildings and a church that blends in with the other buildings. The tower will also block their view and likely lower the property value because of the inconsistent and unsightly obstruction. The parties' experts put estimates at 0-5% diminution of value, and it is likely to lower the value of other homes as well.

Thus, the defendants will cause irreparable harm to the plaintiffs by erecting the tower.

Whether hardship to defendants is greatly disproportionate to hardship caused to plaintiffs

A balance of hardships analysis may appropriately consider impairment of property values and other harms to the entire subdivision. PVHA. In PVHA, out-of-pocket loss to the individual defendant ~280k. Removal would significantly reduce value of his property. Disproportionate hardship to D is of considerable magnitude, and there is no apparent harm to the City (plaintiff). It was also brought years after the violation.

Here, the case is distinguishable because the cost is not to an individual but to the Church and SpeakEasy, a corporation. Out-of-pocket loss to the Church to remove the tower would be $304,000, which it may possibly seek relief from SpeakEasy. The defendants here are not an individual with much smaller pockets. Thus, there would not be such a disproportionate hardship to the Church and/or SpeakEasy. On the other hand, the plaintiffs would suffer irreparable harm as discussed above.

Therefore, hardship to defendants is not greatly disproportionate to hardship caused to plaintiffs.

NOTES

1. Do the CC&Rs prohibit the construction of the disputed tower?
2. Has the CC&Rs' prohibition of the disputed tower, if found to exist, been **waived or abandoned**?
3. Are Πs barred from getting injunctive relief sought due to **laches**?
4. Does the **balance of hardships** dictate that Π's sought remedy of removal of the tower be denied?

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All major issues were hit (hard to miss). Most minor issues were hit. Rules were stated. Cases were analogized and distinguished

Horton (2004)

- Restrictive covenants such as the CC&Rs constitute a K b/w property owners as a whole and each individual property owner, pursuant to which each owner agrees to refrain from using his or her property in a particular manner
- Intent must be determined from specific language used, determined from the contract read in its entirety
- Controlling rule of K interpretation requires the ordinary meaning of language be given to words where circumstances do no show a different meaning is applicable
- "Structure" is defined as "something constructed." A roadway is a structure, i.e., something constructed, within the ordinary meaning of the term

Blaire (1999)

- Waiver
    - 3 factors: location of objecting landowners to where nonconforming use is sought to be enjoined and where nonconforming use has been allowed, similarity of prior nonconforming use to the nonconforming use sought to be enjoined, frequency of prior nonconforming uses
    - Where restrictions are essentially different so that abandonment of one would not induce a reasonable person to assume that the other was also abandoned, acquiescence by the complainant to violations of dissimilar restrictions CANNOT be a bar to enforcement
    - Failure to sue for prior breaches by others where the breaches were non-injurious to the complainant cannot be treated as an acquiescence sufficient to bar equitable relief against a more serious and damaging violation
    - Non-waiver clauses are enforceable where unambiguous and not adverse to public policy
    - DEFENSE COUNTER: Columbia courts have the power to decline to enforce restrictive covenants. D would argue that application of non-waiver provision would lead to random, arbitrary enforcement of CC&Rs, adverse to public policy
        - Nothing arbitrary or capricious about homeowners seeking to prevent additional …
- Abandonment
    - Non-waiver provision would be ineffective if a complete abandonment of the entire set of CC&Rs has occurred
    - The test to determine a complete abandonment of deed restrictions, in contrast to a waiver of a particular section of restrictions, is…
    - In Blaire, the violations have not destroyed the fundamental character of the neighborhood
        - See also Lutz
        - Likewise…

Lutz (2000)

- A court will enforce the terms of restrictive covenants unless the changes in the surrounding areas are so fundamental or radical as to defeat or frustrate the original purposes of the restrictions (see also Blaire)
- Laches

    - Courts may provide relief in whole or in part upon a finding of laches. To bar a claim based on laches, a court must find more than mere delay in the assertion of the claim. The delay must be unreasonable under the circumstances, including 1) the party's knowledge of his or her right and 2) that any change in the circumstances caused by the delay has resulted in prejudice to the other party sufficient to justify denial or relief
    - To avoid laches, it is not required to file a suit as the very first course of action
        - Defendant knew or should have known of the covenant in the deed; nothing prevented him from filing a declaratory judgment seeking a determination of its enforceability
    - DEFENSE COUNTER: Lutz should not be seen as suggesting that the homeowners of a subdivision could force removal of structures that have been **uncontested and present for a lengthy period of time**
        - BUT in Lutz, it was not an unreasonable delay in light of willful violations by the defendant
- Balance of hardships
    - DEFENSE: will claim that injunction will result in damage and hardship -- $350k
    - BUT no court will allow an intentional violator of CC&Rs to rely upon the contention of relative hardship
        - D is an intentional wrongdoer

PVHA (2002) – favors D
- Balancing the hardships
    - A court has discretion to balance the hardships and deny a mandatory injunction to remove a building or structure that has encroached or otherwise violates an enforceable restriction, even in the absence of an affirmative defense such as laches. In exercising its discretion and in weighing the relative hardships to determine whether to grant or deny a mandatory injunction, a court should start with the premise that an owner who violates a restriction is a wrongdoer and that the interests of the plaintiffs have been impaired. Doubtful cases should be resolved in the plaintiff's favor
- Defendant was innocent?
    - Where a party has notice before actually violating a restriction that his structure will violate a restriction, and then completes construction, the party may not claim the benefit of relative hardships. But genuine mistake of fact is sufficient to enable arguing balance of hardships
    - D in PVHA was not an intentional violator. D, his architect, and his contractor all honestly believed his construction complied with the CC&Rs and was not an encroachment
        - DISTINGUISH: There was no mistake of fact. Church and co were aware of the restriction
- Defendant caused irreparable harm?
    - Injunctions will issue on behalf of a homeowner whose property is irreparably damaged due to a violation of CC&Rs. Irreparable damage occurs when a violation interferes with uses, views, or other quiet enjoyment of the property, or

undermines property values, in a manner that cannot easily be ascertained and remedied
    - Nothing to support PVHA's assertions that the setback restrictions are inviolate or that it will be irreparably harmed if D's property is allowed to remain. D's encroachment does not impair a view, present a lot owner with an unsightly obstruction inconsistent with the neighborhood, or possibly affect the property values of the subdivision in any way. Moreover, the city allowed it without objection for 16 years
        - DISTINGUISH:
- Hardship to D is greatly disproportionate to hardship caused to P?
    - Out-of-pocket loss to D ~280k. Removal would significantly reduce value of his property. Dispropo hardship to D is of considerable magnitude, and there is no apparent harm to the City (plaintiff). It was also brought years after the violation
        - DISTINGUISH: cost is not to an individual but to church and company