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Covenants -- Building Restrictions -- Violation of a Restriction Against the Erection of a Duplex

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under a will;[16] action by bondholders to preserve a bond fund;[17] action by beneficiaries of a trust estate to recover funds of the estate;[18] and action by members of a labor union to restore funds to the benefit of the union and its members.[19]

Since North Carolina has given recognition to this broad doctrine, will it follow the lead of other jurisdictions and apply the doctrine to situations other than taxpayers' actions? The answer is clearly uncertain. The court in the principal case expresses no inclination to have its decision embrace cases other than taxpayers' actions; however, this does not affect the real significance of the case. The mere recognition of a doctrine which allows recovery of counsel fees as costs without statutory authorization indicates a tendency by the court to relax its heretofore strict attitude against such allowances. It is suggested that this tendency be extended so as to allow recovery of counsel fees as costs in situations other than taxpayers' actions where substantial justice requires such allowances; thereby bringing North Carolina into accord with other jurisdictions.

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Covenants—Building Restrictions—Violation of a Restriction Against the Erection of a Duplex

Defendants owned a lot subject to the following restrictions contained in the deed: "Said property shall be used only for residential purposes with the understanding that no duplex or apartment house be erected thereon, and shall not be used for cemetery, hospital, sanitorium, or any business purposes." The house upon the lot, as originally constructed, was not a duplex and was used as a single-family residence. Subsequently, defendants installed a second kitchen in a basement playroom, rented out three rooms and bath (the newly created kitchen included) to another family, and occupied the balance of the house as their own home. Plaintiffs, who owned lots in the same division, subject to the same restrictions, brought an action to enforce the restrictions in defendants' deed, alleging that defendants' house, as converted, constituted a duplex in violation of said covenant. At the close of plaintiffs' evidence defendants' motion for a nonsuit was granted by the Superior Court on the ground that the evidence failed to show the construction of a duplex. Affirming this judgment, the Supreme Court of Georgia held that the conversion of a playroom into a second

[16] Johnson v. Williams, 196 S. C. 528, 14 S. E. 2d 21 (1941).
[17] Trustees v. Greenough, 105 U. S. 527 (1881).
[18] *In re* Linch's Estate, 139 Neb. 761, 298 N. W. 697 (1941).
[19] Marine Cooks' & Stewards' Ass'n v. Weber, 93 Cal. 2d 327, 208 P. 2d 1009 (1949).

kitchen and renting out rooms, second kitchen included, did not constitute such a structural change as to make the house a duplex in violation of the restrictive covenant in defendants' deed.[1]

As a general rule, subject to restrictions contained in his deed, the owner of land in fee has the right to use the land for any lawful purpose.[2] So fundamental is this right that covenants restricting the use of the land will be strictly construed by the courts in favor of the free use of land.[3] Where, however, the intent of the parties can be clearly ascertained with respect to the restrictions imposed, such intent should govern.[4] In deciding, therefore, whether or not a particular structure violates a restrictive covenant contained in a deed, the courts attempt to ascertain and effectuate the intent of the parties by construing the "restrictive words" according to their accustomed meaning as used and understood in the community at large.[5]

In applying the general rules of construction above, the courts have generally agreed that where a covenant restricts the structure to be erected to "a residence" or to "residential purposes," without additional words of restriction or qualification, the covenant is not broken by the erection of a multi-family house[6] or by the conversion of a single-

[1] Jordan v. Orr, 71 S. E. 2d 206 (Ga. 1952). In the view of the court, the controlling question was whether a building restriction prohibiting the erection of a duplex was violated by the owner renting out rooms to another family. The court held that it was not.

[2] Matthews Real Estate Co. v. National Printing and Engraving Co., 330 Mo. 190, 48 S. W. 2d 911 (1932); Paff v. Margerum, N. J. Eq. 74, 142 Atl. 6 (Ct. Err. & App. 1928); Schuman v. Schecter, 215 App. Div. 291, 213 N. Y. Supp. 446 (1926); Ivey v. Blythe, 193 N. C. 705, 138 S. E. 2 (1927).

[3] Wing v. Forest Lawn Cemetery Ass'n, 15 Cal. 2d 472, 101 P. 2d 1099 (1940); Newton v. Village of Glen Ellyn, 374 Ill. 50, 27 N. E. 2d 821 (1940); Glenmore Distilleries v. Fiorella, 273 Ky. 547, 117 S. W. 2d 173 (1938); Whitemarsh v. Richmond, 179 Md. 523, 20 A. 2d 161 (1941); St. Botolph Club v. Brookline Trust Co., 292 Mass. 430, 198 N. E. 903 (1936); Wood v. Blancke, 304 Mich. 283, 8 N. W. 2d 67 (1943); Ritzenthaler v. Stehler, 170 Misc. 618, 10 N. Y. S. 2d 898 (Sup. Ct. 1939); Edney v. Powers, 224 N. C. 441, 31 S. E. 2d 372 (1944); Pehlert v. Neff, 152 Pa. Super 84, 31 A. 2d 446 (1943); State *ex rel.* Bollenbeck v. Village of Shorewood Hills, 237 Wis. 501, 297 N. W. 508 (1941).

[4] Dooley v. Savannah Bank and Trust Co., 199 Ga. 353, 34 S. E. 2d 522 (1945); Broad and Branford Place v. Hochenjos Co., 132 N. J. L. 229, 39 A. 2d 80 (Sup. Ct. 1944); Johnson v. Coulter, 25 App. Div. 697. 297 N. Y. Supp. 345 (1937); Starmount Co. v. Greensboro Memorial Park, 233 N. C. 613, 65 S. E. 2d 134 (1951); Davis v. Robinson, 189 N. C. 589, 127 S. E. 697 (1925); Killian v. Harshaw, 29 N. C. (7 Ired.) 964 (1847).

[5] See note 4 *supra.*

[6] Virgin v. Garrett, 233 Ala. 34, 169 So. 711 (1936); Hamm v. Wilson, 169 Ga. 570, 151 S. E. 11 (1930); Yorkway Apartments v. Dundalk Co., 180 Md. 647, 26 A. 2d 398 (1942); Davis v. Sarvari, 250 Mich. 427, 230 N. W. 176 (1930); Miller v. Ettinger, 235 Mich. 527, 209 N. W. 568 (1926); Crane v. Hathaway, 4 N. J. Misc. 293, 132 Atl. 748 (Ch. 1926); Sweet v. Hollearn, 142 Misc. 408, 254 N. Y. Supp. 625 (Sup. Ct. 1932); Pierson v. Rellstab Bros., 246 N. Y. 608, 159 N. E. 671 (1927); Bowers v. Fifth Avenue and 77th Street Corp., 125 Misc. 343, 209 N. Y. Supp. 743 (Sup. Ct. 1925); De Laney v. Van Ness, 193 N. C. 721, 138 S. E. 28 (1927); Satterwaite v. Gibbs, 288 Pa. 428, 156 Atl. 862 (1927); Jernigan v. Capps, 187 Va. 73, 45 S. E. 2d 886 (1947).

family house into a multi-family house.[7] On the other hand, where the covenant restricts the structure to be erected to "one residence," "a private dwelling," "a single dwelling" or other restrictions of similar import, without additional words of qualification, the courts have generally held that the erection of even a two-family house[8] or the conversion of a single-family house into a two-family house[9] constitutes a violation of the covenent. In each of these cases, the court construed the restrictive words and rendered its decision with a view to effectuating the intent of the parties. Thus, restrictions to "a residence" or "residential purposes" were construed as the manifestation of an intention to preserve only a general residential atmosphere. Those restrictions to "single" or "private" residences and dwellings were construed, however, as the indicia of an intention not only to preserve a general residential atmosphere but also to restrict the style of the house to that of a "single-family." Consequently, it follows that a multi-family house would not violate the restrictive covenants in the former instance, but would do so in the latter.

Where, as in the principal case, a covenant not only restricts the land to "residential purposes" but goes further to prohibit the erection of a "duplex" and "use" of the property for enumerated purposes, the courts disagree as to what constitutes a "duplex" in violation of the covenant.[10] This disagreement seems to stem from the divergent definitions of a "duplex house" formulated by the courts in their effort to effectuate the intent of the parties.[11] That is to say, whether

[7] Leverich v. Roy, 338 Ill. App. 248, 87 N. E. 2d 226 (1947); Ulmer v. Ulrey, 280 Ky. 457, 133 S. W. 2d 744 (1940); Bennett v. Petrino, 235 N. Y. 474, 139 N. E. 578 (1923); Austin v. Richardson, .. Tex ...., 288 S. W. 180 (1926).

[8] Michigan Shores Estates v. Robbins, 290 Mich. 384, 287 N. W. 547 (1939) (one residence only); Nerrerter v. Little, 258 Mich. 462, 243 N. W. 25 (1932) (dwelling house only); Seeley v. Phi Sigma Delta Corp., 245 Mich. 252, 222 N. W. 180 (1928) (private dwelling only); Bailey v. Jackson-Campbell Co., 191 N. C. 61, 131 S. E. 567 (1926) (not more than one house); Lebo v. Fitton, 71 Ohio App. 192, 41 N. E. 2d 402 (1942) (single dwelling only).

[9] Hooker v. Alexander, 129 Conn. 433, 29 A. 2d 308 (1943) (one family house only); Allen v. Barrett, 213 Mass. 36, 99 N. E. 575 (1912) (a single-family house); Paine v. Bergrose, 119 Misc. 796, 198 N. Y. Supp. 311 (Sup. Ct. 1922) (private dwelling only); Upper Arlington Co. v. Lawwell, 20 Ohio App. 362, 152 N. E. 203 (1915) (single private dwelling only); Gerstell v. Knight, 245 Pa. 83, 26 A. 2d 329 (1942) (one resident only).

[10] See note 16 *infra*.

[11] Baker v. Lunde, 96 Conn. 530, 114 Atl. 673 (1921) (a double house having one continuous roof); Donnelly v. Spitza, 246 Mich. 284, 222 N. W. 396 (1929) (a house designed for two families); Kenwood Land Co. v. Hancock Investment Co., 169 Mo. App. 715, 155 S. W. 861 (1913) (a double house or a house in duplicate); Hammett v. Born, 247 Pa. 148, 93 Atl. 505 (1915) (a house designed for occupancy of two families under one roof); Schwarser v. Calcasian Lumber Co., 176 S. W. 2d 597 (Tex. Civ. App. 1943) (a building designed for two families, divided vertically down the middle). See also Edwards v. City of Los Angeles, 48 Cal. App. 2d 62, 119 P. 2d 370 (1941) (dicta to effect that a duplex may in fact be apartments or flats).

the court will decide that a particular structure is a "duplex" in violation of a covenant prohibiting its erection will depend not upon universal definitive terminology but rather upon the term "duplex" as used and understood in the community at large.[12]

Thus, if the building is designed, both exteriorly and interiorly, as two houses under one roof, each complete in itself, with a partition between and separate entrances, the courts have held it to be a duplex in violation of a covenant restricting the land to "residential purposes" and prohibiting the erection of a "duplex."[13] The reason being that the parties intended to preserve a residential atmosphere and to restrict the style of structure to that of a single-family house. Where, however, the building erected, as in the principal case, has the conventional exterior design of a "single-family house" but is being used interiorly as a "double-family house," there is sharp conflict among the courts as to whether it violates the covenant prohibiting the erection of a "duplex."[14]

The strict construction, followed by the court in the principal case, is that where a portion of the covenant restricts the type of structure to be erected, its use is not to be considered to be restricted where elsewhere in the covenant are enumerated specific uses which are not permitted, and the use complained of is not one of those excluded.[15] Accordingly, if the structure is being used as a residence, although by two families with separate living accommodations, and is exteriorly designed as a single-family residence, the courts following this view refuse to hold it to be a "duplex" in violation of the covenant.[16] The other and more liberal construction, is that the building restriction to "a residence" and "no duplex" defines the use to which the building may be put as well as its exterior form notwithstanding the fact that such use is not one of those elsewhere prohibited in the covenant.[17] The courts following this view have held houses with a "single-family residence" exterior design but being used interiorly as a "two-family residence" to be a duplex in violation of the covenant.[18]

[12] See note 11 *supra.*

[13] Hooker v. Alexander, 129 Conn. 433, 29 A. 2d 308 (1943); Upper Arlington Company v. Lawwell, 20 Ohio App. 362, 152 N. E. 203 (1915); Ward v. Prospect Manor Corp., 188 Wis. 534, 206 N. W. 856 (1926).

[14] Jordan v. Orr, 71 S. E. 2d 206 (Ga. 1952); Renn v. Whitehurst, 181 Va. 360, 25 S. E. 2d 276 (1945). See also cases cited in notes 15-17 *infra.*

[15] Clark v. James, 87 Hun 215, 33 N. Y. Supp. 1020 (Sup. Ct. 1895). See note, 155 A. L. R. 1012 (1945).

[16] Leverich v. Roy, 338 Ill. App. 248, 87 N. E. 2d 226 (1947); Ulmer v. Ulrey, 280 Ky. 457, 133 S. W. 2d 744 (1940); Bennett v. Petrino, 235 N. Y. 474, 139 N. E. 578 (1923); Austin v. Richardson, ... Tex. ..., 288 S. W. 180 (1926).

[17] Michigan Shores Estates v. Robbins, 290 Mich. 384, 287 N. W. 547 (1939); Straus v. Ginsberg, 218 Minn. 57, 15 N. W. 2d 130 (1944); Ritzenthaler v. Stehler, 170 Misc. 618, 10 N. Y. S. 2d 898 (Sup. Ct. 1939); Pulitzer v. Campbell, 147 Misc. 700, 262 N. Y. Supp. 743 (Sup. Ct. 1933).

[18] See note 17 *supra.*

While North Carolina has followed the general rules that a restriction to "residential purposes only" is not violated by the erection of or conversion into a multi-family house,[19] but that such an erection or conversion does violate a restriction to a "private dwelling" or "single-family house,"[20] our court has not decided the question involved in the principal case.[21] Past decisions indicate, however, that the decision, if and when rendered, would be substantially in accord with that in the instant case.[22] In view of the fact that the modern tendency is not to imply restrictions which might or ought to have been written in by the parties, it is submitted that the view taken in the principal case, although the stricter, is nevertheless the sounder view.[23]

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Damages—Mental Anguish—Action Arising Out of Tort

Recently, the North Carolina Supreme Court upheld a lower court decision that damages could be recovered for mental anguish resulting from the unauthorized removal of flowers from the grave of a deceased spouse. The court, in rendering its decision, held that the plaintiff could recover damages for the mental anguish endured by him as a result of the trespass to his burial lot regardless of whether or not he suffered physical injury.[1]

[19] De Laney v. Van Ness, 193 N. C. 721, 138 S. E. 28 (1927).

[20] East Side Builders v. Brown, 234 N. C. 517, 67 S. E. 2d 489 (1951).

[21] This question appeared, however, in East Side Builders v. Brown, 234 N. C. 517, 67 S. E. 2d 489 (1951), where the restriction was to "single-family residences." It was not answered, however, the case being reversed on other grounds. It has not been retried, pending the decision in Huffman v. Johnson, 236 N. C. 225 (1952). This latter case has recently been decided in favor of the free use of the land. It adds little to the law, and is distinguishable from the principal case and from East Side Builders v. Brown, *supra*, in that there was no allegation or proof of the installation of a second kitchen and the formation of a separate apartment, or that a separate apartment was in fact rented.

[22] The North Carolina view is that the covenant must be strictly construed, Starmont Co. v. Greensboro Memorial Park, 233 N. C. 613, 65 S. E. 2d 134 (1951), in favor of the free use of the land, Davis v. Robinson, 189 N. C. 589, 127 S. E. 697 (1925); and that restrictions should be created in plain and explicit terms, Ivey v. Blythe, 193 N. C. 705, 138 S. E. 2 (1927). A restriction to "residence" or "residential purposes" will not prohibit the erection of a multi-family house, De Laney v. Van Ness, 193 N. C. 721, 138 S. E. 28 (1927). A residence occupied by four families is no less a residential building. That it is intended to accommodate more than one family does not ipso facto bring it within what is forbidden. Charlotte Consol. Construction Co. v. Cobb, 195 N. C. 690, 143 S. E. 522 (1928). But see Bailey v. Jackson-Campbell Co., 191 N. C. 61, 131 S. E. 567 (1926) where the court held that an apartment house is not a "residence" within a covenant providing that "not more than one residence shall be built."

[23] It is suggested that if the intent of the parties is to restrict the property to single-family use only, the covenant should read: "Said property is restricted to the erection and maintenance of a single-family type residence, with the understanding said residence shall not be used by more than a single family." This or similarly worded restrictions leave no doubt as to the intent of the parties.

[1] Matthews v. Forrest, 235 N. C. 281, 69 S. E. 2d 553 (1952).