1967

Carroll Freeman, Ann Marie Freeman, Sidney L. Cohen, Kathleen Cohen, Plato G. Christapulos, Stella A. Christapulos, E. M. Richardson, Kenneth R. Poulsen, Virginia C. Poulsen, Benjamin N. Meldrum, Grace D. Meldrum, Erwin F. Zeyer, Wilma Grace Zeyer, Edward R. O'Hara, Eileen O'Hara, Oscar Sorenson, M. Alice Sorenson, Earl E. Loman, Helen M. Loman, Robert E. Themselves and For Other Land Owners of Indian Rock Subdivision v. Leland 0. Gee, Vilate D. Gee, James F. Craner and Ida Craner : Respondents' Brief

Utah Supreme Court

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Leonard J. Lewis; Attorneys for AppellantsRichard L. Bird, Jr.; Attorney for Respondents CranerAlan H. Bishop; Attorney for Respondents Gee

IN THE SUPREME COURT OF THE STATE OF UTAH

CARROLL FREEMAN, ANN MARIE FREEMAN, SIDNEY L. COHEN, KATHLEEN COHEN, PLATO G. CHRISTOPULOS, STELLA A. CHRISTOPULOS, E. M. RICHARDSON, KENNETH R. POULSEN, VIRGINIA C. POULSEN, BENJAMIN M. MELDRUM, GRACE D. MELDRUM, ERWIN F. ZEYER, WILMA GRACE ZEYER, EDWARD R. O'HARA, EILEEN O'HARA, OSCAR SORENSON, M. ALICE SORENSON, EARL E. LOHMAN, HELEN M. LOMAN, ROBERT E. THAYER, and ELIZABETH THAYER, for themselves and for other land owners of Indian Rock Subdivision,

Plaintiffs-Appellants,

vs.

LELAND O. GEE, VILATE D. GEE, JAMES F. CRANER and IDA CRANER,

Defendants-Respondents.

Case No. 10590

RESPONDENTS' BRIEF

Appeal from the Order of Dismissal of the Third District Court of Salt Lake County Honorable Merrill C. Faux, Judge

RICHARDS, BIRD & HART
Richard L. Bird, Jr.
716 Newhouse Building
Salt Lake City, Utah
Attorneys for Respondents Craner

ALAN H. BISHOP
201 State Exchange Building
Salt Lake City, Utah
Attorney for Respondents Gee

VAN COTT, BAGLEY, CORNWALL & McCARTHY
Leonard J. Lewis
C. Keith Rooker
Suite 300, 141 E. First South
Salt Lake City, Utah
Attorneys for Appellants

PRINTED BY SALT LAKE TYPING

TABLE OF CONTENTS

Cases and Secondary Authorities Cited

Secondary Authorities

IN THE SUPREME COURT OF THE STATE OF UTAH

CARROLL FREEMAN, ANN MARIE FREEMAN, SIDNEY L. COHEN, KATHLEEN COHEN, PLATO G. CHRISTOPULOS, STELLA A. CHRISTOPULOS, E. M. RICHARDSON, KENNETH R. POULSEN, VIRGINIA C. POULSEN, BENJAMIN M. MELDRUM, GRACE D. MELDRUM, ERWIN F. ZEYER, WILMA GRACE ZEYER, EDWARD R. O'HARA, EILEEN O'HARA, OSCAR SORENSON, M. ALICE SORENSON, EARL E. LOHMAN, HELEN M. LOMAN, ROBERT E. THAYER, and ELIZABETH THAYER, for themselves and for other land owners of Indian Rock Subdivision,

Plaintiffs-Appellants,

vs.

LELAND O. GEE, VILATE D. GEE, JAMES F. CRANER and IDA CRANER,

Defendants-Respondents.

Case No. 10590

RESPONDENTS' BRIEF

DISPOSITION IN LOWER COURT

Appellants state too broadly the ruling of the District Court and omit the particularity of the Order. This final Order, entered after protracted preliminary proceedings, arguments, attacks and defenses, issued March 9, 1966 (R. 126-128). The statement of appel-

lants (Brief Page 2) is that the Restrictive Covenants in question related only to the original construction of homes in the subdivision.

The Court's first Pre-Trial Order (R. 66, 67) distinguishes between construction covenants and use covenants and rules that Covenant III is a building restriction and that Covenant I is primarily a building restriction and should be interpreted as such particularly since no affirmative injunction or demolition was being sought.

The Court's final Order disposing of the case preparatory to permitting an appeal holds that Covenant I, when interpreted with other covenants of the building restriction, pertains to matters of construction and physical qualities, whereas, Paragraphs V, VI, VIII and IX of the Restrictive Covenants relate to use of buildings once they have been constructed (R. 126-127).

STATEMENT OF FACTS

Respondents agree generally with the statement of facts in appellants' Brief (Pages 3 to 5). Their statement again suggests that only Covenant I of the Restrictive Covenants was before the Court whereas it is the position of respondents that all of the Restrictive Covenants must be read to interpret I.

Appellants refer to a stipulation that the plaintiffs were not seeking relief by way of demolition by saying

at Page 4 of their Brief that plaintiffs had asked to be relieved "of a statement apparently made to the trial Court by their former counsel, Mr. Greenwood * * *."

This statement appears under "Stipulations and Court's Rulings" in the first Pre-Trial Order where the Court says: "And, as you are not seeking an affirmative injunction which would require demolition, this may be a building-restriction only and not a use-restriction, even though the California case seemed to interpret such words as a 'use-restriction' " (R. 67).

The Amended Pre-Trial Order sets out plainly that the action is one for damages, (R. 76 ¶ 19) and the plaintiffs' Motion to Amend Pre-Trial Order (R. 79-82) seeks no change from this ruling.

The lengthy Brief filed by former counsel for plaintiffs does not complain of elimination of the demolition issue and argues in favor of a cause of action for damages (R. 90-108).

The respondents Craner rented the upstairs of their home to their son and his wife from 1955 until February, 1964; the lower floor to one Verlin Scott from May 10, 1964 to January 17, 1965 and to Mr. and Mrs. Don F. Choquette from April 1, 1965 to October 22, 1965 and thereafter (R. 56, 67). An additional door giving access to the lower floor was installed October 1, 1964 at a cost of $100.00 (R. 56).

It appears from the Amended Complaint and from the Answer of respondents Gee to the Amended Com-

plaint that the Gee home was constructed immediately after November 20, 1961 and that upon completion of construction, it was occupied as a duplex (R. 36 ¶ 7; R. 45 ¶ 6).

Indian Rock Subdivision at all times material to the action and as of the 8th day of August, 1951, was a part of Salt Lake City and subject to the provisions of the Salt Lake City Zoning Ordinance of which the Court took judicial notice, (R. 77 ¶ 20) which fact was not referred to in the Court's final Order (R. 126-127). See the discussion of this in the March 4th proceedings (R. 163).

ARGUMENT

Point I. The trial Court correctly ruled that the Restrictive Covenants of the Indian Rock Subdivision permit continued occupancy of duplexes under the facts of this case.

Point II. No trial is necessary to interpret the Restrictive Covenants.

Point III. The Court did not err in refusing to permit new counsel to change the theory of the action.

POINT I. THE TRIAL COURT CORRECTLY RULED THAT THE RESTRICTIVE COVENANTS OF THE INDIAN ROCK SUBDIVISION PERMIT CONTINUED OCCUPANCY

OF THE DUPLEXES UNDER THE FACTS OF THIS CASE.

All of the Restrictive Covenants must be read together in order to construe Covenant I.

It must be borne in mind also that under Covenant III it is contemplated that during construction or prior thereto there will be approval of plans, design and location which then provides "in any event, if no suit to enjoin the erection of such building or the making of such alterations has been commenced prior to the completion thereof, such approval will not be required and this Covenant will be deemed to have been fully complied with * * *." (R. 54).

The words "permitted to remain" in Covenant I must therefore be read in connection with the remedy provided in Covenant III with the result that the building shall not "be permitted to remain" if action is taken prior to the completion of construction.

The Court must also keep in mind that Covenants V, VI, VIII and IX relate specifically to use of the property, distinguishing those from Covenants I, II, III and IV which relate to the construction of improvements of the property.

The Craner home has been occupied as a duplex from 1955 to the present time (Craner Deposition Page 2-3; Answers to Interrogatories 2 and 3, [R. 56-57]); and the Gee home has been occupied as a duplex since its completion in 1961 (Gee Deposition Page 19).

If there were nothing before the Court except the language quoted at Page 5 of appellants' Brief, then respondents agree that many courts and perhaps the majority of courts have held that such language would cover use of improvements on property as well as the construction thereof. This is the conclusion of Thompson on Real Property, §3167, P. 166. An extensive annotation at 14 A.L.R. 2d 1376, 1381, 1432 to 1436 is quite equivocal. Respondents submit that *Jordan v. Orr,* 209 Ga. 161, 21 S.E. 2d 206 (1962), is a case close to the facts of the case at bar, whereas appellants do not cite any analogous case.

In support of respondents' admission that Covenant I standing alone could well be interpreted in favor of appellants, we note their case *Walker v. Haslett,* 44 Cal. App. 394, 186 P. 622, where the words in the covenant were: "no building or structure whatever, other than a first class private residence * * * shall be erected, placed or permitted on said premises." The Court relied on the word "private" as proscribing a "double house" and the word "permitted" was what made this a use covenant.

Hooker v. Alexander, 129 Conn. 433, 29 A.2d 308, provided that grantee "will not erect or maintain on the premises any building except one one-family dwelling house" and the Court found the word "maintain" to relate to use. The same word "maintain" was the basis of the decision in *Simons v. Work of God Corporation,* 36 Ill. App. 2d 199, 183 N.E.2d 729 (1962), which is

cited in the same manner and on the same basis in 20 Am. Jur. 2d, *Covenants, Conditions & Restrictions*, §190, P. 759, Note 7.

Because of the words "permitted to remain" in Covenant I it seems useless to embark upon consideration of the general proposition which appellants make that some courts construe the words "construct" or "erect" or "shall be first class residences" as relating to construction as well as use whereas other courts give the opposite interpretation.

Covenants I, II, III and IV relate generally to construction and Covenants V, VI, VIII and IX relate generally to use and therefore, the words "permitted to remain" could well be construed as a permission to remain during the process of construction only since there is no proscription of such use in Covenants V, VI, VIII and IX. Respondents do not rely on this argument since it would be conjectural. There must be read in connection with Covenant I the more explicit Covenant III, which provides a specific procedure to be followed by lot owners and builders and contemplates specific remedy by other lot owners in the subdivision but limits that remedy to the period during which there is construction. Plainly in this case we are well past that period and that is why demolition of the building was withdrawn as an issue by the original counsel for plaintiffs under the stress of argument at the Pre-Trials. Covenant I and the words "permitted to remain" appear as part of the construction words

and must be interpreted in the framework of the construction process in Covenant III and distinguished from the use covenants.

20 Am. Jur. 2d, *Covenants, Conditions & Restrictions,* § 190, reflects the argument upon which respondents here rely. Section 189 points out a division of the authorities on whether a restriction concerning construction or building is applicable to later use of the land and Section 190 reaffirms this by stating:

> "Similarly, a covenant against the erection of a building other than a one-family or single dwelling house has been held to restrict the use of the building when erected to one-family purposes.
>
> "Other courts, however, take the view that a restriction against the erection of a building other than a dwelling house is a restriction only as to the type of construction and not as to the subsequent use of the structure, *particularly where another restriction expressly prohibits certain uses.*" (Emphasis added).

In support of this view, this treatise cites the annotation at 14 A.L.R.2d, P. 1433, and the following cases: *Neptune Park Association v. Steinberg,* 138 Conn. 357, 84 A.2d 687, 690 (1951); *Daniels Gardens, Inc. v. Hilyard,* 29 Del. Ch. 336, 49 A.2d 721, 723 (1946); *Jones v. Park Lane for Convalescents,* 384 Pa. 268, 120 A.2d 535, 538 (1956); *Jordan v. Orr,* 209 Ga. 161, 71 S.E.2d 206 (1952); and *Ratkovich v. Randell Homes, Inc.,* 403 Pa. 63, 169 A.2d 65 (1961).

In *Neptune Park*, supra, the use of defendant's fourteen room house as a common living place for families was held not a violation of a zoning ordinance limiting use to single family dwellings or a restrictive covenant against erecting buildings except dwelling houses. In reaching its decision, the Court stated:

> "That it was the intent of the parties to make this covenant apply only to the nature of the structure to be erected on the land and not to limit the use of it to occupancy by a single family is made abundantly clear by the fact that there is another covenant in the deed which does control the use of the property. We refer to the covenant that 'no public hotel, public bathing house or club house, shop, store, saloon or other place of business shall be erected or maintained on the lot here conveyed.' This covenant does prohibit maintenance of the structures named as well as their erection. It prohibits uses which might otherwise be made of buildings which structurally were in the form of dwelling houses. If it had been the intent of the parties to prohibit the use of any dwelling house erected within the development by more than one family, they would naturally have so specified in this covenant in connection with the prohibition of hotels."

Daniels Gardens, Inc. v. Hilyard, supra, involved a situation where the plaintiff owned all of a housing development of 350 dwellings, many of which had been sold and where two buyers had converted a living room into a delicatessen and grocery store, and into a pickup station for dry cleaning and laundry, respectively. A single deed covered the entire tract and each lot therein

and contained two restrictions pertinent here and which were considered by the Court:

> "1. All lots * * * shall be known and described as residential lots * * * . No structure shall be erected, altered, placed or permitted to remain on any residential building plot other than one single family dwelling * * *."
>
> "4. No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood."

In advising a Decree of Dismissal the Court considered the contentions of the parties much as they are being advanced in the case at bar, and with language almost identical with our Covenants I and V, and noted that rules of strict construction apply and that words will be given their ordinary meanings, concluding:

> "As the words used in the first restriction are generally understood today, the restriction deals only with the type of structure and not with the use of such structure. * * *
>
> "Another reason exists which in part bulwarks the conclusion I have reached with respect to the first restriction. The fourth restriction explicitly enumerates certain uses of the lots which are prohibited. If the first restriction is to apply to use as well as the character of the structure, then what possible function will certain language of the fourth restriction dealing with offensive trade serve?"

The Court cited, as containing construction covenants and use covenants as distinguished from each other the

following cases: *Carr, et al. v. Riley, et al.,* 198 Mass. 70, 84 N.E. 426; *Clark v Jammes, et al.,* 87 Hun. N.Y. 215, 33 N.Y.S. 1020; *Goodhue v. Cameron,* 142 App. Div. 470, 127 N.Y.S. 120; *Tannelle v. Hayes, et al.,* 118 Mass. 339, 194 N.Y.S. 181, and also 155 A.L.R. 1007, 1012.

In *Jones v. Park Lane for Convalescents,* supra, the Court made this distinction between building covenants and use covenants at Page 530 of 120 A.2d:

> "A building restriction and a use restriction are wholly independent of one another, and, in view of the legal principles above stated, the one is not to be extended so as to include the other unless the intention so to do is expressly and plainly stated; to doubt is to deny enforcement."

This language was with reference to what the Court held to be a building restriction in the following language:

> " * * * shall be used only for the purpose of erecting thereon prinvate dwellings * * *."

In *Jordan v. Orr,* supra, the plaintiff had been non-suited following trial by the Georgia District Court. The facts were that the defendant had made a basement room into a kitchen and had then rented three rooms and bath including the kitchen so that there were two entirely separate families in the dwelling. All deeds in the subdivision contained the same eleven restrictions of which the opinion quotes four. Two of these are as follows:

"(1) Said property shall be used only for residential purposes with the understanding that no duplex or apartment house is to be erected thereon, and shall not be used for cemetery, hospital, sanitarium, or any business purposes."

"(3) No use to be made of said property, or any part thereof, which would constitute a nuisance or injure the value of any of the neighboring lots."

Restriction (5) dealt with cost of the residences to be constructed and Restriction (11) gave all owners the right to enforce compliance with the restrictive covenants.

The Court held that installation of the kitchen was not such a structural change as to make the house a duplex since it had not been one before. It held that the first part of Restriction (1) applies to building and the latter part to use saying:

"Had the subdivider intended that each residence was to be used by only one family, this could have been made clear by so stating in that part of the covenant dealing with the use of the property."

And held that this covenant was not violated by occupying a building as a residence and renting out a portion to another family.

A similar rule is indicated by the summary statement in 155 A.L.R. 1007 at 1012 as follows:

"In some cases where a portion of the covenant restricted the 'erection' of structures, the court

have held that the use was not to be considered as also restricted, where the covenant elsewhere enumerated specific business or occupations which should not be permitted on the premises, and the use complained of was not one of those so excluded." Citing several cases.

Respondents ask the Court to interpret the Indian Rock Subdivision Restrictive Covenants in the light of the foregoing principles, giving strict construction to the covenants and the language thereof.

Covenants I, II, III and IV seem plainly to relate to construction matters, Covenant III relating to approval of plans and objections to plans and suits to enjoin "the erection of such building or the making of such alterations" and providing that if no suit to enjoin is commenced prior to the completion of the structure "such approval will not be required and this Covenant will be deemed to have been fully complied with."

Covenants V, VI, VIII and IX relate to use of the property and Covenant VII relates to moving a structure onto one of the lots. No issue is raised on this record under Covenants V, VIII and IX and Covenant VII is not involved. Covenant VI also relates to use and requires more careful consideration. Covenant VI refers to use of basements which are apparently included as one of the possible "outbuildings" and use of a basement "as a residence temporarily or permanently" is prohibited. Appellants have not argued that Covenant VI gives them a remedy; but the Court may inquire

into that possibility which seems to respondents to
appellants' strongest argument.

The Statement of Facts refers to the houses
respondents as each having a "walk-out basement floor
and then provides that each floor is independent
equipped as a residence and at Page 4 the Statemen
says that the respondents have rented out the "basemen
floors."

In the Interrogatories submitted by the plaintiff
to the defendants Craner, the lower unit of the Crane
home was referred to as "the lower floor of your prem
ises" and the "lower apartment" in the Interrogatorie
1, 3 and 4 (R. 56-57).

In the James F. Craner deposition the referen
is to "upstairs", and "downstairs", Page 2 and 3 an
also to the "lower portion" Page 3 and 4. One questio
asked about reference in the building permit to "an
of the basement rooms or basement area as being con
vertible into rooms under the permit" which Mr. Crane
answered "I don't remember."

In the Leland O. Gee deposition the reference
to the "lower element" (Page 15).

In his deposition, Earl R. Belnap, the builde
of the Gee home refers to the lower floor as a basemen
at Pages 8, 9, 14 (where it is also referred to as th
lower floor), 21, 23, (where it is also referred to
downstairs). At Page 30, this question was put to Mr
Belnap:

"Q. As a matter of fact, a good many of these split-level houses that are one family dwellings look exactly like this, isn't that so?"

and it was answered:

"A. Oh, it could be.

"Q. It's pretty hard to tell from the outside whether they're a duplex or a one-family dwelling, isn't it?

"A. Yes, that's why the neighbors shouldn't be complaining."

And in all of the depositions the buildings are referred to as duplexes.

Mrs. Vilate B. Gee in her deposition referred to the lower floor as "downstairs" (Page 15 and 25).

Therefore, it fairly appears that the two homes of respondents are two-level homes, appearing similar to other homes in the subdivision which are also two-level homes where neither level is below ground, except that at the back end or upper end, the lower floor terminates in the hill with no indication as to whether the upper floor so terminates in the homes of respondents or any of the other homes in the subdivision.

The covenant seems to be directed at a custom with some people to construct a basement with a temporary roof on it and dwell in that basement until the home can be completed, which is a sort of sub-standard residence in a high class subdivision. The covenant is susceptible of the interpretation also that an undesir-

able basement or a below ground basement should not be inhabited as a residence. Nothing in Covenant VI refers to apartments or self-contained units in basements. It would therefore appear that when the only portion of a house that exists is the basement, it is contrary to the covenant to use that basement for residential purposes, as though it were a tent, trailer, shack or garage or "other outbuilding". Exhibit 1 of the Leland Gee deposition is a photograph of the front of the Gee home and should be produced for the benefit of the Court.

In summary the respondents submit that the issue of demolition was eliminated as a concession to proper interpretation of the covenants. Construction of a duplex is proscribed by Covenant I but is approved by inaction under Covenant III. Use of the completed building must be measured by Covenants V, VI, VIII and IX, none of which applies. Had the preparer of the covenants desired to prohibit use of buildings as duplexes Covenant VI should have been expanded to cover such use whether the double units be side by side, front and back, or upper and lower. The reference to "basements" along with garages and outbuildings contemplates a basement unit without a superstructure since otherwise lower levels of two-level homes could not be used for residential purposes either as self-contanied units or as part of larger units.

This gives meaning to all the covenants and recognizes the logical treatment of constructoin, procedure (Covenant III) and use of the property and buildings

POINT II. NO TRIAL IS NECESSARY TO INTERPRET THE RESTRICTIVE COVENANTS.

Appellants contend that a trial of the case is needed as an aid in interpreting the Restrictive Covenants, citing *Metropolitan Investment Co. v. Sine,* 14 Ut. 2d 35, 376 P.2d 940. That case involved a controversy between parties to a restrictive covenant and states that the surrounding circumstances may be received in evidence. Here, all of the respondents were subsequent purchasers of the lots and took no part in any negotiations leading up to the preparation of the covenant.

> "In an action to enforce a restrictive covenant, evidence of the intent of the parties with regard to the creation and extent of the restriction is limited to the instrument itself, unless the meaning of the language used is uncertain or ambiguous, in which case the surrounding circumstances may also be taken into consideration." 20 Am. Jur. 2d, *Covenants, Conditions & Restrictions,* §322.

The evidentiary circumstances indicated there, are whether similar restrictions were inserted in other deeds, whether there were buildings at the time, abstracts of title, and similar things. These matters are all before the Court in this action in the form of exhibits which include plat of the subdivision with its date, the dates of acquisition of the lots by the various parties involved, depositions of the defendants, the deeds by which the defendants took title, and the Salt Lake City Zoning Ordinance which antedated the Restrictive Covenants.

The Court must first determine whether it regards the Covenants as ambiguous or uncertain, and if so, it should then determine whether the exhibits and the depositions before the Court are sufficient to supply the needed circumstances to assist in interpreting the covenants.

At Page 15 of their Brief, appellants state that it is the respondents' view that the Covenants are ambiguous as to whether they restrict use as well as construction. This is not the view of respondents. It is our view that the Covenants must be strictly construed and that as so interpreted they are not ambiguous and that the surrounding circumstances need not be delved into by the Court.

At Page 13 of appellants' Brief it is stated that: "Plaintiffs have invested in their dwelling sites and improvements in reliance upon covenants providing for restriction to single family occupancy." The only facts in evidence belie this statement. The Affidavit in Support of Defendants' Motion for Summary Judgment shows that most of the plaintiffs obtained deeds to their property after the Craners and the construction of their home for two family occupancy (R. 53).

It is doubtful whether a trial would shed further light on the surrounding circumstances.

POINT III. THE COURT DID NOT ERR IN REFUSING TO PERMIT NEW COUNSEL TO CHANGE THE THEORY OF THE ACTION.

At Page 6 of their Brief, appellants misstate the position of respondents. Respondents do not admit that plaintiffs have any remedy at the present time to have either of the houses demolished or altered. Our position is not so narrow as to contend that somehow the plaintiffs have lost a remedy to have the buildings demolished. The plaintiffs' former counsel were convinced that under the Restrictive Covenants they had no effective cause of action for demolition of the buildings, and therefore at Pre-Trial withdrew that as an issue. The position of defendants on this matter is that there is no basis for relief for demolition of the buildings under the Restrictive Covenants. Under Covenant III this remedy was available prior to the construction of the house, when the plans were filed and open to view, and during the course of construction and not thereafter. Secondly, plaintiffs desired no issue on this partly because they believed their cause of action was deficient and partly also because they really were not seeking to change the houses of defendants but only the use of those houses. And thirdly, since plaintiffs acting through their counsel went through the Pre-Trial procedure without making an issue on this point and specifically advised the Court that they did not desire this as an issue, there is no occasion at the present time to change this commitment.

Once the Pre-Trial Order has been made, the modification of it is for the discretion of the Court. There is no obligation of the Court to permit new counsel to change the position of the parties after there has been full argument.

The Amended Complaint plainly seeks relief by demolition or alteration of the houses of defendants. At Pre-Trial conferences it is appropriate to limit the issues of fact and law (Rule 16 Utah Rules of Civil Procedure), particularly when there is a Motion for Summary Judgment as was the case here. Counsel were free to make a record on this point and preserve it for this Court on appeal had they desired to do so. Present counsel suggests that former counsel were derelict in abandoning the issue. However, the parties are bound by actions of their counsel and as the Court commented in the proceedings here on March 4, 1966, the issue of demolition was withdrawn because former counsel believed they could not prevail on it under the Covenants and that the case had been thoroughly explored by former counsel and the law does not favor the shifting of lawyers to get a new chance at old questions and noted also that other persons had intervened in behalf of the plaintiffs which the Court did not desire to encourage (R. 157 to 158).

CONCLUSION

The trial Court properly limited the issues in the case through the Pre-Trial procedure and made a sound interpretation of the Restrictive Covenants as limiting duplexes at the construction stage.

There is no need for a trial in the case as the circumstances surrounding the execution of the Covenants were before the Court by Answers to Interrogatories.

depositions of the parties, and exhibits offered at the Pre-Trial.

There was no artifice or misunderstanding in elimination of the demolition issue and no obvious merit in it under the facts of this case.

The Order of the District Court dismissing the Complaint should be affirmed.

Respectfully submitted,

RICHARDS, BIRD AND HART

By Richard L. Bird, Jr.
Attorneys for Respondents Craner

716 Newhouse Building
Salt Lake City, Utah

ALAN H. BISHOP
Attorney for Respondents Gee

201 State Exchange Building
Salt Lake City, Utah