

CITY OF POWELL  
Minutes of 2/4/2020  
Exhibit 1

**From:** [William Souder](#)  
**To:** [Frank Bertone](#); [Daniel Swartwout](#); [Jon Bennehoof](#); [Tom Counts](#); [Heather Karr](#); [Brian Lorenz](#); [Melissa Riggins](#); [Karen Mitchell](#); [Mary Anne Souder](#)  
**Subject:** IMPORTANT - Please add to the record - The Retreat Zoning Text - 2020-02-04 Meeting  
**Date:** Tuesday, February 4, 2020 5:59:51 PM  
**Attachments:** [2020-02-04\\_SUMMARY-SOUDER-CONCERNS\\_TEXT-AND-CASE-REFERENCES.pdf](#)  
[2009-12\\_CORRESPONDENCE\\_POWELL\\_RECORD.pdf](#)

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Good day all, we ask that this email as well as the attachments be added to the record for the coming City Council meeting today 2020-02-04.

**Reference:**

**Title:** The Retreat Zoning Text

**Type of Review:** Major Amendment to a Final Development Plan Text

**Location:** The Retreat & Cardinal Hill

Dear Powell City Council Members,

My name is William Souder. My wife and I, Mary Anne Souder, live at 559 Cardinal Hill Lane, Powell Ohio 43065. According to our deed, the property is lot number 462 of Cardinal Hill Subdivision.

ATTACHMENT 1: 2020-02-04\_SUMMARY-SOUDER-CONCERNS\_TEXT-AND-CASE-REFERENCES

ATTACHMENT 2: 2009-12\_CORRESPONDENCE\_POWELL\_RECORD

We do not approve of this development text (additional reasons attached) but we continue to believe there can be a solution to balance property rights and public interest.

We continue to question why the document cannot be changed to address the numerous concerns and further have not received information from the applicant nor The City of Powell as to why "public health, safety, convenience, and/or welfare" is still not served by making the suggested changes or removals.

We thank you again for your time and consideration.

Mary Anne Souder and William Souder

SCHERNER & SYBERT, LLC

ATTORNEYS  
153 SOUTH LIBERTY STREET  
POWELL, OHIO 43065

TELEPHONE 614.785.1700  
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CURTIS J. SYBERT\*  
BENJAMIN SCHERNER  
BRANT K. RHOD  
\*ALSO LICENSED IN PENNSYLVANIA

December 24, 2009

SCOTT & JOANNA ATWAY  
545 Chardonay Lane  
Lewis Center, Ohio 43035

RECEIVED

DEC 31 2009

CITY OF POWELL, OH

RE: Your Residential Building Project  
Lot 2241 Robinson Subdivision, part of Phase I Retreat Subdivision  
Also Known as 1080 Retreat Lane, Powell, Ohio

Dear Scott & Joanna:

As we have discussed, our firm has completed our legal research, investigation and review of deed restrictions that apply to your lot and the October correspondence from the group calling themselves "The Retreat Architectural Control Committee". It is our legal opinion that this group is advisory only and cannot and does not have any authority or ability to affect your building project. Further, it is our legal opinion, that the members of Phase I of the Retreat, to which your lot belongs, have voluntarily waived their right to form a legally binding Retreat Architectural Control Committee as envisioned by the Phase I Declaration of Restrictions and Protective Covenants. Accordingly, our legal opinion is that you should go forward with permitting of your plans and after compliance with the city requirements, begin construction of your residence.

The following is the basis of the above opinions:

The current group that is calling themselves "The Retreat Architectural Control Committee" is advisory only. While the Phase I Declaration of Restrictions and Protective Covenants give some limited powers to an entity with the same name, they also describe the formation of that entity to include only a majority of the lot owners in Phase I. After the Phase I Declaration of Restrictions and Protective Covenants additional restrictions were prepared for the additional sections or phases of the Retreat. Each phase and its set of restrictions are separate not only in terms of membership, but also in the actual restrictions that apply to that phase's lot owners. As they are written, each phase of the Retreat is to have a separate and distinctly different "Retreat Architectural Control Committee" applying that phase's restrictions to the lot owners of that phase. There are no provisions in existence that allow for a single committee to conduct reviews or issue decisions regarding all of the different phases of the Retreat. The current group calling themselves "The Retreat Architectural Control

Committee" does not comply with any of the declarations of restrictions and protective covenants from any of the various phases of the Retreat.

Interestingly, this reality of the different restrictions of each phase of the Retreat was recognized by the homeowners and they previously sought a legal opinion from their own independent legal counsel, Charles Williams. As published by The Retreat Homeowners Association, Attorney Williams advised and concluded the following:

- a. *The deed restrictions for the various sections of The Retreat were poorly written by the original developers.*
- b. *In order for the Retreat to maintain any architectural review committee, it must be done by section, and in accordance with that respective section's deed restrictions. In other words, rather than having one homogeneous committee it would be necessary to create seven committees with each respective building phase/section.*
- c. *The Retreat Association, because it is not recognized in any of the deed restrictions, cannot act as an oversight body. It has no authority to enforce deed restrictions.*
- d. *The only legal remedy that we as homeowners have in order to challenge a proposed improvement within our section is by legal action against the offending homeowner. The Retreat Association and the Retreat Architectural Committee in their current embodiment do not possess legal authority to enforce deed restrictions.*

Published to all Retreat Homeowners through "The Retreat Beat" neighborhood newsletter, February, 2006 attached.

The homeowners then listed the following options:

1. *Keep the RAC in its current voluntary form and communicate to the homeowners and the City of Powell that compliance with RAC is strictly voluntary.*
2. *Attempt to form individual RACs by section (seven required) per deed restrictions. The individual RACs would replace the current RAC. Inform Powell of this change. The existing member of the RAC could assist with the formation of individual RACs, and act as an 'advisory group' to assist sections with formation and governance.*
3. *Do nothing, and form no new Retreat Architectural Committee. The City of Powell would act on its own to issue permits, but only by requiring compliance to city building codes.*

"The Retreat Beat" neighborhood newsletter, February, 2006 attached.

Given that there currently exists only one group calling themselves "The Retreat Architectural Control Committee" they clearly choose option number three. This is further confirmed by the group's use of the following disclaimer in their minutes:

**DISCLAIMER. THE RAC AND THE RAC REVIEW IS ESTABLISHED FOR ADVISORY PURPOSES ONLY. THE RAC HAS NO AUTHORITY TO EITHER APPROVE OR DISAPPROVE IMPROVEMENTS IN THE RETREAT NOR DOES IT HAVE ENFORCEMENT AUTHORITY.**

The Retreat Architecture Review Committee Minutes, 2006 attached.

The current group calling themselves an RAC is no different in form or function than the one that existed in 2006. The current single group is comprised of members of several different phases/sections and has no legal authority to exist, no legal authority to require plans submission, no legal authority to perform a review, no legal authority to offer opinions, no legal authority to issue approvals or non-approvals, no legal authority to publish its opinions to the City of Powell, and absolutely no legal authority to tell you that "[t]he City of Powell will not issue a building permit without RAC approval." Such a statement is almost laughable. If the City of Powell were to withhold building permits solely on that basis then the City's failure to issue permits would be actionable.

Where to go from here? Given that the homeowners of Phase I of the Retreat have waived their rights to maintain an RAC and given the purely advisory role of the current group using the title RAC, our legal recommendation is that you do the following:

1. Confirm compliance with all Phase I Declaration of Restrictions and Protective Covenants not related to RAC approval;
2. Confirm compliance with all applicable building codes;
3. Submit your plans to the City of Powell for review based on its code; and,
4. Begin construction of your residence.

I hope this addresses your questions and concerns. Please feel free to share this opinion letter as you feel necessary.

Very truly yours,



Benjamin Scherner

Attachments

# *The Retreat Beat*

## *The Neighborhood Newsletter of The Retreat, Powell, Ohio*

*Sponsored by The Retreat Homeowners Association*

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*This is a special issue of the Retreat Beat devoted to summarizing the current status of the Retreat governance structure, and the actions that have occurred over the past several months.*

*As was reported in previous issues, The Retreat Association Board of Trustees has undertaken the task of examining the structure of our organization and that of the Retreat Architectural Committee, in order to insure that we were complying with the Deed Restrictions and the Board Constitution, which outline the requirements for these organizations.*

*In order to provide some background for those homeowners who are new, or those who have not had an in-depth knowledge of this issue, the following points are necessary:*

- 1. The Retreat Association is a voluntary homeowners association which was formed in 1984. It is the organization which annually elects Trustees, collects annual dues, and oversees activities ranging from landscape maintenance, signage and guardrail maintenance, social gatherings, new resident greeting and orientation, the resident directory, and the Retreat Beat newsletter. The Board also occasionally interacts with the Powell Police department to insure security and safety measures are addressed, and to maintain awareness of trends in the area. This group meets formally six times each year in a member's residence, with minutes and reports documented. These meetings are, and will continue to be, open to all Retreat Homeowners. There is an Annual Meeting of the members of The Retreat Association, typically held in March or April, during which elections occur, and a summary of the previous year is given.*
- 2. The Retreat Architectural Committee is a voluntary group of homeowners who meet on a monthly basis to review and advise homeowners on property improvements. This group was formed since the early 1990s, and acts independently of the Retreat Association. The existence of an Architectural Review Committee is defined in the Deed Restrictions for each section of the Retreat. The overarching mission of the RAC is to preserve the natural beauty of the neighborhood landscape and to insure quality, architecturally appropriate modifications be made to new and existing homes in the Retreat, according to the Deed Restrictions. Historically, Powell building permits require RAC approval.*
  - a. The Retreat community is comprised of 159 total homes or parcels, and these are divided into seven separate phases. Each of these phases operates under a separate set of Deed Restrictions, although there is much similarity between them. Because the Retreat was built by multiple developers over a period of time, the result was a complicated deed restriction situation.*
  - b. The Retreat Architectural Committee has served over the past several years as an interpretative body of all of the deed restrictions. Their purpose has been to evaluate plans submitted by homeowners, and provide recommendations to the City of Powell as to the compliance of those improvements with the applicable deed restrictions, based on where that residence might be located. In most situations this process worked well, and harmony was maintained as homeowners continued to improve their properties while maintaining the character and rural integrity of The Retreat.*

3. Recently, certain decisions by the Retreat Architectural Committee have been challenged by a few homeowners who disagreed with interpretation of language contained in the deed restrictions. These challenges have begun to involve legal recourse against the RAC by individual homeowners, as they sought to have their position maintained to alter their property regardless of deed restriction interpretation.
4. Coinciding with the recent increase in challenges has been the City of Powell's debate over how to recognize architectural committees, and how to incorporate homeowner association recommendations for property improvements in the building permit process.
5. The Retreat Association, although a separate body from the Retreat Architectural Committee, nonetheless felt it necessary to explore the situation through an independent legal counsel, whose expertise is in the area of homeowners associations. A task force was formed, and a comprehensive list of questions was prepared using information from both the Retreat Association and the Retreat Architectural Committee. On November 10, 2005, a meeting with selected attorney Charles Williams was held in his office. The following points were the result of Mr. Williams review:
  - a. The deed restrictions for the various sections of The Retreat were poorly written by the original developers.
  - b. In order for the Retreat to maintain any architectural review committee, it must be done by section, and in accordance with that respective section's deed restrictions. In other words, rather than having one homogeneous committee it would be necessary to create seven committees with each representing their respective building phase/section.
  - c. The Retreat Association, because it is not recognized in any of the deed restrictions, cannot act as an oversight body. It has no authority to enforce deed restrictions.
  - d. The only legal remedy that we as homeowners have in order to challenge a proposed improvement within our section is by a legal action against the offending homeowner. The Retreat Association and the Retreat Architectural Committee in their current embodiment do not possess legal authority to enforce deed restrictions.

So, now that you have the background, where do we go with this? What are our options? How do we preserve the beauty, integrity and property values in our neighborhood? We understand from our legal counsel that we have the following options:

1. Keep the RAC in its current voluntary form and communicate to the homeowners and the City of Powell that compliance with RAC is strictly voluntary.
2. Attempt to form individual RACs by section (seven required) per deed restrictions. The individual RACs would replace the current RAC. Inform Powell of this change. The existing members of the RAC could assist with the formation of individual RACs, and act as an 'advisory group' to assist sections with formation and governance.
3. Do nothing, and form no new Retreat Architectural Committee. The City of Powell would act on its own to issue permits, but only by requiring compliance to city building codes.

One important point to consider is Powell's eventual position on this matter. It will be necessary for the Retreat to ascertain Powell's position on enforcement and support for community deed restrictions, and their recognition of neighborhood architectural committees in future decisions. Without Powell's support, our future decisions may be pointless.

Many people have been involved in both the Retreat Association and the Retreat Architectural Committee over several years. They have contributed countless hours and dedicated their decisions

and opinions toward the betterment of our community, and the preservation of our property values. Their actions were well-intentioned and guided by the best information that we had at the time. Powell's uncertain opinion, combined with the need to avoid legal dispute has brought us to this point.

It is important to understand that no decisions have been made to move forward. The next step is to incorporate as much homeowner feedback as possible in order to arrive at a consensus opinion. The Retreat Association will be evaluating your input and discussing our next step in our future meetings. We are considering a survey of all homeowners on the issue, as well as a meeting, possibly held at the City of Powell's offices, to facilitate a potentially large group of interested Retreat residents.

We hope that you feel that this communication has been thorough, and that you have a better understanding of the issues. We look forward to moving ahead and continuing our dedication to maintaining our community's appearance and value. We will continue to communicate our progress with you, and appreciate your continued support.

Sincerely,  
**The Retreat Association Board of Trustees**

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### ***Retreat Homeowner Survey***

Please read the following questions and provide us your response. You may either reply on-line at [RetreatHomeowners.com](http://RetreatHomeowners.com) (our website) and sending your reply to [webmaster@retreathomeowners.com](mailto:webmaster@retreathomeowners.com), or detach this survey and return it via mail to: The Retreat P.O. Box 240 Powell, OH 43065. You may choose to remain anonymous, however, we are seeking as many replies as possible. We thank you for your input and opinions. We will be discussing the results of this survey at the annual meeting in March.

1. What section (phase) of the Retreat are you in? \_\_\_\_\_
2. Do you have a copy of your deed restrictions?      Yes      No
3. Have you read the deed restrictions and do you understand them?      Yes      No
4. Do you feel that it is important that the Retreat maintain a review process to ensure that home improvements (landscape, building additions, fences, etc.) meet the standard of your neighborhood section as set forth in the Deed Restrictions?  
Yes      No
5. Should this process be voluntary (strictly advisory in nature as a helpful free service) or mandatory with compliance required?
  - a. Voluntary
  - b. Mandatory
  - c. Neither; I do not favor a process at all.
6. If you want a mandatory review process, are you willing to serve on the committee that would decide if your neighbor's project is acceptable as described by the Deed Restrictions for your section?      Yes      No

***Deadline for returned surveys is Friday, March 11th***



## **The Retreat Architectural Review Committee (RAC) of The Retreat (Homeowner's) Association**

### **1. Purpose**

The purpose of the RAC is "to manage the architectural review process for the members of The Retreat Association,...[which is] generally understood to be the review and recommendation of homeowner property improvements within The Retreat."<sup>1</sup>

### **2. Composition & Terms**

The RAC will be composed of from 7 to 15 homeowners. Every effort will be made to draw representative members from the seven sections/phases of The Retreat (Sections I-V, Cardinal Hill and By The River). Membership on the committee is open to any member of the Association. Members will be nominated by the current members of the RAC or by any other homeowner and elected at The Retreat Association's annual meeting.

The chair of the RAC will be appointed by The Retreat Association's Board of Trustees. At least one Retreat Association Board of Trustees Member will be represented on the RAC to serve as a liaison between the RAC and the Board.

Members shall serve 2 year terms, which are renewable. The committee shall strive to have a mix of new members and members who have served at least one term to provide continuity to the review process.

### **3. Meetings**

- a. Regularly scheduled meetings of the RAC will be held on the second Saturday of each month at 10:00am if reviews are pending. Announcements of such meetings shall be posted on the Association's website. Expedited reviews may be requested by the homeowner. Expedited reviews may be done by polling the members of the RAC by telephone or email.
- b. Regularly scheduled meetings are open to the public and to residents who submit projects.
- c. A quorum (majority) of the committee membership will be needed to conduct business.
- d. Meetings shall be conducted using Roberts Rules of Order as a guide and at a level of informality considered appropriate by the chair.
- e. Minutes of the meetings will be kept and be available to current members of The Retreat Association. Proceedings of the meetings will be reported to the next The Retreat Association's Board of Trustees meeting.

### **4. Review Process**

- a. Projects may be submitted to the RAC by either the homeowner or his contractor. Projects should be submitted at least ten (10) days before the next regularly scheduled meeting of the RAC. Projects should include professionally prepared architectural/building plans. These plans should include (where applicable): site plan, floor plans, elevation drawings, landscape plan, building materials. Three (3) sets of plans should be submitted to the committee. Sketches or drawings are not acceptable. The committee will keep a set of plans for its files.
- b. The committee will review each project and give its recommendations to the homeowner in writing (see Exhibit 1). Recommendations will be arrived at by voting of a simple majority of those members attending the meeting.
- c. Recommendations will be based on "The Retreat Community standards and existing deed restrictions"<sup>1</sup>. Such recommendations may include to go forward with the project as submitted, or to modify the project. The committee may also withhold its recommendation.

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<sup>1</sup> Motion approved at The Retreat Association Board of Trustees meeting, August 7, 2006



**Below you will find Ohio Court Case decisions that are relevant to our concerns with this development text.**

**DEVELOPMENT TEXT – “good faith effort to accommodate”**

iii. The ARC has acted in recommending a denial of such application and listed the reasons behind such recommendation, but the Zoning Administrator finds the homeowner has made a good faith effort to accommodate the concerns of the ARC.

**PROBLEMS / CONCERNS**

What is a good faith effort to accommodate? If it is only a recommending body why is there a duty to accommodate?

The Zoning Administrator is being asked to decide if the homeowner accommodated the concerns of the ARC. Isn't that an arbitrary decision given there are no guidelines for the ARC or the City Staff?

**STATE, EX REL. SELECTED PROPERTIES, INC. V. GOTTFRIED**

*"Administrative power and discretion may be and usually are vested in designated departments, boards or officials or in the municipal legislative body itself to grant, deny or revoke building permits. However, the authority vested in them can not be a power of arbitrary decision in each case, uncontrolled by any general rule. In other words, the discretion must be made subject to a standard or rule to operate uniformly in all cases. An ordinance conferring upon officials unrestricted discretion in the granting or refusal of building permits is a denial both of equal protection and due process of law. Certainly, an ordinance conferring arbitrary and despotic power in this respect is void. Indeed, an ordinance can not commit to the municipal legislative body itself, any more than to administrative officials, uncontrolled discretion as to permits for the erection of buildings and structures. Nor does charter power to regulate the granting of permits authorize the delegation to an officer or committee of power to make restrictions and regulations."*

"In accordance with settled principles that no American legislative body can constitutionally and validly delegate to administrative officers an exercise of discretionary power which is arbitrary, it is established that any municipal ordinance which vests an arbitrary discretion in public administrative officials with reference to the rights, property, or business of individuals, without prescribing a uniform rule of action, making the enjoyment of such rights depend upon arbitrary choice of the officers without reference to all persons of the class to which the ordinance is intended to be applicable, and without furnishing any definite standard for the control of the officers, is unconstitutional, void, and beyond the powers of a municipality. With specific reference to property, the courts have often stated that if an ordinance upon its face restricts the right of dominion, which the owner might otherwise exercise without question, not according to any uniform rule, but so as to make the absolute enjoyment of his own property depend upon the arbitrary will of the municipal authorities, it is invalid, because it fails to furnish a uniform rule of action and leaves the right of property subject to the will of such authorities, who may exercise it so as to give exclusive profits or privileges to particular persons."

#### DEVELOPMENT TEXT

1.2 (A) .... Where the (ARC) is hereby created to  
2. make recommendations to ensure the modifications are consistent with the standards of the subdivision - promoting the maintenance of beauty, environmental harmony, and integrity of the neighborhood

#### PROBLEM / CONCERN

There are no specific written guidelines as to what the ARC will accept or object. There is too great a possibility that the outcome can be exercised in an arbitrary, capricious, and unreasonable manner.

#### PESTWICK LANDOWNERS' ASSOCIATION v. UNDERHILL

*Here, there are no written or de facto guidelines to give notice to a lot owner as to the kind of fence which will qualify for the Architectural Committee's consent. The minutes of the Architectural Committee reflect this: "\* \* \* the Board's policy \* \* \* to consider each and every request for a fence by it's [sic] individual merits. \* \* \*" In fact, there were no two fences alike in the entire development. Thus, the Underhills had no guidelines at all in submitting their plans, and the Architectural Committee had no guidelines at all as to accepting or rejecting them. In other words, there is too great a possibility here that the consent restriction can be exercised in an arbitrary, capricious, and unreasonable manner. Dixon v. Van Sweringen Co., supra, at 69; Bailey Development Corp. v. MacKinnon-Parker, Inc., supra, at 316.*

*In one respect the association was not unreasonable. It rejected the Underhills' plans in part because they failed to meet the policy requirements of specificity as to "kind, shape, height, [and] materials" (paragraph 11[b] of the Declaration, supra). **However, the implication is clear that the Architectural Committee rejected the plans primarily because they were not "pleasing" enough. "Pleasing" alone, like "harmonious," is not enough of a guideline to insure that consent be given or withheld in a reasonable manner.***

## GENERAL LAW

### Chapter 5312: OHIO PLANNED COMMUNITY LAW

(M) "Planned community" means a community comprised of individual lots for which a deed, common plan, or declaration requires any of the following:

- (1) That owners **become members of an owners association** that governs the community;
- (2) That owners or the owners association holds or leases property or facilities for the benefit of the owners;
- (3) That owners **support by membership or fees, property or facilities for all owners to use.**

(A) **Any planned community in this state is subject to this chapter.** No person shall establish a planned community unless that person files and records a declaration and bylaws for that planned community in the office of the recorder of the county or counties in which the planned community is located.

## PROBLEMS / CONCERNS

Section 1.4 of this development text needs to be removed.

The city is giving power to the Retreat Association to create the ARC. In order for homeowners to join the ARC they must pay dues and become a member of the Retreat Association. The Retreat Association supports by membership or fees, property within the Retreat. Isn't this a Planned Community according to ORC 5312?

### **Shouldn't the Retreat Association be governed by the same rules as all other HOA's in Powell?**

According to the following case HOA's must prove they have standing to enforce claims against property owners. Attached to this email is a document written by the Retreat Association's own lawyer explaining to them why they have never and will never be able to make claims against property owners in the Retreat.

## LAKE MILTON ESTATE PROPERTY OWNERS ASSOCIATION, INC. v. WILLIAM HUFFORD

<http://www.supremecourt.ohio.gov/rod/docs/PDF/7/2018/2018-Ohio-4784.pdf>

*The Ohio General Assembly introduced Senate Bill 187 to establish requirements governing the formation and operation of a homeowners association, or what was termed "planned communities." SB 187 became Chapter 5312 of the Ohio – 8 – Case No. 17 MA 0163 Revised Code when enacted. Known also as the "Ohio Planned Community Law," it became effective on September 10, 2010. R.C. 5312.01.*

***The legal formation of a homeowner's association requires more than drafting documentation never registered with the secretary of state or filed with the recorder.***

#### DEVELOPMENT TEXT

1.4 Any activity, structure, or condition in violation of the Deed Restrictions of The Retreat prior to adoption of this Development Text for The Retreat shall not be considered a permitted non-conformance or approved pre-existing condition. Mechanisms for relief to address any such condition available to The Retreat prior to the adoption of this text shall remain available and are not precluded.

#### PROBLEM / CONCERN #1

Effect of Restrictive Covenants must be determined solely from their language. All Deed Restrictions had a written expiration date of 1/1/2020. They are dead and cannot be revived.

#### DRISCOLL v. AUSTINTOWN ASSOCIATES

*While a court has the authority to interpret the language of a restrictive covenant to determine the intent of the drafters, it cannot rewrite a covenant to create new restrictions.*

Pursuant to Driscoll, the language in these deed restrictions must be strictly construed against the limitations which they impose.

#### PROBLEM / CONCERN #2

The "mechanism for relief" mentioned in 1.4 no longer exists. Any entities that once existed no longer exist, the deed restrictions are expired therefore there are no "mechanisms for relief".

#### BARBATO v. SHUNDY

In Barbato, the property owner attempted to prohibit neighbors from building a detached garage on their property pursuant to a restrictive covenant which required approval from a corporation which was then defunct. The Fifth District held that a property owner could not unilaterally and arbitrarily assume that authority.

**"the restrictions are not enforceable because the rejection procedure no longer exists. A property owner cannot unilaterally and arbitrarily assume that authority, however capable he is of enforcing a clear cut restriction that requires no aesthetic or other judgment."**