IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARSHALL E. BELAGER-PRICE
AND BRENDA C. BELAGER-PRICE;
BRIAN E. PRICE AND RETHA A.
PRICE; RICHARD TUCKER AND
CAROLYN TUCKER; AARON D.
PUCKETT, JR. AND LESLIE PUCKETT;
AND MARY ANNE NARRON — APPELLANTS

V. — NO.: 2008-CA-02102

RICHARD LINGLE AND NAOMI
T. LINGLE — APPELLEES

BRIEF OF APPELLANTS

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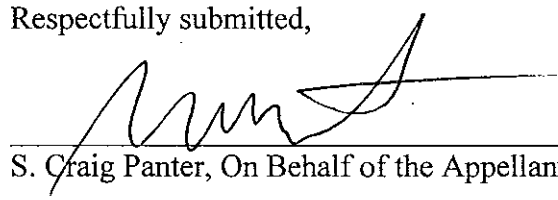
Oral Argument Requested

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Marshall E. Belager-Price and Brenda C. Belager-Price (Appellants);
2. Brian E. Price and Retha A. Price (Appellants);
3. Richard Tucker and Carolyn Tucker (Appellants);
4. Aaron D. Puckett, Jr. and Leslie Puckett (Appellants);
5. Mary Anne Narron (Appellant);
6. S. Craig Panter and Ronald E. Stutzman, Jr., Panter & Stutzman, PLLC, Counsel for Appellants;
7. Richard M. Lingle and Naomi T. Lingle (Appellees);
8. Pamela Hancock, Hancock Law Firm, PLLC, Trial Counsel for Appellants;
9. Ronald Henry Pierce, Pierce Law Firm, Counsel for Appellees; and
10. The Honorable Thomas Zebert, Trial Judge.

Respectfully submitted,



S. Craig Panter, On Behalf of the Appellants

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STATEMENT OF THE ISSUES

I. The Chancellor erred as a matter of law in ruling that the protective covenants at issue were ambiguous.

II. The Chancellor erred as a matter of law in ruling that the Appellees (hereinafter the "Lingles") could use the property for construction of a horse barn and the boarding of horses without contemporaneously using the property for a residence.

III. The Chancellor erred as a matter of law in ruling that the Lingles' intent to use the property for a single-family residence at some unknown, future date could justify a nonconforming use in the interim.

IV. The Chancellor erred when he failed to grant injunctive relief in favor of the Petitioners/ Appellants.

STATEMENT OF THE CASE

A. Course of the Proceedings Below

This is an appeal from a Final Judgment of the Chancery Court of Madison County, Mississippi denying a Petition to Enforce Covenants and for Permanent Injunctive Relief (hereinafter the "Petition to Enforce"). This case centers around the interpretation and application of the protective covenants for the Kristen Hill Subdivision in Madison County, Mississippi.

Appellants (who were the Petitioners in the lower court) are Marshall E. Belager-Price, Brenda C. Belager-Price, Brian E. Price, Retha A. Price, Richard Tucker, Carolyn Tucker, Aaron D. Puckett, Jr., Leslie Puckett and Mary Anne Narron. They are referred to collectively below as the "Homeowners".

All of the Homeowners (except for Mary Anne Narron) are residents of the Kristen Hill Subdivision. Although Ms. Narron does not reside in the Kristen Hill Subdivision, she was a general partner of Cherry Hill Plantation, Limited Partnership, the developer of the subdivision, and she joined in the Petition to Enforce in that capacity.

Appellees (who were Respondents in the lower court) are Richard M. Lingle and Naomi T. Lingle. The Lingles purchased a lot in the Kristin Hill Subdivision on June 14, 2007. The Lingles' lot is subject to certain protective covenants. The covenants state that the lot "can only be used to build and construct only one single-family residence and appurtenances thereto." *See* Trial Exhibit 5; *see also* Record page 61 (hereinafter "R.__").

On April 29, 2008, the Homeowners filed their Petition to Enforce. R. 1. It was alleged in the Petition to Enforce that the Lingles were engaged in construction of a horse barn on the lot in question and intended to board horses there without constructing a single-family residence. The Homeowners contended that such a use violated the applicable protective covenants, and they sought injunctive relief.[1]

In response, the Lingles filed an Answer and asserted numerous affirmative defenses, including the contention that the protective covenants were ambiguous. R. 33. The Lingles also asserted a counterclaim in which they alleged that the Homeowners had interfered with their right to quiet enjoyment of their property and had caused the Lingles mental suffering and emotional damages.

After the first two chancellors assigned to the case entered Orders of Recusal, the Mississippi Supreme Court appointed the Honorable Thomas Zebert as a Special Judge to

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[1] As explained in the Petition to Enforce, there was also an issue regarding a trailer the Lingles had parked on the property. This issue is now moot, as the Lingles have removed the trailer.

preside over the case. R. 57.

This matter proceeded to trial before Chancellor Zebert on October 21, 2008. During the course of the trial, all of the Homeowners (with one exception) testified, as did Ms. Karen Deem, another individual involved in the original development of the subdivision. Mr. Lingle was the only witness to testify for the defense. The Lingles did not offer any proof in support of their Counterclaim.

On November 13, 2008, the Chancellor entered his Final Judgment and Findings of Fact Including Conclusions of Law. R. 60; Record Excerpts page 004 (hereinafter "R.Ex. ____"). The Chancellor ruled that:

-The protective covenants were ambiguous. R. 75-77; R.Ex. 019-021.

-Since the protective covenants were ambiguous, they did not preclude the Lingles from constructing the horse barn and using the property for boarding horses as long as the Lingles intended to construct a single family residence on the land at some future (but unknown) date. R. 77-82; R.Ex. 021-026.

As a result, the Chancellor denied all relief requested by the Homeowners. The case was dismissed with prejudice. R. 83; R.Ex. 027.

Trial counsel for the Homeowners filed a Motion to Reconsider on December 1, 2008. R. 85; R.Ex. 029. The Chancellor denied the Motion to Reconsider on January 6, 2009.[2] R.Ex. 032.

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[2] The Court's Final Judgment Regarding Motion for Reconsideration of the Court's Prior Judgment was not included by the Circuit Clerk in the initial Record and is, therefore, included in the Supplemental Record.

The Notice of Appeal was filed on December 10, 2008. R. 105.[3]

B. Statement of Relevant Facts

The Kristen Hill Subdivision is located on Gluckstadt Road in Madison, Mississippi. The subdivision contains 5 lots ranging in size from 7.45 acres up to 13.10 acres. A copy of a plat of the subdivision can be seen as part of Trial Exhibit 8.

With the exception of the lot purchased by the Lingles, all of the lots in the Kristin Hill Subdivision contain large single-family residences and are used for that purpose. Photographs of the area, and of the homes in particular, can also be seen as part of Trail Exhibit 8.

Plaintiff Mary Anne Sharpe Narron is a General Partner of Cherry Hill Plantation, Limited Partnership, the original grantor of each of the lots. Cherry Hill Plantation, L.P. owns property contiguous to the above lots to the north, west and directly across Gluckstadt Road.

The lots in the Kristin Hill Subdivision are all subject to protective covenants restricting use to single-family residences and, with the exception with the lot owned by the Lingles, are being using consistent with those protective covenants.

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[3] The Court will note that the Notice to Appeal was filed prior to the time the Chancellor denied the Motion to Reconsider. This reason is that Appeal counsel for the Homeowners noticed that the Motion to Reconsider had been filed more than 10 days after entry of the Final Judgment. This appeared to make the Motion untimely. *See* Rule 59, M.R.Civ.P.; *see also* Rule 4(d), M.R.A.P. [altering the deadline for the filing of a notice of appeal if a party has filed a ***timely*** post-trial motion]; *see also Anderson v. Anderson*, 2007-CA-00879-COA (Miss. Ct. App. 4-14-2009) [a motion to reconsider is treated as Rule 59 motion, and a chancellor is without jurisdiction to grant an untimely motion to reconsider].

Under these circumstances, appeal counsel for the Homeowners thought it appropriate to go forward with the Notice of Appeal. If this conclusion was erroneous, however, then under Rule 4, M.R.A.P., the notice of appeal "ripened" once Chancellor Zebert denied the Motion to Reconsider. *See* Advisory Committee Historical Note and the Comment regarding Rule 4(d), M.R.A.P.

The Lingles' Warranty Deed contains protective covenants "as a burden and encumbrance on the property" and which "run with the title to the property." Covenant (1) is relevant to the present suit:

> (1) **The subject property can only be used to build and construct only one single family residence and appurtenances thereto** (the term "single" family residence as used herein shall be construed to exclude among other things, hospitals, duplex houses, apartment houses, churches and schools and to exclude commercial and professional use, except a personal office in the home); . . .

Trial Exhibit 5 (emphasis added).

In the lower court, there was never a dispute as to whether the Lingles were aware of the protective covenants in their Warranty Deed. In fact, as a real estate attorney, Mr. Lingle had his own office prepare his Warranty Deed. Trial Exhibit 5, p. 3. The only dispute was as to the meaning of the protective covenants.

In 2008, the Homeowners became concerned when they observed a trailer on the Lingles property (in violation of the one of the protective covenants) and learned that the Lingles were planning to construct a horse barn but not a residence on the property (in violation of another protective covenant).

The Homeowners were concerned about this nonconforming use and how it would affect the neighborhood as a whole and their own property values in particular. The testimony on this point can be found at Trial Transcript Vol. I, pages 13, 35, 53, 56, and 71.[4] None of the

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[4] In his Final Judgment, the Chancellor commented that the Homeowners had not put on evidence as to how the Lingles' nonconforming use would actually affect their property values. R. 79; R.Ex. 023. Of course, such evidence is not necessary to enforce a protective covenant. As long as the restriction is expressed in unambiguous language, enforcement is available in the

Homeowners objected to the concept of a horse barn being located on the Lingle's property. What they wanted to see was that the property was being used for residential purposes and that the barn was an appurtenance to the residence.

Throughout the proceedings below, there was never a dispute as to whether the Lingles were planning to build (and were actually in the process of building) a horse barn for the purpose of boarding horses on the property. The Lingles also acknowledged that they were not undertaking at the time to construct a single-family residence on the property or to use it for that purpose.

In fact, there was a dispute in the lower court about whether the Lingles ever intended to construct a single-family residence on the property. One of the Homeowners, Mary Ann Narron, testified that Mr. Lingle told her he had "no intention of building a house." Trial Transcript, Vol. I, p. 73. She also testified that Mr. Lingle had told her that if he sold the property, there would be a place left where somebody else could come to build a house. Trial Transcript, Vol. I, p. 77.

On the other hand, Mr. Lingle sent a letter to the other Homeowners in the Kristen Hill Subdivision dated October 23, 2007 in which he stated his intent "to build a house on the property at some point in the future." Trial Exhibit 8. Mr. Lingle explained in his letter, however, that "due to the slump in the real estate market, we cannot predict a date upon which the house will be built."

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courts of this state to persons of proper standing. *Kinchen v. Layton*, 457 So. 2d 343, 345 (Miss. 1984). (One can imagine the litigation nightmares that would ensue if each time a subdivision sought to enforce a protective covenant, the subdivision was required to retain experts and put on evidence as to exactly how a violation of that protective covenant would impact each of the homeowners in the subdivision.)

In his letter, Mr. Lingle also explained that he currently owned two homes and that he did not expect either to be a quick sale. But, in the meantime, the Lingles wanted to build a horse barn and move a couple of horses to the property as soon as possible. Trial Exhibit 8.

At trial, Mr. Lingle also testified that he intended to build a house at some point in time. He explained:

> I can not sit here and tell you if its one month or two months, ***or any time frame***. But what I can say is it will be a house built there at some point in time and that time is measured by when we get through—when the house at Country Place sells, as well as my financial condition at the time, obviously.

Trial Transcript, Vol. II, p. 149 (emphasis added).

In his Findings of Fact, the Chancellor concluded that there had been a miscommunication between Ms. Narron and Mr. Lingle regarding the question of whether the Lingles had an intent to build a house. R. 78; R. Ex. 022. The Chancellor found from the conflicting testimony that the Lingles did have an intent to build at some time in the future. R. 10-11, 81; R. Ex. 025. [5]

Turning to the language of the protective covenant, the Chancellor found ambiguity in the phrase "the subject property can only be used to build and construct only one single-family residence and appurtenances thereto." R. 63; R. Ex. 007. Specifically, the Chancellor found it to

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[5] The Chancellor made this particular finding of fact from conflicting evidence. On appeal, the Homeowners recognize that this Court will only reverse a chancellor's findings of fact if such are clearly erroneous. So, for purposes of this appeal, the Homeowners will accept the Chancellor's finding that the Lingles had an intent to build a home at some unknown, future point in time.

Such a finding does not, however, control the outcome of this case. Quite the opposite. As argued below, the protective covenants restrict the use to which the Lingles may put this property. Even if the Lingles have a current intent to make a conforming use of the property at some future point, it does not mean that they can make a nonconforming use in the interim.

be ambiguous "as to staging the scheduling of the building of the home and appurtenances thereto." R. 63; R. Ex. 007.

At trial, the Homeowners contended that under the protective covenants, the Lingles could not use the property for an appurtenance (such as a barn) without there first being a residence to which the barn was "appurtenant thereto." The Chancellor agreed that such was one reasonable interpretation of the protective covenant. R. 75; R. Ex. 019.

The Chancellor concluded, however, that since the barn constituted an "appurtenance", and since the protective covenants did not (in his opinion) specifically state the order in which construction of the home and appurtenances must occur, then another reasonable interpretation was that the appurtenances could be built and used first, with the home being built at some future date. R. 75-77; R. Ex. 019-021.

Because the Chancellor concluded that the protective covenants were ambiguous, he deemed it appropriate to construe the covenants in favor of the Lingles and against the Homeowners. R. 77; R. Ex. 021.

As to the fact that the Lingles were not building a home at the present, the Chancellor found that the Lingles had the following "valid reasons" for not doing so:

- Economical/credit lending issues;

- The inability of the Lingles to sell their home in Rankin County after having it on the market for over a year and having reduced the sales price.

R. 81; R.Ex. 025.

The Chancellor concluded, therefore, that the Lingles could use the property for construction of a horse barn and the boarding of horses so long as the Lingles had a present intent to build a residence on the property at some future date.

There was no evidence as to when that date might be, however. The Chancellor made no findings as to an anticipated date for the construction of a residence, nor did the Chancellor's ruling require that the Lingles ever commence construction.

As to the counterclaim, the Lingles put on no proof. The Chancellor did not even mention it in his Final Judgment.

SUMMARY OF THE ARGUMENT

Mississippi law regarding protective covenants is well-established. This case involves the straight-forward application of those principals of law to unambiguous protective covenants that limit use of land to residential purposes.

The protective covenants here clearly state that the "subject property can only be used to build and construct only one single family residences and appurtenances thereto." There is no ambiguity.

At trial, the evidence was as follows:

1. The Lingles were in the process of constructing a horse barn on the property for the purpose of boarding horses. This was undisputed.

2. There was no single-family residence on the property, and the Lingles were not in the process of constructing one. This was undisputed.

3. Mr. Lingle testified that he could not currently build a residence due to the slump in the real-estate market, his need to sell one or both of his currently-owned houses, and the Lingles' financial condition in general.

4. There was no evidence as to a date by which the Lingles would, in fact, begin construction of the house. To the contrary, Mr. Lingle disclaimed (more than once) his ability to predict a date upon which a house would be built.

In light of these facts, were the Lingles making a nonconforming use of the land in violation of the protective covenants? The answer is "yes". Put in this simplest of terms, the Lingles were making use of this land, and that use did not include a single-family residence.

As discussed below, the Mississippi Supreme Court has already addressed the same issue. Courts of other jurisdictions have likewise addressed the question and have come to the same conclusion - - a restrictive covenant limiting use of the land to single-family residences prohibits the owner from building and using "appurtenances" on the land until such time as the owner has begun using the land for residential purposes.

As written, the Chancellor's ruling impermissibly allows the Lingles to make a nonconforming use of the property based upon the Lingles' expressed intent to ***subsequently*** make a conforming use of the property at some unknown, future date, when their financial condition changes. This is contrary to law.

ARGUMENT

A. Standard of Review

A chancellor's findings of fact will not be disturbed on appeal unless the chancellor was manifestly wrong or clearly erroneous. *Burnett v. Burnett*, 792 So. 2d 1016, 1018-1019 (Miss. Ct. App. 2001). On the other hand, a chancellor's conclusions of law are reviewed *de novo*. *Id.*

In this appeal, the Homeowners do not challenge any findings of fact by the Chancellor. They do, however, contend that the Chancellor made erroneous legal conclusions. Specifically, the Homeowners contend that the Chancellor erroneously held that the protective covenants at issue were ambiguous.

It is well-established that the issue of whether a document is ambiguous is a question of law for the court. *Crisler v. Crisler*, 963 So. 2d 1248, 1251 (Miss. Ct. App. 2007). If the

document is found by the court to be ambiguous, then the finder of fact may resolve the ambiguity. *Id.*

In the present case, then, the Chancellor's ruling that the protective covenants were ambiguous was a legal determination and should be reviewed *de novo* on appeal.

B. The Protective Covenants are Not Ambiguous

It may be useful for the Homeowners to begin their argument with a recitation of the principles established by the Mississippi courts for the interpretation and application of protective covenants.

"In construing covenants imposing restrictions and burdens on use of land, the language used will be read in its ordinary sense, and the restriction and burden will be construed in light of the circumstances surrounding its formation, with the idea of carrying its object, purpose and intent, and the restrictions and burdens should be fairly and reasonably interpreted according to their apparent purpose." *Griffin v. Tall Timbers Development*, 681 So. 2d 546, 551 (Miss. 1996).

"In construing restrictive covenants, the question is primary one of intention, and the fundamental rule is that the intention of the parties as shown by the agreement governs, being determined by a fair interpretation of the entire text of the covenant." *A. A. Home Improvement Co. v. Hide-A-Way Lake*, 393 So. 2d 133, 136 (Miss. 1981).

If a protective covenant is ambiguous, it should be construed strongly against the person seeking enforcement. *Kinchen v. Layton*, 457 So. 2d 343, 345 (Miss. 1984). But, if the wording of the protective covenant is clear, it "will not be disregarded merely because a use is restricted." *Id.* "So long as prohibition is expressed in unambiguous language, enforcement is available to persons of proper standing." *Id.*

It is against this backdrop that the protective covenants in this case must be read. Again, it bears repeating that there is no dispute in this case as to whether the Lingles were aware of the protective covenants. The only issue is as to their meaning.

Do these covenants mean (as the Homeowners contend) that before a horse barn can be constructed on the property and put to use, there must also be a single-family residence on the property? Does the phrase "appurtenances thereto" mean that the barn must be appurtenant to an existing residence?

Or, do they mean (as the Lingles contend and the Chancellor ruled) that the horse barn can be placed on the property and put into use even in the absence of a single-family residence? Can the construction and use of a barn for boarding horses be allowed under the protective covenants so long as the landowner expresses an intent to build a residence at some future (but unknown) date?

As noted above, the Chancellor concluded that the protective covenants were ambiguous as to this question. In doing so, the Chancellor focused too narrowly on the question of whether the protective covenant contained words to the effect "the residence must be built first, then the barn."

More specifically, during trial the Chancellor used his discretion to ask questions of the witnesses. The Chancellor asked Homeowner Richard Tucker:

> "Ok. Now the question I want to ask: You have been testifying all but one time, that it says "build the single-family dwelling and then you can build." * * * It doesn't say "and then" in there does it?

Trial Transcript, Vol. I, p. 61.

Similarly, in his Final Judgment, the Chancellor concluded that the protective covenants were ambiguous as to the "scheduling of the building of the home and appurtenances thereto." R. 63; R. Ex. 007.

In his analysis, the Chancellor failed to give a "fair interpretation of the entire text of the covenant." *A.A. Home Improvement*, 393 So. 2d at 136. He did not read the covenant "in its ordinary sense." *Griffin*, 681 So. 2d at 551.

The protective covenant clearly states that the Lingles' lot "can only be used to build and construct only one single-family residence and appurtenances thereto." The Homeowners submit that there is no ambiguity as to the meaning of this covenant. The land is to be used for single-family residential purposes only, and that use extends to appurtenances ***to the single-family residence.***

Black's Law Dictionary (6th Ed.) defines "appurtenance" as "that which belongs to something else; an adjunct; an appendage. Something annexed to another thing more worthy as principal, and which passes as incident to it, as a right of way or other easement to land; an outhouse, barn, garden, or orchard, to a house or messuage."

Under the terms of the protective covenant at issue, appurtenances cannot be legally constructed and used indefinitely when no single-family residence exists. If a landowner is making use of the land, and if that use is <u>not</u> that of a single-family residence, then it is a non-conforming use.[6]

[6] A barn is one example of an appurtenance to a single-family. Others might include a swimming pool or a tennis court. It is clear that the Lingles could not build and use a swimming pool or tennis court on the property in the absence of a single-family residence. Neither the swimming pool nor the tennis court would be an appurtenance ***to a residence***.

The Mississippi Supreme Court has already addressed this issue, and the Court answered it in favor of the Homeowners' position. In *Gast v. Ederer*, 600 So. 2d 204, 207 (Miss. 1992), the Court reviewed facts that are remarkably similar to those in the present case.

The *Gast* decision involved a subdivision in Jackson County, Mississippi. The protective covenants for the subdivision prohibited buildings other than single-family dwellings and private car garages.

Notwithstanding these protective covenants, the defendant, Frederic Gast, purchased an undeveloped lot and then began building a pier and boathouse. When other property owners brought suit seeking an injunction, Gast responded by stating that:

-He intended to build a residence on the lot as soon as he sold his current home; and

-The boat house was a reasonable and incidental use of a neighborhood lot and that many neighborhood residents docked their private boats at piers and slips behind their homes.

Id. at 207.

The Supreme Court agreed with Gast that an additional use of a residential lot must be incidental to and in substantial harmony with protective covenants. *Id.* at 207 (citing *A.A. Home Improvement Co. v. Hide-A-Way Lake Club, Inc.*, 393 So. 2d 1333 (Miss. 1981). But, the Supreme Court explained, Gast's argument "misses the mark" because "such additional use must be incidental to some *residential* purpose." *Gast*, 600 So. 2d at 207 (emphasis in original). Yet, Gast had not constructed a residence on his lot.

The Supreme Court found further support for its ruling in the decision of the Wyoming Supreme Court in *Sutherland v. Bock*, 688 P.2d 157 (Wyo. 1984). In *Sutherland*, the protective covenants in question provided that "[n]o structure shall be erected, placed or permitted to remain on said premises except residential buildings . . . and outbuildings incidental to the use

and occupancy of the property for residential purposes only." When the property owners began construction of a shop/garage prior to commencing construction of a residence, other property owners brought suit and sought an injunction.

In *Sutherland*, the defendants took the position that they were constructing the shop/garage prior to constructing a residence for convenience and to save money. They also said they planned to build a personal residence subsequently.

The trial court in *Sutherland* granted the injunction, and on appeal the Wyoming Supreme Court affirmed. The Wyoming Supreme Court explained:

> Clearly, the protective and restrictive covenants contemplate that a residence is to be the principal building on the premises. The residence could exist without an outbuilding, but an outbuilding cannot be legally constructed independent of a residence. Stated in another way, a residence cannot be incidental to an outbuilding.

Id. at 159.

The Wyoming Supreme Court further explained that an "outbuilding on a restricted lot cannot be justified as incidental to a residence that is not in existence" *Id.* "It cannot be rationally argued that an outbuilding can be constructed on a residential site without any residential structure on it." *Id.*

Returning to *Gast,* the Mississippi Supreme Court quoted with approval the conclusion of the Wyoming Supreme Court that "an outbuilding cannot legally be constructed independent of a residence." *Gast,* 600 So. 2d at 207 (citing *Sutherland*, 688 P.2d at 158).

There is no material difference between the facts in *Gast* and those in the present case. In both instances, the defendant purchased an undeveloped lot and began building an appurtenance. In both case, the defendant contended that he would construct a house later after his current

home was sold. The Homeowners submit that the Chancellor's ruling can only be upheld if this Court overrules the prior ruling in *Gast.*

The decision of the Mississippi Supreme Court in *McGuffie v. Duckworth*, 208 So. 2d 179 (Miss. 1968) is also on point. In case, the Supreme Court addressed the question of whether landowners could maintain a stable enclosed by a corral-type fence for the purpose of boarding horses.

The protective covenant at issue in *McGuffie* required that the property "be used strictly for residential purpose" but there was no residence on the lot. The Supreme Court agreed with the trial court that the keeping of horses on the lot was not a "residential purpose" and, therefore, violated the protective covenant.

In the present case, the Chancellor took the phrase "single-family residence and appurtenances thereto" and effectively ignored the operative word "thereto". Instead, he concluded that an "appurtenance" is simply something that "attaches to the land." R. 75; R. Ex. 019. This had the effect of overriding the clear intent of the covenant to restrict the land to residential uses.

The Homeowners have never denied that a horse barn could be an appurtenance to a single-family residence. What they have said is that a horse barn cannot be an appurtenance to a single-family residence that does not yet exist (and which may never exist).

Courts of other states have reached the same conclusion as did the Mississippi Supreme Court in *Gast* and *McGuffie*. In *Timms v. Griffith*, 68 S.W.2d 535 (Tex. Civ. App. 1934), the restrictive covenant prohibited any use "except for residence purposes." When one of the lot owners put a barn and corral on the lot and began boarding horses (but did not construct a residence on the property), other owners in the subdivision filed suit.

Citing decisions from a number of other jurisdictions, the Texas Court concluded that the lot owner/defendant was in violation of the protective covenant. More specifically, the Texas Court cited *Blakemore v. Stanley*, 33 N.E. 689, 690 (Mass. 1893) for the proposition that a stable may be a necessary outbuilding, but it must be used in connection with the main building. Since there was no main building as called for by the terms of the deed, the stable could not constitute a necessary outbuilding. *Timms*, 68 S.W.2d. at 537.

The Texas Court also looked to the decision in *Highland Realty Company v. Groves*, 113 S.W. 420, 421 (Ken. Ct. App. 1908) in which the property was restricted to residence purposes but on which the land owner had built only a stable. The Kentucky Court ruled that "[i]f the residence required by the condition in the deed had first been erected, a stable to be used in connection with it might fall within the term 'residence purposes,' but it can scarcely be maintained that a stable alone fulfills the condition of residence purposes." *Timms*, 68 S.W.2d at 537.

Similarly, in *Hillcrest Homeowners Association v. Wiley*, 778 P.2d 421 (Mont. 1989), the defendants built a garage on the lot and planned to construct a residence at a later date. The residence was not constructed, however.

In *Hillcrest*, the protective covenants provided that no lot could be used "except for single-family residential purposes." The defendants argued that a garage was consistent with a residential purpose.

The Montana Supreme Court ruled that the construction of the garage alone violated the protective covenants.

> Reading the covenant as a whole and in light of the popular and ordinary meaning of "residential," a garage, by itself, is not consistent with "single-family residential purposes" when the garage is not used in conjunction with a residential dwelling.

Hillcrest, 778 P.2d at 423.

The Montana Supreme Court acknowledged that a private garage could be a proper appurtenance to the enjoyment of a dwelling house and would not violate a "for residence purposes only" covenant. *Id.* Nevertheless, the Montana Court concluded that the defendant violated the restrictive covenant when he built the garage and did not, within a reasonable time, build a residential dwelling to accompany the garage. *Id.*

In summary, the protective covenants at issue in this case are not ambiguous. The phrase "single-family residence and appurtenances thereto" means exactly what it says. The property must be used for a single-family residence and the appurtenances must be incidental to and used in connection with an existing residence.

The use of the property for construction of a horse barn and the boarding of horses, without the presence of a residence and without any residential use of the property violates the protective covenants.[7]

C. The Lingles' Expressed Intent to Build a House at Some Unknown, Future Date Cannot Justify Use of the Land for a Horse Barn and the Boarding of Horses in the Interim

In his ruling, that Chancellor found it significant that the Lingles intended to build a single-family residence on the property at some future date. The Chancellor noted that in an October 3, 2007 letter, Mr. Lingle expressed his intent "to build a house on the property at some

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[7] In his Final Judgment, the Chancellor rejected the argument of the Homeowners, because it would lead to the conclusion that the Lingles could not even construct a fence around their property or a retaining wall until their residence was completed. R. 72-73; R. Ex. 016-017. With deference and respect to the Chancellor, that type of analysis has the effect of trivializing the concerns of the Homeowners. This case is about the property owner's intent to construct a barn and board horses, not about *de minimis* improvements to the property. It also overlooks the core issue, which is <u>use</u> of the property.

point in the future. However, due to the slump in the real estate market, we cannot predict a day on which the house will be built." R. 69; R. Ex. 013.

The Chancellor also observed that the Lingles had expanded the size of a house pad that was on the property and had constructed a "very upscale stone entrance to the property." R. 69-70; R. Ex. 013-014. The Chancellor noted Mr. Lingle's testimony that he was unable to build a single-family dwelling on the property at the time of trial due to economic/credit lending issues and the inability of the Lingles to sell their former home in Rankin County. R. 69-70; R. Ex. 013-014.

Despite professing an intent to build a home in the future, Mr. Lingle never committed to such in his testimony. He stated that his ability to build a house depended upon a sale of other property he owned. Trial Transcript, Vol. II, p. 124. He also acknowledged that his financial condition at the time (whatever time that might be) would influence whether he could start construction of the house. Trial Transcript, Vol. II, p. 149. However sincere Mr. Lingle may be in his expression of his current state of mind, an intent to follow the protective covenants at a future date is not a substitute for compliance at the present date.

Under the Final Judgment entered by the Chancellor, there is no requirement that the Lingles ever actually construct a residence on this property. As written, the Final Judgment gives no relief at all to the Homeowners should one year, three years, or ten years pass without the construction of a residence. Put simply, the Chancellor ruled that the Lingles' statement that they planned to build a house in the future is all it takes to meet the requirements of these protective covenants. This is clearly contrary to law.[8]

[8] Imagine a scenario in which the protective covenants set the minimum size of a home at 3000 square feet. Imagine a homeowner begins construction of a 1500 square foot house and tells his neighbors "I don't have the money to fully comply with the protective covenants at present, but

In addition, the Chancellor offered the opinion that the "building site in question cannot be viewed in the same manner as a house in a small subdivision which could very well have been a different set of circumstances than lots 5.5 to 9 acres in size." R. 80; R. Ex. 024.

The Homeowners respectfully submit that protective covenants are no less enforceable on large residential lots than on small lots. The Chancellor erred in his suggestion that that the protective covenants might somehow be "more enforceable" if the Kristen Hill Subdivision was one comprised of small lots.

The Chancellor stated that there was no legal prohibition to the Lingles getting a head start by building a barn first. R. 80; R. Ex. 024. He was apparently referring to the fact that the Lingles' construction was not contrary to local zoning ordinances. Trial Transcript, Vol. II, pp. 135-138. Yet, the Mississippi Supreme Court has previously held that it is irrelevant whether zoning ordinances allow a certain use of property. *Hudson v. Morrison Heights Baptist Church,* 782 So. 2d 726, 730 (Miss. 2001). "[A] valid restriction upon the use of property is not terminated, superceded, or nullified by the enactment of a zoning ordinance . . . ." *Id.*

In summary, regardless of the sincerity that the Lingles might have regarding their intent to build a home at some future date when their finances allow, such cannot serve as a substitute for compliance with the requirements of the protective covenants. Protective covenants may not be disregarded on the grounds that the property owner does not currently have the financial resources to fully comply.

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once I get the money in the future, I will add on another 1500 square feet." Would the other homeowners be entitled to injunctive relief? The answer is "yes".

D. The Appropriate Remedy

The Homeowners are entitled to an injunction prohibiting the nonconforming use of the property. This certainly includes an injunction against the boarding of horses on the property. In the absence of a residence, such a use is clearly prohibited.

The Homeowners are also entitled to an injunction requiring that the Lingles remove the horse barn. In *Gast*, despite the fact that the defendant had already constructed the boat house, the Chancellor ordered that it be removed. On appeal, the Mississippi Supreme Court affirmed.[9]

At the same time, despite their strong desire that the Lingles should be required to comply with the protective covenants, the Homeowners would prefer, if possible, a remedy that does not result in unnecessary economic waste.

As a result, the Homeowners request that this Court reverse the ruling of the Chancellor and remand this action with instructions to immediately enter a permanent injunction:

(1) Prohibiting the Lingles from boarding horses on the property or making other uses of the barn until such time as they have constructed a single-family dwelling and begun to use the property for residential purposes; and

(2) Requiring the Lingles to remove the horse barn from the property unless they have already commenced good faith construction of their single-family residence and diligently pursue it to completion.[10]

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[9] As of the time of the submission of this Brief, the Lingles had already begun construction of the horse barn. It seems likely that the construction will be completed by the time this Court issues its ruling.

[10] In the alternative, and should this Court conclude that it is appropriate, the Lingles should be required to remove the horse barn if within a reasonable time after the this Court's decision they do not commence good faith construction of their single-family residence and diligently purse it to completion. The Homeowners respectfully submit that under this alternative remedy, the Court should instruct the Chancellor to rely solely on objective facts (such as the amount of time

CONCLUSION

For the reasons set forth above, the Homeowners request that this Court reverse the decision of the Chancellor and remand this action to the Chancellor with instructions to enter the injunctions as described above.

Respectfully submitted, this the 27 day of May, 2009.

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actually needed to construct a house of the size required by the protective covenants) and disregard subjective facts (such as changes in the real estate market, sales of the Lingles' other properties, or changes in the Lingles' financial condition).

CERTIFICATE OF SERVICE

I, S. Craig Panter, attorney for the Plaintiffs-Appellants, hereby certify that I have caused a true and correct copy of the foregoing document to be served via U.S. mail, postage prepaid, to the following:

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This, the 27 day of May, 2009.

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