IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DEAN E. LAUMBACH and ANN M. LAUMBACH,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2442-VCS
ROBERT J. WESTGATE and TAMME L. WESTGATE,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: August 15, 2008
Date Decided: August 19, 2008

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STRINE, Vice Chancellor.

I. Introduction

In this case, plaintiffs Dean and Ann Laumbach are suing defendants Robert and Tamme Westgate, to enforce compliance with certain restrictive covenants governing their residential subdivision. After a one day trial held on July 11, 2008, I find that the Westgates have violated several restrictive covenants and award permanent injunctive relief requiring that the Westgates remedy those violations and enjoining them from committing future violations. In accordance with a provision in the restrictive covenants awarding reasonable attorneys' fees to homeowners forced to bring suit to enforce those covenants, I award the plaintiffs the cost of prosecuting this lawsuit.

II. Factual Background

These are the facts as I find them.

The Laumbachs and the Westgates each own and reside in homes next door to each other on a cul-de-sac of Boxwood Road in the residential community of "Gardenside," located in Smyrna, Delaware. The Westgates, and especially Robert, enjoy refurbishing classic cars and have made various modifications to their property to enable them to pursue this hobby. Most notably, in June of 2005 the Westgates erected a 25 foot wide, 38 foot long and 13 foot high military-style Quonset hut made of plywood and corrugated steel on a concrete foundation in the rear of their property. The Quonset hut's half moon shaped steel frame is far larger than any other non-residential structure in the neighborhood and its austere plywood and steel construction stand out from the homes and small sheds in Gardenside. The Quonset hut is placed on the Westgate property on a concrete foundation next to a more typically sized (but still large) shed and

near a 20-foot long cargo trailer parked at the property line with the Laumbachs that can be used for transporting cars, but is seldom moved. After erecting the Quonset hut, the Westgates paved asphalt over their formerly grass side yard, resulting in an approximately 30 foot wide driveway that abuts the common property line with the Laumbachs. That enlarged driveway enables vehicles to be driven around their two car garage to the Quonset hut behind the Westgate home. The Quonset hut, the enlarged driveway, and other conditions on the Westgate property more generally are eyesores that are visible not only from the Laumbach property but also from the street and several other homes on Boxwood Road. I do not use the term eyesores lightly but the visual effect is more consistent with an industrial use or car repair shop than a home.

For several years, Robert Westgate actively worked on automobiles in or near the Quonset hut, although he has not done so actively since January of 2007 for personal reasons, including a deteriorating medical condition. Staging from the Quonset hut, he has worked on several of the four cars and one van stored at the property. Only two of those vehicles are registered for use. One car remains in pieces inside the Quonset hut and large parts from several other cars have littered the general area near the Quonset hut for some time.

At various times, Westgate has used an industrial car lift, sand blasting equipment, a compressor assembly for spray painting cars, a pressure washer, and welding equipment on his property to work on those cars. At certain times, fumes from welding or spray painting have been noticeable from the Laumbach property. For long periods of time, the Westgates have kept a rusted car chassis, strips of metal and other car parts strewn about

their property and in piles on the side of their shed closest to the Laumbach property. Along with the various car parts, left over sections of fencing, a pile of rotting wood, and other various debris are visible from the Laumbach property. Most of these conditions on the Westgate property are also noticeable from Boxwood Road and from other homes in the community. At trial, the Laumbachs and several other Gardenside residents testified that the Westgate property is both an eyesore and an embarrassment to their community and this common perception was confirmed by many photographs taken of the property over several years.[1]

Shortly after the Quonset hut was built, residents of Gardenside, led by the Laumbachs, have tried to force the Westgates to return the conditions on their property to something that resembles the well-kept character of other lots in the surrounding community. In June of 2005, the Laumbachs spoke to a code enforcement officer of the town of Smyrna about the state of the Westgate property.[2] In July of 2006, the Laumbachs gathered signatures from dozens of their neighbors on a petition they presented to the Smyrna town council on August 7, 2006 seeking to have the town enforce the zoning code or the Declaration of Covenants.[3] In both instances, the Laumbachs were told that there were no code violations on the property and that the town of Smyrna does not enforce private deed restrictions such as the Declaration of Covenants.

[1] *E.g.*, Tr. at 120; *id.* at 126; JXs 8, 10, 11, 19, 21, 24.
[2] Tr. at 45-46, 113.
[3] JX 28.

Gardenside has certain restrictive covenants contained in a Declaration of Covenants, Conditions and Restrictions for Gardenside and certain amendments to that declaration that are recorded with the Kent County Recorder of Deeds (together, the "Declaration of Covenants").[4] Although the Declaration of Covenants provides for the creation of a Homeowners Association to enforce those Covenants,[5] Gardenside has not yet formed one. The Declaration of Covenants also allows individual homeowners to sue to enforce those restrictions.[6] After counsel for the Laumbachs sent a notice on September 6, 2006 to the Westgates informing them that they were violating several of the restrictions contained in the Declaration of Covenants, Robert Westgate replied with a letter demanding that the Laumbachs write a letter of apology and reimburse the Westgates $10,000 "[f]or which the Westgates will not file charges on the Laumbach's for 1311.Harrassment;class B misdemeanor section (5) . . . ," enclosing copies of the Delaware statute.[7]

That the Laumbachs and other Gardenside residents did not approach the Westgates directly with their concerns at an earlier time is unsurprising. Robert Westgate's neighbors — many of whom are retired and much older than he is — perceive him to be a temperamental man who takes pleasure in upsetting his neighbors.[8] And with good reason. Convincing testimony at trial established that Robert Westgate often calls

[4] JX 1 (Declaration of Covenants, Conditions and Restrictions for Gardenside), JX 2 (Fourth Amendment to Declaration of Covenants, Conditions and Restrictions for Gardenside) (together, the "Declaration of Covenants").
[5] *Id.* ¶ 17.
[6] *Id.* ¶ 24.
[7] JX 35 (apparently citing 11 *Del. C.* § 1311).
[8] *E.g.*, Tr. at 121 ("He just was very rude, and he insults everyone in the neighborhood. He made disparaging remarks, upon which I have walked away from him.").

his neighbors profane and upsetting names.[9] In one incident that took place before the Westgates built the Quonset hut, Robert Westgate began calling one neighbor names when she asked him to fix water runoff that was flooding that neighbor's yard because the Westgates had installed a pool.[10] Since 2005 and as a result of this dispute, Robert Westgate has crushed the Laumbachs' flowers with cardboard boxes and trash, and he has sprayed herbicide on their shrubs. Police officers have responded to several incidents between the Laumbachs and the Westgates.

On September 27, 2006, the Laumbachs filed this suit seeking preliminary and permanent injunctive relief for the violations of the Declaration of Covenants and attorneys' fees under a fee shifting provision in the Declaration of Covenants for a homeowner who successfully enforces compliance with those Covenants. This suit was stayed one week before a scheduled trial date after the Westgates filed for bankruptcy on February 14, 2008. The Bankruptcy Court vacated that stay with respect to this suit on April 28, 2008.[11] As of the date of trial, held on July 11, 2008, the Westgates had not removed the Quonset hut, despite offering to remove it as early as February of this year and consistently promising in their trial briefs that they would do so. The Westgates did eventually remove the Quonset hut several weeks after trial, but the mammoth concrete foundation remains in place.

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[9] *E.g.*, *id.*; *id.* at 57 (loudly referring to Ann Laumbach as "psycho lady" when she would walk to get the paper); *id.* ("[He c]alled me 'The Rat,' because I'm a retired police officer. . . . [I]nternal affairs is normally called the rat in television, so I guess he would get a kick going 'Rat, Rat, Rat,' as I would walk by.").

[10] *Id.* at 42-43 ("And he was very, very adamant to tell me about how that white-haired bitch was constantly complaining about the side of the pool . . . .").

[11] JX 65.

III. Legal Analysis

The parties agree that at all relevant times both the Laumbachs' and the Westgates' properties were governed by the Declaration of Covenants. The Declaration of Covenants provides for private enforcement of the restrictions contained in the Declaration of Covenants by other landowners in Gardenside.[12] "Restrictive covenants and deed restrictions are recognized and enforced in Delaware where the intent of the parties is clear and the restrictions are reasonable."[13] A landowner in a residential development may enforce restrictive covenants for the common benefit of landowners in a development against another landowner.[14]

The Westgates make several arguments about the enforceability of the Declaration of Covenants against them that apply broadly to several violations. The Westgates first argue that the Laumbachs may not enforce the restrictions contained in the Declaration of Covenants because the Laumbachs themselves have arguably violated certain Covenants. In particular, the Laumbachs have a satellite dish that measures 30 inches wide and 15½ inches high where the Declaration of Covenants prohibits satellite dishes that exceed 18 inches in diameter.[15] The Westgates point to several landscaping activities that do not actually violate the Declaration of Covenants.[16] Even if they were breaches of the

[12] Declaration of Covenants ¶ 24.
[13] *Mendenhall Village Single Homes Ass'n v. Harrington*, 1993 WL 257377, at *3 (Del. Ch. June 16, 1993).
[14] *E.g.*, *Henderson v. Chantry*, 2003 WL 139765 (Del. Ch. Jan. 10, 2003).
[15] Declaration of Covenants ¶ 7(j) (restricting the size of satellite dishes).
[16] In particular, the 6 foot hedges in the rear of the Laumbach property do not violate any size requirement and replacing small trees and shrubbery does not constitute a "landscape design." *See id.* ¶ 7(i)(ii) (requiring that "hedges planted *forward* of the rear yard . . . may not exceed four

Covenants, those de minimis violations are far from the type of conduct that would trigger an application of the unclean hands doctrine that would bar an otherwise valid claim for relief.[17] Nor is the fact that the Laumbachs did not approach the Westgates during the building of the Quonset hut an important factor here. I am not convinced that the Laumbachs fully understood the size or appearance of the Quonset hut at that time. Nor, given Robert Westgate's abusive behavior, were the Laumbachs obliged to take their concerns directly to him, and risk further insult and hostility.[18]

The Westgates, without citing any legal authority, next attack the continued enforceability of the Declaration of Covenants against them because of other conditions in Gardenside. They claim that the Declaration of Covenants should not be enforced against them because other residents of Gardenside have sheds that are slightly larger than the Declaration of Covenants allows and there are other violations of the Declaration of Covenants in the community. The Westgates also point out that since as early as 2002 homeowners have not sought approval for alterations of their property from the developer, Cantwell Development, LLC ("Cantwell"), as required by various sections of the Declaration of Covenants.[19] But even if the Westgates could prove that minor

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(4) feet in height") (emphasis added); *cf. id.* ¶ 4 (requiring that "landscape designs" be approved).

[17] *See Tusi v. Mruz*, 2002 WL 31499312, at *5 (Del. Ch. Oct. 31, 2002) ("[O]ne who is guilty of a *substantial breach* of a restrictive covenant may not seek equal equitable relief against another who similarly breaches that restrictive covenant.") (emphasis added).

[18] *See also* Declaration of Covenants ¶ 24 ("No delay or failure on the part of an aggrieved party to invoke an available remedy in respect to a violation of any of these Restrictions shall be held to be a waiver of that party or an estoppel of that party to assert any rights available to him upon the reoccurrence or continuance of such violation o[r] the occurrence of a different violation.").

[19] Because Gardenside does not have a Homeowner's Association in place, the Declaration of Covenants provides that architectural and other review process will be conducted by the

violations of the Declaration of Covenants had been waived or abandoned, their violations of the Declaration of Covenants are on a much different scale than any other potential violations that they have identified in the community.[20] Accordingly, I find that the Declaration of Covenants is enforceable against the Westgates.

I now turn to the Westgates' particular violations of the Declaration of Covenants.

A. The Quonset Hut

As a result of this litigation, the Westgates have conceded that the Quonset hut violates the Declaration of Covenants. The Declaration of Covenants clearly provides as follows:

> 7(c). After construction of the original structure on any lot within this subdivision, no detached structure or addition to the principal structure shall be placed or erected without the consent of . . . Declarant, with the exception that a storage shed may be placed in the rear yard; such shed shall have a maximum size of 150 square feet and a height not to exceed nine (9) feet to roof top. The shed shall be constructed with all sides fully enclosed with colors and materials similar to those used on the dwelling.[21]

The 25 foot wide, 38 foot long and 13 foot tall, 950 square foot Quonset hut does not fit within (no pun intended) the exception for storage sheds, and its plywood and steel construction does not in any way resemble the Westgate home.

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developer, Cantwell, referred to as the "Declarant" in the Declaration of Covenants. *Id.* ¶ 8(a) ("The power to review plans until such time as the power is turned over to the Homeowner's Association will be vested in Declarant."). Because Cantwell never transferred its review authority upon establishment of the Homeowner's Association under ¶ 17 of the Declaration of Covenants, it retains authority as the Declarant in the Declaration of Covenants.

[20] *Cf. Tusi*, 2002 WL 31499312, at *4 ("The conduct of the lot owners in the Subdivision may have resulted in a waiver of the Restriction as to sheds and other similar small improvements, but there is no evidence to suggest a waiver as to a 2,200 square foot, brick, three-car garage.").

[21] Declaration of Covenants ¶ 7(c).

In addition to the requirement in ¶ 7(c) of the Declaration of Covenants that the Westgates obtain Cantwell's "consent" before building the Quonset hut, two other paragraphs also required that the Westgates obtain approval from Cantwell for the Quonset hut.

> 4. DWELLING PLAN REVIEW. *No* house, dwelling, *accessory building* or landscape design shall be commenced, erected, nor any addition to, nor alteration thereto shall be made until house plans, specifications, and landscaping design showing nature, shape, height, materials, floor plan, color scheme, and location *shall have been submitted to and approved in writing* by Declarant or the Association created herein, its successors or assigns.[22]
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> 8. DWELLING CONSTRUCTION. The following general prohibitions and requirements shall apply to construction or other activities conducted on any numbered lot or given land area in Gardenside.
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> (a)(i) The owner of each and every lot or other land area within Gardenside, by accepting title thereto, or by occupying the same, hereby covenants and agrees that *no building, structure, or other improvement shall be erected, altered, rebuilt, placed or permitted to remain upon any such lot or other land area, unless and until the plans and specifications therefor shall have first been approved in writing by the Declarant or the Association*, or its successors, and that each such building, structure or other improvement shall be erected, altered, rebuilt, placed or permitted to remain upon any such lot or other land area only in accord with such approved plans and specifications therefor.[23]

[22] *Id.* ¶ 4 (emphasis added); *see also id.* ¶ 1 ("No *structure or other improvements*, except as herein provided, shall be erected, altered, placed, used or permitted to remain upon any such numbered lot in Gardenside.") (emphasis added).
[23] *Id.* ¶ 8 (emphasis added).

The Westgates neither sought, nor obtained consent before building the Quonset hut, and I find that if they had, it would not have been approved.[24] It is clear that the Quonset hut violates the Declaration of Covenants.

This conclusion applies with equal force to the 950 square foot concrete foundation underneath the Quonset hut's steel structure. Not only is that concrete foundation an integral part of the Quonset hut, thereby forming a part of an unapproved "accessory building" under ¶ 4, a "detached structure" under ¶ 7(c) and a "building, structure or other improvement" under ¶ 8(a)(i), but I also conclude that it is encompassed within the prohibitions of ¶ 8(a)(i) in and of itself.[25] Accordingly, although the Westgates have already removed the Quonset hut, they will be ordered to also remove its concrete foundation from their property.

B. The Oversized Driveway

The extended portion of the Westgates' driveway (the "Paved Area") — if it can still be called a driveway in the traditional sense of that word — now extends from the location of the original driveway approximately 8 to 9 additional feet to the property line with the Laumbachs near the front of the property and wraps completely around the Westgate home to the Quonset hut in the rear. Because of the wedge shape of the Westgate lot, the Paved Area appears to be almost 30 feet wide behind the Westgate

[24] *See* Tr. at 73 (owner of Cantwell testifying that the Quonset hut would not have been approved).

[25] The language of ¶ 8(a)(i) covering any "building structure or other improvement" that is "erected, altered, rebuilt, placed or permitted to remain upon any such lot or land area" appears designed to capture anything on the property that is both large and permanent. A 950 square foot concrete foundation certainly applies. Additional reasoning supporting this conclusion is described in further detail in Section III.B, *infra*, addressing the oversized driveway.

home. Although the parties did not submit into evidence a precise measurement of the Paved Area, a review of an architectural drawing of the lot and numerous photographs submitted into evidence suggests that if parked end to end, the Westgates could fit nearly a dozen or more large vehicles on that extended portion of the driveway.[26]

The Declaration of Covenants does not restrict the maximum size of a driveway as such. Nor does it specifically require a Gardenside homeowner to obtain approval before enlarging the homeowners' paved driveway. But two other paragraphs provide support for the conclusion that the Westgates needed prior approval before undertaking to pave the entire side of their house to the property line and around to the rear of property. Paragraph 8(a)(i) of the Declaration of Covenants requires approval for any "building, structure or other *improvement*" that is "erected, altered, rebuilt, placed or permitted to remain upon any such lot or land area." The common sense reading of this clause is that it captures any significant change to a lot in Gardenside that is both large and permanent, and thus comfortably encompasses the addition of the Paved Area.[27] Similarly, having paved over their entire side yard, the Westgates altered the "landscape design" of their property under ¶ 4 without prior written approval. I am convinced that had the Westgates

[26] *See* JXs 3, 14, 21, 48, 49, 51.

[27] *See Zimmer v. Village of Willowbrook*, 610 N.E.2d 709, 713 (Ill. Ct. App. 1993) ("An improvement is a valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and *intended to enhance its* value, beauty or *utility or to adapt it for new or further purposes*.") (emphasis added) (internal citations and quotations omitted); C.J.S. *Improvements* § 1 (2008) ("The term 'improvements' means permanent additions to, or betterments of, real property that are more extensive than ordinary repairs, and which substantially enhance property value. . . . Typical improvements include: . . . making of substantial additions to or changes in existing buildings, the construction of sidewalks, the erection of fences, and the preparation of land for building sites.").

properly requested permission to pave over their side yard to the property line, extending their driveway completely around their home, that request would have been denied. This conclusion is strengthened by the fact that the clearly intended purpose of adding the Paved Area was to provide access to the Quonset hut, itself an impermissibly large and unapproved structure under the Declaration of Covenants. Accordingly, the Westgates will be ordered to return the paved section of their driveway to its originally intended size and return the side yard to its pre-existing condition.

C. The Cargo Trailer

The Westgates have kept a 20-foot long cargo trailer used for carrying cars on their property along the property line with the Laumbachs. Paragraph 11 of the Declaration of Covenants provides that "[n]o vehicles, except as may be reasonably be classified as passenger cars, station wagons, vans, or pickup trucks of one (1) ton or less shall be regularly parked upon any lot where they may be seen from the common area." The Westgates do not dispute that the cargo trailer is a "vehicle" under ¶ 11,[28] but instead point out that various homeowners in Gardenside keep recreational vehicles in the rear of their yards where they are viewable from the street. Construing this as an extension of their waiver argument that was addressed briefly above, the Westgates have not met their burden of proving this affirmative defense.[29] Having shown only six other instances of

[28] *See* Westgate Pre-Trial Op. Br. at 10 ("[The Westgates] suggest that their vehicle fits that condition [of ¶ 11] with respect to their vehicle.").
[29] *Tusi*, 2002 WL 31499312, at *4 (stating that the party arguing a waiver defense against enforcement of a deed restriction has the burden of proving that defense).

recreational vehicles, travel trailers, and tow trailers being visible from the street,[30] I cannot say that these violations "represent a widespread, general, and pervasive violation" of ¶ 11 in Gardenside, an 80-90 lot subdivision.[31]

The Westgates next argue that they can park the cargo trailer in the rear of their property where it cannot be seen from a common area. I reject this argument. For starters, the Westgates have had years to show they could do this and have failed. The cargo trailer is easily visible from the common area. This is not surprising for two reasons. First, the Westgates have a wedge-shaped lot that makes most of their backyard visible from the common area. Second, the cargo trailer — like the shed, the Quonset hut, and even the Westgates' oversized garage — is huge. Because the Westgates have persistently breached the Declaration of Covenants by keeping the cargo trailer in plain view of the common area, the only fitting remedy is an injunction requiring its removal from the property altogether.

D. Automotive Repair Activities

The Laumbachs have established that Robert Westgate violated the Declaration of Covenants by conducting several activities when he worked on cars on his property. Paragraph 12 of the Declaration of Covenants provides as follows:

> 12. NUISANCE ABATEMENT. It shall be the responsibility of each lot owner to prevent the development of any unclean, unsightly, or unkempt conditions of buildings or grounds upon such lot which shall tend to substantially decrease the beauty of the specific area. No noxious or offensive activity shall be carried out on any lot, nor shall anything be done

[30] *See* JXs 55-60.
[31] *Henderson*, 2003 WL 139765, at *3 & n.13.

> on any lot to cause embarrassment, discomfort, annoyance, or nuisance to the neighborhood. . . .

Robert Westgate welded, sandblasted, and spray painted various cars on his property and he pressure washed the insides of engines, allowing the grime to seep into the Laumbachs' yard and public sewers. These were not isolated instances, they were persistent. I disagree with the Westgates that ¶ 12 is too vague to be enforced here. These activities caused fumes and debris to cross into the Laumbachs' property and were not in keeping with the residential quality of the neighborhood.[32] No reasonable person could have concluded that these activities were not "noxious or offensive" or that they did not "cause embarrassment, discomfort, annoyance, or nuisance to the neighborhood." I therefore conclude that these activities violated ¶ 12 of the Declaration of Covenants.

Although Robert Westgate has not actively worked on vehicles in Gardenside since January of 2007, if he ever resumes these activities such violations will be no more acceptable at such future date. Requiring the Laumbachs to return to court to enforce these restrictions would be inappropriate and wasteful of judicial resources. Accordingly, I will issue an injunction prohibiting any person on the Westgate property from engaging in these activities in the future.

E. The General Condition Of The Westgate Property

For several years, the Westgate property has been littered with various car parts and other debris. Paragraph 12 of the Declaration of Covenants states that "[i]t shall be the responsibility of each lot owner to prevent the development of any unclean, unsightly,

[32] *See* Declaration of Covenants ¶ 1 ("Each lot or given land area located in Gardenside shall be solely and exclusively used for residential purposes and recreational purposes incident thereto.").

or unkempt conditions of buildings or grounds upon such lot which shall tend to substantially decrease the beauty of the specific area." Paragraph 7(h) states that "[n]o rubbish, trash, garbage or other waste material shall be kept or permitted on any lot or on the common area except in sanitary containers which are securely fastened to prevent dispersal of such materials by animals or birds. Such containers shall be kept in an appropriate area which is concealed from public view." The Laumbachs have established that the car parts, fencing, and other debris kept on the Westgates' property contribute to an "unsightly [and] unkempt" condition and qualify as "rubbish, trash, garbage or other waste material." Accordingly, the Westgates shall be required to either remove these items from their property or to store them inside their house or shed.

The Westgates keep five cars on their property, but only two are registered for use. The other three are in various stages of disrepair. Paragraph 7(f), states that "[n]o wholly or partially stripped down motor vehicle or battered motor vehicle shall be permitted to be parked on any lot or on any street in Gardenside." In sum, the Westgate property often looked like an unregulated auto repair yard, which operated with no regard for good order or aesthetics. In order to prevent future violations of this restriction, the Westgates will be enjoined from having any vehicle visible on their lot that is not currently registered for use.

F. Attorneys' Fees

Having successfully prevailed in this action against the Westgates, the Laumbachs are entitled to the cost of this lawsuit pursuant to the Declaration of Covenants.[33] There is nothing unfair or inequitable about this result. The Westgates have had over three years to remedy their violations of the Declaration of Covenants, but have not done so.

IV. Conclusion

For the foregoing reasons, the Laumbachs are entitled to the relief that they have requested. Counsel for the Laumbachs shall submit an implementing order consistent with this opinion, with approval as to form, within 10 days. To that end, he shall provide the Westgates with an affidavit of the reasonable attorneys' fees and expenses incurred litigating this action. The proposed final judgment order shall contain the following timetable to remedy violations of the Declaration of Covenants:

- The Westgates shall be ordered to remove the cargo trailer and remedy the violations described in Section III.E of this opinion within 30 days of the date of that order.

- The Westgates shall be ordered to remove the concrete foundation of the Quonset hut and the Paved Area within 180 days of the date of that order.

[33] *Id.* ¶ 24.