[Cite as *Stars of Cleveland, Inc. v. D & L Ferguson, L.L.C.*, 2016-Ohio-4625.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STARS OF CLEVELAND, INC., ET AL.	:	JUDGES:
Plaintiffs-Appellants	:	Hon. W. Scott Gwin, P.J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J.
-vs-	:	Case No. 2015CA00190
D & L FERGUSON, LLC	:	
Defendant-Appellee	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, Case No. 2014CV01879

JUDGMENT: REVERSED AND REMANDED

DATE OF JUDGMENT ENTRY: June 13, 2016

APPEARANCES:

For Plaintiffs-Appellants:

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Delaney, J.

{¶1} Plaintiffs-Appellants Stars of Cleveland, Inc. dba Montrose Ford Lincoln and Michael Thompson as Trustee of the Michael W. Thompson Living Trust appeal the September 30, 2015 judgment entry of the Stark County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

{¶2} In 1983, The Alliance Mall Company was the owner of property located at 2490 West State Street and 2500 West State Street, Alliance, Ohio. On September 15, 1983, The Alliance Mall Company conveyed 2490 West State Street to the Midland Service Corporation by General Warranty Deed ("Property"). The deed contains the following restrictive covenant:

> In accepting this conveyance and as part of the consideration therefor, the Grantee, its successors and assigns, covenants with the Grantor [The Alliance Mall Company], its successors and assigns, that it will not use the above described premises for any purpose other than a saving and loan branch office and that said branch office structure shall not exceed 750 square feet. This covenant shall run with the land herein conveyed and shall be binding on the Grantee, its successors and assigns, unless this covenant is subsequently modified in writing by the Grantor, its successors and assigns.

(hereinafter "Restrictive Covenant").

{¶3} 2500 West State Street comprises the Carnation Mall, a dominant retail facility. On December 26, 1990, The Alliance Mall Company conveyed 2500 West State Street to AllOhio Holding, Inc. AllOhio Holding, Inc. conveyed 2500 West State Street

to Carnation Mall, LLC on February 28, 2001. Carnation Mall, LLC conveyed 2500 West State Street to D&L Ferguson, LLC by Quit Claim Deed on April 17, 2008. As to the Property and the Restrictive Covenant, D&L is the successor of The Alliance Mall Company.

{¶4} The Property abuts the parking lot for Carnation Mall. There is a one-story bank-branch style building on the Property. The size of the building is approximately more than 750 square feet. At some point, Sky Bank used the Property as a bank branch. Sky Bank was purchased by Huntington National Bank. On June 1, 2000, Huntington National Bank leased the Property to the Alliance Area Development Foundation. The Alliance Area Development Foundation is a non-profit organization that promotes the economic development of Alliance, Ohio. The Alliance Area Development Foundation is not a savings and loan institution. There was never a written modification to the Restrictive Covenant to allow the Alliance Area Development Foundation to operate at the Property.

{¶5} At the time D&L purchased the Carnation Mall property, it was aware of the Restrictive Covenant encumbering the Property. It was also aware that the Alliance Area Development Foundation operating on the Property was not a savings and loan branch office. D&L did not enforce the Restrictive Covenant against the Alliance Area Development Foundation nor did D&L modify the Restrictive Covenant to allow the Alliance Area Development Foundation operate on the Property.

{¶6} In 2012, Huntington National Bank advertised the Property for sale for a list price of $425,000 to $450,000. Huntington National Bank did not list the Property as

only available for use as a savings and loan branch office pursuant to the Restrictive Covenant.

{¶7} The Property is located next to a car dealership owned by Plaintiff-Appellant Stars of Cleveland, Inc. dba Montrose Ford Lincoln. Plaintiff-Appellant Michael Thompson is the Trustee of the Michael W. Thompson Living Trust and one of the principals of Stars of Cleveland (hereinafter "Stars of Cleveland").

{¶8} In October 2013, Thompson was looking for a way to separate Montrose's car and expanding truck business and envisioned putting 30-40 trucks for display on the adjoining Property and housing the sales and financing personnel in the former branch building.

{¶9} Thompson and Joseph Stefanini, vice-president of Stars of Cleveland, inquired about the Property and they learned the Property was encumbered by the Restrictive Covenant. Thompson and Stefanini discussed the Restrictive Covenant and concluded it had probably been waived because the Property had not been used as a savings and loan branch office since at least 2000. Thompson purchased the Property from Huntington National Bank for $150,000. Thompson felt the risk of purchasing the Property with the Restrictive Covenant was worth the price of the Property. Thompson felt that if D&L attempted to enforce the Restrictive Covenant to prevent Stars of Cleveland from using the Property as a car dealership, he would either negotiate with D&L or litigate the issue. The real estate transaction closed in late November or early December 2013. Thompson, on behalf of the Trust, leased the Property to Stars of Cleveland for use in conjunction with its existing car dealership.

{¶10} Lisa Ferguson, principal of D&L, learned the Property was for sale or lease because a potential buyer contacted Lisa Ferguson with concerns about the Restrictive Covenant. On November 4, 2013, Lisa Ferguson emailed Huntington National Bank to remind it of the Restrictive Covenant on the Property and to request it cease promoting the Property for any use that violated the Restrictive Covenant. Lisa Ferguson also emailed the realtor for Huntington National Bank.

{¶11} On April 28, 2014, Lisa Ferguson sent a letter to Thompson referencing the Restrictive Covenant and notifying him that D&L intended to enforce the Restrictive Covenant.

{¶12} Stars of Cleveland filed a complaint for tortious interference of business relationships, slander of title, and injunctive relief on August 11, 2014.

{¶13} The trial court dismissed some of the claims for tortious interference with business relationships and the claim for slander of title on July 7, 2014.

{¶14} On March 30, 2015, Stars of Cleveland filed a first amended complaint to add a claim for declaratory judgment. Stars of Cleveland included the claim for declaratory judgment for the trial court to determine the enforceability of the Restrictive Covenant. Specifically, Stars of Cleveland moved the trial court to declare that the Restrictive Covenant did not prevent it from operating a car dealership on the Property because D&L waived the Restrictive Covenant.

{¶15} Stars of Cleveland and D&L filed motions for summary judgment on the claim for declaratory judgment. Stars of Cleveland dismissed without prejudice its claim for tortious interference with a business relationship.

{¶16} On September 30, 2015, the trial court issued its decision granting summary judgment in favor of D&L. It determined the Restrictive Covenant was enforceable against Stars of Cleveland.

{¶17} It is from this judgment Stars of Cleveland now appeals.

ASSIGNMENTS OF ERROR

{¶18} Stars of Cleveland raises three Assignments of Error:

{¶19} "I. THE TRIAL COURT INCORRECTLY GRANTED SUMMARY JUDGMENT TO D&L FERGUSON BASED ON ITS ARGUMENT THAT IT HAD NOT WAIVED THE USE RESTRICTION.

{¶20} "II. THE TRIAL COURT INCORRECTLY GRANTED SUMMARY JUDGMENT TO D&L BASED ON ITS ARGUMENT THAT MR. THOMPSON AND STARS COULD NOT CHALLENGE THE USE RESTRICTION BECAUSE THEY KNEW ABOUT IT BEFORE MR. THOMPSON BOUGHT THE OUT LOT.

{¶21} "III. THE TRIAL COURT INCORRECTLY DENIED MR. THOMPSON AND STARS' MOTION FOR SUMMARY JUDGMENT."

ANALYSIS

STANDARD OF REVIEW

{¶22} Stars of Cleveland argues the trial court erred in granting summary judgment in favor of D&L. We refer to Civ.R. 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely

> filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶23} The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth “specific facts” by the means listed in Civ.R. 56(C) showing that a “triable issue of fact” exists. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶24} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

I. ENFORCEMENT OF THE RESTRICTIVE COVENANT

{¶25} This case involves a restrictive covenant limiting the use of the Property. Ohio's law "does not favor restrictions on the use of property." *Polaris Owners Assn., Inc. v. Solomon Oil Co.*, 2015-Ohio-4948, -- N.E.3d --, ¶ 51 (5th Dist.) quoting *Driscoll v. Austintown Assoc.,* 42 Ohio St.2d 263, 276, 328 N.E.2d 395 (1975). "The general rule, with respect to construing agreements restricting the use of real estate, is that such agreements are strictly construed against limitations upon such use, and that all doubts should be resolved against a possible construction thereof which would increase the restriction upon the use of such real estate." *Bove v. Giebel,* 169 Ohio St. 325, 159 N.E.2d 425 (1959), paragraph one of the syllabus. Furthermore, "[i]f the covenant's language is indefinite, doubtful, and capable of contradictory interpretations, the court must construe the covenant in favor of the free use of land." *Farrell v. Deuble,* 175 Ohio App.3d 646, 2008-Ohio-1124, 888 N.E.2d 514 (9th Dist.), ¶ 11, citing *Houk v. Ross,* 34 Ohio St.2d 77, 296 N.E.2d 266 (1973), paragraph two of the syllabus. The disfavor towards efforts to restrict land use can be overcome by evidence establishing a general land use plan or scheme as well as notice to the land purchaser of such a general plan or scheme. *Bailey Dev. Corp. v. MacKinnon-Parker, Inc.*, 60 Ohio App.2d 307, 14 O.O.3d 277, 397 N.E.2d 405, 406 (6th Dist.1977), paragraph one of the syllabus.

{¶26} In this case, the language of the Restrictive Covenant is clear. The Restrictive Covenant unambiguously states that the Grantee covenants with the Grantor "that it will not use the above described premises for any purpose other than a savings and loan branch office * * *." The parties in this case do not dispute the meaning or the interpretation of the Restrictive Covenant. The issue in this case is whether D&L can

enforce the Restrictive Covenant to prevent Stars of Cleveland from operating a car dealership on the Property.

Waiver or Abandonment of the Restrictive Covenant

{¶27} Stars of Cleveland contends D&L cannot enforce the Restrictive Covenant because it waived or abandoned the Restrictive Covenant when it failed to enforce the covenant against the Alliance Area Development Foundation while it occupied the Property. There is no dispute the Alliance Area Development Foundation is not a savings and loan institution and it did not use the Property as a savings and loan branch office.

{¶28} Restrictive covenants become unenforceable in Ohio when there is a waiver or abandonment of the restrictions because the nature of the neighborhood or community has so changed that the restriction no longer has substantial value. *Snell v. Englefield*, 5th Dist. Knox 96CA13, 1996 WL 752800, * 5 (Nov. 14, 1996) citing *Romig v. Modest*, 102 Ohio App. 225, 142 N.E.2d 555, paragraph three of the syllabus (2nd Dist.1956). The substantial value test originated in the *Romig* case has generally been applied to cases involving residential subdivisions. *See Landen Farm Community Serv. Assn., Inc. v. Schube*, 78 Ohio App.3d 231, 604 N.E.2d 235 (12th Dist. 1992); *Trautwein v. Runyon*, 5th Dist. Delaware No. 94-CA-E-11-032, 1995 WL 498951 (Aug. 10, 1995); *Corna v. Szabo*, 6th Dist. Ottowa No. OT-05-025, 2006-Ohio-2764; *Rockwood Homeowners Assn. v. Marchus*, 11th Dist. Lake No. 2006-L-130, 2007-Ohio-3012. The issue in *Romig* was whether the failure to object to the continued construction of fences in violation of the deed restriction changed the character of the neighborhood to render the deed restriction waived. *Romig*, 102 Ohio App. at 229.

{¶29} In *Snell v. Engelfield*, 5th Dist. Knox 96CA13, 1996 WL 752800 (Nov. 14, 1996), this Court utilized the substantial value test established in *Romig* to determine whether a deed restriction as to a commercial property was waived. The deed restriction at issue in *Snell* restricted the size of the building on the property to one story and a basement, to be used only for retail mercantile business, offices, restaurants, and service stations. *Id*. at *4. No drive-in business that involved the sale of food, beverages, or ice cream was permitted. *Id*. The appellee requested a zoning variance of a setback requirement to allow construction of a convenience store and a gasoline station on the property. Appellant, the owner of adjoining property, objected to the zoning variance. Appellee argued appellant waived or abandoned the deed restriction. *Id*. The trial court held the deed restriction was unenforceable because they did not represent a common plan or scheme for development as the common grantor had previously released the same restrictions on adjoining property. The trial court further found the deed restriction was outmoded by the change in industry and locale. *Id*. at *4. We affirmed the trial court's decision utilizing the test outlined in *Romig*. Accordingly, we have applied the substantial value test to commercial property.

{¶30} The issue in this case is whether D&L waived the right to enforce the Restrictive Covenant by allowing the Alliance Area Development Foundation to occupy the Property in violation of the Restrictive Covenant. This matter is before the Court upon an appeal of a judgment entry granting summary judgment; therefore, we consider the argument under a de novo standard of review without deference to the trial court's judgment entry.

Substantial Value

{¶31} D&L argues the Restrictive Covenant has substantial value because it allows D&L to maintain harmony and overall development of the mall. (Lisa Ferguson Depo., p. 40). By enforcing the Restrictive Covenant, D&L can develop the out parcel because it enhances and benefits the mall. (Lisa Ferguson Depo., p. 40).

{¶32} It is well-settled that restrictive covenants are disfavored under Ohio law. "The general rule, with respect to construing agreements restricting the use of real estate, is that such agreements are strictly construed against limitations upon such use, and that all doubt should be resolved against a possible construction thereof which would increase the restriction upon the use of such real estate." *D & N Dev., Inc. v. Schrock*, 5th Dist. Tuscarawas No. 89AP080066, 1990 WL 41691, *2 (Mar. 29, 1990) quoting *Loblaw v. Warren Plaza*, 163 Ohio St. 581,127 N.E.2d 754 (1955), paragraph two of the syllabus. The disfavor of the restrictive covenant can be overcome, however, by evidence establishing a general land use plan or scheme as well as notice to the land purchaser of such a general plan or scheme. *Bailey Dev. Corp. v. MacKinnon-Parker, Inc.*, 60 Ohio App.2d 307, 14 O.O.3d 277, 397 N.E.2d 405, 406 (6th Dist.1977), paragraph one of the syllabus. A plan designed to maintain harmony and aesthetic balance of a community will often be upheld where the restrictions are reasonable. *Rockwood Homeowners Assn. v. Marchus*, 11th Dist. Lake No. 2006-L-130, 2007-Ohio-3012, ¶ 12 citing *Garvin v. Cull*, 11th Dist. No. 2005-L-145, 2006-Ohio-5166, ¶ 21.

{¶33} The substantial value of a restrictive covenant can be supported through evidence of a building plan or scheme. In *Polaris Owners Assn., Inc. v. Solomon Oil Co., supra*, the development of the mall area called the Polaris Centers of Commerce was

governed by a Declaration of Protective Covenants that contained design standards for the businesses located in the mall area. *Id.* at ¶ 3. The Declaration of Protective Covenants was enforced by the Design Review Committee. *Id.* at ¶ 8. This Court determined the restriction on the use of commercial property in a mall area was enforceable and not against public policy because it was part of a well-defined general building scheme or plan. “Where an owner of land has adopted a general building scheme or plan for the development of a tract of property, designed to make it more attractive for residential purposes by reason of certain restrictive agreements to be imposed upon each of the separate lots sold, embodying the same in each deed, such agreements will generally be upheld provided the same are not against public policy.” *Polaris Owners Assn., Inc. v. Solomon Oil Co.*, 5th Dist. Delaware No. 14CAE110075, 2015-Ohio-4948, 2015 WL 7738185, *10, ¶ 52 quoting *Dixon v. Van Sweringen Co.*, 121 Ohio St. 56, 166 N.E. 887 (1929), paragraph one of syllabus.

{¶34} In the present case, however, D&L did not present a general building scheme or plan for the development of the Carnation Mall. The parties did not submit photographs or maps of the mall area with their motions for summary judgment. There was no testimony as to the purpose of limiting the use of the Property to specifically a savings and loan branch office. D&L concluded, based on Lisa Ferguson’s testimony, that the Restrictive Covenant was the result of the belief that having a savings and loan branch office near a shopping mall enhanced and benefited the mall. However, Thompson testified the area is a heavily used truck area. (Michael Thompson Depo., p. 49). The presence of an automobile dealership adjoining the Property indicates that auto sales are a permitted and compatible industry in the Carnation mall area. Therefore,

there are material issues of fact as to whether the restrictive use of the Property as a savings and loan is reasonable at this time.

Failure to Enforce the Restrictive Covenant

{¶35} D&L's conclusion as to the purpose of the Restrictive Covenant creates questions of fact considering the Alliance Area Development Foundation is not a savings and loan branch office and was permitted to operate on the Property since 2000. It was not until Stars of Cleveland purchased the Property did D&L seek to enforce the Restrictive Covenant. In *Wingate Farms Owners Assn. v. Sankarappa*, 5th Dist. Delaware No. 11-CAE-05-0041, 2012-Ohio-14, ¶ 42, this Court cautioned against a deed restriction too broad in scope because it would give too much control over property vested in the hands of someone other than the owner of the property. While the Restrictive Covenant in the present case is clear because it limits the use of the Property to a savings and loan branch office, the facts of this case show that D&L exhibited unfettered discretion as to the enforcement of the Restrictive Covenant. D&L, as well as prior mall owners, chose not to enforce the Restrictive Covenant against the Alliance Area Development Foundation but then chose to enforce it against Stars of Cleveland. Stars of Cleveland argues this Court should apply our holding in *Colonial Estates Home Owners Assn., Inc. v. Burkey*, 5th Dist. Tuscarawas No. 97AP020013, 1997 WL 34724487 (Oct. 7, 1997), where we found if there has been a general acquiescence in the violation of the restriction, the restriction is rendered unenforceable. *See also Rockwood Homeowners Assn., supra* at ¶ 22. However, it is not a bright line test that holds where there is acquiescence, there is always waiver.

{¶36} Upon our de novo review, we find the limited Civ.R. 56 evidence supporting the parties' arguments creates genuine issues of material fact as to the character of the community and whether the Restrictive Covenant has substantial value for the development of Carnation Mall preventing this Court from granting summary judgment in favor of one party. Ohio law cautions against the use of restrictive covenants and discourages unfettered discretion as to the application of a restrictive covenant. As found in *Polaris*, however, evidence of the value of the restriction and the proper enforcement of the restriction can overcome the predisposition against a restrictive covenant.

{¶37} We sustain the first Assignment of Error of Stars of Cleveland.

II. STANDING

{¶38} The next issue to be resolved is whether Stars of Cleveland has standing to challenge the Restrictive Covenant. Stars of Cleveland argues in its second Assignment of Error that the trial court erred when it found Stars of Cleveland did not have standing to challenge the Restrictive Covenant because it held the facts established Stars of Cleveland purchased the Property with the intent to disregard the Restrictive Covenant. We agree the trial court erred.

{¶39} D&L cites to *Kokenge v. Whetstone*, 26 Ohio Law Abs. 398, 4 Ohio Supp. 207 (C.P.1938) for the proposition that a buyer who purchases property with the intent of disregarding a deed restriction has no standing in a court of equity. *Id*. at 214. In *Kokenge*, the Hamilton County Court of Common Pleas was asked to determine whether a deed restriction established in 1899 was enforceable because the character of the neighborhood had changed from a residential district. In support of its decision that the deed restriction was not waived by a change in the character of the neighborhood, the trial court quoted *Wallace v. Clifton Land Co.*, 92 Ohio St. 349, 359, 110 N.E.940 (1915):

> These restrictions were not imposed for the benefit of the original proprietor, further than the fact that the general and uniform plan of restricting the allotment to resident purposes might contribute to a readier sale of the lots. The real purpose of the restrictions was to guarantee to the purchasers a quiet residence locality, where they might build their homes and live apart from the noise of manufacturing and the bustle and confusion of the marts of trade. The great majority of these purchasers undoubtedly bought with this idea in view. Their grantor kept faith and imposed like restrictions upon all the lots in this allotment that were similarly located. *The purchaser who bought with the intent or purpose of disregarding the restrictions and devoting the property purchased by him to any purpose that might suit his whim or his business needs, regardless of the restrictions written in his deed, has no standing in a court of equity.*

(Emphasis added.)

{¶40} Based upon the sentence emphasized above, the trial court agreed there was no genuine issue of material fact that Stars of Cleveland did not have standing to challenge the Restrictive Covenant. It further found this Court followed *Kokenge* in *Samsa v. Hess*, 5th Dist. Tuscarawas No. 2014 AP 0008, 2015-Ohio-1319. In support of its standing argument, D&L utilized our finding in *Samsa* where we stated, “[i]n the case at bar, the trial court found the [appellants] disregarded advice of other lot owners and relatives to review and abide by restrictions, and continued the construction in spite of written notification from an attorney to cease.” *Id*. at ¶ 30. We have reviewed our opinion in *Samsa* and we find no reference to standing or a citation to the highlighted proposition

of law quoted in *Kokenge*. Our statement in *Samsa* relied upon by D&L was not referring to standing, but rather to the appellants' argument that the doctrine of latches barred appellee from enforcing a restrictive covenant. *Id*. at ¶ 28. We affirmed the trial court's decision that the doctrine of laches was not applicable because it was reasonable for appellee to delay filing suit after the structure was completed. *Id*. at ¶ 31. The delay was based on the appellee's efforts to afford the appellants the opportunity to correct the violations at issue. *Id*. We find no support in *Samsa v. Hess* for D&L's argument on standing.

{¶41} As to the sentence referring to standing in the *Wallace* opinion, the Ohio Supreme Court later interpreted its meaning:

> While not strictly applicable to the facts of this case, the following quotation from *Wallace v. Clifton Land Co., supra*, 92 Ohio St. at page 360, 110 N.E. at page 943, indicates the attitude of the court regarding the attempted avoidance of restrictions to which property was subject at the time of purchase: '* * * The purchaser who bought with the intent or purpose of disregarding the restriction and devoting the property purchased by him to any purpose that might suit his whim or his business needs, regardless of the restrictions written in his deed, has no standing in a court of equity.'

Berger v. Van Sweringen Co., 6 Ohio St.2d 100, 107, 216 N.E.2d 54, 59 (1966). The issue of standing referred to in *Wallace* did not refer to the party's ability to invoke the jurisdiction of the court of equity, but rather for the concept that a party is expected to approach a court of equity with clean hands in order to obtain the relief the party deserves. *Baze-Sif v. Sif*, 10th Dist. Franklin No. 15AP-152, 2016-Ohio-29, ¶ 14.

{¶42} We held there is a genuine issue of material fact whether the Restrictive Covenant is enforceable. We find the trial court erred when it determined Stars of Cleveland did not have standing to challenge the Restrictive Covenant, whether upon jurisdictional or equitable grounds.

{¶43} The second Assignment of Error of Stars of Cleveland is sustained.

III. SUMMARY JUDGMENT

{¶44} Stars of Cleveland argues in its third Assignment of Error that the trial court erred in denying summary judgment in its favor. Based on our decisions on the first and second Assignments of Error, we agree that the trial court erred in granting summary judgment in favor of D&L. We find there are genuine issues of material fact as to whether D&L waived or abandoned the Restrictive Covenant.

{¶45} The third Assignment of Error of Stars of Cleveland is rendered moot.

CONCLUSION

{¶46} The judgment of the Stark County Court of Common Pleas is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion and law.

By: Delaney, J., and

Wise, J., concur.

Gwin, P.J., dissents.

Gwin, J., dissents

{¶1} I respectfully dissent as to the majority's decision in Assignments of Error I and III. I would find the "substantial value" test inapplicable to the instant case. The cases cited by D&L in which the "substantial value" test has been applied (*Romig* and its progeny) are those in which a property owner argues that the right to enforce a restriction has been lost by the failure to enforce this restriction against other properties, primarily in residential subdivisions or adjoining properties. *Romig v Modest,* 102 Ohio App. 225, 142 N.E.2d 555 (2nd Dist. 1956); *Emerald Estates Homeowners Assn. v. Albert*, 5th Dist. Stark No. 2009 CA 00072, 2009-Ohio-6627; Thus, in those cases, the court determines whether the failure to enforce the restriction against other properties caused a change in the neighborhood such that the restriction no longer retained "substantial value." *Id.*

{¶2} However, I would find the instant case is distinguishable from those cases cited by appellees utilizing the substantial value test. Here, appellants, the property owners, do not argue the right to enforce the restriction has been lost by a failure to enforce the same restriction against other properties. Rather, appellants claim the right to enforce the restriction stems from D&L's failure to enforce the restriction for an extended period of time on the property against which D&L is seeking to enforce the restriction, which is the property at issue. In this case, there is no failure to enforce the restriction against other properties and no comparison with other properties that would make a substantial value determination relevant. Thus, I would find the "substantial value" test not relevant or applicable to the instant case.

{¶3} I would instead apply our holding in *Colonial Estates* that when there has been a general acquiescence in the violation of the restriction, the restriction is

unenforceable. *Colonial Estates Home Owners Assn. Inc. v. Burkey*, 5th Dist. Tuscarawas No. 97AP020013, 1997 WL 34724487 (Oct. 7, 1997). Further, I would construe the general warranty deed in accordance with the contract principle that a waiver of a provision may be express or implied from conduct that is inconsistent with an intent to claim the right. *Laughbaum v. Rabb*, 5th Dist. Richland No. 2028, 1982 WL 5481 (Aug. 11, 1982); *Congress Lake Club v. Witte*, 5th Dist. Stark No. 2007CA00191, 2008-Ohio-6799. Here, appellees abandoned and impliedly waived the restriction on the property by their own conduct. Appellees permitted the restriction to be disregarded for an extended period of time and there is no dispute that the Alliance Area Development Foundation is not a savings and loan institution and did not use the Property as a savings and loan branch office.

{¶4} In this case, appellees clearly abandoned and waived the use restriction on the Property by allowing the Alliance Foundation, a non-profit organization which is not a savings and loan branch and did not use the Property as a savings and loan branch, to occupy the subject property for thirteen (13) years in violation of the deed restriction. Ferguson acknowledged she knew the lot was being used in a manner not permitted by the use restriction during the entire time D&L owned Carnation Mall, yet she made no effort to enforce the restrictive covenant until appellants purchased the property.

{¶5} Accordingly, I would sustain appellants' first assignment of error and find appellees and its predecessor waived the restriction on the property by their own conduct of permitting the restriction to be disregarded for an extended period of years. Further, based upon this waiver, as to appellants' third assignment of error, I would find there is no genuine issue of material fact and appellants are entitled to judgment as a matter of

law. Thus, I would find that, upon a de novo review, the trial court erred in granting summary judgment in favor of appellees and erred in not granting summary judgment to appellants.

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HON. W. SCOTT GWIN