NO. 85-98-J

IN THE DISTRICT COURT

DALLAS COUNTY, TEXAS

191ST JUDICIAL DISTRICT

MARVIN H. RANDLE, et al.,

Plaintiffs

VS.

LANNY PHILLIPS,

Defendant

DEFENDANT'S POST-TRIAL BRIEF

TO THE HONORABLE JUDGE OF SAID COURT:

I.

Introduction

The above-referenced matter was tried to the Court on the 24th and 25th of September, 1985, at the conclusion of which the Court indicated that it desired the parties to address and brief the following issues:

1. Whether there is sufficient state action to bring this case within the ambit of the protection afforded by the federal and state constitutions.

2. Whether the filing of record of restrictive covenants as a separate instrument is constructive notice to a purchaser

where neither his deed nor the deeds of any of his predecessors in interest reference the restrictions.

3. Whether a title policy referencing the restrictions received after the purchaser had closed on the purchase of the property is constructive notice of the restrictions.

4. Whether Plaintiffs Toia and Drivers should be considered estopped by their own inaction and Plaintiff Randle's acquiescense in the installation of the tower and antenna.

5. Whether the Court may fashion a remedy such that Defendant Phillips will be monetarily compensated for the cost of removing the tower if the Court orders such a removal.

In response to the Court's request, Defendant Lanny Phillips submits this Post-Trial Brief, and respectfully requests the right to make a brief closing argument addressing these and other points discussed herein, provided that the Court deems that such argument would be helpful in resolving the issues currently before the Court.

In addition to addressing the specific questions raised by the Court, Defendant discusses those issues previously raised in its Trial Brief, in light of the evidence at trial, which Defendant believes compels a judgment in his favor and denying Plaintiffs any relief.

II.

Plaintiffs Are Not Entitled To Relief
Because They Have Failed To Meet Their Burden
Of Establishing A General Plan or Scheme of Development

A deed restriction has been held to be a personal covenant with the grantor and as such, it cannot be enforced by the owners of other lots in a subdivision unless there is proof of a general plan or scheme for restricting the entire subdivision. Thus, before a restriction can be enforced against a grantee by another property owner, there must be a showing of a general plan or scheme and an intent of the parties to the covenant that the restrictive scheme inure to the benefit of all owners in the subdivision. Scott v. Rheudasil, 614 S.W.2d 626 (Tex. Civ. App. - Fort Worth 1981, no writ). The burden is on the Plaintiffs to prove that a general scheme or plan does exist. Brehmer v. City of Kerrville, 320 S.W.2d 193 (Tex. Civ. App. - San Antonio 1959, no writ).

The mere placing of a plat and dedication of record is not sufficient evidence to establish that a general plan or scheme exists where it is not shown that the lots were purchased in reliance on the recorded plat and dedication instrument. Burns v. Wood, 492 S.W.2d 940 (Tex. 1973). Additionally, it has been held that conveyance of a large number of lots without any restrictions eliminates the possibility that the primary developer intended to impose a common plan or scheme for the development of the subdivision. Wiley v. Schorr, 594 S.W.2d 484 (Tex. Civ. App. - San Antonio 1979, no writ).

Some courts have even gone so far as to hold that in order to find the existence of a general plan or scheme the restrictions must not only appear in one deed but on all deeds of the lots purportedly restricted. See Moe v. Gier, 2 P.2d 852, 116 Cal. App. 403 (1931). Davis v. Huey, 620 S.W.2d 561 (Tex. 1981), confirms this idea, as it states that restrictive covenants will be enforced when "such covenants are inserted in all the deeds for lots sold in pursuance of the plan," quoting with approval from Curlee v. Walker, 244 S.W. 497 (Tex. 1922).

Plaintiffs have failed in their burden to show that a general plan or scheme existed. The testimony and evidence showed that the subdivision was established without any deed restrictions of record, and that the attempt to establish a scheme occurred later and was not joined in by all of the owners of lots within the subdivision. Burns v. Wood demonstrates that the mere filing of record of deed restrictions is insufficient proof of a general scheme or plan of development. Plaintiffs, in order to prevail, must show that the lots were purchased in reliance on the restrictions. See Lehmann v. Wallace, 510 S.W.2d 675 (Tex. Civ. App. - San Antonio 1974, writ ref'd n.r.e.). The Plaintiffs have not shown that any of the purchasers of lots in the subdivision purchased lots in reliance on the restrictions. To the contrary, the evidence establishes that most of the purchasers in the subdivision were not even aware that such restrictions existed and would not take any action to enforce the restriction at issue. Moreover, the fact that most of the deeds in evidence

do not even reference the restrictions should eliminate the possibility that such a scheme exists or was intended to exist. See Wiley v. Schorr; Keith v. Seymour, 335 S.W.2d 862 (Tex. Civ. App. - Houston 1960, writ ref'd n.r.e.). Clearly, the Plaintiffs have not sufficiently established either the existence of a general plan or scheme, or the intent to maintain a general plan or scheme.

Wiley v. Schorr indicates the restrictions must be universal: "Therefore, if an agreement purports to restrict all of the lots in a designated area, the restrictions must apply to all lots of like character in that area." 594 S.W.2d at 487.

The evidence clearly establishes that the restrictions purported to be universal when in fact they were not. The restrictions were stated as encompassing all lots within the subdivision, when in fact several owners of lots in the subdivision did not join in the creation or filing of the restrictions. Plaintiffs conceded at trial that such restrictions did not bind such owners or apply to their property. Most of these people still own property in the subdivision. As a result, the restrictions did not apply to all lots of a similar character and were not universal in character. Universiality of restrictions was further diluted by the failure of the lot developers, including Plaintiffs Randle and Toia, to specifically or otherwise reference the recorded deed restrictions in conveyances to the current owners of lots within the subdivision. Because of these failures, the restrictions should not be enforceable as a

general plan or scheme, and absent proof (there being no evidence at trial) of a direct contractual relationship between Plaintiffs and Defendant Phillips, there is no basis upon which to order any mandatory injunctive relief requiring removal of Defendant's tower and antenna.

III.

Plaintiffs failed in Their Burden To Establish That Defendant Phillips Had Actual or Constructive Notice of The Restrictions

Texas law is clear that in order to enforce restrictions based on a general plan or scheme, it is essential that the party seeking to enforce the restrictions on the use of land establish that the purchaser had notice of the limitations on his title. McCart v. Cain, 416 S.W.2d 463 (Tex. Civ. App. - Fort Worth 1967, writ ref'd n.r.e.); Fleming v. Adams, 392 S.W.2d 491 (Tex. Civ. App. - Houston 1965, writ ref'd n.r.e.). There are two types of notice: actual and constructive. There is no dispute that the testimony in this case shows that the Defendant had no actual notice of the restrictions. Indeed, the evidence shows that no one informed Defendant Phillips prior to his purchase of a lot that recorded deed restrictions existed and prohibited the erection of a tower and antenna. This fact was crucial to Defendant Phillips' decision to purchase the property, as he testified he would not have closed the purchase had he been informed of the restrictions. Constructive notice of restrictions can only be established through an instrument which forms an essential link in the owner's chain of title. Smith v.

Bowers, 463 S.W.2d 222 (Tex. Civ. App. - Waco 1970, no writ). No document forming an essential link in Defendant Phillips' chain of title reflects the existence of the restrictions upon which Plaintiffs base their claim for injunctive relief.

In Keith v. Seymour, it was held that no building restrictions were imposed on property where the only reference thereto appeared in the general warranty clause of a deed. In the present case, the testimony indicates that the deed restrictions were filed of record as a separate instrument but were not mentioned in the Deed to Defendant Phillips or any of his predecessors in interest. Thus, the facts at trial were stronger than those present in Keith v. Seymour, which denied plaintiffs the right to injunctive relief to enforce the recorded deed restrictions.

The Court has specifically raised the issue of whether this separate recordation is sufficient to constitute constructive notice to the Defendant. Defendant believes it is not. George W. Thompson, Thompson on Real Property, (1963 replacement by John S. Grimes), Vol. 8A § 4340, pg. 5, addressed this issue by stating: "If a restrictive covenant appears in a separate instrument or rests in parol and not in a deed in the chain of title and is not referred to in such deed, a purchaser has no constructive notice of it," citing Turner v. Glenn, 220 N. Car. 620, 18 S.E.2d 197 (1942).

Similarly, Hancock v. Gumm, 107 S.E. 872, ___ Ga. ___ (1921), held that where a recorded deed of one of the lots of a

larger tract contains restrictive covenants which purport to apply to all lots of the larger tract belonging to a common grantor, the purchaser of one of the remaining lots at a later time without reference to deed restrictions is not chargeable with constructive notice of those covenants through the recorded deed of the lot which reflects the existence of such restrictions.

Under the foregoing authorities, the recording of the restrictions in a separate document should not be constructive notice to Defendant Phillips, where neither his Deed nor the deeds of any of his predecessors made any mention or reference to the existence of such covenants.

The court has specifically raised another issue concerning constructive notice - the issue whether the fact that the title policy mentioned the restrictions should constitute constructive notice where the policy was received two months after the Defendant closed the purchase of his house. Again, Defendant believes the answer to this issue is negative.

Texas law is replete with the idea that the purchaser must have had notice of the restrictions at the time he purchased the property. Davis v. Huey states that the purchaser will be bound by the restrictions "if he has bought with actual or constructive knowledge of the scheme, and the covenant was part of the subject matter of his purchase." 620 S.W.2d at 567. (emphasis added)

Likewise, Fleming v. Adams states that the purchaser will be bound "if he bought with actual or constructive knowledge", 392

S.W.2d at 495, and Monk v. Danna, 110 S.W.2d 84 (Tex. Civ. App. - Dallas 1937, writ dism'd), holds that the purchaser must have "purchased with knowledge." Id. at 87.

These cases stress the idea that the owner of the property must have had knowledge of the restrictions at the time he purchased the property. Knowledge at a later time is not sufficient for the purchaser to be bound by the restrictions. The fact that a title policy, received two months after the purchase of the property, references the restrictions is simply irrelevant under these authorities on the issue whether Defendant Phillips had constructive notice at the time he made his purchase. Moreover, the evidence is clear that Defendant Phillips did not have actual notice that his title policy referenced the restrictions until his attorney called it to his attention after the tower and antenna had been installed.

IV.

Even If A General Plan Or Scheme Could Be Established And The Plaintiffs Could Prove That Defendant Phillips Had Notice, The Restrictive Covenants Should Be Found To Have Been Waived And Abandoned

The conveyance of several lots without mention of restrictions has been held to be sufficient to support a finding that restrictions have been abandoned. Overton v. Radland, 54 S.W.2d 240, 243 (Tex. Civ. App. - Amarillo 1983, writ dism'd), Duncan, Trustee, and Others v. Central Passenger R. Co., 4 S.W. 228, 85 Ky. 525 (1887). Furthermore, lots should not be subject to restrictions pursuant to a general plan or scheme where the deeds do not indicate that a general plan or scheme for

restrictions has been effectually established and followed. Keith v. Seymour, 335 S.W.2d at 868.

Pursuant to the foregoing authorities, it becomes obvious that any plan or scheme that may have ever existed has now been abandoned. Only two deeds of property to current owners in the subdivision make any specific reference to the recorded restrictions. Most of the deeds from Mr. Randle, the originator of the restrictions, make no or only indirectly and generally reference to restrictions. The same is true with respect to conveyances by others to current owners of lots in the subdivision. This is insufficient under the holding in Keith v. Seymour.

Furthermore, restrictive covenants in a general plan or scheme may be waived. See Tejas Trail Property Owners Ass'n v. Holt, 516 S.W.2d 441 (Tex. Civ. App. - Ft. Worth, no writ). In Tejas Trail Property Owners Association v. Holt, the court found that the complaining party had waived its rights to enforce the restrictions in that it had permitted a number of other violations in the subdivision without complaint. 516 S.W.2d at 445. Similarly, in this case, the complaining parties have been inconsistent in their enforcement of the restrictions.

The evidence shows that the restrictions in question have been waived. There have been many violations - side-entry garages have been built on several houses in clear violation of the restrictions, large advertising signs in violation of the

restrictions have remained posted for long periods of time, and vehicles have been parked in violation of the deed restrictions.

Not only have the Plaintiffs been inconsistent in their enforcement of the restrictions, but Plaintiff Randle testified that they have subjectively decided which restrictions to enforce and which ones to allow. Plaintiff Randle testified that he decided which restrictions to enforce by deciding whether the violation was "within the intent of the restrictions." Basically, he has subjectively determined which restrictions he felt were repugnant to his senses and should be enforced rather than abiding by the letter of the restrictions. Restrictions purportedly restricting land should not be used as a method for one to make and enforce subjection determinations of what one finds personally objectionable. Plaintiffs hould be estopped to rely on the restrictions in that their past conduct shows that the restrictions were not being enforced as written and had been effectively waived.

V.

None Of The Plaintiffs Have Clean Hands To Request Injunctive Relief

Since injunctive relief is an equitable remedy, the complaining party must come to the Court with clean hands and must have acted promptly to enforce the restrictions. Foxwood Homeowners' Association v. Ricles, 673 S.W.2d 376 (Tex. Civ. App. - Houston 1984, writ ref'd n.r.e.). In the Foxwood case, the court found that the parties attempting to enforce the restrictions had failed to use due diligence in enforcing the restrictions in that

they did not complain or object to the alterations being made by the defendant until several months after they became aware that the defendant was making alterations to his home in violation of the restrictions. Similarly, in this case, the testimony indicates that the tower was in plain sight of all of the Plaintiffs for several weeks before its installation was complete. The installation itself was done in several phases over a period of time. Plaintiff Randle admittedly discussed Defendant Phillips' plans for the tower and antenna with Defendant Phillips and made no objection until installation was complete. As in Foxwood, all of the Plaintiffs were surely aware of Defendant Phillips' plans long before any objections were made to his erection of the tower and antennas. As in Foxwood, objections were heard to be made only after the project was completed. Therefore, Plaintiffs do not have clean hands to request the mandatory injunctive relief which they seek.

Conduct on the part of the Plaintiffs in permitting other violations of the restrictions without any objection, also results in a waiver or estoppel barring suit to enforce the restrictions. Zmotony v. Phillips, 529 S.W.2d 760 (Tex. 1975); Baker v. Brackeen, 354 S.W.2d 660 (Tex. Civ. App. - Amarillo 1962, no writ).

The evidence has established that all of the Plaintiffs have themselves violated the deed restrictions time and time again. Also, Plaintiffs have been aware of many other violations that they have allowed to go unchecked. Because of the numerous

violations by Plaintiffs themselves and Plaintiffs' knowledge of other violations that went unchecked, Plaintiffs have unclean hands and no right to seek any injunctive relief against Defendant. Foxwood Homeowners' Association v. Ricles, 673 S.W.2d at 379.

The right to an injunction may be waived by acquiescing to violation of the restrictions. The concept of "laches" comes to play in such a situation. Laches involves a prior failure to enforce a covenant agent the present violator, rather than a prior failure to enforce the promise against prior offenders. Gillingham v. Timmins, 104 S.W.2d 115 (Tex. Civ. App. - Galveston 1937, writ dism'd w.o.j.). Laches has application in this case as the Plaintiffs knew of Defendant Phillips' plan long before any objections were made. In addition, Plaintiffs failed to enforce another restrictive covenant against Defendant Phillips when he built a non-conforming garage specially designed to store his radio equipment. The garage is apparently in violation of the restrictions but no complaints were made during its construction or after its completion. In fact, no one ever even informed Defendant Phillips that his garage was in violation of the restrictions. Because of the Plaintiffs' failure to timely enforce the restrictions relating to towers and antennas and garages, Plaintiffs are guilty of laches and should now be estopped to seek injunctive relief.

Clearly, Plaintiff Randle should be barred from seeking a remedy as the evidence shows that he waived his rights by

acquiescing and consenting to the ordering and the installation of the tower. As the testimony showed, Plaintiff Randle anonymously mailed a letter containing the deed restrictions to Defendant Phillips' home after Defendant Phillips had already purchased and neared completion of the installation of the tower and antenna. No actual complaint was made by Plaintiff Randle until installation of the tower and antenna was complete. The remaining Plaintiffs also acquiesced in the erection of the tower by not objecting to it until it had been completed when the installation process took several weeks to complete and the tower and antenna were in plain view for anyone to see.

The Court has also specifically raised the issue whether Plaintiff Randle's knowledge and waiver should be imputed to the other Plaintiffs. It has been held that when some members of a property owner's association know that a lot owner is planning to install à certain type of roofing not allowed under a restrictive covenant, but wait until after the roofing has been completely installed before objecting, laches will defend against a later attempt to enforce the covenant. Tejas Trail Property Owner's Ass'n v. Holt, 516 S.W.2d at 443, 444. The Plaintiffs should now be estopped to seek relief. See also Overton v. Ragland, 54 S.W.2d 240 (Tex. Civ. App. - Amarillo 1932, writ dism'd w.o.j.); Spencer v. Maverick, 146 S.W.2d 819 (Tex. Civ. App. - San Antonio 1941, no writ).

VI.

The Balancing Of Equities Justifies Denying Plaintiffs Any Injunctive Relief

Even if the Court finds that the remaining Plaintiffs did not waive their rights and that the Randle waiver and consent cannot be imputed to them, the Court should balance the equities between the remaining Plaintiffs and the Defendant. Where enforcement of an injunction would be inequitable, oppressive, harsh, and unconscionable, the Court may refuse to allow an injunction. Davis v. Carothers, 335 S.W.2d 631 (Tex. Civ. App. - Waco 1960, writ dism'd by agr.). Where it has been demonstrated that there is a substantial disproportion between the Defendant's harm and the benefit to be received by the Plaintiffs, courts have refused enforcement on equitable grounds. Garden Oaks Bd of Trustees v. Gibbs, 489 S.W.2d 133 (Tex. Civ. App. - Houston [1st Dist.] 1972, writ ref'd n.r.e.).

Comparing the harm that will be done to the remaining Plaintiffs by allowing the tower to remain to that which will be done to Defendant Phillips if he is forced to remove the tower and antenna, it becomes obvious that the equities are in Defendant Phillips' favor. The Plaintiff Drivers live several houses down and across the street from the Defendant. They will not, by any stretch of the imagination, be significantly damaged if the tower and antenna remain, as is further demonstrated by their lack of interest to testify or even appear at the trial of this case. Similarly, Plaintiff Toia, a builder, does not even live in the house which he owns in the neighborhood. In fact, he testified

that there is presently a sale pending on such house which will close in the near future, eliminating his ownership of any lot in the neighborhood. He did not allege that the existence of the tower and antenna had in any way hindered the sale of the house or that removal of the tower and antenna is required by his purchasers. Furthermore, the remaining lot owners in the subdivision have signed a petition indicating that they would not seek injunctive relief to enforce the restrictions against Defendant Phillips.

On the other hand, Defendant Phillips will suffer irreparable harm if he is forced to remove the tower and antenna. He will be forced to give up a hobby that he has participated in for over 37 years. He has expended over $25,000.00, installed a great deal of radio equipment and specially designed his garage -- all of which will be a waste of time, energy, planning and money if he is now forced to remove the tower and antenna. Furthermore, the community will be deprived of the public service benefits which ham operators like Defendant Phillips can offer in times of emergency, disaster and crisis. In reality, Defendant Phillips will likely have no choice but to begin a search for a new home, since he testified that he would not have purchased the property had he known of the restrictions. Clearly, the harm Defendant Phillips will suffer <u>greatly</u> out-weighs any harm that will be allegedly suffered by the remaining Plaintiffs. Indeed, Plaintiffs have not presented any testimony of specific harm they have or will incur if the tower and antenna remain, other than

the Randles' personal distaste after they built their home on the vacant lots behind Defendant Phillips' home.

Enforcement will also be unjust because Defendant Phillips was unaware of any deed restrictions upon his property when he purchased it, he sought and obtained consent to erect the radio tower and antenna from Plaintiff Randle, the primary developer of lots within the subdivision, and he did not receive any objections or complaints from any of the Plaintiffs until after the installation and erection of such equipment was complete. Under these circumstances and in light of the fact that none of Defendant's neighbors, other than the named Plaintiffs, object to the tower and antenna, the balancing of the equities reveals that any enforcement of the deed restrictions against Defendant would be both inequitable and unjust.

Adding to the equities in favor of the Defendant is the fact that the law does not favor restrictions on land. In Baker v. Henderson, 153 S.W.2d 465 (Tex. 1941), the court stressed this idea when it said: "Restrictive clauses in instruments concerning real estate must be construed strictly, favoring the grantee and against the grantor, and all doubt should be resolved in favor of the free and unrestrictive use of the premises."

VII.

Enforcement Of The Restrictions
Violates The Texas And Federal Constitution

Yet another reason exists for refusing the injunction sought by the Plaintiffs. Enforcement of the restriction should not be

allowed since enforcement of the deed restrictions would violate the Defendant's right to freedom of speech.

Both the federal and state constitutions protect the right of free speech. Freedom of speech is considered a fundamental right and it has been a right jealously guarded throughout American history. In fact, the United States Supreme Court has declared that: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." N.Y. Times v. United States, 403 U.S. 713, 91 S.Ct. 2140 (1971). The restriction sought to be enforced here is in derogation of Defendant's liberties, rights and privileges guaranteed by the Constitutions of the United States and Texas. In light of this factor and the heavy presumption against the constitutional validity of such a restraint, the Plaintiffs' actions and rights should be examined with close scrutiny and any doubts should be resolved in favor of the Defendant. N.Y. Times v. United States, 403 U.S. at 714. See also Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625 (1931) and Universal Amusement Co. v. Vance, 587 F.2d 159 (1978, CA5 Tex.), aff'd 446 U.S. 947 (1980).

The freedom of speech protected by the First Amendment is among the fundamental liberties protected by the due process clause of the Forteenth Amendment from impairment by the state.

The Court has specifically raised the issue of whether or not there is sufficient state action in the present case to bring it within the confines of constitutional protection. Defendant believes there is.

The federal guarantee of due process is a restraint upon all the departments of government - legislative, executive, and judicial - and binds every state official, high and low. It applies whatever the guise in which the action is taken. United States v. Raines, 362 U.S. 17, 80 S.Ct. 519 (1960). The Texas constitutional provision of due process also has application to the judiciary. Hewitt v. State, 25 Tex. 722 (1860).

Neither the state nor the federal clauses apply to purely private action. However, a violation of the clauses may result from the interplay of governmental and private action. The state may not do indirectly through its officers, agencies, or instrumentalities that which it could not do through legislative act. Juarez v. State, 277 S.W. 1091 (Tex. 1925).

Specifically, in one of the leading constitutional cases on state action, Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 842 (1948), the U.S. Supreme Court held that court enforcement of a restrictive covenant was sufficient state action to bring the covenant within the ambit of the Constitution, stating:

> "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear that there has been no action by the state and the provisions of the Amendment have not been violated.
>
> But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements."

The Court went on to add "that the action of state courts and of judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment, is a proposition which has long been established." Id. at 842.

The Court further noted in Shelley, like the present case, that it was not a case in which the state had merely abstained from action. Rather, in Shelley, as in the present case, individuals were being given the full coercive power of the state to deny a fundamental right to another citizen. Id. at 845.

It is difficult to see how the Shelley case can be distinguished from this case. Both cases involve state enforcement of restrictive covenants which will result in the denial of a fundamental right to a citizen. Court enforcement of the restrictive covenant should, as in Shelley, be sufficient state action.

Since the restriction is an absolute ban on radio towers and antennas, Phillips must remove his tower and antennas in their entirety if the Plaintiffs prevail. It has been held that radio tower height limits restrict free speech. Oelkers v. City of Placentia, slip op. No. CV78-1801-R art (C.D. Cal. 1980) (opinion attached). The Court in the Oelkers case found that the 25-foot height limitation ordinance in question effectively prohibited all radio transmissions by the radio operator and that, because of this, there was an effective prohibition of speech. On this basis, the court found the ordinance to be unconstitutional.

The present case is even a more evident denial of free speech. Here the tower must be removed entirely if the Plaintiffs prevail. This will result in absolute prohibition of speech through radio communications. All radio transmissions will be halted by such an action and Defendant Phillips will be denied his fundamental and protected right to freedom of speech. Moreover, it would further serve to deprive the community of a public service which has been of numerous benefit to citizens in the past on a local, state, national and world-wide basis, as testified to by both Defendant Phillips and Mr. Haynie.

The federal government has recently reiterated its concern for the protection of radio transmissions. Mr. Haynie's testimony revealed that the Federal Communications Commission has recently declared a limited pre-emption over state and local regulation concerning amateur radio facilities, holding that there is strong federal interest in promoting amateur communications. Surely, in light of the important services performed by radio operators and the federal government's concern for promoting amateur communications, all doubt should be resolved in favor of Defendant Phillips.

VIII.

Defendant Phillips Should Be Allowed Monetary Relief If He Is Ordered To Remove The Tower

The Court has specifically raised the issue whether it would be proper for the Court to allow Defendant Phillips some sort of monetary compensation to cover the expenses he will incur if the Court were to require him to remove his tower and antennas. No

monetary remedy can make the Defendant Phillips whole if he is required to remove the tower and antennas. However, if the Court does order the removal of the tower and antenna, then Defendant Phillips should be compensated for his expenses in installing the tower and antenna and costs of removal.

American jurisprudence and Texas law are replete with the idea that "he who seeks equity must do equity." Sudderth v. Howard, 560 S.W.2d 511 (Tex. Civ. App. - Amarillo 1977, writ ref'd n.r.e.); Hendricks v. City of Sherman, 220 S.W.2d 189 (Tex. Civ. App. - Fort Worth 1949, writ ref'd n.r.e.). In fact, it has been held that a party seeking relief in equity will be required to do equity as a condition to the obtaining of relief.

In State v. Synder, 18 S.W. 106 (Tex. 1886), the Texas Supreme Court had this to say on the issue:

> "It may be regarded as a universal rule governing the court of equity in the arbitration of its remedies that, whatever may be the nature of the relief sought by the plaintiff, the equitable rights of the defendant growing out of or intimately connected with the subject of the controversy in question will be protected; and for this purpose the plaintiff will be required, as a condition to his obtaining the relief which he asks, to acknowledge, admit, provide for, secure, or allow whatever equitable rights, if any, the defendant may have, and to that end the court will, by its affirmative decree, award to the defendant whatever reliefs may be necessary in order to protect and enforce those rights."

Likewise, in Gaffney v. Kent, 74 S.W.2d 176 (Tex. Civ. App. - San Antonio 1934, no writ), it was held that:

> A court of equity finds no obstacle in the way of decreeing that which is right and just, through it be in favor of a defendant who is in some particular a wrongdoer. The maxim that he who seeks equity must do equity imposes upon him who invokes the jurisdiction of

> the court a plain condition that he must have accorded to the defendant and must consent for the court to decree to the defendant the latter's rights in the subject matter of the suit. It is intended neither as a weapon of offense against nor as a shield of defense for the defendants. It simply requires recognition of the rights, whatever they may be, of the defendant without regard to other considerations. Thus it occurs that, while the plaintiff will have all of his legal and equitable rights decreed and enforced, the defendant may also obtain affirmative relief that he would be precluded from seeking if he were the plaintiff. The equitable rights of the defendant will be protected.

Courts of equity have always been given wide latitude in fashioning remedies. "Courts of equity are not bound by cast iron rules, but are governed by rules which are flexible and adapt themselves to particular extingencies..." Warren v. Osborne, 154 S.W.2d 944 (Tex. Civ. App. - Texarkana 1941, writ ref'd w.o.m.) quoting with approval from Cox v. Hall, 54 Mart. 154, 168 P. 519.

In this case, the Plaintiffs seek to invoke the equitable jurisdiction of the court. Clearly, according to the cases above, the Court may fashion a remedy between the parties in whatever manner it finds to be just and fair. The Plaintiffs must be willing to allow the Court to do equity in that they themselves seek equity. A monetary award compensating Defendant for his expenses in purchasing, installing and removing the tower and antenna should be allowed if the Court orders such removal.

IX.

Defendant Phillips Is Entitled To A Declaratory Judgment And Recovery Of His Attorneys' Fees

The Uniform Declaratory Judgments Act, Article 2524-1 §10, Tex. Rev. Civ. Stat., provides that in any proceeding under the Act the court may make such award of costs and reasonable and necessary attorneys' fees as may seem equitable and just. See Rimmer v. Mckinney, 649 S.W.2d 365 (Tex. Civ. App. - Ft. Worth 1983, no writ). Counter-Plaintiff Phillips seeks a declaratory judgment under this statute. The Court has raised the issue of whether all of the parties necessary for such a declaratory judgment are parties to this suit. Specifically, the issue is whether all of the lot owners in the neighborhood must be joined in order to proceed under the Declaratory Judgments Act.

In J. C. Davis, et al. v. Congregation Shearith Israel, 283 S.W.2d 810 (Tex. Civ. App. - Dallas 1955, writ ref'd n.r.e.), a land owner brought suit against certain other landowners as members of a class. These landowners defended on the basis that all of the landowners affected by the restrictions were necessary and indispensable parties. The court disagreed with the defending landowners. The court stated that it was not called upon to decide whether property owned by the landowners not parties to the suit was subject to the restrictions. Rather, the only purpose of the suit so far as the deed restrictions were concerned was to obtain an adjudication as to whether the plaintiff landowner's land was subject to the restrictions. Id. at 812.

As a result, that court held that the landowners not parties to the suit were not necessary and indispensable parties.

In the present case, the same situation has occurred. Counter-Plaintiff Phillips does not seek to have the court determine the application of the restrictions to the other landowners. Rather, he seeks an adjudication of the application of the restrictions to his property only. Thus, following J. C. Davis, et al. v. Congregation Shearith Israel, the remaining landowners in the subdivision are not necessary and indispensable parties to his declaratory judgment suit.

Counter-Plaintiff Phillips seeks a declaratory judgment under this statute and the evidence in this case demonstrates that the equities lie with Defendant and Counter-Plaintiff Phillips. As a result, according to Section 10 of the Declaratory Judgments Act, Phillips should recover from Counter-Defendants his reasonable attorneys' fees incurred in the prosecution of his counterclaim through trial and on any appeal therefrom.

X.

Conclusion

For all the foregoing reasons, Defendant and Counter-Plaintiff Lanny Phillips requests that Plaintiffs take nothing by reason of their suit, that he recover his costs and expenses, that he be awarded judgment against Plaintiffs and Counter-Defendants declaring that the deed restrictions in question are unenforceable or alternatively not binding upon him and his

property, that he recover from Plaintiffs and Counter-Defendants his reasonable attorneys' fees through trial and any appeal therefrom, and for such other and further, general or special, at law or in equity to which he may show himself to be justly entitled.

Respectfully submitted,

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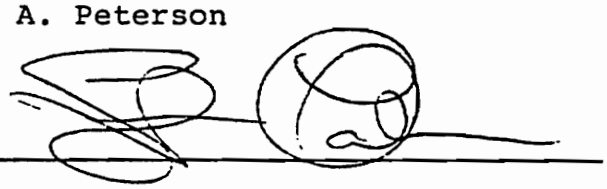
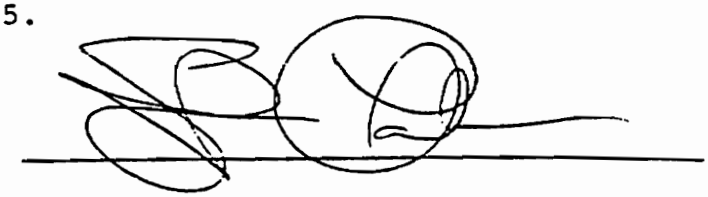
By: 

Attorneys for Defendant and
Counter-Plaintiff, LANNY PHILLIPS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Letter Brief of Defendant has been forwarded to all parties of record by certified mail, return receipt requested, on this the 15th day of October, 1985.



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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GEORGE E. CELKERS, Plaintiff vs. CITY OF PLACENTIA, CHARLES J. POST, III, GEORGE F. DE JESUS, WILLIAM E. RASHFORD; L. JACK GOMEZ, VIRGINIA C. FARMER, DONALD A. HOLT, JR. Defendants	CASE NO. CV 78-1301-RMT (Gx) FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court makes the following findings of fact and conclusions of law in this matter.

FINDINGS OF FACT

1. On May 1, 1978, pursuant to Motion by Plaintiff for a Preliminary Injunction heard on April 20, 1978, this court issued a Preliminary Injunction, including the following:

A. Plaintiff, a federally licensed amateur radio operator, was ordered to maintain his antennae at a height not to exceed fifty (50) feet above the ground.

B. Defendants were enjoined from enforcing a twenty-five

(21) and thirty (30) feet height restriction ordinance, as described in the City of Placentia ordinances 78-0-103 and 78-0-104 and Code Sections 23.12.040 and 23.81.090 against Plaintiff, including the bringing of a criminal or civil action against Plaintiff for any alleged violation of said ordinances or code sections.

2. This court continued further proceedings in this matter until August 21, 1978 to permit Defendant City of Placentia to consider reasonable standards and regulations regarding radio antenna height and radio wave propogation and the effect upon the city.

3. At the request of the City of Placentia, Plaintiff stipulated to a further continuance of this matter to November 13, 1978.

4. As of November 13, 1978, the City of Placentia failed to enact a reasonable height limitation ordinance and, pursuant to the request of the City of Placentia, the court further continued this matter until December 11, 1978.

5. On December 11, 1978, in open court, the City Attorney for the City of Placentia indicated that the city would consider and adopt a height limitation ordinance no later than May, 1979.

6. In open court, counsel for Plaintiffs and Defendants stipulated that the court's Preliminary Injunction, dated May 1, 1978 may be made permanent.

7. In compliance with this court's order of May 1, 1978, Plaintiff's antennae are maintained currently at a height not exceeding fifty (50) feet. Plaintiff is deprived of the use of some radio frequencies at said height and of consistent effective

world wide radio communication.

8. If Plaintiff's antennae are lowered to twenty-five (25) feet and ordered to comply with the subject ordinances, it is uncontested that there will be no functional utility of Plaintiff's radio equipment.

CONCLUSIONS OF LAW

1. Since the twenty-five (25) foot height limitation ordinance of the City of Placentia effectively prohibits all radio transmission of Plaintiff, the case of Schroeder v. Municipal Court of Los Cerritos Judicial District, 73 Cal.App.3d 841 (1977) is inapplicable.

2. This case involves the important right of Plaintiff's freedom of speech. By the imposition of a twenty-five (25) foot height limitation on radio towers and antenna, Plaintiff will be denied use of his radio equipment. Thus, this case involves effective prohibition of speech rather than regulation of speech.

3. If the subject ordinances were to be enforced, Plaintiff would be forced to either remove his towers or face civil or criminal prosecution.

4. This case involves serious questions of federal preemption, since Plaintiff is a federally licensed amateur radio operator pursuant to the Communications Act of 1934 47 U.S.C§ 151, et seq).

5. The federal abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971) is inapplicable, since the Younger Doctrine refers to refraining from enjoining pending state court proceedings and there is no pending state court proceeding involved in this case. See also Doran v. Salem 422 U.S. 922 (1975).

6. Since the subject height limitation ordinances and code sections are unconstutional as applied to Plaintiff herein, this court grants a permanent injunction as per the attached order.

Dated: JAN 9 1979

ROBERT M. TAKASUGI,
United States District Judge,

These findings of fact and conclusions of law have been lodged in accordance with this court's local rules.