

RESTRICTIVE COVENANTS: SINGLE FAMILY USE V. SINGLE FAMILY STRUCTURE

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The Court of Appeals has decided the case of *Winding Ridge Homeowners Association, Inc. v. Joffe, et al*, ___ N.C. App. ___, ___ S.E. 2d ___ (NO. COA06-1506, 7-17-07). (2007 WL 2032736.)

Article VIII of the restrictive covenants was titled, "Use Restrictions." The covenants provided:

Section 3. Use Of Property.

- (a) Only one *single family dwelling* or replacement thereof shall be placed upon each lot as designated on the said plat and no such lot shall be further subdivided by future owners for the purpose of accommodating additional buildings....
- (b) *This property shall be used for single family residential structures* and no duplex houses, apartments, trailers, tents or commercial or industrial buildings shall be erected or permitted to remain on the property provided, however, that this restriction shall not preclude the inclusion of one small light housekeeping apartment within the residential structure for occupancy by not more than two persons.
- (c) No *single family dwelling* shall be built, erected, altered or used unless the main body of the structure, exclusive of garages, porches, breezeways, stoops, and terraces, shall contain at least 1650 square feet of finished and heated floor space in the main body of the house if the structure is a one-story building or at least 2,000 square feet for all other structures.... (Emphasis is the court's.)

A residence was placed on the lot. The owners leased the unit to four unrelated college students.

The Court of Appeals stated that there were two issues. First, were the restrictions an occupancy restriction or a structural restriction? Second, if the restrictions constituted an occupancy restriction, did the four students constitute a single family unit?

The Court of Appeals made several holdings. 1. A provision in restrictive covenants as to the character of a structure which may be placed on a lot does not by itself constitute a restriction of the premises to a particular use. 2. The restrictive covenants were not analogous to those in *Hobby & Sons v. Family Homes*, 302 N.C. 64, 274 S.E. 2d 174 (1981). Instead, they were analogous to those in *Higgins v. Builders & Finance, Inc*, 20 N.C. App.1, 200 S.E. 2d 397, cert. den., 284 N.C. 616, 201 S.E. 2d 689 (1974). 3. In the case, unlike in *Hobby*, the captions of the relevant article and section were "Use Restrictions" and "Use Of Property," respectively, and, when construed with the language of the covenants, the covenants regulated the utilization of property through a structural limitation. The restrictive covenants constituted both an occupancy and structural restriction. 4. The four students did not constitute a single family and so, the restrictive covenants were violated.

The dissenter would have held that the covenants only constituted a limitation of the type of structure that could be placed on the property and not a restriction on the type of occupancy permitted within the dwelling and stated that *Hobby* applied. The dissenter stated that the majority had, in effect, rewritten the covenants to add a limitation in violation of the often stated rule of construction handed down by the Supreme Court that restrictive covenants are not favored by the law and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestricted use of land. The dissenter said that the majority focused on subsection (b)'s provision that "[t]his property shall be used for single family residential structures," the majority suggesting that it paralleled the provision upheld in *Higgins*, a case decided before *Hobby*. In *Higgins*, however, the restrictive covenant stated: "No structure shall be erected...other than for use as a single family residential dwelling...." *Id.* at 2, 200 S.E. 2d at 399 (emphases added). The two provisions are dispositively different, said the dissenter. The covenant in this case restricts *the use of the property* to certain types of "structures," as did the one in *Hobby*, while the *Higgins* covenant restricted the *use of the structure* to a single family dwelling.

Who is correct, the majority or the dissenting opinion?

In *Hobby*, the restrictive covenants provided:

No lot shall be used except for residential purposes, but nothing herein shall be construed to mean that a lot may not be converted to a street regardless of the type of use made of such street. No building shall be erected, altered, placed, or permitted to remain on any building unit other than one detached single-family dwelling not to exceed 2 ½ stories in height, a private garage for not more than three cars and outbuildings incidental to residential use.

In *Hobby*, the court held that the restrictive covenants (1) limited the property to residential use; (2) a single family residential structure was required; (3) but the use of the single family residential structure was not limited to a single family. So, in *Hobby*, the structure could be used as a home housing mentally retarded adults and their caretakers.

In *Higgins*, the court held that the language of the restrictive covenant, which provided that "[n]o structure shall be erected, altered, placed or permitted to remain on any lot other than *for use as a single family residential dwelling*," was both a structural and usage restriction.

We believe that *Hobby* and *Higgins* were decided correctly.

In *Winding Ridge Homeowners Association*, the restrictions stated that the land shall be utilized for a single family structure. In *Higgins*, the restrictions required that the structure had to be erected for use as a single family dwelling. This author believes the dissenter has a valid point, but the case is "close."