IN THE SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

HIGH GABLES HOMEOWNERS ASSOCIATION, INC. Plaintiff, v. LARRY C. OLDHAM, Defendant.	CIVIL ACTION FILE NO. 05 CV 2005

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR MANDATORY INJUNCTION

PLAINTIFF HIGH GABLES HOMEOWNERS ASSOCIATION, INC., ("High Gables"), files this, its Brief in Support of Motion for a mandatory injunction against DEFENDANT, LARRY C. OLDHAM, ("Oldham"), and shows this Court that a mandatory injunction is necessary to protect the rights of High Gables and its residents.

INTRODUCTION

High Gables seeks an mandatory injunction requiring Oldham to abide by certain restrictive covenants (described below) and (1) install an approved mailbox and mailbox post, and (2) complete landscaping. High Gables respectfully requests that this Court also order Oldham to pay High Gables attorney's fees as demonstrated below, under both Georgia law and equity. High Gables is entitled to relief and this Court has the power to grant it.

FACTS

High Gables is a Homeowner's Association in charge of maintaining the residential district within High Gables neighborhood. In order to provide a uniform and aesthetically pleasing place to live, High Gables imposes certain restrictions upon its residents. These restrictions are the same for every lot in the subdivision. High Gables' authority is grounded in

the Declaration of Covenants and Restrictions Applicable to High Gables, recorded at Deed Book 1538, Page 769, et seq., as amended at Deed Book 2876, Pages 548-554 (collectively the "Declaration"). A true and correct copy of the Declaration is attached to the Complaint as Exhibit "B."

Defendant Oldham owns a residence located at 4250 High Gables East, Cumming, Georgia 30041, as noticed by the General Warranty Deed recorded at Deed Book 3094, Pages 721-722. The deed conveying Oldham's lot specifically states that the property is subject to the all covenants and restrictions contained therein and of record, and all amendments thereto, relative to High Gables. Pursuant to Article V of the Declaration, and as a consequence of owning the lot, Oldham became a member of High Gables. Since purchasing the lot and becoming a member of High Gables, Oldham acknowledged, ratified, and publicized his membership by paying annual dues to High Gables.

Pursuant to Article VI of the Declaration, High Gables adopted Standard Building and Design Specifications ("Specifications") which, inter alia, mandate for each resident: 1) a poured concrete driveway; 2) a poured concrete sidewalk along the frontage of the property; 3) an approved mailbox and mailbox post assembly; and 4) finished entrance landscaping. No deviation from the Specifications is permitted absent specific approval in advance by the High Gables Architectural Control Committee ("ACC") consistent with its judgment and consideration of the best interests of the membership as a whole.

At the time Plaintiff filed its Complaint, Oldham had failed to pour a concrete driveway, failed to pour a concrete sidewalk along the frontage of the property, failed to erect an approved mailbox and post, and failed to place finished entrance landscaping on his property in direct, knowing and defiant violation of the Declaration and Specifications.

Former President of High Gables, David Marchat, sent Oldham a letter demanding that he comply with the Specifications, but Oldham failed to take any remedial action. Thereafter, High Gables Property Management Company sent Oldham another letter demanding that he take appropriate steps to conform his property to the High Gables Specifications. Despite this formal demand, Oldham failed to take any remedial action. After the Complaint was filed, Oldham installed the driveway and sidewalk. To date, Oldham's property continues to remain out of compliance, and Oldham remains in continuing violation of Association rules. In fact, rather than install an appropriate mailbox, Oldham has installed a "temporary" eyesore. A true and correct copy of a photograph of Oldham's "mailbox" is attached hereto as Exhibit "1."

ARGUMENT AND CITATION OF AUTHORITY

I. STANDARD FOR MANDATORY INJUNCTION

While an injunction is typically utilized to restrain action, an injunction may be entered requiring the defendant to perform some act. Goodrich v. Georgia R.R. & Banking Co., 115 Ga. 340, 41 S.E. 659 (1902), Sweetman v. Owens, *et al.*, 147 Ga. 436, 94 S.E. 542 (1917), Ellis v. Campbell, *et al.*, 211 Ga. 699, 88 S.E.2d 389 (1955). Such an injunction is a "mandatory" one. Id. State Farm Auto. Ins. Co. v. Rudine Mabry, *et al.*, 274 Ga. 489, 556 S.E.2d 114 (Ga. 2001) (citing Glynn County v. Waters, 268 Ga. 500, 491 S.E.2d 370 (1997)). Mandatory injunctions were forbidden in Georgia until the Civil Practice Act of 1967 expressly repealed O.C.G.A. § 55-110. See Ga. L. 1967, pp. 226, 244, § 40(f). See also Atlanta Country Club, Inc., *et al.* v. Sanders, 230 Ga. 146, 195 S.E.2d 893 (1973), Taylor v. Evans, *et al.*, 232 Ga. 685, 208 S.E.2d 492 (Ga. 1974). Now, Georgia Courts are free to issue mandatory injunctions, and in a proper case, a mandatory injunction may even issue after a temporary hearing. Wheatley Grading Contractors, Inc., *et al.* v. DFT Invs., Inc., 244 Ga. 663, 261 S.E.2d 614 (1979).

A trial judge has a wide latitude of discretion in determining whether an injunction will issue, and this discretion will not be disturbed unless manifestly abused. Taylor, 232 Ga. 685, 208 S.E.2d 492 (1974) (citing Davies v. Curry, 230 Ga. 190, 192, 196 S.E.2d 382 (1973), Prime Bank v. Galler, *et al.*, 263 Ga. 286, 430 S.E.2d 735 (1993). A mandatory injunction is an extraordinary remedy, one of the most powerful a court can issue. Prime, 263 Ga. 286, 430 S.E.2d 735 (1993). For that reason, it is called the "strong arm of equity." Id. "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion...It should be crafted in a way that is least oppressive to the defendant while still protecting the valuable rights of the plaintiff." Id. at 289 (quoting Cullman Prop. Co. v. H. H. Hitt Lumber Co., 201 Ala. 150; 77 So. 574 (1917).

It is an not an abuse of discretion to enter a mandatory injunction preventing the breach of restrictive covenants. Id. at 289. See also Focus Int'l, Inc., *et al.* v. Partridge Greene, Inc., 253 Ga. App. 121, 558 S.E.2d 440 (2001). Irreparable harm automatically occurs as a matter of law arising from a violation of a covenant running with the land. Partridge Greene, 253 Ga. App. 121, 558 S.E.2d 440 (2001). "Thus, no special showing of irreparable harm is necessary other than a violation of a valid restrictive covenant [for] equity to interpose by injunction to prevent the breach of [] covenants annexed to deeds..." Id. at 127-128. Equity will not refuse to enforce restrictive covenants unless there is such a gross inadequacy of consideration as to shock the conscience and amount to fraud. Burdine v. Brooks, 206 Ga. 12, 18, 55 S.E.2d 605, 609 (1949).

II. ISSUING A MANDATORY INJUNCTION REQUIRING DEFENDANT TO ABIDE BY THE RESTRICTIVE COVENANTS IN HIS DEED IS NOT AN ABUSE OF DISCRETION

Oldham owns a residence (noticed by the General Warranty Deed recorded at Deed Book 3094, Pages 721-722). The deed conveying Oldham's lot specifically states that the property is

subject to the all covenants and restrictions contained therein. High Gables adopted Standard Building and Design Specifications which mandate for each resident: 1) an approved mailbox and mailbox post assembly; and 2) finished entrance landscaping. Oldham has failed to abide by these mandates.

To maintain an action to enforce restrictive covenants, an individual must have a direct interest in the premises. Turner Adver. Co. v. Garcia, *et al.*, 252 Ga. 101, 31 S.E.2d 466 (1984). High Gables Homeowners Association has a direct interest in the premises, as it was formed to maintain and guarantee that all properties in the community would remain uniform and desirable. Furthermore, the members of High Gables Homeowner's Association are High Gables residents.

A purchaser of land is conclusively charged with notice of restrictive covenants contained in a deed which constitutes one of the muniments of his own title, and where the covenant is recorded, the purchaser has legal notice of it even if it is not stated in his own title. King v. Baker, *et al.*, 214 Ga. App. 229, 447 S.E.2d 129 (1994) When a grantee accepts a deed, and possession under it, such acceptance commits the grantee to the performance of the restrictive covenants. Louisville & Nashville R.R., 145 Ga. 594, 89 S.E. 693 (1916). All restrictions are recorded in "The Declaration of Covenants and Restrictions Applicable to High Gables," recorded at Deed Book 1538, Page 769. Oldham also had notice of the restrictions contained in his own deed.

Where one has a duty to perform restrictive covenants, requiring such performance is not an abuse of discretion. State Farm Mut. Auto. Ins. Co. v. Rudine Mabry, *et al.*, 274 Ga. 498, 556 S.E.2d 114 (Ga. 2001). Oldham accepted the deed and possession under it, therefore he committed himself to performance of the restrictive covenants. Louisville & Nashville at 594. Requiring Oldham to fulfill that duty is not an abuse of discretion. State Farm, 274 Ga. 498, nor

is it oppressive. Requiring Oldham to fulfill that duty is the only means by which to protect the Plaintiff's valuable rights.

III. A MANDATORY INJUNCTION REQUIRING DEFENDANT TO ABIDE BY THE RESTRICTIVE COVENANTS IS NECESSARY TO PROTECT THE PLAINTIFF'S VALUABLE RIGHTS

Requiring Oldham to landscape his property and install an approved mailbox is the least oppressive means by which to protect the Plaintiff's valuable right to maintain the neighborhood. In fact, requiring Oldham to take such action is *the only* means by which to protect Plaintiff's rights. Plaintiff's remedy at law is inadequate. Plaintiff asks that this court require Oldham to maintain his property at the standards he agreed to when he purchased the property. High Gables residents have been made to endure Oldham's stubborn refusal to abide by the restrictive covenants, and their interests can only be vindicated by requiring Oldham to perform, just as they have been required to perform.

In Dawson v. Wade, 257 Ga. 552, 361 S.E.2d 181 (1987), the defendant built a canal off of a creek upstream from the plaintiff. The trial court granted an injunction to the plaintiff, and the appellate court remanded the case for a determination of whether it was necessary to fill in the canal to protect the plaintiff's rights. The trial court answered the question in the affirmative. In Dawson, requiring the defendant to fill his canal was not oppressive. Similarly, requiring Oldham to install a mailbox and post and landscape is not oppressive.

In King v. Baker, 214 Ga. App. 229, the defendants violated a restrictive covenant mandating that "no animals other than a reasonable number of generally recognized household pets shall be kept on the property." Defendants ran a kennel out of their home and the neighbors objected. Despite the fact that defendants spent a substantial sum of money setting up the dog kennels, the Court ordered defendants to remove all dog pens from their yard, and awarded the plaintiff's their attorney's fees. The trial court noted that the defendants were conclusively

charged with notice of the covenants, that the value of the neighbor's property was affected by the defendant's kennel. The court stated that removal of the kennels was necessary to prevent the defendant's neighbors from suffering irreparable harm.

Similarly, Oldham has notice of the covenants, and his failure to abide them reduces the value of his neighbor's property. Requiring him to abide by them is necessary to prevent High Gables and its residents from suffering irreparable harm.

In Hech v. Summit Oaks Owners Ass'n, Inc., *et al.*, 2005 Ga. App. LEXIS 948, 2005 Fulton County C. Rep. 2716, the court required defendants to remove a swimming pool built in violation of restrictive covenants contained in the deed to their property. Defendants were ordered to remove their pool despite the fact that they had paid a substantial sum of money to have it constructed. Such a requirement was not considered oppressive, rather it was considered necessary to vindicate the rights of the neighborhood residents, all of whom had to abide by the same covenant.

Similarly, Oldham must comply with the restrictive covenants despite the fact that such compliance may cost money. Requiring Oldham to fulfill the promise that he made to the homeowner's association and his neighbors is not oppressive, rather, it is the only way to vindicate their rights.

Finally, High Gables need not show any irreparable harm to enforce the restrictive covenants found in Oldham's deed and in the Declarations. Focus Entm't, 236 Ga. App. 121. This is because irreparable harm automatically occurs as a matter of law when restrictive covenants are violated. *Id.* Equity will issue an injunction to protect the unique quality of the land, and money damages are generally considered inadequate. Id. Equity will not refuse to enforce restrictive covenants unless there is such a gross inadequacy of consideration as to shock

the conscience and amount to fraud. Burdine v. Brooks, 206 Ga. 12, 18, 55 S.E.2d 605, 609 (1949).

The restrictive covenants at issue were bargained for during negotiations for the sale of Oldham's lot. Oldham ultimately paid good consideration for the lot, and in return, Oldham was given title to the lot. Nothing in the sale of the property suggests that any fraud occurred, or that the consideration was inadequate. Oldham's violations of the restrictive covenants establish irreparable harm as a matter of law, and High Gables is entitled to an injunction to protect the quality of the land. *Id.*

IV. ATTORNEY'S FEES ARE AVAILABLE IN EQUITABLE ACTIONS

Attorney's fees may be awarded in equitable actions pursuant to O.C.G.A. § 13-6-11. King v. Baker, 214 Ga. App. 229. See also Clayton v. Deverell, 257 Ga. 653, 362 S.E. 364 (1987). Jones v. Spindel, 239 Ga. 68, 235 S.E.2d 486 (1977), Grant v. Hart, 197 Ga. 662, 30 S.E.2d 271 (1944), C & S Nat'l Bank v. Haskins, 254 Ga. 131, 137, 327 S.E.2d 192 (1985). It is clear that Oldham has acted in bad faith, has been stubbornly litigious and has caused Plaintiff unnecessary trouble and expense. Plaintiff will establish its fees at the hearing on its Motion for Injunctive Relief.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court issue a Mandatory injunction against Oldham.

Respectfully submitted,

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EXHIBIT
"1"


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR MANDATORY INJUNCTION** was served by first class mail, postage prepaid, upon:

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