Maryland State Board of Law Examiners

JULY 2021 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND

REPRESENTATIVE GOOD ANSWERS

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MPT 1

Representative Good Answer No. 1

To: Hon. Joann Gordon
From: Examinee
Re: Winston v. Franklin T-Shirts, Case No. 21-CV-0530

I. Introduction

You asked me to consider the four factors of fair use to determine whether Franklin T-Shirts use in contravention to Naomi Winston's copyright is or is not actionable.

II. Copyright and Fair Use

The owner of copyright under 17 U.S.C. 101 has the exclusive right to do and authorize a number of things, including reproducing the copyrighted work, preparing derivative works based upon the copyrighted work, and to distribute copies to name a few. 17 U.S.C. 106. Nonetheless, "the fair use of copyright . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." 17 U.S.C. 107. The fact that the use meets the above criteria, in and of itself, does not qualify the use as fair use. Brant v. Holt, United States District Court for the District of Franklin (1998). The courts must consider the following factors to determine if the use is fair use: "1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3) the amount and substantiality of the person used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work." Id.

II. Purpose and Character of the Use.

"The first factor requires an analysis of the purpose and character of the use, including whether it is of commercial nature . . . or for nonprofit educational purposes." Brant. "Political discourse is vital to the essence of our democracy, and uses for that purpose should, absent other factors, weigh heavily in favor of fair use." Id. The mere fact that a candidate for governor used a musician's song to send an uplifting purpose did not weigh in favor of fair use, especially when the candidate was not using the song to make a specific comment on his political agenda. Id.

An important factor weighing in favor of fair use is whether the subsequent user of the copyrighted material transformed the work. Allen v. Rossi, United States District Court of the District of Franklin (2015). "Simply reproducing the copyrighted work, even in another medium, is not the transformation that would justify a finding of fair use." Id. Indeed, reproducing a photograph into a three-dimensional sculpture was not fair use. Rodgers v. Koons. "Using an element of a copyrighted work in combination
with other creative expression, for a different purpose than the copyright owner's and to make a different social commentary, changes - transforms - the use and argues for fair use." Allen. Thus, when graphic artist took part of a wildlife photograph and cropped out an endangered animal to place into a larger collage of endangered animals, the work was found to be transformative. Id.

To begin, the use at issue may fall under the category of criticism or commentary, but that does not stop the analysis. Here, Franklin T-Shirts took a copy of the Naomi Winston's photograph of Jim Barrows being walked away from a demonstration in which he was arrested for and convicted of disorderly conduct. The use of the photograph was to counter Jim Barrows' later run for mayor, more than 20 years after his arrest and conviction. Franklin T-shirts used the picture on t-shirts that it sold during the time Barrows was running for mayor. The t-shirt contained the words "Arrested and Convicted" in red over the photograph and pronounced a caption that Barrows is a Hypocrite. This use weighs in favor of fair use because it is associated with political discourse and it is directly associated with Barrows' stance on "law and order."

There is also an argument that Franklin T-Shirts transformed the work. Franklin T-Shirts did not merely reproduce the work, but Franklin T-shirts also included the words "Arrested & Convicted" and "Barrows is a Hypocrite" to show that Barrows own actions and conduct were in contravention to this political messages and agenda. Thus, this factor weighs in favor of fair use.

III. Nature of the Copyrighted Work

The second factor to consider for fair use is the nature of the copyrighted work. "This factor usually does not significantly figure in most fair use analyses." Brant. "Most cases see its application as favoring the use of published as opposed to unpublished works, and scientific or factual works as opposed to those that are creative and expressive." Id. The creator and copyright owner of an unpublished work "should have the right to first divulge the work to the public in the manner she desires." Klavan. However, "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of the [four factors]." 17 U.S.C. 107. But, the creator and copyright owner of an unpublished work "should have the right to first divulge the work to the public in the manner she desires."

Photographs are intrinsically creative arts, which weighs against fair use. Allen. But where the photo is more informative than artistic, and it has been published, it weighs in favor of fair use. Id. Further, the artistic merit of works may be limited upon the passage of time (e.g., 10 years). Id. The mere fact that use was commercial does not mean the use cannot be fair. Klavan v. Finch

Broadcasting, United States District Court for the District of Franklin. Where the use involves something of importance to the public, the fact that the use was a commercial use does not bar a finding of fair use. Id.

Fair use of an unpublished work will be found where it depicts "a visual record of a significantly newsworthy event" and where it is the only visual record of the significant newsworthy event." Klavan. This was present where a news broadcast played the only video depicting violent actions by the Speaker of City Council and in the only video capturing the moment of the assassination of President Kennedy. Id. There are three significant factors in the case at bar that weigh in favor of fair use. First, the photograph taken by Ms. Winston of Mr. Barrows was published in two forms. The photograph was first published by Riverside Record, a local newspaper, and in Franklin in the 1980s. Thus, Ms. Winston was given the opportunity, and took the opportunity, to "first divulge the work to the public in the manner she desires." Not only was the use published, but the use involved factual depictions which weigh in favor of fair use.

Although photographs are intrinsically creative arts, the photo at issue is more informative than artistic because it depicts Mr. Barrows being arrested for disorderly conduct at the Franklin Fun Fair. Of course, the mere fact that Franklin T-Shirts used it in a commercial manner is no bar because it concerns something of importance to the public. Along those same lines, Ms. Winston was the only photographer on the scene that day. Similar to the video of the violent actions of the Speaker of City Council in Klavan, as well as the assassination of President Kennedy, this was a "visual record of a significantly newsworthy event" and it was the only visual record of such event. It is a matter of public importance to know where your candidate for governor, who is strict on law in order, has committed any crimes. As such, this factor weighs in favor of fair use.

IV. Amount and Substantiality of the Person Used in Relation to the Copyrighted Work.

The third factor requires courts "to analyze both the quantitative ('amount') and qualitative ("substantiality") use of the work." Brant. Where "the entire work was used, repeatedly, and without modification," the factor weighs against fair use. Id. However, "there are circumstances where use of the entire work can nevertheless amount to fair use (e.g., when the entire work is necessary for a commentary or a news report)." Moreover, where a user takes only a small portion of the copyrighted material, especially when that small portion does not go to the heart of the copyrighted work, the use will cut in favor of fair use. Allen. Where only eight seconds of a fourteen-minute work was used, and there were other portions of the video that had significance apart from the eight seconds, the use weighed in favor of fair use. Kavlan.

At the outset, Franklin T-Shirts used the photograph that Ms. Winston took of Mr. Barrows being arrested for disorderly conduct in its entirety. This would seem weigh against fair use. Moreover, the part of the picture of "the police leading a sneering Barrows away from the demonstration in handcuffs" is certainly the heart of the copyrighted work. However, the use at hand may meet the circumstances where use of the entire work can nevertheless amount to fair use. The use of the photograph at issue would be completely meaningless if Franklin T-Shirts was unable to use the entire photograph. Indeed, "the entire work [was]s necessary for a commentary." Although

this is a much closer call than the first two factors, this factor may weigh slightly in favor of fair use.

V. Effect of the Use Upon the Potential Market.

The final factor "is the effect of the use on the market for, or value of, the copyrighted work." Brant. This is an important factor in many a copyright case. Id. "One of the purposes of copyright is to protect the economic interests of the copyright owner." Id. "[T]he statute speaks not merely of actual harm, but also of harm to the potential market for or value of the copyrighted work." Id. Where a musician contended that a candidate for governor's use of her song would make the song permanently identified
with him and his political views, that the singer feared loss of reputation with her fans because she had publicly opposed the candidate's views, and that the singer had not licensed the use of her song to the candidate, the use of her song by the candidate weighed heavily against fair use. Id. On the other hand, where the copyrighted work has yielded little value (e.g., $100) over a long period of time (e.g., 10 years), and no one would have the "slightest notion" upon view that it is from the copyrighted work, the use will cut in favor of fair use." Allen. Fair use will too be found where the copyright owner still has many uses of the work subject to the fair use, where there is an untouched market for portion of the copyright not used, and where the copyright's value has actually been enhanced by the fair
use. Kavlan.

Here, there are several facts of great import. First, Ms. Winston granted a single license use to the Riverside Record, a local newspaper, allowing it to publish the Photograph accompanying a story about the political demonstration in exchange for $500 near the time of Mr. Barrow's arrest. Several years later, Ms. Winston licensed the photograph at issue, along with 72 other photographs, to the publisher of a coffee-table book of her photographs, entitled Franklin in the 1980s, which retailed for $40. Ms. Winston received a one-time license fee of $10,000, plus a 7% royalty for each copy sold. 3,500 copies were sold before the book went out of print in 1995. Ms. Winston made $9,800. In the twenty-five (25) years that have passed, Ms. Winston has not received any revenues from uses of the photograph since 1995. There is an argument that this case is unlike the Allen case where Allen's picture of the wildlife scene yielded little to no value in the time that preceded the transformative, fair use of Allen's picture. Here, Ms. Winston has made considerable consideration from her picture of Mr. Barrows, in excess of $10,000 to be exact. But much like the Allen case, Ms. Winston's photo has yielded little to no value in over ten (10) years, nor has the photograph been used in any fashion since 1995. There's no analogous argument to the Brant case in that Franklin T-Shirts use could damage her reputation or shed upon her views in a false light. Indeed, there are no set of facts that Ms. Winston favored Mr. Barrows for mayor. Moreover, there could be an argument that Franklin T-Shirts use has actually enhanced the value of Ms. Winston's photograph, which had little to no value in the preceding twenty- five years. Indeed, Franklin T-Shirts had sold 2,000 units of the shirt. One argument in Ms. Winston's favor is that the viewers of the photograph could have a notion that the photograph is the copyrighted material of Ms. Winston, since the photograph was published in coffee-table book of Ms. Winston's photographs. But taken as a whole, since there does not

appear to be much effect on the actual market of the photograph, the potential market of the photograph (since Barrows has completely withdrew from public life, retired from his business, and moved to the neighboring state of Olympia), and likely does
not adversely impact Ms. Winston's reputation, this factor likely weighs in favor of fair use.

VI. CONCLUSION

After weighing each of the factors, Franklin T-Shirts use of Ms. Winston's photograph of Mr. Barrows getting arrested in 1985 at the Franklin Fun Fair for disorderly conduct is most likely a fair use.

Representative Good Answer No. 2

MEMORANDUM

TO: Hon. Joann Gordon
FROM: Applicant
DATE: July 27, 2021
RE: Winston v. Franklin Summary Judgment

Fair use is an affirmative defense to a claim of copyright infringement. Brant v. Holt (1998) (Brant). In cases finding fair use, the use in question (absent any other valid defense) would constitute infringement. Brant. But the copyright statute excuses acts that would otherwise be infringements if they fall within the limits of the fair use provision of the Copyright Act 17 USC section 107. Brant. The Copyright Act requires that, to determine if a particular use is a fair use, we analyze four factors. Allen v. Rossi (2015) (Allen).

Factor 1: Purpose and Character of the Use

The first factor requires an analysis of the purpose and character of the use, including whether it is "of a commercial nature of for nonprofit educational purposes." Brant.

Was the purpose political?

In Brant, the use was not for commercial nor nonprofit educational purposes, rather the use was for political purposes. The court in Brant, concluded that political discourse is vital to the essence of democracy, and uses for that purpose should, absent other factors, weigh heavily in favor of fair use. However, in Brant, the defendant was not using that particular song to make any specific comment on his political agenda- it was more of a generalized feeling that all candidates espouse. Brant. Therefore, the court in Brant, found this factor only slightly favored the copyright owner and against fair use. Here, defendant Franklin T-Shirts, Inc (T-Shirts) is a purely commercial company that manufactures and sells t-shirts. However, its owner is active in Riverside politics and was a strong supporter of Barrow's opponent in the mayoral election. Additionally, the t-

shirts were sold at cost for only $4.00 and 2,000 units were sold. Finally, the purchasers of the t-shirts were overwhelmingly supporters of Barrow's opponent in the mayoral election. Therefore, a court would likely find that T-Shirts was making a specific comment on his political agenda, and not the use was not for commercial purposes because the t-shirts were only $4 and sold at cost to Barrow's opponents. In conclusion, the purpose was likely political.

Was the purpose for news reporting?

Statute explicitly states that one of the uses that may be fair use is "news reporting." Klavan v. Finch Broadcasting (2017) (Klavan). In Klavan, the defendant's purpose in using the excerpt of the video was to report the news to its viewers. While the use in Klavan was commercial (defendant operates the television station for profit), that does not mean that the use cannot be considered fair. Klavan citing Campbell. In Klavan, the news story was one of significant importance to the populace of Franklin City- it showed something about the Speaker of the City Council that reflected on his character and temperament. Klavan. Here, one could argue that the purpose of this use (photo on the t-shirts) was news because it is significantly important to the population of Riverside to inform them that a candidate running for mayor has been arrested and convicted of disorderly conduct. Similarly, to Klavan, it showed a political candidate in a manner that reflected on his character and temperament. However, a judge could also argue that this purpose was more political (see analysis above) than newsworthy because usually newsworthy information is published to newspapers or television and not spread through t-shirt sales. Therefore, the purpose was likely not newsworthy.

Was the use transformative?

A transformative use is not absolutely necessary for a finding of fair use, however, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Allen. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may wight against finding of fair use. Allen citing Campbell. In Allen, the defendant was selling copies- a commercial use- of a collage of endangered species photographs. However, in Allen, the defendant was giving the proceeds to noncommercial educational purpose, as endorsed by the statute. There may be cases where the reproduction of the entire work is transformative, by making a new work different in character and meaning from the original. Allen. But, as a general matter, simply reproducing the copyrighted work, even in another medium, is not the "transformation" that would justify a finding of fair use. Allen citing Rodgers (reproduction of a photograph into a three-dimensional sculpture was not fair use). That type of use simply treads on the copyright owner's right to make derivative works, 17 USC section 106(2). On the other hand, using an element of a copyrighted work in combination with other creative expression, for a different purpose than the copyright owner's and to make a different social commentary, changes - transforms- the use and argues for fair use. Allen citing Blanch (use of a portion of a copyrighted photograph in a collage, which in total made a comment on the materiality of commercialism, constituted fair use.) In Allen, the defendant's collage of endangered species was similarly transformative and weighed

in favor of fair use. Here, T-Shirts took a copy of the photo and reproduced it in its entirety on a t-shirt. Then the words "Arrested & Convicted" were stamped over the photo in red which adds a creative expression for a different purpose than the copyright owners because the defendant is trying to hurt Barrow's campaign for mayor. Additionally, the caption Barrows is a Hypocrite was added to further this message. Therefore, the work is likely transformative. Application of the first factor weights in favor of fair use.

Factor 2: Nature of the Copyrighted Work

Factor 2 usually does not figure in most fair use analysis, however it can be important in some instances. Klavan. Most cases see its application as favoring the use of published as opposed to unpublished works, and scientific or factual works as opposed to those that are creative and expressive. Brant. If the video was unpublished, it weighs against fair use. Klavan. This is because the creator and copyright owner should have the right to first divulge the work to the public in the manner she desires. Klavan. However, according to the last sentence of section 107, "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." Klavan. Thus, while the court must take into account the unpublished nature of the video, that does not end our inquiry. Klavan. Here, the work was published in a local newspaper with an accompanying story about the political demonstration. Additionally, the photograph was likely more factual because it was used to describe what occurred at the demonstration.

Factor 2 will militate in favor of fair use for two reasons: (1) if it is a visual record of a significant newsworthy event and is more vivid and revealing than a mere description would be and, more significantly, (2) it is the only visual record of the significant newsworthy event. In Time, Inc. v. Bernard (1968), a book's use of line drawings made from single frames of the only motion picture capturing the moment of the assassination of President John Kennedy was deemed by the court to be fair use because the case involved the use of the only visual record of an event of transcendent national importance. It is important to note that that this case was brought before the current Copyright Act was enacted, at a time when the fair use doctrine was uncodified and entirely judge made. However, the Franklin court still finds it persuasive. Here, the photo was a visual record or a newsworthy event and more vivid and revealing than a description would be. Additionally, Winston was the only professional photographer on the scene that day. Therefore, this weighs in favor of fair use.

Although photographs are intrinsically creative works (weighing against fair use), a photo that is more informative than artistic will weigh in favor of fair use. Allen. Furthermore, if a photo is published, it will weigh in favor of fair use. Allen. If the photograph is not used often (like in Allen, once only in the 10 years it was taken), it will weigh in favor of fair use. Allen. Here, the photo was more informative, it was published, and Winston has not received revenues from uses of the photo since 1995.

Application of the second factor weighs in favor fair use.

Factor 3: Amount and Substantiality of the Portion Used

For this factor, the statute requires the courts to analyze both the quantitative ("amount") and the qualitative (substantiality") use of the work. Brant. The question is whether the defendant has taken the heart of the Photo. Allen. In Klavan, the court found that eight seconds of a 14-minute video was minimal. However, the substantiality portion used is closer. Klavan. The court will look at the most significant portion of the video and see if that portion was used. Klavan.

In Brant, the analysis was simple because the entire work was used, repeatedly, and without modification. The court in Brant notes that there are circumstances where the use of the entire work can nevertheless amount to fair use (e.g., when the entire work is necessary for a commentary or a news report). Here, the entire work is used on the t-shirt. However, the entire work is necessary for a commentary purpose because in order to understand what happened to Barrows so people will vote against him, they must see the entire picture of him being arrested.

Application of the third factor weighs slightly against fair use.

Factor 4: Effect of the Use on the Potential Market for and Value of the Work

The fourth factor, which some cases (but by no means all) have said is of great importance, is the effect of the use on the market for, or value of, the copyrighted work. Brant. One of the purposes of copyright is to protect the economic interests of the copyright owner. Brant. The statute speaks not merely of actual harm, but also of harm to the "potential market for or value of the copyrighted work." Brant.

The question for this factor is will the plaintiff lose a potential market. Klavan. Here, Winston only sold
3,500 copies and the book went out of print in 1995. Additionally, Winston licensed the photo to a publisher of a coffee-table book of her photographs, which retailed for $40. She only received a one-time license fee of $10,000 plus 7% royalty.

Are there many uses of that portion of the video that differ from the defendant's use and that could be licensed. Klavan. Further, there is an untouched market for the entire video and for other portions of it. Klavan. Does the defendant's use actually enhance the video? It is for the copyright owner, not the user, to determine what may enhance the work's value. Klavan.

The question is whether there is a substantial effect of the defendant's use on the actual or potential value of the copyrighted work. Allen. In Allen, the defendant only sold the rights to the photo once, for a mere $100, and has not made any further sale in 10 years. Allen.

Application of the fourth factor weighs in favor fair use.

Conclusion: Based on this analysis, I find that the factors weigh in favor of fair use and Summary judgment will likely be granted.

MPT 2

Representative Good Answer No. 1

Fawccett & Brix LLP
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Hayden, Franklin 33054

Dear Canyon Gate Property Owners Association,

Below is our firm's analysis regarding potential claims the Stewart family may have regarding their proposed improvements to their home. In short, although the ACC correctly determined that the Stewarts' fence should not be approved, the Stewarts have a viable claim that their proposed outbuilding should have been adopted.

Issue #1: The first issue is whether the Board should uphold the Association's architectural control committee's (ACC) denial of the Stewart's application for a structure and fence?

Because the plain language of the Canyon Gate Covenants, Conditions, and Restrictions ("Covenants") prohibit the Stewarts' new structure and fence, the ACC's denial was appropriate.

Restrictive covenants are a "contract between a subdivision's property owners as a whole and individual lot owners and are thus subject to the general rules of contract construction." (*Coleman v. Ruddock* (Fr. Sup. Ct. 1999)). In construing a restrictive covenant, "a court must ascertain the drafter's intent from the instrument's language, giving a restrictive covenant's words and phrases their commonly accepted meaning." (*Foster v. Royal Oaks* (Franklin Ct. Appeal 2017)). Although at common law, covenants restricting the free use of land were disfavored, *see Foster v. Royal Oaks*, the Franklin Supreme Court had held that Section 403's reasonable construction rule concerning restrictive covenants supersedes this common law rule. *See Humphrey's v. Oliver* (Fr. Sup. Ct. 2007)). Under Franklin Property Code Section 403(a), a restrictive covenant "shall be reasonably construed to give effect to its purposes and intent." However, under Section 403(b), a restrictive covenant may not be construed to prevent or restrict the use of property as a family home.

The Stewart's Outbuilding

The first issue is whether the Stewarts' proposed outbuilding violates the Covenants. The Stewarts proposed to build a structure that will be 600 square feet (30 feet wide, by 20 feet deep). The ACC denied this, citing Covenant Rule 5C, which states that the maximum allowable square footage of all outbuildings shall not exceed 100 square feet per acre of a homeowner's

lot. The Stewarts' home is on two acres, and thus their maximum size under Rule 5C should be 200 square feet.

There is no question that the Stewarts' design exceeds 100 square feet. However, a primary issue here is whether the outbuilding is an outbuilding or a residential building. A residential building is one "which is used for residential purposes or in which people reside, dwell, or make their homes, as distinguished from one which is used for commercial or business purposes." (20 Am. Jur. 2d Covenants 179 (2018)). Notably, the definition of a residential building "does not mean only the occupying of a premises for the purpose of making it one's 'usual' place of abode; a building is a residence if it is 'a' place of abode." (*id.*). On the other hand, *Black's Law Dictionary* defines an outbuilding as a "detached building (such as a shed or garage) within the grounds of a main building." And USLegal.com defines an outbuilding as "a structure . . . not connected with the primary resident on a parcel of property."

The Stewarts will likely argue that their proposed outbuilding may, in fact, be a residential building. For one, the new structure would be connected to the existing home by a breezeway whose roof would extend from the edge of the new structure's roof to the existing roof of the Stewart's house. Thus, the home could be considered as a single-family home that does not violate Section 3B. Moreover, the Stewarts are building this structure, not as a barn or garage, but as a guest house so that Mrs. Stewart's 72-year-old mother can move into the new structure. Franklin courts have recognized that "a court must ascertain the drafter's intent from the instrument's language, giving a restrictive covenant's words and phrases their commonly accepted meaning." (*Foster v. Royal Oaks* (Franklin Ct. Appeal 2017)). Here, assuming this dictionary definitions are, in fact, commonly accepted within the community, the ACC may have wrongly denied the Stewarts' application.

Moreover, under Franklin Property Code Section 403(b), a restrictive covenant may not be construed to prevent or restrict the use of property as a family home. Here, the ACC's decision, which would preclude Mrs. Stewarts' mom from moving into the family home, may run afoul of Section 403(b). This case is different from *Powell v. Westside Homeowners Association* (Franklin Ct. Appeal 2019), in which the court upheld an HOA's determination that a homeowner, who parked his minivan on his lawn, violated the HOA's restrictive covenants and needed to be removed. There, the restrictive covenant stated, in relevant part, that "no vehicles . . . shall be parked or stored between the curb and building line of any lot, other than on a paved driveway." Critically, the court noted that this covenant did not violation Franklin Property Code Section 403(b), which dictates that a restrictive covenant may not be construed to prevent or restrict the use of property as a family home. Because the covenant simply prevented homeowners from parking on their lawns, the court found that the restriction was reasonable. Here, the covenant, if construed to apply to guesthouses, more significantly interferes with a homeowner's ability to use their home as a residence.

The ACC may argue that, under Franklin Property Code Section 403(a), a restrictive covenant "shall be reasonably construed to give effect to its purposes and intent." Here, no other lots in the entire neighborhood have an existing guesthouse. And the ACC could argue that the purpose

of the covenant was to outlaw all additional structures. Ultimately, on balance, the plain meaning of the words of the covenant suggest the ACC erred.

The Stewarts' Proposed Fence.

The second issue is whether the ACC correctly denied the Stewarts' request to build a fence. Per Section 7A of the Canyon Gate Covenants, Conditions, and Restrictions, fences taller than six feet are not permitted. Here, the Stewarts proposed to install an eight-foot-tall fence so that the dog would not get injured on their property. Unlike the proposed guest house, this fence does not seem to violate Franklin Property Code Section 403(b), which prevents covenants from restricting the use of property as a family home. Instead, the focus is whether Rule 7A prevents the fence.

In *Foster v. Royal Oaks* (Franklin Court of Appeal (2017), the Franklin Court of Appeal's upheld a property association's determination that a family's construction of a fence violated certain restrictive covenants. The defendants in that case built a wrought iron fence 10 feet from the street, even though their deed required any fence be set back 25-feet from the street.

In *Foster*, the defendant-owners claimed that the trial court had misinterpreted the neighborhood's restrictive covenant. There, the deed restrictions prohibited any fence from being erected "nearer to the street than 25 feet." But an additional provision stated that "*to the extent not otherwise limited* by these deed restrictions, no building or other structure shall be located nearer to a side-lot line than five feet." (emphasis added). The defendants claimed that, because the *side* of their home faced the street with the 25-foot restriction, the second provision should control. But the Franklin Court of Appeals held that this interpretation "lacks merit." Because the second restriction only applied "to the extent not otherwise limited" by other deed restrictions, the side lot line rule did not apply as another section required a greater setback.

Here, the Covenants provide for no exemptions. Section 7A simply states that [n]o fence having a height greater than six feet shall be constructed or permitted to remain in the subdivision." Given that the language is plain and unequivocal, the ACC correctly determined that the 8-foot-high fence should not be permitted, and the Board should uphold its decision.

Issue 2: If the board affirms the ACC's denial, and the Stewarts sue, what outcome is likely and what remedies are available.

If the Stewarts sue, they are likely to win on the issue of the new outbuilding, and you may be liable for damages under Franklin Property Code Section Section 404, but they likely to lose on the issue of a fence.

Suit on the New Structure

In *Foster*, the court held that "an association's application of a properly interpreted restrictive covenant in a particular situation is presumed to be proper 'unless the court determines that the association acted in an arbitrary, capricious, or discriminatory manner.'" (*Foster* (quoting *Cannon*

v. Bivens (Fr. Sup. Ct. 1998))).Thus, here, if the covenant was properly construed, then the burden is on the Stewarts to prove by a preponderance of the evidence that the ACC's denial of the variance was arbitrary, capricious, or discriminatory. (*Foster*). But as mentioned above, the Stewarts' have a strong argument that, at least as applied to the new proposed structure, the Covenant was not properly interpreted.

If the Stewarts file suit and win, they are likely to receive injunctive relief from the court. They will also likely argue that they are entitled to damages under Franklin Property Code Section 404. Section 404(b) allows a court to "assess civil damages for the violation of a restrictive covenant in an amount not to exceed $200 for each day of the violation." The Stewarts will likely argue that, here, your ACC is in violation of the neighborhood's restrictive covenant.

The amount of damages a court can assess under Franklin Property Code Section 404 is unrelated to any showing of injury or harm. (*Foster*). Instead, damages are related to the number of days that the violation takes place. Under franklin Property Code Section 404(b) a court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed $200 for each day of the violation. Because Section 404(b)'s damage provision is not intended to provide compensatory relief, the sole focus is on the days the violation occurred--not the injury suffered. Because the Stewarts application was denied on July 16, 2021, the court may count the number of days from the date of denial. The Stewarts may also obtain attorney's fees and costs as, in *Foster*, the district court awarded relief pursuant to Section 404 in addition to attorney's fees and costs.

Suit on the Fence

The Stewarts are unlikely to win a suit based on the denial of their proposed fence.

In *Mims v. Highland Ranch Homeowner's Ass'n*, the Franklin Court of Appeals upheld a determination that an association had acted in an arbitrary, capricious, or discriminatory manner in denying a request to build a carport. In *Mims*, although the deed restrictions did not prohibit carports, an ACC member told the homeowner that any carport plan submitted to the ACC would be denied "no matter what." In fact, the ACC did not review the submitted plans nor did it ever contact the homeowner who submitted the plans for the carport. Notably, in *Foster*, the court distinguished its case from *Mims*, noting that there, the homeowners had deviated from approved plans and the ACC had attempted to work out other fencing options. Here, this case is like *Foster* and unlike *Mims.* Here, the fence was explicitly prohibited by the neighborhood Covenants. Moreover, the ACC never indicated that it would deny any fence application submitted by the Stewarts. Rather, the ACC simply intended that the Stewarts family comport with the community restrictions.

Alternatively, the Stewarts will likely argue that the ACC has waived its right to enforce the deed restrictions. To demonstrate a waiver of a restrictive covenant, a party must establish that "the violations then existing ere so extensive and material and to reasonably lead to the conclusion that the restrictions had been waived." *Larimer Falls Comm. Assoc. v. Salazar* (Fr. Ct. App. 2005).

In determining whether a condition has been waived, courts look at the number, nature, and severity of the existing violations.

Franklin courts have found evidence insufficient to support a waiver of a covenant when 1-10% of properties violated the covenant at issue. For example, as the court in *Larimer Falls* noted, no waiver was found when 4 out of 62 homes had non-conforming fences, 2 of 33 lots contained unapproved access roads, when 10 of 180 houses violated setback requirements, and when 15 of 150 homeowners stored prohibited recreational vehicles on their property.

Here, Canyon Gate consists of 45 single family homes. From what we know, a few homes in the community have some type of fencing that is noncompliant with the deed restrictions with regard to fence height, color, and/or material. These homes are also in violation of the neighborhood Covenants but have not been addressed due to lax enforcement. The Stewarts will likely contend that, because one former ACC member built, and has been permitted to retain, a non-conforming fence, it shows the ACC is acting arbitrarily. However, so long as the number of non-conforming homes is less than 5 (i.e., less than 10% of the community), your Association is likely able to enforce the covenant under *Larimer Falls*.

Respectfully,
Applicant

Representative Good Answer No. 2

TO: Canyon Gate Property Owners Association (Board of Directors)
FROM: Examinee
DATE: July 27, 2021
RE: ACC Denial of Stewarts' application

Statement of Facts

(omitted)

Question 1: Should the board uphold the ACC's denial of the Stewart's application for a structure and a fence?

Short Answer:

The ACC's denial of the application was erroneous as to the Structure because the Structure is part of the same residence, and as to the fence because the board waived enforcement of the fence, so the board should not uphold the denial.

Issues and Analysis:

In determining whether the board should uphold the ACC's decision, there are several issues to consider. I take them in turn.

Issue 1: Is the 600 square foot building sought be the Stewarts an Outbuilding or a Residence?

Franklin Property Code provides that restrictive covenants, such as the one before us should be "reasonably construed to give effect to its purposes and intent." Section 403. It also provides that a "restrictive covenant may not be construed to prevent or restrict the use of property as a family home." Id (emphasis added). This applies no matter when the restrictive covenant was enacted. Id. In construing the covenant, the Franklin Supreme Court has instructed that courts must construe the "drafter's intent" by "giving a restrictive covenant's words and phrases their commonly accepted meaning." Coleman v. Ruddock.

At the outset, we must consider the effect of the language in Section 403 that a covenant "may not be construed to prevent or restrict the use of property as a family home." This is not a broad prohibition. In Powell v. Westside (Franklin Court of Appeals), a man sued claiming that an association was denying him the ability to use his property as a family home by not parking his minivan in the front yard. But the court found that it was not the case, because he could still use it as a family home even if he parked his car in the front of the house or on the parking pad. The same analysis is applicable here: if the covenant as otherwise construed would not allow the building, it is not denying the use of the family home because the existing house can still be used as a family home.

The issue here is whether the building sought is a "Residence," and thus guided by Section 3 of the covenant, or if it is an "Building other than" a residence such as an "outbuilding" and thus guided by Section 5 of the covenant. Giving the words their ordinary meaning as the Franklin Supreme Court requires, Black's Law Dictionary from 2019 defines an outbuilding as a "detached building (such as a shed or garage) within the grounds of a main building." It is clear that the relevant building here is within the grounds of the mail building. But there are two issues. First, is the building detached? The meeting with Jane Mendoza indicates that the structure "would be connected to the existing home by a roof-covered walkway" which would "extend from the edge of the Structure's roof to the existing roof on the Stewart's house." There is an argument to be made that this is still a detached building, as one has to go outside to reach the other building. But there is a plausible argument that the structure sought is not a detached building at all. In addition, the dictionary includes in parenthesis a shed and garage, which are both buildings that are not used for housing people. Canons of construction may indicate that this means the definition should be thought to include only buildings that do not house people. In addition, US Legal defines an outbuilding as a structure "not connected with the primary residence on a parcel of property" such as "a shed, garage, [or] barn." It is certainly clear from the facts that the Structure would be connected to the main house, even if just by a breezeway. Thus, it is likely that at least under this definition, it is not considered to be an outbuilding. Given that, and that

the first definition leaves it ambiguous, it is likely that the proposed structure is not an outbuilding.

Further, a residential building "does not mean only the occupying of a premises for the purpose of making it one's 'usual' place of abode; a building is a residence if it is 'a' place of abode." Am Jur 179. We know from the facts that the structure is intended to be used to house an elderly parent. It will be, therefore, a place of abode. It matters not how much the elderly parent will be there, because she will be there, it is a residence. This, of course, does not end the matter. Section 3 of the covenant provides that "[o]nly one family residence may be erected, altered, placed, or permitted to remain on any lot." So, there is a further issue, once again, as to whether the Structure is connected to the already existed residence, which, from the discussion above as to the outbuilding, it likely is. And, it meets the requirements that a residence be set back from the street because it will be set back 50 feet from the street.

Of course, if it is an outbuilding, it was permissible to deny, because they were limited to 100 square feet per acre (2 acres here).

Issue 2: Does the covenant prohibit the building of the fence on its terms?

Yes. This issue does not depend upon whether the structure is an outbuilding or part of the residence.

All fences are covered by Section 7, which limits the height to 6 feet.

Issue 3: If the terms of the covenants do prohibit the building of the 600 square foot building and the fence, did the Board waive the right to enforce either covenant?

A board can, through its actions, waive the right to enforce a prohibition in the covenant. A waiver occurs if "the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived" Larimer, see also Powell. In determining if this is so, the number, nature, and severity of the violations are considered.

The Structure. As for the structure, if my analysis above is incorrect and it is considered to be an outbuilding, there was no waiver. The record provides that the ACC has approved shed and barns, but those complied with the covenant.

The Fence. The ACC has never "formally approved the installation of fences that are over six feet tall." Additionally, as for the number, it is unknown what number of fences are non-conforming, though there are some. Courts, generally, have not found the number of nonconforming items to be so severe when the number is fewer than 10% of the whole. See Powell Here, with 45 lots, 4 or fewer fences would not ordinarily give rise to a waiver. But that is not the end of the inquiry because the nature and severity is important. That one ACC member built a fence without approval which was nonconforming could "reasonably lead to the conclusion that the restrictions had been waived." This is an issue of first impression, and much may depend on agency law (if

the ACC member had apparent authority on the agency, etc.), but it is at least plausible that the board and ACC has waived its ability to enforce the fencing restriction.

Issue 4: Should the board, in any event, grant a variance?

As noted above, the variance should be granted for the Structure, because it is likely a residence and thus allowed by the covenant. And enforcement of the fence covenant is arguably waived. But if I am wrong as to both of those, a variance is not needed. The covenant requires "compelling circumstances" to grant a variance and can choose not to grant one if not acting in an "arbitrary, capricious, or discriminatory matter." (See Cannon, FR Supreme Court). Because the facts do not indicate discrimination against the Stewarts (unlike in Mims, where they told him that there was no ability to grant a carport and they did not consider his appeal), this finding will not be found.

Question 2: If the board affirms the ACC's denial and the Stewarts sue the Association, what outcome is likely and what potential remedies are available?

Short Answer:

For reasons expressed mostly in Question 1, the Stewarts are likely to prevail, and they can certainly receive a permanent injunction from enforcement of the covenant and perhaps $200 a day as statutory damages.
Issues and Analysis:

As noted above on the merits, the Stewarts are likely to prevail on the structure, and likely on the fence too. It is unclear what damages they can get. Section 404 provides that a court can assess civil damages for the violation of a covenant not to exceed $200 a day for each day of the violation. But Courts have applied that when an association prevails, not when a homeowner prevails. If it can apply when an association violates the covenant, then the Stewarts may seek $200 a day per day they were denied the ability to construct the Structure and Fence. They may also seek a permanent injunction allowing them to build the Structure and Fence. On the other hand, if the association somehow prevails, because there was no actual violation, the $200 of damages are unavailable. But an injunction can be sought to prevent building of the Structure and fence.

MEE 1

Representative Good Answer No. 1

1. For the jury to find the son acted negligently, it would need to find that the six-year-old breached his duty to act with the care of other six-year-olds with the same experience, impairments, and abilities. A finding of negligence requires showing that the son owed a duty of care, he breached that duty, and that breach was the actual and proximate cause of the son's damages. Here, we know that the six-year-old was visually impaired, so the son will have a duty