

## **MPT 1 — Sample Answer 1**

TO: Hon. Joann Gordon

FROM: Examinee

DATE: July 27, 2021

RE: Winston v. Franklin T-Shirts Inc., Case No. 21-CV-0530

### **INTRODUCTION**

Jim Barrows, a student at Franklin State University, joined in a political demonstration in 1985 and was subsequently arrested for and convicted of disorderly conduct. The Plaintiff, Winston, took a picture of the police leading Barrows away from the demonstration in handcuffs, which was the only pictorial record of the arrest. During the 2020 mayoral campaign, the Defendant used the photograph on t-shirts with "Arrested & Convicted" stamped in red over it. It was captioned "BARROWS IS A HYPOCRITE!" Below is an analysis of the Plaintiff's fair use claim under 17 USC Section 107 resulting from the Defendant's use of the Plaintiff's photograph. The parties agree that, in the absence of finding fair use, the Defendant infringed on the Plaintiff's copyright.

### **ANALYSIS**

17 USC Sections 106 and 107 govern the exclusive rights in copyrighted works and the limitations on those exclusive rights. One such limitation is known as "fair use" of the work, which establishes an affirmative defense to a claim of copyright infringement. Establishing a permissible fair use of a copyrighted work requires a four-factor analysis: (1) the purpose and character of the use, including whether such use is of a commercial nature or for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion 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.

It should be noted that criticism and comment are explicitly listed in the statute as a possible "fair use." Arguably, "criticism" or "comment" encompass the Defendant's actions in this case. However, the analysis cannot end here. The four factors of fair use must still be applied and analyzed in any fair use case. Klavan.

As you are aware, these factors are not applied mechanically. The Court has considerable discretion to consider the weight to give to each factor in reaching its conclusion. Below is my analysis of each of these four factors as applied to the case at hand.

(a) The Purpose and Character of the Use Likely Weighs In Favor of Fair Use, Because It Is a Comment on Political Discourse and Makes a Sufficiently Specific Comment on the Character of a Mayoral Candidate.

The first factor in the fair use analysis is the purpose and character of the use at issue. Notably, this portion of the analysis includes consideration of whether the use is of a commercial nature or for

nonprofit educational purposes. The courts, including the Supreme Court, have made "transformative use" of a work that takes only part of the work and uses it to make a comment on a social issue a touchstone of the fair use analysis. Such a transformative use is not absolutely necessary for a finding of fair use, but promoting science and the arts goes to the "heart" of the Copyright Act, and the more transformative a work is, the less the significance of other factors, like commercialism, may weigh against a finding of fair use. Campbell.

As stated in the Brant case, political discourse is vital to the essence of our democracy, and uses for that purposes should, absent other factors, weigh heavily in favor of fair use. Simply because a particular use is for profit does not mean the use cannot be deemed "fair." Campbell.

In Klavan, the news story at issue 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. In that case, despite the fact that the use was for profit, the court held that under these circumstances, this factor of the analysis weighed in favor of fair use. By contrast, the court in Brant found that the Defendant's use of the work was not used to make any specific comment on his political agenda, but instead was used as a reflection of a generalized feeling that all candidates espouse. As a result, the court held that this factor weighed against fair use.

In this case, the Defendant reprinted the photograph with the words "Arrested & Convicted" stamped in red over it. Below the photograph was the phrase, "BARROWS IS A HYPOCRITE!" The Defendant will likely argue that he simply used the photograph in combination with other creative expression, for the distinct purpose to make a different social commentary--transforming the use and placing it within the bounds of a "fair use." However, this argument is fairly weak. The Defendant's use of the work in this case is more closely analogized to the rule articulated in Rodgers, which states that simply reproducing the copyrighted work, even in another medium, is not the kind of "transformation" that would justify a finding of fair use. The Defendant's second, and more meritorious, argument will likely be that his use was similar to the use in the Klavan case, because it reflects on the character of a political figure. He will likely argue that, unlike Brant, his use is a sufficiently specific comment on his political agenda, and not simply a generalized feeling about the political atmosphere.

The Plaintiff, by contrast, will likely argue that the Defendant's use of the photograph was not sufficiently transformative or political in nature for this factor to weigh in favor of fair use. Instead, this case is more similar to Brant, because the shirts reflect a generalized feeling, instead of a specific comment on the political agenda.

Application of this factor in the current case likely weighs in favor of fair use. The Defendant's use of the photograph seems to communicate more than a generalized dislike for the political figure portrayed. Instead, it is more similar to a specific sentiment that the candidate is unfit to be the mayor, due to his past criminal history. While this use was for profit, that alone will not be sufficient for this factor to weigh against fair use. As a result, this factor of the analysis likely weighs in favor of fair use.

(b) The Nature of the Copyrighted Work Likely Weighs In Favor of Fair Use, Because It Is the Only Visual Record of a Significant Newsworthy Event.

This factor does not figure in most fair use analyses. Klavan. The nature of the photograph at issue in this case is arguably more informative than artistic, which weighs against fair use. Rossi. However, one

of the most frequent applications of this factor turns on whether or not the work has been published. Klavan. When a work is unpublished, the use is less likely to be deemed a "fair use," based upon the fact that the creator and copyright owner should have the right to first divulge the work to the public in the manner she desires. Klavan. However, it is explicitly stated in Section 107 that "The fact a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all [] factors."

In Klavan, the court held that this factor weighed in favor of fair use because: (1) it was a visual record of a significant newsworthy event, and (2) it is the only visual record of the significant newsworthy event.

In this case, the Plaintiff's photograph is the only visual depiction of the arrest, which was arguably a significant newsworthy event. Additionally, the work has been published twice in the past, which the Plaintiff was compensated for. Because the work at issue in this case has been published and is the only visual record of this significant newsworthy event, this factor will likely weigh in favor of fair use.

(c) The Amount and Substantiality of the Portion Used Weigh Against a Finding of Fair Use, Because the Entire Work was Used, With Little to No Modification.

This portion of the analysis focuses on the amount of the work that was actually used, as well as the substantiality of the use has taken to the "heart" of the work. *Rossi*.

Analysis of this factor is fairly straightforward in this case. Like the *Brant* case, the entire work was used, without modification. The Defendant will likely argue that the stamp over the photograph is a sufficient modification, but this argument is weak. This factor will likely weigh against a finding of fair use.

(d) The Effect of the Use on the Potential Market for and Value of the Work Weighs in Favor of Fair Use, Because there Is Plenty of Market Space Left for Alternative Uses of the Work In the Future.

This portion of the analysis will hinge on whether or not the plaintiff will lose a potential market for the portion of the work used by the defendant.

In Klavan, the court held that this factor tilted in favor of fair use, because there were many uses of the portion of the video used that differed from the defendant's use and that could be licensed. Further, there was an untouched market for the entire video, and for other portions of it. The court gave no merit to the defendant's argument that his use had enhanced the value of the video by bringing public attention to it.

In Rossi, the court held that this factor weighed in favor of fair use as well, because the rights to the photograph at issue had only been sold once, for a mere \$100, and no further sales were made in the following 10 years.

As copyright owner of the photograph at issue, the Plaintiff has previously granted a single-use license to the Riverside Record, allowing it to publish the photograph accompanying a story about the political demonstration. She received a fee of \$500 for this use. Later, the Plaintiff licensed the photo and 72 other pictures she had created to the publisher of a coffee table book, which retailed for \$40. She received a one-time license fee of \$10,000, plus a 7% royalty for each copy sold. The Plaintiff will argue that this suggests a much more extensive use of her rights to the photograph than the Rossi case. However, the Defendant will likely counter that argument by stating that the Plaintiff has not received

any revenues from uses of the photograph since 1995. Additionally, the Defendant will argue that his use of the photograph on a t-shirt allows for plenty of continued market space for use of the photo, because it leaves open plenty of alternative uses.

The Defendant likely has the stronger argument in this case, and this factor will weigh in favor of fair use.

Based on the analysis above, the court will likely find that this was a valid fair use of the copyrighted work. While the third factor clearly weighs against this finding, this factor often is not considered particularly significant in the analysis. All other factors seem to weigh more heavily in favor of the conclusion that this use was fair, which will act as an affirmative defense to the claim of copyright infringement.

### **CONCLUSION**

Overall, the Defendant's fair use claim will likely be successful, and summary judgment should be granted. Three of the four factors in the fair use analysis weigh in favor of a finding of fair use, which will act as an affirmative defense to the Plaintiff's fair use claim. Please let me know if there is anything further I can do to assist you with this matter.

## MPT 1 — Sample Answer 2

**Chambers of the Hon. Joann Gordon**  
**United States District Court for the District of Franklin**  
120 N. Henry Street  
Centralia, Franklin 33705

### MEMORANDUM

TO: Hon. Joann Gordon  
FROM: Examinee  
DATE: July 27, 2021  
RE: *Winston v. Franklin T-Shirts, Inc.*, Case No. 21-CV-0530

As you know, Defendant Franklin T-Shirts ("FTS") will be making a motion for summary judgment in this case, arguing that its use of Plaintiff Naomi Winston's ("Winston") photograph of Jim Barrows's arrest (the "Photograph") was fair use under the federal copyright statute, 17 U.S.C. 107. You have tasked me with drafting a memorandum that analyzes the possible fair use claim. Below is my analysis and subsequent conclusion for the overall claim of fair use.

#### **Fair use generally**

Under 17 U.S.C. 106, "the owner of copyright . . . has the exclusive rights to do and to authorize" various different listed uses and reproductions of the copyrighted work. In relevant part, the copyright owner must authorize the reproduction of the copyrighted work in copies, the preparation of derivative works based upon the copyrighted work, the distribution of copies of the public work to the public by sale, and, in the case of pictorial or graphic works, the display of the copyrighted work publicly. 17 U.S.C. 106(1), (2), (3), (5).

In response to a claim of copyright infringement, however, a defendant may raise the affirmative defense of "fair use." Specifically, "[n]otwithstanding the provisions of section[]106 . . . , the fair use of a copyrighted work, including such use by reproduction in copies . . . or by any other means specified by that section, for purposes such as criticism[ or] comment . . . is not an infringement of copyright." 17 U.S.C. 107. The determination of "whether the use made of a work in any particular case is a fair use" involves the consideration of four factors. According to *Brant*, this "requires a fact-specific analysis under four factors[.]" The application of those statutory factors, along with our Court's interpretation of the scheme, to the facts of this case is as follows.

#### **Factor 1: The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes**

This factor "requires an analysis of the purpose and character of the use, including whether it is 'of a commercial nature . . . or for nonprofit educational purposes.'" *Brant* (quoting 17 U.S.C. 107). In *Brant*, a political candidate used a song numerous times in campaign rallies and speeches without the permission of the song's copyright owner. The political candidate argued that the use of the song was fair use because it was for a political purpose. In his opinion, "political discourse is and should be encouraged in our society, and that his use of this particular song does so." *Id.* However, this Court said that this was

not the end of the inquiry. Because there were other songs that could have been used and because the song was used to create a "generalized feeling" rather than to make a specific comment about his political agenda, the factor cut slightly in favor of the copyright owner and against fair use.

*Allen* involved a photograph of a scene at a watering hole in Africa. The photo included several animals and was published in a book of photographs by many different photographers. Years later, a graphic artist took a copy of a copyrighted photo from the book that had published it, cut the picture of the rhinoceros, "and then included it in the collage with excerpts of 13 other photographs from various sources, all depicting endangered species of animals." *Id.* Though prints of the collage were sold for \$450 each, the proceeds were sent "to benefit nonprofit organizations devoted to protecting endangered species." *Id.* The graphic artist that created the print said that the purpose was to draw attention to the plight of endangered species. Further, [b]y taking only a part of the Photo and using it to make a comment on a social issue, [the defendant] transformed the original aspect of the Photo." *Id.*

In *Klavan*, the sole bystander of an altercation involving a politician took a 14-minute-long video of the event. She copyrighted the video and then offered the local television station to air it for \$5,000. The station then played an eight-second excerpt without paying her and without her permission. This Court noted that the commercial aspect of the use (the station ran for profit) was not dispositive. The Court found that the political, newsworthy elements of the video were important, particularly because it reflected the character and temperament of the councilman, so the factor weighed in favor of fair use.

Our Court then cited to the Supreme Court in saying that transformative works, though not absolutely necessary for finding fair use, "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[.]" *Campbell*. Though the prints were sold, a commercial use, the proceeds were going for noncommercial educational purposes, which is a use endorsed by the statute. "[U]sing 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 - and transforms - the use and argues for fair use." *Id.* (citing *Blanch*). Because this Court found that this is what happened here, the factor weighed in favor of fair use.

Here, Winston will argue that the purpose of the use of their work was commercial and that, as in *Brant*, use for political discourse is not dispositive, and FTS could have used lots of other pictures of Barrows for the shirt. Further, as opposed to *Allen*, the entire work was used.

FTS will argue that though they profited off the t-shirt, it is still a newsworthy event and the purpose is to oppose the campaign. Further, the work is transformative because it contains red lettering. Instead of completely copying the use in its entirety, FTS transformed the work by offering political commentary on top of and below the Photograph.

Because FTS's arguments are stronger, and because the reproduction is transformative, this weighs in favor of finding fair use.

## **Factor 2: The nature of the copyrighted work**

*Allen* stated that publication of the original work weighs in favor of fair use. Further, the fact that a photograph has been used or published "only once in the 10 years it was taken[]" leans towards fair use as well.

In *Klavan*, this factor was of great importance. Though the video was unpublished, which weighs against finding fair use, the Court found this factor weighed in favor of fair use because it was a visual record of a significant newsworthy event and, "more significantly, it is the only visual record of the significant event." *Id.*

Because the work was published and because Winston has not used the work for profit of otherwise in nearly 30 years, this will weigh in favor of fair use.

**Factor 3: The amount and substantiality of the portion used in relation to the copyrighted work as a whole.**

*Brant* informs us that "[t]he statute requires us to analyze both the quantitative ('amount') and qualitative ('substantiality') use of the work." In that case, our Court stated that, because "the entire work was used, repeatedly, and without modification[.]" the factor cut in favor against fair use. In *Allen*, by contrast, only a small portion of the photo was used, which weighed in favor of finding fair use.

Here, the t-shirt at issue modified the Photograph. FTS took a copy of the Photograph and reproduced it in its entirety, yes, but the words "Arrested & Convicted" were stamped in red over the photograph, and the caption "BARROWS IS A HYPOCRITE" was printed below the Photograph. The red letters over the Photograph itself is a great modification. Though the entire Photograph was used, *Brant* noted that "there are circumstances where use of the entire work can nevertheless amount to fair use[.]"

In sum, this factor weighs in favor of finding fair use.

**Factor 4: The effect of the use upon the potential market for or value of the copyrighted work**

*Brant* informs us that some cases stress that this factor "is of great importance[.]" Specifically, "[o]ne of the purposes of copyright is to protect the economic interests of the copyright owner." *Id.* In *Brant*, this Court found that this factor cut strongly against fair use because the copyright owner feared that the use of the song would make the song permanently identified with the political candidate and his views and erode its popularity with members of the public who did not agree with that candidate's views. Further, the plaintiff personally strongly opposed the candidate's views and was public about this fact. In effect, the plaintiff was worried her reputation with their fans would be undermined.

In *Allen*, by contrast, this Court saw "no substantial effect" on the defendant's use "on the actual or potential value of the copyrighted work." Specifically, the owner 'sold the rights to the Photo but once, for a mere \$100, and has not made any further sale in 10 years." *Id.* "in addition, no one seeing the collage would[] . . . have the slightest notion that the picture of the rhinoceros came from *Allen*'s picture." Because the Court believed it would have no effect on the possible market for the use of the photo in the future, this factor cut in favor of fair use as well.

Here, Winston will argue that the Photograph will be entrenched in the political and commercial use of the t-shirt. As opposed to *Brant*, however, Winston has not publicly opposed Barrows's political opponent. Further, the Photograph is 35 years old and is likely not recognizable to the bare eye. Specifically, like in *Allen*, though the facts are not as strong (the entire Photograph was used here as

opposed to just a small excerpt), the Photograph is likely not recognizable as Winston's because the Photograph has not been used in years and the work has been transformed.

In sum, this factor also weighs in favor of finding fair use.

**Conclusion on the fair use claim overall**

As you mentioned, this Court has considerable discretion in weighing each factor in reaching its conclusion. However, because each factor at least partially weighs in favor of fair use, the Court should find for FTS in holding that the use of the Photograph was fair use under 17 U.S.C. 107.

## MPT 1 — Sample Answer 3

### MEMORANDUM

TO: Hon. Joann Gordon

FROM: Examinee

RE: Winston v. Franklin T-Shirts Inc., Case No. 21-CV-0530

#### I. Introduction

You have asked for my analysis on the possible fair use claim of Franklin T-Shirts Inc. (Franklin T-Shirts). Below is my analysis of the claim. In short, Franklin T-Shirts likely has a valid fair use defense under the federal copyright statute.

#### II. Applicable Law

Under Sec. 106 of the United States Copyright Act, the owner of a copyright has the exclusive right to do and to authorize the following: "(1) to reproduce the copyrighted work in copies and phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) . . . to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture other audiovisual work, to display the copyrighted work publicly; and (6) . . . to perform the copyrighted work publicly by means of a digital audio transmission."

However, under Sec. 107 of the Act, there are limitations of these exclusive rights based on fair use. Fair use is an affirmative defense to a claim of copyright infringement. See *Brant v. Holt*. Under Section 107, "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research, is not an infringement of copyright." These uses are not dispositive, however, and a fact-specific analysis under the four factors must be used to determine if the use is excused. See *Brant v. Holt*.

Under Sec. 107, there are four factors that are considered in order to determine whether a 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 substantially of the portion 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." Additionally, the fact that a work is unpublished does not itself bar a finding of fair use.

#### III. Analysis

Under Sec. 107, fair use is an affirmative defense to copyright infringement if being used for criticism, comment, news reporting, teaching, scholarship, or research. However, these factors are not dispositive, and the four-factor analysis must be conducted to determine if the use is fair use. See *Brant v. Holt*.

Here, Franklin T-Shirts will claim that their use was for criticism and comment. However, the four factors still need to be considered to determine whether there is fair use.

### *1. The purpose and character of the use*

The first factor considered under Section 107 is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education purposes." A use for a political purpose is not a commercial or nonprofit purpose. See *Brant v. Holt*. The purpose of political discourse should weigh heavily in favor of fair use absent other factors, if it is being used to make specific comment on a political agenda, and that particular work must be used to do so. *Id.* If it is not a specific message and is general, then this cuts in favor the copyright owner. *Id.*

However, if part of a photo is used to make a comment on a social issue, this transforms the original aspect of the photo and is considered fair use as a "transformative work." See *Allen v. Rossi*. The more transformative the work, the less other factors will weigh against finding fair use. *Id.* Simply reproducing the work the work in another medium is not transformative, but instead treads on the owner's right to make derivative works. *Id.* But using an element of the work in combination with other creative expression for a different purpose than the copyright owner's and to make a different social commentary transforms the use into fair use. *Id.*

Here, Franklin T-Shirts is a purely commercial company, and they will likely argue that the shirts were sold for a purely commercial purpose. However, Franklin T-Shirts is also active in Riverside politics and was an active supporter of Barrows's mayoral opponent. They used Winston's photograph on a T-shirt with negative statements about Barrows, for the political purpose of hurting his campaign. A use for a political purpose is not a commercial or nonprofit purpose. See *Brant v. Holt*. All that being said, this photo is being used to make a specific message about Barrows and his political agenda, and this particular photo was necessary for this specific message because it was the only photo taken on that day. So, it was used for specific political discourse, cutting in favor of fair use. See *Id.*

Further, Franklin T-Shirts used the photo to make a comment on a social issue, Barrows's character and fit for mayor during a mayoral campaign. That was not the original purpose of the photo, for Winston only took it to document Barrows's arrest, long before he ever ran for mayor. This transforms the original purpose of the photo and makes this a transformative work. Franklin T-Shirts took the photo and combined it with other creative expressions, the comments on the shirts, and used it for a different purpose (social commentary) than Winston's purpose (documentation). This makes this a transformative work and cuts in favor of fair use.

### *2. The nature of the copyrighted work*

The second factor considered under Sec. 107 is "the nature of the copyrighted work." Most cases see this factor as favoring the use of published work as opposed to unpublished works, and scientific or factual works as opposed to those that are creative and expressive. See *Brant v. Holt*. A photo's artistic merit is limited if it has not been used much in the past 10 years, weighing in favor of fair use. See *Allen v. Rossi*.

Here, the photo is a published work because it was published in the newspaper and in books. However, being a photograph, it is also a creative and expressive work, rather than scientific or factual. Further, Winston's artistic merit on the photo is limited because it has not been used since 1995, and she has not made any money off the photo since 1995. So, this cuts in favor of fair use as well.

### *3. The amount and substantiality of the portion used in relation to the copyrighted work*

The third factor considered under Sec. 107 is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." The use of the entire amount, unmodified, generally cuts against fair use. See *Brant v. Holt*. However, if the entire work is necessary for a commentary or news report, it may still amount to fair use. *Id.*

Here, the entire photograph was used by Franklin T-Shirts on the shirt. The photo itself was unmodified, and they only added comments. This cuts in favor of the copyright holder.

However, Franklin T-Shirts will argue that the entire photo was necessary for a commentary on Barrows's character for his campaign. This will likely be a successful argument, since the entire photo is necessary to show Barrows's arrest and to make a comment on his hypocrisy, unlike the case in *Allen v. Rossi*, where a portion of a photo could be used without needing the entire photo. So, because the entire photo was needed for the commentary to be effective, this cuts in favor of fair use as well.

In the alternative, Franklin T-Shirts may also argue that it did only use a portion of the copyrighted work, rather than the full work. They used a singular photo from the Pictorial History Book, rather than the full 72 photos that Winston submitted to the book. This is a small portion compared to the full work of the book as a whole. If this argument is accepted, then this also cuts in favor of fair use.

### *4. The effect of the use upon the potential market for or value of the work*

The last factor considered under Sec. 107 is "the effect of the use upon the potential market for or value of the copyrighted work." This factor cuts against fair use if the use of the work will make it permanently identified with the defendant and erode its popularity with the copyright holder. See *Brant v. Holt*. This includes harm to the potential market or value of the copyrighted work, not just actual harm. *Id.* If a photo has only been sold once in the past 10 years, and no one seeing the photo would have the notion that the photo came from the copyright holder, then there is no effect on any possible market for the copyright holder in the future. See *Brant v. Holt*.

Here, Winston will argue that the use of the photo and its large sales on the shirts will make the photo be permanently identified with Franklin T-Shirts, rather than with Winston. Winston will argue that the T-shirt sales will harm the current market for the photograph, as well as the future potential market, since it will only be associated with the shirts, even though she is the only one who captured a photo of the event. This cuts in favor of the copyright holder.

However, Winston's argument on this factor will likely fail. This photograph was only published in the newspaper and in the Pictorial History Book, which went out of print in 1995. Winston has not received any money from the photo since 1995. This means that Franklin T-Shirt's cannot possibly have an effect on Winston's current, actual market for the photograph, because it is not currently being used or sold. Further, it is not effecting her potential future use, because she also has no plans to use it in the future,

such as in *Brant v. Bolt*. No one seeing the photo currently would have any notion that the photo came from Winston. So, this factor also cuts in favor of fair use.

#### **IV. Conclusion**

Based on the above factors, I believe that Franklin T-Shirts has a valid fair use claim.

First, the use on the T-shirts is a transformative work that is being used to comment on a specific social and political issue. This photo was also necessary for those comments, which all weighs in favor of fair use. Second, it is a published work with limited artistic merit, also weighing in favor of fair use. Next, while the entire photo was used, it was necessary for the political commentary, which weighs in favor of fair use. But if it instead is found that only a portion of the full 72-photo work was used from *A Pictorial History*, then this cuts in favor of fair use as well. Finally, there is no effect on Winston's current or potential market for the work, also weighing in favor of fair use.

Because all of these factors weigh in favor of fair use, Franklin T-Shirt's use of the photo is likely excused as fair use under the federal copyright statute.

## MPT 2 — Sample Answer 1

To: Canyon Gate Property Owners Association

Re: Opinion Letter, Charles and Eleanor Stewart application denial

Dear Canyon Gate Property Owners Association:

This letter is regarding the denial of the application from Charles and Elenor Stewart to construct a new structure and fence on their property. As discussed below, this letter gives an opinion as to whether the ACC properly denied the Stewart's application and an analysis of the Stewart's remedies going forward if they take this matter to court.

(1) The first question is whether the board should uphold the ACC's denial of the Stewarts' application for a structure and a fence.

**The Board should uphold the ACC's denial of the Stewarts' application for a new structure and fence.**

Restrictive covenants are widely used to prevent homeowners from construction that could interfere with the neighbors use and enjoyment of their property or could impair property values. See *Foster v. Royal Oaks Property Owners Association*. In Construing a restrict 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." *Coleman LLC v. Ruddock*.

At the outset, it is important to note that restrictive covenants in Franklin will be reasonably construed to give effect to their intended purpose and meaning. *Foster*. Here, the relevant determination rests on the Canyon Gate Code and the restrictive covenants therein reasonable meanings.

The Canyon Gate Code states that the living area, or air-conditioned space, of a residence shall be a minimum of 2,800 square feet. Here, the Stewart's home is already 3,000 square feet (we do not have facts as to the square footage of air-conditioned space) but in any event, an additional 600 square feet will exceed the minimum square footage limits. The proposed structure is 600 square feet and will be air conditioned, most likely, because it is a living and sleeping area with a bathroom.

Additionally, the Code restricts each lot to one family residence per lot. A residence is a building used for residential purposes in which people reside, dwell, and make their homes. The Stewarts have stated that the new structure would serve as Estelle's (Ms. Stewart's mother) home, as she seeks to move in with the Stewarts. Thus, the new structure arguably would be a second residence on the Stewart's lot—which would violate the code. Even if it was not considered a second residence, but instead an addition to the Stewart's current residence, this would still violate the square footage restrictions on living areas of residences, discussed above.

The Stewarts may argue that the new structure is an outbuilding, allowed under the Code if under 100 square feet per acre of a homeowner's lot. The definition of an outbuilding is a detached building within the grounds of a mail building; it is a structure not connected with the primary residence on a parcel of property. In this case, the Stewarts seek to build a new structure that will be connected to their home

by a walkway without walls. The proposed structure is, by definition, not a detached building because it will be connected to the Stewart's primary residence by a walkway.

Under the reasonable interpretations of the Code sections, the new structure is neither an outbuilding but an addition to the Stewart's residence which exceeds the square foot limitations in the restrictive covenant.

The Canyon Gate Code additionally limits fences to a maximum height of six feet. The Stewarts seek to install an eight foot fence, to prevent Estelle's dog from roaming the entire property or potentially getting out of the property. The ACC denied the construction of the fence because the proposed fence would be in excess of the Code's height limits. Giving the Code's restrictions their reasonable meanings would seem to support upholding the ACC's decision. However, because this restriction potentially has been waived (discussed more below), it is possible that a Court hearing this appeal would find in favor of the Stewarts on the issue of the fence.

Finally, the Canyon Gate Code allows for variances to the design standards where there is a compelling reason and only if the general purposes and intent of the covenants and design standards are substantially maintained. Here, the Stewarts

(2) The second question is, if the board affirms the ACC's denial and the Stewarts sue the Association, what outcome is likely and what potential remedies are available.

**If the board affirms the ACC's denial and the Stewarts sue the Association, the Court would likely uphold the denial of the construction of the new structure but would likely overturn the denial of the construction of the fence. Potential remedies include a permanent injunction against enforcement for the Stewarts, or in the alternative, damages for the Association.**

If the Stewarts sue the Association, they would have the burden at a trial to establish by a preponderance of the evidence that the Association's denial of their request for variance of the structure and fence was arbitrary, capricious, or discriminatory. They would also have the burden to establish that the ACC's application of the deed restrictions with regard to the structure were misapplied. "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.'" See *Foster* (citing *Cannon v. Bivens*).

(a) The Structure: The application of the provisions as to the structure were applied correctly, and will be upheld on appeal. As discussed, the structure is not an outbuilding according to common interpretation of that word. The structure is either an addition to the residence, in violation of the square foot requirements, or it is another residence in violation of the restriction against multiple residences per lot. Thus, the denial will be proper unless the court finds that ACC acted in an arbitrary, capricious, or discriminatory manner. There is no evidence of that here, as the ACC was simply denying the application for the structure because it exceeded 3000 square feet of residential space.

It is important to note that restrictive covenants cannot be used to prevent the use of property as a family home, see Fr. Prop. Code §403(a). However, in this case, the relevant code sections do not prevent the Stewarts from using their property as a family home. They do not even prevent the Stewarts from using their property for Estelle to move in with them. The restrictions only prevent the residences

from having a certain square footage, which the court would likely not find as a restriction on the use of the property as a family home. See *Powell v. Westside Homeowners Association Inc.*

(b) The Fence: However, a Franklin Court may find that the Board has waived its right to enforce the restrictions regarding the fence heights against the Stewarts. In order for the Stewarts to show that this provision has been waived, they must demonstrate that "the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived." *Larimer Falls Comm. Assoc. v. Salazar*. In this case, the Stewarts contend that other homes in the neighborhood have fences exceeding six feet, although we do not have an exact number.

The court will consider the number, nature, and severity of existing violations to determine waiver. See *Powell v. Westside Homeowners Association Inc.* The courts have found that evidence of other violations are insufficient to support a waiver of a condition where even 10% of properties have been in violation of a covenant. *Id.* However, in this case, a member of the ACC enacted a fence higher than six feet while serving on the ACC. This violation alone may serve to be so material as to reasonably lead to the conclusion that the restriction was waived because a reasonable person in the neighborhood may conclude that a condition was waived when a member of the association in charge of enforcement of conditions has broken the violation.

The Stewarts applied for a variance as to the application of the Code for their construction of the fence. The Code allows for variances where there are "compelling circumstances". The Stewarts have not offered compelling reasons why a fence, which will serve the purpose of keeping Estelle's dog contained to a certain portion of the yard, must exceed 6 feet. However, the denial of the variance may be improper here because, as discussed above, it could be considered arbitrary and capricious for the Board to enforce the restriction against the Stewarts where a one of their own members is in violation of this same provision.

(c) Remedies: The damages provided for by the Code are recovery from any violating party all costs, attorneys fees, and out-of-pocket expenses incurred in enforcement of any covenants. If the Stewarts take this matter to court, they could be liable for any attorneys fees and other costs incurred in meantime.

The Stewarts are entitled to defend the enforcement of the restrictive covenant against them. They may seek a permanent injunction requiring the Association to grant their variance for the fence, if the court finds that the Board has waived the right to enforce the restriction. The Association may be entitled to damages for violations of the covenants in an amount not exceeding \$200 for each day of the violation.

The damages assessed are not related to any showing of harm or injury from the violation of the covenant. Rather, the damages are assessed by considering the number of days that the violation took place. See *Foster*. Because the Stewarts have not actually constructed the structure or the fence in this case, the damages for each day of a violation are not relevant. Rather, the Association could likely get damages from attorneys fees and other court costs required to defend the suit against the Stewarts.

## MPT 2 — Sample Answer 2

**FAWCETT & BRIX LLP**  
**Attorneys at Law**  
425 Lexington Ave., Suite 100  
Hayden, Franklin 33054

Dear Ms. Mendoza, Chair of the Canyon Gate Property Owners Association Board of Directors:

**(1) You have asked whether the board should uphold the ACC's denial of the Stewarts' application for a structure and a fence. The Board should not uphold the denial of the structure, but should uphold the denial for the fence.**

First, the Canyon Gate Covenants, Conditions, and Restrictions were adopted on April 12, 1985. The Stewarts have lived in Canyon Gate for approximately seven years, beginning around 2014. This, however, does not affect the validity of the restrictive covenants as applied to the Stewarts because Section 403(c) of the Franklin Property Code establishes that Section 403 applies to all restrictive covenants regardless of the date on which they were created.

### Application of the Deed Restrictions to the Structure

Restrictive covenants are contracts between the property owners of a subdivision as a whole and the individual lot owners in the subdivision. *Foster v. Royal Oaks Property Owners Association* (Franklin Ct. App. 2017) Thus, restrictive covenants are subject to the general rules of contract interpretation. Id. In Franklin, restrictive covenants are reasonably construed and interpreted to give effect to their "purposes and intents." Franklin Property Code Section 403(a). When interpreting a restrictive covenant, a court will determine the drafter's intent from the text of the restrictive covenant, using the commonly accepted meanings of the words and phrases. *Foster v. Royal Oaks Property Owners Association* (Franklin Ct. App. 2017)

Section 1 of the Canyon Gate covenants makes clear that the purpose of the restrictive covenants is to establish a uniform plan for improvements to lots within the subdivision, to benefit each and every property owner in the subdivision. Thus, all covenants will be construed to give effect to this purpose: uniformity.

The Stewarts have applied for a Structure to be erected on their property. Section 3B of the covenants establishes that only one family residence may be placed on each lot. To be defined as a "residence," Section 3A requires a minimum of 2,800 square feet and to be set back at least 30 feet from the front street right of way. The Structure is planned to be 600 square feet, and is set back 50 feet from the street. Thus, it is too small to be defined as a residence by the covenants.

Section 5C establishes that for "outbuildings", buildings other than residences, the maximum square footage is 100 square feet per acre. Because the Stewarts live on two acres, this means the structure may not exceed 200 square feet. Because the Structure is planned to be 600 square feet, it violates Section 5C.

However, a restrictive covenant may not be construed to prevent or restrict the use of property as a family home. Franklin Property Code Section 403(b). Despite the fact that the Structure is too small to be a residence under Section 3A, a court still may find that the Structure is a residence. The Stewarts application made clear that the use of the Structure will be for Mrs. Stewart's mother to live in. The Structure will contain a large living/sleeping area and a bathroom. Further, the common meaning of "residential building" is one used for residential purposes where people will reside, dwell, or make their homes as compared to commercial purposes. The use of the Structure by Mrs. Stewart's mother is clearly residential purposes because it will be established as her place of abode.

Comparatively, the common meaning of outbuilding is a detached building not connected to the primary residence, such as a shed or garage. Here, the Structure will be connected to the existing home by a roof-covered walkway without walls. This is connected to the existing home, thus the requirement of Section 5A that there is only one family residence per lot may not even be violated here.

Because the purpose of the Structure is for residential purposes and it will be attached to the primary residence, a court will likely find that the denial of the Structure violates Franklin Property Code 403(b) because the denial prevents and restricts the use of the property as a family home. While the purpose of the Canyon Gate covenants is uniformity, a court will not allow the covenants to violate Section 403(b). However, the purpose of uniformity is not defeated because while the Structure is the first of its kind in Canyon Gate, it maintains the residential appearance of the neighborhood and upholds the residential purpose.

#### Variance for the Fence

Section 10 of the covenants establishes that variances will be granted only for a "compelling" reason and only if the general purposes and intent of the covenants is substantially maintained. As discussed above, the general purpose of the Canyon Gate covenants is uniformity. Thus, the Stewarts must demonstrate a compelling reason for the eight foot fence that will not defeat uniformity. While they can argue that the safety of the dog is a compelling reason, they will find a higher chance of success in arguing that the covenant has been waived by the ACC so there is no defeat of the purpose of uniformity.

Section 7A of the covenants establishes that fences are limited to a maximum height of six feet. Thus, the Stewarts' proposed eight foot fence is in violation of Section 7A. However, restrictive covenants can be waived by the Association. To demonstrate waiver, the Stewarts must prove that violations already exist in the neighborhood, and the violations are "so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived." *Powell v. Westside Homeowners Association Inc.* (Franklin Ct. App. 2019) (quoting *Larimer Falls v. Salazar*). The number, nature, and severity of the existing violations are factors the court will consider. *Id.*

It is the responsibility of the Stewarts to bring forward the evidence of violations of the covenant in the neighborhood. In *Powell*, the homeowner did not provide any evidence to support his claim that others in the neighborhood violated the covenant at issue, while the ACC chair testified that in the five years leading up to the lawsuit she had not seen any other violations of the covenant in the neighborhood. *Id.* Thus, there was no waiver. *Id.*

Here, the ACC has never formally approved the installation of fences over six feet tall, which supports a finding of no waiver. However, there are nonconforming fences in Canyon Gate due to lax enforcement of the fencing requirements. This includes one former ACC member who built a nonconforming fence without approval while serving on the ACC. The Stewarts will likely need to identify the number of homes with non-conforming fences. If only 1% to 10% of the 45 homes in Canyon Gate violates the covenant, then this will be insufficient for Franklin Courts to find waiver. *Powell*. The Stewarts must demonstrate that over 10% of the homes violate the covenant to have a reasonable chance of establishing waiver.

**(2) You have asked if the board affirms the ACC's denial and the Stewarts sue the Association, what outcome is likely and what potential remedies are available. The Stewarts will likely succeed in their claim that the structure does not violate the restrictive covenants, and the Stewarts will likely fail in their claim that the variance should be granted due to waiver because they have not provided sufficient facts.**

The Stewarts may seek a declaratory judgment that their proposed structure does not violate the restrictive covenants. The Stewarts may also seek a declaratory judgment that the ACC's denial of a variance was arbitrary, capricious, and/or discriminatory.

The Association may defend in litigation affecting the enforcement of a restrictive covenant. Section 404(a). If the Association prevails, the court may assess civil damages for the violation of the restrictive covenant, not to exceed \$200 for each day of the violation. Section 404(b). These civil damages do not require any type of injury or harm to be demonstrated by the Association, just the number of days the violation occurred without reference to any existence, nature, or type of injury. *Foster v. Royal Oaks*. If the Stewarts prevail in their declaratory judgment for the structure, they will be allowed to construct the structure.

ACC's application of a restrictive covenant, if properly interpreted, is presumed to be proper "unless the court determines that the association acted in an arbitrary, capricious, or discriminatory manner." *Foster v. Royal Oaks* (quoting *Cannon v. Bivens*). The burden is on the Stewarts to prove by a preponderance of the evidence that ACC's denial of the variance was arbitrary, capricious, or discriminatory.

For example, where an ACC member told the homeowner that his application would be denied "no matter what," the ACC did not review the application, and the ACC did not contact the homeowner to discuss the application, summary judgment was found in favor of the homeowner that the ACC acted in an arbitrary, capricious, or discriminatory manner. *Foster v. Royal Oaks* (discussing *Mims v. Highland Ranch Homeowners Ass'n Inc.*, Franklin Ct. App. 2011).

Alternatively, in *Foster v. Royal Oaks* there was no finding that the ACC acted in an arbitrary, capricious, or discriminatory manner where the ACC attempted to resolve a conflict created by the homeowner in violation of the rules by discussing other fencing options. ACC was permitted to modify deed restrictions under "compelling circumstances," but the homeowners did not provide any justifications at all to necessitate the variance. *Id.*

Here, the ACC's denial letter to the Stewarts establishes that the application received careful consideration, review of the submitted plans and specifications, and an on-site meeting to inspect the

proposed location of the improvements. The letter also laid out the reasons for the denial in the letter, and indicated how to request a hearing before the Association Board of Directions to appeal either denial. Further, the Stewarts have not provided significant information for a court to determine that waiver of the covenant occurred, because that would require the Stewarts to show proof that more than 10% of houses in the neighborhood are in open violation of the covenant. While there is some evidence, as it appears right now it is insufficient. The facts clearly demonstrate that the denial of the variance was not arbitrary, capricious, or discriminatory but instead based on careful review and application of the covenants.

The potential outcome, then, hinges on whether the court finds that the ACC properly interpreted and applied the covenants. As discussed in the first question, the denial of the Structure will likely found to violate Franklin Property Code Section 403(b), thus the Stewarts would likely prevail in their suit for a declaratory judgment, which would allow them to construct the structure. The denial of the variance will not be found arbitrary, capricious, or discriminatory because the Stewarts failed to put forth facts supporting waiver of the covenant to necessitate a variance and failed to put forth facts of an unjust process by the ACC.

Please contact our office if you have any further questions, and we would be happy to discuss matters further with you.

Thank you,

## MPT 2 — Sample Answer 3

TO: All attorneys  
FROM: Examinee  
DATE: January 6, 2020  
RE: Canyon Gate Property Owners Association

### OPINION LETTER

Restrictive covenants are a type of deed restriction commonly used in neighborhoods to protect homeowners against construction or use that could hinder their enjoyment of the land. According to Franklin's Property Code, a restrictive covenant is a condition or restriction that runs with the land and limits use of the land (401). These covenants should be read to give effect to their purpose and intent and should not be construed to restrict the use of property as a family home (403). A property owner's association can initiate, defend, or join proceedings affecting the enforcement of restrictive covenants or the use of property subject to a restrictive covenant, and a court can decide whether civil damages for a violation of the restrictive covenant is necessary, but the court cannot make a property owner pay more than \$200 for each day of the violation (404).

### Background Legal Principals

In *Foster v. Royal Oaks Property Owners Association*, the Association sued property owners to enforce the deed restrictions for their subdivision after the property owners erected a fence in violation of restrictive covenants. The Royal Oaks subdivision, is subject to deed restrictions that include certain boundary requirements governing the placement of structures (like fences) on each lot. The Royal Oaks Architectural Control Committee (ACC), is a three-member committee appointed by the Association and is made up of homeowners in the subdivision—they have the power to allow certain improvements on the lots and to enforce the restrictive covenants. The property owners in this case bought a lot of the subdivision and received approval from the ACC to build a house. The approved plans included a fence that inclosed the backyard. However, when the ACC went to check on improvements they noticed the fence was much closer to the street than the restrictive covenant allowed. They sent a letter to the property owners telling them about the violation and advising them to stop construction; however, the owners did not listen and finished construction of the fence. Afterward, the requested a variance to allow the noncompliant fence to remain. After failed discussions with the ACC, the brought a claim to enforce the restrictive covenant and impose damages. The property owners countered with a claim stating they were not in violation or (alternatively) that the ACC had been "arbitrary, capricious, and/or discriminatory in not granting their variance." After judgement was entered against them, the property owners appealed the action.

On appeal in *Foster*, the court first had to determine whether the Association properly applied the restrictive covenant. The court stated that restrictive covenants are a "contract between a subdivision's property owners as a whole and individual lot owners and are thus subject to general rules of contract construction." (quoting *Coleman LLC v. Ruddock*). In looking at a restrictive covenant, the court should ascertain the drafter's intent from the language and give the words their commonly accepted

meaning--In 1990, Franklin legislature amended the Property Code to provide that all restrictive covenants contained in deeds should be reasonably construed to give effect to their purpose and intent (403). The Franklin Supreme Court has held that this rule supplants the common law rule of strict construction (*Humphreys v. Oliver*). The Court in *Foster* held that the property owner's interpretation of a larger boundary lacked merit because the Section they attempted to avoid specifically stated that there should be a greater setback with any structures and the street. This was clear in the language of the deed and was not to be questioned by the court.

In *Foster*, the court emphasized 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." (quoting *Cannon v. Bivens*). Thus, the property owners have the burden to prove by a preponderance of the evidence that the Association acted in this manner. For example, in *Mims v. Highland Ranch Homeowners*, the court stated that an ACC member's absolute denial of a homeowner's carport plans was arbitrary and capricious when the deed restrictions did not specifically prohibit carports. The ACC did not review the plans or even contact the owner to discuss them--it was an absolute denial. However, in *Foster*, the property owners deviated from the plans that had already been approved by the ACC, and the ACC attempted to work out different fencing options with them. Thus, the ACC did not act arbitrarily.

Finally, when there is a breach of a covenant, the court can assess and impose damages. The amount of damages is not related to any type of injury or harm but is instead related to the number of days that the violation takes place (*Foster*). Nothing in Section 404 indicates that damages are intended to compensate for actual harm done from the violation of the covenant. Thus, in *Foster*, the court did not abuse its discretion in awarding a large sum of damages (\$20,000) because it properly applied the above-stated standard outlined in Section 404(b).

In *Powell v. Westside Homeowners Association Inc.*, the Franklin Court of Appeals affirmed a Homeowner's Association's (HOA) decision to uphold a restrictive covenant. In this case, property in the neighborhood is subject to deed restrictions which are enforced by the HOA Architectural Control Committee (ACC). The property owner owned a home in the neighborhood and began parking a minivan on his front lawn. The ACC notified him that parking a vehicle there violated the HOA restrictive covenants and the vehicle should be removed in 10 days. The letter also stated that if the property owner disagreed, then he could contact the ACC and explain his position. He neither responded to the letter or moved the vehicle. The ACC then sent a second letter notifying him that they were prepared to file a suit against him and that he could request a hearing before the board in 30 days. The property owner also did not respond to this. The ACC then asked the court to enforce the covenant, and it did, and the court also assessed damages against the homeowner.

In *Powell*, on appeal, the property owner argued that he did not violate the restrictive covenant or in the alternative that even if it was a violation, the HOA waived its rights to enforce the restrictions because they allowed other homeowners to park their cars in their front yards. The court stated, like in *Foster*, that restrictive covenants are subject to the general rules of contract law and are to be reasonably construed to give effect to their purposes and intent (citing 403(a)). Although restrictive covenants cannot restrict or prevent the use of property as a family home, the restrictive covenant in question did not do

so. Instead, it simply required homeowners not to park their vehicles in the front yard. Note that this restriction was recorded in 1973 (before the enactment of the Franklin property Code), but 403 applies retroactively to create a presumption that the restriction is reasonable (see 403(c)). The property owner here clearly violated that covenant.

Additionally, to demonstrate a waiver of restrictive covenants, "a party must prove that the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived" (Larimer Falls). The number, nature, and severity of the existing violations are factors to consider when determining whether there has been a waiver. Franklin courts have found that 1-10% of properties in violation of the covenant is not enough to prove waiver. The property owner here did not produce any evidence other than his allegation that others were also breaking the rules. Thus, the covenant had not been waived.

### **1. Whether the board should uphold the ACC's denial of the Stewart's application for a structure and a fence**

The Board should not uphold the denial of the Stewart's application for a structure, but might be able to uphold the denial for the fence.

Canyon Gate is a small, residential subdivision consisting of 45 single-family homes on lots that range from 1-5 acres. The Canyon Gate Property Owners Association (Association) has appointed an ACC to oversee approvals and enforcement of the Association's covenants, conditions, and restrictions. The Stewarts have lived in the neighborhood for about two years and recently submitted an application to the ACC (along with plans and specifications) seeking approval for two home improvements (1) construction of a new Structure to be located adjacent to their existing home and (2) installation of a eight-foot-tall fence to be erected behind this structure. The Structure would be about 12 feet to the right of their existing home and 50 feet back from the street. This was to be connected by a breezeway, and the purpose of the structure was to enable Mrs. Stewart's elderly mother to move in and live with the Stewarts. The purpose of the fence is to ensure her mother's dog does not roam off and get lost.

This kind of structure would be the first of its kind in the neighborhood and none of the lots contain any similar building (like a guest house). In the past, the ACC has approved the construction of sheds and barns that comply with the deed restrictions, and the ACC has never approved the installation of fences that are over 6 feet tall. However, a few homes in the community do have fences that do not comply with the restrictions--Mrs. Mendoza is not sure how many there are. But she says that this happens because the ACC has been pretty relaxed (one of the members built a nonconforming fence while serving on the board). Nonetheless, after review of the plans and an on-site meeting with the Stewarts, the ACC denied the request to build the structure and install the fence. In this denial, the ACC stated the structure violates section 5C of the Canyon Gate Covenants, and the fence violates section 7A. Following this denial, Ms. Mendoza received a call from the Stewarts stating that the ACC misapplied the deed restrictions and requesting a hearing.

Section 5C states that "the maximum allowable square footage of all outbuilding shall not exceed 100 square feet per acre of a homeowner's lot." Section 7A states that "fences are limited to a maximum

height of six feet. No fence having a height greater than six feet shall be constructed or permitted to remain in the subdivision." Additionally, the common meaning of residential building is defined as "a building 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... a building is a residence if it is a place of abode." Thus, it does not have to be one's usual place of abode. On the other hand, an outbuilding is "a detached building (such as a shed or garage) within the grounds of a main building."

In *Foster*, the court stated that restrictive covenants are subject to general application of contract principles. Thus, the words of the parties and their intentions should be given effect. Here, the language of 5C favors the Stewarts since the structure they are building constitutes a residential building. While the Stewarts are not planning to live there, their family member is planning to, and 403 specifically states that restrictions cannot restrict one's use of the family home. Additionally, the structure complies with the boundary in the covenants since it would be 50 feet back from the road. Thus, it is clear that this should be treated as a residential building instead of an outbuilding.

However, section 3A does state that the living area of a residence should be a minimum of 2,800 feet. The Stewart's current house is 3,000 and in violation of that, and it is not clear by the language whether this meant to include guest house or whether that would be viewed as a separate structure. Thus, this might be a way to deny the variance; however, section 5C is not a proper justification of the denial.

The fence clearly violates the restrictive covenant; however, the Stewarts will likely argue that there has been a waiver. In *Powell*, the court stated that to demonstrate a waiver of restrictive covenants, "a party must prove that the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived." In determining whether there has been a waiver, the court will consider the number, nature, and severity of the existing violations. Here, Ms. Fawcett was not sure about the number of people violating the restriction regarding fences; however, the fact that a member of the ACC is in violation of the restriction tends to favor that there has been a waiver. Nonetheless, if the Board finds that there are minimal fences in violation of the restriction, a court would likely hold that there has been no waiver (See *Powell*).

**2. If the board affirms the ACC's denial and the Stewart's sue the Association, what outcome is likely and what potential remedies are available.**

The Court will likely find that the denial of the structure was impermissible; however, whether the court finds a waiver has occurred regarding the fence will depend on the number of violations present in the community.

The Court will likely find that this was an impermissible interpretation of the restrictive covenants based on the plain meaning of the words referenced in Ms. Fawcett's letter. In finding this, the court will likely grant a permanent injunction preventing the ACC from stopping the construction of the structure on the Stewarts' lot. Additionally, if the court finds that the denial of the application was arbitrary and capricious (assuming the Stewarts can prove this by a preponderance of the evidence), they might be more inclined to find that there was also a waiver of the restriction in regard to the fence.

Additionally, the language of 403 does not limit damages to property owners subject to restrictive covenants; thus, the court might impose damages against the ACC for violating Sections 2A and 10 of the Restrictive Covenants when they failed to approve a structure that complied with the restrictive covenants. This is because having an elderly mother live near you to take care of her is likely compelling and the structure complies with the general purposes and intent of the covenants (Section 10 of the Restrictive Covenants). These damages would be calculated by how many days the violation occurred-- aka, how many days the Stewarts were unable to begin construction of the structure and fence. Note also that actual damage done is irrelevant here since these damages are not meant to compensate. (403).

If this is the outcome, the Board can appeal the action, and the court of appeals will review the finding *de novo* (*Mistover LLC v. Schmidt*).