

**Rick Carroll****[rcarroll@aspentimes.com](mailto:rcarroll@aspentimes.com)**

December 1, 2014

## **Judge: Aspen neighbors can't enforce 1957 building restriction**

When Aspen visionary Fritz Benedict designed a neighborhood on the east side of town in 1957, one restriction was that only single-family homes could be built there.

Somebody didn't get that memo, and in 1979, a high-end duplex was erected on the 200 block of Midland Avenue in the Promontory subdivision. Now, some 35 years later, a federal judge has ruled that the covenant is no longer enforceable by a group of neighbors. That's partly because the duplex "has been used openly and notoriously in violation of the Single Family Dwelling Restriction since at least 1979," wrote U.S. Magistrate Judge Boyd N. Boland in an order handed down last month.

Felix and Carolyne DeJean, owners of one of the duplex units, have been trying to sell the place for years, their lawsuit claimed. But the building limitations, which have been haggled over in previous lawsuits in Pitkin County District Court, spooked away potential buyers.

"Nobody was really aware of these restrictions that Fritz put in the deeds in 1957," said Aspen attorney Michael Hoffman, who represents the couple along with fellow Garfield & Hecht lawyers Chris Bryan and Angela Vichick. "Nobody thought about it, and nobody enforced it."

In September 2013, the DeJeans, part-time residents, sued their neighbors, who are also second-home owners, in U.S. District Court in Denver. The defendants included Colleen Grosz, who owns the other duplex unit next to the DeJeans, and Timothy and Marjorie Roddell, who own a single-family home next door.

---

The DeJeans' suit asked the court to make a decision in the form of a declaratory judgment, which would preclude their neighbors from enforcing the single-family-home-only restriction.

And that's what Boland's ruling effectively does. But Wednesday, the defendants filed a notice in federal court indicating they will appeal the decision.

Kenneth Citron, who is the defendants' attorney, said that his clients didn't initiate the lawsuit and "we never made an attempt to enforce the restrictions."

"No one is suggesting that the existing structure (the duplex) should come down," he said.

Citron noted, however, that Grosz and the Roddells need to preserve their rights in the case of the unexpected.

"The fact is, if the property burns to the ground, provided (the DeJeans) get the approvals, they could put a multi-family dwelling there, which is not consistent with the character of the neighborhood," he said. "That's what they're concerned about."

In their lawsuit, the DeJeans claimed that the single-family-dwelling restriction detrimentally affected their unit's value by \$1.43 million. They also said the restriction has thwarted their ability to sell the unit, which they had shown 74 times to potential buyers.

"Their rationale is that they're trying to sell the unit with the single-family restriction and they've been impacted," Citron said. "Those are their allegations. But we never got to the point to seeing if that was true in trial."

Hoffman said the order certainly helps the DeJeans in their plans to sell the property, "but it's not over yet."

While the DeJeans filed suit last year, the controversy over the subdivision's building restrictions dates back to last decade. The DeJeans sued the same defendants in Pitkin County District Court, and in July 2010, a judge ruled in the defendants' favor after reversing another judge's order.

But at the time of the 2010 ruling, the 18-year statute of limitations on the enforcement of the covenant had not expired.

The DeJeans bought their unit in June 2000, Grosz bought her unit in August 1995, and the Roddells acquired their home in February 1994. The previous owner of the duplex and the home was Theresa M. Hubbert Schiff.

Both Hoffman and Citron said they weren't sure if Schiff was aware of the building restriction, but it's indisputable that it wasn't enforced.

And now that the 18-year statute has passed, the DeJeans have renewed their case in federal court.

"The 18-year limitation period lapsed against the Roddells' enforcement right on Feb. 18, 2012, and against Ms. Grosz's enforcement right on Aug. 31, 2013," Boland wrote. "Thus, the DeJeans have met all of the requirements necessary to modify the Roddells' and Ms. Grosz' right to enforce the single-family dwelling restriction against Lot 5 (where the duplex is located)."

Boland also noted that the “Single Family Dwelling Restriction is, in essence, a fiction in connection with Lot 5 because a duplex has existed on the property, unchallenged, since at least 1979. The law cannot support this fiction to the profound detriment of the DeJeans.”

Citron said one of the defenses has been that “the issues have been decided in state court and shouldn't be brought to federal court on the same issue.”

rcarroll@aspentimes.com

©2005 - 2014 Swift Communications, Inc.