STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

CENTER WOODS, INC., a Michigan Nonprofit Corporation,

Plaintiff/Counter-Defendant/Appellant,

v.

RUTH AVERILL,

Defendant,

and

RES-CARE PREMIER, INC., a Delaware Corporation,

Defendant/Counter-Plaintiff/Appellee.

Docket No. 144721

BRIEF ON APPEAL - DEFENDANT/APPELLEE RES-CARE PREMIER, INC

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS FOR JURISDICTION

Plaintiff/Appellant's statement of jurisdiction is correct but incomplete. First, the statement does not reflect that this Court has the authority to hear this appeal under MCR 7.301(2).

Second, Plaintiff/Appellant's statement does not reflect that the Court instructed the three enumerated issues were to be included "among the issues to be briefed," but did not preclude the briefing of other relevant issues.

STATEMENT OF QUESTIONS PRESENTED

I. Whether the common law doctrines of de facto corporation and corporation by estoppel survived enactment of the Nonprofit Corporation Act?

Court of Appeals: Did not answer this question

Trial Court: Did not answer this question.

Plaintiff/Appellant Answers: Yes.

Defendant/Appellee Answers: No.

II. If so, whether Center Woods Inc. which was dissolved in 1993 but reinstated in 2009 continued to exist as a de facto corporation during the period of dissolution such that defendant Ruth Averill was required to provide notice to the corporation pursuant to its Articles of Agreement of the pending sale of her property?

Court of Appeals Answers: No.

Trial Court: Did not answer this question.

Plaintiff/Appellant Answers: Yes.

Defendant/Appellee Answers: No.

III. Whether defendant Ruth Averill is estopped to deny the existence of the corporation?

Court of Appeals: Did not answer this question.

Trial Court: Did not answer this question.

Plaintiff/Appellant Answers: Yes.

Defendant/Appellee Answers: No.

V. Whether the Court of Appeals decision to grant summary disposition in favor of Res-Care should also be affirmed based upon the other arguments raised by Res-Care in its Brief on Appeal?

Court of Appeals: Did not answer this question.

Trial Court: Did not answer this question.

Plaintiff/Appellant Answers: No.

Defendant/Appellee Answers: Yes.

INTRODUCTION

The Plaintiff/Appellant in this case, Center Woods Inc.[1] ("CWI"), a "desirable residential neighborhood" in Saginaw County, has a problem: It does not want people that its members suspect might be "disabled individuals" or "troubled youth" living in their neighborhood. CWI's members know that if Defendant/Appellee Res-Care Premier Inc. ("Res-Care") is allowed to purchase the Property commonly known as #2 Center Woods, developmentally disabled persons will reside there. They are unabashed about their desire to keep Res-Care's residents out of their community. They do not hide the fact that this litigation is their effort to achieve this unsavory end.

The vehicles they are attempting to use, so far unsuccessfully, are certain Articles of Agreement (Appellant Appendix 31a) that were adopted by the original incorporators of CWI in 1941. The Articles contain some unexceptional provisions: residential use requirements, required set backs and the like. CWI concedes that these provisions give them no right to prevent "disabled individuals" from moving in to their neighborhood.

The Articles also contain some rather exceptional provisions as well, including one that prevents the sale of homes in the neighborhood to "Hewbrews [sic]" and anyone "other than those of the Caucasian (white) race."

> 15. No property in Center Woods may be sold, assigned, mortgaged or conveyed to or let, leased, rented or occupied by Hewbrews [sic], or by any person other than those of the Caucasian (white) race.

[1] In the Trial Court, the Plaintiffs were Dr. Scott Woodbury and Jeanne Woodbury and Center Woods Inc. Similarly, in the Court of Appeals, Dr. Woodbury, Mrs. Woodbury and Center Woods Inc. were identified as Plaintiffs/Counter-Defendants/Appellees. This Appeal has been filed only by Center Woods Inc; the Woodburys have not appealed the Court of Appeals decision.

And, in case there were any other "Caucasian (white)" persons who wouldn't fit in in Center Woods, the incorporators included a discriminatory catch-all paragraph:

> 16. No property in Center Woods shall be sold without first giving Center Woods, Inc. thirty (30) days notice thereof and first opportunity to purchase said property at a price equal to a bonafide offer.

Discriminatory provisions such as paragraph 15 are now illegal. *See* MCL § 37.2505; *Shelley v Kramer*, 334 US 1; 68 S Ct 836; 92 LEd 1161 (1948). However, CWI nevertheless seeks to enforce the catch-all discriminatory provision (paragraph 16) under the guise of corporate and real estate law.

CWI's Complaint first claimed that Res-Care's use of the Property as an adult foster care home was a prohibited commercial use. This claim, however, runs directly contrary to a long line of Michigan cases that recognize the clear policy of the State. Those cases provide that the use of a home as an adult foster care facility constitutes a residential use of property and classifies the occupants as a single family unit. *See eg. Bellarmine Hills Association v The Residential Systems Company,* 84 Mich App 554; 269 NW2d 673 (1978); *Malcolm v Shamie*, 95 Mich App 132; 290 NW2d 101 (1980); *Leland Acres Homeowners Association, Inc v R T Partnership*, 106 Mich App 790; 308 NW2d 648 (1981); and *Livonia v Dept of Social Services,* 423 Mich 466, 378 NW2d 402 (1985). CWI has abandoned this argument.

CWI now focuses its claim on paragraph 16, the so-called right of first refusal option. CWI claims that defendant Ruth Averill failed to provide sufficient notice to CWI of the pending sale of #2 Center Woods to Res-Care which, therefore, denied CWI the right to purchase the Property. But CWI has a problem with this theory too. In addition to the fact that CWI cannot legally exercise a right of first refusal in a discriminatory way, CWI has no right to notice because it did not legally exist on the date Mrs. Averill sold the Property to Res-Care.

CWI dissolved in 1993 for failure to file any annual reports for two years. It received notice from the State of the deficiency (MCL § 450.2922(1)), but did not cure. For sixteen years, CWI was content to remain dissolved. During the dissolution, it did not act like a corporation. It had not only stopped filing annual reports, but had stopped electing the directors required to conduct corporate business. Ruth Averill purchased #2 Center Woods in 2001, while CWI was dissolved.[2] A group styling itself the "Center Woods Association" was conducting meetings, collecting dues, and maintaining the subdivision as any homeowner's association could do without being incorporated. Mrs. Averill paid dues to the Association, but did not have any interactions with an entity claiming to be CWI. That entity remained dissolved an inactive until **after** Ruth Averill sold her home to Res-Care.

After remaining dissolved for sixteen years, on October 13, 2009, CWI renewed its corporate existence (only minutes before filing this lawsuit and for the specific purpose of preventing Res-Care's disabled residents from moving into the neighborhood). However, on September 25, 2009 (the date Mrs. Averill sold #2 Center Woods to Res-Care) CWI did not exist and, therefore, was not entitled to any notice of the pending sale. CWI's corporate reinstatement three weeks later did not give it the right to, retroactively, purchase #2 Center Woods.[3] By choosing to remain dissolved for sixteen years, CWI forfeited its right to purchase the Property.

The Court of Appeals correctly determined that since CWI was (for 16 years) a dissolved corporation, it was not entitled to notice of the sale of #2 Center Woods by Defendant Ruth Averill to Res-Care and, therefore, not entitled to exercise the right of first refusal option. The

[2] Center Woods, Inc. claims that when Averill first moved in, "Center Woods was in good standing" Appellant Brief at 30. This statement is false. Center Woods, Inc. was dissolved in 1993 and Averill purchased #2 Center Woods in 2001.

[3] If this were true, CWI would also have the right to purchase other homes sold in 2008, 2007 and all prior years.

Court of Appeals correctly held that Mrs. Averill was not required to give notice to a corporation that did not exist, "on the contingent basis that at some unknown time in the future, some unknown person might elect to reinstate it" (Appellant Appendix 28a) and also correctly concluded that at the time of Ruth Averill's sale of #2 Center Woods to Res-Care (September 25, 2009), CWI did not factually or legally exist.

CWI now claims that even if it did not have a legal existence when Mrs. Averill sold her home, it was still entitled to notice of the sale under the common law doctrines of de facto corporation or corporation by estoppel. But, at least within the context of corporate renewal after dissolution, those doctrines did not survive enactment of the Michigan Nonprofit Corporations Act. Pursuant to MCL § 450.2833, a dissolved corporation "shall not conduct affairs, except for the purpose of winding up its affairs." CWI's attempt to purchase #2 Center Woods is in no way related to the winding up of its affairs. To the extent the common law doctrines would permit CWI to take action specifically prohibited by MCL § 450.2833, they were superseded by that statute. The doctrines of de facto corporation and corporation by estoppel are further inconsistent with the Michigan Nonprofit Corporations Act, because the Act specifically says that contracts entered into and rights acquired during the time a corporation was dissolved are valid and enforceable only "upon compliance with the provisions" of the Act regarding renewal of the corporate existence. MCL § 450.2925(2). Contrary to that provision, the common law doctrines would validate a dissolved corporation's contracts even if it never fixed its compliance issues. In the context of corporate renewal, the doctrines of de facto corporation and corporation by estoppel are incompatable with the NCA and did not survive its enactment.

And, CWI would not be able to avail itself of either of these doctrines even if they had survived the enactment of the Act. First, the doctrine of de facto corporation applies to a

corporation that, acting in good faith, simply erred and, based on a technicality, was not a legal corporation at the time of contracting. It does not apply to a corporation that was given notice of its imminent dissolution, and chose to do nothing about that dissolution for sixteen years, failing even to elect the directors charged with carrying out the business of the corporation. Second, both the doctrines of de facto corporation and corporation by estoppel require that the entity was acting *as a corporation* in its dealings with the other party. Here, the "Association's" dealings with Mrs. Averill did not suggest a corporate existence. CWI was not entitled to notice of the sale under either doctrine.

Finally, although Res-Care strongly contends that the Court of Appeals' decision on the notice issue was correct and, therefore, dispositive of the case, there are numerous other grounds on which to affirm the result reached by the Court of Appeals. The most direct argument[4] in this regard is that CWI waived its rights to enforce the restrictions, by its failure to enforce them in the 68 years prior to Mrs. Averill's sale of # 2 Center Woods to Res-Care. Out of the approximately 69 sales of homes in the Center Woods subdivision since 1941, there were only 8 occasions where a notice was even *arguably* given and, of those 8, only a few actually complied with the Articles of Agreement. Since 1941, until Res-Care's purchase, CWI has never enforced the notice provision and CWI has never attempted to exercise the so-called right of first refusal option. Michigan Courts have consistently held that where the owners of a property acquiesce to a restricted practice, the restrictions are deemed waived.

Further, there is undisputable evidence that the right of first refusal is being used to further a discriminatory purpose. The Trial Court erred when it ignored CWI's discriminatory

[4] The Court of Appeals could have also reversed the Trial Court by finding that Mrs. Averill had given the required notice or by determining that the Articles of Agreement had expired or had been extinguished.

motives. Once Res-Care made a prima facie showing that CWI was attempting to exercise the right of first refusal for discriminatory and unlawful purposes, the burden shifted to CWI to present facts that proved that it was not attempting to exercise the right of first refusal in a discriminatory manner. Its inability to do so invalidates the right of first refusal provision.

For all of these reasons, Res-Care (and the developmentally disabled residents that it serves) respectfully asks this Court to affirm the Court of Appeals decision. Alternatively, Res-Care respectfully requests that this Court affirm the Court of Appeals' decision based upon any of the other grounds raised by Res-Care in its Brief on Appeal, or remand the case back to the Court of Appeals for a decision on these other issues.

COUNTER-STATEMENT OF FACTS

A. THE PARTIES

Res-Care is a state licensed operator of adult foster care facilities. Its name, short for "Respect and Care", coincides with its stated mission "to assist people to reach their highest level of independence." Res-Care provides vital rehabilitation and residential services to individuals who are intellectually disabled or who struggle with developmental disabilities. *See* Appendix 11b. Unable to sufficiently rely on the support of their natural families and often, due to their unique circumstances, unlikely to marry and form independent families, Res-Care provides these individuals with an environment therapeutically designed to emulate a conventional family environment. It does so in Saginaw County with the financial support of the County and under contract with the Saginaw County Community Mental Health Authority. *See id.*

In order to fulfill its mission, and indeed the policy initiatives of the State of Michigan, Res-Care endeavors to purchase (or lease) and operate its homes in quiet, peaceful, residential settings. It looks for properties in which its residents will have a stable living environment. *See id.* Res-Care purchased #2 Center Woods from Ruth Averill for that purpose.

The residents that were set to reside at #2 Center Woods are all Saginaw County residents. They are all contributing members of society. "Resident A" is a 19 year old girl who, during the 2009-2010 school year, was an honors student at Saginaw Arthur Hill High School. In addition to studying, she is also an avid cook and regularly prepares the meals for the other residents in the house. *See id.* "Resident B" is in his late 20's. He has a full time job at Bayside Lodge and he regularly attends bible study and services at a nearby church. *See id.* Like all families, this one has its issues, and both of these residents suffer from some form of intellectual disability. Res-Care provides 24/7 staff, supervision, and support, i.e. the "Respect and Care," to ensure that they have a stable living environment. *See id.*

Dr. Scott Woodbury and Jeanne Woodbury (Plaintiffs below) are the owners of the property commonly known as #3 Center Woods, which is next door to # 2 Center Woods. *See* Appellant Appendix 19a. CWI was incorporated as a non-profit corporation in 1941. *See* Appellant Appendix 137a. CWI stopped filing annual reports and paying annual fees in 1991, and was automatically dissolved under MCL § 450.2922 in 1993.

Ruth Averill purchased #2 Center Woods in 2001. *See* Appellant Appendix 44a at 9:18-23. When Mrs. Averill purchased her home, CWI had already been dissolved for eight years. CWI remained dissolved for the entire time that Mrs. Averill lived in her home, and until after she sold #2 Center Woods to Res-Care on September 25, 2009.

During the time that Mrs. Averill lived in the subdivision, the neighborhood association referred to itself as "Center Woods," or "Center Woods Association," not Center Woods Inc. *See* Appendix 3b, 4b, 87b; Appellant Appendix 147a, 153a. The "Association" collected dues, held meetings, and maintained common property as any other neighborhood association could do without being incorporated. CWI did not attempt to elect a board or file any annual reports until

after the sale of Mrs. Averill's property to Res-Care. *See* Appendix 8b-9b. On October 13, 2009, the same day that Plaintiff/Appellant filed its complaint, CWI filed renewal of existence papers with the State of Michigan. *See* Appellant Appendix 137a.

B. THE ARTICLES OF AGREEMENT

In 1941, Articles of Agreement were entered into by the then owners of the properties in the Center Woods subdivision and filed in the property records. *See* Appellant Appendix 31a. They identified certain categories of persons who were not considered to be desirable potential neighbors:

> 15. No property in Center Woods may be sold, assigned, mortgaged or conveyed to or let, leased, rented or occupied by Hewbrews [sic], or by any person other than those of the Caucasian (white) race.

Appellant Appendix 33a. The Articles of Agreement have been revised from time to time. The discriminatory provisions were never amended or removed however. In fact, as late as 1967, 19 years after *Shelley v Kramer, supra.* CWI still sought to use these discriminatory provisions to "assure us of a continuing compatible group in our small section." *See* Appendix 1b - December 7, 1967 letter from one of the original incorporators, Lewis Barnard, Jr. to another resident, Dale C. Morris.

The most recent Amendment, made in 2010, has clearly been adopted to discriminate against the individuals Res-Care serves and to prevent Res-Care's use of its Property:

> 2. Use. Each Lot within, and the Subdivision as a whole is, and shall be, maintained solely as an attractive and desirable single family residential unit, made up of only one private single family dwelling house per one Lot. Commercial, trade, professional, industrial, business, nonprofit business, or non-residential activities of any type, or any activities requiring a license from any level of government to engage in, or the provision of any services for hire or compensation, or the sale or maintenance of any Inventory, are not, and shall not be, permitted to operate out of any property in the Subdivision. Hire for

> maintenance, housekeeping, and au pair type services for the Lot Owners, their homes, their children, and their parents shall be allowed. The homes in the Subdivision each are, and shall be, occupied only by a single family of people related by blood, adoption, or marriage. The Lot Owners do not, and shall not, operate any business, profession, or any other commercial enterprise from their homes in the Subdivision, on the Lots, or on the Association's property, not shall they store equipment or supplies for such businesses, professions or commercial enterprises on such property. Regular or recurring deliveries for such purposes are likewise prohibited. Other than the Association, there is not, and shall not be, any corporate ownership of property in the Subdivision, whether the corporation is for profit or not for profit.

See Appendix 51b - Fourth Amendment to Declaration of Restrictive Covenants Center Woods Subdivision (emphasis added).

C. THE TRANSACTION

On July 10, 2009, Mrs. Averill entered into a contract with Moshen H. Zadeh for the purchase of #2 Center Woods for $170,000. *See* Appellant Appendix 143a. Closing was set for August 15, 2009. Since Res-Care prefers to lease its homes, it had entered into an arrangement (as Res-Care typically does) to have Mr. Zadeh purchase the home and lease it to Res-Care. *See* Appellant Appendix 20a. On July 20, 2009, Ruth Averill sent a memo addressed to Jack Short, the President of "Center Woods Association" which provided:

> My home is scheduled for "closing" of sale: August 14, 2009 And I expect to [be] moving on that date.
>
> Since I have NOT received notification of three previous sales in The Woods... I assume this stipulation is no longer necessary.
>
> I do not know the buyer... my realtor is Mary Klein, and the buyer's realtor is Keller Wms (Flint office).
>
> Thank you for all your TLC of The Woods... it has been a delightful place to live for eight years.

See Appellant Appendix 147a. No one contacted Mrs. Averill or her realtor regarding the pending sale. No one told Mrs. Averill that it was still necessary to give 30 days' notice regarding a sale in Center Woods. *See* Appellant's Appendix 81a at 46:13-23.

After Mr. Zadeh was unable to obtain financing, Res-Care stepped in to purchase the property on its own, without Mr. Zadeh, under the exact same terms, including the same price, as the Zadeh offer. *See* Appellant's Appendix 148a. Closing was scheduled to be on or before September 30, 2009, and actually occurred on September 25, 2009. *See* Appellant's Appendix 149a.

On October 7, 2009, Mrs Averill sent another letter to Jack Short and "Center Woods Association," but this time also addressed it to Suzanne Short and the Woodburys. *See* Appellant's Appendix 153a. The letter provided:

> Subject: The sale of my house was delayed until September 18th. I am scheduled to move Monday, October 12th.
>
> New Owner: ResCare Premier, Inc....
>
> Local Manager: Laura L. Smith...
>
> When the identity of the buyers was revealed I talked personally with both Ron Lee and Tim Braun [Saginaw Township officials] regarding zoning. They told me that "group homes" are exempt from the law and cannot be refused or discriminated from a neighborhood.
>
> Tim Braun has enacted a Saginaw Township registry of rental homes to keep aware of the percentage of non-owners. I have sent him the names of the people who are responsible for the property and the maximum of six residents, who will have 24[-] hour supervision.
>
> They must comply with the State mandated safety measures which have been installed.
>
> During inspection, Laura emphasized that they expect to be "good neighbors", and plan to invite neighbors to an open house when they are settled. Best wishes...

Id.

On Friday October 9, 2009, after learning of the identity of her new neighbors, Plaintiff Jeanne Woodbury sent an e-mail to Laura Smith, resident director of Res-Care, and stated that she was "very concerned" that her new neighbors might be "disabled individuals or trouble youth/sexual offenders." *See* Appendix 7b -email from Jeanne Woodbury to Laura Smith dated October 9, 2009. While she claimed that she did not oppose "group homes," she stated a preference not to have "troubled youths right next door."[5] *Id.*

Two days after Ms. Woodbury sent the e-mail to Laura Smith, an "emergent" meeting of the homeowners in Center Woods was held. *See* Appendix 8b. Neither Mrs. Averill nor Res-Care was invited. At the meeting, two Directors were elected to fill longstanding Board vacancies (CWI was still a dissolved corporation at the time of this vote). *See* Appendix 9b. The Board was authorized to take steps to prevent "this improper use," and the Board authorized Dr. Woodbury to be "a committee of one, to meet with" a real estate specialist attorney, with legal action expected to be filed "within a day or two." *See id.*

On October 12, 2009, counsel sent a letter to Mrs. Averill claiming that she violated paragraph 16 of the Articles of Agreement and requesting details of the transaction "so [CWI] may consider exercising its right to purchase the property" (which had been sold three weeks earlier). *See* Appellant Appendix 21a. The letter made no mention of the fact that, at the time this letter was written, CWI had been dissolved for 16 years and remained a dissolved corporation. *Id.*

The homeowners association then hastily sought to re-establish its corporate status by filing annual reports dating back five years with the State of Michigan. On October 13, 2009, the

[5] Although this should not matter, all of the residents served by Res-Care are adults.

same day that it filed its corporate papers, CWI and Dr. and Mrs. Woodbury commenced this action.

D. PROCEEDINGS BELOW

CWI and the Woodburys filed a Complaint alleging two counts of "breach of building and use restrictions," one for the right of first refusal and one for non-commercial use, and requested a preliminary injunction preventing Res-Care from occupying the property. *See id.* Res-Care filed an answer that included several affirmative defenses, including that CWI waived the right to enforce the right of first refusal, that CWI's failure to maintain its corporate status deprived it of standing, that the Articles of Agreement were clearly discriminatory and, therefore, invalid under state and federal law, and that Res-Care's use of the property was a valid residential use not in violation of any restrictions, even assuming they were enforceable. *See id.*

The Trial Court granted the preliminary injunction preventing Res-Care from occupying the Property. *See* Appellant Appendix 22a. Res-Care then filed counterclaims against CWI and the Woodburys, claiming tortious interference with a contract, abuse of process, violations of the Federal Fair Housing Act, and violations of the Americans with Disabilities Act. *See id.*

Res-Care filed a motion for summary disposition alleging that Plaintiffs' claim failed because the "building and use restrictions" were extinguished under the Marketable Record Title Act (MRTA)[6], and because Mrs. Averill was not required to provide any notice to CWI since it was a nonexistent entity. *See id.* Mrs. Averill then moved for summary disposition adopting Res-Care's MRTA and dissolution arguments, and also arguing that she had complied with the notice requirement. After expedited discovery, Res-Care filed a second motion for summary disposition, alleging that plaintiffs' claim as to the right of first refusal failed because of CWI's

[6] MCL § 565.101 *et seq.*

discriminatory motive, and that the count as to commercial use failed because a group home is not considered a commercial use. *See id.*

Plaintiffs also moved for summary disposition, arguing that Mrs. Averill and Res-Care both had constructive and actual knowledge of the "building and use restrictions" and that CWI had acted within 30 days of when it received notice of the sale. They noted that there were some factual disputes, but contended that none of them prevented summary disposition. *See id.*

CWI and the Woodburys argued that the lack of 30-days notice and a failure to include a price rendered Mrs. Averill's notice ineffective as a matter of law. *See* Appellant Appendix 23a. They argued that the discriminatory restriction was severable and, therefore, did not automatically render the right of first refusal invalid. *See id.* Finally, they argued that CWI was statutorily deemed to be in existence at the time of the sale and, thus, was entitled to notice. *See id.* They also filed a combined response to Res-Care and Mrs. Averill's three motions for summary disposition, reiterating most of the same arguments. They provided no evidence or argument to refute ResCare's allegations that discriminatory intent voided the exercise of the right of first refusal. *See id.*

Res-Care filed a response to the Plaintiffs' motion for summary disposition and argued that the right of first refusal expired for failure to contain a definite time period and that Plaintiffs had waived their right to notice based on failure to enforce that right. *See id.* Res-Care also noted that Plaintiffs had failed to argue anything regarding the commercial use of the property and contended that Plaintiffs had abandoned that argument. The hearing on the parties' motions took place December 22, 2009. *See id.*

The Trial Court issued its opinion on February 4, 2010. *See* Appellant Appendix 4a. The Trial Court began by indicating that it was not addressing any civil rights claims, but was only

addressing the enforceability of the 30-day notice provision, the propriety of the notice given, and the related issue of CWI's corporate status. It concluded that the MRTA did not extinguish the "building and use restrictions" contained in the Articles of Agreement because they had been sufficiently rerecorded by reference in the deeds found in Mrs. Averill's chain of title. It concluded that the right of first refusal had not expired and that any determination of a time period for the right would be arbitrary and capricious and that the only unreasonable time period was that suggested by defendants- the lifetime of the signatories. *See* Appellant Appendix 23a.

The Trial Court acknowledged that the notice provision had not been enforced historically, but found that was not an abandonment of the right, but simply proof that there were times CWI elected not to exercise its right of enforcement. The Trial Court concluded that the notice provided by Mrs. Averill was insufficient. The Trial Court also concluded that CWI's status as a dissolved corporation did not excuse Mrs. Averill's failure to give notice, if not to the individual homeowners, then to someone involved with the corporation's day to day operations. *See id.*

Finally, the Trial Court concluded that any discussion of defendants' discrimination claims was premature because the right of first refusal had not yet been exercised and it was possible for Plaintiffs to exercise the right in a non-discriminatory manner. The Trial Court set aside the sale between Res-Care and Mrs. Averill and ordered that, if they renewed their agreement, they had to provide 30 days' notice to CWI who would have 30 days from receipt of the notice to exercise its right of first refusal. *See id.*

On April 12, 2010, the Trial Court entered an amended judgment that expressly stated that the judgment rendered Res-Care's counterclaim moot and that the judgment was entered

without prejudice to Res-Care's right to renew those claims. *See* Appellant Appendix 1a. Res-Care thereafter appealed.

The Court of Appeals first reversed the Trial Court's determination that Mrs. Averill ought to have notified someone other than CWI. The Court of Appeals found the Articles of Agreement were a contract and, therefore, "only Center Woods was entitled to notice, and the Trial Court's conclusion to the contrary was in error." *See* Appellant Appendix 25a. CWI has not appealed this decision.

The Court of Appeals then turned to an issue CWI raised for the first time on appeal. Plaintiffs/Appellant had not argued the implications of reinstatement before the Trial Court. In the Trial Court, in response to Res-Care's argument that CWI's failure to maintain its corporate status prevented it from seeking to enforce the Articles of Agreement, CWI argued only that this was a "technicality" and that it continued to operate, collect dues, maintain the roads, etc. *See* Appendix 48b-49b, Plaintiffs/Counter-Defendants' Combined Response to Res-Care Premier Inc.'s Motion for Summary Disposition and Second Motion for Summary Disposition and Ruth Averill's Motion for Summary Disposition and Brief in Opposition. CWI argued that it did not "cease to exist" and that it remained a body corporate, albeit not in good standing. *See id.*

In its Appellate Brief, CWI argued for the first time that because it reinstated its corporate existence, it had every right it would have had if it had existed continuously since 1941, and was entitled to notice. Res-Care's Reply Brief in the Court of Appeals argued that pursuant to this Court's "raise or waive" rule of appellate review, CWI's failure to raise the reinstatement argument operated a waiver of this issue on appeal. *See* Appendix 74b, Res-Care's Reply Brief, citing *Robert Walters v Nathan Nadell*, 481 Mich 377; 751 NW2d 431, 437 (2008) ("A litigant must preserve an issue for appellate review by raising it in the trial court.") and *Therrian v Gen*

Laboratories, Inc, 372 Mich 487, 490; 127 NW2d 319 (1964) ("Since the defendant failed to raise such issues below, they are not available to it on appeal.")

The Court of Appeals found that the Trial Court erred in holding that CWI was entitled to notice of the sale between Mrs. Averill and Res-Care because CWI did not exist at that time. *See* Appellant Appendix 29a-30a. It determined that, though the reinstatement statute created a legal fiction in which a corporation is treated as if it had not been dissolved, in reality CWI did not exist in 2009. Mrs. Averill could not be expected to anticipate whether it would ever reinstate.

CWI sought leave to appeal the issue of whether a dissolved corporation waives rights, such as a right to notice, that arises when the corporation is dissolved. *See* Application for Leave to Appeal ¶ 3.

ARGUMENT

I. STANDARD OF REVIEW

Issues of law such as statutory interpretation are subject to de novo review by this Court. *Morley v Automobile Club of Michigan*, 458 Mich. 459, 465, 581 NW2d 237 (1998); *Alex v Wildfong*, 460 Mich 10, 21, 594 NW2d 469 (1999). Appellate review of a trial court's grant of summary disposition is also de novo. *See Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681; 599 NW2d 564 (1999); *Smith v Kowalski*, 223 Mich App 610, 612; 567 NW2d 463 (1997).

II. THE COMMON LAW DOCTRINES OF DE FACTO CORPORATION AND CORPORATION BY ESTOPPEL CONFLICT WITH AND WERE SURMOUNTED BY ENACTMENT OF THE NONPROFIT CORPORATION ACT

A. The Effect of the Nonprofit Corporation Act Must be Determined By The Act's Plain Language

CWI places undue importance on the legislative history of the Nonprofit Corporations Act ("NCA") and Business Corporations Act in order to determine the NCA's purpose and effect. The legislative history is not relevant.

> In the interpretation of legislation, we aspire to be a 'nation of laws, not of men.' This means (1) giving effect to the text that lawmakers have adopted and that the people are entitled to rely on, and (2) giving *no* effect to lawmaker's unenacted desires. As Justice Oliver Wendell Holmes put it: 'We do not inquire what the legislature meant; we ask only what the statute means.' That is why the cases approving the use of legislative history (as we do not) *disapprove* of it when the enacted text is unambiguous.

ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 29 (Thomson/West 2012) (emphasis in original) (internal citations omitted). This Court should not accept CWI's invitation to speculate on the subjective intent of the legislature, based on documents the legislature did not enact such as the Senate or House Analysis papers or Committee memos.

> Legislators' talk (whether on the floor or in a committee report) is not as precise as statutory language, and it is not adopted by the process for creating laws.... Legislative intent is a fiction, a back-formation from other and often undisclosed sources. Every legislator has an intent, which usually cannot be discovered, since most say nothing before voting on most bills; and the legislature is a collective body that does not have a mind; it "intends" only that the text be adopted, and statutory texts usually are compromises that match no one's first preference.

Id at xxii. Indeed, the analysis papers and committee memos cited by CWI do not convey one clear intent. While CWI claims that, based on these documents, the legislature intended only to clarify statutory law, those same documents also suggest the contrary conclusion. *See eg* Appellant's Appendix 175a (noting that "the impact of *judicial decisions and common law principles* upon the inter-relationship of the two categories of statutory provisions [for nonprofit corporations and general business corporations] has often been unclear.") While the legislative history expresses an intent to clarify statutory law, it does not, as CWI suggests, express a refusal to clarify confusing common law principles. The legislative history is both indefinite on this issue and irrelevant.

Rather than speculating on the legislature's subjective intent based on language the legislature did not enact, the Court should instead discern the legislature's objective intent based on the actual language of the NCA. "Where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed – no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). That clear language reflects that, while the legislature did not abrogate all common law doctrines when it enacted the NCA, it also did not leave them all intact. As CWI acknowledges, there are numerous places within the NCA where the legislature specifically stated that a particular statute had not displaced the relevant common law. *See eg* Appellant Br at 18 n 4. But the statutes particularly at issue in this case, MCL §§ 450.2833, 450.2834, 450.2922 and 450.2925, contain no such provision. The legislature could have, but did not state that these statutes were not to impact the common law doctrines of de facto corporation or corporation by estoppel. And, as explained below, the plain statutory language conflicts with those doctrines. The language of the NCA reveals three issues fatal to CWI's claims in this case.

1. MCL § 450.2833 Provides That A Dissolved Corporation Shall Not Conduct Affairs Except for the Purpose of Winding Up its Affairs.

MCL § 450.2833 and 450.2834 address the status of dissolved corporations. MCL § 450.2834 provides:

> **Subject to Section 833** and except as otherwise provided by Court order, a dissolved corporation, its officers, directors, shareholders and members shall continue to function in the same manner as if dissolution had not occurred. . . . (emphasis added.)

Section 834 goes on to address certain specific actions that a dissolved corporation may take. There is no mention in the specifically enumerated examples of any right of a dissolved

corporation to receive notice or to exercise an option to purchase property while the corporation is dissolved.

In fact, the statute expressly makes MCL § 450.2834 "[s]ubject to Section 833," which precludes dissolved corporations from buying new property like #2 Center Woods. Section 833, entitled "Winding Up; Conduct of Affairs," specifically provides:

> Except as a Court may otherwise direct, **a dissolved corporation** shall continue its corporate existence but **shall not conduct affairs except for the purpose of winding up its affairs** by
>
> (a) Collecting its assets.
>
> (b) Selling or otherwise transferring with or without security, assets which are to be distributed in kind pursuant to Section 855.
>
> (c) Paying its debts and other liabilities.
>
> (d) Doing all other acts incident to liquidation of its affairs.

MCL § 450.2833 (emphasis added). CWI does not, and cannot, provide this Court with any authority for the notion that its alleged right to purchase #2 Center Woods is in any way incident to the liquidation of its affairs. If anything, CWI's attempt to purchase #2 Center Woods is being done (albeit with a completely discriminatory motive) in order to *continue* its stated business purpose of maintaining a "desirable residential community." Appellant's Appendix 33a.

The language of MCL § 450.2833 is clear and must be enforced as written. The statute does not, as CWI suggests, make any distinctions between corporations that are intentionally dissolved versus those that are inadvertently dissolved. It applies to "a dissolved corporation," without regard to how the dissolution occurred. CWI's interpretation would require the Court to impermissibly read into the statute a distinction that is simply not there, based on CWI's view of

what would make good policy. But the law must be enforced as the legislature wrote it. By its clear language it applies equally to all dissolved corporations.

CWI also claims that its reading is the only way to reconcile MCL § 450.2833 with the statute permitting renewal of dissolved corporations, MCL § 450.2925(2). That is simply not the case. MCL § 450.2925(2) provides that after a corporation follows the required process to renew its existence, the contracts it entered and rights it acquired while it was dissolved are enforceable:

> Upon compliance with the provisions of this section, the rights of the corporation shall be the same as though a dissolution or revocation had not taken place, and all contracts entered into and other rights acquired during the interval shall be valid and enforceable.

CWI argues that the phrase "all contracts" means that a corporation can continue to conduct regular business after it is dissolved and that "all" contracts (as opposed to only those contracts entered into relating to the winding up of its corporate affairs) can be enforced. However, CWI's interpretation of the word "all" in MCL § 450.2925(2) would render MCL § 450.2833 meaningless. Why would the legislature specifically limit the actions a dissolved corporation can take (collecting its assets, selling assets which are to be distributed, paying debts and doing other acts incident to liquidation) in MCL § 450.2833(a)-(d) if "all" contracts can be enforced? And, if "all" contracts can be enforced upon reinstatement, why would any corporation maintain its corporate status? If a corporation can be dissolved (and not pay its annual fees) for 20 years and then reinstate (and only pay the last 5 years fees) corporations would be encouraged to not file their annual reports. Instead, "all contracts entered into and other rights acquired" during the corporation's dissolution must be read in light of MCL § 450.2833 to refer all contracts *that a dissolved corporation is permitted to enter* under MCL § 450.2833 such as rights to collect assets, sell or transfer assets, etc. It does not enable

corporations to enforce contracts that it would have been illegal for them to enter under MCL § 450.2833.

CWI further argues that, contrary to the statutory language plainly stating that a dissolved corporation cannot take any actions other than those related to winding up its business, the common law doctrine of de facto corporation nevertheless permits a dissolved corporation to conduct any regular business it chooses. In other words, CWI would have the common law overrule the statute. That is the opposite of what the law requires. *See Bradley v Bd of Ed'n,* 455 Mich 285, 301; 565 NW2d 650, 657 (1997) (an applicable statute always surmounts a conflicting common-law rule). For a reading of a statute to change the common law, "the alteration of prior law must be clear – but it need not be express, nor should its clear implication be distorted." SCALIA AND GARNER, *supra*, at 318. Here the language forbidding a dissolved corporation from taking actions, other than winding up its affairs, clearly conflicts with a doctrine that would permit a dissolved corporation to do whatever it wishes.

2. The Act's Plain Language Permits A Renewed Corporation To Enforce Only Rights Acquired During The Dissolution

The NCA provides only that contracts entered into and "other rights *acquired*" during the corporate dissolution are valid and enforceable. MCL § 450.2925(2). CWI did not "acquire" any right to notice (or to purchase property) during the period that it was dissolved. It could not under MCL § 450.2833, as that would be contrary to winding up its affairs.

Rather than enforce a right "acquired" during its dissolution, CWI is attempting to enforce a right it *forfeited* during that period. CWI allowed any right to notice or right of first refusal that it could have exercised as a corporation to lapse for sixteen years. When the corporation renewed its existence, it could only continue to exercise those rights it possessed. By its plain language, the statute does not attempt to restore any rights CWI allowed to lapse and

failed to preserve. This result parallels what would happen if CWI waited until after the statute of limitations had passed to renew its existence and file a lawsuit. During the sixteen years that it was a dissolved corporation that was *not* engaged in the process of winding up its business, CWI had no ability to file lawsuits. *See* MCL §§ 450.2833; 450.2834(e). While it is again able to file lawsuits due to its corporate renewal, the corporate renewal did not restore its ability to sue on any claims for which CWI allowed the statute of limitations to lapse in the interim. Rights forfeited during dissolution are not renewed.

This is the result required by the language of the statute, common sense, and the stated purpose of the NCA to "provide a general corporate form for the conduct of lawful nonprofit activities with such variations and modifications from the form as interested parties in any corporation may agree upon, subject only to overriding interests of this state *and of third parties*." MCL § 450.2103(b). As the Court of Appeals correctly found, it is not reasonable for third parties to have to wonder if "at some unknown time in the future, some unknown person might elect to reinstate" the corporation, when they just as easily might not. *See* Appellant Appendix 28a. While third parties would be actively engaged in and aware of a dissolved corporation's efforts to contract with or acquire rights from them, and would not be surprised by a corporation's efforts to enforce those rights, the same cannot be said for rights the dissolved corporation has long since ceased to exercise and has apparently abandoned.

CWI has pointed out that there are currently 735,783 corporations in Michigan (654,168 for profit corporations and 81,615 non-profit corporations) who are not in good standing. *See* Appellant Appendix 232a. Since there are only 291,196 active corporations, this means that 72% are not in good standing. If CWI's position is adopted, third parties dealing with all 735,783 dissolved corporations would have to give notice or perform other acts because all

735,783 of them might, at some point in the future, seek reinstatement. This would be an absurd burden, and is why the Court of Appeals determined it was "not reasonable to require persons to give notice to a non-existent corporation on the contingent basis that at some unknown time in the future, some unknown person might elect to reinstate [all 735,783 of them]." Appellant Appendix 28a.

3. The Act's Plain Language Permits A Renewed Corporation To Enforce Its Rights Only Upon Compliance With the Statutory Renewal Procedure

MCL § 450.2925(2) also provides that a renewed corporation can exercise its existing rights only "upon compliance with the provisions" for renewal in MCL § 450.2925(1). Unless and until a dissolved corporation takes those steps, the contracts entered into and other rights acquired during the interval are not valid and enforceable. Any other reading would make the "upon compliance" language meaningless. This is a marked departure from the common law doctrines of de facto corporation and corporation by estoppel. As further explained below, those doctrines would ratify a corporation's contracts regardless of whether it complied with the renewal procedure.

B. The Common Law Doctrines of De Facto Corporation and Corporation by Estoppel Conflict With the Nonprofit Corporation Act By Permitting Enforcement of Contract Rights Regardless of Renewal

"De facto corporation and corporation by estoppel are separate and distinct doctrines that warrant individual treatment." *Duray Development, LLC v Perrin,* 288 Mich App 143, 152; 792 NW2d 749, 755 (2010). The doctrine of de facto corporation confers a legal status on a defectively formed corporation, so that it is viewed as existing under the law for all purposes of ordinary and regular business, and as to all the world except the State. *See id* at 152; *Tisch Auto Supply Co v Nelson,* 222 Mich 196, 200; 192 NW 600, 602 (1923). In contrast, the doctrine of corporation by estoppel does not change the defectively formed corporation's legal status. It

merely prevents one who has been dealing with the corporation as a corporation from challenging its legal status. *See Duray Development*, 288 Mich App at 153. It is an equitable doctrine that bars only the party who interacted with the corporation from making this challenge, based on that party's own actions. *See id.*

The doctrine of de facto corporation applies when the incorporators, proceeding under statutory authority and with a valid purpose, make a good faith effort to incorporate, and have used their corporate powers and/or have executed and acknowledged articles of association. *See Tisch,* 222 Mich at 200; *Newcomb-Endicott Co v Fee*, 167 Mich 574, 580; 133 NW 540, 542 (1911). The doctrine of corporation by estoppel applies when persons hold themselves out to others as acting on behalf of a corporation, and are dealt with by those others as a corporation. *See Duray Development*, 288 Mich App at 153; *Estey Mfg Co v Runnells,* 55 Mich 130, 133; 20 NW 823, 824 (1884). Both doctrines share one very important aspect: neither requires that the corporation first fix any defects in order to avail themselves of these doctrines. *See Tisch, supra* (finding that defendant was a de facto corporation and holding that plaintiff was estopped from denying that status despite the fact that the corporation never did file its articles of incorporation); *Estey, supra* (estopping defendant from denying the corporate existence of a company whose articles of association did not at that time – or possibly ever - conform to statutory requirements). As such, these doctrines conflict with the NCA.

MCL § 450.2925(2) provides that a renewed corporation must first comply with the provisions for renewal (filing delinquent annual reports and paying delinquent fees) before the contracts that it entered into during dissolution will be valid and enforceable. If the doctrines of de facto corporation and corporation by estoppel apply, that requirement is completely pointless. A dissolved corporation could continue to enter and enforce contracts without attempting

renewal. And, contrary to MCL § 450.2834 which permits a dissolved corporation to sue and be sued only for the purpose of winding up its affairs, under the doctrine of de facto corporation a dissolved corporation could continue to initiate suit for any purpose because the courts would view it as a legal corporation for *all purposes* of regular business. *See Duray Development,* 288 Mich App at 152. Because application of these doctrines conflicts with the NCA, enactment of the NCA superseded them. *See Bradley v Bd of Ed'n,* 455 Mich 285, 301; 565 NW2d 650, 657 (1997) (an applicable statute always surmounts a conflicting common-law rule).

C. The Court Can Deny CWI's Appeal Because CWI Waived Its Corporate Reinstatement Statute Argument By Failing To Raise The Issue In The Trial Court

CWI never raised its reinstatement statute argument in the Trial Court. The Court of Appeals could have refused to consider the reinstatement argument on appeal, as may this Court, since CWI waived this issue when it failed to raise it below. This Court has recently reiterated the long-standing "raise or waive" rule of appellate review. *See Robert Walters v. Nathan Nadell,* 481 Mich. 377; 751 N.W.2d 431 (2008). "A litigant must preserve an issue for appellate review by raising it in the trial court." *Id.* at 437. *See also Therrian v Gen Laboratories, Inc.,* 372 Mich. 487, 490; 127 N.W.2d 319 (1964) ("Since the defendant failed to raise such issues below, they are not available to it on appeal.")

Although the Court of Appeals determined that it would consider the argument, CWI's failure to raise the reinstatement issue in the Trial Court operated as a waiver of this issue on appeal. The Court of Appeals could have decided that it was not possible to give CWI notice based on its automatic dissolution and this waiver. Similarly, this Court may affirm the result reached by the Court of Appeals for those reasons.

III. EVEN IF THE DOCTRINE OF DE FACTO CORPORATION WAS NOT SUPERCEDED BY THE NCA, CWI DID NOT CONTINUE TO EXIST AS A DE FACTO CORPORATION AND MRS. AVERILL WAS NOT REQUIRED TO GIVE NOTICE.

A. CWI Was Not A De Facto Corporation Because Its Dissolved Status Was Not Due To A Good Faith Error In Formation

In order for the doctrine of de facto corporation to apply, CWI would have to demonstrate it was acting in good faith, attempted to comply with the applicable laws, and simply suffered from a technical error in its formation. *See Tisch,* 222 Mich at 200; *Newcomb-Endicott Co v Fee*, 167 Mich 574, 580; 133 NW 540, 542 (1911). None of these factors is present here.

First, CWI is a corporation that was initially formed correctly, and then dissolved. Unlike the cases cited by CWI, *Tisch Auto Supply Co v Nelson*, 222 Mich 196; 192 NW 600 (2003), *Model Board LLC v Board Institute Inc*, 209 US Dist LEXIS 198 22 (ED Mich, 2009) and *Newcomb-Endicott Co v Fee*, 167 Mich 547; 133 NW 540 (1911), this is not a situation involving a defect in corporate formation. CWI simply stopped following the law applicable to nonprofit corporations.

Second, CWI's failures to follow the law were so numerous and obvious that CWI cannot be said to have acted in good faith, or in an attempt to comply with applicable law. The State is required to notify a nonprofit corporation of impending dissolution 90 days before the dissolution actually occurs. *See* MCL § 450.2922(1). Though CWI had an opportunity to prevent dissolution, it did not act. In fact, it did not act for sixteen years. During that time, CWI was failing to follow even the most basic requirements governing its existence. It was not filing annual reports. It did not have the minimum three directors required to carry out the day to day business of a corporation under the NCA. *See* MCL §§ 450.2501(1); 450.2505(1). These directors were elected only after the sale to Res-Care. *See* Appendix 9-b. And CWI had even stopped filing corporate US tax returns. *See* Appendix 77b-82b – representative tax returns

showing filings in each decade from the 1940's until the early 1990's. In response to discovery requests, CWI did not produce any tax returns after 1993, presumably because they do not exist. Whether these failures were a flagrant disregard of the NCA's requirements and other corporate requirements, or extreme ignorance of the law, there was no good faith effort to follow the NCA. The de facto corporation doctrine does not apply in this case.

B. CWI Acted as an Unincorporated Association, Not A De Facto Corporation.

The doctrine of de facto corporation also requires a use of corporate powers during the time in question. *See Newcomb-Endicott Co v Fee,* 167 Mich 574, 580; 133 NW 540, 542 (1911). But CWI appears to have stopped acting as a corporation by at least the mid-1990s. Based upon the records produced by CWI in discovery, it appears that before Mrs. Averill moved to # 2 Center Woods in 2001, the residents of Center Woods Subdivision began referring to themselves as Center Woods Association instead of Center Woods Inc. Correspondence was signed on behalf of "Center Woods Association." Appendix 3b. Meetings were held for "Center Woods." Appendix 4b. The bank account which had formerly been in the name of "Center Woods, Inc." was abandoned in lieu of an account in the name of "Center Woods Association." *See* Appendix 83b-87b. The residents were required to pay their annual dues to "Center Woods Association." *See* Appendix 3b. And "Center Woods" had stopped observing corporate laws. It stopped filing its annual reports in the 1990s, similarly stopped filing corporate tax returns in the 1990s, *see* Appendix 77b-82b, and also stopped electing directors. *See* Appendix 9b. All of these records suggest a conscious decision to abandon the corporate form. Regardless of CWI's intent, it was not portraying itself as a corporation to others.

Mrs. Averill moved to the subdivision in 2001. During that time, she was aware that there was a neighborhood association that collected dues, held meetings, and maintained

common areas of the neighborhood. But a neighborhood association does not have to incorporate to do these things. And the association had stopped referring to itself as Center Woods, Inc. While corporations may operate under assumed names, they may only do so if they register those assumed names with the State. *See* MCL § 450.2217. "Center Woods Association" is not a registered assumed name of "Center Woods, Inc." The State of Michigan's database does not reflect any registered assumed names for CWI whatsoever. *See* Appendix 76b. Mrs. Averill's day to day dealings with the Association did not create any expectation that she was dealing with a corporation as opposed to an unincorporated association.

C. CWI Did Not Continue As A De Facto Corporation Because It Failed To Renew Within A Reasonable Time

MCL § 450.2925(2) does not provide a timeframe in which a dissolved corporation must decide whether or not it is going to renew. But there are only two choices open to the dissolved corporation: renew or wind up under MCL § 450.2833. MCL § 450.2833 similarly does not provide a timeframe in which a dissolved corporation may wind up its affairs, but the Court of Appeals has held that the omission of a time limitation in that statute does not mean that a dissolved corporation can "languish in perpetutity." *Flint Cold Storage v Dep't of Treasury*, 285 Mich App 483, 496; 776 N.W.2d 387, 395 (2009).

In *Flint Cold Storage*, plaintiff, a closely held Michigan corporation, brought an action to recover unclaimed property, namely life insurance proceeds of $188,679.99, thirty-two years after its dissolution. Plaintiff argued that although it had dissolved in 1975 it had the authority under MCL § 450.1833 to "continue doing business after dissolution for the purpose of collecting its assets." *Id.* at 490. Plaintiff also argued that although dissolved it still had the power to sue and hold assets under provisions of MCL § 450.1834. *See id.* Defendant argued

that *Flint Cold Storage* lacked the capacity to sue because it no longer existed and that it could not possibly be winding up its affairs more than 32 years after dissolution. *See id.*

After analyzing the provisions of MCL §§ 450.1834 and 450.1833, the court concluded "a dissolved Michigan corporation may continue to exist beyond its date of dissolution only until it has concluded 'winding up its affairs.'" *Id.* at 495. The Court held that as the Business Corporations Act provided no specific time period in which a dissolved corporation must complete the winding up process, corporations only have a reasonable time after dissolution to do so; after expiration of that time they cease to exist altogether. *See id.* at 497. The Court concluded that what constitutes a reasonable time is generally a question of law for the Court, but they could "scarcely, if at all, envision a case in which a 32 year winding up period might be considered reasonable." *Id.* at 498.

This Court should similarly interpret MCL § 450.2925. The law of Michigan cannot be that upon dissolution, a corporation has a reasonable time to decide if it is going to wind up its affairs, but all eternity to decide if it is going to renew its corporate existence. Otherwise, corporations like the plaintiff in Flint Cold Storage could essentially sidestep the requirement of winding up within a reasonable time by filing renewal papers on the eve of filing their lawsuit. This Court should determine that a corporation has a reasonable time to renew its corporate existence under MCL § 450.2925(2), and that sixteen years was not reasonable.

CWI dissolved in 1993 and after a reasonable period ceased "to exist for all purposes." *Id* at 496. It thus had no de facto or other existence prior to its reincorporation on October 13, 2009. CWI could not enforce the so-called right of first refusal option in July, August or September 2009. Mrs. Averill could not give notice of the sale of her property to an entity which did not exist at the time of the sale.

D. Ruth Averill Was Not Required To Give Notice As She Was Never a Member or Shareholder of CWI.

This Court's November 7, 2012 Order asks the parties to brief, *inter alia*, whether "Defendant Ruth Averill, a member and shareholder of the corporation was required to provide notice to the corporation . . . ." The question as posed assumes that Mrs. Averill was a member of CWI. The Court may have gotten this impression from CWI's misstatement that CWI was "in good standing" "when she first moved in." Appellants' Brief, p. 30. However, that is not the case.

It is undisputed that CWI dissolved automatically in 1993. *See* Appellant Appendix 19a. It had already been dissolved for eight years when Mrs. Averill bought her home in 2001. *See* Appellant Appendix 44a at 9:18-23. It was not in good standing when she moved in, and that fact did not change at any point during the entire eight year period that she lived in Center Woods, up through her sale to Res-Care in September 2009. CWI did not renew its corporate existence until October 2009. *See* Appellant Appendix 137a. In short, CWI was dissolved from the time that Mrs. Averill first moved in to the time she sold her home. Mrs. Averill could not have become a member or shareholder of a corporation that did not exist during any point of her residence in Center Woods subdivision.

IV. MRS. AVERILL IS NOT ESTOPPED TO DENY THE CORPORATE STATUS OF "CENTER WOODS ASSOCIATION"

A. Corporation By Estoppel Does Not Apply To An Entity That Did Not Deal With Mrs. Averill As A Corporation

The doctrine of corporation by estoppel states that one who deals with a corporation *as a corporation* cannot afterward attack its corporate status. The idea is that one believing herself to be dealing with a corporation has no reasonable expectation that she could avoid the protections that the corporate form provides the other party, such as freedom from individual liability. *See*

Tisch Auto Supply Co v Nelson, 222 Mich 196; 192 NW 600 (1923) (when the borrower requested credit as a corporation, the lender ran a credit report on the corporate name, and then extended credit under the corporate name, plaintiff was estopped from denying the existence of the corporation and pursuing the individuals for repayment); *Newcomb-Endicott Co v Fee,* 167 Mich 574 (1911) (plaintiff that extended credit to a corporation could not pursue individuals for repayment). The doctrine does not apply where, as here, Mrs. Averill never dealt with Center Woods as a corporation. *See Love v Ramsey,* 139 Mich 407, 102 NW 965 (1905) (stating that if plaintiff contracted with the defendant in his individual capacity rather than with the corporate entity estoppel would not apply, and remanding to the trial court for a factual determination on that issue).

In this case, Center Woods did not hold itself out as a corporation and Mrs. Averill did not deal with it as a corporation. *See* Argument III, B, *supra.* This case, therefore, is clearly distinguishable from *Stott v Stott Realty Co,* 288 Mich 35, 284 NW 685 (1939), where the Plaintiff, after filing suit to have the business wound up, attended stockholders' meetings, voted for directors, participated in a directors' meeting, took part in an election of officers, and was himself elected vice president. In *Stott,* based upon his conduct, the Court held that the plaintiff was estopped from questioning the revival of the corporation. By contrast, in this case, CWI only claims that "periodic meetings" were held and only cites to one meeting of "Center Woods Association" that Ruth Averill attended. *See* Appellant's Brief at 27.

This case is also clearly distinguishable from *Etsey Manuf'g Co v Runnells* and *Flueling v Goeringer.* In *Etsey,* the defendant voluntarily entered into a contract with "Etsey Manufacturing Company," as a corporate body. Here, Mrs. Averill did not interact with CWI as a corporation, had no expectations that she would be dealing with one, and did not pattern her

behavior on that assumption. In *Flueling,* the plaintiff chose to initiate litigation against the Checker Cab Company as a corporation, and sued it for tort damages. When Checker Cab defended by claiming that it was a *nonprofit* corporation, and as such was exempt from paying damages under the law, the plaintiff then changed its tune and claimed Checker was not properly incorporated after all. Here, Res-Care is not claiming that CWI was not a corporation at the time CWI filed its lawsuit. Its current status is not relevant to the issue of how it acted from the time when Mrs. Averill moved in to the time she sold her home.

B. Mrs Averill and Res-Care Are Not Estopped From Relying On The State's Determination That At The Time Mrs. Averill Sold Her Home CWI Was Dissolved

CWI's claims that only the State can challenge its corporate existence are irrelevant because Mrs. Averill and Res-Care are not challenging whether CWI was properly incorporated back in the 1940's, or whether it is currently a valid corporation. And the State itself determined that, in September 2009, when Mrs. Averill sold her home, CWI was not in good standing and had been automatically dissolved. This case simply regards the effect that dissolution had on CWI's ability to enforce a right of first refusal.

Further, the common law doctrines of de facto corporation and corporation by estoppel that CWI asks this Court to enforce would never have existed if a person could never question whether a corporation that was improperly formed or dissolved could exercise the rights it claims to have as a corporation.

CWI's argument is not only irrelevant and meritless, but need not be considered as CWI waived it by failing to raise it below. *See Robert Walters v Nathan Nadell,* 481 Mich 377, 388; 751 NW2d 431, 437 (2008) ("A litigant must preserve an issue for appellate review by raising it in the trial court."); *Therrian v Gen Laboratories, Inc,* 372 Mich 487, 490; 127 NW2d 319, 320

(1964) ("Since the defendant failed to raise such issues below, they are not available to it on appeal.")

C. The Counterclaim Does Not Operate As A Bar Against Mrs Averill Or Res-Care

Raising another argument for the first time on appeal, CWI also claims Res-Care is estopped from questioning CWI's status as of September 2009 simply because Res-Care filed a counterclaim in this case after CWI renewed its existence in October 2009. This argument was not only waived, *see Walters*, 481 Mich at 388; *Therrian*, 372 Mich at 490, it is illogical and unsupported by the authority cited by CWI.

There is no dispute that CWI is currently a valid corporation, and that it renewed its existence (minutes) before filing this lawsuit. Its current existence as a corporation has never been at issue. The fact that Mrs Averill and Res-Care recognize its current existence as a corporation (by virtue of filing a counterclaim against CWI or otherwise) is not at all inconsistent with the contention that at the time Mrs. Averill sold her home, CWI was a dissolved corporation. As such, this case is completely distinguishable from *Flueling v Goeringer.* In *Flueling,* in the course of the lawsuit the Plaintiff took the contradictory positions of first arguing that the defendant was a corporation and suing it as a corporation, and then attempting to deny the existence of the corporation to obtain a damages award that prohibited by the defendant's corporate form.

Further, CWI's argument would have the wholly inequitable effect of forcing defendants to either accept a corporate designation that the plaintiff has claimed to have in the case caption, or forego any counterclaims they may have against the plaintiff. There is no logical or equitable reason to bar Mrs. Averill or Res-Care from challenging whether, before CWI renewed its corporate existence, it had a right to notice or of first refusal.

V. SEVERAL OTHER BASES EXIST UPON WHICH THIS COURT SHOULD AFFIRM THE DECISION OF THE COURT OF APPEALS

In addition to the arguments regarding CWI's corporate existence and ability to require notice of the sale, Res-Care presented a number of other arguments which supported reversal of the Trial Court. Although the Court of Appeals found the notice issue dispositive and, therefore, did not address Res-Care's remaining arguments, this Court could also affirm the Court of Appeals based upon any of the other arguments. This Court may decide any issue properly argued before the Court of Appeals, even if the Court of Appeals declined to address the issue. *See eg.; Shavers v Kelley,* 402 Mich 554, 593, 267 NW2d 72 (1978) ("The Court of Appeals did not address this 'sub-issue'... we feel compelled to address it because of its basic, threshold importance to any decision we might render...")

A. The Trial Court Erred in Not Finding That Plaintiffs Waived Any Rights They Otherwise Would Have Had to Enforce the So Called Building and Use Restrictions

Although Res-Care strongly contends that CWI had long ago lost its right to enforce the aforementioned provisions in the Articles of Agreement, CWI has, at the very least, waived its rights to enforce the alleged restrictions.

1. CWI Has Not Uniformly Enforced The Notice Requirement Or Right Of First Refusal In The Building And Use Restrictions

Records from the Saginaw County Register of Deeds shows that there have been 69 sale transactions involving the fourteen lots in the Center Woods Subdivision since it was first incorporated in 1941. In response to discovery requests, CWI produced only eight sales where the alleged "notice" was given.

Even among the eight sale transactions CWI identified in which some form of notice was given, they did not meet the 30 day notice requirement. On November 11, 1998, notice was given of the sale of Lot 11. *See* Appendix 2b Letter from Prudential Realty Company. However,

the letter indicates that the sale was to take place (and did indeed take place) on November 16, 1998, a mere five days after the notice. Mr. Short admitted that the 30 day notice provision was not followed:

> Q. So there was no 30 day right of first refusal on this sale?
> A. Apparently not.

See Appendix 33b - Deposition of Jack Short.

Similarly, with regard to Lot 5, which was sold on August 15, 2008, the so-called notice was given on the same date of the sale. *See* Appendix 6b. Mr. Short again confirmed that the 30 day notice provision had not been complied with. *See* Appendix 34b-35b. CWI did not sue these homeowners to enforce the 30 day notice provision.

The sale of Lot 1 is perhaps the most glaring piece of evidence demonstrating that CWI's intent in this matter was simply to discriminate against developmentally disabled persons. CWI claims that its objection to Mrs. Averill's sale was that she failed to give notice of the sale to CWI and an opportunity to exercise the right of first refusal option. Yet, with regard to Lot 1, the President of the Association, Jack Short, acknowledged that no notice was ever given.

> Q: Well, let's take it piece by piece. The right of first refusal wasn't done on Lot 1; correct?
> A. It was not done.

See Appendix 36b - Deposition of Jack Short.

Mr. Short was then asked why the Association was suing Mrs. Averill to unwind the sale of Lot 2, but had not also sued to unwind the sale of Lot 1:

> Q. What was the consensus reached by the group on the October 11th, 2009, meeting regarding what action should be taken in connection with the owner of Lot 1?
> A. Since no one was interested in it and no one, you know, we as a group did not decide to enforce it because no one was interested in purchasing it.

Appendix 40b. Lot 1 sold in 2008 for a price substantially less than Lot 2, yet "no one was interested" in it. Lot 2 is the only sale the residents have brought a lawsuit to block. Before that, CWI was not attempting to enforce the restrictions.

2. The Restrictions Have Been Waived By CWI's Acquiescence

Michigan courts have consistently held that where the owners of a property acquiesce to a restricted practice, the restrictions are deemed waived. *Burns v Beckenhauer*, 368 Mich 516, 118 NW2d 263 (1962). ("[C]ommercial use... was acquiesced in for over 30 years...[t]his worked as a waiver...). As such, courts have long held that property owners must act with "reasonable promptness" after they know or should have known about violations of building and use restrictions. *Tuttle v Ohio Boulevard Land Co,* 245 Mich 188, 222 NW 171 (1928). In *Margolis v Wilson Oil Corp,* 342 Mich 600, 70 NW2d 811 (1955), the court held that persons who failed to previously object to the erection of buildings in violation of plat restrictions were estopped from doing so thereafter.

In this case, CWI's actions in only having notices for 8 of the 69 transactions; not enforcing the 30 day requirement (Appendix 2b, 6b, 34b-35b); not enforcing the restriction at all in 2008 as to Lot #1; and overall lack of attention operates as a waiver of the requirement. That waiver entitled Res-Care to Summary Disposition.

Based upon these facts, the Trial Court erred in its finding that:

> "The fact that there are instances where Center Woods did not intervene or block a sale where there was improper notice only indicates that in those cases, Center Woods, and more importantly the member land owners, decided not to exercise their rights. It does not mean they abandoned their rights."

Appellant Appendix 14a.

The Trial Court cited no authority for its statement. Based on the decisions cited above in *Burns, Tuttle* and *Margolis* the Trial Court erred in its ruling on the waiver issue and the Court of Appeals could have also reversed on this ground.

B. The Trial Court Erred in Not Reaching the Question of Plaintiff/Appellant's Discriminatory Motives.

Although Res-Care submitted uncontroverted evidence of Plaintiffs/Appellant's discriminatory motives in exercising the right of first refusal option, the Trial Court simply chose to ignore this evidence. The Trial Court concluded that based upon Mrs. Averill's alleged lack of notice, ". . . until that notice is given any discussion of Defendants' discrimination claims is premature." Appellant Appendix 16a. It further concluded:

> "Stated differently, it is entirely possible for Plaintiffs to invoke a right of first refusal and not be in violation of any anti-discrimination laws. *See Phillips v Hunter Trails Community Association*, 685 F.2d 184 (7th Cir 1982); *Randolph v Reisig*, unpublished Opinion of the Court of Appeals entered September 2, 2003 (Docket No. 23966)."

Id.

In this case, there is evidence that, even after *Shelley v Kramer*, *supra*, the residents of Center Woods have attempted to use the right of first refusal option for discriminatory purpose. *See* Appendix 1b - December 7, 1967 letter from Lewis Barnard, Jr. to Dale Morris seeking to "assure us of a continuing compatible group." This letter is further evidence that Paragraph 16 is not truly being used by CWI as a real property right, but is instead a thinly disguised discriminatory provision. Paragraph 16 is simply intended to buttress the invalid racial restriction (Paragraph 15) and, therefore, should be invalidated.

1. A Right Of First Refusal Cannot Be Exercised In A Discriminatory Way

This case requires the Court to balance two competing interests. On the one hand, the Federal Fair Housing Act, 42 U.S.C. §3601 et seq, as amended by the Fair Housing Amendments

Act of 1988, 42. U.S.C. §3604(2) ("Fair Housing Act"), the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2501 et seq ("Elliot Larsen Act"), and the Persons With Disabilities Civil Rights Act, MCL 37.1501 et seq ("PDCRA"), all mandate that there should be no discrimination in housing opportunities. The Michigan Legislature and a clear line of decisions have specifically held that Adult Foster Care small group homes are a protected use and that communities and individuals cannot discriminate against the establishment of these facilities. Notwithstanding these clear Federal and State mandates, CWI argues that a right of first refusal is a valuable property right and that it should be entitled to exercise that right in a discriminatory manner.

The case which best sets forth the interaction between a right of first refusal and the fair housing laws is *Phillips v Hunter Trails Community Association,* 685 F.2d 184 (7th Cir. 1982). In *Phillips*, the plaintiffs, a successful black businessman and his wife, agreed to buy a house in an exclusive subdivision in Illinois. *Id* at. 185. The offer to purchase the home for $675,000 was accepted by the owner on June 13, 1980 and the closing date was set for July 21, 1980. The plaintiffs paid a $75,000 deposit to the seller. Unbeknownst to Mr. Phillips, on June 18, 1980, fifteen residents of the Hunter Trails subdivision held an emergency meeting[7]. *Id.* The seller, who was also the vice-president of the Hunter Trails Community Association ("Association"), was not invited to the meeting and did not attend. *Id.*

One of the covenants that attached to every piece of property in the subdivision gave the Association a thirty day right of first refusal on any proposed sale. *Id.* During the June 18 meeting, the residents decided to assign this right of first refusal to a syndicate or limited partnership in order to block the sale to the plaintiffs. *Id.*

[7] A similar emergency meeting was held in our case. *See* Appendix 8b.

When the Phillips learned of these developments on July 17, they were disappointed, humiliated, and angry. *Id.* Having prepared to move in to their new home on July 21, they were now "forced to live in hotels and with relatives until they found a rental apartment."[8] *Id.* Finally, they were forced to bring an action to vindicate their right to live in the house that they had agreed to purchase in the Hunter Trails Subdivision. *Id.*

The trial court found in favor of the Phillips. In its final order, the court required the house to be sold to plaintiffs at the agreed upon price and awarded them actual damages of $52,675 (against the Association and Mrs. Butler, jointly and severally), punitive damages of $100,000 each against both, $35,000 in attorneys' fees, and $1,016 in costs. *Id.* The Association appealed and the Seventh Circuit Court of Appeals affirmed the lower court's decision. The Court of Appeals noted the "numerous indications of unalloyed bigotry", including "explicitly racist remarks" that were made by some of the residents of Hunter Trails and the Association's attorney during the meeting. *Id* at 188. Any attempt to disavow the Association from the comments made by the residents and the attorney were rebuffed by the Court who noted that the attorney "was the individual [the Association] chose to manage the whole effort to block the sale." *Id.*

The Phillips Court then articulated the test to be used in cases involving discriminatory intent:

> To make out their prima facie case under the Fair Housing Act, they had only to show:
>
> (1) that they were black,
> (2) that they applied for and were qualified to buy the... house,
> (3) that they were rejected, and
> (4) that the [seller's] house remained on the market.

[8] The Res-Care residents were also forced to live in hotels for several months until an alternate home was located.

Id at 190. The Court of Appeals agreed that the plaintiffs made this showing and that "the burden then shifted to the defendant to articulate non-racial reasons for its actions." *Id.*[9] It agreed with the trial court's finding that the Association clearly did not succeed in meeting its burden, and affirmed the trial court's ruling.

Federal Courts in Michigan, applying Federal and State law, have also adopted the *Phillips* test. In *Shaw v Cassar*, 558 F Supp 303 (ED Mich 1983), the plaintiffs were a black couple who desired to rent an apartment in the desirable Palmer Park area of Detroit. *Id* at 305. They filled out a rental application and submitted a security deposit check that contained a minor error in that there was a discrepancy between the numerical and written amount on the check. *Id* at 306. The defendant landlord did not initially catch the minor error and thereafter agreed to rent the unit to plaintiffs effective April 15, 1981. On April 14, 1981, plaintiffs gave defendants a check dated April 15, 1981 and received a set of keys. On April 16, plaintiffs attempted to access the unit but discovered that their keys did not work in the door. *Id* at 307. Distressed, they contacted the defendant landlord and were told that they "had no business" getting the apartment. The defendant landlord changed the locks and refused to allow the plaintiffs to rent the unit. *Id.* The plaintiffs thereafter brought suit.

The district court noted that plaintiffs had made out a prima facie case by showing (1) they were members of a racial minority, (2) they rented an apartment, (3) they were evicted, i.e. locked out of their apartment, and (4) the apartment continued to be available and was subsequently rented to a white family. *Id* at 312. The Court noted that, with these proofs in

[9] This is similar to the McDonnell Douglas burden shifting test Michigan courts use in Elliot Larsen Civil Rights Act claims. *See Hazle v Ford Motor Co,* 454 Mich 456, 463; 628 NW2d 515 (2001) (when a plaintiff presents evidence that 1) she is a member of a protected class, 2) suffered an adverse employment action, 3) was qualified, and 4) the job was given to someone else under circumstances giving rise to an inference of discrimination, the burden shifts to the employer to rebut the presumption of discrimination that arises).

place, "the burden then shifted to defendants to produce evidence that the self-help eviction was motivated by legitimate non-racial considerations." *Id.* The Court of Appeals ultimately found that the district court had erred in finding that the defendant's refusal to rent was based on legitimate business reasons, and remanded entry of judgment for the plaintiffs. *Id* at. 316. The Court of Appeals also ordered compensatory and punitive damages, "because of the emotional stress, embarrassment, and humiliation... and the willful and wanton disregard of [plaintiff's] rights." *Id.*

2. Res-Care Made A Prima Facie Showing Of Discrimination And The Trial Court Erred By Failing To Shift The Burden To CWI

In this case, as in *Phillips*, Res-Care can easily show that the four (4) elements are met. First, it is undisputed that the residents who are moving in to the home at # 2 Center Woods are either intellectually disabled or they struggle with developmental disabilities. *See* Appendix 11b - Affidavit of Laura Smith, ¶2, and that Res-Care is a "person associated with" those disabled persons." Second, it is equally undisputed that Res-Care purchased the home from Mrs. Averill. Third, Plaintiffs now wish to unwind that transaction by using a never before enforced provision. Finally, CWI has not identified any plans for the house, or any ability to pay for it.

Q. How much money is in the [association] bank account right now?
A. Not a lot.
Q. Less than a thousand?
A. Yes.

See Appendix 31b - Deposition of the homeowner's association President, Jack Short, dated December 2, 2009.

As set forth in *Phillips*, once Res-Care has made this prima facie showing, "the burden then shifted to the [Plaintiffs] to articulate a non [biased] reason for its actions." *Phillips*, 685 F2d at 190 (1982). CWI failed to meet this burden to show that it was not acting in a

discriminatory manner toward these disabled individuals. In fact, CWI does not come close to meeting its burden.

First, as in *Phillips*, the Center Woods residents held an emergency meeting as soon as they found out that their new neighbor "would not fit in." Like the Hunter Trails residents, the Center Woods residents invited everyone but the "offending seller" (Mrs. Averill) to the meeting. Second, the testimony of the Association President and Treasurer shows that CWI doesn't have the money to purchase the house and doesn't have a plan for what it will do with the house if it had the money. The Association President Jack Short testified:

> Q. What are you going to do with the house once you own it?
> A. I haven't got that far yet.

See Appendix 32b - Deposition of Jack Short, December 2, 2009.

> Q. Earlier when you were asked if the property, if it was acquired by the association would not be leased, how did you know that?
> A. Well, I told you that I didn't know what was going to happen. I haven't got that far yet.

See Appendix 41b - Deposition of Jack Short, December 2, 2009.

Third, and perhaps most important, the Association's discriminatory intent can be found in the minutes of its meetings and the words of its members. The Minutes of CWI's Owner's Meeting, dated October 11, 2009 show that the Association convened the meeting after it learned that #2 Center Woods had been sold "for the purpose of a 'group home.'" Appendix 8b. The Association voiced concerns over who the residents in the house would be. *See id.* "It was decided that the appropriate steps should be taken (by the Association) to try to prevent this improper (group home) use, . . ." *See id.*

The Minutes of CWI's Board of Directors Meeting (held the same date, October 11, 2009), reflect a similar discriminatory intent. The Board of Directors described Res-Care's

purchase of #2 Center Woods as a "critical situation" and since it was expected that Res-Care would move in immediately, "Immediate action was obviously needed." Appendix 9b. The Board scheduled meetings with the Township Zoning officials in an attempt to use the zoning laws to block Res-Care's use of the property,[10] and the Board authorized legal action against Res-Care. *See id.*

Further evidence of CWI's discriminatory intent is found in Mr. Short's testimony. Mr. Short testified about one of the Res-Care residents who was a high school student at the school where he coaches girls soccer. He testified that he wouldn't discriminate against her on the soccer team but that Center Woods was "different":

> Q. She'd be good enough to play on your team if she had the athletic ability to do so?
> A. Correct.
> Q. But she's not good enough to be your neighbor?
> MR. BASIL: Objection. I'm going to instruct you not to answer that question.
>
> * * *
>
> BY THE WITNESS:
> A. You know, it's, you've two different things. You know, its my team, it's you know, Center Woods. It's, I can really, I can't -- I don't think the two questions are -- I can't um, answer that, you know.
> Q. I understand that. My question was: Is it appropriate to discriminate in Center Woods and not appropriate to discriminate in the school?
> A. You're asking me a question --
> BY MR. ASHER:
> Q. It's been 20 seconds. You're struggling with the answer. Your hesitation, I don't want to -- if it's not -- is the question not clear, or it's just a hard answer you don't want to give?
> A. Well, like you said, it's two different things for me, and I have a hard time, you know.

Appendix 25b, ln 16-21; 26b, ln 8-12; and 27b, ln 12-25. (The entire line of questioning appears on 22b-29b.)

[10] Only to be told by the Zoning Officials that a group home was permitted in a residential neighborhood under the Township Zoning laws.

Still further evidence of the Association's discriminatory intent is found in the words of one of its members, Mrs. Jeanne Woodbury. Mrs. Woodbury, in an e-mail to Res-Care Program Manager Laura Smith, stated that she was "very concerned about who the residents will be . . ." Appendix 7b. She expressed concerns about living next to disabled individuals and characterized them as troubled youth and sexual offenders. "Though I do not oppose group homes one for troubled youths right next door to me is somewhat of a concern." *See id.*

These stereotypical generalizations are akin to those made by the defendants in *Phillips* and *Shaw*. Plaintiffs/Appellant do not come close to meeting their burden since the justifications proffered by Plaintiffs for wanting to exercise this rarely enforced "right of first refusal" are as specious as those rejected in *Phillips* and *Shaw*. In fact, Plaintiffs offered no credible explanation other than their desire to discriminate against "disabled individuals" and "group homes." It is clear that Plaintiffs have no legitimate reason for the exercise of the right of first refusal. Their only reason for its attempted exercise is to prevent the sale of Mrs. Averill's home to Res-Care. CWI has never wanted to buy any house; CWI allowed a house be sold for $115,000 ($55,000 less than the $170,000 sale price in our case) and never purchased; CWI permitted other homes to be foreclosed and sit as vacant eyesores (Appellant Appendix 69a at 34:17-19); CWI didn't require any 30 day notice in a lot (the majority) of cases, but it never objected; it didn't get the 30 day notice in some cases where notice was given, but it did nothing; and it didn't object in 2008 (or sue in 2009) when Unit #1 sold and no notice was given. It took no action against anyone -- except to block a group home for developmentally disabled residents.

Here we have undisputed evidence that Plaintiffs/Appellant seek to use the right of first refusal to prevent the residents of a group home from moving in to the subdivision. CWI cannot meet its burden to show that it was acting in a non-discriminatory manner because it wasn't. They simply don't want developmentally disabled persons in their neighborhood. And *Phillips v Hunters Trials Community Association* and its progeny says that they can't discriminate in this way.

The Trial Court erred by failing to shift the burden of proof to CWI. Pursuant to the *Phillips* decision, once Res-Care made its prima facie showing "the burden then shifted to the Plaintiffs to articulate a non-biased reason for its actions." The Plaintiffs in this case presented no such evidence. Notwithstanding that fact, the Trial Court inexplicitly found that "it is entirely possible for Plaintiffs to invoke a right of first refusal and not be in violation of any anti-discrimination laws." Appellant Appendix 16a. Although it is perhaps "possible" the evidence in this case leads to the opposite conclusion. The burden shifted to the Plaintiffs and they failed to meet their burden.

The Trial Court erred in determining that the discussion of Defendants discrimination claims was premature and the Court of Appeals could have reversed on this basis also. The Court of Appeals reached the right result.

VI. CONCLUSION

For all of the aforementioned reasons, Res-Care respectfully requests that this Court deny Center Woods, Inc.'s Appeal and affirm the Court of Appeals. Alternatively, Res-Care respectfully requests that this Court affirm the Court of Appeals' decision based upon any of the other grounds raised by Res-Care in its Brief on Appeal, or remand the case back to the Court of Appeals for a decision on these other issues.

RESPECTFULLY SUBMITTED,

MILLER, CANFIELD, PADDOCK AND STONE, PLC

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