We note in this regard that although a commitment decision is initially made by the Board, SOCA provides for judicial review of the Board's treatment orders. See § 71-1214. Therefore, SOCA provides those subject to a commitment order the opportunity to present legal arguments to a court. We conclude that the district court did not err when it rejected S.J.'s due process challenge.

## CONCLUSION

We first note that, as determined above, the materials contained in the supplemental transcript were not considered by the Board in making its commitment decision nor properly considered as evidence in the district court on appeal; we therefore did not consider such materials in our review of the district court's decision. We conclude that the record before the Board and properly before the district court contained clear and convincing evidence to support the findings of the Board as affirmed by the district court that S.J. was substantially unable to control his criminal behavior and that inpatient treatment was the least restrictive alternative. We reject S.J.'s due process challenges to the proceedings before the Board under SOCA. We therefore affirm the judgment of the district court which affirmed the Board's commitment order.

AFFIRMED.

WRIGHT, J., not participating.

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SOUTHWIND HOMEOWNERS ASSOCIATION, A CORPORATION, APPELLEE, V. DAVID BURDEN AND WILAI BURDEN, HUSBAND AND WIFE, APPELLANTS.

810 N.W.2d 714

Filed March 16, 2012. No. S-11-373.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Restrictive Covenants: Intent.** Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants.

3. **Restrictive Covenants.** If the language of a restrictive covenant is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction.
4. ____. Restrictive covenants are not favored in the law and, if ambiguous, should be construed in a manner which allows the maximum unrestricted use of the property.
5. **Restrictive Covenants: Injunction: Proof.** Where there has been a breach of a restrictive covenant, it is not necessary to prove that the injury will be irreparable in order to obtain injunctive relief.
6. **Restrictive Covenants.** Nebraska has consistently enforced restrictive covenants so long as they are unambiguous.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Affirmed.

Marion F. Pruss for appellants.

Larry R. Forman, of Hillman, Forman, Childers & McCormack, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

## INTRODUCTION

David Burden and Wilai Burden provide childcare services in their home in Sarpy County, Nebraska. The Southwind Homeowners Association filed suit against the Burdens, alleging that the childcare services as provided violated several restrictive covenants applicable to the premises and asking that the Burdens be enjoined from providing those services. The district court found that the childcare services were in violation of several restrictive covenants and granted an injunction. The Burdens appeal. We affirm.

## FACTUAL BACKGROUND

The facts of this case are largely undisputed. The Burdens purchased the property in question, located in La Vista, Nebraska, on November 30, 2007. At the time of the purchase, a certified copy of various covenants, conditions, restrictions, and easements of the Southwind development was on file with the Sarpy County register of deeds. There is no dispute that the Burdens were given at least constructive notice of these

covenants. Moreover, the Burdens do not contend that they had no notice of the covenants.

As relevant, the covenants limit the use of the subject premises as follows:

> 1. Each lot shall be used exclusively for single-family residential purposes . . . .
>
> . . . .
>
> 5. . . . No business activities of any kind whatsoever shall be conducted on any Lot including home occupations as defined in the Zoning Code of the City of LaVista, Nebraska . . . .
>
> 6. No obnoxious or offensive activity shall be carried on upon any Lot, nor shall anything be done thereon which may be, or may become, an annoyance or nuisance to the neighborhood, including, but not limited to, odors, dust, glare, sound, lighting, smoke, vibration, and radiation.

Apparently, since shortly after they purchased the residence, the Burdens have provided daytime childcare to between four and six children, ages 6 months to 10 years, Mondays through Saturdays from 6 a.m. to 6 p.m. Two of the children for whom they provide care are related to them. The Burdens charge a fee to provide this care. In 2008, the Burdens had a net income from childcare services of $2,625, and in 2009, the net income was $45. In 2010, the Burdens apparently earned less than $1,000. Wilai is licensed through the State of Nebraska to care for up to eight children full time and another two children part time.[1]

Written notice was given to the Burdens on July 7, 2008, informing them that the use of the property as a daycare was in violation of the covenants. The Burdens continued to provide childcare services, and the Southwind Homeowners Association brought suit on September 17, 2010, asking that the court find the Burdens in violation of the covenants and enter an order enjoining the Burdens from continuing to operate the daycare.

On February 3, 2011, the Southwind Homeowners Association filed a motion for summary judgment. Following

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[1] See Neb. Rev. Stat. § 43-2609 (Reissue 2008).

a hearing on March 25, that motion was granted on March 30. In granting the motion, the district court noted the language of the covenant prohibiting "'business activities of any kind.'" The district court also rejected the Burdens' argument that they were authorized to provide childcare services on the premises by the Quality Child Care Act.[2] The Burdens appeal.

## ASSIGNMENT OF ERROR

The Burdens assign that the district court erred in granting the Southwind Homeowners Association's motion for summary judgment.

## STANDARD OF REVIEW

[1] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[3]

## ANALYSIS

The issue presented by this case is whether the Burdens' conduct of providing childcare under these facts violated the restrictive covenants on their property.

[2-5] Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants.[4] If the language is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction.[5] However, restrictive covenants are not favored in the law and, if ambiguous, should be construed in a manner which allows the maximum unrestricted use of the property.[6] Where there has been a breach of a restrictive covenant, it is

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[2] Neb. Rev. Stat. §§ 43-2601 to 43-2625 (Reissue 2008).

[3] *Village of Hallam v. L.G. Barcus & Sons*, 281 Neb. 516, 798 N.W.2d 109 (2011).

[4] *Lake Arrowhead, Inc. v. Jolliffe*, 263 Neb. 354, 639 N.W.2d 905 (2002).

[5] See *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994).

[6] See, *Knudtson v. Trainor*, 216 Neb. 653, 345 N.W.2d 4 (1984); *Ross v. Newman*, 206 Neb. 42, 291 N.W.2d 228 (1980).

not necessary to prove that the injury will be irreparable in order to obtain injunctive relief.[7]

While this court has not been presented with the issue of whether a home daycare is a violation of these types of restrictive covenants, this issue has been litigated in other jurisdictions.[8] The prevailing weight of that authority suggests that the operation of a daycare is a violation of restrictive covenants allowing only single-family or residential use and/or prohibiting the operation of a trade or business.[9]

For example, in *Terrien v. Zwit*,[10] a Michigan Supreme Court case, the applicable covenants prohibited any use other than for "'residential purposes'" and further stated that "'[n]o part . . . shall be used for any commercial, industrial, or business enterprises.'" The court held that the daycare in question violated these prohibitions.[11] The court also rejected the defendants' contention that the operation of a family home daycare was a "'favored use'" and that thus, a covenant restricting that activity was in violation of public policy.[12] In rejecting this argument, the court noted that assuming the operation of a daycare was part of Michigan's public policy, also part of public policy was a property holder's right to improve his or her property,

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[7] *Breeling v. Churchill*, 228 Neb. 596, 423 N.W.2d 469 (1988).

[8] See Annot., 81 A.L.R.5th 345 (2000).

[9] *Williams v. Tsiarkezos*, 272 A.2d 722 (Del. Ch. 1970); *Chambers v. Gallaher*, 257 Ga. 795, 364 S.E.2d 576 (1988); *Lewis-Levett v. Day*, 875 N.E.2d 293 (Ind. App. 2007); *Berry v. Hemlepp*, 460 S.W.2d 352 (Ky. App. 1970); *Woodvale Condominium Trust v. Scheff*, 27 Mass. App. 530, 540 N.E.2d 206 (1989); *Terrien v. Zwit*, 467 Mich. 56, 648 N.W.2d 602 (2002); *Ginsberg v. Yeshiva of Far Rockaway*, 74 Misc. 2d 391, 344 N.Y.S.2d 602 (1973); *Walton v. Carignan*, 103 N.C. App. 364, 407 S.E.2d 241 (1991); *Hill v. Lindner*, 769 N.W.2d 427 (N.D. 2009); *Martellini v. Little Angels Day Care, Inc.*, 847 A.2d 838 (R.I. 2004); *Metzner v. Wojdyla*, 125 Wash. 2d 445, 886 P.2d 154 (1994). But see, *Shoaf v. Bland*, 208 Ga. 709, 69 S.E.2d 258 (1952); *Stewart v. Jackson*, 635 N.E.2d 186 (Ind. App. 1994); *Beverly Island Ass'n v Zinger*, 113 Mich. App. 322, 317 N.W.2d 611 (1982).

[10] *Terrien v. Zwit, supra* note 9, 467 Mich. at 60, 648 N.W.2d at 605.

[11] *Terrien v. Zwit, supra* note 9.

[12] *Id.* at 69, 648 N.W.2d at 609.

including the adoption of covenants which would enhance the value of that property.[13] The court stated that there were no "'definite indications'" in Michigan law of any public policy against such a covenant.[14]

Other courts have also held that daycare facilities violated covenants similar to the ones at issue in this case.[15] The Rhode Island Supreme Court, in *Martellini v. Little Angels Day Care, Inc.*,[16] held that a covenant limiting the use of the property to "'single family private residence purposes'" was violated by the operation of a daycare. In that case, the court distinguished an earlier case, which held that allowing a group home was not a violation of a similar covenant. The court noted that while residents of the group home were not a traditional family unit, the residents would operate as such, as distinguished from a daycare, which would be composed of several occupants that did not reside there or engage in the traditional family activities outside of the hours when they paid for care.[17] The court also rejected the defendant's public policy argument.[18]

The Burdens direct us to this court's decision in *Knudtson v. Trainor*[19] and contend that that decision supports their position. We disagree. We held in *Knudtson* that the operation of a group home did not violate a covenant restricting the use of property to only a residential purpose. We read the term "residential" as meaning where people reside or dwell and distinguished it from use for commercial or business purposes. We noted that the home in question would continue to look like a

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[13] *Terrien v. Zwit, supra* note 9.

[14] *Id.* at 72, 648 N.W.2d at 611.

[15] See *Martellini v. Little Angels Day Care, Inc., supra* note 9. See, also, *Williams v. Tsiarkezos, supra* note 9; *Chambers v. Gallaher, supra* note 9; *Lewis-Levett v. Day, supra* note 9; *Berry v. Hemlepp, supra* note 9; *Woodvale Condominium Trust v. Scheff, supra* note 9; *Ginsberg v. Yeshiva of Far Rockaway, supra* note 9; *Walton v. Carignan, supra* note 9; *Hill v. Lindner, supra* note 9; *Metzner v. Wojdyla, supra* note 9.

[16] *Martellini v. Little Angels Day Care, Inc., supra* note 9, 847 A.2d at 841.

[17] *Martellini v. Little Angels Day Care, Inc., supra* note 9.

[18] *Id.*

[19] *Knudtson v. Trainor, supra* note 6.

single-family home and that people would continue to reside in it; thus, the use was in compliance with the covenant.

While it is true that the Burdens' home will continue to be a single-family residence, look like one, and have a family (the Burdens) living in it, the character of the home, for at least part of the day, will be different from any other single-family home. At least 5 days a week between the hours of 6 a.m. and 6 p.m., five children will become temporary residents. The amount of traffic will increase at child dropoff and pickup times and, to a lesser extent, between those times. This is compared to the group home in *Knudtson*, where the residence might not be used to house a traditional family, but nevertheless those residents will live together much in the same way that a traditional family would. We also note that in *Knudtson*, the only covenant at issue was one limiting the use to residential purposes, and not one explicitly prohibiting business or commercial activities.

The covenants in this case require that the property be used for a single-family dwelling only and expressly prohibit the operation of a business on the property. Where unambiguous, the terms of a restrictive covenant should be enforced by their terms. These terms are unambiguous; moreover, our conclusion is supported by the greater weight of case law. And no matter how the Burdens characterize the operation, the couple is running a daycare for profit (no matter how little profit it might generate) at their home. We conclude that this is a business purpose, which is prohibited by the covenants.

Because the terms are unambiguous and must therefore be enforced, the Burdens' arguments that the residential nature of the neighborhood is not impaired by their daycare are unavailing. The Southwind Homeowners Association need not prove irreparable damage in order to obtain an injunction and in turn enforce their covenants.[20]

Finally, the Burdens' argument that public policy would prohibit the enforcement of these covenants is also unpersuasive. It is true that the Legislature has adopted legislation with respect to family home daycares like the one operated by the

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[20] See *Breeling v. Churchill, supra* note 7.

Burdens,[21] including § 43-2616, which permits the establishment of a family home daycare in any "residential zone within the exercised zoning jurisdiction of any city or village."

But as the Burdens acknowledge, while the Quality Child Care Act "established a public policy in favor of permitting" family home daycares, § 43-2616 "does not specifically ban the enforcement of restrictive covenants prohibiting the establishment" of family home daycares.[22] Thus, it would appear, as in *Terrien*, that there are no "'definite indications'" that covenants which would prohibit the operation of family home daycares would be against that public policy.[23]

[6] Moreover, as is noted above, Nebraska has consistently enforced restrictive covenants so long as they are unambiguous.[24] And we have recognized a strong policy favoring the freedom to contract, which is really what a covenant is: "'"It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands."'"[25]

We note that in their amended answer and in response to one interrogatory, and again at oral argument, the Burdens assert that the Southwind Homeowners Association selectively enforces the restrictive covenants at issue. There is no evidence in the record to support that assertion; we therefore find that contention to be without merit.

Turning then to the ultimate question, whether summary judgment was appropriate, we conclude that it was. The Burdens argue that there remain several genuine issues of material fact—namely, whether what they are really running is a business. But while the Burdens maintain these are issues of fact, they are really issues of law—whether the Burdens'

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[21] See §§ 43-2601 to 43-2625.

[22] Brief for appellants at 15.

[23] See *Terrien v. Zwit, supra* note 9, 467 Mich. at 72, 648 N.W.2d at 611.

[24] *Boyles v. Hausmann, supra* note 5.

[25] *Parkert v. Lindquist*, 269 Neb. 394, 397, 693 N.W.2d 529, 532 (2005) (quoting *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. 469, 293 N.W.2d 843 (1980)).

undisputed activities on the property violate the covenants. Having concluded that the Burdens' activities are a violation, summary judgment was appropriate.

## CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

McCORMACK, J., not participating.