

Case 424-0  
August 16, 1999

The above-entitled case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(I), 10B9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the Commission having considered the testimony and other evidence of record, it is therefore this 9th day of June, 1999, found, determined and ordered as follows:

On September 17, 1998, the Complainant, Barry Blufeld, filed a Complaint with the Commission on Common Ownership Communities in which he alleged that the Board of Directors for the Fallstone Homeowners Association improperly demanded that the complainant remove, from his deck, two fruit trees and the containers in which the trees are planted.

This dispute dates back to 1995 when Barry Bluefeld filed his first application seeking community approval for "container vegetable gardening and dwarf fruit trees" on his deck. This application sought approval for eleven large polyethylene containers. Exhibit CB-2. The application was denied by the Architectural Control Committee.<sup>1</sup> The committee based its decision on section 7.2(n) of the declaration which provides that "vegetable gardens shall be maintained only within the rear yard of any lot, and shall be maintained in a neat an attractive

<sup>1</sup> Although only a matter of semantics, the Declarations give Architectural Control to either the Board of Directors or the "Covenant Committee". Article 6, Section 6.1.

manner." The committee found that the deck was not "within the rear yard" of the lot and, therefore, because vegetable gardens are only allowed "within the rear yard", the planters proposed by Bluefeld were prohibited on a deck. Bluefeld revised the application and modified his plans at various times over the next few years without receiving approval. Finally, in 1998, without seeking approval for these specific plans, and shortly after having another application for "vegetable gardening in containers on [his] deck", Exhibit CB-23, denied, he placed four (4) containers on his deck, each measuring approximately 4'x4' (four feet by four feet). Inside each container, Mr. Bluefeld placed smaller containers in which he planted fig trees. He also placed a fifth container on the deck, circular approximately four (4) feet in diameter, which is used for composting.

On August 21, 1998, counsel for Fallstone wrote to Bluefeld demanding "that [he] immediately remove the fruit trees from [his] deck." The letter noted that the board considered Mr. Bluefeld "in violation of the association's governing documents" because he disregarded the Architectural Control Committee's denial of his application to place the fruit trees on his deck. The authority to deny the application, cited by counsel in the letter, is Article 6, Section 6.1 of the Association's declaration. That provision states:

No building, fence, wall, mailbox or other structure shall be commenced, erected or maintained upon the Property, nor shall any exterior addition to or change or alteration therein be made (including, but not limited to, changes in color, changes or additions to driveways, or walkway surfaces and landscaping modifications) until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board of Directors of the Association, or by a covenant committee composed of three (3) or more representatives appointed by the Board of Directors.

On September 8, 1998, Fallstone sent Mr. Bluefeld a letter informing him that it voted to levy a fine of \$250 against him if he does not remove "the two fruit trees from [his] deck within ten days." The letter indicates that, according to the board, there is a community policy that does not allow for trees.

Fruit trees attract bugs, bees, crows, birds and rodents. These problems are especially bothersome in a town home community such as ours.

To further clarify to the ACC's long-standing policy as it applies to decks, the Board agreed to allow the planting of shrubs, small plants and small trees on decks, as long as the height of any such shrubs, plant, or tree does not exceed three feet above the standard at railing height. In addition, the Board clarified the ACC's limit on the size of outdoor planters to no more than three (3) feet in diameter, or 3-feet by 3-feet if they are a square or rectangle.

The letter reminded Mr. Bluefeld "that with regard to planting anything, approval must be granted by the ACC in advance of planting anything in Fallstone." The letter concludes "that the Board cannot allow you or anyone else in the community to defy the community's rules and standards. On the other hand, we do hope that you will remove the trees and related materials from your deck before any fines are automatically assessed." This action followed.

Fallstone presents three defenses to Bluefeld's claim. First, it argues that the planters Bluefeld placed on his deck are "structures" and that the trees in the planters are "landscaping", both of which are regulated by Article 6, Section 6.1 of the declarations. Second, Fallstone claims that as early as 1995, it promulgated rules and regulations controlling the height and placement of trees. Finally, the community argues, in the alternative, that even if the disputed items constitute only a "vegetable garden", they are still prohibited on the deck as a violation of Article 7, Section 7.2 (n) of the declarations.

Stripped of the emotional chaff that is frequently associated with these neighborhood disputes, the question at issue in this case is straightforward. Can the potted fig trees and containers in which they are placed remain on Mr. Bluefeld's deck. The answer is: yes.

### **FINDINGS OF FACT**

1. Barry Bluefeld, complainant, is a homeowner residing at 11417 Hollowstone Drive, Rockville, MD 20852. This residence is located in the Fallstone Homeowners Association.
2. The Fallstone Homeowners Association is a townhome community located in Rockville,

Maryland. The community is governed by Articles of Incorporation, Bylaws, and a Declaration of Covenants, Conditions and Restrictions. The relevant provisions of the Declaration that govern this dispute are Article 6, Section 6.1. and Article 7, Section 7.2(n).

3. The Association has not promulgated any rules or regulations relevant to this dispute. Even though the Association avers that it has promulgated rules and regulations "related to the height and placement of trees" and has done so as early as 1995, see Respondent's Pre-hearing Statement, the Association could not produce copies of such rules and regulations. Testimony from the Association President indicated that the only copies of the written rules were two articles in the community newsletter. The article in the June 1995 newsletter discusses limitations on planters in the front of a house and restrictions on the height of in-ground plantings to three feet.<sup>2</sup> Exhibit CB32. The newsletter issued in September 1998, the month this complaint was filed, "clarified" the rules with regard to plants on decks." Exhibit CB33. Without a copy of the previously promulgated rule this appears to be little more than a post hoc justification of the Association's actions.
4. In late spring 1998, Bluefeld placed on his deck four containers measuring approximately four feet by four feet and one circular container measuring approximately four feet in diameter. In the bottom of the four square containers Bluefeld placed approximately two inches of rock to act as a weight. He then put other pots into the larger containers. In these smaller pots he had planted fig trees. Bluefeld uses the circular container as a composter.
5. Counsel for Fallstone wrote to Bluefeld, on August 21, 1998, demanding "that [he] immediately remove the fruit trees from [his] deck." The letter noted that the board considered Mr. Bluefeld "in violation of the association's governing documents" because he disregarded the Architectural Control Committee's denial of his application to place the fruit trees on his deck.
6. Bluefeld did not remove the trees and the board imposed a fine of \$250.00. The board subsequently agreed to vacate the fine.

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<sup>2</sup> Based on pictures entered into evidence and that testimony of the Association's board members at the hearing, this rule appears to be most honored in its breach.

### CONCLUSIONS OF LAW

1. The Fallstone Declaration of Covenants, Conditions And Restrictions is a valid and enforceable document. Markey, et al. v. Wolf, et al., 607 A.2d 82, 87 (Md. 1992).
2. Article 6, Architectural Control, gives the Homeowners Association the authority to regulate and approve or disapprove changes in the community. The board may require prior application and approval for any "landscaping modifications" that a homeowner intends to make to his property. Furthermore, the board has the authority to require a homeowner to submit an application seeking approval for the erection and/or construction of any "building, fence, wall, mailbox or other structure."
3. Article 7, Section 7.2(n) limits placement of vegetable gardens to "within the rear yard of any Lot." The Association adopts a technical reading of this provision that finds a deck in the rear of the house is not "within the rear yard." The panel disagrees with this interpretation. Anything in the rear of the house is "within the rear yard." However, even if the panel adopted the technical reading proposed by the Association, the Association would not prevail because such a technical reading requires that the fig trees on the deck be considered "fruit" not "vegetables" and this covenant does not regulate fruit trees.
4. In the two letters to Bluefeld, neither the Association's counsel nor the Association's President demand removal of the planters. In the August 21, 1998 letter from the Association's counsel, she said "we demand that you immediately remove the fruit trees from the deck." Counsel's letter does not mention any other items that the Association wants removed from the deck. The Association's President threatened a fine "if you do not remove the two fruit trees from your deck." In this letter the only mention suggesting removal of any other items is precatory. "On the other hand, we do hope that you will remove the trees and related materials from your deck." However, as discussed below, even if the letters explicitly demanded removal of the containers, it would not alter the decision.
5. Credible expert testimony by Juan Chacon, a landscaper with extensive experience and education in landscaping, indicated that the placement of fig trees in pots on a deck is not "landscaping." No evidence was presented at the hearing to counter this expert testimony. The panel concurs and finds that the placement of trees in pots does not comprise "landscaping." Because the fig trees are not "landscaping" their regulation is

not governed by Article 6, Section 6.1 of the declarations.

6. If the planters on Bluefeld's deck are "structures," then the Association has the authority, under Article 6, Section 6.1 of the Declaration of Covenants, Conditions and Restrictions, to require an application before the containers are placed on the deck. It follows that if the association can require an application it also had the authority to deny the application. Conversely, if the planters are not "structures" then Bluefeld has the right to place them on his deck without approval from the Association. Based on the discussion below, the panel finds that the planters that Bluefeld placed on his deck are not "structures."

### DISCUSSION

What is a "structure"? The legal encyclopedia Corpus Juris Secundum discusses the term at length:

It has been said that the word "structure" is very comprehensive, and one of the broadest terms in the English language, and then it may be used in a broad sense or in a more restricted sense.

Primarily, "structure" means a thing built, erected, or fabricated; that which is built or constructed; something constructed or built, as a building, a dam, or a bridge. In its broadest and widest sense "structure" means any construction; any production or piece of work artificially built up, or composed of parts joined together in some definite manner; and when the term is applied to a material thing made by human labor, it means something composed of parts or portions which have been put together by human exertion.

In a more restricted sense, the word "structure" is ordinarily understood to mean a building of any kind, especially a building of some size or magnificence; an edifice.

While a structure is defined to be a production composed of parts artificially joined together according to a plan, and designed to accomplish a definite purpose, it has been said that it may well be doubted whether such a definition now precisely and truly describes a structure as that word is generally and customarily used, since the term ordinarily carries with it the idea of size, weight, and strengths.

The word "structure" refers to a permanent stationery erection, and ordinarily carries with it the idea of size, weight, and strength.

83 C.J.S. 547-50 (citations omitted).

Maryland courts have not spoken extensively on the concept of a "structure" when that term has been used in a restrictive covenant. In one case the Court of Special Appeals found that an above ground swimming pool "was a structure as contemplated by the restrictive covenant . . ." Lindler v. Woytowitz, 378 A.2d 212, 216 (Md. App. 1977). Outside the restrictive covenant context, the Court of Appeals found that public utility poles are "structures." Deen v. Baltimore Gas and Electric Co., 214 A.2d 146, 151 (Md. 1965).

However, courts outside of Maryland have addressed this issue. In 1944, the Texas Supreme Court found that a fence was a structure because it was "substantial and permanent." Stewart v. Welsh, 178 S.W.2d 506, 508 (Tx. 1944). In a case, from the Appellate Court of Illinois, Third District, that court found that planters built in place along the full length of a driveway which could not be utilized in any other location were "structures" within the context of that association's restrictive covenants. However, those particular planters exhibited the permanence necessary to be included in the definition. In fact, that court found that other planters in the community "not attached to any other part of the townhouse complex" "would not be thought of as 'structures' under any common definition of the word." Yorkshire Village Community Association, 524 N.E.2d 237, 241 (Ill. App.3d 1988).

Based on testimony at the hearing, and other evidence in the record, the panel finds that without properly promulgated rules, regulations and/or guidelines, the planters placed by Mr. Bluefeld on his deck are not "structures."

Homeowners associations, particularly newly formed associations, frequently face the dilemma of an application for an architectural change never envisioned by the developer when drafting the covenants, and thus, not clearly addressed in the Declarations. The association may deny such an application if the denial is not unreasonable and it is made in good faith. Markey, 607 A.2d at 96. However, an association then should issue guidelines to the community encompassing this unforeseen request to bring this issue within the penumbra of the Declarations. Once the unanticipated issue is raised, the Association may not continually rely on the reasonable and good faith denial basis for turning down similar project applications.

The association must give the applicant, and the community as a whole, guidance regarding what is acceptable and what is not acceptable for placement within the community. Looking at the evolution of Mr. Bluefeld's applications, it appears that he made an effort to satisfy the concerns of his neighbors and the board. He not only changed the nature and quantity of the plantings, he also changed the appearance of the planters themselves. The continual denial of his modified applications without an articulation, for the community, of how these denial "bears some relation to the other buildings or the general plan of development," *id.*, is arbitrary and capricious.

Mr. Bluefeld, while within his legal right to place these containers on his deck, needs to understand why his actions raised the ire of some his neighbors. A townhome community is not a farm. Had Mr. Bluefeld intended to supply his organic fruit and vegetable needs by growing it on his property, he should have chosen to live in a less densely populated community than Fallstone. When an individual purchases real property in a community, such as Fallstone, and there are covenants that place use restrictions on the property in that community, the individual may not do whatever he/she wants to do with the property.

Mr. Bluefeld also needs to understand the scope of this decision. He has the legal right to put these planters with fig trees on his deck, and the Association may not force him to remove these items. That is all he has the right to do. However, the Association may promulgate rules, regulations and/or guidelines that limit his right to expand or change the number and appearance of the planters and the plantings within those containers. The Association may promulgate rules, regulations and/or guidelines that specifically prohibit containers and plantings of the size and type that Mr. Bluefeld placed on his deck. A rule imposing such a prohibition would not allow the association to order Mr. Bluefeld to remove his four planters, but it would allow the association to prohibit Mr. Bluefeld from expanding or changing what he has placed on his deck, and such a rule would allow the Association to prohibit another resident from placing similar containers on his/her property without approval of the Association. Furthermore, the Association may promulgate rules governing the storage and placement of ancillary items (bags of mulch and dirt, hoses, gardening tools, plastic drop cloths, etc.) on community decks. Mr. Bluefeld has no right to disregard any such properly promulgated regulation.

### **ORDER**

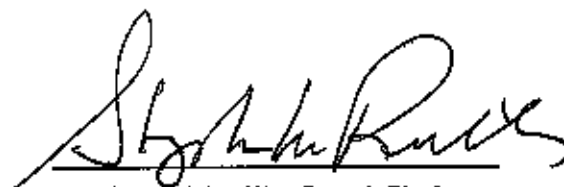
In view of the foregoing, and based on the record, for the reasons set forth above, the Commission finds:



Under the Declaration of Covenants, Conditions and Restrictions of the Fallstone Homeowners Association, Inc., and without any current rules, regulations and guidelines promulgated under the Declaration that require an application, the fig trees and the planters placed on the Bluefeld deck are not items that require an application for approval. Therefore, Mr. Bluefeld is not required to remove these items. Each party is responsible for his/its own attorney's fees and other costs associated with this action.

The foregoing was concurred in by panel members Price, Kristian and Reilly.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland within thirty (30) days from the days of this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

A handwritten signature in dark ink, appearing to read "Stephen M. Reilly", is written over a horizontal line.

Stephen M. Reilly, Panel Chairperson  
Commission on Common Ownership  
Communities