

**COMMISSION ON COMMON OWNERSHIP COMMUNITIES  
MONTGOMERY COUNTY, MARYLAND**

**FIRST AQUARIUS HOMES ASSOCIATION INC.,**

Complainant,

Case **#13-09**

v.

Panel Hearing Date:

January 20, 2010

**JAQUIS ROSSITER,**

Decision issued:

February , 2010

Respondent.

**MEMORANDUM DECISION AND ORDER**

The Board of Directors of First Aquarius Homes Association Inc. (“Complainant” or the “Association”) filed a dispute with the Commission on Common Ownership Communities on March 26, 2009, alleging that Jaquis Rossiter (“Respondent”) was in violation of Article VIII, Section 2 of the First Aquarius Homes Association Inc. Declaration as filed in the Land Records of Montgomery County on June 26, 1972, which prohibits any fence which is not split rail or cedar stockade, or which extends beyond the front building line of any dwelling; as well Article VIII, Section 1 which states, in pertinent part, “...no building, fence, wall or other structure shall be commenced, erected or maintained upon The Property (governed by the Association), nor shall any exterior addition to or change [including any change in color] or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, color and location of the same shall have been submitted to and approved in writing...by the Board of Directors of the Association, or by an architectural control committee...appointed by the Board of Directors.” The Complainant’s cover letter alleges that Ms. Rossiter installed a new fence on her property and affirmatively states that had Respondent made formal request for approval of her fence, “This request would have been denied...”. The letter refers to another fence “...that the Rossiters recently had **removed**...”, but does not discuss any relationship between the present and former fences.

The Complaint was filed March 26, 2009. Commission staff sent a copy of the Complaint to Respondent, who filed a timely response. On July 1, 2009, the Commission accepted jurisdiction pursuant to Montgomery County Code Section 10B-8(3)(A)(i) and Regulation 10B.06.01.02. Notification to both parties was issued July 2, 2009.

A hearing was held before the Commission on Common Ownership Communities on January, 2010, before a hearing panel comprised of Commissioners Helen Whelan and Allan Farrar, and Greg S. Friedman, Panel Chairman.

### **Findings of Fact**

Complainant First Aquarius Homes Association Inc. is a homeowners association within the meaning of the Maryland Homeowners Association Act and Chapter 10B of the Montgomery County Code. First Aquarius Homes is a common ownership regime established in accordance with the requirements of the Annotated Code of Maryland, by Rossmoor Construction Corporation, the Declarant, in a Declaration recorded in Liber 4230 at folio 869, among the Land Records of Montgomery County, Maryland. Respondent is owner-occupant of a single family, one story detached residence in First Aquarius Homes.

Complainant enforces covenants recorded in the Declaration, as well as rules and regulations for the First Aquarius Homes community. Changes or modifications to homes in the First Aquarius regime require an application to the Architectural Control Committee ("ACC") appointed by the Association Board of Directors, and approval by the ACC. Relevant provisions of the Declaration appear at Article VIII, Sections 1 and 2, and are recited in the reference to Complainant's letter of Complaint referenced hereinabove. Neither the Declaration nor the Complaint provide any insight into the rationale for the limitation to two dissimilar specified styles of fencing, nor for the exclusion of other styles which might be more similar to the appearance of either split rail or stockade.

Evidence adduced at the hearing was as follows:

1. Respondent and her late husband purchased the subject home at 2902 Aquarius Avenue in 1999. A significant consideration in the decision to acquire the home was an existing picket fence in the front yard which had been constructed more than ten years earlier (the "Original Fence"). Prior to settlement, the Board of Directors, or its delegee, provided a homeowners association package to Mr. and Mrs. Rossiter, in accordance with the Maryland Homeowners Association Act, **Annotated Code of Maryland, Real Property, Title 11B**. The homeowners association packet, which was specific to the property which Mr. and Mrs. Rossiter had contracted to purchase, did not make any reference to the existing fence nor did it provide any indication that

any violation of the Declaration existed at the premises 2902 Aquarius Avenue.

2. June Hubley, President of the Association, testified that a review of the Association records did not disclose any evidence of an application by the prior homeowner for approval to construct the original fence. This testimony was corroborated by Sharon Augustin, Treasurer of the Association, who testified that she has been a member of the Association since 1983 and has served continually on the Board of Directors since 1985. Ms. Augustin testified that she is unaware of any formal request by the previous owner of 2902 Aquarius Avenue to construct the Original Fence, but acknowledged that the Board of Directors had discussed the fence at that time and affirmatively decided not to take any enforcement action and did not issue a notice of violation to the property owner. It is evident that successive Boards acceded to such decision, or considered the Board to be bound by such decision, until December 2008. Over the intervening years, a large hedge had been cultivated in front of the fence such that much of the fence was not visible from the street.
3. Some time in 2008, Respondent applied to the Board for approval to remove a very large tree on the front lawn of her property. The property was inspected by two members of the First Aquarius Architectural Control Committee ("ACC"). The ACC issued written approval to remove the tree. Evidence is consistent that the tree had grown into the Original Fence and become intertwined with the fence and that it was apparent to anyone inspecting the tree that it could not be removed without severely damaging the fence which would require replacement of a significant stretch of fencing.
4. After removal of the tree, Respondent contacted Long Fence to repair the portion of fence which had been removed. The contractor advised Ms. Rossiter that as the portion of the fence still standing was severely deteriorated by rot and termites, it would not be possible to restore the fence without replacing the entire fence. Respondent instructed the contractor to replace the fence with the exact same form of

construction in the exact same location as the Original Fence. Complainant did not dispute Respondent's good faith effort to replace the Original Fence with a fence of identical construction in essentially the same location as the Original Fence.

### **Conclusions of Law**

The legal principles applicable to this case are found in *Kirkley v. Seipelt*, 212 Md.127, 128 A.2d 430 (1957) and *Markey v. Wolf*, 92 Md. App. 137, 607 A2d 82 (1992). *Kirkley* held that covenants that establish a general development plan for a neighborhood with the intention of regulating the construction of dwellings so as to create an attractive, desirable community are enforceable in equity, even though no specific standards may be set out in the covenants themselves; provided, however, that the approval or disapproval of alterations or modifications are reasonable and performed in good faith. As there is no assertion by Respondent that the present Board has failed to act in good faith, the issue becomes one of whether the Board was on notice of the Original Fence, which it clearly was, as well as of the necessity to take action to repair the fence after removal of the tree, a matter of which the Board – or at least its designated representatives on the ACC -- also appeared to be aware.

The corollary issue is whether Respondent's actions involved an alteration or modification. We conclude that it did not. As removal of the tree necessitated a repair of the fence, which the Complainant's witnesses repeatedly testified would not require Board approval, and as the damaged portion of the fence could not be repaired without addressing the entire four lengths of fence, we hold that the work constituted a repair rather than an alteration or modification. Respondent's action did not alter, make addition to, or change the appearance of any Association common element, nor the previous exterior appearance of any portion of the Association Property. **See** *Garfink v. Cloisters at Charles, Inc.*, 392 Md. 374, 401-02 (Md. 2006). Respondent's action was not the erection of a new improvement, but rather the proper maintenance of an existing structure which if not formerly approved, had at least been condoned by the Board of Directors for a period exceeding twenty years. At the very least prior Board action constituted tacit approval of the Original Fence. **See also** *Blumberg v. Council of Owners of Saltaire at Annapolis Condominiums*, Anne Arundel County Cir. No. C-07-123365 (December 31, 2008) which expressly held the replacement of rotted wood to constitute a repair, as contrasted to an addition, alteration or improvement to the property.

The Commission disagrees with Complainant's argument that replacement of the Original Fence constituted erection of a new improvement, thereby requiring formal application to the ACC under the provisions of the Declaration. Complainant has filed a Memorandum of Law submitting that "A

purchaser is on constructive notice of recorded covenants appearing in his chain of title and is bound by the restrictions contained therein...Restrictive covenants shall not be deemed waived or abandoned without clear evidence of an intention to abandon established by unequivocal acts of a decisive nature.” The Commission accepts Complainant’s position; however holds that the homeowner’s association package provided to the purchasers constituted actual notice that the property was in conformity with the requirements of the Declaration which must take precedence over any constructive or implied notice. Although we find that the language of the Declaration does not mandate a finding that Respondent should have filed a formal change request to replace the Original Fence, even if we did make such a finding, *Lindner v. Woytowitz*, 37 Md.App. 652, 378 A.2n 212 (1977), cited by Complainant, mandates a finding that the Board of Directors had abandoned such requirement in the case of the Rossiter property, as Respondent had been unequivocally advised at the time of purchase that no violation existed on the property.

Complainant also argues, “As the facts and evidence demonstrate in this case, with the community sentiment, the covenant committee activity and enforcement in the past and present, like in *Kirkley*, establishes that the reasons for the restrictions are just as alive today as they were more than 30 years ago. Contrary to Complainant’s assertion, the commission finds that twenty years of non-enforcement constitutes clear and convincing evidence that the community sentiment was not critical of the fence on the Rossiter property.

Moreover, if one accepts Complainant’s assertion that the Original Fence was never permitted and that the fence was barred by the covenants stated in the Declaration, the continued existence of the fence adverse to such recorded Declaration raises a question of adverse possession. Maryland law provides at **Annotated Code of Maryland, Courts and Judicial Proceedings, Section 5-103**, provides for fee simple ownership after a period of twenty years of adverse possession. Ownership must be adverse, actual, hostile and notorious (i.e., conspicuous), exclusive, continuous and under claim of right. The doctrine of adverse possession includes the concept of “tacking”; i.e., subsequent owners are entitled to the benefits of the doctrine if the requisite time period has been continuous even though more than one “owner” may have adversely used the property during the requisite statutory twenty-year period.

Complainant did not exercise bad faith in the bringing of the Complaint. Therefore, Respondent’s request for an award of attorney’s fees is denied.

### **Order**

Based upon the foregoing Findings of Fact and Conclusions of Law, we ORDER as follows:

1. Complainant's petition is denied.
2. Complainant shall return Respondent's check in the amount of \$200 which was tendered by Respondent in response to assessment of a penalty by the Association.
3. Each party shall bear its own attorney's fees and costs.

Commissioners Farrar and Whelan concur in this Memorandum Decision and Order.

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

**COMMISSION ON COMMON OWNERSHIP COMMUNITIES  
FOR MONTGOMERY COUNTY, MARYLAND**

By: \_\_\_\_\_  
Greg S. Friedman, Panel Chair

Date: \_\_\_\_\_