

Before the
Commission on Common Ownership Communities

In the matter of	X	
Avenel Community Association, Inc.	X	
9501 Beman Woods Way	X	
Potomac, MD 20854,	X	
Complainant,	X	
	X	Case No. 220-G
vs.	X	March 11, 1994
	X	
Mr. & Mrs. Sankarah Nayar, Owners	X	
8904 Holly Leaf Lane	X	
Bethesda, MD 20817,	X	
Respondents.	X	

DECISION and ORDER

The above-entitled case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1984, as amended, and the Commission having considered the testimony and evidence of record, it is therefore, this March 11, 1994, found, determined and ordered as follows:

By letter dated February 11, 1993, Donald V. Pafford, General Manager, Avenel Community Association, requested the assistance of the Commission on Common Ownership Communities in the resolution of a dispute with Mr. and Mrs. Nayar relating to the completion of landscaping in accordance with the Avenel Declaration of Protective Land Use Standards, Use Restriction 4.

By letter dated February 23, 1993, the Office on Common Ownership Communities transmitted a complaint form to Mr. Pafford. By letter dated March 1, 1993, Mr. Pafford filed a complaint against Mr. and Mrs. Sankarah Nayar, requesting that the Commission require that the construction approved and initiated in the front yard of the Nayar's house be completed by a date certain.

In response to correspondence from the Office on Common Ownership Communities, Mr. and Mrs. Nayar responded by letter dated April 9, 1993, indicating that they were having a variety of problems completing the construction in their front yard.

At the time of the hearing in this matter, only landscaping remained to be completed. At the hearing, the Avenel Community Association requested that the Commission order the Nayars to complete the planting the Community believed to be included in the application for approval to install the fountain, or alternative planting suggested by the Community during discussions which took place between the parties in November 1993, by March 31, 1994, and award attorneys' fees and costs expended by the Community in

pursuing resolution of this dispute.

The Nayars indicated that they believed that they had complied with their application and should be under no further obligation.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to Section 10B-11(e). On October 6, 1993 the Commission voted to hold a public hearing. The hearing was initially scheduled for November 17, 1993 but was postponed, at the request of the parties, until January 12, 1994. After the public hearing, the record was kept open for the submission of additional documents. By letter dated January 13, 1994, the Avenel Community Association was requested to submit "[a] copy of the Declaration of Protective Land Use Standards which demonstrates that it was properly filed in the land records and is therefore enforceable ..." and "a detailed record of fees relating to this dispute" not later than January 31, 1994. The Commission on Common Ownership Communities received from the Avenel Community Association a copy of the Protective Covenants, Conditions and Restrictions for Saunders Gate at Avenel and detailed records of attorneys' fees incurred in this dispute. The record was closed on February 1, 1994.

FINDINGS OF FACT

Based on the testimony and evidence of record, the Commission makes the following findings:

1. Avenel Community Association, Inc., represents a homeowners' community with 823 single-family homes.
2. By letter dated October 20, 1988, the Nayars were informed that the Control Committee had approved their application for a circular drive and landscaping.
3. By letter dated March 21, 1991, the Control Committee notified the Nayars that their application for a fountain in their front yard was approved conditioned on additional requirements set forth in the letter. Still relevant to this dispute are the Control Committee's reservation of the right to require additional landscaping "should the proposed plantings not adequately soften the appearance of the structure" and, pointing out that the structure will be in a highly visible area, reservation of the right to maintain the structure and landscaping at the owner's expense, should it fall into disrepair.
4. More than a year later, by letter dated July 6, 1992, the Control Committee reminded the Nayars that paragraph

4 in the Use Restrictions section of the "Declaration of Protective Land Use Standards" applicable in the Avenel Community, requires that construction be completed within one year of commencement, and requested that they complete construction as soon as possible, particularly since their construction was in a highly visible area.

5. By letter dated July 25, 1992, the Nayars notified the Avenel Community Association that the construction work was delayed because of difficulties with their contractor.

6. By letter dated August 26, 1992, the Control Committee informed the Nayars that if the construction was not completed within 21 days, the Committee would take action to protect the interests of the Association.

7. By letter dated August 28, 1992, the Nayars informed the Committee that the work would not be completed in 21 days.

8. By letter dated December 22, 1992, Mr. and Mrs. Nayar were notified by counsel for the Avenel Community Association that the problems they had described having with their contractor were not considered by the community to be grounds for delay in completion of the construction work for such an extended time and that their failure to address the current situation to the satisfaction of the Association within 14 days would result in legal action for damages and injunctive action being taken. Counsel also informed Mr. and Mrs. Nayar that the governing documents for the Association authorize collection of court costs and attorneys' fees if incurred.

9. By letter dated December 23, 1992, Mr. and Mrs. Nayar informed the Association of the status of the construction work and that no progress could be expected until the Spring of 1993.

10. By letter dated January 8, 1993, the Association acknowledged the Nayars' letter of December 23, 1992, and informed them that the matter had been referred to counsel.

11. By letter dated February 11, 1993, the Association notified the Nayars that a dispute had been filed with the Commission on Common Ownership Communities since the construction work was still incomplete.

12. Correspondence between the parties and construction

on the driveway and fountain continued during 1992. By the time of the hearing, the remaining disputes between the parties related to the landscaping which had been part of the application for approval for the installation of the fountain.

13. The Nayars purchased this house in June or July of 1986. By their testimony, they were given a number of documents at the closing on this house which related to covenants and restrictions related to living in Avenel. It was explained to them that these covenants were to protect their investment in the community. They said they did not know what documents had been included and had not read them.

14. A level of frustration and exasperation was in evidence in the hearing on the part of both parties. It was clear that the construction of these front yard improvements had been underway for a very long time which was a cause of frustration to both parties. It was also clear that the Nayars had had a good deal of work done on their property, including construction of a swimming pool in the back yard which had apparently been accomplished without any disagreement between these parties.

15. A number of documents purporting to govern activities in the Avenel Community Association are in the record. A review of these documents indicates that external improvements to Avenel property are restricted and carefully governed. The only document in the record for which there is evidence of having been filed with the land records in the County Clerk's Office is the "Protective Covenants, Conditions and Restrictions: Saunders Gate at Avenel". The date stamp of the County Clerk's Office indicates that it was received for filing on August 5, 1984, and the Nayars' address is included in the list of Parcel Identification Numbers attached to the Covenants. This document was submitted as Complainants Exhibit C-9 at the hearing in this matter.

16. Relevant excerpts from this document follow:

Under "Definitions", paragraph A. 3.

"Control Committee" shall mean the person or persons designated by the Declarant or its successors and assigns from time-to-time to administer and provide for enforcement of the covenants, conditions and restrictions set forth hereinafter, such persons being granted hereby the authority necessary for such purpose including, but not limited to, the approval or disapproval of improvements to be constructed on the Building Sites.

Under "Use Restrictions", paragraph C. 1. No improvements of any character shall be erected and none begun, nor any change made to the exterior design of such improvements after the original construction has begun on any Building Site unless and until the cost, type and size thereof; materials to be used in construction; exterior color scheme; exterior lighting plans, specifications and details thereof, and lot plans, showing the proposed location of the dwelling, garage, and drive-ways upon the Building Site, final Building Site grades shall have been approved in writing by the Building Site Control Committee, and copies of said plans, specifications and details shall have been lodged permanently with said Committee. Generally, homes will be traditional in design and substantially of brick construction with roof of cedar shakes, slate or other shingles of at least 360 pound weight. Considering that there are and will continue to be innovations in building materials, upon application the Control Committee may approve other materials coming on the market which in its sole discretion provide similar high quality aesthetic appeal and promise long-term endurable value both in utility and appearance. Building Site plans submitted to the Committee shall have a scale of not less than 1 inch for every 20 feet, elevations shall be on a scale of not less than 1/4 inch for each foot; and floor plans, etc., shall have a scale of not less than 1/4 inch for each foot. Improvements as used herein is intended to mean the improvements of every kind and character which shall be placed upon a Building Site. Plans may be disapproved for any reason including purely aesthetic reasons.

Under "General Provisions":

At paragraph F, the Declarant reserves the right to enter a Building Site in case of any violation of the covenants to abate or remove the violation at the owners' expense; At paragraph G, the Declarant reserves the right to assign its rights, powers and obligations to another corporation or association; and Paragraph J, provides for the enforcement of the covenants at law or in equity and includes the right of a successful plaintiff to recover attorneys' fees and court costs from the defendant.

17. The Avenel Community Association argued that paragraph C. 4. under "Use Restrictions" which requires that the "exterior of all structures, including garage, shall be completed in accordance with the approved plans and specifications within a period of one year from the

commencement of construction thereof" established a deadline for completion of the work in dispute in this matter.

18. No size was indicated for the plants shown on the landscaping plan submitted by the Nayars with their application for approval to install the fountain in their front yard. The Association is dissatisfied with the size of some of the plants which the Nayars have planted and says that the Nayars should have known that these plants would not be up to the standard of the Community.

19. The Nayars argued that they had planted in accordance with their application, that they would substitute different plants in some areas for those on the application at some future time and that the Community suggested alternative plan was not workable. They appear to have not understood that the Control Committee has the right to approve a specific and particular plan and have it followed. The Nayars seem to believe that they retain the right to change the proposed planting significantly without approval of the Control Committee.

CONCLUSIONS OF LAW

The Commission concludes, based on a preponderance of the evidence, including, but not limited to, testimony and documents admitted into evidence, and after a full and fair consideration of the evidence of record, that:

1. The "Protective Covenants, Conditions and Restrictions: Saunders Gate at Avenel" were filed with the land records of the Montgomery County Clerk's office prior to the Nayars purchase of their property at 8904 Holly Leaf Lane, which parcel is included under the provisions of those Protective Covenants.
2. The authority retained in the Protective Covenants to review and grant or deny approval for improvements to property in Avenel is sufficient to reach the driveway and fountain which the Nayars have constructed, and sufficient to enforce completion of the landscaping included in the construction application.
3. The deadline of one year following commencement of construction for completion of the work which the Community argued should be applied is not applicable in this case. The Covenant provision requires that the "exterior of all structures" be completed within one year of commencement. The "structures" involved in this

dispute, even assuming that the driveway and fountain fall within the meaning of this term, are complete and no longer in dispute. The landscaping which is in dispute does not fall within the scope of a provision requiring completion of the exterior of structures. There are other community documents which speak to this issue, but there is nothing in the record which supports the application of those documents to the Nayars' property. However, it does seem appropriate within a regulatory scheme of this sort that completion of landscaping proposed in conjunction with construction be done in a reasonable time. The almost three years which have now passed since the approval of the plans for the fountain does seem to have been adequate time for completion of the construction and landscaping.

4. The Control Committee assumed that their vision of the Nayars' intended landscaping was the same as the Nayars' vision, and did not specify the size of plants which would make the proposed landscaping adequate to the Community. However, as a condition of its application approval, the Committee did retain the right to require additional landscaping if the proposed plantings did not adequately soften the appearance of the structure.

5. The Nayars have not completed the planting which was proposed on the landscape plan submitted with their application for construction of a fountain. The construction of their driveway and fountain have clearly been very frustrating to the Nayars. Nonetheless, they have failed to take into account the authority of the Control Committee and their responsibility to submit an application which represents their intentions and to complete the work as described.

6. The extraordinary circumstances which would justify the shifting of costs and fees are not found to be present in this record.

ORDER

In view of the foregoing, and based on the evidence of record, the Commission orders the following:

1. That Respondents complete the planting on or before April 30, 1994, in one of the following manners: (a) as shown in the landscaping plan submitted with their application for approval to construct the fountain, at the sizes which the Control Committee has indicated will be acceptable; or (b) in accordance with the substitute plan proposed by the Committee in November 1993. In the

absence of a mutually agreed upon alternative plan between the parties, the terms of the order as stated above are to be followed; and

2. Complainant's request for fees and costs is denied.

The foregoing was concurred in by panel members Fox, Jacobsen and Stevens.

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 date of this order, pursuant to Chapter 1100, Subtitle B, Maryland Rules of Procedure.



Dinah Stevens
Panel Chairwoman
Commission on Common
Ownership Communities