

**Before the
Commission on Common Ownership Communities**

In the matter of	x	
Cloisters Homeowners Association	x	
c/o Abaris Realty, Inc.	x	
11820 Parklawn Drive	x	
Rockville, Maryland 20852,	x	
Complainant,	x	
	x	
v.	x	Case No. 280-G
	x	December 15, 1995
Steven and Joyce Solomon, Owners,	x	
5957 Valerian Lane	x	
Rockville, Maryland 20852,	x	
Respondent.	x	

DECISION AND ORDER

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing on August 30, 1995, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the duly appointed hearing Panel, having considered the testimony and evidence of record, finds, determines and orders as follows:

Background

On June 27, 1994, Steven Landsman of Abaris Realty, Inc., Property Manager for the Cloisters Homeowners Association, filed a complaint with the Office of Common Ownership Communities on behalf of the Board of Directors of the Cloisters Homeowners Association, Inc. ("Association" or "Board") against Steven and Joyce Solomon, owners of 5957 Valerian Lane, Rockville, Maryland 20852 ("Respondents"). The complaint alleges that the Respondents erected a deck on the back of their house without prior approval of the Association's Architectural Control Committee in violation of Article V of the community's Declaration of Covenants, Conditions and Restrictions; that the deck includes a sunburst design in the railing which is not in conformity with the community's design scheme; and that Respondents have failed to correct this non-conforming condition after having been requested to do so and having agreed to do so. The complaint requests an Order from the Commission that the sunburst design be removed from the deck.

By letter dated July 11, 1994, Mrs. Solomon responded to the complaint indicating that in her view the decision of the Association in opposition to her deck design was arbitrary because other decks in the neighborhood are different and her deck cannot be seen except by those who walk behind her house.

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 May 3, 1995, and the Commission voted that it was a matter within the Commission's jurisdiction, and the matter was scheduled for a public hearing on August 30, 1995.

Findings of Fact

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

1. By letter dated May 19, 1993, Abaris Realty, on behalf of the Association, advised Mrs. Solomon that it had come to the attention of the Association's management that a deck had been installed on her property which did not have the prior approval required for all architectural changes, modifications and additions to houses within the development. Mrs. Solomon was requested to submit a completed Architectural Approval Request Form, on or before June 1, 1993, for review by the Association's Architectural Control Committee (ACC).

2. An undated document was submitted by Mr. Solomon, which appears to be a sketch of the Solomon's deck railing, including the sunburst design, with a narrative description. The minutes of the August 19, 1993 meeting of the Board include a report by the Architecture Committee and that a motion was made, seconded, and carried unanimously to ask Mr. Solomon to remove the sunburst design in his deck railing, to resubmit his request using proper procedures and that his plan be consistent with community design standards. By letter dated September 10, 1993, on behalf of the Board, the Solomons were notified of this action of the Board.

3. An Architectural Approval Request Form dated November 17, 1993, was submitted by the Solomons. The minutes of the Board meeting of November 17, 1993 record that Mr. Solomon appeared at the meeting, submitted the requested ACC form, expressed the opinion that the sunburst design was in conformity with the rest of the community and pointed out that some houses in the community have spiral staircases and metal parts on their decks. A member of the Board explained that some deck designs were part of the original structures erected by the developer. A member of the Board asked if Mr. Solomon would agree to plant an evergreen tree behind the deck which would screen the sunburst from Tuckerman Lane and Mr. Solomon agreed. However, when the Board considered a motion to allow the design to remain if screened by a tree the motion failed. A motion to deny Mr. Solomon's appeal was made, seconded and carried. The minutes indicate that Mr. Solomon was upset by this decision, and that he then left the meeting. The Board gave further consideration to the appeal, but determined not to reverse their denial of the Solomon's appeal.

4. By letter dated December 28, 1993, on behalf of the Board, Mr. Solomon was reminded that at the hearing he attended on November 17, 1993 the Board informed him of their denial of his appeal to keep the sunburst design in the deck railing and that if the deck railing was brought into conformity with community design by December 31, 1993, the Board was willing to waive sanctions authorized in the Association's Rules and Regulations Handbook.

5. Mr. Solomon sent an undated, hand-written note to Mr. Landsman, stating:

In accordance with your decision to make us remove our existing sunburst on our deck and replace with acceptable design we will do so when the weather permits.

6. By letter dated April 15, 1994, Respondents were reminded that if they failed to bring their deck into conforming design, they would be subject to sanctions described in the Association's rules and regulations.

7. By letter dated June 15, 1994, a copy of the complaint filed in this matter was transmitted to Respondents.

8. At the hearing in this matter, Mr. Landsman, on behalf of Complainant, introduced a number of exhibits:

The first of these was a copy of the Bylaws of Cloisters Homeowners Association, Inc. Mr. Landsman pointed out that the Bylaws provide, at Article VII, Section 1. (a), that the Board of Directors has the power to "adopt and publish rules and regulations governing the use of the Common Area and facilities, and the personal conduct of the members and their guests thereon, and to establish penalties for the infraction thereof".

The second exhibit was a copy of the Cloisters Homeowners Association, Inc. Declaration of Covenants, Conditions and Restrictions, which Mr. Landsman pointed out regulate Architectural Control within the community at Article V. This provision establishes, in pertinent part,

No building, fence, wall 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 change in color) 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 and conformity with the design concept for the Property 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 of the Association ("Architectural Control Committee").

The third exhibit was the Cloisters Homeowners Association Rules and Regulations Handbook. This document, beginning at page 8, includes a section called "Architectural Policy for the Cloisters Community", in which it is indicated that,

[u]niformity and consistency will be emphasized, but some diversity will be permitted. Suggested guidelines for a number of items are included herein. However, please note that these are only guidelines, and that these guidelines should not be deemed to be exhaustive.... Exceptions to these guidelines have been approved because of their completion prior to the formation of CHA. These exceptions will remain the only exceptions granted to these guidelines. (emphasis in original)

The following pages included "Specific Architectural Guidelines" for several common structures, starting with decks. There are four guidelines for decks of which only the following is relevant to this case:

It is recommended that decks consist of 2' x 2'¹ picket railings with a 4 1/2" space between pickets.

The fourth exhibit was five applications for approval of decks to be added to houses in the Association submitted between January 18, 1989 and March 28, 1995. Included in this exhibit is a letter dated April 21, 1995 from the management company on behalf of the Board which says that "[a]ll pickets must be vertical and spaced 4 1/2" apart". In response to argument from the Solomons, Mr. Landsman testified that the guideline indicating that the pickets are to be 4 1/2" apart assumes that they will be parallel and that all of the pickets in the community are vertical.

The fifth exhibit was the minutes from several meetings of the Board.

9. Mr. Landsman testified that these documents establish that the community has the authority to reject the Solomon sunburst design, that the Board followed its procedures and was acting within its authority, and that this was a matter on which the Board had established a consistent design standard and had enforced it consistently. Thus, he moved for summary judgment on behalf of the Association in this matter.

10. In response to Mr. Landsman's Motion for Summary Judgment, the panel asked Mr. and Mrs. Solomon for testimony rebutting Mr. Landsman's case or for testimony indicating that the action of the Board in rejecting their deck design was arbitrary or capricious. Mr. and Mrs. Solomon and another couple from the community testified that there were a number of different deck designs, that other features were not always consistent and that the railing design on the Solomon deck was attractive. There was no testimony that other decks had a picket railing design which was not predominantly parallel and vertical. Mr. Solomon indicated that he had been led to believe that the Commission would review the aesthetics of the deck design and render a decision regarding the reasonableness of the Board decision on the deck design from an aesthetic point of view. The Panel Chairwoman explained that the Commission did not have the authority to review the design from an aesthetic view but only to review the reasonableness of the community Board in reaching their decision regarding the deck design. At the time of the hearing, the Panel believed that the appropriate legal standard was that set forth in Black v. Fox Hills North Community Association, Inc., 90 Md. App. 75, 599 A.2d 1228, cert. denied 326 Md. 177 (1992). However, since the hearing, the Maryland Court of Special Appeals has issued an unreported decision in Ryan v. Montgomery Village Foundation, Inc., No. 1907, September 28, 1995, which provides the Panel with guidance on the appropriate standard to apply in this case.

Conclusions of Law

The Maryland Court of Special Appeals in the decision in Ryan, supra, declared that the appropriate standard of review of an action applying a covenant is that set forth in Kirkley v. Seipelt, 212 Md. 127 (1957) and that the standard set forth in Black, supra, is limited to questions of enforcement.

¹ The Panel believes that this is intended to be 2" x 2".

In the Kirkley decision, the Court of Appeals of Maryland examined the application of a covenant substantively similar to that in the Association's Declaration. In that case, the covenant was challenged as unreasonable on the grounds that there were no specific standards or general plan of development to guide the approving authority. The Court of Appeals found that a generalized goal of maintaining the value of the surrounding property could provide adequate basis for support of the covenant. The Court then held that refusal by the approving authority under the covenant

would have to be based upon a reason that bears some relation to the other buildings or the general plan of development; and this refusal would have to be a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner. at 133.

The testimony offered on behalf of the Association supports the conclusion that the architectural guidelines have been applied in an effort to achieve uniformity and consistency, at least since the Association assumed responsibility in the community. Further, the testimony supports the interpretation of the guideline regarding deck railings as requiring parallel, vertical pickets. No instance of a variation in this design was established in the record. Uniformity in this feature can reasonably support the general plan of development in this community in that it avoids potential conflict in design. Thus, the denial of the Solomons application for a sunburst design in their deck railing was consonant with the community design and was a reasonable determination made in good faith and was not high-handed, whimsical or captious in manner.

The Commission can only be disruptive of communities if it begins second-guessing decisions made within the community which properly include consideration of issues such as historical and design consistency with which the Commission cannot be familiar. The Commission cannot substitute its aesthetic judgment for a decision made by an authorized body in a community taking into account all the applicable issues to be considered in reaching that decision.

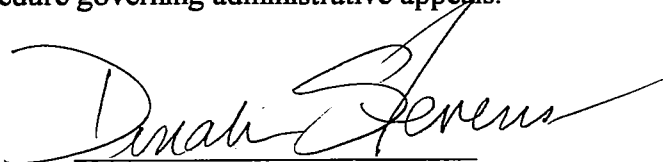
Order

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

1. the denial of the Solomon's appeal for approval of the design of their deck railing by the Board of Directors of the Cloisters Homeowners Association is affirmed; and
2. the Solomons must remove the sunburst design from their deck railing and replace it with a design in conformance with community design standards approved by the Architectural Control Committee within thirty (30) days of the date of this Order, or such period agreed to by the Cloisters Homeowners Association Board of Directors.

The foregoing was concurred in by panel members Huson, Simon 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 the Maryland Rules of Procedure governing administrative appeals.

A handwritten signature in cursive script, reading "Dinah Stevens". The signature is written in black ink and is positioned above a horizontal line.

Dinah Stevens, Panel Chairwoman
Commission on Common Ownership
Communities