IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ALEX F. BRADLEY, JR., a/k/a ALEXANDER F. BRADLEY, JR. And ANNE MARIA BRADLEY, PETITIONERS, v. OLD LANDING ASSOCIATION, A Delaware corporation, Respondent.	)))))))))))	C.A. No. 1505-MA

MASTER'S REPORT

Date Submitted: April 16, 2007
Final Report: November 7, 2007

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And

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AYVAZIAN, Master

Petitioners Alex F. Bradley, Jr., and his wife Ann Maria Bradley ("Bradleys") own Lot 48 in the Old Landing Subdivision in Rehoboth Beach, Delaware. On June 11, 2004, Respondent Old Landing Association ("Association") filed a Notice of Lien for Assessments Due in the Office of the Sussex County Recorder of Deeds, alleging that the Bradleys were delinquent in their assessment payments in the amount of $660.00, "plus late charges and interest thereon at the legal rate accruing from January 1, 2003, together with accruing assessments, attorney's fees and recording costs."[1] On July 19, 2005, the Bradleys filed a Verified Complaint for Declaratory and Injunctive Relief seeking: (Count 1) a permanent injunction prohibiting the Association from placing any liens on their property for any alleged violation of the Certificate of Incorporation; and (Count II) a declaratory judgment canceling the Notice of Lien on their property, ordering that the Bradleys are not members of the Association and are not bound by any rules or regulations promulgated by the Association, and awarding costs and reasonable attorney's fees to the Bradleys. Both parties have now filed cross-motions for summary judgment pursuant to Chancery Court Rule 56.

[1] Pet. Ex. A.

The Undisputed Facts

The Bradleys acquired their lot by deed dated September 25, 1996, recorded in the Sussex County Office of the Recorder of Deeds, at Deed Book 2152, Page 223,[2] from the Estate of Sophia Martin. Sophia Martin was Mr. Bradley's aunt. According to the deed transferring title to the Bradleys, the lot is "subject to a detailed schedule of restrictive covenants contained in a certain deed from Lewes Trust Company unto Florence A. Wingate, single woman, under date of January 19, 1955, the said deed being recorded in the Recorder's Office in Deed Book 442, page 348."[3]

The restrictive covenants attached to the Wingate deed establish a common plan for Lots 2 to 50 on the plot known as "Old Landing," which plot is recorded in the Recorder's Office in Plot Book No. 2 at page 72. In addition to establishing certain requirements for lot size and placement of buildings, building design, sanitation, safety and maintenance, use of premises, and transfer of property, the restrictive covenants establish a "Governing Committee" that has the right to cause specific work to be done on lots within the subdivision, i.e., installing sanitary facilities and maintaining land "in a neat and orderly condition" if the owner or occupant

[2] Pet. Ex. B.
[3] Pet. Ex. C.

fails to do so, and for making necessary road repairs within the subdivision.[4] If such work is undertaken, the Governing Committee has the right to recover the expense from the owner, but in the case of road repair, the Governing Committee may recover only "so much of the repair expense as is proportionate to the particular owner's frontage upon the road repaired."[5]

The Wingate deed also contains the following provision regarding termination and amendment of the restrictions:

> These restrictions as hereinabove written, and as amended, shall have force for a period of fifty years, at the end of which period they will be automatically terminated. In the meantime, after there have become as many as eight separate owners of this land, they may be amended at will and to any extent, provided that at least three-fourths of all of the owners (not necessarily the owners of three-fourths of the land) of the land conveyed by this instrument shall join in a deed effecting the amendment or amendments.

On September 5, 1984, a Certificate of Incorporation of the Old Landing Association was filed with the Delaware Secretary of State and subsequently filed in the Sussex County Office of the Recorder of Deeds in Miscellaneous Book 144 at page 139.[6] According to the Certificate, the nature and purpose of the Association was:

> to assume the rights, duties and obligations created herein and those contained in the Governing Regulations; to promote and protect the interests of property Owners (as the term is defined in Section 14 hereof) in the Subdivision (as defined in Section 14 hereof); to

[4] Pet. Ex. C, at pp. 350-352.
[5] *Id.* at p. 351.
[6] Pet. Ex. L.

> transact any business involving the interests of said property Owners as a group; to do any and all other things related to the operation of a homeowners association; to do any and all other acts which are lawful under the State of Delaware.[7]

"Subdivision" is defined in the Certificate as

> all that certain tract, piece and parcel of land, lying and being situate in Lewes and Rehoboth Hundred, Sussex County, Delaware, being known as Old Landing, as more particularly shown on plots of survey of the various sections thereof, as the same are recorded from time to time, the plot of survey for Section One being March 20, 1984, and Recorded in Plot Book , page .[8]

Nowhere in the Certificate is there a definition of "Governing Regulations."

According to the Certificate, all property owners in the Old Landing Subdivision automatically become members of the Association upon their acceptance of a deed conveying fee simple title.[9] In addition, the Association has the power to levy annual assessments on its members "as may be determined by the Association … to be used for the purposes of operating the Association, maintaining any Common Areas, and for other purposes and to assist the Association in fulfilling its duties and obligations as set forth in the Governing Regulations, this Certificate of Incorporation,

[7] *Id.*at p. 139.
[8] *Id.* at p. 146 (blanks in the original).
[9] *Id.* at p. 139.

and the By-Laws."[10] The assessment operates as a lien upon the lot against which the assessment is made and remains such until paid.[11]

The Issues

The Bradleys contend that they are entitled to summary judgment in their favor because the restrictive covenants attached to the Wingate deed do not authorize the collection of general or annual assessments or the filing of a Notice of Lien against them for any reason. In addition, they argue that the restrictive covenants expired by their own terms on January 19, 2005. According to the Bradleys, the Certificate of Incorporation does not operate as an amendment to the restrictive covenants in the Wingate deed because the Certificate itself does not reflect that three-fourths of the property owners considered it as an amendment. Since the Certificate lies outside their chain of title, they argue, they are neither members of the Association nor responsible for paying any assessments or dues to the Association.

The Association raises several arguments in support of its motion for summary judgment. First, the Association points out that the Wingate deed provides for a formation of a governing body, and allows for future amendments of the restrictive covenants. The Association argues that the restrictive covenants were effectively amended to allow annual assessments

[10] *Id.* at p. 141.
[11] *Id.*

and the creation of liens when the Association recorded its Certificate of Incorporation in 1984. Second, the Association argues that an equitable restriction exists because the Bradleys had record notice, constructive notice, and actual notice of the Association's claimed rights through conversations with Sophia Martin, their predecessor in title. Alternatively, the Association appears to argue that a covenant allowing the Association to collect assessments should be implied under the common development plan because the remaining 49 lot owners in the subdivision rely on the Association and its management of the community. Finally, the Association argues that the equitable defenses of acquiescence, ratification, laches, and estoppel operate as affirmative defenses in this case because: (1) Sophia Martin, the Bradleys' predecessor in title, acquiesced in the formation of the corporation and the levying of assessments; (2) the Bradleys themselves acknowledged and ratified the existence of the Association; and (3) the Bradleys unreasonably waited to file their suit until the time period for amending the restrictive covenants had expired, thus precluding the Association from amending the covenants "in a more traditional manner."[12]

Summary judgment may be granted only when there are no disputed issues of material fact and the moving party is entitled to judgment as a

[12] Respondent's Opening Brief in Support of Respondent's Motion for Summary Judgment and in Opposition to Petitioners' Motion for Summary Judgment, at p. 24.

matter of law. *See Greylag 4 Maintenance Corp. v. Lynch-James*, 2004 WL 2694905, at *4 (Del. Ch. Nov. 18, 2004); Ch. Ct. R. 56. When deciding a motion for summary judgment, the record must be viewed in a light most favorable to the non-moving party. *See Billops v. Magness Const. Co.*, 391 A.2d 196, 197 (Del. 1995). The moving party has the burden of demonstrating that there is no dispute as to any issue of fact material to any valid legal theory advanced by the non-moving party. *Krajewski v. Blair*, 297 A.2d 70, 72 (Del. Ch. 1972). If the moving party's burden is met, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

The primary issue in this case is whether the restrictive covenants were effectively amended in 1984. Because the Wingate deed specifies that the original restrictive covenants may be amended "at will and to any extent", the Association broadly construes this provision as allowing the original restrictive covenants to be amended "in any way."[13] According to the Association, more than three-fourths of the property owners in 1984 approved the incorporation of their homeowners association, thus complying with one of the Wingate deed's requirements. Therefore, the Association argues, the Certificate of Incorporation constitutes record notice and

[13] Respondent's Opening Brief at p. 15.

constructive notice of the Association's assessment and lien practices that existed before the Bradleys acquired their property.

The Association's argument, however, is flawed. While the Wingate deed allows the restrictive covenants to be amended "at will and to any extent," the plain language of the deed mandates a specific amendment process: "provided that at least three-fourths of the owners … of the land conveyed by this instrument shall join in a deed effecting the amendment or amendments."[14] There is no uncertainty or ambiguity in this language and, hence, no need for interpretation, despite the Association's contention that such a procedure is impractical, if not impossible, for a fifty-lot subdivision. By requiring the affirmative action of at least three-fourths of the property owners in the development to amend the original covenants, the Wingate deed strikes a reasonable balance between "protecting the neighboring property owners' expectations for their community and the rights of landowners to use their property as they may lawfully choose." *Greylag 4*, letter op. at *5, *supra*.

In this case, the only language purportedly authorizing annual assessments and the creation of liens on the land in the development is found in the Certificate of Incorporation. This document was signed by two

[14] Ex. C of Respondent's Opening Brief.

persons, filed in the Office of Secretary of State on September 5, 1984, and recorded shortly thereafter.[15] To support its argument that the recorded Certificate effectively amended the original restrictive covenants contained in the Wingate deed, the Association refers to a file memorandum written by legal counsel in 1988, indicating that the vote in favor of incorporation was 33 to 7.[16] Even if I were to view this document, written several years after the fact, as a supporting affidavit, *see* Rule 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, …."), the document does not demonstrate that the owners knew they were voting for anything other than the incorporation of their homeowners association.

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[15] Ex. D of Respondent's Opening Brief. The incorporators were two members of the five-person Board of Directors of the Association at the time.

[16] Ex. E of Respondent's Opening Brief. The pertinent part of the memorandum, referring to a meeting of the Association's Board of Directors on November 12, 1988 states:

> (1) Certificate of Incorporation. I confirmed that a Certificate of Incorporation of Old Landing Association was in fact filed with the Secretary of State and recorded in the Office of the Recorder of Deeds in and for Sussex County in Miscellaneous Book 114, Page 138, &. I was advised by members of the Board that in late 1983, registered notice was sent to all lot owners/members of the Association that the Association was considering incorporation and that a vote was requested on incorporation by ballot. Included in the notice was a provision that if no response was received, this would be considered a vote in favor of incorporation. The best recollection of the members of the board was that a majority voted in favor of incorporation. I was given the original of a letter dated November 9, 1984, written by Robert Dobak, confirming that an annual meeting of the Old Landing Association was held on Sunday, September 9, 1984, where "only 16 members of the 41 property owners" was present. The letter also contained a report that "the response to incorporate was as follows: for, 33, against, 7."

Furthermore, the file memorandum undermines the Association's claim that a majority of homeowners approved incorporation. The document states that registered notice of the proposed incorporation, which had been sent to the lot owners in late 1983, provided that if no response was received, the lot owner's failure to respond would be considered a vote in favor of incorporation. The file memorandum further states that during the annual meeting on September 9, 1984, only 16 of the 41 property owners were present. Thus, even if each property owner present at the meeting had voted in favor of incorporation, there were less than three-fourths of the property owners present at the meeting, and their favorable votes were insufficient to bind the remaining property owners to additional restrictions on the use of their land. The possibility that the remaining votes in favor of incorporation were acquired by ***default*** defeats the Association's argument because the Wingate deed explicitly required ***affirmative*** action by the owners -- three-fourths of all the owners had to join in a deed effecting the amendment or amendments -- before the original restrictive covenants could be amended. Therefore, even if I viewed the recorded Certificate of Incorporation as the substantial equivalent of a deed, there is no evidence that three-fourths of the property owners affirmatively voted in favor of incorporation.

Since the Association has failed to demonstrate that three-fourths of the owners had knowledge of the contents of the Certificate of Incorporation, and affirmatively voted in favor of incorporation in 1984, I must conclude that the attempted changes to the original restrictive covenants contained in the Wingate deed were ineffectual. *See, e.g.*, *Welshire, Inc. v. Harbison*, 91 A.2d 404, 405 (Del. 1952); *Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 75 P.3d 132, 135-36 (Ariz. App. 2003). This conclusion makes it unnecessary to address the Association's arguments that the Bradleys had record notice, constructive notice, and actual notice of the Certificate of Incorporation and the Association's claimed rights. Since the Association lacked any authority under the Wingate deed to assess the lands generally or to create liens, its self-proclaimed rights were invalid and unenforceable. *See Bordas v. Virginia City Ranches Ass'n*, 102 P.3d 1219, 1223 (Mont. 2004). Whether or not the Bradleys had notice of the Association's claimed rights is thus immaterial.

In addition, the Association has failed to demonstrate that an equitable restriction was created by the recording of its Certificate of Incorporation. "To establish an equitable restriction, [a party] must demonstrate that (1) the claimed restrictive covenant 'touches and concerns' the land, (2) the original covenanting parties 'intended' to create a binding covenant, and (3) the

successor to the burden had 'notice' of the covenant when he acquired his interest in the subject property." *Van Amberg v. Board of Governors of Sea Strand Ass'n*, 1988 WL 36127, at *6 (Del. Ch. Apr. 13, 1988). The Association has presented no evidence that the original covenanting parties "intended" to create a binding covenant running with the property that provided for annual or general assessments, or liens on the lands in the development. To the contrary, the Wingate deed reflects an intention to ***limit*** expenses incurred by the "Governing Committee" to necessary road repairs, and sanitary facilities and land maintenance where the owners had failed to install their own sanitary facilities or to maintain their lands in a neat and orderly fashion. If the original covenanting parties had intended to empower the Governing Committee to file notices of liens on lots in order to recover the expenses it had incurred on behalf of such owners, then the parties could have provided explicit language to that effect in the Wingate deed. *Cf. Henlopen Acres, Inc. v. Potter*, 127 A.2d 476, 478 (Del. Ch. 1956) (restrictive covenant in Corkran deed made maintenance charges and assessments liens upon the land). Nor is there evidence that the original covenanting parties intended to provide for mandatory membership in a homeowners association. The Wingate deed only states that "all of the owners of these lands shall have the right to meet, not more often than once

in each calendar year … and elect three members of a five-member Governing Committee ….”[17] The right to meet and vote in an election once a year does not, in and of itself, embrace the concept of ***mandatory*** membership in a homeowners association.

I also find unavailing the Association’s argument that a restrictive covenant can be implied in this case. “Recognition of an implied restrictive covenant necessarily ‘involves a relaxation of the writing requirement,’ and thus, implied covenants ‘are not favored by courts and are [instead] construed in favor of the unrestricted use of free property.’” *Greylag 4*, letter op. at *5, *supra* (quoting 9 POWELL ON REAL PROPERTY § 60.03[1] at 60-22). The test is whether the party can show by clear and convincing evidence that a common plan of development in fact existed. *Id.* Here, the Wingate deed and the recording of the plot plan for the subdivision in 1955 demonstrate without a doubt that the developer intended to impose a general or common plan of development on the fifty-lot subdivision. Included in that plan, as evidenced by the restrictive covenants attached to the Wingate deed, was the notion of a governing committee that had the limited right to

[17] Pursuant to the Wingate deed, the original Governing Committee consisted of W. Virden Marshall, Joseph L. Marshall, Robert L. Patterson, and Frederick R. Butler. PX C, at 4. Once there were eight different owners in the development, the owners were allowed initially to elect three members of the Committee. W. Virden Marshall had lifetime membership on the Committee, and was to be succeeded by his wife Hazell D. Marshall for her lifetime. Joseph L. Marshall had a seat as long as the Lewes Trust Company owned any of the lots in the development. Eventually, the owners were allowed to elect the fourth and fifth members of the Committee.

cause certain work to be done on the roads and lots, at a cost to the owners of the affected lots, which was a benefit and a burden to each lot owner in the development. However, the common plan in this case cannot serve as a basis for an implied covenant authorizing the Association to assess lots annually for such expenses as snow removal and lagoon dredging or creating a lien for nonpayment of assessments. To do so would defeat the developer's express intention that, at a minimum, three-fourths of the owners join in a deed before additional restrictions on the use of their land could be imposed.

The Association also raises the equitable defenses of acquiescence, ratification, laches, and estoppel, arguing that the Bradleys should not be allowed to evade their responsibility to pay for the benefits they have received as property owners in the development. These defenses apply, the Association contends, because the Bradleys obtained consent from the Association under a right of first refusal prior to accepting delivery of their deed,[18] and because the Bradleys initially paid dues and assessments to the Association. The Association also points to conduct of the Bradleys'

[18]The Wingate deed provides that prior to transferring title to any premises within the development, at least 30 days' notice must be given to the Governing Committee as to the name and address of the prospective purchases, and the price the prospective purchases proposes to pay for the property. PX C at 4-5. Pursuant to the deed, the Governing Committee may avoid the sale to the prospective purchaser by paying the seller the price the seller was to receive. Presumably, the Bradleys obtained consent for the transfer of their deed from the Association because the Governing Committee no longer exists as a separate entity.

predecessor in title, Sophia Martin, who attended homeowners meetings and paid her dues and assessments. The Bradleys, in response, argue that an equitable defense such as ratification or acquiescence does not apply here because it could result in some lots in a development being bound by a covenant while others are not. I find the Bradleys' argument to be persuasive.

The law generally favors the free use of one's property. *Andrews v. McCafferty*, 275 A.2d 571, 573 (Del. Ch. 1971). Where there are restrictive covenants binding the land, the law traditionally favors property rights over contractual rights. *Bethany Village Owners Ass'n, Inc. v. Fontana*, 1997 WL 695570, at *2, (Del. Ch. Oct. 9, 1997). For example, when language used in a restrictive covenant empowering a committee to review building plans and specifications is "overly vague, imprecise, or so unclear as not to lend itself to evenhanded application, then the grant of authority is normally not enforceable." *Seabreak Homeowners Ass'n, Inc. v. Gresser*, 517 A.2d 263, 269 (Del. Ch. 1986). Here, neither the Wingate deed nor the Certificate of Incorporation empowers the Association to assess generally or to impose liens on lands within the development. If a homeowners association were allowed to enhance its authority based on the theories of acquiescence and ratification, then no common scheme of development would be possible.

Instead, a subdivision would reflect a crazy quilt of responsibilities and privileges, depending upon the conduct of individual owners or their predecessors in title. While individual owners may voluntarily undertake additional responsibilities that are not set forth in the restrictive covenants, or may undertake additional responsibilities by mistake, they are not contractually bound to perform or continue to perform such tasks. *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 633 S.E.2d 78, 86 (N.Car. 2006). In this case, the Association cannot rely on prior payments of dues by owners or participation in Association meetings as a bootstrap to its authority.

The Association also argues that the equitable defense of laches applies because the Bradleys waited until the 50-year period in the Wingate deed had expired to bring suit Along the same lines, the Association argues that the Bradleys should be estopped from nullifying its authority because the Bradleys continue to reap the benefits of having a vacation home in the development. The record shows that the Bradleys did not unreasonably delay bringing suit because the Association imposed the lien on the property for nonpayment of assessments and dues only six months before the expiration of the restrictive covenants in the Wingate deed. Furthermore, the Association was not prejudiced by the Bradleys' alleged delay. The

Bradleys were not the first owners to challenge the Association's authority regarding assessments and liens.[19] The Association, however, chose to continue asserting its authority, rather than to amend the restrictive covenants in the manner required. Any unreasonable delay in this case has been on the part of the Association, not the Bradleys.

Conclusion

The original covenanting parties intended to create a subdivision consisting of 50 lots under a common plan of development as reflected by the restrictive covenants contained in the Wingate deed, a common plan which was to be administered by a "Governing Committee" for the benefit of the property owners. The restrictive covenants put in place in 1955 were to expire after 50 years, but the restrictions could be amended "at will and to any extent," provided at least three-fourths of the owners joined in a deed effecting the amendment or amendments. Three-fourths of the owners did not join in the Certificate of Incorporation that was recorded in1984. As a result, the Certificate of Incorporation failed to effect any amendment to the original covenants, which have now expired by the terms of the deed.

The Bradleys' Motion for Summary Judgment on Counts I and II is granted. The Association's Motion for Summary Judgment on Counts I and

[19] *See* Letters dated 2 June 1987 and 5 October 1989 from Maurice A. Hartnett, III. PX H & J.

II is denied. Each party shall bear its own costs and fees. Counsel for the Bradleys shall submit an appropriate form of order upon notice after this report becomes final.