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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

ANNE A. DOLAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 097-S
	)	
VILLAGES OF CLEARWATER HOMEOWNER'S ASSOCIATION, INC., a Delaware corporation.	)	
	)	
Defendant.	)	

MASTER'S REPORT
Date Submitted: August 3, 2004
Draft Report: September 29, 2004
Final Report: May 12, 2005

Paul G. Enterline, Esquire, Georgetown, Delaware; Attorney for Plaintiff.

Mary R. Schrider-Fox, Esquire, Tunnell & Raysor, P.A., Georgetown, Delaware; Attorney for Defendant.

GLASSCOCK, Master

The plaintiff, Anne A. Dolan, is the owner of a home in a Sussex County development called the Villages of Clearwater ("the Villages"). She seeks to enjoin the defendant Villages of Clearwater Homeowners Association, Inc. ("the Association") from interfering with her plan to pave[1] the area under her home and between her home and the street. The Association maintains that its architectural review board ("the ARB") has determined that this paving project is impermissible under the terms of the deed restrictions applicable to homeowners in the Villages. It has denied her permission to proceed with the paving project. The matter was tried before me, and the parties have submitted post-trial briefing. This is my decision on the plaintiff's request for injunctive relief.

In order to demonstrate entitlement to a permanent injunction, a plaintiff must show the improper infringement of a right (success on the merits), that the infringement has caused or will cause her irreparable harm, and that the equities weigh in favor of the injunction. *See*, *e.g.*, Christiana Town Center v. New Castle Center, Del. Ch., No. 20215, Lamb, V.C. (June 6, 2003)(Mem. Op.) at 2. Because I find that the plaintiff has not suffered an infringement of a right here, I need examine only the first prong of the test to determine that the injunction request must be denied.

[1] I use the terms "pave" and "pavement" here in the sense that they were used at trial, to denote a hard covering of the ground poured or formed in place, as with concrete or asphalt, and excluding stones, gravel, unmortared bricks, etc.

The plaintiff took ownership to her property[2] subject to certain restrictions. That is, certain property rights which would normally accrue to the owner of the real property are, pursuant to the deed, held by others: the reciprocal covenant holders individually or as a homeowners' association. The deed restrictions, however, being limitations on the full use of real property, are construed strictly in favor of the property owner. *E.g.*, Tusi v. Mruz, Del. Ch. No. 18563-NC, Noble, V.C. (Oct. 31, 2002) (Mem. Op.) at 3; Seabreak Homeowner's Assoc., Inc. v. Gresser, Del. Ch., 517 A.2d 263, 269 (1980).

I. FACTS

The Villages is an unusual development in that it contains three distinct sections. One of the sections (Newport Village) is composed of large, free-standing houses on relatively large lots. A second section (Northampton Cottages) is composed of cottages on smaller lots. The third section, the Village of Half Moon Bay, is where Ms. Dolan's house is located. A small section of Half Moon Bay is set aside for cottages, but the majority of Half Moon Bay contains what in the Villages are known as "Key West" style

[2] The pretrial stipulation indicates that Ms. Dolan "owns" her lot in the Villages. In fact, it appeared at trial that at least some portion of the lot is owned by a condominium of property owners. I asked the parties to address in post-trial briefing whether the ownership of the lot by the condominium, reserved to the use of Ms. Dolan, should make a difference in the legal analysis of this matter; and I instructed the parties that if they did not address this issue I would deem it waived and deem the parties to have consented to go forward on this issue as though the lot were owned by Ms. Dolan in fee, consonant with the pretrial stipulation. The parties have chosen not to address the issue, and I shall therefore proceed as though the fee ownership of the entire lot were in Ms. Dolan.

houses.[3] The Key West style houses are (to this Sussex Countian's eye at least) distinctive and unusual-looking homes. They are all one or one-and-one-half story houses with metal roofs and what appears to be vertical board siding. They are all elevated on pilings so that what would normally be the area occupied by a ground floor is an open area which the residents use for parking. They all have an apron or driveway of white pea gravel extending from the paved street completely under the house, for the house's full width.[4] That is, this is not a driveway in the sense of a narrow lane leading to a garage, but a distinctive architectural feature of the Key West style. Many of the houses in the other two Villages that compose the Villages of Clearwater, and the cottages in the portion of Half Moon Bay dedicated to non-Key West style cottages, have traditional driveways of various composition. Some are paved and some are colored gravel. None, however, has the full-house-width pea gravel treatment extending under the house, because only the Key West style homes are elevated on pilings.

The Villages is located in a low area of southeastern Sussex County near the Assawoman Canal. Drainage is poor and minor flooding and standing water are often

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[3] The Key West and non-Key West houses in Half Moon Bay are not intermixed; that is, there is a section which consists all of cottages and a larger section which consists all of Key West style houses.

[4] In her exceptions to the draft version of this report, the plaintiff argued that her trial exhibits demonstrate that "not all homes on pilings have the broad 'aprons' of stone extending the width of the home." I have reviewed the exhibits she cites in support of this argument (Joint Exhibit 1, Nos. 7-A-3, A-6, A-7). These photographs show white stone yards in front of Key West-style homes, broken in places by landscaping. The photographs admitted at trial reinforce my finding that a white stone area before each home is a distinctive feature of the Key West-style homes.

problems. Ms. Dolan noticed that during wet weather water would stand around the pilings under her house. It was in order to enhance the drainage of this area that she decided to pave the area under the house and between the house and the street. The paved area proposed would incorporate a professionally-designed gutter catchment system which would drain rain water to a french drain installed on the property. Ms. Dolan hired a contractor to install the paving, and he removed the white gravel and was preparing to install the system when a neighbor spoke to him, objecting that the work he was doing required the permission of the ARB. The contractor stopped work and informed Ms. Dolan, who made a prompt application to the ARB. After considering the application, the ARB denied permission to pave the area under and in front of Ms. Dolan's home. The ARB stated, rather cryptically, two grounds for its decision (grounds which were considerably amplified at the hearing).[5] As explained at the hearing, those grounds are that the paved area would simply "move water around," that is, it would drain the water from Ms. Dolan's property to other areas of the community, causing flooding; and that a paved driveway area up to and under the Key West homes was not in architectural harmony with the Villages. Ms. Dolan then brought this injunction action. The area under and in front of her house remains cleared of gravel and unpaved.

[5] The ARB's denial was communicated via a form, on which the space "disapproved" was checked. The disapproval was briefly amplified in a "remarks/modifications" section in two handwritten bullet points: "No concrete for driveway and under house." and, "Sussex County planning and zoning have alerted us that water displacement is just that — moving water around."

II. THE DEED RESTRICTIONS

The deed restrictions are contained in the recorded Declaration of Covenants, Conditions and Restrictions for the Villages of Clearwater, at Article 7. Section 7.1 provides that

> except for those parts of the property subjected to the Unit Property Act, no structure, fence, sidewalk, wall, drive or other improvement shall be placed or altered on any unit except in accordance with the provisions of this declaration.

Section 7.2 provides that

> no building, fence, wall or other structure, and no change in topography, overlot grading or grading, shall be commenced, erected or maintained upon any portion of the Development, nor shall any exterior addition or change be made until the plans and specifications including but not necessarily limited to all elevations showing grading, kind, size, shape, height, materials, color and location of the same shall have been submitted to and approved in writing as to the harmony of the external design and location in relation to the surrounding structures and topography by the Developer.

Pursuant to §7.2(B), the authority of the Developer cited above has been transferred to the ARB. Section 7.3 provides the objectives of the architectural review which the developer or the ARB must make in determining whether to permit the improvement sought by the homeowner:

> Architectural and designer reviews shall be directed towards attaining the following objective for the Development and the Developer or Association may adopt reasonable standards, rules and regulations deemed necessary or convenient in attaining such objectives: . . . (C) insuring that the architectural design of structures and their materials and colors are visually harmonious with the Development's overall appearance, history and cultural heritage, with surround development, with natural land forms and native vegetation . . ..

III. THE PARTIES' CONTENTIONS

The Association raises two grounds to support their denial of permission for the pavement of the area under and in front of the plaintiff's home. According to the plaintiff neither ground is within the limited authority granted to the Association under the deed restrictions.

1) *Visual Harmony*

The Association contends that the paving of the area under and in front of the Dolan home with concrete would not be "visually harmonious" with the neighborhood. Section 7.3(c) of the deed restrictions provides that the "design … materials and colors" of permissible structures shall be "visually harmonious with the Development's overall appearance … [and] with surrounding development …." The Association's position is that the Key West style of home has a unique appearance. While details may differ from home to home, there is a unifying common design to these homes: built on pilings and open on the ground floor, metal roofs, and white gravel under and in front of each home. The Association contends that this is an independent reason to deny any application to pave the area below and in front of each Key West home. They point out that no such pavement under and in front of a Key West home has been permitted within the Villages

(in fact, applications for such paving have been rejected), and find that such pavement would not be visually harmonious with the surrounding Key West homes.[6]

The plaintiff argues that the ARB has misinterpreted its commission under the deed restrictions. The plaintiff points out that the ARB relies on § 7.3(C): that the "design . . . materials and colors" of permissible structures shall be "visually harmonious with the Development's overall appearance . . .[and] with surrounding development . . . ." The plaintiff points to another section in the deed restrictions speaking to visual harmony. Section 7.3(B) requires the "location and configuration" of proposed structures to be "visually harmonious with . . . surrounding residential structures . . . ." The plaintiff contrasts this language with that of the section relied on by the association (7.3(C)), requiring visual harmony with "the Development's overall appearance . . . [and] with surrounding development . . . ." Noting that "the Development" is defined in the deed restrictions as referring to "the Villages of Clearwater" (that is, the entire development of three "villages"), the plaintiff offers the following interpretation of the deed restrictions: (1) under §7.2(B) the "location and configuration" of proposed structures must be in visual harmony with surrounding lots and structures; (2) under §7.2(C), by contrast, the design materials and colors of those structures must be visually harmonious with "the Development" (the entire Villages of Clearwater) and "surrounding development" (that

[6] In her exceptions to this report, the plaintiff points out that the ARB allowed one "Key West" homeowner to place brick pavers under the house, but required the white gravel yard to remain between the house and the street. *See* Joint Exhibit 1, No. 6.

is, other real estate developments in the area of the Villages of Clearwater), *but not with surrounding lots and structures*. In other words, when the Association is presented with a question of design, materials or colors, it may evaluate those proposed factors for visual harmony with the *entire* Villages of Clearwater and with surrounding developments, but not with that portion of the Villages which is nearby. Thus, argues the plaintiff, even if the visual harmony of the Key West style requires the area under and in front of the houses to be in white gravel, since the entire development is not in white gravel the Association may not reject a change from white gravel to pavement on grounds of visual harmony. At the very least, argues the plaintiff, the deed restrictions *could* be read in the manner she has suggested, leading to an ambiguity which must be resolved in favor of the plaintiff-landowner.

It is, of course, correct that any ambiguity in the deed restrictions must be read in the plaintiff's favor here. *See* Tusi, (Mem. Op.) An ambiguity can only exist where more than one reasonable construction exists, however. The deed restriction in this regard is not ambiguous. With respect to location and configuration of the structure on the lot, the Association is directed to look at harmony with "surrounding residential structures," that is, those structures which would be impacted by a change in the location of a structure on a lot. With respect to design materials and colors, the Association is directed to insure visual harmony with both the "surrounding development," that is, the neighborhood in which the structure is to be located, together with the "Development's overall appearance," that is, the appearance of the Villages as a whole. The alternative

suggested by the plaintiff, that design material and color must be "visually harmonious" with the Villages as a whole or with surrounding *developments* external to the Villages, simply does not make sense in the context of the deed restrictions. The Association, of course, would have no authority over development surrounding but outside the Villages of Clearwater, whether residential or commercial. They would have no reason to try to insure "harmony" with, for instance, a local trailer park, borrow pit, or gated residential community.

Moreover, even if I were considering the Villages of Clearwater as a whole to be the loadstar of the Association's "visual harmony" analysis, it is apparent that the plan of the developer for the Villages was to construct separate areas with different and distinctive architectural styles, that the most distinctive of these is the area of Key West style houses, and that maintaining the visual "harmony" of the Villages as a whole involves maintaining the "melodies" of its constituent parts. Therefore, I find that in evaluating visual harmony the Association and its ARB may, pursuant to the deed restrictions, consider the compatibility of the proposed design's material and color with that of similar houses in its neighborhood.

The plaintiff points out that even if the Association has the authority to consider visual harmony with surrounding structures, it may not enforce the visual harmony standard arbitrarily, nor may it deny an application on purely aesthetic grounds. A deed restriction which conditions the right to make improvements on the permission of a developer or ARB is enforceable, but only so long as the standards for enforcement are

reasonable. The granting of permission to make such improvements must not be withheld unreasonably and the burden is on the ARB to show that its actions are reasonable. Seabreak, 517 A.2d at 268. A refusal by an ARB to permit an improvement on grounds of pure aesthetics, relying on language of a deed restriction, is unenforceable, because such a direction to the ARB is too vague to permit the ARB to make a reasonable and non-arbitrary decision. Seabreak, 517 A.2d at 269. Where, as here, the ARB is directed to ensure that improvements are "visually harmonious" with surrounding development, such a direction is not *per se* unenforceably vague, and a denial of permission based on lack of visual harmony will be enforced by this Court if the decision of the ARB was reasonable. *See* Cannonshire Maintenance Association v. Hafcyz, Del. Ch., No. 14849, Balick, V.C. (Oct. 8, 1996) (Mem. Op) at 2 *citing* Alliegro v. Homeowners of Edgewood Hills Inc., Del. Ch., 122 A.2d 910 (1956). *Compare* Cannonshire (Mem. Op.) at 2 (upholding Association's decision to forbid an outbuilding with a gambrel roof in community of houses with gable roofs, as reasonable and non-arbitrary under covenant requiring construction to be "in harmony with the development") *with* Point Farm Homeowner's Association, Inc. v. Evans, Del. Ch., No. 1505, Hartnett, V.C. (June 28, 1993) (Mem. Op.) (finding decision of architectural review committee denying permission to install vinyl siding as not in harmony with the development to be a decision based purely on aesthetics and therefore unreasonably arbitrary and capricious). I must determine, therefore, whether the ARB has acted reasonably in determining that replacing

the white gravel yard in front of and under the plaintiff's house would be visually disharmonious such as to permit the ARB to withhold permission for the improvement.

The plaintiff argues that the ARB's preference for gravel over concrete is an arbitrary exercise of power based solely on aesthetic considerations. The Association counters that it has not acted arbitrarily but has denied the plaintiff's application to pave the area beneath and in front of her house, as well as other similar applications, because the white stones placed in that area are an integral part of the distinctive Key West look.

The Association points out that it has not allowed any pavement of drives or areas under and in front of Key West style houses, and that all the owners of Key West houses (except plaintiff) maintain the white gravel areas. After looking at the photographs both sides have submitted into evidence, it is clear that there are some landscaping differences among the various Key West houses. However, it is also clear to me that they have maintained a distinctive look that is tied to the pilings, the vertical siding, the empty ground floor, the metal roofs, and the white gravel. It is clear to me that this is meant to convey an "exotic" feel that, for those who enjoy it, is one of the selling points of the community. I have no doubt that an individual who read the deed restrictions and viewed the neighborhood would conclude that the Association had the right to insure that the unique appearance of the community would continue. It does not appear to me to be arbitrary or capricious for the Association to deny homeowners the right to change one of the exterior elements contributing to the Key West look.

2) *Drainage*

The second ground on which the Association defends its denial of permission to the plaintiff to pave the area under and in front of her house is the effect that paving would have on drainage. Since I have already found that the Association has the right to deny the replacement of white gravel with concrete for reasons of visual harmony, strictly speaking I need not address the drainage issue. However, since it seems to me likely that the plaintiff may resubmit an application to put in a pavement and collection system *under* white gravel, in terms of litigants' and judicial economy it seems worthwhile to address the issue briefly.

The parties hotly contest whether various provisions of the deed restrictions give the ARB the ability to deny an application for an improvement where that improvement would have a negative impact on local storm water runoff and drainage. The plaintiff also points out that the association has permitted paved driveways in many areas of the community, but has denied that right to the plaintiff despite the plaintiff's proposed incorporation of a catchment and drainage system utilizing a french drain, a system which was neither suggested nor required for other paving projects in the community. If I assume for purposes of this report, however, that the association has the right to deny an improvement based on local drainage concerns and that, by permitting others to pave, the association has neither waived its rights under the deed restriction nor acted arbitrarily in enforcing those restrictions against the plaintiff, the association would still have to demonstrate that it acted reasonably in denying the plaintiff's pavement application based

on drainage concerns. The association contends that allowing the plaintiff to pave the area under and in front of her house will, as a matter of "common sense," change the drainage characteristics of her property. The fundamental flaw in the Association's position is that it denied the plaintiff's application without any information about whether the proposed paving and drainage system would exacerbate the drainage problems of the community. The Association's own expert testified that he would have to receive the results of percolation and water table tests to be able to give an opinion on this issue. If the Association is going to permit some paved areas and deny others, and do so in a manner that is not arbitrary and capricious, it must have some reasonable basis to make its decision, whether that basis is developed through its own investigation or by requesting information from the homeowner.

EXCEPTIONS TO THE DRAFT REPORT

The plaintiff has taken exception to the draft version of this report on numerous grounds. I have either modified the body of this report to address those exceptions or consider them adequately addressed in the body of this report. This section will address a ground of exception which I feel warrants further review.

The plaintiff points out that allowing the ARB to review construction plans for resulting "visual harmony" with other improvements in the Villages gives the ARB a degree of discretion. He suggests that the case of Point Farm Homeowner's (Mem. Op.) makes such a delegation to the ARB unenforceable. He suggests that to the extent Alliegro, 122 A.2d 910 and Cannonshire (Mem. Op.) are compatible with such a grant of discretion, they should be disregarded in favor of the Point Farm Homeowner's rationale which, according to the plaintiff, is better reasoned.

Point Farm Homeowner's involved a deed restriction which required construction to be approved by an ARB based on "aesthetic" considerations. The plaintiff in Point Farm Homeowner's was constructing a new house on her lot and wished to use vinyl siding. The ARB found vinyl siding inappropriate and attempted to enjoin its use. The Court in Point Farm Homeowner's held that:

> Restrictive covenants that give an architectural review committee authority to review and approve plans are suspect because of their tendency to be arbitrary, capricious, and therefore unreasonable. Seabreak Homeowner's Association, Inc. v. Gresser, Del.Ch. 517 A.2d 263, 268 (1986). However,

> such committees are not invalid *per se*. Alliegro v. Home Owners of Edgewood Hills, Inc., Del.Ch. 122 A.2d 910, 912 (1956). Where the judgment of those with authority to pass on plans is "controlled by fixed standards and made to hinge on whether submitted plans meet precise requirements," the application of the covenant will be upheld because the potential for arbitrary action is slight. Id. *See also* Seabreak, 517 A.2d at 269 (specific restrictions detailing minimum cost, set-back, side spaces are enforceable because they are clear, specific and reasonable).
>
> However, to the extent that architectural review is "based on purely aesthetical considerations," that review is considered arbitrary and capricious and therefore not reasonable. Chambers, (Slip Op.) at 7. Additionally, "where the language used in the restrictive covenant empowering the committee is overly vague, imprecise, or so unclear as to not lend itself to even-handed application, then the grant of authority is normally not enforceable." Seabreak, 517 A.2d at 269.

The plaintiff's position is that the "visual harmony" standard with which the ARB is charged here is insufficiently clear to meet the requirement set out in Point Farm Homeowner's.

Point Farm Homeowner's, in my view, may be read in harmony with Alliegro (in fact, the Point Farm Court relied on Alliegro in its holding set out above). The Point Farm plaintiff had purchased her building lot in specific reliance on the lack of a prohibition in the deed restrictions against vinyl siding, only to have her proposed home rejected by the ARB on the ground that such siding would be inharmonious with "the predominantly forested" neighborhood. The analysis of the Point Farm Homeowner's court starts with the proposition that consideration of deed restrictions involves two

competing values: freedom of contract, including the freedom to contractually bind oneself to the decisions of another, such as an ARB, versus the "ancient legal doctrine that favors the free use of land." Point Farm Homeowner's (Mem. Op.) at 2. Where those two principles conflict, as they do in the delegation of decisions involving the use of property from the owner of a fee to an ARB, this Court has balanced the competing interests by allowing the ARB to impose restrictions so long as they act reasonably. The Court in Point Farm Homeowner's found that the citation by the ARB of "harmony" with "the predominantly forested" community (together with other bases purportedly relied on by the ARB) amounted to no more than the rendering of a purely aesthetic judgement, and was as such neither reasonable nor enforceable. As I read Point Farm Homeowner's, actions by an ARB based on purely objective criteria are permissible, actions based on purely subjective criteria (aesthetics) are not. *See also* Abbott v. FD Builders, Del. Ch., No. 18487-NC, Noble, V.C. (Nov. 29, 2000) (Mem. Op.). Decisions of ARBs involving a mix of objective and subjective criteria (as is the case here) are viewed with suspicion but are enforceable when neither unreasonable or arbitrary. *E.g.* Cannonshire (Mem. Op.); Alliegro, 122 A.2d at 912.

The determination of whether the delegation of authority to the ARB, and the ARB's exercise of that authority, are reasonable is one that necessarily turns on the facts of the situation at hand. Here, the developer constructed a community with three distinct sections, one of large houses on large lots, one of small cottages and one with a section of cottages and a section "Key West" homes with distinct architectural features. One of

these architectural features was white gravel before and under each house. In buying such a house, the plaintiff contractually agreed that the Board had the authority to reject improvements which were not visually harmonious with this development. In agreeing to this contractual provision, the plaintiff should have been aware that changes to the distinct features of her home were subject to prohibition by ARB as visually inharmonious with the development.[7] Therefore, I find that the consistent denial of the ARB to allow the replacement of the white stone areas under and before Key West-style houses with concrete to be neither arbitrary *per se* (as in the Point Farm Homeowner's case) nor unreasonable in context.

In her exceptions, the plaintiff suggests that the public policy of this state requires that homeowners' associations and ARBs be permitted to make decisions on proposed improvements within their jurisdictions only to the extent that those decisions are purely ministerial (as wether or not a setback requirement has been met, or a minimum square footage requirement satisfied). According to the plaintiff, public policy forbids the exercise of any discretion by an ARB, regardless of whether the homeowners have knowingly bound themselves, by contract or deed, to cede such decisions to the ARB, and regardless of whether the decision of the ARB is reasonable. Whatever the public policy merits of such a position, I do not find this to be the current state of our law. *See, e.g.*

[7] In other words, this is not a situation where a reasonable homeowner would be surprised to find that the ARB had jurisdiction, pursuant to the deed restrictions, to allow or disallow the improvement she proposed. *Compare* Seabreak, 517 A.2d at 270-71.

Cannonshire (Mem. Op.); Welshire Civic Assoc., Inc. v. Stiles, Del. Ch., Berger, V.C. (Nov. 19, 1993) (Mem. Op.) at 3.

For the reasons state above, the plaintiff's exceptions are denied.

CONCLUSION

I find that under the deed restrictions, the Association acted reasonably in denying the plaintiff permission to pave the area on her property originally covered in white stone, out of consideration for preserving the visual harmony of the community. Therefore, the plaintiff's injunction request must be denied. When this matter becomes final, parties should submit a consistent form of order.

/s/ *Sam Glasscock, III*
Master in Chancery

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