Before the
Commission on Common Ownership Communities
Montgomery County, Maryland

In the Matter of

Burman & Deborah Berger 12624 Gravenhurst Lane North Potomac, MD 20878, **Complainant,**	x x x x x	
v.	x	**Case No. 359-O**
	x	**March 27, 1998**
Fox Hills North Community Association c/o Lerch, Early & Brewer Suite 380 3 Bethesda Metro Center Bethesda, MD 20814-5367, **Respondent.**	x x x x x x x	

DECISION AND ORDER

The above-captioned 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, 1994, as amended, and the Commission having considered the testimony and evidence of record, it is therefore found, determined, and ordered, as follows:

Background

Burman and Deborah Berger, owners of 12624 Gravenhurst Lane, North Potomac, Maryland (hereinafter Complainants), filed a formal dispute with the Office of Common Ownership Communities on or about April 4, 1997, alleging that the conditions contained in the approval by the Fox Hills North Community Association of their application to build a fence in the rear of their house were not reasonable because it allowed them to enclose only about half of their backyard and the enclosed yard would not be accessible from their deck stairs or basement walk out doors. They alleged that their next door neighbors, Mr. and Mrs. Fishkin, opposed construction of a fence which went in front of the Fishkin's front building line, that Mr. Fishkin had been elected to the Fox Hills North Community Board of Directors during the pendency of the

Berger's fence application and that Mr. Fishkin might have participated in the development of the conditions which were imposed on the approval decision. Mr. and Mrs. Berger listed several other properties in the community which have fences extending in front of the building line of an adjacent property. They requested that the Commission approve a fence design which allows direct access to their fenced yard from the basement and deck.

On behalf of the Fox Hills North Community Association Board of Directors (hereinafter Board or Respondent), counsel opined that the action of the Board in conditioning the approval of the Berger's fence application had been proper and indicated that the appropriate legal standard for reviewing this action is found in Black v. Fox Hills North Community Association, Inc., 90 Md. App. 75, cert. den., 326 Md. 177 (1992).

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), the Commission voted that it was a matter within the Commission's jurisdiction, and a hearing was scheduled.

Findings of Fact

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

1. Deborah and Burman Berger are the owners of 12624 Gravenhurst Lane, North Potomac, which is located in the area included in the Fox Hills North Community Association.

2. There are approximately 358 dwelling units in the Fox Hills North Community Association of which approximately 299 are single family detached houses.

3. A "Declaration of Covenants and Restrictions" for the Fox Hills North Community Association, Inc., was filed with the Montgomery County Clerk's Office on December 22, 1983. It has been amended but not in any particular of relevance to this matter.

4. The Declaration includes at Article VII conditions and restrictions on alterations and modifications to structures and lots within the community, including a general requirement that all external modifications be approved by an Architectural and Environmental Control Committee (A.E.C.C.) designated by the Board. In addition, at Section 9, this Article includes, in relevant part, the following language directly related to "Fences":

> Any fence constructed upon the Property shall not extend beyond the front building line of the dwelling on the lot upon which any such fence is erected or the front building line of the dwellings on all immediately adjacent lots.... The erection of all fences shall be subject to the provisions of Article VII of this Declaration.

5. Mr. and Mrs. Berger submitted an application to the Fox Hills North Community Association A.E.C.C. in August 1996 to build a fence around their back yard. The rear of the Berger house faces a side of the Fishkin house. The front of the Fishkin house is at approximately the mid-point of the rear of the Berger house. The A.E.C.C. approved the application conditioned on the fence not extending along the rear of the Berger's lot beyond the front of the Fishkin's house. The Bergers appealed to the Respondent Board which substantially confirmed the A.E.C.C. decision.

6. A sketch of the Bergers' lot on which is indicated the Bergers' house, including screen room and deck with stairs, and the location of the Fishkins' house and garage was used for all of the proposed fence line drawings submitted in this case. A line of circles has been drawn on this sketch between the two houses running along just inside of most of the Bergers' rear lot line, and described in the legend to be ten-year old mature trees. There was testimony indicating that this sketch was drawn by the Fishkins. The photographs in the record indicate that these trees are evergreens. The Bergers submitted two versions with their complaint. One, described on its face as that approved by the Board, shows the fence running along the Bergers' rear lot line outside the trees from the corner of the lot to the point where an imaginary continuation of the front building line of the Fishkin house (not including the garage front extension) would intersect and then cutting across the Berger's back yard to their house at the screen room. The second, described on its face as "Berger proposal", shows the fence running outside the tree line along the Berger's rear property line to the point where the Fishkin's front building line would intersect and then jogging inside the tree line and continuing just inside the tree line to the Berger's side building line and turning to the rear side corner of their house.

7. The fence line approved by the A.E.C.C. in the October 10, 1996 letter written on behalf of the Committee by the Community's management company, and indicated on a third version of the sketch described above, is within the tree line at the rear of the Berger's property and extends along that line to the front building line of the Fishkin's house (not including the front extension of the garage). Testimony at the hearing indicated that this was the

approved layout but that it was not a matter of importance to the A.E.C.C. whether the fence was inside or outside of the tree line in this configuration.

8. Testimony from the company presently serving Respondent as their management company was that when this company was first hired, in the summer of 1990, taking responsibility from the community, which had previously managed itself, they received about one and a half archive-type boxes of materials containing few community records and no architectural records.

9. A letter from Victor H. Agresti, signing as Chairman, Architectural and Environmental Control Committee, on Fox Hills North Community Association, Inc., dated December 28, 1988, addressed to Michael W. Kuhn, President, Fox Hills North Community Association was moved into evidence at the hearing by the Respondent without objection by Complainant. There was no testimony available regarding the circumstances under which the letter had been written. The contents of the letter indicate that the Respondent Board had asked the A.E.C.C. to review compliance within the community with the fence covenant at issue in this case. In this letter, Mr. Agresti did not include a discussion of the purpose of or philosophy behind this covenant. However, he indicated that the A.E.C.C. at that time interpreted the front building line to be the line of building most forward on the lot, apparently frequently the front garage line; he indicated that the A.E.C.C. was interpreting the covenant in accordance with a plain English meaning in cases of a number of different design layouts; and said that the A.E.C.C. would like to develop a more lenient interpretation of the covenant, which he did not describe, with the concurrence of the Board. Mr. Agresti attached a discussion of 13 houses which had fences which the A.E.C.C. considered to be non-conforming including a couple that the community developer, who also authored the covenant, had approved. There was no testimony regarding further consideration of this matter or any action by the community.

10. Copies of a letter sent to five homeowners in December 1997 by the community's management agent in an attempt to reconstruct history regarding non-conforming fences and duplicates of four of them with handwritten notations by the management agent reflecting the result of telephone responses from the homeowners were introduced at the hearing.

11. William Mayer, Chairman of the A.E.C.C. since approximately 1990 and member for one year previously, testified that this is the only application he can remember for a fence to which Article VII, Section 9 applies in his tenure in that

position. He also testified that he has lived in the Community for almost 11 years, and that he was unaware of other fences which violate the provisions of this covenant. He says he doesn't know what the intention of including this covenant was other than to avoid allowing full enclosure of a property. He was previously unaware of the existence of the 1988 Agresti letter. He interprets the front building line to be the front of the main part of the structure rather than the most forward building line and does not know on what Mr. Agresti's interpretation was based. He believes that the A.E.C.C. responsibility is to apply the covenants as written.

12. The testimony of both the management agent and the Board President was that Mr. Fishkin did not participate in the Board action on the Bergers' fence application, and there was no credible evidence to the contrary.

Conclusions of Law

Counsel for Respondent argued that Black v. Fox Hills North Community Association, supra, a case arising in this community regarding the same covenant at issue here, but with different facts, set forth the law which controls in this case. He also argued that the decision in Ryan v. Montgomery Village Foundation, Inc., No. 1907 (Md. Ct. Spec. App. September 28, 1995), was not applicable and as an unreported decision should be given less weight. He suggested that in the alternative, if it was considered applicable, it established a reasonableness standard which the action of the community met.

The Maryland Court of Special Appeals in Ryan reviewed a decision from this Commission regarding the application of a covenant in which the business judgment rule set forth in Black had been applied and indicated that the business judgment rule was appropriate, inter alia, to a decision by the community to enforce a covenant, but not to disapproval of an application under a covenant. The Court indicated instead that with regard to denials under covenants the test of reasonableness set forth in Kirkley v. Seipelt, 212 Md. 127 (1957) was the appropriate standard both for review of the validity of the covenant and in review of the application of the covenant to the facts in a given case. Reported or not, Ryan is a decision of the Court of Special Appeals handed down on the Appeal of a decision by this Commission, explaining the application of the law in Black, and directly relevant to the facts in this case.

The Maryland Court of Appeals in the Kirkley decision reviewed a number of covenant cases and cited with approval a general rule

from Jones v. Northwest Real Estate, Co., 149 Md. 271 (1925), that where the intention of the parties is clear, and the restrictions within reasonable bounds, they will be upheld. While the language of this covenant is clear, it has not been applied in accordance with the clear meaning in the past. The purpose or goal to be achieved by this clause of the covenant is not clear. In this case, literal application of this provision would significantly reduce the use by these homeowners of their back yard. However, it is not necessary to this decision to reach the question of whether the covenant would withstand the established test.

The language from the Kirkley decision quoted by the Court of Special Appeals in Ryan as the standard for review of a denial under a covenant is:

> any refusal to approve the external design...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.

212 Md. at 133.

Ironically, going back to the facts in the Black case, even then the community seems either to have been unclear about the meaning of this covenant or to have waived or abandoned its application in instances in which the facts are similar to those in the Bergers' situation. Owners in the Fox Hills community had applied to and been granted approval by the A.E.C.C. for permission to construct a split-rail fence along the sides and rear of their property which extended forward of the front building line of an immediately adjacent property. Another neighbor sued the fence-building homeowner and included the community as a defendant in an effort to force the literal enforcement of the same covenant as at issue in this case. It was with regard to the action attempting to require the community to enforce the covenant that the Court of Special Appeals decided that the business judgment rule applied.

As additional indication of the historical lack of clarity or consistency in the interpretation of the language of this covenant by Fox Hills, the community filed a cross-appeal in the Court of Special Appeals in Black, which was not allowed but which shows the position of the community at that time, contending that the trial level summary judgment supporting strict and literal construction of this covenant would affect prior approvals of similar fences and cast doubt on the ability of the community to approve such applications in the future.

At about the same time as the application, approval, fence construction, and reaction in the Black case were taking place, the research for the Agresti letter was being conducted and it was being written and transmitted to the President of the Board. No evidence of further action by the community on this subject has been submitted for this record until the letters sent in December 1997 in order to try to reconstruct a community record regarding the application of this covenant.

Complainant submitted a copy of a letter, by an attorney who previously had represented Fox Hills North, written to the Board in January 1989 regarding this covenant. It was admitted into evidence over objection of the Respondent. This opinion of counsel provides further evidence of the complexity and confusion regarding the interpretation of this covenant in this community. In the absence of testimony that counsel had some knowledge or experience that would establish his expertise on the interpretation of this covenant, or that the community relied on this interpretation, the contents of this letter are not relevant testimony in this case.

Respondent submitted a copy of an order, rendered in response to a summary judgment motion, entered on December 19, 1990, by Judge John Mitchell, in Black v. Kupersmith, the trial level case which was decided on appeal in Black v. Fox Hills North Community Association, supra. This also was not relied on in deliberating a conclusion for this case because it appears to be a declaratory conclusion based on the plain meaning of the covenant without consideration of the law under which the covenant is to be applied.

From early in its existence this community has not applied the restriction against constructing fences forward of the front building line of dwellings on lots immediately adjacent to that on which the fence is built with any consistency. In fact, the record here does not include evidence of a single instance, to date, in which this covenant has been applied or enforced in a situation with facts similar to this one. However, clearly there are a number of fences in the community that do not conform with this covenant. The Agresti letter indicates complexity in application of this covenant and a desire for the A.E.C.C. to have the ability to create a more lenient interpretation for this covenant than the literal one. It also records a number of nonconforming fences in existence at that time.

Complainants have introduced photographs of fences in the community today which do not conform with this covenant. Respondent seeks to excuse its inconsistency in the application and enforcement of the covenant. First, Respondent contends that some nonconforming fences are more than ten years old and that an effort

to enforce this Covenant at this late date in those instances is unlikely to be successful. Second, Respondent argues that some of the fences are only minimally nonconforming. However, the record indicates that after a number of years of inconsistent application and enforcement of this covenant, the community is now seeking to enforce it literally and strictly. There is no explanation of how the literal and strict application of this covenant benefits the community or adds to a general plan of development. In light of the prior inconsistent application of the covenant and the absence of an explanation of community design or benefit, it is unreasonable to treat the Bergers differently from other similarly situated homeowners in the community.

In the Bergers situation, literal application of this prohibition would place a significant limitation on their right to enjoy their property. Additionally, the fence line proposed by the Bergers abuts a line of evergreen trees making it relatively unobtrusive. The conditions placed on the approval of the Bergers fence application are not reasonable. The conditions placed upon approval of the Bergers' fence application are tantamount to a refusal that is whimsical or captious and not reasonable under the circumstances presented here.

ORDER

In view of the foregoing and based on the evidence of record, it is hereby ORDERED that:

The decision of Respondent to condition approval of the Bergers' fence application based on Article VII, Section 9 of the Fox Hills Covenants so that the fence would not extend along the Bergers' rear lot line forward of the Fishkins' house front building line is reversed.

The foregoing was concurred in by panel members Price, Wilson and Stevens.

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

Dinah Stevens, Panel Chairwoman
Commission on Common Ownership Communities