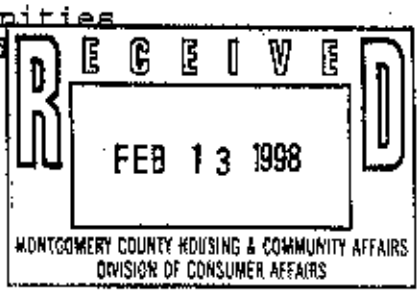
Before the
Commission on Common Ownership Communities
for Montgomery County, Maryland



In the Matter of MacArthur Park Homeowners Association	:	
Complainant,	:	
vs.	:	Case No. 362-G Issue Date: February 12, 1998
Mikki Steinhardt 6444 Wishbone Terrace Cabin John, Maryland 20818	:	
Respondent.	:	

Decision and Order

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing, on November 19, 1997, 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 duly appointed hearing Panel having considered the testimony and evidence of record, finds, determines and orders as follows:

On April 18, 1997, MacArthur Park Homeowners Association, by counsel, (hereinafter the "Association") filed a formal dispute with the Office of Common Ownership Communities. The Association alleged that Mikki Steinhardt, owner of 6444 Wishbone Terrace (hereinafter the "Respondent"):

> "...constructed a basketball court in her back yard in violation of the Declaration of Covenants and Restrictions and Procedures and Guidelines. The Court consists of a hoop with a green concrete slab."

The Association asked that the Commission order the Respondent to "...remove the green cement slab and basketball hoop (and) clean up the common areas where she has placed debris." The Commission received no evidence from either party concerning any "debris" on the common area and therefore the sole issues to be considered by the Commission is the propriety of the erection of the basketball hoop and court.

The Respondent answered that the basketball hoop was not a "structure" and therefore did not require the prior approval of

the Association as mandated by the restrictive covenants. Furthermore, that the basketball hoop and court were similar to other improvements that had been allowed or ignored by the Association without regard to the submission of applications.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities and the Commission voted that it was a matter within the Commission's jurisdiction and a hearing before the Panel was held November 19, 1997.

Findings of Fact

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

1. The Respondent is the owner of the property at 6444 Wishbone Terrace, Cabin John, Maryland 20818 ("property") and by virtue of such ownership is automatically a member of the MacArthur Park Homeowners Association, a non-stock Maryland corporation ("Association") consisting of forty-five townhouse homes.

2. A Declaration of Covenants and Restrictions, (hereinafter "Declaration") was recorded among the land records of Montgomery County binding all owners within the Association, including the Respondent, to the rights and obligations set forth in the Declaration.

3. Article XI of the Declaration provides:

> Architectural and Environmental Standards
>
> Except for the original construction and development upon the property by, for or under contract with the Declarant, and except for any improvements to any Lot or to the Common Areas accomplished by the Declarant concurrently with said construction and development, and except for purposes for proper maintenance and repair, no building, fence, wall or other improvements or structure shall be commenced, placed, moved, altered or maintained upon the property subject to the terms hereof, nor shall any exterior addition to or change (including any change of color) or other alteration thereupon be made until the complete plans and specifications showing the location, nature, shape, height, material, color, type of construction and any other proposed form of change shall have been submitted to and approved in writing as to safety, harmony of external design, color and location in relation to surrounding structures and topography by the Board of Directors.

Subject to the same limitations as hereinabove provided, it shall be prohibited to install, erect, attach, apply, hinge, screw, nail, build, alter, remove or construct any lighting, shades, screens, awnings, patio covers, fences, walls, slabs, sidewalks, curbs, gutters, patios, balcony's, porches, driveways, or to make any change or otherwise alter (including any alteration in color) in any manner whatsoever the exterior of any improvements constructed upon any lot or upon any other Common Areas, until the complete plans and specifications, showing the location, nature, shape, height, material, color, type of construction and any other proposed form of change shall have been submitted to and approved in writing as to safety, harmony of external design, color and location in relation to surrounding structures and topography by the Board of Directors.

4. Article XII (a) of the Declaration provides that:

"No noxious or offensive trade or activity shall be carried on upon any lot or within any dwelling, nor shall anything be done therein or thereon, which may be or become an annoyance or nuisance to the neighborhood or other members."

5. The Association, in approximately 1984, adopted rules governing the architectural change approval process entitled Procedures and Guidelines Architectural Control Committee (hereinafter "Guidelines").

6. In June or July of 1996, the Respondent had a concrete patio ("patio") installed at the rear of her lot and also attached a basketball backboard and hoop ("backboard") to the deck at the rear of her lot. The Respondent did not submit a written application to the Association for the backboard or patio, either through the Board of Directors ("Board") or the Architectural Control Committee ("ACC") of the Association, prior to installing either improvement. The Respondent testified at the hearing that she had submitted an application for the backboard and patio shortly after receiving a letter from the Board of Directors dated August 2, 1996, but there was no mention of this application in the record and no copy was submitted by the Respondent at the hearing.

7. By letter dated August 2, 1996, the Association, through its President, notified the Respondent of the need to submit an application for the concrete patio and that while "...we do not expect there to be a problem with your plans, as the Board of Directors, we are required to review and approve those plans per the process established in the DOC and By-laws."

8. According to the minutes of the Board of Directors'

meeting held on October 25, 1996, the Board of Directors of the Association voted against the "construction" of the basketball court and backboard.

9. By letter dated January 29, 1997, the Association, through its managing agent Samuel Faller, notified the Respondent that the Board had decided that the structure "...is not consistent with the Association documents and standards." Further, that the Respondent could reply by either "...removing the concrete slab, and associated debris located in the woods at the rear of your lot, or *(by sending)* a letter outlining your intentions."

10. The Respondent has refused to remove the backboard or patio as requested by the Association.

11. The Association admitted in its testimony that enforcement of the Association restrictive covenants has been inconsistent and attributed much of that inconsistent enforcement to turnover in the professional management of the community as well as turnover on the Board.

12. The Association also admits that another backboard/hoop had previously been installed by another owner, Lesley Trembath, at the rear of her home. Ms. Trembath (who happens to be the current Architectural Committee Chair for the Association) testified that she voluntarily removed the unapproved backboard/hoop shortly before this action was filed. She also testified that her neighbor thanked her for removing the backboard/hoop due to the noise generated by the use of the backboard/hoop.

13. The Association submitted photographs of the rear yards of several different lots in the Association, including that of the Respondent, and such pictures showed various improvements that have been erected in those areas by the owners.

14. Sondra Baxt, one of the neighbors immediately adjacent to the Respondent, testified that she was disturbed by the basketball play and that it interfered with her enjoyment of her premises by the noise, vibration and balls and other play equipment that would enter her yard.

15. Another neighbor, Jane Goodridge at 6440 Wishbone Terrace, wrote the Board in a letter dated, August 27, 1996, objecting to the installation of the patio.

Conclusions of Law and Decision

The issue before us is whether the provisions of Article XI

and Article XII(a) of the Declaration and the Guidelines should be enforced against the Respondent.

The facts clearly indicate that the Respondent freely took title to her property and in so doing agreed to be subject to the restrictive covenants contained in the Declaration.

The provisions of Article XI of the Declaration clearly specify that changes that alter the exterior appearance of the lot require pre-approval by the Association. We find that the patio and backboard are the kind of changes that would require pre-approval by the Association under Article XI. We do not agree with the Respondent that the patio and backboard fall outside the broad scope of Article XI and find that both the patio and backboard are improvements or structures within the meaning of the covenants and the installation of the same altered the exterior appearance of the Respondent's lot.

Respondent contends that even if installation of the backboard and patio required pre-approval by the Association, she was given verbal pre-approval by then Association President, Peter King. The Respondent claims that Mr. King showed her Ms. Trembath's property as an example of an acceptable basketball hoop and court and that she relied upon that "example" prior to authorizing the installation of the patio and backboard. While the panel was persuaded that Mr. King may have discussed the patio and backboard with the Respondent, Mr. King was not called to testify and his correspondence to the Respondent, dated August 2, 1996, contradicts the assertion that he had given the Respondent approval. In any event, the provisions of Article XI require "written" application and approval and we believe the requirement for written approval was intended, in large part, to avoid just this type of dispute concerning the existence and breadth of "oral" approvals. Thus, even if the Respondent had presented more solid evidence concerning Mr. King's statements, her reliance upon those statements would not have been justified given the clear requirements of the Declaration.

The Respondent also contends that the Association has an obligation to fairly and uniformly enforce the terms of the Declaration and Guidelines and that, because of its failure to do so, the Association should be estopped from enforcing the Guidelines and the pre-approval requirements of the Declaration against her.

The Court of Special Appeals in Kirkley v. Seipelt 212 Md. 127, 128 A.2d 430 (1957), considered a challenge to the enforcement of a design review covenant similar to the covenant at issue here. In *Kirkley*, the defendant-owner wished to install metal awnings at the front of her home. The Association sued the

owner to have the awnings removed and the Court agreed with the Association's position and entered an order enjoining the placement of the awnings.

In *Kirkley*, the Court stated that it would enforce a denial under a pre-approval covenant where the decision "...bears some relation to the other buildings or the general plan of the development...". Further, the decision must otherwise be a "...reasonable determination made in good faith, and not high-handed, whimsical or captious in manner". *Kirkley* at 434.

We do find that the denial of permission to install a backboard to the rear of the Respondent's deck has a bearing on the other buildings and general plan of development and is consistent with the general scheme of the community in that no similar structures exist in the community.

As to the Respondent's claim that the prior presence of the Ms. Trembath's basketball backboard estopped the Association from denying her the right to use the backboard, the decision in *Kirkley* is also instructive. The defendant in *Kirkley* asked the court to deny enforcement of the covenant based on the fact that metal awnings of the type she proposed were installed on the front of two other homes in the community. The Court held that the existence of these other awnings "...does not constitute an abandonment of the restrictive covenant or a waiver thereof." While admitting that acquiescence in the actions of the other owners might bear on the question of whether the Association had abandoned the right to enforce the covenant, in order to constitute a defense an aggrieved owner would have to show estoppel. In other words, that the owner would have to show that he or she relied upon the abandonment of the restriction or that the Association somehow induced the owner to breach the covenant.

As in *Kirkley*, we find that the Respondent has not abandoned the covenant or that the earlier placement of the other backboard had amounted to a waiver of the right to enforce the covenant against the Respondent. Establishing a "waiver" requires very clear proof that the scheme of the covenants has essentially been abandoned as a result of the waiver. *Kirkley* at 435. This is a very high standard that the Respondent did not establish. In addition, and as stated above, we do not find sufficient evidence that Respondent relied upon the action or inaction of the Association in deciding to install the backboard.

Finally, we were not persuaded that the decision of the Association with respect to the backboard was unreasonable, made in bad faith, high-handed, whimsical or captious in manner. The only evidence provided in this regard by the Respondent was the prior existence of Ms. Trembath's backboard and we do not find

that this alone invalidates the decision (especially where such backboard no longer existed at the time of this decision).

As to the patio, the Association President Susan Stewart testified that the basis of their objection to the patio was the size, color and drainage/run-off concerns.

As to the drainage concerns, the Association President testified that the Board had no evidence, expert or otherwise, that there were any actual drainage or water run-off problems associated with the patio. It appears that this was a "concern" that was originally raised but never substantiated.

As to the size issue, no size standards are included in the Guidelines and no evidence concerning acceptable patio sizes was received by the panel. Various photographs were submitted of other backyard improvements, patios and stone walkways. These photographs, if anything, appeared to support the Respondent's view that her patio is of no greater impact than, for instance, a rear-yard pool or garden taking up nearly the entire rear portion of the lots.

It appears that the use of the patio, as opposed to the size, was the principal concern of the Board: the letters from the Board to the Respondent consistently refer to the patio and backboard collectively as a "basketball court" thus inferring that the use and not the size of the patio was of concern. In addition:

- the Board minutes of August 29, 1996 state that, "The 'use' of the construction is really the problem. Board members felt that the choices narrowed down to either prohibiting basketball completely or restricting time or use of the court";

- the October 23, 1996 Board meeting minutes state that, "More at issue, board members and homeowners said, is the nuisance/noise problem a hoop and concrete court may create, and whether the Board would have approved such a construction if it had known in advance". In addition, it was also noted in the October 23, 1996 Board minutes (at which time the Board voted on whether to approve the hoop and patio as they existed) that "...all of the Board members have not even seen the construction", adding further support that the decision was based on the "use" of the improvement instead of the Article XI standards of "...harmony of external design, color and location in relation to surrounding structures and topography..." since the latter criteria would appear to contemplate a decision based on visual factors.

These facts lead us to the conclusion that there was little evidence to support the Board's position that the patio was inconsistent with the "standards" of the Association because of

its size and that this decision was unreasonable, arbitrary and an afterthought.

As to the color issue, we do note that the Guidelines, page 10, provide that materials for decks or patios "...should be of *natural weathering* quality such as brick, wood, stone *and concrete*." The Respondent's patio is concrete but it was painted green. Given that there was no evidence that there were other "painted" patios in the community and because of the clear language of the Guidelines, it does not appear that enforcement of a restriction regarding the color of the patio would be selective or arbitrary and such a decision should stand.

Finally, we also recognize the relevance to this case of the provisions of Article XII (a) of the Declaration which prohibit "noxious or offensive" activity and activity that becomes an "annoyance or nuisance to the neighborhood or other members."

We are persuaded that the Respondent's use of rear patio as a basketball court constitutes an "annoyance or nuisance" contemplated by Article XII. The testimony of Ms. Baxt supports this conclusion. Likewise, Lesley Trembath testified that when she voluntarily removed the backboard from her lot, a neighbor thanked her and mentioned the unwelcome noise that was involved with basketball play. However, unlike the situation with the Respondent's backboard, no evidence was submitted indicating that the Board had received any complaints about the use of Ms. Trembath's hoop or that such use had constituted a nuisance or annoyance requiring Association action.

While we acknowledge that Article XII requires subjective conclusions concerning the point at which certain activity reaches the level an actionable "nuisance" or "annoyance" under the Declaration, we can appreciate that the use of patios for basketball could constitute a nuisance (eg., an unreasonable interference with the use and enjoyment of one person's property due to the use by another of his or her property) or annoyance. While certain activity in a single family community of detached homes may be perfectly acceptable in that community, the same activity might be unacceptable in a community of attached townhouses. Townhomes share party walls and are situated in close proximity to one another and the rights of owner's are closely and necessarily intertwined with their neighbors. The reality of neighbors living in such close proximity to each other also persuades the panel that the basketball play in these rear yard areas (especially with backboards connected to the townhomes) was, and is, an improper use that could constitute a nuisance or annoyance.

Finally, the Association requested an award of its attorney

fees in filing this Complaint. However, even if the panel was inclined to such an award, no evidence of the amount of such fees was submitted and no authority for such fees was found in the governing documents of the Association. Therefore, no award of such fees will be considered.

Order

In view of the foregoing, and based on the evidence of record, it is, on this 12th day of February, 1998, hereby Ordered by the Commission Panel that:

1. The Respondent, within 30 days of the date of this Order, permanently remove the basketball backboard from the rear of her home and have the paint stripped from the patio to bring the patio into a "natural" state.

The foregoing was concurred in by panel members Philbin, Glick and Price.

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.

Peter S. Philbin, Panel Chair
Commission on Common
Ownership Communities