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

**In the matter of**

| | | |
|---|---|---|
| Raymond Hernandez | | x |
| 20009 Mattingly Terrace | x | |
| Gaithersburg, Maryland 20879 | x | |
| **Complainant** | | x |
| | x | |
| v. | x | **Case No. 37-11** |
| | x | July 17, 2012 |
| | x | |
| Hadley Farms Community Association, Inc. | | x |
| 18401 Woodfield Road, Suite H | x | |
| Gaithersburg, Maryland 20870 | x | |
| **Respondent** | x | |

## DECISION AND ORDER

The above-captioned case came before the Commission on Common Ownership Communities for Montgomery County ("CCOC"). Pursuant to Chapter 10B of the Montgomery County Code, 2004, as amended, and the duly authorized Hearing Panel ("the Panel") having considered the testimony and evidence of record, finds, determines, and orders as follows:

## BACKGROUND

Raymond Hernandez, ("Hernandez" or "the Complainant") is the owner of 20009 Mattingly Terrace, Gaithersburg, Maryland 20879 ("the Property"). The Property is subject to certain governing documents, including a Declaration of Covenants, Conditions and Restrictions ("the Declaration") and Bylaws, recorded among the land records of Montgomery County on or about September 17, 1985 in liber 6872 at folio 213 *et seq*. The Declaration established the Hadley Farms Community Association ("the Association" or "Respondent") and provided easements, covenants, conditions, and restrictions governing the subject property.

Hernandez filed a Complaint ("the Complaint") with the CCOC against the Association on July 27, 2011. The Complaint alleged that when Hernandez purchased the Property in December, 2006, its improvements included a fish pond with waterfall, a fence, individual stones on the ground and a bird bath in the backyard. These improvements were allegedly made approximately 13 years before Hernandez's purchase. During his ownership the Complainant made additional improvements to his backyard, including installing playground equipment (all of the improvements collectively "the Improvements"). The Complainant further contended that, in November, 2010, the

Association informed Hernandez that the Improvements were encroachments on the Association's common area, violated the Association's "regulations" and that Hernandez had to remove the Improvements at his cost. Hernandez responded to the Association's claims by pointing out that the Association had conducted inspections of the Property prior to his purchase and had not noted the encroachments. Hernandez acknowledged that a "possible fence and patio encroachment" had been detected upon his purchase but this information had not been disclosed to him and the sale had gone forward without mention of this information. Hernandez argued that requiring him to remove the improvements, after 13 years of Association inaction, would be a hardship. He stated that he was not opposed to having the structures removed but that requiring him to be responsible for the labor and costs of same would be "unjust and burdensome."

Respondent asserted that it had learned of the Complainant's encroachments by an email from one of Complainant's neighbors in 2009. This neighbor voiced concerns about construction debris upon the Property, which led to an inspection of the Property and a subsequent survey by Witmer Associates, LLC ("the Witmer Survey"), which confirmed the encroachments. The Association advised that Hernandez had been given notice of this violation and instructed to remove the encroaching items. A hearing was held by the Association's Board of Directors ("the Board") which ruled that the Improvements had to be removed. That decision prompted Hernandez's Complaint to the CCOC.

## DISCUSSION

The Witmer Survey was admitted into evidence and clearly established the boundariesof the Complainant's property. Further, it reflected that the Improvements are located outside of the Property and on the Association's common area. Jamie Hernandez, a co-owner of the Property and the Complainant's son, testified that it was his understanding that the fence at the rear of the Property determined the Property's boundary line. Theunderstanding was proven incorrect, as the fence is located in the common area. Indeed, there was no credible evidence introduced at the hearing to dispute the fact that the Improvements were located on the common area. Article I, Section 4 of the Declaration defines the Common Area as follows:

> "Common Area" shall mean all real property owned by the Association for the common use and enjoyment of the owners. The Common Area to be owned by the Association at the time of the conveyance of the first Lot is described more particularly on Schedule B attached hereto and incorporated herein by reference.

Section K of the Association's Rules and Enforcement Policy prohibits personal property on the Common Areas. That section states:

> Common areas are provided for the use and enjoyment of HFCA members. Destruction or vandalism of the common property, including but not

limited to, trees, shrubs, flowers, grass, playground equipment. **Storage of personal property on common grounds is also prohibited.** [Emphasis added]

Furthermore, Article V of the Declaration states that:

> No building, fence, wall, or other structure shall be commenced, erected, or maintained upon the Properties (defined in the Declaration to include all lots and common areas) until specifications… shall have been submitted to and approved in writing…by the Board of Directors of the Association, or by an architectural committee…

There was no evidence that the Board or any Association architectural committee ever approved the Improvements.

The Complainant testified that he removed the Improvements that he installed on the common area but did not remove the items that were installed prior to the date he took title. However, as the Association pointed out at the hearing, the governing documents forbid a member from maintaining personal property on common ground.

The Complainant argued that the Association erred in allowing the Improvements and not taking action to advise of or remove them prior to the Association's above described notice. Unfortunately, for the Complainant, he took title subject to the Declaration, which governs his obligations.

The Panel believed that the Complainant implicitly argued that the Association waived or abandoned its right to require removal of the encroachments. However, Article X, section 1 of the Declaration forbids the Association from effectuating such a waiver or abandonment, stating:

> Failure by the Association or by any Owner or by any mortgagee of any Lot to enforce any covenant or restriction herein contained or any provision of the Bylaws or Articles of Incorporation of the Association shall in no event be deemed a waiver of the right to do so thereafter.

Further, the evidence introduced at the hearing did not "clearly or equivocally" establish either waiver or abandonment. There was no document establishing that the Association knew of the encroachments prior to 2009, and the Respondent's witness credibly explained why the Association did not see the encroachments. The Complainant testified that Board members "got together" on the encroaching patio prior to title vesting in the Complainant, but this testimony rested upon hearsay, was unattributed to any declarant, and not considered credible by this Panel.

The Complainant testified that he would not have bought the house except for the landscaped and improved back yard. However, the Complainant, as well as his son, Jaime Hernandez, acknowledged receiving a survey from Haller-Blanchard and Associates, dated December 18, 2006, at closing that reflected a possible fence and

patio encroachment and that the Improvements were outside of the Property's lot lines. Jamie Hernandez stated that the survey was not explained at closing, but the tender of this survey put the Complainant on notice of the issue and obligated him to make further inquiry.

## FINDINGS OF FACT

1. Raymond Hernandez and Jaime Hernandez purchased the property improved by 20009 Mattingly Terrace, Gaithersburg, Maryland 20879 on or about December 21, 2006, and are currently the owners of the Property.

2. At closing the Complainant was provided with a survey reflecting the Property's lot lines and that the Improvements might be outside of the Property's lot lines and located on the common area.

3. The Complainant took title subject to the Association's Declaration and Bylaws, and is bound by these governing documents. The Declaration forbids the storage of personal property on common grounds.

4. The Association did not learn that the Improvements were outside of the Property's lot lines until approximately 2009, which led to an inspection of the Property and a subsequent survey. This survey confirmed the encroachments.

5. In accordance with Article X of the Declaration, and the testimony introduced at trial, the Association did not "clearly or equivocally" waive or abandon its right to enforce the removal of the encroachments.

## CONCLUSIONS OF LAW

Whether covenants have been abandoned by an Association is a question of fact and abandonment must be established by "evidence clear and unequivocal of acts of a decisive nature." The Panel finds that such facts have not been established. *See, Lindner v. Woytowitz*, 37 Md. App., 378 A.2d 212 (1977).

A trespass may be committed by the continued presence on the land of a structure, chattel or other thing, which the actor or his predecessor in legal interest has placed on the land. See Restatement (Second) of Torts, section 160. As such, the Complainant's failure to remove the Improvements from the condominium Association's common area constitutes a continuing trespass.

There is clearly a basis for the Association enforcing the boundary lines, and there has been no "change in the neighborhood" to defeat the purpose of the applicable sections of the Declaration. *See, Kirkley v. Seipelt*, 212 Md 127, 128 A.2d 430 (1957).

## CONCLUSION and ORDER

In light of the foregoing, the Panel determines that the Complainant is in violation of the Association's Declaration, which violation has not been waived or abandoned. Complainant must remove the Improvements that it has not previously removed.

The Panel has given thought as to who should bear the expense of the removal of the Improvements. The Respondent's Handbook provides that it will conduct inspections on an annual basis in early spring. Respondent acknowledged that this was not done for a period of time. Further, when the inspections were done, the observations made only from the street, and not from the common area or back of the Property, thus limiting the Association's ability to see the encroachments. The Panel believes that the encroachments would probably have been ascertained and removed prior to the Complainant's purchase if the Association's required inspections had been timely and comprehensively performed. Even if the Association had informed the Complainant of the encroachments shortly after his purchase then the Complainant might have avoided investing time, energy, and money constructing and/or maintaining the Improvements. Further, Complainant might have had the opportunity to seek timely redress against his seller. Therefore, the Panel believes that the cost of the removal should be borne by the Association.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is this 17th day of July, 2012:

**ORDERED**, that the Complainant's request for relief is DENIED; and it is further

**ORDERED** that the Respondent may, at its cost and expense, remove such of the Improvements as remain on the common area, as designated by the Witmer Survey, provided Complainant is given no less than seven (7) days written notice of the date that Respondent intends to effectuate this removal.

Panel members Weinstein and Brandes concur in the above findings and Order.

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

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Mitchell I. Alkon, Panel Chairman
Commission on Common
Ownership Communities