

Question MPT-2 – July 2021 – Selected Answer 1

FAWCETT & BRIX LLP
Attorneys at Law

TO: Canyon Gate Property Owners Association

DATE: July 27, 2021

RE: The Architectural Control Committee's denial of the Stewarts' application

Dear Ms. Mendoza,

This letter is intended to give an opinion on the actions the Canyon Gate Property Owners Association (the Board) should take with respect to the ACC's denial of the Stewarts' application for a structure and fence. Further, it provides an opinion on the likely outcome if the Board were to affirm the denial and the Stewarts take the case to court.

STRUCTURE

The Board should not uphold the ACC's denial of the Stewarts' application for a structure.

The question is whether the Canyon Gate Property Owners Association (the Board) should uphold the Architectural Control Committee's (ACC) denial of the Stewarts' application for a structure. The Board should not uphold the ACC's denial because the ACC likely mis-characterized the structure.

A restrictive covenant is "any condition or restriction that runs with the land and limits permissible use of the land." Franklin Property Code (Code) § 401. A restrictive covenant may not be construed to prevent or restrict the use of property as a family home. Code § 403. A restrictive covenant is a contract, and "a court must ascertain the drafter's intent from the instrument's language, giving a restrictive covenant's words and phrases their commonly accepted meaning." *Foster*. Restrictive covenants "must be reasonably construed to give effect to their purpose and intent." *Foster v. Royal Oaks Property Owners Association* (Fr. Ct. App. 2017). "An association's application of a properly interpreted restrictive covenant in a particular situation is presumed to be proper unless the court determines that the association acted in an arbitrary, capricious, or discriminatory manner." *Foster* (citing *Cannon v. Bivens* (Fr. Sup. Ct. 1998)).

Under Section 3 of the Board's Declaration of Covenants, Conditions, and Restrictions (Declaration), the living area of a residence must be at least 2,800 square feet and must be at least 30 feet from the front street right-of-way. A residential building is "a building which is used for residential purposes or in which people reside, dwell, or make their homes, as distinguished from one which is used for commercial or business purposes." 20 Am. Jur. 2d *Covenants* §179 (2018). Further Section 3 of the Declaration states that "[a]ll lots shall be known and described for residential purposes only" and "only one family residence maybe erected, altered, placed, or permitted to remain on any lot." A residential purpose includes the meaning of a building used as *a* place of abode. 20 Am. Jur. 2d *Covenants* §179 (2018).

Under Section 5 of the Declaration, buildings other than residences shall not exceed 100 square feet. An outbuilding is "[a] detached building (such as a shed or garage)", Black's Law Dictionary (11th ed. 2019), or "a structure . . . not connected with the primary residence on a parcel of proeprty", www.definitions.uslegal.com/o/outbuilding.

The Stewarts' application was for a structure that would be 600 square feet. It will contain a large living/sleeping area and a bathroom. Further, the structure would be connected tot he existing home through a breezeway. Finally, the structure would be set back 50 feet from the street.

The ACC denied the Stewarts' application for the structure because it categorized the structure as an outbuilding, or a building other than residences. However, the purpose of the structure indicates that it is a residential building. Further, it is not detached from the existing residence. Therefore, the Board should not uphold the ACC's denial of the Stewarts' application for a structure.

Assuming the Board affirms the ACC's denial, a court will likely find for the Stewarts.

If the Board affirms the ACC's denial and the Stewarts sue the Board, then the question is what the likely outcome is. The Court will likely find for the Stewarts because the structure can be construed as an addition to the existing residence.

The court must first determine whether the Board properly interpreted the restrictive covenant. *Foster*. As mentioned above, the ACC likely erred on classifying the structure. However, a court will likely assess if the structure complied with the requirements for a residence.

Whether a court sides with the Board or the Stewarts depends on whether the structure is considered a separate residence building. If it is, then it clearly violated

Section 3(A) and Section (B) of the Declaration for square footage and the restriction of only one family residence. However, if the Structure is part of the existing house, then it is only one residence with the minimum square footage. To support this potential outcome, the structure shares the roof with the existing house and is connected by a breezeway. The structure is meant to house Mrs. Stewart's 72-year-old mother. The structure does not have its own kitchen, which likely means she will be using the existing house as well. Moreover, there is no indication that it is an apartment. For these reasons, it is likely that the structure will be not be considered a separate residential building. Despite this going to court, this is another reason why the Board should not uphold the ACC's denial. The Board should instead grant a variance under Section 10 of the Declaration since the structure doesn't erode the purposes and intent of the covenant, and there is a compelling reason to grant it.

Therefore, a court will likely find that the association actions were arbitrary and capricious and likely side with the Stewarts. This means the Stewarts will be allowed to build the structure.

FENCE

The Board should uphold the ACC's denial of the Stewarts' application for a fence.

The question is whether the Board should uphold the ACC's denial of the Stewarts' application for a fence. The Board should uphold the denial because it is against the Declaration, and the Stewarts have not shown a compelling reason for a variance.

As mentioned above, a restrictive covenant is a contract, and "a court must ascertain the drafter's intent from the instrument's language, giving a restrictive covenant's words and phrases their commonly accepted meaning." *Foster*. Restrictive covenants "must be reasonably construed to give effect to their purpose and intent."

Section 7(A) of the Declaration limits fences to a maximum height of six feet. The ACC cited this reason for denying the Stewarts' application for an eight-foot-high fence. Mrs. Stewart argues that a variance should be granted for the fence. Under Section 10 of the Declaration, a variance is granted only for compelling reasons and if it maintains the purposes and intent of the covenant. The Stewarts would be required to provide a justification. *See Foster*.

The Stewarts require the fence is to enclose a space for Mrs. Stewart's mother's dog. The Stewarts provide no reason why a six-foot-high fence would not be able to contain the dog. Therefore, there is no compelling reason for a variance.

Thus, the Board should uphold the ACC's denial of the Stewarts' application for a fence.

Assuming the Board affirms the ACC's denial, a court will likely find for the Stewarts on a waiver defense.

If the Board affirms the ACC's denial and the Stewarts sue the Board, then the question is what the likely outcome and potential remedies. A court will likely find that the Board waived the covenant with respect to fence restrictions.

As mentioned, the Stewarts' proposed fence does not comply with the Declaration and there is no reason for a variance. The Stewarts would thus need to argue a defense. The Stewarts may argue that the Board waived the right to enforce the deed restriction on fences. "To demonstrate a waiver of restrictive covenants, a party must prove that 'the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived.'" *Powell v. Westside Homeowners Association Inc.* (Fr. Ct. App. 2019). The court considers facts such as the number, nature, and severity of the existing violations. *Id.* "Franklin courts have repeatedly found that the evidence was insufficient to support a finding of waiver when 1% to 10% of properties violated the restrictive covenants at issue." *Id.*

Here, the community has 45 single-family homes. The ACC has never formally approved the installation of fences that are over six feet tall. However, a few homes have non-compliant fencing. These homes do not comply with fence height, color, and/or material. Ms. Mendoza, the Board's chair, stated that there are nonconforming fences due to lax enforcement of fence requirements.

More information is needed to determine the number and severity of the existing violations. However, based on the information presented, specifically Ms. Mendoza's acknowledgment of lax enforcement, the Stewarts may likely be able to successfully make a waiver defense. If this is the outcome, they will likely be able to construct the fence.

OTHER POTENTIAL OUTCOMES

Under the Code, the Board will not be entitled to civil damages if it is successful because damages are assessed on the number of days the Stewarts would be in violation. Since nothing has been constructed, there is no damages. However, the Board will likely be able to get an injunction to prevent the Stewarts from erecting the structure or fence if the Board is successful. However, based on the analysis above the Board is not likely going to succeed in court.

CONCLUSION

The Board should not uphold the denial of the structure because of the ACC's mis-characterization of the structure. The Stewarts will likely win in a court case involving the structure. The Board, however, should uphold the denial of the fence. Despite this recommendation, if the Stewarts were to go to court, they would likely succeed on a defense of waiver based on the facts currently presented. The Board can still win a court case on the fence issue if more facts are presented in their favor regarding the number and severity of existing non-compliant fences.

Respectfully,
Lawyer

Question MPT-2 – July 2021 – Selected Answer 2

FAWCETT & BRIX LLP

Attorneys at Law

425 Lexington Ave., Suite 100
Hayden, Franklin 33054

July 27, 2021

Attn: Ms. Jane Mendoza, Chair
Canyon Gate Property Owners Association Board of Directors

Re: Denial of Home Improvement Application Submitted by Mr. and Mrs. Stewart

Dear Ms. Mendoza:

Thank you for seeking legal advice from Fawcett & Brix LLP regarding the home improvement application submitted by homeowners Charles and Eleanor Stewart. Upon conducting a thorough evaluation of the facts and circumstances surrounding Mr. and Mrs. Stewart's application, the ACC's subsequent denial thereof, the Canyon Gate Covenants, Conditions, and Restrictions ("deed restrictions"), and any relevant legal issues and applicable law surrounding the matter, we wish to provide the following analysis for your review on the matter:

I. Under the Canyon Gate Covenants, Conditions, and Restrictions and the Franklin Property Code, should the Board of Directors uphold the ACC's

denial of the home improvement application submitted by homeowners Charles and Eleanor Stewart with respect to the specific structure requested?

No, the Board should not uphold the ACC's denial of the Stewarts' request to build the structure described therein because the structure, as described by the Stewarts, would not violate the deed restrictions based on its status as a "residential building" rather than an "outbuilding."

In its decision letter to the Stewarts, the ACC denied the structure requested based on Section 5 C of the deed restrictions, stating that adding the structure would cause the Stewart's property to exceed the maximum allowable limit per acreage. The ACC's denial is thus based on its classification of the requested structure as an "outbuilding" (*i.e.*, buildings other than residences.)

Although the Franklin Property Code does not define "outbuilding," this term has been legally defined as a "detached building (such as a shed or garage) within the grounds of a main building." Black's Law Dictionary (11th ed. 2019). A reputable legal treatise (American Jurisprudence) has defined a residential building as: "a building which is used for residential purposes *or in which people reside, dwell, or make their homes*, as distinguished from one which is used for commercial or business purposes." 20 Am. Jur. 2d *Covenants* § 179 (2018) (emphasis added). The phrase "residential purposes" is not limited to buildings in which one designates its usual place of abode; rather, a building is a residence if it is *a* place of abode. *Id.* (emphasis added). This suggests that any place in which one resides or makes a home, as opposed to using the structure commercially, is deemed a residential building.

Here, the Stewarts wish to construct a residential building, not an "outbuilding" as classified by the ACC. The purpose of the structure is to house Mrs. Stewart's mother. The structure will include a living area for her mother, as well as a bathroom. The mother will be moving in with the family, and the Stewarts wish to build the structure as a means of expanding their own home. As the structure the Stewarts wish to build is residential in nature, the ACC improperly categorized the structure as an outbuilding within the scope of Section 5C.

In addition, Section 403 of the Franklin Property Code requires restrictive covenants to be "reasonably construed to give effect to its purpose and intent" and further provides that a "restrictive covenant may not be construed to prevent or restrict the use of property as a family home." FR. PROP. CODE § 403(a), 403(b). If the Board were to construe Section 5C of the deed restrictions as encompassing the type of structure the Stewarts wish to build, the Association would effectively be limiting the

Stewart's use of their property as a family home by denying the ability to house a family member (i.e., Mrs. Stewart's mother).

As there is no express limitation as to the maximum square footage allowed for residential structures, the ACC improperly denied the Stewarts' request with respect to the structure and the ACC's denial of this request should, therefore, be reversed.

II. Under the Canyon Gate Covenants, Conditions, and Restrictions and the Franklin Property Code, should the Board of Directors uphold the ACC's denial of the home improvement application submitted by homeowners Charles and Eleanor Stewart with respect to the fence requested?

Assuming there is a sufficient number of Canyon Gate homeowners who have constructed non-compliant fences without enforcement action taken by the ACC, the Board should not uphold the ACC's denial of the Stewarts' request to build the fence described.

While permitting the Stewarts to construct the fence, as requested, would constitute a violation of the deed restrictions, the Board should still consider granting a variance to the Stewarts. Section 10 of the deed restrictions provides that the Stewarts may be entitled to a variance if they can provide a compelling reason for the 6 foot fence and if the general purpose purpose intent of the covenants and design standards are maintained.

Although keeping their dog enclosed on the property may not be viewed as "compelling," the Stewarts, if denied, may initiate litigation against the Association. In the even that the Stewarts bring suit against the Association, the Stewarts have a fair likelihood of success on the merits of their claim with respect to the fence, even if the fence is not compliant.

The existence of various other homeowners with non-compliant fences may serve as a "waiver" and, if litigated, could allow the Stewarts to successfully argue that the Association has waived the applicable deed restriction. A more detailed explanation of this argument is provided below.

III. If the Board Affirms the ACC's Denial As to the Structure and the Fence, and the Stewarts Bring Suit Against the Association As a Result, What is the Stewarts' Likelihood of Success?

Based on Franklin case law, the Stewarts will most likely succeed on both claims if a suit is brought against the Association.

In the event that the Board upholds the ACC's denial of the Stewarts' application and litigation ensues, the Franklin court will engage in a two-pronged analysis: first, the court will determine whether the Association correctly interpreted the restrictive covenant; second, the court will determine whether the Association properly applied the restrictive covenant.

Restrictive covenants are subject to the general rules of contract construction and are to be reasonably construed to give effect to their purposes and intent. FR. PROP. CODE § 403(a).

An interpreting whether the structure is properly classified as a outbuilding under Section 5C or a residential building, the of Section 5C. Regarding the first prong, a court would
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Restrictive covenants are subject to the general rules of contract construction and are to be reasonably construed to give effect to their purposes and intent. FR. PROP. CODE § 403(a)

A court will likely state that the ACC improperly interpreted Section 5C based on the common meaning of "residential building" and "outbuilding." Because the ACC will have been deemed to improperly interpreted the deed restriction, the court is likely to overturn their decision.

The court will likely conclude that the ACC properly interpreted the deed restriction with respect to the fence height. However, the court will then determine whether the ACC's application of this properly interpreted restrictive covenant is proper. As there is a presumption that an association's application is proper, the Stewart family will have the burden at trial of proving (by a preponderance of the evidence) that the ACC's denial of their variance was arbitrary, capricious, or discriminatory. *See Foster citing Cannon Bivens (1998).*

The Stewarts are likely to succeed because there are many homeowners with non-compliant fences and the ACC has neglected to take any action against those homeowners. This arbitrary enforcement of fence requirements may be viewed as a waiver of the applicable deed restriction.

Franklin courts have repeatedly found that the evidence was insufficient to support a finding of waiver when 1-10% of properties violated the restrictive covenants at issue. If the Stewarts can support the allegation that the ACC Has previously approved and permitted the construction of non-compliant fences for more than 10% of the homes at Cayon Gate, then they will likely prevail.

Further, the intent and purpose of the deed restrictions according to Section 1 are that they intend to embody the superior standards of single-family housing for the purpose of creating and carrying out a uniform plan. Deed Restrictions. The Association's lack of enforcement disserves the intent and purposes of the deed restrictions, which further justifies waiver of the restriction as to the Stewart's requested fence.

IV. What, if Any, Remedies Would Be Available?

If the Association were to successfully defend against the Stewarts' claims, it is entitled to injunctive relief from enjoining the Stewarts from construction, and attorneys' fees and costs. No damages would be awarded as there has not yet been a violation of the covenants by the Stewarts.

If the Stewarts prevail, it is likely that they can recover attorneys' fees and costs and an injunction to compel the Association to permit construction of the structure and fence.

If you have any questions or would like further explanation regarding any of the above information, please do not hesitate to contact the firm.

Sincerely,

Associate Attorney
Fawcett & Brix LLP

Question MPT-2 – July 2021 – Selected Answer 3

Fawcett & Brix LLP
Attorneys at Law
Hayden, Franklin 33054

July 27, 2021

Dear Canyon Gate Property Owner's Association Board of Directors,

This goal of this letter is to answer two questions: (1) Should the board uphold the ACC's denial of the Stewart's application for a structure and fence? and (2) If the board affirms the ACC denial and the Stewarts sue the Association, what outcome is likely and what potential remedies are available? Both questions are answered below with a brief explanation outlining the reasoning for the answer provided.

Restrictive covenants are a contract between a subdivision's property owners as a whole and individual lot owners and are therefore subject to the general rules of construction. (*Foster v. Royal Oaks Property Owner's Association*) While traditional rules of law disfavored restricting the free use of ones land, Franklin law was amended to provide that all restrictive covenants in instruments governing certain residential developments must be reasonably construed to give effect the their purposes and intent.

Should the board uphold the ACC's denial of the Stewart's application for a structure and fence?

The Board of Directors should uphold the ACC's denial of the Stewart's application for a structure and fence. The Board may more closely consider the denial of the application for a fence depending on the number of fences in the neighborhood that currently exceed six feet.

1. Structure: The Association's decision to uphold the denial depends on its interpretation of restrictive covenants as applied to the request for the Structure. If the Association views the Structure as a detached outbuilding, the denial should be upheld because the square footage exceeds the amount allowed. However, if the Association views the Structure as part of the residence, the court may consider reversing the denial.

Restrictive covenants shall be reasonably construed to give effect to their purpose and intent. The Association's rules state that no outbuilding shall exceed 100 square feet per acre of a homeowner's lot. Therefore, the Structure, if considered an outbuilding, may not exceed 200 square feet. As the Structure's plan describe it is 600 square feet, the Structure if erected would violate the restrictive covenant.

However, The Stewarts will likely argue that the Structure is merely an addition to their residence, rather than an outbuilding. As a part of their residence, the restrictions for outbuildings are not applicable to the Structure. An outbuilding is considered to be a structure not connected with the primary residence on a parcel of property. (DefinitionsUSLegal) Whereas, the definition of residential building is one that is used for residential purposes. Residential purposes is not limited to occupying the premises solely for one's usual place of abode. Rather, a building is a residence if it is a place of abode. (20 Am. Jur. 2d Covenants)

If the Structure is view as part of their residence, the Structure only adds the square footage to the residence current square footage. The Association's rules in include a minimum square foot requirement for residences, but they do not include a restrictive covenant stating the maximum amount of square feet. Therefore, the addition of the Structure as part of the residence may not violate any restrictive covenant.

Although the Association has previously allowed sheds and barns that comply with the requirements, the Structure is substantially different in nature and will be connected to the residence. The Association could uphold the denial on the grounds that the Structure requested does not constitute an outbuilding or a part of the residence. There are no other lots in the subdivision that contain similar structures or separated living areas connected to the originally constructed residence. This may show that the Association has not previously allowed these types of structures and denied similar requests in the past.

However, the Association could assert that the Structure is considered an outbuilding because the mere use of the roofed walkway is not enough to constitute attachment to the residence. Therefore, if the Structure is considered an outbuilding, its placement and size on the property would violate the restrictive covenant.

The Stewarts may also argue that the denial of their request violates § 403 because the Association is preventing or restricting the use of the property as a family home. They may argue that the addition of the Structure is support a family member, and the ACC's denial of their request directly restricts their use of the property as a family home.

2. Fence: The variance for the fence should not be granted unless the Association finds that the protection of the family's dog is a compelling reason. Under the general rules of construction, the restrictive covenant limiting the height of fences in the neighborhood to six feet is unambiguous. While restrictive covenants cannot restrict or prevent the use of property as a family home, the height limitation for fences does

not necessarily restrict or prevent the use of the property as a family home. Therefore, any fence that is erected higher than six feet is a violation of the restrictive covenant.

The Stewart's application requests a variance to erect a fence that is eight feet tall. If the fence were to be erected, it would certainly violate the restrictive covenant.

The Stewarts will likely argue that the Association has waived its right to enforce the restrictive covenant as to the fence due to the various violations that have previously gone unaddressed.

To establish that an association has waived the restrictive covenant, a party must show that the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived. (*Larimer Falls Comm. Assoc. v. Salazar*) Courts have found insufficient evidence to support waiver when only a minimal amount of violations have occurred regarding the restrictive covenant.

The neighborhood currently has 45 homes. It is acknowledged that some of the houses have fences that do not comply with the requirements for height, color, and/or material. If only a few homes have fences that exceed six ft, the denial should be upheld because there is not sufficient evidence to support a waiver. However, if a substantial amount of homes in the neighborhood have taller fences, the Stewarts may prevail in a showing of waiver of the restrictive covenant as to the height of fences.

The Stewarts will also argue that the variance should have been granted because they offered a compelling reason and the nature, material, etc. of the fence would be substantially the same. The Association's rules state that a variance can be made if there is a compelling reason for granting the variance. The Association should consider whether the fence necessarily has to be eight feet to prevent the dog from roaming the entire backyard. Or, in the alternative, if a six foot fence would be sufficient. Because the two foot difference is not substantial and the neighborhood currently has noncomplying fences, the Association should consider whether the reason for the variance is compelling enough to establish the variance.

If the board affirms the ACC denial and the Stewarts sue the Association, what outcome is likely and what potential remedies are available?

A court will likely find that the Association's application was proper because there is no indication that the Association acted arbitrarily or capricious. The Association may seek damages under Franklin Property Code § 404(b).

A court will find an association's application of a properly interpreted restrictive covenant proper unless the association acted in an arbitrary, capricious, or

discriminatory manner. (*Foster*) The individuals or homeowners challenge the association's application have the burden of proving by a preponderance of the evidence that the association acted in the prohibited manner when denying the request. For example, an association asks in the prohibited manner by informing a homeowner that the request would be denied "no matter what."

A court will likely find that the Association did not act in the prohibited manner because the Stewarts will be unable to prove by a preponderance of the evidence that the denial was made in an arbitrary, capricious, or discriminatory manner. The Association, listed the reasons for denying each request - reasons that specifically pointed to the restrictive covenants and their interpretation. There is no evidence that the ACC acted in a discriminatory manner when making the denial or that the ACC made the denial for arbitrary reasons.

If the court finds that the Association's application was proper, the Association could seek damages under § 404(b) as a remedy. Section 404(b) allows civil damages for a violation of a restrictive covenant. However, the amount of damages may not exceed \$200 for each day of the violation. The number of days of the violation is the determining factor for the amount of damages. The court will not consider the type of injury or harm or the extent of such injury or harm. (*Foster*)

However, a court may not award damages in this case because there has been no technical violation of the restrictive covenant yet. The Stewarts have not yet begun constructing the Structure or the Fence and therefore, there is no physical violation yet. As there has been no violation of the restrictive covenant, the court will be unable to assess the amount of damages based on the number of days the party has been in violation.

Sincerely,
Examinee