IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

WARWICK PARK OWNERS ASSOCIATION, INC., a Delaware corporation,	)	
Petitioner,	)	
v.	)	C.A. No. 418-S
GEORGE SAHUTSKY AND SANDRA SAHUTSKY,	)	
Respondents.	)	

MEMORANDUM OPINION

Submitted: August 31, 2005
Decided: September 20, 2005

Robert V. Witsil, Jr., of ROBERT V. WITSIL, JR., P.A., Georgetown, Delaware, Attorney for Petitioner.

Eric C. Howard, of HALBROOK & BAYARD, P.A., Georgetown, Delaware, Attorney for Respondents.

CHANDLER, Chancellor

This is the Court's Memorandum Opinion and Order issued after trial held on June 20, 2005. At the conclusion of the trial, the Court granted judgment in favor of Petitioner ("Warwick Park"). This Memorandum Opinion and Order memorializes the Court's ruling.

A.

The parties had stipulated to the following facts. Respondents ("Sahutsky") own a parcel of land improved by a residential structure, identified as Lot 26, Block C, Warwick Park, and further designated as 96 Comanche Circle, Millsboro, Delaware. On September 13, 1995, when Respondents purchased their premises in Warwick Park, a fifteen-foot side yard setback was in effect.[1] The applicable setback requirements provided as follows:

> **BUILDING LOCATION.** No structure or projection therefrom shall be erected upon or extended within thirty (30) feet of the road property line(s) of any lot, nor within fifteen (15) feet of the sidelines or twenty (20) feet of the rear line of any lot, save for Lots A-1 thru A-13 and A-49 thru A-61 which require a forty (40) foot setback from the rear lot line. Placement of said structures on lots shall comply with the Sussex County codes.

The deed restrictions were later amended. In August 2003, respondents decided to construct a garage addition to their home. The

[1] As recorded in Deed Book 1183, Page 157, dated June 1, 1983.

applicable restrictive covenants at that time were of record in the Office of the Recorder of Deeds in and for Sussex County.[2] The relevant building setback requirement was amended to provide:

> **BUILDING LOCATION.** No dwelling structure or projection therefrom shall be erected upon or extended within thirty (30) feet of the road property line(s) of any lot, nor within fifteen (15) feet of the sidelines or twenty (20) feet of the rear lines of any lot, save for Lots A-1 thru A-13 and A-49 thru A-61 which require a forty (40) foot setback from the rear lot line. Lot elevations shall not be graded to adversely affect adjoining lots. Sheds may be placed according to Sussex County codes. No shed shall be larger than 256 square feet.

Additionally, the Amended Restrictions[3] state under the caption of "Architectural Control":

> No dwelling, building, fence or other structure including canopies, tents, car ports or the like shall be erected, constructed or moved upon any lot, nor any addition, change or alteration made to any existing dwelling, building or other structure until plans and specifications have been submitted to and approved as to location, elevation, plan or design, in writing by the Owners Association.

Respondents applied for and received a 2.5-foot variance from the Sussex County Board of Adjustment on August 25, 2004. The Board's decision stated that "the Board pointed out that its approval would not affect

[2] Deed Book 2762, Page 41 et seq., filed on or about October 2, 2002.
[3] Deed Book 2762, Page 42.

the restrictive covenants of Warwick Park." At the Sussex County Board of Adjustment hearing several letters were submitted in favor of and in opposition to the application. Included in the correspondence were letters from the Warwick Park Board of Directors opposing the application, as well as a letter from Patrick Miller, the Board's President, in his individual capacity, who supported the variance application.

On September 3, 2003, after the County Board of Adjustment granted the variance, the Association's attorney addressed a one-paragraph letter to respondents as follows:

> Please be advised that I represent Warwick Park Homeowners Association and its Board of Directors, which has directed me to inform you that although you may have received a variance from the Sussex County Board of Adjustment for proposed construction, all additional construction must meet the setback requirements of Warwick Park Covenants and Restrictions. Specifically, no dwelling, structure or projection there from shall be erected or extended within thirty (30) feet from the road, property lines of any lot nor within 15 feet of the rear line. A copy of the restrictions is attached to this correspondence. Please contact the Association to confirm your compliance with this set of restrictions. Thank you for your cooperation.

On March 22, 2004, the Association's attorney received a one-paragraph letter from Eric C. Howard, Esquire, the respondents' attorney, stating the following:

> I have conferred with the Sahutskys concerning the granting of the variance at their property known as Lot 26, Block C, Warwick Park. The Sahutskys obtained a variance from the Sussex County Board of Adjustment on October 15, 2003, which variance became final and non appealable on November 15, 2003. The Sahutskys intend to proceed with construction in accordance with the variance.

About one month later, Howard Detweiler, a member of the Warwick Park Board of Directors, met with respondent George Sahutsky. While Detweiler was visiting Sahutsky's neighbor, Donna McCandless, Sahutsky walked over to McCandless' property and told Detweiler that the Sahutskys had dug trenches for the footings and that the foundations would be poured on or before June 19, 2004. The Sahutskys commenced construction of the garage foundation until the petition was filed, when counsel for the parties arranged an agreement that construction would cease until final determination of this lawsuit.

At trial, respondent George Sahutsky testified that he had submitted hand-drawn sketches of his proposed garage structure to a member of the architectural review committee at a meeting of the Warwick Park Owners Association Board of Directors. Sahutsky testified that he was told to seek a variance from the Sussex County Board of Adjustment and that he interpreted those words to mean that if a variance was granted by the Sussex County

Board of Adjustment, his application would be approved by the Warwick Park Owners Association. Respondents' witness, James Denney, testified that he saw Sahutsky speaking with someone at a board meeting, that he was not party to the discussion, but that after the meeting Sahutsky seemed pleased and stated that he was going to proceed with the plan for construction of the garage and apply for a variance. Petitioner's witnesses (the president of Warwick Park Owners Association, Patrick Miller, and a board member, Harold Detweiler) testified that Sahutsky was informed that he could get a variance from the Sussex County Board of Adjustment but that no assurance was given him that the granting of a variance would exempt the proposed structure from the requirements of the Warwick Park restrictive covenants.

B.

Although the Court is sympathetic to respondents' position, the answer to this dispute is clear. First, restrictive covenants govern all the properties in this development and clearly set forth the setback requirements for garages and similar structures. Respondents have not argued that the restrictive covenants are ambiguous. In other words, this dispute did not arise because of an inability to interpret what was required under the applicable covenants. The difficulty arose, fundamentally, when Sahutsky spoke with someone, evidently a Mr. Freeman, from the architectural review committee with respect to the

proposed garage. For whatever reason—we will not know the reason because Freeman was unavailable to testify and no one took his deposition—Sahutsky testified that Freeman said that, at the very least, the Sahutskys ought to get a variance from the Sussex County Board of Adjustment. It is reasonable to suppose that Freeman said this to respondent because he didn't want to say "no." Rather, by referring respondents to the Sussex County Board of Adjustment, Freeman avoided having to say "no" to a neighbor, assuming the matter might end with the Sussex County Board of Adjustment.

The Sahutskys submitted their application to the Board of Adjustment. But while they were waiting for a decision from the Board of Adjustment, which did not arrive until October 2003, they received a formal letter from Mr. Witsil on behalf of the Board of Directors for Warwick Park. Witsil's letter was unmistakably clear. When the Sahutskys received Witsil's letter of September 3, 2003, that correspondence rejected any tentative or conditional authorization by Freeman on behalf of the Architectural Review Committee.

As a technical matter, Freeman had no authority to give the Sahutskys technical or conditional approval to proceed with constructing the garage in the setback area. Even assuming for the sake of argument that Freeman did have such authority, it was rescinded as of September 3, 2003.

Thereafter, in March of 2004, Eric Howard, Esq., on behalf of the Sahutskys, responded to Witsil, attorney for the Board of Directors, stating that the Sahutskys had obtained a variance from the Sussex County Board of Adjustment, that the appeal period from the Board of Adjustment's decision had expired, and that the Sahutskys now had a right to proceed with construction of the proposed garage. The correctness of that position, however, depended upon ignoring what had occurred in September 2003 – explicit notice from Warwick Park's attorney that the Sahutskys' proposal to build a garage within the setback was contrary to applicable restrictive covenants. As a result, the Sahutskys were on notice in September that they did not have a right to proceed and were not entitled to rely upon Freeman's informal authorization to proceed.

Unfortunately, the Sahutskys proceeded at their own risk when they constructed the garage's foundation *after* receiving explicit notice from the Association. Additionally, there is no evidence that Freeman had authority to give the Sahutskys permission to proceed without the Association's permission. There is evidence that Freeman gave Sahutsky encouragement to seek approval from the Board of Adjustment for Sussex County. Estoppel, however, does not apply because Sahutsky had no right to rely upon Freeman's statement. Even if Sahutsky did reasonably rely upon Freeman's

statements, there was no detrimental reliance. Before Sahutsky took any steps to pour the garage's foundation, he was informed by the Board's attorney that he could not proceed.

C.

Although Delaware case law has not addressed the issue, it is generally recognized that a zoning ordinance or variance cannot destroy, impair, abrogate or enlarge the force and effect of an existing private restrictive covenant.[4] Restrictive covenants are a matter of contract, creating rights in the nature of servitudes or easements; on the other hand, zoning regulations constitute a governmental exercise of police power and must bear a substantial relation to the public health, safety, or general welfare. It is well established that zoning ordinances (or the granting of variances by a governmental authority) cannot relieve private property from valid restrictions if the ordinances or variances are less restrictive.[5] Accordingly, the Sussex County Board of Adjustment's grant of a variance had no effect upon the Warwick Park Restrictive Covenants side yard setback requirement.

[4] 20 Am.Jur. 2d, COVENANTS, § 242.
[5] *McDonald v. Emporia – Lyon County Joint Board of Zoning, Appeals and the City of Emporia, Kansas*, Ka. Ct. App., 697 P.2d 69 (1985).

The other issues that the Court now turns to for the sake of completeness are the affirmative defenses of waiver or estoppel. The burden of proof on those who assert affirmative defenses requires in this case that, at least by a preponderance of the evidence, one demonstrate the existence of facts that would suggest that Warwick Park Owners Association abandoned or waived its right to enforce the restrictive covenants that apply in the community. At best, respondents have offered anecdotal testimony concerning other instances of noncompliance with the restrictive covenants. The law requires more than that, however.

This Court's decision in *Henderson v. Chantry*[6] describes eleven specific instances that were asserted in that case to be evidence of waiver or abandonment of a community's right to enforce restrictive covenants. The Vice Chancellor rejected four or five of those examples, but even given the remaining six examples of abandonment, the Court did not believe they were significant enough (or important enough) to be viewed as abandonment or waiver of the governing restrictive covenants of the community.

In the present litigation, no evidence has been offered that even approaches the level of evidence that was presented in *Henderson v. Chantry*. Nothing in this record would lead the Court to conclude that the Warwick Park

[6] C.A. No. 1486-K, Strine, V.C., (Jan. 10, 2003).

community has waived or abandoned its right to enforce its restrictive covenants as they now exist.

D.

For all of the above reasons, the Court concludes that Warwick Park's covenants are valid and enforceable. The respondents are not permitted to build a garage as presently configured, as it will encroach approximately two feet within the setback area. Accordingly, the Court grants the petitioner's requested relief. Respondents are enjoined from violating the setback restrictions and are ordered to remove the offending portion of the foundation within ninety days from receipt of this Order.

The Court denies petitioner's request for attorney's fees. The restrictive covenants for Warwick Park provide that the Association may recover "costs, damages or other dues for such violation". This language does not entitle the petitioner to attorney's fees. The language does not use the words "attorney's fees". It uses the word "damages" which I interpret to mean compensation for injury inflicted upon the association or its properties as a result of a violation of the covenants. No evidence has been offered regarding damages. Court costs are awarded to petitioner and assessed against respondents.

IT IS SO ORDERED.