IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

PATRICK MATTHEWS BOGART and BENJAMIN KURTZ,	:	
Plaintiffs,	:	
vs.	:	Civil Case No. 273518-V
CARDEROCK SPRINGS CITIZENS ASSOCIATION, INC.,	:	
Defendant.	:	

MOTION TO DISMISS
AND REQUEST FOR HEARING

Defendant Carderock Springs Citizens Association, Inc., by its undersigned attorney, moves this court to dismiss Counts II, III and IV of the Amended Complaint for the following reasons:

I.
BACKGROUND

This is an action by homeowners in the community of Carderock Springs whose plans for an addition have been denied by the Architectural Review Committee of the Carderock Springs Citizens Association, Inc. The Carderock Springs Citizens Association, Inc. (hereinafter "Carderock Springs") is a non-stock membership corporation charged with enforcing certain restrictive covenants pertaining to changes and modifications to existing dwellings.

Count II of the Amended Complaint seeks $750,000.00 from Carderock Springs for an alleged breach of contract. Count III of the Amended Complant seeks $750,000.00 from

CHEN, WALSH, TECLER
& MCCABE, L.L.P.
ATTORNEYS AT LAW
200A MONROE STREET
SUITE 300
ROCKVILLE, MARYLAND 20850

Carderock Springs for an alleged taking of Plaintiffs' property. Count IV of the Amended Complaint is a repeat of Count I of the original Complaint, with the difference that the Plaintiffs request the court to "enter a judgment approving the Plaintiffs' proposed addition to their property", but after the court has determined that the restrictions that require such approval have been abandoned and are unenforceable.

Counts II and III fail to state a claim upon which relief can be granted. Plaintiffs apparently assert these claims for their shock value, since they seek enormous damages against a voluntary non-stock membership corporation. The Amended Complaint raises the claim from $500,000.00 to $750,000.00. Carderock Springs is unlikely to have sufficient assets to pay any such damages, and by virtue of the legal structure of the relationship between the corporation and the individual homeowners, the individual homeowners are not personally liable for any judgment. Thus even if Counts II and III stated claims upon which relief can be granted, there is no practical relief available.

Count IV repeats Count I. Together Counts I and IV seek to have the restrictive covenants of Carderock Springs declared unenforceable as a result of having allegedly been abandoned. If the court finds that Plaintiffs are entitled to build their addition because the covenants have been abandoned, then in fact there is no need for any one to approve the addition because there would be no covenants that require prior approval. Consequently Count IV is entirely superfluous.

CHEN, WALSH, TECLER
& MCCABE, L.L.P.
ATTORNEYS AT LAW

200A MONROE STREET
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II.
THE NATURE OF RESTRICTIVE THE COVENANTS

For purposes of this Motion to Dismiss, the court must accept the allegations of the Amended Complaint as well pled. The Amended Complaint does not include a copy of the restrictive covenants at issue; however, the allegations of the Amended Complaint present a limited description of the nature of these covenants.

Amended Complaint, Paragraph 7, alleges that as homeowners Plaintiffs are required to submit their planned property improvements to the Architectural Review Committee of Carderock Springs before beginning construction. Amended Complaint, Paragraph 22, alleges that by purchasing a home in Carderock Springs Plaintiff "agreed to abide by the conditions, covenants, restrictions and easements affecting the property." Thus, there are allegations sufficient to establish that there are restrictive covenants recorded among the land records, the restrictive covenants are applicable to Plaintiff's property, and the restrictive covenants require prior approval before Plaintiffs may construct an addition on their property. Plaintiffs further allege that Carderock Springs has abandoned the restrictive covenants because its enforcement of them has been inconsistent and selective. Amended Complaint, Paragraphs 16 and 31.

The Maryland Court of Appeals has long recognized that restrictive covenants or equitable servitudes or however restrictions on the development of property are identified, are enforceable if they create a general plan or scheme of development and they are applied reasonably. Kirkley v. Siepelt, 212 Md. 127, 128 A.2nd 430 (1957). Maryland courts have also recognized that while as a general rule restrictive covenants will be construed strictly against those seeking to enforce them, nevertheless the purpose of those covenants is to preserve and

CHEN, WALSH, TECLER
& MCCABE, L.L.P.
ATTORNEYS AT LAW
200A MONROE STREET
SUITE 300
ROCKVILLE, MARYLAND 20850

enhance property values. In Guilford Ass'n, Inc. v. Beasley, 29 Md. App. 694 350 A.2nd 169 (1976) the Court of Special Appeals said that the courts are under a duty to effectuate the intention that is clear from the context of the covenants, notwithstanding that general rule. Regarding the impact on property values, the court said:

> "The restrictions in the case now before us were not imposed for the benefit of The Roland Park Company nor its assignee, the appellant. We believe it beyond serious question but that the restrictions on the Guilford tract are for the benefit of the residents of Guilford in that the restrictions protect their property value, maintain the status quo with respect to the neighborhood esthetics and generally aid in making the area a better place in which to reside." 29 Md. App. at 700.

The issue in Guilford was whether the covenants intended to restrict buildings but leave the surrounding land unencumbered and available for any use. The court recognized that the clear purpose of covenants is to protect property values, and maintain the status quo with respect to neighborhood esthetics. The Plaintiffs' assertion in this case, therefore, that enforcement of restrictive covenants results in "a considerable decrease in value of the Plaintiffs' property", Amended Complaint, Paragraph 7, runs directly counter to this recognized principle.

III.
COUNTS II AND III FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Count II is a breach of contract claim. The Plaintiffs claim:

> "That Plaintiffs entered into an agreement with Defendant, by which the Plaintiffs bought a home in the Defendant's community and agreed to abide by the conditions, covenants, restrictions and easements affecting the property." Amended Complaint, Paragraph 22.

CHEN, WALSH, TECLER
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While there is no agreement between Plaintiffs and Carderock Springs to purchase or sell property, Plaintiffs are correct that their obligation to abide by restrictive covenants that run with the land is contractual in nature. Chestnut Real Estate Partnership v. Huber, 148 Md. App. 190 811 A.2nd 389 (2002). Plaintiffs allege that Carderock Springs "breached his obligation to the Plaintiffs by enforcing a covenant against the Plaintiffs in which the Defendant had selectively enforced in the past." Amended Complaint, Paragraph 23. Plaintiffs claim that as a result of the actions of Carderock Springs in attempting to enforce a covenant that allegedly had been selectively enforced in the past, "Plaintiffs have incurred a loss in property value from being unable to make additions to their home." Amended Complaint, Paragraph 24.

The argument in Count III, "Constructive Taking", is similar. By attempting to enforce a restrictive covenant that Plaintiffs claim is unenforceable, Carderock Springs has allegedly deprived "the Plaintiffs of all reasonable use of their property." Amended Complaint, Paragraph 26. Plaintiffs further allege that the "interference is so substantial it creates a considerable decrease in value of the Plaintiffs' property." Amended Complaint Paragraph 27.

Counts II and III are premised upon the unenforceability of the restrictive covenants of Carderock Springs, and the efforts of Carderock Springs to enforce them nonetheless. As said earlier, Carderock Springs, through its Architectural Review Committee, has denied Plaintiffs' plans for an addition. This is all that Carderock Springs has done.

If the restrictive covenants are unenforceable, then Plaintiffs do not have to seek prior approval of their addition and Carderock Springs' denial of their request is a nullity. The Plaintiffs are therefore not damaged because Carderock Springs is not in the position of preventing anything. In Count II Plaintiffs placed themselves in the contradictory posture of

CHEN, WALSH, TECLER
& MCCABE, L.L.P.
ATTORNEYS AT LAW
200A MONROE STREET
SUITE 300
ROCKVILLE, MARYLAND 20850

claiming that the restrictive covenants create a contractual right at the same time that Plaintiffs' claim that the restrictive covenants are unenforceable and create no contractual right or obligation. If the restrictive covenants are invalid, they cannot be the basis for a count in breach of contract. If the restrictive covenants are invalid, Carderock Springs insistence that they are not gives rise to no damages or injury. Certainly, the filing of a counterlclaim and an attempt to enforce the restrictive covenants, which have never been found to be unenforceable, is no more then an exercise of Carderock Springs' right to enforce recorded covenants in equity in accordance with establish law. Kirkley, supra.

It should be noted, that nowhere do Plaintiffs allege that they have been precluded from obtaining a building permit. In fact elsewhere in the pleadings in this case it has been alleged that Plaintiffs do in fact have a building permit from Montgomery County, Maryland for a set of plans never reviewed by the Architectural Review Committee of Carderock Springs. Nevertheless, based on the allegations in the Amended Complaint, the fact stands that if the restrictive covenants are unenforceable, as Plaintiffs allege, then Carderock Springs is powerless to preclude Plaintiffs from constructing their addition and Plaintiffs' property has not been damaged.

On the other hand, if the restrictive covenants are enforceable, then they place a legally valid burden upon Plaintiffs' property with which Plaintiffs must comply. In that case, the restrictive covenants do not unlawfully cause a loss of Plaintiffs' property. To the contrary, most courts in Maryland would take the position that restrictive covenants in fact enhance property values by preserving them and preserving the esthetics of the status quo. See Guilford, supra. In either case, Plaintiffs do not state a claim for damages recognizable by this court.

CHEN, WALSH, TECLER
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There is no claim based on unenforceable covenants because Carderock Springs cannot enforce the covenants if they are unenforceable, whether due to prior actions or failure or failures to act. There is certainly no claim for damages based on enforceable covenants.

The taking argument is further flawed in that Carderock Springs is not an entity that has the power of eminent domain; nowhere do Plaintiffs allege that it does. Restrictive covenants are not a taking of property. Furthermore as a private individual, Carderock Springs has no authority to take the property of another and a court could not compel one person to surrender his property for the private use of another. Consequently there is simply no foundation for the claim that by attempting to enforce restrictive covenants, Carderock Springs is taking Plaintiffs' property. Again, if the restrictive covenants are unenforceable, then Plaintiffs are free to build their addition without prior written approval. Carderock Springs can do nothing to prevent that under those circumstances. However, if the restrictive covenants are enforceable, then a court will recognize and enforce them. There is no taking and no damage.

IV.
REPETITION OF COUNT I

Count IV of the Amended Complaint requests that the court enter a judgment approving Plaintiffs plans for its proposed addition because the restrictive covenants are unenforceable. Which plans the Plaintiffs are talking about is not specified. Count I also requests the court to hold that the restrictive covenants are unenforceable. The basis of both counts is the same - that there has been an abandonment of the restrictive covenants. If there has been an abandonment of the restrictive covenants, then there is no reason for the court to approve Plaintiffs' proposed addition as requested in Count IV. Consequently Count IV is entirely superfluous.

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CONCLUSION

While Counts II and III of the Amended Complaint, the claims for $750,000.00 in damages, up from $500,000.00 in the original Complaint, may have a certain shock value, they have no practical impact against a voluntary non-stock membership corporation. More importantly however, Counts II and III fail to state a claim on which this court can grant relief. They are premised on the unenforceability of the restrictive covenants. If those covenants are unenforceable, then by definition they can cause no harm to the property values of Plaintiffs. If they are enforceable, and Maryland courts have recognized their enforceability for over a century, then they are binding. Plaintiffs cannot state a claim by asserting the contractual validity of the restrictive covenants in one breath, their unenforceability in the next and then alleging damage because approval under the purportedly unenforceable covenants has been denied by the Carderock Springs Architectural Review Committee. The only proper claim and relief, if there is any, is for a declaration as to the validity of the restrictive covenants. Whether the restrictive covenants are enforceable or not enforceable, a claim for damages does not lie.

With respect to Count IV, it is simply a repetition of Count I. There is no reason or need for this court to become the Architectural Review Committee and approve the Plaintiffs' addition if the covenants are unenforceable.

For all of the foregoing reasons Carderock Springs requests that Counts II, III and IV of the Amended Complaint be dismissed without leave to amend.

CHEN, WALSH, TECLER
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SUITE 300
ROCKVILLE, MARYLAND 20850

REQUEST FOR HEARING

Defendant requests a hearing on this motion.

John F.McCabe, Jr.

Respectfully submitted,

John F. McCabe, Jr.
200A Monroe Street, Suite 300
Rockville, MD 20850
301-279-9500
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of January, 2007, a copy of the foregoing "Motion to Dismiss or in the Alternative for Stay and Request for Hearing" was mailed via first-class mail, postage prepaid, to:

Jeffrey M. Axelson Esq.
VanGrack, Axelson, Williamowsky
Bender & Fishman, P.C.
401 North Washington Street, Suite 550
Rockville, MD 20850

John F. McCabe, Jr.

CHEN, WALSH, TECLER
& MCCABE, L.L.P.
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ORDER

UPON CONSIDERATION of the Motion to Dismiss and of any response thereto, and after hearing before this court, it is this _____ day of _____, 2007

ORDERED:

Counts II, III and IV of the Amended Complaint are dismissed without leave to amend.

_____
JUDGE

Copies to:

John F. McCabe, Jr., Esq.
Chen, Walsh, Tecler & McCabe, L.L.P.
200A Monroe Street, Suite 300
Rockville, MD 20850

Jeffrey M. Axelson, Esq.
VanGrack, Axelson, Williamowsky
Bender & Fishman, P.C.
401 North Washington Street, Suite 550
Rockville, MD 20850