BVSA Mailbox and Above-Ground Pool Legal Opinion and Board Decision Date.

This following is a legal discussion that was carried out via email on February 16, 2015, March 20, 2015 and March 24, 2015 between the BVSA board and Mr. Stephan Guerra, attorney. It was put into this format to simply reading. The opinion contained herein was considered and the mailbox and above-ground pool decisions were then made by the BVSA board and recorded in meeting minutes dated April 8, 2015.

February 16, 2015, Stephan Guerra wrote:

I've reviewed the following governing documents for Buckingham Village Nos. 1 and 2:

1. Declaration of Easements, Covenants and Restrictions for Buckingham Village No. 1, recorded March 17, 2013, in Liber 13100, Page 670 et seq.;

2. First Amendment to Declaration , Recorded March 18, 2005, in Liber 16496, Pages 240 et seq.;

3. Plat Buckingham Village No. 1; and

4. Plat Buckingham Village No. 2.

I did not receive or review the Association's corporate bylaws, but that should not be necessary to address your question below. I of course also reviewed the Macomb County Circuit Court's Opinion and Order entered on November 18, 2014, in Case No. 2014-0657-CZ (note that page 1 of the Opinion and Order references a master deed for both BVI and BVII - master deeds are only utilized with condominiums, so I presume this reference is a typo given that BVI and BVII are subdivisions and not condominiums - if I am missing something here, please let me know). On page 10 of the Court's Opinion and Order, the Court makes a general statement that "laches would be a valid defense to the enforcement of a restriction against a homeowner's existing violation if [it] is shown that the delay in enforcing the restriction prejudiced the party asserting the defense." The Court goes on to state on page 11 that "enforcement issues are to be resolved *on the facts of each specific case*" and that the facts of those "*potential cases*" were not presently before the Court. Consequently, the Court did not indicate whether or not the Association had to enforce the Declaration restrictions against presumed existing violations.

As indicated by the Court, laches will operate to bar enforcement of a restriction where there has been a lack of diligence *and* there is some prejudice to the party against whom the enforcement action is being taken. In other words, in the absence of some prejudice, lack of diligence or delay alone will *not* be sufficient to warrant the application of laches. Note that this is *different* from a statute of limitations defense, which is concerned only with the time that has passed (and not the prejudice resulting from the passed time). Note also that laches is an equitable *defense* and, therefore, the party asserting the defense (i.e. the violating owner) has the burden of proving that the doctrine applies to bar enforcement of a valid restriction.

As the Court indicated, whether there is prejudice in the delay of enforcement will depend on the particular facts of each case. In a restriction enforcement scenario, some facts to consider follow:

1. Where plans and specifications submitted to the Association prior to constructing as required by Sections 2 and 12 of the Declaration?

2. Was the Board aware of the violations? If so, did the board object at the time or soon after the Board became aware?

3. If no objection after the Board became becoming aware, did the owner take additional actions that would cause an economic loss to that owner?

4. Note that the fact that there may be other similar violations, that fact alone does not prevent the enforcement of the restriction.

As to enforcing the Declaration restrictions, the Board of Directors is charged with, among other things, the legal duty to enforce the Declaration restrictions. When making enforcement decisions, the Board must use its best business judgment, taking into consideration the various factual considerations that go into determining whether the restriction should be enforced (e.g. has there been a waiver or may the doctrine of laches apply). In general, though, the Board of Directors cannot ignore its fiduciary duty to enforce the restrictions (that is the case even if a majority of the owners desire to have them do so), as it takes but one co-owner to impose liability on any Director who does not fulfill his or her fiduciary duties to the membership as a whole. Accordingly, as to enforcing BVI's and BVII's restrictions, the Board should be reviewing violations that existed both before and after the November 18, 2014 Order, as the facts surrounding each of those specific violations will be different and will determine whether or not the restriction likely can be enforced. If you'd like us to assist in analyzing those specific scenarios, please feel free to forward information on those specific violations.

Follow-on questions from the BVSA Board (March 20, 2015 and answered March 24, 2015):

Mailboxes - All of Buckingham Village I (BVI) has the same matching mailbox. This addition has 122 homes in it. Only about 5-10 homes in Buckingham Village II (BVII) have the correct, compliant mailboxes (181 homes). Some of the mailboxes in BVII have been here for as long as 8 years, some as short as 6 months.

There are a few impediments to the Association enforcing the mailbox restriction in BVII. First is the laches defense. This defense was discussed at length in my email to you on February 16th. In short, if a delay in enforcement results in prejudice to the party against whom the enforcement action is brought, the Court will not permit enforcement. In this instance, and especially as it relates to mailboxes that were constructed prior to the Court's ruling on November 18, 2014, laches would be a viable defense to an enforcement action to the extent those owners relied on the fact that the Association (wrongfully) would not be enforcing any restrictions in BVII. In addition to laches, owners could potentially argue in response to an enforcement action that the use of non-conforming mailboxes is so prevalent that it is impossible to accomplish the original purpose of the restrictive covenant, thereby preventing its enforcement. In short, the Association should not require owners that installed mailboxes prior to the Court's ruling on November 18, 2014, to remove nonconforming mailboxes. With that said, on a going forward basis, the Association still must enforce the prior written approval requirement contained in Section 2(a) of the Declaration, and the Association could require as part of the approval process that any mailbox replacement be done with a conforming mailbox. The Association could also send notices to all owners with non-conforming mailboxes asking that they voluntarily replace the mailboxes and that, if they chose not to, any future replacement of the mailbox must be done with a conforming mailbox and with the Association's prior written approval.

Above ground pools - There is 1 above ground pool in BVII that has been in place for about 2 years. According to the ECR's one most obtain approval from the HOA board before erecting such things. Since the HOA did not recognize BVII as members prior to 11/18/14 when the judge ruled that BVII did in fact belong to the HOA there was no one to seek approval from.

This scenario is a bit more difficult and much will depend on whether the owner made any attempt to obtain the approval of the Association prior to installing the above-ground pool. That is, the laches defense is only viable if enforcement results in prejudice to the party against whom the enforcement action is brought. If this owner sought approval but was informed that there would be no review as the Association refused to enforce or otherwise administer BVII, then the owner has a strong argument that it relied on the Association's position and that to enforce now would result in prejudice. On the other hand, if the owner installed the above-ground pool and made no attempt to obtain the Association's prior approval and did not know that the Association refused to administer BVII, then there likely is no prejudice as the owner did not rely on any Association position before installing the pool. In either instance, the Association should send a letter to this owner informing them that the above-ground pool is not acceptable and requesting that they remove the pool voluntarily - this should be done so

that, at a minimum, other owners seeking an above-ground pool approval cannot claim that the Association is enforcing the documents arbitrarily. Such a letter may very well prompt compliance. If not, the Association will have to analyze any response and will have to determine whether the facts warrant court action.

Stephen M. Guerra
Makower Abbate Guerra PLLC
30140 Orchard Lake Road
Farmington Hills, MI 48334
Phone: 248.254.7600
Direct: 248.254.7603
Fax: 248.671.0100
www.maglawpllc.com