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CLERK
SUPREME COURT OF VIRGINIA
FEB 02 2000
RICHMOND, VIRGINIA

IN THE
Supreme Court of Virginia

RECORD NO. 992258

**HERMAN E. LEEMAN, MARY E. LEEMAN,
RAYMUND A. PLUNKETT, and BERTA S. PLUNKETT,**

Appellants,

v.

TROUTMAN BUILDS, INC.,

Appellee.

JOINT APPENDIX

**Mark P. Friedlander, Jr.
FRIEDLANDER &
FRIEDLANDER, P.C.
1364 Beverly Road, Suite 201
McLean, Virginia 22101
(703) 893-9600**

Counsel for Appellants

**John E. Rinaldi
WALSH COLUCCI STACKHOUSE
EMRICH & LUBELEY, PC
13663 Office Place, Suite 201
Woodbridge, Virginia 22192-4216
(703) 680-4664**

Counsel for Appellee

Table of Contents

Page Number

Bill of Complaint for Declaratory Judgment filed May 13, 1999	1
Exhibit A - Arlington County Circuit Court Final Order in <i>Faherty, et al. v. The Garfield Manor Corporation</i> dated December 16, 1998	5
Exhibit B - Proposed "Modification of Restriction" issued May 27, 1998	7
Answer and Grounds of Defense filed June 7, 1999	11
Order of Dismissal by Non-Suit as to Faherty & Holland filed June 8, 1999	15
Motion for Summary Judgment filed July 2, 1999	17
Memorandum in Support of Motion for Summary Judgment filed July 2, 1999	18
Exhibit A - Deed of March 7, 1927 containing the restrictive covenant	23
Exhibit B - Arlington County Circuit Court Final Order in <i>Faherty, et al. v. The Garfield Manor Corporation</i> dated December 16, 1998	25
Opposition to Motion for Summary Judgment filed July 12, 1999	27
Response to Opposition filed July 14, 1999	33
Final Order entered July 16, 1999	37

Notice of Appeal filed July 19, 1999	40
Assignments of Error	42

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ARLINGTON

HERMAN E. LEEMAN
MARY E. LEEMAN
1224 South Oakcrest Road
Arlington, Virginia

RAYMUND A. PLUNKETT
BERTA S. PLUNKETT
1226 South Oakcrest Road
Arlington, Virginia

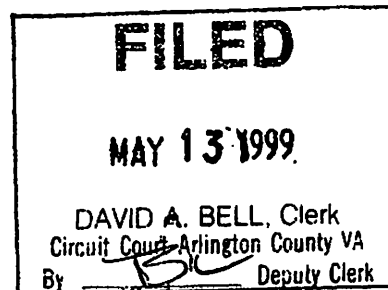
Plaintiffs

vs.

TROUTMAN BUILDS, INC.
c/o Elanor Troutman, R/A
3407 Old Dominion Blvd.
Alexandria, VA 22305

JOYCE FAHERTY
JAMES EDWARD HOLLAND JR.
JON EDGAR HOLLAND
2911 North 26th Street
Arlington, Virginia

Defendants.



Chancery No. 99-292

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT

COME NOW the Complainants, and move this Honorable Court for a Declaratory Judgment, pursuant to Section 8.01-184 of the Code of Virginia, 1950, as amended.

1. This action involves real estate located in Arlington County, Virginia; more particularly, the property located at 2343 Arlington Ridge Road, Arlington, Virginia, as subdivided to lots 6B-1 and 6B-2, Block 1, Section 1, Oakcrest, hereinafter referred to herein as "THE TROUTMAN PROPERTY".

2. The issue herein concerned is whether or not the restrictive covenant on the Troutman Property that runs with the land prohibits the building of a second residential home on said lot and, therefore, prohibits construction on a subdivided lot to accomplish this prohibited action.

3. Defendants Faherty, Holland and Holland are the owners of the Troutman Property having acquired the same on June 28, 1997.

4. Upon information and belief Defendant Troutman Builds, Inc. is contract Purchaser of the Troutman Property, and intends to build a residence on Lot 6B-1.

5. Complainants Herman E. Leeman and Mary E. Leeman are abutting property owners to the Troutman Property and are subject to and protected by the same restrictive covenant derived from a common grantor, along with the Defendants.

6. Complainants Raymund A. Plunkett and Berta S. Plunkett own property in the same subdivision of the Troutman Property and are subject to and protected by the same restrictive covenant derived from a common grantor along with the Defendants.

7. The parties hereto are all owners of record of lots which were a part of the Re-Subdivision of Lots 1 to 7 inclusive, Block 1, Section 1, Oakcrest, as contained on a plat attached to a deed recorded in Deed Book 229 at page 62 among the land records of Arlington County, Virginia.

8. Garfield Manor Corporation conveyed the original Lot 6B, (now 6B-1 and 6B-2) Block 1, Section 1, Oakcrest, Arlington County Virginia subject to 7 restrictions, of which Restriction 7 states: "Not more than one dwelling shall be erected on said lot except with written approval of vendor".

9. The vendor "Garfield Manor Corporation" was terminated as a corporation by the State Corporation Commission on June 3, 1958.

10. On or about December 16, 1998, by an ex parte law action in Arlington Circuit Court, Joyce H. Faherty, James Holland and John Holland secured a Final Order voiding the said Restriction 7, a copy of which is attached as Exhibit A.

11. Said Court Ruling is not valid as to the rights of Complaints herein in that (1) Defendant had notice of Complaints rights as evidenced by the proposed Modification of Restriction issued on May 27, 1998, a copy of which is attached as Exhibit B, and (2) Complaints were necessary parties to the action represented by Exhibit A, and (3) The Court was without power to issue equitable relief in an action at Law.

12. Garfield Manor Corporation was the common grantor in the chains of Title of the Complainants and the Defendants in the aforementioned lots. respectively.

13. Each of the Deeds contained the identical provisions of the restrictive covenant prohibiting the construction of no more than one residence on each lot. Said restriction covenant was intended to benefit all land and land owners from the common grant so designated.

14. Defendants by applying for approval of a subdivision of said lot 6-B into 6B-1 and 6B-2 have evidenced an intention to build more than one residence on the subject lot.

15. It is the position of the Complainants that the subdivision of the lot does not permit a violation of the restrictive covenant limiting the number of residences per lot to Lot 6B. The Complainants, therefore, seek a Declaratory Judgment to declare that the restrictive covenant, Restriction 7, aforesaid forbids the construction of more than one residence on the subject lot, and that a subdivision of said lot into two lots does not alter the covenant so that

construction of a residence on Lot 6B-1 is a violation of this restrictive covenant.

16. The Defendants' violation of the restriction, if allowed, would cause the Complainants irreparable injury for which there is no adequate remedy at law.

WHEREFORE, Complainants pray:

1. That the Court issue a Decree construing the residential restriction applicable to the subdivision, declaring that said restriction is valid and enforceable, and enjoining the Defendants from building an additional residence on the newly created Lot 6B-1 contrary to the restrictive covenant; and

2. That the order of the Court in Faherty et al v The Garfield Manor Corporation Law No 98-918 is invalid as to the rights of Complainants herein to enforce the restriction covenant.

3. That the Court grant such other relief as is just and meet.

HERMAN E. LEEMAN et al.

By: Herman E. Leeman

Subscribed and Sworn to before me, the undersigned Notary Public in and for the Commonwealth of Virginia, At Large, this 13 day of May, 1999.

My Commission Expires: 8-31-99

Harlene J. Sinkley
Notary Public

Mark P. Friedlander, Jr.
Mark P. Friedlander, Jr.
FRIEDLANDER & FRIEDLANDER, P.C.
1364 Beverly Road, Suite 210
McLean, VA 22101
Bar # 4773
Counsel to Complainants

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

JOYCE H. FAHERTY.
JAMES HOLLAND
JON HOLLAND
Complainants

vs.

THE GARFIELD MANOR CORPORATION
Respondents

At Law No. 98-918

FINAL ORDER

THIS MATTER came on upon the Complainants', JOYCE H. FAHERTY, JAMES HOLLAND, and JON HOLLAND, request for the entry of a default judgment granting their Motion for Declaratory Judgment to declare a restrictive covenant on the lot known as 2343 S. Arlington Ridge Road, Arlington, Virginia, void as a matter of law because it required the approval of the Defendant, The Garfield Manor Corporation which has been a dissolved corporation since 1958. Proper service was made through the State Corporation Commission but because the Garfield Manor Corporation has not been in existence for more than 40 years, no answer was filed, and

WHEREFORE the subject property is located at 2343 S. Arlington Ridge Road, Arlington, Virginia, and

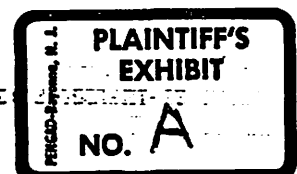
WHEREFORE the subject property is burdened by a restrictive covenant which states "Not more than one dwelling shall be erected on said lot except with written approval of the vendor" and

WHEREFORE the vendor "Garfield Manor Corporation" ("the Corporation") was terminated as a Corporation by the State Corporation Commission on June 3, 1958, more than 40 years ago, and

6979944 P.03

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FROM Lexington Title Agency



WHEREFORE the Complainants wish to subdivide the lot and construct a dwelling on the newly formed second lot subject to the approval of the Arlington County subdivision ordinance, and

WHEREFORE the Court finds that the covenant is impossible to perform as no vendor exists to give permission for the construction of a second dwelling on the lot, and

WHEREFORE the Court further finds that the covenant void and unenforceable as a matter of law because it is impossible to perform and it is therefore

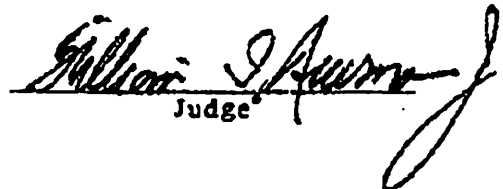
ORDERED, ADJUDGED and DECREED as follows:

1. The restrictive covenant that states "Not more than one dwelling shall be erected on said lot except with written approval of the vendor" is void and unenforceable as a matter of law as to the lot known as 2343 S. Arlington Ridge Road, Arlington, Virginia.

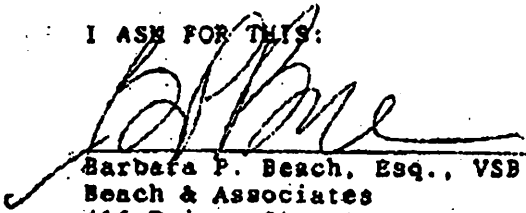
THIS ORDER IS FINAL.

THE CLERK is hereby directed to send certified copies of this Order to counsel of record.

ENTERED this 16th day of December, 1998.


Judge

I ASK FOR THIS:


Barbara P. Beach, Esq., VSB #19665
Beach & Associates
416 Prince Street
Alexandria, VA 22314
(703)683-3434
Counsel For Complainants

Dan Troutman, Troutman Builds

3407 Old Dominion Blvd. Alex. VA 22305 (703)684-9512

May 27, 1998

Dear Home Owner of the Oakcrest Subdivision,

My name is Dan Troutman. My Dad and I own Troutman Builds, a small home building company that constructs two or three houses a year. We presently have a contract to buy the house at 2343 Arlington Ridge Road. The lot has now been preliminarily approved by Arlington County for the subdivision of one lot on Oakcrest and the original house to remain on Arlington Ridge. I plan to renovate the house on Arlington Ridge and live in it myself. Our company plans to build a new house on Oakcrest to sell.

We have built two houses in your neighborhood in the last two years. They are located at 1107 23rd Road and 2116 S. Lynn Street. If you have seen them, you know they are quality homes that fit graciously into the surroundings. Our houses are not accidents, but rather a process of studying the area and the street to create something as individual as your house, so we can be proud, along with you of the product, and attract a quality home buyer. We believe that one of our houses can enhance a piece of land and add to the property value of the community.

We have plans to commence construction in June, but have encountered a problem. While our lawyer was bringing down the title in a title search, he discovered that one of the articles (#7) of this deed, restricts the building of a second dwelling on the property. The 1925 deed document left a very definite possibility of changing this restriction with permission of the vendor. Since the vendor (developer of the subdivision) is no longer a valid entity, the successor to that role becomes each home owner in the Oakcrest subdivision. Even though this lot, 6B, one of two original large lots in the subdivision, meets every covenant of the County for dividing, it is bound by this restriction. There are 11 owners in the Oakcrest subdivision including 6B.

I would like to ask each of you to help us continue this project of building one new house and my living in the existing house by signing a waiver of Article # 7 of the deed to 2343 Arlington Ridge Rd. The project can go on if each homeowner will sign.. If one deed owner decides not to sign, the project is null and void. In return we will make effort to be a good neighbor and to treat the property in discussion as precious and important as your home.

If you will sign the waiver, you may do so, without any cost to you, either at the Burke and Herbert Bank in Crystal City or we will arrange for a Notary to come to your house at your convenience.

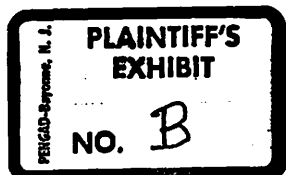
Again, thank you for your consideration of this important matter in the progress of our company and in my own life as a hopeful home owner in your community.

Sincerely,

Dan Troutman

Phone # 684-9512

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PREPARED BY AND RETURN TO:

Gerald E. Williams, 2055 15th Street, North, #200, Arlington, VA 22201-2613

703-524-7774 FAX 703-528-2140 T-22067

RPC#s: 37-021-234; 37-021-142; 37-021-233; 37-021-232; 37-021-143; 37-021-141;
37-021-144; 37-021-140; 37-021-139; 37-021-145; 37-021-138; 37-021-146;
37-021-137; 37-031-147; and 37-021-148

This document was prepared without the benefit of title examination

MODIFICATION OF RESTRICTIONS

THIS MODIFICATION OF RESTRICTIONS, Made this 28th day of May, 1998, by and between Mary B. KIRN, party of the first part; Raymond Arthur PLUNKETT and Berta Salazar PLUNKETT, parties of the second part; Raymond Arthur PLUNKETT, party of the third part; Stanley Parley SMITH and Linda Joan HOBBS, parties of the fourth part; Herman E. LEEMAN and Mary E. LEEMAN, parties of the fifth part; Wesley A. REYNOLDS and Marie C. REYNOLDS, parties of the sixth part; TROUTMAN BUILDS, INC., a Virginia corporation, party of the seventh part; Gladys R. CLEEK, party of the eighth part; John N. DICKIE and Judith Ann DICKIE, parties of the ninth part; Curtis N. BLOGIN and Ashley C. BLOGIN, parties of the tenth part; Nolen E. RHEA, party of the eleventh part; Ralph Warren SHORT and Dana M. SHORT, parties of the twelfth part; and Barbara F. SHEEHAN, party of the thirteenth part;

WHEREAS, the party of the first part is the record owner of Lot 2-A and Part of Lot 1-A, Block 1, Section 1, **OAKCREST**, and Part of Lot 1-A, Block 1, Section 1, **OAKCREST**, having acquired the same by deed recorded in Deed Book 2220 at page 253, among the land records of Arlington County, Virginia; and

WHEREAS, the parties of the second part are the record owners of 3-A and 3-B, Block 1, Section 1, **OAKCREST**, having acquired the same by deed recorded in Deed Book 2247 at page 104, among the land records of Arlington County, Virginia; and

WHEREAS, the party of the third part is the record owner of Lot 4-A, Block 1, Section 1, **OAKCREST**, having acquired the same by deed recorded in Deed Book 1732 at page 450, among the land records of Arlington County, Virginia; and

WHEREAS, the parties of the fourth part are the record owners of Lot 4-B, Block 1, Section 1, **OAKCREST**, having acquired the same by deed recorded in Deed Book 2828 at page 1036, among the land records of Arlington County, Virginia; and

WHEREAS, the parties of the fifth part are the record owners of Lot 5-A, Block 1, Section 1, **OAKCREST**, having acquired the same by deed recorded in Deed Book 2819 at page 468, among the land records of Arlington County, Virginia; and

Section 1, **OAKCREST**, having acquired the same by deed recorded in Deed Book 2738 at page 1861, among the land records of Arlington County, Virginia; and

WHEREAS, the party of the seventh part is the record owner of Lot 6-B, Block 1, Section 1, **OAKCREST**, having acquired the same by deed recorded in Deed Book _____ at page _____, among the land records of Arlington County, Virginia; and

WHEREAS, the party of the eighth part is the record owner of Lot 6-A, Block 1, Section 1, **OAKCREST**, having acquired the same by deed recorded in Deed Book 1241 at page 420, among the land records of Arlington County, Virginia; and

WHEREAS, the parties of the ninth part are the record owners of Lot 7-B, Block 1, Section 1, **OAKCREST**, having acquired the same by deed recorded in Deed Book 1844 at page 515, among the land records of Arlington County, Virginia; and

WHEREAS, the parties of the tenth part are the record owners of Lot 7-A, Block 1, Section 1, **OAKCREST**, having acquired the same by deed recorded in Deed Book 2863 at page 1217, among the land records of Arlington County, Virginia; and

WHEREAS, the party of the eleventh part is the record owner of Lot 7-C, Resubdivision of Part of Lots 7, 8 and 9, Block 1, Section 1, **OAKCREST**, having acquired the same by deed recorded in Deed Book 1886 at page 516, among the land records of Arlington County, Virginia; and

WHEREAS, the parties of the twelfth part are the record owners of Part of Lots 7 and 8, Block 1, Section 1, **OAKCREST**, having acquired the same by deed recorded in Deed Book 2610 at page 1725, among the land records of Arlington County, Virginia; and

WHEREAS, the party of the thirteenth part is the record owner of Part of Lot 8, Block 1, Section 1, **OAKCREST**, having acquired the same by deed recorded in Deed Book 2749 at page 744, among the land records of Arlington County, Virginia; and

WHEREAS, the parties hereto are all of the owners of record of all of the lots which were a part of the Re-Subdivision of Lots 1 to 7 inclusive, Block 1, Section 1, **OAKCREST**, as shown on a plat attached to a deed recorded in Deed Book 229 at page 62, among the land records of Arlington County, Virginia; and

WHEREAS, when Garfield Manor Corporation conveyed Lot 6-B, Block 1, Section 1, **OAKCREST**, Arlington County, Virginia, in Deed Book 259 at page 115, among the land records of Arlington County, Virginia, seven restrictions were made a part of the deed. Restriction 7 states as follows: "Not more than one dwelling shall be erected on said lot except with written approval of vendor"; and

WHEREAS, the vendor has gone out of business and none of the members of the

corporation can be found; and

WHEREAS, the parties hereto desire to delete Restriction 7 recorded in Deed Book 259 at page 115, among the land records of Arlington County, Virginia.

NOW, THEREFORE, for and in consideration of the sum of One Dollar (\$1.00) and other valuable consideration the receipt of all of which is hereby acknowledged, the parties hereto, being all of the parties in interest do hereby amend the restrictions set forth in the deed recorded in Deed Book 259 at page 115, among the land records of Arlington County, Virginia, as follows:

1. That Restriction 7, "Not more than one dwelling shall be erected on said lot except with the written approval of vendor" is deleted.

WITNESS the following signature and seal:

_____[SEAL]
Mary B. Kirn

COMMONWEALTH OF VIRGINIA AT LARGE

COUNTY OF ARLINGTON, to-wit:

The foregoing instrument was acknowledged before me this ____ day of _____, 1998, by Mary B. Kirn.

My commission expires: _____

Notary Public at Large

VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

HERMAN E. LEEMAN, et al.

Plaintiffs

v.

TROUTMAN BUILDS, INC., et al.

Defendants

Chancery # 99-292

FILED

JUN 07 1999

DAVID A. BELL, Clerk
Circuit Court Arlington County, Va.
By *[Signature]* David A. Bell

ANSWER AND GROUNDS OF DEFENSE

COMES NOW the Defendant, Troutman Builds, Inc. ("Defendant") and as its Answer and Grounds of Defense to the Bill of Complaint for Declaratory Judgment filed by the Plaintiffs in the above-captioned matter states as follows, to-wit:

1. The allegations contained in Paragraph 1 are admitted.
2. Paragraph 2 contains no allegations of fact. Defendant states that the issues involved in this matter are for the determination of the Court. To the extent necessary, the allegations found in Paragraph 2 are denied.
3. The allegations contained in Paragraph 3 are denied.
4. The allegations contained in Paragraph 4 are denied.
5. The Defendant has no knowledge of the facts alleged in Paragraph 5 and therefore denies the same and demands strict proof thereof.
6. The Defendant has no knowledge of the facts alleged in Paragraph 6 and therefore denies the same and demands strict proof thereof.
7. The Defendant has no knowledge of the facts alleged in Paragraph 7 and therefore denies the same and demands strict proof thereof.

8. The Defendant states that the status of title to any property in Arlington County is reflected in the land records of Arlington County, which speak for themselves. To the extent necessary, Defendant states that it has no knowledge of the facts alleged in Paragraph 8 and therefore denies the same and demands strict proof thereof.

9. The allegations found in Paragraph 9 are admitted.

10. The Defendant states that the status of any action of the Arlington County Circuit Court is reflected in the files and records of the Arlington County Circuit Court Clerk, which speak for themselves. To the extent necessary, Defendant admits that a valid and enforceable Final Order was entered by the Circuit Court of Arlington County in At Law #98-918. The Defendant denies the said Order was the result of an ex parte action. To the extent necessary, Defendant states that it has no knowledge of any of the remaining facts alleged in Paragraph 10 and therefore denies the same and demands strict proof thereof.

11. The allegations found in Paragraph 11 are denied.

12. The Defendant states that the status of title to any property in Arlington County is reflected in the land records of Arlington County, which speak for themselves. To the extent necessary, Defendant states that it has no knowledge of the facts alleged in Paragraph 12 and therefore denies the same and demands strict proof thereof.

13. Defendant states that it has no knowledge of the facts alleged in Paragraph 13 and therefore denies the same and demands strict proof thereof.

14. The Defendant, Troutman Builds, Inc., has not applied for the subdivision of the property at issue in this case. Defendant states that it has no knowledge of the any of the other facts alleged in Paragraph 14 and therefore denies the same and demands strict proof thereof.

15. Paragraph 15 contains no allegations of fact. Defendant states that the interpretation of any restrictive covenant is for the determination of the Court, which has been done by the final Order in Arlington County Circuit Court at Law #98-18. To the extent necessary, the allegations found in Paragraph 15 are denied.

16. The allegations found in Paragraph 16 are denied.

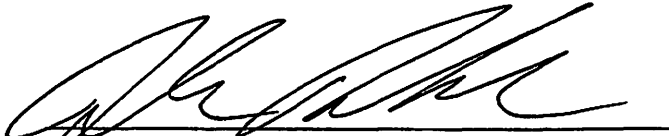
WHEREFORE, the Defendant, Troutman Builds, Inc., prays that this Court dismiss the above-captioned matter with prejudice, award the defendant its reasonable costs for defending this matter, including but not limited to attorney's fees, and grant such other relief that the court deems just and equitable.

GROUND OF DEFENSE

1. The Plaintiffs claims are barred by the doctrine of *Res Judicata*.
2. The Plaintiffs claims are barred by the doctrine of *Collateral Estoppel*.
3. The Plaintiffs lack standing to bring the above-captioned action.

WHEREFORE, the Defendant, Troutman Builds, Inc., prays that this Court dismiss the above-captioned matter with prejudice, award the defendant its reasonable costs for defending this matter, including but not limited to attorney's fees, and grant such other relief that the court deems just and equitable.

TROUTMAN BUILDS, INC.
By Counsel



John E. Rinaldi VSB #31580

Walsh, Colucci, Stackhouse, Emrich, & Lubeley, P.C.
13663 Office Place
Suite 201
Woodbridge, Va. 22192
Counsel for Troutman Builds, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing was served via first class mail, postage prepaid to the following on June 4, 1999:

Mark P. Friedlander, Esq.
Friedlander & Friedlander, P.C.
1364 Beverly Road
McLean, Va. 22101
Counsel for Plaintiffs



John E. Rinaldi

V I R G I N I A :

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

HERMAN E. LEEMAN, et al.,

Plaintiffs,

v.

Chancery No. 99-292 ✓

TROUTMAN BUILDS, INC.

and

JOYCE FAHERTY

JAMES EDWARD HOLLAND JR.

JON EDGAR HOLLAND,

Defendants.

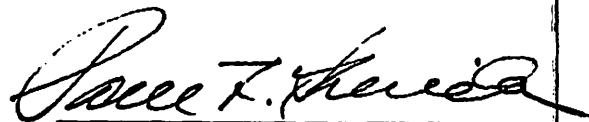
ORDER OF DISMISSAL BY NON-SUIT

IT APPEARING TO THE COURT that the Plaintiff, as a matter of law, pursuant to Section 8.01-380 of the Code of Virginia, 1950, as amended, has requested that the Defendants in the above case, JOYCE FAHERTY, JAMES EDWARD HOLLAND JR., and JON EDGAR HOLLAND, be non-suited; it is, therefore,

ORDERED, ADJUDGED AND DECREED that the Plaintiff, be and it is granted leave to suffer a non-suit as to Defendants JOYCE FAHERTY, JAMES EDWARD HOLLAND JR., and JON EDGAR HOLLAND, pursuant to Section 8.01-380 of the Code of Virginia, 1950, as amended, and the action against these Defendants stands dismissed without prejudice; and

THIS CAUSE IS CONTINUED.


ENTERED: 8 June 1999



JUDGE

✓
WE ASK FOR THIS:

FRIEDLANDER & FRIEDLANDER, P.C.

BY: 
Mark P. Friedlander, Jr.
Virginia Bar No. 4773
1364 Beverly Road, Suite 201
McLean, Virginia 22101
Telephone: (703) 893-9600
Counsel for Plaintiffs

VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

HERMAN E. LEEMAN, et al.

Plaintiffs

v.

TROUTMAN BUILDS, INC., et al.

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Chancery # 99-292

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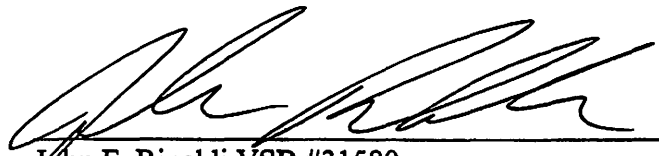
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DAVID A. BELL, Clerk
Circuit Court Arlington County VA
Deputy Clerk

MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, Troutman Builds, Inc. ("Defendant") and as its Motion for Summary Judgment states that there are no material facts at issue in the above-captioned matter and that the Defendants are entitled to Summary Judgment for the reasons stated in the attached Memorandum in Support of Motion for Summary Judgment.

TROUTMAN BUILDS, INC.
By Counsel



John E. Rinaldi VSB #31580
Walsh, Colucci, Stackhouse, Emrich, & Lubeley, P.C.
13663 Office Place
Suite 201
Woodbridge, Va. 22192
Counsel for Troutman Builds, Inc.

M:\LITV\TROUTMAN\SUMMARY.WPD

VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

HERMAN E. LEEMAN, et al.

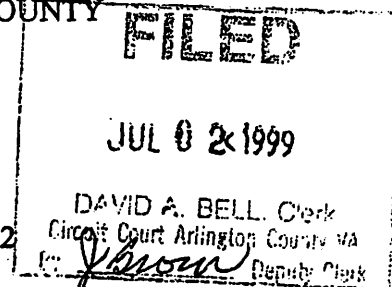
Plaintiffs

v.

TROUTMAN BUILDS, INC., et al.

Defendants

Chancery # 99-292



**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Defendant, Troutman Builds, Inc. ("Defendant") and as its Memorandum in Support of Motion for Summary Judgment states as follows, to-wit:

UNDISPUTED FACTS

This case involves the interpretation of restrictive covenants that affect a parcel of land in Arlington County formerly known as Lot 6B-1, Block 1, Section 1, in the Oakcrest subdivision ("Property").¹ Garfield Manor Corporation placed the original restrictive covenants against the Property as a part of its conveyance of the Property to a remote predecessor in title to the Defendant. The Property was later subdivided into two lots, known as Lot 6B-1 and 6B-2.² A true and exact copy of the restrictive covenants at issue is attached as Exhibit A. The specific covenant at issue is Covenant #7, which states, "Not more than one dwelling shall be erected on said lot *except with written approval of vendor.*" (Emphasis added).³

¹ Bill of Complaint, Para. 1 and 2.

² Bill of Complaint, Para. 8.

³ Id.

The State Corporation Commission terminated the vendor, Garfield Manor Corporation, on June 3, 1958.⁴ There is nothing in the covenants at issue stating that the right to approve the construction of further dwellings on any lot passes to the other property owners within the subdivision after the State Corporation Commission has terminated Garfield Manor Corporation.

On October 9, 1999, the immediate predecessors in title to the Defendant filed Joyce H. Faherty, et al. v. Garfield Manor Corporation, Arlington County At Law # 98-918, seeking a declaration that Covenant #7 is void as a matter of law. The Plaintiffs in Faherty properly served Garfield Manor Corporation through the State Corporation Commission. Garfield Manor Corporation failed to file a response. On December 16, 1998, the Arlington County Circuit Court entered a Final Order, which is attached as Exhibit B. The Final Order concludes and declares that because the State Corporation Commission terminated Garfield Manor Corporation, performing Covenant #7 is impossible, therefore Covenant #7 is “void and unenforceable as a matter of law.”⁵

On May 13, 1999, 148 days after the entry of the final order, the Plaintiffs filed this action seeking to overturn the Final Order in Faherty.

I. THE COURT NO LONGER HAS THE POWER TO OVERTURN THE FINAL ORDER ENTERED IN FAHERTY V. GARFIELD MANOR CORPORATION.

All final orders such as the final order in Faherty remain under the trial court's control for twenty-one days after their date of entry and may only be modified, vacated, or suspended during that time. Rule 1:1. The Court may interrupt the running of time under Rule 1:1 only by entering

⁴ Bill of Complaint Para. 9.

⁵ See the Arlington County Circuit Court's record on Faherty et al. V. Garfield Manor Corporation, at Law #98-918.

an order suspending or vacating the prior order. *School Bd. of City of Lynchburg v. Caudill Rowlett Scott, Inc.*, 237 Va. 550, 556, 379 S.E.2d 319, 323 (1989). If no such order is entered, the trial court loses jurisdiction over the matter after twenty-one days. *In re Commonwealth Dept. of Corrections*, 222 Va. 454, 464, 281 S.E.2d 857, 862-63 (1981). The order in Faherty is a final judgment that the Court neither suspended nor vacated. Therefore, the court lost jurisdiction over the order in Faherty 21 days after the order's entry, or on January 6, 1999. See *Stultz v. Albaugh*, ___ Va. App. ___, 1998 Va. App. LEXIS 591 (Va. App. 1998). Under Rule 1:1, the Court no longer has jurisdiction to alter or vacate the final order in Faherty. The Court cannot grant the relief being sought by the Plaintiffs.

II. THE FINAL ORDER IN FAHERTY IS CORRECT IN ALL RESPECTS

The final ruling in Faherty was based upon a single fact. The single fact was that the State Corporation Commission terminated Garfield Manor Corporation on June 3, 1958. The Plaintiffs admit that this single fact is true. Based on the single fact, the Court correctly ruled that performance of Covenant #7 is impossible as a matter of law and is therefore void as unenforceable.

In Virginia, the effect of termination of a corporation is that the corporation ceases to exist. See, Va. Code §§13.1-750.C. and 13.1-754 and *Moore v. OSHA*, 591 F.2d 991 (4th Cir. 1979). Following its termination, Garfield Manor Corporation ceased to exist and could not possibly either grant or deny permission to construct more than one dwelling on the Property. It is also impossible to reinstate Garfield Manor Corporation to give or deny permission to build further dwellings because the State Corporation Commission terminated Garfield Manor Corporation more than five years ago. Va. Code §13.1-754. Performance of Covenant #7 was rendered impossible by virtue of the termination of the corporation by the State Corporation Commission in 1958.

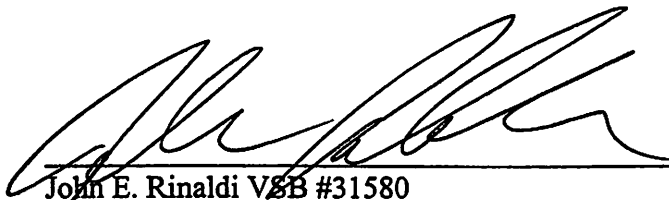
The doctrine of Impossibility of Performance applies to restrictive covenants running with land. See *Net Realty Holding Trust v. Franconia Properties, Inc.*, 544 F. Supp. 759 (E.D. Va. 1982) (Invalidating portions of a covenant on commercial property for impossibility of performance due to the bankruptcy of a lessee). If a promise or covenant is based on the continued existence of a person or thing, the cessation of the existence of that condition will excuse performance. *Housing Authority of Bristol v. East Tennessee Light & Power Co.*, 183 Va. 64, 73 & 74, 31 S.E. 2d 273 (1944). Covenant #7 is clearly based on the continued existence of Garfield Manor Corporation to give or deny permission to construct additional dwellings on the Property. However, because Garfield Manor Corporation was terminated, it can no longer give or deny that permission, making it impossible to perform Covenant #7.

Contrary to the Plaintiffs' assertions, the Plaintiffs would not have had standing and do not now have standing to object to the final order in Faherty. Covenants that restrict the free use of land are not favored and must be strictly construed. *Mid-State Equipment Co. v. Bell*, 217 Va. 133, 140, 225 S.E. 2d 877, 884 (1976). In order to enforce the covenants themselves, the Plaintiffs must show that the covenants are clearly intended to benefit them. *Forbes v. Schaefer*, 226 Va. 391, 401, 310 S.E.2d 457 (1983), See also, *Burns v. Winchester Memorial Hospital*, 225 Va. 545, 549, 303 S.E. 2d 908 (1983). The covenants do not absolutely preclude the construction of more than one dwelling on the Property. The covenants merely limit construction to those dwellings that the vendor, Garfield Manor Corporation, has permitted. Nothing in the covenants gives the Plaintiffs the right to grant or deny permission for the construction of further homes on lots in the subdivision. In fact, it is clear that if Garfield Manor Corporation still existed, it could grant permission for the construction of an additional dwelling on the Property over the objections of the Plaintiffs. If

performing the covenant was possible, the Plaintiffs would have no say at all in the decision of the vendor, Garfield Manor Corporation, to allow for the construction of another dwelling on the Property.

III. CONCLUSION

The court should grant summary judgment when there are no material facts at issue. *Stone v. Alley*, 240 Va. 162, 163, 392 S.E.2d 486, 487 (1990). In the present case, there is only one material fact that the court needs to determine in order to grant summary judgment. The one fact is that the State Corporation Commission terminated Garfield Manor Corporation. The one fact has already been conclusively found in Faherty, and is admitted by the Plaintiffs in their Bill of Complaint. The fact that Garfield Manor corporation no longer exists led this Court to the conclusion that Covenant #7 is now void as a matter of law because performing the covenant is impossible. Because the Court has already found that the State Corporation Commission terminated Garfield Manor Corporation and made the conclusion of law that Covenant #7 is impossible to perform and therefore void as unenforceable, there is no need for any further proceedings or arguments regarding the interpretation of Covenant #7. This matter should be dismissed with prejudice.



John E. Rinaldi V&B #31580
Walsh, Colucci, Stackhouse, Emrich, & Lubeley, P.C.
13663 Office Place, Suite 201
Woodbridge, Va. 22192
Counsel for Troutman Builds, Inc.

TROUTMAN BUILDS, INC.
By Counsel

M:\LIT\TROUTMAN\MEMORAND.WPD

annexed deed, bearing date on the 28th day of February, A. D. 1927, has acknowledged the same before me in my District aforesaid, to be her act and deed.

My commission expires November 14th, 1930.

Given under my hand and seal this 28th day of February, A. D. 1927.

LORRITA E. GRAVES

S S A E

Notary Public, D. C.

VIRGINIA

In the Clerk's Office of the Circuit Court of Arlington County April 13th, 1917, this deed was received, and with the annexed certificate admitted to record at 12 o'clock NOON.

Testes

B. G. Queen, Clerk.

.....

259-115

+ Restrictions

L. F. M...
M. M. M...
C. R. A...
1927

GARFIELD KADON CORPORATION

to S. & S.

ADA L. TANNY et vir

.....

THIS DEED, made this 7th day
of March, A. D. 1927, by and be-
tween GARFIELD KADON CORPORATION,

a corporation created under the laws of the State of Virginia, party of the first
part, and ADA L. TANNY and her husband JOSEPH C. TANNY, JR., parties of the
second part.

WITNESSETH, that the said party of the first part in consideration of the sum
of Ten Dollars, receipt whereof before the signing, sealing and delivery of these
presents is hereby acknowledged, does hereby grant, bargain, sell and convey unto
the said parties of the second part, as joint tenants with the common law right
of survivorship and not as tenants in common, with general warranty of title, all
that certain piece or parcel of land, with the improvements thereon, situate,
lying and being in Arlington County, Virginia, more particularly known and described
as:

All of Lot Numbered Six B (6-B), Block One (1), Section
One (1), of the Subdivision of "OAKCREST", as shown upon a plat
attached to a deed dated October 26th, 1925, showing a resubdivision
of Lots One (1) to Eight (8) inclusive, in said Block, recorded in
Deed Book 22v page 62, one of the Land Records of Arlington County,
Virginia.

This property is sold upon the following conditions, which shall be construed
as covenanted running with the land.

- (1) No dwelling or building occupied as such costing less than \$6,000.00, (of which fact the grantor shall be satisfied) shall be erected on the property.
- (2) No metal garages shall be erected on the property prior to January 1, 1930.
- (3) All dwellings and business houses shall be erected within the building line indicated on the plat of this subdivision and shall face, in the main, the street line of said lot, and all outbuildings shall be at least twenty feet from any side street.
- (4) No board fences shall be erected on the property.
- (5) Said property or any interest therein shall not be sold, transferred, leased, rented or conveyed to any person not of the Caucasian race.
- (6) Said property shall not be used for business purposes unless so indicated on its plat of subdivision.
- (7) Not more than one dwelling shall be erected on said lot except with written approval of vendor.

The party of the first part covenants that it has a right to convey said land to the grantees; that the grantees shall have quiet possession thereof, that it has done no act to encumber said land except as may be herein mentioned, and that it will execute such further assurance of said land as may be requisite or necessary.

WITNESS the signature and seal of the said party of the first part.

GARFIELD MANOR CORPORATION

CORPORATE SEAL

By CLARENCE R. AHALT, Vice-President.

ATTEST:

FRANK G. CAMPBELL, Secretary.

DISTRICT OF COLUMBIA, ss:

I, LORETTA E. GRAVES, a Notary Public in and for the District of Columbia, aforesaid, do hereby certify that CLARENCE R. AHALT, the Vice-President and FRANK G. CAMPBELL, the Secretary of Garfield Manor Corporation, a corporation created under the laws of the State of Virginia, whose names are signed to the foregoing and annexed deed bearing date on the 7th day of March, A. D. 1927, personally appeared before me in my district aforesaid and acknowledged said deed to be the act and deed of the said Garfield Manor Corporation; that the seal thereto affixed is the corporate seal of said corporation and that said deed was so signed, executed, acknowledged and delivered by them, and the seal thereto affixed, by authority of the Board of Directors of said Corporation.

Given under my hand and seal this 13th day of April, A. D. 1927.

S E A L

LORETTA E. GRAVES

Notary Public, D. C. whose
Commission expires Nov.
14, 1930.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

JOYCE H. FAHERTY
JAMES HOLLAND
JON HOLLAND
Complainants

At Law No. 98-918

vs.

THE GARFIELD MANOR CORPORATION
Respondents

FINAL ORDER

THIS MATTER came on upon the Complainants', JOYCE H. FAHERTY, JAMES HOLLAND, and JON HOLLAND, request for the entry of a default judgment granting their Motion for Declaratory Judgment to declare a restrictive covenant on the lot known as 2343 S. Arlington Ridge Road, Arlington, Virginia, void as a matter of law because it required the approval of the Defendant. The Garfield Manor Corporation which has been a dissolved corporation since 1958. Proper service was made through the State Corporation Commission but because the Garfield Manor Corporation has not been in existence for more than 40 years, no answer was filed, and

WHEREFORE the subject property is located at 2343 S. Arlington Ridge Road, Arlington, Virginia, and

WHEREFORE the subject property is burdened by a restrictive covenant which states "Not more than one dwelling shall be erected on said lot except with written approval of the vendor" and

WHEREFORE the vendor "Garfield Manor Corporation" ("the Corporation") was terminated as a Corporation by the State Corporation Commission on June 3, 1958, more than 40 years ago, and

WHEREFORE the Complainants wish to subdivide the lot and construct a dwelling on the newly formed second lot subject to the approval of the Arlington County subdivision ordinance, and

WHEREFORE the Court finds that the covenant is impossible to perform as no vendor exists to give permission for the construction of a second dwelling on the lot, and

WHEREFORE the Court further finds that the covenant void and unenforceable as a matter of law because it is impossible to perform and it is therefore

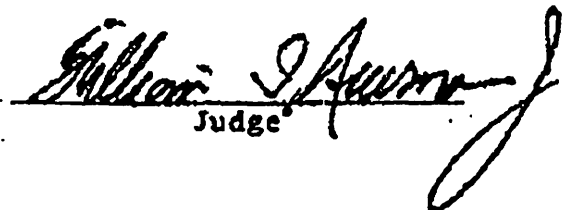
ORDERED, ADJUDGED and DECREED as follows:

1. The restrictive covenant that states "Not more than one dwelling shall be erected on said lot except with written approval of the vendor" is void and unenforceable as a matter of law as to the lot known as 2343 S. Arlington Ridge Road, Arlington, Virginia.

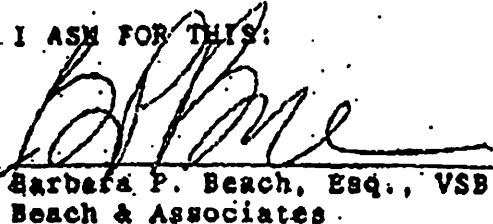
THIS ORDER IS FINAL.

THE CLERK is hereby directed to send certified copies of this Order to counsel of record.

ENTERED this 16th day of December, 1998.


Judge

I ASK FOR THIS:


Barbara P. Beach, Esq., VSB #19665
Beach & Associates
416 Prince Street
Alexandria, VA 22314
(703)683-3434
Counsel For Complainants

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY OF ARLINGTON

HERMAN E. LEEMAN, et al.,

Plaintiffs,

v.

TROUTMAN BUILDS, INC., et al.,

Defendant.

Chancery No. 99-292

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiffs and oppose the Motion for Summary Judgment and as grounds therefore state as follows:

It is the argument of the Defendant that the Order entered by this Court in the case of Faherty, et al. v. The Garfield Manor Corporation (Plaintiff's Exhibit A to Bill of Complaint), is, as a matter of law, dispositive of the validity of the restrictive covenant which is the subject matter of the existing suit. This cannot be decided as a matter of law because it is a mixed question of law and fact. The final Order entered in Faherty v. The Garfield Manor Corporation is not binding where necessary parties were not included.

(1) Troutman cites Stone v. Alley 240 Va. 162, 392 S.E.2nd 486 (1990) to support its position that the Court should grant summary judgment when there are no material facts at issue. However, in the Stone case, the Supreme Court of Virginia reversed the trial court for entering summary judgment, pointing out that a material question of fact was put into issue by the

LAW OFFICES OF
FRIEDLANDER & FRIEDLANDER, P.C.
(FOUNDED IN 1925)
1364 BEVERLY ROAD
SUITE 201
MCLEAN, VIRGINIA 22101
(703) 893-9800

pleadings themselves. Therefore, applying the law of that case to the present facts would dictate a denial of summary judgment:

(a) In Paragraphs 5 and 6 of the Complaint the Leemans and Plunketts allege that they, as abutting property owners, are subject to and protected by the restrictive covenant at issue in this case. This allegation of fact is denied by the Troutman's pleadings.

(b) In Paragraph 11 the Complainants state that the Court ruling in the Faherty case is

"not valid as to the rights of the Complaints herein, in that (1) Defendant had notice of Complaints rights as evidenced by the proposed Modification of Restriction issued on May 27, 1998, a copy of which is attached as Exhibit B, and (2) Complaints were necessary parties to the action represented by Exhibit A, and (3) the Court was without power to issue equitable relief in an action at Law."

This allegation was denied by Troutman in it's pleadings. These allegations and denials under the Stone case cited by Troutman in it's Memoranda is squarely on point against them and is authority for denial of the Motion for Summary Judgment.

(2) In Exhibit B to the Bill of Complaint, in a memorandum signed by Dan Troutman, he stated the ultimate fact.

"Since the vendor, (developer of the subdivision) is no longer a valid entity, the successor to that role becomes each homeowner in the Oakcrest subdivision. Even though this lot, 6B, one of the two original large lots in the subdivision, meets every covenant of the County for dividing, it is bound by this restriction. There are 11 owners in the Oakcrest subdivision including 6B."

Since that was the position taken by Dan Troutman in May 27, 1998, it is clear that since Troutman knew as early as May 27, 1998, that there was a restrictive covenant on Lot 6B, it now appears that having failed, as a contract purchaser, to get a release from the affected community, he returned to the contract sellers/owners, Faherty and the Hollands, and had them institute the ex parte suit (Exhibit A) without including in the action all of the necessary parties. As the Court of Appeals has held in McDougle v. McDougle, 214 Va. 636 (1974), the Court cannot render a valid judgment where necessary parties to the proceedings are not before the Court. Necessary parties include all persons having a legal or beneficial interest in the subject matter of the suit. By excluding the necessary parties and then seeking to use the default, ex parte judgment, Troutman, through the contract sellers, has sought to deprive the Complainants herein of their property rights, namely the protection of the restrictive covenant, without giving them an opportunity to be heard. The exact manner in which this occurred is a question of fact to be determined at trial. The Complainants herein, the Leemans and the Plunketts, having been excluded necessary parties are not barred from pursuing their remedies in Court based upon the Faherty case (Exhibit A) now urged by Troutman.

(3) Troutman discusses the doctrine of impossibility of performance and of a covenant based upon the continued existence of a person or thing, citing Housing Authority of Bristol v. East Tennessee Light and Power Co., 183 Va. 64, 31 S.E.2d 273 (1944).

That case involved a personal service contract and has no bearing whatsoever on the existence or nonexistence of the original grantor of a restrictive covenant. Once Garfield Manor Corporation no longer existed, there was no person who was authorized to delete restriction No. 7, and as Troutman himself wrote on his letter of May 27, 1999, (Exhibit B)

"Since the vendor is no longer a valid entity, the successor to that role becomes each home owner in the Oakcrest subdivision."

(4) Troutman further argues that in order to enforce the covenant, the Complainants herein must show that the Complainants are intended to be the ones to benefit from the covenant, citing Forbes v. Shafer, 26 Va. 391, 310 S.E.2d 457 (1983), and Burns v. Winchester Memorial Hospital, 225 Va. 545, 303 S.E.2d 908 (1983). Neither of these two cases are on point with the instant case. A covenant to preclude the construction of more than one dwelling on a lot, does not allow a subdivision of that lot to defeat the restrictive covenant. In Woodward v. Morgan, 252 Va. 135, 475 S.E.2nd 808 (1996), the Court held that even though the lot could be subdivided in accordance with ordinances of the subject county, that did not change the meaning of the restrictive covenant to allow the building of a second house on the newly subdivided lot, that is, the term "lot" as used in the restrictive covenant, refers to the lot as originally conveyed.

Recently, in Sloan v. Johnson, 254 Va. 271, 491 S.E.2d 725 (1997) arising in the Arlington Circuit Court, Judge Charles

Duff sitting as a Circuit Court Trial Judge, erroneously applied the equitable servitude principles described in the Burns case to a set of circumstances almost identical to the present case where there was a lot subject to the restrictive covenant which was subdivided as authorized by the County of Arlington and approved by the Board of Zoning Appeals. Judge Duff ruled that the restrictive covenant did not apply to the neighbors because there was no general development plan as required by Burns, and that the owners of the lawfully subdivided lot could build a house on that lot. However, on appeal the Supreme Court reversed the trial court and held that this was not an equitable servitude but rather was a restrictive covenant at common law, and that the newly subdivided lot could not be built upon. That is, the common law restrictive covenant would be enforced.

(5) In the final analysis, the Motion for Summary Judgment should be denied because there are mixed questions of law and fact. The genuine issues of material fact in this case involve: (1) Were the Complainants herein necessary parties to the Faherty case which is now being relied upon by Troutman? (2) Is the Faherty case binding upon Complainants, when Troutman was fully aware of their involvement before the contract-sellers instituted the Faherty suit? (3) Are the Complainants parties for whom the restrictive covenants are intended to protect under the common law doctrine set forth in Sloan v. Johnson? (4) Do Woodward v. Morgan, supra, and Sloan v. Johnson, supra, bar construction of the house on the subdivided 1/2 of Lot 6B?

For the reasons set forth above, the Motion for Summary Judgment should be denied.

HERMAN E. LEEMAN, et al.


By Counsel

FRIEDLANDER & FRIEDLANDER, P.C.

BY: 

Mark P. Friedlander, Jr.
Virginia Bar No. 4773
1364 Beverly Road, Suite 201
McLean, Virginia 22101
Telephone: (703) 893-9600
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY certify that on this 9th day of July, 1999, a copy of the Opposition to Motion for Summary Judgment and Order were mailed postage, prepaid to John E. Rinaldi, Esq., Walsh, Colucci, Stackhouse, Emrich & Lubeley, 13663 Office Place, Suite 201, Woodbridge, VA 22192, Counsel for Defendant.


Mark P. Friedlander, Jr.

7/19/99

VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

HERMAN E. LEEMAN, et al.)	
Plaintiffs)	
)	
v.)	Chancery # 99-292
)	
TROUTMAN BUILDS, INC., et al.)	
Defendants)	

RESPONSE TO OPPOSITION

COMES NOW the Defendant, Troutman Builds, Inc. ("Defendant") and as its Response to the Opposition to Motion for Summary Judgment filed by the Plaintiffs in the above-referenced matter states as follows, to-wit:

This case involves the interpretation of restrictive covenants that affect a parcel of land in Arlington County. The specific covenant at issue ("Covenant #7"), states, "Not more than one dwelling shall be erected on said lot *except with written approval of vendor.*" (Emphasis added). The State Corporation Commission terminated the vendor, Garfield Manor Corporation, on June 3, 1958. Following its termination, Garfield Manor Corporation ceased to exist and therefore could neither grant nor deny permission to construct further dwellings on the property in question. On December 16, 1998, the Arlington County Circuit Court entered a Final Order in Faherty, et al. v. Garfield Manor Corporation, Arlington County At Law # 98-918, which concludes that performing Covenant #7 is impossible, therefore the covenant is "void and unenforceable as a matter of law." None of these facts are in dispute.

The Plaintiff contends that because the Defendants have denied the allegations of Paragraphs 5, 6, and 11 of the Bill of Complaint, there are material facts at issue. In the context of a Motion for Summary Judgment, a "material fact" is one that is of such a nature as to affect the outcome of an

action. *Black's Law Dictionary*, 5th ed. Paragraphs 5 and 6 of the Complaint state that the Plaintiffs are subject to and protected by Covenant #7. Whether the Plaintiffs are subject to Covenant #7 is not material to the issue of whether performing Covenant #7 is possible because that fact has no bearing on whether the State Corporation Commission terminated Garfield Manor Corporation. Paragraph 11 mainly recites conclusions of law, not facts. The only statement of fact in Paragraph 11, that the Defendant had notice of the Plaintiffs alleged rights, is not material to the issue of whether it is possible to perform Covenant #7 for the same reason that the allegations in Paragraphs 5 and 6 are not material to the issue. The only fact material to the issue of whether Covenant #7 can be performed is whether the vendor can possibly grant or deny permission to build another dwelling on the property in question. The Court has already concluded that the vendor cannot, because the State Corporation Commission terminated the vendor more than forty years ago. Therefore, the conclusion that performing Covenant #7 is impossible remains the same, whether the facts alleged in Paragraphs 5, 6, and 11 are true or not.

The Plaintiffs place great weight on a letter from Dan Troutman, attached to the Complaint as Exhibit B. While Dan Troutman is anxiously awaiting his appointment as an Arlington County Circuit Court Judge, the Virginia General Assembly is yet to approve his appointment. Until then, he plans to keep running his "small home building company that builds three or four houses per year." See Exhibit B, Complaint. Dan Troutman and Troutman Builds, Inc. have no authority to interpret Covenant #7, that is a privilege reserved to the Arlington County Circuit Court.

The Plaintiffs also contend that the judgment rendered in Faherty is invalid because the Plaintiffs in that suit failed to name the Plaintiffs as additional defendants. However, this argument ignores the rule of law stating that covenants restricting the free use of land are not favored and must

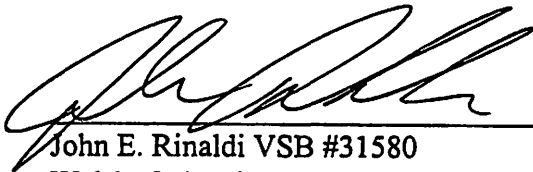
be strictly construed. *Mid-State Equipment Co. v. Bell*, 217 Va. 133, 140, 225 S.E. 2d 877, 884 (1976). Covenant #7 does not give the Plaintiffs the right to approve or deny a request of the Defendants or any other property owner to construct a dwelling on the property in question. That privilege was specifically reserved to the vendor. Because the Plaintiffs were not granted the right to approve or deny the construction of further dwellings on the property in question by the covenants, their rights were not affected by the final order in Faherty. The Plaintiffs were not proper parties to the Faherty case.

The Plaintiffs contend that *Woodward v. Morgan*, 252 Va. 135, 475 S.E.2d 808 (1996) and *Sloan v. Johnson*, 254 Va. 271, 491 S.E.2d 725 (1997) preclude the entry of summary judgment in this matter. However, the covenants sought to be enforced in both of those cases were different than Covenant #7. The covenant at issue in *Woodward* stated, "That not more than one residence exclusive of outbuildings shall be erected upon one lot." 252 Va. at 136. The covenant at issue in *Sloan* stated, "Not more than one residence shall be erected on this lot, the cost of which shall be not less than \$4,000.00." 254 Va. at 273. Both covenants completely precluded the construction of more homes on the properties in question. Covenant #7 does not preclude the construction of more homes. Covenant #7 merely limits construction to those dwellings that the vendor, Garfield Manor Corporation, has permitted. Garfield Manor Corporation can no longer give or deny permission to construct more homes on the property in question due to its termination in 1958. Performing Covenant #7 is therefore impossible.

In conclusion, the analysis is much more simple than the Plaintiffs suggest. Covenant #7 says, "Not more than one dwelling shall be erected on said lot except with written approval of vendor." Covenants restricting the free use of land are not favored and must be strictly construed.

Mid-State Equipment Co. The covenants do not specifically give the Plaintiffs the right to give or deny permission to construct further dwellings. That right is specifically reserved to the vendor. Any doubt or ambiguity in the application of a restrictive covenant is to be resolved against the restrictions and in favor of the free use of property. *Friedberg v. Riverpoint Bldg. Comm.*, 218 Va. 659, 665, 239 S.E.2d 106, 110 (1977). The State Corporation Commission terminated the vendor, Garfield Manor Corporation, on June 3, 1958. Because Garfield Manor Corporation is terminated, it can neither grant nor deny permission to construct another dwelling on the property in question. Performing Covenant #7 is therefore impossible. The Court should reaffirm its ruling in *Faherty* that Covenant #7 is void and unenforceable as a matter of law because it is impossible to perform.

TROUTMAN BUILDS, INC.
By Counsel

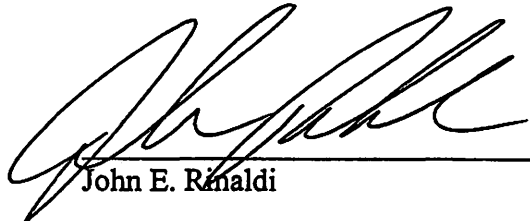


John E. Rinaldi VSB #31580
Walsh, Colucci, Stackhouse, Emrich, & Lubeley, P.C.
13663 Office Place
Suite 201
Woodbridge, Va. 22192
Counsel for Troutman Builds, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing was served via first class mail, postage prepaid and via facsimile to the following on July 14, 1999:

Mark P. Friedlander, Esq.
Friedlander & Friedlander, P.C.
1364 Beverly Road
McLean, Va. 22101
Counsel for Plaintiffs


John E. Rinaldi

M:\LIT\TROUTMAN\RESPONSE.WPD

7/16/99

VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

HERMAN E. LEEMAN, et al.

Plaintiffs

v.

TROUTMAN BUILDS, INC., et al.

Defendants

Chancery # 99-292 ✓

FINAL ORDER

THIS CAUSE came before the Court on the 16^m day of July 1999, on the Motion of the Defendant, Troutman Builds, Inc., and

IT APPEARING that this matter involves the interpretation of restrictive covenants that affect a parcel of land in Arlington County formerly known as Lot 6B-1, Block 1, Section 1, in the Oakcrest subdivision and now known as Lots 6B-1 and 6B-2, Block 1, Section 1, in the Oakcrest subdivision; and

IT FURTHER APPEARING that the provision of the covenants at issue is Covenant #7, which states: "Not more than one dwelling shall be erected on said lot except with written approval of vendor"; and

IT FURTHER APPEARING that the vendor described in the said covenants was the Garfield Manor Corporation; and

IT FURTHER APPEARING that The State Corporation Commission terminated the vendor, Garfield Manor Corporation, on June 3, 1958; and

IT FURTHER APPEARING that the covenant at issue cannot be performed under any circumstances because the vendor, Garfield Manor Corporation, no longer exists and therefore can neither grant nor deny permission to construct further dwellings on the Property; and

IT FURTHER APPEARING that by the final order in Faherty, et al. v. Garfield Manor Corporation, Arlington County At Law # 98-918 dated December 16, 1998, this court determined that the covenant at issue is void as unenforceable as a matter of law; and

IT FURTHER APPEARING that more than 21 days has elapsed since the entry of the final order in Faherty, et al. v. Garfield Manor Corporation; and

IT FURTHER APPEARING that there are no material facts at issue; and

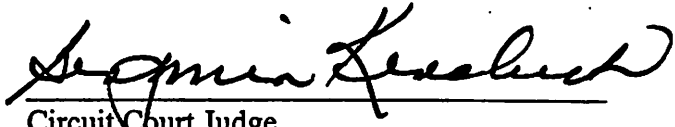
IT FURTHER APPEARING that the entry of this Final Order is proper in all other respects; it is therefore

ADJUDGED, ORDERED, AND DECREED that the Defendant's Motion for Summary Judgment is hereby GRANTED and this matter is hereby dismissed with prejudice; ~~and it is~~

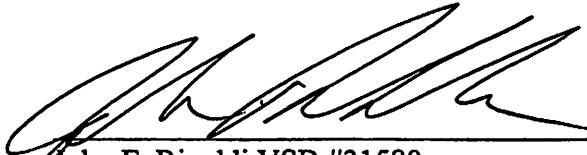
~~FURTHER ADJUDGED, ORDERED, AND DECREED that the Plaintiffs shall jointly and severally pay the Defendant's costs and reasonable attorney's fees for defending this matter, which the Court finds to be in the amount of \$_____.~~

THIS ORDER IS FINAL.

Entered this the 16th day of July, 1999.


Circuit Court Judge

I ASK FOR THIS:



John E. Rinaldi VSB #31580
Walsh, Colucci, Stackhouse, Emrich, & Lubeley, P.C.
13663 Office Place
Suite 201
Woodbridge, Va. 22192
Counsel for Troutman Builds, Inc.

SEEN AND ~~OBJECTED~~ EXCEPTION NOTED FOR ALL THE
REASONS STATED IN PLAINTIFFS' OPPOSITION TO MOTION
FOR SUMMARY JUDGMENT!



Mark P. Friedlander, Esq.
Friedlander & Friedlander, P.C.
1364 Beverly Road
McLean, Va. 22101
Counsel for the Plaintiffs

M:\LITV\TROUTMAN\ORDER.WPD



HERMAN E. LEEMAN
MARY E. LEEMAN

RAYMUND A. PLUNKETT
BERTA S. PLUNKETT,

vs.

Chancery No. 99-292

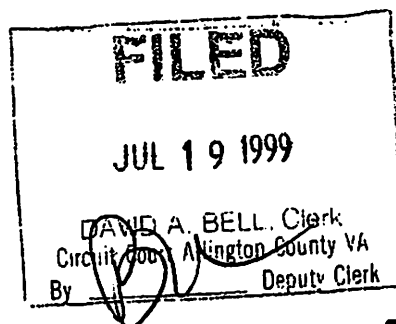
Defendant.

Counsel for, HERMAN E. LEEMAN, MARY E. LEEMAN, RAYMUND A. PLUNKETT, and BERTA S. PLUNKETT, the Petitioners in the above-styled case, in the Circuit Court of Arlington County, Virginia, hereby gives notice of appeal to the Supreme Court of Virginia from the Order granting Summary Judgment entered in this cause on the July 16, 1999, pursuant to the provisions of Rule 5:9 of the Rules of the Supreme Court of Virginia. There was no testimony, therefore, a transcript of the testimony is not necessary. The other incidents of the proceedings involve the Court file.

FRIEDLANDER & FRIEDLANDER, P.C.

By: Mark P. Friedlander, Jr.
 Mark P. Friedlander, Jr.
 Virginia Bar No. 4773
 1364 Beverly Road, Suite 201
 McLean, Virginia 22101
 Telephone: (703) 893-9600
 Counsel for Petitioners

LAW OFFICES OF
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SUITE 201
MCLEAN, VIRGINIA 22101
(703) 893-9600



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Notice of Appeal was mailed, postage prepaid, this 19th day of July, 1999, to John E. Rinaldi, Esq., Walsh, Colucci, Stackhouse, Emrich & Lubeley, 13663 Office Place, Suite 201, Woodbridge, Virginia 22192, Counsel for Defendants.


Mark P. Friedlander, Jr.

ASSIGNMENT OF ERRORS

1. The trial court erred in ruling that an ex parte final order in a case involving the subject matter restrictive covenant is binding on necessary parties not named in the action in which the final order was issued.

2. The trial court erred in ruling that a restrictive covenant which bars construction of more than one house on a lot becomes null and void because the termination of the corporate existence of the grantor corporation, which had reserved unto itself the right to waive the restrictive covenant in the subdivision.

3. The trial court erred in ruling that a restrictive covenant which bars construction of more than one house on a lot became unenforceable under a theory of impossibility of performance because of the termination of the corporate existence of the grantor corporation which had reserved unto itself the right to waive the restrictive covenant in the subdivision.

4. The trial court erred in granting summary judgment when there were material facts in dispute including the written acknowledgment by the defendant/appellee that the complainants/appellants, as property owners in the subject subdivision, were known to be necessary parties, but had not been included in Faherty v. Garfield Manor Corporation, relied upon by the trial court in granting summary judgment.