

Court Rules Unilateral ARC Decision is Not Valid

by Lawrence Szabo, Esq. | Mar 22, 2019

Declaration provided from the creation of an Architectural Review Committee (“ARC”) consisting of at least 3 members. If no committee was appointed by the Board, the Executive Board would perform all duties of the ARC. During period of Declarant control, the Declarant would appoint the ARC members.

The Declaration also set forth the powers of the ARC, which included the approval of plans for building and site improvements, and a provision stating that if the ARC failed to approve or disapprove a request within 45 days after required plans and specifications have been submitted, the approval will not be required. The Declaration also contained provisions concerning the construction of fences, and required that the design, placement, and materials of any fence had to be approved by the ARC.

The fence requirements were modified by Design Review Guidelines (“Guidelines”) that were adopted by Association in 2014, and which addressed the types of fencing that homeowners would be permitted to construct on their lots. The Guidelines stated:

- In order to maintain views, fences were discouraged.
- ARC could approve some fencing upon petition by an owner for unique reasons (i.e. provide enclosed area for a dog),
- ARC has sole discretion over size, materials and location of fencing.
- A 4’ solid fence for sole purpose of privacy would be permitted.
- Maximum height for any fence set at 5’ and any fence over 4’ must be a picket style fence.

In 2015, after Owners constructed a wooden fence on their property that exceeded the height limitations specified in the Guidelines, Association notified Owners that they were in violation of Association’s Declaration by construction a fence without first submitting an application to the ARC. Subsequently, ARC demanded that all work on the fence be discontinued until the required forms were submitted to the ARC and the request is approved. Owners thereafter submitted an application to the chairman of the ARC seeking approval of the fence. A few weeks after submitting the application, Owners received a letter from the chairman which stated that the ARC has determined that Owners acted in violation of the Guidelines and no variance would be granted for their fence. The letter also granted Owners 30 days to bring the fence into compliance with the Guidelines.

After Owners failed to modify the fence, Association imposed fines on Owners and filed a lien on their property. Rather than pay fines that were imposed by Association, Owners filed an action against Association seeking a declaratory judgment “as to the legal effect of the Declaration as it relates to enforceability of restrictions against the fence” and relief from the fines that had been imposed on Owners by Association. Both sides moved for summary judgment and the trial court granted summary judgment in favor of Association and further ordered Owners to pay all fines, costs and attorneys’ fees.

Owners then appealed the trial court’s judgment contending that although Association’s Declaration required their application to be acted upon by an ARC composed of multiple members, the chairman exercised sole decision-making authority in denying their application for a variance and, as such, the denial was not a proper denial. Owner also argued that their fence should be deemed permissible because their application was not properly acted upon by the ARC within the required 45 day period. Accordingly, under the terms of the Declaration, Owners’ application should be deemed to be in compliance with the Declaration.

The appellate court ruled that the Declaration required that the ARC be comprised of more than one person, and because the evidence showed that the chairman acted unilaterally in denying the application, the denial was not made by a properly constituted ARC. Because 45 days passed following the submissions of Owners' application without the issuance of a proper ARC decision, the appellate court found that Owners' fence was "deemed permissible" under the terms of the Declaration. As such, the fines that were subsequently imposed on Owners for their failure to comply with were not appropriate. Accordingly, the appellate court reversed the trial court's judgment and ruled that Owners were entitled to have judgment entered in their favor.

UNPUBLISHED South Carolina Appellate Court decision (March 19, 2019).

Case decision: Makar v. Mimosa Bay Homeowners Association, Inc.