



Civic Association of Surrey Park v. Robert Riegel and Erin Riegel

2022 | Cited 0 times | Court of Chancery of Delaware | May 19, 2022

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CIVIC ASSOCIATION OF SURREY PARK,

Petitioner,

v.

ROBERT RIEGEL and ERIN RIEGEL,

Respondents.))))))) C.A. No. 2019-0961-SEM

MASTER S FINAL POST-TRIAL REPORT

Final Report: May 19, 2022 Draft Report: December 30, 2021 Date Submitted: September 24, 2021

Thomas C. Marconi, LOSCO & MARCONI PA, Wilmington, Delaware; Counsel for Petitioner.

Richard L. Abbott, ABBOTT LAW FIRM, Hockessin, Delaware; Counsel for Respondents.

MOLINA, M. The Civic Association of Surrey Park contends certain homeowners constructed a large shed on their property without approval, which is not suitable, desirable, or in harmony with the neighborhood and negatively affects the outlook of a neighboring property. The homeowners argue the association lacks standing to enforce the restrictions, failed to issue a final decision on their plans, acquiesced to earlier violations, and rejected the plans based on restrictions that are not enforceable or were arbitrarily applied.

For the reasons explained herein, I find the association failed to prove standing



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to enforce the restrictions. In the interest of providing a complete record for exception purposes, I also address the remaining issues and find the dispute is ripe, widespread acquiescence has not been established, and the restrictions relied on by the association are unenforceable and were arbitrarily applied plans. I recommend judgment be entered for the homeowners.

I. Background 1

This is a dispute regarding the enforcement of deed restrictions by the Civic against Robert Riegel and Erin Riegel, Surrey

Park residents and owners of 200 Saddler Lane, Wilmington, Delaware (the

1 The facts in this report reflect my findings based on the record developed at trial on June 29, 2021, and July 21, 2021. See weight and credibility I find it deserves. Citations to the trial transcripts are in the form . 2 Surrey Park is a residential subdivision with approximately 221

single-family homes in Brandywine Hundred, New Castle County, Delaware. 3 In a

Surrey Park features a variety of architectural styles, including Cape

Cod, French Colonial, Dutch Colonial, ranch, and contemporary. 4

A. The Early Years

Park in the 1960s. 5

The Corporation recorded a declaration of restrictions covering

6 In pertinent part, the Declaration

requires homeowners to submit plans for approval before building any structures on

property within Surrey Park. 7 The plans and specifications must kind, shape, height, materials, floor plans, color scheme, location or approximate

cost of such structure, the location of driveways, and the grading of the parcel of



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land to be built upon[.] 8 Through the Declaration, the Corporation has

the right to refuse to approve any such plan or specifications or grading plan, which are not suitable or desirable, in their opinion, for aesthetic or other reasons; and in so passing upon such plans . . . [the Corporation

2 See RX 3. 3 PX 1; Tr. 25:16-22. 4 Tr. 25:22-23, 238:6-16, 267:9. The homes within Surrey Park also feature a variety of facades, from brick to cedar to vinyl siding. Tr. 25:23-24. 5 PX 1. 6 Id. 7 Id. 8 Id. has] the right to take into consideration the suitability of the proposed building or other structure and of the materials of which it is to be built, to the site upon which is proposed to erect the same, the harmony thereof with the surroundings and the effect of the building or other structure, as planned, on the outlook for the adjacent or neighboring property. 9

The Declaration further provides the Corporation with the power to enforce the restrictions and assign its rights and powers. 10

The Corporation was dissolved on January 12, 1971. 11 At the time of dissolution, the Corporation had two stockholders, Pierce K. Crompton, Jr. and Letitia M. Crompton . 12 More than four (4) years after

dissolution, the Cromptons executed an assignment of rights, powers, titles, estates, duties and obligations under restrictions covering Surrey Park to CASP (the

. 13 The Assignment provides Declaration were transferred to its stockholders at the time of dissolution and the

Cromptons were thereby transferring their acquired rights to CASP. 14

9 Id. 10 Id. 11 RX 9. 12 PX 2. 13 Id. 14 Id. B.

CASP is a non-profit, non-stock corporation, and the civic association for the

community of Surrey Park. 15 It is -volunteer organization 16 established promote the general welfare and the community activities of Surrey Park; to enforce

deed restrictions and governmental regulations; to aid in protection of property



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CASP is governed by its bylaws . 18

Under the Operating Documents, CASP manages its affairs through

a board of directors , with the president of the Board empowered to

appoint district representatives, committees, and committee chairpersons. 19

CASP enforces the restrictions in the Declaration through its deed restriction

20 Residents of Surrey Park are advised to submit

15 RX 35. 16 Tr. 27:17. 17 RX 38. 18 RX 37-38. 19 RX 38. The Board consists of four (4) officers and fourteen (14) district representatives. Id.; Tr. 26:11-20. 20 See RX 43-45; Tr. 29:24-30:14, 43:13-22. it requires more ongoing work

ad hoc -6. The Riegels argue in their exceptions to my final report Committee[. D.I. 88, p.5. I disagree. I find the

former officers was credible and, coupled with the documentation showing committee action (see, e.g., RX19), is sufficient to support the existence and role of the Committee. plans for new improvements, including fences and sheds, to the Committee for

approval. 21 CASP maintains information about the restrictions on its website

(launched in 2016) and in the civic association directory, which is distributed every

few years and to new residents. 22

Two CASP witnesses testified that CASP has consistently enforced the

restrictions in the Declaration: Randall Hirt and Timothy Michael Laur. 23 Mr. Hirt

moved to Surrey Park when he was 11 or 12 years old and lived there through high

school, before moving away. 24 In 2012, Mr. Hirt returned, buying and moving back

into his childhood home. 25 After returning home, Mr. Hirt 21



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PX 5; Tr. 31:9-11. 22 Tr. 30:18-32:9, 41:23-42:21. 23 Tr. 29:4-7, 440:11-442:10. As a longtime resident, Walter Randall Williamson largely agreed. Tr. 228:8-14. Mr. Laur explained, in his capacity as then-the board is tasked with as one of the defined obligations, is to enforce the deed restrictions

to maintain the character of the neighborhood, the appeal of the neighborhood, the attractiveness of the neighborhood, to make sure people maintain their properties and they -155:5. See also Tr. 440:11-20. Mr. Hirt offered a personal anecdote in support: when Mr. Hirt was a child, in 1973 or 1974, a tree fort he and a friend constructed was taken down after others complained to CASP. Tr. 30:3-13. 24 Tr. 25:11-13. 25 Tr. 24:18- Williamsons. Tr. 24:23-24. Mr. Hirt testified that he has known the Williamsons for decades and they have a friendly relationship. Tr. 60:9-61:5. Mr. Williamson testified that he and his wife have lived in Surrey Park since 1981. Tr. 227:9-13. president from 2015-2017. 26 second witness, Mr. Laur, moved to Surrey

Park in 2009 and served as president of CASP from 2018 through (at least) trial. 27

Mr. Laur, however, admitted that keeping is lacking. 28

Unfortunately, CASP did not maintain a central

repository of records. 29 Thus, when it came time to collect records for this litigation,

CASP needed to contact and collect from previous members of the Committee and,

in the process, CASP learned some records were inadvertently disposed of without

permission from CASP or the Committee. 30

C. The Riegels

The Riegels purchased the Property, a two-story Dutch Colonial, on

November 6, 2015. 31 The deed to the Property provided notice to the Riegels that

26 Tr. 27:4-5. 27 Tr. 107:12-13, 108:2-4. Mr. Laur testified he was not planning to seek reappointment as president 1. Tr. 452:6-8. 28 Tr. 442:15-446:17. 29 Tr. 443:1-5. 30 Tr. 442:15-443:9, 446:5-17. The Riegels have latched onto the dearth of records as proof that multiple structures within Surrey Park were constructed without prior approval. Mr. Riegel conducted a personal survey of various sheds and additions throughout Surrey Park by walking around the neighborhood and taking pictures of any structures that he noticed. See RX 11-12; Tr. 343:17-20. He then reviewed the documents produced by CASP to see if the records showed written approval of these structures. Tr. 332:13-17. Many structures were unsupported. 31 RX 3; Tr. 267:9. the Property is subject to all restrictions. 32



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The Riegels were also reminded of the

restrictions by Mr. Hirt when they began building a fence in December 2015. 33 The

Riegels did not submit a plan to CASP or the Committee for approval before they

began construction. Mr. Hirt, then-president of CASP, noticed the construction and

d that made sure [the Riegels] were aware that there

were deed restrictions in Surrey Park and requested that they submit an application,

34 The Riegels complied and the fence was ultimately approved. 35

By the fall of 2017, the Riegels were considering constructing a shed in their

backyard for storage. 36 Mr. Riegel spoke with Mr. Hirt about the standard process

and was, again, advised that he would need to submit a plan to the Committee for

pre-approval. 37 Mr. Hirt followed up their conversation with an email on October 2,

32 Yet Mr. Riegel testified that their settl anyone else has it, you can have it. 253:23-254:5.

33 Riegels drove throughout Surrey Park and observed that other homes had split rail fences. Tr. 253:16-17, 254:6-9. 34 Tr. 48:21-24. 35 Tr. 255:21-256:2, 49:3-4, 101:9-23, 261:1-21. Although a plan was ultimately submitted, Mr. Riegel testified he does not remember Mr. Hirt emphasizing the preapproval requirement. Tr. 255:16-20, 255:5-6, 27:4-5. Rather, Mr. Riegel contends Mr. Hirt instructed him to check with his neighbors and ensure compliance with the county code. See also Tr. 263:13-22, 452:6-10. persuasive. 36 Tr. 262:21-263:3. 37 Tr. 45:21-46:5. 2017, which included , and the New Castle County Code. 38

Although Mr. Riegel responded

to the Committee for approval before beginning construction. 39

But the Riegels did not move forward with their shed until

2019. 40 While driving on Route 40, Mr. Warren Riegel saw a shed that matched the Property,

toured the building, and took pictures to share with his son. 41 Mr. Riegel was



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inspired by the design and located similar plans online that he modified to fit his needs. 42

Despite his earlier experience with the fence and the 2017 reminder, Mr.

Riegel testified that he believed he could begin construction of the Structure after

consulting the New Castle County Code and his neighbors. 43 Mr. Riegel endeavored

38 PX 6. Mr. Hirt confirmed his reference to shed guidelines was inaccurate, as there were no shed guidelines on the website at that time. Tr. 80:18-23. But Mr. Hirt contends there Id. Precisely what information there was is unclear. 39 PX 6; Tr. 402:6-403:8. This is another not find his professed ignorance credible.

40 Tr. 264:11-13. 41 Tr. 427:11-23. 42 Tr. 251:19-252:1, 428:9, 428:14-17, 266:18-267:9. 43 Tr. 403:3-8. Mr. Riegel knew, or should have known, that deed restrictions ran with the land, binding the Property. He was also reminded by Mr. Hirt, at least twice, that pre- approval was required. to do both. The first was easy per Mr. Riegel, the Structure did not require a

building permit, because it would be less than 200 square feet. 44 The second was a

bit more challenging. One set of neighbors, the Williamsons, raised concerns about

the size of the Structure; in particular, its height. 45 Mr. Riegel and Mr. Williamson

disagree about whether the Williamsons were provided with specifications or a

general description that the S 46 They also disagree about

the nature of their conversation, with Mr. Riegel testifying he sought the

approval and Mr. Williamson testifying that Mr. Riegel told them he

already had all the necessary approvals and asked nothing of them. 47

Thereafter, in April 2019, without applying to and getting the approval of

CASP or the Committee, the Riegels began construction of the Structure. 48 By May,

needed to submit a plan to CASP or the Committee implausible; rather, I find Mr. Riegel



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affirmatively decided not to submit plans before beginning construction of the fence or the Structure. 44 Tr. 264:14-265:19. 45 Tr. 267:19-268:4. Another neighbor of the Riegels, Lawrence Francis Fetes, testified that he had no concerns about the Structure and was happy with the work the Riegels have done to the Property. See, e.g., Tr. 217:17-20. See also Tr. 189:23-190:10 (Laur) in about the Structure). 46 Compare Tr. 231:14-20 with 267:15-268:4. 47 Compare Tr. 232:9-12 with Tr. 404:3-14. It is unfortunate that the relationship between the Riegels and the Williamsons deteriorated. Both Mr. Williamson and Mr. Riegel testified that their relationship started well, with mutual friendship and neighborly assistance. See, e.g., Tr. 229:9-13. 48 Tr. 273:14-17. the Riegels had completed the base of the Structure. 49 The Riegels continued

building the Structure, including installing the roof trusses and most of the plywood

for the roof, without approval or objection for nearly two (2) months. 50

On July 27, 2019, when the Structure was approximately eighty (80) percent

complete, trouble started brewing. 51 On that day, Mr. Hirt and Mrs. Williamson

approached Mr. Riegel in his yard to discuss their concerns about the Structure. 52

Their conversation grew contentious. Mr. Hirt cal Mr. Riegel, having planned and built the Structure himself, understandably, took

offence. 53 When pressed by Mr. Hirt about whether Mr. Riegel had approval, Mr.

54

Three days later, Mr. Laur, as president of CASP, emailed Mr. Riegel,

informing him that he must stop construction of the Structure and submit plans for

CASP or else he would be violating the deed restrictions. 55

Mr. Laur advised Mr. Riegel to submit

49 Tr. 273:18-274:2. 50 Tr. 275:19-276:16. 51 Tr. 275:8-22. 52 Tr. 275:7-10, 275:21-22. 53 Tr. 58:1-9, 278:15-22. 54 Tr. 58:8-9, 278:5-9. 55 RX 4. the application and assured him that CASP would treat him fairly. 56 But Mr. Riegel

57 Per Mr.



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Laur, Mr. Riegel was insistent that he was building the Structure no matter what and would go to court if needed. 58

Nevertheless, Mr. Riegel did submit an application and plans for the Structure

to CASP, through Mr. Laur, shortly thereafter. 59 application and plans to the Committee for review. 60

After review, including an in-

person meeting with Mr. Riegel at the Property, the Committee requested the Board

meet to discuss the application further. 61 At a July meeting, with a quorum present,

the B. 62 Mr. Laur testified that the

56 See Tr. 134:14-135:23. 57 Id.; Tr. 408:22-409:12. See also Tr. 279:9-12 (Riegel) (explaining he believes Mr. Hirt came after him about his fence, then his Christmas blowups, then his shed). The Riegels argue that Mr. Hirt was involved in the review and rejection process, despite no longer being an officer of CASP or a member of the Committee. Mr. Hirt was copied on certain emails and does appear to have taken a special interest in the issue, but CASP has submitted sufficient evidence that a decision was made on each application by the Committee or the Board. 58 See Tr. 134:14-135:3. 59 RX 17; Tr. 138:20-22. 60 Tr. 147:5-7, 109:18-21. Christian Lehr was the head of the Committee at that time, with fellow members Mike Riches and Kevin Wolpert. Tr. 87:16-17, 109:22-110:7. 61 Tr. 140:10-16, 141:11-24. Mr. Riegel testified that Mr. Lehr and Mr. Riches went to the Property on or around August 8, 2019 to view the Structure. Tr. 351:4-353:8. 62 Tr. 150:4-11, 171:4-24. and attribute his inability to identify the breakdown of officers and representatives in attendance to the passage of time between the meeting and trial. Tr. 149:15-20. Board determined the plans were unacceptable because was massive

in structure, set a precedent, it was imposing and intrusive to the neighbors, the direct

63

After the meeting, on August 19, 2019, CASP wrote to the Riegels explaining

to approve the plan. 64 The letterhead read Surrey Park Deed Restriction Committee Notice of Decision, it was signed by

Mr. Lehr and Mr. Laur, and provided four (4) reasons for refusal:



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counsel, a building permit is required for the building by New Castle

County for a number of reasons; including because the height of the building will be more than a single story;

2. The large two-story building is undesirable, and is not suitable for the site and its surroundings. More specifically, the two-story building you propose is much larger and much taller than any other accessory building in Surrey Park. As such, it upsets the long-maintained aesthetic balance which has long existed in the neighborhood;

outlook of adjacent and neighboring properties; and

4. The building is otherwise not in harmony with the neighborhood and approval of your plans would set an inappropriate precedent for the accessory buildings in Surrey Park. 65

63 Tr. 113:4-21. 64 RX 19. 65 Id. After this initial rejection, Mr. Riegel revised the plans, adding a roof over the

Structure 66 Mr. Riegel submitted the revised plans for the Structure to the

New Castle County Department of Land Use, which approved the plans on August

30, 2019. 67 Mr. Riegel then submitted the revised plans to CASP. 68

On September 9, 2019, CASP sent the Riegels a letter refusing to approve the

revised plans, signed again by Mr. Lehr and Mr. Laur and on the same letterhead. 69

The second rejection letter provided three reasons for non-approval:

1. The building is not suitable or desirable in that at 20 feet high (including the concrete footing) it is significantly taller than any other accessory structure in Surrey Park.

2. The size and location of the building also negatively impact the outlook of the neighboring property. Specifically, the structure is clearly visible from the inside of their home as well as from the backyard. Moreover, it is fair to say that the structure is the dominant view from the rear rooms of the home, with the 2nd floor of the structure being particularly conspicuous.

66 Tr. 291:1-4. Mr. Riegel testified that he added the porch to make the Structure large enough to require a permit and because he believed it would be more aesthetically pleasing. Tr. 291:6-11. 67 Tr. 285:12-286:13; RX 16. 68 Tr. 290:12-24. 69 RX 5. How the second rejection came to be is less clear than



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the first. Mr. Laur testified that the Board met in August and September and voted electronically to reject the revised plans before the Committee issued the second rejection letter. Tr. 167:8-19, 172:14-23. -vote, no such minutes or other records were produced. Tr. 167:23-168:6. 3. The building is otherwise not in harmony with the neighborhood due to the aforementioned reasons and approval of your plans will set an inappropriate precedent for accessory buildings in Surrey Park. 70

The letter did provide the Riegels with a compromise: CASP would be willing to accept the building in its current location, with an overall total height off of the ground of 71 Other than this compromise, the second rejection letter demanded the Riegels cease further construction. 72

Despite the second Structure. 73

Mr. Riegel testified that he did so in the interests of safety and preserving the work that had already been done. 74 As completed, the Structure

70 RX 5. 71 Id. Mr. Riegel testified that he would not have reduced the height but there were other options they would have considered such as moving the Structure or putting up trees. Tr. 421:23-422:8. 72 is not appropriate for the small plot of So, when they go out in their Florida room and the sun sets it now sets hours before because it casts a shadow. And this is not suitable for what I think the association wants for its - of its size in comparison to other accessory structures in the neighborhood. Tr. 192:7-12.

73 Tr.292:2-19. 74 Tr. 292:5-18. Mr. Riegel testified he gave verbal notice to Mr. Lehr that he would be the continue. Tr. 293:1-13; RX 8. matches the style and color of the Property and is attractive and appears well made. 75

Since construction, the Riegels have used the Structure primarily for storage. 76 The Structure houses sports equipment, lawn equipment, a tractor, a snow blower, and at least twenty (20) totes full of Christmas decorations. 77

Standing at 17.5 feet tall from ground level to the peak of the roof, the parties agree the Structure is the largest shed within Surrey Park. 78 Per Mr. Hirt, the



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79 Mr.

80

Mr. Laur testified similarly, stating

81 CASP

did not, however, present any evidence in support of these observations and beliefs.

75 See PX 9; Tr. 366:14-367:3. Mr. Laur testified that the Structure is well built, and he has no complaints about its visual appearance, other than the height and overall size. Tr. 200:4- 278:21-279:2.

76 Tr. 251:12-13. 77 Tr. 252:15-253:12. 78 See, e.g., Tr. 405:8-11 (Riegel) (admitting he did not locate any sheds as tall as the Structure). There has been some confusion about the height of the shed, but I accept Mr. -6. 79 Tr. 56:10-18. 80 Tr. 68:10-12. 81 Tr. 155:21-22. Evidence did confirm that the Structure is plainly visible from the

82 But the property line between the Riegels

and the Williamsons features a line of six-foot-tall shrubs and evergreen trees. 83 At

most, the Structure blocks the partial view permitted by such shrubbery into the

. 84

Since the Structure was completed CASP has taken steps to ensure other

outbuildings were reviewed and approved and to prevent future, similar outbuildings

from being constructed. Mr. Hirt testified that, after this litigation commenced and

other sheds were not pre-approved, he

contacted certain homeowners to confirm approval. 85 And on October 21, 2019,

CASP adopted written shed guidelines, through a majority vote of the Board. 86

82 Tr. 234:20-235:3, 239:1-9 -14. 83 See PX9. 84 Tr. 240:22-241:13, 239:10- 237:11-13.

85 Tr. 87:19-88:7. 86 Tr. 80:24-81:9. The shed guidelines limit the maximum size of a shed to 200



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square feet and establish a maximum height of ten feet. RX 25. The shed guidelines also explicitly reiterate the requirement to submit plans to the Committee for approval before construction. Id. D. Procedural History

On December 2, 2019, after the Structure was completed, CASP filed a petition against the Riegels to enforce the restrictions under Title 10, Section 348 of the Delaware Code, seeking declaratory and mandatory injunctive relief. 87 The Riegels initially moved to dismiss, but after briefing and argument, I issued a final report recommending that the motion be denied. 88 The Riegels answered on September 23, 2020, and trial was set first for January 12, 2021, then rescheduled to March 9, 2021. 89

On January 21, 2021, CASP filed a motion for the appointment of a receiver for the Corporation. 90 Shortly thereafter, CASP filed a motion to compel the Riegels to appear for a deposition. 91 After the motions were fully briefed, I issued a final report on June 2, 2021, recommending that the motion to appoint a receiver be denied and that the Riegels be made available for deposition. 92 Regarding the former, I found I did not have a sufficient record before me to determine if the

87 D.I. 1. The parties participated in expedited mandatory mediation under 10 Del. C. § 348, but it was unsuccessful. See D.I. 18. 88 D.I. 7, 14, 15, 20-22. 89 D.I. 25, 29, 33. 90 D.I. 35. 91 D.I. 38. 92 D.I. 48. appointment of a receiver was necessary and appropriate. 93 With trial scheduled for

June 29, 2021, I stayed any exceptions; that stay is now lifted.

Ultimately, a one-and-a-half-day trial was held on June 29, 2021 and July 21, 2021. 94 Post-trial submissions were filed on September 24, 2021, at which time the matter was submitted for my consideration. 95 I then issued a draft report on



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December 30, 2021, to which both sides filed exceptions. 96 This is my final report. 97

II. Analysis

The restrictions at issue in this case are commonly referred to as architectural review covenants, in that they require prior review and approval of plans for carefully evaluated because their arguably subjective

98

CASP bears the burden of proving the restrictions (1) are enforceable in that f application (2) were not

93 Id. 94 D.I. 61, 68. 95 D.I. 74. 96 See D.I. 76-77. 97 This final report makes the same substantive findings as my draft report, except regarding standing, and the exceptions are primarily addressed in footnotes, providing responses and clarification as appropriate. 98 Lawhon v. Winding Ridge Ho , 2008 WL 5459246, at *5 (Del. Ch. Dec. 31, 2008). , and

(3) were violated by the Riegels. 99 CASP also bears the burden of proving entitlement to injunctive relief to remove the Structure and must (1) actual success on the merits of the claims; (2) that [CASP] will suffer irreparable harm if injunctive relief is not granted; and (3) that the harm to [CASP] outweighs the harm to the [Riegels if] an injunction is granted. 100

The Riegels argue CASP cannot meet its burden of proof. The Riegels also enforce the restrictions and argue that this case is not ripe for adjudication. CASP bears the burden of proving standing and ripeness. 101 The Riegels have also asserted the affirmative defense of acquiescence, for which they bear the burden of proof. 102



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The burden of proof for these claims and defenses is by a preponderance of the evidence. something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe

99 Id. 100 , 2015 WL 5714847, at *11 (Del. Ch. Sept. 30, 2015). 101 , 838 A.2d 1103, 1109 (Del. 2003). 102 Tusi v. Mruz, 2002 WL 31499312, at *4 (Del. Ch. Oct. 31, 2002). 103 the burden of proof loses. 104

A. CASP has failed to prove standing to enforce the declaration.

I first address the threshold issue of standing. -in-

terests he or she seeks to be protected are within the

105 The Riegels concede that the Declaration

granted standing to the Corporation to enforce the restrictions. But they contest

, arguing the right to enforce was not effectively transferred from

the Corporation to the Cromptons and then to CASP. In this final report, I have

reconsidered the holding in my draft report and find that CASP has failed to establish

standing by a preponderance of the evidence.

When a Delaware corporation dissolves, it goes through a three-year winding

up process. 106 As explained by Vice Chancellor Laster, after wind up the

103

Del. Exp. Shuttle, Inc. v. Older, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002) (citations and quotation marks omitted). 104 OptimisCorp v. Waite, 2015 WL 5147038, at *55 (Del. Ch. Aug. 26, 2015). 105 , 838 A.2d at 1110. 106 See In re Altaba, Inc., 2021 WL 4705176, at *10 (Del. Ch. Oct. 8, 2021) (quoting 8 Del. C. § 278). residual claimants. Hence they must stand at the back of the line, await the results

of the winding up process, and receive what remains after creditors claims have



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been paid. 107 This receipt is codified in 8 Del. C. § any assets that remain after the dissolved corporation has paid existing claims and

108

Thus, I must answer two questions was the right to

enforce an asset of the Corporation and was it distributed to the Cromptons?

The assets of a dissolved corporation include not only physical property, but

109 I continue to find the right to

enforce deed restrictions has value to the holder and is property and, more so, an

asset within the context of winding up. 110

As to the second question, I pause to better understand what it means to

effect to the inten 107

Id. at *10. 108 In re Krafft-Murphy Co., Inc., 82 A.3d 696, 706 (Del. 2013). 109 Id. at i.e., of a dissolved corporation include both vested and

110 In their exceptions, 8 Del. C. Del. C. § 278. D.I. 81, p.15. I clarify herein that the right to enforce the restrictions was both property and an asset of the Corporation, based on my finding that the right to enforce has value to the Id., p.19. 111 distribute as fol 112

Thus, the question is

whether CASP presented evidence making it more likely than not that the

Corporation distributed the right to enforce to the Cromptons by apportioning,

delivering, or dispersing it to them. I find the answer is no.

CASP relies solely on the Assignment to prove that the right to enforce was

distributed to the Cromptons. The Assignment provide 113

CASP argues this passing or devolution was



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by operation of law and confirmed in the Assignment. I disagree.

Although Vice Chancellor Laster in *In re Altaba Riegels* that this should not be read to support automatic devolution of assets. First,

it is a stretch too far from dicta. Second, it conflicts with the need for post-

111 *In re Altaba, Inc.*, 2021 WL 4705176, at *19 (citations omitted). 112 Distribute 113 RX2. dissolution receiverships expressed in our statutory scheme. as defined implies some affirmative action. As such, CASP cannot rely solely on

the fact of dissolution to prove that the right to enforce devolved to the Cromptons.

Nor would the Assignment qualify as such affirmative action because it was more than four years after dissolution.

The next question is whether the language in the Assignment that the right was distributed to the Cromptons by or before January 13, 1974 (the end of the winding up process). I think not. There is no evidence regarding how such passing occurred. The Assignment is, at best, vague on this point. And the Declaration contained a written assignment clause; if the right to enforce was passed or distributed to the Cromptons during the winding up process, one would expect to see a written assignment in compliance therewith. 114 Without anything demonstrating how the right to enforce was passed to the Cromptons, the Cromptons were without authority to transfer that right through the Assignment. They could not transfer something they did not own. For these reasons, CASP has failed to demonstrate standing to enforce the deed restrictions.

* * *



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114 See also RX9, RX15 (reflecting the written transfer of assets one day before dissolution). issues in the interest of judicial economy and efficiency should additional exceptions

be filed.

B. The p dispute is ripe for adjudication.

115

The Court will not exercise jurisdiction until

a controversy has point where judicial action is appropriate 116

The Riegels argue CASP failed to prove ripeness because the Board did not

vote nclear whether the Board took action

on the revised plans, but, at the least, the Committee did. I find a rejection by the

Committee is sufficiently definite to ripen this matter for judicial action. 117,118

115 , 303 A.2d 660, 663 (Del. 1973). 116 Stroud v. Milliken Enterprises, Inc., 552 A2d 476, 480 (Del. 1989). 117 Cf. Seabreak Homeowners Assoc. v. Gresser, 517 A.2d 263, 267 (Del. Ch. 1986), , 538 A.2d 1113 (Del. 1988) -

118 This finding remains the same from my draft report, to which the Riegels took exception. The Riegels argue that this action is not ripe because CASP did not prove that I disagree. Ripeness does not require such technicalities. the interests of the party seeking immediate relief outweigh the concerns of the court in postponing review until the question arises in some more concrete and f XL Specialty Ins. Co. v. WMI Liquidating Tr., 93 A.3d 1208, 1217 (Del. 2014) (cleaned up). C. CASP has not acquiesced to violations of the restrictions.

The final gatekeeping issue is whether CASP has acquiesced to violations of

the restrictions and, as such, waived the ability to enforce them. t is clear that when

a party acquiesces in violations of a deed restriction, the restriction may become

unenforceable. But minor violations do not support a claim of abandonment. 119

-enforcement decision, a prior



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failure to enforce does not preclude future enforcement of the same restrictive

120 compelling facts to show [CASP] intended to abandon the right to enforce the

restriction[s] . . . 121

Before I address the evidence presented by the Riegels, I note the Declaration

contains a non- 119

Henderson v. Chantry, 2003 WL 139765, at *3 (Del. Ch. Jan. 10, 2003) (citations and internal quotation marks omitted). 120 , 2005 WL 2810724, at *4 n.19 (Del. Ch. Oct. 21, 2005) (addressing Brandywine Hills Cmty. Assoc. v. T. Bruce Wilmoth Constr. Co., 1995 WL 767336, at *10 (Del. Ch. Dec. 21, 1995)). 121 Id. See also Brandywine Hills, 1995 WL 767336, at *9-*10 (rejecting summary

alleged desuetude of power, knowingly and willingly waived or abandoned its power to

The Riegels argue for the first time in their exceptions that their acquiescence argument should be viewed under either a waiver or abandonment lens. But their post-trial briefing focused primarily on widespread abandonment. See D.I. 74, p.16-18. By failing to argue waiver in their post-trial briefing, the Riegels waived such argument. Emerald Partners v. Berlin that a party waives an argument by not including i to enforce any restriction, condition, covenant or agreement herein contained shall

122 Although CASP

argues this clause bars any claim of acquiescence, I disagree. As recognized by then-

Vice Chancellor Steele a non- contractual right to insist failure

to enforce does not constitute waiver. 123 The Court is not, however, estopped from

considering evidence of alleged waiver and weighing the against the

evidence presented.

But any challengers here, the Riegels must meet a high burden. To

prevail, the Riegels had to demonstrate, by a preponderance of the evidence, that the

presence of unapproved structures is pervasive throughout Surrey Park and



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allowance of unapproved structures reflects a total and absolute abandonment of

for pre-approval. 124 The Riegels

fell short.

-home community of Surrey Park has 51

unapproved sheds, 48 unapproved decks and additions, and 20 expressly

122 PX 1. 123 Brandywine Hills, 1995 WL 767336, at *9 (emphasis in original). 124 See Tusi, 2002 WL 31499312, at *3. See also Henderson, 2003 WL 139765, at *3 esent a approved sheds, decks, or additions. 125 Even assuming Mr. Riegel is correct that

unsupported equals unapproved, I find the lack of approval is not so pervasive or

systemic that it is more likely than not CASP has totally and absolutely abandoned

architectural review and preapproval of sheds, decks, and additions. Thus, the

Riegels have failed to prove their defense of acquiescence by a preponderance of the

evidence. 126

125 D.I. 74 (citing RX 13, 33). Anything unsupported in the written record, the Riegels argue, was not approved, and supports their acquiescence claim. The Riegels point to the

writing and the f

failure to enforce. Cf. Henderson, 2003 WL 139765, at *3 (finding violations of

the restriction at issue). 126 This finding remains the same as my draft report, to which the Riegels took exceptions. The Riegels argue D.I. 81, p. 29. The Riegels further argue that they had never been one, single, legally valid approval of any Sheds, Fences, or Other Structures

proposition that the Committee or a Chairperson of the Committee ever granted approvals to over eighty percent (80%) of all of the Sheds, Fences, and Other Structures installed in Id., p. 30. I disagree. The Riegels conceded in their post-trial briefing, as reflecting in RX13 and RX33, at least 20 sheds, decks, or additions were approved by the Committee or its chair. D.I. 74, p.17. Further, I found testimony by Yet the Riegels argue that I should be looking at the prevalence of unapproved structures more strictly, arguing without



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Id., p.33. The test is not so rigid rather, the evidence in the neighborhood or a clear intent on the part of the property owners generally to

abandon the original plan. *Henderson v. Chantry*, 2003 WL 139765, *3 (Del. Ch. Jan. D. The restrictions are unenforceable and were arbitrarily applied.

I arrive at the final step whether CASP has met its burden to prove the restrictions are enforceable and were not arbitrarily applied to the plans submitted by the Riegels. I find CASP fails in both respects, although either would suffice to reject their claims.

1. The restrictions are unenforceable. 127

CASP, alone or through the Committee, can only enforce restrictions that are , imprecise, or so

128 The three restrictions

s are the latter.

10, 2003). On this record, I find the Riegels failed to meet this standard (assuming for purposes of this discussion CASP had standing to so enforce). 127 tions, which should be overruled. CASP

sufficiently objective, clear, specific and reasonable to be enforceable in a neighborhood

shed that exists in But see D.I. 90 (changing 75% to 76%). The premise for these questions is, however, flawed. disclosed in a plan submitted in compliance with the Declaration. PX 1. It is not an independent restriction rather the restrictions were phrased much broader as suitability/desirability, harmony, and outlook. Id. 75-76% quantification based on the slim record developed at trial. I continue to find the

restrictions unenforceable as written for the reasons provided herein. 128 Seabreak, 517 A.2d at 269. See also *Canal Corkran Homeowners Assoc., Inc. v. Petrone* a The Declaration other

structure and of the materials of which it is to be built, to the site upon which is

proposed to erect the same, the harmony thereof with the surroundings and the effect



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of the building or other structure, as planned, on the outlook for the adjacent or

129 These three inquiries suitability/desirability, harmony,

and outlook are overly vague, imprecise, and unclear as written.

An 130

This dooms the

suitability/desirability factor in the Declaration, which is expressly tied to aesthetics

subject to subjective opinions.

Second, -in, objective standards that would

enable it to be applied in an evenhanded manner or to be used as a guideline by lot

131 The Declaration permits CASP to consider

129

RX 1. 130 Lawhon, 2008 WL 5459246, at *5. 131 Seabreak, 517 A.2d at 268. adjacent or neighboring property. 132 I find this restriction is vague, imprecise, and

lends itself to arbitrary application; as such it is unenforceable as written.

Third, and finally, harmony restrictions, like the one here, have only been

when that comm - 133

Testimony at trial confirmed

there are at least five (5) different architectural styles within Surrey Park. There are

also several different types of facades, utilizing different building materials. There

are also many different kinds of accessory buildings, including gazebos and pool

houses, throughout the community. Surrey Park is not sufficiently coherent in visual



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style to provide the Riegels or other residents with an objective standard for community visual harmony. 134

I find all three restrictions unenforceable. 135

[F]undamental fairness

requires that a property owner be given notice, whether written or de facto, of the

132 PX 1. 133 Lawhon, 2008 WL 5459246, at *5. 134 however, further support judgment for the Riegels, because the Structure matches the style

of the Property. 135 Canal Corkran Homeowners Assoc., Inc., 2017 WL 1450168, at *4. specific requirements to which the[ir] building plans must conform for those plans

to receive . . . approval. 136 As explained by Vice Chancellor Noble, notice means communicating the demands of compliance; whether that be a 10-foot-

setback or a certain architectural style. Restrictive covenants which are too vague

137 CASP failed

to meet its burden of proving that the restrictions are clear, specific, and provided

sufficient notice and a reasonable standard for its enforcement actions. 138

136 Seabreak, 517 A.2d at 270 (citations omitted). 137 Lawhon, 2008 WL 5459246, at *5 (citations omitted). The architectural review restrictions in Lawhon helpful analysis of enforceability, the Court was not asked to decide whether the

restrictions were unenforceable as written. See id. at *4 (explaining the questions presented were whether (1) the homeowners association had the power to enforce, (2) enforcement was arbitrary and capricious, or (3) enforcement was barred by laches, equitable estoppel, or waiver). Cf. id. at *7 (rejecting the power to enforce argument and noting the review provision provided adequate notice of the proper procedure to seek approval, meeting the

enforceability of the aesthetic, harmony, and outlook standards articulated for such review); Dawejko v. Grunewald, 1988 WL 140225, at *5 (Del. Ch. Dec. 27, 1988)

convey review powers, but remaining silent as to the enforceability of suitability, harmony, and



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outlook standards for such review). 138 See *Campanelli v. Coffee Run Condo. Council*, 2021 WL 3120198, at *6-*7 (Del. Ch. Jul. 23, 2021) (finding architectural review provisions imprecise, vague, and unclear); , 2015 WL 5714847, at *9 (finding a restriction requiring all outbuildings to be

Serv. Corp. of Westover Hills v. Guzzetta, 2009

la , 2014 WL 7269740, at *9 (Del. Ch. 2. The restrictions were arbitrarily applied. 139

Even if the restrictions were enforceable, I find they were arbitrarily applied

to the Riegels. 140 Although architectural review powers are commonplace, they are

particularly susceptible to arbitrary, capricious, and unreasonable application. 141

142

CASP

must show [it or the Committee] applied the relevant standards on a reasoned and

Dec. 22, 2014), adopted Delaware law because of the absence of any clear and precise standard governing the

139 that a structure that is 75% taller than any other shed in Surrey Park not suitable, or

which [the Structure] must be in harmony with under the deed restrictions limited to just

the architectural style of their home, or can these surroundings include the other sheds in D.I. 79.

But see D.I. 90 (changing 75% to 76%). Initially, as already stated, it is difficult

-76% quantification based on the slim record developed at trial. And, if the field for comparison is the entire neighborhood, I find it would be unreasonable not to include all outbuildings in my review.

When looking at all outbuildings, there are a number that compare to or dwarf the Structure in size, distinguishing this case from those like , 2007 WL 3301024, *2 (Del. Ch. Nov. 2, 2007). See, e.g., RX30.

I continue to find the restrictions were arbitrarily applied for the reasons provided herein. 140 I engage in this analysis for the sake of efficient judicial review and recognizing some of my colleagues have upheld language similar to that used in the Declaration. See, e.g., , 2007 WL 3301024, at *1 (Del. Ch. Nov. 2, 2007) -even though sometimes they may frustratingly lack desired specificity- 141

Seabreak, 517 A.2d at 268. 142 Id. nonarbitrary basis (not on subjective aesthetics) revised

plan. 143



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revised plan was rejected primarily because of height 17.5 feet and outlook concerns for . But, during the application process, CASP or the Committee indicated that a 10- or 12-foot structure would have been acceptable. CASP has failed to demonstrate how a 10-or 12-foot structure would be more suitable, desirable, or in harmony with the neighborhood than the Structure. Further, testimony confirmed that the outlook from the property would be similarly affected if the Structure was 10 or 12 feet tall. And CASP failed to present evidence in support of its contentions that the Structure is unlike other outbuildings in the neighborhood in terms of its overall size property. 144 Setting aside

property, the Structure is in harmony with the immediate surroundings home (the Property). Further, all parties agree the Structure was well-constructed.

On this record, I find the rejection of the Rie revised plans was arbitrary.

143 , 2021 WL 2324660, at *5 (Del. Ch. June 3, 2021). 144 But see RX 11 #16 (shed with windows), #18 (shed with windows, porch, and second level), E. The Riegels are entitled to a fees and court costs.

This action was brought under 10 Del. C. § 348. Section 348 cases are subject to prevailing party fee shifting: the non-prevailing party at a trial held pursuant to [Section 348] must pay the prevailing party's attorney fees and court costs, unless the court finds that enforcing this subsection would result in an unfair, unreasonable, or harsh outcome. 145

I find the Riegels are the prevailing parties. The Riegels have not, however, submitted an affidavit of costs under Court of Chancery Rule 88, nor has CASP had within twenty (20) days of this report becoming an order of the Court and CASP



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may respond twenty (20) days after such filing.

III. Conclusion

For these reasons, I find the R judgment should be entered in favor of the Riegels and further briefing should

commence regarding fee shifting.

145 10 Del. C. § 348(e). This is my final report and exceptions may be filed under Court of Chancery Rule

144. The stay of exceptions to any interim rulings is hereby lifted.

IT IS SO ORDERED.

